COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	**D.T.E. 04-33**

VERIZON MASSACHUSETTS' INITIAL BRIEF

Aaron M. Panner Scott H. Angstreich Stuart Buck KELLOGG, HUBER, HANSEN, TODD, EVANS, & FIGEL, P.L.L.C. 1615 M Street, N.W., Suite 400 Washington, D.C. 20036 (202) 326-7900 (202) 326-7999 (fax) apanner@khhte.com sangstreich@khhte.com sbuck@khhte.com	Bruce P. Beausejour Keefe Clemons Alexander Moore 185 Franklin Street – 13th Floor Boston, MA 02110-1585 (617) 743-2445 Kimberly Caswell Associate General Counsel, Verizon Corp. 201 N. Franklin St. Tampa, FL 33601 (727) 360-3241 (727) 367-0901 (fax)

Attorneys for Verizon Massachusetts

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I. INTRODUCTION

The purpose of this arbitration is to conform Verizon Massachusetts' ("Verizon") interconnection agreements with certain CLECs to changes in federal law arising from the Federal Communications Commission's ("FCC") rules adopted in its *Triennial Review Order*[1] and *Triennial Review Remand Order*.[2] But instead of acknowledging the binding force of federal law, the CLECs seek to *avoid* federal law with amendment proposals that would perpetuate unbundled access, at TELRIC rates, to network elements that they have no legal right to obtain. In so doing, the CLECs rely on arguments the Department has already considered and rejected – for instance, that the FCC's Bell Atlantic/GTE merger conditions require Verizon to continue to provide de-listed UNEs indefinitely; that the Department may enforce unbundling

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*") (subsequent history omitted).

[2] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338 (FCC rel. Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*").

obligations that supposedly exist under Section 271; and that the Department may re-impose unbundling obligations the FCC has eliminated under authority of state law.

As the Department has already determined, all of these arguments are incorrect. As a matter of binding federal law, the *TRO* and the *TRRO* eliminate (or confirm the elimination of) any obligation on Verizon to provide unbundled access for the following network elements:

- local circuit switching
- OCn-level loops and transport
- certain DS1 and DS3 loops and transport
- the feeder portion of a loop
- packet switching
- FTTP loops
- hybrid copper-fiber for broadband purposes
- entrance facilities
- line sharing
- dark fiber loops
- certain dark fiber transport
- signaling networks and virtually all call-related databases

To the extent existing ICAs did not already authorize ILECs to cease providing UNEs upon the FCC's elimination of the ILECs' unbundling obligations, the FCC anticipated that the rules adopted in the *TRO* would be implemented through amendment of ICAs under the process set forth in section 252 of the Act, within nine months of the effective date of the *TRO*, October 2, 2003.

In the *TRRO*, however, the FCC took a much different approach to implementation, expressly prohibiting CLECs from obtaining new arrangements for the UNEs eliminated by that order (*i.e.* mass market switching, dark fiber loops, and certain DS1 and DS3 loops and DS1, DS3 and dark fiber transport) as of the effective date of the order, March 11, 2005. For each of

these UNEs, the new federal rules state that "*requesting carriers may not obtain* new [UNE arrangements] as unbundled network elements" where ILECs are no longer required to provide such UNEs under the rules.[3] The *TRRO* also established a transition period of 12 months (18 months for dark fiber) from March 11, 2005, for moving the embedded base of delisted elements to alternative arrangements, and it established new, transitional rates for embedded base UNEs effective as of March 11, 2005.[4]

Proper and prompt implementation of the new limitations on unbundling is of critical public policy importance, as the FCC and the courts have affirmed repeatedly. Overbroad unbundling obligations have discouraged investment in innovative facilities and hindered the most effective competition. To the extent existing interconnection agreements perpetuate such obligations, those agreements must be revised to reflect federal law. To that end, Verizon has proposed clear and unambiguous contract amendments that accurately implement the requirements of Section 251 of the 1996 Act, and specifically, the mandatory regulations issued by the FCC in the *TRO* and the *TRRO*.

The core provision of Verizon's proposed Amendment 1 (addressing the new limitations on unbundling) is § 2.1 which provides as follows:

> Section 2.1 – Notwithstanding any other provision of the Agreement, this Amendment, or any Verizon tariff or SGAT: (a) ***Verizon shall be obligated to provide access to unbundled Network Elements*** ("UNEs") and combinations of unbundled Network Elements ("Combinations") to ***CLEC Acronym TXT*** under the terms of this Amended Agreement ***only to the extent required by the Federal Unbundling Rules***, and (b) ***Verizon may decline to provide access to UNEs and Combinations to*** ***CLEC Acronym TXT*** to the extent that provision of access to such

[3] (Emphasis added.) *See*, 47 CFR §51.319(a)(4)(iii), (5)(iii) and (6)(ii) (re loops); 47 CFR §51.319(d)(2)(iii) (re switching) and 47 CFR §51.319(e)(2) (ii)(C), (iii)(C) and (iv)(B) (transport).

[4] *Id*.

UNEs or Combinations ***is not required by the Federal Unbundling Rules***.[5]

By limiting Verizon's unbundling obligations to those set forth in the FCC's unbundling rules, Verizon's proposal guarantees that the parties' contractual rights will remain co-extensive with the rights established under federal law – the preemptive and only source of Verizon's unbundling obligations. That guarantee extends not only to the FCC rules that define the availability of a UNE, but also to the transition rules adopted in the *TRRO*. Thus, Verizon's proposal is, by its express terms, consistent with its obligations under section 251(c)(3) and the FCC's implementing rules.

There is no lawful basis for imposing any different unbundling obligations in those agreements: as will be explained below with respect to Issue 1, the FCC's regulations establish not only Verizon's unbundling obligations, but also the *limits* on those obligations. By limiting Verizon's obligations under its ICAs to the obligations imposed under section 251(c)(3) and the FCC's implementing rules, Verizon's Amendment provides for automatic implementation of any subsequent reductions in unbundling obligations without the wasteful and prolonged procedure that is underway here. This is not a novel or extraordinary approach. In fact, most of Verizon's existing interconnection agreements already make clear that Verizon, without amending the agreements, may cease providing UNEs that it has no section 251 obligation to unbundle, and Verizon has already implemented discontinuance of various de-listed UNEs under the great many ICAs that it has not proposed to amend.[6] Verizon's Amendment 1 also specifically

[5] *See also*, Amendment 1, § 3.1, which provides for the discontinuance of UNEs that are not subject to the Federal Unbundling Rules, and Amendment 1, § 4.7.6, defining "Federal Unbundling Rules" as "Any lawful requirement to provide access to unbundled network elements that is imposed upon Verizon by the FCC pursuant to both 47 U.S.C. §251(c)(3) and 47 C.F.R. Part 51…."

[6] *See* Verizon Comments filed on April 1, 2005, to Hearing Officer Briefing Questions, which detail the terms of various ICA that enable it to cease providing UNEs delisted by the FCC by giving CLECs written notice. Where amendments clearly are not required, Verizon has already implemented discontinuance of the UNEs as to which the

implements (for the ICAs that might arguably require amendment) the rulings in the *TRO* that eliminated certain unbundling obligations.[7]

In contrast to Verizon's Amendments, the amendments proposed by the CLECs attempt to evade, rather than implement, the FCC's unbundling rules. The CLECs seek unlawfully to extend indefinitely their access to UNEs the FCC has eliminated with contract language purporting to allow the Department to preempt federal law; by establishing endless procedural hurdles that would violate the FCC's rules; and by blatantly misinterpreting the FCC's regulations. The CLECs also seek to circumvent the clear commands of the FCC that CLECs "may not obtain" switching or non-qualifying loops or transport elements as new UNE arrangements after March 11, 2005, and that the embedded base of those UNEs must be transferred to alternate arrangements within either 12 or, for dark fiber, 18 months of that date. A representative sampling of the CLECs' overreaching and unlawful contract terms follows:

- The Competitive Carrier Coalition ("CCC") would preclude Verizon from discontinuing any of the UNEs eliminated by the *TRRO* until the conditions imposed on Verizon in Appendix D, ¶39, of the GTE/Bell Atlantic Merger Order expire, *see* CCC TRRO Amendment §1.2.[8] However, the Department has previously ruled that those conditions have already expired.[9]

TRO removed Verizon's unbundling obligation. Even Verizon's agreements with CLECs that Verizon did not propose to dismiss from this arbitration may allow Verizon to cease providing particular UNEs, and Verizon continues to reserve any rights it may have in this regard. Moreover, as discussed further *infra*, no amendment is required to implement the FCC's mandatory prohibition against CLECs adding certain UNEs eliminated under the *TRRO* as of March 11, 2005.

[7] Verizon's Amendment 2 addresses the new obligations imposed on Verizon by the *TRO*, such as the obligations to perform commingling, conversions of special access services to EELs, and routine network modifications.

[8] The CCC filed a proposed amendment on March 18, 2005, in response to the *TRRO* and the FCC's new rules. Unlike the amendments filed by other CLECs at that time, however, the CCC's amendment is not a revision to its earlier proposed amendment but an entirely new, separate amendment. For purposes of clarity, Verizon refers herein to the CCC's original amendment as "CCC Amendment" and to its new, supplemental amendment as "CCC TRRO Amendment."

[9] *See* Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17, entered in D.T.E. Nos. 03-60 and 04-73 on December 15, 2004, at 48 (the "Consolidated Order").

- The CCC TRRO Amendment provides that the transition period for UNEs eliminated by the *TRRO*, and the FCC's transitional rates, would commence not on March 11, 2005 as expressly required by the FCC,[10] but only upon the effective date of the Amendment, presumably sometime after a decision enters in this proceeding. CCC TRRO Amendment §§7.1.1, 7.2.3.

- MCI insists that it be allowed to replace its discontinued UNEs with analogous Section 271 services at the TELRIC rates that were in effect in April, 2001, when the FCC approved Verizon's Section 271 application for Massachusetts. *See* MCI Amendment §11.2.4. MCI ignores the Department's recent findings that Section 271-only elements:

> should be priced, not according to TELRIC, but rather according to the "just and reasonable" rate standard of Section 201 and 202 of the Act…. [T]he FCC has the authority to determine what constitutes a "just and reasonable" rate under Section 271, and the FCC is the proper forum for enforcing Verizon's Section 271 unbundling obligations. … We do not have authority to determine whether Verizon is complying with its obligations under Section 271.[11]

- The CCC and other CLECs would require Verizon to accept new orders for discontinued UNEs during the transition period if needed to serve the CLECs' "embedded base," defined as those customers whom the CLEC was serving by way of UNEs as of March 11, 2005.[12] Again, this is contrary to the new rules, which were effective on March 11, 2005, and expressly state that a "requesting carrier may not obtain" any new arrangements for the discontinued UNEs.[13]

- MCI further demands that Verizon continue to provision *all* new orders for UNE-P and UNE loops, transport and dark fiber (not just for the "embedded base") through

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[10] 47 CFR §51.319(a)(4)(iii), (5)(iii) and (6)(ii); 47 CFR §51.319(d)(2)(iii) and 47 CFR §51.319(e)(2) (ii)(C), (iii)(C) and (iv)(B); *see also TRRO* ¶ 235.

[11] *Consolidated Order* at 55-56 (Citations omitted.) The FCC has flatly rejected MCI's position that TELRIC rates apply to elements provided pursuant to § 271, and the D.C. Circuit affirmed that decision. *See TRO*, 18 FCC Rcd at 17386, ¶ 656; *USTA II*, 359 F.3d at 589 ("the CLECs have no serious argument that the text of the statute clearly demonstrates that the § 251 [TELRIC] pricing rules apply to unbundling pursuant to § 271")

[12] *See* CCC TRRO Amendment ¶¶ 7.1.2 and 7.2; MCI Amendment §8.1.1 (also inexplicably including customers added by MCI between June 1, 2005 and the execution of the Amendment); Competitive Carrier Group ("CCG") Amendment, §3.2.2.1, 3.3.1.1, 3.6.1.1.

[13] *See e.g*. 47 C.F.R. §51.319(d)(2)(iii), stating that "Requesting carriers may not obtain new local switching as an unbundled network element." *See also*, *TRRO* ¶ 226, note 625, stating that "The transition period we adopt here thus applies to *all unbundled local circuit switching arrangements* used to serve customers at less than the DS1 capacity level as of the effective date of this Order." Thus the "embedded base" for UNE-P purposes applies to *arrangements*, not the customers served by those arrangements. In addition, the transitional rules for loop and transport UNEs don't even use the term "embedded base" but simply refer directly to those UNEs "that a competitive LEC leases from the incumbent LEC as of" the effective date of the *TRRO* but which the ILEC is not obligated to unbundle under the rules. *See* 47 C.F.R. §§51.319(a)(4)(iii), (a)(5)(iii), (a)(6)(ii), (e)(2)(ii)(C), (e)(2)(iii)(C) and (e)(2)(iv)(B).

the date the new Amendment is executed.[14] This too patently violates the federal ban on new orders for the discontinued UNEs as of March 11. Moreover, the Department recently allowed Verizon's revisions to Tariff D.T.E. No. 17 to take effect on March 11 as requested, over the CLECs' objection that the new rules cannot be implemented until the parties' ICAs are amended. The Department likewise declined the CLECs' Petition for an emergency order directing Verizon to continue to provide the discontinued UNEs after March 11 pending amendment of the ICAs. The Department thus has been consistent in refusing to allow terms of the parties' contracts to trump the FCC's binding, effective and preemptive federal unbundling regulations.[15]

- AT&T and Conversent propose that Verizon must provide it with loop and/or transport facilities at TELRIC rates, even where unbundled access to such facilities is no longer allowed under the federal rules, where Verizon either denies a CLEC request for conduit space or fails to respond to such a request within 45 days.[16] The new federal rules, however, impose no such condition on unbundling relief, so the Department cannot do so, either.

- AT&T and MCI would extend the transitional rates mandated by the *TRRO* through the full year (or 18-month) transition period, even if the CLEC had transferred its discontinued UNEs to replacement facilities long before the close of the transition periods.[17] The FCC's transition periods, however, were intended solely to allow time for operational changes by the parties. The *TRRO* does not provide that the CLECs may enjoy transitional rates for arrangements that *replace* the embedded base of discontinued UNEs for the full length of the transition periods. To the contrary, whatever rates are applicable to those replacement arrangements – including commercial rates that are outside the Department's jurisdiction – would govern.

- AT&T proposes that it need not submit its orders to convert its embedded base UNEs to alternative arrangements until AT&T chooses to agree on conversion terms – even if that does not occur until after the close of the FCC's transition periods.[18] AT&T's proposal would thus violate the FCC's requirement for CLECs "to convert their mass market customers to an alternative service arrangement *within twelve months* of the effective date" of the *TRRO*.[19]

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[14] MCI Amendment §§8.1, 9.1.2.1, 9.2.2.1, 9.4.1, 10.1.3.1, 10.2.3.1 and 10.3.2.1.

[15] For further discussion of the primacy of the federal unbundling regulations over terms of the parties' contracts, Verizon refers the Department to the Opposition of Verizon Massachusetts to Petition for Emergency Declaratory Relief, filed on March 9, 2005, and Verizon incorporates that document herein.

[16] AT&T Amendment §3.9.5; Conversent Amendment §3.10.

[17] *See e.g.* AT&T Amendment §3.10.1; MCI Amendment §8.1.1, 9.1.2.1.

[18] *See* AT&T Amendment §3.10.2.

[19] *TRRO* ¶ 227 (emphasis added). *See also,* 47 CFR §51.319(a)(4)(iii), (5)(iii) and (6)(ii); 47 CFR §51.319(d)(2)(iii) and 47 CFR §51.319(e)(2) (ii)(C), (iii)(C) and (iv)(B), all of which provide outside limits for the transition rates of either 12 or 18 months form the effective date of the TRRO, March 11, 2005.

- Before discontinuing any UNEs eliminated by the *TRO* (which are not subject to the mandatory *TRRO* transition periods), AT&T would require Verizon to provide 90 days' notice (in addition to the notices it has already provided to AT&T) identifying to AT&T's sole satisfaction "the specific facilities" to be discontinued. If the parties subsequently fail to agree on replacement terms for the discontinued UNEs, they could submit the dispute to the Department. AT&T Amendment §§3.11 and 3.11.1. Thus, Verizon would be forced to continue to provision new AT&T orders for, say, enterprise switching UNEs – eliminated by the FCC in the *TRO* 18 months ago – until Verizon: (1) completes this arbitration; (2) executes an amended ICA; (3) gives 90-days' notice to AT&T; (4) negotiates with AT&T for replacement terms; (4) failing agreement, completes a second arbitration; and (5) executes a second ICA amendment or other agreement providing for replacement service. AT&T's proposal would unlawfully override the FCC's mandatory unbundling limitations and allow AT&T to keep UNEs for years after their elimination by the FCC.

- The agreements of virtually all of the CLECs designate state law as a potential source of unbundling. *See e.g.*, AT&T Amendment, §§2.0, 3.5.2; CCG Amendment §3.2.1.2; MCI Amendment §8.1; Conversent Amendment §2.1; CCC TRRO Amendment §7.1

In addition to these unlawful provisions, the CLECs' proposed amendments are rife with terms that render the agreement intentionally confusing and ambiguous. For example, on the subject of mass market switching, the CCG proposes the following language:

> Verizon shall provide Mass Market Switching to CLEC under the Amended Agreement. Such Mass Market Switching will be provided on a nondiscriminatory, unbundled basis, in accordance with 47 U.S.C. 251(c)(3), 47 C.F.R. Part 51, Section 3 above, or other Applicable Law.[20]

Of course, the first sentence is contrary to law; the new FCC rules expressly state that ILECs have no section 251 obligation to provide mass market switching, so there is no legitimate reason to state otherwise. The reference to the federal rules in the next sentence confuses, rather than clarifies, the situation, because it refers to sources other than federal law – even though Verizon's unbundling obligations are governed solely by section 251(c)(3) and the FCC's implementing rules. Obviously, CCG's only objective is to obtain language so ambiguous that it

[20] CCG Amendment §3.2.1.1.

imposes no limits at all on CCG's ability to obtain unbundled elements, regardless of what federal law says.

Verizon addresses some of these contract proposals further in the context of particular Issues, below, but there is no need for a detailed, section-by-section analysis to conclude that the CLECs' amendments must be rejected outright. Each of these amendments is deliberately structured to avoid the effect of preemptive federal law, so this problem affects each amendment as a whole. There is no need for the Department to parse the individual sections of each of the several amendments when even a cursory review reveals they are minefields of misleading, confusing and intentionally ambiguous provisions intended to perpetuate unbundling obligations the FCC has eliminated. Only Verizon's proposed Amendments are designed to ensure that the Department is acting within its authority, and consistently with the FCC's *TRO* and *TRRO* rulings.

The proper purpose and outcome of this proceeding are simple. Prior FCC unbundling regulations have unlawfully forced Verizon to surrender its facilities to rivals, at prices that the Supreme Court has characterized as all-but-confiscatory. *See Verizon Communications Inc. v. FCC*, 535 U.S. 467, 489 (2002). When FCC regulations *cease* to require such unbundling, Verizon should be able to stop providing it. The Department should reject the CLECs' efforts to collaterally nullify the currently-effective unbundling determinations made by the FCC in the *TRO* and *TRRO* proceedings which, as the Department has already determined, is preemptive federal law.

A. Regulatory Background

Until 2003, the FCC's rules effectively required incumbents to share every element of their networks with their competitors, thus reducing or eliminating the incentives for those

competitors to build any of their own facilities. The Supreme Court reversed the first set of FCC rules in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), and when the FCC tried to re-impose a similar set of maximum unbundling rules, the D.C. Circuit vacated those rules in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

After the *USTA I* remand, the FCC issued its *Triennial Review Order* in an attempt to delineate unbundling obligations that would meet the standards of the 1996 Act. In that order, the FCC noted the "limitations inherent in competition based on the shared use of infrastructure through network unbundling," and stated "that excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology." 18 FCC Rcd at 16984, ¶ 3. Thus, the FCC eliminated or reduced the scope of many unbundling obligations. To take just a few examples, it held that:

- "incumbent LECs do not have to provide unbundled access to the high frequency portion of their loops [*i.e.*, line sharing]," *id.* at 16988, ¶ 7
- "[i]ncumbent LECs do not have to offer unbundled access to newly deployed or 'greenfield' fiber loops or to the packet-switching features, functions, and capabilities of their hybrid loops," *id.*
- ILECs "are no longer required to unbundle OCn loops," *id.*; that ILECs do not have to offer "unbundled local circuit switching when serving the enterprise market," *id.* at 16989, ¶ 7
- ILECs "are not required to unbundle packet switching, including routers and Digital Subscriber Line Access Multiplexers (DSLAMs)," *id.*
- ILECs "are only required to offer unbundled access to their signaling network when a carrier is purchasing unbundled switching," *id.*
- CLECs "are not impaired without unbundled local circuit switching when serving the enterprise market." *Id*.

The FCC concluded that these reductions in unbundling obligations would "help stabilize the telecommunications industry, yield renewed investment in telecommunications networks, and increase sustainable competition in all telecommunications markets for the benefit of American consumers." *Id.* at 16985, ¶ 6. To accomplish these beneficial ends, the FCC

provided that negotiations over new interconnection agreements should begin "*immediately*," because any "delay in the implementation of the new rules we adopt in this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry." *Id.* at 17405, ¶ 703 (emphasis added). The FCC stated that "parties may not refuse to negotiate *any subset* of the rules we adopt herein." *Id.* at 17406, ¶ 706 (emphasis added).

Moreover, the FCC stated that "state commission[s] should be able to resolve" any disputes over contract language arising from the order "*at least* within the nine-month timeframe envisioned for new contract arbitrations under section 252." *Id.* at 17406, ¶ 704 (emphasis added). Finally, the FCC stated that even where parties' agreements might appear to contemplate implementing a change in law only if it has become "final and unappealable," these contracts could not be interpreted to delay implementation of the *Triennial Review Order* rulings: "Given that the prior UNE rules have been vacated and replaced *today* by new rules, we believe that it would be *unreasonable and contrary to public policy* to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order." *Id.* at 17406, ¶ 705 (emphasis added).

In the *USTA II* decision,[21] the D.C. Circuit vacated or remanded a number of *TRO* rulings where the FCC *still* retained overly broad unbundling obligations (or sub-delegated authority to state commissions), particularly with regard to narrowband facilities and high-capacity facilities used to serve business customers.[22] The order, however, was essentially affirmed insofar as it

[21] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied sub nom. National Ass'n of Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004) ("*NARUC*").

[22] *See id.* at 594 (vacating the FCC's nationwide impairment findings as to DS1, DS3, dark fiber, and mass market switching; wireless access to dedicated transport; and all portions of the *Triennial Review Order* that involve the "subdelegation to state commissions of decision-making authority over impairment determinations").

cut back on unbundling obligations.[23] The D.C. Circuit's mandate issued on June 16, 2004, and the Supreme Court denied certiorari.[24]

The FCC then issued its *Interim Rules Order*,[25] in which it required ILECs, on an interim basis, to "continue providing unbundled access to [mass-market circuit] switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004." *Id.* ¶ 1 (footnotes omitted). That interim obligation ended on March 11, 2005, when the unbundling rules adopted in the *Triennial Review Remand Order* took effect. *Id.*

In the *TRRO*, the FCC adopted rules to replace the unbundling rules that had been vacated in *USTA II*. Among other things, the FCC prohibited the use of UNEs "exclusively for the provision of telecommunications services in the mobile wireless and long distance markets," established specific impairment tests and transition plans (complete with pricing) for high-capacity (DS1, DS3, and dark fiber) transport and loops, confirmed (under an alternative legal theory) its previous elimination of any unbundling obligation as to entrance facilities, and eliminated any unbundling obligation as to mass market switching, for which it also created a specific transition plan. *Id.* ¶ 5. As to all of the UNEs at issue – high-capacity loops and transport, mass market switching – the FCC explicitly held that its transition plan was applicable

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[23] *See, e.g.*, *USTA II*, 359 F.3d at 582 (upholding FCC's decision not to unbundle broadband capacity of hybrid loops); *id.* at 584 (upholding FCC's decision not to unbundle "fiber-to-the-home" loops); *id.* at 585 (affirming FCC's decision not to unbundle line sharing); *id.* at 587 (upholding FCC's decision not to unbundle enterprise switching); *id.* at 587-88 (upholding FCC's decision not to unbundle signaling or call-related databases except in narrow circumstances); *id.* at 588 (upholding FCC's decision to require unbundling of shared transport only in situations where switching is unbundled); *id.* at 589 (upholding FCC's decision that section 271 does not require either section 251 TELRIC pricing for elements unbundled only under section 271 or the combination of elements); and *id.* at 592-93 (upholding FCC's eligibility criteria for CLEC access to the Enhanced Extended Link).

[24] *See National Ass'n of Regulatory Util. Comm'rs v. United States Telecom Ass'n,* 125 S. Ct. 313, 316, 345 (2004).

[25] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 19 FCC Rcd 16783 (2004) ("*Interim Rules Order*").

only as to the "embedded customer base." *Id.* Hence, this plan "do[es] not permit competitive LECs to add new dedicated transport UNEs in the absence of impairment," "to add new high-capacity loop UNEs in the absence of impairment," or "to add new switching UNEs" as of March 11, 2005, in any circumstance. *Id.* The "no-new-adds" directive does not depend on any particular interconnection agreement language. Although the FCC contemplated that carriers would negotiate arrangements to implement the FCC's *permanent* unbundling rules (*e.g.*, to change the list of UNEs available under interconnection agreements and to work out operational details of the transition of the embedded base), no negotiation is required to implement the immediate no-new-adds directive included in the transition plan.[26]

Consistent with the *TRRO's* explicit ban on new UNE-Ps, a number of state regulatory commissions (including all of the commissions that have addressed the issue in proceedings involving Verizon) have rejected CLECs' unlawful attempts to continue to order UNE-Ps. In this regard, the Department declined to take emergency action to block implementation of the UNE-P ban on March 11, 2005.[27] It also allowed Verizon to delete from its tariff those UNEs discontinued in the *TRRO*.

Other state commissions have made clear that staying the FCC's no-new-adds mandate would violate the explicit language of the *TRRO* and the new rules, as well as the FCC's underlying policy goals. For example, the New York Public Service Commission ("NYPSC") approved Verizon's tariff implementing the *TRRO*, finding that "[t]he changes Verizon has made to its tariff implement the FCC's designated transition periods and price structures for dedicated

[26] Similarly, at the end of the 12-month transition period, incumbent LECs have no further obligation to provide access to UNE-P or high-capacity facilities that are no longer subject to unbundling, even at the transitional rate. *See TRRO* ¶¶ 145, 198, 228 (noting that the "limited duration of the transition" protects incumbents).

[27] *See Petition of Verizon New England for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers pursuant to Section 252 and the TRO,* D.T.E 04-33, Briefing Questions to Additional Parties (March 10, 2005)

transport, high capacity loops, and local circuit switching."[28] Notably, the NYPSC specifically rejected CLEC arguments that Verizon could be required to negotiate amendments to interconnection agreements before implementing the FCC's no-new-adds rule. The NYPSC correctly concluded that change of law provisions of interconnection agreements cannot override the FCC's "express directive" prohibiting CLECs from continuing to order UNE-P.[29]

Likewise, the Indiana Utility Regulatory Commission refused to order SBC to accept orders for new UNE-P customers after March 10, 2005, finding that:

> [W]e cannot reasonably conclude that the specific provision of the TRRO to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements. [30]

On March 24, 2005, the Rhode Island Public Utilities Commission denied a similar emergency motion and refused to order Verizon to accept orders for UNEs discontinued by the *TRRO* as of March 11, based in part on the fact that granting the motion would require Verizon to provide services no longer required by federal law. A few days earlier, the Commission had unanimously adopted , on an interim basis, Verizon's tariff revision that implements the *TRRO's* no-new-UNE-Ps directive, and rejected the CLECs' requests that that Commission ignore the FCC's clear mandate.[31] Similarly, the Ohio Public Utilities Commission found that "the FCC had very clearly determined that, effective March 11, 2005, the ILECs unbundling obligations

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[28] Order Implementing *TRRO* Changes, *Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC'S Triennial Review Order on Remand*, Case No. 05-C-0203, at 13 (N.Y. PSC Mar. 16, 2005).

[29] *Id.* at 26.

[30] *See Complaint of Indiana Bell Telephone Company for Expedited Review of a Dispute with Certain CLECs Regarding Adoption of an Amendment to Commission-Approved Interconnection Agreements*, Cause No. 42749, Order (Indiana URC March 9, 2005), at 7.

[31] Open Hearing, *Verizon RI Tariff filing to implement the FCC's new unbundled (UNE) rules regarding as set forth in the TRO Remand Order issued February 4, 2005,* Docket 3662 (March 8, 2005), *available at* http://www.ripuc.org/eventsactions/docket/3662page.html.

with regard to mass market local circuit switching…would no longer apply to serve new customers, " and declined to require SBC to continue to add new UNE-P customers.[32]

The state commission in Maryland also refused CLECs' requests for intervention to block implementation of the *TRRO*.[33] In California[34], Ohio[35], Texas,[36] and Kansas[37], the state commissions declined to require incumbent LECs to accept UNE-P orders for new customers. As the California Public Utilities Commission stated:

> [S]ince there is no obligation and a national bar on the provision of UNE-P, we conclude that "new arrangements" refers to any new UNE-P arrangement, whether to provide service for new customers or to provide a new arrangement to existing services. The TRRO clearly bars both.* * *
>
> Indeed, common sense indicates that it would be more disruptive to provide a service to a new customer that would only be withdrawn in 12 months than to refrain from providing such a service that will be discontinued.
>
> In summary, the only reasonable interpretation of the prohibition of "new service arrangements" is that this term embraces any to any [sic]

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[32] *See In re Emergency Petition for a Declaratory Ruling Prohibiting SBC Ohio from Breaching its Existing Interconnection Agreements and Preserving the Status Quo with Respect to Unbundled Network Element Orders,* Case No. 05-298-TP-UNC, Entry (Ohio PUC March 9, 2005), at 5-6. The Ohio PUC did, however, require SBC to continue to provision new lines for the "embedded customer base" for an interim period. *Id.*

[33] *See In re Emergency Petition from MCI for a Commission Order Directing Verizon to continue to Accept New Unbundled Network Element Platform Orders*, ML No. 96341, Letter (Md. PSC March 10, 2005). The PSC granted MCI's request to withdraw, and held CLECs petitions to intervene mooted. It allowed the parties to pursue their dispute in Case No. 9026 under a typical hearing schedule.

[34] Petition of Verizon California Inc. (U 1002 C) for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in California Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order*, App. No. 04-03-014, Assigned Commissioner's Ruling Granting In Part Motion for Emergency Order Granting Status Quo for UNE-P Orders (Ca. PUC March 11, 2005).*

[35] *See In the Matter of the Emergency Petition of LDMI Telecommunications, Inc., MCImetro Access Transmission Services, LLC, and CoreComm Newco, Inc. for a Declaratory Ruling Prohibiting SBC Ohio from Breaching its Existing Interconnection Agreements and Preserving the Status Quo with Respect to Unbundled Network Element Orders,* Case No. 05-298-TP-UNC, *et al.* Entry (Ohio PUC Mar. 9, 2005) at 3.

[36] *See Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement,* Docket No. 28821, Proposed Order on Clarification, Approved as Written (Tex. PUC Mar. 9, 2005) at 1.

[37] *See In re General Investigation to Establish a Successor Standard Agreement to the Kansas 271 Interconnection Agreement,* Docket No. 04-SWBT-763-GIT, Order Granting in Part and Denying in Part Formal Complaint and Motion for an Expedited Order (Kan. SSC March 10, 2005).

> arrangements to provide UNE-P services to any customer after March 11, 2005.[38]

The Kansas commission similarly concluded that "the FCC is clear in that as of March 11, 2005, the mass market local circuit switching…[is] no longer available to CLECs on an unbundled basis for new customers" and, therefore, "the sooner the FCC's new rules can be implemented, the sooner rules held to be illegal can be abrogated."[39]

II. ISSUE-BY-ISSUE ANALYSIS

In the following sections, Verizon explains its positions on each of the issues jointly identified by the parties in their Joint Matrix of February 18, 2005, and their Supplemental List of Issues of March 4, 2005. Several CLECs, including AT&T and the Competitive Carrier Group,[40] MCI, Sprint, the Competitive Carrier Coalition[41] and Conversent have submitted alternative proposals. All of the CLECs' proposals are inconsistent with binding federal law and should be rejected.

Issue 1: Should the Amendment include rates, terms, and conditions that do not arise from federal unbundling regulations pursuant to 47 U.S.C. sections 251 and 252, including issues asserted to arise under state law?

Relevant Provisions: Verizon Amendment 1, §§ 2.1, 2.3, 3.1, 4.7.3, 4.7.6; Verizon Amendment 2, §§ 2.1, 2.3, 2.4, 3.1, 3.2.2, 3.2.3, 3.2.4, 3.3.1, 3.4.1.1, 3.4.1.2.1, 3.4.1.2.2, 3.4.2.1, 3.4.2.2, 3.5.1, 3.5.3, 4.7.5.

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[38] *Petition of Verizon California,* Assigned Commissioner's Ruling at 7-8.

[39] *Kansas General Investigation,* Order at 4-5.

[40] The CCG includes: A.R.C. Networks Inc., d/b/a/ InfoHighway, Allegiance Telecom of Massachusetts, Inc., Comcast Phone of Massachusetts Inc., IDT America Corp., Metropolitan Telecommunications of Massachusetts, Inc., d/b/a MetTel, RNK Inc., d/b/a RNK Telecom, Spectrotel, Inc., and XO Massachusetts Inc.

[41] The Competitive Carrier Coalition includes: ACN Communication Services, Inc., DSLnet Communications, LLC, Focal Communications Corp. of Massachusetts, Lightship Telecom, LLC, RCN-BecoCom LLC, and RCN Telecom Services of Massachusetts, Inc.

Verizon proposed its Amendments and filed its Petition to bring its interconnection agreements into compliance with sections 251 and 252, as interpreted by the FCC. As discussed below, no other source of law can override the FCC's delineation of unbundling obligations. Furthermore, the 1996 Act makes clear that state commission authority under the 1996 Act is limited to implementation of the unbundling obligations under section 251(c)(3) and the FCC's implementing regulations. Thus, the amendments to the ICAs must include only rates, terms, and conditions that arise from federal unbundling regulations adopted by the FCC pursuant to sections 251 and 252.

A. Federal Law, Not State Law, Governs Verizon's Unbundling Obligations

Although the 1996 Act affords states a role in implementing the Act, it vests the authority to make unbundling determinations, including the determination as to whether competitive local exchange carriers would be "impaired" without access to incumbent-provided network elements on an unbundled basis pursuant to § 251(c)(3), exclusively with the FCC. 47 U.S.C. § 252(e)(2); *see USTA II*, 359 F.3d at 565-68. Indeed, the *USTA II* court made clear that the 1996 Act establishes as an affirmative requirement of federal law that there be a valid finding of impairment *by the FCC* before an incumbent can be required to provide any network element as a UNE at TELRIC prices. Where no such valid federal finding exists — either because the FCC has not found impairment or because a court has vacated an FCC impairment finding — imposition of any unbundling requirement is inconsistent with federal law and is not permitted. Verizon's unbundling obligations exist, if at all, by virtue of federal law.

This Department has correctly recognized that it cannot lawfully impose an unbundling obligation that the FCC had already rejected:

> State mandated unbundling of packet switching under Massachusetts law would not be "merely" inconsistent with the

> federal rules in their current form, but would be contrary to them. . . . Therefore, . . . we conclude that the FCC's *Triennial Review Order* precludes further Department review of Verizon's PARTs unbundled packet switching offering.

D.T.E. Phase III-D Order at 15, 16-17 (2004).[42] Other state commissions have, likewise, concluded that they have no authority to override the FCC's unbundling decisions. For example, the Virginia commission held that "*USTA II* establishes that no unbundling can be ordered in the absence of a valid finding by the FCC of impairment under 47 U.S.C. § 251(d)(2)" and that any state-commission imposed UNE obligations would therefore "violate federal law."[43] The Florida and Indiana Commissions have, likewise, found that the impairment determinations necessary to require unbundling are "reserved for the FCC, not the states."[44]

More recently, the Department recognized in its *Consolidated Order* dismissing the *TRO* investigation that the Act preserves state authority to enforce regulations only to the extent that they are consistent with the requirements of section 251: "The language of the Section 251(d)(3) savings clause does not ... suggest a congressional intent to save state commission actions that

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[42] Order Dismissing Remaining Issues, *Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in M.D.T.E. No. 17, filed with the Department by Verizon New England, Inc. d/b/a Verizon Massachusetts on May 5 and June 14, 2000, to become effective October 2, 2000*, D.T.E. 98-57 Phase III-D (D.T.E. Jan. 30, 2004) ("*D.T.E. Phase III-D Order*").

The Department also rejected CLEC claims that the Department should continue its investigation under Section 271 of the 1996 Act. Here too, the Department rejected the CLECs' argument and ruled:

> [I]f Verizon is obligated to offer access to packet switching under Section 271 at "just and reasonable" rates under Sections 201 and 202, the FCC, not the Department, has authority to enforce that obligation under Section 271. 47 U.S.C. § 271(d)(6). The proper forum for enforcing Verizon's Section 271 unbundling obligations is before the FCC. *Id.*

Id. at 16.

[43] Order Dismissing Petitions, *Petitions of the Competitive Carrier Coalition and AT&T Communications of Virginia, LLC*, Case Nos. PUC-2004-00073 & PUC 2004-00074, at 6 (Va. SCC July 19, 2004).

[44] Order Closing Dockets, *Implementation of Requirements Arising from FCC's Triennial UNE Review: Local Circuit Switching for Mass Market Customers,* Docket Nos. 030851-TP & 030852-TP, at 3 (Fla. PSC Oct. 11, 2004). *See also Indiana Utility Regulatory Commission's Investigation of Matters Related to the Federal Communications Commission's Report and Order*, Cause Nos. 42500, 42500-S1 & 42500-S2, 2005 Ind. PUC LEXIS 31, at *14 (I.U.R.C. Jan. 12, 2005) ("*Indiana Order*").

conflict with Section 251 or with the FCC's regulations."[45] The Department explicitly rejected a CLEC's "suggestion that Section 252(e)(3) preserves the ability of the States to require unbundling where the FCC finds that it is not required," because this reading of the Act "would discount improperly the preemptive effect of federal regulation under Section 251." *Id.* at 22. Instead, it held that, "Where the FCC has found affirmatively that CLECs are 'not impaired' and that ILECs are therefore not obligated to provide the network elements as UNEs under Section 251, a contrary finding of impairment would conflict with federal regulation." *Id*. at 23, n. 17.

Consistent with these observations, the Department must reject CLEC proposals to define unbundling obligations by reference to "Applicable Law," merger conditions, or anything other than section 251(c)(3) and the FCC's unbundling rules. *See*, *e.g.*, AT&T Amendment §§ 1.1, 2.0.

Nor may the CLECs rely on the Department's finding in the *Consolidated Order* that "where there is a gap [in FCC regulations], the Department would not be preempted from imposing unbundling requirements if state law provides that authority; but this is the case only so long as that exercise of authority is consistent with Section 251 and does not substantially prevent implementation of the Act."[46] Aside from the fact that federal law does not allow the Department to "fill the gap" in the first place, the fact remains that there is no "gap" here. The FCC has not remained silent but has made affirmative non-impairment findings as to each of the UNEs the CLECs are trying to retain—and the Department has already held that it cannot rely on state law to countermand the FCC's findings.

The CLECs' basic position – that the limitations on unbundling established in federal law do not bind state commissions – is all-the-more untenable after the FCC's decision in *BellSouth*

[45] *Consolidated Order* at 21.

[46] *Consolidated Order* at 23.

Telecommunications, Inc. Request for Declaratory Ruling, WC Docket No. 03-251, FCC 05-78 (rel. Mar. 25, 2005) ("*BellSouth Preemption Declaratory Ruling*"). In that case, the FCC granted BellSouth's request for a declaratory ruling that decisions by state commissions in Florida, Georgia, Kentucky, and Louisiana – which had purported to require BellSouth to provide DSL service to customers that purchase voice telephone service from CLECs using unbundled loops leased from BellSouth – are contrary to the FCC's determinations in the *Triennial Review Order* and therefore preempted. *See* Mem. Op. ¶¶ 17, 25, 26. In so ruling, the FCC squarely ruled that section 251(d)(3) – notwithstanding any of the "savings clauses" in the 1996 Act – bars state commissions from ordering unbundling in circumstances where the FCC has determined that no unbundling should be required.

The FCC determined that "state decisions that require BellSouth to provide DSL service over the [high frequency portion of the loop ("HPFL")] while a competitive LEC provides voice service over the low frequency portion of a UNE loop facility effectively require unbundling of the [low frequency portion of the loop ("LFPL")]. *Id.* ¶ 25. The FCC held that such decisions "violated [47 U.S.C. §] 251(d)(3)(B) because such decisions directly conflict and are inconsistent with the [FCC's] rules and policies implementing section 251." *Id.* ¶ 26. Such requirements "impose on BellSouth a requirement to . . . do exactly what the Commission expressly determined was not required by the Act and thus exceed the reservation of authority under section 251(d)(3)(B)." *Id.* ¶ 27. Such decisions are "therefore inconsistent with federal law." *Id.*

The FCC's analysis squarely applies to the question whether a state commission may require an incumbent to unbundle any de-listed network element. The FCC reiterated that "a state decision, pursuant to state law, to unbundle an element for which the [FCC] has either

found no impairment or otherwise declined to require unbundling on a national basis, would likely conflict with and 'substantially prevent' implementation of the federal regime, in contravention of the Act's specific and limited reservation of state authority." *Id.* ¶ 7 (citing *Triennial Review Order*). The FCC held that "[t]he Act establishes – and courts have confirmed – the primacy of federal authority with regard to several of the local competition provisions of the 1996 Act . . . . including, of course, unbundling and other issues addressed by Section 251." *Id.* ¶ 22.[47] "[E]xcept in limited cases, the [FCC's] prerogatives with regard to local competition supersede state jurisdiction over these matters." *Id*.

"Accordingly, the reach of the states' authority with regard to local competition is governed principally by federal law" – in particular, section 251(d)(3). *Id.* ¶ 22. The FCC noted that a state requirement is not protected from preemption "when the state regulation is inconsistent with the requirements of section 251 *or* when the state regulation substantially prevents implementation of the requirements of section 251 or the purposes of sections 251 through 261 of the Act." *Id.* The FCC noted that, in reaching its unbundling determinations, it must "weigh … the benefits of unbundling against the costs of unbundling, including the potential of depressing competitive incentives to deploy facilities." *Id.* ¶ 29. A state requirement imposing the very unbundling obligation that the FCC had decided should not be imposed would "undermine the effectiveness of incentives for deployment" and "therefore do not pass muster under section 251(d)(3)(C) of the Act." *Id.* ¶ 30.[48]

[47] The FCC noted that "'[t]he statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof.'" *Id.* ¶ 19 n.57 (quoting *City of New York v. FCC*, 486 U.S. 57, 64 (1988)).

[48] Thus, the CCG's reliance on 251(d)(3) to *support* state authority to over-ride FCC unbundling limitations, *see* CCG Br. at 2, is misplaced.

Notably, the FCC specifically rejected the argument, pursued by many of the same CLECs who have filed here, that any of the other provisions of the Act – including section 252(e)(3),[49] section 261, or section 601(c)[50] of the 1996 Act – can override the clear limitations imposed by section 251(d)(3). *See BellSouth Preemption Declaratory Ruling* ¶ 23 nn. 74, 75. Where the FCC has made a deliberate determination to limit unbundling obligations – consistent with the pro-competitive goals of the 1996 Act – no state commission can order further unbundling without "substantially prevent[ing] [the FCC's] implementation" of the Act.

B. Verizon's Language Appropriately Reflects the Preemptive Scope of Federal Law

Verizon's Amendment 1, § 3.1, provides that Verizon is not "obligated to offer or provide access on an unbundled basis . . . to any facility that is or becomes a Discontinued Facility," with the latter term being defined as any facility which "ceases to be subject to an unbundling requirement under the Federal Unbundling Rules," *id.* § 4.7.3; *see also id.* § 2.1 (restricting Verizon's obligations to the "Federal Unbundling Rules"). The term "Federal Unbundling Rules" is also specifically defined as unbundling obligations imposed under section 251(c)(3) and the FCC's implementing rules. *See id.* § 4.7.6. This language appropriately reflects the fact that Verizon's unbundling obligations are tied to the requirements of federal law, as they may evolve.

The CLECs' proposed alternatives must be rejected because they specifically define Verizon's unbundling obligations to include sources of law *other than* federal law. (*See., e.g.*, AT&T's proposed § 2.0, "Applicable Law") This approach violates the Act, which provides that section 251 and the FCC's regulations govern unbundling obligations. Where the FCC has

[49] CCG (Br. at 2-3) and AT&T (Br. at 4-5) wrongly rely on this provision.

[50] ATT (Br. at 5 n.11) wrongly relies on this provision.

found that unbundling is not required under § 251(c)(3), there is no source of law allowing state commissions to override that decision, as the CLECs' amendments erroneously provide.

For instance, MCI has proposed deleting Verizon's § 2.1, which makes clear that Verizon's unbundling obligations are tied to federal law, and added language (in MCI Amendment §8.1) purporting to permit state commissions to preempt the FCC's ruling eliminating mass-market switching. AT&T's amendment, likewise, subordinates the FCC's elimination of UNE-P to an "independent state ruling that access to new UNE-P arrangements must be provided pursuant to applicable state law at specific regulated rates, terms and conditions."[51] Of course, there is no such state ruling, and the Department has ruled that there *can be none*, in light of the FCC's affirmative finding of non-impairment in the absence of local circuit switching. *Consolidated Order* at 22, 23 n.17. The Department should reaffirm its prior ruling and reject the CLECs' amendments contemplating that the Department may re-impose unbundling obligations the FCC has eliminated.

Issue 2: What terms and conditions and/or rates regarding implementing changes in unbundling obligations or changes of law should be included in the Amendment to the parties' interconnection agreements?

Relevant Provisions: Verizon Amendment 1, §§ 2.1, 2.3, 3.1, 3.2, 4.7.3, 4.7.6; Verizon Amendment 2, §§ 2.1, 2.3, 2.4, 2.5, 3.5.3, 4.7.5;

A. Verizon's proposed Amendment makes clear that, in the event Verizon's obligation to provide access to a particular unbundled network element is eliminated – by the FCC or by a court of competent jurisdiction – Verizon has no further obligation to provide that element under the interconnection agreement, either. Thus, Amendment 1 provides that

[51] *See also*, AT&T Amendment §3.5.2; CCG Amendment §3.2.1.2 (requiring Verizon to provide enterprise switching where the Department so orders "under state law or pursuant to Section 271."); MCI Amendment §11.2.5 (giving MCI the right to convert discontinued UNEs to "an analogous element or service that is required under state law, where applicable.")

"Verizon shall be obligated to provide access to unbundled Network Elements ("UNEs") . . . only to the extent required by the Federal Unbundling Rules." Verizon Amendment 1, § 2.1. Section 3.1 goes on to provide that, to the extent that Verizon has not already ceased provision of a Discontinued Facility (as defined in section 4.7.3), Verizon shall provide 90 days written notice of its intent to cease provision of such access.[52] For the UNEs at issue in the *Triennial Review Order*, of course, the CLECs have already had abundant notice – since Verizon's October 2, 2003 letter – that the network elements at issue are no longer available as UNEs.[53] Thus, for the avoidance of doubt, section 3.1 provides that the "Parties acknowledge that Verizon . . . has provided [the CLECs] with any required notices of discontinuance of certain Discontinued Facilities."[54] As explained under Issues 3 and 4, *infra*, however, no amendment is required to implement the FCC's mandatory prohibition against CLECs adding certain UNEs eliminated under the *TRRO*.

Verizon's proposed amendment also acknowledges, to the extent necessary, that alternative arrangements will replace discontinued UNEs.[55] Thus, under section 3.2, if the CLEC wishes to continue to obtain access to the discontinued UNE, it is free to do so under a separate arrangement with Verizon (*i.e.*, a commercial agreement, an applicable Verizon special access tariff, or resale). The CLEC, of course, may also self-provision the subject arrangement

[52] Such *notice* may be provided before the effective date of any FCC regulations eliminating a particular UNE, but Verizon may not cease provision of the UNE prior to the effective date of the notice or the regulation, whichever comes later.

[53] Verizon's October 2, 2003, Notice of Discontinuation covered OCn transport; OCn loops; dark fiber transport between Verizon switches or wire centers and CLEC switches or wire centers; dark fiber feeder subloop; newly built fiber to the home; overbuilt fiber to the home; hybrid loops, subject to exceptions for time division multiplexing and narrowband applications; and line sharing. In addition, on May 18, 2004, Verizon sent a notice of discontinuation of enterprise switching and local circuit switching subject to the FCC's "four line carve-out" rule.

[54] As noted above, Verizon has already provided notice of discontinuance of the UNEs delisted in the *Triennial Review Order*, and Verizon has implemented such notices under most of its interconnection agreements.

[55] It is worth noting that the FCC's *TRRO* established transition periods for certain UNEs up to 18 months. Thus, CLECs often have access to network elements directly under federal regulations for a period longer than the 90-day default period, and Verizon's amendment gives effect to such requirements.

or obtain it from a third party provider. If the CLEC has not specifically requested either disconnection or an alternative arrangement, Verizon may reprice the discontinued UNE at special access or resale-equivalent rates. *Id.*

Verizon's Amendment recognizes that the FCC may determine the length and conditions of any transition period after it decides to discontinue a UNE obligation, just as it has done most recently with the 12- and 18-month transition periods for the UNEs delisted by the *TRRO*. Where the FCC adopts a mandatory transition period, that period cannot be extended by a state commission. Any such modifications would conflict with the FCC's rules, and would therefore be preempted.

The Department should therefore reject the CLECs' proposals to override implementation of federal law by adopting lengthy and cumbersome "transition" processes, or by attaching conditions to implementation of the FCC's mandatory transition plan. AT&T's complicated scheme, already discussed in the Introduction, above, would postpone discontinuance of those UNEs indefinitely while the parties negotiate "replacement terms" or arbitrate this issue a second time. AT&T Amendment §§3.11 and 3.11.1. AT&T would also extend the *TRRO* transition periods indefinitely until AT&T chooses to agree to a "conversion process."[56] Conversent would also extend the FCC's conversion deadlines indefinitely, until the parties agree on a "conversion process." *See* Conversent Amendment §3.11.3. CCG would introduce the opportunity for even more delays by referring disputes about the "operational plan" to implement the FCC's *TRRO* rules to the dispute resolution terms of the ICA, which in turn would send the dispute to the Department. *See* CCG Amendment §§3.2.2.1 and 3.3.1.3(a). The CCG, moreover, would apparently impose no end-date at all on the FCC's transitional rates. *See e.g. id*. §§3.2.2.2,

[56] *See* AT&T Amendment §3.10.2.

3.2.2.3 and 3.3.1.4. Conversent would go even further, and block implementation of the FCC-prescribed transition rates until Verizon "fully complied" with Conversent's contract proposal allowing it "to commingle UNEs and UNE Combinations without restriction." Conversent Amendment §3.1. And AT&T proposes to authorize this Department to arbitrate or otherwise rule on the rates, terms and conditions under which Verizon would offer replacement services for the UNEs discontinued by the FCC.

The CLECs' proposals would allow them to continue to order and obtain new UNE arrangements during the *TRRO* transition periods if used to serve those customers they served on March 11, 2005,[57] are unlawful for the reasons stated in the Introduction, above, and with respect to Issue 30, below, and must be rejected.

All of these provisions are unlawful.[58] As noted, the FCC's mandatory transition periods cannot be extended for any reason, including allowing CLECs to manufacture disputes about conversion terms, as they surely will if the Department adopts their provisions designed to delay implementation of federal law.[59] The FCC established a defined period for CLECs to work out any operational issues, and replacement arrangements – including resale, special access, and Verizon's Wholesale Advantage offering—are readily available. The FCC also prescribed transitional rates for specifically defined periods—and no longer—because that was sufficient, in the FCC's judgment, to prevent potential disruption of a "flash cut" to commercial pricing. And the FCC did not condition implementation of the transitional rates upon the ILECs' compliance

[57] *See e.g.*, CCC TRRO Amendment ¶¶7.1.2 and 7.2, MCI Amendment §8.1.1 and Competitive Carrier Group ("CCG") Amendment, §3.2.2.1, 3.3.1.1, 3.6.1.1

[58] The CCG would also include packet switching within the scope of its transitional rules. *See* CCG Amendment §3.9.2. Packet switching, however, has never been available as a UNE and cannot be included in any regime designed to transition CLECs off of an embedded base of UNE arrangements.

[59] *See TRRO* ¶227 and, 47 CFR §51.319(a)(4)(iii), (5)(iii) and (6)(ii); 47 CFR §51.319(d)(2)(iii) and 47 CFR §51.319(e)(2) (ii)(C), (iii)(C) and (iv)(B), all of which provide outside limits for the transition rates of either 12 or 18 months from the effective date of the TRRO, March 11, 2005.

with any CLEC-imposed conditions—let alone unlawful ones, like unrestricted commingling—so the Department cannot do so, either. The Department has, in any event, allowed the transitional rates to go into effect by approving Verizon's TRRO tariff changes and declining to grant the CLECs' Emergency Petition that would have allowed them to receive discontinued UNEs at TELRIC rates.

The Department should reject the CLECs' unreasonable notice requirements. As discussed earlier, AT&T would require Verizon to notify AT&T yet again, *after* new amendments are executed, that Verizon intends to discontinue the UNEs delisted in the *TRO* 18 months ago. Such a notice requirement has no basis in federal law and would frustrate the federal mandate, clearly articulated in the *TRO*, that the unbundling limitations adopted in that order be implemented quickly. (Indeed, the FCC anticipated that those provisions would already have been implemented months ago.) There is no legitimate reason to give CLECs any more notice of the discontinuation of elements that were de-listed 18 months ago. The purpose of a notice period is to allow CLECs to prepare themselves for the transition to UNE replacement services. By the time amendments are executed, it will be about two years since the *TRO* took effect. That is more than enough time for the CLECs to have made any necessary changes in their operations.

CCG would also require Verizon to re-notify it of the discontinuation of these UNEs, with outrageous notice periods – *ten months* for local switching UNEs and *sixteen months* for dark fiber loops or transport – that have no relation to the FCC's mandatory transition rules. As explained at length above, the FCC's "nationwide bar" on new UNE-P arrangements and its prohibition on ordering of qualifying high-capacity facilities and dark fiber facilities has already

taken effect; its transition period – which expires on March 11, 2006 for all facilities except for dark fiber – does not depend on provision of notice either.

Just as groundless and unreasonable is AT&T's proposal in its section on Mass Market Switching to force Verizon to allow it to place resale orders for local service using the existing process for ordering UNE-P, for up to a year after the effective date of the *TRRO*. AT&T Amendment §3.5.1.1. To the extent AT&T chooses to order local service at resale pursuant to section 251(c)(4) in lieu of UNE-P, it may do so, but there is nothing new about Verizon's obligation to provide service at a wholesale discount for resale. There is no basis in the *TRRO* for imposing any additional or different operational requirements on ILECs. Moreover, AT&T is fully capable of complying with Verizon's resale ordering process, as it has demonstrated by ordering resale services in the past.

B. In light of the dramatic expansion of local telecommunications competition – including intermodal competition from cable and wireless providers – it is unlikely that the FCC will ever have occasion to *expand* the list of UNEs that incumbents must provide to their rivals. Nevertheless, Verizon's Amendment addresses the possibility of such new elements by providing that the rates, terms, and conditions for such "shall be as provided in an applicable Verizon tariff that Verizon . . . establishes or revises to provide for such rates, terms, and conditions, or . . . as mutually agreed by the Parties in a written amendment to the Amended Agreement." Verizon Amendment 1, § 2.3.

Verizon's proposed language recognizes that there is a fundamental difference between rules that *eliminate* an unbundling obligation and those that *create* a new unbundling obligation. When an incumbent's obligation to provide access to an element under section 251(c)(3) is eliminated, the details of any subsequent arrangements are no longer within the scope of

interconnection agreements, as the FCC has held. *See*, *e.g.*, *Qwest Declaratory Ruling*,[60] 17 FCC Rcd at 19341, ¶ 8 n.26 (holding that the various provisions of § 252 apply to "only those agreements that contain an ongoing obligation relating to section 251(b) or (c)"); *see also Coserv*, 350 F.3d at 488 ("An ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252."). As such, the parties must negotiate separate, arrangements for the discontinued services.

By contrast, if a new unbundling obligation arises under § 251, the parties need to negotiate (and to arbitrate, if necessary) the rates, terms, and conditions governing Verizon's provision of the new service in the context of their interconnection agreements (in the absence of an applicable tariff). In other words, new obligations cannot be automatically implemented the way the elimination of UNEs can (and should) be. Nevertheless, Verizon's proposal provides for prompt implementation of any new interconnection obligations and should be adopted.

Issue 3: What obligations, if any, with respect to unbundled access to local circuit switching, including mass market and enterprise switching (including Four-Line Carve-Out switching), and tandem switching, should be included in the Amendment to the parties' interconnection agreements?

Relevant Provisions: Verizon Amendment 1, § 4.7.3.

In the *TRRO*, the FCC eliminated switching as a UNE: "we impose no section 251 unbundling requirement for mass market local circuit switching nationwide." *TRRO* ¶ 199. It found that "the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and we therefore determine not

[60] Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, 17 FCC Rcd 19337 (2002) ("*Qwest Declaratory Ruling*").

to unbundle that network element." *Id.* ¶ 210. Hence, the FCC held that "we bar unbundling . . . where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition." *Id.* ¶ 218.[61] The new rules confirm that "[a]n 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," 47 C.F.R. § 51.319(d)(2)(i), and that "[r]equesting carriers may not obtain new local switching as an unbundled network element," *id.* § 51.319(d)(2)(iii).

The FCC established a mandatory transition plan beginning March 11, 2005: "We require competitive LECs to submit the necessary orders to convert their mass market customers to an alternative service arrangement within twelve months of the effective date of this Order." *Id.* ¶ 227. It emphasized that "[t]his transition period shall apply *only* to the embedded customer base, and does *not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching*." *Id.* (emphasis added). The FCC found that a year-long period "provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut-overs or other conversions." *Id.*

The FCC also prescribed the rates for delisted UNEs during that transition period. Specifically, the FCC required that "unbundled access to local circuit switching during the transition period be priced at the higher of (1) the rate at which the requesting carrier leased

[61] The FCC found that "competitive LECs not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets." *Id.*; *see also id.* ¶¶ 204-209. Moreover, it found that "the BOCs have made significant improvements in their hot cut processes that should better situate them to perform larger volumes of hot cuts," and that "the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives." *Id.* ¶ 199; *see also id.* ¶¶ 210-221.

UNE-P on June 15, 2004 plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for UNE-P plus one dollar." *Id.* ¶ 228.

The FCC's nationwide bar on new UNE orders took effect on March 11, 2005 for all carriers, and did not depend on any contract amendments. *See* Verizon's response to Issue 10, *infra*. As for UNE arrangements in service on that date, Verizon's Amendment 1 as currently written fully accommodates the TRRO transition requirements. Amendment 1 already provides that "Verizon shall not be obligated to offer or provide access on an unbundled basis at rates prescribed under Section 251 of the Act to any facility that is or becomes a Discontinued Facility, whether as a stand-alone UNE, as part of a Combination, or otherwise." Amendment 1, § 3.1. In turn, "Discontinued Facility" is defined to include "Any facility that Verizon, at any time, has provided or offered to provide to [the CLEC] on an unbundled basis pursuant to the Federal Unbundling Rules (whether under the Agreement, a Verizon tariff, or a Verizon SGAT), but which by operation of law has ceased or ceases to be subject to an unbundling requirement under the Federal Unbundling Rules." *Id.* § 4.7.3. Switching is, therefore, a "Discontinued Facility" under Verizon's Amendment, which makes clear that Verizon's contractual unbundling obligations are the same as its unbundling obligations under federal law.

In response to CLECs' concerns, Verizon has offered during ongoing negotiations to insert the following at the end of the sentence of §3.1 of its Amendment quoted above:

> provided, however, that in accordance with but only to the extent required by the TRRO (and only for so long as, and to the extent that, the TRRO remains effective and is not stayed, reversed, modified, or vacated), Verizon shall continue during the applicable transition period specified in the TRRO (and not beyond such period) to provide ***CLEC Acronym TXT***'s embedded base of UNEs that, as of March 11, 2005, became Discontinued Facilities by operation of the TRRO, and such embedded

base of UNEs shall be subject to FCC-prescribed rate increases pursuant to Section 3.5 below.

Thus, the amended ICAs would explicitly recite the obligation to continue providing the embedded base UNE-P arrangements (and other discontinued UNE) during the transition period. Verizon's language should be adopted because it efficiently implements the non-impairment findings in the *TRRO* (as well as the *TRO*) and assures the CLECs that Verizon will comply with the *TRRO* transition rules.

In contrast, the CLECs' proposed amendments are designed to evade, rather than implement, the FCC's non-impairment findings. As discussed above, their language as to switching is intentionally confusing and ambiguous, so as to allow the CLECs to argue that their contracts entitle them to continue ordering UNE-P arrangements which the FCC has eliminated. And they all propose unlawful provisions that contemplate unbundling under sources other than section 251(c)(3) of the Act and 47 C.F.R. Part 51. Verizon has already addressed a number of the most plainly unlawful terms proposed by the CLECs, but certain aspects merit emphasis here.

First, the CLECs' amendments incorrectly assume that this Department has the authority – under section 271, state law or other, undefined law – to impose unbundling obligations the FCC has eliminated. *See e.g.* AT&T Amendment §§2.0, 3.5.1, 3.5.1.1 and 3.5.2 (referring to "Applicable Law" and defining it to include "[a]ll laws, rules and regulations," including state commission decisions]; CCG Amendment §§2.1, 3.2.1.1, 3.2.1.2, 3.4.1.1 (same); MCI Amendment §8.1.1 (referring to state law). As explained above, and as the Department has held, this is incorrect.

Second, even where the CLECs don't specifically designate state law or another source, their drafting is deliberately confusing and misleading in an attempt to leave themselves room to argue that UNE-P hasn't been eliminated under their contracts. *See e.g.* CCG Amendment

§3.2.1 ("Verizon shall provide CLEC with non-discriminatory access to Local Circuit Switching … in accordance with Applicable Law."), 3.2.1.1 ("Verizon shall provide Mass Market Switching to CLEC under the Amended Agreement.") and 3.2.1.2 (regarding enterprise switching); AT&T Amendment §3.5.2 ("Verizon shall be obligated to provide non-discriminatory access to Enterprise Switching only where the [Department] has ordered [so] under state law or pursuant to Section 271."). Again, the FCC's rules establish Verizon's unbundling obligations, and any inconsistent provisions are unauthorized by law.

The CLECs consistently omit any provision clearly stating that the law does not, in fact, require Verizon to provide unbundled access to switching or other delisted items. Verizon is entitled to a clear statement that it is not obligated to provide any local circuit switching UNE to the CLECs other than as required by the FCC's unbundling rules. Fair implementation of the *TRO* and the *TRRO* require no less.[62]

Third, a number of the CLECs' proposals would defer the effective date of the new rules under the *TRRO* – including the ban on new UNE-P and other discontinued UNEs and the inception of transitional rates – from March 11, 2005, as expressly ordered by the FCC, to the "Amendment Effective Date," meaning the date of execution of the Amendment, which will not be for some months yet. *See e.g.* MCI Amendment §8.1, 8.1.1. The rules are clear, however, that "Requesting carriers may not obtain new local circuit switching as an unbundled network element" as of March 11, 2005. 47 C.F.R. §51.319(d)(2)(iii) and TRRO ¶235.

Finally, MCI would explicitly require Verizon to continue to provide unbundled access to mass market switching beyond the close of the 12-month transition period if UNE-P arrangements are not migrated to alternative arrangements during the transition period—even if

[62] The CLECs' refusal to propose clear contract terms allowing Verizon not to provision UNEs where not required by law is not limited to their proposals regarding local switching but runs to all of the UNEs addressed in their amendments.

MCI itself is the cause of the delay. The FCC found that a year was long enough to work out the transition details, and the CLECs cannot be given the discretion to extend this period by stalling conversions (or for any other reason). In this regard, Verizon has asked carriers for their transition plans by May 15. If the CLECs cooperate with Verizon, as they are supposed to, there will be plenty of time for a smooth transition to replacement arrangements.

Issue 4: What obligations, if any, with respect to unbundled access to DS1 loops, DS3 loops, and dark fiber loops should be included in the Amendment to the parties' interconnection agreements?

Relevant Provisions: Verizon Amendment 1, §§ 3.1, 4.7.3; AT&T Amendment, §§ 3.2.1, 3.2.2.

In the *TRRO*, the FCC eliminated any obligation to unbundle dark fiber loops. *TRRO* ¶ 146 (finding that "requesting carriers are not impaired without access to unbundled dark fiber loops in any instance"). Hence, its new rule states that "[a]n incumbent LEC is not required to provide requesting telecommunications carriers with access to a dark fiber loop on an unbundled basis," and that "[r]equesting carriers may not obtain new dark fiber loops as unbundled network elements." 47 C.F.R. 51.319(a)(6). The FCC also established tests for determining impairment as to DS1 and DS3 loops in any given market. Specifically, it held that "requesting carriers are not impaired without access to DS3-capacity loops at any location within the service area of a wire center containing 38,000 or more business lines and four or more fiber-based collocators," and that "requesting carriers are not impaired without access to DS1-capacity loops at any location within the service area of a wire center containing 60,000 or more business lines and four or more fiber-based collocators." *TRRO* ¶ 146.

In addition, even where CLECs are permitted to obtain high capacity loops as UNEs, they are subject to specific FCC-imposed caps on the total number of these facilities a CLEC may obtain along a given route. For example, the FCC's rules provide that a CLEC "may obtain a

maximum of ten unbundled DS1 loops to any single building in which DS1 loops are available as unbundled loops."[63] In the case of DS3 dedicated transport, a CLEC "may obtain a maximum of a single unbundled DS3 loop to any single building in which DS3 loops are available as unbundled loops."[64]

As with switching, the FCC adopted a mandatory transition plan that applies to delisted high-capacity loops. Specifically, CLECs have 12 months to transition to alternative facilities or arrangements as to DS1 and DS3 loops, and 18 months to transition away from dark fiber loops. *Id.* ¶ 195. These transition plans explicitly apply only to the embedded base, and do not permit competitive LECs to add new, delisted high-capacity loop UNEs after March 11, 2005. *Id.* ¶ 195. During that transition period, the delisted high-capacity loops shall be available "at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the loop element on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order, for that loop element." *Id.* ¶ 198.

As Verizon has explained, no contract amendments are necessary to implement the FCC's mandatory transition plan. (Verizon is nevertheless willing to include terms memorializing its commitment to continue to serve the embedded base in accordance with the *TRRO*'s transition terms.) And, of course, Verizon's Amendment appropriately incorporates the FCC's non-impairment determinations with respect to high-capacity loops, just as it does with switching, because it makes clear that Verizon's unbundling obligations follow federal law.

In contrast, the CLECs' proposals are once again intended to avoid, rather than implement, the new federal rules. Rather than recognizing the elimination of unbundled access

[63] 51.319(a)(4)(ii).

[64] 51.319(a)(5)(ii).

to any high-capacity loops, the CLECs' amendments purport to create a right to such access. Further, the CCG, AT&T and Conversent all propose that the FCC's transition rates apply for the full transition period, even if the CLECs' UNE arrangements are converted to other facilities before that time. *See e.g*. with respect to loops, CCG Amendment §3.3.1.3, AT&T Amendment §§3.2.1.3 and 3.2.5.2 and Conversent Amendment §3.2.4.2. Of course, the *TRRO* does not require Verizon to provide replacement services at transitional rates. Certainly, while one purpose of the transitional periods is to help CLECs adjust to higher rates, that purpose is fully satisfied by allowing CLECs to convert their UNEs gradually during the transition period. Extending transition rates for the full period as to all facilities, on the other hand, has no basis in federal law and must be rejected for that reason alone. Indeed, such a rule would frustrate the FCC's design for gradually transitioning CLECs to lawful arrangements and rates.

Likewise, as discussed in the Introduction and with respect to Issue 3 above, MCI would delay the FCC's ban on orders for delisted UNE arrangements, including dark fiber loops and certain DS1 and DS3 loops, until execution of the amendment. *See e.g*. MCI Amendment Introduction and §§9.1.2.1, 9.2.2.1. As already discussed, this is contrary to the federal rules, which forbid CLECs from obtaining new UNE arrangements for dark fiber loops and non-qualifying DS1 and DS3 loops as of March 11.[65]

The CCG would give itself the right to order new, delisted DS1 and DS3 UNE loops during the transition period where used to service "all end-user customers of CLEC who were customers as of the effective date of the *TRRO*…." CCG Amendment §3.3.1.3. But the FCC's rules contain no such exception to the bar on new orders for delisted facilities. Indeed, the transition period for high-capacity loops and transport applies *only* to those *UNE arrangements*

[65] *See* 47 C.F.R. §51.319(a)(4)(iii), (5)(iii) and (6)(ii).

that were in place as of the effective date of the rules. *See e.g*. 47 C.F.R. §51.319(a)(4)(iii), applying the transition period to "any DS1 loop UNEs that a competitive LEC leases from the incumbent LEC as of that date." Thus the CCG is not entitled to order new delisted UNE loops (or transport) – at all.

Also inconsistent with the FCC's rules is Conversent's proposed §3.2.1.2.1, which would limit the transitional loop rates to those loops leased as of March 11, 2005, that exceed the FCC's caps of ten DS1 loops or one DS3 loop per building – even where the wire centers serving those loops satisfy the FCC's non-impairment criteria. Of course, Verizon has *no* obligation to provision *any* high-capacity loops out of such offices. *All* existing UNE loops served by such offices, not only the loops that fit under the caps, must be transitioned off of UNE service, and all are subject to the transition rates.

Finally, MCI's proposed §9.4.1 is unacceptable because it attempts to create a "loophole" with respect to the FCC's ban on new orders for unbundled access to dark fiber. (*See* 47 C.F.R. §51.319(a)(6)(ii)). MCI states that it "may not obtain new dark fiber loops as unbundled Network Elements, *except as otherwise set forth in this Amendment*." (Emphasis added.) This vague qualification is presumably intended to leave MCI the option of pointing to other provisions in the amendment to conjure an unbundling right where none exists under federal law. Nothing in the amendment can override the FCC's no-new-adds directive for dark fiber loops, however, and the Department should reject MCI's language.

The Department should reject the CLECs' overreaching and unlawful language and adopt Verizon's proposed amendment.

Issue 5: **What obligations, if any, with respect to unbundled access to dedicated transport, including dark fiber transport, should be included in the Amendment to the parties' interconnection agreements?**

Relevant Provisions: Verizon Amendment 1, §§ 3.1, 4.7.3.

In the *TRRO*, the FCC again refused to require unbundling of "entrance facilities," finding that CLECs are not impaired without access to them. *TRRO* ¶ 66. It noted that "entrance facilities are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices." *Id.* ¶ 138. And just as with loops and switching, the new rules "do not permit competitive LECs to add new dedicated transport UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists." *Id.* ¶ 142. The FCC, however, required no transition period for entrance facilities, because it had already decided they should not be unbundled in the *TRO*.

For other high-capacity transport elements, the FCC held that CLECs may not obtain DS1 transport for routes connecting two wire centers "each of which contains at least four fiber-based collocators *or* 38,000 or more business lines," *Id.* ¶ 66 (emphasis in original), and that CLECs may not obtain DS3 or dark fiber transport on routes connecting two wire centers "each of which contains at least three fiber-based collocators *or* at least 24,000 business lines." *Id.* (emphasis in original). It found that "the thresholds we choose are designed to capture areas that have or are likely to have significant competitive transport." *Id.* ¶ 111. In addition, even where CLECs are permitted to obtain high capacity transport as UNEs, they are subject to specific FCC-imposed caps on the total number of these facilities a CLEC may obtain along a given

route. Unbundled DS1 dedicated transport circuits are capped at 10 on each route[66] and unbundled DS3 dedicated transport circuits are capped at 12 per route.[67]

As with loops, the FCC adopted a 12-month transition plan for DS1 and DS3 transport, and an 18-month transition for dark fiber transport. *See id.* ¶ 142. It reiterated that "[t]hese transition plans shall apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists." *Id.* During that transition period, eliminated UNEs "shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order, for that transport element." *Id.* ¶ 145.

As with loops and switching, the FCC's ban on new orders for delisted transport facilities took effect on March 11, 2005, without the need for any contract amendments. As to incorporation of the permanent unbundling rules in amendments where necessary, Verizon's Amendment appropriately reflects the FCC's elimination of transport facilities that meet the FCC's non-impairment criteria and should therefore be adopted.

The CLECs' proposals with regard to dedicated transport suffer from the same fatal flaws noted above with respect to switching and loops. Namely, the CLECs fail to offer any terms clearly allowing Verizon to discontinue provision of UNEs eliminated by the FCC; they seek the benefit of the transitional rates for the full transition period even for those elements converted off of UNE service earlier; they seek to extend the transition periods indefinitely; and at least some

[66] 51.319(e)(2)(ii)(B).

[67] 51.319(e)(2)(iii)(B).

of them would delay the FCC's ban on new orders for delisted UNEs until the amendments are signed, despite the clear March 11 prohibition date in the rules.

In addition, Conversent improperly limits the application of the FCC's cap on DS1 dedicated transport circuits only to routes on which Verizon is not required to unbundle DS3 dedicated transport, (Conversent Amendment §3.4.2.3.1) The rule makes clear that the cap applies to all DS1 routes, not merely to those routes where Verizon need to unbundle DS3 facilities. It states, in its entirety, as follows:

> Cap on unbundled DS1 Transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

47 C.F.R. §51.319(e)(2)(ii)(B). Although the text of ¶128 of the TRRO lends some support to Conversent's position the rule itself contains no limitation on the applicability of the cap. The FCC's Rule must be applied as written, and the Department must reject Conversent's alternate formulation.

Issue 6: Under what conditions, if any, is Verizon permitted to re-price existing arrangements which are no longer subject to unbundling under federal law?

Relevant Provisions: Verizon Amendment 1, §§ 3.2, 3.3; Verizon Amendment 2, § 2.5.

Verizon's right to re-price existing UNE arrangements that are no longer subject to unbundling under federal law is limited only by the FCC's transitional rules applicable to mass market switching and high-capacity loops and transport facilities. Where a particular network element or arrangement is no longer subject to unbundling under § 251(c)(3), the FCC has held that the rates, terms, and conditions for such elements are not subject to the standards set forth in sections 251 and 252. *See*, *e.g.*, *Qwest Declaratory Ruling*, 17 FCC Rcd at 19341, ¶ 8 n.26

(holding that the various provisions of § 252 apply to "only those agreements that contain an ongoing obligation relating to section 251(b) or (c)"). To the extent Verizon continues to provide such facilities to CLECs, it will do so through access tariffs or through separate, commercial agreements that will be negotiated between the parties outside of the § 252 process. Nothing in the 1996 Act authorizes state commissions to review the rates, terms, and conditions in such separate, non-§ 252 arrangements. While the Amendment may properly refer to the fact that Verizon is entitled to establish separate commercial arrangements for non-§ 251 elements (*see* Verizon Amendment 1, § 3.2), it should do no more than that. *See* Verizon's response to Issue 25, *infra*. In particular, the Amendment should not contain any provisions — such as those proposed by AT&T (Amendment, § 3.11.3) — purporting to govern the *specific* terms on which Verizon continues to provide access to facilities that no longer need to be provided as UNEs under § 251(c)(3). As this Department recently found, section 252 arbitrations are not the place to investigate unrelated matters (such as section 271 compliance). *D.T.E. Phase III-D Order* at 16.

Issue 7: Should Verizon be permitted to provide notice of discontinuance in advance of the effective date of removal of unbundling requirements? Should the Amendment state that Verizon's obligations to provide notification of discontinuance have been satisfied?

Relevant Provisions: Verizon Amendment 1, § 3.1.

Verizon has proposed that it may provide notice to CLECs that it will cease providing access to a network element as a UNE "in advance of the date on which the facility shall become a Discontinued Facility as to new orders that [the CLECs] may place, so as to give effect to Verizon's right to reject such new orders immediately on that date." Verizon Amendment 1, § 3.1. This language is necessary to avoid any further delay in implementing changes to the

federal unbundling regulations, especially in light of the now-**18-month** delay in implementing the rulings of the *TRO*.

When the FCC adopts new unbundling rules, it generally does so by releasing an order detailing those new rules. But the order — which often is preceded by a press release weeks or months earlier summarizing the content of the new rules — is not effective on release. Instead, the FCC sometimes first publishes a summary of the new rules in the Federal Register; and ordinarily, the rules are effective 30 days after Federal Register publication. *See, e.g.*, 47 C.F.R. § 1.427(a) (2003); *Triennial Review Order*, 18 FCC Rcd at 17460, ¶ 830 (establishing effective date). Accordingly, all parties will generally have notice of the elimination of a particular unbundling requirement at least several weeks before the regulation becomes effective. In the context of the *Triennial Review Order*, more than seven *months* passed between the FCC's press release (February 20, 2003) and the effective date of its Order (October 2, 2003), which was released on August 21, 2003.

There is thus nothing unfair about Verizon providing notice that it intends to implement a new rule after the rule has been adopted but before it has become effective. In any event, Verizon's language makes clear that Verizon cannot implement a rule before its effective date, nor can Verizon implement it if the rule is stayed either by the FCC or a court of competent jurisdiction.

It is, likewise, reasonable for Verizon's Amendment to recognize that Verizon has already provided written notice to the CLECs of the discontinuation of the UNEs eliminated by the *TRO*. The purpose of a notice requirement is to give parties time to prepare for the transition away from a particular UNE. By the time parties execute the amendments resulting from this proceeding, about two years will have passed since the *TRO* took effect. In addition, Verizon

already issued, many months ago, notices of discontinuance of UNEs that the TRO eliminated. No CLEC can legitimately claim that it has not had enough time to prepare for the transition to replacement arrangements for the UNEs delisted in the TRO. The only conceivable purpose of the CLECs' proposals for additional notice – of up to 16 months – of discontinuation of delisted UNEs is to further delay implementation of federal law. The Department should reject all such terms.

Issue 8: Should Verizon be permitted to assess non-recurring charges when it changes a UNE arrangement to an alternative service? If so, what charges apply?

Relevant Provisions: Verizon Amendment 2, §§ 3.4.2.4, 3.4.2.5.

If there are additional costs incurred in setting up an alternative service – such as a service order – Verizon may legitimately recover those costs. Verizon has not proposed rates under its Amendment for setting up alternative services at this point, but it reserves the right to do so in its forthcoming cost study. Therefore, the Amendment should not foreclose recovery for any costs Verizon incurs to provide service to CLECs. In any event, the Department cannot lawfully constrain the parties' rights to negotiate prices in the context of non-section 251 commercial agreements, which are not subject to section 252's negotiation and arbitration requirements.

AT&T argues that it would be unfair to assess disconnection charges when a UNE is disconnected. *See* Joint Issues Matrix, Issue 8, at 21-22. Verizon, however, has not proposed any disconnection charges in its Pricing Attachment, because Verizon already recovers the costs of disconnection through up-front charges. Indeed, this Department has explicitly approved

Verizon's practice in this regard.[68] AT&T's amendment would thus have the effect of prohibiting Verizon from recovering its costs through charges that the Department has already approved, so it must be rejected.

Issue 9: What terms should be included in the Amendments' Definitions Section and how should those terms be defined?

Verizon's definitions are appropriate and reflect federal law, and they should be adopted. Most of the CLECs' definitions, on the other hand, are part of their unlawful scheme to perpetuate unbundling obligations that the FCC has eliminated (or that never existed in the first place). Below, Verizon first explains its position on its own definitions that the CLECs have disputed or amended. Then, Verizon discusses the additional definitions that CLECs have proposed.

A. CLEC Disagreements With Verizon's Proposed Definitions

1. "Dark Fiber Loop"

As noted, the FCC has ruled that ILECs have no obligation to provide dark fiber loops, but has established an 18-month period for CLECs to transition away from these facilities. Therefore, a definition of dark fiber loop is still appropriate in the *TRO* Amendment. Verizon's definition provides that a dark fiber loop "[c]onsists of fiber optic strand(s) in a Verizon fiber optic cable between Verizon's accessible terminal, such as the fiber distribution frame, or its functional equivalent, located within a Verizon wire center, and Verizon's accessible terminal located in Verizon's main termination point at an end user customer premises, such as a fiber patch panel, and that Verizon has not activated through connection to electronics that 'light' it

[68] *See* Order, *Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided-Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts*, D.T.E. 01-20, 2002 Mass. PUC LEXIS 41 (Mass. D.T.E. 2002).

and render it capable of carrying telecommunications services." Verizon Amendment 2, § 4.7.2. This definition combines the FCC's definition of "loop" in 47 C.F.R. § 51.319(a)(1) ("The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises."), with its definition for "dark fiber" in *id.* § 51.319(a)(6)(i) ("Dark fiber is fiber within an existing fiber optic cable that has not yet been activated through optronics to render it capable of carrying communications services.").

The principal problem with the CLECs' treatment of dark fiber loops is that none of them recognize that Verizon's obligation to unbundle these facilities has been eliminated (except for the FCC-prescribed transition obligations that apply to the embedded base).[69] CCC and CCG maintain that dark fiber loops may still be unbundled under state law or section 271. (*See* CCC Amendment, § 7.1; CCG Amendment, § 2.9.) Dark fiber loops are, likewise, not in AT&T's list of "Declassified Network Elements" and its definition does not recognize the FCC's finding that "requesting carriers are not impaired without access to unbundled dark fiber in any instance." (AT&T Amendment, §§ 2.5, 2.8; *TRRO*, ¶ 146.) Moreover, AT&T adds language to Verizon's definition of dark fiber that would make dark fiber loops available when fibers "can be made spare and continuous via routine network modifications." (AT&T Amendment, § 2.5.) Conversent adds language to its "Routine Network Modifications" section that would have the same effect. (Conversent Amendment, §§ 3.7.1.1, 4.7.3.) But under the FCC's mandatory transition plan, CLECs have *no* right to new dark fiber loops at all (*see TRRO*, ¶ 195), let alone a right to force Verizon to make unlimited network modifications to make new fiber loops available.

[69] The CCC and MCI propose to delete Verizon's definition.

The Department should reject the CLECs' dark fiber loop definitions, which embody their erroneous position that the Department may force Verizon to unbundle these facilities, despite the FCC's non-impairment ruling.

2. "Dark Fiber Transport"

Verizon defines "Dark Fiber Transport" as an "optical transmission facility within a LATA, that Verizon has not activated by attaching multiplexing, aggregation or other electronics, between Verizon switches (as identified in the LERG) or wire centers." Verizon Amendment 2, § 4.7.3. In accordance with the FCC's definition of dedicated transport to include only "facilities between incumbent LEC wire centers or switches" (*see TRRO*, ¶ 67), Verizon's dark fiber transport definition clarifies that: "Dark fiber facilities between (i) a Verizon wire center or switch and (ii) a switch or wire center of [the CLEC] or a third party are not Dark Fiber Transport." *Id*.

AT&T's definition expressly and impermissibly contradicts the FCC's express limitation of dedicated transport to transmission facilities between LEC wire centers or switches, instead proposing to expand Verizon's unbundling obligations to facilities "between Verizon wire centers or switches and requesting telecommunications carriers' switches or wire centers, including DS1, DS3, and OCn-capacity level services as well as dark fiber, dedicated to a particular customer or carrier." (AT&T Amendment, § 2.9.)

Although Conversent's definition first recognizes, correctly, that "Dark Fiber Transport shall be as defined in FCC Rule 51.319," it then specifies that Verizon shall provide unbundled dark transport not just in accordance with section 251(c)(3) and the FCC's Rules, but with "other Applicable Law." (Conversent Amendment, §.4.7.4.) But provision of dark fiber transport in accordance with FCC's Rule 51.319 necessarily excludes "other Applicable Law." Only the FCC can and has defined the terms of availability for unbundled dark fiber transport, so

Conversent's reference to other, undefined Applicable Law is self-contradictory, as well as impermissible.

MCI, likewise, contradicts itself by first recognizing that new unbundled dark fiber transport is not available out of Verizon wire centers that meet the FCC's non-impairment criteria, but then stating that dark fiber transport unbundling may nevertheless be required "as otherwise set forth in this Amendment" (MCI Amendment, § 10.3.2.1) – that is, as a "State Law-Required Element" priced at TELRIC (*id*., § 11.2.5) or a "Section 271 Element" priced at TELRIC (*id*., § 11.2.4.) Of course, the Department cannot re-impose the same unbundling obligations the FCC has eliminated, so MCI's language must be rejected as unlawful.

CCG's dark fiber transport definition appears to correctly recognize that facilities are only available between Verizon wire centers or switches (CCG Amendment, § 2.8) – but subject, again, to the unlawful condition that the Department can override the FCC's elimination of unbundling obligations. (CCG Amendment, § 2.9). CCG also adds language stating that a Verizon wire center or switch would include "Verizon switching equipment located at CLEC's premises." (*Id*., § 2.8.) This language is not in the FCC's definition and there is, in any event, no need to waste time debating whether it belongs in the amendment, because Verizon has no switching equipment located at CLEC's premises. There is no need for language addressing a purely hypothetical situation.

Finally, CCC's definition of dark fiber transport appears to limit availability of unbundled access to offices that do not meet the FCC's non-impairment criteria (CCC TRRO Amendment, § 6.4.2), but CCC renders this limitation meaningless with its other language contemplating unbundling under "state or federal merger conditions" and "state law or section 271." (*See id*., §§ 1.2 & 7.1)

In short, all of the CLECs' definitions are unacceptable, because none plainly recognizes the unbundling limitations the FCC has imposed on dark fiber transport.

3. "Dedicated Transport"

Verizon defines "Dedicated Transport" in its Amendments as a "DS1 or DS3 transmission facility between Verizon switches (as identified in the LERG) or wire centers, within a LATA, that is dedicated to a particular end user or carrier." (Verizon Amendment 1, § 4.7.4; Verizon Amendment 2, § 4.7.4.) MCI and Sprint agree with this definition, which tracks the FCC's definition and availability provisions of FCC Rule 51.319.

Because dedicated transport encompasses dark fiber transport, AT&T's, CCG's, and CCC's dedicated transport definitions present the same problems as their dark fiber transport definitions, and they must be rejected as unlawful for the reasons discussed in the preceding section. In addition to the problems emphasized above, AT&T (at § 2.9) and CCC (at § 6.2) would still require Verizon to unbundle "OCn-capacity level services," even though the FCC in the *TRO* eliminated all unbundling of OCn transport. (*See TRO*, ¶ 389 ("requesting carriers are not impaired without OCn or SONET interface transport.").

4. "Discontinued Facility"

Under Verizon's Amendments, a "Discontinued Facility" is one that Verizon has provided as a UNE, but that is no longer subject to an unbundling requirement under the Federal Unbundling Rules. As examples, Verizon lists some ten specific UNEs that the FCC held in the *Triennial Review Order* are not required to be unbundled. (In negotiations, Verizon has proposed to add the services delisted in the *TRRO* for purposes of clarity).[70] In addition, Verizon

[70] With these additions, Verizon's §4.7.5 would read: "Discontinued Facility. Any facility that Verizon, at any time, has provided or offered to provide to ***CLEC Acronym TXT*** on an unbundled basis pursuant to the Federal Unbundling Rules (whether under the Agreement, a Verizon tariff, or a Verizon SGAT), but which by operation of law has ceased or ceases to be subject to an unbundling requirement under the Federal Unbundling

concludes its list by including "any other facility or class of facilities" that is no longer unbundled under federal law. Thus, Verizon's definition of "Discontinued Facility" captures the effect of federal law, both as it stands now and as it may be modified in the future. Tying Verizon's unbundling obligations to federal law ensures that Verizon's contracts implement federal law, without the need for protracted and expensive multi-party proceedings like this one. As Verizon has pointed out, most of its contracts already permit automatic implementation of delisted UNEs. Verizon's TRO Amendment will bring the relatively small number of remaining contracts—those that may appear to require negotiation and arbitration of amendments to discontinue delisted UNEs—in line with the others.

In their proposed amendments, MCI, AT&T, CCG, and Conversent eviscerate the definition of "Discontinued Facility" by limiting it to certain network elements de-listed in the *TRO* and by pointing to potential sources of unbundling obligations other than section 251(c)(3) and 47 C.F.R. Part 51—including state law, section 271, and undefined "applicable law." (*See*, *e.g.*, CCG Amendment, §§ 1.2, 2.1, 2.9; MCI Amendment, §§ 12.7.5, 12.7.8, 8.1; AT&T Amendment, §§ 1.1, 1.2; Conversent Amendment, § 4.7.6.) CCC doesn't even include a section

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Rules. By way of example and not by way of limitation, Discontinued Facilities include the following, whether as stand-alone facilities or combined with other facilities: (a) any Entrance Facility; (b) Enterprise Switching; (c) Mass Market Switching; (d) Four-Line Carve Out Switching; (e) OCn Loops and OCn Dedicated Transport; (f) DS1 Loops or DS3 Loops out of any wire center at which the Federal Unbundling Rules do not require Verizon to provide ***CLEC Acronym TXT*** with unbundled access to such Loops; (g) Dark Fiber Loops; (h) any DS1 Loop or DS3 Loop that exceeds the maximum number of such Loops that the Federal Unbundling Rules require Verizon to provide to ***CLEC Acronym TXT*** on an unbundled basis at a particular building location; (i) DS1 Dedicated Transport, DS3 Dedicated Transport, or Dark Fiber Transport on any route as to which the Federal Unbundling Rules do not require Verizon to provide ***CLEC Acronym TXT*** with unbundled access to such Transport; (j) any DS1 Dedicated Transport circuit or DS3 Dedicated Transport circuit that exceeds the number of such circuits that the Federal Unbundling Rules require Verizon to provide to ***CLEC Acronym TXT*** on an unbundled basis on a particular route; (k) the Feeder portion of a Loop; (l) Line Sharing; (m) any Call-Related Database, other than the 911 and E911databases; (n) Signaling; (o) Shared Transport; (p) FTTP Loops (lit or unlit); (q) Hybrid Loops (subject to exceptions for TDM and narrowband services (i.e., equivalent to DS0 capacity)); and (r) any other facility or class of facilities as to which the FCC has not made a finding of impairment that remains effective, or as to which the FCC makes (or has made) a finding of nonimpairment."

on discontinued elements, instead assuming the possibility of continued unbundling obligations under state law; section 271; any "state or federal merger conditions," specifically including the FCC's Bell Atlantic/GTE Merger Conditions; and even the FCC's 1999 *Line Sharing* and *UNE Remand Orders*, which CCC pretends are not yet final and non-appealable. (*See*, *e.g.*, CCC Amendment §§ 1.2 & 7.)[71] The Department should reject all of the CLECs' language, which fails to plainly recognize the elimination of particular unbundling obligations.

5. "DS1 Loop" and "DS3 Loop"

Verizon defines DS1 Loop as a "digital transmission channel, between the main distribution frame (or its equivalent) in an end user's serving wire center and the demarcation point at the end user customer's premises, suitable for the transport of 1.544 Mbps digital signals." (Verizon Amendment 2, § 4.7.8.) Verizon's language further specifies, as does Verizon's standard interconnection agreement, that "[t]his loop type is more fully described in Verizon TR 72575, as revised from time to time," and that "[a] DS1 Loop requires the electronics necessary to provide the DS1 transmission rate." *Id*.

Similarly, Verizon defines DS3 Loop as a "digital transmission channel, between the main distribution frame (or its equivalent) in an end user's serving wire center and the demarcation point at the end user customer's premises, suitable for the transport of isochronous bipolar serial data at a rate of 44.736 Mbps (the equivalent of 28 DS1 channels)." *Id*. § 4.7.9. Verizon's language further specifies that "[t]his loop type is more fully described in Verizon TR

[71] The CCC formerly took the position that "[c]hanges in law resulting from the *TRRO*, or other changes desired by a party, should not be part of this proceeding at this time." *See* Joint Issues Matrix, Issue 11, position of CCC at 29. Nevertheless, the CCC subsequently joined other CLECs and Verizon in filing the Supplemental List of Issues, thereby agreeing that issues arising from the TRRO are properly addressed in this proceeding. Of course, the CCC has also filed a proposed *TRRO* Amendment in this docket.

72575, as revised from time to time," and that "[a] DS3 Loop requires the electronics necessary to provide the DS3 transmission rate." *Id.*[72]

AT&T's definitions of these terms basically track Verizon's, but with one important modification. AT&T defines both DS1 and DS3 loops as "including any necessary Routine Network Modifications." (AT&T Amendment, §§ 2.12 & 2.13.) This language may be construed to require Verizon to perform *any* modifications necessary to make available a DS1 or DS3, particularly because AT&T's definition of "Routine Network Modifications" fails to recognize the FCC's constraints on Verizon's obligation to modify its network to permit unbundled access. (*See infra*, "Routine Network Modifications" discussion.) CCC does not define DS1 or DS3 loops, but addresses only their availability—which, as explained above, CCC erroneously views as unconstrained by the FCC's unbundling limitations. (CCC TRRO Amendment, §§ 5.2 & 5.3.)

MCI's DS1 and DS3 loop definitions address the FCC-prescribed transition period, but incorrectly interpret the bar on new orders for de-listed facilities to begin on the date the amendment is executed, rather than on March 11, 2005, as the FCC mandated. As Verizon discussed in the Introduction and with regard to Issues 3 and 4, above, the *TRRO* repeatedly and explicitly states that the FCC's transition period applies on to the embedded base, not to new

[72]TR 72575 is a Verizon technical publication that specifies how Verizon applies the industry standards for particular loop types, including DS1 and DS3 loops, in Verizon's network. Such references are appropriate in interconnection agreements to ensure that Verizon and CLECs have a common understanding of the technical details relating to unbundling of particular facilities. Given the pace of technological change in the industry, it would not be appropriate to freeze technical details in the contract. As the Florida Commission pointed out in approving Verizon's references to TR 72575 in Verizon's ICA with Covad, Covad could not "provide any specific instances where the application of TR 72575 caused any conflicts" with the standards of the American National Standards Institute (ANSI). *Id.* at 56. Moreover, if ANSI revised its standards at some future date, "one company could be operating with revised ANSI standards where another may not." *Id.* It is, therefore, "logical that a company should have a blueprint as to how a particular ANSI standard . . . is being implemented within its network," *i.e.*, TR 72575. *Id.* Indeed, "[i]t is in Verizon's best interest to ensure that it does not cause interconnection problems with the circuits that are defined within TR 72575 and that are currently provisioned or are in the process of being provisioned for its wholesale or retail customers." *Id.* "The inclusion of the technical reference which acts as a blueprint applying the industry standards will not be a detriment to Covad." *Id.*

orders. As numerous other Commissions have found, it would make no sense for the FCC to have imposed an explicit bar on new orders as of March 11, 2005, but then, in the same order, negated that decision by giving carriers until March 11, 2006 to negotiate implementation of the no-new-adds directive. The Department cannot adopt any provision that purports to stay the FCC's no-new-adds directive, including MCI's DS1 and DS3 loop definitions.

6. "Enterprise Switching"

Enterprise switching was de-listed in the *TRO*. (*See* TRO, ¶ 451 ("we establish a national finding that competitors are not impaired with respect to the DS1 enterprise customers that are served using loops at the DS1 capacity and above." Enterprise switching (unlike mass-market switching) is not subject to a transition period. Verizon gave notice of the discontinuation of enterprise switching in May 2004, and this element was discontinued for most CLECs last August 2004 (that is, the CLECs with clear automatic discontinuation language in their contracts). Verizon's Amendment defines enterprise switching as "Local Switching or Tandem Switching that" the CLEC would use to serve "customers using DS1 or above capacity Loops." Verizon Amendment 2, § 4.7.10. AT&T and CCG use the same definition, and both correctly define enterprise switching as a de-listed service (AT&T Amendment, § 2.8; CCG Amendment, § 2.9) (although, as noted earlier, both would impermissibly allow the Department to re-impose unbundling obligations for enterprise switching).

CCC does not define any type of switching, but addresses the availability of "Local Switching." It states that "Verizon is not required to provide Unbundled Local Switching," except as provided in §§1.2.1 and 7 of CCC's TRRO Amendment. Section 1.2.1, as noted earlier, would allow CCC to keep receiving UNEs, including switching, under the FCC's *UNE Remand Order* and *Line Sharing Orders* until they are "final and non-appealable." But those

Orders became final and non-appealable over two years ago, when the Supreme Court denied certiorari of the USTA I decision,[73] so CCC's language is pointless.

Section 7 of CCC's Amendment relates to its version of the FCC's transition plan in the *TRRO*. Aside from CCC's misinterpretation of the terms of the transition plan, its failure to distinguish between enterprise switching and mass-market switching would incorrectly subject enterprise switching (which was de-listed in the *TRO*) to the FCC's transition period (which was imposed for mass-market switching in the *TRRO*). MCI tries to do the same thing, because its "Local Circuit Switching" definition would encompass both mass-market and enterprise switching. (*See* MCI Amendment, § 12.7.14). But Verizon has the right to discontinue enterprise switching (for all carriers still receiving it) as soon as the *TRO* Amendment is executed. As noted, Verizon gave notice of discontinuation of enterprise switching last May, over 10 months ago. No further notice or transition period is required or justified, so the Department should reject the CLECs' language stating or implying otherwise.

7. "Entrance Facility"

Verizon defines an entrance facility as a "transmission facility (lit or unlit) or service provided between (i) a Verizon wire center or switch and (ii) a switch or wire center of [the CLEC] or a third party." Verizon Amendment 2, § 4.7.11. This definition reflects the FCC's rule – as adopted in the *Triennial Review Order* and left in place in the *TRRO* -- which provides: "*Entrance facilities*. An incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers." 47 C.F.R. § 51.319(e)(2). The *TRO* eliminated all unbundling for entrance facilities,

[73] *United States Telecomm. Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003).

and the *TRRO* confirmed that CLECs had no right to such facilities. Verizon's definition effectuates the FCC's elimination of any unbundling obligation as to entrance facilities.

AT&T agrees with Verizon's definition, but then adds the limitation that entrance facilities do not include "facilities used for interconnection or reciprocal compensation purposes provided pursuant to 47 U.S.C. §251(c)(2)." (AT&T Amendment, § 2.16.) Conversent, CCC, and CCG take the same approach, but they refer more generally to interconnection facilities under section 251(c)(2). (*See* CCG Amendment, § 3.6.1.1; CCC TRRO Amendment, §§ 6.3 & 6.7; Conversent Amendment, § 4.7.11; MCI Amendment, § 10.6.) As a simple drafting matter, however, the interconnection agreements should not confuse the *definition* of entrance facilities with the *obligation* to provide interconnection facilities at cost-based rates. The CLECs' additions are, moreover, inappropriate in this proceeding, because neither the *TRO* nor the *TRRO* changed Verizon's obligations with respect to interconnection facilities. The underlying ICAs already address network architecture, typically in a number of interrelated provisions. It would be inappropriate to pick out one aspect of architecture to address in the ICA amendment – let alone in the definitions section—that has nothing to do with any rule changes in the *TRO* or the *TRRO*.

The CLECs' treatment of entrance facilities in their Amendments also violates the *TRRO* because it would subject entrance facilities to the FCC's transition periods for the embedded base of delisted UNEs. (*See, e.g.*, CCG Amendment, § 3.6.1.1.) The FCC plainly stated that: "We find no justification in the record for making entrance facilities available on a transitional basis." (*TRRO*, ¶141 n. 395.) The Department, of course, cannot draw the opposite conclusion.

8. "Four-Line Carve Out Switching"

Verizon defines "Four-Line Carve Out Switching" as "Local Switching that Verizon is not required to provide pursuant to 47 C.F.R. § 51.319(d)(3)(ii)." Verizon Amendment 2, § 4.7.13. Several CLECs have deleted this term, presumably because the FCC has now eliminated unbundling obligations for all switching. However, the FCC has indisputably eliminated any obligation to unbundle switching that is subject to the Four-Line Carve Out rule, s*ee* 47 C.F.R. 51.319(d)(3)(ii), so a definition of Four-Line Carve Out Switching is still appropriate to avoid any doubt that might result from omitting such switching from the exemplary list of Discontinued Facilities.

9. "FTTP Loop"

Verizon defines an "FTTP Loop" as a Loop "consisting entirely of fiber optic cable" that extends from a wire center to the demarcation point at an end user's premises or to a serving area interface at which the fiber optic cable connects to copper coaxial distribution facilities that are within 500 feet of the demarcation point. Verizon Amendment 2, § 4.7.14. Verizon's definition then adds that, for residential multiple dwelling units, an FTTP Loop extends from the wire center (a) to or beyond the minimum point of entry (MPOE) as defined in 47 C.F.R. § 68.105, or (b) to a serving area interface at which the fiber connects to copper or coaxial distribution facilities that are within 500 feet of the MPOE. *Id.*

AT&T, in particular, seeks to expand Verizon's fiber unbundling obligations by using the term, FTTH ("fiber-to-the-home"), rather than FTTP ("fiber-to-the-premises"). (*See, e.g.*, AT&T Amendment, § 2.19.) This approach ignores the law, particularly the clarifications the FCC made after the *TRO*.

The *TRO* provided that Verizon need not unbundle a loop consisting entirely of fiber in "greenfield" situations. 47 C.F.R. § 51.319(a)(3)(i).[74] Section 51.319(a)(3)(i) as originally attached to the *TRO* spoke in terms of fiber loops that are deployed to "a residential unit." This was a mistake, because in paragraph 201 of the *TRO* the FCC had made clear its loop unbundling rules were customer-neutral: "Thus, while we adopt loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops do not vary based on the customer to be served." Accordingly, the FCC issued errata in which it substituted "residential unit" with the customer-neutral term "end user customer premises."[75] Thus, although the FCC continues to use the term "fiber-to-the-home" (or "FTTH"), the term is a misnomer that perpetuates the inaccurate notion that a fiber loop is exempt from unbundling only if it serves a residence. The correct term is "fiber-to-the-premises" or "FTTP." On reconsideration, the FCC issued two orders that further limit Verizon's unbundling obligations as to fiber loops. First, on August 9, 2004, the FCC ruled that the above FTTP exemption applies to fiber loops serving multiple dwelling units that are "predominantly residential."[76] The *MDU Reconsideration Order* clarified that, in such situations, the FTTP exemption applies if the fiber loop extends to the minimum point of entry at the MDU, regardless of who owns the inside wire beyond that point.

Second, on October 18, 2004, the FCC issued a further order in which it ruled a fiber loop need not reach all the way to the customer premises (or to the MPOE in the case of an MDU) to

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[74] If a fiber loop replaces an existing copper loop that Verizon has not retired, the *TRO* required Verizon to continue to make available the copper loop or, if it retires the copper loop, a voice grade transmission path capable of voice grade service. *Id.*, § 51.319(a)(3)(i).

[75] Errata, *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*, FCC 03-227, at ¶ 38 (Sep. 17, 2003).

[76] Order on Reconsideration, *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*, FCC 04-191, at ¶ 38 (Aug. 9, 2004) (the "*MDU Reconsideration Order*").

qualify for the FTTP exemption from unbundling.[77] The *FTTC Order* provides that the above FTTP exemption applies so long as the fiber loop extends to a point within 500 of the demarcation point at the customer premises (or within 500 feet of the MPOE in the case of a predominantly residential MDU). Fiber loops meeting this definition are sometimes referred to as "fiber-to-the-curb" or "FTTC."

For the sake of simplicity, Verizon's amendment uses only the term "FTTP Loop" and defines it to include any fiber loop falling within the above exemptions from unbundling.

In addition, while the *MDU Reconsideration Order* indicated that the FCC granted unbundling relief as to FTTP loops serving "MDUs that are predominantly residential in nature," 19 FCC Rcd at 15857-58, ¶ 4, the FCC's *FTTC Order* clarified that "incumbent LECs are not obligated to build TDM capability into new packet-based networks or into existing packet-based networks that never had TDM capability." *FTTC Order* ¶ 20. As to dark fiber loops, the *TRRO* found that "[c]ompetitive LECs are not impaired without access to dark fiber loops in any instance." *TRRO* ¶ 5. The combined result of these holdings is that FTTP loops – which are packet-based and contain no TDM capability – are not required to be unbundled to any type of location (regardless whether the location is characterized as mass market, enterprise, residential, business, or otherwise), whether dark or lit. Thus, CLECs are wrong to the extent their

[77] Order on Reconsideration, *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*, FCC 04-248 (Oct. 18, 2004) (the "*FTTC Order*").The revised version of 47 C.F.R. § 51.319(a)(3)(ii) attached to the *FTTC Order* included the same typographical error that had previously been corrected in the errata to the *TRO*. To correct that error, the FCC issued another errata stating that "in rule section 51.319(a)(3)(ii), titled 'New builds,' we replace the words 'a residential unit' with the words 'an end user's customer premises.'" Errata, *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*, 2004 FCC LEXIS 6241, at ¶ 11 (Oct. 29, 2004). Thus, the current version of 47 C.F.R. § 51.319(a)(3)(ii) provides: "An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC deploys such a loop to *an end user's customer premises* that previously has not been served by any loop facility." (emphasis added). Thus, the FCC's exception for FTTP (including FTTC) does not apply just to residential units, but to all "customer premises."

amendments suggest that a fiber-only loop must be unbundled if it is not used for purposes of serving a "mass-market customer."

Finally, AT&T proposes a clause noting that "FTTH Loops do not include such intermediate fiber-in-the-loop architectures as fiber-to-the-curb (FTTC), fiber-to-the-node (FTTN), and fiber-to-the-building (FTTB)." (AT&T Amendment §2.19). That is not the law. As noted above, the FCC has explicitly held that "fiber-to-the-curb" architectures are exempt from unbundling requirements, and the current version of rule 51.319 classifies "fiber-to-the-curb" alongside "fiber-to-the-home." The Department should therefore reject AT&T's language.[78]

10. "House and Riser Cable"[79]

Verizon defines "House and Riser Cable" as "[a] distribution facility in Verizon's network, other than in an FTTP Loop, between the minimum point of entry ('MPOE') at a multiunit premises where an end user customer is located and the Demarcation Point for such facility, that is owned and controlled by Verizon." Verizon Amendment 2, § 4.7.15. This is in accord with the FCC's definition of "inside wire" as "all loop plant owned or controlled by the incumbent LEC at a multiunit customer premises between the minimum point of entry as defined in § 68.105 of this chapter and the point of demarcation of the incumbent LEC's network as defined in § 68.3 of this chapter." 47 C.F.R. § 51.319(b)(2). And as discussed below, Verizon's definition also reflects the FCC's recent determination that the "definition of FTTH loops includes fiber loops deployed to the minimum point of entry (MPOE) of MDUs, regardless of the

[78] Similarly, the CCC's language neglects to implement or fully describe the FCC's clarifications.

[79] The CCC's definition is virtually identical in all substantive respects to Verizon's.

ownership of the inside wiring." *MDU Reconsideration Order*,[80] 19 FCC Rcd at 15856, ¶ 1; *see also id.* at 15857-58, ¶ 4 ("[T]o the extent fiber loops serve MDUs that are predominantly residential in nature, those loops should be governed by the FTTH rules.").

The CLECs' definitions of the term "Inside Wire Subloop" generally conform to Verizon's definition of "House and Riser," except that, by omitting the clarification that Verizon's language contains, they attempt to impose unbundling obligations on the portion of an FTTP loop that extends beyond the minimum point of entry. Accordingly, Verizon's definition, which correctly reflects federal law, should be adopted.

11. "Hybrid Loop"

Verizon defines "Hybrid Loop" as a "local Loop composed of both fiber optic cable and copper wire or cable." Verizon Amendment 2, § 4.7.16. The definition adds that an "FTTP Loop is not a Hybrid Loop." *Id*.

AT&T, however, adds language that is inconsistent with the current law, because it would define a hybrid loop as "including such intermediate fiber-in-the-loop architectures as FTTN and FTTB." AT&T Amendment, § 2.21. Similarly, both MCI and CCC delete Verizon's sentence stating that an "FTTP Loop is not a Hybrid Loop." As noted above, the FCC classifies FTTC-type architectures with FTTP, not with "Hybrid Loops," so the CLECs' definitions are unlawful.

12. "Local Switching"

Verizon defines "Local Switching" to include "[t]he line-side and trunk-side facilities associated with the line-side port, on a circuit switch in Verizon's network (as identified in the LERG), plus the features, functions, and capabilities of that switch." Verizon Amendment, §

[80] Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 15856 (2004) ("*MDU Reconsideration Order*").

4.7.19. Its definition then lists several "features" that are part of the Local Switching element. *Id.*

The CCC proposes to add the following sentence: "The term Local Switching does not include Tandem Switching." CCC Amendment, § 5.11. To the contrary, as noted above, the FCC's Rule 51.319(d) makes clear that "local circuit switching" "*includ[es] tandem switching*." 47 C.F.R. § 51.319(d) (emphasis added).

MCI's definition adds that local Switching "includes the circuit switching functionalities of any switching facility regardless of the technology used by that facility." MCI Amendment, § 12.7.14(iii). AT&T and CCG, likewise, state that local circuit switching may be provided by a packet switch. (AT&T Amendment, § 2.26; CCG Amendment, § 2.25.) Any such language relating to unbundling of packet switching is unlawful. The FCC has never required unbundling of packet switches, and the Department cannot approve language that is contrary to the FCC's rules. *See* Verizon's discussion of packet switching in response to Issue 13, *infra*.

13. "Mass Market Switching"

Verizon's Amendment defines "Mass Market Switching" as "Local Switching or Tandem Switching that, if provided to [the CLEC], would be used for the purpose of serving a [CLEC] end user customer with three or fewer DS0 Loops. Mass Market Switching does not include Four Line Carve Out Switching." Verizon Amendment 2, § 4.7.20. This definition appropriately reflects federal law. AT&T's, MCI's, and CCG's definitions are similar to Verizon's, except that they leave out the reference to the Four-Line Carve-Out (discussed above in response to sub-issue 8). (AT&T Amendment, § 2.28; CCG Amendment, § 2.27; MCI Amendment, § 12.7.16). AT&T also changes the phrase "if provided to" AT&T to "as provided to" AT&T. Verizon's formulation is

more accurate than AT&T's and should be adopted, because it plainly recognizes that unbundled switching has been eliminated.

14. "Packet Switched"

Verizon's Amendment defines "Packet Switched" as the "[r]outing or forwarding of packets, frames, cells, or other data units based on address or other routing information contained in the packets, frames, cells or other data units, or functions that are performed by the digital subscriber line access multiplexers, including but not limited to the ability to terminate an end-user customer's copper Loop (which includes both a low-band voice channel and a high-band data channel, or solely a data channel); the ability to forward the voice channels, if present, to a circuit switch or multiple circuit switches; the ability to extract data units from the data channels on the Loops; and the ability to combine data units from multiple Loops onto one or more trunks connecting to a packet switch or packet switches." Verizon Amendment 2, § 4.7.22. This definition quotes from 47 C.F.R. § 51.319(a)(2)(i).

AT&T's Amendment, § 2.30,[81] omits everything after the parenthetical phrase and adds a "Packet Switch" definition stating that a packet switch "performs functions primarily via packet technologies," but that "[s]uch a device may also provide other network functions (*e.g.*, Circuit Switching.)" (AT&T Amendment, § 2.30.) CCG keeps the language after the parenthetical, but adds the statement: "Circuit switching, even if performed by a Packet Switch, is a network element that Verizon is obligated to provide on an Unbundled Network Element basis." (CCG Amendment, § 2.28.) These definitions and any other CLEC language that suggests Verizon has any unbundling obligation relating to packet switching are unlawful. Packet switching is not and never has been a UNE. The Department cannot impose a packet switching unbundling

[81] The CCC and MCI simply delete Verizon's definition.

obligation, or burden Verizon's right to deploy packet switching, where the FCC has consistently and explicitly declined to do so. (*See, e.g.*, *TRO* ¶ 537. ("on a national basis... competitors are not impaired without access to packet switching"); ¶ 539 ("there do not appear to be any barriers to deployment of packet switches that would cause us to conclude that requesting carriers are impaired with respect to packet switching").)

In fact, in the *TRO*, the FCC expressly encouraged carriers to replace circuit switches with packet switches, even while recognizing that the result of such replacement would be the elimination of the incumbent's unbundling obligations. As the FCC explained, "to the extent there are significant disincentives caused by unbundling of circuit switching, incumbents can *avoid* them by deploying more advanced packet switching." (*Id*. at ¶ 447 n.1365 (emphasis added).) No state Commission has any authority to contradict the FCC's binding judgment in this regard.

In any event, because the FCC has ruled that incumbents have no obligation to unbundle *circuit* switching and has required CLECs to convert UNE-P arrangements to lawful arrangements, there is no basis for requiring Verizon to provide unbundled access to packet switching under any circumstances.

15. "Sub-Loop for Multiunit Premises Access"

Verizon's definition provides that "Sub-Loop for Multiunit Premises Access" is any portion of a loop, other than an FTTP loop, that "is technically feasible to access at a terminal in Verizon's outside plant at or near a multiunit premises." Verizon Amendment 2, § 4.7.24. Verizon adds that "[i]t is not technically feasible to access a portion of a Loop at a terminal in Verizon's outside plant at or near a multiunit premises if a technician must access the facility by removing a splice case to reach the wiring within the cable." *Id.* Verizon's definition tracks

federal law: Rule 51.319 provides that "[t]he subloop for access to multiunit premises wiring is defined as any portion of the loop that it is technically feasible to access at a terminal in the incumbent LEC's outside plant at or near a multiunit premises;" 47 C.F.R. § 51.319(b)(2), and provides that a "point of technically feasible access is any point in the incumbent LEC's outside plant at or near a multiunit premises where a technician can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within to access the wiring in the multiunit premises." *Id.* § 51.319(b)(2)(i).

The CLECs delete the portion of Verizon's definition that excludes FTTP subloops. *See, e.g.*, CCC Amendment, § 5.15; AT&T Amendment, § 2.35; Sprint Amendment §2.31. But Verizon's definition reflects the FCC's determination that the "definition of FTTH loops includes fiber loops deployed to the minimum point of entry (MPOE) of MDUs, regardless of the ownership of the inside wiring." *MDU Reconsideration Order*, 19 FCC Rcd at 15856, ¶ 1; *see also id.* at 15857-58, ¶ 4 ("[T]o the extent fiber loops serve MDUs that are predominantly residential in nature, those loops should be governed by the FTTH rules."). Because such FTTP facilities to predominately residential multiunit premises are treated the same as other fiber facilities, Verizon's definition is appropriate and reflects federal law.

16. "Federal Unbundling Rules"

As discussed in previous sections, all of the CLECs' Amendments cite things other than section 251(c)(3) and the FCC's Rules as sources of unbundling obligations, including merger conditions, state law, section 271, and "applicable law." As Verizon has explained, the FCC has exclusive authority to make the impairment determinations that are required to impose unbundling obligations, and the Department cannot approve any amendment language that suggests otherwise.

B. New CLEC-Proposed Definitions

1. "Applicable Law"

AT&T and the CCG define "Applicable Law" to include Department decisions and orders," as well as section 271. (AT&T Amendment § 2.0; CCG Amendment § 2.1). As discussed, all of the CLECs' references to unbundling under anything other than section 251(c)(3) and Part 51 are unlawful and must be rejected.

2. "Business Line"

The CLECs' definitions of "Business Line" do not belong in the TRO Amendment. First, the FCC has already defined the term in 47 C.F.R. §51.5, and there is no need to repeat that definition in the amendment, let alone try to modify it, as the CLECs do. In this regard, they either fail to include the entire FCC definition (AT&T Amendment, §2.1; Conversent Amendment, §4.7.1) or seek to append to that definition additional, self-serving language (CCG Amendment, §2.2).

In any event, the "Business Line" definition is relevant only for purposes of determining which wire centers satisfy the FCC's non-impairment criteria for high-capacity loops and dedicated transport. As discussed below in response to Supplemental Issue 3, however, the FCC has prescribed the mechanism for exempting wire centers from unbundling, and for ILEC challenges to CLEC orders on a case-by-case basis. The Department cannot prescribe an alternate mechanism in this arbitration.

3. "Circuit Switch"

As discussed, the CLECs' switch and switching definitions and provisions are all intended to allow them to argue that packet switches are subject to unbundling obligations. (*See e.g.* AT&T Amendment, § 2.3; CCG Amendment §2.4.) As Verizon explained in subsections 12

and 14, above, all of this language is unlawful because the ICAs cannot impose packet switching unbundling obligations that the FCC has refused to impose. In any event, neither the *TRO* nor the *TRRO* changed the definition of circuit switches, so there is no need to consider a new definition in this proceeding intended to address *changes* in the FCC's unbundling rules.

4. "Combination"

Neither the *Triennial Review Order* nor the *TRRO* altered the definition of combinations, so there is no need for a new definition in the Amendment. In accordance with governing law, however, Verizon's Amendment explicitly allows only combinations of UNEs obtained "pursuant to 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51," (Verizon Amendment 2, § 3.4.1.1.)

Even though no re-definition of combinations is necessary, the CLECs propose new ones in order to try to impose obligations on Verizon that the FCC does not. AT&T and MCI define "Combination" as "[t]he provision of UNEs in combination with each other, including, but not limited to, the loop and switching combinations and shared transport combination (also known as Network Element Platform or UNE-P) and the combination of loops and Dedicated Transport (also known as an EEL)." (AT&T Amendment, § 2.4; MCI Amendment, § 12.7.2.) In addition, AT&T's definition cross-references other definitions that are themselves erroneous because they would permit continuation of de-listed UNEs under other than section 251(c)(3) and the FCC's Rules. (*See, e.g.*, AT&T Amendment, § 2.9 ("Dedicated Transport," discussed above, in subsection 2.)) CCG's section 4.3 would require Verizon to combine or commingle UNEs (even delisted UNEs) under section 271. These provisions are inappropriate because they assume the continued availability of UNE-P, which the FCC eliminated in the *TRRO*. *See TRRO* ¶ 199. Moreover, the FCC has never required Verizon to combine or commingle UNEs under section 271 at all, and the Department cannot create any such obligations in the amendment. (*See TRO*,

¶ 655 n. 1990, stating that "We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251....We also decline to apply our commingling rule...to services that must be offered pursuant to [section 271]."") Likewise, the Department has held that "Section 271 does not contain the same 'combination' requirement of Section 251, and therefore, Verizon is not required to offer UNE-P under Section 271." *Consolidated Order*, at 55.

The Department should reject the CLECs' unlawful definitions.

5. "Commingling"

AT&T and MCI define "Commingling" as "[t]he connecting, attaching or otherwise linking of a Network Element, or a Combination of Network Elements, to one or more facilities or services that [the CLEC] has obtained at wholesale from Verizon pursuant to any other method other than unbundling under Section 251(c)(3) of the Act, or the combining of a Network Element, or a Combination of Network Elements, with one or more such facilities or services." (AT&T Amendment, § 2.5; MCI Amendment, § 12.7.3.) CCC's definition is similar, except that it would explicitly require commingling under section 271. (CCC Amendment, § 5.2.)

As with their combinations definitions, discussed above, the CLECs' commingling definitions are unlawful because they incorrectly suggest, either explicitly or implicitly, that CLECs might be allowed to commingle UNEs with elements obtained under section 271 or sources of law other than section 251(c)(3) and the FCC's implementing rules. As noted above, in its *Triennial Review Order*, the FCC explicitly declined to require commingling under Section 271. *Triennial Review Order* ¶ 655 n.1990. Even if section 271 references were appropriate in the *TRO* Amendment (and they are not, as Verizon has explained), the FCC has made clear that there are no combinations or commingling obligations under section 271. The Amendment

cannot impose obligations that the FCC has specifically ruled do not exist, so the CLECs' language must be rejected.

6. "Fiber-Based Collocator"

As in the case of the CLECs' proposals to define "Business Lines," there is no need for a contract definition of "fiber-based collocator." The CLECs include this term only to advance their position that the Department should establish a process to identify Verizon wire centers that meet the FCC's non-impairment criteria. As discussed in the context of the "business lines" dispute, the FCC has already established a process under which ILECs will provision and then, if necessary, dispute CLEC orders on a case-by-case basis, so the Department cannot deviate from that process. In any event, "fiber-based collocator" is already defined in the FCC's rules, and the CLECs do not accurately restate that definition.

Moreover, the CLECs seek to define the term "affiliate" for purposes of counting the number of collocators in a wire center to include "carriers that have entered into merger and/or other consolidation agreements, or otherwise announced their intention to enter into the same." (CCG Amendment §2.17; *see also* CCC TRRO Amendment §2.1 (defining "affiliate").) This attempt to count Verizon and MCI (and SBC and AT&T) as a single entity because of their announced merger is contrary to law. Federal statute defines "affiliate" to mean "any person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person." (47 U.S.C. §153(1), applicable here pursuant to 47 C.F.R. §51.5.) Until and unless the Verizon/MCI merger closes, they are independent companies (as their conflicting positions in this arbitration prove), and are required by law to conduct themselves as such. They do not own or control each other, nor are they owned or controlled in

common. They are not affiliates under federal law, and the CLECs cannot override that law in their contracts.

7. "Hot Cut"

AT&T and CCG include the same hot cut definitions[82] and detailed hot cut proposals in their amendments. (AT&T Amendment, § 2.20 & Exs. B & C; CCG , § 2.19 & Exs. A& B.) But no hot cut definitions or other provisions are appropriate for consideration in this proceeding, because they have nothing to do with federal unbundling obligations.[83] When the FCC eliminated switching as a UNE, it explicitly found that the ILECs' — in particular, Verizon's — hot cut processes were satisfactory and specifically rejected CLECs' "speculative" concerns about hot cut procedures. *See* Verizon's response to Issue 3 *supra*; *Triennial Review Order*, 18 FCC Rcd at 17103,17109-10, ¶ 199, 210. The CLECs' hot cut definitions are part of their hot cut proposals, which would guarantee the continued availability of unbundled mass market switching under the parties' agreement until such time as the CLECs' proposed performance metrics and remedies are implemented to their satisfaction.[84] These hot cut proposals are unlawful (and the hot cut definition pointless), because the FCC has unconditionally eliminated the requirement to unbundle mass market switching, and state commissions have no authority to impose their own hot cut conditions before Verizon may cease providing UNE switching. The CLECs proposals would, moreover, specifically override the FCC's mandatory transition plan for UNE-P.

[82] AT&T's § 2.20 and CCG's Amendment, § 2.19 define "Hot Cut" as the "[t]he transfer of a loop from one carrier's switch to another carrier's switch; or from one service provider to another service provider."

[83] The same applies to §8.3.1 of MCI's proposed Amendment, which would require Verizon to provide MCI with basic, large and batch hot cut processes.

[84] *See* AT&T Amendment §3.12.2 and Exhibit A; CCG Amendment § 3.11 and Exhibit A.

As the Department recognized in closing its *TRO* investigation, Verizon cannot be required to provide unbundled access to any item for which the FCC has eliminated unbundling obligations. Under *USTA II*, the decision-making regarding impairment is reserved for the FCC, not the states. Therefore, the CLECs' proposal to condition the elimination of mass-market switching on the Department's approval of hot cut processes and metrics must be rejected, and the Department should not waste time and resources on the issue as part of this proceeding.

Indeed, a U.S. District Court in Michigan earlier this year preempted a Michigan Public Service Commission ("MPSC") hot cut proceeding like the one the CLECs seek in the context of this arbitration.[85] The MPSC had initiated a batch hot cut proceeding pursuant to the *TRO*, but refused to close the proceeding despite the D.C. Circuit's invalidation of the FCC's subdelegation scheme. Instead, in a June 29, 2004 Order, the MPSC adopted an interim batch hot cut process and ordered the parties to negotiate a final batch hot cut process. Michigan Bell appealed that Order, arguing that the hot cut procedures the MPSC mandated were preempted by federal law. *See Michigan Bell*, slip op. at 2-3.

The Court granted summary judgment for Michigan Bell. It explained that the *TRO*'s batch hot cut requirement was vacated along with the FCC's subdelegation of authority to the states to evaluate switching impairment. The Court rejected the defendants' arguments that the MPSC could undertake a hot cut proceeding as a matter of state law:

> Their position is undermined by the simple fact that the state-imposed requirements are at odds with *USTA II* and the subsequent Order and Notice. It is incongruous for the *USTA II* Court to find that Congress prohibited the FCC from passing unbundling decisions to the state, but found the states could seize the authority themselves.[86]

[85] *Michigan Bell Tel. Co., Inc. v. Mich. Pub. Serv. Comm'n and AT&T Comm. of Michigan, Inc. and MCImetro Access Transmission Services, LLC*, No. 04-60128 (E.D. Mich. Jan. 6, 2005) ("*Michigan Bell*").

[86] *Michigan Bell*, slip op. at 13-14. The "Order and Notice" referenced by the Court is the FCC's *Interim Rules Order*.

Consistent with this reasoning, the Indiana Utility Regulatory Commission shut down its hot cut proceeding in January, concluding, as the *Michigan Bell* Court did, that a state cannot maintain a hot cut proceeding linked to an invalid delegation of authority to evaluate impairment: "state decision-making authority to determine whether CLECs are not impaired in the context of the batch cut process is inseparable from the FCC's [vacated] national finding. . . . We do not think it is reasonable to conclude that the delegation to establish a batch hot cut process has survived *USTA II*, since its survival would only be in a form not contemplated by the FCC."[87]

Through litigation of their hot cut proposals, the CLECs hope to convince the Department to seize unbundling authority from the FCC. Their hot cut proposals would require this Department to disregard the FCC's conclusion that "[i]ncumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching;"[88] to override the FCC's transition plan; and to determine for itself when and under what conditions UNE mass-market switching might be discontinued.

The Department cannot adopt such a proposal, and it would be a waste of time and resources to consider it. The Department has enough to do without undertaking the pointless inquiry AT&T proposes into establishing hot cut processes, pricing, performance measures, and remedies as a basis for a *state* non-impairment determination. Indeed, as AT&T's own hot cut proposal indicates, AT&T has deleted its hot cut proposal as to all Verizon states except for Massachusetts and New York. But federal law is no different here than it is elsewhere in Verizon's footprint, so AT&T has no basis for refusing to drop its unlawful hot cut proposal in Massachusetts.

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[87] *Indiana Order*, 2005 Ind. PUC LEXIS 31, at *16-*17.

[88] *TRRO* ¶ 5.

8. "Line Conditioning"

AT&T and CCG add a new definition for "Line Conditioning": "The removal from a copper loop or copper Subloop of any device that could diminish the capability of the loop or Subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders." (AT&T Amendment, § 2.23; CCG Amendment, §2.22.) MCI not only adds a new definition but an explicit new line-sharing obligation, requiring Verizon to condition loops "including, without limitation, the high frequency portion of a copper Loop, to ensure that the copper Loop or copper sub-Loop is suitable for providing xDSL services, including those provided over the high frequency portion of the copper Loop or copper sub-Loop, whether or not Verizon offers advanced services to the end-user customer on that copper Loop or copper sub-Loop." (MCI Amendment, § 7.4.)

The FCC did not create any new line conditioning obligations in the *TRO*, so there is no basis for inserting any new line conditioning definition into the ICAs, and the Department cannot adopt any language, like MCI's, that purports to re-impose a line-sharing obligation that the FCC definitively eliminated in the *TRO*. (*See TRO*, ¶ 261.) As noted above with respect to Issue 1, the FCC recently confirmed in the *BellSouth Preemption Declaratory Ruling* that states could not impose their own line sharing obligations.

9. "Line Splitting"

As discussed below, the FCC's line splitting rules pre-date the *Triennial Review Order,* and these obligations are already embodied in existing ICAs. Accordingly, there is no basis for inserting into the ICAs new provisions related to line splitting, including definitions. (AT&T Amendment, § 2.25, MCI Amendment, § 12.7.13; CCC Amendment, § 5.10.)

10. "Mobile Wireless Service"

In the *TRRO*, the FCC specified that UNEs may not be used "exclusively for the provision of telecommunications services in the mobile wireless and long distance markets," but it did not change the definition of "mobile wireless service." *TRRO*, ¶ 5. Presumably to address the FCC's ruling, the CCC copies the text of the FCC's definition of "mobile wireless service" into the Amendment. Because the FCC has already defined the term, there is no need to add the same language into the ICAs and freeze into the contract a definition the FCC may later change. Section 2.2 of Verizon's Amendment 1 accounts for the FCC's ruling without locking into the ICAs language from the rule that may change.[89]

11. "Predicate Conditions" and "Zone Definitions"

These definitions in §§2.30 and 2.40 of CCG's Amendment are meant, by their terms, to apply in New York only so Verizon assumes CCG agrees to their deletion for Massachusetts ICAs.

12. "Route,"

AT&T, Conversent and MCI define "Route" by quoting Rule 51.319(e) nearly verbatim. (*See* AT&T Amendment, § 2.31; MCI Amendment §12.7.17; Conversent Amendment §4.7.19.) Again, by quoting language from the regulation, the CLECs would lock in the current regulation, though it may change over time. Verizon's amendment already captures the FCC's definition without freezing the exact text of the current regulation.[90]

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[89] Section 2.2 provides: "***CLEC Acronym TXT***" may use a UNE or Combination only for those purposes for which Verizon is required by the Federal Unbundling Rules to provide such UNE or Combination to ***CLEC Acronym TXT***."

[90] As noted earlier, Verizon's definition of "Discontinued Facilities" includes: "DS1 Dedicated Transport, DS3 Dedicated Transport, or Dark Fiber Transport on any route as to which the Federal Unbundling Rules do not require Verizon to provide ***CLEC Acronym TXT*** with unbundled access to such Transport" and "any DS1 Dedicated Transport circuit or DS3 Dedicated Transport circuit that exceeds the number of such circuits that the Federal Unbundling Rules require Verizon to provide to ***CLEC Acronym TXT*** on an unbundled basis on a particular route...."

13. "Routine Network Modifications"

Verizon's definition of "Routine Network Modifications" tracks the FCC's rulings on this issue. In particular, Verizon's definition makes clear that its obligations to perform such modifications are limited to facilities that have already been constructed, and it lists the FCC's examples of routine network modifications from the *TRO*. (Verizon Amendment 2, § 3.5.1.1; *TRO*, ¶¶ 632, 634.) In negotiations, Verizon has also offered to insert language tracking the FCC's description of a routine network modification as an activity "that the incumbent LEC regularly undertakes for its own customers." 47 C.F.R. § 51.319(a)(7)(ii).

In contrast, the CLECs would impose no meaningful limitations on Verizon's network modification obligations. They all fail to recognize the essential "no-new-construction" limitation, and use the most expansive possible language to impose obligations the FCC never did. Conversent defines routine network modifications as "activities that Verizon performs for its own customers," thus purporting to expand Verizon's obligation from activities the ILEC "regularly undertakes for its own customers" to any and all activities it might perform for its customers at any time for any reason. (Conversent Amendment §3.7.1.1.) CCG and AT&T define routine network modifications to include "those prospective or reactive activities that Verizon is required to perform for AT&T and that are of the type that Verizon regularly undertakes when establishing or maintaining network connectivity for its own retail customers." (AT&T Amendment, § 2.32; CCG Amendment, § 2.32.) It is not clear what "prospective or reactive" might mean—which is, no doubt, just the effect the CLECs intended, because they could claim that just about anything is a routine network modification. Moreover, the CLECs attempt to expand Verizon's obligation beyond those activities Verizon would routinely undertake to activate service for its customers to activities it might undertake to "maintain[] network connectivity" for its customers. There is no basis in the *TRO* to require Verizon to

perform network modifications beyond those required to provide access to a facility in the first instance.

There is, likewise, no basis to adopt amendment language specifying that routine network modification costs "are already included in the existing rates and charges" for UNEs, as Conversent proposes. (Conversent Amendment, § 3.7.1.2.) Verizon is entitled to recover its costs of providing services to the CLECs. There is no support for the CLECs' assertions that Verizon's existing UNE rates already recover the costs of the routine network modifications ordered in the TRO. In fact, the Department has not set rates for these new activities. The CLECs' speculation about what existing rates might include provides no basis for the Department to adopt amendment language eliminating Verizon's right to prove its entitlement to routine network modification rates in Verizon's upcoming TELRIC case or elsewhere.

14. "Loop"

The *Triennial Review Order* did not change the pre-existing definition of "loop" in 47 C.F.R. § 51.319(a), so there is no need to modify ICAs to add or amend a definition for this term. MCI again tries to regain de-listed elements by means of a definition. In this regard, MCI's definition of a loop specifies that Verizon must make available "all features, functions, and capabilities" of the loop which "include, but are not limited to, dark fiber...." (MCI Amendment, § 12.7.15.) As discussed above, the FCC has eliminated dark fiber loop unbundling obligations, so MCI's language must be rejected.

15. "Loop Distribution"

AT&T adds this definition for "Loop Distribution:"

> The portion of a Loop in Verizon's network that is between the point of demarcation at an end user customer premises and Verizon's feeder/distribution interface. It is technically feasible to access any portion of a loop at any terminal in Verizon's outside plant, or inside wire owned

> or controlled by Verizon, as long as a technician need not remove a splice case to access the wire or copper of the Subloop; provided, however, near Remote Terminal sites, Verizon shall, upon site-specific request by AT&T, provide access to a Subloop at a splice.

(AT&T Amendment, § 2.27.) This definition is subject to the same objection discussed above: Most of it is concerned not with defining a term, but with describing the substance of an unbundling obligation. The Department should not adopt that sort of confusing and unnecessary "definition."

Similarly, the CCC defines "Subloop Distribution Facility" as "the copper portion of a Loop in Verizon's network that is between the minimum point of entry ('MPOE') at an end user customer premises and Verizon's feeder/distribution interface." **(**CCC Amendment, §5.16.) Verizon does not object to inclusion of that definition.

16. "Packet Switch"

As discussed above in subsections 12 and 15, the CLECs' switching definitions and provisions would impermissibly impose packet switching unbundling obligations on Verizon. In addition to the provisions discussed in those sections, CCG includes a "Packet Switch" definition stating that a packet switch "may also provide other network functions (e.g., Circuit Switching). Circuit Switching, even if performed by a Packet Switch, is a network element that Verizon is obligated to provide on an Unbundled Network Element basis." (CCG Amendment §2.28; *see also* AT&T Amendment §3.5.4.)

This definition is incorrect and contrary to law, insofar as it implies an obligation to unbundle packet switches. In the *Triennial Review Order*, the FCC acknowledged that "using packet-switched technology, carriers can transmit voice, fax, data, video, and other over a single transmission path at the same time," 18 FCC Rcd at 17114, ¶ 220. Nonetheless, the FCC directly

held – without exception – that "we decline to unbundle packet switching as a stand-alone network element." *Id.* at 17321, ¶ 537.

Moreover, the FCC recognized that "to the extent there are significant disincentives caused by unbundling of circuit switching, *incumbents can avoid them* by deploying more advanced packet switching." *Id.* at 17254, ¶ 447 n.1365 (emphasis added). Allowing incumbents to avoid unbundling obligations would give them "every incentive to deploy these more advanced networks, which is precisely the kind of facilities deployment we wish to encourage," while giving "competitors" the "incentives to build comparable facilities to compete." *Id.* That determination contradicts the CLECs' suggestion that packet switches can still be unbundled depending on their "function." *See also infra* Issue 13.h.

Contrary to the CLECs' provisions related to packet switching, Verizon is *not* obligated to provide circuit switching on a UNE basis under any circumstances, no matter what technology is used. The Department must reject any provisions that assume any unbundling obligations relating to packet switching.

17. "UNE-P"

AT&T defines "UNE-P" as "a leased combination of the loop, local switching, and shared transport UNEs." (AT&T Amendment, § 2.38.) There is no basis for adding a definition of "UNE-P" to the ICAs, because the *TRO* and the *TRRO* did not change the definition of UNE-P. Rather, the *TRRO* eliminated UNE-P. The Department should therefore reject AT&T's proposal, as well as any CLEC language indicating that UNE-P remains available (except in accordance with the FCC's transition plan).

18. "Conversion"

The CCC defines "Conversion" as "all procedures, processes and functions that Verizon and CLEC must follow to convert any Verizon facility or service other than an unbundled network element (e.g., special access services) or group of Verizon facilities or services to the equivalent UNEs or UNE Combinations or Section 271 Network Elements, or the reverse. Convert means the act of Conversion." CCC Amendment, § 5.3.

This definition is improper in that it refers to Section 271, which is not pertinent to this proceeding. *See* Verizon's response to Issue 31, *infra*. To the extent that a CLEC wishes to convert special access facilities (which are not covered by section 252) to section 271 elements (also not covered by section 252), the conversion involves non-section-252 elements at all stages. Because such conversions are not subject to section 252, they cannot be addressed in an interconnection agreement negotiated and arbitrated under that section.

19. "Enterprise Customer"

CCC defines "Enterprise Customer" as "any business customer that is not a Mass Market Customer." CCC Amendment, § 5.4. In turn, CCC defines "Mass Market Customer" as "an end user customer who is either (a) a residential customer or (b) a business customer whose premises are served by telecommunications facilities with an aggregate transmission capacity (regardless of the technology used) of less than four DS-0s." *Id*., §5.12.

These definitions are unacceptable because they are improperly used elsewhere in the CCC's Amendment, purportedly to limit unbundling relief to mass market customers and add unbundling obligations as to enterprise customers. *See, e.g.*, Verizon's response to Issue 17(b), *infra*. Because these definitions are part of CCC's integrated approach to maintaining unbundling obligations that do not exist under federal law, they must be rejected.

20. "Section 271 Network Elements"

For all the reasons stated below in response to Issue 31, Section 271 is outside of the scope of this proceeding and no Section 271 obligations can be addressed in the arbitrated amendment. The Department must reject the definition proposed in CCC Amendment, § 5.13.

22. "Tier 1 Wire Center," "Tier 2 Wire Center," "Tier 3 Wire Center"

These terms in the CCG Amendment (at §§2.36, 2.37 and 2.38) are relevant only to the determination of the wire centers that satisfy the FCC's non-impairment criteria for high-capacity loops and transport. As Verizon explains with respect Supplemental Issue 3, below, terms relating to wire center determinations do not belong in the ICAs. In addition, the CCG improperly seeks to use these definitions to impose onerous data-production requirements on Verizon that do not appear in the FCC's rules and that would unlawfully deviate from the process the FCC has established for to address exemptions from unbundling requirements for high-capacity facilities.

23. "Wire Center"

The CCC and AT&T would add a definition of "wire center" to their ICAs by quoting the FCC's definition in 47 C.F.R. §51.5. (CCC TRRO Amendment §2.6; AT&T Amendment 2.39.) This addition is unacceptable for the same reasons discussed in connection with the CLECs' proposals to add definitions of "business lines" and "fiber-based collocator." In short, the "Wire Center" definition relates to determination of which ILEC offices qualify for unbundling relief, which is not an appropriate inquiry in this docket.

Issue 10: **Should Verizon be required to follow the change of law and/or dispute resolution provisions in existing interconnection agreements if it seeks to discontinue the provisioning of UNEs under federal law? Should the establishment of UNE rates, terms and conditions for new UNEs, UNE combinations, or commingling be subject to the change of law provisions of the parties' interconnection agreements?**

Relevant Provisions: None.

A. The first question may be sub-divided into two parts: The *TRRO* and the *TRO*.

First, implementation of the FCC's mandatory transition plan in the *TRRO* does *not* depend on any particular contract language, including any change-of-law provisions in existing agreements. Pursuant to the FCC's explicit directive, the transition plan for the UNEs at issue in the *TRRO* takes effect immediately even though change-of-law processes with respect to the CLEC's embedded base of de-listed UNEs might take up to 12 months (18 months, for dark fiber facilities) under the FCC's plan.

For example, as to high-capacity transport, the FCC held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes." *TRRO* ¶ 143. Furthermore, the "no-new-adds" and transition rate provisions for these facilities begin "as of the effective date of this Order" —that is, March 11, 2005. *Id.* ¶ 145. The FCC emphasized that the transition period applies only to the arrangements in service as of the effective date of the *TRRO*, and that as of that date, its rules "do not permit competitive LECs to add new dedicated transport UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists." *Id.* ¶ 142. As noted above, the FCC made identical findings as to high-capacity loops, *see id.* ¶¶ 195-198, and switching, *see id.* ¶¶ 227-228.

In other words, the FCC clearly held that the *TRRO*, including its transition plans, would be immediately effective on March 11, 2005, and that CLECs would have up to 12 months (18

months for dark fiber) to modify their interconnection agreements to implement the FCC's *permanent* unbundling rules (*e.g.*, to change the list of UNEs available under interconnection agreements, to work out operational details of the transition). The FCC firmly shut the door on any possibility of using the change-in-law process as an excuse to circumvent the *TRRO* itself or to avoid following the relevant transition plans.

If the FCC had meant for the change-in-law process to take precedence over its currently effective binding federal regulations, it would have held that the relevant transition plans would take effect after negotiations, rather than on a date certain (March 11, 2005). Instead, the FCC repeatedly and explicitly stated that the transition period does not apply to the "no-new-adds" prohibition. It would make no sense for the FCC to have ruled that the transition plan "does not permit competitive LECs to add new switching UNEs" as of March 11, 2005 (*TRRO* ¶ 5), but then to have given carriers 12 (or 18) months to complete an amendment before they could implement this prohibition, as the CLECs argue. The CLECs' interpretation would render the FCC's no-new-adds directive meaningless.

Second, as for the *Triennial Review Order* – that is, as to UNEs other than mass market switching and high-capacity loops and transport – the FCC determined that "the section 252 process . . . described above provides good guidance even in instances where a change of law provision exists." 18 FCC Rcd at 17405, ¶ 704. The FCC "expect[ed] that parties would begin their change of law process promptly," that "negotiations and any timeframe for resolving the dispute would commence immediately," and that "a state commission should be able to resolve a dispute over contract language *at least* within the nine-month timeframe envisioned for new contract arbitrations under section 252." *Id.* at 17405-06, ¶ 704 (emphasis added).

Verizon initiated negotiations 18 months ago, and filed for arbitration more than a year ago to modify its agreements to implement the *TRO* rulings.[91] But – because of CLECs' procedural wrangling and delaying tactics – the FCC's timeframe for conclusion of a *TRO* amendment expired without any substantive progress toward an arbitrated amendment, even to implement the *TRO* rulings that have been final and unappealable for many months now.

The Department should reject any suggestion by the CLECs that their contracts require another protracted "negotiation" period or other procedures before the Department may resolve the issues in this arbitration. In fact, the Department has *already* rejected CLECs' efforts to delay this case further, by denying AT&T's motion to reset the procedural schedule and by refusing to expand the schedule to address wire center certification issues.[92] The Department should likewise reject the CLECs' latest attempt to delay implementation of federal law – this time by vague references to change-of-law requirements. Another negotiation period or other dispute resolution procedures would be pointless. After 18 months of negotiations, the parties' basic positions concerning a *TRO* amendment — such as whether Verizon's unbundling obligations are governed exclusively by federal law or whether the states can re-impose unbundling obligations the FCC has eliminated – have not changed.

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[91] Verizon's interconnection agreements with most CLECs (including some the Department has permitted to remain in this arbitration) already contain terms permitting Verizon, upon specified notice, to cease providing UNEs that are no longer subject to an unbundling obligation under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51. Thus, these agreements need not be amended in order to implement Verizon's contractual right to cease providing UNEs that were eliminated by the *TRO* or the *TRRO*. Indeed, amendments may well not be required even for agreements that otherwise appear to call for an amendment to effect a change of law. Verizon does not, by prosecuting this arbitration, waive the argument that it cannot be required under its agreements with any CLEC to continue to provide UNEs eliminated by the *TRO* or the *TRRO*. This arbitration should nevertheless proceed in order to eliminate any doubt regarding Verizon's right to cease providing such UNEs.

[92] *See*, respectively, *Arbitrator Ruling on AT&T's Motion to Amend the Procedural Schedule and for Extensions of the Judicial Appeal Period; and on Verizon's Motion for Leave to Amend the Petition for Arbitration*, dated February 7, 2005 ("Arbitrator Ruling on Motion to Amend Schedule") and *Arbitrators' Ruling on Motion to Expand Procedural Schedule*, dated March 30, 2005.

B. The second question in Issue 10 involves whether "the establishment of UNE rates, terms and conditions for *new* UNEs, UNE combinations, or commingling be subject to the change of law provisions of the parties' interconnection agreements." The FCC has not established any new UNEs in the *TRO* or the *TRRO*. In the unlikely event that it does, however, Verizon's Amendments specify that the rates, terms, and conditions governing such new services will be as provided by applicable tariff, or, in the absence of a tariff, as mutually agreed by the parties. (Amendment 1, § 2.3; Amendment 2, § 2.3.) As Verizon discussed in response to Issue 2, *supra*, new unbundling obligations cannot be implemented in the absence of any rates or terms for their provision.

Issue 11: How should any rate increases and new charges established by the FCC in its final unbundling rules or elsewhere be implemented?

Relevant Provisions: Verizon Amendment 1, § 3.5.

Verizon's Amendment 1 provides that Verizon may implement any rate increases or new charges established by the FCC by issuing a schedule of rates, for effect no earlier than the date established by the FCC. *See* Verizon Amendment 1, § 3.5. In negotiations, Verizon has proposed language to more specifically recognize Verizon's right to use a true-up, as specified in the *TRRO*, to apply any rate increases.[93] Section 3.5 also makes clear that any new rates prescribed by the FCC shall be "in addition to, and not in limitation of," any rate increases imposed by this Department or that are otherwise lawfully applicable under the Amended Agreement or tariff. *Id.*

[93] The new language reads as follows: "Verizon may, but shall not be required to, use a true-up to apply the rate increases or new charges effective as of the date indicated in the schedule issued by Verizon. The Parties acknowledge that Verizon, prior to the Amendment Effective Date, may have provided ***CLEC Acronym TXT*** such a schedule identifying rate increases or new charges for certain Discontinued Facilities, and that no further notice or schedule is required for those rate increases or new charges to take effect."

Many, if not most, of Verizon's existing interconnection agreements already give automatic effect to any FCC-ordered rate increases, so Verizon's approach in section 3.5 is consistent with existing practice. In addition, Verizon is entitled to a true-up, back to March 11, 2005, to collect the rates prescribed in the *TRRO* (to the extent particular contracts may not permit automatic implementation of rate increases). *See TRRO* ¶ 145 n.408, ¶ 198 n.524, ¶ 228 n.630. As discussed, the CLECs cannot extend the FCC's mandatory transition periods by failing to cooperate with conversion of the embedded base or for any reason, so they cannot deny Verizon the right to a true-up (whether or not the amendment specifically refers to a true-up). The CLECs largely agree that where the FCC has specifically prescribed rate increases, those increases should go into effect on the FCC's terms, so they should have no disagreement with Verizon's rate implementation language. Indeed, because *TRRO* issues were added to this proceeding at the CLECs' request, they should have no objection to implementation of the rates mandated in that order.

Issue 12: How should the interconnection agreements be amended to address changes arising from the *TRO* with respect to commingling of UNEs or Combinations with wholesale services, EELs, and other combinations? Should Verizon be obligated to allow a CLEC to commingle and combine UNEs and Combinations with services that the CLEC obtains wholesale from Verizon?

Relevant Provisions: Verizon Amendment 2, § 3.4.

Verizon's proposed language provides that Verizon will not prohibit commingling of UNEs with wholesale services (to the extent it is required under federal law to permit commingling), Verizon Amendment 2, § 3.4.1.1. The Amendment also provides that Verizon will perform the functions necessary to allow CLECs to commingle or combine UNEs with wholesale services. *Id.* The rates, terms, and conditions of the applicable access tariff or separate non-251 agreement will apply to the wholesale services. *Id.* To offset Verizon's costs

of implementing and managing commingled arrangements, a nonrecurring charge will apply to each UNE circuit that is part of a commingled arrangement. *Id.* Ratcheting — creating a new pricing mechanism that would charge CLECs a single, blended rate for the commingled facilities, rather than the charges for its component parts — "shall not be required." *Id.* Verizon may exclude its performance from standard provisioning measures and remedies, if any, since any such measures and remedies were established before Verizon became subject to the new requirements under the *Triennial Review Order* and thus do not account for the additional time and activities associated with those requirements. These provisions are consistent with the rules adopted in the *TRO*, which the FCC did not modify in the *TRRO*. *See* 47 C.F.R. § 51.315; *Triennial Review Order*, 18 FCC Rcd at 17343-46, ¶¶ 581-582.

AT&T (joined by CCC, CTC, and WilTel) contends that CLECs should not be required to certify, on a circuit-by-circuit basis, that any combined facilities satisfy the eligibility criteria that the FCC established in the *TRO* and reaffirmed in the *TRRO*. *TRRO* ¶ 234 n.659 ("[W]e retain our existing certification and auditing rules governing access to EELs."). This argument is without foundation. As the FCC held, "We apply the service eligibility requirements *on a circuit-by-circuit basis*, so *each DS1 EEL* (or combination of DS1 loop with DS3 transport) *must satisfy the service eligibility criteria*." *Triennial Review Order*, 18 FCC Rcd at 17355, ¶ 599 (emphasis added). Verizon's language exactly tracks the *Triennial Review Order*.

Issue 13: Should the ICAs be amended to address changes, if any, arising from the *TRO* with respect to:
a) Line splitting;
b) Newly built FTTP, FTTH, or FTTC loops;
c) Overbuilt FTTP, FTTH, or FTTC loops;
d) Access to hybrid loops for the provision of broadband services;
e) Access to hybrid loops for the provision of narrowband services;
f) Retirement of copper loops;
g) Line conditioning;
h) Packet switching;

i) Network Interface Devices (NIDs);
j) Line sharing?

This proceeding is intended to address parties' disputes about how to implement the changes in unbundling obligations adopted in the *TRO* and the *TRRO*. Thus, Verizon's Amendment 2 incorporates language to address, for example, commingling and FTTP loops. But the Department should not entertain CLEC proposals that relate to unbundling obligations that predate the *Triennial Review Order*, including line splitting, line conditioning, and NIDs (among other issues). This arbitration is not a free-for-all for parties to propose changes to terms in their underlying agreements that they may not like. CLEC proposals to litigate non-*TRO* items fail to acknowledge that existing agreements already address these issues. Their proposals likewise fail to include standard operational provisions, including recurring and non-recurring charges, which have already been negotiated or arbitrated under existing agreements. To the extent any CLECs have "holes" in their agreements, Verizon has offered to negotiate appropriate provisions with them. But the scope of this proceeding is limited to modification of the ICAs in order to effectuate the changes in unbundling obligations brought about by the *TRO* and the *TRRO*. This reasoning informs Verizon's discussion of the various sub-issues presented here.

a) Line splitting

Relevant Provisions: None.

As it had in earlier orders, in the *Triennial Review Order*, the FCC continued to find that ILECs must provide line splitting, which is defined as describing the "scenario where one competitive LEC provides narrowband voice service over the low frequency of a loop and a second competitive LEC provides xDSL service over the high frequency portion of that same loop." 18 FCC Rcd at 17130, ¶ 251. This requirement merely reaffirmed the FCC's line splitting requirement adopted in 2001. *Id.* ("The Commission previously found that existing

rules require incumbent LECs to permit competing carriers to engage in line splitting . . . . We reaffirm those requirements.")[94]

Because the requirement to provide line splitting is not a new obligation – *see, e.g.*, *Phase III-B Clarification Order*[95] (noting, at 2-3, that the Department enforces the FCC's line splitting rules) – there is no basis for addressing this issue in this arbitration. For this reason, Verizon has not proposed any language with respect to line splitting in its amendment. Moreover, to the extent any CLEC may lack line splitting provisions in its existing contract, Verizon's standard line splitting amendment is available, and has been available since 2001. Numerous CLECs across Verizon's region have signed this amendment. No CLEC can complain that litigation of this issue here is necessary to implement their line-splitting rights.

b) Newly built FTTP loops

Relevant Provisions: Verizon Amendment 2, § 3.1.

In the *Triennial Review Order*, the FCC found that CLECs are not impaired, on a national basis, without unbundled access to "loops consisting of fiber from the central office to the customer premises," known as fiber-to-the-premises or FTTP loops. 18 FCC Rcd at 17110, ¶ 211. Thus, the FCC held that "[i]ncumbent LECs do not have to offer unbundled access to newly deployed or 'greenfield' fiber loops." *Id.* at 17142, ¶ 273. The FCC has clarified that this rule applies to multiple dwelling units ("MDUs") that are primarily residential. *See generally MDU Reconsideration Order*. And the FCC has also extended this relief to "fiber-to-the-curb"

[94] *See also* Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 2101, 2109, ¶ 16 (2001) ("[W]e clarify that existing [FCC] rules support the availability of line splitting.").

[95] Letter Order Dismissing Remaining Issues, *Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in M.D.T.E. No. 17, filed with the Department by Verizon New England, Inc. d/b/a Verizon Massachusetts on May 5 and June 14, 2000, to become effective October 2, 2000*, D.T.E. 98-57 Phase III-B (D.T.E. Feb. 21, 2001) ("*Phase III-B Clarification Order*").

loops as well, defined as "local loop[s] consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises or, in the case of predominantly residential MDUs, not more than 500 feet from the MDU's MPOE." *FTTC Order*, 19 FCC Rcd at 20311, App. B - Final Rules; 47 C.F.R. § 51.319(a)(3)(i)(B).[96]

Verizon's Amendment 2 accordingly provides simply that "in no event shall [the CLEC] be entitled to obtain access to an FTTP Loop (or any segment or functionality thereof) on an unbundled basis" where the FTTP loop is newly built to serve a new customer. Verizon Amendment 2, § 3.1. This language is consistent with the FCC's rules, and no CLEC substantively disagrees. *See*, *e.g.*, AT&T Amendment § 3.2.2.1 (acknowledging that Verizon need not provide access to any new FTTP loop); CCC Amendment, § 1.3.1.[97] Verizon's language should therefore be adopted.

c) Overbuilt FTTP loops

Relevant Provisions: Verizon Amendment 2, § 3.1.

Although the FCC eliminated unbundling obligations for new FTTP loops, it held that ILECs must offer unbundled access to FTTP loops "for narrowband services only," in so-called "fiber loop overbuild situations" — that is, where the ILEC builds a new FTTP loop to serve a customer currently served by a copper loop and then "elects to retire existing copper loop[]." *Triennial Review Order*, 18 FCC Rcd at 17142, ¶ 273. If the ILEC "keep[s] the existing copper

[96] The CCC states that it "has not proposed terms related to FTTC loops because the FCC's rules with respect to such facilities were not adopted in the *TRO* and were not made part of Verizon's request for arbitration." Joint Issues Matrix, Issue 13, position of CCC at 44-45. First, Verizon's Amendment and arbitration petition did, in fact, put at issue the scope of the FCC's FTTP rules (*see, e.g.*, Amendment 1, § 4.7.9 (defining FTTP Loops); Amendment 2, § 4.7.14 (same)). Second, there is no justification for ignoring governing federal law, and the Department has ruled that the scope of this proceeding includes issues raised by the *TRRO*.

[97] The CCC urges that "the *TRO* only relieved Verizon of offering FTTH loops to Mass Market Customers," Joint Issues Matrix, Issue 13, position of CCC at 44. This position is incorrect, as explained above in Verizon's response to Issue 9(16) (definition of "Sub-Loop for Multiunit Premises Access").

loop connected to a particular customer," it does not have to unbundle the narrowband portion of the FTTP loop. *Id.* at 17144-45, ¶ 277.

Verizon's language accordingly provides that if Verizon deploys an FTTP loop to replace a copper loop used for a particular end-user customer, and if Verizon retires that copper loop such that there are no other copper loops available to serve that customer, then Verizon will provide "nondiscriminatory access on an unbundled basis to a transmission path capable of providing DS0 voice grade service to that end user's customer premises." Verizon Amendment 2, § 3.1. Verizon's language is thus consistent with the FCC's determinations and should be adopted. In particular, Verizon's language correctly refers to section 251(c)(3) and the FCC's rules as the authority controlling Verizon's obligations, while language proposed by AT&T and MCI inaccurately paraphrases the FCC's requirements.

d) Hybrid loops for broadband

Relevant Provisions: Verizon Amendment 2, § 3.2.2.

In constructing loops, carriers often install "feeder plant" made of fiber. This fiber feeder carries traffic from the carrier's central office to a centralized field location called a "remote terminal." From the remote terminal, traffic then travels over "distribution plant" (typically made of copper) to and from customers. *Triennial Review Order*, 18 FCC Rcd at 17112, ¶ 216. The result is a "hybrid loop," *i.e.*, those "local loops consisting of both copper and fiber optic cable (and associated electronics, such as DLC systems)." *Id.* at 17149, ¶ 288 n.832.

In the *Triennial Review Order*, the FCC "decline[d] to require incumbent LECs to unbundle the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market." *Id.* ¶ 288. Nor do ILECs have to provide "unbundled access to any electronics or other equipment used to transmit packetized

information over hybrid loops, such as the xDSL-capable line cards installed in DLC systems or equipment used to provide passive optical networking (PON) capabilities to the mass market." *Id.* The FCC found that "incumbent LECs remain obligated, however, to provide unbundled access to the features, functions, and capabilities of hybrid loops that are not used to transmit packetized information," *i.e.*, a "complete transmission path over their TDM networks." *Id.* at 17149, ¶ 289. The FCC noted that certain DS1 and DS3 services "are non-packetized, high-capacity capabilities provided over the circuit switched networks of incumbent LECs," and that "[t]o provide these services, incumbent LECs typically use the features, functions, and capabilities of their networks as deployed to date – *i.e.*, a transmission path provided by means of the TDM form of multiplexing over their digital networks." *Id.* at 17152, ¶ 294.

Verizon's language accordingly provides that, if a CLEC requests a hybrid loop for broadband services, Verizon will provide "the existing time division multiplexing features, functions, and capabilities of that Hybrid Loop (but no features, functions or capabilities used to transmit packetized information) to establish a complete time division multiplexing transmission path between the main distribution frame (or equivalent) in a Verizon wire center service an end user to the demarcation point at the end user's customer premises." Verizon Amendment 2, § 3.2.2.

AT&T's counter-proposal, by contrast, is not consistent with binding federal law. First, AT&T's proposed § 3.2.3.1 does not clearly limit Verizon's obligations to those imposed by section 251(c)(3) and the FCC's implementing regulations but instead includes an impermissible reference to "other Applicable Law." Second, AT&T omits the FCC's limitation that Verizon is only required to unbundle *existing* time division multiplexing features. *See FTTC Order*, 19 FCC Rcd at 20303-04, ¶ 20 ("we clarify that incumbent LECs are not obligated to build TDM

capability into new packet-based networks or into existing packet-based networks that never had TDM capability"). Furthermore, AT&T fails to include important conditions governing the use of all UNEs, as set forth in Section 2 of Verizon's proposed Amendment.[98]

Verizon's language is fully consistent with the FCC's rules, and should be adopted.

e) Hybrid loops for narrowband services

Relevant Provisions: Verizon Amendment 2, § 3.2.3.

The FCC limited ILECs' unbundling obligations to the "features, functions, and capabilities of hybrid loops that are *not* used to transmit packetized information." *Triennial Review Order*, 18 FCC Rcd at 17149, ¶ 289 (emphasis added). Under the new rules, if a CLEC requests a hybrid loop for the purpose of providing narrowband service, "we require incumbent LECs to provide an entire non-packetized transmission path capable of voice-grade service (*i.e.*, a circuit equivalent to a DS0 circuit) between the central office and customer's premises." *Id.* At 17153, ¶ 296. The FCC "limit[ed] the unbundling obligations for narrowband services to the TDM-based features, functions, and capabilities of these hybrid loops." *Id.* at 17154, ¶ 296. Incumbent LECs, moreover, "may elect, instead, to provide a homerun copper loop rather than a TDM-based narrowband pathway over their hybrid loop facilities if the incumbent LEC has not removed such loop facilities." *Id.*

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[98] Here, too, the CCC claims that "the *TRO* only relieved Verizon of offering Hybrid Loops to Mass Market Customers." Joint Issues Matrix, Issue 13, position of CCC. This is incorrect, as the FCC's loop rules apply across the board. *See* Verizon's Response to Issue 17, *infra*, and *Triennial Review Order*, ¶¶ 209-210.

In negotiations, Sprint has proposed to add the following italicized text here, and then adds an explanatory comment:

> . . . .Verizon shall provide ***CLEC Acronym TXT*** with unbundled access under the Amended Agreement to the existing time division multiplexing features, functions, and capabilities of that Hybrid Loop (but no features, functions or capabilities *of that Hybrid Loop* that is used to transmit packetized information) . . . ."

Sprint Amendment, § 3.3.2. Verizon is willing to accept that change.

Verizon's language accordingly provides that if a CLEC seeks to provide narrowband services via a hybrid loop, Verizon may either provide (a) a "spare home-run copper Loop serving that customer on an unbundled basis," or (b) a "DS0 voice-grade transmission path between the main distribution frame (or equivalent) in the end user's serving wire center and the end user's customer premises, using time division multiplexing technology." Verizon Amendment 2, § 3.2.3. By contrast, although the FCC says that "Incumbent LECs may elect" to provide a copper rather than a TDM-based narrowband pathway over a hybrid loop, AT&T's language would *require* Verizon to provide a copper loop at AT&T's discretion. AT&T Amendment, § 3.2.3.2. The *Triennial Review Order*, however, plainly gave Verizon — not the CLECs — the choice whether to use a spare copper loop. Furthermore, as with AT&T's proposed § 3.2.3.1, § 3.2.3.2 improperly refers to "other Applicable Law" which, as explained, AT&T defines to include state law and section 271 obligations, which have nothing to do with the section 251 unbundling obligations the parties are litigating here. (Similarly, CCC's Amendment removes any reference to section 251, CCC Amendment, § 1.4.3.) In addition, AT&T's reference to the "entire hybrid loop capable of voice-grade service" is misleading, because it is undisputed that a CLEC may not demand access to the "entire" loop, but only to a voice-grade transmission path.

Verizon's language fully accords with the FCC's rules, and should be adopted.

f) Retirement of copper loops

Relevant Provisions: None.

In the *TRO*, the FCC stated that "when a copper loop is retired and replaced with a FTTH loop, we allow parties to file objections to the incumbent LEC's notice of such retirement." 18 FCC Rcd at 17147, ¶ 282. Likewise, the FCC's rules provide that "Prior to retiring any copper

loop or copper subloop that has been replaced with a fiber-to-the-home loop, an incumbent LEC must comply with: (A) The network disclosure requirements set forth in section 251(c)(5) of the Act and in § 51.325 through § 51.335; and (B) Any applicable state requirements." 47 C.F.R. § 51.319(a)(3)(iii).

Verizon will provide notice of its intention to retire copper facilities in a manner consistent with the FCC's rules. AT&T and the CCC, however, propose that Verizon be required to provide 180 days notice before retiring copper facilities, AT&T Amendment, § 3.2.2.7; CCC Amendment, § 1.5.4.1, which departs from the FCC's notice requirement (47 C.F.R. § 51.333(b)(ii) & (f)) establishing the applicable timetable and procedures. Under the FCC's rules, Verizon may provide notice to affected CLECs and then file a certification with the FCC; the FCC then issues a public notice. *See id.* In the absence of an objection filed within 10 days, the notice is deemed approved on the 90th day after the release of the FCC's public notice of filing. (Such objections are likewise deemed denied if they have not been ruled upon within the 90-day period.).

The CLEC proposals depart from the FCC's rules in other respects as well. The CCC would require CLEC approval before a copper loop is retired, *see* CCC Amendment, § 1.5.4.1.2, but the FCC regulation bars such a requirement. AT&T's proposed section 3.2.2.6 refers generally to "copper subloops," even though the FCC has specifically held that its regulations do not apply to "copper feeder plant." *Triennial Review Order*, 18 FCC Rcd at 17147, ¶ 283 n.829. And AT&T's sections 3.2.2.7, 3.2.2.8, and 3.2.2.9 contain additional onerous and unreasonable requirements that are not in the FCC's regulations.[99]

[99] MCI's language is also objectionable insofar as it requires not only compliance with the federal rules governing retirement, but also "any applicable requirements of state law" without regard for whether that state law (if any) might be preempted by the federal rules. MCI Amendment, § 7.3.

As noted above, the MA DTE No. 17 Tariff already refers to the operative FCC regulations at issue here and requires Verizon to comply with them.[100] The CLEC provisions cannot alter binding FCC rules as incorporated by Verizon's tariff. To the contrary, the FCC's expedited procedures were adopted in recognition of the significant consumer benefit to be derived from network modernization. Any provision that discourages or delays such investment would be not only unlawful, but also contrary to sound policy.

g) Line conditioning

Relevant Provisions: None.

In the *Triennial Review Order*, the FCC did not adopt any new rules related to line conditioning. Instead, it directly stated that "we readopt the [FCC's] previous line and loop conditioning rules for the reasons set forth in the *UNE Remand Order*.[101]" 18 FCC Rcd at 17378-79, ¶ 642 (citing *UNE Remand Order*, 15 FCC Rcd at 3775, ¶ 172). The Department has already addressed loop conditioning by Verizon under the FCC's rules. *See, e.g.*, *Phase III-B Clarification Order* at 2 ("The Department grants this part of Verizon's motion and clarifies its loop conditioning rulings to permit Verizon to charge CLECs to remove bridged tap from CSA-compliant loops . . . ."). Because the requirement to provide line conditioning is not a new obligation, there is no need to address this issue in this generic proceeding to address changes of law. As in the case of line splitting, Verizon has offered line conditioning terms in its standard contract for years. To the extent particular CLECs' agreements (if any) omit such terms,

[100] To the extent particular interconnection agreements (if any) do not refer to the MA DTE No. 17 Tariff, an amendment still should be unnecessary, as Verizon's standard interconnection agreement in Massachusetts (at Section 28, "Notice of Network Changes") already addresses such matters, and requires Verizon to comply, *inter alia*, with 47 C.F.R. §§ 51.325 through 51.335.

[101] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3835, 3840, ¶¶ 306, 313 (1999) ("*UNE Remand Order*"), *petitions for review granted*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

Verizon has offered to negotiate with such CLECs outside of this arbitration to incorporate the terms into their agreements.

h) Packet Switching

Relevant Provisions: Verizon Amendment 2, § 3.2.1.

With respect to packet switching, whether used in conjunction with hybrid loops or otherwise, the FCC found, "on a national basis, that competitors are not impaired without access to packet switching, including routers and DSLAMs," and accordingly "decline[d] to unbundle packet switching as a stand-alone network element." *Triennial Review Order*, 18 FCC Rcd at 17321, ¶ 537 (footnotes omitted). Accordingly, Verizon's proposed amendment simply clarifies that, in the case of hybrid loops, CLECs "shall not be entitled to obtain access to the Packet Switched features, functions, or capabilities of any Hybrid Loop on an unbundled basis." Amendment 2, § 3.2.1. Verizon's language is consistent with the FCC's rules, and should be adopted.

Various CLECs have proposed, on the other hand, that they should gain access to packet switching that is allegedly used to provide circuit switched services. CCC's Amendment asserts that "[w]here Verizon is required to provide unbundled Local Switching, it is not relieved of such requirement by virtue of its performance of local switching functionality using facilities other than a circuit switch." CCC Amendment, § 1.1.2; *see also* AT&T Amendment, § 2.26 (defining "Local Circuit Switching" to include packet switches) and §3.5.4 (claiming that "Local Circuit Switching, even if performed by a Packet Switch, is a network element that Verizon is obligated to provide on an Unbundled Network Element basis."); CCG Amendment §2.25 and 2.28 (same).

The CLECs' argument is squarely precluded by federal law. The FCC has always held that packet switching need not be unbundled: in the *Local Competition Order*, the FCC expressly "decline[d] to find, as requested by AT&T and MCI, that incumbent LECs' packet switches should be identified as network elements" that must be unbundled.[102] In the *UNE Remand Order*, the FCC again determined that it would "not order unbundling of the packet switching functionality as a general matter," creating only "one limited exception" that is not relevant here.[103] For this reason, Verizon's current interconnection agreements, virtually all of which were approved before release of the *TRO*, do not obligate Verizon to unbundle packet switching. The *TRO* confirms that any such order would violate federal law. The FCC again "decline[d] to unbundle packet switching as a stand-alone network element," finding, "on a national basis, that competitors are not impaired without access to packet switching." *Triennial Review Order*, 18 FCC Rcd at 17321, ¶ 537; *see id.* at 17323, ¶ 539 ("there do not appear to be any barriers to deployment of packet switches that would cause us to conclude that requesting carriers are impaired with respect to packet switching"). The FCC also found that its "limited exception to its packet-switching unbundling exemption is no longer necessary." *Id*. at 17321, ¶ 537. Where the FCC has expressly found that competitors are not impaired without UNE access to a network element, state commissions have no authority to require unbundling of that element; any state law purporting to require unbundling would be preempted. *See id.* at 17098-01, ¶¶ 191-195.

Furthermore, the FCC has expressly rejected the argument made by the CLECs here, that packet switching should be unbundled if Verizon uses it to provide circuit switching functionality. After the FCC in the *UNE Remand Order* had said for a second time that packet

[102] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15713, ¶ 427 (1996) ("*Local Competition Order*") (subsequent history omitted).

[103] 15 FCC Rcd at 3835, 3840, ¶¶ 306, 313.

switches were not subject to unbundling, MCI filed a petition for clarification of that Order in which it argued the following:

> Packet switched technology can be used to provide voice services as well as high-speed Internet access. . . . Given the [FCC]'s expressed policy of implementing the 1996 Act in a technology-neutral fashion, it cannot be the [FCC]'s position that voice traffic that is transmitted through a new type of switch is no longer subject to the 1996 Act's unbundling obligation. Indeed, no rational distinction between circuit-switched voice service and packet-switched voice service can be countenanced by the Act. The [FCC] should clarify that packet switching must be unbundled as a network element to the extent that it is used to provide narrowband or voice service.[104]

However, citing precisely to the page of MCI's petition for clarification that is quoted above, the FCC flatly rejected MCI's request to make packet switches subject to unbundling to the extent they are used to provide circuit switching: "Because we decline to require unbundling of *packet-switching equipment*, we deny WorldCom's petition[ ] for . . . clarification requesting that we unbundle packet-switching equipment . . . ." *Triennial Review Order* ¶ 288 n.833 (emphasis added) (citing MCI Petition for Clarification at 2).

As if that were not clear enough, the FCC went on to make this point even clearer by explicitly holding that the replacement of a circuit switch with a packet switch eliminates any unbundling requirement – even if the *sole purpose* of such deployment is to avoid having to continue to provide unbundled switching.

> [T]o the extent that there are significant disincentives caused by the unbundling of circuit switching, incumbents can avoid them by deploying more advanced packet switching. This would suggest that incumbents have every incentive to deploy these more advanced networks, which is precisely the kind of facilities deployment we wish to encourage.

[104] Petition of MCI Worldcom, Inc. for Clarification, CC Dkt. No. 96-98, at 2-3 (filed Feb. 17, 2000) (footnote omitted), at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6010955528.

Id. ¶ 446 n.1365. This Department has no authority to contradict the FCC's binding judgment and policy in this regard.

i) Network Interface Devices (NIDs)

Relevant Provisions: None.

Network interface devices, or NIDs, were included in the initial set of UNEs in 1996. The FCC defined "NID" as "a cross-connect device used to connect loop facilities to inside wiring." *Local Competition Order*, 11 FCC Rcd at 15697, ¶ 392 n.852. The FCC later modified the definition of a NID "to include all features, functions, and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism." *UNE Remand Orde*r, 15 FCC Rcd at 3801, ¶ 233. In the *Triennial Review Order*, the FCC did not change, but merely reaffirmed, its previous rules: "We conclude that the NID should remain available as an UNE as the means to enable a competitive LEC to connect its loop to customer premises inside wiring." 18 FCC Rcd at 17196, ¶ 356. In addition, Verizon's MA DTE No. 17 Tariff (at 5.1.1.A. and 12.1.1.A.1) and its model ICA in Massachusetts already include terms and conditions for access to the NID, both as a stand-alone element and as needed for access to loops or subloops. Because Verizon's contracts and tariff already address the current NID requirements, which did not change with the *TRO*, there is no reason to address them in this proceeding. Verizon, therefore, has not proposed any new language regarding its pre-existing obligation to provide access to NIDs as UNEs, and none is necessary.

j) Line Sharing

Relevant Provisions: Verizon Amendment 1 § 4.7.3.

In the *Triennial Review Order*, the FCC determined that CLECs are not impaired without unbundled access to the high-frequency portion of the loop and eliminated ILECs' obligation to provide access to line-sharing as a UNE. *See Triennial Review Order*, 18 FCC Rcd at 17132-33, ¶ 255. The FCC also established a transition plan to govern treatment of existing line-sharing arrangements and CLECs' right to establish new line-sharing arrangements. *See id.* at 17137-39, ¶¶ 264-265. Even as to those on-going obligations, the FCC reaffirmed that CLECs may obtain unbundled access to the high frequency portion of the loop ("HFPL") only where "the incumbent LEC is providing, and continues to provide, analog circuit-switched voiceband services on the particular loop." *Id.* at 17140, ¶ 269.

In Verizon's Amendment 1, Verizon identifies line sharing as a "Discontinued Facility" in § 4.7.3. This suffices to bring the agreements into accord with federal unbundling rules. To the extent that the FCC mandated a transition period or grandfathering for pre-existing line sharing arrangements, *Triennial Review Order*, 18 FCC Rcd at 17137-39, ¶¶ 264-265, Verizon is required to comply with this transition plan without an amendment, and regardless of any change-of-law provisions in its existing agreements. In addition, the FCC adopted the line sharing transition plan pursuant to 47 U.S.C. § 201 — not § 251 — so there are no grounds, in any event, to incorporate such requirements into the Massachusetts ICAs as certain CLECs propose. *See*, *e.g.*, AT&T Amendment, § 3.2.9; CCC Amendment, §§ 1.5.1.1, 1.5.1.2; CCG Amendment §3.4.1.[105] Because interconnection agreements are designed to implement the requirements of section 251 and the FCC's rules adopted thereunder – not other provisions of federal law – the agreements cannot address any transitional arrangements governing line sharing

[105] MCI proposes to amend the definition for "Discontinued Element" so as to add the following italicized phrase: "Line sharing *(subject, however, to the FCC's rules regarding the transition of Line Sharing)*." MCI Amendment, § 12.7.5. As stated above, Verizon must and will continue to comply with any FCC transitional rules, which do not depend for their implementation upon amendment of the interconnection agreements.

adopted under § 201. Verizon has and will continue to comply with the FCC's line sharing transition plan, and has reached a number of commercial line sharing agreements under which Verizon will provide the CLECs with line sharing in Massachusetts and all other states outside of the 251/252 process.

In addition, the line sharing provisions proposed by the CCG are intentionally ambiguous and misleading, if not directly contrary to federal law. For example, its §3.4.1.1(a) provides that "Pursuant to section 251(c)(3), Verizon shall also provision new Line Sharing arrangements under the Agreement." Of course, Verizon has no legal obligation to provision new line sharing arrangements under section 251, so there is no reason for this statement (even to refer to the FCC's transitional rules, which were adopted under section 201, not section 251). Moreover, the CCG would also require Verizon to provide line sharing arrangements pursuant to section 271 of the Act. This is improper for two reasons. First, as demonstrated herein, section 271 obligations have no place in the ICAs. Second, section 271 does not require Verizon to provide line sharing to CLECs. As to this last issue, the Department has acknowledged that it has no authority to consider such a dispute over the scope of section 271. See Consolidated Order at 56.[106]

Issue 14: What should be the effective date of an Amendment to the parties' agreements?

Relevant Provisions: Verizon Amendment 1, Preamble; Verizon Amendment 2, Preamble.

[106] For the same reason, the Department cannot require Verizon to file a tariff "for substitute services for Dark Fiber Loops and Dark Fiber Dedicated Transport at just and reasonable rates" as Conversent proposes in §3.11.2 of its Amendment. Where Verizon has no section 251 obligation to provide dark fiber, the ICA cannot impose one. Moreover, Conversent's proposal is also improper to the extent it presumes to enforce a section 271 obligation, in that Conversent is wrong – section 271 imposes no obligation on Verizon to provide dark fiber loops or transport, and the Department lacks jurisdiction to make a determination to the contrary.

The effective date of Amendment 1 or 2 should be the date of execution by the parties and approval by this Department, unless the parties agree to specify a different effective date. Sprint and MCI agree with Verizon.

AT&T – joined by the CCC, CTC, and WilTel – also agree with Verizon's position, except that they would require a different effective date—specifically, the *TRO*'s October 2, 2003 effective date--for implementation of the *TRO*'s commingling and conversions provisions. The sole reason for a unique effective date for these provisions is so that a CLEC would "receive *pricing* for new EELs/conversions as of the date it made its request to Verizon." Joint Issues Matrix, Issue 14, position of AT&T at 49 (emphasis added). As Verizon discusses below in response to Issue 20(b)(4), the CLEC proposal here would be inconsistent with the *TRO* – which requires that new unbundling obligations be implemented through an amendment process – and unfair, in that it would allow some parties to pick and choose particular provisions to except from the contract's effective date just to give them a retroactive benefit.

Issue 15: How should CLEC requests to provide narrowband services through unbundled access to a loop where the end user is served via Integrated Digital Loop Carrier (IDLC) be implemented? Should Verizon be permitted to recover its proposed charges (e.g., engineering query, construction, cancellation charges?)

Relevant Provisions: Verizon Amendment 2, § 3.2.4.

Carriers use digital loop carrier ("DLC") systems to aggregate the many copper subloops that are connected to a remote terminal location. At the remote terminal, a carrier multiplexes (*i.e.*, aggregates) such signals onto a fiber or copper feeder loop facility and transports the multiplexed signal to its central office. These DLC systems may be integrated directly into the carrier's switch (*i.e.*, Integrated DLC systems or "IDLC") or not (*i.e.*, Universal DLC systems or "UDLC"). As the FCC has explained, "Universal DLC systems consist of a 'central office

terminal' and a 'remote terminal,' *i.e.*, a DLC system in the carrier's central office terminal mirrors the deployment at the remote terminal. . . . By contrast, an Integrated DLC system does not require the use of a central office terminal because the DLC system is integrated into the carrier's switch (thus, the naming convention)." *Triennial Review Order*, 18 FCC Rcd at 17113, ¶ 217 n.667 (citation omitted).

In those cases where the ILEC is required to unbundle a loop for an end-user customer who is currently served over IDLC architecture, the FCC recognized that, in most cases, the ILEC will be able to do this "through a spare copper facility or through the availability of Universal DLC systems," but that, "if neither of these options is available, incumbent LECs must present requesting carriers a technically feasible method of unbundled access." *Id.* at 17154, ¶ 297. The unbundling obligation is limited, however, to narrowband services: "we limit the unbundling obligations for narrowband services to the TDM-based features, functions, and capabilities of these hybrid loops." *Id.* at 17154, ¶ 296. In that situation, "we require incumbent LECs to provide an entire non-packetized transmission path capable of voice-grade service (*i.e.*, a circuit equivalent to a DS0 circuit) between the central office and customer's premises." *Id.* at 17153, ¶ 296.

Accordingly, Verizon's proposed language provides that if a CLEC seeks to provide narrowband services via a 2-wire or 4-wire loop that is currently provisioned via IDLC, Verizon will provide a "Loop capable of voice-grade service to the end user customer." Verizon Amendment 2, § 3.2.4. Verizon's language further states that Verizon will provide the CLEC with an existing copper loop or a UDLC loop, where available, at the standard recurring and non-recurring charges. *See id.* § 3.2.4.1. If, and only if, neither a copper loop nor a UDLC loop is available, the CLEC has the option of requesting Verizon to construct the necessary copper loop

or UDLC facilities. *See id.* § 3.2.4.2. In that case, the CLEC will be responsible for certain charges associated with the construction of that new loop facility, including an engineering query charge, an engineering work order nonrecurring charge, and construction charges. *See id.*

The language proposed by AT&T and MCI, in contrast, is inconsistent with the FCC's determinations insofar as it requires Verizon to provide, at the *CLEC's* "option," a choice of an existing copper loop, a UDLC loop, or an "unbundled TDM channel on the Hybrid Loop." MCI Amendment, § 7.2.2.1; AT&T Amendment, § 3.2.4. Nothing in the *Triennial Review Order* gives CLECs such a choice. To the contrary, the FCC only required that the ILEC provide access to "a transmission path" — not to the transmission path of the CLEC's choice. 18 FCC Rcd at 17154, ¶ 297. MCI's and AT&T's language transforms the ILEC's choice into the CLEC's, and thus contradicts the *Triennial Review Order*.

The CLEC proposals also appear to imply incorrectly that Verizon could be forced to construct a new copper loop at the CLEC's request for free. *See* CCC Amendment, § 1.4.4.2; AT&T Amendment, § 3.2.4. Nothing in the *Triennial Review Order* (or anything else) requires incumbents to construct a brand new copper loop for a CLEC for free, and the Amendment should eliminate any basis for the CLECs to argue that they are entitled to free loop construction. Verizon is entitled to recover its costs of providing facilities and services to CLECs, at the CLECs' requests, so Verizon's proposal to charge for loop construction is appropriate.

Issue 16: Should Verizon be subject to standard provisioning intervals or performance measurements and potential remedy payments, if any, in the underlying Agreement or elsewhere, in connection with its provision of

a) unbundled loops in response to CLEC requests for access to IDLC-served hybrid loops;

b) Commingled arrangements;

c) conversion of access circuits to UNEs;

d) Loops or Transport (including Dark Fiber Transport and Loops) for which Routine Network Modifications are required;

e) batch hot cut, large job hot cut and individual hot cut processes;

f) network elements made available under section 271 of the Act or under state law?

Relevant Provisions: Verizon Amendment 2, §§ 3.2.4.3, 3.4.1.1, 3.4.2.6, 3.5.2.

The measures and standards in the Massachusetts PAP have been taken directly from the Guidelines for Carrier-to-Carrier (C2C) Performance Standards and Reports developed in New York Case 97-C-0139. On January 14, 2000, the Department adopted the New York C2C Performance Measurement Plan for evaluating Verizon MA's compliance with the requirements of Section 271 of the Telecommunications Act of 1996. *See* Letter Order, *Evaluation of Bell Atlantic-Massachusetts Operations Support Systems: Final Attachment A to 11/19/99 Letter Order on Final Master Test Plan,* D.T.E. 99-271 (D.T.E. Jan. 14, 2000). The New York metrics are subject to updating and review by both Verizon and CLECs as part of the New York Carrier Working Group, and any change mandated by the New York Public Service Commission is subject to the Department's review. The issue of applicable performance metrics is also being considered by this Department in another docket (03-50) that is well underway. This proceeding is not the place to address performance metrics that have been and will be fully considered elsewhere.

In any event, as the FCC noted in the *Verizon Massachusetts 271 Order*,[107] the measurements adopted by New York and this Department involved routine and standardized

[107] Memorandum Opinion and Order, *Application of Verizon New England Inc., et al, for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988 (2001) ("*Massachusetts 271 Order*").

processes that Verizon employs for various tasks. *See, e.g.*, *Massachusetts 271 Order*, 16 FCC Rcd at 9011, ¶ 44 n.124 (noting that KPMG had "validated Verizon's calculation of results for a series of metrics measuring Verizon's performance of pre-ordering, ordering, provisioning, maintenance and repair, billing, network performance and operator services functions."). The measurements already contain several exclusions for orders that require non-standard processing, such as when an order is delayed as a result of actions of the end-user customer. Providing a CLEC with an unbundled loop to serve a customer currently served using IDLC, for example, involves non-standard processes, and generally requires additional provisioning time. *See*, *e.g.*, Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd 27039, 27318-19, ¶¶ 575-578 (2002) (agreeing with Verizon that it needed extra time for provisioning IDLC loops). Thus, the activities set forth in items (a)-(d) above – which are new and non-standard – should likewise be excluded from existing, standard measures.

For the above reasons, the Department should adopt Verizon's proposed language for Amendment 2, which allows Verizon to exclude its performance in provisioning IDLC Hybrid Loops, commingling, conversions, and routine network modifications from all performance measurements and remedies.

With regard to Verizon's batch hot cut process, the FCC specifically singled out Verizon's hot cut procedures, approved by the New York Commission (and available in Massachusetts, as well), as sufficient to eliminate any past concerns about ILECs' hot cut performance. *See TRRO* ¶¶ 211, 213-14. Moreover, the FCC observed that "any inadequacies in

carriers' hot cut performance can be addressed through . . . complaints pursuant to section 271(d)(6)" (*not* through TRO amendment arbitrations). *Id.* ¶ 211. In addition, given the *TRRO*'s effective elimination of the switching UNE, the hot cut issue can be addressed (if need be) through inter-carrier commercial negotiations that will take place outside of sections 251 and 252.

Furthermore, the New York Carrier Working Group ("CWG") established under the auspices of the New York Public Service Commission has long afforded all parties a working and viable method of amending the Carrier to Carrier Guidelines and Performance Assurance Plan, and the NY PSC has in fact recently approved new performance measures governing hot cuts, including batch hot cuts, which Verizon has submitted to the Department for approval. Verizon has agreed to make these new hot cut processes available to CLECs in Massachusetts on the same basis as in New York, upon a CLEC's request and execution of an amendment to its interconnection agreement. The Department should not interfere with the CWG process, which is working well on its own, by transforming this contract amendment arbitration into a general C2C metric proceeding.

As for section 271 and state law in general, the purpose of this proceeding is to bring Verizon's interconnection agreements into compliance with section 251 and the FCC's implementing regulations as expressed in the *Triennial Review Order* and the *TRRO*. As this Department has already recognized, any obligations that Verizon may have under section 271 are matters for the FCC to address, and any unbundling obligations beyond those imposed under federal law are preempted under section 251(d)(3) and general preemption principles. *See* Consolidated Order at 22, 23 n. 17, 55, 56. Issues relating to section 271 or state law are not properly a part this proceeding.

Issue 17: **How should the Amendment address sub-loop access under the *TRO*? Should the Amendment address access to the feeder portion of a loop? If so how? Should the Amendment address the creation of a Single Point of Interconnection (SPOI)? If so, how? Should the Amendment address unbundled access to Inside Wire Subloop in a multi-tenant environment? If so, how?**

Relevant Provisions: Verizon Amendment 2, §§ 3.3.1, 3.3.2.

a) Sub-loop access

In the *Triennial Review Order*, the FCC generally required "incumbent LECs to provide unbundled access to their copper subloops, *i.e*., the distribution plant consisting of the copper transmission facility between a remote terminal and the customer's premises." *Triennial Review Order*, 18 FCC Rcd at 17131, ¶ 253. The FCC "define[d] the copper subloop UNE as the distribution portion of the copper loop that is technically feasible to access at terminals in the incumbent LEC's outside plant (*i.e*., outside its central offices)," and held further that "any point on the loop where technicians can access the cable without removing a splice case constitutes an accessible terminal." *Id.* at 17132, ¶ 254.

Verizon accordingly provides that CLECs "may obtain access to the Distribution Sub-Loop Facility at a technically feasible access point located near a Verizon remote terminal equipment enclosure . . . . It is not technically feasible to access the sub-loop distribution facility if a technician must access the facility by removing a splice case to reach the wiring within the cable." Verizon Amendment 2, § 3.3.2. Verizon's language is consistent with the FCC's rule, and it should be adopted.

b) Feeder portion of the loop

In the *Triennial Review Order*, the FCC held that "[c]onsistent with our section 706 goal to spur deployment of advanced telecommunications capability, we do not require incumbent LECs to provide access to their fiber feeder loop plant on an unbundled basis as a subloop UNE.

As explained below, in light of our decision to refrain from unbundling the packetized capabilities of incumbent LECs, incumbent LECs will provide access to their fiber feeder plant only to the extent their fiber feeder plant is necessary to provide a complete transmission path between the central office and the customer premises when incumbent LECs provide unbundled access to the TDM-based capabilities of their hybrid loops." *Triennial Review Order*, 18 FCC Rcd at 17131, ¶ 253. Verizon accordingly classifies "feeder" as a "Discontinued Facility" in Amendment 2, § 4.7.5. AT&T substantially agrees. *See* AT&T Amendment, § 3.2.3.3.

The CCC's provision states that "Verizon is not required to provide unbundled access on a stand-alone basis to a fiber Feeder portion of a Loop serving a Mass Market customer except when such access is to be used to provide a complete transmission path between the central office and the customer premises when Verizon provides unbundled access to the TDM-based capabilities of its Hybrid Loops." CCC Amendment, § 1.6. As explained immediately below, the restriction to "Mass Market customer" is without foundation in the *Triennial Review Order*, and should not be added. The rest of the CCC's provision is redundant, given that Verizon's provision on hybrid loops already requires Verizon to provide, where appropriate, "a complete time division multiplexing transmission path between the main distribution frame (or equivalent) in a Verizon wire center serving an end user to the demarcation point at the end user's customer premises." Verizon Amendment 2, § 3.3.2.

The CCC maintains that the FCC's restrictions as to fiber feeder in paragraph 253 of the *TRO* pertained only to "Mass Market Customers." Joint Issues Matrix, Issue 17, position of CCC at 59. This is incorrect. Paragraph 253 of the *Triennial Review Order* – which states that "we do not require incumbent LECs to provide access to their fiber feeder loop plant on an unbundled basis as a subloop UNE" – is not limited to mass market customers. There is nothing

in that paragraph or the FCC's rules that transforms the FCC's general elimination of unbundled access to fiber feeder into a *positive* unbundling obligation as to business customers. It is true that the FCC noted at the beginning of its loop section in the *Triennial Review Order* that because different markets are typically served by different loop types, it would first "analyze those loops generally provisioned to mass market customers and then analyze the high-capacity loops generally provisioned to enterprise customers." *Triennial Review Order*, ¶ 209. But the FCC also squarely held that this analytical approach does *not* mean that loop unbundling obligations pertain only to one specific customer type: "while we adopt loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops *do not vary based on the customer to be served*." *Id.* ¶ 210 (emphasis added). In other words, if a "very small business or residential customer typically associated with the mass market" orders a DS1 for some reason, that DS1 will not be subject to unbundling. *Id.* Conversely, if a business customer seeks to service a "remote business location[] staffed by only a few employees where high-capacity loop facilities are not required," that business customer can order an unbundled DS0. *Id.* The unbundling rules do not change depending on the identity of the end-user.

Verizon's language is appropriate and should be adopted.

c) Single Point of Interconnection

Relevant Provisions: Verizon Amendment 2, §§ 3.3.1.2.1, 3.3.1.2.2.

Verizon's language mirrors the FCC's determination that ILECs are not required to construct a single point of interconnection ("SPOI") at a multiunit premises unless: (1) it has distribution facilities to the premises and owns and controls (or leases and controls) the house and riser cable at the premises; and (2) the CLEC commits that it will place an order for access to the subloop element via the newly-provided SPOI. *See Triennial Review Order*, 18 FCC Rcd at

17192,¶ 350 n.1058; Verizon Amendment 2, §§ 3.3.1.2.1, 3.3.1.2.2. Where these conditions are satisfied, Verizon's Amendment provides that the parties shall negotiate in good faith an amendment memorializing the terms, conditions, and rates under which Verizon will provide a SPOI. *Id.* § 3.3.1.2.

The CCC's proposed language does not accurately reflect the requirements of federal law in that it excludes the FCC's two conditions for SPOI construction. CCC Amendment, § 1.7.1.1. AT&T's proposal is likewise inconsistent with federal law, in that it both omits the conditions discussed above and adds other obligations that have no foundation in federal law (such as the requirement that Verizon has only "forty-five (45) days from receipt of a request by [CLEC] to construct a SPOI"). AT&T Amendment, § 3.4.5.

Verizon's language reflects the requirements of federal law more accurately than the CLECs' proposals, and should accordingly be adopted.

d) Inside Wire Subloop

Relevant Provisions: Verizon Amendment 2, § 3.3.1.1.

In the *Triennial Review Order*, the FCC defined the subloop as a "smaller included segment of an incumbent LEC's local loop plant, *i.e.*, a portion of the loop from some technically accessible terminal beyond the incumbent LEC's central office and the network demarcation point, including that portion of the loop, if any, which the incumbent LEC owns and controls inside the customer premises." 18 FCC Rcd at 17184-85, ¶ 343 (footnotes omitted). Its rules, in turn, define the "inside wire" subloop: "One category of this subloop is inside wire, which is defined for purposes of this section as all loop plant owned or controlled by the incumbent LEC at a multiunit customer premises between the minimum point of entry as defined in § 68.105 of this chapter and the point of demarcation of the incumbent LEC's network as defined in § 68.3 of

this chapter." 47 C.F.R. § 51.319(b)(2). "A competitor purchasing a subloop from an incumbent LEC to serve a particular customer location will access the incumbent LEC's loop along its distribution path at a technically feasible accessible terminal," and the usual access points include "a feeder distribution interface (FDI); a pole or pedestal; the MPOE; or the NID." *Triennial Review Order*, 18 FCC Rcd at 17185, ¶ 343. (footnotes omitted). The FCC also clarified that "no collocation requirement exists with respect to subloops used to access the infrastructure in multiunit premises." *Id.* at 17192, ¶ 350.

Verizon's language accordingly provides that a CLEC "may access a House and Riser Cable only between the MPOE for such cable and the demarcation point at a technically feasible access point." Verizon Amendment 2, § 3.3.1.1; *cf.* 47 C.F.R. § 51.319(b)(2). Verizon's language also provides that "[i]t is not technically feasible to access inside wire sub-loop if a technician must access the facility by removing a splice case to reach the wiring within the cable." Verizon Amendment 2, § 3.3.1.1; *cf. Triennial Review Order*, 18 FCC Rcd at 17132, ¶ 254 ("any point on the loop where technicians can access the cable without removing a splice case constitutes an accessible terminal"). The rest of Verizon's provisions relating to inside wire are geared towards the practical and logistical implementation of CLEC orders for inside wire, including the omission of any requirement for a CLEC to install a terminal block, in recognition of the FCC's ruling on this issue in the *TRO*. *See, e.g.*, Verizon Amendment 2, §§ 3.3.1.1.1.1-3.3.1.1.1.6, 3.3.1.1.2-3.3.1.1.4.

AT&T's language, on the other hand, includes several specific requirements that are not present in the *Triennial Review Order*. AT&T Amendment, § 3.4.2 (giving Verizon 30 days to provide a "written proposal" to AT&T regarding points of access, requiring negotiation over such points between 10 to 40 days after Verizon's written proposal, *etc*.). These requirements

are too specific, especially given the varying nature of subloop access arrangements, and might not apply to every given situation. AT&T has not justified these extra requirements, so the Department should not adopt them.

Finally, AT&T includes several sections that are near verbatim quotes of the rules. *See* AT&T Amendment, § 3.4.2 (quoting 47 C.F.R. § 51.319(b)(2)(i) on "point of technically feasible access"); *id.* §§ 3.4.6, 3.4.7 (quoting 47 C.F.R. § 51.310(b)(3), dealing with technical feasibility and "best practices"). As a general practice, it is often better to *cite* the FCC's rules – as Verizon has offered to do in this context in its negotiations with the CCG – rather than quote the rule verbatim. Citing the rule allows the agreements to change automatically if and when the FCC's rule itself changes, whereas quoting the rule verbatim unnecessarily freezes into place one version of the FCC's rules.

Issue 18: **Where Verizon collocates local circuit switching equipment (as defined by the FCC's rules) in a CLEC facility/premises (*i.e.*, reverse collocation), should the transmission path between that equipment and the Verizon serving wire center be treated as unbundled transport? If so, what revisions to the parties' agreements are needed?**

Relevant Provisions: None.

In the *Triennial Review Order*, the FCC noted that if an ILEC "has local switching equipment . . . 'reverse collocated' in a non-incumbent LEC premises, the transmission path from this point back to the incumbent LEC wire center shall be unbundled as transport." 18 FCC Rcd at 17206, ¶ 369 n.1126. To the best of Verizon's knowledge, the situation described in this issue does not exist anywhere in the real world, and in particular in Massachusetts. There is no instance where Verizon owns "local switching equipment" installed at a CLEC premise, nor does Verizon intend to establish any such arrangement in Massachusetts. It is therefore unnecessary for either of the Amendments to address this hypothetical issue.

Issue 19: What obligations, if any, with respect to interconnection facilities should be included in the Amendment to the parties' interconnection agreements?

Relevant Provisions: None.

The *Triennial Review Order* did not purport to establish new rules regarding CLECs' rights to obtain interconnection facilities under section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Parties' existing interconnection agreements contain negotiated (or arbitrated) terms regarding such interconnection architecture issues, and there has been no change in law that would justify renegotiation (or arbitration) of such issues here. The network architecture attachments of interconnection agreements address not only the parties' financial responsibility for interconnection facilities under 251(c)(2), but also a host of related provisions that typically reflect the outcome of bargaining and mutual concessions on related issues such as the number and location of points of interconnection the CLEC must establish in a LATA and the per-minute rate of compensation for the exchange of traffic. CLECs should not be permitted to renegotiate (or re-arbitrate as the case may be) those complex issues here.

Sprint claims that interconnection facilities were at issue in *TRRO* ¶ 140. But Paragraph 140 simply states that "our finding of non-impairment with respect to entrance facilities *does not alter* the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service." *Id.* (emphasis added). In other words, the FCC merely acknowledged that section 251(c)(2), which requires access to "the facilities and equipment" used by CLECs for "interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access . . . ." continues to impose the same obligations

as before. 47 U.S.C. § 251(c)(2). Nothing in the *TRO* or *TRRO* expands upon or alters any pre-existing rights or obligations relating to the use of interconnection facilities under section 251(c)(2), so it would be improper to litigate any such issues in this proceeding to address *changes* in unbundling rules.

Issue 20: What obligations, if any, with respect to the conversion of wholesale services (e.g. special access circuits) to UNEs or UNE combinations (e.g. EELs), or vice versa ("Conversions"), should be included in the Amendment to the parties' interconnection agreements?

a) What information should a CLEC be required to provide to Verizon (and in what form) as certification to satisfy the FCC's service eligibility criteria to (1) convert existing circuits/services to EELs or (2) order new EELs?

Verizon's language states that a CLEC's certification:

> must contain the following information for each DS1 circuit or DS1 equivalent: (a) the local number assigned to each DS1 circuit or DS1 equivalent; (b) the local numbers assigned to each DS3 circuit (must have 28 local numbers assigned to it); (c) the date each circuit was established in the 911/E911 database; (d) the collocation termination connecting facility assignment for each circuit, showing that the collocation arrangement was established pursuant to 47 U.S.C. § 251(c)(6), and not under a federal collocation tariff; (e) the interconnection trunk circuit identification number that serves each DS1 circuit. There must be one such identification number per every 24 DS1 circuits; and (f) the local switch that serves each DS1 circuit.

Amendment 2, § 3.4.2.3. This language precisely implements the criteria established in the *Triennial Review Order*, where the FCC required the following: (a) the CLEC must certify the "local number assignment to a DS1 circuit," *Triennial Review Order*, 18 FCC Rcd at 17356, ¶ 602, (b) "each DS3 must have at least 28 local voice numbers," *id.*, (c) the date of each circuit's establishment, which would enable the CLEC to certify "that it will not begin to provide service until a local number is assigned and 911 or E911 capability is provided," *id.*, (d) the CLEC should specify the collocation termination connecting facility assignment for each circuit, because "termination of a circuit into a section 251(c)(6) collocation arrangement in an

incumbent LEC central office is an effective tool to prevent arbitrage," *id.* at 17356, ¶ 604, and (e) the interconnection trunk information, which would enable the CLEC to certify that "each EEL circuit" was "served by an interconnection trunk in the same LATA as the customer premises served by the EEL," *id.* at 17358, ¶ 607. Finally, the FCC stated "that each EEL circuit must be served by a Class 5 switch or other switch capable of providing local voice traffic." *Id.* at 17360, ¶ 610.

Some CLECs complain that it would be unduly onerous to provide the level of detail described above. Instead, they appear to believe that they are entitled simply to assert that their EEL requests meet the FCC's conditions without providing any of the supporting information. But the FCC did not adopt such a rule. *See id.* at 17368, ¶ 624 ("We do not specify the form for such a self-certification."). The FCC, in fact, specified that it "expect[ed] that requesting carriers will maintain the appropriate documentation to support their certifications" and held that demonstrating compliance with each of the eligibility criteria would not "impos[e] undue burdens upon" CLECs. *Id.* at 17368, 17370, ¶¶ 622, 629. Because a CLEC is required to have in its possession all of the information necessary to certify its compliance with the EEL eligibility criteria at the time it provides its self-certification, it would impose no meaningful burden on that CLEC to require it to provide the same information to Verizon. This approach is also consistent with the FCC's system of self-certification followed by the possibility of an audit, as it provides greater certainty that the CLEC's circuits are compliant when ordered, and minimizes the need to resolve compliance issues through costly and inefficient audits and dispute resolution proceedings that may follow. Notably, in the *TRRO*, the FCC explicitly "retain[ed] our existing certification and auditing rules governing access to EELs." *TRRO* ¶ 234 n.639; *see also* 47 C.F.R. § 51.318.

Verizon's language is therefore appropriate, and should be adopted.

b) Conversion of existing circuits/services:

1) Should Verizon be prohibited from physically disconnecting, separating, changing, or altering the existing facilities when Verizon performs Conversions unless the CLEC requests such facilities alteration?

Relevant Provisions: None.

As stated in Verizon's position on the Joint Issues Matrix, Verizon's Amendment does not provide for separation or other physical alteration of existing facilities when a CLEC requests an EEL conversion. While Verizon would not expect a standard conversion to require any physical alteration of the facilities used for wholesale services that may be converted to UNEs, an inflexible, uniform prohibition on all alterations might preclude those that Verizon might find necessary to convert wholesale services to UNEs in particular instances. Removing the flexibility to address situations that depart from the norm would likely just delay requested conversions. Moreover, removing only Verizon's flexibility in this regard, while allowing the CLECs the ability to request a change to the facilities as part of an EEL conversion is simply one-sided and unfair. If a CLEC requires changes in its facilities to conform them to UNE requirements, it must make those changes first, before the facilities would qualify for EEL conversion.

2) What type of charges, if any, and what conditions, if any, can Verizon impose for Conversions?

Relevant Provisions: Verizon Amendment 2, §§ 3.4.1.1, 3.4.2.4, 3.4.2.5.

AT&T and WilTel dispute Verizon's right to charge a retag fee and/or other non-recurring charges to cover Verizon's costs related to conversions, as provided in Amendment 2, §§ 3.4.2.4, 3.4.2.5. The CCC, in particular, cites paragraph 587 of the *Triennial Review Order*,

which limits discriminatory charges for conversions. *See* Joint Issues Matrix, Issue 20, position of CCC at 65-68.

The CCC has misinterpreted the Order. The FCC's concern was that ILECs might impose "wasteful and unnecessary charges," *Triennial Review Order*, 18 FCC Rcd at 17349, ¶ 587. It did not, however, hold that ILECs are barred from recovering legitimate expenses.

A "retag fee" is one such legitimate expense. That fee compensates Verizon for the cost of physically retagging a circuit that a CLEC requests to convert from special access to UNEs. The retagging work is necessary because the converted UNE circuit has a different circuit ID from the special access circuit. Tagging the circuit with the correct circuit ID facilitates future maintenance and ordering activities.

Verizon has also proposed a "nonrecurring charge . . . for each UNE circuit that is part of a commingled arrangement," and that this charge is "intended to offset Verizon's costs of implementing and managing commingled arrangements." Verizon Amendment 2, § 3.4.1.1. These costs include the costs of system and process changes, added costs to perform billing investigations, and added costs for future access product changes or additions that will require changes to UNE products in order to allow commingling. For example, Verizon must receive and validate CLEC's self-certifications for every commingled circuit requested. This requires changes to ASR processing that will increase the amount of time customer service representatives must spend processing orders manually. In addition, billing investigations may require new work for customer service representatives to set up part of a commingled arrangement to be billed as a UNE while the other part is billed as access, with a different billing rate structure, terms and conditions, and policies. Since these costs are triggered by the

commingling of services (on a per circuit basis), it would be appropriate to charge per commingled circuit.

Verizon is therefore entitled to recover its costs of conversions (Amendment 2, § 3.4.2.4), and to be compensated for the costs of retagging a circuit (*id.* § 3.4.2.5). When Verizon incurs costs for conversions, retagging circuits, or any other activity performed for a CLEC, it is entitled to recover its costs of doing so. Contrary to the CLECs' claims, the FCC has not prohibited conversion charges, and the *TRO* Amendment should not do so, either. Although Verizon is no longer proposing new rates for conversions at this stage,[108] it reserves the right to do so later upon submission of a cost study, and nothing in the any ICA amendment should foreclose Verizon from seeking to assess new non-recurring charges in the future.

3) Should EELs ordered by a CLEC prior to October 2, 2003, be required to meet the FCC's service eligibility criteria?

Relevant provisions: Verizon Amendment 2, § 3.4.2.1.

Prior to the *Triennial Review Order*, the FCC had imposed safeguards to prevent CLECs from using a combination of UNEs known as an EEL to displace special access,[109] a result that the FCC determined would undermine existing facilities-based competition in the highly competitive special access market. Specifically, the FCC required that UNEs be used to provide "a significant amount" of local exchange service, and it prohibited "commingling" of UNEs and special access. The D.C. Circuit upheld those safeguards. *See Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002).

[108] In March, Verizon notified the Department and the parties that it would not seek in this arbitration to litigate the non-recurring rate elements identified in Exhibit A to Verizon's Amendment 2 for which the Department has not already set rates. Letter from Bruce Beausejour, Verizon Massachusetts General Counsel, to Mary Cottrell, D.T.E. Secretary (March 1, 2005) ("March 1 Letter").

[109] "Special access" refers to high-capacity, tariffed services used predominantly by interexchange carriers, such as AT&T and MCI, to connect high-volume customers directly to these carriers' long-distance networks, thereby bypassing "switched access" charges paid by smaller customers. *See WorldCom, Inc. v. FCC*, 238 F.3d 449, 453 (D.C. Cir. 2001).

In the *Triennial Review Order*, however, the FCC modified its EEL eligibility requirements. *See* 18 FCC Rcd at 17356-61, ¶¶ 601-611. Various CLECs propose deleting Verizon's language requiring re-certification in accordance with these new standards. But when the FCC established its new eligibility criteria, it made clear that those criteria apply to *all* EELs, with no exceptions or grandfathering for pre-existing EELs that a CLEC might have obtained under the old rules. *See id.* at 17355, ¶ 599 ("We apply the service eligibility requirements on a circuit-by-circuit basis, so *each DS1 EEL* (or combination of DS1 loop with DS3 transport) *must satisfy the service eligibility criteria*.") (emphasis added). Although the FCC identified three specific instances in which a CLEC must provide a certification that its EELs satisfy these criteria, the FCC did not suggest that those examples were the only such instances. Nor did the FCC indicate that existing EELs would be grandfathered and could remain in service regardless of whether they satisfied the current certification criteria. Because the new rules differ from the old ones, an EEL that qualified under the old criteria will not necessarily continue to qualify under the new criteria.

The CCC argues that "[p]aragraph 589 of the *TRO* makes clear that the FCC envisioned two tracks of EELs eligibility," *i.e.*, the old and the new certification rules. Joint Issues Matrix, Issue 20, position of CCC at 67. This position is based on a misinterpretation of the FCC's decision to "decline to require retroactive billing to any time before the effective date of this Order." *Triennial Review Order*, 18 FCC Rcd at 17350, ¶ 589. The FCC's determination that no retroactive charges could be imposed for EELs that were ordered in the past does not mean that such EELs could be maintained where ILECs are no longer required to provide them – to the contrary, the FCC explicitly held that "[t]he eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past." *Id.*

Verizon's language is therefore appropriate, and should be adopted.

4) For conversion requests submitted by a CLEC prior to the effective date of the amendment, should CLECs be entitled to EELs/UNE pricing effective as of the date the CLEC submitted the request (but not earlier than October 2, 2003)?

Relevant provisions: None.

Several CLECs argue that the *TRO*'s new commingling and conversion obligations should take effect retroactively to the October 2, 2003 effective date of the *TRO*, rather than upon the effective date of the Amendment, as other provisions will. AT&T Amendment, § 3.7.1; CCC Amendment, §§ 2.1, 2.3, 2.3.4.4. The CLECs' admitted rationale for this unique carve-out to the otherwise effective date of the Amendment is solely to receive more favorable UNE pricing for the facilities at issue for the time before the Amendment took effect. *See* Joint Matrix, Issue 20, at 67. But the FCC in the *TRO* declined to override existing contracts to order automatic implementation of its rules as of a date certain (as it did with the *TRRO* transition plan). Instead, it required carriers to use section 252 to amend their agreements, where necessary, to implement the *TRO* rulings: "to the extent our decision in this Order changes carriers' obligations under section 251, we decline the request . . . that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions." *Id.* ¶ 701.

The FCC, of course, expected any necessary amendments to be completed by no later than July of last year, nine months from the *TRO*'s effective date — and amendments *would* have been completed within that timetable but for CLECs' efforts to delay this arbitration proceeding. The CLECs' continuing obstruction means that they were not able to proceed to arbitration of any amendments terms, including those that are favorable to them. The CLECs should not be rewarded for ignoring the FCC's directive to promptly amend their contracts by

awarding them two years' worth (or more, by the time amendments are executed) of the difference between their existing contract rate that applies under the special access tariff from which the CLECs ordered the circuits as channel termination facilities and the lower contract rate for UNE EELs. Accepting the CLECs' retroactive billing proposal would impose a substantial, unanticipated, and unjustified liability on Verizon. It would also be wholly inequitable to allow the CLECs to implement rates favorable to them back to October 2, 2003, but not to give Verizon the benefit of the higher, non-TELRIC rates that the *TRO* eliminated effective as of October 2, 2003. Of course, the CLECs have not suggested this reciprocal approach.

5) When should a Conversion be deemed completed for purposes of billing?

Verizon's position is simple: A conversion, like any other activity Verizon undertakes for a CLEC, should be deemed completed for purposes of billing when the actual work of the conversion is completed pursuant to the standard conversion process. No other date – whether before or after the actual conversion is completed – makes any sense.

c) How should the Amendment address audits of CLECs' compliance with the FCC's service eligibility criteria?

Relevant Provisions: Verizon Amendment 2, § 3.4.2.7.

ILECs have the right to "obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria." *Triennial Review Order*, 18 FCC Rcd at 17369, ¶ 626. The auditor "must perform its evaluation in accordance with the standards established by the American Institute for Certified Public Accountants," and the audit may "include an examination of a sample selected in accordance with the independent auditor's judgment." *Id.* If the auditor "concludes that the competitive LEC failed to comply with the service eligibility criteria, that carrier must true-up any difference in payments, convert all

noncompliant circuits to the appropriate service, and make the correct payments on a going-forward basis." *Id.* at 17370, ¶ 627. In addition, if the auditor "concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor." *Id.* ¶ 628 Similarly, if the auditor "concludes that the requesting carrier complied in all material respects with the eligibility criteria, the incumbent LEC must reimburse the audited carrier for its costs associated with the audit." *Id.*

Verizon's language mirrors the FCC's requirements. Specifically, Verizon provides that it "may obtain and pay for an independent auditor to audit [the CLEC's] compliance in all material respects with the service eligibility criteria," and that the "audit shall be performed in accordance with the standards established by the American Institute for Certified Public Accountants, and may include, at Verizon's discretion, the examination of a sample selected in accordance with the independent auditor's judgment." Amendment 2, § 3.4.2.7. If the "report concludes that [the CLEC] failed to comply with the service eligibility criteria for any DS1 or DS1 equivalent circuit, then [the CLEC] must convert all noncompliant circuits to the appropriate service, true up any difference in payments, make the correct payments on a going-forward basis, reimburse Verizon for the entire cost of the audit within thirty (30) days after receiving a statement of such costs from Verizon." *Id.* On the other hand, if the auditor confirms the CLEC's "compliance with the service eligibility criteria for each DS1 or DS1 equivalent circuit, then [the CLEC] shall provide to the independent auditor for its verification a statement of [the CLEC's] out-of-pocket costs of complying with any requests of the independent auditor, and Verizon shall then reimburse [the CLEC] for its out-of-pocket costs within thirty (30) days of the auditor's verification of the same." *Id.* Verizon also provides that

the CLEC "shall maintain records adequate to support its compliance with the service eligibility criteria for each DS1 or DS1 equivalent circuit for at least eighteen (18) months after the service arrangement in question is terminated." *Id.*

AT&T and CCC disagree with Verizon's requirement (Amendment 2 §3.4.2.7) that a CLEC reimburse Verizon for the entire cost of an audit where an auditor finds that the CLEC failed to comply with the service eligibility criteria for any DS1 circuit (*see* Joint Issues Matrix, Issue 20, at 68, CCC's Position.). Indeed, AT&T claims that this requirement has no basis in the *TRO*. Joint Matrix at 64. AT&T is wrong; as described above, the FCC clearly imposed such an obligation on CLECs that fail eligibility audits. Indeed, this is only fair, given that Verizon will also reimburse the CLEC for its audit-related costs if it passes the audit (as required by *Triennial Review Order*, 18 FCC Rcd at 17370, ¶ 628).

WilTel believes that "the standard of noncompliance with the criteria should require '*material*' noncompliance before CLEC would pay auditing costs and/or have to convert the circuits and true up payments, etc." Joint Issues Matrix, Issue 20, position of WilTel at 65. But Verizon's language is perfectly symmetrical, in that (1) it requires the CLEC to reimburse Verizon when it fails the audit; and (2) it requires Verizon to reimburse the CLEC when it passes the audit. In any event, WilTel's suggestion should make little difference, as any failure to comply with the FCC's requirements that resulted in provision of EELs for which the requesting carrier was ineligible would be material, and there is no sense in inserting a subjective standard that could lead to disputes.

The CCC also has several disagreements with Verizon's proposed language. For example, it argues that "Verizon is entitled only to one audit of a CLEC's books in a 12-month period, not once per calendar year as Verizon has proposed," and that "[i]n order for an audit to

be considered 'annual,' a full year would have to elapse between audits." Joint Issues Matrix, Issue 20, position of CCC at 67. It further claims that "[u]nder Verizon's proposal, Verizon could audit a CLEC's books in December, and then audit again in January of the following year." *Id.* But the CCC is arguing against a straw man; it presents no reason to think that Verizon or anyone else will attempt to demand an audit 2 months in a row. Indeed, if the CLEC failed the audit, there would be no need to repeat the audit a mere month later; and if the CLEC passed the audit, Verizon would hardly wish to repeat the process and find itself liable for paying the CLEC's expenses a second time. Even in the exceedingly unlikely event that Verizon did request an audit in a December and then again in January, it would then automatically have to wait at least 12 months until the *next* audit, because the next "calendar year" would not begin until the following January.

Verizon's language encompasses the far more likely situation in which, for example, Verizon might need to audit a given CLEC in September of one year, and then in August of the next year. The CCC's language, by contrast, would rigidly and unnecessarily prevent the next year's audit from taking place before a full 12 months had elapsed, no matter how pressing the need for an audit at that time.

The CCC also complains that "Verizon's proposal that a CLEC keep books and records for a period of eighteen (18) months after an EEL arrangement is terminated is not supported by anything in the *TRO*. The proposed interval is unreasonably long and unduly burdensome." *Id.* at 68. But given that this information resides only with the CLEC, it is not unduly burdensome for the CLEC to keep the information on hand in the event of an audit. Indeed, under both the CCC's and Verizon's proposals, an audit might take 18 months or even more after the EEL arrangement in question was ordered (*i.e.*, an EEL arrangement might be ordered in early 2005

and audited in late 2006). Given the possibility for such a delay, an 18-month record-keeping obligation is consistent with the nature and purpose of the audit requirement. As the FCC said, "Although we do not establish detailed recordkeeping requirements in this Order, we do expect that requesting carriers will maintain the appropriate documentation to support their certifications." *Triennial Review Order*, 18 FCC Rcd at 17370, ¶ 629.

Issue 21: How should the Amendment reflect an obligation that Verizon perform routine network modifications necessary to permit access to loops, dedicated transport, or dark fiber transport facilities where Verizon is required to provide unbundled access to those facilities under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51? May Verizon impose separate charges for Routine Network Modifications?

Relevant Provisions: Verizon Amendment 2, § 3.5.

In the *Triennial Review Order*, the FCC required "incumbent LECs to make routine network modifications to unbundled transmission facilities used by requesting carriers *where the* requested transmission facility has already been constructed." *Triennial Review Order*, 18 FCC Rcd at 17371-72, ¶ 632 (emphasis added). It defined "routine network modifications" as "those activities that incumbent LECs regularly undertake for their own customers." *Id.* It clarified, however, that such modifications "do not include the construction of new wires (*i.e.*, installation of new aerial or buried cable) for a requesting carrier." *Id.* It noted that "[w]e do not find, however, that incumbent LECs are required to trench or place new cables for a requesting carrier," because such "[r]equests for altogether new transmission facilities" impose greater demands on the ILEC. *Id.* at 17374, ¶ 636. The FCC's rule on routine network modifications specifies several examples, including:

> rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; and attaching electronic and other equipment that the incumbent LEC ordinarily attaches to a DS1 loop to activate such loop for its own customer. They also

> include activities needed to enable a requesting telecommunications carrier to obtain access to a dark fiber loop. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the construction of a new loop, or the installation of new aerial or buried cable for a requesting telecommunications carrier.

47 C.F.R. § 51.319(a)(7)(ii). Accordingly, Verizon's language provides that "Verizon shall make such routine network modifications, at the rates and charges set forth in the Pricing Attachment to this Amendment, as are necessary to permit access" by the CLEC to the UNE, "where the facility has already been constructed." Verizon Amendment 2, § 3.5.1.1. Just as in the FCC's rule and the *Triennial Review Order*, Verizon's language specifies that:

> "[r]outine network modifications applicable to Loops or Transport may include, but are not limited to: rearranging or splicing of in-place cable at existing splice points; adding an equipment case; adding a doubler or repeater; installing a repeater shelf; deploying a new multiplexer or reconfiguring an existing multiplexer; accessing manholes; and deploying bucket trucks to reach aerial cable. Routine network modifications applicable to Dark Fiber Transport may include, but are not limited to, splicing of in-place dark fiber at existing splice points; accessing manholes; deploying bucket trucks to reach aerial cable; and routine activities, if any, needed to enable [the CLEC] to light a Dark Fiber Transport facility that it has obtained from Verizon under the Amended Agreement. Routine network modifications do not include the construction of a new Loop or new Transport facilities, trenching, the pulling of cable, the installation of new aerial, buried, or underground cable for a requesting telecommunications carrier, or the placement of new cable. Verizon shall not be required to perform any routine network modifications to any facility that is or becomes a Discontinued Facility.

Verizon Amendment 2, § 3.5.1.1.

AT&T adds this sentence: "Determination of whether a modification is 'routine' shall be based on the tasks associated with the modification, not on the end-user service that the modification is intended to enable." AT&T Amendment, § 3.8.1. In an attempt to support this language, it claims that "Verizon's language limits routine network modifications to only those that support services that mimic a Verizon end-user service offering, and only to the exact same degree that Verizon would do for its own customers," and urges that it should be "to offer unique

and differentiable services by coupling UNEs with AT&T-deployed new technologies." Joint Issues Matrix, Issue 21, position of AT&T at 70. But AT&T's addition is unnecessary: Nothing in Verizon's language limits routine network modifications to any particular services at all, provided that the modifications meet the FCC's governing standard.

AT&T also adds this sentence: "Verizon shall perform Routine Network Modifications without regard to whether the facility being accessed was constructed on behalf, or in accordance with the specifications, of any carrier." AT&T Amendment §3.8.1. Verizon has agreed in negotiations with certain CLECs to insert substantially similar language at an appropriate place in Verizon's amendment, and will do so here.

Conversent claims that Verizon's language defining routine network modifications is "unduly narrow," but Verizon's language (just as the FCC's) already provides that the list of possible modifications is "not limited to" the specific examples provided.

AT&T, MCI, CTC, CCC, and Conversent also claim that Verizon is already compensated for routine network modifications by its recurring charges for the element in question. As described in Verizon's March 1, 2005 letter to this Department, Verizon has not yet completed its new TELRIC study addressing that issue (among others). Therefore, as stated in that letter, Verizon "will not seek through this arbitration to litigate charges for the non-recurring rate elements . . . for which the Department has not already set approved rates." (*See* March 1 Letter.) In addition, Verizon has offered not to charge for those activities "[u]ntil rates for those elements are approved by the Department." *Id.* Nevertheless, nothing in the Amendment should foreclose Verizon from charging for those activities later, upon completion of an appropriate cost study, or now, where Department-approved rates for an activity performed by Verizon on behalf of a CLEC already exist.

In short, Verizon's language is appropriate, and should be adopted.

Issue 22: Should the parties retain their pre-Amendment rights arising under the Agreement and tariffs?

Relevant Provisions: Verizon Amendment 1, §§ 2.1, 2.3, 3.1, 3.4, 4.5, 4.7; Verizon Amendment 2, §§ 1, 2.1, 2.3, 2.4, 3.1, 3.2.1, 3.2.2, 3.2.3, 3.2.4, 3.3.1, 3.4.1, 3.4.1.2.2, 3.4.2, 3.5.3, 4.5, 4.7.

Verizon filed its arbitration petition to eliminate any doubt regarding its right to cease providing unbundled access to facilities as to which its unbundling obligation under Section 251 of the Act has been removed. Verizon cannot lawfully be required under any interconnection contract to continue providing unbundled access to facilities that are no longer UNEs under Section 251. Accordingly, Verizon's proposed amendment makes clear that the limitations on Verizon's unbundling obligations established in the core provisions of the Amendment are "[n]otwithstanding any other provision of this Agreement, this Amendment, or any Verizon tariff." Verizon Amendment, §§ 2.1, 3.1; *see also* Verizon Amendment 2, §§ 2.4, 3.5.3. Because the amendment will be binding as a matter of federal law, it supersedes any inconsistent obligation, wherever it may be found.

At the same time, to the extent that the Amendment does not affect pre-existing terms of agreements or tariffs – including independent rights to discontinue provision of particular network elements – those terms retain their binding force, and Verizon's proposed language makes that clear as well. AT&T, WilTel, CCC, and CTC complain that Verizon has not specified any particular tariffs that will continue to apply, and claim that "inclusion of such vague and ambiguous language in the ICA can only cause confusion as to the parties' rights and obligations." Joint Issues Matrix, Issue 22, position of AT&T at 74. Their argument is without merit. The challenged language is clear and important: it makes clear that the amendment defines the parties' obligations with regard to provision of unbundled network elements

notwithstanding any other provisions in other regulatory instruments while preserving other pre-existing rights and obligations. Neither party should need to conduct an exhaustive review of every tariff that might potentially affect a term or condition simply to incorporate particular tariff references into the Agreement.

Conversent claims that if "tariffs or other Applicable Law restrict Verizon's ability to discontinue providing UNEs or other services, or impose procedural requirements such as tariff amendment procedures, then Verizon is obligated to comply." Joint Issues Matrix, at 74-75, position of Conversent. Conversent is wrong. For the reasons that Verizon has explained at length above, Verizon's unbundling obligations are circumscribed by the requirements of section 251(c)(3) and the FCC's implementing regulations. The purpose of this proceeding is to ensure that Verizon's legal obligations conform to those imposed under federal law. It is therefore not merely appropriate, but mandatory, for the Amendment to supersede any other requirements that are inconsistent with federal law.

Issue 23: Should the Amendment set forth a process to address the potential effect on the CLECs' customers' services when a UNE is discontinued?

Relevant Provisions: Verizon Amendment 1, §§3.1, 3.2.

Verizon's Amendment 1 sets out a clear and fair process for transitioning away from UNE arrangements when Verizon is no longer required to provide such an arrangement under § 251(c)(3) (in the event the FCC does not prescribe a different transition process). Under § 3.1, Verizon will provide at least ninety days' notice that a given UNE has been discontinued, at which point Verizon will stop accepting new orders for the UNE in question. Section 3.2 then provides that, during the 90-day notice period, a CLEC that wishes to continue to obtain access

to the facilities used to provide the discontinued UNE arrangement can make an alternative arrangement (whether through a separate, commercial agreement, an applicable Verizon special access tariff, or resale). If the CLEC has not selected any of those options, Verizon language provides that Verizon can reprice the discontinued UNE in question at a rate equivalent to the applicable special access or resale rate. *See* Verizon Amendment 1, § 3.2.

The CLECs are, of course, free to take measures they deem appropriate to address potential effects on their own end users' services. They will have plenty of time to do so; for example, as discussed at length above, the FCC has imposed a twelve-month transition period for the CLECs' embedded base of de-listed mass-market switching, loops, and transport, and an eighteen-month period for embedded dark fiber loops and transport.

CLECs thus have ample opportunity to address the potential impact on their own customers of a UNE discontinuation. Verizon, for its part, will not disconnect any CLEC unless the CLEC chooses that option. In the event that a CLEC elects to stop providing service to its customers following the discontinuance of a UNE, it is the responsibility of the CLEC — not Verizon — to provide its customers with appropriate notice. It would not be appropriate to address a CLEC's obligations *to its customers* in the context of an interconnection agreement between the CLEC and Verizon.

The CLECs' alternate proposals here are unnecessary and inconsistent with federal law, as discussed at length above in response to Issue 2.

Issue 24: How should the Amendment implement the FCC's service eligibility criteria for combinations and commingled facilities and services that may be required under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51?

This Issue was addressed in the context of Issue 20, and Verizon refers the Department to that discussion.

Issue 25: Should the Amendment reference or address commercial agreements that may be negotiated for services or facilities to which Verizon is not required to provide access as a Section 251 UNE?

Relevant Provisions: Verizon Amendment 1, § 3.2.

As discussed in response to Issue 2, Verizon is not required to negotiate, and cannot be forced to arbitrate, issues that are not related to Verizon's unbundling obligations under section 251(c)(3) of the Act. The 1996 Act makes clear that a state commission's authority is limited to implementation of the unbundling obligations under section 251(c)(3) and the FCC's implementing regulations. Because Verizon has not agreed to negotiate terms of commercial agreements for UNE replacements as part of its TRO Amendment, the Department may not arbitrate these terms. *See Coserv Ltd. Liab. Corp. v. Southwestern Bell Tel. Co*., 350 F.3d 482 (5th Cir. 2003).]]

While commercial agreements are not subject to negotiation or arbitration under § 252, a reference to commercial arrangements appropriately signifies that CLECs have other options in case of the elimination of a UNE. Thus, section 3.2 of Verizon's Amendment 1 makes clear that a CLEC may "continue to obtain access to a Discontinued Facility under a separate arrangement."

Verizon's amendment refers to commercial agreements solely for the convenience of the parties, in order to describe the action Verizon will take (*i.e.*, application of the applicable access tariff rate or other applicable rate) if the CLEC, upon discontinuance of a UNE, does not replace the UNE with a commercial arrangement (or other alternative arrangement). The reference is simply for clarity and does not affect any substantive obligations imposed under the agreement.

Verizon would consider omitting any reference to commercial agreements provided that the amendment is otherwise clear as to Verizon's right to take such action upon a CLEC's failure

to put in place an alternative arrangement. The principal reason that CLECs object to references to commercial agreements, however, is that they argue that a commercial agreement would almost never become an issue because any "gap" in Verizon's unbundling obligation would, they argue, always be filled by an obligation under some other "Applicable Law." That argument is incorrect for reasons explained herein.

Issue 26: Should Verizon provide an access point for CLECs to engage in testing, maintaining and repairing copper loops and copper subloops?

Relevant Provisions: None

Verizon objects to this issue on the same grounds as other non-*TRO* issues described above. The *Triennial Review Order* did not change the rules with respect to testing, maintaining, or repairing copper loops, and existing contracts already address these matters, to the extent parties deemed necessary when the agreements were negotiated and/or arbitrated. If particular CLECs wish to change their agreements to address (or re-address) loop maintenance or repair issues, this is not the forum to do so. Instead, Verizon has offered to work with such CLECs separately to incorporate such provisions. But it would be improper, as well as a waste of resources, to complicate this proceeding by arbitrating non-*TRO* provisions that are already included in existing contracts.

Issue 27: What transitional provisions should apply in the event that Verizon no longer has a legal obligation to provide a UNE? Does Section 252 of the 1996 Act apply to replacement arrangements?

Relevant Provisions: Verizon Amendment 1, § 3.1

Please see Verizon's responses to Issues 1 and 2. Section 252 does not apply to arrangements to replace network elements no longer required to be unbundled under that section.

Issue 28: Should Verizon be required to negotiate terms for service substitutions for UNEs that Verizon no longer is required to make available under section 251 of the Act?

Relevant Provisions: None

Please see Verizon's response to Issue 2.

Issue 29: Should the FCC's permanent unbundling rules apply and govern the parties' relationship when issued, or should the parties not become bound by the FCC order issuing the rules until such time as the parties negotiate an amendment to the ICA to implement them, or Verizon issues a tariff in accordance with them?

Relevant Provisions: None.

The parties have no discretion to determine when the FCC's unbundling rules will apply. By explicit directive of the FCC, the *Triennial Review Remand Order* and the rules adopted in that order took effect on March 11, 2005, *see* TRRO ¶ 235, and all parties must comply with them, including the mandatory transition plan. As discussed above, as of March 11, 2005, the FCC prohibited CLECs from ordering new UNE-P or high-capacity loops or transport facilities that do not meet the impairment criteria in the *TRRO*. The prescribed transition period begins on March 11, 2005, and ends 12 months later (or 18 months, for dark fiber loops and transport). During this period, the parties are expected to negotiate implementation of the FCC's permanent unbundling rules (including any operational details that may need to be worked out), but the FCC repeatedly and explicitly specified that the transition periods do *not* apply to the no-new-adds directives, but only to the embedded base. *See TRRO* ¶¶ 5, 142, 195, 199. It also ruled that CLECs "*must* transition" the embedded base of de-listed facilities at the end of the prescribed transition period (*Id.* ¶ 143, 196, 227), foreclosing the possibility that CLECs will again stall implementation of federal law, as they did with respect to the *TRO* rulings.

Verizon refers the Department to its Opposition to Petition for Emergency Declaratory Relief filed with the Department on March 9, 2005, and incorporates that Opposition here.

Verizon also refers the Department to Verizon's response to Issue 10 herein, which also addresses this Issue.

Issue 30: Do Verizon's obligations to provide UNEs at TELRIC rates under applicable law differ depending upon whether such UNEs are used to serve the existing customer base or new customers? If so, how should the Amendment reflect that difference?

Relevant Provisions: None.

All carriers must comply with the mandatory transition plan the FCC established in its Triennial Review Remand Order, which distinguishes between the embedded base and new orders. For the embedded base, the FCC has established a twelve-month transition period, including transitional rates, for mass-market switching, dedicated transport, and high-capacity loops; and an eighteen-month transition period for dark fiber loops and transport. The FCC's transition plan does not permit CLECs to add new UNEs where the FCC has determined that no section 251(c) unbundling obligation exists. *TRRO* ¶¶ 5, 142, 195, 199, 227. Thus, TELRIC rates do not apply to elements that are no longer subject to unbundling under the Triennial *TRRO* – even for the embedded base.

Verizon's Amendment captures Verizon's obligations under the *TRRO*. As noted in the discussion of Issue 3, above, Verizon has offered to add terms to its Amendment 1 confirming its obligation to comply with the FCC's transition rules. Once Verizon's obligation to provide a UNE has been eliminated (*i.e.*, any FCC-prescribed transition periods are over), then by federal law Verizon is not required to provide that item at TELRIC rates, or at the FCC's transitional rates, to any customer, new or existing. As discussed, there is no need for an amendment to reflect the FCC's mandatory transition plan, because that plan took effect, as a matter of binding FCC regulation, on March 11, 2005.

The CLECs' transition terms, however, would allow them to override the FCC's no-new-adds directive and to keep ordering new arrangements of the delisted UNEs throughout the transition period, if used to serve customers existing as of March 11, 2005. CCC TRRO Amendment ¶¶7.1.2 and 7.2; MCI Amendment §8.1.1; CCG Amendment, §3.2.2.1, 3.2.2.4, 3.3.1.3(a), 3.3.2.2(a), 3.6.1.1(e). The Department should reject the CLECs' attempts to establish purported contract rights beyond those granted in *TRRO* and the *TRO*, neither of which allow CLECs to purchase additional de-listed UNEs for existing customers. *See e.g*. 47 C.F.R. §51.319(d)(2)(iii) (stating that, "Requesting carriers may not obtain new local switching as an unbundled network element").

With respect to UNE-P, the FCC's transition period for the embedded base "*does not permit competitive LECs to add new UNE-P arrangements* using unbundled access to local circuit switching." (*See TRRO* ¶ 227 (emphasis added).) The FCC did not intend for CLECs to add *any* UNE-P arrangements during the same period they are supposed to be transitioning away from UNE-P. As the California Commission observed, "common sense indicates that it would be more disruptive to provide a service to a new customer that would only be withdrawn in 12 months than to refrain from providing such a service that will be discontinued."[110] The FCC held that "[i]ncumbent LECs have *no* obligation to provide competitive LECs with unbundled access to mass market local circuit switching." (*TRRO*, ¶ 5 (emphasis added).) This holding was based upon the FCC's finding that "the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, *justify a nationwide bar on such unbundling*." (*TRRO* ¶ 204, (emphasis added).) It would make no sense for the FCC to have adopted a national bar on unbundling, and then granted—without saying so—an exception for new arrangements for existing

[110] Petition of Verizon California for Amendment to Interconnection Agreements, Application 04-03-014, Assigned Commissioner's Ruling, at 8 (March 10, 2005) ("*California Order*").

customers. As the California Commission held, review of the entire FCC Order confirms that "'new arrangements' refers to any new UNE-P arrangement, whether to provide service for new customers or to provide a new arrangement to existing services. The TRRO clearly bars both." *California Order* at 7.

The language, as well as policy, of the *TRRO* supports this interpretation. For example, the FCC stated: "we establish a transition plan to migrate *the embedded base of unbundled local circuit switching* used to serve mass market customers to an alternative service arrangement." (*TRRO* ¶207 (emphasis added); *see also*, *TRRO* ¶ 226 n.625 (stating that, "The transition period we adopt here thus applies to *all unbundled local circuit switching arrangements* used to serve customers at less than the DS1 capacity level as of the effective date of this Order") (emphasis added).) The FCC did *not* refer to an embedded base of *customers,* which might have been construed to permit existing UNE-P customers to add more UNE-P lines, but to the UNE *arrangements* themselves.[111]

With respect to loop and transport UNEs, the FCC's transitional rules don't allow *any* new UNE arrangements that do not meet the new criteria, without exception for elements ordered to serve existing customers. *See* 47 C.F.R. §§51.319(a)(4)(iii), (a)(5)(iii), (a)(6)(ii), (e)(2)(ii)(C), (e)(2)(iii)(C) and (e)(2)(iv)(B).

Both the federal courts and the FCC concur that unbundling obligations must be "targeted" such that overly-broad "unbundling does not frustrate sustainable, facilities-based competition." *TRRO* ¶ 2; *see also USTA II*. It would frustrate this goal if the CLECs were able to maintain and even expand their leased UNEs simply on the basis that they are serving existing customers.

[111] Although a few state commissions have read the *TRRO* to permit addition of new UNE-P arrangements to serve existing customers, those decisions are inconsistent with the *TRRO* for the reasons discussed in the text.

Issue 31: Should the Amendment address Verizon's Section 271 obligations to provide network elements that Verizon no longer is required to make available under section 251 of the Act? If so, how?

Relevant Provisions: None.

A. Section 271 is Enforced by the FCC, Not by State Commission Arbitration Under Section 252

Various CLECs wish to insert a series of provisions into the ICAs addressing section 271 obligations. As Verizon has explained, there is no lawful basis to include section 271 obligations in the section 252 Amendment under arbitration.

Indeed, this Department has already conclusively rejected such arguments. In a proceeding that involved allegations that Verizon should provide packet switching, the Department said:

> [I]f Verizon is obligated to offer access to packet switching under Section 271 at "just and reasonable" rates under Sections 201 and 202, *the FCC, not the Department, has authority to enforce that obligation under Section 271*. 47 U.S.C. § 271(d)(6). The proper forum for enforcing Verizon's Section 271 unbundling obligations is before the FCC. *Id*.

D.T.E. Phase III-D Order at 16 (emphasis added). Moreover, as noted in the Introduction, *supra*, the Department has also ruled that:

> [Section 271-only elements] should be priced, not according to TELRIC, but rather according to the "just and reasonable" rate standard of Section 201 and 202 of the Act…. [T]he FCC has the authority to determine what constitutes a "just and reasonable" rate under Section 271, and the FCC is the proper forum for enforcing Verizon's Section 271 unbundling obligations. … We do not have authority to determine whether Verizon is complying with its obligations under Section 271.[112]

[112] Consolidated Order at 55-56 (Citations omitted.) Thus, the CCG's proposal to require Verizon to provide at TELRIC rates network elements required solely by section 271 (CCG Amendment, §4.2) are unlawful regardless of the scope of the ICAs or the Department's authority to enforce section 271. The CCG's attempt to require Verizon to "combine and/or commingle" section 271-only elements (Amendment §4.3) must also be rejected, because "Section 271 does not contain the same 'combination' requirement of Section 251, and therefore, Verizon is not required to offer UNE-P under Section 271." Consolidated Order at 55.

The Department's determinations in this regard are correct. As the FCC has held, Congress granted "*sole authority* to the [FCC] to administer . . . section 271" and intended that the FCC exercise "*exclusive authority* . . . over the section 271 process." *InterLATA Boundary Order*,[113] 14 FCC Rcd at 14400-01, ¶¶ 17-18 (emphases added). Courts have likewise held that "Congress has clearly charged the FCC, and *not the State commissions*," with assessing a BOC's compliance with section 271. *See*, *e.g.*, *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) (emphasis added). And the text of Section 271 is replete with references to the FCC's duties. *See* 47 U.S.C. § 271(d)(3), (4), (6).

By contrast, the only role Congress identified for state commissions in section 271 is with respect to an "application" for long-distance approval, and there Congress provided that "the *[FCC] shall consult* with the State commission of [that] State" so that the FCC (not the state commission) can "verify the compliance of the Bell operating company with the requirements of []section [271](c)." *Id.* § 271(d)(2)(B) (emphasis added). Congress gave state commissions no role *after* approval of such an application, and the FCC has never held that it has the obligation to consult with a state commission before ruling on a complaint under section 271(d)(6). State commissions therefore have no authority to "parlay [their] limited role in issuing a recommendation under section 271 . . . into an opportunity to issue an order" — whether under federal law or "ostensibly under state law" — "dictating conditions on the provision" of 271 elements. *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004). Such efforts are preempted because they "bump[] up against" the procedures that are "spelled out in some detail in sections 251 and 252" and "interfere[] with the method the Act sets out" in Section 271. *Id.*

[113] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions To Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392 (1999) ("*InterLATA Boundary Order*").

The detailed procedures in § 251 and § 252, moreover, confirm that state commissions have no authority to regulate 271 elements. To the extent those sections impose obligations on incumbents or grant authority to state commissions, they are expressly tied to network elements that must be provided as UNEs under § 251. State commission authority over interconnection agreements is triggered only by "a request . . . *pursuant to section 251*," and where "negotiation[s] *under this section*" are unsuccessful either party "may petition a State commission to arbitrate any open issues." 47 U.S.C. § 252(a)(1), (b)(1) (emphases added); *see also id.* § 252(c)(1) (state commission must resolve open issues consistent with "the requirements of section 251"); *id.* § 252(e)(2)(B) (state commission may reject arbitrated agreement that "does not meet the requirements of section 251"). Furthermore, § 251(c)(1) obligates incumbents to negotiate — and, if necessary, arbitrate pursuant to § 252 — only "terms and conditions of agreements to fulfill the duties described in [section 251(b) and (c)]." *Id.* § 251(c)(1). Based on these provisions, the FCC has held that "*only* those agreements that contain an ongoing obligation *relating to section 251(b) or (c)*" are "interconnection agreement[s]" covered by § 252. *Qwest Declaratory Ruling*, 17 FCC Rcd at 19341, ¶ 8 & n.26 (emphases added).

With respect to state commissions' authority to set rates, § 252(d)(1) is similarly "quite specific" and "*only* applies for the purposes of implementation of section 251(c)(3)." *Triennial Review Order* ¶ 657 (emphasis added). The FCC's conclusion is compelled by the text of § 252, which authorizes state commissions, in arbitrating interconnection agreements, to establish rates only for "network elements according to [section 252(d)]," which in turn authorizes "[d]eterminations by a State commission" of the "rate for network elements *for purposes of* [*section 251(c)(3)*]." 47 U.S.C. § 252(c)(2), (d)(1) (emphasis added). Congress made no

comparable delegation of rate-setting authority to state commissions with respect to 271 elements, and there is "*no serious argument*" that the UNE pricing regime "appl[ies] to unbundling pursuant to § 271." *USTA II*, 359 F.3d at 589 (emphasis added). And because Congress gave the FCC — and the FCC alone — authority to determine whether a BOC complies with section 271, that authority rests exclusively with the FCC. *See id.* at 565.

Indeed, state law regulation of 271 elements (even if it were permitted, and it is not) would be contrary to the FCC's expressed preference for commercial agreements with respect to those elements. *See UNE Remand Order*, 15 FCC Rcd at 3906, ¶ 473; *Triennial Review Order* ¶ 664.[114] The possibility of state commission review and potential modification of voluntary commercial agreements encourages parties to attempt to use the regulatory process to improve further on the terms of a negotiated deal, thus diminishing their ability to resolve issues with any certainty at the bargaining table. The FCC recognized this in the *Qwest Declaratory Ruling*, explaining that subjecting commercial agreements to the same procedural requirements that Congress specifically applied only to agreements implementing § 251(b) and (c) would raise "unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs." *Qwest Declaratory Ruling*, 17 FCC Rcd at 19341, ¶ 8. In addition, most competitors operate in multiple states and typically seek to negotiate multi-state agreements with incumbents. If the rates, terms, and conditions for provision of 271 elements in such agreements were subject to diverging and potentially conflicting regulation by each state commission, the ability of carriers to reach commercial agreements would also be severely undermined. In this regard, it is noteworthy that numerous competitors in multiple states have obtained access to

[114] *See also*, *e.g.*, Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein on Triennial Review Next Steps (Mar. 31, 2004) ("The Communications Act emphasizes the role of commercial negotiations as a tool in shaping a competitive communications marketplace.").

directory assistance and operator services as 271 elements from Verizon under a standard multi-state contract offer, without any regulation by state commissions. As the FCC recognized, there has been "no adverse effect" on competitors — let alone any "perverse policy impact" — from BOCs' provision of these 271 elements without state regulation. *Triennial Review Order* ¶ 661.

B. Section 271 Obligations Are Not UNEs, and Section 271 Does Not Incorporate Section 251 Obligations

The FCC has made clear that elements provided under section 271 *are not UNEs*. The obligation to provide UNEs arises under section 251(c)(3). The obligation under section 271 — which never uses the term "unbundled network element" — is "independent" of "any unbundling analysis under section 251." *Triennial Review Order* ¶ 653. The FCC has therefore held that the TELRIC prices that apply to UNEs do not apply to section 271 elements. Indeed, the FCC held that "TELRIC pricing" or other "forward-looking pric[ing]" for section 271 elements would be "*counterproductive*" (*UNE Remand Order*, 15 FCC Rcd at 3906, ¶ 473 (emphasis added)) and is "*no[t] necessary* to protect the public interest" (*Triennial Review Order* ¶ 656 (emphasis added)). Moreover, section 271 elements do not have to be offered as part of a "combination," and thus there is no such thing as a section 271 Platform.

In reviewing the FCC's determinations, the D.C. Circuit considered and rejected the precise argument made by the CLECs in the Joint Matrix, Issue 31 at 89-90 (*i.e.*, that because section 271(c)(1)(A) and (c)(2)(A) refer to section 252 agreements, section 271 obligations are therefore to be enforced in section 252 arbitrations). In *USTA II*, the CLECs argued, as AT&T does here, "that the independent § 271 unbundling provisions incorporate all the requirements imposed by §§ 251-52, including pricing and combination." *USTA II*, 359 F.3d at 589. The D.C. Circuit, however, held that "the CLECs *have no serious argument*" that section 251 obligations apply to section 271's checklist items four, five, six, and ten (*i.e.*, unbundled elements). *Id.* Just

as here, "[t]he CLECs contend that checklist item two specifies that the § 252(d)(1) pricing rules apply to all unbundled 'network elements,' but checklist item two says no such thing." *Id.* Instead, said the court, "checklist item two by its terms requires only 'nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)' – it says nothing suggesting that the requirements of those sections also apply to the independent unbundling requirements imposed by the other items on the § 271 checklist." *Id.* Thus, the court held that the CLECs' argument "is grounded in an erroneous claim of a cross-application of § 251," and that "none of the requirements of § 251(c)(3) applies to items four, five, six and ten on the § 271 competitive checklist." *Id.* at 590.

The case cited by AT&T in the Joint Matrix, at 90 – *Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) – did *not* hold that the competitive checklist requirements are to be enforced by state regulatory commissions. To the contrary, the D.C. Circuit simply observed that *some* of the statutory requirements of 271 "are simply incorporations by reference of obligations independently imposed on the BOCs by §§ 251-52 of the Act, [47 U.S.C.] § 271(c)(2)(B)(i) & (ii), and enforced by state regulatory commissions pursuant to § 252." *Id.* at 552. That is, the D.C. Circuit was merely pointing out that the first two items on the checklist look to whether a BOC has satisfied the section 252 process. But that in no way implies the converse proposition, *i.e.*, that the section 252 process should somehow implement the *rest* of section 271's obligations. It is section 271 that incorporates section 252, not vice versa.

The CCC argues that referring to section 271 is necessary "in the context of implementing the *TRO* because such terms were only made necessary by the *TRO*'s elimination of certain UNEs from the FCC's § 251 regulations." Joint Issues Matrix, Issue 31, position of CCC at 91. The argument is wrong: indeed, CCC effectively admits that it is trying to

circumvent the FCC's definitive elimination of particular UNEs. But the Department can no more accept the CCC's invitation to override the *TRO* or the *TRRO* by resort to section 271 than by resort to state law. The FCC's elimination of particular section 251 unbundling obligations does not transform section 271 into a license for states to re-impose those same obligations.

Thus, the CLECs' suggested references to section 271 are inappropriate. This Amendment is intended to implement *unbundling* obligations under section 251, not to incorporate section 271 or anything else in pre-existing federal law.

Issue 32: Should the Commission [Department] adopt Verizon's proposed new rates for the items specified in the Pricing Attachment to Amendment 2?

Relevant Provisions: Verizon Amendment 2, Pricing Attachment

The FCC's new rules, particularly as to routine network modifications, require Verizon to provide services to requesting CLECs for which no prices have yet been established under existing interconnection agreements. Verizon has the right to be compensated for performing such services. Accordingly, Verizon's Amendment 2 includes a Pricing Attachment that addresses the elements or services that Verizon is required to provide under the terms of the *Triennial Review Order,* including routine network modifications and various activities related to providing commingling arrangements. Verizon will submit a cost study and propose prices for these new items.

For any elements or services not already contained in either Verizon's Amendment or in CLECs' existing agreements, Verizon's Amendment provides that prices should be those approved (or otherwise allowed to go into effect) by the Department or by the FCC. This requirement is appropriate, and should be adopted.

Supplemental Agreed Issues

The parties have recently agreed on four additional issues that relate to implementation of the *TRRO*.

1. **Should the Agreement identify the central offices that satisfy the FCC's criteria for purposes of application of the FCC's loop unbundling rules?**
2. **Should the Agreement identify the central offices that satisfy the Tier 1, Tier 2 and Tier 3 criteria, respectively, for purposes of application of the FCC's dedicated transport unbundling rules?**

The interconnection agreement should not include any list of particular central offices that are subject to (or exempt from) unbundling of loops and/or transport under the *TRRO*. As described above, the *TRRO* establishes detailed and generally applicable criteria to govern whether high-capacity loops or dedicated transport facilities are subject to unbundling under section 251(c)(3). Those criteria should not be reflected in the parties' agreements, and there is no need to litigate in advance the question of whether particular offices currently meet those criteria.

This is particularly clear because the FCC has already taken steps to ensure that CLECs are adequately informed as to which ILEC wire centers satisfy the various criteria established in the *TRRO*. In response to the request of the Chief of the FCC's Common Carrier Bureau, all the RBOCs, including Verizon, filed lists of wire centers that satisfy the *TRRO* criteria with regard to unbundling of high-capacity loops and transport. *See Verizon Ex Parte,* from Susanne G. Geyer to Marlene H. Dortch, *Unbundled Access to Network Elements,* WC Docket No. 04-313; *Review of Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers,* CC Docket No. 01-338 (Feb. 18, 2005). Verizon has also provided back-up documentation supporting that list. In all likelihood, that filing should forestall the need for further litigation over this issue. But if specific disputes do arise, they can be litigated on an individual carrier and

individual central office basis as the FCC has ordered in ¶ 234 of the *TRRO*. Such an approach would be far more efficient than forcing litigation of such issues before any dispute arises.

3. Should the DTE determine which central offices satisfy the various unbundling criteria for loops and transport? If so, which central offices satisfy those criteria?

The CLECs ask the Department to ignore the first question in Issue 3 and go directly to the second, but the Department cannot reach that question unless it answers the first question in the affirmative. The correct answer to that question, however, is that the Department should *not* determine in this arbitration which central offices satisfy the FCC's unbundling criteria for loops and transport. Instead, the Department should leave any disputes over whether particular central offices qualify for unbundling – if any such disputes arise – to the parties' dispute resolution procedures. Indeed, that is the procedure that the FCC prescribed.

In ¶ 234 of the TRRO, the FCC provided that a CLEC may order and obtain access to high-capacity loops and transport consistent with the new unbundling rules, so long as it can certify in good faith that the facility is subject to unbundling:

> 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.

(Footnotes omitted.) Thus, the FCC established a complete system by which CLECs may order and obtain access to UNE loops and transport consistent with the new unbundling rules. And

they can do so *without changing their existing interconnection agreements*. Moreover, because Verizon must immediately process a CLEC-certified order for such a UNE, the existence of a dispute between Verizon and the requesting carrier over the availability of the UNE will not prevent the CLEC from obtaining the facility at UNE rates in the first instance. Thus, CLECs suffer no harm in the absence of a contractual statement defining the wire centers that satisfy the various criteria for unbundling of loops and transport.

As noted above, Verizon has already publicly filed with the FCC a list of the central offices in Massachusetts that qualify for relief from unbundling of transport and/or high-capacity loops. The wire center information provided by Verizon conforms in all respects to the *TRRO*'s requirements and consists of updated versions of the very same data sources (*i.e.*, ARMIS 43-08 business lines and ILEC fiber-based collocation information) that the FCC relied on in making its impairment determinations in the *TRRO*. *See* TRRO ¶¶ 100, 105. If and when additional offices qualify for relief, Verizon will notify CLECs promptly. Furthermore, to the extent a CLEC wishes to examine the data supporting Verizon's list of qualified central office, Verizon is willing to make that information available after the CLEC has signed an appropriate non-disclosure agreement. There is thus no reason to litigate in this proceeding over which central offices qualify for unbundling relief under the FCC's current rules.

The *TRRO* does not require the Department to insert new terms into the parties' ICAs to govern the ordering of high capacity loops and dedicated transport UNEs, nor does the *TRRO* entitle CLECs to such terms. While the FCC states in ¶233 of the TRRO that "We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act[,]" this statement neither limits implementation of the *TRRO* to the section 252 amendment process nor negates the specific directives of the TRRO, such as the

UNE-ordering provisions of ¶234. Indeed, ¶¶ 233 and 234 taken together comprise the entire section of the TRRO under the heading "Implementation of Unbundling Terms." The FCC clearly intended both of those paragraphs to govern implementation of its decision. Therefore, contrary to the CLECs' contentions throughout this proceeding, not *everything* in the *TRRO* is subject to negotiation.

Moreover, the general directive of ¶233 must give way in the face of the terms of ¶234 specifically addressing the ordering of loop and transport UNEs. This is placed beyond doubt by footnote 660 of the TRRO, appended at the close of ¶234, which states:

> Of course, this mechanism for addressing incumbent LEC challenges to self-certification is simply a *default* process, and pursuant to section 252(a)(1), carriers *remain free* to negotiate alternative arrangements. 47 U.S.C. §252(a)(1).

(Emphasis added.) Thus, as a *default* system, the process established by the FCC in ¶234 to resolve any disputes as to the availability of loop and transport UNEs on a case-by-case basis under dispute resolution procedures is intended to be implemented without amending the parties' contracts. That is inherent in the meaning of "default." Furthermore, the FCC's statement that the parties "remain free to negotiate alternative arrangements" means such negotiations are optional; the parties also remain free *not* to negotiate alternative arrangements. Had the FCC intended to *order* the parties to implement its UNE-ordering system through amendment of their contracts, it would have said so.

Here, the CLECs seek to force Verizon to accept various alternative systems for ordering UNE high capacity loops and dedicated transport and for resolving related disputes that are completely at odds with the default system established by the FCC. Paragraph 234 of the TRRO requires "a requesting carrier" to undertake a reasonably diligent inquiry before ordering a UNE loop or transport and then based on that inquiry "self-certify" that the order is consistent with the

TRRO's requirements. In contrast, the CLECs ask *the Department* to conduct that inquiry and ask *the Department* – by its decision in this arbitration – to certify which central offices satisfy which FCC criteria. Paragraph 234 anticipates that the requesting carrier will undertake an inquiry each time it prepares to submit a UNE loop or transport order, but the CLECs would have a single inquiry conducted now and presumably would rely on the results of that inquiry in submitting all future orders.

Furthermore, the case-by-case dispute resolution process set forth in ¶ 234 is sufficiently flexible to account for changes in facts affecting central offices, such as installation of new collocation arrangements. In contrast, the CLECs propose to freeze in place an initial list of central offices that qualify for relief under the FCC's unbundling criteria by incorporating that list into the ICAs. The CLECs then propose to prohibit any changes in that list except at particular intervals[115] or by way of a lengthy negotiation and arbitration process.[116] Verizon is not obligated to agree to the CLECs' alternative arrangements, and the CLECs' have no right to force it upon Verizon in this arbitration. Moreover, such proposals are contrary to law. Once particular high-capacity loops or transport qualify for relief from unbundling, Verizon cannot be forced to continue to provide unbundled access to those facilities at TELRIC rates. Rather, as in the case of any other element that is no longer subject to unbundling, Verizon must be permitted to cease providing access to that element after complying with the Amendment's proposed notice provision. Adopting the CLECs' approach would impose UNE obligations that exceed, and thus conflict with, those imposed under federal law.

[115] *See e.g*. MCI Amendment §10.4 (allowing quarterly changes in the list); CCG Amendment §3.10.3 (annual changes only)

[116] *See e.g*. CCC Amendment §8.4.

In the same vein, the CCG and other CLECs propose to establish complex systems for amending the list of wire centers they wish to include in the ICAs, all designed to make it difficult to add wire centers to the list. *See e.g.* CCG Amendment §3.10.3; CCC TRRO Amendment §8.4. MCI proposes additional 12-month transition periods every time a wire center is found to meet the FCC's unbundling criteria for loops or transport. *See* MCI Amendment §§9.1.2.2, 9.2.2.2, 10.1.3.2 and 10.2.3.2. These proposed transition periods clearly have nothing to do with the FCC's purposes in creating its transition periods in the *TRRO* – avoiding CLEC rate shock and allowing the parties time to make operational changes and set up replacement services – but merely seek to extend the CLECs' ability to obtain UNEs despite the FCC's rules.

Aside from the fact that Verizon is under no obligation to insert into its ICAs any provisions defining the wire centers that satisfy the FCC unbundling criteria or establishing a system for ordering such UNEs, the CLECs' proposed ICA amendments are replete with terms that are inconsistent with the *TRRO* and the new FCC rules on these issues. For example, the CCC would extend the ordering and provisioning scheme that the FCC established for dedicated transport and high capacity loop UNEs to "any type of network element." CCC TRRO Amendment, § 8.1. This language goes well beyond the scope of application intended by the FCC in adopting this process, which was expressly limited to dedicated transport and loops UNEs. *Id.* The CCC's proposed language is unsupported by any ruling in the *TRO* or *TRRO* and must be rejected.

Section 8 of the CCC's TRRO Amendment suffers from additional flaws as well. First, § 8.2 provides that if Verizon has not provided notice to the CLEC of its belief that a request for a particular network element "is inconsistent with the Amended Agreement" the "CLEC is entitled to rely on the absence of such notice as satisfaction of its obligation to perform a

reasonably diligent inquiry under the terms of Section 8.1." The language is incorrect and should be rejected. The relevant point of reference for the availability of a loop or transport UNE are the FCC's criteria laid out in its rules, not the CCC's TRRO Amendment. In addition, the FCC clearly obligated the CLEC to undertake a "reasonably diligent inquiry" prior to placing an order for high capacity loop and dedicated transport UNEs. A failure by Verizon to challenge a particular order does not relieve the CLEC of that obligation.

Section 8.3 of the CCC's TRRO Amendment provides that "[u]nder no circumstances may Verizon reject or delay orders where CLEC has provided the certification pursuant to Section 8.1." This is overbroad in at least two respects. First, it would ostensibly apply to orders for any UNEs, not just high-capacity loops or dedicated DS1 or DS3 transport as intended by the FCC. Second, this language would foreclose *any* lawful right Verizon might otherwise have for rejecting or delaying an order for a UNE – unrelated to whether the relevant wire centers meet the FCC's unbundling criteria, such as overdue accounts, unavailability of the requested facilities, etc. Nothing in the ¶ 234 of the *TRRO* suggests that the FCC thereby intended to undercut existing negotiated provisions of Verizon's ICA's that allow Verizon to refuse or delay provisioning a UNE arrangement under specified circumstances.

The CCG proposes in § 3.10.1 that "Verizon must provision all qualifying facilities and/or services notwithstanding any prior failure of such facilities and/or services to meet the relevant service eligibility criteria." This language is contrary to federal law. In fact, the FCC held that "once a wire center satisfies the standards for no . . . unbundling, the incumbent LEC shall not be required in the future to unbundle . . . in that wire center." *TRRO* ¶¶ 167 n.466. Otherwise, "modest changes in competitive conditions" could result in "reimposition of

unbundling obligations" – something that the FCC determined would be inappropriate. *Id.* The Department should thus reject CCG's proposal.

The CCG would further impose onerous data requirements on Verizon nowhere required by the FCC, such as requirements to provide "real-time access" to Verizon's data regarding number of fiber-based collocators and business lines at each wire center and to provide voluminous "back-up data" upon request. The *TRRO* grants CLECs no such rights to Verizon's data. As noted above, Verizon will make available to CLECs – if they sign an appropriate non-disclosure agreement – data supporting Verizon's designation of wire centers as satisfying the FCC's criteria. There is no reason to address the issue in the agreement, however, and there is plainly no reason to require Verizon to provide competitively sensitive data to CLECs in cases where Verizon has not designated a particular wire center as satisfying the FCC's criteria.

For all of the foregoing reasons, the Department should not determine which Verizon central offices satisfy the various unbundling criteria for loops and transport.

4. What are the parties' obligations under the TRRO with respect to additional lines, moves and changes associated with a CLEC's embedded base of customers?

CLECs are not allowed to add new lines for existing customers or to obtain de-listed UNEs when existing customers move to different locations. Adding new lines for existing customers or adding new lines at a different location falls within the plain terms of the FCC's prohibition on new adds after March 11, 2005. As discussed at length above, the FCC held that as of March 11, 2005, the *TRRO* "does not permit competitive LECs to add *new UNE-P arrangements* using unbundled access to local circuit switching . . . ." *TRRO* ¶ 227 (emphasis added); *see also id.* ¶¶ 142 (same as to high-capacity transport), 195 (same as to high-capacity loops). Any new UNE-P arrangement (or high-capacity facility that is not subject to unbundling)

– even if used to serve an existing customer – would fall within the terms of this prohibition. This prohibition need cause no significant commercial issues for any CLEC, because CLECs have many other options – including commercial arrangements, special access, and resale – to supplement existing UNE-based services for existing customers.

III. CONCLUSION

The Department should adopt Verizon's proposed amendments.

Respectfully submitted,

/s/Alexander W. Moore

Aaron M. Panner
Scott H. Angstreich
Stuart Buck
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (fax)
apanner@khhte.com
sangstreich@khhte.com
sbuck@khhte.com

Bruce P. Beausejour
Alexander W. Moore
Keefe B. Clemons
185 Franklin Street – 13th Floor
Boston, MA 02110-1585
(617) 743-2265

Kimberly Caswell
201 N. Franklin St.
Tampa, FL 33601
(727) 360-3241
(727) 367-0901 (fax)