The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 04-33-B May 5, 2006

Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of 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

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ORDER ON COMPLIANCE

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ORDER ON COMPLIANCE

I. INTRODUCTION

On July 14, 2005, the Department of Telecommunications and Energy ("Department") issued its final Order in D.T.E. 04-33 ("Arbitration Order") resolving the 36 issues presented to the Department for arbitration. In the Arbitration Order, the Department directed the parties to submit a single final Amendment to the parties interconnection agreements ("ICA") applicable to all parties, consistent with the Department's findings in the Order. Arbitration Order at 290. Pursuant to this directive, on October 7, 2005, a compliance Amendment was submitted to the Department on behalf of Verizon New England, Inc., d/b/a Verizon Massachusetts ("Verizon"), AT&T Communications of New England, Inc. and Teleport Communications Boston, Inc. ("AT&T"), Conversent Communications of Massachusetts, Inc. ("Conversent"), DSLnet Communications, LLC ("DSLnet"), RCN-BecoCom LLC ("RCN-BecoCom"), RCN Telecom Services of Massachusetts, Inc. ("RCN"), and the Competitive Carrier Group ("CCG").[1]

As a result of further negotiations, the parties submitted a revised compliance Amendment on October 27, 2005. The parties, however, were unable to agree on appropriate contract language for a number of issues. The revised compliance Amendment therefore

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[1] CCG includes the following carriers: A.R.C. Networks, Inc. d/b/a InfoHighway Communications Corporation ("A.R.C. Networks"); Broadview Networks Inc. and Broadview NP Acquisition Corp.; Cleartel Telecommunications, Inc. f/k/a Essex Acquisition Corp.; DIECA Communications Inc. d/b/a Covad Communications Company ("Covad"); DSCI Corp; IDT America Corp.; KMC Telecom V, Inc.; and XO Communications Services, Inc. (formerly XO Massachusetts, Inc. and Allegiance Telecom of Massachusetts, Inc.) ("XO").

contains opposing language proposed by one or more competitive local exchange carriers or by Verizon. The parties requested the opportunity to file briefs on the remaining disputes over contract language to assist the Department in resolving these disputes.

On December 16, 2005, the Department issued its Order on Reconsideration ("Reconsideration Order") resolving all issues raised in the motions for reconsideration or clarification of the Arbitration Order.[2] In the Reconsideration Order, the Department again directed the parties to submit a single conforming Amendment applicable to all parties, consistent with the findings contained therein. Reconsideration Order at 67. Additionally, while the Department directed the parties to seek to resolve the disputes over contract language presented in the October 27 compliance Amendment, the Department permitted the parties to file briefs on any disputes over contract language which remain. Id.

On January 17, 2006, the parties filed a second revised compliance Amendment ("January 17 Compliance Amendment").[3] Because the parties were still unable to agree on conforming contract language for a number of issues, Verizon and the CLECs also submitted briefs on the disputed contract language in the January 17 Compliance Amendment ("Verizon

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[2] Motions for clarification or reconsideration of the Arbitration Order were filed on August 24, 2005 by AT&T; Conversent; Verizon; CTC Communications Corp. and Lightship Telecom, LLC, jointly; and by XO.

[3] The January 17 Compliance Amendment was filed on behalf of Verizon and the following carriers: Conversent; DSLnet; RCN-BecoCom; RCN; A.R.C. Networks; Covad; and XO (collectively, "CLECs").

Compliance Brief" and "CLEC Compliance Brief," respectively).[4] On January 31, 2006, the CLECs submitted a Supplemental Brief to substitute portions of its Compliance Brief.[5] In this Order, the Department discusses and make findings on all remaining contact language disputes presented by Verizon and the CLECs in the January 17 Compliance Amendment.

II. DISPUTED CONTRACT LANGUAGE

Unlike the role of a conventional arbitrator who is called by contracting parties to resolve a dispute over the terms of their agreement, the Department's role here is to supply additional terms amending existing contracts that fully expressed the parties agreement and intent. We act to bring these contracts into conformity with changes in the Federal law that itself required that the contracts be entered into in the first place. Thus, because the parties were unable to come to agreement on their own and sought Department intervention, our Order, like others we issued in this field, becomes part not only of the contract language but also of the "background [ ] and purpose" for construing the contracts in the event of future dispute in this or other forums. MCI WorldCom Communications, Inc. v. Department of

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[4] AT&T did not join in the revised Amendment or submit a brief on the disputed contract language. Instead, AT&T submitted a letter accepting all language in the January 17 Compliance Amendment that is not subject to dispute and taking no position on the matters that are in dispute. AT&T states in its letter that it intends to abide by the results of this negotiation and arbitration process (Letter from Jay Gruber to Mary Cottrell, dated January 17, 2006).

[5] The Supplemental Brief was necessary because the January 17 Compliance Amendment contained language different from that which Verizon proposed earlier in the negotiations. See CLEC Supplemental Brief at 1-2.

Telecommunications and Energy, 442 Mass. 103, 113 (2004), citing USM Corporation v. Arthur D. Little Systems, Inc., 28 Mass. App. Ct. 108, 116 (1989).

A. § 4.4 (Scope of the Amendment)

Section 4.4 of the Amendment outlines the scope of the Amendment. The CLECs propose two additional sentences after the agreed-upon language in § 4.4. The first sentence proposed by CLECs states:

> This Amendment does not alter, modify or revise any rights or obligations under applicable law contained in the Agreement, other than those Section 251 rights and obligations specifically addressed in this Amendment.

January 17 Compliance Amendment, § 4.4. The second proposed sentence states:

> Furthermore, [CLEC]'s execution of this Amendment shall not be construed as a waiver with respect to whether Verizon, prior to the Amendment Effective Date, was obligated under the Agreement to perform certain functions required by the TRO.

Id. For the reasons outlined below, we adopt the first proposed sentence and reject the second.

In the Arbitration Order, we arbitrated only those terms necessary to implement the new unbundling rules in the Triennial Review Order[6] and the Triennial Review Remand

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[6] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No.98-96; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 01-36 (rel. Aug. 21, 2003) ("Triennial Review Order" or "TRO"), vacated in part and remanded in part by United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

Order.[7] Arbitration Order at 53. Additionally, we did not foreclose the operation of applicable law as defined in the underlying interconnection agreement. Arbitration Order at 45-46, 85, 87, 92, 238-239, 262. By limiting the scope of the Amendment to only those changes of law addressed by the Department, the first sentence of the additional language proposed by CLECs in § 4.4 is consistent with our determinations and is therefore approved.

On the other hand, the second sentence proposed by the CLECs is inconsistent with our determinations in the Arbitration Order. As Verizon correctly points out (see Verizon Compliance Brief at 2 n.1), by seeking to preserve the argument that Verizon was obligated to perform certain functions required by the Triennial Review Order prior to the July 14, 2005 effective date of the Amendment, the CLECs' proposed language conflicts with our determination that, with the exception of delisted UNEs for which the FCC explicitly established a different effective date, the July 14, 2005 effective date of the Amendment "applies to all provisions of the Amendment whether based upon the Triennial Review Order or the Triennial Review Remand Order." Arbitration Order at 188-189. Thus, for all CLECs whose interconnection agreements required an amendment to implement the changes of law in the Triennial Review Order, any Verizon obligation arising from the Triennial Review Order did not begin until July 14, 2005, the effective date of the Amendment. Id. at 135. Because the second sentence of the CLECs proposed language in § 4.4 undermines our findings as to

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[7] In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) ("Triennial Review Remand Order" or "TRRO").

the effective date of Verizon's obligations arising from the Triennial Review Order, we reject it. Accordingly, consistent with our findings above, § 4.4 of the Amendment shall read, in its entirety, as follows:

> Scope of Amendment: This Amendment shall amend, modify and revise the Agreement only to the extent set forth expressly herein. As used herein, the Agreement, as revised and supplemented by this Amendment, shall be referred to as the "Amended Agreement." Nothing in this Amendment shall be deemed to amend or extend the term of the Agreement, or to affect the right of a Party to exercise any right of termination it may have under the Agreement. This Amendment does not alter, modify or revise any rights or obligations under applicable law contained in the Agreement, other than those Section 251 rights and obligations specifically addressed in this Amendment.

We now turn to the cross references to § 4.4 elsewhere in the Amendment. We agree with Verizon that this proceeding is not the appropriate forum to address the scope of the underlying interconnection agreements (Verizon Compliance Brief at 4). Nevertheless, we approve the CLECs' proposed cross references to § 4.4 for the following reasons. In each instance where the CLECs propose to insert a reference to § 4.4, the phrase "Notwithstanding any other provision of the Amended Agreement," or language to that effect, precedes the proposed reference, which could be read to limit the effect of § 4.4. Therefore, we find the CLECs clarification that the scope of the Amendment continues to apply, despite the "notwithstanding" phrase, to be reasonable.

Furthermore, as the CLECs point out (see CLEC Compliance Brief at 2-3), the cross references to § 4.4 are consistent with our determinations in the Arbitration Order with respect to the operation of applicable law and the scope of the Amendment. The references to § 4.4 do

not, as Verizon asserts they might be read to do, reinterpret the underlying interconnection agreement. Rather, the references to § 4.4 merely preserve the possibility that sources of law other than § 251(c)(3) may apply and, thus, is entirely consistent with the Department's determinations. Accordingly, we approve the references to § 4.4 (as adopted above) in §§ 2.3 (General Conditions - Discontinued Facilities), 3.1.1 (FTTH and FTTC Loops - New Builds), 3.1.2 (FTTH and FTTC Loops - Overbuilds), 3.2.1 (Hybrid Loops - Packet Switched Features, Functions and Capabilities), 3.2.2 (Hybrid Loops- Broadband Services), 3.2.3 (Hybrid Loops - Narrowband Services), 3.2.4 (Hybrid Loops - IDLC Hybrid Loops), 3.3.2 (Sub-Loop - Distribution Sub-Loop Facility), 3.6.2.4 (Certification and Dispute Process for High Capacity Loops and Transport - Provision-then-Dispute Requirements), 3.11.1 (Commingling), and 3.11.2 (Service Eligibility Criteria for Certain Combinations and Commingled Facilities and Services). In directing that the cross-references be inserted, we expressly intend that limitation on their reading as controlling in the event of any future dispute over their effect.

B. § 2.5.1 (Pre-Existing Discontinuance Rights)

Section 2.5.1 of the Amendment seeks to clarify that Verizon's rights regarding discontinuance of "Discontinued Facilities" pursuant to the Amendment are in addition to any pre-existing discontinuance rights Verizon may have under the Agreement. The parties differ on the language describing the facilities for which Verizon's pre-existing discontinuance rights under the Agreement are preserved. The CLECs propose that the pre-existing discontinuance rights under the Agreement should refer specifically to "Discontinued Facilities," which the

Amendment defines in § 4.7.6.[8] Verizon, on the other hand, prefers a broader reference to "UNEs that by operation of law have/has ceased or cease(s) to be subject to an unbundling requirement under 47 U.S.C. § 251(c)(3) or 47 C.F.R. Part 51" because, according to Verizon, "that is the full panoply of UNEs governed by the [interconnection agreements] in the first place" (Verizon Compliance Brief at 4).

As we have stated repeatedly, the purpose of the Amendment is to implement the FCC's rules in the Triennial Review Order and the Triennial Review Remand Order. The Triennial Review Order and the Triennial Review Remand Order delisted only a subset of § 251(c)(3) UNEs. Thus, the Amendment does not at all affect Verizon's pre-existing discontinuance rights under the Agreement with respect to UNEs other than those delisted in the Triennial Review Order or the Triennial Review Remand Order. Indeed, in the Arbitration Order at 236, the Department determined, and the parties generally agreed that, to the extent the Amendment did not affect pre-existing terms of agreements, including discontinuance rights, those terms retained their binding force. Furthermore, the scope of the Amendment, outlined in § 4.4 of the Amendment and discussed above, makes this point clear ("This Amendment shall amend, modify and revise the Agreement only to the extent set forth expressly herein . . . Nothing in this Amendment shall be deemed . . . to affect the right of a Party to exercise any right of termination it may have under the Agreement"). As such, we find Verizon's attempt to preserve its discontinuance rights as to the "full panoply of UNEs"

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[8] In this Order (see below),we resolve the dispute over and adopt a definition for "Discontinued Facilities."

redundant and unnecessary. Under the provision just quoted, whatever termination rights arise from the Agreement or from applicable law (statutory, regulatory ,or judicial) will remain unaffected and unimpaired by failure to include the broader reference Verizon sought.

On the other hand, the CLECs proposal in § 2.5.1 of the Amendment seeks to preserve Verizon's pre-existing discontinuance rights only as to those UNEs delisted by the Triennial Review Order and the Triennial Review Remand Order, i.e., Discontinued Facilities as defined in § 4.7.6 of the Amendment. This proposal is consistent with the limited scope of the Amendment and is approved.

C. § 3.1.1 (FTTH and FTTC Loops - New Builds)

The language proposed by the CLECs in § 3.1.1[9] of the January 17 Compliance Amendment regarding new builds states, in relevant part, that:

> Verizon is not required to provide nondiscriminatory access to a FTTP or FTTC Loop on an unbundled basis when Verizon deploys such a Loop to the customer premises of an end user that has not been served by any other loop facility.

Verizon proposes to add the phrase "other than a FTTH or FTTP Loop" at the end of § 3.1.1.

We conclude that the FCC did not intend to require ILECs to unbundle any portion of a FTTH or FTTC loop that is deployed parallel to, or in replacement of, an existing FTTH or FTTC loop. While the FCC did not specifically address the variation of the overbuild situation raised by Verizon (where a FTTH or FTTC loop is deployed parallel to, or in replacement of, an existing FTTH or FTTC loop rather than an existing copper loop), the FCC was clear that

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[9] The CLECs also propose to reference § 4.4 of the Amendment, regarding the scope of the Amendment, in § 3.1.1. We adopted the CLECs' proposal, above.

an ILEC is obligated to unbundle the narrowband portion of a FTTH or FTTC loop only when a FTTH or FTTC loop is deployed parallel to, or in replacement of, an existing copper loop.[10] See Triennial Review Order at ¶ 273 ("Only in fiber loop overbuild situations where the incumbent LEC elects to retire existing copper loops must the incumbent LEC offer unbundled access to those fiber loops"). Accordingly, we agree with Verizon's assertion that no obligation exists to unbundle any portion of a new FTTH or FTTC loop that has been deployed parallel to, or in replacement of, an existing FTTH or FTTC loop. To reflect the FCC's intent, the parties shall include the following language in the Amendment:

> Notwithstanding any other provision of the Amended Agreement, but subject to and without limiting Section 4.4, below, Verizon is not required to provide nondiscriminatory access to a FTTH or FTTC loop on an unbundled basis when Verizon has deployed such a loop parallel to, or in replacement of, an existing FTTH or FTTC loop.

D. § 3.2.4.2 (ILDC Hybrid Loops)

In § 3.2.4.2 of the proposed Amendment, the parties propose different terms regarding the responsibility for payment of charges for the construction of a new loop when neither a copper loop, or a loop served by existing UDLC facilities is available. Verizon proposes the following language:

> In addition to the rates and charges payable in connection with any unbundled Loop so provisioned by Verizon, [CLEC] shall be responsible for the following charges to the extent provided for in the Pricing Attachment of this Amendment provided, however, that the following charges shall apply even if not provided for in the Pricing Attachment to this Amendment in cases where

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[10] Section 3.1.2 of the Amendment addresses Verizon's obligations when it deploys a FTTH or FTTC loop parallel to, or in replacement of, an existing copper loop.

> Verizon offers, and [CLEC] requests, construction of the necessary copper or UDLC facilities: (a) an engineering query charge for preparation of a price quote; (b) upon [CLEC]'s submission of a firm construction order, an engineering work order nonrecurring charge; and (c) construction charges, as set forth in the price quote.

January 17 Compliance Amendment, § 3.2.4.2 (emphasis added). The CLECs proposal replaces the language underlined above with the following "only if [CLEC] requests the construction of a copper Loop or UDLC facilities when Verizon has proposed to provide a different less costly method of technically feasible access."

In the Arbitration Order at 194, the Department determined that "the FCC was silent about cost recovery for activities related to providing "technically feasible" access to narrowband IDLC loops, and [that] Verizon ha[d] not yet demonstrated through the evidentiary rate setting process [ ] how its proposed charges relate to the provision of narrowband IDLC loops." Accordingly, the Department rejected Verizon's proposals to assess certain new charges related to providing "technically feasible" access to narrowband IDLC loops, such as charges for constructing a new loop, including an engineering query charge, an engineering work order charge, and construction charges. Id. The only exception to the Department's finding is "where a CLEC specifically requests new construction, notwithstanding Verizon's determination to provide a different, less-costly method of technically feasible access. Id. In

that circumstance, the Department held that Verizon may charge the CLEC for constructing the loop.[11] Id.

Verizon's proposal attempts to assess CLECs charges for construction of new loops contrary to our explicit directive that such charges may not be imposed unless a CLEC specifically requests new construction. Verizon argues, in its compliance brief, that when construction of a new loop or UDLC facility is necessary to provision a CLEC's order, the CLEC must pay for the build-out because an ILEC's unbundling obligation only extends to Verizon's existing network (Verizon Compliance Brief at 7). But, as the CLECs correctly point out (see CLEC Compliance Brief at 7), Verizon did not seek reconsideration of the Department's determination on this issue, and we find that it is inappropriate to consider new arguments opposing our determinations during the compliance phase of this proceeding. Accordingly, because Verizon's proposed language would impose construction charges on a CLEC when new construction is the only technically feasible method of access, Verizon's proposal is inconsistent with our determinations in the Arbitration Order, and is rejected. The CLEC's proposed language accurately reflects our determinations in the Arbitration Order that Verizon may only impose construction charges when a CLEC specifically requests new construction in lieu of Verizon's offer to provide a different, less costly method of access and is therefore adopted.

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[11] However, even when a CLEC specifically requests new construction in lieu of Verizon's offer to provide a different, less costly method of technically feasible access, the ILEC still makes the ultimate decision as to what type of access to provide. See Arbitration Order at 194.

We now turn to charges for loop construction in circumstances where Verizon proposes a less costly method and the CLEC requests new construction. The agreed upon language in § 3.2.4.2 provides that a CLEC shall be responsible for "construction charges, as set forth in the price quote" but only "to the extent provided for in the Pricing Attachment to this Amendment." Verizon states that because the Pricing Attachment does not set forth loop construction charges, this agreed upon language leaves Verizon to pay for actual construction charges (see Verizon Compliance Brief at n.6). We agree with Verizon that such a result would be contrary to our determination in the Arbitration Order that a CLEC is responsible for the costs of constructing a new loop if a CLEC specifically requests new construction even though Verizon has proposed a different less costly method of access. However, because loop construction depends on factors which may vary from location to location, inclusion of loop construction charges in the Pricing Attachment may not be feasible. Instead, when a CLEC requests new construction even though Verizon proposes a different less costly method of access, loop construction costs should be determined on a case-by-case basis, as is done in Verizon's special construction tariff. See M.D.T.E. Tariff No. 16. Accordingly, we direct that parties include language to clarify that loop construction charges shall be determined on a case-by-case basis and that a CLEC is responsible for such charges, even though such charges are not provided for in the Pricing Attachment, when a CLEC specifically requests new construction notwithstanding Verizon's offer to provide a different less costly method of technically feasible access.

E. §§ 3.3.1.2.1 and 3.3.1.2.2 (Single Point of Interconnection)

In § 3.3.1.2.1 of the January 17 Compliance Amendment, the CLECs desire negotiation of a "master agreement" setting forth the "general" terms and conditions along with a schedule containing specific terms and rates for the specific single point of interconnection ("SPOI"), whereas Verizon seeks, for each SPOI request, to require a CLEC to negotiate an amendment to the Amended Agreement memorializing the terms, conditions and rates under which Verizon will provide that SPOI. The CLECs argue that having to renegotiate the general terms each time a CLEC requests access to a SPOI would delay a CLECs access (CLEC Compliance Brief at 11-12). Verizon, on the other hand, asserts that the Department already rejected the CLECs proposal for a "master" agreement and urges the Department to reject the CLECs attempt "to re-litigate this issue in the guise of a dispute over contract language" (Verizon Compliance Brief at 10-11). For the reasons outlined below, we reject the CLECs language and approve Verizon's proposal.

In the Arbitration Order at 219, the Department adopted Verizon's proposed language in § 3.3.1.2.1, subject only to two changes in the language in order to conform to the language in the Triennial Review Order. The two changes required by the Department were: (1) to use the specific words "owns, controls, or leases" instead of "either owns and controls, or leases and controls," and, (2) to use the words "intends to place an order" instead of "certifies that it will place an order." Id. at 218. Other than these two modifications, no other conditions were

placed on our approval of § 3.3.1.2.1.[12] Accordingly, because the specific revisions to § 3.3.1.2.1 that we required in the Arbitration Order were made, we approve Verizon's proposed language. Additionally, consistent with this approval, we also approve Verizon's proposed language in § 3.3.1.2.2.[13]

Moreover, even if we were to review the CLECs' proposed language, we would reject it. As we determined in the Arbitration Order,

> ILECs are not required to negotiate the specific rates, terms, and conditions of SPOI construction until a CLEC makes request for interconnection at a multiunit premises. This approach, as Verizon points out, allows the parties to tailor the terms to the specific circumstances of each location.

Arbitration Order at 217 (emphasis in original). Thus, the CLECs' proposed "master agreement" containing "general" terms and conditions along with rate schedules under which Verizon is to provide a SPOI is inconsistent with the Arbitration Order and the FCC's rule, 47 C.F.R. § 51.319(b)(2)(ii), and must be rejected. But, in order to streamline the negotiation process for subsequent SPOI requests and to minimize delay, we encourage the parties to adopt any applicable term or condition from prior SPOI amendments into subsequent SPOI

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[12] The Department also required the Amendment to state that the SPOI obligation is in addition to Verizon's obligations to provide non-discriminatory access to a subloop for access to multiunit premises wiring, including any inside wire, at any technically feasible point. Arbitration Order at 218. The parties have complied with this requirement by adding a new provision. See § 3.3.1.2.3 of the January 17 Compliance Amendment.

[13] Section 3.3.1.2.2 provides for dispute resolution if the parties are unable to agree on the rates, terms and conditions under which Verizon will provide a SPOI.

amendments. We also affirm our willingness to assist the parties in the event negotiations protract unduly. See Arbitration Order at 217.

F. References to § 251(c)(3) of the Act

In §§ 3.4.1 (DS1 Loops), 3.4.2 (DS3 Loops), 3.4.3.1 (Dark Fiber Loops), 3.5.1 (DS1 Dedicated Transport), 3.5.2 (DS3 Dedicated Transport), 3.5.3 (Dark Fiber Transport), 3.5.4 (Entrance Facilities), 3.10 (Line Sharing),[14] the CLECs propose to qualify the specific UNEs at issue as "§ 251(c)(3)" UNEs, e.g, in § 3.4.1, the CLECs refer to DS1 Loops as "§ 251(c)(3) DS1 Loops." The CLECs argue that because the rates, terms and conditions in the Amendment must be limited to § 251(c)(3) network elements and facilities affected by the Triennial Review Order and the Triennial Review Remand Order, such qualifying language is necessary to properly define the scope of the Amendment (CLEC Compliance Brief at 3). Verizon, on the other hand, argues that the insertion of the modifier "§ 251(c)(3)" is unnecessary in that it does not affect the substance of the section at issue (Verizon Compliance Brief at 11). Verizon further states that the proposed insertion is confusing because it misleadingly implies that the Amendment governs only those UNEs that Verizon must provide pursuant to § 251(c)(3), but that the existing ICA requires Verizon to provide unbundled access to an additional set of UNEs, that are not required by § 251(c)(3) (id. at 11-12).

As we have stated previously, the Triennial Review Order and the Triennial Review Remand Order changed the CLECs' rights with regard to UNEs, not with respect to non-§251

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[14] The CLECs also propose to insert "§ 251(c)(3)" to modify the term "facility" in the definition of Discontinued Facility. See January 17 Compliance Amendment, § 4.7.6.

network elements or services that a CLEC may or may not obtain pursuant to other applicable law. Accordingly, we approve of the CLECs' insertion of the modifier "§ 251(c)(3)" in the above cited sections of the Amendment because it adds clarity to the Amendment. We emphasize that our approval of the insertion of the modifier "§ 251(c)(3)" in the above cited sections should not be construed to imply that the Department finds that any § 251(c)(3) UNE may or may not be obtained pursuant to other applicable law, such as § 271 of the Act or state law. This immediately foregoing observation should dispel any confusion of the sort Verizon argues might arise from adopting the CLEC's proposed language. Rather, we find that"foreclosing the operation of state law, as well as other sources of 'applicable law,' is contrary to the statutory scheme of the Act." Arbitration Order at 44 (internal citation omitted).

G. References to "Affiliate"

We reject the use of the term "affiliate" in limiting the availability of DS1 and DS3 loops and transport in §§ 3.4.1.1.2, 3.4.2.1.2, 3.5.1.1.2, 3.5.2.1.2. Verizon's inclusion of the term "affiliate" would limit the availability of DS1 and DS3 loops and transport to the maximum identified in the cap for a CLEC and all its affiliates, collectively. But nothing in the FCC's rules on the DS1 and DS3 loop and transport caps supports this interpretation. Rather, the FCC rules merely specify that a "requesting telecommunications carrier" is subject to the cap. See 47 C.F.R. § 51.319(a)(4)(ii), (a)(5)(ii), (e)(2)(ii)(B) and (e)(2)(iii)(B). Furthermore, we agree with the CLECs that if the FCC intended to apply the caps in the

manner suggested by Verizon's proposed language, it would have explicitly said so (see CLEC Compliance Brief at 15, citing 47 C.F.R. § 51.5 (definition of fiber-based collocator)).[15]

Nor are we persuaded to find otherwise by Verizon's statement that a CLEC may circumvent the cap by substituting the name of one of its affiliates on an order, or creating a new affiliate to obtain additional UNEs over the permissible limit (see Verizon Compliance Brief at 12-13). We do not intend our rejection of Verizon's proposed language to open a loophole for abuse. We are confident that, if Verizon finds that such abuse of the process is likely, or if such abuse actually occurs, Verizon can and will address the problem in an appropriate manner that does not impede the availability of DS1 and DS3 loops and transport to CLECs as required by the FCC rules. Verizon may also bring evidence of any manipulation that occurs during the term of the arbitrated agreement to our attention and request an investigation. A complaint averring sufficient facts may warrant opening an investigation and ultimately granting a remedy.

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[15] The FCC defines a fiber-based collocator as "any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber optic cable or comparable transmission facility that (1) terminates at a collocation arrangement within the wire center; (2) leaves the incumbent LEC wire center premises: and (3) is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph . . . Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator." 47 C.F.R. § 51.5; see also Triennial Review Remand Order at ¶ 102.

H. § 3.6.1.3 (CLEC Certification for High Capacity Loops and Transport)

In § 3.6.1.3 of the January 17 Compliance Amendment, Verizon proposes to require CLECs to utilize its newly modified electronic ordering system to provide self-certifications for high-capacity loops and transport. Verizon asserts that certification through its electronic ordering system consists of filling in a "c" in the appropriate box on the Access Service Request or Local Service Request forms by which the CLECs submits its request; thus, Verizon argues, its electronic certification minimizes the paperwork, time and resources needed to submit, certify and process an order (Verizon Compliance Brief at 13). The CLECs state that they would agree to certification via Verizon's electronic ordering system as long as Verizon agrees to inclusion of the limiting phrase "so long as such method is no more onerous than providing certification by letter" (CLEC Compliance Brief at 16). The CLECs argue that Verizon's refusal to agree implies that the electronic certification system will be more onerous than a letter (id.). Verizon, however, argues that the CLECs' proposal "would permit [CLECs] to avoid electronic certification on the basis of even the most implausible claim of undue burden" (Verizon Compliance Brief at 13).

Based upon Verizon's description of the certification process through its electronic ordering system, on its face it would appear to be in the CLECs best interest to utilize the system. But, aside from Verizon's assertions in its Compliance Brief, the record does not contain any evidence on the efficiency of Verizon's electronic ordering system in comparison to certifications by letter. Without a thorough examination of the electronic certification system, it would be inappropriate for the Department to endorse such system by requiring its

use, particularly when CLECs would be restricted to self-certify via the electronic ordering system.

Moreover, CLECs have little incentive to delay submissions of self-certifications or the processing of its orders for UNEs. To the contrary, the sooner the CLECs submits its self-certifications and its order is processed, the sooner the CLECs may obtain access to the requested UNEs. If the electronic ordering system is as beneficial to all parties as Verizon claims, we find Verizon's concern that CLECs will avoid electronic certification based upon claims of undue burden to be unlikely. For these reasons, we find that the CLECs' proposed language is reasonable and hereby adopt it.

I. § 3.6.2.2 (Provision-then-Dispute Requirements)

Verizon's proposal to retroactively reprice a facility or service back to the date of Verizon's notification that it disputes an order, even if Verizon fails to meet the 30-day deadline,[16] is also inconsistent with the 30-day deadline we imposed and is denied. Verizon's proposal diminishes the incentive for Verizon to meet the 30-day deadline in the first place. Moreover, as Conversent pointed out in its opposition to Verizon's request for reconsideration

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[16] The CLECs challenge the underlined language in Verizon's proposed § 3.6.2.2, which reads:

> If Verizon intends to retroactively reprice a facility or service back to the date of provisioning pursuant to section 3.6.2.3 below, then Verizon, within thirty (30) days of the date on which it receives [CLEC]'s certification under this section 3.6.1.1, must notify [CLEC] that Verizon disputes the subject order; provided, however, that if Verizon fails to notify [CLEC] within such thirty (30) day period, in no event shall Verizon's right to reprice retroactively be limited to a date later than the date on which Verizon notifies [CLEC] that Verizon disputes the subject order.

of this issue (see Conversent Opposition at 2-3), the law provides many examples where a party's failure to timely assert its rights risks losing those rights (referring to statutes of limitations and statutes of repose). Our 30-day time limit is yet another example. We find that the CLECs' proposed language[17] is consistent with our determinations in the Arbitration Order and we adopt it. We only modify the CLECs' proposal by also including in § 3.6.2.2 Verizon's proposed reference to § 3.6.2.3, discussed below. That section involves the rates at which the facility or service at issue shall be repriced should Verizon prevail in a dispute, and thus, is appropriate.

However, we reject the CLECs assertion that the 30-day time limit applies to all challenges, including those challenges in which Verizon seeks to reprice the facilities in question only on a going-forward basis (see CLEC Compliance Brief at 17). Our imposition of the 30-day time limit for Verizon to dispute a CLEC's self-certification of entitlement of unbundled access to particular high-capacity loop or transport UNEs applies only "in the event Verizon seeks retroactive repricing of those UNEs if Verizon prevails in the dispute."[18] Arbitration Order at 288 (emphasis added).

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[17] Verizon challenges the underlined language in the CLECs' proposed § 3.6.2.2, which reads:

> If Verizon intends to seek retroactive repricing of a facility or service back to the date of provisioning should Verizon prevail in a dispute, then Verizon, within thirty (30) days of the date on which it receives [CLEC]'s certification under this section 3.6.1.1, must notify [CLEC] that Verizon disputes the subject order.

[18] We denied reconsideration of this issue. Reconsideration Order at 28-30.

J. §§ 3.6.2.3 and 3.6.2.3.1 (Provision-then-Dispute Requirements)

Section 3.6.2.3 and subsection 3.6.2.3.1 of the January 17 Compliance Amendment provide for the rates that retroactively apply when a facility or service, ordered by and provisioned to a CLEC as a UNE, is successfully challenged by Verizon. Verizon's proposed language in § 3.6.2.3 requires the facility or service at issue to be repriced, back to the date of provisioning, as if ordered on a month-to-month term under Verizon's interstate special access tariff and other applicable charges such as late payment charges. Verizon's proposed language also provides that the month-to-month rates shall apply until the CLEC requests disconnection or an alternative term that Verizon offers under its interstate special access tariff for the subject facility or service. The CLECs proposal for § 3.6.2.3 states that "repricing shall be at rates no greater than the lowest rates [CLEC] could have obtained in the first instance (for the facility to be repriced) had [CLEC] not ordered such facility as [a] UNE."

With regard to § 3.6.2.3, we find that Verizon's proposal to reprice the facilities at issue, back to the date of provisioning, as if ordered on a month-to-month basis under Verizon's interstate special access tariff is reasonable. We agree with Verizon (see Verizon Compliance Brief at 16) that the option to open litigation before the Department over what the lowest rate available at the time of provisioning, as proposed by the CLECs, has the potential to encourage wasteful litigation. But, we also find that if the CLEC has a wholesale special access contract with Verizon, the applicable rate under that contract would apply (see CLEC Supplemental Compliance Brief at n.4). We find that a CLEC who has invested its resources into negotiating such a contract should be afforded the benefit of its efforts even if, despite its

reasonably diligent inquiry, the CLEC turns out to be wrong in its assessment of a wire center's impairment status.

Additionally, once a dispute is resolved in Verizon's favor, a CLEC is not precluded from negotiating a wholesale special access contract with Verizon, or from requesting the application of volume or term discounts, on a going-forward basis. When a CLEC, notwithstanding its reasonably diligent inquiry, incorrectly determines a wire center's impairment status, prohibiting a CLEC from obtaining more favorable terms or rates on a going-forward basis would only serve to penalize the CLEC. We agree with the CLECs that a CLEC should not be penalized from ordering UNEs from a wire center of questionable impairment status (see CLEC Supplemental Compliance Brief at 4) and Verizon's arguments comparing a CLEC to a debtor (Verizon Compliance Brief at 16) do not persuade us to find otherwise.

By explicitly requiring ILECs to provision the requested UNEs before disputing access to those facilities (see Triennial Review Remand Order at ¶ 234), the FCC has placed the burden on the ILEC to show that the subject wire center meets the FCC's non-impairment criteria. Indeed, the FCC's statement that a CLEC requesting access to UNEs "certifies only to the best of its knowledge" and the FCC's observation that the CLEC is unlikely to have in its possession all information necessary to evaluate whether the network element meets the FCC's factual impairment criteria supports this conclusion. See Triennial Review Remand Order at n.659. We therefore find that where a CLEC self-certifies based on its reasonably diligent inquiry that it is entitled to access to the requested facilities under § 251(c)(3) of the

Act at a particular wire center, it is inappropriate to impose charges such as late fees on a CLEC even if Verizon prevails in a subsequent dispute.[19] We therefore reject Verizon's language imposing late fees or "any other applicable charges" on CLECs. We also reject, on a going-forward basis, Verizon's proposal to limit a CLEC to access to the subject facilities to the month-to-month rates or alternative terms under Verizon's interstate special access tariff.

Our rejection of Verizon's language imposing late fees or "any other applicable charges," however, should not foreclose the possibility of Verizon recovering carrying costs, such as interest, on the difference between the UNE rates and access tariff, or other non-TELRIC, rates. We find that if Verizon satisfies the prerequisites for imposing retroactive charges, it may be reasonable to permit Verizon not only to recover the difference between the UNE rate and the non-TELRIC rate, but also to impose interest on that difference for the time period in which Verizon was entitled to receive the non-TELRIC rate for the facilities at issue. Because the CLEC obtained UNE pricing for non-UNEs, interest on the difference between the UNE and non-TELRIC rate does not penalize CLECs, but merely makes Verizon whole. Accordingly, when Verizon challenges a CLEC's entitlement to access to requested facilities and has satisfied the prerequisites for retroactive pricing, Verizon may at that time request to

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[19] If, however, Verizon demonstrates to the Department that a CLEC has acted in bad faith in its self-certification, e.g. failed to perform a reasonably diligent inquiry, the Department may impose such charges on the CLEC. The FCC did not define what constitutes a "reasonably diligent inquiry" and we acknowledge that problems of proof may arise if litigation ensues over this issue.

recover carrying charges, such as interest, on the difference between the UNE rate and the non-TELRIC rate should Verizon prevail in the dispute.[20]

Turning to Verizon's proposal in § 3.6.2.3.1 for retroactive repricing of dark fiber transport if Verizon prevails in a dispute,[21] Verizon proposes that the monthly recurring charges shall be "the charges for the commercial service that Verizon, in its sole discretion, determines to be analogous to the subject dark fiber facility." Verizon's proposal further states that unless otherwise agreed in writing by the parties, Verizon may disconnect the subject dark fiber facility 30 days after the dispute is resolved in Verizon's favor. Verizon's proposal also states that in any case where the CLEC submits, within 30 days of the date on which a dispute is resolved in Verizon's favor, a valid Access Service Request ("ASR") for "lit" service, Verizon shall continue providing dark fiber transport at the specified commercial rates for the duration of the standard interval for installation of the "lit" service.

If the Department determines that Verizon is not required to unbundle dark fiber transport at the subject wire center pursuant to § 251(c)(3) of the Act, we agree with Verizon that it is not bound by TELRIC pricing nor would the rates for dark fiber transport be subject to Department approval (see Verizon Compliance Brief at 17). In that situation, because there is no analogous service in Verizon's special access tariff, the commercial rates Verizon

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[20] As a general matter, error in contract performance, even when made in good faith, does not ordinarily shift legitimate costs, due and owing under the contract, from an errant obligor to an obligee. See, e.g., Black's Law Dictionary 1002 (6th ed. 1990) ("Unilateral Mistake. A mistake by only one party to an agreement and generally not a basis for relief by [contract] rescission or reformation").

[21] The CLECs do not propose separate language for the repricing of dark fiber transport.

proposes may indeed be the appropriate rate Verizon may charge for dark fiber transport. But, as the CLECs point out, Verizon's proposal precludes CLECs from acquiring other services that Verizon may be required to provide, such as dark fiber transport under § 271, and is therefore inconsistent with the Arbitration Order (see CLEC Supplemental Compliance Brief at 4-5, citing Arbitration Order at 250). In the Arbitration Order, we specifically declined to allow preclusion of other sources of applicable law (see Arbitration Order at 45-46, 85, 87, 92, 238-239, 262). Thus, for repricing of dark fiber transport should Verizon prevail in a dispute, we determine that the "lowest rate" language the CLECs' proposed for § 3.6.2.3 is appropriate for § 3.6.2.3.1.[22]

We find that the "lowest rate" proposal would not preclude Verizon from charging commercial rates if, indeed, no other rates exist for the analogous service nor does it preclude CLECs from obtaining access to dark fiber transport pursuant to other sources of applicable law, such as § 271. But, we note, any dispute over the reasonableness of the rates for dark fiber transport pursuant to § 271 is for the FCC to decide. Similarly, any dispute over access to dark fiber transport pursuant to § 271 is also a matter for the FCC. As such, we determine that Verizon's proposal for disconnection of dark fiber transport 30 days after a dispute is resolved in Verizon's favor is reasonable because Verizon's proposal allows the parties to

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[22] Although we rejected the CLECs' "lowest rate" proposal in § 3.6.2.3 and instead adopted Verizon's proposal to reprice facilities at issue under Verizon's interstate special access tariff, we deem inclusion of the CLECs' "lowest rate" proposal for repricing dark fiber transport warranted because, unlike the earlier instance, there is no tariffed rate to act as a "backstop." Establishment of a "lowest rate" requirement in this instance will not encourage wasteful litigation, but rather serve as a useful check.

otherwise agree on terms regarding disconnection and also provides 30 days notice before disconnection, during which time the CLEC may seek from the FCC or other appropriate authority continued access to dark fiber transport pursuant to other sources of law.

In sum, § 3.6.2.3 shall read:

> If a dispute pursuant to section 3.6.2.2 above is resolved in Verizon's favor, then ***CLEC Acronym TXT*** shall compensate Verizon for the additional charges that would apply if ***CLEC Acronym TXT*** had ordered the subject facility or service on a month-to-month term under Verizon's interstate special access tariff (except as provided in section 3.6.2.3.1 below as to dark fiber). The month-to-month rates shall apply until such time as ***CLEC Acronym TXT*** : (1) requests disconnection of the subject facility; (2) requests an alternative term that Verizon offers under its interstate special access tariff; (3) requests the application of applicable term or volume discounts; or (4) negotiates a wholesale special access contract with Verizon for the subject facility or service. If ***CLEC Acronym TXT*** has an effective wholesale special access contract with Verizon, the applicable rates under that contract would apply.

Additionally, § 3.6.2.3.1 shall read:

> In the case of Dark Fiber Transport (there being no analogous service under Verizon's access tariff), the monthly recurring rate that Verizon may charge, and the ***CLEC Acronym TXT*** shall be obliged to pay, for each circuit shall be no greater than the lowest rates ***CLEC Acronym TXT*** could have obtained in the first instance (for the facility to be repriced) had ***CLEC Acronym TXT*** not ordered such facility as a UNE. Unless otherwise agreed in writing by the Parties, Verizon may disconnect the subject dark fiber facility thirty (30) days after the date on which the dispute is resolved in Verizon's favor. In any case where ***CLEC Acronym TXT***, within thirty (30) days of the date on which the dispute is resolved in Verizon's favor, submits a valid ASR for a "lit" service to replace the subject Dark Fiber Transport facility, Verizon shall continue to provide the Dark Fiber Transport facility at the rates provided for above, but only for the duration of the standard interval for installation of the "lit" service.

K. § 3.8.3 (Retrospective Transition Charges)

The CLECs propose a term with regard to the detail of bills rendered to implement transition rate charges or true up charges:

> Any bills issued by Verizon that include either a transition rate charge or a true up charge shall specifically identify the time period for which such transition rate or true up applies; the applicable transition rate or true up, and the details that enable [CLEC] to identify the specific facilities to which the transition rate or true up amounts apply.

January 17 Compliance Amendment, § 3.8.3. In the Arbitration Order at 87, we noted that the amendments should state the specific transition rates calculated using the FCC's formulas, because the Amendment must "include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement." The schedules of itemized charges would not be useful unless the bills identified which specific facilities are subject to those charges and for what period the charges apply. In order to render true-up bills, Verizon must know the basis for the bills. That is, Verizon could not render such bills without already having the information that we require it to include in the bills. We are not convinced that requiring Verizon to identify the applicable facilities and billing periods would place an unfair administrative burden on Verizon (see Verizon Compliance Brief at 18). Therefore, we approve the proposed terms of § 3.8.3.

L. §§ 3.9.1.1 and 3.9.2 (Timeliness of Conversion Orders and Temporary Repricing)

In the Arbitration Order at 74-75, the Department expressed concern that CLECs would have an incentive under the FCC's established transition plan to delay placing conversion orders until the very end of the transition period in order to take advantage of lower UNE

rates. In order to lessen this incentive, the Department determined that CLECs should be permitted to submit conversion orders during the transition period, but have the orders not take effect until the end of the transition period. Id.

The parties proposed dueling terms regarding the date on which a conversion or migration request is made. The CLECs seek terms providing that if a CLEC places an order before the end of the transition period on March 11, 2006, i.e. "on or before March 10, 2006 (or, in the case of dark fiber, September 11, 2006)," and if Verizon does not complete the conversion by the requested conversion date, then Verizon may in its sole discretion reprice the discontinued facility effective as of that date by application of the rate applicable to the available replacement service requested until Verizon completes the actual conversion; but, if the CLEC does not submit an order for a replacement service on or before the applicable deadline, Verizon may in its sole discretion either disconnect the discontinued facility any time after the end of the relevant transition period or convert or migrate the discontinued facility to an analogous access, resale, or commercial arrangement. Verizon's proposed language would require a "timely" conversion order to be placed "taking account of any standard intervals that apply, order volumes, and any preparatory activities that [CLEC] must have completed in advance."

The Department finds that Verizon's proposed "timely" order submission deadline will result in unnecessary disputes over whether orders placed were timely, as opposed to having been filed before a clear deadline, on or before March 10, 2006, or, in the case of dark fiber, September 11, 2006. The terms permitting Verizon to reprice elements on a temporary basis

in the event that it cannot complete orders by the requested dates already provide Verizon with sufficient flexibility to deal with potentially high order volumes. We do, however, approve of Verizon's terms requiring the orders to have been placed taking account of standard intervals, if applicable, and requiring the requesting CLEC to have completed necessary preparatory activities by the requested date of the conversion. Because it is entirely within the CLECs' ability to avoid delay by submitting orders early and to be ready for conversions within the transition period, the risk of delay should be placed on those CLECs that do not take account of standard intervals and necessary preparatory activities on the CLEC's part. The Amendment should make clear that conversion orders must take into account standard provisioning intervals and that CLECs must complete preparatory activities in advance such that the conversion order can be provisioned by March 11, 2006, or, in the case of dark fiber, September 11, 2006.

Where a CLEC has not placed a conversion order by this deadline, the CLECs also request language providing that Verizon shall identify the analogous month-to-month access, resale or commercial arrangement to which Verizon will convert the discontinued facility, in writing "at least 30 days in advance." In the Arbitration Order at 54-55, the Department found no need to require additional notice of discontinuance of UNEs affected by the Triennial Review Order and the Triennial Review Remand Order, because the commencement of this proceeding already provided the parties with sufficient notice. The term at issue here, however, addresses a different point: the CLECs have not yet been given notice of the applicable post-UNE rate. Given that the parties have agreed that Verizon will provide written

notice within 30 days in advance of disconnecting a discontinued facility if Verizon chooses that option, we approve the CLECs' proposal to have Verizon identify in writing at least 30 days in advance of the conversion deadline the temporary access, resale, or commercial arrangement that will apply if Verizon chooses to convert or migrate the arrangement instead of disconnecting it.

The parties submitted dueling terms regarding the method of billing CLECs on a temporary basis for replacement services, or their equivalent, until Verizon completes the actual conversion or migration. The parties recognize that Verizon's billing systems may not be designed to apply temporary rates. Verizon's proposed term would permit it to effectuate repricing by application of a surcharge "to be equivalent to" the subject replacement service. The CLECs propose to permit Verizon to effectuate repricing by application of a surcharge "such that the billed rate is equal to the rate for" the subject replacement service. Verizon argues that it cannot develop a surcharge that would result in a combined rate that is "equal" to the rate for replacement services, because the exact surcharge will depend on line usage levels and patterns, which will not be known ahead of time (Verizon Compliance Brief at 22). Verizon states that it can develop a surcharge to be applied to all UNE-P arrangements so the combined "equivalent" rate will result in proper charges in the aggregate (id. at 23). Because the line usage levels and patterns are not known ahead of time, we find it reasonable for Verizon to bill at a combined "equivalent" rate that will result in proper charges in the aggregate.

Finally, the CLECs propose new language to address conversions or migrations in wire centers or transport routes whose impairment tier status is still in dispute at the end of the transition period:

> However, if [CLEC] challenges Verizon designation that certain loop and transport facilities are Discontinued Facilities, Verizon shall continue to provision the subject elements as UNEs and then seek resolution of the dispute by the Department or the FCC, or through any dispute resolution process set forth in the Agreement that Verizon elects to invoke in the alternative.

January 17 Compliance Amendment, § 3.9.2.1. The CLECs argue that this provision would apply the "provision but dispute" principle to the embedded base of UNEs where this is a dispute as to the impairment status of a wire center or dedicated transport route (CLEC Compliance Brief at 33–34). The CLECs argue that this provision is necessary because the Department adopted a case-by-case approach to the classification of wire centers, and it would be inappropriate to permit Verizon unilaterally to re-price facilities when the Department ultimately could decide that the wire center is impaired (id. at 34). Verizon argues that the Department should reject the proposed term, because it would improperly extend transitional UNE pricing beyond March 11, 2006 (Verizon Compliance Brief at 26). We determine that this proposed term does not extend transition pricing beyond March 11, 2006. Transitional pricing applies only to discontinued facilities. The CLECs intend the term to apply where the CLECs claim that they are still entitled to UNEs because they are still impaired in those wire centers or routes even under the new impairment rules. We have stated that Verizon's proposed list of non-impaired wire centers should not be legitimized without the Department's review. Reconsideration Order at 23. It would therefore be reasonable to maintain the status

quo until the dispute is resolved.[23] We note, however, that the placement of this term under § 3.9 regarding the discontinuance of the embedded base may create the ambiguity to which Verizon objects. It is more closely related to the general "Provision-then-Dispute Requirements" of § 3.6.2 and should be set forth as a subsection under that heading.

M. § 3.9.3 (Conversion or Migration Fees)

With respect to fees for conversion or disconnection of discontinued facilities, the CLECs propose:

> Except as permitted under Section 1.3 in the Pricing Attachment, Verizon shall not charge [CLEC] any fees associated with the conversion or migration of Discontinued Facilities to alternative arrangements.

(See January 17 Compliance Amendment, § 3.9.3). Verizon opposes including such a provision, but in the alternative, if the Department determines that it is necessary to approve specific terms governing these conversion charges, Verizon proposes:

> Except as permitted under Section 1.3 of the Pricing Attachment to this Amendment, as provided for in a Verizon tariff, or as otherwise agreed by the Parties, Verizon shall not charge [CLEC] any fees for the conversion (i.e., records-only changes to convert circuits that are already in service, which do not require Verizon to perform any physical installation, disconnection, or similar activities) or disconnection of a Discontinued Facility.

(See January 17 Compliance Amendment, § 3.9.3). Both parties cite to our decision to defer the issue of these charges because Verizon pledged not to apply charges for conversions until after it submits rates in its next cost study and those rates are approved (Verizon Compliance

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[23] We acknowledge our obligation to resolve disputes over the impairment status of wire centers expeditiously and, as we found above (see section II.J.), if Verizon prevails in a dispute, carrying costs, such as interest, on the difference between the UNE rate and the applicable market rate for the facilities at issue may be appropriate.

Brief at 27, citing Arbitration Order at 90; CLEC Compliance Brief at 31, citing Arbitration Order at 136). Section 1.2 of the Pricing Attachment provides that charges for services under the Amendment shall be those set forth in Exhibit A of the Pricing Attachment, and the Pricing Attachment contains no charges for conversion or disconnection of discontinued facilities. Further, § 1.3 of the Pricing Attachment allows a subsequently approved charge to go into effect without further amendment. Thus, the terms of the Pricing Attachment are sufficient to implement the Department's intent that charges for conversion, migration, or disconnection of discontinued facilities would not be assessed until Verizon submits its next cost study and the Department establishes the appropriate charges. We determine that there is no need for § 3.9.3 in either form.

N. § 3.11 (Commingling and Combinations)

The CLECs propose to specify that Verizon will not prohibit commingling of UNEs or a combination of UNEs obtained under 47 U.S.C. § 251(c)(3) "or"[24] 47 C.F.R. Part 51, and specifically 47 C.F.R. § 51.318, under a Verizon tariff, "or under other applicable law" (CLEC Compliance Brief at 28; cf. Verizon Compliance Brief at 30). We have stated throughout the Arbitration Order that the Amendment should not preclude the operation of other "applicable law."[25] Therefore, we find it appropriate for this section to refer to Verizon's commingling obligations under applicable law.

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[24] The parties disagree whether this word should be "and" or "or." This word should be "and" because § 251(c)(3) and 47 C.F.R. Part 51 are not independent.

[25] Again, we pass on the subject of whether Verizon has obligations and is meeting those under "applicable law," such as § 271, beyond its obligations under § 251(c)(3).

Verizon seeks to clarify a term, "Qualifying UNEs," with reference to unbundled network elements obtained pursuant to 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51. Verizon asserts that we approved the use of the term Qualifying UNEs (Verizon Compliance Brief at 33). Although we had approved the term, the definition in the proposal that we considered clarified the term with respect to "Interim Rules Facilities," which is a term no longer included in the Amendment. The inclusion of the term "Qualifying UNEs" from the original definition, as well as the passage of time (i.e., the end of the transition period), renders the need for the term "Qualifying UNEs" moot. The Department finds that this term, as drafted in the current proposal, adds no clarification to the Amendment, because it identifies no subset of UNEs; network elements obtained under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51 describe all UNEs.

With respect to combinations, the CLECs propose: "Verizon shall provide access to UNE combinations upon request in accordance with applicable law" (January 17 Compliance Amendment, § 3.[--]). The Department rejects this term, because it fails to define specifically Verizon's obligation to provide UNE combinations and adds nothing to the other specific amendments that are already proposed regarding service eligibility criteria for combinations. In addition, combinations is a term that predates both the Triennial Review Order and the Triennial Review Remand Order.

The CLECs also propose to insert the phrase "or other documentation, e.g. if managed as a project" into § 3.11.2.2. The CLECs, however, fail to explain why this language is

necessary (see CLEC Compliance Brief at 21-22). Verizon objects to this additional language. Absent a sufficient explanation for the need for this language, it is disallowed.

Section 3.11.2.2 also provides that if a High Capacity EEL circuit becomes noncompliant with the service eligibility criteria of 47 C.F.R. § 51.318, Verizon in its sole discretion may apply a new rate or a surcharge equivalent to an analogous access service or other analogous arrangement. The CLECs propose a term specifying that "[t]he new rate shall be no greater than the lowest rate CLEC could have otherwise obtained for an analogous access service or other analogous arrangement." While Verizon would have no obligation to provide access to High Capacity EEL circuits that are noncompliant under 47 C.F.R. § 51.318, and § 3.11.2.2 grants Verizon sole discretion to reprice such noncompliant circuits, Verizon would have a continuing obligation of good faith and fair dealing in exercising that discretion under the Amendment. The Department finds the CLECs' proposal to be consistent with that duty and approves the CLECs' proposed language.[26]

O. § 3.12 (Routine Network Modifications)

Section 3.12.1 establishes general conditions for the provision of routine network modifications "[i]n accordance with, but only to the extent required by 47 C.F.R.

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[26] Requiring Verizon to re-price the former EEL to the lowest available rate for an analogous access service or arrangement does not require Verizon to determine a "theoretical" rate (cf. Verizon Compliance Brief at 34). The premise behind giving Verizon the discretion to re-price the EEL is that Verizon can identify at least one existing analogous access service or arrangement.

§§ 51.319(a)(8) and (e)(5) . . . ."[27] The CLECs seek to add to this provision the term "or applicable law," because the Department stated that CLECs may bring to the Department's attention any disagreement over Verizon's obligation "to perform a certain unlisted task as a [routine network modification]" (CLEC Compliance Brief at 27, citing Arbitration Order at 231. Verizon counters that the CLECs can point to no other "applicable law" that imposes an obligation on Verizon to perform routine network modifications (Verizon Compliance Brief at 35). We stated that a CLEC could bring to the Department a future disagreement over Verizon's obligation to perform a specific task as a routine network modification, because the list of routine modifications provided in the agreement is not exhaustive. Arbitration Order at 231. If such a dispute were brought before the Department, the proper inquiry would be whether Verizon would be required to perform the task as a routine network modification under the relevant FCC rules on routine network modification. It would not be necessary to provide for the operation of "applicable law," because the Department's decision would be made pursuant to the enumerated FCC rules. Therefore, the Department rejects the proposed addition of the term "applicable law."

P. § 4.7.4 (Dark Fiber Transport)

Verizon proposes to add a definition for dark fiber transport: "An optical transmission facility within a LATA, that otherwise meets the definition of Dedicated Transport but which Verizon has not activated by attaching multiplexing, aggregation or other electronics." As we

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[27] Due to revisions to the FCC's rules, the correct citation is 47 C.F.R. §§ 51.319(a)(7) and (e)(4). The parties should revise the Amendment to reflect this.

stated in the Arbitration Order at 103, the FCC did not adopt a new definition for dark fiber transport in the Triennial Review Order or the Triennial Review Remand Order, and there is no need for a new definition in the Amendment. Therefore, we reject Verizon's proposed definition. If the parties agree that a definition should be included, they should take the definition from the current rule on dark fiber transport: "Dark fiber transport consists of unactivated optical interoffice transmission facilities." 47 C.F.R. § 51.319(e)(2)(iv).

Q. § 4.7.5 (Dedicated Transport)

Verizon includes language in its definition of dedicated transport indicating that dedicated transport includes Verizon transmission facilities "within a LATA" (January 17 Compliance Amendment, § 4.7.5). The CLECs argue that the FCC does not limit its definition of dedicated transport to points within a LATA, and that the Department already rejected Verizon's proposed language in its Arbitration Order (CLEC Compliance Brief at 12-14, citing Arbitration Order at 101-103 and Reconsideration Order at 40).

In adopting AT&T's proposed definition of dedicated transport, we did not explicitly address the "within a LATA" language in Verizon's proposal. Rather, we simply stated that AT&T's proposed definition was consistent with the FCC's definition contained in 47 C.F.R. § 51.319(e)(1). See Arbitration Order at 103. While the FCC's definition of dedicated transport in 47 C.F.R. § 51.319(e)(1) does not include the "within a LATA" language, the FCC did impose this limitation (see Triennial Review Order at ¶ 365) ("We limit our definition of dedicated transport under section 251(c)(3) to those transmission facilities connecting incumbent LEC switches and wire centers within a LATA"). Accordingly, we approve of

Verizon's proposed "within a LATA" language in the definition of dedicated transport as it is consistent with the Triennial Review Order and with the Department's findings concerning entrance facilities and reverse collocation in the Arbitration Order.

R. § 4.7.6 (Discontinued Facility)

The proposed § 4.7.6, defining the term "discontinued facilities" includes a preamble that describes the term discontinued facilities generally, before listing specific facilities to be discontinued. With respect to the general term, the CLECs propose to specify that "Discontinued Facility" refers to any "Section 251(c)(3)" facility that Verizon has provided, but which has ceased to be subject to an unbundling requirement. The parties also differ on what the stated source of the change of law should be that causes a facility to fall within the definition of discontinued facilities. Verizon would state that the unbundling relief may arise "under 47 U.S.C. § 251(c)(3) or 47 C.F.R. Part 51." The CLECs would state that the unbundling relief arises "under the TRO or TRRO." Finally, parties differ on whether the list of facilities set forth in the definition of discontinued facilities should be an illustrative list or an exhaustive list. Verizon's terms provide that the list of discontinued facilities "[b]y way of example and not by way of limitation . . . include the following . . . ." The CLECs' term provides that the specifically listed facilities "are" discontinued facilities.

In the Arbitration Order, we ruled that "the list of discontinued facilities must be updated to reflect those facilities that were delisted in the Triennial Review Order and the Triennial Review Remand Order." Arbitration Order at 96. We intended that the parties would submit an exhaustive list of facilities that would be discontinued pursuant to the

Triennial Review Order and the Triennial Review Remand Order for the purpose of clarity and to reduce the risk of future litigation. Id. Thus, we find the introductory language to be entirely unnecessary. We are not convinced that requiring the parties to itemize each discontinued facility will result in a "game of gotcha," if Verizon has failed to list every possible type and subcategory of a facility that is on the list (cf. Verizon Compliance Brief at 39). Verizon provides no explanation why listing the discontinued facilities would exclude the discontinuation of sub-categories that have not specifically been listed, nor do we find that to be a proper reading of the section.[28]

With regard to the specific facilities listed, the CLECs seek to limit the discontinuation of OCn Dedicated Transport "subject to 3.5.4" (January 17 Compliance Amendment, § 4.7.6(e)). The FCC, however, found that requesting carriers are not impaired without OCn transport. Triennial Review Order at ¶ 389. Because there is no qualification on this finding of non-impairment, there is no need to subject the section to § 3.5.4. The CLECs also seek to insert a reference to § 3.5.4. into the terms discontinuing facilities for dedicated transport on routes that meet the non-impairment criteria and circuits that exceed the number of circuits be provided (January 17 Compliance Amendment, §§ 4.7.6 (j), (k)). There is no need to append these provisions with such a reference, because § 3.5.4 itself states that the discontinuation of unbundled entrance facilities or dedicated transport does not alter any right to interconnection

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[28] Regarding Verizon's example, we find no reasonable reading of § 4.7.6 that would leave specific types of OCn loops subject to UNE pricing, when the provision lists "OCn Loops" as a discontinued facility (cf. Verizon Compliance Brief at 39).

under 47 U.S.C. § 251(c)(2). Thus, § 3.5.4 already applies to §§ 4.7.6.(j) and (k), and there is no need to include the cross-reference.

S. § 4.7.13 (Fiber-Based Collocator)

In defining the term "fiber-based collocator," the parties differ over whether, "for purposes of this Amendment," or "for purposes of this section" the term "affiliate" is defined by 47 U.S.C. § 153(1) and any relevant interpretation in Title 47 of the Code of Federal Regulations. Because we rejected the use of the term "affiliate" in limiting the availability of DS1 and DS3 loops and transport in §§ 3.4.1.1.2, 3.4.2.1.2, 3.5.1.1.2, 3.5.2.1.2 of the January 17 Compliance Amendment, and because the term affiliate appears only in the definition of fiber-based collocator, it makes no difference whether this particular usage of the term applies to the entire amendment or this section. Therefore, the last sentence of § 4.7.13 shall read "The term affiliate is defined by 47 U.S.C. § 153(1) and any relevant interpretation in Title 47 of the Code of Federal Regulations."

T. Pricing Attachment Exhibit A Footnotes 2 & 3

The CLECs propose to include explanatory footnotes stating that Engineering Query Charges and Engineering Work Order Charges "shall not apply to routine network modifications as described in 3.12.1 of the Amendment until such time as Verizon may be permitted to charge for such network modifications in accordance with § 1.3 of this Pricing Attachment." Section 1.3 of the Pricing Attachment provides that a charge not provided for by the Amendment or the Pricing Attachment and established by the FCC or the Department (an "established charge") shall be effective immediately without amendment. The CLECs argue

that Verizon is not entitled to any charges for routine network modifications required by the Triennial Review Order, other than those already approved and in effect, because Verizon deferred the rate issue until it submits its next TELRIC cost study (CLEC Compliance Brief at 24, citing Arbitration Order at 266). Verizon proposes broader language that includes cross-references to §§ 1.2–1.4 of the Pricing Attachment, the effect of which would permit Verizon to assess engineering charges where it performs a routine network modification for which Verizon is already permitted under the Agreement to charge a rate, even though the Department may not have yet approved rates for all other routine network modifications (Verizon Compliance Brief at 39).

We find that Verizon's language is reasonable and reflects our earlier findings on application of rates and charges. Pursuant to the Arbitration Order, the Reconsideration Order, and this Order, Verizon is currently only allowed to assess engineering query and work order charges with respect to routine network modifications for line sharing. In addition, Verizon may assess charges for construction of a new loop, where requested by the CLEC, for "technically feasible" access to narrowband IDLC loops. If, and when, the Department approves charges for other routine network modifications, we will also address the issue of whether engineering charges apply to those routine network modifications.

III. COMPLIANCE TARIFF

On August 29, 2005, Verizon filed revisions to M.D.T.E. Tariff No. 17 in compliance with the Arbitration Order. The Department docketed its review of the tariff revisions as D.T.E. 05-63. In the Reconsideration Order, the Department noted that because further issues

may need to be resolved, the Department directed Verizon to withdraw its compliance tariff revisions until after a final amendment had been approved. Because this Order resolves all outstanding contract language disputes between the parties, and thus, the submission of a conforming Amendment for our final approval is merely an administrative task, we direct Verizon to submit a revised compliance tariff consistent with the Arbitration Order, the Reconsideration Order, and this Order within 15 days from the issuance of this Order.

IV. ORDER

Accordingly, after due consideration, it is

ORDERED: That the issues under consideration in this Order are determined as set forth in this Order; and it is

FURTHER ORDERED: That the parties shall file a conforming Amendment consistent with the July 14, 2005 Arbitration Order, the December 16, 2005 Reconsideration Order, and this Order within 15 days of the issuance of this Order; and it is

FURTHER ORDERED: That Verizon shall file its compliance tariff consistent with the July 14, 2005 Arbitration Order, the December 16, 2005 Reconsideration Order, and this Order within 15 days of the issuance of this Order; and it is

FURTHER ORDERED: That the parties shall comply with all other directives contained herein.

By Order of the Department,

/s/
Judith F. Judson, Chairman

/s/
James Connelly, Commissioner

/s/
W. Robert Keating, Commissioner

/s/
Paul G. Afonso, Commissioner

/s/
Brian Paul Golden, Commissioner

Pursuant to § 252(e)(6) of the Telecommunications Act of 1996, appeal of this final Order may be taken to the federal district court or the Federal Communications Commission. Timing of the filing of such appeal is governed by the applicable rules of the appellate body to which the appeal is made or in the absence of such, within 20 days of the date of this Order.