The Commonwealth of Massachusetts

DEPARTMENT OF
TELECOMMUNICATIONS AND ENERGY

D.T.E. 04-33 July 14, 2005

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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ARBITRATION ORDER

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TABLE OF ABBREVIATIONS & ACRONYMS

ARMIS:	Automated Record Management Information System
ASR:	Access Service Request
BA:	Bell Atlantic
BOC:	Bell Operating Company
C2C:	Carrier to Carrier
CCC:	Competitive Carrier Coalition
CCG:	Competitive Carrier Group
CLEC:	Competitive Local Exchange Carrier
CWG:	Carrier Working Group
DLC:	Digital Loop Carrier
DS0:	Digital Signal Level 0
DS1:	Digital Signal Level 1
DS3:	Digital Signal Level 3
DSL:	Digital Subscriber Line (also *x*DSL)
EEL:	Enhanced Extended Link
FCC:	Federal Communications Commission
FDI:	Feeder Distribution Interface
FTTC:	Fiber to the Curb
FTTH:	Fiber to the Home
FTTP:	Fiber to the Premises
HARC:	House and Riser Cable
HFPL:	High Frequency Portion of the Loop
IDLC:	Integrated Digital Loop Carrier
ILEC:	Incumbent Local Exchange Carrier
Kbps:	kilobits per second
LATA:	Local Access and Transport Area
LEC:	Local Exchange Carrier
LERG:	Local Exchange Routing Guide
LSR:	Local Service Request
Mbps:	megabits per second
MDU:	Multiple Dwelling Unit
MPOE:	Minimum Point of Entry
MSA:	Metropolitan Statistical Area
NGDLC:	Next Generation Digital Loop Carrier
NID:	Network Interface Device
NYPSC:	New York Public Service Commission
OCn:	Optical Carrier Network
OSS:	Operations Support System
PAP:	Performance Assurance Plan
RBOC:	Regional Bell Operating Company

RNM:	Routine Network Modification
SGAT:	Statement of Generally Available Terms
SPOI:	Single Point of Interconnection
TDM:	Time Division Multiplexing
TELRIC:	Total Element Long-Run Incremental Cost
TRO:	Triennial Review Order
TRRO:	Triennial Review Remand Order
UDLC:	Universal Digital Loop Carrier
UNE:	Unbundled Network Element
UNE-P:	UNE Platform
USF:	Universal Service Fund

ARBITRATION ORDER

I. INTRODUCTION

This proceeding is a consolidated arbitration, pursuant to § 252 of the Telecommunications Act of 1996 ("Act"),[1] between Verizon New England, Inc. d/b/a Verizon-Massachusetts ("Verizon"),[2] the incumbent local exchange carrier ("ILEC"), and the following competitive local exchange carriers and commercial mobile radio service providers (collectively, "CLECs"): AT&T Communications of New England, Inc., TCG Massachusetts, ACC Telecom Corporation, MCImetro Access Transmission Services LLC, Brooks Fiber Communications of Massachusetts, Inc., MCI WorldCom Communications, Inc., MCI WorldCom Communications, Inc. as successor to Rhythm Links, Inc., Intermedia Communications, Conversent Communications of Massachusetts LLC, Qwest Communications Corp., Sprint Communications Company, BrahmaCom, Inc, C2C Fiber of Massachusetts LLC, Eagle Communications Inc., Freedom Ring Communications LLC d/b/a Bay Ring Communications, Global Crossing Local Services Inc., IDT America Corp., Looking Glass Networks Inc., Metropolitan Telecommunications of Massachusetts Inc. d/b/a MetTel, PNG Telecommunications Inc., RCN-BecoCom LLC, RCN Telecom Services of Massachusetts Inc., RNK Inc. d/b/a RNK Telecom, SpectroTel, Inc., US West Interprise America Inc. d/b/a

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1 Section 252(b) of the Act permits a carrier to petition a state commission to arbitrate any issues left unresolved after voluntary negotiations between the carriers have occurred. 47 U.S.C. § 252(b)(1).

2 Verizon is the successor to New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts. Some of the interconnection agreements analyzed below refer to that predecessor entity as "BA." This entity was also formerly known as NYNEX.

!nterprise, Volo Communications of Massachusetts Inc., XO Massachusetts Inc., Yipes Transmission, Inc., Budget Phone, Inc., Covista, Inc., McGraw Communications, Inc., Acceris Communications Corporation f/k/a Worldxchange Corporation, BCN Telecom, Inc. f/k/a NUI Telecom, Inc., and New Horizons Communications Corporation, WilTel Local Network, LLC and the carrier members of the Competitive Carrier Coalition ("CCC")[3] and the Competitive Carrier Group ("CCG").[4]

II. PROCEDURAL HISTORY

On February 20, 2004, Verizon filed with the Department a Petition for Arbitration, requesting that the Department initiate a consolidated arbitration proceeding to amend the interconnection agreements between Verizon and its competitors. In its Petition,

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3 The members of the Competitive Carrier Coalition are: Allegiance Telecom of Massachusetts, Inc., ACN Communications Services, Inc., Adelphia Business Solutions Operations, Inc. d/b/a Telcove, CoreComm Massachusetts, Inc., CTC Communications Corp., DSLnet Communications, LLC, Focal Communications Corporation of Massachusetts, ICG Telecom Group, Inc., Level 3 Communications, LLC, Lightship Telecom, LLC, LightWave Communications, Inc., PAETEC Communications, Inc., RCN-BecoCom, LLC, and RCN Telecom Services of Massachusetts, Inc.

4 The members of the Competitive Carrier Group are: A.R.C. Networks Inc., Broadview Networks Inc. and Broadview NP Acquisition Corp., Bullseye Telecom Inc., Comcast Phone of Massachusetts Inc., DIECA Communications, Inc. d/b/a Covad Communications Company, DSCI Corporation, Equal Access Network LLC, Essex Acquisition Corp., Global Crossing Local Services Inc., IDT America Corp., KMC Telecom V Inc., SpectroTel Inc., Talk America Inc., and XO Communications, Inc.

Verizon asserted it was necessary to amend the interconnection agreements to implement changes in its network unbundling obligations to reflect the rules promulgated by the Federal Communications Commission ("FCC") in the Triennial Review Order.[5]

On March 16, 2004, the Department received the Attorney General's Notice of Intervention, as well as responses to the Petition for Arbitration from the following CLECs: AT&T Communications of New England, Inc., TCG Massachusetts, and ACC Telecom Corporation (collectively, "AT&T"); MCIMetro Access Transmission Services LLC; Brooks Fiber Communications of Massachusetts, Inc.; MCI WorldCom Communications, Inc., MCI WorldCom Communications, Inc. as successor to Rhythms Links, Inc., and Intermedia Communications (collectively, "MCI"); Conversent Communications of Massachusetts, LLC ("Conversent"); BrahmaCom, Inc. ("BrahmaCom"); CCC; and CCG. On August 20, 2004, Verizon sought to withdraw its arbitration petition with respect to approximately 100 of the approximately 130 CLECs originally named in the Petition for Arbitration, arguing that the affected CLECs' interconnection agreements permitted Verizon to cease provisioning delisted UNEs upon notice, without amendment of the interconnection agreement (Verizon Notice of Withdrawal of Petition for Arbitration (Aug. 20, 2004)).

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[5] 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 96-98; 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"), vacated in part and remanded in part by United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II").

On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit Court") issued its decision in USTA II in which it affirmed in part and vacated in part the FCC's Triennial Review Order. The vacatur took effect on June 16, 2004, and the United States Supreme Court denied certiorari. National Association of Regulatory Utilities Commissioners v. United States Telecom Association, 125 S. Ct. 313, 316, 345 (2004).

On December 15, 2004, the FCC announced new unbundling rules to replace those vacated by USTA II. The FCC promulgated the new rules in its Triennial Review Remand Order[6] which the FCC issued on February 4, 2005, and which took effect on March 11, 2005.[7] Also, on December 15, 2004, the Department issued a Procedural Order establishing that the scope of this proceeding would include contract amendments necessary to implement both the Triennial Review Order and the Triennial Review Remand Order. Consolidated Arbitrations, D.T.E. 04-33, Procedural Order (Dec. 15, 2004) ("Procedural Order"). In the Procedural

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6 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").

7 Between the June 16, 2004 partial vacatur of the Triennial Review Order and the March 11, 2005 effective date of the Triennial Review Remand Order, the FCC established a comprehensive twelve-month plan to govern the provision of UNEs affected by USTA II, including maintaining the status quo by requiring ILECs to continue provisioning delisted UNEs pursuant to the same rates, terms and conditions that applied under interconnection agreements as of June 15, 2004. See In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (rel. Aug. 20, 2004) ("Interim Rules Order").

Order, the Department also denied in part, and granted in part, Verizon's August 20, 2004 Notice of Withdrawal. Specifically, the Department declined to permit Verizon unilaterally to withdraw its petition with respect to any CLEC that had filed an answer to the Petition or that had filed a letter of intent as to participation. Procedural Order at 20-26.

On January 5, 2005, the Department held a procedural conference to finalize the schedule for this proceeding. The procedural schedule originally provided for evidentiary hearings on rates for routine network modifications ("RNMs"), but, on March 1, 2005, Verizon withdrew the rates issue, indicating that once the interconnection amendments are amended, Verizon will not charge for RNMs when provisioning new loops, until the Department sets new UNE rates after Verizon files its next TELRIC study. Because the remaining issues to be arbitrated presented no issues of fact, the procedural schedule provided only for the filing of a joint stipulation of disputed issues and for initial and reply briefs.

On February 18, 2005, the parties filed their Joint Stipulation of Disputed Issues ("Joint Issues Matrix") identifying 32 issues for resolution by the Department.[8] On March 4, 2005, the parties filed a Second Joint Stipulation of Issues identifying four additional issues relating to the Triennial Review Remand Order. The parties also filed proposed Amendments to their interconnection agreements for the Department's consideration (AT&T TRO Amendment (Sept. 17, 2004); AT&T TRRO Amendment (Mar. 18, 2005); CCC TRO Amendment (Feb. 18, 2005); CCC TRRO Amendment (Mar. 18, 2005); CCG Amendment

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[8] The Joint Issues Matrix provided descriptions of the issues, and the positions of the parties.

(Mar. 21, 2005); Conversent Amendment (Mar. 18, 2005); MCI Amendment (Mar. 18, 2005); Verizon Amendment 1 (Sept. 14, 2004); Verizon Amendment 2 (Dec. 22, 2004)). The proposals filed by carriers in March 2005 focused on issues arising from the Triennial Review Remand Order.

On April 5, 2005, briefs were filed by AT&T, CCC, CCG, Conversent, MCI, and Verizon.[9] Reply briefs were filed on April 20, 2005 by AT&T, CCC, CCG, Conversent, MCI, and Verizon. Additionally, Verizon and CCC filed separate replies to the briefing questions posed by the Department on March 1, 2005 and March 10, 2005 (Verizon Reply to Briefing Questions Issued on March 1, 2005 (Apr. 1, 2005) ("Verizon Resp. to Briefing Questions"); Verizon Reply to Briefing Questions Issued on March 10, 2005 (Apr. 1, 2005); CCC Response to March 1, 2005 Procedural Notice and Briefing Questions and March 10, 2005 Briefing Questions to Additional Parties (Apr. 5, 2005) ("CCC Resp. to Briefing Questions"). CCC and CCG filed separate replies to other parties' responses to the briefing questions (CCC Reply to Verizon Massachusetts' Response to March 1, 2005 Procedural Notice and Briefing Questions and March 10, 2005 Briefing Questions to Additional Parties (Apr. 26, 2005) ("CCC Reply to Resp. to Briefing Questions"); Reply Brief of CCG to Additional Briefing Issues (Apr. 26, 2005) ("CCG Reply to Resp. to Briefing Questions").

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9 Sprint, RNK and WilTel did not file briefs in this proceeding. The Joint Issues Matrix, however, included the positions of Sprint, RNK and WilTel on various issues, and we note that the arguments Sprint, RNK and WilTel presented in the Joint Issues Matrix are consistent with the briefed CLEC positions.

Other carriers incorporated their responses to the briefing questions into their briefs and reply briefs.

III. STANDARD OF REVIEW

The standards for arbitrations by state commissions are set forth in 47 U.S.C. § 252(c), which states, in relevant part, that a state commission shall:

> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications Commission ("FCC")] pursuant to section 251;
>
> (2) establish any rates for interconnection, services, or network elements according to [section 252(d).]

Additionally, § 251(c)(2) of the Act defines the obligations for ILECs to interconnect with other carriers. Specifically, each ILEC has the duty:

> [T]o provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network -- (A) for the transmission and routing of telephone exchange service and exchange access; (B) at any technically feasible point within the carrier's network; (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of [section 251] and section 252.

Furthermore, § 252(e)(3) provides that "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards and requirements."

IV. WHETHER CERTAIN INTERCONNECTION AGREEMENTS NEED NOT BE AMENDED IN ORDER TO IMPLEMENT THE TRIENNIAL REVIEW ORDER AND THE TRIENNIAL REVIEW REMAND ORDER

A. Introduction

As discussed above, during the course of these proceedings, Verizon sought to withdraw its arbitration petition with respect to a number of carriers whose interconnection agreements, Verizon argued, permit Verizon to cease providing UNEs that are no longer subject to unbundling obligations under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51 without first renegotiating an amendment to implement changes of law. The Department permitted Verizon to withdraw its arbitration petition with respect to carriers that had not filed responses to the petition. Procedural Order at 21 n.24. Guided, though not governed, by Massachusetts civil practice, the Department denied Verizon's request to withdraw its arbitration petition as of right with respect to carriers that had filed responsive pleadings or otherwise had indicated their intent to participate in these proceedings. Id. at 20; see Mass R. Civ. P. 41(a)(1). After a procedural conference, the Department clarified the list of carriers that remained as parties to this proceeding. Consolidated Arbitrations, D.T.E. 04-33, Procedural Memorandum (Jan. 10, 2005).

In addition, Verizon filed a motion for relief from the December 15, 2004 Procedural Order, arguing that, while the Department declined to interpret the terms of the interconnection agreements to determine Verizon's right to discontinue UNEs until an actual dispute arises under the dispute resolution provisions of those interconnection agreements, the Procedural Order, which acknowledged that the Interim Rules Order required the parties to maintain the status quo on rates, terms, and conditions under the interconnection agreements as of June 15, 2004, had the effect of preventing Verizon from enforcing such contract terms against the CLECs that remain in the arbitration (Verizon Motion for Relief at 6 (filed Jan. 6, 2005)). The Department did not rule on the motion, but instead sought further comment from the parties by issuing briefing questions that would assist the Department in identifying which provisions of the interconnection agreements in particular are relevant to the issues raised by Verizon's motion.[10] While the completion of these arbitration proceedings renders Verizon's motion for relief from the Procedural Order moot, the Department still must review the terms of the interconnection agreements in question in order to determine whether any amendment to

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[10] On March 1, 2005, the Department issued the following briefing questions:

1. Notwithstanding the carrier's substantive arguments in this proceeding regarding proposed rates, terms, or conditions for any specific service, for each carrier's individual interconnection agreement, please identify each and every term that is relevant to whether or not the interconnection agreement's change of law or dispute resolution provisions permit the parties to implement changes of "applicable law" without first executing an amendment to the interconnection agreement. In providing your response, please quote the relevant interconnection agreement provisions, citing them by section, and provide highlighted copies of the relevant language.

2. Indicate whether a change of law or dispute resolution provision has been triggered and state the date on which each condition precedent or party obligation (*e.g.*, notice requirements) was met, if applicable, with regard to the implementation of (1) the Triennial Review Order, (2) USTA II, (3) the Interim Rules Order, (4) the Triennial Review Remand Order, or (5) any other statutory, judicial, or regulatory change, state or federal, that you claim did modify the parties' rights under the interconnection agreement.

those interconnection agreements is necessary to implement the Triennial Review Order and the Triennial Review Remand Order through this arbitration.

Soon after the FCC issued the Triennial Review Remand Order, certain CLECs jointly filed a Petition for Emergency Declaratory Relief seeking a declaratory ruling that Verizon may not unilaterally implement the terms of the Triennial Review Remand Order on March 11, 2005; that Verizon must continue to accept orders for UNEs that are no longer required to be unbundled by the Triennial Review Remand Order under the rates, terms, and conditions of its existing interconnection agreements; and that Verizon must comply with the change of law provisions of its interconnection agreements with regard to implementation of the Triennial Review Remand Order. The Department did not rule on this motion either, but instead issued similar briefing questions to the remaining carriers that were not already the subject of the March 1, 2005 briefing questions. Unlike its responses to the March 1, 2005 briefing questions, Verizon's response to the March 10, 2005 briefing questions contends not that the terms of the interconnection agreements do not require negotiation of amendments in response to changes of law, but rather that the terms of the Triennial Review Remand Order itself prevail over any contractual obligation to negotiate new terms. In other words, Verizon argued that the rules contained in the Triennial Review Remand Order are "self-effectuating" (see Verizon Reply to Briefing Questions Issued on March 10, 2005 (Apr. 1, 2005)). We address the separate question of whether Verizon may implement the rules contained in the Triennial Review Remand Order without renegotiation of terms in our discussion of Issues 3 through 5, infra.

B. Change of Law Provisions

We now review the change of law terms of the interconnection agreements that were subject to the March 1, 2005 briefing questions, i.e., the carriers identified by Verizon in its Notice of Withdrawal and Motion for Relief. Because of the large number of parties involved, and because many of the parties' interconnection agreements have similar terms as a result of the adoption of the terms of existing interconnection agreements, the Department permitted the parties to group their responses to the briefing questions where the legal effect of the relevant change of law terms is identical. According to Verizon, the interconnection agreements may be grouped into six different forms of change of law terms. Certain CLECs challenge Verizon's categorization of their interconnection agreements. Our analysis below is based on Verizon's proposed groupings, with certain exceptions as noted. We cite to the language contained in the adopted agreement that is representative of the agreements of carriers included in each category.[11]

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[11] We note that the particular interconnection agreements may contain varying notice periods. While we review the form of the adopted agreements generally, our analysis below is not intended to modify notice periods specific to each carrier's interconnection agreement.

1. <u>Group 1</u>

The carriers in Verizon's Group 1 adopted the Z-Tel Communications interconnection agreement.[12] According to Verizon, the relevant change of law terms are: General Terms and Conditions § 4.7, which provides:

> Notwithstanding anything in this Agreement to the contrary, if, as a result of any legislative, judicial, regulatory or other governmental decision, order, determination or action, or any change in Applicable Law, Verizon is not required by Applicable Law to provide any Service, payment or benefit, otherwise required to be provided to [CLEC] hereunder, then Verizon may discontinue the provision of any such Service, payment or benefit, and [CLEC] shall reimburse Verizon for any payment previously made by Verizon to [CLEC] that was not required by Applicable Law. Verizon will provide thirty (30) days prior written notice to [CLEC] of any such discontinuance of a Service, unless a different notice period or different conditions are specified in this Agreement (including, but not limited to, in an applicable Tariff) or Applicable Law for termination of such Service in which event such specified period and/or conditions shall apply.

and the UNE Attachment § 1.5, which provides:

> Without limiting Verizon's rights pursuant to Applicable Law or any other section of this Agreement to terminate its provision of a UNE or a Combination, if Verizon provides a UNE or Combination to [CLEC], and the Commission,

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12 These carriers include Acceris Communications Corp., BCN Telecom, Budget Phone, Inc., Bullseye Telecom, Inc., Covista, Inc., DSCI Corp., DSLNet Communications, LLC, ICG Telecom Group, Inc., Lightwave Communications, Inc., MCI WorldCom Communications, Inc. (as successor to Rhythms Links, Inc.), New Horizons Communications Corp., and Talk America, Inc. Although ACN Communications Services, Inc. adopted the arbitrated Global NAPs agreement, that agreement contains change of law clauses that are substantially identical to the Z-Tel agreement for the purpose of this analysis. We do not include PaeTec Communications, Inc. within this group, because the company adopted the ACC National Telecom Corp. agreement, which is in Group 6. We also include Broadview Networks, Inc. and Broadview NP Acquisition Corp. in this group, because these two carriers have adopted the NEON Connect Inc. interconnection agreement, which has the same provisions for amendment of interconnection agreements as the Z-Tel agreement.

> the FCC, a court or other governmental body of appropriate jurisdiction determines or has determined that Verizon is not required by Applicable Law to provide such UNEs or Combination, Verizon may terminate its provision of such UNE or Combination to [CLEC] for new customers. [CLEC's] existing customers may continue to receive service over a UNE or Combination for a transition period of up to six months unless otherwise agreed to by the Parties. If Verizon terminates its provision of a UNE or a Combination to [CLEC] pursuant to this Section 1.5 and [CLEC] elects to purchase other Services offered by Verizon in place of such UNE or Combination, then: (a) Verizon shall reasonably cooperate with [CLEC] to coordinate the termination of such UNE or Combination and the installation of such Services to minimize the interruption of service to Customers of [CLEC]; and, (b) [CLEC] shall pay all applicable charges for such Services, including, but not limited to, all applicable installation charges.

(Verizon Resp. to Briefing Questions at 10-11; accord CCC Resp. to Briefing Questions at 4-5; CCG Brief, app. 1).[13] Verizon also cites, in passing, to General Terms and Conditions § 50.1, but we do not find that this section disposes of the question before us today. This section, obligating Verizon to provide at least 30 days notice of withdrawal of a service, is a general term applicable to any withdrawal of service, not simply those resulting from a change of law. That is, the term is also applicable when Verizon seeks to withdraw a service under the existing terms of the interconnection agreement. This clause cannot be read by itself,

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13 Only Covista, Inc., New Horizons Communications Corp., and Talk America, Inc. have this form of § 1.5. The version of this provision contained in the agreements of Acceris Communications Corp., BCN Telecom, Inc., Broadview Networks, Inc, Broadview NP Acquisition Corp., Budget Phone, Inc., Bullseye Telecom, Inc., DSCI Corporation, DSLnet Communications, LLC, Lightwave Communications, Inc., and MCI Worldcom Communications, Inc. (as successor to Rhythms Links, Inc.) omits the language of the six month transition period. Section 1.5 of the network elements attachment of the agreement of ICG Telecom Group Inc. also omits language providing for a CLEC's election to purchase replacement services. The omitted language does not affect our analysis of whether the agreements must be amended in order to implement the Triennial Review Order and the Triennial Review Remand Order.

conversely, to relieve Verizon of a duty to negotiate (if applicable) simply upon issuing a notice of discontinuance, or otherwise to grant Verizon the right to discontinue a service, because to do so would render all of Verizon's service obligations under the interconnection agreement illusory. Rather, the clause merely requires Verizon to provide notice any time that it will terminate the provision of a service.

In addition to the clauses cited by Verizon, the CLECs cite to General Terms and Conditions § 4.6, which provides:

> If any legislative, regulatory, judicial or other governmental decision, order, determination or action, or any change in Applicable Law, materially affects any material provision of this Agreement, the rights or obligations of a Party hereunder, or the ability of a Party to perform any material provision of this Agreement, the Parties shall promptly renegotiate in good faith and amend in writing this Agreement in order to make such mutually acceptable revisions to this Agreement as may be required in order to conform the Agreement to Applicable Law. Either party may initiate such good faith negotiations in writing upon the issuance of any relevant decision, order, determination or action, or any change in Applicable Law. If the Parties have been unable to negotiate an amendment to this Agreement within forty-five (45) days of the date of the initiating Party's written notice, either party may pursue any remedies available to it under this Agreement, at law, in equity, or otherwise, including, but not limited to, instituting an appropriate proceeding before the Commission, the FCC, or a court of competent jurisdiction.

(CCC Resp. to Briefing Questions at 4-5; CCG Brief, app. 1).[14] The term "applicable law" is defined broadly under the Glossary section of the agreement as "[a]ll effective laws,

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14 The CLECs also cite to UNE Attachment § 1.4.1, which provides that when changes in "applicable law" require Verizon to provide UNEs or Combinations not offered under the agreement, the terms and conditions for such UNEs are to be provided by tariff or "as mutually agreed in writing by the Parties." Section 1.4.1 does not apply in this case, however, because the FCC did not create new UNEs under the Triennial Review Order or the Triennial Review Remand Order, but rather, eliminated certain UNEs or mandated a transition away from such arrangements.

government regulations and orders, applicable to each Party's performance of its obligations under this agreement" (see Z-Tel Agreement, Glossary § 2.10).

While General Terms and Conditions § 4.6 obligates the parties to renegotiate in good faith any amendments necessary to conform the agreement to applicable law when a change of law "materially affects" any material provision of the agreement, the Parties' rights or obligations under the agreement, or the ability of a Party to perform under the agreement, the other relevant clauses, General Terms and Conditions § 4.7 and UNE Attachment § 1.5, are more specific, and thus, controlling in the event of a conflict. See In re 604 Columbus Avenue Realty Trust, 968 F.2d 1332, 1357 (1st Cir. 1992), citing Lembo v. Waters, 1 Mass. App. Ct. 227, 232 (Mass. App. Ct. 1973) ("If the apparent inconsistency is between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and pro tanto nullification of the former.") (quoting 3 A. Corbin, Contracts § 547, at 176 (1960)). General Terms and Conditions § 4.7 applies when, as a result of a change of law, Verizon is "not required by Applicable Law to provide any Service, payment or benefit, otherwise required to be provided to [the CLEC] hereunder." More specifically, UNE Attachment § 1.5 applies when the service no longer required to be provided is a UNE. The effect of the Triennial Review Order and the Triennial Review Remand Order was to eliminate Verizon's obligations to provide certain UNEs. Therefore, UNE Attachment § 1.5 applies.

While it might be argued that General Terms and Conditions § 4.6 also is triggered because the elimination of an obligation to offer UNEs "materially affects" Verizon's obligations under the interconnection agreement (see CCC Reply to Resp. to Briefing Questions at 6; CCG Reply to Resp. to Briefing Questions at 3-4), such a reading would be in conflict with Verizon's right to terminate its provision of such UNEs. If the interconnection agreement did require Verizon to renegotiate the terms of the interconnection agreement in good faith, notwithstanding its right to terminate the UNE arrangements, the duty to negotiate in good faith would be unenforceable. There would be no remedy if Verizon were to refuse to negotiate, because Verizon has the right under the UNE Attachment § 1.5 to terminate its provision of UNEs to the extent permitted by the Triennial Review Order and the Triennial Review Remand Order. In order to interpret General Terms and Condition § 4.6 in a manner that does not render it unenforceable, we construe the right to terminate pursuant to UNE Attachment § 1.5 as a modification of General Terms and Conditions § 4.6, such that the duty to negotiate applies only when the change of law results in an ongoing right or obligation under the interconnection agreement, not when it eliminates entirely such rights or obligations.

Some CLECs argue that neither General Terms and Conditions § 4.7 nor UNE Attachment § 1.5 are even triggered as a result of the Triennial Review Order and the Triennial Review Remand Order, because while the new FCC rules may have eliminated the obligation to offer certain UNEs, neither FCC order was a determination that Verizon is "not required by Applicable Law" to provide UNEs, whereas the term "Applicable Law" has been defined broadly under the interconnection agreement to encompass "all" effective laws, regulations, and orders, not limited to 47 U.S.C. § 251 and the FCC's unbundling regulations under 47 C.F.R. Part 51 (CCC Reply to Resp. to Briefing Questions at 4-5; CCG Reply to

Resp. to Briefing Questions at 3). The effects of the Triennial Review Order and the Triennial Review Remand Order are limited to § 251 unbundling obligations, and do not affect other bases of Verizon's obligation to provision network elements. Therefore, certain CLECs argue, Verizon may have ongoing obligations to provision network elements under Applicable Law.

We find, however, that this reading ignores the last clause of the definition of Applicable Law common to all of these interconnection agreements: "applicable to each Party's performance of its obligations under this agreement" (see Z-Tel Agreement, Glossary § 2.10 (emphasis added)). The obligations "under this agreement" that the Triennial Review Order and the Triennial Review Remand Order have modified are Verizon's obligations under the UNE Attachment. The law applicable to the parties' performance of such obligations arise under 47 U.S.C. § 251 and 47 C.F.R Part 51. While Verizon may have ongoing obligations to provide network elements arising from other sources of law, the FCC has stated that those obligations are independent of an ILEC's UNE obligations. Triennial Review Order at ¶ 653-55.

We find that the law applicable to Verizon's obligations under the interconnection agreement has changed, and that both General Terms and Conditions § 4.7 and UNE Attachment § 1.5 have been triggered for this group of interconnection agreements. Verizon, therefore, had the right to terminate provision of UNEs as permitted by the Triennial Review Order and the Triennial Review Remand Order, subject to the transition terms of UNE Attachment § 1.5, except where the FCC has mandated specific transition terms. Further, the only ongoing obligation that § 1.5 imposes is a duty to coordinate the termination of discontinued UNEs and installation of replacement services, if the CLEC chooses to purchase other services that Verizon may offer. This obligation does not require negotiation and arbitration of the terms of the replacement service. Therefore, we find that no negotiation or arbitration of amendments to the interconnection agreements for this group is necessary to implement the terms of the Triennial Review Order and the Triennial Review Remand Order. Rather, if there is a dispute over the manner in which Verizon implements the new rules, the issue would be a matter to be raised according to the dispute resolution provisions of the parties' interconnection agreements, not a matter for arbitration.

2. Group 2

The carriers in Group 2[15] have interconnection agreements that are substantially similar to the Level 3 interconnection agreement. Verizon claims that the relevant provisions are § 11.0 on Unbundled Access, which provides:

> To the extent required by Applicable Law, and subject to the provisions of this Section 11.0 (including, without limitation, Section 11.7 hereof), BA shall offer to [CLEC] nondiscriminatory access to Network Elements on an unbundled basis at any technically feasible point pursuant to, and in accordance with the terms and provisions of, this Agreement; provided, however, that BA shall not have any obligation to continue to provide such access with respect to any Network Element listed in Section 11.1 (or otherwise) that ceases to be subject to an unbundling obligation under Applicable Law; provided further that, if BA intends to cease provisioning a Network Element that it is no longer required by

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15 These carriers include Cleartel Telecommunications, Inc. f/k/a Essex Acquisition Corp., Equal Access Networks LLC; KMC Telecom V, Inc.; Level 3 Communications LLC, Lightship Telecom LLC; and McGraw Communications, Inc. As discussed above, Broadview Networks, Inc. and Broadview NP Acquisition Corp. are not properly classified in Group 2, but rather in Group 1. CCG argues that Cleartel has the same relevant provisions as for Group 1 (CCG Reply to Resp. to Briefing Questions at 4), but the agreements on file with the Department do not have the provisions cited.

> Applicable Law to provision, the Parties agree to work cooperatively to develop an orderly and efficient transition process for discontinuation of provisioning of such Network Element. Unless otherwise agreed to by the Parties (or required by Applicable Law), the transition period shall be at most three (3) months from the date that the FCC (or other applicable governmental entity of competent jurisdiction) issues (or issued) public notice that BA is not required to provision a particular Network Element. [CLEC] may request renegotiation pursuant to Section 27.3 hereof to obtain from BA access to any Network Element not listed in Section 11.1 that is subject to a legally effective FCC or Department order, and which BA makes available to requesting carriers under the Act; in such cases [CLEC] shall not be required to use the Bona Fide Request Process to obtain nondiscriminatory access to such additional Network Element on an unbundled basis.

and a general term, § 27.4, which states:

> Except as explicitly provided in Sections 4.2.4, 5.7 and 22 of this Agreement, notwithstanding anything else herein to the contrary, if, as a result of any decision, order or determination of any judicial or regulatory authority with jurisdiction over the subject matter hereof, it is determined that BA is not required to furnish any service, facility or arrangement, or to provide any benefit required to be furnished or provided to [CLEC] hereunder, then BA may discontinue the provision of any such service, facility, arrangement or benefit to the extent permitted by any such decision, order or determination by providing ninety (90) days prior written notice to [CLEC], unless a different notice period or different conditions are specified in this Agreement (including, but not limited to, in an applicable Tariff or Applicable Law) for termination of such service, in which event such specified period and/or conditions shall apply.

(Verizon Resp. to Briefing Questions at 12-13; accord CCC Resp. to Briefing Questions at 8-9; CCG Brief, app. 1).[16] The CLECs also highlight a preceding general term, § 27.3:

> Except as explicitly provided in Sections 4.2.4, 5.7 and 22 of this Agreement, in the event of a change in Applicable Law that materially affects any material term of this Agreement, the rights or obligations of either Party hereunder, or the ability of either Party to perform any material provision hereof, the Parties shall renegotiate in good faith such affected provisions with a view toward agreeing to acceptable new terms as may be required or permitted as a result of such legislative, regulatory, judicial or other legal action.

(CCC Resp. to Briefing Questions at 9; CCG Brief, app. 1). As with Group 1, the interconnection agreements in Group 2 define the term "Applicable Law" as "all laws, regulations and orders applicable to each Party's performance of its obligations hereunder" (see Level 3 Agreement, § 1.6).

As with the parties' responses for Group 1, the CLECs argue that there has been no determination under "all" applicable law that Verizon is relieved of its obligation to provide UNEs, and therefore, §§ 11.0 and 27.4 do not apply (CCG Reply to Resp. to Briefing Questions at 7-8; CCG Reply to Resp. to Briefing Questions at 5). As we concluded for

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16 Sections 4.2.4, 5.7, and 22 are not relevant to this proceeding. Section 4.2.4 pertains to interconnection points and trunking architecture. We resolve the issue of the construction of a single point of interconnection in our discussion of Issue 17, but the issue of a physical point of interconnection is distinct from the designation of an interconnection point, which is a financial demarcation point for termination and transport costs. Petition of Global NAPs, Inc., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration to establish an interconnection agreement with Verizon New England, Inc., D.T.E. 02-45, at 17 (Dec. 12, 2002) ("Global NAPS/Verizon Arbitration Order"). Section 5.7 pertains to intercarrier compensation. The Triennial Review Order and the Triennial Review Remand Order did not affect these terms. Finally, § 22 provides for the parties' rights to terminate the agreement and to request negotiation of a new agreement, both of which rights are beyond the scope of this proceeding.

Group 1, we find that under all laws applicable to the parties' obligations to provide access to certain "Network Elements on an unbundled basis" under § 11.0 of the agreement, namely § 251(c)(3) and the rules promulgated by the Triennial Review Order and the Triennial Review Remand Order, there has been a determination that Verizon is no longer required to provide them. Verizon may or may not have an independent obligation to provide interconnection and access to those network elements on "just and reasonable" terms, pursuant to 47 U.S.C. § 271, but, even so, not on an unbundled basis, and therefore, not under § 11.0.

Thus, § 27.4 applies, and Verizon may discontinue provision of such UNEs, subject to the condition "to work cooperatively to develop an orderly and efficient transition process for discontinuation of provisioning of such Network Element." The renegotiation provisions of § 11.0 do not apply, because the FCC did not create network elements that are not listed in § 11.1. In contrast with UNE Attachment § 1.5 from the agreements of Group 1 above, § 11.0 does not explicitly provide for cooperation to develop a transition to replacement services. We do not read any intent in this omission to preclude the parties from entering into agreements for alternate arrangements. The obligation to work cooperatively to develop a transition process does not, however, create an obligation to renegotiate terms for the provision of UNEs under the interconnection agreement. Further, while § 27.3 imposes a duty to renegotiate provisions in good faith in the event of a change of law that "materially affects" the parties' rights under the agreement, we find that this section is inapplicable, by the same reasoning that we applied to § 1.5 vis a vis § 4.6 in Group 1 above. Sections 27.4 and 11.0

should prevail, because the Triennial Review Order and the Triennial Review Remand Order have eliminated, not simply materially affected, the parties' rights to certain UNEs.

We find that the terms of the Triennial Review Order and the Triennial Review Remand Order may be implemented without renegotiation of the terms of the interconnection agreements for Group 2. Thus, no amendment of terms is necessary.

CCC suggests that Lightship's second amendment to its interconnection agreement, the UNE Remand Amendment, contains two relevant sections, § 1.4.1 and § 1.5 (CCC Resp. to Briefing Questions at 9-10). These terms are substantially identical to the same numbered sections in the Group 1 agreements. As we discussed above, § 1.4.1 is not relevant where the FCC has eliminated certain unbundling obligations. Section 1.5 operates in the same manner as § 1.5 in Group 1, providing an additional duty to cooperate reasonably to coordinate a transition to replacement services and minimize interruption of service to customers if the CLEC elects to purchase replacement services. As a later amendment, § 1.5 also prevails over any conflicting terms of the underlying agreement.

3. Group 3

Verizon and CCC agree in identifying the relevant sections of the interconnection agreements of the CLECs in Group 3.[17] These agreements are substantially similar to the MCIMetro Access agreement. The parties cite to § 2.2 of the opt-in agreement, which provides:

> The Parties agree that if any judicial or regulatory authority of competent jurisdiction determines (or has determined) that BA is not required to furnish any service or item or provide any benefit to Telecommunications Carriers otherwise required to be furnished or provided to [CLEC] hereunder, then BA may, at its sole option, avail itself of any such determination by providing written notice thereof to [CLEC].

The parties, however, disagree as to whether § 8.2 and § 8.3 of the agreement apply, notwithstanding § 2.2 of the opt-in agreement. Section 8.2 states:

> In the event the FCC or the Department promulgates rules or regulations, or issues orders, or a court of competent jurisdiction issues orders, which make unlawful any provision of this Agreement, or which materially reduce or alter the services required by statute or regulations and embodied in this Agreement, then the Parties shall negotiate promptly and in good faith in order to amend the Agreement to substitute contract provisions which conform to such rules, regulations or orders. In the event the Parties cannot agree on an amendment within thirty (30) days after the date any such rules, regulations or orders become effective, then the Parties shall resolve their dispute under the applicable procedures set forth in Section 16 (Dispute Resolution Procedures) hereof.

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17 These carriers are BrahmaCom, Inc. and CTC Communications Corp. CCC responds only on behalf of CTC Communications Corp. While we observe that these carriers have adopted the MCIMetro Access agreement, MCIMetro Access Transmission Services, LLC is not part of this group, because Verizon did not seek to withdraw its arbitration petition with respect to this carrier. Therefore, there is no dispute before the Department as to whether MCIMetro Access Transmission Services, LLC is subject to arbitration of an amendment to its interconnection agreement in this proceeding.

Section 8.3 states:

> In the event that any legally effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of [CLEC] or BA to perform any material terms of this Agreement, [CLEC] or BA may, on thirty (30) days written notice (delivered not later than thirty (30) days following the date on which such action has become legally binding or has otherwise become legally effective) require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required.

(Verizon Resp. to Briefing Questions at 14-15; <u>accord</u> CCC Resp. to Briefing Questions at 2-3). Verizon argues that § 2.2 of the opt-in agreement provides that it has the "sole option" to "avail itself" of the <u>Triennial Review Order</u> and the <u>Triennial Review Remand Order</u>, and § 2.2 provides that it may do so upon written notice, not subject to renegotiation under §§ 8.2 or 8.3 (Verizon Resp. to Briefing Questions at 14). CCC counters that Verizon may only "avail itself" of the <u>Triennial Review Order</u> and the <u>Triennial Review Remand Order</u> by negotiating amendments to the interconnection agreement, because the FCC "decline[d] the request of several BOCs that [the FCC] override the § 252 process and unilaterally change all interconnections agreements" (CCC Reply to Resp. to Briefing Questions at 9, <u>quoting</u> <u>Triennial Review Order</u> at ¶ 701; <u>see</u> <u>also</u> <u>Triennial Review Remand Order</u> at ¶¶ 143, 196, 227 (establishing transition periods to afford carriers time "to modify their interconnection agreements, including completing any change of law processes")).[18] CCC argues therefore that §§ 8.2 and 8.3 apply and require the parties to negotiate substitute contract provisions to conform to the Triennial Review Order and the Triennial Review Remand Order (CCC Reply to Resp. to Briefing Questions at 10-11).

Even if we were to agree with CCC that its reading is consistent with the terms of the adopted MCIMetro Access agreement and CTC's opt-in agreement taken alone, nonetheless CTC has amended that agreement. CTC's UNE Remand Amendment, contains a provision, § 1.5, that is substantially identical to the same-numbered term as Lightship's UNE Remand Amendment in Group 2 and as the UNE Attachment term in Group 1. We find that § 1.5 of the UNE Remand Amendment has the same effect here, and no amendment of the CTC agreement is necessary in order to implement the terms of the Triennial Review Order and the Triennial Review Remand Order.

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18 CCC also makes reference to the procedure for challenging a CLEC submission of an order for a high capacity loop or transport UNE (CCC Reply to Resp. to Briefing Questions at 10, citing Triennial Review Remand Order at ¶ 234), but we do not find the FCC's language relevant to the issue at hand. Cf. Supplemental Issues 1 - 3. The question of the validity of the CLEC's self-certified UNE order would not arise from a change of law, but rather, would arises from the parties' conduct under the self-certification process. A dispute under that process does not require renegotiation of the agreement. That is, as the FCC indicated in the cited passage, the ILEC can raise the issue in a dispute resolution proceeding.

4. Group 4

CCC argues that the carriers in Group 4[19] must renegotiate terms pursuant to General Terms and Conditions § 8.3, which provides:

> In the event that a change in Applicable Law materially affects any material terms of this Agreement or the rights or obligations of either [CLEC] or VERIZON hereunder or the ability of [CLEC] or VERIZON to perform any material provision hereof, the Parties shall renegotiate in good faith such affected provisions with a view toward agreeing to acceptable new terms as may be required or permitted as a result of such legislative, regulatory, judicial or other legal action.

Verizon argues that General Terms and Conditions § 8.4 of the interconnection agreements is relevant to the question before the Department. General Terms and Conditions § 8.4 provides:

> Notwithstanding anything herein to the contrary, in the event that as a result of any unstayed decision, order or determination of any judicial or regulatory authority with jurisdiction over the subject matter hereof, it is determined that a Party ("Providing Party") shall not be required to furnish any service, facility, arrangement or benefit required to be furnished or provided to the other Party ("Recipient Party") hereunder, then the Providing Party may discontinue the provision of any such service, facility, arrangement or benefit ("Discontinued Arrangement") to the extent permitted by any such decision, order or determination by providing sixty (60) days prior written notice to the Recipient Party, unless a different notice period or different conditions are specified in this Agreement (including, but not limited to, in an applicable Tariff . . . or Applicable Law) for termination of such Discontinued Arrangement, in which event such specific period and/or conditions shall apply. Immediately upon provision of such written notice to the Recipient Party, the Recipient Party shall be prohibited from ordering and the Providing Party shall have no obligation to provide new Discontinued Arrangements.

Verizon argues that, like the provisions discussed above, § 8.4 permits it to discontinue the provision of UNEs following the Triennial Review Order and the Triennial Review Remand

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19 These carriers include Focal Communications Corp. of MA and Sprint Communications Company. CCC comments on behalf of Focal Communications Corp. only.

Order by providing notice, not by amending the agreement (Verizon Resp. to Briefing Questions at 16). Verizon further argues that § 1.7.2 of Part II of the agreement, which provides specifically for UNEs and combinations, is applicable:

> Without limiting VERIZON's rights pursuant to Applicable Law or any other section of this Agreement to terminate its provision of a Network Element or a Combination, if VERIZON provides a Network Element or combination of Network Elements ("Combination") to [CLEC], and the Department, the FCC, a court or other governmental body of appropriate jurisdiction determines that VERIZON is not required by Applicable Law to provide such Network Element or Combination, VERIZON may terminate its provision of such Network Element or Combination to [CLEC]. VERIZON will give [CLEC] ninety (90) days advance written notice of such termination. If VERIZON terminates its provision of a Network Element or a combination to [CLEC] pursuant to this Section 1.7.2 and [CLEC] elects to purchase other services offered by VERIZON under this Agreement in place of such Network Element or Combination, then: (a) VERIZON shall reasonably cooperate with [CLEC] to coordinate the termination of such Network Element or Combination and the installation of such services to minimize the interruption of service to customers of [CLEC]; and, (b) [CLEC] shall pay all of the charges set forth in this Agreement for such services, including, but not limited to, all applicable installation charges.

Verizon concludes that §§ 8.4 and 1.7.2 must be read as excluding amendment of the interconnection agreement as a requirement (Verizon Resp. to Briefing Questions at 17).

CCC counters that Verizon construes this section too narrowly (CCC Reply to Resp. to Briefing Questions at 13). As with the previously discussed interconnection agreements, the term "Applicable Law" is defined broadly as "all laws, regulations, and orders applicable to each Party's performance of its obligations hereunder." Sprint Agreement, att. 1, § 1.0. Thus, CCC argues that § 1.7.2 does not apply, and the parties must "renegotiate in good faith such affected provisions with a view toward agreeing to acceptable new terms as may be required or permitted as a result of" the Triennial Review Order and the Triennial Review Remand Order (CCC Reply to Resp. to Briefing Questions at 13).

Part II of the interconnection agreement specifically provides for terms and conditions for the provision of UNEs. As we have observed above, the law applicable to Verizon's performance of its obligation to provide "unbundled" network elements arises from § 251(c)(3), the Triennial Review Order, and the Triennial Review Remand Order. The new rules eliminate Verizon's obligations to provide certain UNEs. Therefore, § 1.7.2 permits Verizon to terminate the provision of those UNEs, imposing only a duty to cooperate with the CLEC to coordinate a transition to minimize interruption of service to customers. By the same reasoning applied above, § 8.3 cannot be read to continue to obligate parties to negotiate new contractual terms when the underlying right to a network element has been eliminated. Thus, the parties may implement the FCC's new rules without amending their agreements.

5. Group 5

Covad is the only carrier in Group 5. Section 11.0 of the agreement provides terms for unbundled access to network elements pursuant to § 251(c)(3):

> To the extent required of each Party by Section 251 of the Act, each Party shall offer to the other Party nondiscriminatory access to Network Elements on an unbundled basis at any technically feasible point. . . .

Section 11.1 further provides with respect to certain enumerated network elements:

> At the request of Covad, BA shall provide Covad access to the following unbundled Network Elements in accordance with the requirements of the FCC Regulations and Applicable Law.

Verizon contends that its obligation to provide UNEs to Covad is delimited by "Section 251 of the Act" and only "in accordance with the requirements of the FCC Regulations" (Verizon Resp. to Briefing Questions at 18). Verizon argues that the relevant change of law language is contained within § 28.3,[20] which provides:

> The Parties recognize that the FCC has issued and may continue to issue regulations implementing Sections 251, 252, and 271 and other Sections of the Act that affect certain terms contained in this Agreement. In the event that any one or more of the provisions contained herein is inconsistent with any applicable rules contained in such FCC Regulations or as may be enacted by the Department, or imposed by a court in the exercise of its lawful jurisdiction, or which, in BA's reasonable determination, affects BA's application pursuant to Section 271(d) of the Act, the Parties agree to negotiate in good faith the revisions necessary to eliminate the inconsistency or amend the application-affecting provision(s). Such revisions need not be considered material, and need not require further Department approval beyond any Department approval required under Section 252(e) of the Act. If, however, any such change in Applicable Law or amendment to this Agreement would necessitate a change that would affect the interconnection of network facilities or Covad's ability to use any BA service or Network Element, Covad shall have a reasonable time to modify or re-deploy its network or operations to reflect such change.

CCG notes that the definition of Applicable Law under Covad's interconnection agreement is defined broadly under § 1.7 as "all laws, regulations, and orders applicable to each Party's performance of its obligations hereunder." CCG also highlights § 29.19, which provides that "[n]o modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties."

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[20] Both Verizon and CCG initially mis-cited the relevant provision in their briefs, but have since issued corrections. Both parties agree that § 28.3 is as quoted in this passage (CCG Reply to Resp. to Briefing Questions at 6; Letter from Barbara Anne Sousa, Assistant General Counsel, Verizon Massachusetts at 1 (July 6, 2005)).

Unlike the agreements in the first four groups, we find no necessary conflict between §§ 11.0, 11.1, and 28.3 that would render any of the clauses meaningless or unenforceable. While the interconnection agreement's general terms, §§ 11.0 and 11.1, define the scope of Verizon's obligations in accordance with Section 251, FCC regulations, and Applicable Law, nothing in those provisions explicitly provides that Verizon "may terminate" provisioning the UNEs that are no longer required to be unbundled under FCC regulations without first amending inconsistent terms.[21] As a general rule of construction, changes of law enacted after execution of an agreement "are not incorporated into an agreement unless the contract provisions 'clearly establish that the parties intended to incorporate subsequent enactments into their agreement.'" Mayor of Salem v. Warner Amex Cable Communications Inc., 392 Mass. 663, 666-67 (1984) (quoting Feakes v. Bozyczko, 373 Mass. 633, 636 (1977)). We must therefore examine the parties' expectations at the time the agreement was executed.

At the time the agreement was executed, the parties expected that Verizon's obligation to provide UNEs under the applicable law under §§ 251, 252, and 271, would be modified as a

[21] Verizon points out that the Covad agreement contains amendments specific to particular UNEs, such as line splitting and dark fiber. The line splitting amendment contains a provision, § 1.5, which explicitly provides that Verizon "may terminate" provision of line splitting after notice when the FCC removes the line splitting obligation. The language is identical to the similarly numbered UNE attachment provisions analyzed in the previous groups. We find that this provision has the same effect as similar terms discussed above (i.e. permitting Verizon to cease provisioning line splitting when de-listed, without first negotiating an amendment to the agreement). The dark fiber provision to which Verizon cites, UNE Remand Amendment sub. (A), contains no language that we would interpret to grant Verizon the right to terminate dark fiber arrangements without first amending the interconnection agreement (cf. Verizon Resp. to Briefing Questions, exh. 1, at 16).

result of changes in FCC regulations, determinations by the Department, or rulings by the courts. Section 28.3 provides that in response to these changes, "the Parties agree to negotiate in good faith the revisions necessary to eliminate the inconsistency." This agreement specifically provides for an amendment process in the event of a change of law.

Verizon argues that § 28.3 provides that "the Parties agree to make only the minimum revisions necessary to eliminate the inconsistency" (Verizon Responses to Briefing Questions at 19). While the agreement does not contain this limiting language, minimizing the scope of amendments made in response to changes of law is an implied term. Nevertheless, the agreement still contemplates that amendments would be made to the agreement to eliminate inconsistencies that may arise between the terms of the interconnection agreement and applicable law from time to time. To read §§ 11.0 and 11.1, as Verizon suggests, in a manner that would obviate the need for amendment on the grounds that the agreement automatically ceases to obligate Verizon to provide UNEs whenever the FCC removes such obligations from its regulations (i.e. an amendment is not "necessary"), would render meaningless the obligation to "negotiate in good faith the revisions necessary to eliminate the inconsistency or amend the application-affecting provision." Because we must construe all contractual terms to give them effect whenever possible, we find that §§ 11.0 and 11.1 do not obviate the need to amend the interconnection agreement in response to changes of law under § 28.3.

Thus, to the extent that we find that amendments are necessary in response to the unresolved arbitration issues discussed below, we find that the Covad interconnection agreement must be amended in order to implement the Triennial Review Order and the

Triennial Review Remand Order. Covad and Verizon shall amend their interconnection agreement consistent with our treatment of the arbitration issues discussed below. This finding shall not be construed to invalidate or supercede the separate commercial agreements into which Covad and Verizon have entered.[22]

6. Group 6

Verizon and AT&T agree upon the relevant provision in the interconnection agreement for Group 6.[23] The change of law language is contained in § 35, which provides:

> This Agreement is subject to change, modification, or cancellation as may be required by a regulatory authority or court in the exercise of its lawful jurisdiction. If, however, a regulatory authority or court in the exercise of its lawful jurisdiction enacts a Law or makes a finding that would necessitate a change that would affect the interconnection of network facilities or [CLEC's] ability to use any NYNEX service or Network Element (for example, [CLEC's] ability to combine certain Network Elements), [CLEC] shall have a reasonable time to modify or redeploy its network or operations to reflect such change.

The parties cite to no other relevant provisions. AT&T disputes that the FCC's new rules have triggered this change of law provision (AT&T Reply Brief at 31-33). AT&T would distinguish between rules that "require" or "necessitate" a change, versus rules that are "permissive," not mandatory, and thus do not require a change (id. at 32). AT&T argues that the new rules only "relax" preexisting unbundling obligations; they do not prohibit ILECs from providing

22 Press Release, Covad Communications, Covad and Verizon Sign Commercial DSL Line Sharing Agreement (Dec. 15, 2004).

23 Verizon only includes ACC National Telecom Corp. ("ANTC") in Group 6, but, as we found above, we also include PAETEC in Group 6. AT&T briefs only on behalf of ANTC.

unbundled access.[24] Thus, AT&T argues, there has been no action that "necessitates a change" to the interconnection agreement.

Verizon counters that the FCC's new unbundling rules are not merely "permissive," but in fact "prohibit" CLECs from ordering new arrangements of the delisted UNEs (Verizon Reply Brief at 79, citing 47 C.F.R. § 51.319(d)(2)(iii) ("Requesting carriers may not obtain new local switching as an unbundled network element") (emphasis added)). Verizon also counters that the FCC explicitly "required" parties to amend their interconnection agreements only to the extent necessary to conform to the terms of the Triennial Review Order (id. at 79, citing Triennial Review Order at ¶¶ 703-04). Verizon maintains, however, that nothing in § 35 of the agreement suggests that Verizon must amend its agreement before it can conform to the current FCC regulations.

Although § 35 recognizes that "a regulatory authority or court in the exercise of its lawful jurisdiction" may direct the parties to modify the terms of the interconnection agreement, it contains no language binding the parties to renegotiate the terms of the

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24 AT&T cites to language, for example, providing that an ILEC "is not required to provide" or "is not obligated to unbundle" certain network elements (AT&T Reply Brief at 32 n.69, citing 47 C.F.R. §§ 51.319(a)(1)(i), (a)(1)(i)(B), (a)(3)(ii), (a)(3)(iii), (a)(4)(iii), (a)(5)(iii), (a)(6)(i)).

agreement. The second sentence is the relevant clause.[25] In this case, the FCC has made findings that CLECs are not impaired without unbundled access to certain UNEs, and therefore, has determined that ILECs, such as Verizon, are not obligated to provide them on an unbundled basis. We find nothing in the plain meaning of the text of this section to suggest that the parties intended to distinguish between regulatory or judicial action that is claimed to be "permissive" rather than "mandatory." The findings in the Triennial Review Order and the Triennial Review Remand Order are findings that "would necessitate a change that would affect . . . [the CLEC's] ability to use any NYNEX service or Network Element." This section provides only that the CLEC "shall have a reasonable time to modify or redeploy its network or operations to reflect such change." Thus, we find that no amendment to this agreement is necessary to implement the terms of the Triennial Review Order and the Triennial Review Remand Order.

C. Summary

Of the carriers that Verizon had sought to withdraw from this proceeding, but which we permitted to continue as parties to this arbitration proceeding, we find that the change of law provisions in the interconnection agreements of all of these carriers, except for Covad, require no amendment to the interconnection agreements arising from the terms of the Triennial

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25 The sentences are drafted in the disjunctive. The first sentence of § 35 refers to regulatory or judicial action that is directed specifically at this interconnection agreement. The first sentence does not apply, because the FCC did not order these parties to modify their specific agreement to conform the terms to the Triennial Review Order and the Triennial Review Remand Order. The second sentence refers to a regulatory or judicial action that is not specific to this interconnection agreement, but which would necessarily "affect" the parties' rights under the agreement.

Review Order and the Triennial Review Remand Order. The interconnection agreements of Covad and of the carriers not referenced in Section IV.B, supra, must be amended as discussed in our review of the unresolved issues which follows.

V. UNRESOLVED ISSUES

The Department's objective in this Order is to arbitrate an Amendment to interconnection agreements to implement the changes in law as a result of the Triennial Review Order and the Triennial Review Remand Order. It is not to arbitrate any new term or to modify any existing term that does not arise from the Triennial Review Order and the Triennial Review Remand Order. Accordingly, our review of the issues presented is limited to arbitrating only those terms and conditions necessary to implement the new rules.

A. 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?

1. Positions of the Parties

a. Verizon

Verizon includes language throughout its proposed Amendments limiting its various obligations to provide facilities and services to its unbundling obligations "in accordance with, but only to the extent required by 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51" (see, e.g., 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, 3.4.1.2.2, 3.4.2.1, 3.4.2.2, 3.5.1, 3.5.3, 4.7.5). In several of these proposed terms, Verizon alternatively uses the synonymous phrase, "Federal Unbundling Rules." Verizon contends that while the Telecommunications Act affords states a role in implementation, it vests authority to make unbundling determinations exclusively with the FCC (Verizon Brief at 17, citing 47 U.S.C. § 252(e)(2); USTA II, 359 F.3d at 565-68). Verizon notes that the Department has correctly recognized that it cannot lawfully impose an unbundling obligation that the FCC has already rejected (id. at 18, citing Verizon New England, Inc., D.T.E. 98-57 Phase III-D at 15-17 (2004) ("D.T.E. 98-57 Phase III-D Order")). Verizon also notes that the Department also has held that the savings clauses in §§ 251(d)(3) and 252(e)(3) do not permit state commissions to require unbundling where the FCC finds affirmatively that it is not required (id. at 18-19, citing Mass Market Switching Investigation and Verizon New England, Inc. Tariff M.D.T.E. No. 17, D.T.E. 03-60/04-73, Consolidated Order at 21-23 (2004) ("Consolidated Order"); see also id. at 20-22, citing In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers, WC Docket No. 03-251, Memorandum Opinion and Order and Notice of Inquiry, FCC 05-78 (rel. Mar. 25, 2005)). While Verizon disputes the Department's finding that federal law would permit the Department to "fill the gap" in the absence of FCC unbundling regulations (id, at 19, citing Consolidated Order, D.T.E. 03-60/04-73, at 23), Verizon also maintains that there is no regulatory gap to fill here, because 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" (id. at 19). Verizon argues, therefore, that its proposed language appropriately "reflects the fact that Verizon's unbundling obligations are tied to the requirements of federal law, as they may evolve" (id. at 22).

In contrast, Verizon argues that the CLECs' proposed alternatives must be rejected because they specifically define Verizon's obligations to include sources other than federal law. Verizon specifically points to AT&T's Amendment, § 2.0, which would define obligations with respect to "Applicable Law;" MCI's proposal to delete Verizon's proposed § 2.1; and MCI's proposed § 8.1, which would provide that Verizon is not obligated to provide mass market switching "unless Verizon is required to do so under the applicable Federal Unbundling Rules or State law" (id. at 22-23). Verizon argues that these amendments would subordinate improperly 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" (id. at 23). Verizon notes that, in fact, 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 (see id., citing Consolidated Order, D.T.E. 03-60/04-73, at 22, 23 n.17).

b. AT&T

AT&T proposes language that would obligate Verizon to provide UNEs "under the terms of this Amended Agreement pursuant to 47 U.S.C. § 251(c)(3), 47 C.F.R. Part 51 or other Applicable Law as it exists at the time the parties enter into this Amendment" (AT&T

Amendment, §§ 1.1, 1.2). AT&T contends that Verizon's proposed language inappropriately excuses it from any obligations beyond federal obligations (AT&T Brief at 5).

AT&T argues that the Department has authority to impose and enforce state law-based unbundling (id., citing 47 U.S.C. § 251(e)(3)). AT&T maintains that "network elements provided pursuant to state law are intrastate telecommunications services subject to the jurisdiction of the Department; thus the Department has the power to include the terms and conditions of these UNEs in the ICAs" (id. at 5-6). AT&T asserts that the Act expressly preempts only state law that poses a barrier to entry, while enacting four separate savings clauses, 47 U.S.C. §§ 251(d)(2), 252(e)(3), 261(c), and Act § 601(c)(1), that authorize states to enact or enforce additional pro-competitive requirements under state law so long as they do not "lower" the federal floor (id. at 6-7, citing CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)). AT&T argues that Congress has not preempted state unbundling requirements, noting that when Congress intends federal regulations to operate both as a floor and a ceiling, it may use terms to preclude states from imposing requirements that "differ" from, are "in addition to," or "not identical to" federal obligations (id. at 7). Rather, AT&T argues, Congress did the opposite by expressly permitting states to impose additional access obligations so long as they are not "inconsistent" with federal law (id. at 8, citing 47 U.S.C. § 261(c)).

AT&T further argues that Congress has not preempted the field, and nor should preemption be inferred, because the Act provides a role for state authorities (id.). Moreover, AT&T notes that the FCC only made a "general prediction" that state unbundling requirements that are inconsistent with the Triennial Review Order are likely to be preempted, but that it reserved decisions on state preemption for future "declaratory ruling" proceedings to be initiated by the parties (id. at 9). That is, AT&T argues that the FCC has not taken any view on any attempted state unbundling order, and that the preemption question is "unripe" (id., citing USTA II, 359 F.3d at 594). Given that state law has not been preempted by the Act, AT&T argues, Verizon's proposed language that would remove any reference to applicable law beyond §§ 251 and 252 is overbroad and should be rejected (id. at 10).

c. CCC

CCC argues that Verizon's proposal to limit its obligation to provide UNEs "only" to the extent required by 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51 should be rejected, because a party may only seek arbitration of terms necessary to implement laws that have changed (CCC Brief at 2-3). CCC states that the change of law provisions in its interconnection agreements permit parties to renegotiate terms "as may be required" in order to conform the Agreement to applicable law, or terms "that have been rendered unlawful by a change of law" (id. at 3-4). CCC argues that a change of law event does not open the door to re-litigate any and every issue in the Agreement (id. at 3). CCC states that Verizon has not identified any provision of the Triennial Review Order that would "make unlawful" the existing Agreements' contemplation that other sources of law could exist (id. at 4).

CCC maintains that the Act unambiguously provides that states may impose additional unbundling obligations based upon state law, so long as their requirements are consistent with and do not substantially prevent implementation of § 251 (id. at 7, citing 47 U.S.C.

§§ 251(d)(3), 252(e)(2)(B), (e)(3), 261). Because of these savings clauses, CCC argues that there is no field preemption of state authority (id. at 8). CCC argues that to approve Verizon's proposed language limiting any unbundling obligations only "to the extent required by 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51" would unduly strip the Department of its obligations and authority to implement § 251 (id. at 7). CCC argues that while there may be a dispute over whether Massachusetts law today authorizes the Department to impose unbundling obligations, "there is no basis for the Interconnection Agreement to determine in advance that any such law or Department decision will be ignored under the terms of the Agreement," and CLECs should not be forced to waive such rights prospectively (id. at 11-12). Moreover, CCC argues that it cannot be claimed that the Triennial Review Order changed the law in a manner that precludes "other federal sources of unbundling requirements, such as § 271 or a merger condition imposed by the FCC," because the FCC found that § 271 establishes an independent unbundling obligation (id. at 5).

CCC urges the Department to approve amendments that set forth specific changes to each of Verizon's unbundling requirements that were altered by the Triennial Review Order and the Triennial Review Remand Order (id. at 14). CCC further proposes terms referring to Verizon's unbundling obligations under § 271, restating the Bell Atlantic/GTE Merger Conditions, and clarifying that any omission of terms related to rights pursuant to law other than § 251 does not constitute a waiver of rights (id. at 15-16).

d. CCG

CCG maintains that the Act does not preempt, and in fact, expressly permits the Department to issue and enforce its own unbundling rules (CCG Brief at 2-3, citing 47 U.S.C. §§ 251(d)(3), 252(e)(3)). Further, CCG maintains that § 252(c) provides to states the authority to make unbundling determinations on "open issues" that the FCC has not yet resolved (id. at 3). CCG argues that § 251(d)(3) provides that states may establish unbundling, as long as those obligations comply with § 251(d)(3)(B) and (C) (id. at 4). CCG claims that neither the Triennial Review Order nor the Triennial Review Remand Order displaces the Department's authority (id.).

e. Conversent

Conversent proposes language that would define Verizon's obligation to provide UNEs, combinations, or commingling "under the terms of this Amended Agreement pursuant to 47 U.S.C. § 251(c)(3), 47 C.F.R. Part 51 or other Applicable Law" (Conversent Brief at 3; Conversent TRRO Amendment, § 2.1). Conversent maintains that this proposed language would give the Department the flexibility to exercise state law or § 271 authority to require unbundling, if appropriate (Conversent Brief at 4). In contrast, Conversent argues, Verizon's amendments would preclude the exercise of the Department's authority under § 251(d)(3) or § 271 (id. at 4-5).

Conversent notes that the FCC has acknowledged that in the absence of federal unbundling rules, states may fill in the gap (id. at 6, citing United States Telecom Ass'n v. FCC, FCC Motion to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari at 9 (D.C. Cir., filed May 24, 2004)). Conversent contends that the issue of a regulatory gap is not speculative, because Verizon has filed an appeal seeking review of the Triennial Review Remand Order (id.). While the outcome of that appeal is uncertain, Conversent maintains that the Department is not prohibited from leaving open the option to fill the gap (id. at 6-7). Conversent acknowledges that the Department has not yet chosen to require unbundling under state law, but argues that accepting its proposed language does not require the Department to rule that Verizon should unbundle any particular element under state law; rather, Conversent maintains, the language merely preserves the option to make that determination at a later date (id. at 7).

f. MCI

MCI argues that §§ 251 and 252 are not the sole source of Verizon's obligations, but rather, those obligations may also arise from § 271 or Massachusetts law, as well as from voluntary commitments made by Verizon (MCI Brief at 2). MCI notes that § 252(e)(3) provides that nothing shall prohibit states from establishing or enforcing requirements of state law in interconnection agreements (id. at 2-3). MCI argues that the Department has ample authority under state law to require unbundling (id. at 3, citing G.L. c. 159, § 12). MCI argues that state action has not been preempted as a matter of law, because Congress did not preempt the field and because the FCC had only made a "general prediction" about when state agency actions might be preempted (id. at 4). MCI observes that the D.C. Circuit in USTA II held that the "general prediction voiced in ¶ 195 [that state decisions to require unbundling where the FCC has determined that it is not required would be preempted] does not constitute final agency action, as the [FCC] has not taken any view on any attempted state unbundling order" (id., citing USTA II, 359 F.3d at 594).

Finally, MCI argues that because Verizon is still required to provide access to unbundled local switching under § 271, a state requirement that Verizon unbundle elements on the § 271 checklist is consistent with federal law (id. at 5). Moreover, MCI notes that the FCC has stated that § 271 elements must be provided at "just and reasonable" rates, the same standard that the Department uses to establish rates under G.L. c. 159, § 14 (id.).

2. Analysis and Findings

The question presented is whether to approve Verizon's proposal to limit its obligations only to those required by § 251(c)(3) and 47 C.F.R. Part 51. We determine that the Department cannot approve such language, because it is inconsistent with the savings clauses of §§ 251(d)(3), 252(e)(3), and 261, which explicitly preserve the Department's authority to apply state law that is consistent with, and does not substantially prevent implementation of, the federal unbundling rules. See Consolidated Order, D.T.E. 03-60/04-73, at 21-23. In this jurisdiction at least, but cf. Verizon New England, Inc. v. Public Utilities Commission, 2005 ME 64 (Maine Supreme Judicial Court, June 2, 2005), the question Verizon poses is at present abstract – there is no case or controversy over any Massachusetts-imposed UNE obligations before us. There is only the question whether the arbitrator should, at the urging of one party to an interconnection agreement, substitute specific legal references for the more general and evidently serviceable wording settled on in bilateral contract negotiations. We see no need to do so and some reasons not to do so.

It cannot be said a priori that state law has been preempted, because the FCC has not acted to preempt any unbundling action by the Department or by the Massachusetts Legislature. See USTA II, 359 F.3d at 594. Preemption is not a favored doctrine. Arthur D. Little, Inc. v. Commissioner of Health and Hospitals, 395 Mass. 535, 545 (1985). Rather, in order to demonstrate that there is a conflict between state and federal regulation, a party must demonstrate the conflict with respect to each specific obligation that may arise from state law. See Consolidated Order, D.T.E. 03-60/04-73, at 21-26. Where the FCC has made affirmative non-impairment findings and has ruled that network elements are not required to be unbundled, state mandated unbundling of those elements would be contrary to federal regulation; but, even so, each obligation asserted to arise under state law must be reviewed individually. See, e.g., id. at 23 n.17; D.T.E. 98-57-Phase III-D Order at 15. It may well be that there currently are no unbundling obligations arising from state law regarding the network elements affected by the Triennial Review Order or the Triennial Review Remand Order. See, e.g., Consolidated Order, D.T.E. 03-60/04-73, at 26. But foreclosing the operation of state law, as well as other sources of "applicable law" including other sources of federal law, is contrary to the statutory scheme of the Act. 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261. The various savings clauses of the Act explicitly preserve state regulation where such regulation does not conflict with federal law and does not substantially prevent implementation of the requirements and purposes of the Act. We are unwilling to rule in the abstract, that federal law, as expressed in recent FCC rulings, preempts in some general and unspecified way, the statutory scheme in G.L. c. 159.

Moreover, we find that such delimiters to the parties' contractual obligations are not necessary to implement the Triennial Review Order or the Triennial Review Remand Order. Rather, as CCC points out, the purpose of these arbitrations is to determine the parties' rights in compliance with the new unbundling rules, rather than define these obligations merely by reference to malleable definitions of applicable law. We find that the Amendment must define the parties' obligations specifically with respect to each obligation. We would permit citation to specific agreed-upon sources of applicable law, if provided for interpretive guidance as to the meaning of terms contained within the Amendment, but such interpretive statements are not mandatory terms of the Amendment. The phrase "Applicable Law," as currently used throughout many of the existing interconnection agreements, however, remains consistent with the Triennial Review Order and the Triennial Review Remand Order law changes; and the broader reference to "Applicable Law," rather than to specific statutory provisions will allow the interconnection agreements to respond to those changes. This outcome is consistent with the treatment of this question in MCI WorldCom Communications, Inc., D.T.E. 97-116-G, at 23, 27-31 (2002) (construing a comparable contract clause, § 1.6 of the Verizon-WorldCom interconnection agreement contemplating evolving regulatory interpretation of the 1996 Act), affirmed MCI WorldCom Communications, Inc. v. Department of Telecommunications and Energy, 442 Mass. 103, 112-14 (2004).

Further, we are arbitrating only those terms that are necessary to implement the new rules; the scope of the Amendment is already delimited. While we find that it is inappropriate to anticipate some future, dispositive judicial ruling and to foreclose the operation of applicable law beyond § 251 and the FCC's regulations, we also find it unnecessary to include amended terms providing for specific rights and obligations beyond § 251 and the FCC's regulations, because such obligations were not altered by the new unbundling rules. Thus, for example, the Amendment need not include terms providing for, or limiting, access to specific § 271 network elements, because whatever obligation Verizon arguably may or may not have to provide access to those elements would be independent of § 251 and this proceeding.[26] We also find that the Amendment need not reiterate terms pertaining to the Bell Atlantic/GTE Merger Conditions, because those conditions were not modified by the Triennial Review Order or the Triennial Review Remand Order.[27] We also find that it is inappropriate to include specific terms regarding future merger conditions, which are beyond the scope of this arbitration. Should the FCC or any other authority with competent jurisdiction impose future merger conditions, any affected rights would remain subject to the processes provided by § 252.

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26 We discuss this issue throughout the analyses of the unresolved issues that follow, and in particular, Issue 31.

27 In the Consolidated Order, D.T.E. 03-60/04-73, at 47-48, we observed that the issuance of the new unbundling rules may have triggered the expiration of certain obligations under the Merger Conditions. The effect of the expiration of those obligations was not a change of law, but merely the result of the operation of the Merger Conditions themselves. We note that several CLECs have sought a declaratory ruling from the FCC's Enforcement Bureau on Verizon's continuing obligations under the Merger Conditions (CCC Brief at 15), but we find no need to restate the terms of the Merger Conditions within the Amendment.

B. 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?

1. Positions of the Parties

a. Verizon

Verizon proposes language that would, as discussed above in our review of Issue 1, obligate Verizon to provide UNEs by reference to its obligations only under § 251(c)(3) and the federal unbundling rules (Verizon Brief at 24). Where the FCC or a court of competent jurisdiction eliminates unbundling obligations, Verizon's proposed language would require it to provide 90 days written notice of its intent to cease to provide access (id.) Verizon also proposes language providing that CLECs acknowledge that Verizon has already provided any required notices of discontinuation for delisted UNEs under the Triennial Review Order (id.). Verizon claims that no amendment is required to implement the FCC's prohibition against adding new UNEs that were eliminated under the Triennial Review Remand Order (id.). Verizon claims that its proposed language would ensure not only that interconnection agreements reflect current unbundling obligations, but also that they will continue to do so in the future (Verizon Reply Brief at 8).

Verizon counters the CLEC argument that the provisions at issue improperly modify change of law provisions, arguing that its provisions merely define the scope of Verizon's unbundling obligations in a manner that is consistent with federal law (id. at 8-9). Verizon argues that CLECs voluntarily agreed to such provisions in the majority of its interconnection agreements (90 of Verizon's 121 active interconnection agreements), and that the proposed changes to the remaining interconnection agreements would bring the remainder in line (id. at 9). Verizon also notes that most of its agreements allow discontinuation of service upon 30 days, and, in some cases, no notice, and that therefore, 90 days notice of discontinuation is more favorable than the provisions that most CLECs already agreed to (id. at 10).

Verizon further argues that when an unbundling obligation is eliminated, the details of subsequent arrangements are no longer within the scope of interconnection agreements and the parties must negotiate separate arrangements, but where the FCC creates new unbundling obligations, the parties must negotiate terms for the new service in the absence of a tariff (Verizon Brief at 28-29). Therefore, Verizon proposes language that would provide for newly-created unbundling obligations by an applicable tariff or as mutually agreed in a written amendment (id. at 28; Verizon Amendment 1, § 2.3).

Verizon argues that the CLECs' proposed Amendments would postpone discontinuance of the delisted UNEs indefinitely and would unlawfully permit them to order and obtain new UNE arrangements during the Triennial Review Remand Order transition period[28] (id. at 25-26). Verizon also argues that the CLECs' proposals would create additional opportunity for delay by referring disputes over the implementation of the unbundling rules to the dispute resolution provisions of the interconnection agreements, which would send the dispute to the Department for review (id., citing CCG Amendment §§ 3.2.2.1, 3.3.1.3(a)). Verizon argues

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28 Verizon argues that the Department should reject CCG's proposal to include packet switching within the scope of the transitional rules, because packet switching was never available as a UNE (Verizon Brief at 26 n.58; CCG Amendment § 3.9.2).

that the FCC's mandatory transition periods cannot be extended beyond the established twelve or 18 month periods, and that the FCC has already determined that these transition periods are sufficient to prevent potential disruption of a "flash cut" to commercial pricing (id. at 26, citing Triennial Review Remand Order at ¶ 227; 47 C.F.R. §§ 51.319(a)(4)(iii), (5)(iii), (6)(ii), 51.319(d)(2)(iii), 51.319(e)(2)(ii)(C), (iii)(C), (iv)(B)). Verizon argues that there is no basis for requiring it to notify the CLECs again, after new Amendments are executed, that Verizon intends to discontinue the delisted UNEs, and further, that the CLECs' proposed notice periods have no relation to the FCC's transition periods (id. at 27). Finally, Verizon asks the Department to reject AT&T's proposal to allow it to place resale orders for local service using the existing process for ordering UNE-P (id. at 28, citing AT&T Amendment, § 3.5.1.1). Verizon maintains that there is nothing new about Verizon's obligation to provide local service at resale pursuant to § 251(c)(4) and there is no basis in the Triennial Review Remand Order for imposing different operational requirements (id.).

b. AT&T

AT&T argues that interconnection agreements should be amended to reflect the actual changes in unbundling obligations that the FCC has directed (AT&T Brief at 10). AT&T asserts that Verizon is attempting to expand the arbitration process by proposing a fundamental change to the parties' existing change of law provisions (id.). AT&T argues that the FCC did not order any changes to the change of law provisions (id.). AT&T maintains that Verizon's proposal would eliminate the negotiation and arbitration process for implementing the FCC's decisions (id. at 11). AT&T argues that the FCC has expressly reaffirmed the use of the § 252 process (id. at 10, citing Triennial Review Order at ¶ 701; Triennial Review Remand Order at ¶¶ 143, 196, 227).

c. CCC

CCC argues that the Triennial Review Order did not render unlawful the change of law provisions of the existing interconnection agreements, and the FCC explicitly stated that carriers must follow their existing change of law provisions to implement the Triennial Review Order (CCC Brief at 16-17, and n.37, citing Triennial Review Order at ¶¶ 700-701). CCC contends that Verizon's proposal would give Verizon unilateral authority to interpret the FCC's rules and permit it simply to give notice of intent to discontinue services when it decides that it is no longer obligated to provide the service, without negotiating new terms (id. at 16-17, 19). CCC maintains that the agreements do not need new change of law terms, because their existing change of law terms already prescribe what must happen to implement changes that have arisen from the Triennial Review Remand Order (id. at 18). Rather, CCC argues, the Amendments should simply list the changes to Verizon's unbundling obligations (id. at 19).

CCC argues, however, that the Triennial Review Remand Order does necessitate certain changes to terms applicable to future changes in Verizon's unbundling obligations. CCC notes that when CLECs order high-capacity loops or transport, they are now required to self-certify their eligibility to obtain such a facility as a UNE, and Verizon is now obligated to process the UNE order first, and only then dispute the CLEC's right to order that UNE (id. at 22). CCC argues that Verizon can no longer simply "notify" CLECs of the unavailability based on a supposed change in law. Thus, CCC proposes that in the event of future changes of law, Verizon should be obligated to provision the disputed UNE before resorting to dispute resolution (id.). Finally, CCC proposes that if change of law provisions are to be revised as a result of the Triennial Review Remand Order, Verizon should be required to provide at least 90 days notice before withdrawing a UNE offering, so that parties will have adequate time to bring any objections to the notice to the Department for resolution (id. at 23).

d. CCG

CCG also argues that neither the Triennial Review Order nor the Triennial Review Remand Order require the parties to modify change of law provisions (CCG Brief at 4-5). CCG claims that the Triennial Review Order makes clear that the FCC's unbundling determinations are not self-effectuating, and accordingly the parties must implement changes "as directed by section 252 of the Act" (id. at 4, citing Triennial Review Remand Order at ¶ 233). CCG also argues that the FCC expressly rejected ILEC proposals to bypass the interconnection agreements and make such changes to agreements self-effectuating (id. at 6; CCG Reply Brief at 10, citing Triennial Review Order at ¶ 701 ("We do not believe that the lag time involved in negotiating and implementing new contract language warrants the extraordinary step of the Commission interfering with the contract process.")). CCG argues that Verizon improperly attempts to modify the change of law provisions, so that any future change of law limiting or eliminating Verizon's obligations to provide certain UNEs would automatically be incorporated, but changes that are not in Verizon's favor (i.e., commingling and RNMs) are not implemented unless there is a written amendment (id. at 5).

e. MCI

MCI argues that Verizon has proposed to limit its unbundling obligations to only those set forth in § 251 and the FCC regulations, but that this is an "end run" around the MCI interconnection agreement, which provides for negotiation of those obligations (MCI Brief at 8). MCI argues that nothing in the Triennial Review Order, USTA II, or the Triennial Review Remand Order invalidates the change of law provisions (id.). MCI claims that Verizon's approach, permitting Verizon to discontinue services upon notice, is contrary to the scheme of the Act, and that Congress explicitly required agreements regarding interconnection, bundling, and resale be captured in agreements negotiated or arbitrated and approved by state commissions (id. at 9).

2. Analysis and Findings

Verizon's proposal to define its obligations by reference only to § 251(c)(3) and the federal unbundling rules is inappropriate, because, while not actually stating what the parties' obligations are, the cross-references have the effect of modifying the operation of existing change of law provisions in the interconnection agreements. Verizon concedes that the intended effect of the language is to ensure that the Amendment will reflect the federal unbundling rules as they change in the future (Verizon Reply Brief at 8). We find that nothing in either the Triennial Review Order or the Triennial Review Remand Order invalidated existing change of law provisions requiring good faith negotiation of new terms or otherwise made amendment of those change of law provisions necessary. In fact, the FCC has emphasized that it would not override the existing § 252 process for renegotiating or arbitrating new contract provisions. Triennial Review Order at ¶¶ 700-701; Triennial Review Remand Order at ¶ 233. As the scope of this proceeding is limited only to arbitration of terms that are necessary to implement the unbundling rules promulgated by the Triennial Review Order and the Triennial Review Remand Order, terms that address future changes in unbundling obligations are speculative and beyond the scope of this proceeding.[29]

Verizon's observation that the majority (90 of 121 agreements) of Verizon's interconnection agreements, which the Department has approved, contain terms that provide for self-executing implementation of changes in federal regulation does not change our finding, because the carriers that are party to such agreements voluntarily agreed to such terms. Parties may always voluntarily negotiate terms that do not meet the requirements of § 251, so long as the terms are nondiscriminatory and are consistent with the public interest.
47 U.S.C. § 252(a)(1), (e)(2)(A). Further, where those agreements do provide for implementation of changes in federal law without renegotiation of terms, we find that no amendments are necessary. See Section IV, supra.

We reject CCC's proposal to add a provision requiring Verizon to continue to provide UNEs until the agreement is amended, in the event that a future change of law occurs such that the unbundling requirement is eliminated (cf. CCC TRRO Amendment, § 8.4). Although the

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[29] Because we are not mandating new terms pertaining to the treatment of future unbundling obligations that are eliminated or created, we need not rule on the arguments regarding Verizon's proposed treatment of the implementation of new rules, i.e. whether Verizon may unilaterally withdraw "delisted" UNEs, while at the same time requiring negotiation for new unbundling obligations. Whether Verizon has such a right is not a proper point for arbitration in the instant proceeding.

FCC ruled that incumbents must immediately provision requests for access to dedicated transport or high-capacity loops before challenging CLECs' self-certification that they are entitled to unbundled access to that network element, it does not follow that this requirement extends to arbitrations in response to future changes of law. It is clear that the FCC intended this process of initial self-certification and subsequent challenge by ILECs to those certifications to be limited to dispute resolution proceedings to determine whether certain arrangements are subject to unbundling under the current rules. See Triennial Review Remand Order at ¶ 234. This process does not trigger renegotiation or arbitration of amendments to the interconnection agreements.[30]

The FCC did not establish a notice requirement for discontinuing UNEs under the new rules. Rather, the only indications that the FCC gave for the timetable to implement the new rules were its statements that the effective date of the Triennial Review Order would serve as the notification or request date for negotiations under § 252 and that the new rules under both orders must be implemented as directed by § 252. See Triennial Review Order at ¶¶ 701-706; Triennial Review Remand Order at ¶ 233. Thus, the commencement of negotiations prior to this arbitration proceeding provided sufficient notice to all parties that the Amendment will implement the new rules. We find no basis under either the Triennial Review Order or the

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30 We direct the parties, in Section V.C.3.a, infra, not to include any operational conditions to the FCC's transition plan. As we observe that the FCC did not intend renegotiation of the terms of interconnection agreements to erode the established transition periods, it also would be inappropriate to subject that transition to additional dispute resolution proceedings over yet-to-be-agreed-upon "operational plans" to implement the mandated transition.

Triennial Review Remand Order to mandate new terms or modify existing terms, if any, under the interconnection agreements requiring Verizon to provide notice of its intent to discontinue UNEs.[31] Therefore, we deny the CLECs' proposals. We similarly deny Verizon's proposal to modify notice periods under the interconnection agreement.[32] If a party believes that its obligation to provide notice is triggered by an event other than the effective date of an FCC order, any dispute over the sufficiency of such notice is a matter for the dispute resolution process.

Moreover, Verizon has given notice of its intent to discontinue certain UNEs through a series of notices dating back to October 2, 2003, the latest statement being an industry notice, issued on February 10, 2005, indicating that Verizon would implement the Triennial Review Remand Order rules as directed by the FCC. The CLECs do not need to be notified again. We find no need to memorialize this fact as part of the Amendment.

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31 We note that CCC indicated that it would withdraw its proposal to require Verizon to provide 90 days notice before withdrawing a UNE offering, in the event that the Department finds this proposal to be incompatible with CCC's argument that the scope of this arbitration is limited to considering terms that implement the change of laws that have actually occurred (CCC Brief at 23 n.45; CCC TRRO Amendment, § 1; CCC TRRO Amendment, § 1.3). As we have stated above, we are only arbitrating terms that are necessary to implement the new rules.

32 These determinations also dispose of arbitration Issue 7, which asks:

> 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?

C. 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?

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?

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?

1. Introduction

Because we address the question of qualifying wire centers in our discussion of Supplemental Issues 1, 2, and 3, neither the parties' positions nor the Department's analysis on the qualifying wire center question will be presented in the discussion of Issues 3, 4, and 5. We incorporate our discussion of Issues 10, 11, 27, 29 and 30 and Supplemental Issue 4 into the discussion of Issues 3, 4, and 5. Issue 10 asks:

> 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?

Issue 11 asks, "How should any rate increases and new charges established by the FCC in its final unbundling rules or elsewhere be implemented?" Issue 27 asks, "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?"[33] Issue 29 asks:

> 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?

Issue 30 asks, "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?" Finally, Supplemental Issue 4 asks, "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?"

2. Positions of the Parties

a. Verizon

Verizon argues that its Amendment 1, as proposed, already accommodates the Triennial Review Remand Order's transition requirements, and further that additional language that it has offered providing that Verizon's obligation to provide UNEs "in accordance with, but only to the extent required by the [Triennial Review Remand Order]" would explicitly recite its obligation to continue providing delisted UNEs during the transition period (Verizon Brief at 31-32, 35). Verizon argues that it is therefore unnecessary to import the text of the Triennial Review Remand Order into the Amendment (Verizon Reply Brief at 13).

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33 We also address Issue 27 in Supplemental Issues 1, 2, and 3.

Verizon argues that the CLECs are presenting Amendments which are deliberately confusing and which unlawfully require unbundling under sources of law other than federal law in order to create an opportunity to later argue that their contracts entitle them to delisted UNEs (Verizon Brief at 32). For example, Verizon argues that one CLEC has proposed language that creates a "loophole" in the FCC's ban on new orders for unbundled dark fiber that permits the CLEC to argue that there is an independent obligation to unbundle dark fiber (id. at 37, citing 47 C.F.R. § 51.319(a)(6)(ii); MCI Amendment, § 9.4.1). Verizon indicates that it is entitled to clear language confirming that Verizon is obligated to offer UNE only to the extent required by the FCC's unbundling rules (id. at 33, 39).

Verizon argues that under the plain terms of the FCC prohibition on new adds after March 11, 2005, CLECs are not allowed to add new lines for existing customers or to obtain delisted UNEs when existing customers move to different locations (id. at 150). Verizon argues that 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 (id. at 150-51). Verizon states that this prohibition has little commercial significance for CLECs because they have many other options, including commercial arrangements, special access and resale, to supplement existing UNE-based services for existing customers (id. at 151).

Verizon also argues that various CLECs are attempting to defer the effective date of the FCC's rules (thus delaying the start of the transition period and the ban on new adds) from March 11, 2005, the date ordered by the FCC, to the date on which the parties execute their

Amendment (id. at 33, 36, 39, 40). Verizon argues that the CLECs are inappropriately relying on paragraph 233 of the Triennial Review Remand Order in support of their argument, as paragraph 233 applies to obligations to unbundle, not to the removal of obligations to unbundle (Verizon Reply Brief at 16). Verizon argues that paragraph 233 requires that parties "implement changes to their interconnection agreements consistent with our conclusions in this Order" (emphasis by Verizon), and that the FCC concluded that CLECs could not obtain delisted UNEs (id.). Verizon argues that the new rules are clear, and that CLECs may not obtain new delisted UNEs as of the effective date of the rules, March 11, 2005 (Verizon Brief at 33, 37).

Verizon also indicates that some CLECs would require Verizon to continue providing access to unbundled switching if UNE-P arrangements are not migrated to alternative arrangements by the end of the transition period, even if the failure to migrate is the CLEC's own fault (id. at 33, 34). Verizon observes that the FCC found a 12-month transition period sufficient, and argues that the CLECs do not have the discretion to extend the transition period (id. at 34). Verizon points out that it has asked all CLECs to submit their transition plans by May 15, 2005, and that a smooth transition is possible if everyone cooperates (id.).

Verizon argues that some CLECs would have the transition rate apply to delisted UNEs for the entire transition period, even if the CLECs' UNEs are converted to alternative arrangements before the end of the transition period (id. at 36, 39). Verizon contends that the Triennial Review Remand Order does not require Verizon to provide replacement arrangements at transitional rates (id. at 36). Verizon argues that one purpose of the transition plan is to help CLECs adjust to higher rates, and that this purpose is accomplished by having CLECs convert their UNEs gradually during the transition period (id.).

Verizon also contends that some CLECs' Amendments would condition the imposition of the transitional rate on Verizon's compliance with other sections of the CLEC Amendment (Verizon Reply Brief at 18). Verizon argues that this condition is unlawful, and contends again that the CLECs do not have the discretion to alter the terms of the FCC's transition period (id.).

Similarly, Verizon argues that a CLEC's proposed Amendment would limit the transitional pricing for loops to loops leased as of March 11, 2005 that exceed the FCC per-building cap, even in those rate centers where loop unbundling has been eliminated (Verizon Brief at 37). Verizon argues that is has no obligation to provide any UNE loops in wire centers that meet the Triennial Review Remand Order's criteria for non-impairment, and that all loops in those wire centers are subject to transitional pricing and must be migrated to alternative arrangements (id.).

Verizon also argues that CLECs are attempting to apply the FCC's cap on unbundled DS1 dedicated transport only to routes where Verizon is not required to unbundle DS3 dedicated transport (id. at 40). Although Verizon admits there is some inconsistency between the rule and the relevant section of the Triennial Review Remand Order, Verizon argues that the rule must be applied as written, and that the FCC's cap on DS1 dedicated transport is not limited to routes where DS3 dedicated transport is no longer unbundled (id.).

Finally, Verizon objects to the proposal that Verizon should be required to provide a substitute for dark fiber on the grounds that dark fiber dedicated transport and special access "simply are not comparable" (Verizon Reply Brief at 24). Verizon argues that the FCC has already determined that CLECs are not impaired without access to dark fiber transport between certain wire centers, and that state commissions do not have the authority to countermand federal law by requiring Verizon to give the CLECs a substitute for something they are no longer entitled to (id.).

b. AT&T

AT&T argues that its Amendment is designed to ensure that customers served via delisted UNEs receive quality service without interruption during the transition period, and includes language addressing CLECs' ongoing rights to use existing maintenance and repair systems for the customers, as well as their rights to order feature changes for existing arrangements (AT&T Brief at 14). AT&T argues that, in the Triennial Review Remand Order, the FCC evinced its concern that there be no disruption in CLECs' ability to serve their existing customers during the applicable transition periods (id. at 90). To avoid disruption, AT&T argues that CLECs must have access to certain UNEs to meet the existing customer's needs (id.). AT&T argues that although the Triennial Review Remand Order prohibits CLECs from adding new UNE-P arrangements for new customers, CLECs must have access to the systems necessary to serve their embedded base (id. at 12). At a minimum, argues AT&T, access must include the ability to order new features or other feature changes to the customer's current UNE-P arrangement (id. at 90-91).

AT&T argues that the Amendment must detail the parties' respective rights and obligations during the transition period in order to eliminate the possibility of misunderstandings and intercarrier disputes, because the transition period is too short to accommodate the dispute resolution process (id. at 14, 15). For example, AT&T argues that the parties' Amendment must also contain procedures to make the migration of customers to alternative facilities as efficient, mechanized, and transparent as possible (id. at 14). AT&T also argues that the Amendment must incorporate the criteria under which CLECs will be eligible for unbundled loops and dedicated transport (id. at 18, 19, 23). AT&T also contends that Verizon must not be permitted to unilaterally make changes to any UNE-P arrangement, especially prior to the end of the transition period, because the Triennial Review Remand Order expressly indicates that CLECs shall initiate conversion orders (id. at 14). AT&T argues the language and spirit of the Triennial Review Remand Order require that CLECs be permitted to place orders converting UNEs to alternative arrangements at any time during the transition period but have those orders not take effect until the end of the transition period (AT&T Reply Brief at 12). AT&T argues that CLECs are entitled to transitional UNE pricing during the entire length of the transition period (id.). AT&T argues that Verizon's proposal, which would convert UNEs to alternative arrangements before the end of the transition period, would improperly shorten the transitional periods mandated by the Triennial Review Remand Order (id. at 12, 13). AT&T argues that if Verizon were permitted to convert UNEs and impose higher rates prior to the end of the transition period, CLECs would have no incentive to submit orders in a timely manner, but would have instead an incentive to hold their conversion orders back until the end of the transition period and then "unload them on Verizon at that time in one fell swoop" (id. at 13).

AT&T argues Verizon's inclusion of the "four line carve out" in its Amendment is unnecessary, as the Triennial Review Remand Order eliminated unbundled switching for all customers at DS0 capacity, not just customers with four or more DS0 loops in Density Zone One of the top 50 MSAs (i.e., the customers previously subject to the four-line carve-out) (AT&T Brief at 13).

c. MCI

MCI argues that under the plain meaning of the FCC's rules, Verizon is obligated to provide access to unbundled switching for one year from the effective date of the Triennial Review Remand Order to handle orders for additional lines, moves and changes (MCI Brief at 21). MCI also argues that the Amendment must contain language reflecting Verizon's obligation to provide UNEs and UNE combinations under §§ 202 and 271 of the Act (id. at 9). MCI contends that unbundled switching is useless to CLECs without access to the loop, and that Verizon would be discriminating against CLECs in violation of § 202 of the Act if it were to provision only unbundled switching to CLECs while providing its retail business with the combinations of elements necessary to service customers; therefore, Verizon must continue to provide switching and all the elements that make up UNE-P (id. at 10). UNE rates previously approved by the Department should be considered "just and reasonable" until such time as a different § 271 rate is incorporated into the parties' agreement (id.).

If the Department limits the scope of this arbitration to Verizon's obligations under § 251 of the Act, MCI argues that the delisted UNEs should be delisted as of the effective date of the Amendment, and subject to the terms set forth in the Triennial Review Remand Order (id. at 11).[34]

d. CCG

According to CCG, the Amendment must incorporate, in its entirety, the FCC's unbundling framework as reflected in the Triennial Review Order and Triennial Review Remand Order, including but not limited to the transition plan for unbundled switching (CCG Brief at 6). For example, the Amendment must specify that CLECs are entitled to transitional pricing for delisted UNEs until the UNEs are converted to alternative arrangements, trued up to the March 11, 2005 effective date upon the execution of the Amendment (id.). CCG argues that the "embedded base" should be defined as any UNE-P line moved, changed, or added by a customer which was served by a CLEC on or before March 11, 2005 (id. at 7). CCG also argues that Verizon should be required to provision new UNE-P for new customers until the Triennial Review Remand Order is incorporated into parties' agreements (id.). CCG argues that its Amendment, by making the distinction between the "embedded base" and "new customers," clarifies which CLEC customers are subject to the transition plan and which customers are not (CCG Reply Brief at 15, 16).

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[34] Verizon states that Verizon and MCI have settled this issue in a commercial agreement (Verizon Reply Brief at 13).

CCG argues that Verizon is not permitted to unilaterally implement any aspect of the Triennial Review Remand Order without first executing an Amendment to its existing interconnection agreements, therefore, the UNE-P relief granted under the Triennial Review Remand Order is without force and effect until such time as Verizon executes an amendment to its existing interconnection agreements under which the availability of local switching is eliminated (CCG Brief at 54-55). Therefore, argues CCG, a customer may be added to a CLEC network, using UNE-P, prior to the effective date of a formal written amendment implementing the Triennial Review Remand Order (id. at 55). The rates that Verizon may charge such a customer, argues CCG, are the § 251(c)(3) UNE rates for the combination of network elements that comprise UNE-P (id.). CCG argues that, once such an amendment is executed, Verizon must provide UNE-P under § 251(c)(3) to the CLEC's embedded customer base, at the transition rates established in the Triennial Review Remand Order (id.). The Triennial Review Remand Order UNE-P transition plan, argues CCG, applies to each carrier's embedded customer base and not merely to embedded UNE-P lines or arrangements (id.). Therefore, CCG argues, CLECs are entitled to add new lines, and make modifications or rearrangements as necessary to accommodate the business needs of their existing customers during the transition period (id.). CCG argues that a contrary reading of the Triennial Review Remand Order would severely limit the ability of CLECs' customers to receive services without disruption during the transition period and would be contrary to the objectives of the FCC's transition plan (id. at 56). CCG argues that the "embedded customer base" subject to the FCC's transition plans includes all customers of a CLEC that were customers of the CLEC on the effective date of the Triennial Review Remand Order, including existing customers of the CLEC at additional locations, existing customers of the CLEC for which the CLEC is providing additional or expanded services or facilities on or after the effective date of the amendment, or existing customers of the CLEC whose connectivity changes on or after the effective date of the amendment (id. at 79).

CCG argues that the Amendment should incorporate all sources of unbundling obligations, including § 271 of the Act, Massachusetts state law, and any other applicable law, as nothing in the Triennial Review Remand Order displaces these independent sources of unbundling obligations (CCG Reply Brief at 16). CCG argues that its Amendment restricts Verizon's ability to raise rates at the end of the transitional period in order to protect end-user customers from any degradation in service which may otherwise result from the sudden increase in cost experienced by the CLECs (id. at 14).

CCG also argues that the Amendment should not include any reference to the four-line carve-out, which is no longer a part of the FCC's unbundling framework (CCG Brief at 7). CCG argues that the transition plan permits CLECs to purchase switching to serve all DS0 customers (id.).

e. CCC

CCC argues that any reference to the four-line carve-out, enterprise switching, mass market switching, and "other DS0 switching" is inappropriate, as the sole remaining relevant distinction is between customers with capacity at or above DS1, and customers with capacity below DS1 (CCC Brief at 24). CCC argues that all customers served by DS0 capacity loops, including customers formerly included in the four-line carve-out, are subject to the transition plan and transitional pricing for local circuit switching (CCC Reply Brief at 16).

CCC contends that the Amendment must contain terms addressing Verizon's obligation to continue to provide unbundled switching under the transition period and under § 271 of the Act (CCC Brief at 25). For example, CCC argues that the Amendment must contain terms preserving CLECs' rights to request moves, adds, and changes to the UNE arrangements for their embedded base of customers during the transition period (CCC Reply Brief at 15). CCC argues that the FCC's reference to "customer base" in the Triennial Review Remand Order applies to any UNEs or changes to existing UNEs that are needed to serve existing customers, and not just to the precise facilities currently used to serve those customers (CCC Brief at 130). CCC argues that the purpose of the FCC's transition rules was to provide CLECs with adequate time to move those customers to alternative arrangements with minimal disruption to the end user customers and Verizon's proposal to deprive CLECs' embedded base of the ability to order moves, adds and changes would undermine this purpose (id.).[35] CCC argues that had the FCC intended to limit Verizon's obligations to the facilities it had already provisioned, there would have been no need to refer to the customer base (id. at 131).

Although CCC agrees that some provisions of the Triennial Review Remand Order reference UNE-P arrangements rather than customers, CCC argues that the provisions which

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[35] A move order is submitted by a CLEC to an ILEC when an existing CLEC customer moves to a new address. An add order is submitted when an existing customer seeks to add an additional line to his service. A change order is submitted when an existing customer seeks to add or delete a feature (CCC Reply Brief at 72 n.187).

"most directly address[ ] the transition terms" make clear that the FCC did not limit the embedded base transition period to include only existing lines and UNE-P arrangements (CCC Reply Brief at 73). Rather, argues CCC, the FCC's intent was to ensure that an ILEC could not frustrate a CLEC's ability to serve its embedded customers during the transition period (id.).

CCC argues that § 271 of the Act and the FCC's unbundling rules refer to "local switching" and switching functions without limiting the switching functions to a particular type of equipment (CCC Brief at 25, 26). CCC contends that the Amendment must state that Verizon's obligation to provide switching is technologically neutral, and that where Verizon has replaced TDM switches with packet switches, Verizon must provide CLECs with unbundled access to the packet switches (id. at 26).

CCC argues that the Amendment must indicate that CLECs are limited to 10 DS1 transport circuits on routes where DS3 circuits are no longer subject to unbundling, and are limited to 12 DS3 circuits on any route (id. at 30, 31). CCC argues that the caps on DS1 loops and transport are designed to prevent CLECs from "evading" a determination of non-impairment for DS3 by ordering large quantities of DS1s instead (id. at 31; CCC Reply Brief at 17). CCC argues that neither the FCC nor Verizon advanced a purpose for caps on DS1s in circumstances where DS3s are still unbundled, and that Verizon should not benefit merely because the FCC failed to include the appropriate detail in its rules (CCC Reply Brief at 17). CCC argues that its approach is more faithful to the FCC's intent, and should be reflected in the Amendment (id.). CCC also argues that the DS1 transport cap does not apply to the transport portion of DS1 loop-transport EELs (CCC Brief at 31). CCC argues that the FCC limited CLECs to 10 DS1 loops per building, but if the cap is applied to EELs then CLECs will only be able to obtain 10 DS1 combinations in an entire rate center (id. at 32).

f. Conversent

Conversent argues that the Amendment should specify Verizon's unbundling obligations for high capacity loops and dedicated transport during the transition period (Conversent Brief at 12, 14). For example, Conversent agrees that Verizon is permitted to back-bill CLECs the transition rate for high capacity loops that existed as of March 11, 2005, but argues that Verizon should not be permitted to assess a late payment charge on these true-up bills as long as CLECs pay the bills within the customary deadline (id. at 11, 12). Conversent also argues that the Amendment should correctly reflect the FCC's policy on DS1 dedicated transport caps, and state that CLECs are limited to ten DS1 dedicated transport circuits only on those routes where DS3 dedicated transport unbundling is not required (id. at 14). Conversent argues that the New York Public Service Commission ("NYPSC") recently ruled that the DS1 dedicated transport cap applies only on routes where DS3 dedicated transport is not required to be unbundled, and required Verizon to amend its tariff accordingly (id.).

Conversent argues that Verizon misunderstands its position on the application of transition provisions to high capacity loops (Conversent Reply Brief at 4). Conversent argues that its proposal correctly reflects the application of the transition terms to all DS1 and DS3 loops in non-impaired wire centers, and to DS1 and DS3 loops above the applicable caps in impaired rate centers (id. at 4, 5).

Conversent argues that the Amendment should state that there is no analogous access service to dark fiber dedicated transport and dark fiber loops, and that Verizon is therefore required to submit a tariff for a substitute for dark fiber loops and dedicated transport, at just and reasonable rates which reflect only the features that CLECs obtained via dark fiber (Conversent Brief at 15, 16, 18).

3. Analysis and Findings

a. Transition Plan

There is no dispute that the effective date of the Triennial Review Remand Order was March 11, 2005. Triennial Review Remand Order at ¶ 235. There is some disagreement, however, as to whether the new unbundling rules were self-effectuating as of that date, or whether the rules only become effective after the parties update their interconnection agreements to reflect the new unbundling regime. The question is an important one, as the effective date of the rules determines the date after which CLECs are no longer entitled to new delisted UNE arrangements ("new adds"), and also determines that date on which CLECs' "embedded bases" are determined for the purpose of the transition period. For the reasons discussed below, the Department determines that the transition period began on March 11, 2005, and the CLECs' embedded bases consist of arrangements in place as of that date.

Our determination begins with a review of the relevant rules. The rules governing the transition periods and bans on new adds for switching, loops, and transport are sufficiently similar that we will confine our discussion to the example of switching; but our reasoning and conclusion concerns loops and transport, too. With respect to local circuit switching, 47 C.F.R. § 51.319(d)(2) provides as follows:

> (i) An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops.
>
> . . . .
>
> (iii) Notwithstanding paragraph (d)(2)(i) of this section, for a 12-month period from the effective date of the Triennial Review Remand Order, an incumbent LEC shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve its embedded base of end-user customers. The price for unbundled local circuit switching in combination with unbundled DS0 capacity loops and shared transport obtained pursuant to this paragraph shall be the higher of: (A) the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or (B) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that combination of network elements, plus one dollar. Requesting carriers may not obtain new local switching as an unbundled network element.

It is clear from the text of the rule that the FCC eliminates the general obligation to unbundle local circuit switching. See 47 C.F.R. § 51.319(d)(2)(i). The FCC does, however, make a limited exception for continued access to unbundled switching at transitional rates to serve a CLEC's "embedded base of end-user customers," beginning on the effective date of the Triennial Review Remand Order and ending 12 months later. See 47 C.F.R. § 51.319(d)(2)(iii). The rule concludes by stating that CLECs "may not obtain new local switching as an unbundled network element." Id.

A review of the text of the Triennial Review Remand Order for additional discussion of the new rules reveals a similar pattern. The FCC states repeatedly and unequivocally that the transition period applies only to the embedded base, and that CLECs are not entitled to new delisted UNE arrangements. "These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs in the absence of impairment." Triennial Review Remand Order at ¶¶ 5, 142. "These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new high-capacity loop UNEs in the absence of impairment." Id. at ¶¶ 5, 195. "This transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new switching UNEs." Id. at ¶¶ 5, 227.

AT&T and Conversent interpret the Triennial Review Remand Order to prohibit new delisted UNEs after March 11, 2005, and have proposed Amendments consistent with this interpretation (AT&T Brief at 12, 29; AT&T Reply Brief at 7; Conversent Brief at 11). The argument for an effective date other than March 11, 2005 focuses largely on the Triennial Review Remand Order's discussion of the parties' obligation to amend their interconnection agreements, especially paragraph 233 of the Triennial Review Remand Order, which states:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

Triennial Review Remand Order at ¶ 233 (emphasis added).

While the FCC expected that parties would amend their interconnection agreements to reflect the new rules, there is nothing in the rules or the text of the Triennial Review Remand Order to suggest that the effectiveness of the new unbundling regime is to be held in abeyance pending the amendment of the parties' interconnection agreements. Such a result would be contrary to the plain language of the rules, which explicitly launch the transition period on the effective date of the Triennial Review Remand Order. The applicable law changed on March 11, 2005; the inevitable lagtime in consequent contract redrafting cannot vitiate or retard the effect of that simple fact. Witness that the FCC requires that delisted UNEs be trued-up to the transition rate after parties have amended their agreements. See Triennial Review Remand Order at ¶¶ 145 n.408, 198 n.524, 228 n.630. There would be no need for the FCC to require the embedded base of delisted UNEs to be trued-up to the transition rate at the end of the change of law process unless the FCC intended the rules to have real, consequential effect as of March 11, 2005. If the transition period did not begin (and the embedded base were not defined) until the parties complete their change of law process, there would have been nothing to true up. Furthermore, if the FCC had intended the transition period and ban on new adds to begin on a date other than the effective date of the Triennial Review Remand Order for certain CLECs based on the change of law provisions in those CLECs' interconnection agreements, it could and likely would have said so. It did not. As discussed above, what the FCC did say, repeatedly and with clarity, was that the embedded base is determined, and the transition period begins, on the effective date of the Triennial Review Remand Order, which was March 11, 2005.

Because the FCC intended the transition period to begin on March 11, 2005, all rates for the network elements delisted by the Triennial Review Remand Order shall be trued up to the applicable transition rate on and after March 11, 2005. If any CLECs have received new delisted UNE arrangements on or after March 11, 2005, those new arrangements will not be considered part of the embedded base and are not eligible for transitional pricing.[36]

The Department determines that all parties have adequate advance notice of the end of transitional pricing, as transitional pricing is limited to the duration of the transition period, which sunsets on a date certain pursuant to federal law. See e.g., 47 C.F.R. § 51.319(d)(2)(iii). Therefore, Verizon is not required to send advance notice concerning the end of transitional pricing, but may immediately re-price the embedded base to commercial rates upon the migration of a CLEC's embedded base to alternative arrangements or upon the expiration of the transition period, whichever occurs first.

However, because the FCC permits transition rates to the embedded base of UNE arrangements to remain in effect through March 11, 2006, we are aware of the perverse incentive that the CLECs will have to delay placing conversion orders until the end of the transition period in order to benefit from the lower transition rates. In the interest of

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[36] In its February 10, 2005 Industry Letter, Verizon notified the CLEC community that Verizon would re-price CLECs' embedded bases of delisted UNEs to the transition rate on March 11, 2005, retroactively if necessary. In addition, Verizon notified CLECs that they could not submit orders for new delisted UNE arrangements for completion on or after March 11, 2005. Because Verizon declined to provision new delisted UNE arrangements after that date and repriced arrangements that were not migrated to alternate arrangements or replacement arrangements, there may in fact be nothing to true up.

administrative efficiency and consistent with the FCC's rules, the Department determines that CLECs are permitted to place orders converting UNEs to alternative arrangements at any time during the transition period but to have the orders not take effect until the end of the transition period.

Concerning the FCC's directive to LECs to conform their interconnection agreements to the requirements of the Triennial Review Remand Order, it is clear that the FCC did not intend that negotiations to comply with that directive should erode the one-year transition period or extend the life of an abandoned rate regime beyond March 11, 2006. Accordingly, the Department directs parties to submit contract language (including such definitions as the parties may agree are necessary) consistent with the determinations in this section. The simplest course for parties may be simply to import the portions of the rules addressing the transition period into their agreements and to provide explicit sunset dates. Parties shall not add any additional elements, such as entrance facilities, which the FCC excluded from the dedicated transport transition plan, see Triennial Review Remand Order at ¶ 141 n.395; 47 C.F.R. § 51.319(e)(2), or operational conditions to the FCC's transition plan.

b. Moves, adds, changes

We determine that additional lines, moves, or changes are not included in the "embedded base" for which CLECs may obtain transition pricing.[37] The FCC created a

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[37] The FCC's transition period pricing is as follows: 115 percent of the rate the requesting carrier paid on June 15, 2004 for loops and transport; and the rate the requesting carrier paid on June 15, 2004 plus one dollar for UNE-P. Triennial Review Remand Order at ¶¶ 145, 198, 228.

transition period to allow CLECs sufficient time to move their embedded bases to alternative arrangements, but once the embedded base is defined it may not continue to grow through additional lines, moves, changes, or new customers. Such a result would be contrary to the FCC's rules, which clearly state that CLECs may not obtain new delisted UNE arrangements. See e.g., 47 C.F.R. § 51.319(d)(2)(iii).

The exclusion of moves, adds, and changes from a CLEC's embedded base does not mean that the CLEC's end user customers are prevented from requesting service changes until the embedded base is migrated to alternative arrangements; rather, the CLEC will be required to pay the market rate for any new arrangements added on behalf of their customers.

c. Loop/Transport Caps

CCC and Conversent argue that there is a conflict between the text of the Triennial Review Remand Order and the final rules regarding the application of the DS1 transport cap, and that the Amendment should reflect the FCC's policy determinations as expressed in the text of the Triennial Review Remand Order (CCC Reply Brief at 17; Conversent Brief at 14). Specifically, they argue that the text of the Triennial Review Remand Order, which caps DS1 transport "[o]n routes for which we determine that there is no unbundling obligation for DS3 transport," conflicts with the FCC's rules, which apply the cap to "each route where DS1 dedicated transport is available on an unbundled basis" regardless of whether DS3 transport is unbundled. Compare Triennial Review Remand Order at ¶ 128 with 47 C.F.R. § 51.319(e)(2)(ii)(B).

The plain language of the rule must prevail over the claim of inconsistency with the FCC's Triennial Review Remand Order. "The Supreme Court has repeatedly emphasized the importance of the plain meaning rule, stating that if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written." United States v. Lachman, 387 F.3d 42, 50 (1st Cir. 2004). "Agencies have an important role to play in the interpretation of statutes and regulations under [Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)] and related doctrines . . . [b]ut we look to agency interpretations only when the statute or regulation remains ambiguous after we have employed the traditional tools of construction." Lachman, 387 F.3d at 54 (internal citations omitted). In this case, there is no ambiguity of the rule itself, which contains no limitation on its applicability based on the availability of unbundled DS3 transport. We have no occasion to look to the FCC's discussion of the rule, which only speaks to the availability of DS1s "[o]n routes for which we determine that there is no unbundling obligation for DS3 transport." Moreover, the FCC's discussion of its rule is merely silent as to the applicability of the DS1 cap on routes where unbundled DS3 transport is available. This silence does not create ambiguity in the plain meaning of the rule.

d. Four-Line Carve-Out/Enterprise Switching

In the Triennial Review Remand Order, the FCC re-examined its findings on mass market local switching as a result of the D.C. Circuit's vacatur of the FCC's previous rules. Triennial Review Remand Order at ¶ 199. The FCC determined that CLECs are not impaired without access to mass market local circuit switching and gave the CLECs twelve months to transition their embedded bases to alternative arrangements. Id. CLECs argue that the transition period applies to all customers served by DS0 loops, including enterprise customers and four-line carve-out customers[38] (CCC Reply Brief at 16; CCG Brief at 7).

The CLECs' attempt to add these customers to the transition plan must fail, however, because the FCC had already eliminated unbundled switching for enterprise and four-line carve-out customers prior to the D.C. Circuit's vacatur and the FCC's subsequent reconsideration of its rules in the Triennial Review Remand Order. The FCC delisted the local switching UNE for four-line carve-out customers in 1999 and delisted the local switching UNE for enterprise customers in the Triennial Review Order in 2003. See Triennial Review Order at ¶ 419. The FCC's prior determinations on enterprise and four-line carve-out switching were not vacated by the D.C. Circuit, and the FCC did not revisit them in the Triennial Review Remand Order. The FCC made no such reversal, but instead indicated in the Triennial Review Remand Order that "the D.C. Circuit upheld our enterprise switching rules and, consequently, they are not at issue here." See Triennial Review Remand Order at ¶ 201 n.533.

Moreover, in the Consolidated Order, D.T.E. 03-60/04-73, at 66, we found "no merit to the argument that Verizon has an 'ongoing' obligation to provide unbundled access to enterprise switching at TELRIC rates to serve customers subject to the four-line carve-out rule.

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38 Four-line carve-out customers are end user customers served by four or more DS0 lines in density zone 1 in the top 50 MSAs, where the ILEC makes EELs available throughout density zone 1. See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, at ¶ 278 (rel. Nov. 5, 1999) ("UNE Remand Order").

The FCC's enterprise switching rule unambiguously states that ILECs have no such obligations." Therefore, the Department denies the attempt to include enterprise switching customers and four-line carve-out customers in CLECs' embedded bases, and the Amendment will retain language referring to four-line carve-out, enterprise switching, mass market switching, and "other DS0 switching." To the extent that CLECs may have continued receiving delisted enterprise and four-line carve-out switching pending completion of change of law processes, the delay does not serve to negate the operation of the FCC's unbundling regime, and enterprise and four-line carve-out switching customers will not be added to CLECs' embedded bases eligible for the transition plan.

e. Packet Switching

CCC argues FCC rules require the unbundling of switching functions, not switching equipment, and to the extent that Verizon is required to provide unbundled switching under §§ 251 and 271 of the Act, Verizon must provide unbundled access to packet switches (CCC Brief at 26) (emphasis added by CCC). CCC's argument would make unbundled packet switching available to CLECs not only during the UNE-P transition period, but on a continuing basis for as long as Verizon is obligated to provide switching under § 271.

In the Triennial Review Order, the FCC found that carriers were not impaired without access to packet switching, and eliminated the limited requirement for unbundled packet switching. Triennial Review Order at ¶ 537. This finding was not vacated by the D.C. Circuit, and was not reconsidered in the Triennial Review Remand Order. When discussing the delisting of local circuit switching in the Triennial Review Remand Order, the FCC noted that CLECs were increasingly deploying their own switches, "often using new, more efficient technologies such as packet switches," and that this deployment helped mitigate the FCC's prior concerns about local switching impairment. Triennial Review Remand Order at ¶ 199. The FCC thus not only eliminated any obligation to unbundle packet switching, but also referred to CLECs' deployment of packet switches as among the grounds supporting a finding of non-impairment for local circuit switching. Thus, CCC's attempt to secure access to unbundled packet switching during the UNE-P transition period and afterwards fails.

f. Substitute Services

Conversent argues that there is no analogous access service to dark fiber dedicated transport and dark fiber loops, and that Verizon is therefore required to submit a tariff for a substitute for dark fiber loops and dedicated transport, at just and reasonable rates which reflect only the features that CLECs obtained via dark fiber (Conversent Brief at 15, 16, 18).

The FCC found that CLECs are not impaired without unbundled dark fiber loops or dark fiber transport between certain rate centers. 47 C.F.R. §§ 51.319(a)(6), (e)(2)(iv). In arguing that the Department should require the tariffing of substitute services for these delisted UNEs, Conversent is essentially arguing for a reconsideration of the FCC's impairment determination in the Triennial Review Remand Order. Regardless of whether or not there exist analogous access service for unbundled dark fiber loops and transport, these elements were delisted because CLECs were capable of self-deployment. See Triennial Review Remand Order at ¶¶ 133, 182. Conversent therefore has substitutes available to it in the form of self-deployed fiber, or commercial agreements for access to LEC or CLEC dark fiber.

D. 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?

1. Positions of the Parties

a. Verizon

Verizon proposes general terms providing that a CLEC that wishes to continue to obtain access to a "discontinued facility" may do so under a separate arrangement, such as a commercial arrangement at market-based rates or an arrangement under a Verizon access tariff or at resale which are not subject to § 251 (Verizon Amendment 1, § 3.2). Verizon proposes further that to the extent that such a CLEC has not executed a replacement arrangement prior to executing the Amendment to the interconnection agreement, Verizon may reprice the discontinued facility, or apply a surcharge, equivalent to an access, resale, or other analogous arrangement (id.). Verizon seeks a term specifying that negotiations for replacement arrangements shall be deemed not to have been conducted pursuant to the amended agreement, § 252(a)(1), or 47 C.F.R. Part 51, and shall not be subject to arbitration under § 252(b) (id. at § 3.3). Finally, Verizon proposes that it may implement rate increases or new charges for future de-listed UNEs that may be established by the FCC by issuing a schedule of those rate increases to the CLEC (Verizon Amendment 2, § 2.5).

Verizon argues that its right to re-price existing UNE arrangements that are no longer subject to unbundling under § 251 is limited only by the FCC's transitional rules for mass market switching, high capacity loops, and transport facilities (Verizon Brief at 40, citing

Qwest Declaratory Ruling at ¶ 8 n.26.[39] Verizon further argues that while the Amendment may properly refer to the fact that Verizon may establish separate commercial arrangements for non-section 251 elements, it should do no more than that (id.). Therefore, Verizon argues that the Department should reject AT&T's Amendment, § 3.11.3,[40] which Verizon claims purports to govern specific terms for facilities that are no longer required to be unbundled under § 251(c)(3) (id. at 14).

b. AT&T

AT&T argues that Verizon may only re-price delisted elements in accordance with the terms of the Triennial Review Remand Order. AT&T proposes an Amendment that would maintain rates currently in effect for the "transitional declassified network elements," until the interconnection agreements have been amended pursuant to their change of law provisions to implement the new unbundling rules, at which time a retroactive true-up would occur back to March 11, 2005 (AT&T Brief at 29; AT&T Amendment, §§ 3.2.1.3, 3.2.5.2, 3.5.1.2, 3.6.2.4). AT&T's Amendment also provides that late payments or penalties do not apply if AT&T pays the true-up charge within the billing cycle time allotted from the receipt of the true-up bill (AT&T Amendment, § 3.5.1.2).

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39 In the Matter of Qwest Communications Int'l, 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), WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276 (rel. Oct. 4, 2002) ("Qwest Declaratory Ruling").

40 We review this proposed Amendment in our discussion of Issue 31.

AT&T argues that Verizon's Amendments allow it to re-price arrangements immediately without going through the change of law process (AT&T Brief at 29). AT&T further argues that other rate increases that are "scattered throughout Verizon's proposed amendments" should be subject to Department review in appropriate cost proceedings and should not be retroactive (id. at 29-30).

c. CCC

CCC argues that it is unnecessary to amend the interconnection agreements to define the manner in which Verizon may reprice network elements that are no longer subject to unbundling, because Verizon's rights and obligations are already defined by the change of law provisions of its interconnection agreements (CCC Brief at 32). CCC argues that, as it argues in response to Issue 2, there is no basis in this proceeding to amend the existing change of law terms in the manner that Verizon proposes (id. at 33).

As for the network elements affected by the Triennial Review Order, CCC's Amendments would allow Verizon immediately to re-price § 251 UNEs to the rates applicable to § 271 network elements, except for certain transition terms established by the FCC to grandfather line sharing arrangements (id.). With regard to network elements affected by the Triennial Review Remand Order, CCC states that the FCC has established clear transition rules, but CCC also urges the Department to make clear that those transition terms apply only to the UNEs that Verizon is no longer required to unbundle at cost-based rates under § 271, state law, or any FCC merger conditions[41] (id. at 34; CCC TRRO Amendment, § 7). Finally, CCC proposes that the Amendment establish and state the specific transition rates calculated using the FCC's formulas, rather than simply restating the FCC's formulas and leaving the proper calculation open for future disputes (id.).

d. CCG

CCG argues that the Amendment must include rates, terms, and conditions that reflect the Triennial Review Order and the Triennial Review Remand Order, and that Verizon may re-price existing § 251(c)(3) arrangements only in accordance with the transitional rate increases prescribed by the FCC (CCC Brief at 14). CCG also argues that Verizon remains bound by the existing interconnection agreements, including rates, terms, and conditions under § 251, until those interconnection agreements are properly amended to incorporate changes of law and FCC-mandated transition plans (id. at 15).

e. MCI

MCI argues that if Verizon is no longer required to offer an element under either § 251 or § 271, the element remains an intrastate service subject to the Department's jurisdiction. (MCI Brief at 11). MCI contends that new wholesale arrangements must be tariffed at the state

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41 CCC proposes that additional transition periods should apply to network elements that become unavailable when wire centers subsequently meet the FCC's unbundling exclusion criteria (CCC TRRO Amendment, § 9.2). We address this point in our discussion of Supplemental Issues 1, 2 and 3.

level, and that the tariffed rates, terms, and conditions must comply with state law and be just and reasonable[42] (id., citing G.L. c. 159, § 14).

2. Analysis and Findings

As we have noted in our analysis of the preceding issues, the scope of this proceeding is limited to arbitration of terms that are necessary to implement the Triennial Review Order and the Triennial Review Remand Order. We find that it is inappropriate to include a term providing for the manner in which Verizon may re-price discontinued facilities, save for the specific transition terms for certain network elements mandated by the FCC. Moreover, we find that it is unnecessary to include terms indicating that "separate arrangements" (i.e., outside the scope of the agreement approved under § 252) for discontinued facilities are available or that in the absence of a separate arrangement a special access or resale-equivalent rate will be applied to the discontinued facilities, because "only those agreements that contain an ongoing obligation relating to § 251(b) or (c) must be filed under 252(a)(1)." Qwest Declaratory Order at ¶ 8 n.26.

Similarly, it is inappropriate to mandate a term explicitly limiting the legal effect of negotiations regarding those "replacement arrangements." When the FCC determines that an element need not be unbundled under § 251(c)(3), access to such network element is no longer subject to compulsory negotiation and arbitration, because there is no ongoing obligation to unbundle it. "An ILEC is clearly free to refuse to negotiate any issues other than those it has a

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42 We decline to address MCI's position on this point, because tariffing obligations are beyond the scope of this proceeding.

duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252." Coserv Limited Liability Corp. v. Southwestern Bell Telephone Company, 350 F.3d 482, 488 (5th Cir. 2003). Because the parties may refuse to negotiate regarding non-section 251 elements, such negotiations need not be combined with voluntary negotiations under § 252(a)(1). Conversely, the parties may jointly choose to combine negotiations for those non-section 251 terms with negotiations for mandatory terms, thus subjecting non-section 251 terms to compulsory arbitration should the parties fail to agree on those terms. See 350 F.3d at 487. Ordinary contract law provides the backdrop of any such arrangement. The parties are in control of the scope of such negotiations, and no amendment is necessary to allow the parties to keep non-section 251 negotiations separate.

Nothing in the Triennial Review Order or the Triennial Review Remand Order purports to limit the scope of the parties' voluntary negotiations to preclude the parties from negotiating access to non-Section 251 facilities as a term of their interconnection agreements, nor do they preclude the parties from negotiating terms separately from their interconnection agreements. We find that existing interconnection agreements continue to govern pricing until they are amended to eliminate the obligation to provide the discontinued UNEs, except for those network elements for which the FCC has established clear transition periods, namely, line sharing, DS1 loops, DS3 loops, dark fiber loops, local circuit switching, dedicated DS1 transport, dedicated DS3 transport, and dark fiber transport. 47 C.F.R. §§ 51.319(a)(1)(i), 51.319(a)(4)(iii), 51.319(a)(5)(iii), 51.319(a)(6)(ii), 51.319(d)(2)(iii), 51.319(e)(2)(ii), 51.319(e)(2)(iii), 51.319(e)(2)(iv).

We decline to require the parties to include terms, urged by CCC, explicitly acknowledging that the transitional rates may not apply because of claimed obligations on Verizon's part under § 271, state law, or merger conditions. As we stated above, we are not permitting the parties to preclude the operation of other "applicable law," which is already defined within the parties' interconnection agreements. Obligations pursuant to other sources of law, if any, are obligations independent of § 251, and are unaffected by the Triennial Review Order and the Triennial Review Remand Order.

The FCC anticipated that a true-up of rates to the applicable transition rate from March 11, 2005 would occur at the conclusion of the arbitrations. Triennial Review Remand Order at ¶¶ 145 n.408, 198 n.524, 228 n.630. Late payment fees and penalties shall not apply to the true-up charge if paid within the billing cycle in which CLECs receive true-up bills, because such penalties are not consistent with a true-up.

Finally, we find that the Amendments should establish and 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 elements included in the agreement." 47 U.S.C. § 252(a)(1).

E. 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?

1. Positions of the Parties

a. Verizon

Verizon proposes to apply charges for conversions between UNEs and alternative arrangements (Verizon Amendment 2, §§ 3.4.2.4, 3.4.2.5). Verizon states that it has not proposed disconnection charges in its pricing attachment to the Amendment, but that it would do so in its forthcoming cost study (Verizon Brief at 43). Verizon states that the Department has already approved the inclusion of recovery of disconnection costs up-front when the UNE was ordered (id. at 44; see UNE Rates Order, D.T.E. 01-20, at 486 (July 11, 2002) ("UNE Rates Order")). Verizon argues that none of the CLECs have presented evidence that would justify reconsideration of that determination, and, in any event, reviewing those rates would be procedurally inappropriate in this proceeding (Verizon Reply Brief at 28).

Verizon urges the Department to reject the CLEC argument that it is the "cost causer" (id. at 27). Verizon argues that when the CLECs chose to access Verizon's network at "cut-rate prices," the CLECs caused the costs that Verizon incurs, including the costs of terminating arrangements that are no longer mandated under federal law (id. at 28). Verizon argues that it may also recover the costs incurred in setting up an alternative service (id.). Verizon states that in conducting a conversion, it must "process service order, change the circuit identification to the appropriate format, move the circuit from the special access billing account to an unbundled billing account, and update the design and inventory records in the maintenance and engineering databases" (id.).

b. CLECs

The CLECs argue that Verizon is the "cost causer" when a UNE is discontinued or migrated to an "alternative arrangement" (AT&T Brief at 30; CCC Brief at 35; CCG Brief at 16). They argue that the disconnection of a UNE arrangement is caused by Verizon's withdrawal of a UNE offering, initiated by Verizon for its own benefit (AT&T Brief at 31; CCC Brief at 35; CCG Brief at 16; Conversent Brief at 18). The CLECs contend that there are few additional costs, because the only work would involve a billing change (AT&T Brief at 31, citing Triennial Review Order at ¶ 588; CCC Brief at 35; MCI Brief at 12).[43] Moreover, they argue, to the extent that there are any costs, Verizon has already recovered them through up-front charges (CCC Brief at 36, citing UNE Rates Order at 486).

Finally, the CLECs argue that the transition from UNEs to alternative arrangements should be governed by the same principles articulated in 47 C.F.R. §§ 51.316(b) and (c) (AT&T Brief at 31). The CLECs argue that Verizon should not be able to impose any termination charges, disconnect fees, reconnect fees or charges associated with establishing a service for the first time, in connection with a conversion between existing arrangements and

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43 MCI argues that Verizon should be permitted to assess non-recurring charges only if there are, in fact, any non-recurring costs associated with the conversion of a UNE arrangement to an alternative arrangement, but that if Verizon incurs only the cost of a billing change, then there is no cost basis for a non-recurring charge (MCI Brief at 12).

new arrangements (id. at 31-32; CCC Brief at 36; Conversent Brief at 18; see also CCG Brief at 16).

2. Analysis and Findings

Verizon states that it has not proposed disconnection charges in this case but will do so in its next TELRIC case. The Department finds that it is premature to address this issue until Verizon submits actual rates for approval. Because Verizon has pledged not to charge CLECs for these services until it submits actual rates and those rates are approved by the Department, the practical effect of postponing a decision on this issue until Verizon's next rate case is nil.

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

1. Introduction

The parties proposed definitions for a number of terms that were already defined and were not modified as a result of the Triennial Review Order and the Triennial Review Remand Order.[44] Therefore, we find that there is no need to amend the agreements to define these terms. Further, we have reviewed the propriety of other proposed terms in conjunction with

44 These proposed definitions include: "DS1 loops," "DS3 loops," "dark fiber loops," "commingling," "combination," "conversion," "distribution subloop," "entrance facility," "Section 271 Network Element," "Applicable Law," "entrance facilities," "circuit switch," "switching," "line splitting," "line conditioning," "enterprise switching, "four-line carve-out switching," "FTTP," "hybrid loop," "mass market switching," "packet switching," "enterprise customer," and "loop distribution."

our analysis of related arbitration issues, and we do not repeat our findings in this section.[45] We review the propriety of proposed definitions for the following terms: federal unbundling rules, discontinued facilities, mobile wireless service, dedicated transport, and dark fiber transport.

2. "Federal Unbundling Rules"

a. Verizon

Verizon argues that the FCC has exclusive authority to make impairment determinations, therefore, the Department cannot approve any amendment language that cites to sources other than § 251(c)(3) and the FCC's rules to impose unbundling obligations (Verizon Brief at 63).

b. CLECs

AT&T argues that even if federal law preempts all state unbundling authority, nothing in the Triennial Review Order or Triennial Review Remand Order provides a basis for the language proposed by Verizon (AT&T Reply Brief at 9). AT&T argues that the Triennial Review Order and Triennial Review Remand Order changed only specific unbundling obligations and those are the only ones to be changed in the Amendment (id.). CCC argues that Verizon's proposal to eliminate all non-Section 251 unbundling obligations is beyond the scope of this proceeding and is contrary to the Act (CCC Brief at 2-3). MCI argues that

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[45] We discuss the definition of "fiber to the premises loop" in Issue 13; "House and Riser Cable" and "Subloop for Multiunit Premises" in Issue 17; and, "Affiliate," "Business Line," "Fiber-Based Collocator," "Wire Center," "Route," and Tier 1 and Tier 2 Wire Centers in Supplemental Issues 1-3.

Verizon ignores the unbundling obligations imposed by Congress under § 271, which Verizon must continue to comply with in order to keep its authorization to provide interLATA service in Massachusetts (MCI Reply Brief at 2). CCG argues that Verizon's unbundling obligations are governed by "applicable law," which includes § 271, the BA/GTE Merger Order,[46] and state law (CCG Reply Brief at 2). Conversent argues that neither Congress, the FCC, nor the courts have "shut the door" on state commission authority to order unbundling, and therefore, Verizon's proposed language should be rejected (Conversent Reply Brief at 14).

c. Analysis and Findings

We decline to adopt Verizon's proposed definition. Following discussion in other sections of this Order, see Issue 1, above, we determine not to foreclose the question whether an ILEC's unbundling obligations could arise from sources other than § 251(c)(3) and 47 C.F.R. Part 51. To limit Verizon's obligations by an amendment to the interconnection agreements as Verizon proposes would be tantamount to rendering a premature judgment about the unbundling framework contemplated by Congress in the Act and our role in this proceeding to implement the changes imposed by the Triennial Review Order and Triennial Review Remand Order. We do not need to reach that question even by implication in adopting the proposed definition.

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46 In re Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, CC Docket No. 98-184, Memorandum Opinion and Order, FCC 00-221 (rel. June 16, 2000) ("BA/GTE Merger Order").

3. Mobile Wireless Service

a. CLECs

CCC argues that its proposed definition is consistent with FCC rules (CCC Reply Brief at 25). CCC argues that, if the FCC's definition changes, then Verizon could invoke the change of law process and initiate a negotiation consistent with existing change of law provisions (id.).

b. Verizon

Verizon argues that there is no need to add the FCC's definition of mobile wireless service in the Amendment (Verizon Brief at 72). Verizon argues that because the FCC has already defined the term, there is no need to add the same language into the Amendment, when the FCC's definition may later change (id.).

c. Analysis and Findings

The Triennial Review Remand Order at ¶ 5 specifies that UNEs may not be used "exclusively for the provision of telecommunications services in the mobile wireless and long distance markets," and added a new definition to 47 C.F.R. § 51.5 for "mobile wireless service."[47] CCC's proposed definition is identical to the new FCC definition. As we have stated throughout this Order, our role as arbitrator in this proceeding is to implement the requirements imposed by the Triennial Review Order and the Triennial Review Remand Order.

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[47] Section 51.5 is the FCC's "Terms and Definitions" section of its rules. The new definition for mobile wireless service in that section is as follows: " Mobile wireless service. A mobile wireless service is any mobile wireless telecommunications service, including any commercial mobile radio service." 47 C.F.R. § 51.5.

It is consistent with this role and with the change of law provisions of the existing interconnection agreements to include in the Amendment new definitions arising from the FCC's orders. Therefore, we adopt CCC's proposed definition.

4. <u>Discontinued Facilities</u>

a. <u>Introduction</u>

Parties disagree whether the Amendment should define a "discontinued facility," whether particular elements should be listed as discontinued facilities, and whether the definition of discontinued facility should reference other sources of unbundling obligations, including state law and § 271.

b. <u>Positions of the Parties</u>

i. <u>Verizon</u>

Verizon defines a discontinued facility as an element that Verizon previously provided as a UNE, but which is no longer subject to unbundling under the federal unbundling regime (Verizon Brief at 48). As part of its definition of discontinued facilities, Verizon lists the individual elements which were delisted in the <u>Triennial Review Order</u> and <u>Triennial Review</u>

Remand Order (id. at 48 n.70).[48] Verizon also lists as a discontinued facility "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" (id.). Verizon argues that this provision captures the prospective effect of federal law, thus ensuring that Verizon's agreements implement federal law "without the need for protracted and expensive multi-party proceedings like this one" (id. at 49). Verizon contends that most of its contracts already provide for the automatic implementation of delisted UNEs, and that this provision will bring the small number of agreements without automatic implementation provisions into line with the others (id.). Verizon argues that the CLECs are attempting to eviscerate the definition of discontinued facility by including references to other sources of unbundling obligations, including state law and § 271 (id.).

ii. CCC

CCC argues that the Amendment should not define "discontinued facility" (CCC Brief at 41). CCC contends that the Amendment should contain terms defining each delisted UNE, because different delisted UNEs are subject to different transition periods (id.).

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48 Verizon's list of discontinued facilities includes: any entrance facility; enterprise switching; mass market switching; four-line carve out switching; OCn loops and OCn dedicated transport; DS1 loops or DS3 loops out of any wire center where unbundling is not required; dark fiber loops; any DS1 or DS3 loop in excess of the applicable cap; DS1 and DS3 dedicated transport or dark fiber transport on any route where unbundling is not required; any DS1 or DS3 dedicated transport circuit in excess of the applicable cap; the feeder portion of a loop; line sharing; any call-related database other than the 911 and E911 databases; signaling; shared transport; FTTP loops, lit or unlit; hybrid loops, subject to the exceptions for TDM and narrowband unbundling; and any other facility or class of facilities for which there is no effective finding of impairment, or for which nonimpairment has been found (Verizon Brief at 48 n.70).

iii. AT&T

AT&T argues that Verizon's definition is inappropriate, because it includes the four-line carve-out, entrance facilities that are part of a loop, and items that are available under § 252(c)(2) (AT&T Brief at 32-33). In addition, AT&T objects to Verizon's attempt to reflect future changes to the federal unbundling regime, arguing that the parties' interconnection agreements should determine the process for implementing future changes to the unbundling rules (id. at 33). AT&T also argues that the Amendment should distinguish between the elements delisted in the Triennial Review Order and the "transitional declassified network elements" from the Triennial Review Remand Order (id.).

iv. CCG

CCG's definition of "declassified network elements" omits a number of the elements included in Verizon's list, and states that Verizon may have obligations to provision declassified network elements under § 271 or state law (CCG Brief at 18-19).

c. Analysis and Findings

While the FCC does not use the term "discontinued facility," we find that for clarity, and to reduce the risk of future litigation, it is necessary that the Amendment include a term that distinguishes UNEs from delisted elements. This Arbitration has been conducted in order to implement changes arising from the Triennial Review Order and the Triennial Review Remand Order, and therefore 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.

Verizon's inclusion of the provision, "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" is, however, designed to amend agreements to provide for the automatic implementation of UNEs delisted in the future. Neither the Triennial Review Order nor the Triennial Review Remand Order require that future, hypothetical delistings be addressed in any particular manner (e.g., immediate implementation, or implementation only after the amendment of an interconnection agreement) and therefore Verizon's provision is outside the scope of this Arbitration and must be stricken.[49]

As to the particular elements on Verizon's list of discontinued facilities, the Department requires that the term "FTTP loops (lit or unlit)" be stricken. FTTP is not a term found in the federal rules, and replacing the FCC's terms (FTTC and FTTH) with a new term (FTTP) has the potential to create confusion. The Amendment will drop the term FTTP and confine itself to FCC terminology for FTTH and FTTC loops subject to unbundling relief.

5. Dedicated Transport and Dark Fiber Transport

a. Positions of the Parties

i. Verizon

Verizon proposes to define "dedicated transport" 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. Transmission facilities or services provided between (i) a

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[49] The striking of this provision does not impair other contractual rights Verizon may have to immediately cease provisioning UNEs delisted in the future.

> Verizon wire center or switch and (ii) a switch or wire center of [the CLEC] or a third party are not Dedicated Transport.

(Verizon Amendment 2, § 4.7.4). Verizon proposes to define "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. 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.

(Verizon Amendment 2, § 4.7.3). Verizon argues that the clarification in the second sentence of these definitions is in accordance with the FCC's definition to include only facilities between ILEC wire centers or switches (Verizon Brief at 46, 48, citing Triennial Review Order at ¶ 67).

Verizon argues that the CLECs' proposed definitions for dedicated and dark fiber transport are unacceptable, because they fail to recognize the unbundling limitations the FCC imposed on dedicated and dark fiber transport (id. at 48). First, Verizon argues that AT&T's proposed definitions to expand Verizon's obligations to facilities "between Verizon wire centers or switches and requesting carriers' switches or wire centers" contradicts the FCC's limitation of dedicated transport to transmission facilities only between ILEC wire centers or switches (id. at 46, citing AT&T TRRO Amendment, § 2.9). Second, Verizon asserts that the definitions for dedicated and dark fiber transport and the related additional language proposed by Conversent, MCI, and CCC impermissibly require Verizon to provide dark fiber transport not only in accordance with § 251(c)(3) and the FCC rules, but also in accordance with "other Applicable Law," as a "State Law-Required Element" priced as TELRIC, a "Section 271 Element," or under "state or federal merger conditions" (id. at 46-47, citing Conversent

Amendment, § 4.7.4; MCI Amendment, §§ 10.3.2.1, 11.2.4; CCC Amendment, §§ 6.4.2, 1.2, 7.1). Similarly, Verizon states that, while CCG accurately defines dedicated and dark fiber transport, CCG proposes additional language that allows the Department to override the FCC's elimination of unbundling obligations as well as language that includes Verizon switching equipment located at a CLEC's premises (id. at 47-48, citing CCG TRRO Amendment, §§ 2.8, 2.9).

Additionally, Verizon states that AT&T and CCC would require Verizon to unbundle "OCn-capacity level services," even though the TRO eliminated all unbundling of OCn transport (id. at 48, citing AT&T TRRO Amendment, § 2.9; CCC TRRO Amendment, § 6.2; and Triennial Review Order at ¶ 389).

ii. AT&T

Section 2.7 of AT&T's TRRO Amendment proposes to define dark fiber transport as "[u]nactivated optical interoffice transmission facilities that meet the criteria for Dedicated Transport set forth in 2.9 below." Section 2.9 reads:

> Dedicated Transport includes Verizon transmission facilities between Verizon switches or wire centers, (including Verizon switching equipment located at AT&T's premises), or between Verizon wire centers or switches and requesting telecommunications carriers' switches or wire centers, including DS-1, DS-2, and OCn-capacity level services as well as dark fiber, dedicated to a particular customer or carrier.

(AT&T TRRO Amendment, § 2.9). AT&T states that its definition is taken directly from 47 C.F.R. § 319(e), and that it restates the requirements virtually verbatim from the FCC's rule (AT&T Reply Brief at 14-15).

iii. CCG

CCG proposes to define dark fiber transport as "[u]nactivated optical transmission facilities within a LATA, without attached multiplexing, aggregation or other electronics, between any two designated Verizon switches or wire centers (including Verizon switching equipment located at CLEC's premises"(CCG TRRO Amendment, § 2.8). These definitions are similar to Verizon's definitions, but without the limiting language.

iv. MCI

MCI does not propose a specific definition of dark fiber transport, but defines dedicated transport similar to Verizon (MCI Redline Amendment, § 12.7.4).

v. Conversent

Conversent proposes to define dedicated transport as:

> A transmission facility between Verizon switches or wire centers, (including Verizon switching equipment located at Conversent's premises), within a LATA, that is dedicated to a particular customer or carrier and that is provided on an unbundled basis pursuant to 47 U.S.C. § 251(c)(3), 47 C.F.R. Part 51, or other Applicable Law. Entrance facilities, as defined by Section 4.7.11, are one type of dedicated transport.

(Conversent TRRO Amendment, § 4.7.5). Conversent defines dark fiber dedicated transport as:

> Dark Fiber Transport shall be as defined in FCC Rule 51.319. Without limiting the foregoing, such facilities include the physical transmission media (e.g. optical fiber) which are "in place" or can be made spare and continuous via routine network modifications in Verizon's network, but are not being used to provide service, and which Verizon shall provide on an unbundled basis, pursuant to 47 U.S.C. § 251(c)(3), 47 C.F.R. Part 51, or other Applicable Law. Dark Fiber is fiber within an existing fiber optic cable that is not activated through optronics to render it capable of carrying communications services. It also includes strands of optical fiber existing in aerial, buried, or underground

> cables which may have lightwave repeater (generator or optical amplifier) equipment interspliced to it at appropriate distances, but which has no attached line terminating, multiplexing, or aggregation electronics.

(Conversent TRRO Amendment, § 4.7.4).

b. Analysis and Findings

In the Triennial Review Remand Order, the FCC stated that:

> The definition of dedicated transport adopted by the [FCC] in the Triennial Review Order was largely similar to that adopted by the [FCC's] prior orders. However, in the Triennial Review Order, the [FCC] narrowed the definition by limiting transport to transmission facilities between incumbent LEC wire centers or switches and by removing from the definition transmission between incumbent LEC wire centers or switches and those owned by requesting telecommunications carriers.

Triennial Review Remand Order at ¶ 67, citing Triennial Review Order at ¶¶ 365-69.

Nevertheless, the FCC stated that "[i]n response to the court's remand [in USTA II], the [FCC] reinstates the Local Competition Order[50] definition of dedicated transport to the extent it included entrance facilities." Id. at ¶ 137 (emphasis added). Indeed, the final FCC rule states that:

> [D]edicated transport includes incumbent LEC transmission facilities between wire centers or switches owned by incumbent LECs, or between wire centers or switches owned by incumbent LECs and switches owned by requesting telecommunications carriers, including but not limited to, DS-1-, DS-3-, and OCn-capacity level services, as well as dark fiber, dedicated to a particular customer or carrier.

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50 In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996) ("Local Competition Order").

47 C.F.R. § 51.319(e)(1) (emphasis added). While there is no doubt that the FCC limited an ILEC's unbundling obligation to dedicated transport between incumbent LEC wire centers or switches, see 47 C.F.R. § 51.319(e)(2),[51] the FCC continues to define dedicated transport to include entrance facilities, i.e., transmission between an ILEC's wire center or switch and a CLEC switch. See Triennial Review Remand Order at ¶ 137. Additionally, the FCC's current definition of dedicated transport is modified from its prior definitions contained in the Local Competition Order and the UNE Remand Order[52] and it is therefore appropriate to incorporate the latest iteration of the FCC's definition of dedicated transport into the Amendment. 47 C.F.R. § 51.319(e)(1). We emphasize, however, that even though the definition of dedicated transport includes entrance facilities, requesting carriers still may not obtain access to dedicated transport as a UNE when it is an entrance facility. 47 C.F.R. § 51.319(e)(2).

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51 Section 51.319(e)(2) states: "Availability. (i) 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."

52 In the Local Competition Order, at ¶ 440, the FCC defined dedicated transport as "incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches."

In the UNE Remand Order, at ¶ 323 (footnote omitted), the FCC clarified that the definition of dedicated transport "includes all technically feasible capacity-related services, including those provided by electronics that are necessary components of the functionality of capacity-related services and are used to originate and terminate telecommunications services."

With regard to the competing definitions of dedicated transport proposed, AT&T's proposed definition of dedicated transport is consistent with the FCC's definition. The FCC's definition, unlike AT&T's, does not include the transmission path between an ILEC wire center and an ILEC switch that is reverse collocated at a CLEC premise, but this additional language is consistent with our findings in Issue 18, below.

With regard to dark fiber transport, the FCC affirmed its definition adopted in the UNE Remand Order. Triennial Review Order at ¶ 381 n.1168; Triennial Review Remand Order at ¶ 133 (citation omitted). We find no significant deviation between the definitions of dark fiber transport contained in the UNE Remand Order and the FCC's definition. Accordingly, we find it is unnecessary to incorporate a definition of dark fiber transport into the Amendment.

G. 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?

The parties do not dispute that the FCC's rules embodied in the Triennial Review Order (which survived or were not challenged in USTA II) must be implemented through contractual change of law provisions in the parties' interconnection agreements. As discussed in greater detail in the Department's analyses of Issues 3, 4, and 5, while the Triennial Review Remand Order delisted certain UNEs and established a transition period as of March 11, 2005, the parties' interconnection agreements still must be amended to the extent required under the change of law provisions of the parties' interconnection agreements.

H. Issues 12, 20, 24 Commingling/Combinations and Conversions

1. Introduction

In this Section, we combine our discussion of arbitration Issues 12, 20, and 24.

Issue 12 asks:

> 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?

Issue 20 asks:

> 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?
>
> (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?
>
> (2) What type of charges, if any, and under what conditions, if any, can Verizon impose for conversions?
>
> (3) Should EELs ordered by a CLEC prior to October 2, 2003, be required to meet the FCC's service eligibility criteria?
>
> (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)?
>
> (5) When should a conversion be deemed completed for purposes of billing?
>
> (c) How should the Amendment address audits of CLEC compliance with the FCC's service eligibility criteria?

Issue 24 asks:

> 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?

In the Triennial Review Order, the FCC reaffirmed its existing rules requiring ILECs to provide UNE combinations to carriers upon request. Triennial Review Order at ¶ 573. One such combination that CLECs rely heavily upon to serve enterprise customers is an Enhanced Extended Link ("EEL"), which is a combination of the high capacity loop UNE and the dedicated transport UNE. Also in the Triennial Review Order, the FCC eliminated restrictions on commingling of UNEs and combinations of UNEs with non-UNE wholesale services, such as switched and special access, and required ILECs "to perform the necessary functions to effectuate such commingling upon request." Id. at ¶ 579. At the same time, the FCC found that carriers can convert wholesale services (e.g., special access services) to UNEs and UNE combinations and vice versa, as long as applicable eligibility criteria are met. Id. at ¶ 586. The FCC's new eligibility rules apply only to EELs and replace its existing "safe harbors" that restricted EELs to carriers providing "a significant amount of local exchange service." Id. at ¶¶ 590, 592. The FCC stated that "[t]o ensure that our rules on service eligibility are not gamed in whole or in part, we make clear that the service eligibility criteria must be satisfied (1) to convert a special access circuit to a high-capacity EEL; (2) to obtain a new high-capacity EEL; or (3) to obtain at UNE pricing part of a high-capacity loop-transport combination (commingled EEL)." Id. at ¶ 593. Issues 12, 20, and 24 all concern implementation of the FCC's combinations, commingling, and conversion requirements, primarily in relation to EELs. Therefore, we address these issues together in this section. The parties agree that Verizon is obligated to combine UNEs, to commingle UNEs and combinations of UNEs with wholesale services, and to convert wholesale services to UNEs. The dispute concerns the manner in which Verizon proposes to implement these obligations.

2. Positions of the Parties

a. Verizon

i. Commingling/Combinations

Verizon claims that its proposed language dealing with commingling in Amendment 2, § 3.4.1.1 appropriately implements its obligations under federal law (Verizon Brief at 83). Verizon states that its language provides that, to the extent required by federal law, it will not prohibit commingling, and will "perform the functions necessary to allow CLECs to commingle any UNE or combination of UNES with wholesale services that are obtained under a Verizon access tariff or separate non-§ 251 agreement with Verizon" (Joint Issues Matrix at 30-31, citing Verizon Amendment 2, § 3.4). In response to the CLECs' argument that combined or commingled facilities do not have to satisfy the FCC's eligibility criteria on a circuit-by-circuit basis, Verizon points to the Triennial Review Order at ¶ 599 which states: "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" (Verizon Brief at 84) (emphasis added by Verizon).

Verizon states that CCC's proposed language would inappropriately permit commingling of UNEs and wholesale services with facilities made available pursuant to other applicable law, such as § 271, the BA/GTE Merger Conditions, or state law (Verizon Reply Brief at 34). Verizon claims that the FCC did not require Verizon to combine or commingle UNEs with § 271 elements and that the Department does not have the authority to create such an obligation (id. at 35, citing Triennial Review Order at ¶ 655 n.1990). Verizon further argues that the Department has found that Verizon is not required to offer UNE-P under § 271 and that allowing CLECs to combine and commingle UNEs and wholesale services with § 271 elements would do just that (id., citing Consolidated Order, D.T.E. 03-60/04-73, at 55). Moreover, Verizon argues that the Department ruled earlier in this case that it would not address § 271, the BA/GTE Merger Order, or state law in this proceeding (id. at 34, citing Verizon Amendment 2, § 3.4.1.1; Procedural Order at 32).

Verizon states that, while UNEs will be priced at TELRIC rates, the wholesale services commingled with UNEs will be subject to "the rates, terms, and conditions of the applicable access tariff or separate non-251 agreement" (Verizon Brief at 83, citing Verizon Amendment 2, § 3.4.1.1). Verizon asserts that "ratcheting," which it defines as "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," is not required by the Triennial Review Order (id. at 84, citing Verizon Amendment 2, § 3.4.1.1). Verizon also objects to the CLECs' attempt to obtain TELRIC pricing for the UNE components of commingled facilities back to the effective date of the Triennial Review Order (Verizon Reply Brief at 34). It asserts that should the Department allow retroactive pricing, then Verizon should likewise be permitted to retroactively price UNEs that were delisted in the Triennial Review Order (id.).

Verizon also states that it will apply a nonrecurring charge to each UNE circuit, that is part of a commingled arrangement, in order to offset Verizon's implementation and management costs for commingled arrangements (Verizon Brief at 83, citing Verizon Amendment 2, § 3.4.1.1). Although Verizon has not proposed specific rates in this arbitration (but states that it will do so in its next TELRIC case), Verizon argues that "it would be inappropriate to foreclose the possibility of such charges if they are appropriately justified" (Verizon Reply Brief at 34).

Verizon contends that its commingling performance should be excluded from any standard provisioning measures and remedies, because those requirements were established before the Triennial Review Order was issued. Verizon claims commingling requires it to undertake additional tasks that are not reflected in the existing performance standards (Verizon Brief at 84).

ii. Conversions

(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 claims that its language "precisely implements the criteria established" in the Triennial Review Order by stating that 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 per every 24 DS1 circuits; and (f) the local switch that serves each DS1 circuit.

(Verizon Brief at 113, citing Verizon Amendment 2, § 3.4.2.3).

Verizon argues that, according to the FCC, the date each circuit was established would enable a 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., citing Triennial Review Order at ¶ 602). Verizon further argues that for each circuit, the CLEC should specify the collocation termination connecting facility assignment, because "termination of a circuit into a § 251(c)(6) collocation arrangement in an incumbent LEC central office is an effective tool to prevent arbitrage" (id., citing Triennial Review Order at ¶ 604). Verizon maintains that asking for a "circuit identification number" is a reasonable means of determining that the CLEC met the FCC's requirement to make sure the requesting carrier maintains at least one active DS1 interconnection trunk for the exchange of local voice traffic for every DS1 EEL or equivalent (Verizon Reply Brief at 59, citing Triennial Review Order at ¶ 607). Verizon also contends that the interconnection trunk information would enable the CLEC to certify every EEL circuit was "served by an interconnection trunk in the same LATA as the customer premises served by the EEL" (Verizon Brief at 113, citing Triennial Review Order at ¶ 607). Verizon claims the FCC states that "each EEL circuit must be served by a Class 5 switch or other switch capable of providing local voice traffic" so requesting information about the local switch that serves each circuit is appropriate (id., citing Triennial Review Order at ¶ 602).

Responding to CLEC arguments concerning its certification language, Verizon claims that its requirements (1) are not onerous, because CLECs have to maintain the information anyway, so having them provide it up-front is no additional burden, and (2) would minimize audits and disputes (id. at 114, citing Triennial Review Order at ¶¶ 622, 629). Lastly, concerning CCC's opposition to its provision stating that conversions will be handled in accordance with its "conversion guidelines," Verizon asserts that CCC does not propose alternative language and does not cite any aspect of Verizon's language that it finds objectionable (Verizon's Reply Brief at 55-56).

iii. Conversion of existing circuits/services:

(A) 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?

Verizon claims that its proposed language does not specifically provide for separation or alterations of wholesale facilities during EEL conversions but simply gives Verizon some flexibility to address non-standard conversions, and that, without such flexibility, orders would likely take longer to complete (Verizon Brief at 115). Verizon also claims that it would be unfair not to provide Verizon with this flexibility when CLECs are allowed to request changes to facilities as part of EEL conversions (id.).

(B) What type of charges, if any, and what conditions, if any, can Verizon impose for conversions?

Verizon contends that while the FCC warned against ILEC's imposing "wasteful and unnecessary charges," the FCC did not bar ILECs from recovering legitimate expenses, and, as a result, Verizon has identified various commingling and conversion-related charges (Verizon Brief at 115-16, citing Triennial Review Order at ¶ 587). Verizon claims that its legitimate 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" (id. at 116). For example, Verizon states that a "retag fee" is a legitimate expense that compensates Verizon for the cost of retagging a circuit (i.e., physically changing the circuit ID on the facility), in order to distinguish the converted UNE from special access (id.).

Verizon states that since conversion costs are incurred by the commingling of services on a per circuit basis, it is appropriate to apply a non-recurring charge for each UNE circuit that is part of a commingled arrangement (id. at 116-17). Although Verizon notified the Department and the parties that it would not seek to litigate these charges in this case, it reserves the right to propose new rates for conversions at a later date upon submission of a cost study (id. at 117).

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

Verizon claims that the FCC made clear that its new eligibility criteria applies to all EELs on a circuit-by-circuit basis, so that each DS1 EEL, or combination of DS1 Loop with DS3 transport satisfies the service eligibility criteria "with no exceptions or grandfathering for pre-existing EELs that a CLEC might have obtained under the old rules" (Verizon Brief at 118, citing Triennial Review Order at ¶ 599). Verizon maintains that an EEL that qualified under the old criteria may not continue to qualify under the new criteria because the old rules have been changed (id.).

Responding to CLEC arguments, Verizon argues that it is not applying the certification criteria to non-UNEs but rather tracking the Triennial Review Order, which states that the certification criteria apply if at least one of the components of loop or transport is a UNE (Verizon Reply Brief at 59, citing 47 C.F.R. § 51.318(b)(2)). Verizon states that, contrary to CLEC claims, it encourages CLECs to self-certify electronically via the access service request ("ASR") process (id. at 60). Lastly, Verizon contends that it is not applying these requirements retroactively but implementing new FCC rules prospectively (id.).

(D) 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)?

Verizon claims that the FCC in the Triennial Review Order "declined to override existing contracts to order automatic implementation of its rules as of a date certain," but instead required carriers to use § 252 to amend their agreements to implement the Triennial Review Order and, thus, argues Verizon, the new conversion rules should not take effect until the amendments are effective (Verizon Brief at 119, citing Triennial Review Order at ¶ 701). Verizon also claims that it would be unfair to allow CLECs to implement conversions on October 2, 2003 but not allow Verizon to implement the Triennial Review Order's delisting of UNEs on that same date (id.).

(E) When should a conversion be deemed completed for purposes of billing?

Verizon claims that under the Triennial Review Order, a conversion should be deemed completed for billing purposes "when the actual work of the conversion is completed pursuant to the standard conversion process," as with any other activity performed by Verizon for a CLEC (Verizon Brief at 120). Verizon contends that CCC's proposals, under which billing would start (1) when Verizon completes the work, or (2) by the standard interval for work completion (but no longer than 30 days), regardless of whether Verizon has actually completed the work, have no basis in federal law (Verizon Reply Brief at 64).[53] Verizon also objects to CCC's proposal concerning pro rata billing and withholding of payments, contending that there is no reason to amend generally applicable billing provisions in the agreements (id.). Regarding AT&T's proposal that billing begin on the next billing cycle following the conversion request, Verizon contends that conversions are not simply a billing function but a multi-step process involving service orders and updating databases for maintenance and engineering, and that AT&T in effect seeks to have pricing changes take effect upon Verizon's receipt of the conversion request, in order to have billing start on the first billing cycle following the request (id. at 64-65).

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53 Verizon asserts that conversion completion intervals should be established through negotiation, as recognized by the FCC (Verizon Reply Brief at 65, citing Triennial Review Order at ¶ 588 (rejecting suggestion that effective date would be ten days after the request because "such time frames are better established through negotiations between incumbent LECs and requesting carriers").

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

Verizon claims that: (1) ILECs have the right to annually audit CLECs to ensure that they meet service eligibility criteria; (2) the independent auditor must perform the audit according to the American Institute for Certified Public Accountants standards; and, (3) the evaluation may include a sample selected with the auditor's judgement (Verizon Brief at 120, citing Triennial Review Order at ¶ 626). In cases where the auditor concludes that the CLEC was not compliant, Verizon's amendment would require CLECs to "convert all noncompliant circuits to the appropriate service, true up any difference in payments, make the correct payments on a going-forward basis, and reimburse Verizon for the entire cost of the audit within thirty (30) days after receiving a statement of such costs from Verizon" (id. at 120-21, citing Verizon Amendment 2, § 3.4.2.7; Triennial Review Order at ¶¶ 627-28). Verizon claims that if the CLEC was shown to be in "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] . . . within (30) days of the auditor's verification of the same" (id.). Verizon also claims that its Amendment would require the CLEC to maintain "records adequate to support its compliance" for a minimum of 18 months following the termination of the service arrangement in question (id. at 122).

Verizon contends that the CLECs have reversed the standard to determine compliance and would only find that a CLEC had a failed an audit if it failed "in all respects" (Verizon

Reply Brief at 65, citing CCG Brief at 44). In addition, Verizon argues that the annual audit requirement in the Triennial Review Order is based on a calendar year, not a twelve-month period, and that the scenario envisioned by CCC of Verizon conducting an audit in December of one year and then another audit in January of the next year is not realistic (Verizon Brief at 122-23). Concerning its recordkeeping language, Verizon notes that CCC recognizes that an audit may take 18 months or longer after an EEL arrangement order, and therefore, Verizon contends that its proposal is "consistent with the nature and purpose of the requirement" (id. at 123-24, citing Triennial Review Order at ¶ 692). Finally, regarding CCC's claim that Verizon's language permitting it to convert all noncompliant circuits constitutes self-help, Verizon asserts that it is an appropriate contractual means of enforcing federal law (Verizon Reply Brief at 66-67, citing Verizon Amendment 2, § 3.4.2.2).

b. CLECs

i. Combinations/Commingling

The CLECs claim that the FCC eliminated prior commingling restrictions and permitted, as of the effective date of the Triennial Review Order, commingling or combining of switched and special access wholesale services with UNE loops or loop-transport combinations, so long as the requesting carrier certifies that it meets the eligibility criteria (AT&T Brief at 37-38, citing Triennial Review Order at ¶¶ 579, 589; 47 C.F.R. § 51.318; CCC Brief at 48; CCG Brief at 30; MCI Brief at 15). The CLECs contend that Verizon's proposed amendment violates the Triennial Review Order by: (1) imposing additional processes or requirements (e.g., requests for unessential information) not specified in Triennial

Review Order; (2) preventing CLECs from self-certifying compliance with eligibility criteria in writing or electronically; (3) excluding Verizon's provisioning to standard provisioning intervals and performance measures; and, (4) charging for conversions and imposing other fees (e.g., retag fees) (AT&T Brief at 38, citing Triennial Review Order at ¶¶ 587-89, 623-24; 47 C.F.R. § 51.316(c); CCC Brief at 47;[54] CCG Reply Brief at 28-29, citing Verizon Amendment 2, § 3.4.1.1).

While some CLECs contend that they are not required to re-certify prior conversions but are only required to certify new conversions, AT&T contends that re-certification should be allowed in one batch (Joint Issues Matrix at 78). The CLECs agree, however, that for new requests CLECs should be allowed to submit orders as a batch rather than being required to certify individual requests on a circuit-by-circuit basis (Joint Issues Matrix at 78; AT&T Brief at 39; CCG Reply Brief at 29, citing 47 C.F.R. § 51.318).

Additionally, AT&T objects to Verizon language that would require CLECs to reimburse Verizon for the full cost of an audit when an auditor "finds no AT&T material failure to comply with the service eligibility criteria for any DS1 circuit" (AT&T Brief at 39, citing Verizon Amendment 2, § 3.4.2.7). CCC also argues that while the Triennial Review Order did not specifically state that CLECs should be permitted to commingle UNEs and UNE combinations with § 271 elements, CCC argues that CLECs should be permitted to do so (CCC Brief at 45-46). The CLECs also oppose the Triennial Review Order term "Qualifying

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[54] CCC proposes that rates to each portion of a commingled facility or service cannot be greater than the rate for that portion if purchased separately (CCC Brief at 48, citing CCC TRO Amendment, § 2.1.1)

UNE" in Verizon's proposed language, arguing that it was vacated by USTA II and not restored by the Triennial Review Remand Order (CCC Brief at 48, citing Verizon Amendment 2, §§ 3.4.1.1, 3.4.1.2; CCG Reply Brief at 27). They argue that Verizon's language would exclude from commingling those UNEs provisioned during the Triennial Review Remand Order transition periods and would do so without following the change of law process in agreements (CCC Brief at 48-49, citing Verizon Amendment 2, §§ 3.4.1.1, 3.4.1.2; CCG Reply Brief at 27).

ii. Conversions

(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?

The CLECs claim that to order new EELs or to convert special access circuits to EELs, they are only required to certify that they satisfy the eligibility criteria of Rule 51.318(b) and therefore Verizon's requirements are inconsistent with the Triennial Review Order (AT&T Brief at 66; CCC Brief at 76-77,[55] citing Triennial Review Order at ¶¶ 623-24, 586, Verizon Amendment 2, § 3.4.2.3; CCG Brief at 41-42). According to CCC, the FCC determined that the ordering process for conversions and new EELs should meet "the basic principles of entitling requesting carriers unimpeded UNE access upon self-certification, subject to later verification" to prevent "the imposition of any undue gating mechanisms that could delay the initiation of the ordering or conversion process" (CCC Reply Brief at 42, citing Triennial

[55] CTC does not join sections 20A and 24 of CCC's brief (see CCC Brief at 74 n.172).

Review Order at ¶¶ 622-23). The CLECs assert that Verizon's proposal for detailed information from CLECs constitutes an unlawful pre-audit and exceeds what the Triennial Review Order requires (AT&T Brief at 67, citing Triennial Review Order at ¶¶ 577, 623; CCC Reply Brief at 42, citing Supplemental Order Clarification at ¶¶ 29, 31;[56] CCG Reply Brief at 56). In addition, CCC argues that Verizon's proposal inappropriately requires that conversion procedures be governed by Verizon's conversion guidelines, which are subject to change at any time and could allow Verizon to avoid its legal obligations (CCC Brief at 75, citing Verizon Amendment 2, § 3.4.2.6). Concerning notification, CCC claims that its proposal reasonably allows a CLEC to initiate a conversion in writing or by electronic notification (id., citing CCC TRO Amendment, § 2.3.1).

iii. Conversion of existing circuits/services

(A) 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?

The CLECs claim that the FCC's rules prevent Verizon from separating or altering facilities while performing conversions (AT&T Brief at 70; CCC Reply Brief at 44, citing 47 C.F.R. § 51.315 ("Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent currently combines"); CCG Reply Brief at 56). The

[56] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Supplemental Order Clarification, FCC 00-183 (rel. June 2, 2000) ("Supplemental Order Clarification").

CLECs contend that the FCC determined that conversions should not affect end-user service quality (CCC Brief at 77-78, citing Triennial Review Order at ¶ 586; CCG Reply Brief at 56).

(B) What type of charges, if any, and under what conditions, if any, can Verizon impose for conversions?

The CLECs contend that Verizon should not be allowed to impose conversion-related charges (AT&T Brief at 71, citing 47 C.F.R. § 51.316(c); CCC Brief at 78-79; CCG Reply Brief at 57, citing 47 C.F.R. § 51.316(c)). They maintain that the FCC found that "[b]ecause incumbent LECs are never required to perform a conversion in order to continue serving their own customers . . . such charges are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access" (CCC Brief at 78, citing Triennial Review Order at ¶ 587; 47 U.S.C. § 251(c)(3); see also CCG Reply Brief at 57). The CLECs further claim that such charges are inconsistent with § 202 of the Act because they would subject CLECs to "undue or unreasonable prejudice or disadvantage" (id. at 83, citing Triennial Review Order at ¶ 587; CCG Reply Brief at 57).

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

The CLECs contend that EELs ordered prior to October 2, 2003 do not have to meet the FCC's new service eligibility criteria (AT&T Brief at 72; CCC Brief at 79, citing Triennial Review Order at ¶ 623 (FCC stated that "new orders for circuits are subject to the eligibility criteria" without mention of old orders); CCG Brief at 43, CCG Reply Brief at 58). If the Department requires re-certifications, AT&T argues that the Department should allow for re-certifications to take place in one batch for all prior and future conversions (AT&T Brief at 73).

According to CCC, the FCC in the Triennial Review Order envisioned a dual-track qualification system where newly ordered circuits would have to satisfy the new standards and would be priced at UNE rates while pending requests submitted before the effective date of the Triennial Review Order would be evaluated according to the old "safe harbors" eligibility criteria and priced according to prices applicable to circuits at the time (CCC Brief at 80, citing Triennial Review Order at ¶ 589). Thus, CCC argues that the Triennial Review Order's new eligibility requirements apply only prospectively (CCC Reply Brief at 45). CCC further argues the FCC determined that: (1) a CLEC cannot recover excessive charges before the effective date if a circuit qualifies under the new standards but did not qualify under the old standards: (2) an ILEC may not recover past losses if a circuit does not qualify under the new standards but did qualify under the old standards; and (3) EELs may continue to be provided under the old standards up to the effective date (id.). Lastly, given that pre-existing EELs do not have to be re-certified, CCC claims that the Department should reject Verizon's self-help language permitting it to "convert existing circuits to alternative arrangements if CLECs do not re-certify in writing for each DS1 circuit or DS1 equivalent within 30 days of the Amendment effective date" (CCC Brief at 80 n.189, citing Verizon Amendment 2, §§ 3.4.2.1, 3.4.2.2).

(D) 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)?

The CLECs claim that Verizon must provide EELs to CLECs under the new rules beginning October 2, 2003 and that CLECs do not have to wait until their agreements are amended (AT&T Brief at 73; CCC Brief at 81, citing Triennial Review Order at ¶ 586; CCG Brief at 43). CCC argues that since the ILECs' obligations to perform conversions existed before the Triennial Review Order, the Triennial Review Order did not constitute a change of law,[57] and thus Verizon is required to perform conversions under the terms of their agreements prior to the effective date of the Triennial Review Order (CCC Reply Brief at 47). Thus, CCC argues no amendment is necessary for them to obtain EELs under the new rules.

(E) When should a conversion be deemed completed for purposes of billing?

The CLECs agree that because Verizon has no financial incentive to expeditiously process a conversion request, completion intervals should be established for purposes of determining when the billing can begin on conversions (AT&T Brief at 73-74; CCC Brief

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[57] Since the Triennial Review Order "did not reverse a previous policy barring conversions" and since "[t]he Triennial Review Remand Order…merely reaffirmed the [FCC's] preexisting policy allowing conversions of services obtained under tariff to UNE arrangements," CCC contends that the new conversion rules cannot represent a change of law (CCC Brief at 81, CCC Reply Brief at 47, citing In the Matter of Unbundled Access to Network Elements Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order, DA 05-675, ¶ 3 (rel. Mar. 14, 2005)) (denying ILEC request for stay of Triennial Review Order).

at 83-84; CCG Brief at 43). The CLECs, however, differ on the specific time frames. AT&T maintains, for example, that "pricing changes for conversion requests submitted after the effective date of the Amendment will be effective upon Verizon's receipt of the conversion request and will be made in the first billing cycle after the request" (AT&T Brief at 74). In contrast, CCG claims that under the Triennial Review Order conversions should be deemed completed for billing purposes no later than the next billing cycle following a CLEC's request for a conversion, thus entitling CLECs to EELs as of the date the CLEC submitted its conversion request (CCG Brief at 43, citing Triennial Review Order at ¶ 588; CCG Reply Brief at 59). Similar to AT&T, CCC proposes that in cases where a conversion requires no physical alterations to the facilities that it be deemed completed "upon receipt of Verizon of the written or electronic request" from the CLEC, and that recurring charges for the replacement facility or service also apply as of that date (CCC Brief at 83). CCC also claims that, in order to minimize incorrect payments, the FCC held that "conversions should be performed in an expeditious manner" and that "converting between wholesale services and UNEs (or UNE combinations) is largely a billing function" (id., citing Triennial Review Order at ¶ 588). In cases where a CLEC requests Verizon to perform alterations to facilities for conversion purposes, CCC proposes the conversion should be deemed completed on the earlier of the date Verizon completes the work, or the standard interval for such work to be completed, not to exceed 30 calendar days regardless of when Verizon completes the work (id. at 84, citing CCC TRO Amendment, § 2.3.4.2).

CCC also proposes that along with the date that conversions are complete, "Verizon bill a CLEC pro rata for the facility or service being replaced through the day prior to the date on which billing at rates applicable to the replacement facility or service commences and the applicable rate for the replacement facility or service thereafter" (id., citing CCC TRO Amendment, § 2.3.4.3). CCC also claims that its language "recognizes that these billing adjustments should appear on the bill for the first complete month after the date on which the Conversion is deemed effective" and that if the proper adjustment does not appear on a bill for applicable conversions, a CLEC may withhold payment in the amount of the adjustment that should appear on the bill (id., citing CCC TRO Amendment, § 2.3.4.3).

iv. How should the Amendment address audits of CLEC compliance with the FCC's service eligibility criteria?

The CLECs claim that the Triennial Review Order allows ILECs to conduct an audit once every twelve months[58] and that Verizon's proposal entitling it to an audit once per calendar year would allow an audit to take place in December of one year and again in January of the next year (CCC Brief at 85, citing Verizon Amendment 2, § 3.4.2.7; CCC Reply Brief at 48, citing XO-Illinois Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, Docket No. 04-0471, Amended Arbitration Decision of the Illinois Commerce Commission, at 38 (Oct. 28, 2004) (arguing that the Illinois

[58] AT&T agrees generally with the positions of the other CLECs but does not indicate whether the annual time frame is based on a calendar year or a 12-month period (AT&T Brief at 74).

Commerce Commission concluded that the "FCC gave ILECs the option of initiating an audit . . . no more than once every 12 months"); CCG Reply Brief at 59). CCG contends that before Verizon may conduct an audit, it must "demonstrate cause" with respect to the circuits it seeks to have audited (CCG Brief at 41). CCC also claims that the Triennial Review Order requires Verizon to give a CLEC 30 days advance notice of the audit (CCC Brief at 85, citing CCC TRO Amendment, § 2.2.3; Triennial Review Order at ¶ 622 n.1898 (noting that the FCC found that an ILEC must provide at least 30 days written notice to a carrier that has purchased an EEL that it will conduct an audit)). Moreover, CCC notes that its proposal requires that the auditor's report be provided to the CLEC at the same time as it is provided to Verizon (id. at 86).

The CLECs claim that Verizon's language does not properly implement the Triennial Review Order's "materiality" standard, which requires that the independent auditor find that a CLEC has failed to comply in all material respects with the service eligibility criteria (id., citing Triennial Review Order at ¶ 628; CCG Brief at 44). CCC states that Verizon recently proposed tariff pages that allow audit costs to be allocated based on whether there is material noncompliance as required by the Triennial Review Order (CCC Reply Brief at 48 n.121, citing Verizon New England M.D.T.E. Tariff 17, D.T.E. 05-36, Partial Suspension Order (March 23, 2005); Verizon Tariff Filing, TT 05-38, M.D.T.E. Tariff 17, Part B, Section 13.4.1.E.3-4 (dated April 19, 2005)).

The CLECs agree with Verizon that the Triennial Review Order requires that, if the auditor finds that a CLEC has failed the audit, the CLEC must reimburse Verizon for the cost of the audit, and that, if the CLEC passes the audit, then Verizon must reimburse the CLEC for the CLEC's audit-related costs. However, CCC claims that Verizon's proposal regarding audit reimbursement is not symmetrical because, depending on the results of the audit, the CLEC would be required to reimburse Verizon within 30 days of receiving the audit costs, whereas Verizon would be required to reimburse the CLEC within 30 days of the auditor's verification following a CLEC's submittal to the auditor of its out-of-pocket audit related costs (CCC Brief at 87, citing Verizon Amendment 2, § 3.4.2.7). CCC proposes that Verizon reimburse CLECs within 30 days of receiving the audit costs (id., citing Triennial Review Order at ¶ 628).

CCC claims that Verizon's proposal to keep books and records for 18 months after an EEL arrangement is terminated is unreasonably long, unduly burdensome, and has no basis in the Triennial Review Order (id. at 87-88, citing Verizon Amendment 2, § 3.4.2.7). CCC also claims that while it has the duty to maintain appropriate documentation when an EEL is in service, it no longer has that responsibility when an arrangement has been terminated since those facilities can no longer be audited (CCC Reply Brief at 48). Moreover, CCC contends that Verizon's plan to convert noncompliant circuits without CLEC consent contradicts the Triennial Review Order, which requires that the carrier convert the circuits (CCC Brief at 88, citing Verizon Amendment 2, § 3.4.2.2; Triennial Review Order at ¶¶ 623 n.1900, 627 (explaining that ILECs should not "engage in self-help")).

3. Analysis and Findings

a. Service Eligibility Certification

The FCC's service eligibility criteria for EELs is set forth in 47 C.F.R. § 51.318 and states that ILECs must provide EELs to a requesting carrier if the carrier certifies that:

> (1) The requesting telecommunications carrier has received state certification to provide local voice service in the area being served or, in the absence of a state certification requirement, has complied with registration, tariffing, filing fee, or other regulatory requirements applicable to the provision of local voice service in that area.
>
> (2) The following criteria are satisfied for each combined circuit, including each DS1 circuit, each DS1 enhanced extended link, and each DS1-equivalent circuit on a DS3 enhanced extended link:
>
>> (i) Each circuit to be provided to each customer will be assigned a local number prior to the provision of service over that circuit;
>>
>> (ii) Each DS1-equivalent circuit on a DS3 enhanced extended link must have its own local number assignment, so that each DS3 must have at least 28 local voice numbers assigned to it;
>>
>> (iii) Each circuit to be provided to each customer will have 911 or E911 capability prior to the provision of service over that circuit;
>>
>> (iv) Each circuit to be provided to each customer will terminate in a collocation arrangement that meets the requirements of paragraph (c) of this section;
>>
>> (v) Each circuit to be provided to each customer will be served by an interconnection trunk that meets the requirements of paragraph (d) of this section;
>>
>> (vi) For each 24 DS1 enhanced extended links or other facilities having equivalent capacity, the requesting telecommunications carrier will have at least one active DS1 local service interconnection trunk that meets the requirements of paragraph (d) of this section; and

> (vii) Each circuit to be provided to each customer will be served by a switch capable of switching local voice traffic.

47 C.F.R. § 51.318(b)(1).

In the Triennial Review Order, the FCC adopted a "self-certification" requirement for carriers to satisfy the service eligibility criteria. Triennial Review Order at ¶ 623. In addition, although the FCC did not "specify the form for such a self-certification", it indicated "that a letter sent to the incumbent LEC by a requesting carrier is a practical method." Id. at ¶ 624. Verizon's proposed amendment requires that CLECs certify in writing that carriers comply with the FCC's service eligibility criteria and that the written certification:

> [C]ontain 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. When submitting an ASR for a circuit, this information must be contained in the Remarks section of the ASR, unless provisions are made to populate other fields on the ASR to capture this information.

(Verizon Amendment 2, §§ 3.4.1.1, 3.4.2.1, 3.4.2.3).

We agree with the CLECs that the FCC adopted a procedure that "entitl[es] requesting carriers unimpeded UNE access based on self-certification, subject to later verification based upon cause" through an audit (see AT&T Reply Brief at 19 (emphasis omitted), citing Triennial Review Order at ¶¶ 622, 625-29 (discussing audit requirements)). Verizon's proposed language amounts to a pre-audit requirement, in that CLECs would need to provide up-front the same information that would be provided during an audit. Under Verizon's proposal, there would be no need for "later verification" through an audit. In adopting a simple, straightforward self-certification process, the FCC stated that "[a] critical component of nondiscriminatory access is preventing the imposition of any undue gating mechanisms that could delay the initiation of the ordering or conversion process." Triennial Review Order at ¶ 623. Thus, the FCC intended that CLECs simply certify in a letter to the ILEC that it meets the FCC's service eligibility requirements. We find that backup information, of the type Verizon would require, need only be provided at the time of an audit. We remind the parties that they have a duty of good faith and fair dealing under the agreements, requiring that when CLECs submit their certification, they know, in fact, that each requirement of 47 C.F.R. § 51.318 is met.[59]

However, contrary to the CLECs arguments, the FCC was clear that certification must be made 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 at ¶ 599. The FCC stated that a "circuit-specific approach rather than a customer-specific one prevents gaming, so the qualification of one DS1 EEL to a customer does not qualify other DS1 EELs

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59 "Certification" in this context is an attestation that the regulatory requirements spelled out by the FCC in the Triennial Review Order have been satisfied: namely, that the certifier has determined, through reasonably diligent enquiry (not by mere surmise or guesswork), that there are sufficient and true facts to warrant certification on each item spelled out by the FCC in its orders. See Black's Law Dictionary 124, 220 (7th ed. 1999) ("attest"; "certification"; "certify"). As noted above, the contracting parties, both ILEC and CLEC, do owe each other a duty of good faith and fair dealing in the discharge of this contractual obligation. Cf. G.L. c. 106, § 1-201(19) ("Good faith" means honesty in fact in the conduct or transaction concerned).

to that customer." Id. at ¶ 599. Although we interpret the Triennial Review Order as allowing CLECs to certify multiple circuits in a single letter to Verizon, rather than having to submit separate letters for each circuit, the FCC's circuit-by-circuit requirement rules out batch certifications (i.e., submitting a letter certifying compliance generally, without identifying specific circuits). In addition, because the FCC stated that "[t]he eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past," we interpret the Triennial Review Order as requiring re-certification for existing EELs, and, as with new orders, the certification must be circuit specific. Id. at ¶ 589.[60] The eligibility that AT&T claims has already been established (see AT&T Brief at 72), is eligibility under the old safe harbor rules. Because the new service eligibility criteria are significantly different from the requirements under the old rules, and because circuits that qualified under the former rules may not qualify under the new rules, it is only logical that the FCC would require re-certification.

Verizon's proposed language allows Verizon to reprice existing circuits to alternative arrangements if CLECs do not re-certify in writing "for each DS1 circuit or DS1 equivalent within 30 days of the Amendment Effective date" (Verizon Amendment 2, §§ 3.4.2.1, 3.4.2.2). The Triennial Review Order does not establish a re-certification deadline, but we find Verizon's deadline to be reasonable, given that the certification process is simple to

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60 The FCC further stated that pending orders for conversions made before the effective date of the Triennial Review Order would be eligible for EELs pricing under the safe harbor rules up to the effective date of the Triennial Review Order. Triennial Review Order at ¶ 589.

comply with, even for carriers re-certifying large numbers of circuits. We also note that no CLECs proposed an alternative deadline.

b. Audits

Under the Triennial Review Order, if an ILEC questions a CLEC's certification, the ILEC cannot resort to self-help and withhold the facilities; instead, as noted above, the FCC established limited audit rights for ILECs. Triennial Review Order at ¶ 623 n.1900 ("an incumbent LEC that questions the competitor's certification may do so by initiating the audit procedures"). The FCC gave ILECs the right to "obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria." Id. at ¶ 626. The audit must be conducted according to the standards of the American Institute for Certified Public Accountants, and the independent auditor must determine "whether the competitive LEC complied in all material respects with the applicable service eligibility criteria." Id. (footnote omitted). The FCC stated further that:

> To the extent the independent auditor's report 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 . . . [and] must reimburse the incumbent LEC for the cost of the independent auditor.

Id. at ¶ 627. On the other hand, if "the independent auditor's report 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. at ¶ 628. Additionally, while the FCC did not establish detailed recordkeeping requirements for use during audits, the FCC stated that it "expect[s] that requesting carriers will maintain the appropriate documentation to support their certifications." Id. at ¶ 629.

Concerning the parties' disagreement over the term "annual," we agree with Verizon that the FCC contemplated a calendar year. The FCC did not specifically state in the Triennial Review Order whether the annual audit requirement was based on a calendar year or a 12-month period. However, the Department can look for guidance to the FCC's safe harbor auditing requirements, established in the Supplemental Order Clarification. As noted by the FCC in the Triennial Review Order, the annual audit requirement under the previous safe harbors' audit rules was based on a calendar year. Id. at ¶ 622, citing Supplemental Order Clarification at ¶ 31. The FCC stated in the Triennial Review Order that the audit rules that it adopted were "comparable" to those in the Supplemental Order Clarification. Id. Therefore, it is reasonable to conclude that the FCC would use the same time period in the Triennial Review Order. Moreover, we are persuaded by Verizon's arguments that there are ample incentives for Verizon to not abuse its audit rights by conducting one audit at the end of the year and another audit at the start of the next calendar year. Indeed, the FCC stated that in requiring ILECs to reimburse CLECs for their audit costs where the auditor finds compliance in all material respects, that it "expect[s] that this reimbursement requirement will eliminate the potential for abusive or unfounded audits." Id. at ¶ 628.

Verizon's proposed audit language contains a standard for CLEC "compliance in all material respects with the service eligibility criteria applicable to High Capacity EELs" (Verizon Amendment 2, § 3.4.2.7). In cases where the auditor concludes that the CLEC was not in compliance, Verizon's language would require that CLEC to reimburse Verizon for the entire cost of the audit within 30 days after receiving a statement of costs from Verizon (id.). If the CLEC was shown to be in compliance with the service eligibility criteria, then it "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.). In addition, Verizon's language would require CLECs to "maintain records adequate to support its compliance" for a minimum of 18 months following the termination of the service arrangement in question (id.).

Contrary to the CLECs arguments, we find that Verizon's language on the auditors standard of "compliance in all material respects" tracks nearly verbatim the FCC's wording in the Triennial Review Order. Triennial Review Order at ¶ 626. The FCC stated that "the independent auditor's report will conclude whether the competitive LEC complied in all material respects with the applicable service eligibility criteria." Id. (emphasis added). The Department does not need to determine whether the standard is "perfection" (see AT&T Reply Brief at 22). Furthermore, as the FCC noted, "materiality" is an accounting concept, which the independent auditor will have the responsibility to apply.

In addition, we find Verizon's reciprocal provisions concerning reimbursement of audit costs generally to be reasonable. The reimbursement deadlines should not be the same because the circumstances are not the same. Verizon's costs of the audit are quickly and easily verified by the CLEC, simply by obtaining that information from the auditor. On the other hand, a

CLECs' costs must be compiled and then verified by the auditor to ensure their appropriateness. These tasks take time to complete and to expect Verizon to reimburse a CLEC within 30 days of the auditor's report is unrealistic. However, to ensure that a CLEC's reimbursement is not unduly delayed while the auditor verifies the CLEC's costs, we require Verizon to reimburse CLECs within 60 days from the date of the CLEC's submission of costs to the auditor.

As noted above, the FCC did not establish specific recordkeeping requirements but rather stated that "we do expect that requesting carriers will maintain the appropriate documentation to support their certifications." Triennial Review Order at ¶ 629. Looking again to the Supplemental Order Clarification for guidance, the FCC stated its expectation that "requesting carriers will maintain appropriate records . . . to support their local usage certification," but "emphasize[d] that an audit should not impose an undue financial burden on smaller requesting carriers that may not keep extensive records." Supplemental Order Clarification at ¶¶ 31-32. Thus, the FCC found that "in the event of an audit, the incumbent LEC should verify compliance for these carriers using the records that the carriers keep in the normal course of business." Id.

The FCC clearly stated that certification-related record keeping should not place an undue financial and administrative burden on CLECs, including smaller CLECs, but, as the tradeoff for streamlined self-certification, the FCC also made clear that CLECs have the burden of demonstrating their compliance with the service eligibility criteria if an ILEC challenges the certification via an audit. Triennial Review Order at ¶¶ 625-29. Accordingly, the Department finds that Verizon's requirement that CLECs maintain records for at least 18 months after the EEL is terminated is reasonable. CLECs need to maintain records for at least a year after an arrangement is terminated, in order for an ILEC to conduct its annual audit at the end of the year on circuits that were terminated at the start of the year. Under this scenario, an additional six months to complete the audit is reasonable. Therefore, we adopt Verizon's 18 month recordkeeping proposal.

Lastly, Verizon's Amendment allows Verizon to reprice noncompliant facilities if a CLEC does not convert those facilities to wholesale services (Verizon Amendment 2, § 3.4.2.2). This, CCC contends, violates the FCC's determination that the CLEC must convert the noncompliant circuits following an audit finding of noncompliance. See Triennial Review Order at ¶ 627. We disagree. Verizon is simply implementing the FCC's requirement that, in addition to converting noncompliant circuits and reconciling past charges, CLECs "make the correct payments on a going forward basis." Id.

c. Implementation Date for New Rules

In the Triennial Review Order, the FCC "eliminat[ed] the commingling restriction that the [FCC] adopted as part of the temporary constraints in the Supplemental Order Clarification and applied to stand-alone loops and EELs." Triennial Review Order at ¶ 579. In addition, although some conversions were permitted under the safe harbor rules, in the Triennial Review Order the FCC adopted definitive conversion rules. Id. at ¶¶ 586, 590; 47 C.F.R. § 51.316; see also Supplemental Order Clarification at ¶¶ 5, 21-23. Further, as noted above, the FCC adopted new service eligibility rules for high capacity EELs. Triennial Review Order at ¶¶ 590-611; 47 C.F.R. § 51.318.

We agree with Verizon that the FCC's new rules for conversions and commingling constitute a change of law. Because the Triennial Review Order declined to override existing contracts to order automatic implementation of its rules as of a date certain, the date the new rules take effect is the effective date of the Amendment for those carriers with agreements that require negotiation and, if necessary, arbitration to implement changes of law. Triennial Review Order at ¶ 701. However, for those carriers that have "self-executing" agreements that do not require negotiation or arbitration to implement changes of law (see discussion in Section IV, supra), Verizon was obligated to provide conversions, commingling and combinations on October 2, 2003, the effective date of the Triennial Review Order.[61]

d. Charges for Commingling and Conversions

In its proposed amendment, Verizon states that "a nonrecurring charge will apply for each UNE circuit that is part of a commingled arrangement . . . to offset Verizon's costs of implementing and managing commingled arrangements" (Verizon Amendment 2, § 3.4.1.1). In addition, Verizon proposes language which states that "[t]he charges for conversions are as specified in the Pricing Attachment to this Amendment and apply for each circuit converted" (id. at § 3.4.2.4). Verizon also proposes that if a conversion-related "change in circuit ID requires that the affected circuit(s) be retagged, then a retag fee per circuit will apply as

[61] Verizon was also obligated to provide Routine Network Modifications to such CLECs beginning on that date.

specified in the Pricing Attachment" (id. at § 3.4.2.5). Verizon Pricing Attachment lists four commingling-related non-recurring charges and three conversion-related non-recurring charges (id., exh. A at 2).[62] Although Verizon initially proposed rates for these services, Verizon notified the Department and parties that it no longer intended to litigate in this proceeding its newly-proposed rates, including the commingling and conversion charges, because it could not comply at that time with the Department's directive to file a Massachusetts-specific TELRIC cost study (Letter from Bruce P. Beausejour at 2 (Mar. 1, 2005)). Verizon stated that it would submit its cost study and proposed rates for the new charges with its next comprehensive TELRIC case, and that until those rates are approved, Verizon stated that it would not charge CLECs for the services (id.). Because Verizon has withdrawn the charges from review in this proceeding, there is no need to address these rate issues in this proceeding. We will do so at the time that Verizon proposes specific changes in its next UNE rate case.

e. Completion Date of Conversions for Billing Purposes

We agree with Verizon that billing for a conversion should begin after the conversion work is completed. However, the parties have left the Department with an insignificant record on how long conversions take to complete. We expect that the New York Carrier Working Group ("CWG") will address conversion intervals at some time in the near future, but until it

62 The Pricing Attachment includes rates for the following services: Commingling Arrangement - Service Order, Commingling Arrangement – Installation (no prem visit), Commingling Arrangement - Installation (with prem visit), Commingling Arrangement - Manual Intervention Charge; and Conversion - Service Order, Conversion - Installation per circuit, Circuit Retag - per circuit (Verizon Amendment 2, Exh. A at 2).

does, the Department must fashion an interim interval in order to ensure that conversions are performed in an expeditious manner, as required by the FCC. Triennial Review Order at ¶ 588. Currently, under Tariff 17, "[w]hen a CLEC has requested conversion of a special access service to an EEL arrangement, EEL rates will be effective no later than 30 business days following the start of the conversion process." Verizon M.D.T.E. No. 17, Part B, § 13.5.1.3; see also D.T.E. 98-57 Phase 1-B at 21-22 (2001). The Department finds this conversion interval to be a reasonable interim standard. Thus, the Amendment must reflect that new rates for conversions will be effective no later than 30 business days after the CLEC submits its order and certification.

f. Separating or Altering Facilities during Conversions

The CLECs point to 47 C.F.R. § 51.315(b) to support its argument that Verizon may not physically disconnect, separate, change, or alter existing facilities when it performs conversions, unless requested to do so by the CLEC. That rule states that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b). Section 51.315, however, addresses rules for combinations, not conversions, so it is not relevant to this issue. Thus, the FCC does not expressly prohibit an ILEC from making changes to facilities during the conversion process. Because the FCC has not clearly spoken on this subject, we will continue our longstanding practice of allowing Verizon to manage its own network in the manner that it regards most appropriate, so long as Verizon does not abuse that discretion by treating CLECs anti-competitively and "affect[ing] the customer's perception of service quality." Triennial

Review Order at ¶ 586. The Department will not hesitate to take action should that occur. Moreover, Verizon indicates that any physical changes to facilities would be the exception rather than the rule, and without this flexibility, CLEC orders would be delayed.

g. Excluding Conversions from Provisioning Standards

Verizon's proposed Amendment states: "Verizon may exclude its performance in connection with the provisioning of commingled facilities and services from standard provisioning intervals and from performance measures and remedies, if any, contained in the Amended Agreement or elsewhere" (Verizon Amendment 2, § 3.4.1.1). In addition, Verizon Amendment 2, § 3.4.2.6 states "[e]ach [conversion] request will be handled as a project and will be excluded from all ordering and provisioning metrics." It is unclear whether existing performance measures and remedies account for commingling and conversions. It is reasonable for Verizon to exclude them from existing standards, until the CWG and the NYPSC develop specific metrics and performance remedies for these activities or include them in existing metrics for these new tasks.

h. Combining/Commingling UNEs with Section 271 Elements

In its proposed Amendment, Verizon limits the wholesale services that may be commingled with UNEs to "Qualifying Wholesale Services," which it defines as "wholesale services obtained from Verizon under a Verizon access tariff or separate non-251 agreement" (Verizon Amendment 2, § 3.4.1.1). This language excludes elements or facilities obtained under other sources of law, such as § 271, the BA/GTE Merger Conditions, or state law.

Verizon raises a number of arguments in support of its language, but all of them must ultimately succumb to the plain language of the Triennial Review Order.

The FCC states that "[b]y commingling, we mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under § 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services." Triennial Review Order at ¶ 579 (emphasis added). We interpret "any method" to include not only wholesale services obtained under an ILEC's access tariff or through a commercial agreement with the ILEC, but also to include elements or facilities obtained under other applicable law, such as § 271, the Merger Conditions, and state law. Our reading of this provision is supported by the FCC's statement that:

> [T]he commingling restriction puts competitive LECs at an unreasonable competitive disadvantage by forcing them either to operate two functionally equivalent networks – one network dedicated to local services and one dedicated to long distance and other services – or to choose between using UNEs and using more expensive special access services to serve their customers . . . Incumbent LECs place no such restrictions on themselves for providing service to any customers by requiring, for example, two circuits to accommodate telecommunications traffic from a single customer or intermediate connections to network equipment in a collocation space.

Id. at ¶ 581 (footnote omitted).

We agree with the rationale of the Illinois Commerce Commission that preventing CLECs from commingling UNEs with elements obtained under § 271 or other applicable law, in fact, would force CLECs to operate two separate networks, a scenario the FCC clearly stated that it sought to prevent (see CCC Brief at 45-46). By requiring Verizon to commingle UNEs with elements or facilities obtained under other applicable law, the Department is not creating a new obligation, but merely enforcing a § 251 obligation created by the FCC in the Triennial Review Order. Cf. Triennial Review Order at ¶ 581 ("Section 251(c)(3) of the Act grants authority for the Commission to adopt rules to permit the commingling of UNEs and combinations of UNEs with wholesale services."). Nor is the Department, as Verizon claims, requiring it to offer UNE-P under § 271. This would have been the case only if the Department had required Verizon to price the commingled § 271 elements at TELRIC, which, of course, we are not. Verizon may price § 271 elements at market-based rates and nothing in this Order requires otherwise. Accordingly, the Amendment shall permit CLECs to commingle UNEs with elements and facilities obtained under other applicable law. In allowing CLECs to commingle UNEs with non-section 251 elements, we want to be clear that Verizon is under no obligation to provide the non-section 251 element at TELRIC rates.

Additionally, the CLECs object to Verizon's term "Qualifying UNEs" because it would limit UNE commingling to those UNEs and combinations obtained under § 251 and allow Verizon to exclude from commingling delisted UNEs without following the change of law process. Verizon refers to the UNEs that are subject to commingling as "Qualifying UNEs," which it states "shall not include . . . any Interim Rule Facility," and defines "Interim Rule Facilities" as "Mass Market Switching, Other DS0 Switching, DS1 Loops (including DS1 Hybrid Loops), DS3 Loops (including DS3 Hybrid Loops), Dark Fiber Loops, DS1 Dedicated Transport, DS3 Dedicated Transport, and Dark Fiber Transport" (Verizon Amendment 2,

§§ 3.4.1.1, 3.4.1.2.1, 4.7.17). As we found above, moves, adds, or changes to UNE arrangements are not included in the embedded base during the transition period. See Issues 3, 4 and 5, supra. Since commingling would constitute such a change, Verizon's proposal is reasonable and appropriate.

i. Verizon's Conversion Guidelines

Verizon's proposed Amendment 2, § 3.4.2.6 states that "[a]ll requests for conversion will be handled in accordance with Verizon's conversion guidelines." CCC objects to conversions being governed by Verizon's conversion guidelines, which are not mentioned in the Triennial Review Order and which Verizon can change unilaterally at any time. Verizon did not address this issue. Verizon's conversion guidelines, which are posted on its website,[63] are standard procedures for carriers in all Verizon states to follow to place orders for conversions. It is appropriate for Verizon to have standardized, generally-applicable ordering processes for conversions, as it does for its other wholesale services. Therefore, we find that the proposed language referencing the conversion guidelines is reasonable. However, actual application of the conversion guidelines to the CLECs may not be inconsistent with our findings in this Order.

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[63] The website address is: http://www22.verizon.com/wholesale/attachments/log/sa_conv_guideFinal.pdf.

I. 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?

1. Positions of the Parties

a. Verizon

Verizon contends that this proceeding is intended to implement changes in unbundling obligations adopted in the Triennial Review Order and the Triennial Review Remand Order (Verizon Brief at 85). Verizon asserts that the Department should not consider CLEC proposals relating to unbundling obligations that predate the Triennial Review Order, including (among other issues) network interface devices ("NIDs"), line conditioning, and line splitting (id.). Verizon argues that existing agreements already address the non-Triennial Review Order issues raised by CLECs in this arbitration (id.). Verizon argues that existing agreements already contain "standard operational provisions" such as recurring and non-recurring charges, and that Verizon is willing to negotiate appropriate provisions in the event that a particular agreement contains "holes" (id.). Verizon explains that its discussion of the sub-issues presented in Issue 13 is based on the above reasoning (id.).

i. Line Splitting

Verizon acknowledges that the Triennial Review Order required ILECs to continue to provide line-splitting, described by the FCC as the "scenario where one competitive LEC provides narrowband voice service over the low frequency portion of a loop and a second competitive LEC provides xDSL service over the high frequency portion of that same loop" (Verizon Brief at 85). Verizon claims that the FCC merely reaffirmed its pre-existing line splitting requirement, but did not create a new obligation, and, therefore, Verizon asserts, there is no reason to address line splitting in this order (id. at 85-86).

Additionally, Verizon notes that it makes a standard line splitting amendment available to any CLEC that lacks line splitting provisions in its existing contract, and that numerous CLECs across Verizon's region have signed this amendment (id. at 86). Verizon therefore asserts that it is unnecessary to litigate this issue to implement line splitting rights (id.).

ii. Newly-Built FTTP, FTTH, or FTTC Loops

Verizon claims that the FCC found that CLECs are not impaired on a national basis without unbundled access to FTTP loops, which the FCC defined as loops consisting of fiber from the central office to the customer premises, and that incumbent LECS are not required to offer unbundled access to newly deployed fiber loops, also known as "greenfield" loops[64] (Verizon Brief at 86). Verizon further claims that the FCC clarified that this rule also applies to primarily residential multiple dwelling units ("MDUs") (id.). Verizon argues that the FCC also extended its non-impairment finding to "fiber-to-the-curb" loops, defined as "local loop[s] consisting of fiber optic cable connecting to a copper distribution plant that is not more than

64 Loops deployed in so-called "greenfield" markets require entirely new construction of local loops to serve new residential communities. Triennial Review Order at ¶ 227.

500 feet from the customer's premises or, in the case of predominantly residential MDUs, not more than 500 feet from the MDU's [minimum point of entry ('MPOE')]" (id. at 87).

Verizon argues that CCC is wrong to claim that FTTC loops are not properly part of this arbitration (id. at 87 n.96). Verizon contends that its Arbitration Petition and Amendment includes issues relating to the FCC's FTTP rules, and that this issue is therefore properly before the Department (id.). Verizon also argues that the Department specifically included changes arising under the Triennial Review Remand Order in the scope of this proceeding (id.).

Verizon also claims that its Amendment 2 states 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" in cases where the FTTP loop is newly built to serve a new customer (id.). Furthermore, Verizon argues, no CLEC substantively disagrees that this language is consistent with the FCC's rules (id.). Verizon claims that CCC, in its Joint Issues Matrix, argues that the Triennial Review Order relieved Verizon of offering FTTH loops only to mass market customers (id.). Verizon responds that CCC's position is incorrect and references its response to Issue 9 where Verizon defines "Sub-Loop for Multiunit Premises Access" (id.).

In response to CCC's argument that Verizon's definition of FTTC loops eliminates an important limitation in the FCC's definition, Verizon responds that its Amendment 2 is consistent with the FCC's definition and provides that FTTP loops are required, where relevant, to include a "a serving area interface at which the fiber optic cable connects to copper or coaxial distribution facilities that . . . extend to or beyond the multiunit premises' MPOE, provided that all copper or coaxial distribution facilities extending from such serving area interface are not more than 500 feet from the MPOE at the multiunit premises" (Verizon Reply Brief at 36).

iii. Overbuilt FTTP Loops

Verizon acknowledges that ILECs must offer unbundled access to FTTP loops, although the FCC eliminated unbundling obligations for new FTTP loops (Verizon Brief at 87). Verizon argues that the Triennial Review Order requires ILECs to offer unbundled access to FTTP loops only in "fiber loop overbuild situations," defined as situations where the ILEC builds a new FTTP loop to serve a customer whom is currently served by a copper loop and then chooses to retire the existing copper loop (id.). Verizon contends that in these fiber loop overbuild scenarios, the ILEC is only required to unbundle the narrowband portion of the FTTP loop (id.). Verizon claims that the ILEC does not have to unbundle the narrowband portion of the FTTP loop if it keeps the existing copper loop connected to a particular customer (id.).

Additionally, Verizon argues that the FCC determined that ILECs are not required to add TDM capability to existing or new packet networks, and that neither packet switching, dark fiber loops, nor the next-generation capabilities of fiber-based local loops are required to be unbundled (Verizon Reply Brief at 38). Verizon argues that FTTP loops, which are packet-based and contain no TDM capability, are therefore not required to be unbundled to any location in order to serve any type of customer (id.).

iv. Access to Hybrid Loops for the Provision of Broadband Services

Verizon argues that the FCC defines hybrid loops as a combination of copper and fiber optic cable (and associated electronics, such as DLC systems) (Verizon Brief at 88). Verizon claims that 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.). Verizon further claims that ILECs need not provide unbundled access to any equipment used to transmit packetized information over hybrid loops, such as xDSL-capable line cards (id.). Verizon adds that the FCC noted certain DS1 and DS3 services are non-packetized and that in order to provide these services, incumbent LECs typically use "the features, functions, and capabilities of their networks to date" (id. at 89).

Verizon claims that consistent with the Triennial Review Order its Amendment provides that Verizon will provide "the existing time division multiplexing features, functions, and capabilities" of a hybrid loop to a CLEC who requests a hybrid loop for broadband services, but that Verizon will not provide any features, functions, or capabilities used to transmit packetized information (id.). Verizon further notes that it will establish "a complete time division multiplexing transmission path between the main distribution frame in a Verizon wire center to service an end user to the demarcation point at the end user's customer premises" by providing "the existing time division multiplexing features, functions, and capabilities of that hybrid loop" (id., citing Verizon Amendment 2, § 3.2.2).

Verizon insists that AT&T's counter-proposal does not limit Verizon's obligations to those imposed by § 251(c)(3), but that AT&T uses a reference to "other Applicable Law," which Verizon finds impermissible (Verizon Brief at 89). Verizon also argues that AT&T omits the FCC's determination that the unbundling requirement would be limited to existing time division multiplexing features (id.). In addition, Verizon claims that AT&T fails to include governing conditions for UNE use (id.).

Verizon insists that the FCC loop rules apply "across the board" and that CCC and Conversent's claims that the Triennial Review Order only relieved Verizon of offering fiber and hybrid loops to mass market customers is incorrect (id. at 90 n.98; Verizon Reply Brief at 36-37). Verizon claims that the FCC made clear that unbundling rules do not vary depending on the identity of the end-user, even though the FCC classified types of loops as "enterprise or "mass market" (Verizon Reply Brief at 38, citing Triennial Review Order, at ¶¶ 210, 316 n.935).

v. Access to Hybrid Loops for the Provision of Narrowband Services

Verizon claims that the FCC limited ILECs' unbundling obligations to the "features, functions, and capabilities of hybrid loops that are not used to transmit packetized information," and that when a CLEC requests a hybrid loop in order to provide narrowband service, LECs are only required to provide a non-packetized DS0-equivalent transmission path between the central office and customer premises (Verizon Brief at 90). Verizon claims that the FCC limits unbundling obligations for narrowband services to the TDM-based features, functions, and capabilities of hybrid loops (id.). Moreover, Verizon claims that, where the

ILEC has not removed its copper facilities, ILECs may choose to provide a homerun copper loop instead of a TDM-based narrowband pathway over their hybrid loop facilities (id.).

Verizon contends that AT&T's language would require Verizon to provide a copper loop at AT&T's discretion; however, Verizon maintains that the FCC gives ILECs, not CLECs, the option of choosing whether to provide a copper instead of a TDM-based narrowband pathway over a hybrid loop (id. at 91).

Verizon furthermore contends that the Department should reject AT&T's attempt to include state law and § 271 obligations in its definition of "other Applicable Law" because state law and § 271 have nothing to do with the § 251 unbundling obligations at issue in this Arbitration (id.). Verizon also claims that CCC's Amendment similarly omits any reference to § 251 (id.).

Verizon argues that AT&T is trying to expand the FCC's unbundling requirement to give CLECs the right to force ILECs to provision copper loops and to give CLECs access to an entire hybrid loop capable of voice-grade service (Verizon Reply Brief at 40). Verizon argues that the FCC gave ILECs alone the right to decide whether to provision a copper loop or a voice-grade transmission path, and that the FCC determined that CLECs are not entitled to an entire hybrid loop (Verizon Brief at 91).

vi. Retirement of Copper Loops

Verizon states that the Triennial Review Order allows carriers to file an objection to the ILEC's notice of retirement of a copper loop (Verizon Brief at 91, citing Triennial Review Order at ¶ 282). Verizon states that FCC rules also provide that before an ILEC retires any copper loop or subloop that is to be replaced by a FTTH loop, it must comply with any applicable state requirements as well as with federal network disclosure requirements (id. at 92, citing 47 C.F.R. § 51.319(a)(3)(iii)).

Verizon states that it will provide notice of its intent to retire copper loop in a manner consistent with FCC rules, and that CLEC proposals are not in line with FCC rules, and should be rejected (Verizon Brief at 92). For example, Verizon claims that CCC would require CLEC approval prior to copper loop retirement which Verizon argues is barred by FCC regulation (id.). Verizon also claims that AT&T and CCC propose that Verizon provide 180 days notice before retiring a copper facility, which Verizon contends is inconsistent with the FCC's timetable and procedures in 47 C.F.R. § 51.333(b)(ii)(f) (id.). Verizon further argues that AT&T refers to "copper subloops" in its proposed Amendment without taking into account the FCC's holding that its regulations do not apply to "copper feeder plant" (id.). Lastly, Verizon claims that MCI applies state law with no regard for whether that state law may be preempted by federal rules (id.).

Additionally, Verizon argues that the FCC adopted expedited procedures in recognition of the benefit of network modernization. Verizon argues that it is willing to insert the following language into § 3.1 of its Amendment 2: "In retiring a copper loop, Verizon shall comply with any effective and lawful requirements that apply to that copper loop under 47 C.F.R. § 51.319(a)(3)(iii)" (Verizon Reply Brief at 41).

vii. Line Conditioning

Verizon claims that the FCC did not adopt new rules in regards to line conditioning, but instead readopted line and loop conditioning rules set forth in the UNE Remand Order (Verizon Brief at 93). Verizon maintains that because line conditioning is not a new obligation, there is no need to address line conditioning in this arbitration. In response to CCC's argument that line conditioning falls under RNMs, Verizon claims that unlike RNMs, the obligation to perform line conditioning predates the Triennial Review Order and was unchanged by it (Verizon Reply Brief at 42). Verizon claims that it has offered line conditioning terms in its standard contract for years and has offered to negotiate outside of this arbitration with CLECs whose agreements do not include line conditioning terms (Verizon Brief at 93-94).

viii. Packet Switching

Verizon claims that the FCC found that competitors are not impaired without access to packet switching, whether used in conjunction with hybrid loops or otherwise, and that therefore the FCC did not unbundle packet switching as a stand-alone network element (Verizon Brief at 94). Verizon claims that its proposed Amendment clarifies the above by stating that CLECs "shall not be entitled to obtain access to the Packet Switched features, functions, or capabilities of any Hybrid Loop on an unbundled basis" (id.).

Verizon claims that some CLECs have proposed contract language which would grant them access to packet switches for the purpose of providing local switching (id.). Verizon contends that in circumstances where Verizon is, for example, obligated to provide unbundled local switching and is using a packet switch to provide local switching functionality, CCC's Amendment would obligate Verizon to provide unbundled access to the packet switch (id.). Verizon also claims that AT&T's Amendment defines Local Circuit Switching as including access to packet switches (id.).

Verizon asserts that the CLECs' arguments are precluded by federal law (id. at 95). Verizon contends that the FCC has repeatedly held that packet switching does not need to be unbundled (id.). Verizon maintains that in the Local Competition Order, the FCC denied the requests of AT&T to unbundle incumbent LECs' packet switches and, in the UNE Remand Order, the FCC again determined that, as a general matter, it would not order unbundling of packet switching functionality with one exception, which the FCC later eliminated as unnecessary (id.). Verizon further claims the Triennial Review Order confirms that any order that would unbundle packet switching would be in violation of federal law because in that Order the FCC again declined to unbundle packet switching as a stand-alone network element, finding that competitors are not impaired without access to packet switching (id.). Verizon claims that state commissions have no authority to require unbundling of an element when the FCC has found no impairment, and that any state law requiring unbundling of packet switching would be preempted (id.).

Finally, Verizon asserts that the FCC has rejected CLECs' argument that packet switching should be unbundled when Verizon uses a packet switch to provide circuit switching functionality and held 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 the unbundling requirement" (id. at 95-96).

ix. Network Interface Devices

Verizon claims that NIDs, defined by the FCC as cross-connect devices "used to connect loop facilities to inside wiring" were included in the set of UNEs in 1996 (Verizon Brief at 97). Verizon claims that 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" (id.). Verizon claims that in the Triennial Review Order, the FCC reaffirmed but did not change its previous rules concerning NIDs when it stated 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" (id.). Additionally, Verizon claims that both its Massachusetts model interconnection agreement and M.D.T.E. Tariff 17 already include terms and conditions for access to the NID, and because the Triennial Review Order did not change the NID requirement there is no reason to address NID requirements in this proceeding (id.). Verizon also claims that AT&T "does not cite any problems with its existing contract language relating to NID" (Verizon Reply Brief at 43).

x. Line Sharing

Verizon claims that in the Triennial Review Order, the FCC determined that CLECs are not impaired without unbundled access to the high frequency portion of the loop ("HFPL"), and eliminated an ILEC's obligation to provide access to line sharing as a UNE

(Verizon Brief at 98). Verizon also claims that the FCC established a transition plan for existing line sharing arrangements and for CLECs seeking to establish new line sharing arrangements (id.). Verizon claims that the FCC reaffirmed that, where line sharing is still required, CLECs may obtain unbundled access to the HFPL only where the ILEC is providing analog circuit-switched voiceband services on the loop (id.).

Verizon claims that it is required to comply with the FCC's transition plan for line sharing arrangements without an amendment, and regardless of any change of law provisions in its existing agreements (id.). Additionally, Verizon claims that there are no grounds to incorporate the FCC's line sharing transition plan into Massachusetts interconnection agreements because the transition plan was adopted pursuant to § 201, not § 251 (id.). Verizon claims that 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 adopted under § 201" (id. at 98–99). Verizon claims that it has reached several commercial line sharing agreements outside of the §§ 251 and 252 process, under which Verizon will provide CLECs with line sharing in Massachusetts (id. at 99).

Verizon claims that it is "unnecessary and inappropriate" to amend agreements pursuant to § 252 in order to establish a temporary grandfathering period that the FCC adopted under its § 201 authority, especially since there has been no dispute about Verizon's compliance with the FCC's line sharing transition plan (Verizon Reply Brief at 44). Verizon asserts that CCG's proposed line sharing provisions are "intentionally ambiguous and misleading, if not directly contrary to federal law" (Verizon Brief at 99). Verizon claims CCG provides that Verizon shall provision new line sharing arrangements under the Agreement pursuant to § 251(c)(3), but, Verizon claims, it has no legal obligation to provide new line sharing arrangements under § 251 (id.). CCG would also require Verizon to provision line sharing under § 271 of the Act, which Verizon argues does not require it to provide line sharing to CLECs, and in any case, has no place in the interconnection agreements (id.). Verizon claims that the Department has acknowledged that it has no authority to consider a dispute over the scope of § 271 (id.).

b. AT&T

i. Line Splitting

AT&T proposes that the parties' interconnection agreement be amended to address changes resulting from the Triennial Review Order with respect to line sharing, line splitting, line conditioning, and the maintenance, repair, and testing of copper loops and subloops (AT&T Brief at 42). AT&T contends that its proposed language at § 3.3 "appropriately implements" the Triennial Review Order requirements, especially the line splitting and line conditioning requirements of 47 C.F.R. § 51.319(a)(1)(ii), while Verizon's proposed amendments include no comparable provisions (id.). More specifically, AT&T states that its Amendment contains procedures consistent with the rule that requires Verizon "to use a splitter collocated at the central office to enable AT&T to engage in line splitting" and "to condition a copper loop at no cost to AT&T where AT&T seeks access to ensure that the copper loop is suitable for providing digital subscriber line services" (id.). AT&T also contends that its

Amendment delineates a procedure for Verizon's maintenance, repair, and testing in connection with line splitting (id.).

ii. Newly-Built and Overbuilt FTTP, FTTH or FTTC Loop Changes

AT&T argues that the Department should adopt AT&T's language at §§ 3.2.2 through 3.2.2.9, which it claims properly implement the FCC's rules "regarding Verizon's obligation to provide access to a narrowband transmission path in newly built FTTH and certain overbuild FTTH situations" (AT&T Brief at 42). AT&T describes the primary disagreement over its proposed language and that of Verizon as concerning AT&T's use of the acronym "FTTH" and Verizon's use of the acronym "FTTP" (id.). AT&T suggests that its proposed language, using the acronym FTTH, should be adopted because it is consistent with the use of the term "fiber-to-the-home," or FTTH, in FCC rules (id. at 42-43).

AT&T concedes that Verizon is not required to provide nondiscriminatory access to a FTTH loop on a unbundled basis with regard to new builds, as the FCC has noted that entry barriers appear to be mostly the same for both incumbent and competitive carriers with respect to newly built FTTH (id. at 43). However, AT&T contends that, for overbuilds, "where Verizon presently has facilities in place to residential subdivisions but retires the copper facilities," Verizon is obligated to provide AT&T with a 64 kbps transmission path capable of voice grade service (id.). AT&T claims that Verizon's approach, which seeks to limit its unbundling obligations by defining this fiber deployment as "fiber-to-the premises" or FTTP, rather than FTTH as the FCC has defined it, violates federal law (id.).

iii. Access to Hybrid Loops for the Provision of Narrowband and Broadband Services

AT&T argues that CLECs are entitled to access an entire unbundled loop regardless of the telecommunications service that a carrier wishes to provide, and "regardless of the underlying loop architecture Verizon uses to provide the loop functionality" (AT&T Brief at 43). AT&T contends that nothing in an NGDLC architecture "changes the fact that the connection from the customer's premises to the central office is still a 'loop'," and AT&T proposes that the electronics associated with the next-generation loop architecture should also be considered part of the loop (id. at 44).

AT&T argues that remote terminal collocation is not a substitute for access to an entire loop (id.). AT&T asserts that many physical limitations preclude physical collocation at the remote terminal and that the economies and costs are "clearly prohibitive" for collocation, because remote terminals each serve a few hundred customers, compared with the thousands that can be served by central office collocation (id.). AT&T posits that remote deployment of transmission-related electronics by CLECs is not likely to occur in most areas and states that its proposed language, at § 3.2.3, is intended to ensure that Verizon cannot obstruct AT&T's unbundled access to all of the TDM features and capabilities of Verizon's network assets "under the guise of a network upgrade or by adding packet capabilities in a digital loop carrier that otherwise serves legacy, TDM loops" (id.).

iv. Retirement of Copper Loops

AT&T acknowledges that the Triennial Review Order permits the retirement of copper loops or subloops that have been replaced with fiber (except with respect to FTTH loops) under certain circumstances, but also maintains that it obligates Verizon "to follow certain network modification and disclosure requirements when retiring copper loops and subloops" (AT&T Brief at 44-45). AT&T claims that Verizon's proposed amendment inadequately addresses issues regarding the retirement of copper loops, and should be rejected, whereas its proposed Amendment addresses these issues in a manner consistent with the Triennial Review Order (id. at 45, citing AT&T TRO Amendment, § 3.2.2).

v. Line Conditioning

AT&T urges the Department to adopt AT&T's proposed amendment language to handle changes arising from the Triennial Review Order with respect to line conditioning because these provisions "properly implement the FCC's rule regarding Verizon's obligation to perform line conditioning" (AT&T Brief at 45, citing AT&T TRO Amendment, §§ 2.23, 3.2.11). Specifically, AT&T argues that its proposed language requires Verizon to condition a copper loop or subloop at no cost, "to ensure that the copper loop or subloop is suitable for providing digital subscriber line services," including those provided over the high frequency portion of the loop, regardless of whether Verizon offers advanced services to the end user on that copper loop or copper subloop (id.). AT&T contends that Verizon's proposed contract language fails to spell out its obligations to perform line conditioning (id.).

Moreover, AT&T argues that the FCC defines line conditioning in its rules as "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" (id. at 45-46). AT&T states that the FCC concluded in the Triennial Review Order that Verizon is required to provide access to "xDSL-capable stand alone copper loops because competitive carriers are impaired without such loops" (id. at 46). AT&T explains that line conditioning is necessary to provide xDSL-capable loops because "certain devices added to the local loop in order to facilitate the provision of voice services disrupt the capability of loop in the provision of xDSL services" (id.).

AT&T notes that the FCC rejected Verizon's argument that it should be exempt from performing line conditioning on the grounds that it would otherwise be providing competitive carriers with superior quality access, stating that "line conditioning and other routine network modifications were similar to the same modifications that Verizon makes to its network to serve its own customers" (id.). AT&T contends that the FCC rules clearly specify that Verizon may not assess a specific charge beyond the TELRIC-based nonrecurring and recurring charges that CLECs pay for an xDSL capable unbundled loop (id. at 46-47). AT&T asserts that Verizon's proposal is not authorized by law because it would require CLECs to pay for line conditioning, in addition to the non-recurring rates that CLECs already pay for an xDSL capable loop, and should therefore be rejected (id. at 47).

vi. Packet Switching

AT&T states that it does not dispute that Verizon is no longer obligated to provide AT&T with packet switching functionality as a UNE under the terms of the Triennial Review Order (AT&T Brief at 47). AT&T contends that the main disagreement instead involves the situation in which AT&T's UNE-P customers are served by a Verizon switch that has both packet switching and circuit switching capability (id.). AT&T argues that Verizon should be obligated to provide AT&T with circuit switching capability "to serve its UNE-P customers during the twelve-month transition period established in the TRRO until such time as Verizon is no longer required to provide UNE-P" (id.).

AT&T contends that the CLECs' customers must be protected from the disruption caused by Verizon's unilateral efforts to disconnect existing services, and that the CLECs, in order to "prepare their own ordering and other back-office systems to process orders for alternative facilities," must also be able to rely on the orderly transition periods established by the FCC in the Triennial Review Remand Order (id. at 47-48). AT&T, therefore, argues that the Amendment should include language stipulating that Verizon must provide AT&T with twelve months notice "for any switch change that would eliminate the availability of circuit switching prior to March 11, 2006," and requiring Verizon to continue to provide local circuit switching functionality to AT&T for its UNE-P customers, regardless of its decision to deploy packet switching, until Verizon is no longer required to provide mass market switching as a UNE (id. at 48).

AT&T claims that it addresses this issue in several sections of its proposed Amendment, and that the language in these sections establish that although Verizon is not required to provide packet switching, it is obligated to provide local circuit switching when it uses a switch that is capable of both (id.). AT&T states that § 3.5.4 requires Verizon to provide unbundled local circuit switching, while § 2.26 defines circuit switching as a function provided by a circuit switch or a packet switch (id.). AT&T explains that its definition of packet switch recognizes that it may be capable of both "packet switching" and "local circuit switching" (id.).

vii. Network Interface Device

AT&T argues that the NID and subloop unbundling rules allow CLECs access to a full loop including the NID if required, or to the NID on a stand-alone basis (AT&T Brief at 49). AT&T states that its proposed Amendment details Verizon's obligation "to provide access to NIDs and to provide the NID functionality with unbundled local loops ordered by AT&T" (id.).

viii. Line Sharing

AT&T argues that while the Triennial Review Order eliminates Verizon's obligation to provide line-sharing as a UNE under federal law over time, it also requires Verizon to "continue existing line-sharing arrangements for customer locations where AT&T began providing xDSL service using line sharing prior to October 2, 2003" (AT&T Brief at 49). AT&T notes that this requirement is specified in § 3.2.9 of its updated Amendment (id.).

c. CCC

i. Line Splitting

CCC takes no position on line splitting (CCC Brief at 49).

ii. Newly-Built and Overbuilt FTTP, FTTH, or FTTC Loops and Access to Hybrid Loops for the Provision of Narrowband and Broadband Services

As an initial matter, CCC argues that the FCC relieved Verizon of the obligation to unbundle FTTH, FTTC, and hybrid loops for the mass market only, but that Verizon is still obligated to unbundle FTTH, FTTC, and hybrid loops for the enterprise market (CCC Brief at 49-50). CCC claims that Verizon recognizes that the FTTH, FTTC, and hybrid loop rules apply only to the mass market, because Verizon urged the FCC to distinguish between the mass markets and enterprise markets in comments submitted in the Triennial Review Remand Order proceeding (id. at 53). CCC contends that the Department should define the mass market and enterprise market so that the FCC's loop unbundling rules can be applied only to loops being used to serve mass market customers (id. at 49-50, 52).

CCC claims that the FCC's FTTH rules were not intended to exclude enterprise customers, although the rules have not expressly stated this (id. at 50). CCC claims that these rules were meant to give ILECs an incentive to construct new fiber loops to serve mass market customers, where it was feared that unbundling would dissuade such deployments (id. at 50, 52). CCC contends that the FCC found that "removing incumbent LEC unbundling obligations on FTTH loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market" (id. at 50). CCC claims that the FCC found that no additional investment is needed to give ILECs an incentive to deploy broadband-capable loops to enterprise customers, and that broadband unbundling relief is not applicable to the enterprise market (id. at 51). CCC argues that the FCC explained the application of its hybrid loop unbundling rules by stating that "we stress that the line drawing in which we engage does not eliminate the existing rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing [TDM-based services]," which are generally provided to enterprise customers rather than mass market customers (id., citing Triennial Review Order at ¶ 294). CCC also claims that if FTTH and hybrid loop unbundling relief applied to every fiber loop, "the FCC's decision in the TRO to preserve dark fiber loops as a UNE would be nonsensical" (CCC Reply Brief at 28).

Although the FCC stated that "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," CCC contends that the FCC's intent "was to make clear that a large corporation would not be treated as an enterprise customer where it ordered services typical of a mass market customer, and a very small business that ordered services typical of a large enterprise customer would not be treated as a mass market customer" (id. at 29, citing Triennial Review Order at ¶ 210). For this reason, CCC claims that its proposal defines the mass market by referring to"the capacity of telecommunications facilities at the location in question, and not the size of the customer's overall business" (id.).

CCC claims although the FCC extended FTTH unbundling relief to MDUs, the FTTH rules only apply to MDUs that are "predominantly residential" (CCC Brief at 51). CCC claims that if all loops were governed identically, then the FCC's MDU Recon Order[65] would have been unnecessary (id. at 52). CCC claims that Verizon's proposed Amendment recognizes that FTTH and FTTC loops to MDUs are only eligible for unbundling relief if the MDU is "predominantely residential," and that it therefore makes no sense for Verizon to contend that all enterprise FTTP loops are eligible for unbundling relief (id. at 51). CCC claims that while the FCC gives no precise definition of "mass market," it provides guidance in the Triennial Review Order and UNE Remand Order (id. at 53). CCC claims that the FCC's "four-line carve-out" rule has served as a proxy of the "demarcation point" between the enterprise and mass markets (id. at 54). CCC accordingly defines a "mass market customer" as an end user who either is a residential customer or a business customer served by facilities with an aggregate transmission capacity (regardless of the technology employed) of less than four DSOs (id.).

CCC claims that the Department will need to establish a definition for "primarily residential MDU" in addition to defining mass market customers (id.). CCC defines a "predominantly residential MDU" as "an apartment building, condominium building, cooperative or planned unit development that allocates more than ninety percent of its total square footage to residences" (id.).

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65 In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, FCC 04-191 (rel. Aug. 9, 2004) ("MDU Recon Order").

CCC argues that Verizon refers to FTTH and FTTC collectively as "fiber to the premises" loops ("FTTP"), a term which is not used by the FCC (id. at 55). CCC claims that, while the unbundling rules for FTTH and FTTC loops are similar, they should be defined separately (id.). CCC claims that Verizon's references to "serving" wire centers in its proposed FTTP definition are ambiguous and should be deleted, because there may be more than one wire center that "serves" a premises (id.).

CCC states that it generally agrees with Verizon's proposal, which states that Verizon "may decline requests to provision an overbuild FTTH loop where it offers the alternative of nondiscriminatory access on an unbundled basis to a transmission path capable of providing DS0 voice grade service to the customer's premises" (id. at 56). CCC states that its proposal specifies that this path must support at least 64 Kbps of transmission, as specified in the FCC's rule (id.). CCC also states that it includes a rate capped at the rate applicable to a DS0 UNE loop to the same premises, while Verizon's proposal does not (id.). CCC further states that its proposal gives Verizon the option, but not the requirement, to continue to offer the unbundled copper loop to CLECs instead of offering the voice grade channel (id.).

CCC disagrees with Verizon's proposed term to provide a voice grade channel "only to the extent required by 47 U.S.C.§ 251(c)(3) and 47 C.F.R. Part 51," because this term inappropriately excludes Verizon's unbundling obligations under other sources of applicable law, such as § 271 and the Bell Atlantic/GTE Merger Conditions (id.). CCC also disagrees with Verizon's proposed language that would prohibit CLECs from obtaining "access to an [FTTH Loop] on an unbundled basis where Verizon has deployed such a Loop to the customer premises of an end user that previously was not served by any Verizon Loop other than an FTTP Loop" on the grounds that such a loop would not be an overbuild, but a new build (id. at 56-57).

CCC argues that FTTC loops should be subject to the same requirements as FTTH loops (id. at 57). CCC claims that Verizon excludes an important part of the FCC's definition, which states that fiber optic cable in a FTTC loop "must connect to a copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premises" (id. at 56-57). CCC contends that the FCC states that this part of the definition ensures that unbundling relief is targeted to FTTC deployments designed to bring more advanced services capability to all end users (rather than those with less than 500 feet or less of copper) and to an entire geographic area (rather than where there may be an existing loop with 500 or less feet of copper distribution) (id. at 58).

CCC claims that Verizon's Amendment does not state that Verizon will provision TDM features, functions, and capabilities of hybrid loops in a "nondiscriminatory manner" as required by the federal rules (id. at 59). CCC claims that Verizon's proposed Amendment contains language drafted prior to the Triennial Review Remand Order, relieving Verizon of unbundling obligations for DS1 or DS3 loops unless the FCC readopted rules for those loops after September 13, 2004 (id.). CCC claims that the FCC readopted those rules, and therefore Verizon's language should be stricken (id.). CCC claims that Verizon's proposal should remove unnecessary language that would limit Verizon's obligation to provide TDM access only to the extent required by federal law, because Verizon has unbundling obligations that arise under other sources of applicable law (id.).

iii. Retirement of Copper Loops

CCC argues that additional terms are needed to implement the FCC's loop retirement rules because the Triennial Review Order recognized that state commissions may impose additional requirements on the retirement of copper loops (CCC Brief at 60). CCC contends that the Triennial Review Order "explicitly required ILECs to comply with any additional state rules, thus leaving the door open for states to impose additional rules for copper retirement" (CCC Reply Brief at 32). CCC states that "[w]hen federal law specifically demands compliance with state requirements, it obviously has not preempted them" (id.).

CCC argues that adequate notice must be given before any copper loops or subloops are retired (CCC Brief at 60). CCC also claims that its proposed Amendment includes safeguards for end user customers by requiring that Verizon provide six months' notice when Verizon seeks to retire a copper loop that currently is being used by a CLEC to serve a customer (id.; CCC Reply Brief at 33). CCC asserts that this would give a CLEC sufficient time to transition to an alternative loop arrangement (CCC Reply Brief at 33). CCC claims that its notice provision is reasonable because the Triennial Review Remand Order determined that CLECs "should be afforded 12-18 months to transition DS1, DS3, and dark fiber loops to alternative arrangements" (id.). In addition, CCC claims that CLECs need advance notice "even where they are not using a copper loop" because their marketing and operations teams need to be aware of the impending loss of copper loop availability before such availability is promised to prospective customers (id.).

CCC further maintains that the new notice requirement proposed by CCC is limited to copper loops already in use by a CLEC to provide service to an end user customer (id. at 32). CCC claims that, under its proposal, Verizon would be required to continue providing a copper loop to a CLEC if the CLEC is providing service to a customer over the loop, if there is no alternate Verizon facility to which the CLEC "can continue to offer its existing services at existing rates and terms," and if terminating the CLEC's access would serve no public interest (id. at 32-33). CCC claims that its proposal does not conflict with state and federal policy in favor of new broadband facilities deployment (id. at 33).

iv. Line Conditioning

CCC disagrees with Verizon's claim that line conditioning should not be included in this proceeding because it predates the Triennial Review Order (CCC Brief at 61). CCC claims that line conditioning is a type of RNM, which both parties agree is within the scope of this proceeding (id.).

v. Packet Switching

CCC argues that the Amendment should reflect that the provisioning of local switching should be technology neutral, and that Verizon is not permitted to evade its obligation to provide access to local switching when it replaces its circuit switches with packet switches and uses the packet switches for local switching functionality (CCC Brief at 61-62). Also, CCC claims that the FCC "declined to single out specific equipment technologies when defining packet switching" (CCC Reply Brief at 38). CCC claims that the FCC defines local circuit switching as "the function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks" (id. at 34). CCC asserts that under this definition, Verizon's packet switches are performing a local circuit switching function when they replace a traditional TDM-based switch (id.).

vi. Line Sharing

CCC argues that the ICAs should be amended to reflect Verizon's obligation to provide certain grandfathered line sharing arrangements, including those ordered between October 2, 2003 and October 1, 2004 as well as those ordered prior to October 2, 2003, at existing rates, "for so long as a CLEC has not ceased providing xDSL service to that end user customer at the same location over that loop or subloop" (CCC Brief at 62).

d. CCG

CCG argues that the parties' interconnection agreements should be amended to reflect changes to the unbundling regime arising under the Triennial Review Order that were not vacated by USTA II, or modified by the FCC in the Triennial Review Remand Order or any other order (CCG Brief at 31). CCG argues that the Amendment should "expressly incorporate the requirements" of the Triennial Review Order and the FCC's rules regarding the elements in this issue (id.).

i. Line Splitting

CCG argues that its proposal incorporates federal rules by including language to enable CLECs to engage in line splitting using a splitter collocated in a central office, to permit line splitting regardless of whether the voice services carrier provides its own switching or obtains local circuit switching as a UNE, and to perform necessary RNMs (CCG Reply Brief at 30). CCG's proposed Amendment also provides that it may avail itself of rights under "Applicable Law," should the FCC issue further orders regarding line sharing or should the Department issue its own line sharing rules (id. at 31). CCG claims that although there are issues addressed in this proceeding that are not new obligations, they should nevertheless be included in contract language to "avoid any doubt as to the nature and extent of the parties' obligations" (id.).

ii. Newly-Built FTTP, FTTH, FTTC Loops and Overbuilt FTTP, FTTH, FTTC Loops

CCG disagrees with Verizon's proposal to use the term FTTP, a term not used by the FCC, in place of the FCC's term, FTTH (CCG Reply Brief at 32). CCG argues that the loops at issue in the Triennial Review Order and subsequent orders are "FTTH" loops, and that Verizon should be required to adhere to the FCC's terminology (id.).

CCG contends that the Amendment should reflect that Verizon is not required to provide access to an FTTH loop that is deployed to a premise that previously has not been served by any loop facility, "subject to a change of law provision in the Agreement" (id.). CCG argues that the Department should not allow Verizon "to preemptively prohibit competitive carriers from utilizing any applicable law other than § 251(c)(3) to maintain continued access to FTTH loops" (id.).

iii. Access to Hybrid Loops for the Provision of Broadband Services and Narrowband Services

CCG states that its provision would require Verizon to provide access to hybrid loops for provisioning broadband and narrowband services to the extent required by 47 U.S.C. § 251(c)(3), 47 C.F.R. Part 51, or other applicable law (CCG Reply Brief at 33-34). CCG notes that Verizon disagrees with the inclusion of "Applicable Law," because "it expands the scope of Verizon's unbundling obligation of hybrid loops for broadband and narrowband services" (id.). CCG argues that Verizon is incorrect, because there are numerous sources of unbundling obligations, including, but not limited to, § 251, § 271, FCC rules, and state law (id.).

CCG agrees with AT&T that "electronics associated with the next-generation loop architecture should be considered part of the loop" (id.). CCG argues that nothing in its proposal is contrary to federal law, and therefore the Department should reject Verizon's objection (id.).

iv. Retirement of Copper Loops

CCG states that Verizon disagrees with the CLECs' proposal for 180 days notice on the grounds that 180 days notice is inconsistent with the FCC's rules (CCG Reply Brief at 35). CCG contends that although the FCC's rules provide that a notice of retirement be deemed approved 90 days after the FCC issues a Public Notice, the FCC's 90-day approval window does not encompass the entire notice period (id.). CCG maintains that 180 days is a reasonable amount of time considering the changes that CLECs must make to accommodate Verizon's copper loop or subloop replacement (id.). CCG responds to Verizon's objections to CCG's and AT&T's reference to copper subloops, by stating that the FCC uses the same term (id.). CCG contends that Verizon is "attempting to redefine FCC-established terms to its benefit" (id.).

v. Line Conditioning

CCG argues that its definition of line conditioning in its proposed Amendment is the same as in 47 C.F.R. § 51.319(a)(1)(iii)(A) (CCG Reply Brief at 36). CCG claims that Verizon may not assess charges greater than what the CLEC must pay for the unbundled loop, because line conditioning is part of the underlying loop (id.). CCG claims that Verizon must be prohibited from assessing non-TELRIC line conditioning charges "in violation of the FCC's rule that Verizon 'shall recover the costs of line conditioning . . . in accordance with the Commission's forward looking pricing principles'" (id.). CCG claims that the Department should address line conditioning in the Amendment in order to avoid any "back-door" attempts by Verizon to assess non-TELRIC rates for line conditioning (id.).

vi. Packet Switching

CCG acknowledges that the FCC found that CLECs are not impaired without access to packet switching (CCG Reply Brief at 36). However, in situations where Verizon switches have both packet and circuit switching capability, CCG claims that Verizon is obligated to provide access to the circuit switching functionality performed by a packet switch (id. at 37). CCG disagrees with Verizon's claim that packet switching does not need to be unbundled (id.). CCG argues that when the FCC declined to require unbundling for packet switching, it did so because packet switching is used in the delivery of broadband (id.). CCG contends that

Verizon cannot use the Triennial Review Order's analysis of broadband services to "bootstrap" the elimination of unbundling for voice services (id. at 38). CCG claims that the FCC broadly defined local switching to include various features, functions, and capabilities of the switch, which CCG claims proves that the underlying technology employed when performing local switching is irrelevant, and that therefore, Verizon must provide UNEs for voice circuits regardless of whether the underlying switch is circuit- or packet-based (id.).

vii. Network Interface Device

CCG argues that in the Triennial Review Order, the FCC determined that CLECs were impaired without access to a stand-alone unbundled NID, NID functionality as part of a subloop or end-to-end loop, or NIDs where necessary to access the inside wire subloop (CCG Reply Brief at 39). CCG urges that Verizon's NID obligations should be established in this Amendment and that CLECs should not have to look to Verizon's tariff, which can be altered to "subvert the change in law procedures" (id.). CCG further argues that CLECs should not have to look to Verizon's standard agreement "which many CLECs have not adopted without modification" (id.).

viii. Line Sharing

CCG claims that line sharing should remain a part of the Amendment because Verizon's obligations under this Agreement are not limited to § 251, but are governed by other sources of applicable law including § 271 (CCG Reply Brief at 40). CCG contends that Verizon must continue to provide line sharing under checklist item 4 of § 271 (id.).

CCG claims that § 271 imposes different obligations on ILECs who are also BOCs operating under § 271 authority, as is the case with Verizon (id.). CCG cites to the Triennial Review Order at ¶ 655, which states that "BOC obligations under § 271 are not necessarily relieved based on any determination we make under the § 251 unbundling analysis" (id.). CCG claims that the FCC's three-year phase out for line sharing does not apply to BOCs like Verizon, which have an obligation to provide access to line sharing under § 271 (id. at 40-41).

e. MCI

MCI claims that it has proposed edits to Verizon's proposed Amendment designed to ensure that the language in the amendment tracks the FCC's rules (MCI Brief at 16).

f. Conversent

Conversent argues that the FCC only granted unbundling relief for FTTH and FTTC loops serving mass market residential customers (Conversent Brief at 22). Conversent contends that Verizon's definition of the term "FTTP" potentially would extend unbundling relief to all customer locations, a result that is contrary to the letter and the intent of the FCC's rules (id.). Conversent argues that extending unbundling relief to the small business market would harm a vitally important segment of the economy (id.).

3. Analysis and Findings

a. Line Splitting

The FCC defines a "line splitting" arrangement as one where the first CLEC provides xDSL service to a customer over the high frequency portion of the loop and a second CLEC provides voice service to the same customer over the low frequency portion of the loop.

Triennial Review Order at ¶ 251. Parties differ on whether the Triennial Review Order changed the FCC's line splitting rules or merely reaffirmed them.

The Triennial Review Order states, "[w]e reaffirm those requirements but, for purposes of clarity and ensuring regulatory certainty, we find that it is appropriate to adopt line splitting-specific rules." Id.. However, when discussing the line-splitting specific rules, the FCC noted that it was merely restating requirements from an earlier Order. Id. at ¶ 252. For example, when discussing the requirement that the LEC make necessary network modifications to facilitate line splitting, the FCC noted that "[w]e do not anticipate that the incumbent LECs will have any difficulty implementing such an obligation because the Commission required as much from them in its Line Sharing Reconsideration Order." Id. Although the FCC may have grouped the rules under a new heading in the Triennial Review Order, the rules themselves pre-date the Triennial Review Order.

The purpose of this Amendment is to reflect those rights and obligations which have changed as a result of the Triennial Review Order and the Triennial Review Remand Order. Because the line splitting rules in the Triennial Review Order do not represent a change in the parties' obligations, but rather a restatement of them, the Amendment shall not contain any terms or conditions related to line splitting.

b. Newly-Built FTTP, FTTH, FTTC Loops and Overbuilt FTTP, FTTH, FTTC Loops

Parties disagree whether the FCC has granted unbundling relief for FTTP, FTTH, and FTTC loops used to provide service to all end user customers, or just to mass market customers. If the FCC granted unbundling relief only for loops used to serve mass market customers, Verizon may be required to provide unbundled access to FTTP, FTTH, or FTTC loops used to serve enterprise customers, and the Department would be required to define the two customer classes in order to implement the FCC's rules.

In addition, parties disagree over the use of the term FTTP, with CLECs arguing that Verizon may be seeking to limit its unbundling obligations by referring to FTTC and FTTH as "FTTP," a term which is not used by the FCC and does not appear in the federal rules. Verizon indicates that it employs the term FTTP "for the sake of simplicity," and that it defines an FTTP loop as any fiber loop granted unbundling relief (Verizon Brief at 57).

As to whether FTTP, FTTH, or FTTC unbundling relief extends to the mass market or the enterprise market or both, the Department begins with a review of the relevant rules. The rules provide that an ILEC is not required to unbundle an FTTH or FTTC loop when the ILEC deploys the loop to a customer's premises that has not previously been served by any loop facility, (i.e., a "new build"). 47 C.F.R. § 51.319(a)(3)(ii). The ILEC also is not required to unbundle an FTTH or FTTC loop when the ILEC deploys the loop parallel to, or in replacement of, an existing copper loop, (i.e., an "overbuild"), so long as the ILEC continues to provide access to the copper loop or a voice grade transmission path on the FTTC or FTTH loop. 47 C.F.R. § 51.319(a)(3)(iii).

The FCC defines FTTH as follows:

> A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, serving an end-user's customer premises or, in the case of predominantly residential multiple dwelling units (MDUs), a fiber optic cable, whether dark or lit, that extends to the multiunit premises' minimum point of entry (MPOE).

47 C.F.R. § 51.319(a)(3)(i)(A) (emphasis added). The FCC defines FTTC as follows:

> A fiber-to-the-curb loop is a local loop 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. The fiber optic cable in the fiber-to-the-curb loop must connect to a copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premises.

47 C.F.R. § 51.319(a)(3)(i)(B) (emphasis added).

The definitions of FTTH and FTTC both refer to "customer premises," without limiting the customer premise to a residential unit. Similarly, the rule on new builds refers to "an end user's customer premises that previously has not been served by any loop facility," 47 C.F.R. § 51.319(a)(3)(ii), and the rule on overbuilds refers to "the particular customer premises," 47 C.F.R. § 51.319(a)(3)(iii)(A), neither of which make any reference to whether the premises in question is residential. In fact, the FCC substituted previous references to "residential units" with the current term, "customer premises." In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Errata, FCC 04-248, at ¶ 11 (Oct. 29, 2004); In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Errata, FCC 03-227, at ¶¶ 37, 38 (Sept. 17, 2003). Moreover, the fact that the FCC retained the term FTTH, rather than FTTP, does not evidence any intent to limit the scope of its unbundling rule to residences, because the FCC already clarified that the terms are equivalent. See, e.g., Triennial Review Order at ¶ 275 n.811 ("By FTTH loop, we mean a loop consisting entirely of fiber optic cable between the main distribution frame (or its equivalent) and the demarcation point at the customers' premises."). The Department therefore finds nothing in the rules linking unbundling relief to a particular customer class.

CLECs argue that the FCC's intent to limit the unbundling relief to loops used to serve mass market customers can be found in the context of the relevant orders. For example, CCC argues that the FCC's discussion of FTTH and hybrid loops occurs under the heading "Mass Market Loops" (CCC Brief at 50). Although CCC is correct that the FCC included its discussion of FTTH loops under the heading "Mass Market Loops," the FCC emphasized elsewhere in the Triennial Review Order that while the FCC "adopt[s] 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." Triennial Review Order at ¶ 210. Therefore, the Department determines that the FCC did not intend to limit FTTP, FTTC, or FTTH unbundling relief only to those loops being used to provide service to residential customers.

As to CCC's argument that Verizon may be seeking to limit its unbundling obligations through the use of the term FTTP to include both FTTC and FTTH, the Department sees no harm to the CLECs from the use of the inclusive term FTTP, because the FCC extended to FTTC loops the same unbundling relief granted to FTTH loops. FTTC Recon Order at ¶ 9.[66] The Department does acknowledge, however, that replacing federal terminology with a new term, FTTP, has the potential to cause some confusion. Occam was right: Entities should not

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66 In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, FCC 04-248 (rel. Oct. 18, 2004) ("FTTC Recon Order").

be multiplied unnecessarily. The Amendment should therefore drop FTTP and confine itself to FCC terminology for loops subject to unbundling relief.

Finally, CCG argues that the Amendment should state that Verizon is not required to provide access to new builds, "subject to a change of law provision in the Agreement" (CCG Reply Brief at 32). CCG apparently argues that parties' agreements need to be amended after every new build, and that Verizon is required to provide access to each new build until the change of law process is complete.

A new build is, by definition, a deployment where the customer has not previously been served by any loop facility. 47 C.F.R. § 51.319(a)(3)(ii). So, as far as the CLEC is concerned there has been no "change" because the CLEC was never entitled to any loop facilities at that location. Federal rules do not impose any network disclosure requirements on the ILEC deploying the new build, and this Amendment shall not contain any terms limiting the absolute unbundling relief that the FCC has granted to new builds. The Amendment will track the language of the FCC rules on fiber loops, including definitions and provisions on new builds and overbuilds.

c. Access to Hybrid Loops for the Provision of Broadband and Narrowband Services

Parties disagree whether the FCC has granted unbundling relief to all hybrid loops, or only to those hybrid loops used to serve mass market customers. In addition, parties disagree whether the FCC's rules allow CLECs access to the entire hybrid loop or limit CLEC access to the TDM features of the hybrid loop, and whether the Amendment should reflect all sources of unbundling obligations for hybrid loops, including § 271 and state law.

Turning to the threshold question of whether hybrid loop unbundling relief applies to all customers or just to mass market customers, the Department's analysis begins with a review of the relevant rules. In 47 C.F.R. § 51.319(a)(2), the FCC defines the term hybrid loop as follows: "[a] hybrid loop is a local loop comprised of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant." The FCC's broadband hybrid loop unbundling rule provides that:

> When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of broadband services, an incumbent LEC shall provide . . . a complete transmission path between the incumbent LEC's central office and the end-user's customer premises.

47 C.F.R. § 51.319(a)(2)(ii). Finally, the narrowband hybrid loop unbundling rule in 47 C.F.R. § 51.319(a)(2)(iii) provides that an incumbent LEC may provide access to an entire hybrid loop capable of voice grade service, or "[p]rovide nondiscriminatory access to a spare home-run copper loop serving that customer on an unbundled basis."

The Department finds nothing in these rules limiting hybrid loop unbundling relief to hybrid loops serving mass market customers. In the rules cited above, the FCC refers to "customers," not "residential" or "mass market" customers. Therefore, the Department determines that the FCC did not intend for its hybrid loop unbundling rules to be limited to the mass market. For broadband services, the Department finds that according to the federal rules, Verizon is not required to unbundle next-generation network, packetized capabilities of hybrid loops, and is not required to provide unbundled access to any electronics or other equipment used to transmit packetized information over hybrid loops, including but not limited to xDSL-capable line cards installed in DLC systems. 47 C.F.R. § 51.319(a)(2)(ii); Triennial

Review Order at ¶ 288. Verizon is, however, required to provide unbundled access to the TDM features, functions, and capabilities of hybrid loops that are not used to transmit packetized information. 47 C.F.R. § 51.319(a)(2)(ii).

With respect to narrowband services, Verizon has the choice of whether to provide a spare home-run copper loop, or access to an entire hybrid loop capable of voice grade service using TDM technology. 47 C.F.R. § 51.319(a)(2)(iii). Despite being required to provide access to the TDM functions of an entire hybrid loop, Verizon is not required to unbundle the packet switched features of that loop. 47 C.F.R. § 51.319(a)(2)(i). In addition, the FCC has clarified that ILECs are not required to build TDM capability into new packet-based networks or into packet-based networks that never had TDM capability. FTTC Recon Order at ¶ 20. Therefore, where Verizon may be required to unbundle the TDM capability of a hybrid loop, it is only required to unbundle such TDM capability when it exists in the hybrid loop, and is not required to add TDM capability for a requesting competitive LEC.

In response to CCC's claim that Verizon's Amendment does not specify that TDM features, functions, and capabilities of hybrid loops will be provided in a "nondiscriminatory manner," (CCC Brief at 59), the Department determines that similar concerns over wording are best resolved by requiring the parties to track the language of the FCC rules in the Amendment.

d. Retirement of Copper Loops

Parties disagree whether additional terms are necessary to implement the FCC's loop retirement rules. In the Triennial Review Order, the FCC noted that various parties had proposed extensive regulatory approval processes for copper loop retirement, but the FCC declined to adopt these processes, finding that its own rules provided adequate safeguards. Triennial Review Order at ¶ 281.

Provisions proposed by the CLECs for copper loop retirement largely exceed the FCC's requirements. For example, AT&T's and CCC's proposed language requires Verizon to provide at least 180 days notice to the FCC for retirement of copper loops or copper subloops that are replaced with FTTH Loops (AT&T TRO Amendment § 3.2.2.7; CCC TRO Amendment § 1.5.4.1). Under the FCC rules, the incumbent LEC may "under no circumstances. . . provide less than 90 days notice of such a change." 47 C.F.R. § 51.333(b)(ii). AT&T's and CCC's proposed notice period is excessive compared to the FCC's time frame and must be stricken. The Department finds that Verizon must provide 90 days notice.

Similarly, CCC would require that Verizon not retire a loop unless Verizon either "demonstrates to CLEC's satisfaction that it will at no cost and in reasonably seamless fashion migrate CLEC to an alternative facility at an equal or lesser rate that supports all the features, functions, capabilities and services CLEC provided to customer over the copper Loop" or obtains a determination from the Department that "the CLEC's rejection of Verizon's proposed alternative is unreasonable and contrary to the public interest" (CCC TRO Amendment, § 1.5.4.1.2). The Department finds that CLEC approval prior to loop retirement is not a requirement established by the FCC, and thus, should be omitted from contract language. Parties are free to negotiate additional terms as they may deem necessary to assist in the implementation of federal rules, but in the absence of agreement on those terms, the Department requires that the parties track the language of the federal rules in their Amendment.

Verizon claims that AT&T refers generally to "copper subloops" in its proposed § 3.2.2.6 without taking into account that the FCC held that its regulation does not apply to "copper feeder plant"(Verizon Brief at 92, citing Triennial Review Order at ¶ 283 n.829). For clarification purposes, the Department finds that the parties' amendment language should include the exception for the retirement of copper feeder plant in regard to modified network notification requirements. CCC refers to state loop retirement requirements. As there are at present no such state requirements in Massachusetts, we need not express a view whether the FCC did or did not preempt state requirements concerning loop retirement.

e. Line Conditioning

Parties disagree whether Verizon's obligation to provide line conditioning was changed by the Triennial Review Order or Triennial Review Remand Order, and whether such changes, if any, need to be incorporated into the Amendment. In the Triennial Review Order, the FCC stated, "we readopt the Commission's previous line and loop conditioning rules for the reasons set forth in the UNE Remand Order." Triennial Review Order at ¶ 642. As the FCC's rules concerning line conditioning were not altered by the Triennial Review Order or the Triennial Review Remand Order, there is no need to include an amendment pertaining to line conditioning.

f. Packet switching

Parties restate the arguments made in Issue 3 concerning unbundled access to packet switches when packet switches are used to provide local switching functionality for voice traffic. For the reasons discussed in Issue 3, we decline to require Verizon to provide access to packet switching.

With respect to AT&T's concern that Verizon may cease providing local switching to the portion of AT&T's UNE-P embedded base which is receiving local switching functionality from a packet switch, the FCC's UNE-P transition plan requires Verizon to continue providing local switching functionality to CLECs' embedded base. The fact that Verizon may have chosen to provide a previously-required UNE (local switching) over a piece of equipment that it has no obligation to unbundle (a packet switch) does not therefore create an obligation to offer access to packet switches, nor does it create a risk that the portion of the embedded base which is receiving local switching functionality through packet switches will suddenly find itself cast out of the embedded base. Verizon's obligation is to provide local switching functionality to the embedded base. However Verizon chooses to provide switching functionality to the embedded base, it must provide switching until the CLECs migrate their embedded bases to alternative arrangements or until the end of the transition period, whichever comes first.

g. Network Interface Devices

In the Triennial Review Order, the FCC reaffirmed ILECs' obligation to provide unbundled access to NIDs, stating 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." Triennial Review Order at ¶ 356. The FCC also "declined to adopt more specific rules defining, on a nationwide basis, the manner and scope of access to unbundled NID functionality." Id. at ¶ 358. The Department determines that the FCC did not alter the obligation to provide unbundled access to NIDs in the Triennial Review Order, and that there are no new terms to include in the Amendment.

h. Line Sharing

The FCC defines a "line sharing" arrangement as one where a CLEC uses the high frequency portion of the loop ("HFPL") to provide xDSL to a customer and the ILEC uses the low frequency portion of the same loop to provide voice service to the same customer. Triennial Review Order at ¶ 255. Parties disagree whether the amendment should contain terms related to line sharing and/or the unbundled HFPL.

In 1999, the FCC ordered unbundled access to HFPL,[67] a determination which was subsequently vacated by the D.C. Circuit. USTA I, 290 F.3d at 429. In the Triennial Review Order, the FCC revisited HFPL and determined that CLECs are not impaired without access to HFPL, because the revenue opportunities afforded by an entire loop compensate for the additional operational and economic costs of purchasing a stand-alone unbundled loop, and therefore, the FCC declined to require ILECs to provide unbundled access to HFPL. Triennial

[67] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Third Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Fourth Report and Order, FCC 99-355, ¶¶ 38-53 (rel. Dec. 9, 1999) ("Line Sharing Order").

Review Order at ¶¶ 255-58. The FCC also noted that CLECs are able to obtain HFPL from other CLECs through line splitting arrangements. Id. at ¶ 259.

Although the FCC declined to reinstate unbundled HFPL, the FCC observed that CLECs may have relied on the FCC's subsequently-vacated line sharing rules when designing products and business plans, and that end-user customers needed to be protected from a sudden loss of their broadband service. Triennial Review Order at ¶¶ 264-69. In order to allow these CLECs adequate time to alter their business plans and negotiate replacement arrangements, and to ensure continuity of service to end-user customers, the FCC adopted a transition plan for new line sharing arrangements and for existing line sharing arrangements for customers served as of the effective date of the Triennial Review Order. Id. The FCC's line sharing transition plan therefore represents a change of law appropriate for inclusion in the Amendment. The FCC's line sharing rules, which by their own terms were effective on October 2, 2003 and sunset on October 2, 2006, are codified at 47 C.F.R. § 51.319(a)(1)(i). Parties are directed to include the line sharing rules verbatim in the Amendment.

J. Issue 14 — What should be the effective date of the Amendment to the parties' agreements?

1. Introduction

The parties generally agree that the effective date of any amendment to the interconnection agreements should be the date of execution by the parties or approval by the Department. AT&T, CCC, and CCG, however, propose an October 2, 2003 effective date for implementation of the Triennial Review Order's commingling and conversion provisions.

2. Positions of the Parties

a. Verizon

Verizon maintains that unless the parties agree to specify a different effective date, the effective date of the amendment should be the date of execution by the parties and approval by the Department (Verizon Brief at 100). With regard to the commingling and conversion provisions, Verizon argues that the sole reason for a different effective date is so that a CLEC would receive a retroactive benefit (id.). But, Verizon insists, the CLECs' proposal for an October 2, 2003 effective date for commingling and conversions is inconsistent with the Triennial Review Order which requires that new unbundling obligations be implemented through an amendment process (id.). Furthermore, Verizon states that the CLEC proposal is unfair in that it would allow some parties to select particular provisions to exempt from the contract's effective date merely to obtain a retroactive benefit (id.)

According to Verizon, nothing in the Triennial Review Order or the FCC's rules requires Verizon to provide retroactive pricing commingling or conversions (Verizon Reply Brief at 44). Verizon argues that if the Department wishes to consider retroactive pricing, it should do so for the UNEs delisted in the Triennial Review Order as well (id. at 45).

b. AT&T

AT&T argues that the Triennial Review Order requires Verizon to permit commingling and conversion upon the Triennial Review Order's effective date so long as the requesting carrier certifies that it has met certain eligibility criteria (AT&T Brief at 38, 50, citing Triennial Review Order at ¶ 589). AT&T further contends that the rates for new EELs or conversions should be those applicable as of the date that AT&T first made its request for those arrangements to Verizon (id. at 50).

c. MCI

MCI maintains that the amendment should be effective upon Department approval (MCI Brief at 16).

d. CCC

CCC contends that the amendment should become effective as of the date that it is approved by the Department with the exception of commingling and conversion, which CCC argues should be effective as of October 2, 2003 (CCC Brief at 62). According to CCC, Verizon had the duty to perform conversions and provision commingled circuits upon the effective date of the Triennial Review Order (id. at 48). Additionally, CCC proposes that CLECs should receive pricing for new EELs and converted UNEs as of the date that they made such requests to Verizon (id. at 63, 81).

e. CCG

CCG argues that the amendment to the parties' agreement should be effective as of the date of execution of the amendment, except with respect to the transition rates for network elements that Verizon is no longer obligated to provide under § 251, as expressly provided by the FCC's rules and orders (CCG Brief at 31). To the extent that any provision of the amendment should be given retroactive effect, CCG maintains that the amendment must state the effective date of the specified provision of the amendment and the controlling FCC rule or order (id.).

Consistent with AT&T and CCC, CCG also insists that the effective date of the commingling and conversions provisions contained in the amendment must be October 2, 2003 and that requesting carriers must receive pricing for new EELs and conversions as of the date the request was made to Verizon (id. at 31-32).

3. Analysis and Findings

With regard to the effective date of the commingling and conversion provisions, the FCC "decline[d] to require retroactive billing to any time before the effective date of this Order." Triennial Review Order at ¶ 589. The FCC intended its Triennial Review Order rulings, including the commingling and conversion provisions, to be implemented through the § 252 process. See id. at ¶¶ 700-702. The FCC explicitly declined to override the § 252 process and unilaterally change all interconnection agreements. It did so in order to avoid any delay associated with renegotiation of contract provisions. Id. at ¶ 701. Admittedly, the delay associated with implementing the conversion and commingling rulings in the Triennial Review Order has been substantial. But, the Department does not find it appropriate or fair to apply rates retroactively unless the FCC explicitly provides for a specific effective date earlier than the effective date of the Amendment. The FCC did not do so in the case of the commingling and conversions. We determine that the effective date of the commingling and conversion provisions should not be given a different effective date than other provisions of the Amendment.

Accordingly, the Department determines that, with the exception of the UNEs delisted in the Triennial Review Remand Order for which the FCC explicitly established a

March 11, 2005 effective date (see discussion of Issues 3, 4 and 5) and line sharing for which the FCC explicitly established an October 2, 2003 effective date (see discussion in Issue 13) the Amendment, including provisions concerning commingling and conversions, should be given effect as of the issuance date of this Order, unless the parties explicitly agree to a different date. Moreover, with the exception of the UNEs delisted in the Triennial Review Remand Order and line sharing, the effective date applies to all provisions of the Amendment whether based upon the Triennial Review Order or the Triennial Review Remand Order. In this Order, we resolve the issues raised by the parties to this arbitration and find no need to delay the effectiveness of our rulings while the parties incorporate these rulings into final amendment language.

K. 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)?

1. Introduction

Carriers use DLC systems to aggregate the many copper subloops that are connected to a remote terminal location (Verizon Brief at 100). 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 (id.). The 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") (id.). Where the ILEC is required to unbundle a loop for an end user who currently is served over hybrid loop IDLC architecture, the FCC held that this should be done either through a spare copper loop or a UDLC loop; if neither option is available, the ILEC must provide the CLEC with a "technically feasible method of unbundled access." Triennial Review Order at ¶ 297. The parties disagree over Verizon's obligations to unbundle IDLC loops.

2. Positions of the Parties

a. Verizon

Verizon's proposed language provides that if a CLEC seeks to provide 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 consistent with the FCC's requirements (Verizon Brief at 101). Provisioning will be done with either a spare copper loop or a UDLC loop (id.). If neither is available, Verizon will construct a copper loop or a UDLC loop, depending on which type the CLEC requests, and will charge the CLEC for the construction, including an engineering query charge, an engineering work order nonrecurring charge, and construction charges (id. at 101-102). Verizon contends that FCC rules permit it to recover its construction costs when it is required to construct new loops at the request of CLECs (Verizon Reply Brief at 46).

Verizon claims that AT&T's and MCI's proposed language is inconsistent with the Triennial Review Order in so far as it requires Verizon to provide the transmission path of the CLEC's choosing (i.e., a spare copper loop, a UDLC loop, or an unbundled TDM channel on the hybrid loop) (Verizon Brief at 102). According to Verizon, the FCC only requires that the

ILEC provide access to one of these transmission paths and that the choice of which path is up to the ILEC (id.). In addition, Verizon states that, contrary to AT&T's assertion, it has not proposed to make CLECs pay for a new copper loop unless the CLEC specifically requests such new construction (Verizon Reply Brief at 46).

b. AT&T

AT&T contends that the FCC obligates Verizon to provide CLECs access to unbundled loops where the customer is served by an IDLC system and that the CLEC should have the choice of whether Verizon provides a spare copper loop, a UDLC loop, or a TDM transmission path on the IDLC loop (AT&T Brief at 51). Contrary to the technical limitations claimed by Verizon for making available a TDM channel on an IDLC loop, AT&T argues that the FCC specifically recognized that transmission paths on IDLC loops can be unbundled by reconfiguring existing IDLC equipment or adding new equipment (id. at 52-53). If Verizon could charge CLECs for the significant costs of new loop construction and if the decision of which option to pursue were Verizon's, AT&T asserts that Verizon could make hybrid loop unbundling uneconomic for CLECs, thus effectively negating Verizon's unbundling obligations (id. at 53).

c. CCC

CCC states that its proposed language generally is the same as Verizon's proposal and that the parties disagree only over the appropriate rates for access to such loops (CCC Reply Brief at 38). According to CCC, existing nonrecurring and recurring loop charges should apply, but no additional charges, including charges for constructing new loops, are allowed (id. at 39). CCC argues that Verizon has not presented any support for its proposed additional charges and, therefore, existing UNE loop rates should apply (id.).

d. MCI

MCI states that its amendment tracks the language of the FCC's rules and should be adopted (MCI Brief at 16). According to MCI, if the loop serving the customer is an IDLC loop, in the alternative Verizon must provide CLECs with either an existing copper loop, a UDLC loop, or an unbundled TDM channel on the hybrid loop (id. at Exh. B; MCI Amendment, § 7.2.2.1). Moreover, MCI states that standard recurring and nonrecurring loop charges should apply, and a nonrecurring charge should apply whenever a line and station transfer is performed (id.).

e. CCG

CCG argues that when a CLEC seeks to provide narrowband services through access to a loop served by IDLC, and a UDLC loop or a spare copper loop is not available, Verizon should be required to provide an unbundled copper loop, making RNMs if necessary, unless no such facility can be made available with such modifications (CCG Brief at 32). CCC argues that to the extent that Verizon incurs additional costs in connection with providing unbundled access to the hybrid loop where the end user is served by IDLC, the cost should be reflected in Department-approved TELRIC rates (id. at 33).

3. Analysis and Findings

In the Triennial Review Order, the FCC found that to enable CLECs to provide narrowband service to end user customers, ILECs must unbundle hybrid loops by providing 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." Triennial Review Order at ¶ 296. Because of the technical nature of IDLC architecture, "a one-for-one transmission path between an incumbent's central office and the customer premises may not exist at all times," thus making it more difficult for ILECs to unbundle a TDM transmission path over IDLC. Id. at ¶ 297. The FCC recognized that in most, if not all, cases, an ILEC will meet its unbundling obligations by providing access to a spare copper loop or a UDLC loop, but stated that "if neither of these options is available, incumbent LECs must present requesting carriers a technically feasible method of unbundled access." Id. The third option cited by the FCC is by "configuring existing equipment, adding new equipment, or both" to IDLC systems, thus creating a transmission path over IDLC. Id. at ¶ 298 n.855. Contrary to the CLECs' claims, the ILEC makes the decision as to what type of access to provide. The FCC did recognize that there may be occasions where an ILEC will elect to construct new loop plant to provide access. Id. at ¶¶ 296-97 n.851.

Verizon has proposed to assess certain new charges related to providing "technically feasible" access to narrowband IDLC loops. These include a line-and-station transfer charge, when provisioning a UDLC loop or a spare copper loop, and charges for constructing a new loop, including an engineering query charge, an engineering work order charge, and construction charges. Consistent with our approach to other rate issues in this case (see Issues 8, 12(d), 21 and 32), the Department will defer a determination of whether Verizon may assess new charges related to providing "technically feasible" access to narrowband IDLC loops to Verizon's next TELRIC case, at which time the Department will have the benefit of a full evidentiary record from which to make its decision, including whether these charges are permitted under federal law. Until then, Verizon may not apply its proposed charges for these IDLC-related services, including the tariffed rate for a line-and-station transfer, an engineering query, and an engineering work order. In contrast with our determination in Issue 32, infra, in which we allow Verizon to charge for those RNMs that have existing tariffed rates (e.g., line conditioning) because the FCC explicitly found that ILECs can recover their costs for RNMs, here, the FCC was silent about cost recovery for activities related to providing "technically feasible" access to narrowband IDLC loops, and Verizon has not yet demonstrated through the evidentiary rate setting process — D.T.E. 04-33 proceeded through exchange of legal briefs rather than through presentation and challenge of evidence — how its proposed charges relate to the provision of narrowband IDLC loops. Therefore, the Department must resolve that question before Verizon may apply any of its proposed charges for these activities. The one exception to this finding is where a CLEC specifically requests new construction, notwithstanding Verizon's determination to provide a different, less-costly method of "technically feasible" access. In that case, Verizon may charge the CLEC for constructing the loop.

L. 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?

1. Positions of the Parties

a. Verizon

Verizon argues that the existing performance metrics contain exceptions for orders requiring non-standard processing, and that items (a) through (d) of Issue 16, which also require non-standard processing, should accordingly be exempted from the existing performance metrics (Verizon Brief at 104). Verizon indicates that the Department adopted the New York C2C Performance Measurement Plan to evaluate Verizon's compliance with § 271 of the Act, and argues that the CWG recently has approved new performance metrics for hot cuts, which Verizon has submitted to the Department for approval (id. at 105). Verizon contends that it will make the new hot cut processes available to CLECs upon request and upon amendment of their interconnection agreements (id.). Verizon argues that any performance metrics arising out of § 271 unbundling obligations are a matter of federal law and should not be addressed in this proceeding (id.).

b. AT&T

AT&T argues that Verizon should be required to meet all of the standard provisioning intervals and performance metrics currently in place (AT&T Brief at 54). AT&T argues that the FCC requires RNMs in order to prevent anticompetitive discrimination against the CLECs, and that UNEs requiring RNMs must be subject to standard provisioning intervals and performance metrics in order to ensure that Verizon performs RNMs as quickly for CLECs as it does for its own customers (id. at 55). AT&T argues that the elimination of UNE-P has made hot cuts increasingly important to CLECs, and that the Department's performance plans should be updated to include new performance metrics and remedies for hot cuts (id.).

c. CCC

CCC argues that Verizon agreed to comply with the performance assurance plans as a condition of approval of its § 271 application (CCC Brief at 65). CCC argues that nothing in the Triennial Review Order altered Verizon's § 271 obligations, and that performance metrics are necessary to ensure that Verizon continues to comply with § 271 (id.).

d. CCG

CCG argues that the application of provisioning intervals and performance metrics was not altered by either the Triennial Review Order or Triennial Review Remand Order, and that Verizon remains bound by existing performance standards (CCG Brief at 34). CCG argues that the FCC expressly contemplated that performance metrics would apply to all UNEs, including those requiring RNMs (id.). CCG argues that whether or not the Department is reviewing performance metrics in other dockets, the Department must clarify that Verizon is not exempt from performance standards for facilities provided under the parties' interconnection agreement (CCG Reply Brief at 44).

e. Conversent

Conversent argues that Verizon's performance of provisioning UNEs requiring RNMs should be subject to standard provisioning intervals and performance metrics and remedies (Conversent Brief at 30). Conversent argues that Verizon was probably performing RNMs when the Department adopted the Performance Assurance Plan ("PAP") and the C2C Guidelines, and that RNMs are therefore already subject to the PAP and C2C (id. at 31). Conversent argues that it takes Verizon longer to provision retail services requiring RNMs, and that eliminating UNEs requiring RNMs from wholesale metrics will therefore skew Verizon's performance in favor of the wholesale side (id.).

2. Analysis and Findings

The Department has adopted New York's C2C Performance Guidelines, as amended on a going-forward basis, to evaluate Verizon's compliance with its § 271 obligations. See Order Adopting Performance Assurance Plan, D.T.E. 99-271, at 2 (Sept. 5, 2000). When the CWG or the NYPSC incorporates new metrics into the New York C2C, they flow through to the Massachusetts C2C Guidelines. In addition, when the New York PAP is amended by the NYPSC, Verizon presents those revisions to the Department for approval.

The Massachusetts C2C and PAP currently lack specific metrics addressing the provisioning of non-standard orders such as reflected in elements (a) through (d). However, the FCC clearly contemplated that states may wish to amend their performance plans to include metrics for non-standard orders, "to the extent that certain routine network modifications to existing loop facilities affect loop provisioning intervals, contained in, for example, § 271 performance metrics, we expect that states will address the impact of these modifications as part of their recurring reviews of incumbent LEC performance." Triennial Review Order at ¶ 639.

The Department determines that the instant proceeding is an inappropriate forum to create metrics and performance remedies for these items. The CWG and NYPSC likely will address the addition of appropriate metrics and PAP-related changes. Until the CWG and the NYPSC adopt new metrics and performance remedies for these services or specifically include them in existing standards, Verizon's performance in provisioning these services should be excluded from existing metrics and performance remedies.

With respect to hot cuts, the NYPSC recently adopted an order which established rates for three different hot cut processes and addressed the creation of relevant performance metrics.[68] The Department has taken comment on the application of the NYPSC processes and metrics in Massachusetts and is currently considering whether any modification to the processes and metrics is necessary prior to their application in Massachusetts.

Finally, the Department determines that it is inappropriate to address performance metrics for non-Section 251 obligations in this Order. As discussed above, this Arbitration is

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68 See Proceeding on Motion of the Commission to Examine the Process and Related Costs of Performing Loop Migrations on a More Streamlined (i.e. Bulk) Basis, Case 02-C-1425, Order Setting Permanent Hot Cut Rates (N.Y.P.S.C., Aug. 25, 2004).

limited to changes arising out of the Triennial Review Order and Triennial Review Remand Order.

M. Issue 17 How should the Amendment address subloop access under the TRO? Should the Amendment address access to the feeder portion of the loop? If so, how? Should the Amendment address the creation of a Single Point of Interconnection? If so, how? Should the Amendment address unbundled access to Inside Wire Subloop in a multi-tenant environment? If so, how?

1. Introduction

The parties disagree about how the FCC's subloop requirements should be implemented, including access points for CLECs to access copper subloops,[69] whether the elimination of fiber feeder as a standalone UNE only applies to mass market customers, and the conditions that must be satisfied before Verizon is required to construct a Single Point of Interconnection ("SPOI"). In addition to these broader issues, the parties disagree about specific contract language, including how certain terms should be defined.

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69 The FCC defined 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), including inside wire." Triennial Review Order at ¶ 254 (footnote omitted); see also 47 C.F.R. § 51.319(b)(1) ("A copper subloop is a portion of a copper loop, or a hybrid loop, comprised entirely of copper wire or copper cable that acts as a transmission facility between any point of technically feasible access in an incumbent LEC's outside plant, including inside wire owned or controlled by the incumbent LEC, and the end-user customer premises").

2. Positions of the Parties

a. Verizon

i. Feeder Subloop

In its proposed Amendment, Verizon classifies fiber feeder as a "Discontinued Facility," based on the FCC's ruling in the Triennial Review Order to delist the fiber feeder subloop from unbundling requirements (Verizon Brief at 107, citing Triennial Review Order at ¶ 253 ("We do not require incumbent LECs to provide access to their fiber feeder loop plant on an unbundled basis as a subloop UNE")). Verizon also states that the FCC found that "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" (id.).

Verizon objects to CCC's proposed language that limits the FCC's fiber feeder restrictions in ¶ 253 of the Triennial Review Order to only mass market customers (id., citing Joint Issues Matrix, Issue 17, at 59 (position of CCC)). Verizon maintains that the FCC's findings are not meant to pertain to one specific customer, because the FCC stated that, "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. at 108, citing Triennial Review Order at ¶ 210).

ii. Distribution Subloop

Verizon maintains that its proposed Amendment language accurately incorporates the FCC's requirements for access to distribution subloop facilities by providing 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 Brief at 106, citing Verizon Amendment 2, § 3.3.2).

iii. Subloops for Multiunit Premises

Verizon claims that the Triennial Review Order allows CLECs to access subloops "at a technically feasible accessible terminal" usually including "a feeder distribution interface (FDI); a pole or pedestal; the MPOE; or the NID" (Verizon Brief at 110, citing Triennial Review Order at ¶ 343). Verizon contends that its proposed Amendment 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" and that a technically feasible point of access is one that does not require the removal of a splice case (id., citing Verizon Amendment 2, § 3.3.1.1; Triennial Review Order at ¶ 254; 47 C.F.R. § 51.319(b)(2)). Verizon claims that its remaining inside wire provisions "are geared towards the practical and logistical implementation of CLEC orders for inside wire" and omit the requirement for a CLEC "to install a terminal block" (id.).

Verizon also objects to AT&T's proposal for CLEC technicians to perform work on Verizon's equipment in accessing subloops. Verizon claims this would allow any CLEC technician to obtain access to and modify Verizon's network regardless of their competency to work on Verizon's plant, which could put its network at risk (Verizon Reply Brief at 51).

Verizon contends that AT&T's language includes requirements that are not in the Triennial Review Order, such as requiring Verizon to provide a "written proposal" to AT&T about access points within 30 days of a request and requiring negotiation to begin between 10 to 40 days after receipt of Verizon's written proposal (Verizon Brief at 110). Verizon claims that given the varying nature of subloop access arrangements AT&T's requirements are too specific (id. at 110-11).

Verizon objects to AT&T's position that it will accept Verizon's refusal to reserve house and riser cable ("HARC") for competitors "if and only if, Verizon is expressly willing to contract to abide by the same limitation" (Verizon Reply Brief at 52). Verizon claims that AT&T's position does not make sense since Verizon already owns the HARC and that its restriction is meant to prevent a CLEC from reserving cable that other CLECs might need while it decides to place an order (id.).

Verizon claims that AT&T proposes language that is "near verbatim quotes of the rules" (Verizon Brief at 111, citing AT&T Amendment, § 3.4.2, quoting 47 C.F.R. § 51.319(b)(2)(i) ("point of technically feasible access"); AT&T Amendment, §§ 3.4.6, 3.4.7, quoting 47 C.F.R. § 51.310(b)(3) (technical feasibility and "best practices")). Verizon asserts that it is better to merely cite the FCC's rules, which allows agreements to change automatically when FCC rules change instead of locking in place a version of the FCC's rules at one point in time (Verizon Brief at 111).

iv. SPOI

Verizon claims that its language tracks the Triennial Review Order findings that ILECs are not required to construct a SPOI at a multiunit premises "unless: (1) Verizon 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" (Verizon Brief at 108, citing Triennial Review Order at ¶ 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. at 108-109, citing Triennial Review Order at ¶ 350 n.1058; Verizon Amendment 2, § 3.3.1.2). Verizon argues that construction of a SPOI is a substantial undertaking that must take account of facts and circumstances specific to each location, and thus the parties should not attempt to lock into the current amendment requirements that assume all cases are the same (Joint Issues Matrix at 58, citing Verizon Amendment 2, § 3.3.1.2; Verizon Brief at 108, citing Triennial Review Order at ¶ 350 n.1058).

Verizon claims that AT&T and CCC exclude the FCC's two conditions for SPOI construction from their proposed contract language (Verizon Brief at 109, citing AT&T TRO Amendment, § 3.4.5; CCC TRO Amendment, § 1.7.1.1). Verizon also argues that AT&T adds a new requirement that Verizon must construct a SPOI within 45 days from receipt of a CLEC request (id., citing AT&T TRO Amendment, § 3.4.5). Lastly, Verizon contends that it has not proposed generally applicable rates and terms for construction of a SPOI, as requested by AT&T, because "there are site-specific differences that may vary significantly" and parties should instead negotiate the specific details of the arrangement (Verizon Reply Brief at 51-52).

b. CLECs

i. Feeder Subloop

The CLECs acknowledge that Verizon is relieved from providing "unbundled access to the feeder portion of the subloop on a standalone basis," but argue that Verizon's Amendment implements its rights too broadly. For example, CCC claims that the delisting of the fiber feeder subloop only applies to mass market customers, but Verizon's language would exclude access to all end users (CCC Brief at 88, citing CCC TRO Amendment, § 1.6, Triennial Review Order at ¶ 253; CCC Reply Brief at 40-41). In addition, CCG contends that the Amendment should not affect CLECs' rights to purchase unbundled access to the feeder subloop under a SGAT or applicable tariff (CCG Brief at 35).

ii. Distribution Subloop

The CLECs claim that the Triennial Review Order requires Verizon to provide CLECs with access to subloops at any technically feasible access point located near a Verizon remote terminal (AT&T Brief at 56, citing Triennial Review Order at ¶ 343; CCC Brief at 67). CCC's amendment requires Verizon to provide unbundled access to the subloop distribution facilities at a technically feasible access point near a "Verizon remote terminal equipment enclosure at the rates and charges provided for Unbundled Subloop Arrangements (or the Distribution Subloop) in the Agreement" (CCC Brief at 67, citing CCC TRO Amendment, § 1.7.2). CCC claims that its proposal recognizes that a technically feasible access point is one where a technician does not have to remove a splice case in order to reach wiring within the cable (CCC Brief at 67-68, citing CCC TRO Amendment, § 1.7.2; 47 C.F.R. § 51.319(b)(1)(i)).

The CLECs claim that Verizon's Amendment does not fully reflect the requirements of the Triennial Review Order and has left issues unresolved, which AT&T argues could potentially lead to new disputes requiring Department intervention (AT&T Brief at 56; CCG Brief at 36). For example, the CLECs contend that the Amendment should define "subloop" (AT&T Brief at 56; CCG Brief at 36). CCG defines it as "any portion of the loop" where it is "technically feasible to access at a terminal in [Verizon's] outside plant at or near a multiunit premises" (CCG Brief at 36). AT&T provides a definition for "subloop" in § 2.35 of its proposed TRRO Amendment.

iii. Subloops for Multiunit Premises

The CLECs state that the amendment should define the "Inside Wire Subloop." CCG defines it as a "Verizon-owned or controlled distribution facility in Verizon's network 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" (CCG Brief at 37, citing CCG Amendment, § 2.21). AT&T defines Inside Wire Subloop in § 2.22 of its TRRO Amendment (AT&T Brief at 57).

CCG contends that Verizon must be required to "provide access to a copper subloop at a splice" upon a CLEC's site-specific request regardless of the "capacity level or type of loop" (CCG Brief at 36-37, citing 47 C.F.R. §§ 51.319(b)(1)(i), (b)(2)).

The CLECs claim that Verizon's proposed language restricts CLEC access to inside wire subloops (AT&T Brief at 58, citing Verizon Amendment 2, § 3.3.1.1.1.3; CCG Reply Brief at 51, citing Verizon Amendment 2, §§ 3.3.1.1.1.2, 3.3.1.1.1.6). For example, the CLECs object to Verizon's language that would not permit CLEC facilities to be attached or adjacent to Verizon's facilities or equipment (AT&T Brief at 58). This, AT&T asserts, would mean that AT&T's facilities cannot pass through or penetrate Verizon's equipment or facilities and cannot be installed in an area where Verizon plans to locate its facilities or equipment (id.).

AT&T claims that Verizon's proposal requires Verizon to perform all installation work on Verizon equipment in connection with AT&T's use of Verizon's HARC but that the Triennial Review Order does not authorize Verizon to limit access exclusively to Verizon technicians to perform work to provide CLECs with access to subloops (id.).[70] AT&T asserts that such a restriction is discriminatory and would create delays and increase costs in providing service to customers (id. at 58-59). Besides objecting to Verizon's provision that would prevent AT&T technicians from performing cutovers, AT&T also argues that any cutovers of customers to AT&T should be subject to a negotiated interval (id. at 58). AT&T proposes to allow AT&T technicians to perform connections to subloops (including the NID), including but not limited to directly accessing a Verizon owned and controlled cross-connection device, without the presence of Verizon technicians and at no additional charge by Verizon (id.;

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70 AT&T contends that Verizon's proposal would require Verizon to perform cutovers of customers to AT&T service through a HARC, install a jumper cable to connect appropriate Verizon HARC pair to AT&T's facilities, and determine how to perform such an installation (AT&T Brief at 58).

AT&T TRO Amendment, § 3.4.8).[71] Although supervision by Verizon personnel is not required, Verizon may choose to monitor the work, at its own expense, assuming that Verizon does not impede AT&T's work (AT&T Brief at 59).

AT&T states that it is willing to accept Verizon's proposal to prevent CLECs from reserving HARC if Verizon foregoes reserving those facilities for its own retail operations (id. at 57). AT&T argues that in order to avoid discrimination against competitors, Verizon must abide by the same guidelines that it has laid out for AT&T (id. at 58).

CCC claims that Verizon's proposed amendment includes terms and conditions for the provision of HARC even though "the TRO did not significantly alter Verizon's obligation to provide unbundled access to HARC" (CCC Brief at 66). CCC claims that Verizon's language contradicts previous orders and "imposes arbitrary operational provisions and restrictions for the provisioning of inside wire," such as requiring CLECs to install facilities "no closer than fourteen (14) inches of the point of interconnection for such cable" (id., citing Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-94 - Phase 4-L; UNE Rates Order at 203-09).

CCC claims that its proposed amendment has more general language requiring Verizon to provide subloops for multiunit premises as required by any "applicable Verizon tariff or SGAT, and any applicable federal and state commission rules, regulations, and orders" (CCC

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71 AT&T claims that the language in § 3.4.8 of its proposal clarifies that, "connecting work performed by AT&T may include, but is not limited to, lifting and re-terminating of cross connection or cross connecting new terminations at accessible terminals used for Subloop access" (AT&T Brief at 58-59).

Brief at 67; CCC TRO Amendment, §§ 1.7, 5.7). According to CCC, Verizon's proposal would render irrelevant state commission decisions on subloops, especially HARC in multitenant buildings, and, therefore, Verizon should petition those state commissions to change their policies, if necessary, to comply with the changes in federal law that Verizon claims have been made (Joint Issues Matrix at 58).

iv. SPOI

CCG claims that its proposed language incorporates the FCC's rules requiring Verizon to provide a SPOI suitable for multiple carriers upon notification of a carrier's request to interconnect at multiunit premises where Verizon "owns, controls or leases wiring" (CCG Brief at 35). Moreover, CCG claims that its Amendment expressly incorporates Verizon's obligation to provide a SPOI "in addition to, and not in lieu of, its obligation, under 47 C.F.R. § 51.319(b)(2) to provide unbundled access to a subloop for access to a multiunit premises, including any inside wire, at any technically feasible point" (id.). CCG also claims that the Amendment should express that Verizon is not entitled to recover charges for SPOI construction over and above existing TELRIC rates approved by the Department (id. at 35-36). CCG claims that the Amendment should include SPOI construction guidelines including a time frame (CCG proposes 45 days) and the requesting carrier's rights and obligations if construction is delayed (id. at 36). CCG also claims that the Amendment should state that any dispute between Verizon and a requesting carrier over Verizon's provision of SPOI is "subject to state commission arbitration under section 252 of the 1996 Act" (id.).

AT&T contends that Verizon's proposed language would postpone a resolution and would require the parties to negotiate another amendment to the ICA at a future date (AT&T Brief at 59). AT&T asserts that an agreement should be reached in this proceeding that memorializes the rates, terms, and conditions for SPOI construction, and proposes language in § 3.4.5 of its TRO Amendment (id.).

3. Analysis and Findings

a. Feeder Subloop

In a change from its prior rules, the FCC declined to continue requiring ILECs to unbundle their fiber feeder loop plant as a subloop UNE to "spur deployment of advanced telecommunications capability." Triennial Review Order at ¶ 253. The FCC determined that "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." Id. at ¶ 253. Thus, the FCC effectively limited ILEC subloop unbundling obligations to the distribution loop plant.

The parties do not dispute that the FCC eliminated the fiber feeder loop as an unbundled subloop UNE in the Triennial Review Order. The dispute raised by CCC concerns only whether that change applies to all customer segments or just to fiber feeder subloops used to serve mass market customers. We find that, having expressed no limitation, the FCC intended this delisting to apply both to the mass market and the enterprise market. While CCC is correct that the FCC's discussion concerning elimination of the fiber feeder subloop was contained in the section of the Triennial Review Order concerning mass market customers, see id. at ¶ 253, we find more persuasive the fact that the FCC made no mention in its rules of limiting the delisting just to the mass market, as we would have expected if a limitation was intended, since the FCC was very careful in other sections of the rules to make clear to which customers or services its rules applied. 47 C.F.R. § 51.319(b); see also, e.g., 47 C.F.R. §§ 51.319(a)(2)(ii), (iii) (specifying the different rules for hybrid loop unbundling for broadband services and narrowband services). Moreover, as Verizon points out, the FCC noted in the Triennial Review Order that "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." Triennial Review Order at ¶ 210 (emphasis added). Accordingly, Verizon's Amendment language with respect to this point is appropriate.

CCG and CCC argue that notwithstanding the delisting of the fiber feeder subloop, the Amendment should reflect that CLECs can still lease this element as a UNE pursuant to Verizon's SGAT or applicable tariff. Verizon does not have a SGAT in Massachusetts, and even for CLECs that are allowed buy out of Verizon's UNE tariff, Tariff 17 (i.e., those CLECs who are permitted to avail themselves of the tariff under their interconnection agreements, or those CLECs who do not have interconnection agreements), that tariff was modified on March 24, 2005 to eliminate the fiber feeder subloop UNE for all customer segments.

b. Distribution Subloop

Verizon's Amendment for the copper distribution subloop provides that:

> upon site-specific request, [CLEC] may obtain access to the Distribution Sub-Loop Facility at a technically feasible access point located near a Verizon remote terminal equipment enclosure at the rates and charges provided for Unbundled Sub-Loop Arrangements (or the Distribution Sub-Loop) in the Amended Agreement. 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 in § 3.3.2 conforms to the FCC's rule and is adopted. See 47 C.F.R. § 51.319(b)(1)(i). However, to ensure that the phrase "near a Verizon remote terminal equipment enclosure" is not construed narrowly, the Amendment shall also include reference to the FCC rule and thereby to the examples of points of technically feasible access that the FCC included in its rule: 47 C.F.R. § 51.319(b)(1)(i) ("Such points include, but are not limited to, a pole or pedestal, the servicing area interface, the network interface device, the minimum point of entry, any remote terminal, and the feeder/distribution interface").

c. Subloops for Multiunit Premises

In the Triennial Review Order, the FCC found that "competitive carriers are impaired on a nationwide basis without access to unbundled subloops used to access customers in multiunit premises" and adopted new rules, particularly those concerning the inside wire subloop (i.e., HARC) and NID UNEs. Triennial Review Order at ¶¶ 348, 351-58. The FCC rules for subloop unbundling to access multiunit premises state in pertinent part:

> An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to the subloop for access to multiunit premises wiring

> on an unbundled basis regardless of the capacity level or type of loop that the requesting telecommunications carrier seeks to provision for its customers. The 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. One category of this subloop is inside wire, which is defined . . . as all loop plant owned or controlled by the incumbent LEC at a multiunit customer premises between the minimum point of entry . . . and the point of demarcation of the incumbent LEC's network . . .
>
> 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. Such points include, but are not limited to, a pole or pedestal, the network interface device, the minimum point of entry, the single point of interconnection, and the feeder/distribution interface.

47 C.F.R. §§ 51.319(b)(2), (b)(2)(1).

First, we address CCC's argument that there is no need for the parties to amend the terms governing inside wire. While subloop unbundling was first adopted by the FCC in the UNE Remand Order, the FCC modified and expanded upon those requirements, particularly the rules for access to multiunit premises. See Triennial Review Order at ¶ 349 ("We expect that, collectively, the unbundling rules we adopt today will both facilitate and encourage facilities-based provisioning and, thus, lead to a greater demand for these unbundled subloops in the future."). Therefore, a change of law did occur, and the parties need to amend their agreements to account for the changes in the FCC's subloop unbundling requirements.

CCC also contends that, besides being unnecessary, Verizon's proposed Amendment conflicts with or renders irrelevant other federal and state law, including state arbitration and adjudicatory decisions, including certain Massachusetts decisions. In this arbitration, the Department is amending parties' agreements to conform to changes in federal law. It is unclear what other sources of federal law CCC had in mind. To the extent that prior, relevant Department decisions are not inconsistent with the Triennial Review Order, those decisions remain applicable to the parties' rights and obligations under the agreement.

Verizon's proposed Amendment defines a "Sub-Loop for Multiunit Premises Access" as:

> any portion of a Loop, other than a FTTP Loop, that is technically feasible to access at a terminal in Verizon's outside plant at or near a multiunit premises. It 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.

(Verizon Amendment 2, § 4.7.24). The CLECs object to Verizon's definition and provide alternatives (CCC Brief at 39; CCG Brief at 25). Verizon's definition is taken almost verbatim from the FCC's rules, except the phrase "other than an FTTP loop." 47 C.F.R. § 51.319(b)(2). Consistent with our findings concerning the term FTTP in Issue 13, we strike this language and approve the remainder of Verizon's definition.

The CLECs also oppose Verizon's definition of the inside wire subloop, which it terms "House and Riser Cable." 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. CCG provides an alternate definition, which is substantially the same as Verizon's, except for the FTTP reference (CCG Brief at 37). We find that Verizon's definition tracks the FCC's definition in its rules, with three exceptions. Cf. 47 C.F.R. § 51.319(b)(2). First, the "owned and controlled" language should be replaced by "owned or controlled," to be consistent with the FCC definition. In addition, to avoid confusion, there should be a parenthetical term that follows "House and Riser Cable" stating "(or Inside Wire Subloop)." Also, for the same reasons as stated above, the "other than an FTTP loop" language should be deleted. With those changes, this definition shall be included in the Amendment.

Even though Verizon proposes a definition for subloops to multiunit premises, its Amendment does not include a provision making this subloop available to CLECs, but only a provision addressing access to the inside wire subloop (Verizon Amendment 2, § 3.3.1.1). That provision states:

> [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. It 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.

Id. This provision is consistent with the FCC's rules and shall be included in the Amendment. 47 C.F.R. § 51.319(b)(2). In addition, for clarity and completeness, the Amendment shall also include a provision that expressly states that Verizon must provide CLECs with access to the subloop for accessing multiunit premises and the language should track verbatim (or as close as possible) the FCC's rule which states that "[a]n incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to the subloop for access to multiunit premises wiring on an unbundled basis regardless of the capacity level or type of loop that the requesting telecommunications carrier seeks to provision for its customer." 47 C.F.R. § 51.319(b)(2).

The remainder of disagreement with Verizon's proposed Amendment concerns certain operational or administrative conditions or procedures in Verizon Amendment 2, § 3.3.1.1.1. For example, AT&T disputes Verizon's language that would restrict work on Verizon's inside wire subloop to Verizon technicians, or would preclude CLECs from reserving facilities. We find that Verizon's proposed language is the same as, or consistent with, provisions that exist in Verizon's wholesale tariff, which was vigorously litigated in D.T.E. 98-57. See Verizon New England, Inc., D.T.E. 98-57 Phase II at 8 (2000); Verizon New England, Inc., D.T.E. 98-57 Phase-1-B at 40-48 (2001); M.D.T.E. Tariff 17, Part B, § 12.2. In addition, the subloop requirements in the Triennial Review Order and its implementing rules did not address these operational and administrative issues. Triennial Review Order at ¶ 343-55. The CLECs have not presented compelling reasons to depart from established practices and procedures that have governed the provisioning of HARC for several years,[72] nor is the record in this case developed sufficiently to do so were we inclined to make changes. Therefore, the Amendment shall include these provisions of Verizon's proposed Amendment.

Lastly, we note that Verizon included a provision in § 3.3.1 of its Amendment that states that the new provisions for subloop access to multiunit premises "shall supersede any other provision in the Agreement or in any Verizon tariff or SGAT in effect prior to the Amendment Effective Date" (Verizon Amendment 2, § 3.3.1 (emphasis added)). The highlighted language above is unreasonable in that it could override rights that a CLEC may

[72] The HARC tariff provisions were approved in 2000 and 2001.

have under the Agreement to avail itself of services from Tariff 17. Therefore, this language is disallowed.

d. SPOI

In the Triennial Review Order, the FCC stated that "we limit the incumbent LEC's obligation to construct a SPOI to only those multiunit premises where the incumbent LEC has distribution facilities to that premises and either owns, controls, or leases the inside wire at the multiunit premises, including the Inside Wire Subloop, if any, at such premises" and further that "the incumbent LEC's obligation to build a SPOI for multiunit premises only arises when a requesting carrier indicates that it intends to place an order for access to an unbundled subloop network element via a SPOI." Triennial Review Order at ¶ 350 n.1058. The FCC's rules also state:

> Upon notification by a requesting telecommunications carrier that it requests interconnection at a multiunit premises where the incumbent LEC owns, controls, or leases wiring, the incumbent LEC shall provide a single point of interconnection that is suitable for use by multiple carriers. This obligation is in addition to the incumbent LEC's obligations . . . to provide nondiscriminatory access to a subloop for access to multiunit premises wiring, including any inside wire, at any technically feasible point. If the parties are unable to negotiate rates, terms, and conditions under which the incumbent LEC will provide this single point of interconnection, then any issues in dispute regarding this obligation shall be resolved in state proceedings under section 252 of the Act.

47 C.F.R. § 51.319(b)(2)(ii). Thus, the FCC's requirements provide that an ILEC has no obligation to provide a SPOI unless (1) a CLEC requests interconnection at a multiunit premises, and (2) the ILEC owns, controls, or leases wiring at that location.

As noted above, the parties disagree on whether their respective Amendments implement the FCC's findings in the Triennial Review Order and its rules concerning the provisioning of a SPOI. Verizon's proposed Amendment states that if "Verizon has distribution facilities to the multiunit premises, and either owns and controls, or leases and controls, the House and Riser Cable at the multiunit premises," and a CLEC "certifies that it will place an order for access to an unbundled Sub-Loop network element," then the parties are required to "negotiate in good faith an amendment to the Amended Agreement memorializing the terms, conditions and rates under which Verizon will provide a single point of interconnection at a multiunit premises suitable for use by multiple carriers" (Verizon Amendment 2, § 3.3.1.2). Thus, Verizon contemplates that the terms of SPOI construction will not be included in this Amendment, but rather will be negotiated at the time a CLEC requests a SPOI. The CLECs disagree and want the detailed provisions that memorialize the rates, terms, and conditions for SPOI construction, including construction intervals and the carriers' rights and obligations if construction is delayed, set out in this Amendment.

In construing the FCC's rules concerning SPOI construction, we find that Verizon is correct in that ILECs are not required to negotiate the specific rates, terms, and conditions of SPOI construction <u>until</u> a CLEC makes a 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. However, we would expect that after negotiating terms for an initial request for construction of a SPOI, Verizon will be able to streamline the negotiation process for subsequent SPOI requests. If negotiations protract unduly, a party to negotiations can petition the Department to intercede and promote a resolution.

As pointed out by CCG, the Amendment must state that the SPOI obligation "is in addition to the incumbent LEC's obligations . . . to provide nondiscriminatory access to a subloop for access to multiunit premises wiring, including any inside wire, at any technically feasible point." 47 C.F.R. § 51.319(b)(2)(ii). In addition, to conform to the language in the Triennial Review Order, the Amendment must use the specific words "owns, controls, or leases" instead of "either owns and controls, or leases and controls," and must use the words "intends to place an order" instead of "certifies that it will place an order." 47 C.F.R. § 51.319(b)(2)(ii); Triennial Review Order at ¶ 350 n.1058.

CCG also claims that, to be consistent with the Triennial Review Order, the Amendment should contain a provision that requires disputes between Verizon and a requesting carrier over Verizon's provision of a SPOI to be subject to state commission arbitration. The rules do contain a provision for dispute resolution; however, it is for disputes during the process of negotiating the "rates, terms, and conditions under which the incumbent LEC will provide this single point of interconnection." 47 C.F.R. § 51.319(b)(2)(ii).[73] It is not a general dispute resolution provision for addressing any and all disputes that may arise during or after Verizon's provisioning of a SPOI. Any disputes that occur at those times are properly addressed under the agreements' existing dispute resolution provisions, which recognize that if

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73 The complete language states: "If the parties are unable to negotiate rates, terms, and conditions under which the incumbent LEC will provide this single point of interconnection, then any issues in dispute regarding this obligation shall be resolved in state proceedings under section 252 of the Act." 47 C.F.R. § 51.319(b)(2)(ii).

the parties are unable to resolve their dispute, they have recourse to the Department. Thus, we reject CCG's proposal.

Lastly, CCG argues that Verizon cannot charge CLECs for the construction of a SPOI. We disagree. The FCC made it clear that a SPOI is a form of interconnection, and it has long been established that ILECs have a right to recover their costs for interconnection. Triennial Review Order at ¶ 350 n.1058 ("A SPOI is a means of interconnection with a network element"); M.D.T.E. Tariff 17, Part B, § 12.1.2(C) (stating that SPOI construction obtained under Verizon's wholesale tariff "shall be performed at the [CLECs] expense"). In addition, in § 51.319(b)(1)(i) of the FCC's subloop unbundling rules, the FCC requires that CLECs compensate ILECs for providing technically feasible access to subloops. It would be inconsistent for the FCC to allow ILECs to recover their costs of providing technically feasible access but to deny them the right to recover the cost of constructing a SPOI. Therefore, we find that the Amendment shall state that Verizon may recover its costs of constructing a SPOI. Accordingly, subject to the findings above, we adopt Verizon's language concerning the SPOI.

N. 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?

1. Positions of the Parties

a. Verizon

Verizon argues that, to the best of its knowledge, ILECs are not reverse collocating local switching equipment in CLEC central offices "anywhere in the real world," and that Verizon itself has no plans to reverse collocate local switching equipment in any CLEC central office in Massachusetts (Verizon Brief at 111). Verizon contends that the only reverse-collocated ILEC equipment that triggers the obligation to unbundle the transmission path back to the ILEC wire center is local switching equipment with line-side functionality[74] (Verizon Reply Brief at 53). Verizon argues that the Amendment should not contain any reference to this hypothetical arrangement (Verizon Brief at 111).

b. AT&T

AT&T argues that the Amendment should include the requirement to unbundle the transmission path between an ILEC wire center and ILEC switching equipment collocated in a CLEC premise (AT&T Brief at 59).

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74 The line-side of the switch connects to the local loop.

c. CCG

CCG argues that the Amendment should define Dedicated Transport to include the transmission path between an ILEC wire center and the ILEC switching equipment reverse collocated at a CLEC premise (CCG Brief at 38). CCG argues that Verizon has presented no evidence that it does not reverse collocate switching equipment at CLEC premises, and further argues that even if Verizon does not engage in reverse collocation now it may do so in the future (CCG Reply Brief at 52). CCG argues that the Amendment must account for all changes in law resulting from the Triennial Review Order and Triennial Review Remand Order, and must therefore include reverse collocation arrangements in its definition of Dedicated Transport (id. at 52-53).

d. CCC

CCC argues that Verizon is required to provision dedicated transport between Verizon switches or other equipment that is reverse collocated at non-Verizon premises, including but not limited to collocation hotels (CCC Brief at 68). CCC argues that Verizon's unbundling obligation is not limited to only those arrangements where an ILEC has reverse collocated local switching equipment, but includes multiplexing equipment and interconnection equipment (id. at 68, 69). CCC argues that, in defining reverse collocation, the FCC incorporated into the definition of dedicated transport eligible for unbundling the installation of ILEC equipment at the premises of a CLEC or any other entity not affiliated with that ILEC regardless of whether the ILEC has a cage (see id. at 69, citing Triennial Review Order at ¶ 605 n.1843).

2. Analysis and Findings

The sections of the Triennial Review Order cited by CCC involve a discussion of service eligibility criteria for EELs, not dedicated transport. Triennial Review Order at ¶ 605. Although the FCC incorporated reverse collocation in the collocation prong of the FCC's service eligibility test, the FCC did not incorporate equipment other than line-side switching facilities into its definition of ILEC wire centers for the purpose of dedicated transport. See Triennial Review Remand Order at ¶ 87 n.251. Therefore, CCC's attempt to expand the universe of qualifying reverse collocation arrangements to include situations where ILECs collocate equipment other than switches must fail.

Verizon argues that the Amendment does not need to contain any reference to ILEC reverse collocation, because Verizon does not reverse collocate any local switching equipment on CLEC premises now, and has no plans to do in the future (see Verizon Brief at 111). Although a qualifying reverse collocation arrangement may be only hypothetical now, the obligation to unbundle dedicated transport in the event of a qualifying reverse collocation is not hypothetical. In defining "wire center" for the purpose of unbundled dedicated transport, the FCC expressly included "any incumbent LEC switches with line-side functionality that terminate loops that are 'reverse collocated' in non-incumbent LEC collocation hotels." Triennial Review Remand Order at ¶ 87 n.251. Therefore, we determine that it is reasonable for the Amendment to include reverse collocation arrangements (defined as ILEC local switching equipment with line-side functionality collocated at non-incumbent LEC premises) as potential qualifying wire centers in the definition of Dedicated Transport. Because no qualifying reverse collocation arrangements currently exist, any reference to reverse collocation in the Amendment serves only as a placeholder to obviate the need for additional changes to the Amendment in the event that Verizon ever does deploy a qualifying reverse collocation arrangement.

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

1. Positions of the Parties

a. Verizon

Verizon argues that CLECs' rights to interconnection facilities were not changed by either the Triennial Review Order or the Triennial Review Remand Order, and that it is therefore unnecessary and improper to consider any amendment to the parties' agreements concerning interconnection facilities in this arbitration (Verizon Brief at 112).

b. CLECs

The CLECs argue the Amendment should reflect the Triennial Review Remand Order's finding that interconnection facilities (including but not limited to tandem switching and certain types of transport) established for the transmission and routing of telephone exchange service and exchange access are interconnection facilities that are available to CLECs at TELRIC prices (AT&T Brief at 61, 62; CCG Brief at 38, 40; CCC Brief at 70).

2. Analysis and Findings

In the Triennial Review Order at ¶ 366, and the Triennial Review Remand Order at ¶ 140, the FCC stated that its finding of non-impairment for entrance facilities did not alter the FCC's prior determinations concerning interconnection facilities. The FCC made no findings, clarifications, or statements in the Triennial Review Order or Triennial Review Remand Order that changed the parties' pre-existing rights and responsibilities concerning interconnection facilities. As no change resulted from the Triennial Review Order or Triennial Review Remand Order, it is unnecessary to litigate any change in language in this proceeding, and it is unnecessary for the parties to amend their agreements with respect to interconnection facilities.

P. 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?

1. Introduction

In its Amendment 2, Verizon proposed language that it claims properly implements the new rules from the Triennial Review Order that require ILECs to perform routine network modifications ("RNMs") when provisioning loops and dedicated transport for CLECs (Verizon Brief at 125). In addition, Verizon proposed rates and charges for the RNMs in the Pricing Attachment to its Amendment (see Verizon Amendment 2, Exh. A). The CLECs argue that the requirement for ILECs to perform RNMs is not a new obligation, but rather an existing obligation that existed prior to the Triennial Review Order (AT&T Brief at 76; CCC Brief at 90; Conversent Brief at 32-33; CCG Brief at 44). Accordingly, the CLECs contend that this issue does not need to be addressed by the parties' Amendment (id.).

2. Positions of the Parties

a. Verizon

Contrary to the CLECs' arguments, Verizon states that the Department has determined in this docket that the FCC established a new obligation for RNMs in the Triennial Review Order (Verizon Reply Brief at 67). According to Verizon, the FCC defined RNMs as those routine activities that ILECs regularly undertake for their own customers to provision loops and transport where the requested transmission facility has already been constructed (Verizon Brief at 124). Thus, Verizon argues that RNMs do not include constructing new facilities (i.e., installation of new aerial or buried cable) for a requesting carrier (see id.; Verizon Reply Brief at 68). For this reason, Verizon contends that its proposed language concerning rearranging or splicing of "in-place" cable or "existing splice points" is necessary to make clear that Verizon is not required to lay new cable (Verizon Reply Brief at 68). In addition, in responding to CCC's concern about its "no build" language, Verizon notes that if it were to reject a CLEC loop or transport order on the grounds that no facilities are available, the CLEC could file a complaint with the Department (id. at 69). Verizon also asserts that it is not required to undertake the extreme burden of tracking and notifying CLECs of network build-outs that did not exist at the time of the CLEC's order (id.).

Concerning the definition of "routine," Verizon objects to AT&T's proposed language that states that "the 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" (Verizon Brief at 125, citing AT&T TRO Amendment, § 3.8.1). Verizon argues that AT&T's language is unnecessary, because nothing in Verizon's language limits RNMs to any particular service, provided that the modifications meet the FCC's governing standard (id. at 126). Verizon also disputes CCC's claim that Verizon's overall language about RNMs is not detailed enough and argues that if the Department adopted more detailed language, it would have to comport with the FCC's rules (Verizon Reply Brief at 69).

Lastly, Verizon states that it will not seek through this arbitration to litigate non-recurring rates for the RNMs and certain activities related to commingling, and that it has offered not to charge for those activities until rates for those activities are litigated and approved by the Department (id.). However, for those activities where rates are already tariffed, Verizon argues that it should be allowed to begin charging CLECs immediately (id. at 68).

b. AT&T

AT&T claims that there is no need to amend carriers' existing agreements to reflect Verizon's obligation to provide RNMs, because the Triennial Review Order simply clarified ILECs' existing obligations (AT&T Brief at 76). Nevertheless, AT&T has proposed language that it contends correctly reflects the FCC's rules and reserves its right to pursue all remedies available for Verizon's "no build" practice (id.).

AT&T contends that Verizon's proposed Amendment only requires Verizon to perform RNMs subject to its ability to impose certain rates on requesting CLECs (id. at 79). AT&T argues that the Triennial Review Order states that the costs of RNMs are most likely already included in existing TELRIC rates (id.). Therefore, AT&T asserts that Verizon should not be able to charge for RNMs until Verizon demonstrates that costs are not already recovered from monthly recurring UNE rates or from other existing cost recovery mechanisms (id.).

c. CCC

CCC claims that the Triennial Review Order did not establish new obligations for RNMs, but rather made certain that ILECs do not subvert existing rules, including § 251(c)(3) of the Act and §§ 51.307, 51.311, and 51.313 of the FCC rules (CCC Brief at 90). While no Amendment is needed for RNMs, CCC argues that, nonetheless, it has proposed its own language to show that Verizon's practice of not attaching routine electronics, such as multiplexers, apparatus cases, and doublers to high-capacity loops ordered by CLECs was inconsistent with the practice of other ILECs throughout the country, as found by the FCC in the Triennial Review Order (id. at 91-92). CCC recommends that the Department reject Verizon's attempt to continue to discriminate in the provisioning of dark fiber loops and transport UNEs and adopt CCC's detailed terms (id. at 93-94). CCC also recommends that the Department adopt additional measures to reduce the likelihood that a CLEC UNE request is denied because of lack of facilities, including requiring Verizon to provide detailed information to CLECs, such as the location, description, estimated cost, proposed timetable, and charges for performing non-routine modifications (id. at 95-96).

Moreover, CCC argues that the Department should prohibit Verizon from assessing charges now or in the future for RNMs and recognize that the cost for these modifications are already included in existing UNE rates (id. at 94). CCC claims that the FCC found that costs associated with RNMs may be already reflected in the carrier's investment in the network element, and labor costs associated with RNMs may be already recovered as part of the expense associated with that investment (id.).

d. Conversent

Conversent also argues that the Triennial Review Order did not create a new obligation for ILECs with respect to RNMs, but merely affirmed Verizon's obligations to provision DS1 UNE loops where certain RNMs are required (Conversent Brief at 32-33). Conversent states that although the Department previously ruled that RNMs were a new obligation subject to the change of law provisions in agreements, the Department is free to change its mind in light of the overwhelming weight of contrary decisions from other states and what Conversent considers to be clear language in the Triennial Review Order that RNMs are a pre-existing requirement (id. at 35). Accordingly, Conversent requests that the Department require Verizon to perform all RNMs without further process or delay (id.).

In addition, Conversent claims that Verizon's list of RNMs is too narrow because its language concerning splicing cable only applies to "in-place cable at splice points" and fails to include explanatory concepts set forth in the Triennial Review Order (id. at 36-37). Conversent also claims that Verizon's list does not include "adding a smart jack," a modification crucial to provisioning of a DS1 loop (id. at 36). Lastly, Conversent states that

Verizon's imposition of separate charges for RNMs is moot in light of Verizon's letter of March 1, 2005, stating that it could not justify its proposed costs for RNMs; therefore, there is no need for an Amendment concerning this issue (id. at 39).

e. MCI

MCI recommends that the Department require RNMs to be defined in the Amendment in the same manner as the FCC did in the Triennial Review Order (MCI Brief at 17).

f. CCG

CCG argues that the obligation to perform RNMs existed prior to the Triennial Review Order, and, therefore, the FCC's findings in the Triennial Review Order do not constitute a change of law under the parties' agreements for which a formal amendment is required (CCG Brief at 44). However, like other CLECs, CCG states that the existing contract language should be amended to avoid doubt and that Verizon's Amendment should define RNMs as those prospective or reactive activities that Verizon undertakes when establishing or maintaining network connectivity for its own retail customers (id. at 45).

CCG also argues that the Amendment should state that the costs for RNMs are already recovered through existing UNE rates set forth in the parties agreements (id.). Moreover, CCG opposes Verizon's plan to charge for those RNMs that have existing Department-approved rates, contending that Verizon has not shown that the existing rates do not double recover its costs (CCG Reply Brief at 62).

3. Analysis and Findings

In the Procedural Order at 31, the Department determined that the RNMs requirement represented a change of law that the Department would consider in this proceeding. In their briefs in this case, however, the CLECs have sought to reargue that decision. We determine that the CLECs have not provided us with any new argument to support a finding that our initial determination was incorrect. Accordingly, as we found in our prior order, the requirement that ILECs perform RNMs is a new obligation that must be incorporated as an Amendment to the parties' interconnection agreements.

Therefore, the only remaining issue is how best to include this new obligation through contract language in the parties agreements.[75] The primary disagreement is over whether the Amendment should include the FCC's list of RNMs or a more expansive list. The FCC defined RNMs as "an activity that the incumbent LEC regularly undertakes for its own customers" and stated that RNMs

> include, but are not limited to, 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 installation of a new loop, or

75 With regard to RNM rates, however, no new rates have been presented for the Department to consider at this time. Therefore, as we discuss in Issues 8, 12, and 32, we do not reach the rate issue in this proceeding.

> the installation of new aerial or buried cable for a requesting telecommunications carrier.

47 C.F.R. § 51.319(a)(7)(ii); see also Triennial Review Order at ¶¶ 632-34.

We find that Verizon's definition more closely tracks the FCC's definition of RNMs. We realize that Verizon's list is not inclusive of all routine modifications, but its definition recognizes that fact by using the term "are not limited to" to indicate that it is only a representative list. For example, as CCC correctly indicates in its brief, attaching electronic and other equipment that Verizon ordinarily attaches to a DS1 loop to activate the loop for its own customers is an example of another routine modification that Verizon must provide to CLECs. However, we decline to require that the Amendment list all possible RNMs. To do so, rather than according the CLECs all the law allows them, would disadvantage them by allowing Verizon to reject a modification that was not on the list, even though it could be an activity Verizon regularly undertakes for its own customers. If a CLEC has a disagreement about whether Verizon is obligated to perform a certain unlisted task as a RNM, the CLEC may draw the matter to the attention of the Department's Telecommunications Division. Lastly, with regard to the CLECs' objection to Verizon's use of the word "in-place" to describe the splicing of a cable, we find that while the FCC does not use the term in its definition, the term is consistent with the FCC's determination that RNMs do not include the construction of a new loop or transmission facility, or the installation of aerial or buried cable.

Q. Issue 22 Should the parties retain their pre-Amendment rights arising under the Agreement, tariffs, and SGATs?

1. Introduction

Issue 22 includes the following sub-issues: (1) whether Verizon may retain independent, and unidentified, rights to discontinue certain network elements, such as those that may be contained in the underlying interconnection agreements or in Verizon's tariffs; and, (2) whether Verizon may limit the underlying agreement's definition of Applicable Law, which purportedly incorporates obligations under § 271, the FCC's merger conditions and state law, by referring in the Amendment only to its unbundling obligations under § 251(c)(3) of the Act and the FCC's regulations.

2. Positions of the Parties

a. Verizon

Verizon argues that its proposed Amendment makes clear that the limitations on its unbundling obligations established in the core provisions of the Amendment are notwithstanding any other provision of the interconnection agreement, the Amendment, or any Verizon tariff (Verizon Brief at 127, citing Verizon Amendment 1, §§ 2.1, 3.1; Verizon Reply Brief at 70). Verizon asserts that because the Amendment will be binding as a matter of federal law, it supersedes any inconsistent obligation, wherever it may be found (Verizon Brief at 127). Verizon argues that this is proper, given that the FCC's rules override anything to the contrary (Verizon Reply Brief at 70).

Verizon further states that to the extent the Amendment does not affect pre-existing terms of agreement or tariffs, including independent rights to discontinue provisioning of particular network elements, those terms retain their binding force (Verizon Brief at 127). Furthermore, Verizon argues that it is unnecessary to conduct an exhaustive review of every tariff that may affect a term or condition simply to incorporate particular tariff references into the agreement (id. at 128).

Verizon also maintains that CLECs' argument that Verizon must comply with any restrictions on Verizon's ability to discontinue UNEs and services that may be contained in tariffs or applicable law is incorrect (id.). Verizon states that its unbundling obligations are circumscribed by the requirements of § 251(c)(3) and the FCC's implementing regulations, and it is therefore mandatory for the Amendment to supersede any other requirements that are inconsistent with federal law (id.).

b. AT&T

AT&T asserts that Verizon seeks to specifically reserve rights to discontinue UNEs that it claims exist in documents outside of the ICA, such as tariffs (AT&T Brief at 82, citing Verizon Amendment 1, §§ 2.1, 3.1; Verizon Amendment 2, §§ 2.4, 3.5.3). AT&T states that to the extent a CLEC is ordering UNEs, facilities, or services out of its ICA with Verizon, the provisions of the ICA regarding discontinuance of facilities should govern (id.). AT&T argues that Verizon should not be allowed to preserve and use some unidentified and unrelated rights external to the ICA (id.). AT&T further notes that Verizon does not identify with specificity any tariffs or other documents that might be implicated and argues that the inclusion of such vague language in the ICA can only cause confusion as to the parties' rights and obligations (id.).

c. MCI

MCI argues that the agreement, as modified by the Amendment, should be the exclusive source for determining the parties' contract rights, and, thus, Verizon's proposal to subordinate § 3 of the Amendment, which defines the terms of when Verizon may discontinue offering certain UNEs or UNE combinations, to any pre-existing and independent rights to discontinue providing facilities that Verizon may have under the original agreement, a Verizon tariff, or otherwise, is unjustified (MCI Brief at 18). Furthermore, MCI maintains that because it is purchasing UNEs out of the ICA, Verizon's tariffs have no relevance to it whatsoever (id.).

d. CCG

CCG states that parties should retain their pre-Amendment rights under the agreement and tariffs (CCG Brief at 45). CCG explains that, in doing so, it does not waive any of its rights to obtain facilities and services under Applicable Law, as defined in the parties underlying Agreement (CCG Reply Brief at 63). CCG argues that Verizon's position, which seeks to limit its unbundling obligations only to those required under § 251(c)(3), is in conflict with the underlying agreement's definition of Applicable Law, which encompasses § 271, the FCC's merger conditions, and state law (id.). But, CCG argues, nothing in this Amendment should be construed to limit a party's right or exempt a party from obligations under

Applicable Law, as defined in the agreement, except in such cases where the parties have explicitly agreed to a limitation or exemption (id.).

Additionally, CCG agrees with AT&T that Verizon must precisely cite any tariffs or other external documents that Verizon seeks to incorporate into the agreement (id. at 63). CCG argues that Verizon must not be allowed to "end-run" the interconnection agreement amendment process by filing tariff changes that could undermine the terms and conditions resulting from this arbitration (id. at 63-64).

e. Conversent

Conversent contends that § 3.4 of Verizon's Amendment 1, which purports to retain discontinuance rights, but does not impose any restrictions or procedural requirements on Verizon, is incomplete, one-sided, and inappropriate, and should therefore be deleted (Conversent Brief at 40). Conversent states that to the extent tariffs or other applicable law grant Verizon discontinuation rights, Verizon retains such rights, but that if tariffs or other applicable law restrict Verizon's ability to discontinue providing UNEs or services, or impose procedural requirements such as tariff amendment procedures, then, according to Conversent, Verizon is obligated to comply (id. at 39-40).

f. CCC

CCC views Verizon's proposed language that it will not provide a particular network element "[n]otwithstanding any other provision of the Agreement, this Amendment, or any Verizon tariff or SGAT" as a backdoor attempt by Verizon to nullify its tariffs and other obligations (CCC Brief at 97-98; CCC Reply Brief at 49). CCC maintains that there is no basis for Verizon to use a change to its § 251 obligations as an excuse to eliminate obligations arising from applicable law or requirements (CCC Brief at 97). If Verizon believes that the new FCC regulations support a change to its tariffs or SGATs, CCC argues that Verizon should propose amendments to those documents through the normal and proper channels (id.; CCC Reply Brief at 49).

3. Analysis and Findings

The Department determines, and the parties generally agree, that provisions in the Amendment supersede inconsistent provisions in the underlying agreement, and that, to the extent the Amendment does not affect pre-existing terms of agreement or tariffs, those terms retain their binding force. But, the Department agrees with CLEC arguments that Verizon's attempt to incorporate discontinuation rights from external documents, such as tariffs, is inappropriate.

Verizon's proposal would apparently preserve the ability to apply any pre-existing or independent discontinuance rights contained in external documents, such as a tariff, regardless of what corresponding provisions in the Amendment or the original agreement say about the parties' rights and obligations with respect to discontinuation of facilities (see, e.g., Verizon Amendment 1, § 3.4). In other words, Verizon proposes that tariff provisions pertaining to discontinuation of facilities "trump" negotiated or arbitrated provisions in the original agreement or in the Amendment with regard to discontinuation of facilities. Verizon's proposal, however, is inconsistent with the policy set forth in our Tariff 17 Order.[76]

In the Tariff 17 Order, the Department held that allowing a tariff to take precedence over contractual provisions had the potential to undermine the intent behind the arbitration and negotiation provisions of § 252 of the Act. Tariff 17 Order at 18. The Department stated that "CLECs should be able to rely with certainty on their interconnection agreements. They should not have to worry about the possibility that Bell Atlantic [now Verizon] will file a tariff that, if approved, could eviscerate their contract." Id. Accordingly, the Department held that "tariff provisions, whether derived from arbitration or Department investigation, will not supersede corresponding arbitrated or negotiated provisions in interconnection agreements." Id. at 19. The Department acknowledged that there may be extraordinary circumstances in which a tariff provision will supersede a corresponding provision in an interconnection agreement, but the Department stated that "the burden on any carrier that proposes to trump an interconnection provision with a tariff provision will be very significant." Id.

Here, we find the CLECs' position consistent with our policy outlined in the Tariff 17 Order. Specifically, we agree that when a CLEC orders UNEs, facilities, or services out of its interconnection agreement, the provisions of the agreement regarding discontinuation of facilities apply. The Department also agrees with CLEC arguments that the failure to identify

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[76] Investigation by the Department on its own motion as to the propriety of rates and charges set forth in the following tariffs: M.D.T.E. Nos. 14 and 17, filed with the Department on August 27, 1999, to become effective on September 27, 1999, by New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, D.T.E. 98-57 (March 24, 2000) ("Tariff 17 Order").

with specificity any tariffs or other documents that might be implicated would be a source of confusion as to the parties' rights and obligations. The Department has previously held that:

> [I]ncorporation of additional terms and conditions from other documents by mere reference to the document is inconsistent with the policy set forth in our Tariff 17 Order unless the parties explicitly intend to incorporate each and every additional term by the reference. By 'additional' we mean terms and conditions in the tariff, or other document, which are not inconsistent with the terms and conditions in the interconnection agreement, and for which there may, or may not, be a corresponding provision contained in the interconnection agreement.

Global NAPs/Verizon Arbitration Order at 53-54. As a matter of general policy, however, the Department does not oppose incorporation of documents, including tariffs, by sufficiently specific reference. Id. at 50.

Finally, Verizon has not presented any argument that would persuade us that the situation now before us should be an exception to our current policy regarding the relationship of tariffs and interconnection agreements. Accordingly, we reject Verizon's attempt to incorporate into the Amendment unidentified pre-existing and independent discontinuation rights from external documents.

Turning to CLEC arguments regarding the definition of "Applicable Law," we note that our role in this arbitration is to implement the rulings of the Triennial Review Order and Triennial Review Remand Order. We determine that implementation of the FCC's rulings in the Triennial Review Order and Triennial Review Remand Order does not require any modification to the underlying agreement's definition of "Applicable Law," and agree with CCG that nothing in this Amendment should be construed to limit a party's rights or exempt a party from obligations under Applicable Law, as defined in the underlying agreement, except in such cases where the parties have explicitly agreed to a limitation or exemption. Accordingly, we reject any attempt, directly or indirectly, to modify the definition of "Applicable Law" contained in the underlying agreements (see additional discussion in response to Issue 1, above).

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

1. Introduction

Issue 23 concerns whether the Amendment should include a process to address the potential effect on CLECs' customers' services when a UNE is discontinued. Verizon states that it will not disconnect any CLEC unless the CLEC opts for disconnection, and Verizon offers to provide at least 90 days' notice that it intends to cease provisioning a discontinued UNE at TELRIC, at which time it will reprice the arrangement. Verizon claims that, given the above, it is the CLECs' responsibility to notify their end users of an approaching disruption in service if the CLEC opts for disconnection. The CLECs argue that the FCC's transition requirements, as well as other rules and requirements, must be reflected in the Amendment in order to ensure that the CLECs' end users are not harmed by the loss or disruption of service.

2. Positions of the Parties

a. Verizon

Verizon argues that its Amendment 1 sets out a "clear and fair process" for movement away from UNE arrangements when Verizon is no longer obligated to provide such arrangements under § 251(c)(3) (Verizon Brief at 128). Verizon states that under § 3.1, it will provide at least 90 days' notice that a given UNE has been discontinued, "at which point Verizon will stop accepting new orders for the UNE in question" (id.). According to Verizon, § 3.2 allows CLECs to make an alternative arrangement through a separate, commercial agreement, an applicable Verizon special access tariff, or resale, to obtain access to the facilities used to provide the discontinued UNEs during the 90-day notice period (id. at 128-29). If the CLEC has not selected any of those options, § 3.2 provides that Verizon may "reprice the discontinued UNE in question at a rate equivalent to the applicable special access or resale rate" (id. at 129).

Verizon notes that CLECs are free to take measures they deem appropriate to address the potential impact of a UNE discontinuation on their own end users' services, and will have sufficient time to do so given the twelve month transition period for the CLECs' embedded base of delisted mass-market switching, loops, and transport, and the 18 month period for embedded dark fiber loops and transport imposed by the FCC (id.). Verizon contends that it will not disconnect any CLEC unless the CLEC opts for disconnection, and that it is therefore the responsibility of the CLEC that chooses to stop providing service to its customers upon the discontinuance of a UNE to extend appropriate notice to those customers (id.). Verizon insists that it would be inappropriate to address a CLEC's obligations to its customers in the context of an interconnection agreement between the CLEC and Verizon (id.).

Verizon argues that although the CLECs urge the Department to ensure that CLEC customers do not lose service as a result of Verizon's discontinuance of a particular UNE, neither the Triennial Review Order nor the Triennial Review Remand Order "conditions unbundling relief on assurances that no CLEC's customer will lose service" (Verizon Reply Brief at 71). Instead, Verizon states that CLECs through their own actions should determine how the elimination of a particular UNE impacts their own customers (id.).

b. AT&T

AT&T asserts that the FCC's adoption of specific transition requirements in the Triennial Review Remand Order is critical, because it addresses the need to maintain service stability for existing customers, offers protection against a "tidal wave of maintenance issues and service rearrangements," and provides stability of prices and costs so that AT&T can properly analyze business decisions (AT&T Brief at 82-83). AT&T contends that the FCC provided CLECs with the tools to control their customers' experience and their own business needs by adopting these transition plans, and, in turn, granted the ILECs a 15 percent premium above their forward-looking loop and transport costs, and a one dollar per line premium above their forward-looking UNE-P cost (id. at 83). AT&T insists that any "adverse modification to these time frames or rates would make an already difficult transition unworkable, and would be inconsistent with the FCC rules" (id.).

AT&T insists that it is imperative that these transition mechanisms are reflected in the parties' interconnection agreements and that the interconnection agreements are sufficiently detailed to remove the possibility of avoidable delays caused by misunderstandings of the parties' rights and obligations or lengthy dispute resolution processes given the relatively short time frame for the transition (id.). AT&T argues that, unlike the detailed provisions proposed by AT&T in §§ 3.10 and 3.11 of its proposed Amendment, Verizon does not include the necessary details about the transition process in its Amendment, which would enable Verizon to conduct such conversions with "disruptive, customer-affecting impact" (id.).

AT&T notes that the FCC has adopted specific parameters for the transition from UNEs that Verizon is no longer obligated to provide, but adds that it believes that the transition to alternative arrangements should also be "governed by the same principles articulated by the FCC in 47 C.F.R. § 51.316(b) and (d) for the conversion to UNEs" (id. at 84). AT&T maintains that Verizon should be required to perform conversions without negatively affecting the service quality delivered to CLECs' customers and that Verizon should not be permitted to impose any termination charges, disconnect fees, reconnect fees, or charges associated with establishing a service for the first time, in connection with the conversion between existing arrangements and new arrangements (id. at 83).

c. CCG

CCG argues that the Amendment should include a process to address the potential effect on CLECs' customers' services to ensure that loss of service to the CLECs' customers does not ensue from Verizon's discontinuance of § 251(c) UNEs (CCG Brief at 45). CCG argues that the Amendment should also include transition periods for discontinued § 251(c)(3) UNEs as required by the Triennial Review Remand Order, and which should be of sufficient duration to afford the CLECs time to make the necessary arrangements to obtain and build replacement facilities (id. at 45-46). In particular, CCG asserts that the Amendment should explicitly incorporate "the FCC's service eligibility criteria set forth in the TRO and § 51.318 of the FCC's rules for combinations and commingled facilities and service" (id. at 46).

CCG claims that its proposed Amendment, § 3.9, includes language that follows the framework established in the Triennial Review Remand Order with specific identification processes, notice periods, and dispute resolution provisions that fill-in the details of the FCC's transition framework (CCG Reply Brief at 64). CCG argues that its proposed notice periods are consistent with those prescribed by the FCC in the Triennial Review Remand Order, "and would enable CLECs sufficient time to transition to alternative arrangements without disrupting their customers' service," whereas Verizon's proposed notice period of only 90 days is inadequate (id. at 65). In addition, CCG insists that the transition plan must accommodate for the resolution of potential disputes over the identification of a declassified UNE and states that its proposed language allows for the CLEC to object to Verizon's identification of a declassified UNE and for the parties to seek resolution from the Department if the parties cannot agree to the applicable rates, terms and conditions of the identified UNE (id.).

d. CCC

CCC states that it addresses this issue in its responses to Issues 6, 13(f), 20, 29, and Supplemental Issue 4 in its initial and reply briefs (CCC Reply Brief at 49). CCC asserts that the language in its proposed TRO Amendment at §§ 2.3.2 and 2.3.3 minimizes the risk of service disruptions as imagined by the Triennial Review Order (CCC Brief at 78).

CCC contends that CLECs must be able to convert discontinued UNEs without disruption or impairment of service to a tariffed service where one exists, and that any other approach that makes room for uncertainty would create an opportunity for "mischief on Verizon's part," to the detriment of end users subscribing to service from CLECs (id.). CCC points out that the FCC held that "[c]onverting between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer's perception of service quality" (id. at 77, citing Triennial Review Order at ¶ 586). Furthermore, CCC states that the FCC also recognized the possibility that conversions may increase the likelihood of service disruptions to competitive LEC customers and mandated that requesting carriers should establish essential operational procedures to make sure that customer service quality is not affected by conversions (id. at 77-78). CCC argues that it is therefore "absolutely critical that Verizon not physically disconnect, separate, change or alter the existing facilities when it performs conversions unless the CLEC requests alterations to its facilities," because there is a far greater risk of customer service quality being degraded, suspended, or cut off (id. at 78).

e. MCI

MCI states that it has proposed several contract provisions to implement the detailed requirements of the FCC's new unbundling rules to govern the transition from UNE arrangements to replacement arrangements (MCI Brief at 19).

3. Analysis and Findings

The potential effect on a CLEC's end users' services when a UNE is discontinued depends primarily on the CLEC's response to the discontinuation of the delisted UNEs. While we agree with AT&T, CCG, and CCC that the FCC envisioned a seamless transition between UNEs or UNE combinations and alternative arrangements and recognized the need to minimize the possibility of service disruptions to CLEC customers, we find that the FCC also addressed that problem by mandating specific transition periods of twelve months for the embedded base of delisted mass-market switching, high-capacity loops, and dedicated transport, and 18 months for the embedded base of delisted dark fiber loops and transport. The FCC's transition plans prescribe specific time frames and interim rates so that CLECs may properly assess their customers' needs and seek access to alternative arrangements, whether through separate, commercial agreements with Verizon or other wholesale providers, a Verizon tariffed service, a resale arrangement, or self-provisioning. In addition, the FCC adopted rules designed to ensure that the process whereby CLECs' convert UNEs and UNE combinations to other wholesale services would be seamless to end users, and our findings in this Order concerning Issues 8 and 12 implement those requirements.[77] Finally, we agree with Verizon that when a CLEC chooses to stop providing service to its customers upon the discontinuance of a UNE, it is the CLEC's responsibility to provide appropriate notice to their end user customers, because Verizon, as the wholesale provider, has no direct relationship with the CLEC's retail customers. CLECs should already have begun planning how best to ease the twelve- and eighteen-month transition periods to minimize effects of the Triennial Review Remand Order on the customers that the CLECs have solicited and won in the marketplace.

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[77] The question of whether Verizon should be permitted to assess any termination charges, disconnect fees, reconnect fees, or charges associated with establishing a service for the first time, in connection with the conversion between existing arrangements and new arrangements is addressed in Issues 8 and 12, above.

S. 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?

1. Introduction

In Verizon's Amendment 1, § 3.2, Verizon references commercial agreements that may be negotiated by the parties for the continuation of former § 251 UNEs. Section 3.2 of Verizon's Amendment 1 also sets forth a default alternative arrangement for former § 251 UNEs if a CLEC fails to secure an alternative arrangement. The CLECs oppose any reference to commercial agreements and challenge Verizon's default alternative arrangement as an attempt to evade a state commission's § 252 authority to review and approve agreements.

2. Positions of the Parties

a. Verizon

Verizon argues that it is not required to, and has not agreed to, negotiate issues that are not related to Verizon's unbundling obligations under § 251(c)(3) of the Act (Verizon Brief at 130). Verizon further argues that, because Verizon has not agreed to negotiate the terms of commercial agreements, the Department may not arbitrate these terms (id., citing Coserv Limited Liability Corp. v. Southwestern Bell Telephone Company, 350 F.3d 482 (5th Cir. 2003)). While commercial agreements are not, according to Verizon, subject to negotiation or arbitration, Verizon claims that a reference to commercial agreements appropriately signifies that CLECs have other options in case of the elimination of a UNE (id.). Verizon maintains that its reference to commercial agreements is solely for the convenience of the parties, in order to describe the action Verizon will take if the CLEC, upon discontinuance of a UNE, does not replace the UNE with a commercial or other alternative arrangement (id.). Verizon insists that the reference is simply for clarity and does not affect any substantial obligations under the agreement (id.). Nevertheless, Verizon states that it would consider omitting any reference to commercial agreements if the Amendment is otherwise clear as to Verizon's right to take action upon a CLEC's failure to put in place an alternative arrangement (id. at 130-31).

Verizon contends that the CLECs' objection to references to commercial agreements is based upon the erroneous argument that any gap in Verizon's unbundling obligations would be filled by an obligation under some other "Applicable Law" (id. at 131). But, Verizon argues, the Department has already held that those sources of law are not to be considered in this proceeding (Verizon Reply Brief at 72, citing Procedural Order at 32).

b. AT&T

AT&T argues that Verizon should not reference or address commercial agreements (A&T Brief at 84). More specifically, AT&T states that inclusion of such vague and ambiguous language in the interconnection agreement can only cause confusion as to the parties' rights and obligations (id. at 82).

c. CCG

CCG contends that there is no basis for the Amendment to address commercial agreements between Verizon and individual CLECs that may be negotiated in the future (CCG Brief at 46). CCG argues that commercial agreements incorporating Verizon's ongoing obligations under § 271, however, are within the scope of interconnection agreements (id.). CCG states that Verizon is not permitted to exclude from state commission-approved interconnection agreements arising under § 252, agreed-upon rates, terms, and conditions applicable to network elements that Verizon provides to CLECs on an unbundled basis consistent with its obligations under other applicable law, including § 271 and state law (CCG Reply Brief at 66). CCG argues that Verizon and CLECs' obligations to file with the Department for § 252 approval any rates, terms, and conditions applicable to network elements encompasses commercial and other negotiated agreements executed by the parties outside this arbitration (id.). CCG therefore argues that the Department should reject Verizon's efforts to minimize its federal and state law unbundling obligations through commercial agreements intended to evade state commission § 252 oversight (id.).

More specifically, CCG argues that any agreement addressing Verizon's ongoing obligations to provide network elements on an unbundled basis under any applicable law, including § 271, must be treated as an interconnection agreement, and, therefore, must be filed with and approved by the Department (id. at 66-68, citing Qwest Declaratory Ruling; Qwest NAL[78]). CCG argues that Verizon's unbundling obligations under any applicable law, including § 271, fall squarely within that requirement and must be treated by the Department as an "interconnection agreement" (id. at 68). Additionally, CCG contends that, in order to prevent discrimination, the Department must require that the rates, terms, and conditions applicable to network elements offered by Verizon be made available for adoption by CLECs pursuant to § 252(i) of the Act (id. at 67).

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78 In the Matter of Qwest Corporation, Notice of Apparent Liability for Forfeiture, FCC 04-57 (rel. Mar. 12, 2004) ("Qwest NAL").

d. CCC

CCC argues that the issue in dispute is not whether the Amendment should reference commercial agreements, but whether the default alternative arrangement for a former UNE should be a network element provided pursuant to a commercial agreement or § 271 (CCC Reply Brief at 49-50). CCC maintains that Verizon's proposed language is superfluous and unnecessary, because Verizon is obligated, pursuant to § 271, to offer rates, terms, and conditions for network elements in § 252 interconnection agreements even if Verizon has been relieved of offering such network elements pursuant to § 251(c)(3) (CCC Brief at 101; CCC Reply Brief at 50). Furthermore, CCC states that Verizon's proposed language has no basis in the Triennial Review Order (CCC Brief at 101). But, CCC notes that consistent with the Triennial Review Order the services provided under a commercial agreement should be subject to commingling and conversion to the same extent as tariffed services (id. at 101-102).

3. Analysis and Findings

As a matter of policy, the Department is not opposed to references to commercial agreements in the Amendment. Nevertheless, for the reasons outlined below, the Department rejects § 3.2 of Verizon's Amendment 1. We reject, as inconsistent with the Act and with independent state unbundling authority, Verizon's claim that it is not required to negotiate any obligations unrelated to § 251(c)(3). Although the Department has not imposed any additional unbundling requirements on Verizon pursuant to our independent state authority, the Department is not precluded from doing so in the future. Consolidated Order, D.T.E. 03-60/04-73, at 21-26, 67. Indeed, the Act specifically leaves this possibility open.

The savings clause of § 251(d)(3) expressly preserves the authority of state commissions to enforce regulations, orders, or policies that are "consistent" with the requirements of § 251 and do not "substantially prevent implementation" of § 251 and the purposes of the Act. 47 U.S.C. § 251(d)(3); see also 47 U.S.C. §§ 252(e)(3), 253, 261. By incorporating a default alternative arrangement for all former § 251(c)(3) UNEs, Verizon's proposal contemplates that Verizon's unbundling obligations are limited to only those obligations under § 251(c)(3) and could therefore impede enforcement of any future state-imposed access and interconnection obligations, if any there may prove to be.

Moreover, we conclude that, contrary to CLEC arguments, Verizon's refusal to negotiate or arbitrate § 271 obligations in its § 252 negotiations or arbitrations does not have any bearing on our role in reviewing and approving interconnection agreements under § 252 of the Act, despite references to § 252 in § 271. The applicable prices, terms, and conditions for ongoing § 271 network elements are determined in accordance with §§ 201(b) and 202(a) of the Act. Triennial Review Order at ¶ 662, citing UNE Remand Order at ¶ 470. The Department's authority to review and approve interconnection agreements, however, is defined by § 252 of the Act, without reference or reliance upon § 271 or any other section of the Act. Under § 252, a state commission may reject a negotiated agreement if the agreement is discriminatory or inconsistent with the public interest, convenience and necessity; or an arbitrated agreement if it fails to meet the requirements of § 251. See 47 U.S.C. § 251(e)(2).

Moreover, despite the argument that § 271(c)(1)(A) and (c)(2)(A) of the Act require Verizon to include its ongoing § 271 unbundling obligations in at least one binding

§ 252-approved agreement in order for Verizon to fulfill its ongoing duty to remain in compliance with § 271 (see 47 U.S.C. § 271(c)(1)(A), (c)(2)(A)), we determine that our authority to review and approve interconnection agreements under § 252 does not include the authority to mandate that Verizon include § 271 network elements in any of its § 252 interconnection agreements.

Indeed, § 271(d)(6) explicitly grants the FCC, not state commissions, the authority to enforce § 271. The FCC has stated that:

> In the event a BOC has already received section 271 authorization, section 271(d)(6) grants the Commission enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271. In particular, this section provides the Commission with enforcement authority where a BOC "has ceased to meet any of the conditions required for such approval."

Triennial Review Order at ¶ 665, citing 47 U.S.C. § 271(d)(6). Thus, whether Verizon continues to meet the requirements for § 271 approval, e.g., by offering § 271 network elements under one or more binding agreements that have been approved under § 252, as required by 47 U.S.C. § 271(c)(1)(A), is an issue of enforcement of the § 271 conditions for the FCC's determination.

In sum, we reject Verizon's proposal regarding the reference to the continuation of any former UNEs pursuant to commercially negotiated agreements between ILECs and CLECs, and its proposal regarding default arrangements for any former UNEs, because it may explicitly run counter to independent state authority to regulate access and interconnection.

T. <u>Issue 26</u> Should Verizon provide an access point for CLECs to engage in testing, maintaining and repairing copper loops and copper subloops?

1. <u>Introduction</u>

This issue concerns whether the Amendment should include a provision that requires Verizon to provide an access point for CLECs to engage in testing, maintaining, and repairing copper loops and copper subloops. Verizon argues that this issue is already addressed in existing agreements, and that the <u>Triennial Review Order</u> did not change existing obligations. CLECs, on the other hand, contend that the <u>Triennial Review Order</u> did in fact establish a new requirement, which must be memorialized in the Amendment.

2. <u>Positions of the Parties</u>

a. <u>Verizon</u>

Verizon claims that the <u>Triennial Review Order</u> did not change the rules regarding testing, maintaining, and repairing copper loops and subloops and that existing agreements already address this issue (Verizon Brief at 131). For those CLECs that do not have existing provisions in their agreements concerning access test points, Verizon states that it has offered to negotiate, in a separate forum, changes to those agreements to incorporate such provisions (<u>id.</u>).

b. <u>AT&T</u>

AT&T argues that Verizon should be required to provide an access point for CLECs to test, maintain, and repair copper loops and subloops and states that its proposed Amendment at § 3.3 appropriately implements the <u>Triennial Review Order</u> requirements (AT&T Brief at 84).

AT&T contends that the Triennial Review Order explicitly requires that ILECs provide, on a nondiscriminatory basis, access to physical loop test access points for the purpose of loop testing, maintenance, and repair activities (id. at 46-47).

c. CCC

Contrary to Verizon's position, CCC claims that this issue is within the scope of the arbitration, because the Triennial Review Order directs ILECs to provide physical loop test access points for CLECs to engage in testing, maintaining, and repairing copper loops and copper subloops (CCC Brief at 102, citing CCC TRO Amendment, Appendix B at 11; 47 C.F.R. § 51.319(a)(1)(iv)(A)). CCC argues that its proposed language properly incorporates the new requirements of the Triennial Review Order (id., citing CCC TRO Amendment, § 1.5.3).

d. CCG

CCG argues that the Triennial Review Order includes new requirements for loop and subloop testing, maintenance, and repair and that its proposed language on this issue appropriately implements those changes (CCG Reply Brief at 70, citing Triennial Review Order at ¶ 252; 47 C.F.R. § 51.319(a)(1)(iv)(A)). Disputing Verizon's claims that arbitrating this issue in this case would be a "waste of resources," CCG contends that it would be more efficient to address the issue in this arbitration, rather than through individual negotiations with CLECs, because numerous CLECs have joined the issue here and have proposed language to implement the requirements (id.).

3. Analysis and Findings

In the Triennial Review Order, within a discussion of various requirements of ILECs to facilitate line splitting, the FCC stated:

> We also readopt the Commission rules requiring incumbent LECs to provide access to physical loop test access points on a nondiscriminatory basis for the purpose of loop testing, maintenance, and repair activities, and allowing incumbent LECs to maintain control over the loop and splitter equipment and functions in certain circumstances. We do not anticipate that the incumbent LECs will have any difficulty implementing such an obligation because the Commission required as much from them in its Line Sharing Reconsideration Order.

Triennial Review Order at ¶ 252 (footnote omitted). Since the FCC reaffirmed an existing requirement, we find that there is no need to include a provision in the Amendment addressing this issue. As we have stated, the purpose of this arbitration is only to implement changes in law resulting from the Triennial Review Order and the Triennial Review Remand Order.

U. 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?

1. Positions of the Parties

For the most part, the carriers simply restate their positions on previous disputed issues by reference,[79] arguing that the Amendments should reflect all of Verizon's unbundling obligations, including Verizon's § 271 obligations. We highlight here only the specific

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[79] Verizon refers to its response to Issue 2 (Verizon Brief at 131). AT&T refers to its responses to Issues 2-8, 10, 11 (AT&T Brief at 85). CCC refers to its responses to Issues 1-3, 6, 27, and 31 (CCC Brief at 108). CCG raises specific arguments regarding § 271 obligations, which we consider under Issue 31 (CCG Brief at 47-48).

response to this Issue. CCC argues that there is no need to include terms pertaining to service substitutions for UNEs for which Verizon in the future obtains relief from its § 251 unbundling obligations, because the existing change of law language is sufficient to handle future contingencies as they arise (CCC Brief at 108-09).

2. Analysis and Findings

As we found under Issue 6, §§ 251 and 252 do not require parties to negotiate terms for non-section 251 elements, although they certainly may. Therefore, Verizon is not required to negotiate terms for service substitutions for UNEs that Verizon no longer is required to make available under § 251 of the Act. Moreover, we find that neither the Triennial Review Order nor the Triennial Review Remand Order require an amendment to provide, or preclude, terms for negotiating service substitutions in response to future changes of law. Further, considering what service substitutions may be permitted in response to future relief that ILECs may obtain would only be speculative.

V. 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?

1. Positions of the Parties

a. AT&T

AT&T proposes language clarifying that for any delisted network element, and for those network elements required to be unbundled on a transitional basis that Verizon remains obligated to provide pursuant to § 271, "Verizon shall provide the Network Element without interruption pursuant to the terms and conditions set forth in the Agreement" at "just and reasonable" rates (AT&T TRO Amendment, § 3.11.3). AT&T argues that the Department should direct Verizon to provide § 271 network elements at rates that comply with the "just and reasonable" standard (AT&T Brief at 86). AT&T contends that a BOC can comply with § 271 only by entering into interconnection agreements "under Section 252" (id. at 87, citing 47 U.S.C. § 271(c)(1)(A)). AT&T argues, therefore, that in arbitrating interconnection agreements, state commissions will, in the first instance, set rates, terms, and conditions for § 271 checklist items (id., citing Sprint Comm. Co. v. FCC, 274 F.3d 549, 552 (D.C. Cir. 2001)).

b. CCC

CCC argues that the dispute over rates, terms, and conditions for § 271 network elements is an "open issue" that may be presented to the Department for arbitration under § 252 (CCC Brief at 110). CCC proposes amendment language that would state that Verizon is obligated to provide § 271 checklist items at TELRIC until the Department approves permanent rates for those items (CCC TRO Amendment, §§ 4, 5.13; CCC Brief at 117-18). CCC notes that the FCC stated that a BOC must satisfy its checklist obligations "pursuant to state-approved interconnection agreements that set forth prices . . . for each checklist item"

(CCC Brief at 111, citing Massachusetts 271 Order[80] at ¶ 11). CCC counters Verizon's argument that the Department does not have authority to arbitrate the rates, terms, and conditions associated with Verizon's obligation to offer them pursuant to § 271, by arguing that states are required to arbitrate "all open issues" (id. at 112). CCC notes that § 271(c)(1)(A) states that a BOC meets its § 271 obligations "if it has entered into one or more binding agreements that have been approved under Section 252," specifying the terms and conditions under which the company is providing § 271 checklist items (id. at 113). CCC argues that by requesting and obtaining authority to provide interLATA services under § 271, Verizon has voluntarily and implicitly agreed to negotiate, and arbitrate when negotiations fail, interconnection agreements that contain § 271 checklist items to be approved pursuant to § 252 (id. at 114).

CCC argues that state commission authority to determine rights and obligations under § 271 issues in a § 252 arbitration has been preserved. CCC notes that § 252 provides that "nothing in [§ 252] shall prohibit a State commission from establishing or enforcing other requirements of state law in its review of an agreement" (id. at 115, citing 47 U.S.C. § 252(e)(3)). CCC argues that the FCC's adoption of the §§ 201 and 202 "just and reasonable" standard for § 271 pricing does not permit the FCC to exert exclusive

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80 In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region InterLATA Services in Massachusetts, CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130 (rel. Apr. 16, 2001) ("Massachusetts 271 Order").

jurisdictional control over § 271 (id. at 116). CCC maintains that § 201 jurisdiction applies only to interstate services, whereas § 271 network elements are local exchange offerings (id.).

CCC notes that while the FCC did state that rates for § 271 network elements would be reviewed utilizing the just, reasonable, and nondiscriminatory standard of §§ 201 and 202, it did not specifically preclude or preempt state commissions from establishing rates for § 271 network elements in arbitration proceedings conducted pursuant to § 252 (id. at 119). Therefore, CCC asserts, states may apply this pricing method to establish rates for these elements according to their authority granted by the Telecommunications Act (id.). Moreover, CCC claims, it is appropriate to allow state commissions to apply the standard, because they are more familiar than the FCC with the individual parties, the wholesale offerings, and issues disputed between the parties (id. at 120). CCC contends that states have the authority to establish rates for § 271 UNEs, just as states have the authority to apply federal pricing standards to network elements unbundled pursuant to §§ 251 and 252, and just as the states had authority to establish rates in reviewing a § 271 application (id. at 120-21). Finally, CCC proposes that Verizon should be required to provide combinations of network elements provided under § 271 and permit commingling, arguing that Verizon's refusal to provide such combinations and commingling would be unreasonable, discriminatory, and in violation of §§ 201 and 202 (id. at 121).

c. CCG

CCG argues that notwithstanding the Triennial Review Order or the Triennial Review Remand Order, Verizon remains obligated to provide network elements set forth in the § 271 competitive checklist, including local circuit switching, line sharing, high capacity loops, and high capacity dedicated transport facilities (CCG Brief at 50, citing 47 U.S.C. § 271(c)(2)(B)). CCG highlights the FCC's statement that § 271(2)(B) establishes "an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251" (id., citing Triennial Review Order at ¶ 655). Thus, CCG argues that the Amendment to the parties' interconnection agreement must expressly incorporate Verizon's ongoing obligations to provide those network elements pursuant to § 271, and that they should be priced at TELRIC until the Department conducts its own pricing proceeding to establish "just, reasonable, and nondiscriminatory" rates (id. at 51).

d. MCI

MCI argues that a plain reading of the Triennial Review Remand Order indicates that the FCC's national finding of "no impairment" for unbundled local switching is solely based on the FCC's analysis of § 251 unbundling standards, and, therefore, the Triennial Review Order only limits unbundling under § 251 (MCI Brief at 6, citing Triennial Review Remand Order at ¶¶ 5, 20-23). MCI contends that the FCC re-affirmed that if Verizon wishes to continue to provide in-region interLATA services under § 271, it "must continue to comply with any conditions required for [§ 271] approval," whether or not a particular network element must be made available under § 251 (id., citing Triennial Review Order at ¶¶ 653-55, 665).

MCI notes that the Department and the FCC have found that Verizon met its obligation to provide the checklist items by making the applicable elements available at TELRIC pursuant to §§ 251(c)(3) and 252(d)(1) (id. at 7). MCI contends that it must follow that, as a condition of continuing to provide in-region interLATA services in Massachusetts, Verizon must continue to offer unbundled local switching and UNE-P (id.).

e. Verizon

Verizon argues that the Department has already conclusively rejected arguments raised by the CLECs (Verizon Brief at 136). Verizon notes that the Department has held that the FCC, not the Department, has authority to enforce obligations under § 271 (id., citing D.T.E. 98-57 Phase III-D Order at 16, Consolidated Order, D.T.E. 03-60/04-73, at 55-56 (holding that § 271-only elements should be priced not according to TELRIC, but rather according to the just and reasonable standard of §§ 201 and 202 of the Act, and that the Department does not have authority to determine whether Verizon is complying with its obligations under § 271)).

Verizon contends that the only role for state commissions in administering § 271 is with respect to an application for long distance approval, and that Congress provided that the FCC "shall consult" with state commissions to verify compliance (id. at 137). Verizon argues that state commissions cannot parlay their limited role in issuing a § 271 recommendation into an opportunity to issue an order under federal law or ostensibly under state law (id., citing Indiana Bell Telephone Company v. Indiana Utility Regulatory Commission, 359 F.3d 493, 497 (7th Cir. 2004)).

Verizon argues that arbitration is limited to a request for negotiation pursuant to § 251, and where negotiations under this section are unsuccessful, either party may petition for arbitration of open issues (id. at 138, citing 47 U.S.C. § 252(a)(1), (b)(1), (c)(1), (e)(2)(B)). According to Verizon, incumbents are only obligated to negotiate the terms and conditions described in § 251(b), (c). Verizon argues that state authority to set rates under § 252(d)(1) applies only for purposes of implementation of § 251(c)(3), but there was no such delegation of authority for § 271 elements (id. at 138-39). Verizon argues that § 271 obligations are not UNEs and § 271 does not incorporate § 251 obligations (id. at 140). Verizon maintains that the CLECs' argument that §§ 251 and 252 apply to § 271 elements "is grounded in an erroneous claim of a cross-application of § 251" and "none of the requirements of § 251(c)(3) applies to items four, five, six and ten on the § 271 competitive checklist" (id. at 141).

2. Analysis and Findings

As the Department was at pains to observe during Verizon's § 271 proceeding, its role was investigatory. 47 U.S.C. § 271(d)(2)(B); see generally Evaluation of the Massachusetts Department of Telecommunications and Energy, CC Docket 00-176 (filed Oct. 16, 2000). Its objective was to assemble a record and to find facts on checklist items in order to advise the FCC about the state of competition in Massachusetts. That achieved, our § 271 role was completed, with the exception of the ongoing monitoring activities that we undertake pursuant to the PAP to make certain that the local exchange market remains open to competition after Verizon achieved § 271 approval. See Verizon Application for Entry into the In-Region InterLATA Telephone Market, D.T.E. 99-271, Order Adopting PAP (Sept. 5, 2000).

The incumbent LECs' obligation under § 271(c)(1)(A) to enter into a binding agreement "approved under Section 252" does indicate that § 271 obligations may be approved under

§ 252, but this does not convert checklist items 4 (loops), 5 (transport), 6 (switching), and 10 (databases and signaling) into terms that may be resolved by compulsory arbitration under § 252, i.e., § 251 obligations.[81] See 47 U.S.C. § 252(c), (d). They are items that may be adopted by negotiation. We may review such negotiated terms, only if presented to the Department for approval under § 252(e)(2)(A), to determine only whether the proposed terms are nondiscriminatory and consistent with the public interest. Should the parties fail to agree upon terms, or if Verizon refuses to negotiate such terms, it is for the FCC to compel compliance with § 271 by mandating the necessary terms. 47 U.S.C. § 271(d)(6).

Our determination today that we cannot compel Verizon to offer such terms under § 252 offers no judgment whether Verizon is satisfying whatever § 271 obligations it may have. See 47 U.S.C. § 271(d)(6). Nor would our review for consistency with the public interest of agreed-upon terms under § 252(e)(2)(A), including a determination of whether those terms for access and interconnection are just and reasonable, constitute a finding that the terms satisfy whatever obligations Verizon may have under § 271.

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81 While the remaining checklist items have analogous § 251 obligations, the terms for which may be brought to the Department for arbitration pursuant to § 252 if the obligations are ongoing, it is erroneous to claim that a state commission therefore has authority to determine such rights under § 271. When a state commission arbitrates terms for such obligations, it does so pursuant to § 252, not § 271. It is erroneous to claim that the Department's authority to arbitrate those terms spills over to items 4, 5, 6, and 10, which are independent of § 251, and therefore cannot be arbitrated unless the parties choose to do so.

W. Issue 32 Should the Department adopt Verizon's proposed new rates for the items specified in the Pricing Attachment to Amendment 2?

1. Introduction

In its Amendment 2, Verizon proposed non-recurring rates for various new services required under the terms of the Triennial Review Order, including RNMs[82] and various activities related to commingling and conversions (Verizon Brief at 142; Verizon Amendment 2, exh. A). However, on March 1, 2005, Verizon notified the Department and the parties that Verizon was not able to comply at that time with the Department's directive to file a Massachusetts-specific TELRIC cost study demonstrating that the proposed rates were just and reasonable and did not double-recover costs, and, therefore, Verizon indicated that it would not litigate the rates in this proceeding (Letter from Bruce P. Beausejour at 2 (Mar. 1, 2005)). Verizon stated that it would submit a cost study and proposed rates for those services with its next comprehensive TELRIC study (id.). Until those rates are approved, Verizon stated that it would not charge for the activities. However, for those activities for which rates already exist in Exhibit A of Verizon Amendment 2, Verizon stated that it will charge those rates when it undertakes the activities for CLECs.[83]

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82 The parties also addressed the issue of whether Verizon may charge for RNMs in their responses to Issue 21, but we rule on that question in this issue.

83 The non-recurring activities for which Verizon has established rates are: standard and expedited engineering query, standard and expedited work order, standard and expedited removal of load coils, standard and expedited removal of single bridged tap, standard and expedited removal of multiple bridged taps, and standard and expedited line and station transfer (Verizon Amendment 2, exh. A at 1).

2. Positions of the Parties

a. Verizon

Verizon claims that the FCC's new rules, particularly as to RNMs, require Verizon to provide services to requesting CLECs for which no prices have yet been established under existing interconnection agreements, and Verizon has the right to be compensated for performing such services (Verizon Brief at 142). Verizon states that it will submit a cost study and proposed prices for these new activities at the time of its next TELRIC case (id.). Moreover, Verizon argues that for any elements or services not contained in either Verizon's Amendment or CLECs' existing agreements, the rates should be those approved by the Department or by the FCC (id.). According to Verizon, even though it did not submit a cost-study in this case, Verizon should not be precluded from doing so at a later date and having the Department approve appropriate cost-based rates for these activities (Verizon Reply Brief at 77).

b. AT&T

AT&T states that, given Verizon's failure to support its proposed rates and its representation that it would refrain from imposing those charges, it is not clear whether this issue is still in dispute (AT&T Brief at 88). If this issue is still presented for decision, AT&T contends that the Department should not adopt Verizon's proposed new rates contained in the attachment to Verizon Amendment 2, particularly the proposed charges for RNMs (id.). AT&T claims that these charges are likely already being fully recovered in Verizon's existing recurring and nonrecurring rates (id.).

c. CCC

CCC states that, based on Verizon's letter to the Department dated March 1, 2005, this issue is now moot and no longer appropriate for resolution in this proceeding (CCC Brief at 122). However, if the Department does consider the rates for RNMs and the other activities, CCC argues that Verizon's entire pricing attachment should be rejected or, at a minimum, the Department should strike §§ 1.2 and 1.3 of the general provisions associated with it (id.; CCC Reply Brief at 65). According to CCC, § 1.2 of Verizon's Amendment 2 is inappropriate, because it permits Verizon to assess to-be-determined ("TBD") charges on a retroactive basis without Department approval, and § 1.3 is equally unacceptable because the language permits Verizon to unilaterally impose new rates without adhering to the terms of its underlying interconnection agreements regarding rate changes (CCC Reply Brief at 65).

d. CCG

CCG indicates that the Department, in its December 15, 2004 Procedural Order, noted that the costs by Verizon for performing RNMs generally are reflected in the recurring rates that CLECs pay for unbundled access to Verizon's local loops (CCG Brief at 51). CCG argues that, in order to avoid double recovery, the Department must order Verizon to submit appropriate cost studies to support its charges for RNMs (id.). Moreover, CCG claims that the FCC in its Triennial Review Order did not permit Verizon to impose additional non-recurring charges for performing the network modifications necessary to abide by the commingling obligations established by the FCC (id. at 52).

3. Analysis and Findings

In the Triennial Review Order, the FCC stated that its pricing rules provide ILECs with the opportunity to recover the cost of the RNMs, but in the same paragraph noted that such costs often are already reflected in the recurring rates that CLECs pay for loops. Triennial Review Order at ¶ 640. Thus, the FCC left it to state commissions to determine whether the costs associated with RNMs are already being recovered through recurring UNE rates or whether new, non-recurring charges should be adopted. Id.

As we noted above, the issue of recovering for RNMs, commingling, conversions, and other rate activities is moot, because of Verizon's decision to defer to a later case submission of a TELRIC cost study to demonstrate that the rates are reasonable and do not double recover costs already being recovered in existing Verizon rates. Until then, Verizon will not charge for performing these activities, except for those rates for the non-recurring activities (e.g., line conditioning) for which Verizon already has approved rates on file with the Department. Because those rates were examined and approved by the Department in our last TELRIC case, D.T.E. 01-20, which was not appealed, those rates are ipso facto just and reasonable and do not provide double recovery; as such, Verizon may charge those rates when it begins performing the associated RNM activities for CLECs. See G.L. c. 159, § 17 (rates on file with the Department "shall be deemed prima facie lawful until changed or modified by the department"). Finally, as Verizon forwent the opportunity to litigate new rates in this proceeding (Letter from Bruce P. Beausejour at 2 (Mar. 1, 2005)), Verizon may not seek to backbill CLECs for RNMs and other activities that it provides to CLECs once rates are approved by the Department for those services.

X. Supplemental Issue 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?

Supplemental Issue 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?

Supplemental Issue 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?

1. Introduction

In the Triennial Review Remand Order at ¶¶ 66, 146, the FCC established specific criteria to determine whether high-capacity loops and dedicated transport must be unbundled under § 251(c)(3). The CLECs propose that the Department arbitrate whether particular central offices meet the FCC’s unbundling criteria for high-capacity loops and transport, and include in the Amendment a Department-approved list of the specific central offices that are exempt from unbundling of loops and transport. The CLECs also propose that the process, along with related supplemental provisions, be incorporated into the interconnection agreement. Verizon, however, is opposed to litigating this issue and to the inclusion of any list of exempt wire centers. Verizon argues that the FCC established a complete, self-effectuating process for CLECs to order and obtain access to UNE loops and transport consistent with its new unbundling rules, and, thus, no amendment to the existing interconnection agreements is necessary.

2. Positions of the Parties

a. Verizon

Verizon states that the FCC established the process that parties should follow to implement the limitation on unbundling of high-capacity facilities and dedicated transport (Verizon Reply Brief at 19, citing Triennial Review Remand Order at ¶ 234). Verizon contends that, under that process, a CLEC must conduct a reasonably diligent inquiry and self-certify that it is entitled to unbundled access to the requested facilities under the Triennial Review Remand Order criteria, whereupon Verizon must provision the requested facilities (id.). Verizon notes that if it wishes to challenge an order from a CLEC for high-capacity loops or dedicated transport, Verizon must raise that dispute in the manner the FCC prescribed (id. at 20).

Verizon argues that there is no need to litigate in advance the question of whether particular central offices meet the FCC's unbundling criteria, 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 Triennial Review Remand Order (Verizon Brief at 143). Specifically, Verizon notes that the FCC required all RBOCs, including Verizon, to file lists of wire centers that satisfy the Triennial Review Remand Order criteria and that Verizon has provided back-up documentation supporting its list (id., citing 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 LECs, CC Docket No. 01-338 (Feb. 18, 2005)). Verizon also states that, if and when additional central offices qualify for relief, it will promptly notify CLECs (Verizon Brief at 145). Verizon suggests that if specific issues arise, those issues should be litigated on an individual carrier- and individual central office-basis as ordered by the FCC (id. at 143-44, citing Triennial Review Remand Order at ¶ 234). Verizon further states that any concerns regarding accuracy of its data can be handled by the requesting CLEC signing a non-disclosure agreement at which time Verizon will provide the requesting CLEC with back-up data (id. at 145).

Additionally, Verizon argues that the Triennial Review Remand Order does not require the Department to insert new terms into the parties' interconnection agreements to govern the ordering of high-capacity loops and dedicated transport, nor does the Triennial Review Remand Order entitle CLECs to such terms (id. at 145). In support of its argument that the process is intended to be implemented without amendment of interconnection agreements, and that negotiation is optional, Verizon points to the FCC's reference to its UNE-ordering system as a "default process" and its statement that carriers remain free to negotiate alternative arrangements (id. at 146).

Furthermore, Verizon argues that the CLEC proposals to freeze in place an initial list of impaired wire centers and to limit Verizon's ability to make changes to the list imposes UNE obligations that exceed and conflict with those imposed under federal law (id. at 147-48). Verizon contends that, after it has complied with the Amendment's proposed notice provision, Verizon must be allowed to cease providing access to high-capacity loops and dedicated transport once those facilities qualify for unbundling relief (id. at 147).

Finally, Verizon claims that, while it is under no obligation to insert any provisions in the Amendment identifying non-impaired wire centers or establishing a UNE-ordering system, the CLECs' supplemental proposals are inconsistent with the Triennial Review Remand Order and the FCC's new rules (id. at 148). For example, Verizon argues that CCC's proposal to extend the high-capacity loop and dedicated transport ordering process to any network element is beyond the FCC's intended scope of application (id., citing CCC TRRO Amendment, § 8.1). Verizon further argues that CCC's proposal that would entitle a CLEC to satisfy its "reasonably diligent inquiry" obligation by relying on the absence of Verizon notice of Verizon's belief that a request for a particular network element is "inconsistent with the Amended Agreement" incorrectly identifies the amended agreement, rather than the Triennial Review Remand Order, as the relevant point of reference and inappropriately relieves CLECs of the obligation to conduct a reasonably diligent inquiry (id. at 149, citing CCC TRRO Amendment, § 8.2). Verizon argues that CCC's proposal prohibits Verizon from rejecting or delaying orders for reasons unrelated to whether the FCC's unbundling criteria are met, such as overdue accounts and unavailability of facilities (id.).

Verizon maintains that CCG's proposal requiring Verizon to provision facilities despite prior failures of such facilities to meet the relevant service eligibility criteria is contrary to the FCC's holding that once a wire center satisfies the no impairment standard, an ILEC is no longer required to unbundle facilities in that wire center (Verizon Brief at 149-50, citing CCG

TRRO Amendment, § 3.10.1 and Triennial Review Remand Order at ¶ 167 n.466). Finally, Verizon argues that the Triennial Review Remand Order does not grant CLECs rights to Verizon's data, and that the data requirements proposed by CCG, such as real-time access to data regarding the number of fiber collocators and business lines and back-up data, are onerous (id. at 150).

b. AT&T

AT&T argues that the Department should ascertain whether Verizon has correctly identified the wire centers in which it seeks to eliminate its obligations to provide access to high-capacity loops and dedicated transport (AT&T Brief at 20, 28, 89-90). AT&T argues that, absent verification by the Department, it would be extremely difficult for AT&T and other CLECs to engage in a comprehensive and accurate verification of the data and its application, and, given the significance of such identification, it is very important that CLECs and this Department have confidence that Verizon has properly applied the FCC's criteria (id. at 20-21). AT&T further states that neither the Department nor any other party has access to the data that Verizon has relied on in compiling its list of non-impaired wire centers, and only if the Department orders Verizon to produce the data for Department and CLEC review will Verizon have the legitimacy necessary to implement the Triennial Review Remand Order (id. at 21). AT&T further notes that under the Triennial Review Remand Order, once the wire centers are verified, Verizon will not be required in the future to unbundle those elements (id.).

Moreover, AT&T claims that the FCC's process to resolve disputes regarding wire center designations could impose a burden on the Department's resources and produce inconsistent outcomes in different proceedings (id. at 21-22, 89-90). AT&T argues that it would be more efficient to conduct, as part of this proceeding, a generic inquiry into the wire centers identified by Verizon (id. at 22). Additionally, AT&T suggests that the interconnection agreements should reflect that, to the extent wire center designations change in the future, Verizon should be obligated to provide a transition period (id. at 22-23). AT&T argues that although the Triennial Review Remand Order's transition plan for high-capacity loops and transport no longer subject to unbundling only applies to a CLEC's embedded base, a transition plan is warranted, because the same concern for avoiding customer disruption exists when a wire center is reclassified (id.).

Finally, AT&T maintains that the wire center designations, after verification by the Department, should then be incorporated in the interconnection agreement (id. at 88). AT&T also argues that the designations should apply for the term of the carriers' interconnection agreement (id.). AT&T states that this approach is consistent with the FCC's rationale behind establishing a permanent wire center classification (id. at 88-89, citing 47 C.F.R. § 51.319(a)(4), (a)(5), (e)(3)(i), (ii)).

c. CCG

CCG argues that the Amendment must include the complete unbundling framework ordered by the FCC for high capacity loops and dedicated transport that Verizon is no longer obligated to provide under § 251(c)(3) of the Act, including a comprehensive list of Verizon wire centers that satisfy the FCC's requirements for unbundling relief (CCG Brief at 53; CCG Reply Brief at 78). CCG contends that the FCC's unbundling criteria must be implemented through amendment to the parties' existing interconnection agreements in accordance with § 252, which, according to CCG, necessarily includes a schedule or other exhibit which identifies the Verizon wire centers and routes for which unbundling relief has been granted (CCG Brief at 53). Lastly, CCG argues that the Amendment must include a provision for dispute resolution to ensure that the information relied on by Verizon is adequate under the FCC's rules (id. at 54).

d. MCI

MCI maintains that the Department should decide in this proceeding which wire centers should be included in the list of wire centers where Verizon no longer has obligations to provide unbundled access to high capacity loops or dedicated transport (MCI Brief at 21). MCI states that its proposed language also provides for a process for updating the list, granting MCI reasonable discovery rights and submitting disputes about the updates to the Department for resolution (id.).

e. Conversent

Conversent argues that the carrier-to-carrier, central office-to-central office litigation proposed by Verizon would be duplicative in the extreme, consuming vast and unnecessary amounts of the Department's and parties' time and resources (Conversent Reply Brief at 11-12). Pointing to Verizon's corrections to its wire center lists in New York and Maine, Conversent questions the accuracy of Verizon's lists (id. at 12). Conversent notes that the NYPSC required Verizon to tariff the list of non-impaired wire centers in New York while the New Hampshire Public Utilities Commission has opened a formal investigation into Verizon's wire center list (id.).

Conversent maintains that the list of wire centers satisfying the FCC's non-impairment criteria is objectively verifiable and that the Department can foster a greater level of certainty and efficiency if CLECs (and the Department) first scrutinize that list, investigate the methodology, and implement necessary refinements to derive a final list of wire centers that meet the FCC's criteria (Conversent Brief at 43). Conversent argues that Verizon's refusal to include a Department-approved list prevents the Department and CLECs from assessing the list's accuracy in a comprehensive and efficient manner (id. at 42). It also places, according to Conversent, the burden on CLECs to avoid all mistakes of judgment concerning whether particular UNEs are available in a given wire center (id. at 43). Conversent contends that a CLEC runs a substantial risk, including litigation,[84] when it places an order for a high-capacity loop in, or dedicated transport on a route to or from, a wire center on the list that Verizon unilaterally compiled, resulting in a chilling effect on a CLEC's willingness to order facilities

84 Conversent states that in a March 1, 2005 letter, Verizon stated that it would deem any CLEC request to provide facilities in a Verizon-designated non-impaired wire center as a separate act of bad faith and a breach of the interconnection agreement that would result in litigation (Conversent Brief at 42). We note that although Conversent indicates Verizon's March 1, 2005 letter is attached as Appendix 12 to its Brief, Appendix 12 actually contains Verizon's February 10, 2005 letter. The March 1, 2005 letter referred to by Conversent was provided by other parties to this proceeding (see, e.g., CCC Brief, Exh. P), and appears to be a form letter issued industry-wide by Verizon.

if any question exists as to whether a wire center satisfies the FCC's non-impairment standard (id.).

Alternatively, Conversent argues that the Department should at least require inclusion of a mechanism by which the parties can determine at the outset of the contractual relationship the accuracy of Verizon's list and has proposed additional contract language to accomplish this (id. at 44-45; Conversent Reply Brief at 13-15, citing Conversent Amendment, § 3.8).

f. CCC

CCC maintains that the primary and fundamental purpose of an interconnection agreement is to clearly spell out the terms under which a CLEC may obtain UNEs and interconnection, and that the inclusion of clear and specific terms reduces the likelihood that disputes will be brought to the Department for resolution (CCC Brief at 122-23). CCC argues that the identification of wire centers is critical to a Triennial Review Remand Order Amendment because it will determine the parties' rights and obligations related to the affected UNEs (id. at 123).

Moreover, pointing to wire centers erroneously included in, and subsequently removed from, the wire center lists by Verizon, SBC, and BellSouth, CCC insists that the ILECs' lists are suspect (id.). CCC states that it would be unreasonable and contrary to the Triennial Review Remand Order for the Department to allow Verizon to impose its wire center lists for Massachusetts without any objective third-party scrutiny (id. at 124).

CCC further argues that, while the Triennial Review Remand Order's self-certification process affords CLECs some ability to challenge Verizon's designations, it cannot be relied upon exclusively (id.). First, CCC notes that Verizon has threatened reprisal against CLECs that self-certify an order for a wire center on Verizon's lists (id. at 124-25). Second, CCC states that regardless of the propriety of Verizon's statements, CCC insists that the FCC did not intend for CLECs to place orders for UNEs as a fishing-expedition means of determining, through ad hoc dispute resolution, which wire centers meet the various FCC thresholds for non-impairment (id.). Finally, CCC maintains that there must be some reliable and timely process that assures that CLECs are able to make accurate determinations as to the eligibility of a wire center for unbundling and, whenever possible, that process needs to occur before the CLEC places an order for the UNE (id. at 125). Otherwise, argues CCC, CLECs could be faced with the choice of foregoing a customer or risk losing the UNE used to serve that customer after the dispute resolution process concludes (id.).

Additionally, CCC argues that an official list attached to the Amendment will avoid disputes over the effective date of any changes to the list, particularly for existing UNEs from newly designated wire centers, which, according to CCC, the Triennial Review Remand Order did not address (id. at 125-26). CCC maintains that the Department cannot approve terms that would allow Verizon to terminate its provisions of existing UNEs at a central office on the basis of some future update to Verizon's list (id. at 126).

Lastly, CCC disagrees with Verizon's claim that the self-certification process is self-effectuating and argues that Verizon's failure to propose any terms to implement the self-certification process is contrary both to the letter and to the effective implementation of the Act (CCC Reply Brief at 66, 68). CCC also maintains that supplemental terms are needed to implement the FCC's process in the "real-world," because ¶ 234 of the Triennial Review Remand Order does not flesh out every detail needed for an effective process (id. at 67). CCC argues that the FCC specifically recognized that additional or alternative terms may be appropriate, and held that such terms are subject to § 252 negotiations (id.) CCC maintains that, whether or not the Department agrees with CCC's proposed solutions, the Department cannot give in to Verizon's demand to ignore the existence of these issues (id. at 68).

Specifically, to implement the self-certification process, CCC proposes additional terms that: (1) entitle a CLEC to rely on the absence of notice from Verizon of non-impairment for a particular wire center to satisfy a CLEC's "reasonably diligent inquiry" obligation; (2) clarify the form in which a CLEC can submit self-certification; (3) propose a 30-day time limit in which Verizon may invoke dispute resolution regarding a CLEC's eligibility to particular network elements; (4) apply the self-certification and dispute process to all UNEs, not just high-capacity loops and transport; (5) establish a process and transition terms to address what happens to existing UNEs already at a wire center when reclassified; and, (6) establish definitions that would be used by the CLEC in determining self-certification (CCC Brief at 126-28).

In response to Verizon's critique of the merits of CCC's proposed terms, CCC first argues that the need for a transitional proposal to address existing UNEs at a wire center that is reclassified is based upon the same reasons why CLECs need transition terms for UNEs eliminated in the future (CCC Reply Brief at 68). Second, CCC also states that a single, advance determination for all central offices would be more efficient than leaving the matter for later dispute resolution (id. at 69). CCC adds that efficiency, however, is not the primary or only consideration, and that Congress' decision to implement the Act through individualized interconnection agreements reflects this fact (id.). Third, CCC disagrees with Verizon's argument that CLECs should be required to self-certify that their UNE requests are not inconsistent with the Triennial Review Remand Order, rather than CCC's proposed language that would require certification that requests are not "inconsistent with the Amended Agreement," which, according to CCC, is more consistent with the design of the Act (id. at 70). CCC argues that a certification of consistency with the Agreement would be at least as good to Verizon as a certification of consistency with the Triennial Review Remand Order (id.). Fourth, CCC acknowledges that its proposal to apply the self-certification process to all UNEs is not provided for in any FCC rule, but, CCC believes that it is a reasonable approach (id.). CCC states that if the Department disagrees, its proposal can easily be modified to be limited to high-capacity loops and dedicated transport, which CCC argues is a more warranted approach than acceptance of Verizon's proposal not to have contract terms that would apply self-certification to any UNE (id. at 71). Finally, CCC would agree to modify its language to address Verizon's point that the self-certification process would not override contract terms that may allow Verizon to reject a UNE order for reasons unrelated to unbundling eligibility, such as overdue accounts or unavailability of facilities (id.).

3. Analysis and Findings

While the FCC required all RBOCs, such as Verizon, to identify those wire centers which the ILEC believed satisfied the Triennial Review Remand Order's non-impairment criteria, the FCC did not make findings as to whether each wire center on an RBOC's list in fact satisfied the FCC's non-impairment criteria. Accordingly, despite supporting documentation provided to the FCC, Verizon's list of wire centers filed with the FCC is not conclusive as to whether a particular wire center in fact satisfies the non-impairment criteria. Nevertheless, for the reasons outlined below, the CLECs' proposals to litigate the wire center designations and to incorporate a Department-approved wire center designation list into the Amendment are rejected.

The FCC's process for resolving disputes is more efficient than litigating the matter before an actual dispute arises. In the FCC's approach, a CLEC must undertake a reasonably diligent inquiry and self-certify that, to the best of its knowledge, its request is consistent with the FCC's requirements. Triennial Review Remand Order at ¶ 234. A CLEC's reasonably diligent inquiry should include a review of Verizon's list filed with the FCC and posted on Verizon's website; but, as stated above, that list is not conclusive as to whether the FCC's criteria have been met. A CLEC may also review Verizon's supporting data which Verizon has committed to provide once the parties sign a non-disclosure agreement. After its reasonably diligent inquiry, a CLEC may be satisfied that a wire center meets the FCC's non-impairment threshold and a dispute may never arise for the Department to resolve. The CLECs' proposal, however, would require us to resolve the matter as to each wire center on Verizon's list filed with the FCC before a dispute, if ever, arises. Committing our resources to this endeavor would be less efficient than waiting until an actual dispute, if any, arises.

Conversent characterizes the reasonably diligent inquiry requirement as burdensome and argues that, coupled with Verizon's March 1, 2005 letter, all the risks of an order are placed on the CLEC. The risk, however, is appropriate and, more importantly, the risk would not be eliminated by a Department-approved list of non-impaired wire centers. First, the possibility of losing the high-capacity loops and dedicated transport should Verizon prevail in a dispute over access ensures that a CLEC conducts a reasonably diligent inquiry. The FCC's process is not a "fishing expedition" where CLECs are blindly requesting access to high-capacity loops and dedicated transport. Rather, the reasonably diligent inquiry requirement requires a CLEC to take steps to verify that its request for access is consistent with the FCC's criteria. As Conversent states, the non-impairment designation is objectively verifiable, and a review of Verizon's supporting data would resolve the matter in many, if not all, cases. If the reasonably diligent inquiry requirement carried no risk to the CLEC, a CLEC could order high-capacity loops and dedicated transport in complete disregard for the FCC's impairment thresholds and render the reasonably diligent inquiry obligation meaningless. The FCC's process appropriately balances the risk associated with a request for access to high-capacity loops and dedicated transport. There is no basis or authority on the Department's part to contravene or deviate from the FCC's decision.

Secondly, a Department-approved list of non-impaired wire centers would only determine which wire centers meet the FCC's non-impairment thresholds at a given point in time. Additional wire centers may meet the FCC's thresholds and be exempt from unbundling in the future. If a CLEC requests access to loop or transport UNEs at a wire center not on the

Department-approved list, Verizon may still dispute access to those facilities. As such, the risk and uncertainty associated with an order for high-capacity loops or dedicated transport remains even if the Department were to litigate the wire center designations now.

Furthermore, the perceived risk associated with Verizon's March 1, 2005 industry letter does not support the CLECs' requests to litigate the wire center designations now. Regardless of Verizon's statements in that letter, a CLEC only needs to certify to the best of its knowledge that its request for access is consistent with the FCC's criteria,[85] and a review of Verizon's underlying data is not necessary for a CLEC to self-certify, unless the CLEC has the same data in its possession. But, a review of those data would minimize the risk associated with a CLEC's request for access, and, if a CLEC chooses not to review the underlying data before requesting access to high-capacity loops or dedicated transport, the CLEC must accept the greater risk and uncertainty associated with its request.

Whether or not a CLEC reviews the underlying data, the FCC's process requires Verizon to provision high-capacity loops and dedicated transport to a CLEC who has provided

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85 In its March 2, 2005 industry letter, at 2, Verizon states that it will treat an order for high-capacity loop and dedicated transport UNEs as "a separate act of bad faith carried out in violation of federal regulations and a breach of [the CLEC's] interconnection agreement" absent "compelling evidence" that Verizon is required to unbundle the requested facilities. Verizon's requirement of "compelling evidence" is inconsistent with the Triennial Review Remand Order. The FCC clearly stated that a "requesting carrier seeking access to the UNE only certifies to the best of its knowledge and is unlikely to have in its possession all information necessary to evaluate whether the network element meets the factual impairment criteria in our rules." Triennial Review Remand Order at ¶ 234 n.659 (emphasis added). Verizon's letter, however, raises a legitimate issue as to whether a CLEC has satisfied its duty to undertake a reasonably diligent inquiry. That issue may be presented in a dispute brought by Verizon pursuant to the FCC's self-certification process.

the requisite self-certification before Verizon is permitted to dispute the matter. The ultimate burden to support the non-impairment designation lies with Verizon, not the CLECs. If Verizon prevails in dispute resolution, a CLEC will lose access to the network elements at issue. Under such circumstances, CLEC proposals for a transition period that would extend a CLEC's access to network elements to which the CLEC is determined not to be entitled goes too far, and is rejected. While CLECs compare such transition periods with those the FCC permitted for UNEs delisted by the Triennial Review Remand Order, the FCC specifically permitted transitions periods for only the embedded base of customers. See Triennial Review Remand Order at ¶¶ 142, 195, 226. There is no basis upon which to apply a transition period for UNEs provisioned beyond those provisioned to the embedded base.

Similarly, incorporation of a Department-approved list into the interconnection agreements could permit CLECs to continue to obtain unbundled access to high-capacity loops and transport at wire centers which, in the future, meet the FCC's criteria by freezing the list of wire center designations as of the effective date of the Amendment and by limiting Verizon's ability to update its non-impaired wire center list except on a periodic basis. Such continued access to non-impaired wire centers is inconsistent with the Act.

Additionally, under the CLECs' proposal, as additional wire centers meet the FCC's criteria, the Department would be asked to litigate and approve each additional wire center, and possibly to arbitrate amendments to interconnection agreements to add any additional wire centers to the non-impaired list in the interconnection agreements. The single generic proceeding proposed by CLECs would result in additional proceedings before the Department.

The FCC's UNE-ordering process, on the other hand, takes into account future changes to wire center designations and gives effect to any changes on a rolling basis. For the reasons stated above, the CLEC proposals to litigate Verizon's wire center designations are rejected.

We now turn to Verizon's argument that the FCC's process is self-effectuating and need not be incorporated into the interconnection agreements pursuant to § 252. We disagree with Verizon's interpretation of the FCC's statement that ILEC challenges to self-certification is a "default" process, and that carriers are free to negotiate alternative arrangements. See Triennial Review Remand Order at ¶ 234 n.660. Unless the carriers negotiate alternative arrangements, the FCC's "default" process itself constitutes a new process related to the new FCC rules regarding high-capacity loop and transport UNEs, which, as a whole, represents a change in law. With respect to changes in law, the FCC clearly stated that carriers "must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes." Triennial Review Remand Order at ¶ 233 (citations omitted). Nothing in the Triennial Review Remand Order exempts the FCC's self-certification process from implementation through the § 252 process. Accordingly, Verizon must implement the FCC's default self-certification process through the § 252 process.

The FCC's process, however, does not include all of the details necessary for an effective self-certification process. The FCC outlined its self-certification process in a single paragraph of the Triennial Review Remand Order and left open for carriers to determine, through negotiation and, if necessary, arbitration, the details necessary for effective implementation. This conclusion is supported by the FCC's refusal to address the precise form certification must take. Triennial Review Remand Order at ¶ 234 n.658.

Moreover, incorporating the operational details of the self-certification process into the interconnection agreements reduces the potential for disputes over the process itself, e.g., disputes over the proper form of self-certification, and reserves the dispute process for substantive disputes pertaining to whether a particular wire center meets the FCC's criteria. Accordingly, for an effective process, supplemental terms should be incorporated into the interconnection agreement pursuant to § 252 of the Act.

Next, we address the supplemental terms proposed by CLECs and begin with CLEC proposals related to the reasonably diligent inquiry requirement. The FCC explicitly held that "to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry." Triennial Review Remand Order at ¶ 234 (emphasis added). Thus, CLEC proposals that seek to satisfy a CLEC's obligation to conduct a reasonably diligent inquiry, despite the CLEC's failure to undertake such inquiry, are inconsistent with the Triennial Review Remand Order and are rejected (see, e.g., CCC TRRO Amendment, § 8.2; Conversent Amendment, § 3.8.5).

Furthermore, the FCC explicitly required that, based upon the reasonably diligent inquiry, a CLEC must self-certify that its request for access is consistent with the requirements set forth in the Triennial Review Remand Order, not some other document. CCC's proposal identifying the Amended Agreement, rather than the Triennial Review Remand Order, as the relevant point of reference for self-certifications, is therefore inappropriate (see CCC TRRO Agreement, § 8.1).

Additionally, because the FCC's non-impairment thresholds for the high-capacity loop and transport UNEs are based on the number of business lines and fiber-based collocators at a given wire center, the CLECs must refer to the these terms, and their definitions, in its reasonably diligent inquiry, as well as to the definitions for affiliate, route, and the FCC's classification of wire centers tier structure. As we have stated throughout this Order, our role as arbitrator in this proceeding is to implement the requirements imposed by the Triennial Review Order and the Triennial Review Remand Order. Therefore, it is consistent with this role to include in the Amendment new definitions arising from these FCC orders. But, the definitions must track the FCC's definitions.

For instance, some CLECs propose definitions for business line, fiber-based collocator, affiliate, wire center, route and Tier 1 and 2 wire centers which include supplemental provisions not found in the FCC's definitions or fail to incorporate accurately the FCC's definitions. Compare 47 C.F.R. Part 51.5 with CCG Amendment, §§ 2.2, 2.17, 2.36, 2.37; AT&T TRRO Amendment, §§ 2.1, 2.3; MCI Redline Amendment, § 12.7.19. Accordingly, we reject the CLECs' definitions for affiliate, business line, fiber-based collocator, wire center, and Tier 1 and Tier 2 wire centers that do no comport with the FCC's definitions. With regard to CLECs' definitions for affiliate,[86] the CLECs' concerns regarding the announced merger between MCI and Verizon and its impact on wire center designations are minimized because wire center designations will not be litigated until a dispute arises.

Turning to supplemental terms for Verizon's production of back-up data to support its wire center designations, Verizon has committed to providing back-up data, provided that an appropriate non-disclosure agreement is executed (see Verizon Brief at 145). A review of Verizon's back-up data would provide greater certainty as to the availability of high-capacity loop and transport UNEs and may be a necessary part of a CLEC's reasonably diligent inquiry. To that end, terms incorporating Verizon's commitment to produce, subject to an appropriate non-disclosure agreement, back-up data to support its wire center designation are appropriate.

Additionally, the supplemental terms regarding the back-up data must clarify the specific data Verizon will provide, namely, the data sources upon which the FCC relied in making its impairment determinations in the Triennial Review Remand Order (i.e., ARMIS data and ILEC fiber-based collocation information). There is no basis to require data beyond that upon which the FCC relied. But, to eliminate unnecessary disputes resulting from self-certifications based on outdated data, the data sources must also be updated to the month in which a CLEC requests such data (see, e.g., CCG Amendment, § 3.10.2). As the FCC noted, ILECs already maintain these data sources for other regulatory purposes. Triennial Review

86 The CLEC proposed definitions of affiliate seek to qualify MCI as a Verizon-affiliated fiber-based collocator before the merger between Verizon and MCI finalizes (see e.g., CCC TRRO Amendment, § 2.1; Conversent Amendment, § 4.17.13; CCG Amendment, § 2.17). These definitions exceed the FCC's definition (see 47 C.F.R. Part 51.5, citing 47 U.S.C. § 153(1)) and are rejected.

Remand Order at ¶¶ 100, 105. An updated data requirement is also consistent with our decision to determine whether a given wire center meets the FCC's non-impairment criteria as disputes arise. Verizon provides nothing to support its claim that "real-time access" to the data sources is "onerous" nor is there anything in the Triennial Review Remand Order that would prohibit us from imposing an updated data requirement.

The last supplemental term relating to the reasonably diligent inquiry proposed by CLECs involves a 10-day time-frame for Verizon to provide back-up data (see CCG Amendment, § 3.10.2; Conversent Amendment, § 3.8.1.1). A CLEC relies on its review of the underlying data to make business decisions, e.g., whether access to facilities is available and, thus, whether or not to serve a particular customer. Thus, prompt production of the data is essential. A deadline provides additional guidance to the parties as to their rights and responsibilities and eliminates undue delay in the production of the data. Accordingly, the 10-day time limit is adopted.

Turning to the supplemental terms proposed by CLEC related to self-certifications, clarification of the form of self-certification is appropriate, because it would eliminate disputes as to whether the self-certification was properly submitted (see, e.g., CCG Amendment, § 3.10.1 (written or electronic notification sent to Verizon)). But, submission of an order, without more, would be inadequate (see, e.g., CCC TRRO Amendment, § 8.2). While the FCC did not address the precise form of certifications, the FCC requires it take some form, such as a letter. See Triennial Review Remand Order at ¶ 234 n.658. Once a CLEC self-certifies, we find it reasonable to impose a 30-day time limit for Verizon to dispute a CLEC's self-certification in the event Verizon seeks retroactive repricing of the UNEs if Verizon prevails in the dispute (see CCC Brief at 128). The Triennial Review Remand Order does not specify a time limitation in which an ILEC may challenge a self-certification, but incorporation of a time interval provides guidance to the parties as to their rights and obligations. It will also prevent accrual of large retroactive bills if Verizon delays challenging a CLEC request for months or even years.

A time limitation on Verizon's right to invoke dispute resolution should not, however, prevent Verizon from discontinuing UNEs when a wire center is reclassified. If a wire center meets the FCC's non-impairment criteria (as determined by the Department or other appropriate authority) and is exempt from unbundling, Verizon must be permitted to discontinue previously provisioned UNEs. To require otherwise, would permit CLECs access to network elements without the requisite finding of impairment as required by the Act. To minimize disruption of service to end user customers if Verizon discontinues provisioning UNEs at a reclassified wire center, a notice period is appropriate to allow CLECs to make other arrangements. Many interconnection agreements already provide for specific notice periods in the event of discontinuation of facilities, and such notice periods would apply to UNEs to be discontinued due to a reclassified wire center. In the absence of such a notice requirement, incorporation of a 30-day notice requirement is appropriate.

We reiterate that Verizon's unilateral designation of a wire center is not evidence of whether a particular wire center in fact meets the FCC's non-impairment criteria. Verizon first must dispute the CLECs' access to UNEs and obtain a determination that the wire center in question should be permanently reclassified. 47 C.F.R. § 51.319(e)(3). Once a wire center reclassification has been so determined, network elements provisioned in connection with that wire center may come to be no longer subject to unbundling pursuant to § 251 of the Act, and Verizon is then permitted, subject to the notice requirement, to discontinue provisioning those UNEs. CCG's proposal, which seeks to circumvent the FCC's holding relieving ILECs of unbundling obligations in a wire center that satisfies the FCC's non-impairment criteria, is rejected (see, CCG Amendment, § 3.10.1).

The final CLEC proposed supplemental provision relates to CCC's proposal to extend the FCC's mechanism for ordering high-capacity loop and transport UNEs to other UNEs (see CCC TRRO Amendment, § 8.1).[87] The FCC's ordering mechanism outlined in the Triennial Review Remand Order applied only to high-capacity loop and transport UNEs and, thus, CCC's proposal is beyond the scope of application of the FCC's self-certification process. Moreover, because this arbitration is limited to implementing the Triennial Review Order and the Triennial Review Remand Order, CCC's proposal to replace the current UNE ordering mechanisms in interconnection agreements with the ordering mechanism outlined by the FCC in the Triennial Review Remand Order for high-capacity loop and transport UNEs is beyond the scope of this proceeding, and is rejected.

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87 Because CCC agrees to modify § 8.3 of its TRRO Amendment to address Verizon's concern that the self-certification process should not override contract terms that may allow Verizon to reject a UNE order for reasons unrelated to unbundling eligibility, such as overdue accounts or unavailability of facilities (see Verizon Brief at 149), we determine that it is unnecessary to address this issue (see CCC Reply Brief at 71).

Y. Conclusion

In this Order, the Department discusses and makes findings on all open, unresolved issues presented by the parties in this arbitration proceeding. The parties are required to submit a single final Amendment applicable to all parties, consistent with the findings herein, for the Department's review and approval within 30 days of the date of issuance of this Order. Additionally, to the extent that any provision in M.D.T.E. Tariff 17 is inconsistent with our findings herein, the Department requires Verizon to file proposed revisions to M.D.T.E. Tariff 17 within 45 days of the date of issuance of this Order.

VI. 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 incorporate these determinations into a final Amendment, to be filed with the Department pursuant to § 252(e)(1) of the Act, within thirty (30) days of the date herein; and it is

FURTHER ORDERED: That, to the extent that any provision in M.D.T.E. Tariff 17 is inconsistent with our findings herein, Verizon shall file proposed revisions to M.D.T.E. Tariff 17 within forty-five (45) days of the date of 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/
Paul G. Afonso, Chairman

/s/
W. Robert Keating, Commissioner

/s/
Judith F. Judson, Commissioner

CONCURRENCE OF COMMISSIONERS CONNELLY AND GOLDEN:

While we concur in the today's Order's treatment of and rulings on the many issues arbitrated, we write separately about the Covad-Verizon Interconnection Agreement ("ICA"), whose treatment appears in § IV.B.5, *supra* at p. 28 *et seq*. The essence of the Order's treatment of that ICA is sound insofar as it may be said to rest upon the following premises: (a) the ICA parties' performance obligations concerning UNEs unquestionably changed on 11 March 2005, when the FCC spoke in its TRRO; (b) the ICA had earlier recognized that FCC or judicial interpretations of "Applicable Law" (*see* ICA §§ 1.1, 1.7, and 1.32) defined in fact, and might in future redefine, the parties' UNE obligations (*see* ICA §§ 11.0 and 11.1); (c) the parties agreed to embody in their ICA, *where necessary*, FCC or judicial changes in Applicable Law by amending their ICA's wording, and so they must now amend their ICA to conform their writing to new requirements imposed on 11 March 2005 by the FCC's change of law; and (d) the requirement to change their ICA's wording does not suspend (awaiting the outcome of the ICA amendment, filing, and approval effort) or otherwise supersede the immediate (i.e., on and from 11 March 2005) effect of the TRRO on Covad's or Verizon's UNE rights and duties. *If, and insofar as*, § IV.B.5 may *not* be so read or so restated, the soundness of § IV.B.5 may suffer impairment.

/s/
James Connelly, 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.