EXHIBIT K

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2004-135

June 11, 2004

VERIZON MAINE
Petition for Consolidated Arbitration

ORDER

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we deny the Motions of the CLEC Coalition, the Competitive Carrier Coalition, and Sprint to dismiss Verizon's Petition for Arbitration and instead consolidate this proceeding with our pending Wholesale Tariff[1] proceedings. We also determine that Verizon may not condition its performance of routine network modifications on amendment of a CLEC's interconnection agreement.

II. BACKGROUND

On February 20, 2004, Verizon Maine (Verizon) filed with the Commission a Petition for Consolidated Arbitration (Petition). The Petition requested that the Commission arbitrate disputes between Verizon and competitive local exchange carriers (CLECs) and Commercial Mobile Radio Service (CMRS) carriers relating to Verizon's October 2, 2003, proposed amendment to all interconnection agreements to implement the Federal Communications Commission's (FCC) *Triennial Review Order (TRO)*. On March 2, 2004, the D.C. Circuit Court of Appeals released its decision in the *United States Telecom Ass'n v. FCC* case (*USTA II),*[2] which upheld, vacated, and remanded various portions of the *TRO.*

Since that time, the parties to this proceeding have made numerous filings, including Motions to Dismiss and multiple replies to those Motions.[3] On May 6, 2004, the Examiner issued a Report recommending that we dismiss Verizon's Petition for

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[1]Docket No. 2002-682, *Verizon-Maine's Request for Commission Investigation For Resold Services (PUC #21) and Unbundled Network Elements (PUC #20)*.

[2]*U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II).*

[3]On May 4, 2004, Verizon filed a Motion for Abeyance with the Commission requesting that this proceeding be stayed pending commercial negotiations. Because our decision today results in this matter being consolidated with ongoing proceedings and requires a month of consultation between the parties, Verizon's Motion has been rendered moot.

Arbitration.[4] Exceptions were filed by Verizon, the CLEC Coalition (Mid-Maine Communications, Oxford Networks, Revolution Networks and Pine Tree Networks), the Competitive Carrier Coalition (Adelphia Business Solutions Operations, Inc. d/b/a Telcove, CTC Communications Corp, DSLnet Communications, LLC, ICG Telecom Group, Inc., Level 3 Communications, LLC and Lightship Telecom, LLC), Lincolnville Communications, Inc., Biddeford Internet Company d/b/a Great Works Internet (GWI), and Conversent.

III. ISSUES RAISED IN MOTIONS TO DISMISS

A. Procedural Infirmities

The CLEC Coalition, the Competitive Carrier Coalition, Sprint, and Conversent all request that the Commission dismiss the Petition because Verizon failed to comply with the procedural requirements of section 252 of the Telecommunications Act of 1996 (TelAct). These parties make two points. First, they argue that section 252 does not apply to Verizon's attempt to amend their interconnection agreements because the interconnection agreements contain change of law provisions which are not governed by section 252. They question the authority of the FCC to effectively override the TelAct by declaring in paragraph 703 of the *TRO* that the effective date of the *TRO* will be considered the date on which all carriers requested modification of their interconnection agreements. Second, they claim that Verizon's failure to provide notice of its intention to file for arbitration, its failure to serve all parties on the day the Commission was served, and its failure to include with its Petition a list of the unresolved issues and the positions of the parties on each issue, require dismissal. The CLECs argue that Verizon's failures have made it difficult, if not impossible, to identify and resolve all of the issues before July 2, 2004 – the deadline set by both the *TRO* and section 252.

In its Briefs, Verizon points to paragraph 704 of the *TRO* and argues that the section 252 timetable applies even in situations where the interconnection agreement contains a change of law provision. Verizon also argues that while the section 252 timetable applies, the section 252 procedural requirements do not and, thus, it did not need to follow section 252's filing requirements. Even if it were required to follow them, Verizon maintains that it has complied, at least in spirit, with the requirements. Verizon argues that the circumstances surrounding its Petition are unique and that it would be very difficult to list all the parties' positions on each issue. Finally, Verizon argues that dismissal is too drastic a measure under these circumstances.

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[4] Due to time constraints, the Examiner did not summarize each party's filing but instead directed interested persons to a Summary of Motions to Dismiss found at Attachment A to the Examiner's Report as well as the filings themselves (available on our website in the virtual case file for this proceeding).

In its Exceptions, Verizon blames its failure to comply with the procedural requirements of section 252 on the CLECs, which Verizon claims never responded to the invitation to negotiate contained in its October 2nd Industry Letter. Verizon argues that the CLECs did not respond because they were trying to delay inevitable changes to their interconnection agreements.

We find that Verizon failed to comply with the procedural requirements of section 252 by failing to provide notice of its intention to file for arbitration, failing to serve all parties on the day the Commission was served, and failing to include with its Petition a list of the unresolved issues and the positions of the parties on each issue. As the Competitive Carrier Coalition pointed out in its Motion, the procedural requirements of section 252 serve an important purpose – without a detailed listing of the issues and the parties' positions, for example, it would be difficult for a state commission to resolve the issues within the statutory deadline. The responsibility for developing such a list clearly lies with the party seeking arbitration, and we will not take on that burden, nor force it on the CLECs. Thus, consistent with the additional direction we give below, as well as any procedural orders issued by the Hearing Examiner, Verizon, in conjunction with the CLECs and other parties, must develop a consolidated list of issues relevant to both the Arbitration proceeding and the Wholesale Tariff proceeding.

B. Failure to Negotiate in Good Faith

The CLEC Coalition, the Competitive Carrier Coalition, GWI, and Sprint all claim that Verizon failed to negotiate in good faith after Verizon issued its October 2nd Industry Letter. The CLEC Coalition and GWI contend that the October 2nd Industry Letter was not sufficient notice under either section 252 or the change of law provisions in their interconnection agreements. They also contend, along with the Competitive Carrier Coalition and Sprint, that Verizon's Petition should be dismissed because of Verizon's lack of good faith negotiations as required by section 252. In support of their contention, Sprint and GWI provided specific information concerning their attempts to negotiate with Verizon and the lack of response by Verizon.

Verizon contends that its October 2nd Industry Letter was sufficient to begin negotiations and that it was the CLECs' burden to initiate further discussions. Verizon states that members of the CLEC Coalition did not initiate any further discussions and argues that its lack of responsiveness to Sprint's proposal does not amount to bad faith – Verizon merely rejected Sprint's proposals.

In its Exceptions, Verizon contends that it did negotiate in good faith with Sprint and attached several affidavits to support its contention. These affidavits reiterate many of the facts alleged in the affidavit attached to Sprint's Motion to Dismiss, although Verizon reaches different conclusions as to the meaning of those facts.

Verizon also contends that it was GWI, not Verizon, who failed to negotiate in good faith.[5]

We find that the documentation Verizon attached to its Exceptions reveals that Verizon's conduct in negotiations was, at least, dilatory. Sprint sent Verizon a marked-up version of the *TRO* Amendment on October 29th – less than a month after Verizon issued its Industry Letter. It took Verizon until March 11, 2004, to provide Sprint with a substantive response – a pace that may not be consistent with the "good faith negotiations" Congress had in mind when passing the TelAct.

Section 251 of the TelAct requires all local exchange carriers to negotiate in good faith. There is a reason for this requirement: it ensures that ILECs, like Verizon, who have the upper hand in negotiations (i.e., they have the network elements that the CLECs need to access), fairly and fully participate in negotiations. It also ensures that substantive discussions and a narrowing of the issues will occur before the matter is brought to the state commission. One does not have to look any further than the face of Verizon's Petition to know that the kind of negotiations contemplated by the TelAct have not taken place.

We need reach no conclusion on whether Verizon negotiated in good faith, however, because even if we found an absence of good faith, we would not necessarily dismiss Verizon's petition. Section 252 provides state commissions with significant discretion concerning how to conduct arbitration proceedings. We find it a better use of all parties' resources for us not to dismiss the arbitration but instead to require strict adherence to good faith negotiation requirements on a going forward basis by all parties. Failure of any party to fully participate in negotiations or failure to respond in a timely way to properly issued requests for negotiation will be taken into account in our decision on the associated issue.

C. Overlap of Arbitration Issues With Existing Cases

The CLEC Coalition and the Competitive Carrier Coalition both argue that many of the issues raised in Verizon's proposed Amendment are already being considered in the Commission's Wholesale Tariff (Docket No. 2002-682) and Dark Fiber (Docket No. 2002-243) proceedings. The CLECs argue that the Commission should focus on the existing cases first, which will establish generally available terms and conditions for all of Verizon's section 251 unbundling obligations and thereby eliminate the need for arbitrating many of the issues presented by Verizon's Petition.[6] Verizon

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[5] We do not reach any conclusions regarding the Verizon/GWI negotiations because GWI's allegations were not supported by an affidavit and because of the difficultly of assessing the impact of each side's allegations without obtaining additional information.

[6] Some of the same CLECs have argued in the Wholesale Tariff proceeding that the wholesale tariff should also cover Verizon's section 271 obligations.

contends that the issues raised in its Petition are distinct from the Wholesale Tariff and should be treated separately. Specifically, Verizon contends that the parties have a statutory duty to conduct their business dealings by contract and that the pending Wholesale Tariff proceeding does not obviate the need for arbitration.

A review of the issues associated with the Petition and with the Wholesale Tariff case reveals a significant overlap. The Petition (both the original and revised version) requests arbitration of Verizon's proposed *TRO* Amendment, which attempts to capture the changes in law caused by the *TRO* and *USTA II*. Specifically, Verizon seeks to amend its interconnection agreements so that they reflect *only* Verizon's unbundling obligations pursuant to section 251 and section 252 of the TelAct; Verizon's proposed amendment does *not* address any obligations it has under section 271 of the TelAct or state law. Similarly, Verizon's proposed Wholesale Tariff addresses Verizon's section 251/252 obligations and not its section 271 or state law obligations.[7]

We conditioned our support of Verizon's 271 application upon the filing of a wholesale tariff because we wanted to avoid multiple arbitration proceedings and to provide a single forum for all CLECs to litigate their disagreements with Verizon concerning the provisioning of UNEs. We have been working on that proceeding since November 2002 and were about to enter the hearing stage when the *TRO* was released, which led to changes in positions, and the need to resolve some preliminary legal issues. Once we resolve the legal issues, we should be able to move directly to the prefiled testimony, discovery, and hearing phases and resolve all outstanding issues, including those involving Verizon's section 271 obligations. A final order in the Wholesale Tariff would likely eliminate many of the issues associated with the Petition.

It might be theoretically possible to litigate the Wholesale Tariff case and the Arbitration simultaneously on separate tracks, but considerations of resources and judicial economy militate against that course. First, our resources are strained. The events of the past eight months have caused a marked increase in complaints from CLECs, which have resulted in additional Rapid Response Complaints as well as a Commission investigation into Verizon's wholesale practices – Docket No. 2004-53. The *TRO* contains numerous ambiguities, which lead to disagreements in interpretation between Verizon and the CLECs and eventually require a detailed legal analysis and decision by the Commission – all of which takes a considerable amount of our time and resources.

In addition, we are endeavoring to complete the Dark Fiber proceeding which has been fully litigated for quite some time but stalled because of the *TRO* and *USTA II* decisions. We also just recently issued a decision in the Skowhegan Online proceeding (2002-704) which took much longer than expected because of the legal disagreements and confusion caused by the *TRO* and *USTA II.* In short, the *TRO* and

[7]Verizon has argued in the Wholesale Tariff proceeding that the Commission has no authority to require Verizon to tariff its section 271 obligations.

USTA II have caused, and continue to cause, a significant drain on our resources, forcing us to make decisions concerning our docket and the use of our resources.

Finally, we acknowledge that events at the federal level and the possibility that CLECs and Verizon will reach commercially negotiated agreements may eliminate (or at least lessen) the need for state commission arbitrations. While it remains unclear whether such negotiations will be fruitful, we believe allowing additional time for negotiations may be helpful. (Verizon itself requested additional time in its Motion for Abeyance.)

Thus, we find it prudent at this time to consolidate Verizon's Petition for Arbitration with the Wholesale Tariff.[8] As stated above, the substantive issues overlap to a great extent and efficiency of process dictates that we resolve these issues only once. To ensure that the consolidated proceeding moves forward as quickly as possible, we direct the parties to develop and submit a consolidated list of issues that must be litigated in this proceeding and file that list with the Commission on **July 16, 2004**. The list should prioritize the issues, with purely legal/policy issues at the top and more fact-intensive costing issues at the bottom. The parties should also submit a joint proposed schedule for the briefing of the legal and policy issues. This schedule should be triggered by the issuance of an order on the preliminary legal issues that have already been briefed in the Wholesale Tariff proceeding.[9]

Parties that disagree with our decision today are free to pursue arbitration at the FCC pursuant to section 252(e)(5), which allows the FCC to step into the state commission's shoes and conduct the arbitration if the state refuses to act. Parties are also free to arbitrate their issues in other states and/or to participate in the commercial negotiations going on at the national level. To the extent that any party believes we have, as a technical matter, failed to perform our obligations under the TelAct because resolution of the consolidated proceeding will not occur within the 252 timetable, that party should state its position in writing no later than **June 23, 2004,** so that we do not consume further resources litigating a matter that will ultimately be taken to the FCC. Failure of any party to inform us that they intend to invoke the timetable as a basis for disputing our authority to resolve the issues raised in the Petition will be considered a waiver.

[8]We expect that some of the issues raised in this new consolidated proceeding may relate to dark fiber. Our Dark Fiber proceeding, Docket No. 2002-243, is already fully briefed and awaiting issuance of an Examiner's Report. We plan to move forward with reaching a decision on the issues already fully litigated in that proceeding. To the extent that parties identify any dark fiber-related issues that were not raised in the Dark Fiber proceeding, those new issues will be addressed in the consolidated proceeding.

[9]We expect the Hearing Examiner to issue an Examiner's Report on those issues by the end of June and that our deliberations would occur by the third week in July.

D. Applicability of Bell Atlantic/GTE Merger Conditions

The CLECs have argued extensively that the *TRO* does not trigger change of law provisions in their interconnection agreements because the Bell-Atlantic/GTE merger conditions require Verizon to continue to make all UNEs available until a final, unappealable decision is released. They further contend that the *TRO* and *USTA II* orders do not constitute such decisions because they were the continuation of litigation in the FCC's *UNE Remand* and *LineSharing* proceedings. Finally, they point to decisions by the FCC's Enforcement Bureau as support for their interpretation of the merger conditions.

Verizon argues that the merger conditions do not apply because: (1) they have sunset; and/or (2) *USTA I*[10] was a final unappealable decision. Thus, according to Verizon, they have no continuing obligation to provide at TELRIC prices those UNEs eliminated by the *TRO.* In its Exceptions, Verizon directs our attention to a decision by a Hearing Examiner in Rhode Island which rejected the CLECs' contentions regarding the continued enforceability of the merger conditions.

We believe the best course of action at this time is for the parties to seek guidance directly from the FCC regarding what it intended concerning the continued enforceability of the conditions. We will take any such guidance into consideration if it is issued before we make a final decision in the consolidated proceeding.

E. Routine Network Modifications

In paragraphs 630-641 of the *TRO*, the FCC discusses the obligations of ILECs to perform routine network modifications to ensure non-discriminatory access to UNEs by CLECs. These requirements were upheld by the D.C. Circuit in *USTA II*. The CLECs now argue that the *TRO* and *USTA II* confirm that ILECs have always had an obligation to perform routine modifications and that there is no need to modify their interconnection agreements to implement existing law. Verizon argues that the *TRO* decision was a change of law, that the FCC established new rules, and that CLECs must modify their interconnection agreements before Verizon will perform routine network modifications.

The *TRO* language on this subject is not clear. Whether the routine network modification rules are new law or codification of existing requirements requires examination of both the historical record and the language of the *TRO*. Historically, until the summer of 2000, Verizon performed routine network modifications, such as installing new line cards, when it was necessary to meet a CLEC's request for facilities.[11] We can conclude from Verizon's earlier behavior that it believed it had an

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[10] *U.S. Telcomm. Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002)(*USTA I*).

obligation to perform those routine network modifications at that time. In 2000, Verizon established a new policy of refusing to perform routine network modifications based upon its belief that any such activities constituted new construction that ILECs were not obligated to perform.[12] This change in policy appears to reflect a decision by Verizon to attempt to shift and limit its obligations to provision certain UNEs.

During our 271 proceeding, we heard testimony and argument from CLECs regarding the discriminatory nature of Verizon's policies. At that time, we said that while we agreed that Verizon's policies prevented CLECs from making use of Verizon's facilities, we would not resolve the issue in the context of the 271 proceeding.[13] We specifically noted that the issue was before the FCC and that we would await their guidance – which they now have issued in the form of the *TRO.*

In paragraphs 632-633 of the TRO, the FCC uses language which indicates that the routine network modification requirement is new ("we adopt today") as well as language which indicates that the FCC was resolving a dispute about existing obligations ("we require" and "we conclude") regarding the line that must be drawn between requiring an ILEC to modify its network to provide CLEC access to the full functionality of the UNE and requiring an ILEC to provide superior quality access – a dispute based upon existing requirements of section 251 of the TelAct.

We find, on balance, that the *TRO* did not establish new law but instead clarified existing obligations. Section 251(c)(3) has always required that Verizon provide access to its UNEs on a non-discriminatory basis. The FCC's new rules merely clarify what is required under that existing obligation. Thus, Verizon must perform routine network modifications on behalf of CLECs in conformance with the FCC's rules. Verizon may not condition its performance of routine network modifications on amendment of a CLEC's interconnection agreement.

With regard to the pricing issues associated with the routine modifications, we do not reach a specific decision today. Instead, we find that our existing TELRIC rates should be used until we approve any additional rates in the Wholesale Tariff case or future TELRIC proceeding. Our decision is consistent with the direction given by the FCC in the *TRO.* Specifically, in paragraph 640, the FCC noted that ILEC costs for routine modifications are often already recovered in non-recurring and recurring costs associated with the UNE. In addition, the FCC noted that state commissions have the discretion to determine how any costs that are not already recovered should be recovered. Thus, to the extent that Verizon believes its existing rates do not recover the

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[11] *Inquiry Regarding the Entry of Verizon-Maine into the InterLATA Telephone Market Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 2000-849, Order at pp 36-42.

[12] *Id*. at 42.

[13] *Id.* at 46.

costs associated with routine modifications, it may amend its cost filings in the Wholesale Tariff case and propose additional rates. If it chooses to do so, it must provide support for the new rates and, in particular, show in detail how the new costs are not already recovered in existing rates.

F. Instability of Law

Both the CLEC Coalition and the Competitive Carrier Coalition argued that that the instability of the law regarding UNEs warrants a decision by the Commission to refrain from further action on Verizon's Petition at this time. Verizon and AT&T, MCI, and Conversent argue that some provisions of the *TRO* which were not appealed should be implemented as quickly as possible. Currently, the FCC has obtained an extension of the stay of the *USTA II* decision until June 15, 2004, in order to allow parties to conduct commercial negotiations.

We agree that the state of the law is very much in flux and that additional changes may occur in the near future. However, this has been the case in the telecommunications arena since the TelAct was passed in 1996. There have been continuous litigation and ever-changing standards and requirements. If we stopped each time there was a possibility that a legal standard could be overturned, we would never reach a decision on any issue. Thus, we find that the best course of action is to proceed with litigating our new consolidated wholesale proceeding with the full knowledge that the standards used to reach our decisions may be changed in the future. Finally, while we specifically do not reach any decision today regarding whether we have, or should exercise, any authority to order the parties to maintain the status *quo* while we resolve the pending disputes, we note that any party that disturbs existing relationships does so at its peril should it ultimately be found to have acted contrary to the law.

G. Verizon's Revised Petition

AT&T contends that the revision of the *TRO* Amendment that Verizon submitted after the release of *USTA II* should be dismissed because *USTA II* is not in force yet and, even when in force, the BA/GTE merger conditions delay any change in Verizon's obligations until there is a final decision in the *TRO* appeals. Verizon contends that the revision is necessary to properly reflect existing law. Because of the decision we reached earlier, this issue is now moot. All existing issues should be included in the consolidated list of issues due on July 16, 2004.

Dated at Augusta, Maine, this 11th day of June, 2004.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.

EXHIBIT L

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, JANUARY 28, 2004

PETITION OF

CAVALIER TELEPHONE, LLC

CASE NO. PUC-2002-00088

For Injunction Against Verizon Virginia Inc. for Violations of Interconnection Agreement and For Expedited Relief to Order Verizon Virginia Inc. to Provision Unbundled Network Elements in Accordance with the Telecommunications Act of 1996

FINAL ORDER

On April 19, 2002, Cavalier Telephone, LLC ("Cavalier"), filed the above-captioned petition with the State Corporation Commission ("Commission"). Cavalier operates in Virginia as a competitive local exchange carrier ("CLEC"). Cavalier complained of the "no facilities" policy asserted by Verizon Virginia Inc. ("Verizon") in refusing to provision certain orders for DS-1 unbundled network element ("UNE") loops.

On May 10, 2002, Verizon responded to Cavalier's petition and requested that it be dismissed. On October 28, 2002, the Commission issued an Order Directing Investigation, which denied Verizon's motion to dismiss and directed the Staff of the Commission ("Staff") to investigate Verizon's policies and practices in the provisioning of DS-1 UNE loops to Cavalier. A procedural schedule also was established.

Motions to intervene were filed by Allegiance Telecom of Virginia, Inc. ("Allegiance"), NTELOS Network Inc. and R&B Network Inc. (jointly "NTELOS"), Covad Communications Company ("Covad"), and AT&T Communications of Virginia, LLC ("AT&T"). NTELOS, in its motion, requested that the Commission expand its investigation to include Verizon's UNE provisioning practices as they relate to digital subscriber lines ("DSL") and voice grade loops.

The Commission, in our Order Granting Interventions dated November 26, 2002, granted the intervention requests of Allegiance, NTELOS, Covad, and AT&T but denied NTELOS' request to expand the investigation to include DSL and voice grade loops. The Order Granting Interventions also modified the procedural schedule originally set forth in the Commission's Order Directing Investigation of October 28, 2002.

On December 13, 2002, XO Virginia, LLC ("XO"), filed a Motion to Intervene. The Commission, in its Order of January 24, 2003, granted XO's motion.

On January 30, 2003, the Staff filed its Report as directed by the Commission.[1] The Staff concluded that, for all practical purposes, Verizon had changed its DS-1 UNE loop provisioning policy and practices in the mid-2001 timeframe. The Staff contended that Verizon had altered the meaning of what constitutes construction to include non-construction activities. Further, the Staff asserted that Verizon's DS-1 UNE loop provisioning policy conflicts with the Total Element Long Run Incremental Cost ("TELRIC") pricing assumptions adopted by the Commission in its Final Order in Case No. PUC-1997-00005 (April 15, 1999) ("UNE Pricing Order").

The possible remedies identified by the Staff include: (1) requiring Verizon to construct and rearrange DS-1 UNE loop facilities in accordance with the underlying assumptions of TELRIC; (2) if the Commission decides that Verizon is not obligated to construct new plant to fulfill DS-1 UNE loop requests, redetermining TELRIC prices to reflect the absence of that obligation; and (3) setting special access rates at TELRIC prices.

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[1] The Staff Report also included a legal brief that addressed the potential preemption of the Commission's jurisdiction and authority by federal law, assessed the effect of the Federal Communications Commission's ("FCC") then-pending Triennial Review Order ("TRO"), and discussed the pertinent state law applicable to this proceeding.

On February 13, 2003, Allegiance, AT&T, Cavalier, and Verizon each filed reply comments to the Staff's Report. Allegiance, AT&T, and Cavalier recommended that the Commission adopt the first possible remedy. AT&T opposed the second possible remedy. Verizon opposed all of the possible remedies, disputed the Staff's conclusions, asserted that the Staff's Report and legal brief were "seriously flawed," asked the Commission to dismiss Cavalier's complaint, requested an evidentiary hearing, and asked for the opportunity to brief legal issues raised by the pending TRO.

On March 25, 2003, the Commission issued an Order Establishing Hearing that, among other things, set this matter for hearing, identified specific questions to be addressed at the hearing, and permitted the participants to file testimony and exhibits relevant to such questions. On April 3, 2003, Verizon filed a Motion to Amend Order Establishing Hearing. Cavalier and AT&T filed responses on April 10, 2003, and Verizon filed a reply on April 14, 2003. On April 16, 2003, the Commission issued an Order Granting in Part, and Denying in Part, Motion to Amend Order Establishing Hearing, which further limited the scope of testimony and exhibits for the hearing and established a separate briefing schedule for certain questions.

By Order issued on May 19, 2003, the Commission granted a Motion to Intervene filed on April 7, 2003, by WorldCom, Inc. ("WorldCom").

WorldCom filed a brief on May 22, 2003. Verizon, Cavalier, and AT&T filed briefs on May 23, 2003. The Staff filed a response on June 6, 2003. Verizon, Cavalier, and AT&T filed reply briefs on June 13, 2003.

The evidentiary hearing was held on June 17 and 18, 2003. Pursuant to the schedule established at the conclusion of the hearing, Verizon filed the surrebuttal testimony of Robert W. Woltz, Jr., Howard A. Shelanski, and Gary E. Sanford on July 11, 2003. Letters were filed on

July 23, 2003, by NTELOS and on July 25, 2003, by Cavalier and AT&T, not objecting to the inclusion of such testimony in the record.[2]

On September 29, 2003, the Commission issued an Order Scheduling Post-Hearing Briefs. The Commission stated that post-hearing briefs may address any issue raised in this proceeding, including the effects, if any, of the TRO released by the FCC on August 21, 2003.[3] Post-hearing briefs were filed on October 31, 2003, by Verizon, Cavalier, Allegiance, Covad, NTELOS, AT&T, and the Staff.

Verizon states that the TRO adopted new rules governing the provisioning of UNE loops. Verizon explains that it has changed its DS-1 UNE loop provisioning policy and, as required by the FCC's new rules, will perform routine network modifications upon the signing of interconnection agreement amendments implementing the new rules. Verizon asserts that its current DS-1 UNE loop rates do not compensate it for network modifications it must perform under the new FCC rules and that it is entitled to negotiate a rate. Verizon also contends that it did not assume an obligation to build new facilities on demand in Case No. PUC-1997-00005. Verizon concludes that the Commission need take no further action in this case. Verizon requests that the Commission dismiss Cavalier's petition and allow the parties to negotiate – and potentially arbitrate – an amendment to its interconnection agreements in accordance with the process set forth in the TRO.

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[2] The surrebuttal testimony of Robert W. Woltz, Jr., Howard A. Shelanski, and Gary E. Sanford, filed on July 11, 2003, will be admitted into the record as Exhibit Nos. 22, 23, and 24, respectively.

[3] See In the matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003).

Cavalier states that the TRO thoroughly rejected all arguments advanced by Verizon to justify its "no facilities" policy, leaving the Commission free to enforce its prior Order on this matter in Case No. PUC-1997-00005. Cavalier asserts that Verizon has continued its "no facilities" policy after the TRO by requiring an amendment to existing interconnection agreements in a purported attempt to incorporate provisions of the TRO. Cavalier states that Verizon's proposed amendment includes a $1,000 charge for DS-1 network modifications and for unspecified time and materials charges for unidentified "other required modifications." Cavalier concludes that the Commission need not enforce the TRO. Cavalier requests that the Commission: (1) order an immediate halt to Verizon's UNE DS-1 "no facilities" policy; and (2) order Verizon to refund to all CLECs the difference between the UNE DS-1 charges that those CLECs should have paid and the special access rates that Verizon's "no facilities" policy required them to pay.

Allegiance asserts that the Commission should order Verizon to provision UNE DS-1s in a manner consistent with the TRO and to perform routine network modifications for CLECs that it performs for its own customers free of charge. Allegiance also requests that the Commission order Verizon to withdraw its demand that CLECs execute a "routine modification" amendment to its interconnection agreement and pay a $1,200 surcharge as a condition of securing Verizon's compliance with federal law.

Covad states that the TRO fully addresses Verizon's ongoing federal legal obligation to perform for competitors the same loop modification functions that the incumbent local exchange carriers routinely perform for their own customers.[4] Covad asserts that Verizon has now chosen

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[4] Covad states that this includes, but is not limited to: "rearrangement or splicing of cable; adding a doubler or repeater; adding an equipment case; adding a smart jack; installing a repeater shelf; adding a line card; and deploying a new multiplexer or reconfiguring an existing multiplexer" (citing TRO para. 634).

to force competitors to adopt new interconnection agreement amendments in which Verizon purports to change its provisioning practices to conform with the TRO. Covad states that the Commission should use this proceeding to enforce Verizon's compliance with its legal obligations to provision high capacity loops. For example, Covad asserts that the Commission should issue an immediate injunction requiring Verizon to rescind its "no facilities" policies and to provision UNE high capacity loops pursuant to state law and the TRO and making clear that no interconnection agreement amendments are necessary.

NTELOS states that Verizon's policies for provisioning DS-1 UNEs were rejected in the TRO. NTELOS contends that Verizon should be required to refund to CLECs the additional charges paid as a result of being forced to order special access service upon wrongful rejection of DS-1 UNE orders. NTELOS urges the Commission to ensure that Verizon promptly changes its DS-1 UNE provisioning policies. NTELOS objects to Verizon's proposed new charge of $1,000 for each DS-1 UNE for "Network Modifications" and asserts that the current DS-1 UNE rates in Virginia already compensate Verizon for the routine network modifications discussed in the TRO.

AT&T states that the TRO addressed and rejected Verizon's discriminatory high capacity UNE loop practices, which are the same practices that were litigated in this proceeding. AT&T asserts that the Commission need not and should not abdicate to the FCC, because Virginia CLECs require and deserve a Virginia forum for enforcing Verizon's obligations with respect to the provisioning of high capacity UNE loops in Virginia. AT&T requests the Commission to rule that: (1) Verizon must make routine network modifications – that is, it must perform those activities that it regularly undertakes for its own retail, resale, and special access customers –

consistent with the TRO; and (2) the costs of such routine network modifications are included in the TELRIC rates for high capacity UNE loops and that additional charges are not justified.

The Staff states that the TRO unequivocally declares Verizon's "no facilities" policy unlawful insofar as making routine network modifications. Staff asserts that pursuant to the Commission's UNE Pricing Order (Case No. PUC-1997-00005), TELRIC rates were determined and ordered to be applied prospectively in existing Verizon arbitrated interconnection agreements. The Staff contends that the Commission's adopted TELRIC cost study and TELRIC pricing established in the UNE Pricing Order: (1) address all of the activities required of Verizon to provision DS-1 UNE loop orders; and (2) are in full compliance with FCC pricing rules. The Staff recommends, at a minimum, that Verizon be enjoined to provision immediately all CLEC DS-1 UNE loops requiring existing network modifications in accordance with the TRO and applicable rules at TELRIC pricing.

NOW THE COMMISSION, having considered the record, the pleadings, and the applicable law, is of the opinion and finds as follows.

Cavalier filed its petition in this proceeding in opposition to the "no facilities" policy asserted by Verizon in refusing to provision certain orders for DS-1 UNE loops. The TRO, however, answers this question by rejecting Verizon's "no facilities" policy and requiring Verizon to perform routine network modifications as addressed in the TRO. The Commission need not enforce the FCC's TRO and will not issue an injunction in this proceeding.

The current interconnection agreement between Verizon and Cavalier is binding on the parties until amended or replaced by another interconnection agreement. Moreover, the TELRIC pricing established in our UNE Pricing Order remains applicable to the current interconnection agreement between Verizon and Cavalier. Verizon asserts, however, that the TELRIC rates established by the Commission in our UNE Pricing Order do not compensate Verizon for performing routine network modifications required by the TRO. Cavalier and the other participants in this case disagree with Verizon's assertion.

Based on the record before us, we find that the activities required to provision DS-1 UNE loop orders have been addressed in the TELRIC pricing established in our UNE Pricing Order. We are not, however, deciding whether current TELRIC pricing fully compensates Verizon today. Rather, we conclude that the costs for routine network modifications have been addressed in the TELRIC rates previously established by the Commission for high capacity UNE loops. Accordingly, Verizon is required to provision DS-1 UNE loops to Cavalier, pursuant to the parties' existing interconnection agreement, under existing TELRIC rates until the FCC or the Commission establishes new pricing, or until the interconnection agreement is amended or replaced.

Finally, although we conclude that Verizon violated its interconnection agreement with Cavalier by refusing to provision certain DS-1 UNE loop orders, we find no authority in this case to establish that it is appropriate for the Commission to order refunds in this proceeding.

Accordingly, IT IS HEREBY ORDERED THAT:

(1) The surrebuttal testimony of Robert W. Woltz, Jr., Howard A. Shelanski, and Gary E. Sanford, filed on July 11, 2003, are admitted into the record as Exhibit Nos. 22, 23, and 24, respectively.

(2) The Federal Communications Commission's Triennial Review Order, released on August 21, 2003, addresses the routine network modifications that Verizon is required to perform in provisioning DS-1 UNE loops.

(3) Verizon is required to provision DS-1 UNE loops to Cavalier under existing TELRIC rates until the Federal Communications Commission or the State Corporation Commission establishes new pricing, or until the interconnection agreement between Verizon and Cavalier is amended or replaced.

(4) Cavalier's request for refunds is denied.

(5) This matter is dismissed.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the State Corporation Commission, c/o Document Control Center, 1300 East Main Street, First Floor, Tyler Building, Richmond, Virginia 23219.

EXHIBIT M

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS BELL TELEPHONE COMPANY, Plaintiff, v. EDWARD C. HURLEY, Chairman, ERIN M. O'CONNELL-DIAZ, LULA M. FORD, ROBERT F. LIEBERMAN and KEVIN K. WRIGHT, in Their Official Capacities as Commissioners Of the Illinois Commerce Commission and Not as Individuals, Defendants, and ACCESS ONE, INC., et al.; COVAD COMMUNICATIONS CO., et al.; DATA NET SYSTEMS, L.L.C., et al., GLOBALCOM, INC.; and MCIMETRO ACCESS TRANSMISSION SERVICES LLC, Defendants/Intervenors.	)	Case No. 05 C 1149 Judge Joan B. Gottschall COPY

MEMORANDUM OPINION AND ORDER

Illinois Bell Telephone Company ("SBC") has brought suit challenging determinations made by the Illinois Commerce Commission ("ICC") that require SBC to provide its competitors, including defendants/intervenors (the "Competing Carriers"), with access to certain portions of SBC's network. Presently before the court is SBC's motion for a preliminary injunction requesting relief from an ICC order pending this court's consideration of the merits of SBC's complaint. For the reasons set forth below, that motion is denied.

I. BACKGROUND

Until the 1990s, the market for local telephone service was widely viewed as a natural monopoly. The federal Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 151 *et seq.*, sought to promote competition in that market by requiring established telephone service providers ("incumbent local exchange carriers" or "ILECs") to provide new market entrants ("competing local exchange carriers" or "CLECs") with access to certain portions of the ILECs' networks ("network elements") at a fair price, a process known as "unbundling." The rationale for this requirement was that new entrants could not be expected to compete immediately with the infrastructure that ILECs had built up over years of operating as legally sanctioned monopolies. *See Ind. Bell Tel. Co. v. McCarty*, 362 F.3d 378, 382 (7th Cir. 2004). The Act tasks the Federal Communications Commission ("FCC") with determining which network elements should be unbundled, requiring the FCC to "consider, at a minimum, whether – (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2).

Prior to the passage of the Act, several states, including Illinois, already had taken steps to promote local telephone competition. SBC, an Illinois ILEC that previously had been regulated by the state using a traditional "rate of return"[1] framework, petitioned for an alternative form of regulation with fewer earnings restrictions to enable it to respond to the advent of new local competition. In exchange for this alternative regulation, SBC agreed to open up portions of its network to its new competitors.

Section 13-801 of the Illinois Public Utilities Act (the "Illinois Act"), 220 ILCS § 5/1-101,

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[1] This form of regulation, often used with public utilities to stop them from exploiting monopoly power, capped the rates SBC could charge at an amount necessary to recoup costs and provide a "reasonable" rate of return on SBC's equity.

et seq., sets forth the obligations of ILECs that have opted for alternative regulation status.[2] On June 11, 2002, the ICC issued an order further specifying SBC's obligations under Section 13-801. *See generally Ill. Bell. Filing to Implement the Public Utils. Act*, Doc. No. 01-0614, 2002 Ill. PUC LEXIS 564 (Ill. Comm. Comm'n June 11, 2002). SBC brought suit in this court two months later, arguing among other things that the federal Act preempted the ICC order because the order imposed unbundling requirements absent an FCC determination that denial of access would "impair" a CLEC's ability to compete.

At SBC's request, this court suspended briefing on the preemption claims until the FCC issued its August 13, 2003 Triennial Review Order ("TRO"). *See* 18 FCC Rcd. 16978 (F.C.C. rel. Aug. 21, 2003). The TRO set forth a new regulatory policy in response to court criticism of the FCC's earlier efforts to implement unbundling requirements, *see United States Telecom Ass'n v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) ("*USTA I*"), and specifically mandated that state regulatory agencies review and amend their decisions to conform to the new federal regulatory framework. The ICC accordingly reopened proceedings examining Section 13-801, and requested that this court "remand" the case to the ICC while the commission completed its review. The court granted the ICC's request on May 17, 2004. *Ill. Bell. Tel. Co. v. Wright*, No. 02 C 6002, Doc. No. 66 (N.D. Ill. May 17, 2004).

SBC is back in court because of additional recent changes to the federal regulatory framework. The parties' current dispute arises out of the ICC's requirement that SBC provide its competitors with unbundled access to mass market local circuit switching and a platform of network

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2 As a practical matter, Section 13-801 applies only to SBC because it is the only Illinois ILEC that has opted for alternative regulation.

elements commonly referred to as UNE-P.[3] This requirement was not directly at issue in the previous proceeding because the FCC required ILECs to provide mass market switching at that time. However, the D.C. Circuit in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") subsequently rejected that requirement. In response to *USTA II*, the FCC issued a Triennial Review Remand Order ("TRO Remand Order") on February 4, 2005. *See* 2005 WL 289015 (FCC Feb. 4, 2005). The TRO Remand Order states that ILECs no longer have an obligation to provide CLECs with additional access to mass market local circuit switching, and provides a 12 month transition period for existing CLEC customers for whom service is provided via UNE-P. TRO Remand Order ¶ 199. The FCC found that removal of the unbundling requirement was justified because newer, more efficient switching technologies are now widely available and continued dependence on the ILECs' infrastructure negatively affects incentives to invest in new technologies. *Id.*

Shortly after the TRO Remand Order issued, SBC sent a series of "Accessible Letters" to Illinois CLECs, informing them that as of March 11, 2005 (the effective date of the order), SBC would refuse new requests for unbundled mass market local switching. After several CLECs questioned the validity of SBC's "unilateral implementation" of the TRO Remand Order, SBC brought this suit seeking a declaration that the FCC's order allows SBC to stop providing mass market switching as an unbundled network element. The Competing Carriers oppose SBC's present request for a preliminary injunction on the merits, while the ICC, through its commissioners, argues that it should be allotted time to finish considering the effect of the TRO before this court takes any

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3 Switches are specialized computers that direct calls to their destinations; that is, the devices that "make the connection" when one places a call. UNE-P (unbundled network element-platform) consists of switches, local loops (the "last mile" of wire that connects switches to telephones) and transport facilities (equipment that directs calls between switches).

action.

II. ANALYSIS

Because the ICC has raised questions of standing and abstention, the court will address the ICC's arguments before proceeding to the merits of SBC's request. The ICC opposes SBC's motion because the ICC has not yet completed the review contemplated by this court's May 17, 2004 remand order. Specifically, the ICC argues that SBC is trying to circumvent that order by returning to federal court, that SBC's claims are unripe because the ICC has yet to take final action, and that SBC has failed to exhaust its administrative remedies. The court disagrees. Although SBC's complaint raises many of the same issues that were before this court in the previous action, SBC now seeks preliminary relief based solely on a federal order issued subsequent to the TRO that the ICC currently is considering. The ICC maintains that it has "bifurcated" its proceedings to address the new federal unbundling rules SBC is relying on, and that the ICC will deal with those questions as part of "Phase II" of those proceedings in due course once Phase I has completed. But this new and separate "phase" of proceedings was not contemplated by the court's May 17, 2004 order, so the court does not see how SBC could be circumventing the court's prior directive by seeking new relief pursuant to new federal rules.[4]

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[4] The ICC also argues briefly that the court should abstain from reaching the merits of the preliminary injunction arguments out of concerns for "comity and federalism." While the ICC correctly notes that the Supreme Court has sanctioned abstention in favor of pending state administrative proceedings on two occasions, "it has never been suggested that [comity] requires deference to a state judicial proceeding reviewing legislative or executive action. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 368 (1989). The court does not believe that the parties' preliminary injunction arguments present an exceptional circumstance warranting abstention.

The court similarly rejects the ICC's argument that SBC's claims are "unripe" because there is no final agency action to consider. The parties do not dispute that SBC has been operating under the ICC's June 11, 2002 order and must continue to obey that order. The very reason SBC has come to court is because it maintains that the recent TRO Remand Order preempts a portion of the state regulations under which it currently must operate. In other words, SBC is seeking review of an administrative decision that has been sufficiently "formalized" to have its effects felt "in a concrete way by the challenging part[y]." *Patel v. City of Chicago*, 383 F.3d 569, 572 (7th Cir. 2004). Finally, the court finds that, to the extent that SBC was required to exhaust its administrative remedies with the ICC before seeking a preliminary injunction, it has done so. SBC filed an emergency petition with the ICC requesting action after the TRO Remand Order was issued, which the ICC denied two days before the TRO Remand Order was to take effect. Accordingly, the court will consider the merits of the parties' preliminary injunction arguments.

A. Legal Standard.

A party seeking a preliminary injunction has "the burden of demonstrating that it has a reasonable likelihood of success on the merits of its underlying claim, that it has no adequate remedy at law, and that it will suffer irreparable harm without the preliminary injunction." *AM Gen. Corp. v. Daimlerchrysler Corp.*, 311 F.3d 796, 803 (7th Cir. 2002). If the moving party meets these requirements, the court then considers "any irreparable harm the preliminary injunction might impose upon [non-movants] and whether the preliminary injunction would harm or foster the public interest." *Id.* at 803-04. In weighing the parties' respective harms, "the court bears in mind that the purpose of a preliminary injunction is to minimize the hardship to the parties pending the ultimate resolution of the lawsuit." *Id.* at 804 (internal citation omitted).

B. Likelihood of Success on the Merits.

The 1996 Telecommunications Act contains "an unusual–and unequal–blending of federal and state authority." *Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm'n*, 359 F.3d 493, 494 (7th Cir. 2004). Although state utility commissions have a role in carrying out the Act, "Congress 'unquestionably' took 'regulation of local telecommunications competition away from the State' on all 'matters addressed by the 1996 Act'; it required that the participation of the state commissions in the new federal regime be guided by federal-agency regulations." *Id.* (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999)). SBC argues that the FCC's determination of the network elements to be unbundled pursuant to Section 251(d)(2) of the Act is one of the most significant components of the federal regime, and that the ICC's order therefore must yield to the FCC's recent finding that "[i]ncumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local switching." TRO Remand Order ¶ 5. The parties do not dispute that the TRO Remand Order and the ICC's June 11, 2002 order command different results with respect to the provision of mass market switching and UNE-P, but the Competing Carriers nevertheless argue that the ICC's order is not preempted and that, even if it is, the TRO Remand Order does not countenance the "unilateral" implementation attempted in SBC's Accessible Letters.

1. Preemptive Effect of the TRO Remand Order.

The Competing Carriers first argue that Illinois law does not impose any mandatory requirements that conflict with federal law because SBC voluntarily agreed to the provisions of Section 13-801 of the Illinois Act (and the subsequent ICC order) as a *quid pro quo* when it opted for the benefits of alternative regulation status. As both SBC and the Competing Carriers have observed, Section 13-801 does not apply to Verizon, another Illinois ILEC that has not sought alternative regulation under Illinois law. According to the Competing Carriers, "SBC is free to end both its alternative regulation status, and the obligations that go along with it, any time it chooses to do so." Competing Carriers' Opp. Br. at 13.

SBC contends that when it sought alternative regulation status it could not possibly have foreseen the ICC's June 11, 2002 order. SBC focuses on the fact that it never explicitly signed away its future federal rights, but this argument ignores the Competing Carriers' main point, which is that the state requirements were not mandatory. SBC's better argument is that, now that SBC has opted for alternative regulation, it cannot act unilaterally to get out of that regulatory scheme, an argument the Competing Carriers impliedly concede when they recommend that SBC "simply petition the ICC for an end to its alternative regulation status." *Id.*

Unfortunately, none of the parties has explained what petitioning the ICC for an end to alternative regulation would entail. SBC maintains that it would be required to proceed under its current regulatory plan until the ICC approves a new one, but this does not provide the court with any indication as to the likelihood of approval, how long the process would take, or even what the approval process might look like. The court imagines that this process would take some time and that the requirements of Section 13-801 would remain mandatory during the transition, but it may well be the case, as the Competing Carriers suggest, that renouncing alternative regulation status is merely *pro forma* and can be done immediately. In any event, the court is reluctant to make a definitive assessment of the preemption question at this point, based on the possibility that the ICC requirements of which SBC complains were voluntarily assumed and can be voluntarily abrogated, an issue which the present record only superficially addresses. *See Clinton v. Jones*, 520 U.S. 681, 690 (1997) ("[W]e have often stressed the importance of avoiding the premature adjudication of constitutional questions.") (citing *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)("[W]e have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law."))

The Competing Carriers also argue that a finding of preemption is premature because the FCC did not state explicitly that state commissions are preempted from making unbundling determinations. In a portion of the TRO undisturbed by *USTA II*, the FCC noted that states are not "preempted from regulating in [the area of unbundled network elements] as a matter of law." TRO ¶ 192. Rather, the FCC invited parties to seek a declaratory ruling to determine if a state unbundling requirement is inconsistent with the federal regime. *Id.* at ¶ 195. SBC has not petitioned the FCC for a ruling regarding the Illinois UNE-P unbundling requirements.

SBC argues that the FCC's invitation to seek a declaratory ruling does not strip this court of jurisdiction to determine the preemption question. This is almost certainly the case, as the FCC's invitation is permissive rather than mandatory. *Id.* However, the FCC's decision not to declare that state law unbundling requirements are preempted weakens SBC's preemption argument, albeit only slightly. In the TRO, the FCC observed that "[i]f a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment ... or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and 'substantially prevent' implementation of the federal regime." *Id.* This language suggests that there is a *possibility* that a state unbundling requirement would not be preempted, although a modest one, and the court does not believe that it would exist in the present case. *Accord Ind. Bell. Tel. Co.*, 362 F.3d at 395 ("[W]e observe that only in very limited circumstances, which we cannot now imagine, will a state be able to craft [an unbundling] requirement that will comply with the Act."). The court finds that, while the preemption question is not as clear as SBC suggests, the likelihood of success on this issue favors SBC.

2. Implementation of the Order.

The Competing Carriers argue that even if the TRO Remand Order is applicable, the FCC still requires that the parties implement the requirements via negotiation rather than unilateral action by an ILEC. The TRO Remand Order provides that "the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes." TRO Remand Order ¶ 233. Additionally, the TRO Remand Order provides a 12 month transition period for the CLECs' existing customers that are provided with service via UNE-P, during which time ILECs and CLECs are to "modify their interconnection agreements, including completing any change of law process." *Id.* at ¶ 227. Therefore, according to the Competing Carriers, federal law does not support the "immediate" relief that SBC requests by way of an injunction.

SBC responds that the requirement that the parties negotiate their interconnection agreements in Paragraph 227 of the TRO Remand Order is applicable only to the "embedded base" of existing customers rather than new customers. SBC has the better of this issue, because that paragraph sets forth a transition plan for moving existing customers away from UNE-P; it does not appear to contemplate new customers. SBC maintains that it is "nonsensical" to think that the FCC would countenance additional new UNE-P arrangements while at the same time providing a discrete time period for CLECs to transition off their existing customer base. According to SBC, the fact that the TRO Remand Order took effect on March 11, 2005 and is "self-effectuating," TRO Remand Order ¶ 3, justifies its unilateral action.

Although the court agrees that the TRO Remand Order does not require ILECs to engage in protracted negotiations simply to stop doing what the FCC has said they are no longer required to do, the court is troubled by SBC's view that it can alter the partes' arrangements unilaterally and without meaningful notice. Unlike Paragraph 227, Paragraph 233 of the TRO Remand Order does not address only existing customers. Rather, it falls under the general heading of "Implementation of Unbundling Decisions" and mandates that the parties "negotiate in good faith regarding *any* rates, terms, and conditions necessary to implement" the rule changes. This requirement presumably would include the substantially increased rate SBC now wishes to charge the CLECs seeking access to SBC's switches. SBC has denied that its actions constitute bad faith because: 1) many of the Competing Carriers participated in the "rulemaking" that resulted in the TRO Remand Order; 2) it issued the "Accessible Letters" a month before it intended to stop provision of UNE-P; 3) it filed a petition with the ICC and "served notice on a host of [common] carriers"; and 4) it served notice on interested competitors that it was bringing the present action and did not oppose their motions to intervene. SBC Competing Carrier Reply Mem. at 9. To the extent that Paragraph 233 of the TRO Remand Order requires good faith negotiations, the court does not see how any these activities qualify.

The March 23, 2005 ICC "Amendatory Order," submitted by SBC as supplemental authority for the proposition that SBC is no longer required under the federal Act to provide UNE-P to new CLEC customers as of March 11, is not to the contrary. *See Cbeyond Communications, LLP v. Ill. Bell. Tel. Co.*, No. 05-0154 (Ill. Comm. Comm'n Mar. 23, 2005). In fact, that decision specifically recognized that the TRO Remand Order contemplates implementation of the new federal framework through negotiation rather than unilateral action. *Id.* at 6 ("[The Complainant CLECs] have presented a fair question of whether the use of the unilateral Accessible Letters ... to modify the terms under which the parties presently transact business is authorized by the [TRO Remand Order]. Indeed, our preliminary conclusion is that the [TRO Remand Order] does not permit such self help.") Perhaps, as SBC suggests, it would be futile for the parties to sit down and negotiate as long as the preemption question has not been definitively resolved, but in this court's view that speculation does not excuse SBC from complying with the negotiation process. Paragraph 233 of the TRO Remand Order mandates that "the parties to the negotiating process will not unreasonably dely implementation of the conclusions adopted in this Order," strongly implying that the FCC envisioned negotiations as a predicate to implementation of the TRO Remand Order's requirements. Indeed, at least one of the Competing Carriers already has pledged that it will negotiate and implement the law changes "expeditiously and smoothly." In short, the Paragraph 233 negotiation provisions weaken SBC's claim that immediate injunctive relief is required to implement the TRO Remand Order.

C. Irreparable Harm/Adequate Legal Remedy.

SBC urges that failure to enjoin the ICC's order will result in irreparable harm to the competitive marketplace and "frustrate the will of Congress and the FCC." Additionally, SBC maintains that it will continue to lose customers to CLECs who compete with SBC by reselling access to SBC's technology to consumers on terms no longer sanctioned by the FCC, citing *Merrill Lynch v. Salvano*, 999 F.2d 211, 215 (7th Cir. 1993) (upholding finding that solicitation and loss of clients "is a harm for which there is no adequate legal remedy"). Although the court recognizes that there is some disagreement as to when loss of customers constitutes irreparable harm, *see, e.g., Central & S. Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 309 (D.C. Cir. 1985) ("revenues and customers lost to competition which can be regained through competition are not irreparable"), the court agrees with SBC that it will suffer irreparable harm because, even if its losses are quantifiable, there is no entity against which SBC could recover money damages. *Accord Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) ("threat of unrecoverable economic loss ... does qualify as irreparable harm"). The court therefore finds that SBC has demonstrated irreparable harm.

D. Balance of Harms and Public Interest.

The Competing Carriers echo SBC's argument that loss of customers and goodwill amounts to irreparable injury. However, the Competing Carriers draw the distinction that, if the preliminary injunction is denied, public perception of SBC's competence will remain largely unchanged, while if the preliminary injunction is granted, the Competing Carriers will be forced to turn away potential new customers and will be unable to service existing customers insofar as they require new or additional services. As SBC's own Accessible Letters indicate, SBC intends to reject requests from the Competing Carriers to add new telephone lines to existing accounts (apparently a common request for small businesses served by UNE-P) or move local phone service to Competing Carriers' customers' new homes if they change addresses. The court agrees that the Competing Carriers have a legitimate apprehension that, if SBC's requested injunction is granted, their ability to service new customers, as well as their ability to address the needs of existing customers for normal and routine modifications of service, will be significantly impaired. Additionally, the Competing Carriers argue that if SBC is permitted to carry out its plan immediately to cut off their access to mass market local circuit switching, their relationships with large businesses could also be severely negatively impacted, because those businesses' satellite offices often are served via UNE-P. Thus, the Competing Carriers face serious reputational injury which, in some cases, could be of fatal proportions.

The court agrees with the Competing Carriers that the loss of goodwill they face if SBC's requested injunction is granted is likely to be far more devastating than anything SBC faces if its requested injunction is denied. SBC may continue to lose customers and revenue to competition if it is required to provide UNE-P during the pendency of this litigation, but if the preliminary injunction issues, the Competing Carriers run a very real risk of being rendered incompetent, and perceived as being so, since they will be unable to deliver some of the basic services they are in business to provide. SBC counters that the Competing Carriers in fact have acted incompetently, or at least improvidently, by failing to plan after *USTA II* and subsequent FCC statements intimated that the end of the federal UNE-P requirement was near. But the federal regulatory framework has not been a model of clarity. As SBC itself notes, CLECs have been able to obtain UNE-P under every prior applicable FCC rule. On this record, it is hardly clear that the Competing Carriers' decision to wait for the ICC's determination of ILEC obligations in light of new federal law was unreasonable. The balance of harms strongly favors the Competing Carriers in this case.

Finally, the court considers the effect of SBC's requested relief on the public interest. SBC argues that the public interest is best served by providing relief that effectuates the "national policy" of eliminating mandated unbundled mass market switching. Granted, there is a strong public interest in providing the Illinois consumer with the technical innovation and competition which the FCC has predicted will result from the elimination of mandated unbundled switching. But SBC's requested relief would allow it, without meaningful notice and without meaningful negotiation, to cut off the Competing Carriers' access to what for them, at least in the short term, is an important resource. The innovation and competition which the FCC hoped to promote, and the public interest served thereby, will not be promoted if SBC is permitted to use the FCC order to cut off its competitors' legs overnight.[5]

Moreover, if the requested preliminary injunction issues, there will be an immediate negative impact on individuals and small business owners currently doing business with the Competing Carriers. CLEC customers who want to add additional telephone or fax lines will be forced to change providers or deal with two providers simultaneously, and customers who move will be forced to switch their local telephone service provider entirely. Saddling the public with these transaction costs in order to permit SBC to take unilateral and immediate action, which may not have been what the FCC contemplated, is contrary to the public interest.

This court has no intention of delaying the resolution of this case. As long as this case moves expeditiously toward a resolution on the merits, neither the balance of harms, nor the public interest, favors SBC. Rather, both the balance of harms and the public interest favor the maintenance of the status quo, as long as the issues raised by SBC are resolved in an orderly fashion through negotiations, before the ICC, before the FCC, or by this court.

III. CONCLUSION

Although the court concludes that likelihood of success on the preemption question favors SBC, the case for the allowance of unilateral and immediate cessation of SBC's provision of UNE-P

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[5] SBC does not dispute the Competing Carriers' contention that at least some of SBC's sister ILECs have chosen to continue to provide UNE-P beyond the March 11 deadline. Moreover, a district court in Michigan recently granted a preliminary injunction in favor of a CLEC preventing SBC Michigan from refusing to provide UNE-P. *See Order Granting Preliminary Injunction*, *MCIMetro Access Transmission Serv. LLC v. Mich. Bell Tel. Co.*, No. 05-70885 (E.D. Mich. Mar. 11, 2005). The parties in that case settled before the judge could issue his formal written opinion, thus mooting the preliminary injunction. However, the fact remains that despite the March 11 effective date of the TRO Remand Order, UNE-P will still be provided in some places by ILECs for some period of time.

to the Competing Carriers is far weaker. The court further finds that while denial of preliminary relief threatens some harm to SBC, the threat of irreparable injury to the Competing Carriers if an injunction is granted is incomparably greater. Moreover, the court finds that as long as this case can move forward at an efficient pace, the public interest favors maintenance of the status quo and argues against the entry of an injunction. SBC's motion for a preliminary injunction is denied.

ENTER:

/s/

Joan B. Gottschall
United States District Judge

DATED: March 29, 2005

EXHIBIT N

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

VERIZON-MAINE
Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)

September 3, 2004

ORDER – PART II

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we find that Verizon must include all of its wholesale offerings in its state wholesale tariff, including unbundled network elements (UNEs) provided pursuant to section 271 of the Telecommunications Act of 1996 (TelAct). In addition, Verizon must file prices for all offerings contained in the wholesale tariff for our review for compliance with federal pricing standards, i.e. "Total Element Long Run Incremental Cost (TELRIC)" for section 251 UNEs and "just and reasonable" rates pursuant to sections 201 and 202 of the Communications Act of 1934 for section 271 UNEs. We also find that we are not preempted from considering in this proceeding whether Verizon must continue to offer line sharing pursuant 35-A M.R.S.A. §§ 1306 and 7101.

II. BACKGROUND

In our Comments to the Federal Communications Commission (FCC) regarding Verizon's section 271 application for authority to enter the interLATA toll market (Verizon's 271 Application), we stated that the availability of a wholesale tariff or Statement of Generally Available Terms (SGAT) would greatly reduce the time required to effect a valid interconnection agreement and would also eliminate the perception shared by some CLECs that they were being "forced" to accept contract terms in their interconnection agreements that were unrelated to the terms that they were interested in negotiating.[1] Thus, in a March 1, 2002 letter from the Commission to Verizon (Commission's 271 Letter), we explicitly conditioned our support of Verizon's 271 Application on Verizon's agreement to fulfill a number of additional requirements, including the filing of a wholesale tariff. Verizon committed to meeting the Commission's conditions in a March 4, 2002 letter to the Commission (Dinan Letter),

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[1] *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine,* CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) at 7.

and on November 1, 2002, Verizon submitted a schedule of terms, conditions and rates for Resold Services (P.U.C. No. 21) and the provision of Unbundled Network Elements and Interconnection Services (P.U.C. No. 20) along with cost studies for certain non-recurring charges and OSS-related issues.

In order to allow enough time to thoroughly examine the tariff, we suspended it on November 11, 2002. On November 13, 2002, the Hearing Examiner issued a Procedural Order requesting intervention and scheduling an initial case conference for December 10th. On December 4, 2002, prior to the case conference, the Hearing Examiner issued a second Procedural Order granting intervention to all parties that requested it[2] and proposing a schedule for processing this case. Between December 2002 and August 2003, the parties conducted some discovery and attempted to identify all the issues that need to be litigated.[3]

On August 11, 2003, the Hearing Examiner issued a Procedural Order setting a hearing date of October 2, 2003, and attaching a list of issues that the Advisors intended to explore at the hearing. Before a hearing could take place, however, on August 21, 2003, the FCC issued its *Triennial Review Order (TRO)*.[4] A case

[2] The parties at that time included: the Office of the Public Advocate (OPA), Association of Communications Enterprises (ASCENT), MCI/WorldCom (MCI), Mid-Maine Telecommunications (Mid-Maine), and Oxford Networks (Oxford). Mid-Maine and Oxford filed joint briefs as the CLEC Coalition.

[3]At the Case Conference on December 10th, the proposed schedule was discussed and on December 17th the Hearing Examiner issued a Procedural Order to grant three additional interventions (Biddeford Internet Corporations d/b/a Great Works Internet (GWI), Conversent Communications (Conversent), and Cornerstone Communications (Cornerstone**)** and to set a preliminary schedule. On January 15, 17, and 23, and February 3, 2003, the Hearing Examiner issued Procedural Orders adjusting the case schedule and outlining further instructions and an initial list of issues to be litigated in the proceeding. On January 22nd, the CLEC Coalition and Cornerstone Communications also filed a list of initial issues. On February 3, 7, and 14, 2003, Verizon submitted responses to Staff's and other parties' issues and questions. On February 18, 2003, both Staff and the CLEC Coalition filed a list of issues that Verizon should attempt to address in its testimony. On February 24, 2003, the Hearing Examiner issued a Procedural Order establishing a schedule for testimony and discovery. On March 3, 2003, the Commission suspended the Verizon tariff for a second time to allow additional time to review it. On March 24, 2003, Verizon witnesses filed panel testimony. Staff issued its first set of data requests on the Verizon testimony on April 1, 2003, to which Verizon responded on April 22nd and 23rd. On May 20, 2003, Verizon issued discovery requests to GWI, to which GWI responded on May 27th.

[4]Report and Order and Order on Remand and Further Notice of Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 96-98 *et al*., FCC03-36, 18 FCC Rcd 16978 (rel. August 21, 2003)(*Triennial Review Order or TRO).*

conference was held on September 16, 2003, to discuss with the parties the potential impact of the *TRO* on the wholesale tariff. On September 18, 2003, the Examiner issued a Procedural Order summarizing the September 16th case conference and setting deadlines for Verizon to file new red-lined tariff schedules based on the changes required by the *TRO*.

On October 16, 2003, the CLEC Coalition filed a Motion for Issuance of Temporary Order. In its Motion, the CLEC Coalition objected to a letter sent by Verizon on October 2nd which stated that Verizon would be discontinuing the provisioning of certain UNEs in compliance with the *TRO*. On October 21, 2003, the Hearing Examiner issued a Procedural Order stating that Verizon had correctly identified those UNEs that the FCC eliminated from the TelAct's section 251 unbundling requirements and that while changes in terms and conditions caused by the *TRO* would be litigated in this proceeding, the Commission would not re-litigate the decision by the FCC to eliminate specific UNEs from section 251's requirements. Finally, the Examiner stated that the Commission had not anticipated the need to address Verizon's continuing obligations under section 271 in this proceeding and that the Advisors would further consider the issues and determine the next steps.

On December 16, 2003, a case conference was held. After discussion, the Hearing Examiner determined that before hearings on the substance of the Wholesale Tariff could be held, legal briefing was necessary on two issues: (1) whether the Commission had authority, under either state or federal law, to require Verizon to tariff its obligations to continue providing UNEs under section 271 of the TelAct and whether it could set the rates for those obligations; and (2) whether the Commission has the authority, under either state or federal law, to order Verizon to continue providing line-sharing at Commission-set TELRIC rates.

On January 16, 2004, Initial Briefs were filed by Verizon, the CLEC Coalition, and the Consolidated Intervenors (GWI, OPA and Cornerstone). The same parties filed Reply Briefs on January 30, 2004.

Before a decision could be reached by the Commission on the legal issues, the D.C. Circuit Court of Appeals issued its decision in *USTA II,* [5] the appeal of the *TRO.* Because *USTA II* was directly relevant to many of the legal issues raised in this Docket, the Hearing Examiner issued a Procedural Order on March 4, 2004, allowing all parties to supplement previously filed briefs to address the impact of the D.C. Circuit Court decision on their positions in this case. On March 26, the Consolidated Intervenors filed a supplemental brief, as did Verizon.

On July 23, 2004, the Hearing Examiner issued her Report recommending that we find that that Verizon must include all of its wholesale offerings, including UNEs provided pursuant to section 271, in its state wholesale tariff. The Examiner also

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[5] *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II).*

recommended that we find that Verizon must continue to offer line sharing pursuant to Checklist Item No. 4 of section 271. Finally, the Examiner recommended that we decline the opportunity to exercise any authority we might have to set rates for section 271 UNEs. In addition to serving her Report on the parties to this proceeding, the Examiner also served the Report on the parties to Docket No. 2004-135, Verizon's Request for Arbitration, pursuant to our June 11, 2004 decision in that case to consolidate the Arbitration proceeding with this Wholesale Tariff proceeding. All parties to both cases were given an opportunity to file exceptions.

On August 6, 2004, Verizon, Conversent, Cornerstone, the Association for Local Telecommunications Services (ALTS), Covad Communications (Covad), the CLEC Coalition, United Systems Access Telecom, Inc. (USA Telephone), AT&T Communications of New England, Inc. (AT&T), and GWI filed Exceptions to the Examiner's Report. The arguments from all parties in the three rounds of briefs and exceptions are summarized below along with our analysis and decision.

III. COMMISSION AUTHORITY TO REQUIRE TARIFFING OF SECTION 271 OFFERINGS

A. Introduction

As will be explained in detail below, at the time we conditioned our support of Verizon's 271 Application on Verizon filing a wholesale tariff, Verizon's unbundling obligations under sections 251/252 of the TelAct were synonymous with its section 271 unbundling obligations. Thus, we made no distinction between the two potentially differing obligations; we simply required a wholesale tariff. Since that time, the *USTA I*[6] decision was released, the FCC issued its *TRO,* and, most recently, the *USTA II* decision was issued. The impact of these three decisions on the issue at hand can be summed up as follows: today an ILEC's 251/252 obligations are narrower (in most respects[7]) than its 271 obligations. The CLECs contend that Verizon must now amend its proposed wholesale tariff to include its section 271 unbundling obligations. Verizon argues that the FCC has exclusive jurisdiction over matters relating to its 271 obligations and that this Commission has no authority to require Verizon to amend its wholesale tariff to include its 271 obligations.

[6] *United States Telecom Association v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) *(USTA I).*

[7] In a recent order in the *Skowhegan Online Proceeding,* we found that subloops were a requirement under Section 251 but not a requirement under Section 271. *Investigation of Showhegan Online's Proposal for UNE Loops*, Docket No. 2002-704, Order (April 20, 2004), and Order Denying Reconsideration (June 16, 2004).

B. Applicable Law

1. Difference Between Section 251 and 271 UNEs

Section 271 of the TelAct sets forth the requirements an ILEC must meet before it will be allowed to enter the interLATA toll market. The so-called "competitive checklist" contains 14 measures which were intended to ensure that the ILEC had opened the local exchange market to competition. Checklist Item No. 2 requires "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252 (d)(1)." Section 251(c)(3) requires ILECs to provide access to their network, i.e. UNEs, while Section 252(d)(1) sets the pricing standard for those UNEs, i.e., TELRIC pricing. Section 251(c)(3) also requires compliance with section 251(d)(2) which limits access to UNEs at TELRIC pricing to only those which meet the "necessary and impair" standard.[8] Thus, Checklist Item No. 2 requires an ILEC to meet all of the 251 and 252 unbundling and pricing standards, which the FCC limited in the *TRO* to specific types of loops, subloops, and transport.[9]

Checklist Items Nos. 4, 5, 6, and 10 require ILECs to provide unbundled access to loops, transport, switching and signaling. The FCC has explicitly found that, despite elimination of a number of UNEs under section 251, ILECs must continue to provide access to those UNEs under section 271.[10] However, none of these other checklist items, unlike Checklist Item No. 2, cross reference sections 251(c)(3) and 252(d)(1). Thus, according to the FCC in the *TRO*, UNEs unbundled under Checklist Items Nos. 4, 5, 6 and 9 must only meet the "just and reasonable" standard of 47 U.S.C. §§ 201-202 and not the TELRIC standard required under section 251.[11]

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[8]In the *TRO,* the FCC retained its earlier definition of "necessary" ("…a proprietary network element is 'necessary' within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.") and adopted a new definition of "impairment" ("A requesting carrier is impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.") *TRO* at ¶¶ 170, 84.

[9]*USTA II* vacated the *TRO's* findings regarding mass market switching, thereby effectively eliminating switching as a 251 UNE.

[10]*TRO* at ¶ 653.

[11]*TRO* at ¶ 656.

2. State Commission Authority in 271 Enforcement Matters

In the FCC's Order granting Verizon 271 authority in Maine,[12] the FCC stated:

> Working in concert with the Maine Commission, we intend to monitor closely Verizon's post-approval compliance for Maine to ensure that Verizon does not "cease [] to meet any of the conditions required for [section 271] approval.[13]

The FCC referred readers of the *Maine 271 Order* to its *Kansas/Oklahoma 271 Order,* for a more complete description of the 271 enforcement process. The *Kansas/Oklahoma 271 Order* states:

> Furthermore, we are confident that *cooperative state and federal oversight and enforcement* can address any backsliding that may arise with respect to SWBT's entry into the Kansas and Oklahoma long distance markets.[14]

(emphasis added). Thus, the FCC recognized the important role that state commissions would play in enforcing the requirements of section 271. Of more importance, however, is the *Kansas/Oklahoma 271 Order*'s citation to the *New York 271 Order,* [15] which made several relevant findings. First, while noting that Congress had authorized the FCC to enforce section 271 to ensure continued compliance, the *New York 271 Order* specifically endorsed state commission authority to enforce

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[12]*Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization to Provide In-Region, InterLATA Services in the State of Maine,* CC Docket No. 02-61, Order, 17 FCC Rcd 11676 (June 19, 2002) (*Maine 271 Order*).

[13]*Maine 271 Order* at ¶ 65.

[14] *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*), *aff'd in part*, *remanded in part sub nom. Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (*Oklahoma/Kansas 271 Order)*.

[15] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* Memorandum Opinion and Order, 15 FCC Rcd 3953 (*New York 271 Order).*

commitments made by Verizon (then Bell Atlantic) to the New York Public Service Commission. The FCC stated that:

> Complaints involving a BOC's [Bell Operating Company] alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, *should be directed to that state commission rather than the FCC*.[16]

(emphasis added). Thus, the FCC explicitly recognized the authority of state commissions to enforce 271-related commitments including, but not limited to, performance assurance plans (PAPs). Indeed, the FCC noted "with approval" the fact that the New York PAP "will be enforceable as a New York Commission order."[17]

3. Verizon's 271 Commitments to the Commission

Turning to Verizon's commitments here in Maine, as stated above, Verizon committed to the following relevant conditions, contained in the March 1, 2002, letter from the Commission:

> 1. Verizon will file a wholesale tariff for Maine no later than October 1, 2002. In the interim, CLECs shall be allowed to amend their interconnection agreements with Verizon in such a manner that enables them to negotiate the inclusion of a single UNE (and any terms and conditions related to the single UNE) rather than be required to sign a multi-part or omnibus amendment which contains provisions unrelated to the single UNE.[18]

In our April 10, 2002 Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of the Telecommunications Act of 1996, we explicitly conditioned our support of Verizon's 271 application upon Verizon's compliance with the list of conditions contained in our March 1, 2002 letter to Verizon, including its commitment to file a wholesale tariff. Specifically, we stated:

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[16] *New York 271 Order* at ¶ 452.

[17] *New York 271 Order* at n. 1353.

[18] Commission's 271 Letter.

> The MPUC finds, based upon the record before us, including the commitments made by Verizon in its March 4, 2002 letter to the MPUC, that Verizon meets the Section 271 Competitive Checklist.[19]

Verizon's commitment to file a wholesale tariff for Maine alleviated certain concerns we had regarding the ability of individual CLECs to negotiate interconnection agreements. Specifically, during the course of our 271 proceeding, we heard from a number of CLECs regarding the difficulties and delays they encountered with Verizon when trying to re-negotiate or amend their interconnection agreements. We found that requiring Verizon to submit a wholesale tariff would simplify the interconnection process for CLECs and provide a single forum for litigating disputes and thus we explained in our 271 Report to the FCC that:

> Unlike some other states, Verizon does not have a Statement of Generally Available Terms (SGAT) or wholesale tariff for the State of Maine. Availability of a wholesale tariff would greatly reduce the time required to effect a valid contract and would also eliminate the possibility of "tying" unrelated sections of an interconnection agreement together when trying to add new terms to an existing agreement. Thus, at our request, Verizon has agreed to file a wholesale tariff for our review by October 1, 2002. This will provide us an opportunity to review all of the terms and conditions that Verizon imposes on CLECs purchasing wholesale services.[20]

Thus, we found the filing of a wholesale tariff encompassing all of Verizon's wholesale obligations would benefit the CLECs, Verizon, and the Commission by consolidating our review of Verizon's wholesale terms and conditions.

C. Positions of the Parties

1. Verizon

Verizon's initial brief did not directly respond to the Hearing

[19]Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine, CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) (271 Report to FCC) at p. 1.

[20]271 Report to FCC at p. 7.

Examiner's question concerning Commission authority to require Verizon to tariff its 271 obligations. In its arguments concerning the availability of specific elements, Verizon admitted that in paragraph 653 of the *TRO*, the FCC recognized that former Bell Operating Companies (BOCs) have ongoing access obligations under section 271 of the TelAct but argued that nothing in the TelAct gives a state commission any power to interpret or enforce section 271 requirements. According to Verizon, only the FCC may issue regulations relating to 271 UNEs and only the FCC may set rates for these UNEs. Verizon maintained that the pricing standard set by the FCC for 271 network elements, "just and reasonable," is not the same as the TELRIC standard used for section 251 UNEs.

In its reply brief, Verizon acknowledged that the Commission may play a role in enforcing 271 obligations – for example, by administering the PAP and Carrier to Carrier Guidelines – but argued that this in no way suggests that the FCC has delegated, or could delegate, to state commissions the authority to determine, in the first instance, whether section 271 requires the unbundling of a particular network element, independent of section 251 requirements. Finally, although Verizon did not specifically address state authority under section 271 in its Supplemental Brief, Verizon stated that the "Commission plainly has no authority to order additional unbundling of network elements under the TelAct."

In its Exceptions, Verizon argued that, even if the FCC orders cited by the Examiner contained a delegation of section 271 enforcement authority to state commissions, after *USTA II* any such delegation would be illegal. Verizon claimed that Congress had expressly limited the states' role in section 271 matters to consultation with the FCC during its review of a 271 application and that any "cooperative enforcement" envisioned by the FCC was limited to a monitoring role.

Verizon also argued that requiring it to file a wholesale tariff at the Commission violated federal law. Specifically, Verizon argued that two federal appellate decisions, *Wisconsin Bell, Inc. v. Bie, et al.,* 340 F.3d 441 (7th Cir. 2003) and *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002), had found that state commissions could not require an ILEC to tariff its TelAct unbundling and interconnection obligations with the state commissions. Verizon contended that the rationale motivating our desire for a state wholesale tariff, namely concerns with difficulties and delays associated with individual negotiations, had been struck down by both courts. Thus, according to Verizon, the two federal decisions "are cause for serious reservation" regarding whether the Commission should "continue to expend resources on state wholesale tariffing inquiries."

2. Consolidated Intervenors

In their initial brief, the Consolidated Intervenors stated that the FCC "took pains" to confirm that section 271 creates independent access obligations for BOCs and cited paragraphs 653 and 655 of the *TRO*. They also pointed to the fact that this Commission conditioned its support of Verizon's 271 Application to the FCC on

Verizon's willingness to adhere to a number of requirements that it would not otherwise be required to meet under section 251.

In their reply brief, the Consolidated Intervenors urged the Commission to reject Verizon's argument that we do not have authority to enforce 271 obligations. They pointed to the history of this case, and the fact that Verizon filed the wholesale tariff in compliance with a condition set by the Commission during its 271 review, as evidence of the Commission's authority. They asserted that Verizon's argument that the Commission has no power to regulate its wholesale tariff "constitutes an outright repudiation of a fundamental premise of the agreement" in the 271 case.

In their Supplemental Brief, the Consolidated Intervenors stated that *USTA II* confirms that Verizon has section 271 obligations that are independent of its obligations under section 251. They also interpreted the *USTA II* decision to confirm that the *TRO* does not impact a state commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs.

The Consolidated Intervenors filed separate Exceptions, however, all three parties (GWI, OPA, and Cornerstone) concurred with the Examiner's analysis of the differing section 251 and section 271 unbundling obligations and her recommendation that Verizon be required to include its section 271 unbundling obligations in the wholesale tariff.

3. CLEC Coalition

In its brief, the CLEC Coalition stated that the authority for the Commission to require Verizon to tariff its UNE obligations under section 271 comes from the Congressional framework of section 271, Verizon's explicit agreement to the UNE tariffing obligations in Verizon's March 4, 2002 letter, and the plain and unambiguous declarations of the FCC in paragraphs 653-655 of the *TRO*. The CLEC Coalition also concluded that the FCC expressly found that it was the responsibility of both the FCC and state commissions to ensure compliance with section 271, including setting prices for UNEs established pursuant to section 271. Finally, the CLEC Coalition argued that the Commission must exercise its 271 authority over Verizon, because if the state does not, no one will; the FCC is simply without the resources. The absence of state action would have a drastic effect on the competitive landscape in Maine.

In their reply brief, the CLEC Coalition concurred with the Consolidated Intervenors and urged the Commission not to let Verizon break its agreement to meet the obligations it agreed to during the 271 approval process. The CLEC Coalition's exceptions generally supported the Examiner's Report and included specific comments on issues addressed in other sections of this order.

4. Other CLECs

ALTS, Covad, USA Telephone, AT&T, and Conversent, though they did not participate in the briefing phase of this proceeding, filed exceptions to the Report. ALTS and Covad filed joint exceptions which concurred with the Examiner's conclusion that we have authority to "ensure Verizon's ongoing compliance with the competitive checklist of section 271" and that we can, and should, require Verizon to file a wholesale tariff including all of its unbundling obligations. ALTS and Covad dismissed Verizon's arguments regarding exclusive FCC jurisdiction as contrary to the existing and continued authority of state commissions to enforce PAPs. USA Telephone's exceptions focused on pricing issues, though they did appear to support the recommendations regarding Commission authority to require a wholesale tariff.

Conversent's exceptions supported the Examiner's conclusion that Verizon should include all of its wholesale offerings, including section 271 UNEs, in its Maine wholesale tariff. Conversent claimed that such a requirement will reduce the risk that Verizon will unilaterally cease providing high-capacity DS1 and DS3 loops and dark fiber. Conversent countered Verizon's arguments concerning the voluntary nature of its PAP commitments and pointed out that if those commitments were entirely voluntary, Verizon could stop making payments at any time – a result not contemplated by the FCC, state commissions or CLECs. Conversent urged us to enforce the 271 conditions and commitments made by Verizon and to specifically require Verizon to include DS1 and DS3 high-capacity loops in its wholesale tariff. Conversent argued that neither the *USTA II* decision nor the Court's mandate eliminated the 251 unbundling requirement for high capacity DS1 and DS3 loops – the decisions only vacated the sub-delegation to the states and not the national finding of impairment. Conversent argued that we are not preempted from requiring Verizon to include those UNEs in the state wholesale tariff because such a requirement does not substantially prevent the implementation of section 251 or the purposes of the Act.

AT&T concurred with the Examiner's recommendations concerning our jurisdiction over 271 unbundling requirements and the need for Verizon to include all of its unbundling obligations in its wholesale tariff.

D. Analysis

As stated above, at the time of Verizon's 271 proceeding, Verizon's unbundling obligations under 251/252 of the TelAct were the same as its 271 unbundling obligations and thus there was no need to distinguish between the two types of requirements. Now that they are different, we must determine both the scope of Verizon's commitment to file a wholesale tariff and, if that commitment includes Verizon's 271 unbundling obligations under Checklist Items 4, 5, 6, and 10, our authority to enforce such a commitment.

1. Scope of Verizon's commitment

Interpretation of Verizon's commitment to file a wholesale tariff requires an examination of the language of the letters exchanged with Verizon during our 271 proceeding and as well as a review of the underlying purposes of the condition. Neither the Commission's 271 Letter nor the Dinan Letter contain any language that would limit Verizon's commitment to file a wholesale tariff to its 251 obligations. Thus, we must turn to the underlying purposes of the condition for guidance. During our 271 proceeding, we heard numerous complaints from CLECs regarding the difficulties and delays associated with negotiating amendments to interconnection agreements with Verizon. Today, we continue to hear complaints from CLECs regarding difficulties with interconnection agreements. In the Verizon Arbitration proceeding,[21] CLECs complained that Verizon had not responded to requests from CLECs to negotiate amendments to their interconnection agreements.

We find that a reasonable interpretation of the condition we placed upon Verizon during our 271 proceeding, and the condition it committed to fulfill, requires Verizon to include both its section 251 and 271 unbundling obligations in its wholesale tariff filed in Maine. Indeed, the reasons underlying the condition apply even more today when the legal and regulatory landscape has become increasingly confusing and complex, making it difficult to completely address and negotiate all of the issues that may arise in an interconnection agreement negotiation.

2. Our authority to enforce Verizon's commitment

While Verizon is correct that section 271(d)(6) allows for continued enforcement of an ILEC's 271 obligations by the FCC, Verizon ignores the FCC's directives regarding enforcement of ILEC commitments to state commissions and fails to explain adequately why states have authority over some section 271 issues, such as PAPs, and not others. Verizon also does not address the requirement, pursuant to section 271(c)(2)(A)(ii), that its interconnection agreements, subject to state arbitration pursuant to section 252(b), include access and interconnection that meets the requirements of section 271(c)(2)(B) – the competitive checklist. We find, upon consideration of each of these factors, that we do have authority to enforce Verizon's commitment to file a wholesale tariff with us that includes both its section 251 and 271 obligations.

Under section 271, state commissions do not have authority to approve an ILEC's 271 application but are allowed to consult with the FCC concerning an ILEC's 271 application. In fulfilling that role, the FCC encouraged state commissions to conduct extensive fact-finding proceedings to ascertain whether the terms, conditions, and prices of an ILEC's wholesale operations met section 271's standards. While the FCC made the ultimate finding of compliance, it relied heavily upon the work of state commissions. Indeed, the FCC noted in its *Maine 271 Order*:

[21] *Investigation Regarding Verizon Maine's Request for Consolidated Arbitration*, Docket No. 2004-135, Order (June 4, 2002).

> 3. We wish to recognize the effort and dedication of the Maine Public Utilities Commission (Maine Commission). In smaller, more rural states, the section 271 process taxes the resources of the state commissions, even more heavily than in other states. Yet, by diligently and actively conducting proceedings beginning in 1997 to set TELRIC prices, to implement performance measures, to develop a Performance Assurance Plan (PAP), and to evaluate Verizon's compliance with section 271 of the Act, the Maine Commission laid the necessary foundation for our review and approval. We are confident that the Maine Commission's efforts, culminating in the grant of this application, will reward Maine consumers by making increased competition in all markets for telecommunications services possible in the state.
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> . . .
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> 5. We rely heavily in our examination of this application on the work completed by the Maine Commission. . . .

Thus, the FCC explicitly acknowledged the prominent role the Commission played in evaluation of Verizon's 271 Application and the depth of the Commission's understanding of the particular circumstances of the competitive market in Maine.

As indicated above, the FCC has clearly stated that states may enforce commitments made to them by ILECs during the 271 process. The FCC's statement regarding enforcement of state 271 commitments, and our significant experience with the issues associated with the wholesale tariff, provide us with legal authority and substantive expertise to enforce Verizon's wholesale tariff commitment. We will exercise this authority by requiring Verizon to honor the commitment it made to us in the 271 process to file a wholesale tariff which includes all of its unbundling requirements and then evaluating that tariff for compliance with state and federal standards. If a party believes the Commission has not applied the correct standard, the party may file an action with the FCC pursuant to 47 U.S.C. §271(d)(6) and the FCC will have the benefit of the detailed factual record developed by us. Nothing about our review of Verizon's wholesale tariff preempts or invalidates the FCC's authority under section 271(d)(6). If the FCC disagrees with the position we take here, it can explain itself in any order issued on appeal. In the meantime, our decision will provide a single litigation proceeding to resolve the myriad of issues resulting from the *TRO* and *USTA II.*[22]

[22]We do not find Verizon's reliance upon the Sixth Circuit's *Verizon North v. Strand* decision and the Seventh Circuit's *Bie v. Worldcom* decision persuasive. In both the *Strand* and *Bie* cases, the issue before the court was whether a state commission could order a complete by-pass of the TelAct interconnection requirements – a matter not at issue in this case. Specifically, we never envisioned that our wholesale tariff would replace the need for an interconnection agreement, only that it would simplify the

Verizon's express agreement to file a wholesale tariff, in its letter confirming that it would abide by the Commission's conditions for recommending Section 271 approval, provide us with an independent basis for requiring Verizon to file such a tariff now. We assume Verizon did not lightly make its commitment, and that Verizon understood that the Commission, in accepting that commitment, would not condone or allow conduct inconsistent with the obligations thus undertaken. It follows, then, that Verizon by its acceptance of the condition (for which Verizon obtained Commission support for its Section 271 application) granted to the Commission the authority to ensure that Verizon fully complied with the wholesale tariff obligation defined by Section 271. This is not to suggest that the Commission has the independent authority to define the scope of those obligations where the FCC has clearly spoken; merely that, in light of Verizon's commitment, the Commission has an independent role in determining whether those obligations have been met.

IV. COMMISSION AUTHORITY TO SET PRICES FOR § 271 OFFERINGS

A. Introduction

Having determined that Verizon must tariff its 271 obligations, we consider the extent of our authority to set rates for those 271 offerings. Under state law, our authority is clear: 35-A M.R.S.A. § 301 requires that rates be just and reasonable and gives the Commission the authority to determine whether a utility's rates meet this standard. The Commission's authority under federal law is not as clear and requires a review of sections 251 and 252 of the TelAct, the *TRO*, and *USTA II.*

B. Applicable Law

Section 252 of the TelAct requires state commissions to apply the pricing standards found in section 252(d) to set the rate for interconnection pursuant to section 251(c)(2) and for UNEs unbundled pursuant to section 251(c)(3). Section 252(d) requires that the rate be based upon cost and be nondiscriminatory, and further provides that it may include a reasonable profit. This standard has been interpreted by

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process by providing a "floor" of standard terms and conditions, which is consistent with Verizon's own practice of offering an interconnection agreement template with standard offerings. Further, we note that section 252 of the TelAct specifically provides that a state commission may consolidate the litigation associated with multiple arbitration requests. Given that Verizon's pending *Arbitration* proceeding involves over 100 carriers and the same issues associated with the wholesale tariff, we believe that our approach of consolidating the two proceedings and developing a baseline wholesale tariff as a first step in the interconnection agreement process achieves the underlying goal of the TelAct, i.e., encouragement of interconnection between competitors and ILECs.

the FCC (and upheld by the Supreme Court[23]) to require forward-looking TELRIC pricing for all UNEs unbundled pursuant to section 251 of the TelAct.

Section 271 does not contain its own pricing standard. Section 271(c)(2)(B)(ii) (Checklist Item No. 2) requires that ILECs make UNEs available "in accordance with the requirements of section 251(c)(3) and 252(d)(1)" while sections 271(c)(2)(B)(iv, v, vi, and x) (Checklist Items Nos. 4, 5, 6 and 10), which provide for access to loops, switching, trunk side transport, and databases, make no reference to a pricing standard.

In the *TRO*, the FCC interpreted the pricing provisions of the TelAct as requiring TELRIC pricing for section 251(c)(3) elements only and "just and reasonable" rates for 271(c)(2)(B)(iv, v, vi, and x) elements. The FCC found that TELRIC pricing for non-251 UNEs "is neither mandated by statute nor necessary to protect the public interest."[24] Relying upon the Supreme Court's holding in *Iowa II* that section 201(b) of the Communications Act empowered the Commission to adopt rules that implement the TelAct, the FCC found that it had authority to impose the just and reasonable and nondiscriminatory standard of sections 201 and 202 of the Communications Act. The FCC went even further and found that it would determine, based upon a fact-specific inquiry pursuant to a section 271 application or a 271 enforcement action, whether the price for a particular 271 element met the section 201/202 standard.[25] The FCC noted that prices similar to those currently charged in ILEC access tariffs would likely meet the standard, as would any prices negotiated through arms-length agreements.[26]

In its March 2004 decision in *UTSA II*, the D.C. Circuit affirmed the FCC's finding that the pricing standard for UNEs unbundled pursuant to § 271 is found in sections 201-202 of the TelAct and not section 251. Specifically, the court upheld the FCC's determination that TELRIC pricing was not required under section 271; all that was required was that the prices not be "unjust, unreasonable or discriminatory."[27] The Court did not address the FCC's assertion that it, rather than state commissions, should determine whether the price for a 271 element meets the just and reasonable standard. The Court did find, in the context of state unbundling authority, that claims relating to the preemptive scope of the *TRO* were not ripe, because no party had challenged a specific state decision.

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[23]*See AT&T v. Iowa Utilities Bd.,* 525 U.S. 355 (1999)(*Iowa II)*.

[24]*TRO* at ¶ 656.

[25]*TRO* at ¶ 664.

[26]*Id*.

[27]*USTA II* at 53.

Since the *USTA II* decision was released, several state commissions have directly addressed the issue of state authority to review pricing for 271 elements. The Massachusetts Department of Telecommunications and Electricity recently found that it could approve or deny, on the basis of market-based pricing, the prices included in Verizon's wholesale tariff for its §271 obligations because those services are jurisdictionally intrastate.[28] On June 21, 2004, the Tennessee Regulatory Authority (TRA) issued an order which sets a 271 switching rate in the context of a section 252 arbitration proceeding.[29] Bellsouth has appealed that decision to the FCC and asked for an emergency declaratory ruling by the FCC that the action taken by the TRA violates the TelAct, FCC Orders, and federal precedent. The FCC has asked for comment on Bellsouth's petition.

C. <u>Position of the Parties</u>

1. <u>Verizon</u>

In its briefs, Verizon argued that the *TRO* makes clear that the FCC has exclusive jurisdiction over the pricing of 271 UNEs and that the "just and reasonable" standard, rather than TELRIC, should be applied to the rates for those elements. Verizon contended that even if TELRIC prices meet the "just and reasonable" standard, there is nothing that precludes Verizon from charging higher rates that also meet the "just and reasonable" standard. According to Verizon, the Commission would have no grounds for insisting on the lower TELRIC rate. Verizon also pointed out that while state commissions have authority to set rates for section 251 UNEs, there is no similar grant of authority for section 271 UNEs.

In its exceptions, Verizon urged us to clarify that all matters involving prices for section 271 elements are "deferred" to the FCC. Verizon argued that, because of its belief that we have no authority to define UNEs under section 271, we also would have no authority to set prices of any such UNEs. Verizon contested the grounds underlying the Examiner's finding that we have authority to set prices for section 271 UNEs, contending that the Examiner places too much significance on the Massachusetts DTE order cited above and that Verizon's petition for reconsideration of that order is still pending. Verizon also argued that Congress's silence on the issue of state enforcement of 271 obligations does not imply that states do, in fact, have any authority. Finally, Verizon alleged that *USTA II* "flatly rejected" any sub-delegation of FCC powers to state commissions.

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[28] *Proceeding by the DTE on its own Motion to Implement the Requirements of the FCC's TRO Regarding Switching for Large Business Customers Serviced by High-Capacity Loops*, DTE 03-59-A (Jan. 23, 2004), fn. 9.

[29] *In the Matter of Bellsouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-__ (July 1, 2004) at 1.

Verizon also challenged the Examiner's recommendation that the Commission require Verizon to offer section 271 UNEs at TELRIC prices until Verizon obtained approval from the FCC of its 271 UNE rates. Verizon alleged that the FCC "ruled unequivocally" that TELRIC should not apply to section 271 UNEs and that the Examiner's recommendation was "based on a misunderstanding" of the process the FCC intends to use for section 271 UNEs. Finally, Verizon urged the Commission to adopt the FCC's "safe harbor" pricing standards for section 271 UNEs, i.e. special access rates or commercially agreed upon prices.

2. CLECs

In its briefs, the CLEC Coalition argued that by agreeing to submit a wholesale tariff, Verizon agreed to file rate schedules for 271 UNEs which the Commission could review, accept, and/or reject. The Consolidated Intervenors did not directly address the Commission's authority to set prices for 271 UNEs because they believed, despite the specific questions posed in the Hearing Examiner's Procedural Order, that pricing issues would be addressed later.[30]

In their exceptions, a number of CLECs challenged the Examiner's analysis and recommendation that we refrain from exercising any section 271 pricing authority that we might have. The CLEC Coalition argued that the FCC's statements in paragraph 664 of the *TRO* should be viewed as a "limited statement" regarding the FCC's assertion of jurisdiction over section 271 pricing and that we should, in fact, exercise our 271 pricing authority. Specifically, the CLEC Coalition argued that paragraph 664's emphasis on pre-entry review by the FCC indicates a desire by the FCC not to "reach down to affect pricing in existing 271 approvals." The CLEC Coalition asserted that the FCC did not establish itself as the initial rate setting body in "a circumstance such as the one in Maine" but rather simply asserted its authority to review rates in the event of a disagreement between Verizon and the state commission. The CLEC Coalition urged us to exercise our authority to ensure that prices are conducive to competition and to provide reasonable transition for any rate changes. Finally, the CLEC Coalition endorsed the Examiner's recommendation that current TELRIC-based rates remain in place until we approve new 271 rates. The Coalition, however, urged us not to determine at this time that FCC-approved prices automatically be allowed to go into effect.

ALTS and Covad argued that the Supreme Court, in *Iowa II,* clearly held that while the FCC could establish the pricing methodology to be used for setting rates under section 252, it was the states that actually applied the methodology and set the rates. ALTS and Covad contended that we have an ongoing role in ensuring that the

[30]It is true that pricing issues were scheduled to be addressed later in the proceeding. However, parties should have reasonably expected that if a specific question relating to the legal underpinnings of the Commission's authority was posed for briefing, the question needed to be addressed.

rates charged by Verizon under section 271 meet the appropriate standards. ALTS and Covad dispute the Examiner's "preemptive preemption" approach of finding preemption before finding an actual conflict with an FCC determination on the merits of an issue. They argued that the question is not whether a state pricing decision thwarts the policies of the *TRO* but, instead, whether it thwarts the requirements of section 251 and 271 of the TelAct. Finally, they argued that, contrary to Verizon's assertions, the FCC did not forbid the application of forward-looking pricing to section 271 UNES but rather only stated that TELRIC pricing was not required. Thus, a state commission could find that TELRIC pricing met the "just and reasonable" standard or that another forward-looking pricing methodology could be used.

USA Telephone also contended that we should exercise our authority to set prices for section 271 UNEs in order to protect the competitive environment in Maine and to meet the needs of Maine consumers. USA Telephone argued that we must be prepared to exercise our authority to encourage stability in the market. The current instability makes it very difficult for CLECs to secure the necessary capital to implement planned facility build-outs. While not suggesting a permanent status *quo*, USA Telephone did urge consideration of the competitive impacts during any transitions.

AT&T argued that the Examiner's recommendation that we refrain from exercising our pricing authority over section 271 UNEs was unwarranted because it was based upon the mistaken belief that the FCC had asserted exclusive jurisdiction in the *TRO.* AT&T pointed out that the Examiner's Report itself admitted that the FCC did not specifically preclude state commissions from evaluating compliance with the federal "just and reasonable" standard. AT&T urged us to preclude Verizon from raising its 271 UNE rates above TELRIC until it obtained specific approval for its new rates from the FCC.

D. Analysis

Determining the scope of the Commission's 271 pricing authority involves both interpretation of the *TRO* and a determination under both state and federal law of the Commission's authority to set rates for intrastate services and products. First, Verizon is correct that the FCC stated in the *TRO* that it would review rates for 271 UNEs in the context of 271 applications and enforcement proceedings. However, as described above, and as acknowledged by Verizon, the FCC has already delegated significant authority to state commissions to enforce 271-related requirements. While the FCC stated it would conduct the review, the FCC did not specifically preclude state commissions from also conducting such an evaluation. Thus, we find, for the reasons discussed below, that we have the authority to require Verizon to file prices for its section 271 UNEs in its wholesale tariff and that we may review those prices for compliance with the FCC's "just and reasonable" standard.[31]

[31]It is also possible that we may order Verizon to unbundle certain elements pursuant to state law, in which case we will use state law pricing standards to evaluate Verizon's proposed rates.

There are a number of factors which generally support a state commission's authority to set prices for section 271 UNEs. First, the standard the FCC has announced for section 271 UNEs, "just and reasonable," is the same standard the Commission applies under 35-A M.R.S.A. § 301. Thus, the Commission has considerable experience in applying this standard to the rates of Verizon and many other public utilities. Further, state commissions, and not the FCC, are most familiar with the detailed company-specific data that will be used to support an ILEC's claim that particular rates are just and reasonable. In addition, as both CLECs and the National Association of Regulatory Utility Commissioners (NARUC) have argued in filings related to the appeal of the *TRO*, the Supreme Court's decision in *Iowa II* and the Eighth Circuit's decision in *Iowa III*[32] clearly establish that states, not the FCC, set rates for UNEs. Indeed, the Supreme Court stated that:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions …. The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.[33]

Finally, state commissions have authority to arbitrate and approve interconnection agreements pursuant to section 252 of the TelAct. Section 271(c)(2)(A)(ii) requires that ILECs provide access and interconnection which meet the requirements of the 271 competitive checklist, i.e. includes the ILEC's 271 unbundling obligations. Thus, state commissions have the authority to arbitrate section 271 pricing in the context of section 252 arbitrations.

In addition to all of the supporting factors, we find that Verizon's commitment to file a wholesale tariff included a commitment to file prices for the elements included in the tariff. Indeed, if we do not require Verizon to file prices, its commitment to file a wholesale tariff becomes a hollow promise, given the complexities of the wholesale marketplace at this time. In addition, practical concerns, such as timely access to section 271 UNEs, require that we enforce Verizon's commitment by requiring it to file proposed rates for each of the section 271 UNEs. We do not foreclose the possibility that Verizon may also seek approval of such rates from the FCC. If it does obtain such approval, it may file those same rates with us and we will give the FCC's determination substantial weight during our review.

Until such time as we approve new rates for section 271 UNEs, adopt FCC-approved rates, or CLECs agree to section 271 UNE rates, Verizon must continue to provide all section 271 UNEs at existing TELRIC rates. We find this requirement

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[32] *Iowa Utilities Board v. FCC,* 219 F.3d 744 (8^{th} Cir. 2000).

[33] *Iowa II,* 525 U.S. at 384.

necessary to ensure a timely transition to the new unbundling scheme. We have no record basis to conclude that TELRIC rates do not qualify as "just and reasonable" rates; while we might ultimately approve higher rates, we cannot do so without the benefit of a record or the agreement of the parties. We note that the decision we reach today is consistent with the approach embodied in the FCC's Interim Rules, which require a six-month moratorium on raising wholesale rates.[34]

V. COMMISSION AUTHORITY TO ORDER LINE SHARING PURSUANT TO STATE LAW

A. Legal Authority

1. Line Sharing

In the *TRO*, the FCC overturned its earlier decision in the *UNE Remand Order*[35] and found that CLECs are not impaired without access to the high frequency portion of the loop (HFPL), i.e. access to line sharing. Specifically, the FCC shifted its focus from the revenues derived from a single service deployed using the HFPL to the potential revenues derived from all services that could be provided over the full functionality of the loop. Thus, the FCC concluded that the increased operational and economic costs of acquiring a stand-alone loop are offset by the increased revenue opportunities afforded by use of the whole loop for services such as voice, voice over xDSL, data and video services.[36] While the FCC declined to explicitly find that any decision by a state commission to require line sharing under state law was automatically preempted, in paragraph 264 it invited any party aggrieved by such a decision to seek a declaratory ruling from the FCC.

In *USTA II*, the D.C. Circuit upheld the FCC's line sharing decision, finding that:

> [E]ven if the CLECs are right that there is some impairment with respect to the elimination of mandatory line sharing, the

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[34] Order and Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket 01-338, FCC 03-313, (rel. August 20, 2004)(Interim Rules Order).

[35] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket 96-98, Third Report and Order And Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, rel. November 5, 1999 (*UNE Remand Order*).

[36] *TRO at* ¶ 258.

> Commission reasonably found that other considerations outweighed any impairment.[37]

Thus, under federal law, section 251 line sharing will only be available on a grandfathered basis for the next three years, with the price increasing each year until it reaches the full price of the loop, at which time unbundling will no longer be required.[38]

2. State authority to order unbundling

Recently, in the *Skowhegan OnLine* proceeding[39], we found that we have authority, pursuant to 35-A M.R.S.A. §§ 1306 and 7101, to order the unbundling of network elements not required by federal law when doing so meets a demonstrated need by CLECs and is consistent with both state and federal policies concerning broadband deployment. We predicated our decision in *Skowhegan Online* on an earlier decision in the *Mid-Maine Arbitration Case,*[40] in which we found that we had authority to order access to additional UNEs under section 252(d)(3) of the TelAct[41] and that 35-A M.R.S.A. § 1306[42] provided us with authority to designate additional UNEs so long as our actions did not conflict with federal law. We found in *Skowhegan Online* that section 1306 continued to provide us with independent authority under state law and that 35-A

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[37] *USTA II at 45.*

[38]Neither the *TRO* or *USTA II* directly addressed whether an ILEC's continuing unbundling obligations under section 271 include continued access to line sharing with the ILECs and we will not reach that issue in this Order.

[39]*Investigation of Skowhegan Online, Inc.'s Proposal for UNE Loops*, Docket No. 2002-704, Order (April 20, 2004) and Order on Reconsideration (June 15, 2004).

[40]*Mid-Maine Telplus, Re: Request for Arbitration of an Interconnection Agreement with Bell Atlantic*, Order Addressing Subloop and Extended Link Issues (E3 and E7) – Part 2, Docket No. 98-593 (April 9, 1999) (*Mid-Maine*).

[41]Our holding was based upon the fact that there was nothing in the TelAct that provided the FCC with exclusive authority to designate UNEs. *Mid-Maine* at 3. Indeed, the FCC's *Local Competition Order* specifically provided that states had authority to order additional UNEs pursuant to state law and the FCC's Rules at that time specifically provided for state commission designation of additional UNEs during arbitration proceedings. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996). The *TRO* has since vacated both of those rules/findings.

[42]Section 1306 provides that, if the Commission determines that a term, condition, practice or act is unjust, unreasonable, insufficient, or unjustly discriminatory, the Commission may "establish or change terms, conditions, measurement, practice, service or acts, as it finds just and reasonable."

M.R.S.A. § 7101 provided additional authority to order unbundling where doing so will allow for further deployment of broadband, especially in rural areas. Thus, we found that unbundling pursuant to state law requires a showing that the lack of unbundling constitutes an unreasonable act or is insufficient when consideration is given to state law, public policy, and the potential impact of the unbundling on the availability of telecommunications services to Maine consumers. In addition, any decision to unbundle pursuant to state law must not conflict with federal law.

In our Order on Reconsideration in *Skowhegan Online*, we re-affirmed our earlier findings and pointed to other provisions of state law that supported our unbundling authority. Specifically, we found that the standards in 35-A M.R.S.A. § 301, requiring all utilities to provide "safe, reasonable and adequate facilities and service," as well as those set forth in 35-A M.R.S.A. § 711, granting us authority to order the joint use of wires and prescribe reasonable compensation and reasonable terms and conditions, supported unbundling. We emphasized section 7101's clear expression of the Legislature's policy objective of supporting broadband deployment throughout the state. Finally, we pointed out that the Law Court had already found that the Commission has all the implied and inherent powers necessary to implement the objective set forth in section 7101. *New England Telephone v. PUC,* 1997 ME 222**.** Thus, we found that the clear policy objectives contained in section 7101, when combined with our broad mandate to ensure that utility practices and rates are reasonable pursuant to section 1306, provided us with the necessary authority to require Verizon to unbundle its legacy copper network.

3. Federal Preemption

a. Definition of Preemption

The Supreme Court has held that "preemption will not lie unless it is 'the clear and manifest purpose of Congress.'"[43] If a federal statute contains an express preemption clause, the court will first focus on the plain wording of the clause, "which necessarily contains the best evidence of Congress' preemptive intent."[44] Similarly, savings clauses, which specifically reserve state authority, are "the best evidence of Congress' preemptive intent."[45] Generally speaking, preemption will be found when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[46] What constitutes a sufficient obstacle,

[43]*CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) *citing Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947).

[44]*Id*.

[45]*Id*.

[46]*Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000).

however, is a matter of judgment, informed by examining the statute as a whole and identifying its purpose and intended effects.[47]

b. Language of the TelAct

Section 251(d)(3) of the TelAct states that the FCC may not preclude enforcement of any state commission decision establishing local exchange interconnection and access requirements which is consistent with section 251 and which "does not substantially prevent implementation of the requirements of this section." In the *TRO,* the FCC asserted that its interpretation of the requirements of section 251, i.e., its Rules, was intended by Congress to be included under the "requirements of this section" language of section 251(d)(3).[48] Thus, according to the FCC, any state decision that is inconsistent with the FCC's Orders or Rules (the so-called "federal regime") violates section 251(d)(3) and is preempted.

However, the FCC's assertion that its Rules are included in "the requirements of this section" language of section 251 was specifically rejected by the Eighth Circuit Court of Appeals in a decision concerning the FCC's *Local Competition Order,* which implemented the TelAct.[49] The Eighth Circuit held that section 251(d)(3) does not require state commission orders to be consistent with all of the FCC's regulations promulgated under section 251.[50] It stated that "[t]he FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical."[51] While portions of the Eighth Circuit's decision were ultimately reversed by the Supreme Court, the FCC did not challenge, nor did the Supreme Court reverse, the Eight Circuit's holding on section 251(d)(3).[52] Indeed, the FCC admits in footnote 611 of the *TRO* that the Eighth Circuit's interpretation of section 251(d)(3) is the law of the land and that mere inconsistency with the FCC's rules is not enough to trigger federal preemption. Thus, contrary to the assertions of both the FCC and Verizon, the mere fact that a state requires an additional unbundled element does not mean it automatically will be preempted. Instead, consideration must be given to whether the requirement is consistent with section 251 and whether it prevents its implementation.

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[47] *Id*.

[48] *TRO* at 191.

[49] *See Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd sub nom. on other grounds, AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999)(*Iowa I*).

[50] *Id*. at 806.

[51] *Id*.

[52] *See TRO* at ¶ 192, fn. 611.

In analyzing the legislative intent behind a statutory requirement that two mandates be consistent, courts have defined the word by its common usage, as found in the dictionary. *See* e.g. *Cross v. Warden, N.H. State Prison*, 644 A.2d 542, 543 (N.H. 1994)(the meaning of "consistent" is synonymous with "consonant" or "compatible."); *Ryan v. Roach Drug Co.*, 239 P. 912, 914 (Okla.1925) ("'Consistent' means not contradictory, compliable, accordant."). Courts have also concluded that two designs may be consistent even if one contains additional elements. *Lake City Corp. v. City of Mequon*, 558 N.W.2d 100, 104 (Wis.1997) ("so long as any issues addressed in both a master plan and an official map are not contradictory, the master plan is consistent with the official map").

The Supreme Court of Vermont addressed the meaning of section 251's "consistency" requirement in a challenge to an order of the Vermont Public Service Board requiring Verizon to make certain facilities or services available to CLECs pursuant to state law.[53] Verizon argued that the Board's order was inconsistent with federal law and not supported by independent state authority.[54] In holding that there was ample state authority to support the order and that the order did not contradict federal law, the Vermont court described how Congress intended the Act to work in conjunction with state regulatory commissions:

> The Telecommunications Act of 1996 fundamentally amends the Communications Act of 1934, the principal legislation that regulates telecommunications and established the FCC. . . . The use of a federal statute by a state board is consistent with the federal government's approach to telecommunications regulation, in which states are considered partners in regulation. In both the 1934 Act and the 1996 Act, Congress has taken pains to preserve the overlapping jurisdiction of the states and the federal government over the telecommunications industry. . . . Congress did not intend to occupy the field of telecommunications regulation, it took explicit steps to maintain the authority of state regulatory bodies to enforce and work within the Act.[55]

The court further explained that the "federal scheme does not outline any limitations on state authority to regulate above and beyond the minimum requirements of the Act . . . federal law sets only a floor, the requirements of which may

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[53] *In re Petition of Verizon New England Inc. d/b/a Verizon Vermont*, 795 A.2d 1196 (Vt. 2002).

[54] *Id.* at 1198.

[55] *Id.* at 1201.

be exceeded by state law."[56] Furthermore, the Vermont court emphasized that when compliance with a state commission's order does not interfere with a carrier's ability to comply with federal law, there is no conflict between the state and federal regulations.[57]

B. Positions of the Parties

1. Verizon

Verizon argued that the FCC has determined that CLECs are not impaired without unbundled access to line sharing. According to Verizon, where federal law sets forth the legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, "the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns." Citing section 251(d)(3) and "long-standing federal preemption principles," Verizon asserted that state commissions have no authority to override the FCC's determination that the unbundling of certain network elements is not required under the TelAct.

Verizon contended that the Commission has no independent authority under state law to impose additional unbundling requirements on Verizon, especially where the FCC has explicitly declared that the UNE is not required. Verizon further argued that the Commission does not have authority to order unbundling under section 271, but even if it did, Checklist Item No. 4 - the local loop - does not include separate access to the HFPL. Additionally, it argued that the pricing would not be TELRIC but would be "just and reasonable" which would require a "fact specific inquiry" conducted by the FCC.

In its Reply Brief, Verizon reiterated its position that "[t]he Commission is legally preempted from re-imposing unbundling obligations eliminated by the FCC's rulings in its *TRO*." In particular, Verizon disputed the CLECs' claim that the Commission has separate state authority to order line sharing and stated that, "where the FCC determines that an element should not be unbundled, a state may not lawfully override that determination." Verizon also refuted the CLECs' claim that the Commission can unbundle HFPL based on Maine specific facts.

In its Supplemental Brief, Verizon asserted that *USTA II* affirms the FCC's findings in the *TRO* on line sharing and unambiguously struck down the FCC's delegation of any unbundling authority to states.[58] Verizon also repeated its belief that the "Commission may not lawfully rely on state law to impose an unbundling obligation

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[56]*Id.* at 1204.

[57]*Id.* at 1205.

[58]*USTA II* at 12.

for line sharing, feeder subloops, OCN transport, entrance facilities or other UNEs expressly eliminated or curtailed by the FCC in the *TRO*." Referring to its previous statements concerning the absence of state law authorizing unbundling, Verizon argued that even if the state is authorized to order unbundling (which they insist, it is not), it may not do so in the case of line sharing because *USTA II* affirmed the FCC's decision in the *TRO* not to order line sharing because it discourages investment.

In its exceptions, Verizon objected to the Examiner's recommendation that we find that line sharing is a continuing 271 obligation under Checklist Item No. 4 but did not directly address state unbundling authority.

2. CLECs[59]

In their Brief, the Consolidated Intervenors pointed to the Commission's reliance upon Verizon's performance in Maine on the number of line sharing arrangements when it found Verizon in compliance with Checklist Item No. 4 during Maine's 271 proceeding. They contended that allowing Verizon to discontinue line sharing now effectively repudiates one of the conditions for the Commission's support and is anti-competitive. The Consolidated Intervenors argued that the FCC took pains to make clear that 271 requirements remain unaffected by the *TRO* (citing to ¶¶ 653, 655). They also suggested that the Commission follow the Pennsylvania Public Utilities Commission's lead in insisting that Verizon honor its 271 obligations. Finally, they cited 35-A M.R.S. A. § 7101 and argued that Verizon's proposal contradicts state telecommunications policy of promoting broadband, especially in rural areas, and urged us to order line sharing because it has been instrumental in creating and fostering competition in rural Maine.

In their Reply Brief, the Consolidated Intervenors again described how Verizon and the Commission relied on the provisioning of line sharing to show that Verizon had opened up its network to competition during the 271 review. The Consolidated Intervenors also cited paragraph 650 of the *TRO* which states that "Section 271(c)(2)(B) establishes an independent obligation for BOCs to provide access to loops…." and implored the Commission to enforce Verizon's 271 obligations and require continued line sharing.

In their Supplemental Brief, the Consolidated Intervenors stated that *USTA II* confirmed the FCC's conclusion that section 271's unbundling requirements for BOCs are independent of a BOC's section 251 requirements. They also argued that "the Court essentially held that the *TRO* has no impact whatsoever, from a legal standpoint, on a state Commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs."

[59]The CLEC Coalition did not brief the line sharing issues but "supports the arguments and conclusions set forth in the briefs on Line Sharing issues submitted by GWI, Conversant and the Office of the Public Advocate."

As stated earlier, the Consolidated Intervenors filed separate exceptions. GWI argued that the Commission is not preempted from ordering line sharing and that, absent a court finding of preemption, the Commission should rely upon state law and policy to require unbundled line sharing. GWI argued that that no court had supported the FCC's proposition that any unbundling not required by the FCC's rules promulgated under section 251 is preempted by the "requirements of this section" language. GWI also pointed to the FCC's own acknowledgement of the limitations of the preemptive effect of the TelAct.

GWI's exceptions also addressed both the state policy supporting broadband deployment and the impact on that policy if line sharing is eliminated. GWI pointed out that the price for line sharing will rise in October and that if GWI has to raise its rates to cover increased costs, rural areas will be the hardest hit. GWI also argued that the FCC's line sharing decision was based upon a vision of the competitive landscape that does not match what is occurring in Maine and which has changed since the issuance of the *TRO* itself. Specifically, *USTA II* overturned the FCC's findings regarding the unbundling of mass market switching, which will limit the development of residential voice competition and the revenues associated with it.

GWI argued that the consequences of the FCC's actions seriously impact the future of competition in Maine, particularly for broadband services. According to GWI, while cable broadband service is available in urban and suburban areas, it is generally not available in rural areas. While Verizon broadband is available in many Verizon exchanges, over 40% of the customers are impacted by distance limitations. GWI asserted that there are ways to overcome those problems but they require CLEC access to Verizon line sharing and Verizon's cooperation in deploying the solutions. Thus, GWI urged us to exercise our authority to order line sharing and to set a fair rate for line sharing because failure to do so will result in constant litigation over interconnection agreement terms.

The OPA's exceptions urged us to order Verizon to continue to provide unbundled line sharing at affordable rates. The OPA argued that the FCC's decision regarding line sharing transition rates should not be interpreted as an FCC decision as to a just and reasonable rate under section 271 and that we should exercise our authority to make a determination regarding pricing. Absent Commission action, Maine consumers will be harmed by substantial increases in prices for xDSL and the potential destruction of the nascent broadband market in Maine.

Cornerstone's exceptions also recommended that we exercise our authority to order the continued availability of line sharing at reasonable rates. Cornerstone alleged that if the FCC's transition rates are allowed to go into effect, Cornerstone would not be able to serve many of the rural exchanges it intends to serve because it could not cover the exchange-specific costs. Cornerstone pointed out that if it and other Maine CLECs cannot economically serve these rural areas, it is unlikely that larger firms would be willing to invest in areas where the margins are so slim. For some of these exchanges, where neither Verizon nor the cable provider have deployed xDSL, this means that citizens and businesses in these areas will continue to lag behind more urban areas.

ALTS and Covad urged us to exercise our own authority to order line sharing under state law. They argued that sections 251 and 252 of the TelAct preserve the authority of state commissions to order unbundling and that the Supreme Court has refused to diminish the role of state commissions in overseeing local competition matters. Further, and contrary to the assertions of the FCC, the FCC cannot preempt state commissions by its orders or rules – the language of the TelAct preserving state authority controls. ALTS and Covad also pointed out that in the *TRO* the FCC did not preempt any existing state law unbundling requirements nor any future state law unbundling requirements – it acknowledged that such unbundling requirements may be consistent with the federal framework.

ALTS and Covad argued that facts supporting the FCC's decision not to unbundle line sharing on a national basis do not exist in Maine. Specifically, the FCC relied upon a carrier's ability to line-split with other carriers. However, in Maine, Verizon has not made line splitting operationally available in the same manner as its own retail voice and data bundles, thereby limiting CLECs' ability to line split. In addition, there are customer-impacting time constraints on line splitting, and different policies for submission of orders, and Verizon will not line split on resold voice service. Thus, ALTS and Covad urged the Commission to order the continued availability of line sharing at TELRIC rates.

AT&T supported the Hearing Examiner's determination that line sharing should be provided under section 271 but disagreed with the recommendation that we not exercise our authority to set prices for section 271 UNEs. Specifically, AT&T contended that the FCC had not asserted exclusive jurisdiction over section 271 pricing and that we need not refrain from exercising our section 271 authority in deference to a claim of exclusive jurisdiction that the FCC did not make.

C. <u>Decision</u>

We find that the FCC has not preempted our further consideration of whether to unbundle line sharing under state law. First, we agree with GWI that the Hearing Examiner essentially recommended preemptive preemption, i.e. that we not take action on the grounds that the FCC might attempt to preempt our action. We reject this approach because, as several parties pointed out, the FCC specifically declined to make a finding of preemption of both existing and future state unbundling decisions. While the FCC made clear that it might find preemption if the state decision met federal preemption standards, such a determination would need to be made based upon the specific circumstances of each case. The D.C. Circuit reached the same conclusion in *USTA II*, i.e., that claims relating to preemption were not ripe because no specific state decision had been challenged.

While we recognize the federal policies enunciated by the FCC in the *TRO*, we find that further exploration of the specific circumstances in Maine and state law policies and mandates are necessary in order to determine whether we should, in fact, exercise our authority under 35-A M.R. S.A. §§ 301, 711, 1306 and 7101 to order line sharing. As we stated in our *Skowhegan Online* decision, we take very seriously the Legislature's directive that all Maine citizens should have access to broadband services. The issues raised by GWI, Cornerstone, and the OPA concerning the viability of rural broadband deployment warrant a closer examination. It would be premature to find at this time, both on a factual and legal basis, that we have already been preempted by the FCC. In addition, there are several pending legal challenges at the FCC and in the courts which may provide further direction concerning the scope of any federal preemption relating to line sharing. Waiting for resolution of those proceedings, however, would mean delaying for an uncertain period a decision that might prevent a significant deceleration in rural broadband deployment. Given our obligation to implement legislative directives, we think the more appropriate course is to proceed as expeditiously as possible to resolve the question of whether to order the unbundling of line sharing under state law.

If we decide to order line sharing pursuant to state law, we would also set the price for such sharing using state law standards, i.e., just and reasonable rates. We invite the parties to develop a record in this proceeding that would allow us to set rates at the conclusion of the proceeding.

VI. CONCLUSION

For the reasons discussed above, we order Verizon to include 271 UNEs and prices for those UNEs in its state wholesale tariff. We also determine that we have authority under state law to order the unbundling of line sharing and that we should proceed to investigate whether to exercise that authority.

Dated at Augusta, Maine, this 3rd day of September, 2004.

BY ORDER OF THE COMMISSION

____

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.

EXHIBIT O

DT 03-201
DT 04-176

VERIZON NEW HAMPSHIRE
SEGTEL, INC.

Proposed Revisions to Tariff NHPUC No. 84
(Statement of Generally Available Terms and Conditions)
Petition for Declaratory Order re Line Sharing

Order Following Briefing

O R D E R N O. 24,442

March 11, 2005

I. PROCEDURAL HISTORY

A. Docket No. DT 03-201

On October 17, 2003, Verizon New England d/b/a Verizon New Hampshire (Verizon) filed with the New Hampshire Public Utilities Commission (Commission) certain proposed revisions to the Company's Statement of Generally Available Terms and Conditions (SGAT), as reflected in Tariff NHPUC No. 84 (Tariff 84), which sets forth the terms of interconnection Verizon offers competitive local exchange carriers (CLECs) as well as the network elements Verizon makes available to CLECs on an unbundled (*i.e.*, individual) basis. These SGAT changes were occasioned by the issuance of the Federal Communications Commission's (FCC's) Triennial Review Order, *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978 (2003) (*TRO*) which evaluated and rewrote the FCC's rules regarding local exchange competition in compliance with the Telecommunications Act of 1996, Pub. L. 104-104, Feb. 8, 1996, 110 Stat. 56, and subsequent amendments, codified as 47 U.S.C. § 151 *et seq*.

An Order of Notice was issued on October 31, 2003, scheduling a prehearing conference and establishing a deadline for intervention petitions. On November 11, 2003, Verizon provided a confidential list of customers with existing services affected by the proposed tariff revisions.

The prehearing conference took place as scheduled on December 2, 2003. Parties granted intervenor status were Biddeford Internet Corporation d/b/a Great Works Internet (GWI), Conversent Communications of New Hampshire (Conversent), Covad Communications Company (Covad), Freedom Ring Communications LLC d/b/a BayRing Communications (BayRing), New Hampshire Internet Service Providers Association (NHISPA), Otel Telekom Inc. d/b/a G4 Communications (G4), Revolution Networks (RevNets), segTEL Inc. (segTEL), and WorldCom Inc. (MCI). The Office of the Consumer Advocate (OCA) entered an appearance on behalf of residential ratepayers. A technical session followed the prehearing conference, at which the participants agreed on a briefing schedule and three questions that would be addressed by the briefs. The schedule was adopted by Secretarial Letter issued on December 19, 2003.

On December 12, 2003, Verizon filed a motion seeking relief from certain provisions in the Order of Notice entered by the Commission in DT 03-201. On the same date, Verizon filed a summary description of each of the terms and conditions Verizon believed would represent changes to its SGAT, the list of unbundled network elements (UNEs) that Verizon believed might be subject to future impairment proceedings in New Hampshire in accordance with the *TRO*, and a copy of Verizon's proposed amendment to interconnection agreements eliminating provisions relating to line sharing pursuant to the *TRO*.[1] Objections to Verizon's Motion for Relief were filed on December 22, 2003, by BayRing, NHISPA, segTEL, and RevNets. GWI concurred with BayRing's objection. Briefs were timely filed by Covad, GWI, MCI, segTEL and Verizon. BayRing and the OCA concurred with segTEL's brief. Conversent filed a brief on December 30, 2003. Reply briefs were timely filed by Covad, GWI, segTEL, and Verizon. BayRing concurred with the reply briefs filed by segTEL and GWI.

On January 30, 2004, the Commission issued Order No. 24,268 on the pending Verizon motion, which concerned the determination in the Order of Notice that Verizon would be required to offer all UNEs contained in the SGAT, at then-current prices, pending review of the proposed tariff revisions. The Commission rejected Verizon's contention that section 3.3.2 of the SGAT required that the proposed revisions go into effect without Commission review. While the Commission denied Verizon's request without prejudice, pending a final ruling in DT 03-201, the Commission granted in part Verizon's request for alternative relief. Specifically, the Commission allowed Verizon to discontinue provisioning new orders for certain UNEs during the pendency of DT 03-201. These UNEs were (1) dark fiber feeder subloop, (2) interoffice transmission facilities (IOF) consisting of OCn (Optical Carrier number) and STS1 (Synchronous Transport Service) transport, and (3) transmission facilities that connect CLEC

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[1] "Impairment" refers to the standard, enumerated in section 252(d)(2) of the Telecommunications Act, with respect to when an Incumbent Local Exchange Carrier (ILEC) such as Verizon must make its network elements available on an unbundled basis pursuant to section 251 to Competitive Local Exchange Carriers (CLECs). Impairment exists when lack of unbundled access to the network element in question would impair a CLEC's ability to provide services to the public on a competitive basis.

central offices or switches to CLEC collocation sites in Verizon central offices (dark fiber channel terminations). The Commission reasoned that such a determination appeared to comport with the *TRO*, did not harm existing customers, and did not amount to a prejudgment of the outcome of DT 03-201. The Commission also directed Verizon to file revised SGAT pages to reflect the line sharing transition requirements of 47 C.F.R. §51.319(a)(1)(i),[2] emphasizing that no separate agreement should be necessary for parties to avail themselves of line sharing consistent with the FCC's rules.

In response, Verizon filed modified revisions to its SGAT on February 9, 2004, which were accepted as compliant by the Staff of the Commission (Staff) on March 25, 2004. On February 26, 2004, Covad requested that the Commission consider a recently-released decision of the Maine Public Utilities Commission (PUC) hearings examiner. Verizon responded on March 9, 2004.

In the meantime, the *TRO* was the subject of numerous appeals which were consolidated by the U.S. Court of Appeals for the District of Columbia Circuit. In its decision, *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II)*, the Court of Appeals vacated a number of the FCC *TRO* determinations, remanded some, and affirmed others. In general, the appellate tribunal vacated decisions that maintained unbundling

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[2] In the *TRO*, the FCC determined that incumbent local exchange carriers (ILECs) were no longer required to offer line sharing to CLECs on an unbundled basis pursuant to section 251, given a lack of section 252 impairment. But the FCC recognized that some CLECs had relied on a previous FCC order reaching the opposite result in order to provide broadband services to consumers. Accordingly, the FCC mandated a three-year transition period with respect to new line sharing arrangements, with the price gradually approaching that of a full, stand-alone local loop, which remains a section 251 UNE. *See TRO* at ¶¶ 264-65.

obligations of incumbent local exchange carriers (ILECs) such as Verizon and affirmed decisions that reduced ILEC unbundling obligations pursuant to section 251. In addition, the Circuit Court was silent on some parts of the *TRO*. On August 20, 2004, the FCC issued an order that required Verizon and other ILECs to continue providing, until February 20, 2005, unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under valid interconnection agreements as of June 15, 2004, and established transitional measures through August 20, 2006, in the absence of an FCC ruling on any particular UNE. *See In re Unbundled Access to Network Elements*, 19 F.C.C.R. 16,783. On October 12, 2004, the Supreme Court declined to hear the appeal of the Court of Appeals' *USTA II* decision, thus allowing it to stand. On February 5, 2005, the FCC issued its *In re Unbundled Access to Network Elements*, 2005 WL 289015 (*TRO Remand Order*). On February 18, 2005, Verizon filed revisions to Tariff 84 with the Commission in response to the FCC's *TRO Remand Order*.

Supplemental briefs were filed on February 18, 2005, by Verizon and segTEL. Lightship Telecom (Lightship) filed a letter in support of segTEL's brief. The Association for Local Telecommunications Services, or ALTS, filed comments on February 18 as well.

B. Docket No. DT 04-176

On September 19, 2004, GWI and segTEL jointly filed a Petition seeking an order on an expedited basis that Verizon remains obligated to provide line sharing. On October 8, 2004, segTEL and Verizon jointly filed a pleading in which segTEL withdrew its request for expedited relief and both parties asked the Commission to hold the underlying dispute in abeyance until November 15, 2004. On November 5, 2004, GWI and Verizon filed a similar notice and motion in regard to GWI.

On November 22, 2004, the Commission issued a secretarial letter asking the Parties in Docket No. DT 04-176 to advise the Commission of the status of their ongoing negotiations, and requesting that Verizon advise the Commission regarding its intentions with respect to filing the interim agreements it had reached with GWI and segTEL. Verizon filed comments in response to the secretarial letter on December 6, 2004. GWI and segTEL separately informed the Commission that no permanent agreement regarding line sharing had been reached.

On January 12, 2005, the Commission issued an Order of Notice scheduling a prehearing conference in Docket No. DT. 04-176 for January 26, 2005. The OCA entered an appearance on behalf of residential ratepayers and Lightship sought intervenor status. At the prehearing conference, GWI indicated that it had reached agreement with Verizon on line sharing but wished to remain a party to the docket. On January 28, 2005, Verizon filed changes to its Tariff 84, to comply with Commission Order No. 24,268 in Docket No. DT 03-201. That same day, segTEL filed a letter requesting the Commission suspend the effective date of Verizon's tariff filing. Verizon filed an objection to segTEL’s request on January 31, 2005. Also on January 31, the Commission issued a Secretarial Letter consolidating DT 03-201 and DT 04-176, and setting out a briefing schedule, as described *supra*.

C. SGAT and Tariff 84

As noted, *supra*, the SGAT set out the general terms and conditions Verizon offers to competitors for interconnection and UNEs. The Commission, pursuant to 47 U.S.C. § 252(f), found Verizon's SGAT compliant with sections 251 and 252(d) of the Telecommunications Act on July 6, 2001. *See Bell Atlantic*, 86 NH PUC 419 (2001).

ILECS such as Verizon that were formerly entities of the regulated telephone monopoly broken up in 1984,[3] were precluded from offering so-called interLATA[4] long-distance service, *i.e.*, long distance service that crosses LATA boundaries. However, section 271 of the Telecommunications Act authorizes the FCC to grant an RBOC authority to offer interLATA long distance service upon satisfaction of certain conditions. In considering such a request from an RBOC, the FCC is obliged to "consult" with the relevant state utility commission concerning whether the RBOC meets the conditions, referred to in the statute as the "[c]ompetitive checklist."

On June 14, 2002, by letter from the Commission in Docket No. DT 01-151 (opened to consider Verizon's request for a favorable section 271 recommendation from the Commission to the FCC), the Commission set out ten conditions for a determination by the

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[3] These ILECs are generally referred to as RBOCs (regional Bell operating companies) or simply BOCs (Bell operating companies).

[4] LATA, or Local Access Transport Area, defines the service areas of the RBOCs. In New Hampshire, the LATA is approximately contiguous with the area designated by the 603 area code, making New Hampshire a single-LATA state. Therefore, in New Hampshire, interLATA and interstate long distance are interchangeable terms.

Commission that Verizon was in compliance with the requirements of section 271. Condition 1 stated:

> To avoid confusion, Verizon will explicitly convert the existing SGAT into a CLEC tariff from which competitors may directly order anything contained in the SGAT, without the need to negotiate an interconnection agreement or amend an interconnection agreement. The tariff may contain a standard form for competitors to complete which would provide Verizon with the information it needs about the competitor in order to interconnect, such as the location of the point of interconnection or identification for billing purposes. The tariff must reflect the SGAT rates, terms and conditions ordered by this Commission in Docket DE 97-171, except to the extent further reductions or changes are required below as a condition of Verizon's receipt of a favorable recommendation on its section 271 petition.

Accordingly, Verizon filed a revised Tariff 84 and a new Tariff NHPUC No. 86 (Tariff 86). These tariffs were approved by Commission Order No. 24,337 on June 18, 2004. Tariff 84 is now a wholesale tariff of UNEs, interconnection and collocation available to CLECs; Tariff 86 is a resale tariff of retail products available at discount to CLECs. Order No. 24,337 says, "Staff recommends adoption of the Tariffs, and states that any variations between the two documents are not intended to reflect a change in the terms and conditions as established in the SGAT." Verizon's January 28, 2005 filing to amend Tariff 84 brings Tariff 84 into agreement with the SGAT as it existed on June 18, 2004, the date the tariff was approved.

The *TRO* prompted Verizon to file revisions to its SGAT as reflected in Tariff 84. According to Verizon, its revisions affect three UNEs: (a) line sharing, (b) certain dark fiber, and (c) interoffice transmission facilities (IOF) consisting of OCn (Optical Carrier number) and STS1 (Synchronous Transport Service) transport. The *TRO*, however, discusses the UNEs in a manner that makes classification of the UNEs into four categories more useful. Therefore, this order will discuss the revisions in terms of four categories: (a) line sharing; (b) dark fiber feeder subloop; (c) IOF at the OCn and STS1 level; and (d) dark fiber channel terminations.

According to Verizon, the tariff revisions are made pursuant to section A.1.4.3.B of Tariff 84[5] which authorizes Verizon to cease offering, with 30 days' written notice, any network elements that the FCC finds should be removed from the national list of UNEs required to be unbundled by ILECs. A number of CLECs objected to the proposed revisions as being inconsistent with the FCC's findings in the *TRO*.

II. BACKGROUND

A. Line Sharing

Line sharing is defined by the FCC as "the process by which a requesting telecommunications carrier provides digital subscriber line service over the same copper loop that the incumbent LEC uses to provide voice service, with the incumbent LEC using the low frequency portion of the loop and the requesting telecommunications carrier using the high frequency portion of the loop. The *TRO* provided that "the high frequency portion of a copper loop shall no longer be required to be provided as an unbundled network element," subject to a three year transition, and provided access to line sharing for an additional year for those CLECs currently utilizing line sharing. Availability of line sharing as a section 251 element expired by the terms of the *TRO* on October 2, 2004.

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[5] Previously section 3.3.2 of the SGAT, Tariff section A.1.4.3.B reads, "Notwithstanding anything herein to the contrary, if, as a result of any decision, order or determination of any judicial, regulatory or other governmental authority with jurisdiction over the subject matter hereof, it is determined that the Telephone Company is not required to furnish any service, facility or arrangement, or to provide any benefit required to be furnished or provided to the TC hereunder, then the Telephone Company may discontinue the provision of any such service, facility, arrangement or benefit to the extent permitted by any such decision, order or determination by providing thirty (30) days prior written notice to the TC."

B. Dark Fiber Feeder Subloop

A loop is a facility that connects from a customer's premises to a central office. Loops are composed of feeder, which extends out from the central office, and distribution, which branches out from the feeder to customer premises. Any portion of a loop can be called a subloop. The FCC defined subloops for the purposes of unbundling in its *Third Report and Order and Fourth Further Notice of Proposed Rulemaking in the Matter of Implementation of The Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C.R. 3696 (1999), which states that subloops are “portions of the loop that can be accessed at terminals in the incumbent's outside plant. An accessible terminal is a point on the loop where technicians can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within.” A hybrid loop consists of copper distribution plant plus fiber feeder facilities between the central office and locations at or near the serving area interface or remote terminal. Verizon's revisions propose eliminating the availability of the feeder portion of a subloop that consists of dark fiber.

C. IOF at the OCn and STS1 level

Unbundled interoffice facilities consist of dedicated transport. In the *TRO*, the FCC redefined the dedicated transport network element as those transmission facilities that connect incumbent LEC switches or wire centers, which we discuss further in section D, Dark Fiber Channel Terminations. The FCC determined that high-speed interoffice transmission facilities at OCn and STS speeds would no longer be section 251 elements. In its impairment analysis the FCC stated, “we find that dark fiber and multiple DS3 circuits provide reasonable substitutes for OCn interface circuits at these capacities and find that requesting carriers are not impaired without OCn or SONET interface transport.” *TRO* ¶389. Verizon's revisions propose eliminating the availability of interoffice transport (IOF) at OCn and STS levels.

D. Dark Fiber Channel Terminations

Verizon seeks to eliminate what it calls dark fiber channel terminations, which are also sometimes referred to as “entrance facilities.” In response to the Commission’s directive to identify the applicable cross references between each proposed tariff revision and the *TRO*, Verizon cited to *TRO* paragraphs 359, 365-369 and 381-385 as justification for eliminating dark fiber channel terminations. The cited paragraphs refer to dedicated transport and dark fiber transport. In paragraphs 359-369, the FCC explains that CLECs use dedicated interoffice transmission facilities to carry traffic from their end users’ loops (in collocation arrangements) to the CLEC’s switch (central office) or point of presence and named this type of circuit “entrance facilities.” In the *TRO* the FCC found that the Telecommunications Act does not require ILECs to unbundle entrance facilities, and it excluded entrance facilities from the definition of dedicated transport. Dedicated transport, therefore, was limited only to those transmission facilities connecting ILEC switches and wire centers. Paragraphs 381-385 found, on a national basis, that CLECs were impaired without access to unbundled dark fiber; The paragraphs noted do not specifically reference dark fiber channel terminations.

USTA II, however, held that the FCC’s exclusion of entrance facilities from the definition of dedicated transport was at odds with the definition of network element, which is “a facility or equipment used in the provision of a telecommunications service." *TRO Remand Order* ¶ 136 and n. 380. In the *TRO Remand Order*, the FCC reinstated its original definition of dedicated transport, to the extent it included entrance facilities, and found that CLECs are not impaired without access to entrance facilities, *TRO Remand Order* ¶ 137.

Verizon's proposed revisions would eliminate the availability of dark fiber channel terminations between CLEC collocation arrangements and the CLEC's central office or point of presence.

III. POSITIONS OF THE PARTIES

A. Verizon

1. General Argument

Verizon contends that the *TRO* eliminated unbundling requirements for certain specified network elements, and that its proposed revisions reflect what it is authorized to do by the *TRO*. Verizon states that since its proposed modifications accurately reflect the FCC's rules and incorporate them by reference, the Commission should approve Verizon's filing as written. Verizon argues that there is no lawful basis for retaining these UNEs in its tariff, either permanently or on a transitional basis. According to Verizon the Commission lacks the authority to add to the list of UNEs established by the *TRO*, and is preempted from reimposing unbundling requirements on UNEs specifically eliminated by the FCC in the *TRO*. The *TRO* made specific findings of non-impairment and, in Verizon's view, the state has no lawful prerogative under the Supremacy Clause of the U.S. Constitution to frustrate or disregard the federal policy established by the FCC. Verizon makes reference to instances where the FCC has exercised its authority and preempted attempts by states to override its decision to remove certain network elements from the national list of UNEs.

Verizon contends that the Commission has no independent authority under state law to ignore the FCC-ordered elimination of UNEs. According to Verizon, the FCC's decision may not be challenged collaterally by ignoring the *TRO* in favor of plenary authority conferred by state statute. Arguments that the Commission may conduct its own impairment analysis are also flawed, in Verizon's view, as the FCC did not authorize state commissions to conduct granular analysis where it has made national determinations. Further, Verizon argues, nothing in the Commission's rules or any state law sets forth any standard for unbundling beyond the sole applicable standard that unbundling obligations must comply with the Telecommunications Act.

Verizon characterizes claims that the Commission has separate authority under section 271 of the Telecommunications Act to determine UNEs, particularly line sharing, as seriously flawed. First, Verizon argues, the section 271 checklist item requiring unbundling of the local loop does not encompass separate access to the high frequency portion of the loop used to provide line sharing. Second, the terms of any required section 271 offerings, including "scope" and price, are governed by Federal law and will be determined by the FCC itself, according to Verizon. Verizon contends that the *TRO* reserves to the FCC the ability to determine whether a checklist element's rate satisfies the just and reasonable pricing standard of sections 201 and 202, through a fact-specific inquiry that the FCC would undertake in the context of an enforcement proceeding brought pursuant to section 271. Verizon expands on this in its reply brief, stating that the FCC sets the general pricing methodology for interconnection and unbundled access while the states are limited to applying that FCC-prescribed methodology in setting rates. Verizon maintains that there is no basis for CLEC claims that the Commission has authority under section 271 to establish its own prices for line sharing. Further, Verizon contends that Covad's support for TELRIC (Total Element Long-Run Incremental Cost) pricing for section 271 elements is weak, stating that even if TELRIC pricing could be found to be just and reasonable under section 271 (and Verizon believes that it could not) that would not preclude Verizon from charging a higher rate that is also just and reasonable, giving the Commission no grounds to insist on a lower TELRIC rate.

Verizon contends that its proposed tariff revisions recognize the fact that, in some cases, Verizon may have a continuing obligation to provide certain UNEs pursuant to existing interconnection agreements. In that instance, Verizon says, it stands ready to negotiate individual agreements with CLECs for the continued availability of those elements. That process, according to Verizon, is independent of the obligations created by its tariff, and there is no reason for generic tariff provisions to be left in place in order to recognize or enforce what is a contractual obligation.

Verizon rejects segTEL's arguments against preemption, saying that mandatory unbundling in the absence of an impairment finding undermines the Telecommunications Act's principal goal of promoting facilities-based competition, such that when the FCC determines that an element should not be unbundled, a state may not lawfully override that determination.

In its supplemental brief, Verizon argues that the Telecommunications Act does not simply create federal rights and obligations that supplement state law requirements, but has unquestionably taken the regulation of local competition away from the states such that states may take no action that is inconsistent with federal legislation and federal policy. Since the FCC eliminated these elements under section 251, Verizon says, the state may not reimpose unbundling obligations. The Commission cannot force Verizon to continue to make delisted UNEs available at TELRIC rates, says Verizon.

2. Line Sharing

Verizon argues that its tariff revisions regarding shared loops implement the FCC's rules governing grandfathered and new line sharing arrangements and should be approved as filed. According to Verizon, the FCC eliminated the requirement that ILECs must provide access to the high frequency portion of a loop and preempted the Commission from requiring the unbundling of shared loops. The FCC expressly declined to readopt its line sharing rules, Verizon says, and instead established a three-year transition period for new line sharing arrangements and grandfathered existing line sharing arrangements. Verizon describes the grandfathered line sharing arrangements as those arrangements over which the CLEC began providing DSL to a particular end user prior to the effective date of the *TRO*, and over which the CLEC has not ceased providing DSL service to that customer. Therefore, Verizon asserts, its tariff revisions properly reflect the FCC's intent that grandfathered line sharing arrangements extend not only to a particular end user customer, but to the exact loop (or subloop) serving that end user at a specific location. CLECs have a limited right to new line sharing arrangements, Verizon contends, for a limited transitional period, at rates which steadily increase toward the price of a standalone unbundled loop.

In its reply brief, Verizon takes issue with the claims of Covad, GWI and segTEL that section 271 imposes additional unbundling requirements for line sharing. Section 271 does not require Verizon to offer the high frequency portion of the loop, says Verizon, as checklist item 4 applies to the local loop transmission from the central office to the customer's premise "*unbundled from local switching or other services*" (emphasis supplied by Verizon). According to Verizon the question is not whether a CLEC should be allowed access to line sharing, but whether the CLEC must take (and pay for) the entire loop when it orders the high frequency portion of that loop. With that in mind, Verizon avers, Congress's failure to require that the high frequency portion be unbundled from the rest of the loop, while expressly requiring that the loop itself be unbundled from switching is significant, and an indication that Verizon need not make the high frequency portion available separate from the low frequency portion. The CLECs have failed, in Verizon's view, to cite any decision by the FCC or any court interpreting section 271 as imposing an obligation on an RBOC – independent of any UNE requirement of section 251 – to unbundle the high frequency portion of the loop from the remainder of the loop.

Verizon continues this argument in its supplemental brief, updating the legal history of line sharing to show that the D.C. Circuit Court expressly upheld the FCC's determination that the high frequency portion of the loop was not subject to unbundling and that line sharing was therefore eliminated as a UNE. Since the Supreme Court denied *certiorari*, Verizon points out that the FCC's decision on this issue is binding as a final and unappealable determination. The Commission is preempted from ordering the continued provision of line sharing due to section 251(d)(3) and familiar principles of conflict preemption, according to

Verizon. Verizon points out that both the Commission and the FCC share the common goal of promoting broadband deployment and enhancing competition. The FCC has concluded, Verizon contends, that forced line sharing is not necessary to promote broadband deployment, and, in fact, will discourage competition and innovation, contrary to the express goals of the Telecommunications Act.

Verizon cites the Supremacy Clause as the source of the preemption on action by this Commission, saying that it is particularly clear in the area of line sharing since the FCC adopted transitional rules which have preemptive effect and displace inconsistent state law. A U.S. District Court in Wisconsin specifically rejected the notion that state commissions have residual authority under the Telecommunications Act to impose state line sharing requirements, alleges Verizon, citing *Wisconsin Bell v. AT&T*, 2004 WL 2059549 (W.D. Wis. June 30, 2004), which, according to Verizon, concludes that the Telecommunications Act preserves state authority only to the extent that state requirements are consistent with the FCC's regulations. Verizon goes on to summarize decisions in Massachusetts, Florida, Indiana and Virginia that reject petitions to retain unbundling obligations that the *USTA II* decision vacated.

Verizon also relies on certain language in the TRO pointing out that if section 251 impairment determinations applied only to ILECs that were neither RBOCs nor exempt from unbundling obligations as rural telephone companies, that would leave only 2.5 percent of access lines subject to the impairment determinations. This, according to Verizon, would trivialize the FCC’s section 251 impairment determinations.

2. Dark Fiber Feeder Subloop

Verizon contends that its proposed revisions eliminate dark fiber feeder subloop arrangements in compliance with the *TRO*. The FCC, according to Verizon, was specific in its determination that ILECs are not required to provide access to their fiber feeder loop plant on an unbundled basis as a subloop UNE.

3. IOF

Verizon contends that its tariff revisions are consistent with the FCC's finding that CLECs were not impaired without OCn or SONET transport facilities.[6] Verizon states that the FCC made a nationwide finding of impairment for dark fiber, DS1 and DS3, however, and requires the Commission to determine whether those findings apply to individual routes based on specific criteria.

4. Dark fiber channel terminations

Finally, Verizon states that its tariff revisions in regard to dark fiber channel terminations are appropriate because the FCC changed the definition of IOF to exclude transport elements that do not connect ILEC switches and ILEC wire centers within a LATA.

B. segTEL

1. General Argument

segTEL describes itself as a New Hampshire CLEC that provides broadband services to residential and business customers, using collocation to access line sharing in 25 Verizon central offices. segTEL argues that the Commission is not preempted from requiring

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[6] Verizon refers to STS as SONET; for purposes of this order, the two terms are interchangeable.

unbundling. According to segTEL, the Commission derives its legal authority to regulate telecommunications in New Hampshire from two sources: the police power of the State, as delegated to the Commission by the General Court pursuant to RSA 374, *et. seq.*, and the regulatory power delegated to the Commission by the federal government, through the Telecommunications Act and the rules the FCC has promulgated to implement the Act. It is the Commission's role, segTEL claims, to try to harmonize these two sources of power, utilizing both its state authority and its federally delegated authority in a way that does not substantially prevent the implementation of the purposes of the Telecommunications Act. Thus, segTEL concludes, preemption would only occur when Commission actions interfere with overriding Federal interests.

segTEL describes three types of Federal preemption: (a) express preemption, where Congress clearly states it is preempting state action; (b) conflict preemption, where terms of Federal and State laws are in conflict; and (c) occupation of the field preemption, where Congress enacts a scheme so pervasive that there is no room left for State action. Citing section 251(d)(3) of the Telecommunications Act, segTEL claims that there is no express preemption, nor does the federal regulatory scheme occupy the field. Therefore, segTEL argues, section 251(d)(3) incorporates the standard recitation of conflict preemption. Paragraph 195 of the *TRO* simply offers the FCC's guess, says segTEL, that a State using its power under State law to require unbundling would be unlikely to survive a preemption challenge. Such *dicta*, segTEL argues, does not absolve this Commission of its duty under state law to make its own determination regarding ILEC unbundling. According to segTEL, the Commission's duty under state law requires that the Commission determine whether requiring UNEs would conflict or substantially interfere with the Federal regime.

segTEL further argues that the *TRO* is not a mandate to cease unbundling, but permission to do so. Verizon's proposed tariff revisions, then, segTEL claims, are not a compliance filing made necessary by the *TRO*, but a request by Verizon to change its tariff in order to take advantage of new rules that roll back unbundling mandates. In all cases, segTEL avers, Verizon must explain how its proposal is consistent with its ongoing obligations under section 271 of the Telecommunications Act. According to segTEL, as an RBOC Verizon retains an obligation to provide UNEs that is independent of its section 251 duties. Verizon must, says segTEL, show how it will continue to meet its section 271 obligations through its tariff and its interconnection agreements.

According to segTEL, Verizon is attempting to make far more out of the *TRO* than the law warrants in order to advance Verizon's own interests and to avoid state-level review. segTEL goes on to say that Verizon is forcing a piecemeal review of the *TRO*'s provisions which will sap the limited resources of its competitors. Accordingly, segTEL recommends a cumulative review to implement all the provisions of the *TRO*, ensuring that final changes to the tariff comport with Verizon's section 271 obligations and incorporating changes that CLECs may request as a result of the *TRO*.

In its reply brief, segTEL reiterates that there is no preemption of state authority by the FCC in the matter of review of rates, terms and conditions for unbundled elements, as section 252(f)(2) of the Telecommunications Act expressly states that "nothing in [section 252] shall prohibit a state commission from establishing or enforcing other requirements of state law in its review."

In its supplemental brief, segTEL again explains that the purpose of Tariff 84 and its successors is to ensure maximum participation of competitors by reducing costs of entry on an open basis at published and Commission-approved rates. Verizon is required to offer line sharing and other elements under section 271 of the Telecommunications Act, according to segTEL, because section 271 creates separate and distinct unbundling obligations for RBOCs such as Verizon. According to segTEL, the FCC reiterated the section 271 obligation to provide line sharing in paragraph 653 of the *TRO*, and in subsequent orders where it stated that a section 251 non-impairment finding was not a barrier to continued section 271 requirements to provide access.

This Commission, segTEL argues, recommended approval of Verizon's entry into the interstate long distance market in part on the basis that Verizon was offering line sharing to CLECs, and conditioned its approval on the conversion of the SGAT to a tariff. Therefore, segTEL claims, the items in the SGAT were section 271 elements. As the Maine Commission found in 2004, segTEL contends, Verizon's unbundling obligations under sections 251 and 252 are synonymous with its section 271 obligations at the time when Verizon sought section 271 approval. Today, segTEL claims, an RBOC's section 251 obligations are narrower in most respects than its section 271 obligations.

Even though the competitive landscape has changed since Verizon's section 271 approval, segTEL continues, Verizon may not change the conditions on which the approval was based by failing to honor one of those underlying commitments.

According to segTEL, the Telecommunications Act makes a clear distinction between sections 251 and 271: section 251, in subsections (d)(1) and (2), requires the FCC to determine what elements should be unbundled and, absent a determination by the FCC that CLECs are impaired without access to those elements, the elements cannot be required to be unbundled. Section 251 preserved the authority of the Commission, segTEL contends, so long as the Commission does not substantially prevent implementation of the Telecommunications Act. Compare this to section 271, segTEL suggests, which sets forth the requirements of an RBOC to enter the interstate long distance market. Section 271, according to segTEL, is a contractual obligation with no section 251 impairment standard: it is a separate prerequisite and an ongoing commitment.

segTEL goes on to assert that state commissions retain a role in review of an RBOC's continued compliance with the section 271 checklist. According to segTEL, not only does the Telecommunications Act specifically require the FCC to consult with state commissions, *see* 47 U.S.C. § 271 (d)(2)(b), but the FCC views state commissions as having the authority to enforce compliance. segTEL quotes from paragraph 171 of the FCC order granting Verizon section 271 authority in New Hampshire, which refers to the "continuing oversight" of the Commission to reasonably assure "that the local market will remain open after 271 authority is granted." *In re Application by Verizon New England Inc.* 17 F.C.C.R. 18,660 (2002) (*NH 271 Order)* at ¶ 171. segTEL reiterates that Verizon had to meet the section 271 checklist to obtain approval, and must continue to meet the checklist after approval in order to maintain its authority to be in the interstate long distance market.

2. Line Sharing

Verizon's proposed tariff revisions cite CFR section 51.319(a)(1)(i)(A)-(B) and *TRO* paragraphs 255-269 as justification for changes to its line sharing offering. segTEL takes issue with Verizon's reliance on these provisions, taking the position that (a) nothing in the *TRO* requires CLECs to execute a separate agreement for line sharing, and (b) Verizon has not established that the elimination of line sharing complies with the requirements of section 271 of the Telecommunications Act. Further, segTEL argues, the FCC's rules are unclear as to what constitutes a "new" line sharing application. segTEL argues that its installation of line sharing terminations and splitter shelves constitute an existing line sharing application that should enable segTEL to continue to serve additional customers at existing TELRIC rates.

While segTEL concedes that the Commission may be preempted from mandating continued line sharing outside of the grandfathering and transition provisions of the FCC's rules under section 251, segTEL claims that Verizon's obligation to provide line sharing under section 271 is clear, inasmuch as paragraph 105 of the *NH 271 Order* explicitly states that the FCC's "conclusion that Verizon complies with checklist item 4 [271(c)(2)(B)(iv)] is based on [the FCC's] review of Verizon's performance for all loop types, which include, as in past section 271 orders, voice grade loops, xDSL capable loops, digital loops, high capacity loops, as well as our review of Verizon's processes for hot cuts, line sharing and line splitting." (emphasis added by segTEL.)

In its reply brief, segTEL takes issue with the language of Verizon's revisions, claiming that Verizon's new tariff language is incorrectly line specific when the *TRO* is clearly customer specific. segTEL supports language that would allow customers to take existing line sharing services with them when they relocate.

In its supplemental brief, segTEL argues that the absence of line sharing in Tariff 84 will force CLECs to negotiate interconnection agreements with Verizon to continue to provide line sharing, a process segTEL describes as burdensome. segTEL argues that the promotion of competition and the development of broadband access to the Internet are important public policy goals, consistent with both the federal regime and state law and policy. Allowing Verizon to eliminate line sharing would thwart these clear public policy goals, according to segTEL, and exacerbate the difference between DSL rates in urban and rural areas due to the disparity in the price of full loops in Tariff 84 ($11.97 in urban areas and $25.00 in rural areas).

3. Dark Fiber Feeder Subloop

In its reply brief, segTEL asserts that Verizon ignores the plain language of the *TRO* in attempting to carve out dark fiber feeder subloops from the list of required UNEs. According to segTEL, the local loop element is designed as the facility between a distribution frame in a central office and the loop demarcation point at a customer premise, and nothing in the applicable regulation supports Verizon's argument that a segment of this element is excluded from the access requirements.

4. IOF

Verizon's proposal to terminate, as soon as possible, all current and future service over OC3, OC12, or STS1 transmission facilities except as provided for under an effective interconnection agreement may be consistent with the *TRO*'s implementation of the Telecommunications Act, segTEL concedes, but it ignores Verizon's obligations under section 271 of the Telecommunications Act. Further, segTEL states that a state decision mandating continuation of OCn/STS transport UNEs could not conflict with the FCC's rules, since nothing in the rules addresses such transport. segTEL asserts that although the *TRO* allows Verizon to remove UNEs from the list of available elements, there is nothing in the Telecommunications Act that requires Verizon to do so. Moreover, according to segTEL, there is nothing in the *TRO* to indicate that continued provision of such services would frustrate or substantially prevent an FCC goal, so no preemption of state law can exist for IOF.

5. Dark Fiber Channel Terminations

segTEL makes no explicit argument regarding the elimination of dark fiber channel terminations UNEs.

C. MCI

1. General Argument

MCI contends that the *TRO* does not preempt states from establishing additional unbundling under state law, citing the statement by the FCC at paragraph 191 of the *TRO* that "[m]any states have exercised their authority under state law to add network elements to the national list." Indeed, avers MCI, the FCC rejected Verizon's argument that there is no independent state role in unbundling determinations. The FCC deferred the issues of preemption to future proceedings, MCI notes, suggesting that a conflict between state and federal law would require a declaratory ruling from the FCC. MCI suggests that any reading of the *TRO* that does not give substantial leeway to the states would itself conflict with the Telecommunications Act, which explicitly recognizes the power of states to order greater unbundling than the FCC at section 251(d)(3) and section 252(e)(3). Withdrawal of the UNEs proposed by Verizon, in MCI's view, would conflict with the Commission's rulemaking authority in RSA 365:8, its power to reject rates that are not just reasonable and in the public interest as set forth in RSA 378:7 and Rule Puc 1311 authorizing the unbundling of ILEC facilities.

Verizon's proposal fails to include adequate transition procedures, MCI asserts, which must be in place in order to prevent disruptions in customer service. In fact, MCI says, Verizon proposed to unilaterally discontinue access to the UNEs at issue on December 6, 2003, without regard to possible service disruptions, an action that MCI contends would fly in the face of FCC policy and the Commission's interest in preventing harm to consumers. MCI urges the Commission to ensure that Verizon establishes an adequate transition framework before its tariff revisions take effect.

2. Line Sharing

MCI takes issue with Verizon's revisions as they apply to line sharing for three reasons. First, MCI argues that Verizon uses the ambiguous term "existing rates" as opposed to the *TRO* language that sets the price to that "charged prior to the effective date" of the *TRO*. Second, according to MCI, Verizon's tariff revisions restrict grandfathering to an "end user customer over that Loop or Subloop at that location," overstating the *TRO*'s non-location-specific standard of a "particular end-user customer." Finally, MCI contends that the *TRO* specifically provides for the inclusion of a "successor or assign" to the CLEC, while Verizon is limiting grandfathering to "the TC."

3. Dark Fiber Feeder Subloop

MCI contends that dark fiber feeder subloops must be made available on an unbundled basis because they are components of dark fiber loops and the *TRO* did not alter this requirement. MCI states that Verizon's justification for the elimination of dark fiber feeder subloops rests on paragraph 253 of the *TRO* which, MCI says, address fiber feeder subloops generally. Since the FCC treated dark and lit fiber quite differently throughout the *TRO*, according to MCI, Verizon's lit fiber analogy does not support its argument that the *TRO* bars the unbundling of dark fiber subloops. MCI argues that a proper conflict preemption analysis pursuant to section 251(d)(3) would result in a finding that the unbundling rules challenged by Verizon would stand, particularly with respect to dark fiber feeder subloops.

4. IOF

MCI asserts that Verizon has identified no provision or purpose of the Telecommunications Act that would be undermined by the unbundling on state law grounds of the high capacity transport UNEs at issue in this docket, because the question is not whether the state requirements and the *TRO* are identical, but whether state requirements substantially prevent the requirements of the Telecommunications Act itself.

5. Dark Fiber Channel Terminations

MCI did not address dark fiber channel terminations specifically.

D. GWI

1. General Argument

GWI asserts that Verizon has grossly overstated the purported preemptive sweep of the *TRO*. Citing section 251 of the Telecommunications Act, GWI argues that a state may require UNEs not unbundled by the FCC so long as the state's action does not undercut the Federal scheme. According to GWI, section 251(d)(3) states that the FCC shall not preclude the enforcement of any regulation, order or policy of a State Commission that (a) established interconnection obligations of LECs, (b) is consistent with the requirements of section 252, and (c) does not prevent implementation of section 252 and the purposes of the Telecommunications Act. Indeed, says GWI, the FCC acknowledged at paragraph 192 of the *TRO* that Congress explicitly declined to preempt states in the field of telecommunications regulation, concluding that "[i]f Congress intended to preempt the field, Congress would not have included §251(d)(3) in the 1996 Act." Instead, GWI explains, the FCC established a procedure by which aggrieved parties may seek review of a state's decision by the FCC, and subsequently test that review in court, if necessary. Citing action by the Pennsylvania Public Utility Commission (Pennsylvania PUC), GWI argues that the state can differ from the *TRO* if the Commission does not have enough information to forecast the outcome of FCC and court review of whether its varying requirements substantially prevent the Federal scheme. GWI attached to its brief the Comments of National Association of Regulatory Utility Commissioners (NARUC) to the Court of Appeals that decided *USTA II*. NARUC's brief addresses whether the FCC can remove the states' authority that was preserved in section 251(d)(3). NARUC contended that the FCC's finding was contrary to the reservation of state's rights to set prices that are subject to review by federal district courts under section 252(e)(6).

In its reply brief, GWI characterizes Verizon's argument that New Hampshire is powerless to enforce Verizon's section 271 obligations as disingenuous. GWI points out that the FCC reviewed the pricing procedures at great length during approval of Verizon's petition for section 271 authority in New Hampshire and, although the FCC took issue with some aspects of the Commission's rate setting, the FCC in no way suggested that the Commission's authority to review rates was limited. In fact, according to GWI, the FCC noted that elements germane to the section 271 review might be altered by this Commission in the future if the Commission were to initiate a new rate proceeding. GWI contends that Verizon supports its position by extracting a quotation from paragraph 664 of the *TRO* which says that the FCC would determine whether section 271 rates were just and reasonable in the course of a section 271 enforcement proceeding. GWI points out that the FCC stated this during a discussion concerning the interplay between sections 251 and 271, noting that (a) an RBOC such as Verizon may be required to make elements available under section 271 that it might not otherwise be required to make available under section 251, and (b) that pricing for such elements would be judged under a "just and reasonable" standard. In further support, GWI cites the *NH 271 Order*, in which the FCC explicitly rejected AT&T's argument that the FCC was required to evaluate the checklist by looking at more than 150 UNE rates on an element-by-element basis. Clearly, according to GWI, the FCC would not now exclude the states from the rate-setting business in connection with section 271 UNEs; rather, the FCC will continue to review state-set rates for those elements required to be unbundled under section 271.

2. Line Sharing

Citing paragraphs 255 through 270 of the *TRO*, GWI contends that the FCC considered economic and operational reasons for reinstating line sharing. Although Verizon's revisions are consistent with the *TRO*, GWI argues, the Commission should independently consider whether line sharing should be offered on an ongoing basis in order to further state policies in support of access to the Internet. GWI encourages the Commission to make an independent assessment, arguing that rural loop rates of $25 would make it impossible to deliver DSL at competitive prices, in direct conflict with the best interests of the residents and businesses of New Hampshire.

3. Dark Fiber Feeder Subloop

GWI takes the position that Verizon's tariff revisions regarding dark fiber feeder subloop are not consistent with the *TRO*. GWI points out that there is a category of dark fiber subloop that is not covered by the FCC's description of UNEs. This category is an intermediate part of the loop: not distribution, which requires an end point at a user premise; and not feeder, which requires an end point at a central office. According to GWI, this intermediate portion of the loop runs from a hard termination point to another hard termination point. To the extent that such dark fiber was already offered in the SGAT, GWI asserts, Verizon must continue to provide it. The FCC was careful, GWI avers, to ensure that ILECs would eliminate only those UNEs that enable the transmission of packetized information, while Verizon's tariff revisions fail to capture that distinction and deny access to all features, functions and capabilities of the subloop.

4. IOF and Dark Fiber Channel Terminations

GWI took no position on IOF or dark fiber channel terminations.

E. Covad

1. General Argument

Covad asserts that the Commission has the authority to enforce Verizon's continuing obligations under section 271 because the Act preserves a state role in the review of RBOC compliance with its section 271 checklist obligations. Citing the Pennsylvania PUC's decision to retain UNE-P[7] as an unbundled element, Covad argues that the checklist contains an undisputed continuing obligation to unbundle local switching. In similar manner, Covad contends, the FCC anticipates that a state Commission's active oversight and comprehensive review would ensure that competitive markets remain open.

Covad further contends that a state may establish its own unbundling, asserting that courts have long held that federal regulation of a particular field is not presumed to preempt state law unless the nature of the regulation permits no other conclusion or Congress has unmistakably ordained that the federal law have preemptive effect. Covad contends that the U.S. Supreme Court has refused to diminish the role of state commissions in overseeing local competition, noting that although the FCC may have plenary authority to implement the

[7] UNE-P, or unbundled network element - platform, is the provision of local loop and switching UNEs in combination.

Telecommunications Act, the FCC would be precluded from eliminating state review altogether. Thus, Covad argues, the FCC's apparent intent to preclude states from exercising their section 251 and section 252 authority notwithstanding, this Commission should not be dissuaded from requiring Verizon to provide line sharing as a UNE.

Several states have independently required unbundling, says Covad, pointing to California and Minnesota as states that have unbundled line sharing, and to Illinois, Wisconsin, Indiana and Kansas as states that have unbundled hybrid loops. Further, Covad states that the FCC has acknowledged that the availability of UNEs may vary between geographic regions, thus, if state-specific circumstances exist, state rules requiring unbundling are permissible and would not substantially prevent the implementation of section 251.

Covad states that the Commission is authorized under section 271 to require that checklist UNEs be priced at cost-based, forward-looking rates. Even if an element is no longer a UNE pursuant to section 251, Covad explains, it must nonetheless be priced appropriately in accordance with sections 201, 202 and 271 of the Telecommunications Act. The FCC has neither ordered nor precluded the application of TELRIC prices that were developed under section 251 for these UNEs, says Covad. In fact, Covad claims, the principles of TELRIC must be applied in some form, as Congress has barred the use of traditional rate-base, rate of return methods of utility pricing since enactment of the Telecommunications Act.

The review of such rates is squarely within the jurisdiction of the Commission, Covad asserts, inasmuch as the U.S. Supreme Court has upheld TELRIC methodology on the condition that state commissions retain the authority to use and apply TELRIC in setting final rates for their respective states. The Pennsylvania PUC determined that rates for UNE-P under section 271 would be existing, approved Pennsylvania UNE rates, according to Covad.

In its reply brief, Covad notes that the *TRO* is not self-executing. Rather, says Covad, the FCC's reiteration of the ILECs' obligations to comply with existing unbundling requirements demonstrates that the *TRO* rules are not immediately effective, but must be implemented in due course and in accordance with the authority granted by the Telecommunications Act. Thus, Covad asserts, this Commission is empowered to suspend, review and amend Verizon's proposed revisions to ensure compliance with federal and state law.

2. Line Sharing

Covad maintains that state-specific conditions exist that would allow the continued offering of line sharing in New Hampshire. The primary and deciding factor regarding the finding of non-impairment in the case of line sharing was the ability of competitors to obtain revenue from both the low and high frequency portions of the loop, including voice and data bundles using line splitting (which allows two CLECs to share the loop, with one providing voice service over the low-frequency portion and the other providing DSL over the high-frequency portion). Covad asserts that Verizon has not made line splitting operationally available in New Hampshire in a manner consistent with what Verizon provides to itself. In support of this claim, Covad contends that: (a) there are limitations on the timing of line splitting order which impact customers; (b) there are discriminatory "versioning" policies for submission of line splitting orders; (c) Verizon recently acted unilaterally to quash a change request that would allow line splitting migrations; and (d) Verizon refuses to provide line splitting with resold voice services. Because of these operational and cost disadvantages, Covad argues, competitors face severe competitive disadvantages in obtaining all potential revenues from using the full functionality of the loop, making the FCC's impairment finding out of line with the facts as they exist in New Hampshire.

Covad asserts that the Commission has independent state law authority to order line sharing as a UNE pursuant to the Commission's independent authority to foster competition in the local telecommunications market. Covad further believes that the Commission should exercise its ratemaking authority under RSA 378 to require Verizon to provide line sharing at forward-looking, cost-based rates. Again citing to the Pennsylvania PUC, Covad believes that the Commission could set rates equivalent to those UNE rates that the Commission has already approved, as nothing in the Telecommunications Act or *TRO* would prohibit the Commission from determining that those rates remain just and reasonable. It is crucial, in Covad's view, that the Commission not cede its authority to set rates that are pro-competitive, pro-consumer, and which reflect Congress's goals for the Telecommunications Act.

In its reply brief, Covad asserts that the Commission is empowered under section 271 to require Verizon to provide access to line sharing at cost-based rates. Covad disagrees with Verizon, maintaining that line sharing falls squarely within the definition of a loop under checklist item 4, and, as such, must be priced at a rate not above costs that reflect a competitive forward-looking network. Covad claims that such rates are the bedrock of nondiscriminatory, just and reasonable pricing required by the Telecommunications Act and is unquestionably within the Commission's authority to regulate. Covad points to a Georgia Public Service

Commission (PSC) ruling that BellSouth must continue to provide line sharing pursuant to section 271. The Pennsylvania PUC, says Covad, also adopted the concept that section 271 imposes separate and independent obligations upon Verizon, irrespective of any impairment findings that may exist under section 251.

Covad rejects Verizon's argument that the only mechanism by which a competitor can obtain review of Verizon's pricing of line sharing is through an enforcement proceeding in front of the FCC. Such a process contravenes the dual-jurisdictional nature of regulation of telecommunications in the United States, according to Covad. Thus, in Covad's view, there is no cause to doubt the Commission's authority to enforce Verizon's section 271 obligations, including the provision of line sharing.

Finally, Covad takes issue with Verizon's proposed tariff language which denies continued line sharing to those customers whose loops require replacement or who change residences. The *TRO* makes clear, according to Covad, that a line-shared loop is grandfathered until a particular end user customer discontinues DSL service. Verizon has no right, Covad claims, to terminate line sharing due to a change in the physical loop that serves the customer, and Verizon's focus on "that loop or subloop" violates the FCC's grandfathering scheme. Similarly, Covad contends that if a customer moves from one location to another, Verizon's proposed language would allow it to terminate the grandfathering of that arrangement. That result is not permitted, says Covad, as the FCC rules state that grandfathering ends only when the ends user "cancels or otherwise discontinues its subscription." Covad also objects to Verizon's use of the ambiguous term "existing rates" instead of the *TRO* language setting the grandfathered price to that “charged prior to the effective date” of the *TRO*.

3. Dark Fiber Feeder Subloop, IOF and Dark Fiber Channel Terminations

Covad made no argument regarding dark fiber feeder subloop, IOF or dark fiber channel terminations.

F. Conversent

1. General Argument

Conversent asserts that the Commission is not preempted from requiring the relevant UNEs, as the *TRO* contemplated a joint federal-state role in managing the transition to the new rules. Conversent maintains that, separate and apart from an ILEC’s unbundling obligations under section 251, Verizon has an obligation under section 271 to offer access at just and reasonable rates. Conversent limited its argument to dark fiber transport, which was not one of the elements Verizon is seeking to remove from Tariff 84.

G. Lightship

Lightship concurs with and supports segTEL's arguments. Lightship contends that states may establish pricing and other terms of section 271 elements. In the *TRO*, according to Lightship, the FCC found that section 271 of the Telecommunications Act imposed separate unbundling obligations from those of section 251 at rates that are just, reasonable, and non-discriminatory. Lightship argues that, unlike sections 251(e) and 276(b) of the Telecommunications Act, section 271 does not unambiguously nor straightforwardly grant the FCC the authority to establish rates, terms and conditions for section 271 elements. Therefore, Lightship continues, it would be unlawful for the FCC to preempt this Commission from exercising its section 152(b) authority to regulate section 271 rates, terms and conditions. In support, Lightship cites the U.S. Supreme Court decision in *AT&T vs. Iowa Utilities Board*, 525.U.S. 366 (1999), which upheld the determination that no preemption exists so long as state commissions apply the proper just and reasonable standard. Therefore, Lightship continues, the Supreme Court has endorsed state commissions' continuing role in the ratemaking process. Lightship wants the Commission to order Verizon to continue to comply with its section 271 obligations.

IV. COMMISSION ANALYSIS

The situation presented here is confronted in one form or another by all the states served by Verizon. It is, in point of fact, nearly identical to that confronted by the Maine PUC as described in its September 3, 2004 order in the agency's Docket No. 2002-682 (*Maine Order*). As we did, the Maine PUC proposed in connection with Verizon's request for section 271 authority that the Company's wholesale rates be filed with the state commission in the form of a tariff. As here, the FCC incorporated this commitment into the order granting section 271 authority. And, as with the approval of section 271 authority for Verizon in New Hampshire, the Maine PUC determination antedated the FCC's *TRO* and the *USTA II* decision of the U.S. Court of Appeals for the District of Columbia Circuit.[8] Maine decided, *inter alia*, (1) that Verizon must include all wholesale offerings in its state wholesale tariff, including UNEs provided pursuant to section 271, and (2) the state commission had authority to approve "just and reasonable" rates for section 271 UNEs in accordance with the standard set forth in Sections 201 and 202 of the Telecommunications Act, 47 U.S.C. § 201-02. We agree for the most part with Maine's approach and reach generally the same conclusions, although we differ on certain specifics, making adjustments as appropriate to circumstances in New Hampshire.

In both Maine and New Hampshire, when Verizon obtained section 271 authority the RBOC's unbundling obligations under sections 251 and 271 were identical. *See Maine Order*, slip op. at 4. The intervening events – issuance of the *TRO* and the *USTA II* decision – changed this landscape, such that Verizon's section 251 obligations were narrowed because, as to some elements, CLEC ability to provide the corresponding services was not impaired without the ability to purchase section 251 UNEs from the RBOC. Among the obligations no longer within the section 251 ambit are the four UNEs at issue in this case which Verizon seeks to remove from its tariff, *i.e.*, line sharing, dark fiber feeder, interoffice transmission facilities (IOF) consisting of OCn (Optical Carrier number) and STS1 (Synchronous Transport Service) transport, and dark fiber channel terminations.

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[8] There are also differences between the situations in the two states. Unlike this agency, the Maine PUC did not approve an SGAT prior to its appearance as a wholesale tariff in November 2002. Accordingly, as soon as Verizon filed a wholesale tariff the Maine PUC suspended the tariff. It remained suspended thereafter. Thus, before the Maine PUC when it issued the *Maine Order* was the entirety of the Verizon wholesale tariff, including provisions that are analogous to the tariff revisions that give rise to this proceeding. The legal issues, regarding the role of state commissions subsequent to RBOC receipt of section 271 authority, are identical.

We address first Verizon's general argument that the FCC's elimination of an element as a section 251 obligation allows Verizon to remove that element from its wholesale tariff altogether. The FCC made clear in the *TRO* that the removal of a UNE from the list of section 251 obligations because of a lack of impairment did not automatically resolve the question of whether an RBOC must still make that UNE available under section 271. *See TRO* at ¶¶ 652-655. The FCC's *TRO* has in fact rejected Verizon's arguments that once the FCC determined that a UNE is not necessary under section 251, the corresponding 271 checklist item should be construed as being satisfied. In rejecting this position, the FCC made it clear in the TRO that "the BOCs have an independent obligation under section 271 (c)(2)(B) to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at reasonable rates." The FCC further concludes that RBOC obligations pursuant to section 271 are "not necessarily relieved based on any determination [by the FCC] under the section 251 unbundling analysis." *Id*. at ¶ 655.[9] The FCC's conclusions were reaffirmed in *USTA II*. *See USTA II,* 359 F.3d at 589-90. Accordingly, determining whether the four elements at issue here remain as Verizon obligations under section 271 requires a case-by-case analysis. At the same time, it is clear as a general matter that, to the extent an obligation persists under

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[9] In arguing to the contrary, Verizon invokes paragraph 660 of the *TRO*. In paragraph 660, the FCC noted that only 2.5 percent of ILEC switched access lines nationwide were served by LECs that are neither RBOCs nor rural telephone companies exempt from section 251 unbundling obligations. According to Verizon, in light of these facts it "trivializes" the FCC's decision to phase out line sharing as a section 251 obligation to determine, in effect, that the decision applies only to 2.5 percent of ILEC switched access lines. December 6, 2004 Comments of Verizon NH in Docket No. DT 04-176 at 15. Verizon reads too much into paragraph 660. The conclusion actually drawn by the FCC in paragraph 660 is that the agency's section 251 impairment determinations should not apply only to ILECs that are not RBOCs because that would tend to render section 251 "superfluous." Nothing in our decision today is intended to suggest that the FCC's impairment determinations should not apply to Verizon.

section 271, the pricing standard changes. As a section 271 element, pricing will be based on a "just and reasonable" standard and not on TELRIC. *TRO* at ¶ 656.

Before we undertake the case-by-case determinations, however, we examine the extent of our authority, under section 271 or otherwise, to determine whether Verizon must continue to offer delisted section 251 UNEs as section 271 elements. The first step in that examination focuses on Verizon's obligation to file a wholesale tariff.

As the FCC noted in the 271 Order, the Commission initially identified ten separate conditions as necessary for recommending that the FCC grant section 271 authority; Verizon agreed to comply with six of them. *See NH 271 Order* at ¶4 n. 10 and ¶5 n. 11. Among the conditions agreed to by Verizon was the requirement that Verizon "explicitly convert the existing statement of generally available terms and conditions (SGAT) into a competitive LEC tariff from which competitors may order anything contained in the SGAT without the need to negotiate or amend an interconnection agreement." *Id.* at ¶4 n. 10. Ultimately, the Commission recommended that the FCC grant section 271 authority subject to the conditions as set forth in a letter to Verizon dated June 14, 2002. *Id.* at 5. It is undisputed that these conditions, including the wholesale tariff obligation, form part of the basis for Verizon's receipt of section 271 authority.

The *NH 271 Order* notes that Verizon agreed to submit a wholesale tariff, and the order did not distinguish between section 251 and section 271 obligations. We find it reasonable and appropriate, as did the Maine PUC, to interpret Verizon's tariff filing obligation as embracing the unbundling obligations of both section 251 and section 271. Indeed, in the introduction to Verizon's SGAT Verizon notes that the SGAT is filed under sections 251, 252 and 271 of the Telecommunications Act. (SGAT p.1). Additionally, Verizon committed to "promptly file modifications to its SGAT and tariff to reflect changes in the services and network elements required by the federal Telecommunications Act, as determined by the FCC or the courts" in its letter to the Commission filed in DT 01-151 on March 15, 2002. In other words, Verizon remains obligated to have a wholesale tariff on file with our agency and an FCC decision to remove a UNE as a section 251 requirement does not automatically eliminate it as an unbundled element that Verizon must offer in its wholesale tariff.

Having determined that Verizon is obliged to file a wholesale tariff, we next examine the implications of that obligation. In granting Verizon section 271 authority in New Hampshire, the FCC made explicit reference to an ongoing role for this agency under section 271 in paragraphs 172 through 174 of the *NH 271 Order*. After affirming that Verizon has continuing obligations under section 271 pursuant to subsection (d)(6), the FCC affirmed its own authority to exact compliance, *NH 271 Order* at ¶ 172. The FCC indicated its readiness to assert such authority while "[w]orking in concert" with this Commission. *Id.* at ¶ 173. The FCC also stated that it would not describe the post-approval enforcement framework because it had already done so in prior section 271 approvals, *i.e.*, those covering Kansas and Oklahoma, Texas and New York. *Id*. at ¶ 172.

The FCC's New York 271 approval order, *In re Bell Atlantic New York*, 15 F.C.C.R. 3953 (1999) (*NY 271 Order*), the earliest of those cited, offers the most complete description of the FCC's view of post-approval section 271 enforcement. The FCC noted that by enacting section 271 Congress intended to give RBOCs an incentive to take actions that would tend to accelerate competition in RBOC-dominated telecommunications markets, observing that the incentive "may diminish" once an RBOC had received section 271 authority. *Id*. at ¶ 446. Therefore, reasoned the FCC, "[s]wift and effective post-approval enforcement of section 271's requirements . . . is essential to achieve Congress's goal of maintaining conditions conducive to achieving durable competition in local markets." *Id.*

After enumerating the various enforcement remedies in section 271, most particularly the ability to suspend an RBOC's section 271 authority, the FCC indicated that it intended to be active and vigilant in this regard. But the FCC went on to stress that

> [i]n addition to FCC-initiated enforcement actions (such as forfeitures, suspensions, and revocations), Congress provided for the expeditious review of complaints concerning failure by a BOC [*i.e.*, an RBOC] to meet the conditions required for section 271 approval. Such complaints may include requests for damages. The Commission will consider and resolve those complaints alleging violations of section 271 as well as the Commission's rules and orders implementing the statute. Complaints involving a BOC's alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, *should be directed to that state commission* rather than the FCC.

Id. at ¶ 452 (footnotes omitted, emphasis added).

Given these legal and factual circumstances, we share the view of the Maine PUC that as a state commission we have the authority to determine whether Verizon's wholesale tariff, including any changes proposed by Verizon, remains in compliance with the obligations Verizon voluntarily undertook in exchange for the right to offer interLATA service. Although, as Verizon notes, subsection (d)(6) of section 271 refers specifically to the FCC's role in post-approval section 271 enforcement, the FCC itself has repeatedly recognized that state commissions may receive and evaluate complaints of non-compliance with the conditions to which the RBOC and the state commission have agreed. In this case, like our Maine counterparts, we do not assert independent authority to define the scope of Verizon's section 271 obligations nor its compliance with those obligations under that section. We are performing our duty as the initial arbiter of disputes over whether Verizon continues to meet the specific commitments previously made to this Commission as a condition for its recommendation that Verizon receive section 271 interLATA authority. *See NY 271 Order* at ¶ 452.[10]

We now examine each of the four elements, line sharing, dark fiber feeder subloop, IOF and dark fiber channel terminations, in the context of the section 271 checklist, to determine whether Verizon remains obliged to offer them in its wholesale tariff. Subsection (c)(2)(B) of section 271 sets forth the "[c]ompetitive checklist" of items that RBOCs must offer CLECs in order to meet the "access and interconnection" requirements for interLATA long-distance authority. Two section 271 checklist items are relevant to determining whether Verizon

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[10] In arguing to the contrary – specifically, in the course of urging the Commission not to require Verizon to offer line sharing to CLECs as part of the wholesale tariff – Verizon relies on a statement in *SBC Communications v. FCC*, 138 F.3d 410 (D.C. Cir. 1998) that "Congress has clearly charged the FCC, not the state commissions," with making certain determinations under section 271. *Id*. at 416. At issue was whether the RBOC was entitled to section 271 authority, notwithstanding certain objections interposed by the relevant state commission, rather than whether the state commission had an enforcement role to play after the FCC allowed the RBOC to enter the interLATA market.

A similar point can be made about *Indiana Bell Telephone Co. v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (4th Cir. 2004), also relied upon by Verizon. At issue in that proceeding was whether, during the long-distance application process, a state regulatory commission had the power to enter an order designed to ensure the RBOC would continue to meet its section 271 obligations. The U.S. Court of Appeals for the Fourth Circuit answered the question in the negative, deciding the case on preemption grounds. The Court held that the state regulatory commission could not "parlay its limited role in issuing a recommendation" to the FCC on whether to grant section 271 authority "into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service." *Id*. at 497.

remains obligated to provide the four elements noted above: checklist item 4, "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services;" and checklist item 5, "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services;" § 271(c)(2)(B)(iv) and (v).

Of the four elements that Verizon seeks to remove from Tariff 84, it is line sharing, which uses the high frequency portion of the local loop, that has engendered the most controversy. We must determine whether checklist item 4, which requires the unbundling of local loops, includes a requirement for the continued provision of line sharing as a section 271 element. The FCC's regulations define line sharing as "the process by which a requesting telecommunications carrier provides digital subscriber line service over the same copper loop that the incumbent LEC uses to provide voice service, with the incumbent LEC using the low frequency portion of the loop and the requesting telecommunications carrier using the high frequency portion of the loop." 47 C.F.R. 319(a)(1)(i). According to the pleading submitted by ALTS on February 18, 2005, the widespread advent of line sharing in 2002 was largely responsible for creating broadband services that gave consumers high-speed access via DSL (digital subscriber lines) to the Internet, both because consumers could obtain this service from CLECs and because the competition induced ILECs themselves to offer DSL service at a more reasonable rate. Whether or not such an interpretation is a fair assessment, there is no question that the broader availability of line sharing, and therefore DSL, in New Hampshire, particularly in rural areas, is encouraged by this Commission and by state statute. *See* RSA 374:22-j, VI.

Checklist item 4 refers only to "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services." If the phrase "local loop" can be understood as having been intended to include all the functionalities of a loop on an unbundled basis, then line sharing is required by checklist item 4. We conclude that it is, relying on, among other things, the Statutory Appendix to the *NH 271 Order*. In this appendix, the FCC specifically addressed how RBOCs can establish that they are in compliance with checklist item 4. *Inter alia*, the RBOC "must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested." *NH 271 Order,* Appendix F at ¶ 49. We understand the high frequency portion of the loop – or, more specifically, the use of that portion of the loop to provide DSL service – to be a "functionality of the loop." The D.C. Circuit has a similar understanding of what "functionality of the loop" means. *See USTA II*, 359 F.3d at 554 (referring, albeit in passing, to the "full functionality of the loop" as including "voice, data, video, and other services.") The discussion of line sharing in the FCC's *TRO Order* further buttresses the notion that line sharing is an individual "functionality of the loop." *See TRO Order* at ¶ 258 ("Whereas in the Line Sharing Order, the focus was only on the revenues derived from an individual service, our focus is on all the potential revenues derived from using the full functionality of the loop.”).[11] Additionally, the FCC specifically included line sharing in its analysis of Verizon’s compliance with the competitive checklist, including line sharing as one of the elements it reviewed as part of Verizon’s compliance with checklist item 4. See *NH 271 Order*. Also, Verizon itself listed line sharing as one of the items it offers to carriers in its checklist declaration to this Commission in Docket No. DT 01-151 filed on July 31, 2001. Accordingly, we determine that checklist item 4 includes a requirement to provide line sharing.

The next element we consider is dark fiber feeder subloop. Because a subloop is a distinct segment of a complete loop, we must determine whether checklist item 4 includes a requirement that subloops, in particular dark fiber feeder subloops, are required for section 271 compliance. We answer the question in the affirmative, noting that Verizon does not suggest to the contrary. The only argument Verizon makes about dark fiber feeder subloop is that the FCC determined in the *TRO* that ILECs were not required under section 251 to offer unbundled access to fiber feeder loop plant. TRO at ¶ 253 (determining that copper subloops were subject to section 251 unbundling). This is not dispositive of whether Verizon remains obliged to provide

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[11] We acknowledge that the FCC is not necessarily the final arbiter of what Congress meant when it used the phrase “local loop” in checklist item 4. However, we are aware of no federal court that has disagreed with the FCC’s construction of this statutory language. A court faced with such a question would be required to grant deference to the FCC under the Supreme Court’s *Chevron* doctrine. *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 843 (1984) (concluding that, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute”).

such access under checklist item 4.[12] It is clear, however, that the FCC anticipated the provision of dark fiber feeder subloop as a section 271 element, stating, "we expect that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECs have access to copper subloops." *Id.* We therefore determine that checklist item 4 includes dark fiber feeder subloops.

MCI and segTEL argue that Verizon's proposal to remove dark fiber feeder subloop as a section 251 element is a misreading of the clear language of the *TRO*. While the *TRO* does not specify "dark" fiber in the discussion of dark fiber feeder subloop, this issue is rendered moot by the plain language of the *TRO Remand Order*, which removes all dark fiber loops, and therefore all dark fiber subloops, from Verizon's section 251 unbundling obligations. *See* 47 C.F.R. 51.319 (a)(6).

The third element we consider is IOF. IOF is transport between Verizon locations, and thus we must determine whether checklist item 5 includes IOF at OCn and STS levels. Since IOF was not a matter of any controversy in the New Hampshire 271 proceeding it is not discussed in the *NH 271 Order*. It is noteworthy that, in discussing IOF, Verizon relies exclusively on the contention that IOF is no longer a section 251 obligation. We agree that IOF at the OCn and STS level is no longer a section 251 obligation, but we disagree as to the

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[12] GWI makes an additional, related argument that the intermediate portion of the subloop, i.e., that portion of the subloop connecting a remote terminal to another remote terminal rather than customer premises, is still subject to section 251 unbundling. Because our decision today means that Verizon is still obliged to offer the intermediate portion of the subloop as a checklist item 4 element, the only question implicated by GWI's argument is whether TELRIC pricing still applies to this portion of the subloop. We defer that question until such time as Verizon seeks to deviate from the rates currently reflected in Tariff 84.

implications on Verizon's section 271 obligations and commitments to this Commission. We therefore determine that checklist item 5 includes OCn and STS transport.

Next we turn to dark fiber channel terminations which, if considered as transport, would require a determination as to whether such facilities are required by checklist item 5. As previously noted, there were a series of developments between the FCC and the Courts, after which the FCC declared that dedicated transport included "incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers." *TRO* ¶ 365 (footnote omitted). Applying this definition, which appears to include entrance facilities, the FCC found that CLECs are not impaired without access to entrance facilities, thereby eliminating the section 251 obligation. (*TRO Remand Order* ¶ 137).

Because the FCC has included entrance facilities within the elements that fall within the category of dedicated transport, and because dark fiber channel terminations are a form of entrance facilities, we must conclude that they remain elements addressed by checklist item 5. Therefore, consistent with our analysis above, Verizon must make dark fiber channel terminations available to satisfy its section 271 commitments.

Having said that, however, we must make two important observations. First, we are sympathetic to Verizon's arguments (and the FCC's original position on this issue) that these facilities may not truly be the type that must be offered on an unbundled basis. It would not be appropriate for this Commission, however, to countermand the language of the FCC and the courts and simply declare dark fiber channel terminations are no longer required to be offered because we think it makes no sense, any more than it would be appropriate for Verizon to make such a unilateral determination. Until there is clearer guidance from the FCC or the courts on this issue, we find no basis to do other than to conclude that Verizon may discontinue offering this element.

Second, we note that MCI and segTEL argued that Verizon is wrong to state that entrance facilities such as dark fiber channel terminations are no longer section 251 facilities. They argue that Verizon should continue to provide them not as just and reasonable rates under section 271 but at TELRIC rates under section 251. This issue has not been adequately developed and we decline to rule on the section 251 status of these entrance facilities in this docket. In the event Verizon proposes a tariff change we will evaluate the issue, including what role the Commission should play in the determination.

We have now reviewed Verizon's proposed tariff revisions and find that Verizon must continue to provide line sharing, dark fiber feeder subloop, dark fiber channel terminations and IOF as part of its wholesale tariff. By our actions today, we are not adding UNEs to those Verizon is currently obliged to offer. Neither are we reimposing section 251 unbundling requirements or making any determinations as to impairment. It is more accurate to say that we are continuing our oversight of Verizon's section 271 obligations.[13]

[13] The parties make a variety of additional arguments, largely based on section 251 and/or state law. Because we decide the case based on legal principles arising out of section 271, we need not address these additional arguments.

Because our decision today has the effect of preventing Verizon from discontinuing the provision of certain network elements to CLECs, we must address pricing issues as to those elements. To the extent an element is eliminated by the FCC as a section 251 obligation and it persists as a section 271 obligation, the pricing standard changes from TELRIC to "just and reasonable." Our analysis of Verizon's obligation to file a tariff leads us inexorably to a conclusion analogous to that reached by the Maine PUC. Specifically, it would be a "hollow promise" if Verizon were to file a tariff with the expectation that the state commission has no role in reviewing the rates, terms and conditions contained in that tariff. As did the Maine PUC, we do not foreclose the possibility that Verizon may turn to the FCC regarding rates but we conclude that, unless or until the FCC acts, pricing is an area of concurrent jurisdiction and an example of cooperative federalism. Accordingly, as a state agency and being closest to the issues, if and when Verizon files changes to rates under its wholesale tariff, we will review such proposed changes in the normal course.

Until new rates are established for line sharing, dark fiber feeder subloop, dark fiber channel terminations and IOF, Verizon shall offer these section 271 elements at existing Tariff 84 rates. Accordingly, Order No. 24,268 (January 30, 2004) granting Verizon's request for relief from a determination in the Order of Notice that existing rates would remain effective pending review of proposed tariff changes is hereby vacated. The result of this determination is that Tariff 84 reverts to the form it took prior to our authorization in Order No. 24,268 of certain tariff revisions on a temporary basis pending the outcome of DT 03-201.

Our decision that line sharing must remain an unbundled network element offered by Verizon pursuant to Tariff 84 is also determinative with respect to the relief requested by segTEL in DT 04-176. Accordingly, we grant the petition in DT 04-176. Our decision today is not intended to express any view as to the just and reasonable rate for any unbundled element offered by Verizon pursuant to Tariff 84 or, indeed, what tribunal would ultimately make such a determination. We simply conclude that Tariff 84 remains unchanged from the version that was applicable at the commencement of DT 03-201, and that the elements therein must be made available to CLECs.

Based upon the foregoing, it is hereby

ORDERED, that the proposed revisions to Tariff No. 84 submitted by Verizon New England in DT 03-201 are rejected, as described fully in the order herein; and it is

FURTHER ORDERED, that the petition of segTEL in DT 04-176 for a determination that Verizon New Hampshire remains obligated to provision line sharing pursuant to Tariff No. NHPUC 84 is GRANTED.

By order of the Public Utilities Commission of New Hampshire this eleventh day of March, 2005.

Thomas B. Getz Chairman	Graham Morrison Commissioner	Michael Harrington Commissioner

Attested by:

Debra Howland
Executive Director and Secretary

EXHIBIT P

Interconnection Services Policy & Planning
Wholesale Markets

verizon

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March 1, 2005

Russell M. Blau
Esquire
Swidler Berlin Shereff Friedman, LLP
RCN Telecom Services of Massachusetts Inc.
3000 K Street, N.W. Suite 300
Washington, DC 20007

Subject: **PUBLICATION OF VERIZON WIRE CENTER INFORMATION**

This letter relates to the interconnection agreement between Verizon New England Inc., d/b/a Verizon Massachusetts, f/k/a New England Telephone and Telegraph Company, d/b/a Bell Atlantic - Massachusetts and RCN Telecom Services of Massachusetts Inc. for the Commonwealth of Massachusetts.

In connection with its implementation of the FCC's Order on Remand in WC Docket No. 04-313 and CC Docket No. 01-338, released on February 4, 2005 (the "*TRO Remand Order*"), Verizon has filed with the FCC a list of Verizon's Tier 1 and Tier 2 Wire Centers.[1] These Wire Center classifications are required by the *TRO Remand Order* to identify the interoffice routes on which the FCC has determined that CLECs are not impaired without access to Dedicated DS1 Transport, Dedicated DS3 Transport, and Dark Fiber Transport.[2] In addition, Verizon has published in the same filing a list of those Wire Centers that satisfy the FCC's non-impairment findings for DS1 and DS3 Loops.[3]

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[1] As set forth in Section 51.319(e)(3) of the FCC's implementing regulations, Tier 1 wire centers are those incumbent LEC wire centers that contain at least four Fiber-Based Collocators, at least 38,000 business lines, or both. Tier 1 wire centers also are those incumbent LEC tandem switching locations that have no line-side switching facilities, but nevertheless serve as a point of traffic aggregation accessible by competitive LECs. Tier 2 wire centers are those incumbent LEC wire centers that are not Tier 1 wire centers, but contain at least three Fiber-Based Collocators, at least 24,000 business lines, or both.

[2] As explained with more specificity in Verizon's industry notice of February 10, 2005: (i) CLECs are not impaired without unbundled access to Dedicated DS1 Transport between any pair of Verizon Wire Centers that are both Tier 1 Wire Centers (and in no event may any CLEC obtain more than ten unbundled Dedicated DS1 Transport circuits on any Route where Dedicated DS1 Transport remains available on an unbundled basis); (ii) CLECs are not impaired without unbundled access to Dedicated DS3 Transport between any pair of Verizon Wire Centers that are both Tier 2 Wire Centers (and in no event may any CLEC obtain more than twelve unbundled Dedicated DS3 Transport circuits on any Route where Dedicated DS3 Transport remains available on an unbundled basis); and (iii) CLECs are not impaired without unbundled access to Dark Fiber Transport between any pair of Verizon Wire Centers that are both Tier 2 Wire Centers.

[3] As explained with more specificity in Verizon's industry notice of February 10, 2005: (i) CLECs are not impaired without unbundled access to DS1 Loops at any building location that is served by a Wire Center with at least 60,000 Business Lines and four Fiber-Based Collocators (and in no event may any CLEC obtain more than ten DS1 Loops at any building location where DS1 Loops remain available on an unbundled basis); (ii) CLECs are not impaired without unbundled access to DS3 Loops at any building location that is served by a Wire Center with at least 38,000 Business Lines and four Fiber-Based Collocators (and in no event may any CLEC obtain more than one DS3 Loop at any building location where DS3 Loops remain available on an unbundled basis).

The *TRO Remand Order* imposes upon requesting carriers an obligation to exercise a reasonably diligent inquiry before submitting orders for the aforementioned unbundled network elements. You are hereby placed on notice of the Wire Center classifications referenced above, which classifications are necessarily part of any reasonably diligent inquiry you undertake, and therefore you are deemed to have actual or constructive knowledge that, to the extent the network elements requested in any order submitted to Verizon fall within the Wire Center classifications described in footnotes 2 and 3 below, such network elements are no longer subject to mandatory unbundling under Section 251 of the Act on and after March 11, 2005.

Accordingly, should you attempt to submit an order for any of the aforementioned network elements notwithstanding your actual or constructive knowledge that Verizon is no longer required to provide such facilities on an unbundled basis, and in the absence of compelling evidence to the contrary, Verizon will treat each such order as a separate act of bad faith carried out in violation of federal regulations and a breach of your interconnection agreements, and will pursue any and all remedies available to it.

The combined lists are available for your inspection at http://www22.verizon.com/wholesale/attachments/verizonwirecentersexempt.xls. They reflect the data sources specified by the FCC in the *TRO Remand Order*, including ARMIS data previously filed with the FCC. This listing reflects the data sources specified by the FCC in the *TRO Remand Order*, including ARMIS data previously filed with the FCC. As the FCC noted in the *TRO Remand Order*, the ARMIS filings are "an objective set of data that incumbent LECs already have created for other regulatory purposes.... [W]e can be confident in the accuracy of the thresholds, and a simplified ability to obtain the necessary information." *TRO Remand Order*, at para. 105. If you nevertheless have questions about Verizon's wire center lists, please submit your request to contract.management@verizon.com. Verizon is prepared to provide to you under an appropriate nondisclosure agreement the backup data that was used by Verizon to develop and update the lists of wire centers. If you have actual, verifiable data that you believe demonstrates that any Wire Center identified on the lists filed by Verizon should not be included on those lists, you are requested to provide such data to your Verizon account manager before March 11, 2005.

Sincerely,

Jeffrey A. Masoner

Jeffrey A. Masoner
Vice President – Interconnection Services Policy & Planning

VIA CERTIFIED MAIL

EXHIBIT Q

S T A T E O F M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by **SBC MICHIGAN** and **VERIZON**.	)))))	Case No. U-14447

At the March 29, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

ORDER AND NOTICE OF THE ADOPTION OF A DISPUTE RESOLUTION PROCEDURE

On February 28, 2005, the Commission commenced a collaborative process for implementation of "Accessible Letters" issued by SBC Michigan (SBC) and Verizon. The collaborative was instituted after a number of competitive local exchange carriers (CLECs) filed objections to certain proposals and pronouncements made in five Accessible Letters dated February 10 and 11, 2005 by SBC, which is an incumbent local exchange carrier (ILEC) under the federal Telecommunications Act of 1996, 47 USC 251 *et seq*.

On March 22, 2005, pleadings were filed by SBC, the Commission Staff (Staff), LDMI Telecommunications, Inc. (LDMI), TelNet Worldwide, Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a Superior Spectrum, Inc., CMC Telecom, Inc., Grid 4 Communications, Inc., Zenk Group, Ltd., d/b/a Planet Access, Climax Telephone Company, d/b/a CTS Communications, Inc., and Global Connection, Inc, of America, (collectively, the CLEC Coalition), MCImetro Access Transmission Services LLC (MCImetro), XO Communications, Inc., and Talk America Inc. (XO and Talk), in response to a March 18, 2005 suggestion made by collaborative facilitator John P. Kern that the collaborators seek guidance from the Commission regarding two disputes that have arisen. The disputes center on the need for issuance of protective orders by the Commission and the need for reasonable and focused discovery.

On March 24, 2005, SBC, XO, Talk, TDS Metrocom, LLC, MCImetro, and the CLEC Coalition filed responsive pleadings.

It appears from the pleadings that at the March 18 collaborative meeting the CLECs expressed interest in obtaining access to the data underlying the list of wire centers that SBC has designated as non-impaired. It also appears that SBC expressed reluctance in acceding to the CLECs' wishes.

The CLECs' arguments are illustrated by the following passage from the CLEC Coalition's filing, which states:

> …An understanding of which wire centers are impaired or not impaired is an integral part of the TRRO.[1] The determination of which wire centers are impaired or not impaired is the sole factor that determines whether or not CLECs have access to high capacity loops and transport. The TRRO cannot be implemented without making this essential determination. A protective order urgently needs to be issued so that confidential information can be shared so that this critical determination can be made.
>
> The fact that CLECs can self-implement is by itself insufficient and does not solve the dilemma CLECs face. As soon as possible, CLECs need to have accurate and reliable information regarding which wire centers are impaired or non-impaired. Before ordering high capacity transport and loops, CLECs need to have a reasonable idea of the cost to lease such facilities. CLECs need such information to be able to make business decisions whether each facility investment is economically justified. No business enterprise can make a rationale investment decision without knowing the underlying wholesale prices. If the wholesale price is

[1] *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313 and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338.

> retroactively adjusted from UNE[2] pricing to special access pricing, such an extraneous, after-the-fact circumstance could easily transform a CLEC's investment from a wise decision to a foolish one.
>
> CLECs also would suffer a severe negative impact by a price change that was prospective only. Without knowing how a product is going to be ultimately priced, a CLEC cannot make a business decision whether to purchase a service on a month-to-month basis or on a long-term basis. Month-to-month pricing is expensive and may not justify investment. Long term pricing is significantly more reasonable, but a CLEC would be rightly hesitant to enter into a five-year contract if the price could be significantly increased in the first 6 or 12 months for the remainder of the contract's term.
>
> Whether a wire center is or is not impaired must be known *before* a CLEC can reasonably decide to invest in high capacity transport and loop. As long as there is any uncertainty as to which wire centers are in fact non-impaired, competition is going to suffer. The determination of specific wire center non-impairment must be made as soon as possible. Consequently, confidential information must be shared as quickly as possible. In order to share confidential information, the proposed protective order must be entered.

The CLEC Coalition's filing, pp. 1-3 (Footnotes added, emphasis in original).

In response, SBC maintains that, in addition to agreeing to make the requested data available pursuant to the terms of the Federal Communications Commission's (FCC) *TRRO* protective order[3] at the Washington, D.C. office of its attorneys, SBC has agreed to make the data available pursuant to the terms of the FCC's protective order at the office of its Michigan counsel in Lansing. In further response, SBC stresses that it is complying with the Commission's March 9, 2005 order, which obligates SBC to provision high-capacity loops and transport on and after March 11, 2005 if a CLEC has self-certified that, to the best of its knowledge, the CLEC's request is consistent with the requirements of the *TRRO.*

SBC maintains that it has reserved the right to challenge such self-certifications at an appropriate time. It also states that, to date, only one CLEC has self-certified that it is entitled to

[2] Unbundled network element.

[3] DA 04-3152, released September 29, 2004, a copy of which is attached to SBC's March 22, 2005 filing as Exhibit E.

access to high-capacity loops or transport in any wire center that SBC has determined to be non-impaired. Further, SBC points out that no Michigan CLEC has reviewed SBC's supporting data at the Lansing office of its Michigan counsel. However, SBC concedes that MCImetro and LDMI have made data requests for such information.

Finally, SBC states:

> Formal discovery requests are an anathema to the informal collaborative process established by the Commission to expeditiously implement the TRO Remand Order. SBC Michigan has voluntarily made information available to CLECs regarding its classification of wire centers under the terms of the FCC's protective order. When CLECs complained that the information was only available in Washington, SBC agreed to make the information available at the offices of its counsel in Lansing. In addition, SBC Michigan has responded to numerous CLEC requests for information regarding SBC's implementation of the self-certification process and its methodology for determining non-impairment.
>
> Furthermore, as the Commission has made clear, SBC Michigan is required to accept CLEC orders for high capacity loops and transport upon a CLEC's self-certification that it is entitled to obtain such network elements as UNEs under Section 251(C)(3). The Commission established a "process the order now – dispute it later" process. While the time may come that SBC Michigan and one or more CLECs have a live dispute regarding the appropriate classification of wire centers as impaired or unimpaired under the TRO Remand Order before the Commission, that time is not now. The Commission established this 45-day proceeding to implement the TRO Remand Order in existing interconnection agreements, not to attempt to engage in dispute resolution with respect to disputes that have not yet been asserted.
>
> The CLECs' claim that they need detailed information regarding SBC Michigan's wire centers – not just those SBC has determined are "unimpaired" but also those offices where there is no dispute they may purchase high capacity loops and transport -- is disingenuous and calculated only to delay this limited proceeding. This is particularly so given the CLECs' failure to even request to review the supporting data filed by SBC with the FCC. The requests are merely an attempt to violate or circumvent the FCC's protective order.
>
> While the CLECs apparently do not like the FCC's protective order, they have not bothered to raise that issue with the FCC. The FCC's order approving the protective order clearly states that "any party seeking access to confidential documents subject to the Protective Order *shall request access pursuant to the terms of the Protective Order.*" Rather than do so, they are attempting to enlist this Commission's assistance in violating that order.
>
> Of course, some CLECs understand full well that specific information regarding CLEC collocation arrangements and wire center specific data is among the most competitively sensitive information. This is the type of company-specific

> information that was not even made available to CLECs during the Commission's Section 271 proceedings.

SBC filing, pp. 5-6, (footnotes deleted, emphasis in original).

The Staff's comments provide some useful and unbiased insight into the dispute between SBC and the CLECs. According to the Staff, the CLECs are concerned by the potential risk of self-certification. In the event that SBC delays commencement of a challenge to a CLEC's self-certification, the CLEC could be faced with a significant liability for special access charges. Although recognizing the validity of the CLEC's concern, the Staff maintains that the Commission should not resort to protective orders and formal discovery at this stage of the collaborative process. In so doing, the Staff states:

> …Instead, Staff recommends that the Commission establish a dispute resolution process that both requires SBC to notify a CLEC that it is challenging its self-certification within one week of the CLEC's self-certification, and that requires the Commission to resolve the dispute within 60 days of the challenge. During dispute resolution SBC will have the burden of proving that a CLEC has incorrectly self-certified. At that time, the parties may choose to enter into a protective order for access to any information needed to verify and analyze the basis for SBC's designation of a wire center as non-impaired, and a quick turn-around period for discovery may be established. All issues regarding the confidentiality of SBC's data can be resolved in that context. The establishment of such a short time frame for dispute resolution would be an appropriate solution to the CLECs' concern, and would lead to an efficient resolution of the parties' dispute.
>
> At the March 18, 2005 collaborative meeting in the above-captioned case, the parties also discussed what form of discovery is to take place in the collaborative. Staff believes that formal discovery would not be effective based on the short period of time remaining for the collaborative. To the extent that discovery is aimed at producing language for the Interconnection Agreement Amendment, Staff encourages the parties to engage in the informal exchange of information in the spirit of collaboration. To the extent that discovery is directed at obtaining information regarding the list of wire centers SBC designated as non-impaired, and the data upon which the designation was based, Staff maintains that the parties will have the opportunity to address those data requests in a dispute resolution process with a 60-day time limitation, should the parties have a dispute over a CLEC's self-certification.

Staff filing, pp. 2-3.

The Commission is persuaded that the Staff's recommendations should be adopted. The Commission never intended the collaborative process to morph into a contested case proceeding through resort to traditional discovery techniques and the issuance of protective orders. The Commission finds that the Staff's proposals limit the availability of discovery and protective orders to situations in which those measures are appropriate.

However, the Commission finds that it should also put into place a specific structure and procedures for disputes regarding self-certifications to be resolved in a timely manner. The Commission has crafted the following structure and procedures in hopes that such disputes can be resolved within 60 to 75 days:

1. Upon receipt of the first self-certification for a wire center, an ILEC shall have 10 calendar days to challenge the self-certification. In the case of any self-certifications that were submitted before issuance of this order, the ILEC shall have 10 calendar days from the issuance of this order to file challenges. Failure to file a challenge in a timely manner shall be deemed a waiver of the ILEC's right to challenge all self-certifications from any CLEC for the affected wire center. The filing of a challenge by an ILEC shall commence the running of period during which the dispute should be resolved and shall be known as "Day 1."

2. An ILEC's right to commence discovery shall begin immediately upon receipt of the self-certification from the CLEC.

3. An ILEC shall file its challenge with the Commission and serve a copy of its challenge on the self-certifying CLEC. The ILEC shall also serve copies of its challenge on all other CLECs at that wire center. At the same time, the ILEC shall also file a proposed protective order with the Commission and serve a copy of the proposed protective order on all of the CLECs at the wire center.

4. An ILEC shall file all documentation and all data upon which it intends to rely with the Commission at the time that it files its challenge. The ILEC's supporting documentation and data shall be submitted under seal to the Commission's Executive Secretary.

5. An ILEC's supporting documentation and data need not be made available to a CLEC unless and until the CLEC has signed a protective order. The Staff shall mediate any disputes regarding the language of a protective order. In the event that the parties are unable to resolve a dispute regarding a protective order

within three business days, the parties shall immediately and jointly petition the Commission to resolve the dispute.

6. "Day 8" shall be the last day for any party to serve any discovery requests. All discovery requests shall be answered within 7 calendar days.

7. On "Day 22" all CLECs shall file and serve all documentation and data upon which they intend to rely.

8. Briefs shall be filed with the Commission on "Day 36."

9. Reply briefs shall be filed with the Commission on "Day 43."

10. The Commission's order, which will be issued as soon as possible, will be binding on the ILEC and on all CLECs in this state, without regard to whether they participated in the dispute resolution proceeding. It is the intent of the Commission to resolve such disputes in 60 to 75 days.

The procedures outlined above are consistent with the intent of the *TRRO* to involve state commissions in the review of the continued provisioning of high capacity loops and transport. *See*, *TRRO*, footnotes 408 and 524.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 *et seq.*; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. The recommendations set forth in the Staff's March 22, 2005 filing should be adopted.

c. The procedures outlined in this order for resolving disputes regarding self-certifications should be adopted.

d. A copy of this order should be served on each ILEC and each CLEC in this state.

THEREFORE, IT IS ORDERED that:

A. The recommendations set forth in the Commission Staff's March 22, 2005 filing are adopted.

B. The structure and procedures outlined in this order for resolving disputes regarding self-certifications are adopted.

C. A copy of this order shall be served on each incumbent local exchange carrier and each competitive local exchange carrier in this state.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(S E A L)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of March 29, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

THEREFORE, IT IS ORDERED that:

A. The recommendations set forth in the Commission Staff's March 22, 2005 filing are adopted.

B. The structure and procedures outlined in this order for resolving disputes regarding self-certifications are adopted.

C. A copy of this order shall be served on each incumbent local exchange carrier and each competitive local exchange carrier in this state.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

Commissioner

By its action of March 29, 2005.

Its Executive Secretary

EXHIBIT R

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PUBLIC UTILITY COMMISSION FILING CLERK

DOCKET NO. 28821

ARBITRATION OF NON-COSTING ISSUES FOR SUCCESSOR INTERCONNECTION AGREEMENTS TO THE TEXAS 271 AGREEMENT	§ § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ON CLARIFICATION

This Order clarifies Order No. 39[1] regarding the Interim Agreement Amendment applicable to the Texas 271 Agreement (T2A) and T2A-based interconnection agreements between Southwestern Bell Telephone, L.P. d/b/a SBC Texas (SBC Texas) and competitive local exchange carriers (CLECs).

The Commission clarifies its intent that, as used in sections 1.3.1 and 1.3.2 of the Interim Agreement Amendment,[2] "embedded base" or "embedded customer-base" refers to existing customers rather than existing lines. The *Triennial Review Remand Order* (*TRRO*)[3] preserved mass market local circuit switching during the transition period for the embedded customer base of UNE-P customers, requiring that "incumbent LECs must continue providing access to mass market local circuit switching . . . for the competitive LEC to serve those customers until the incumbent LECs successfully convert those customers to the new arrangements."[4] The Commission notes that the conflicting interpretations of "embedded customer-base" will be an issue in Track II of this proceeding. However, until a final determination of this issue, SBC Texas shall have an obligation to provision new UNE-P lines to CLECs' embedded customer-base, including moves, changes and additions of UNE-P lines for such customer base at new physical locations. Any price differential for which SBC Texas may seek true-up shall be addressed in Track II or a subsequent proceeding.

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[1] Order No. 39, Issuing Interim Agreement Amendment (Feb. 25, 2005).

[2] Order No. 39, Issuing Interim Agreement Amendment at 7 (Feb. 25, 2005).

[3] *Unbundled Access to Network Elements* and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 01-388 and CC Docket No. 01-388, Order on Remand, FCC 04-290 (Feb. 4, 2005) (*Triennial Review Remand Order*).

[4] *Triennial Review Remand Order* at para. 216.

Further, the Commission notes that in view of the FCC's February 4, 2005 letter requesting ILECs to designate wire centers as Tier 1 and Tier 2, Sections 1.5 and 1.5.1 of the Interim Agreement Amendment may require clarification.[5] Accordingly, the Commission clarifies that, unless the FCC approves the list of wire centers designated by SBC Texas in its February 18, 2005 filing, paragraph 234 of the *TRRO* allows CLECs to self-certify their eligibility for dedicated transport and high-capacity loops and requires ILECs to provision the UNE before submitting any dispute regarding eligibility for the UNE. However, if the FCC approves the wire centers identified by SBC Texas, the PUC clarifies its intent that the FCC's determination shall be dispositive of the disputes regarding eligibility for the UNEs.

SBC Texas shall provide a copy of this Order to those CLECs to which SBC Texas sent the February 11, 2005 Accessible Letters regarding the circumstances in which it intends to deny access to those UNEs addressed in this Order.

[5] Order No. 39, Issuing Interim Agreement Amendment at 8 (Feb. 25, 2005).

SIGNED AT AUSTIN, TEXAS the 16th **day of** March **2005.**

PUBLIC UTILITY COMMISSION OF TEXAS

Julie Parsley

JULIE PARSLEY, COMMISSIONER

PAUL HUDSON, CHAIRMAN

Barry T. Smith

BARRY T. SMITHERMAN, COMMISSIONER

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EXHIBIT S

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by **SBC MICHIGAN** and **VERIZON**.	)))))	Case No. U-14447

At the March 9, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

ORDER

On February 28, 2005, the Commission commenced a collaborative process for implementation of "Accessible Letters" issued by SBC Michigan (SBC) and Verizon. The collaborative was instituted after a number of competitive local exchange carriers (CLECs), including Talk America Inc. (Talk), and XO Communications, Inc. (XO), filed objections to certain proposals and pronouncements made in five Accessible Letters dated February 10 and 11, 2005 by SBC, which is an incumbent local exchange carrier (ILEC) under the federal Telecommunications Act of 1996 (FTA), 47 USC 251 *et seq*.

Accessible Letter No. CLECAM05-037 (AL-37), which is dated February 10, 2005, states that SBC will be withdrawing its wholesale unbundled network element (UNE) tariffs "beginning as early as March 10, 2005." AL-37, p. 1. Accessible Letter No. CLECALL05-017 and Accessible Letter No. CLECALL05-018 (AL-18), which are each dated February 11, 2005, state that SBC will not accept new, migration, or move local service requests (LSRs) for mass market unbundled local switching (ULS) and unbundled network element-platform (UNE-P) on or after March 11, 2005, notwithstanding the terms of any interconnection agreements or applicable tariffs. In AL-18, SBC additionally states that effective March 11, 2005, it will begin charging CLECs a $1 surcharge for mass market ULS and UNE-P. Accessible Letter No. CLECALL05-019 and Accessible Letter No. CLECALL05-020 (AL-20), which are each dated February 11, 2005, state that as of March 11, 2005, SBC will no longer accept new, migration, or move LSRs for certain DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops. Also, in AL-20, SBC states that beginning March 11, 2005, it will be charging increased rates for the embedded base of DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops.[1]

On March 7, 2005, Talk and XO filed a joint emergency motion requesting the Commission to address certain issues that have arisen during the initial phases of the collaborative that they allege demand immediate attention. According to Talk and XO, at the first collaborative meeting, SBC reiterated its intent to act unilaterally on March 11, 2005 pursuant to its Accessible Letters. Talk and XO insist that SBC's threatened and impending actions would violate the plain language of the Federal Communications Commission's (FCC) February 4, 2005 order regarding unbundling obligations of ILECs.[2] Talk and XO have identified the following issues due to their effect on the

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[1]The Commission became aware that Verizon had issued at least two similar Accessible Letters. Because the arguments raised by the CLECs with regard to SBC's proposed actions applied with equal force to the actions proposed by Verizon, the Commission included Verizon in the collaborative process. However, the Commission notes that the motion filed by Talk and XO does not include any requested relief with regard to Verizon.

[2]*In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313 and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338. *(TRO Remand Order).*

CLECs and because these matters appear to be contrary to the direction of the FCC in the *TRO Remand Order*:

1. Citing Paragraph 234 of the *TRO Remand Order,* Talk and XO argue that SBC has threatened not to provision high-capacity loops and transport on and after March 11, 2005 even where a CLEC has undertaken a reasonably diligent inquiry and, based on that inquiry, self-certifies that, to the best of its knowledge, its request is consistent with the requirements of the *TRO Remand Order.* Instead, they maintain that SBC has threatened to reject any such orders that SBC believes does not satisfy the *TRO Remand Order.*

2. Talk and XO contend that SBC has threatened to cease providing access on and after March 11, 2005 to unbundled local switching to CLECs seeking to serve their embedded base of end-user customers as required by 47 CFR 51.319(d)(2)(iii) during the 12-month transition period. Instead, they maintain that SBC has stated that it will reject all move, add, and change orders[3] submitted by CLECs to serve their embedded base of end-user customers.

3. Citing footnote 398 in Paragraph 142 of the *TRO Remand Order,* Talk and XO insist that SBC intends to self-implement rule changes that favor SBC while at the same time refusing to implement rule changes from the FCC's 2003 Triennial Review Order (*TRO*)[4] that were unaffected by United States Circuit Court of Appeals' decision in *United States Telecom Assn v Federal Communications Comm,* 359 F3d 554 (DC Cir 2004) (*USTA II*) or the *TRO Remand Order,* despite the fact that the *TRO Remand Order* recognized that the *TRO* rule changes should be implemented to minimize the adverse impact of the *TRO Remand Order* on CLECs.

Additionally, citing Paragraphs 233, 143, 196, and 227 of the *TRO Remand Order,* Talk and XO argue that SBC intends to implement these and other changes without regard to the "change of law" provisions in their existing interconnection agreements with SBC. Talk and XO state that

[3]A move order is submitted by a CLEC to an ILEC when an existing CLEC customer moves to a new address. An add order is submitted when an existing customer seeks to add an additional line to his service. A change order is submitted when an existing customer seeks to add or delete a feature, such as three-way calling.

[4]*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, para. 278 (2003).

they filed this motion to seek a Commission order requiring SBC, at minimum, to abide by the terms of the *TRO Remand Order.* Accordingly, Talk and XO request that the Commission grant their emergency motion and order SBC to continue provisioning additional UNE-P access lines to serve a CLEC's embedded base of end-user customers. Talk and XO also assert that the Commission must order SBC to provision moves and changes in UNE-P access lines in a manner that will allow a CLEC to serve the needs of its embedded base of end-user customers during the 12-month transition period of the *TRO Remand Order.*

Talk and XO insist that SBC must be ordered to continue to process requests for access to a dedicated transport or high capacity loop UNE upon receipt of a self-certification from the requesting provider, that to the best of its knowledge, the requesting provider believes to be consistent with the requirements of the *TRO Remand Order.* Talk and XO contend that the Commission should order that SBC may not refuse to process such requests based solely on SBC's belief the requesting provider's self-certification is defective or that the provider did not engage in a reasonably diligent inquiry. Talk and XO maintain that, before implementation of the *TRO Remand Order* rules, SBC should be directed to implement the *TRO* rules unaffected by *USTA II* or the *TRO Remand Order*, such as (1) routine network modifications to unbundled facilities, including loops and transport, at no additional cost or charge, where the requested transmission facilities have already been constructed [*See*, 47 CFR 51.319(a)(8), 51.319(e)(5)], (2) commingling an unbundled network element or a combination of unbundled network elements with one or more facilities or services that a CLEC has obtained at wholesale [*See*, 47 CFR 51.309(e) and (f) and 51.318], and (3) the CLEC certification regarding the qualifying service eligibility criteria for each high-capacity enhanced extended loop/link (EEL)[5] circuits [*See*, 47 CFR 51.318(b)].

[5] A loop to a connection between two or more central offices.

At a session of the collaborative held on March 7, 2005, Orjiakor Isiogu, Director of the Commission's Telecommunications Division, who was designated by the Commission to oversee the collaborative, announced that responses to Talk's and XO's motion had to be filed no later than 5:00 p.m. on March 8, 2005, which is permitted pursuant to Rule 335(3) of the Commission's Rules of Practice and Procedure, R 460.17335(3), and that the Commission intended to act on Talk's and XO's motion on March 9, 2005.

Responses in support of the motion were filed by the Commission Staff, Attorney General Michael A. Cox, AT&T Communications of Michigan, Inc., and TCG Detroit, LDMI Telecommunications, Inc., TDS Metrocom, LLC, MCImetro Access Transmission Services LLC, McLeodUSA Telecommunications Services, Inc., and TelNet Worldwide, Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a Superior Spectrum, Inc., CMC Telecom, Inc., Grid 4 Communications, Inc., Zenk Group, Ltd., d/b/a Planet Access, CTS Communications, Inc., and Global Connection Inc. of America. In the interests of time, the Commission simply notes the general agreement of these parties with the positions taken by Talk and XO.

SBC and Verizon filed responses in opposition to the motion.[6] SBC urges the Commission to reject the attempt to delay its lawful and appropriate implementation of the FCC's new rules. In so doing, SBC maintains that the Commission's previous determinations concerning adherence to change of law provisions in interconnection agreements and claims that ILECs are forcing contract terms on CLECs are not at issue in this proceeding. Rather, SBC insists that the motion asks for relief of an extraordinary nature that the Commission has no authority to grant. SBC complains that the motion is bereft of any reference to the Commission's authority to entertain the motion.

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[6]Verizon's comments are consistent with the comments filed by SBC.

According to SBC, it would be wrong for the Commission to act in haste or without carefully examining its authority to do so.

Next, SBC calls upon the Commission to question whether the relief requested by Talk and XO should be granted in the absence of some showing by the CLECs that they will ever place an order with SBC that SBC will reject. According to SBC, Talk and XO simply failed to assert that they will be harmed. SBC explains that it has already disclosed a list of wire centers that meet the *TRO Remand Order* non-impairment thresholds for high capacity loop and dedicated transport facilities. *See*, Exhibit A to SBC's response. After citing a portion of Paragraph 234 of the *TRO Remand Order*, SBC asserts that:

> SBC Michigan does not believe it will be possible for any CLEC to make the required "reasonably diligent inquiry" and then to certify that it is entitled to high-capacity dedicated transport between two offices that are on the list SBC submitted to the FCC, or that it is entitled to a high-capacity loop in a wire center that is on the list SBC submitted to the FCC. That is especially so in view of the fact that the CLECs also have access, subject to protective order, to data SBC has filed with the FCC underlying the list SBC has submitted. Accordingly, consistent with the *TRRO*, SBC Michigan does not expect to receive or process after March 11, 2005, any CLEC orders for high capacity loops or dedicated transport involving wire centers that are on those lists.

SBC's response, p. 5. Moreover, SBC contends that the failure of Talk and XO to affirmatively allege that they will suffer harm by SBC's implementation of its determinations is reason enough to reject their motion.

With regard to new UNE-P arrangements, SBC stresses that the FCC has instituted a nationwide bar on UNE-P. Citing myriad paragraphs of the *TRO Remand Order*, including Paragraphs 5, 204, 210, 227, and 228, SBC insists that the FCC only required UNE-P to be made available during the transition period to the embedded base of lines, not the embedded base of customers, as alleged by Talk and XO. According to SBC, as of March 11, 2005, it has been relieved of the obligation to provision new UNE-P arrangements of any kind. SBC argues that the

FCC would not have intended the interpretation proffered by Talk and XO because it would perpetuate earlier illegal attempts to broadly define impairment. SBC also argues that an unscrupulous CLEC might even attempt to evade the FCC's ban on new UNE-P deployment by disconnecting existing lines and ordering new ones.

Finally, in response to the change of law argument raised by Talk and XO, SBC contends that the operative language in their interconnection agreements provides an ample basis for rejecting their positions. According to SBC, even apart from what the *TRO Remand Order* provides, the plain language of Talk's and XO's interconnection agreements invalidates any contractual obligation by SBC that is inconsistent with those new rules as of March 11, 2005.

The Commission finds that the relief requested by Talk and XO should be granted and that the Commission has the authority to do so. In so doing, the Commission rejects SBC's position that the Commission has no authority to address the merits of Talk's and XO's motion. In Paragraph 233 of the *TRO Remand Order*, the FCC stated that ILECs and CLECs must implement changes to their interconnection agreements consistent with the *TRO Remand Order*. The FCC also stated that the ILECs and CLECs are obligated to negotiate in good faith under Section 251(c)(1) of the FTA regarding any rates, terms, and conditions necessary to implement the rule changes. Indeed, the FCC explicitly observed that "[w]e encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay." Paragraph 233 of the *TRO Remand Order*. As first noted in the February 28 order, the quoted portion of Paragraph 233 indicates that the FCC does not contemplate that ILECs may unilaterally dictate to CLECs the changes to their interconnection agreements necessary to implement the FCC's findings in the February 4 order. It also indicates that the Commission has an important role in the process by which ILECs and CLECs resolve their differences through good faith negotiations. In Paragraph

233, the FCC stated that Section 251(c)(1) applies to the efforts of the ILECs and CLECs to implement changes to their interconnection agreements. Section 251(c)(1) specifically requires that such negotiations are governed by Section 252 of the FTA. Additionally, notwithstanding whether the negotiations are voluntary under Section 252(a)(1) or subject to compulsory arbitration under Section 252(b)(1), Congress has required that the resulting interconnection agreement is subject to approval by this Commission. Moreover, the Commission notes that the Legislature specifically granted the Commission "the jurisdiction and authority to administer ... all federal telecommunications laws, rules, orders, and regulations that are delegated to the state." MCL 484.2201. Therefore, the Commission finds that there is no merit to SBC's claim that the Commission lacks jurisdiction to entertain Talk's and XO's motion.

The Commission also rejects SBC's procedural and policy complaints about Talk's and XO's motion. To begin with, contrary to SBC's argument, the motion does not involve "an affirmative injunction of apparent indefinite duration." SBC response, p. 2. In setting up the collaborative, the Commission directed that "the collaborative process be conducted in a manner that will bring it to a successful end in no more than 45 days." February 28 order, p. 6. Beyond the time necessary for the completion of the work of the collaborative, it was the FCC that established the duration of the transition period for implementation of the *TRO Remand Order*. While SBC may be dissatisfied with the length of the transition period, that issue is not before the Commission. Rather, Talk's and XO's motion concerns the fact that SBC is threatening to violate the FCC's *TRO Remand Order* by denying access to essential UNEs that they allege the FCC required ILECs to provision for the duration of the transition period.

Likewise, the Commission does not conclude that its decision to take up this matter on an expedited basis is objectionable. The motion filed by Talk and XO raised a matter of extreme urgency. The Commission's motion pleading rules, which are set forth at R 460.17335, specifically allow for the shortening of the time for the filing of responsive pleadings, which was communicated to participants at the March 7, 2005 collaborative meeting. The Commission finds that even a cursory examination of the volume and quality of the responses filed by the parties contradicts SBC's bare allegation that the notice was "absurdly short." SBC's response, p. 2.

Turning to the merits of the motion, the Commission is persuaded that SBC's position with regard to its ability to review and reject a CLEC's self-certification for the purposes of Paragraph 234 of the *TRO Remand Order* is inconsistent with the clear and unambiguous language used by the FCC. Paragraph 234 of the *TRO Remand Order* states:

> We recognize that our rules governing access to dedicated transport and high-capacity loops evaluate impairment based upon objective and readily obtainable facts, such as the number of business lines or the number of facilities-based competitors in a particular market. We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in parts IV, V, and VI above and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3). **Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements. In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority.**

Paragraph 234 of the *TRO Remand Order.* (Emphasis added, footnotes deleted).

The language used by the FCC does not indicate that an ILEC may unilaterally take any action to reject the effort of a CLEC to self-certify impairment for the purposes of the provisioning of access to dedicated transport and high-capacity loops. Rather, the FCC required ILECs to accept that such representations are facially valid and only subject to after-the-fact scrutiny. Accordingly, SBC may not reject a CLEC's request to provision high capacity loops and transport without a review by this Commission.

Likewise, the Commission finds that Talk and XO have correctly interpreted the intent of the *TRO Remand Order* with regard to move, add, and change orders necessary ***to meet the needs of its embedded customer base*** during the transition period established by the FCC. Paragraph 199 of the *TRO Remand Order* is typical of the provisions made for the transition period by the FCC:

> Finally, we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order. This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching. During the twelve-month transition period, which does not supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis, competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar until the incumbent LEC successfully migrates those UNE-P customers to the competitive LECs' switches or to alternative access arrangements negotiated by the carriers.

Paragraph 199 of the *TRO Remand Order*, pp. 109-110. (Footnote deleted).

During the 12-month transition period an ILEC is required to provide unbundled local switching to a CLEC to allow the CLEC to serve its embedded base of end-user customers as shown by Rule 51.319(d)(2)(i) and (iii), which in relevant part, provides:

> (i) An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops.
>
> * * * * *
>
> (iii) Notwithstanding paragraph (d)(2)(i) of this section, for a 12-month period from the effective date of the Triennial Review Remand Order, an incumbent LEC shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve its embedded base of end-user customers.

AL-18 sets forth SBC's position that on and after March 11, 2005, the *TRO Remand Order* allows SBC to decline to provide any "New" LSRs for "new lines being added to existing Mass

Market Unbundled Local Switching/UNE-P accounts" or any "Migration" or "Move" LSRs for Mass Market Unbundled Local Switching/UNE-P accounts. AL-18, p. 1. SBC insists that its interpretation is supported by Paragraphs 5 and 227 of the TRO Remand Order, which refer to UNE arrangements, not customers. SBC's position might be more persuasive had the FCC specified that on and after March 11, 2005, the embedded base that should benefit from the transition period was limited to existing lines and UNE arrangements. However, the FCC did not take such a limited approach in its rules. Rather, the FCC chose to require that an ILEC "shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve **its embedded base of end-user customers**." Rule 51.319(d)(2)(iii). (Emphasis added). The distinction between the embedded base of *lines* versus the embedded base of end-user *customers* is critical and recognizes that the needs during the transition period of an existing CLEC customer may well go beyond the level of service provided as of March 11, 2005. By focusing on the needs of the embedded base of end-user customers rather than on lines, the FCC has ensured that the transition period will not serve as a means for an ILEC to frustrate a CLEC's end-user customers by denying the CLEC's efforts to keep its customers satisfied.[7]

Finally, the Commission is persuaded by the arguments of Talk and XO to the effect that it would be contradictory for SBC to assert the right to unilaterally implement the requirements of the *TRO Remand Order* while it refuses to implement provisions approved by both the *TRO* and *USTA II* that are favorable to the CLECs, such as clearer EEL criteria, the ability to obtain routine network modifications, and commingling rights. However, these issues are not sufficiently momentous to require emergency consideration. Rather, the Commission finds that such

[7]*See, TRO Remand Order*, p. 128, paragraph 226 and footnote 626, which indicate the FCC's concern that its transition plan be implemented in a way that avoids harmful disruption in the telecommunications markets.

arguments are more properly considered in Cases Nos. U-14303, U-14305, and U-14327, which are scheduled for oral argument before the Commission on March 17, 2005.

In its February 28, 2005 order, this Commission recognized that "the FCC did not contemplate that ILECs may unilaterally dictate to CLECs the changes to their interconnection agreements necessary to implement the FCC's findings in the February 4 order." February 28 order, p. 5. Further, the Commission stated that the change of law provisions contained in the parties' interconnection agreements "must be followed." February 28 order, p. 6. As a result, the Commission finds that SBC shall not unilaterally implement its interpretation of the *TRO Remand Order,* which the Commission has determined to be erroneous. Rather, SBC may only implement the *TRO Remand Order* changes through the change of law provisions contained in the parties' interconnection agreements in the manner described in the Commission's February 28 order in this proceeding.

In the February 28 order, the Commission indicated that SBC could bill the CLECs at the rate effective March 11, 2005. However, the Commission further provided that SBC could not take any collection actions against the CLECs for the portion of the bill caused by the increase on March 11, 2005. To ensure that there would be no undue benefit to the CLECs or harm to SBC due to the delay associated with the collaborative process, the Commission also provided that there would be a true-up proceeding at the end of the collaborative process. The Commission wishes to emphasize that these provisions remain in effect.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 *et seq.*; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. The relief requested in the March 7 motion filed by Talk and XO should be granted in part and deferred in part, as more fully explained in this order.

THEREFORE, IT IS ORDERED that:

A. SBC Michigan shall provision high-capacity loops and transport on and after March 11, 2005 where a competitive local exchange carrier has self-certified that, to the best of its knowledge, the competitive local exchange carrier's request is consistent with the requirements of the Federal Communications Commission's February 4, 2005 *TRO Remand Order*.

B. SBC Michigan shall provision local service requests for mass market unbundled local switching, unbundled network element-platform, DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops on or after March 11, 2005, consistent with the requirements of this order.

C. SBC Michigan shall comply with the requirements of both this order and the Commission's February 28, 2005 order in this proceeding.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(S E A L)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of March 9, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary