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September 3, 2004

VIA ELECTRONIC MAIL AND OVERNIGHT DELIVERY

Ms. Carole Washburn, Executive Secretary
Washington Utilities & Transportation Committee
1300 Evergreen Park Drive, S.W.
Olympia, Washington 98504

Re: Docket No. UT-043013

Dear Ms. Washburn:

Focal Communications Corporation of Washington, Integra Telecom of Washington, Inc., and McLeodUSA Telecommunications Services, Inc. (collectively the "Competitive Carrier Coalition" or "Coalition"), by their attorneys, respectfully respond to Verizon Northwest Inc.'s ("Verizon") Proposed Schedule that was filed in the above-referenced proceeding on August 27, 2004. In its proposal, Verizon states that on September 10, 2004, it will submit its newest revised TRO Amendment reflecting the FCC's interim rules and that parties should be allowed 30 days to negotiate it. Verizon then proposes dates for submitting issues lists, filing briefs, and an arbitrator's decision.

The Coalition cannot support Verizon's proposal because there is no reason for the Commission to adopt a procedural schedule for the arbitration of an amendment that the Coalition has yet to see or negotiate with Verizon. The Coalition does not know what amendments Verizon now seeks to make to its interconnection agreements as a result of the changed legal predicate since Verizon originally filed its arbitration petition, and therefore does not know what (if any) issues will actually be submitted to arbitration. Thus, until CLECs have had a reasonable opportunity to (1) review Verizon's newest revised amendment, (2) negotiate it with Verizon, and (3) identify any issues in dispute, the Coalition believes it is premature to set a procedural schedule for the arbitration.

Significantly, 47 U.S.C § 252 is unequivocal with respect to how and when an arbitration should proceed. It specifically requires that negotiations take place and issues be identified *before* an arbitration petition is filed. For these reasons, the Coalition recommends that the Commission abate the resolution of the issues that Verizon raised in its Petition or dismiss Verizon's Petition altogether and ask that Verizon file a new arbitration petition if issues remain unresolved after Verizon negotiates its newest amendment with CLECs. Notably, such an arbitration petition should comply with the law and, unlike Verizon's original petition that initiated this proceeding, should "properly identify the issues that remain unresolved and in need

of arbitration by this Commission."[1] If Verizon files such a new petition, then, after CLECs have responded to it, it would be appropriate for the Commission to establish a procedural schedule for an arbitration.

An original and twelve (12) copies of this filing are attached as well as a diskette containing an electronic version of the filing. Please date-stamp the enclosed extra copy of this filing and return it in the attached self-addressed, postage prepaid envelope provided.

Sincerely,

Russell M. Blau
Edward W. Kirsch
Philip J. Macres
Counsel for the Competitive Carrier Coalition

cc: Honorable Anne E. Rendahl, Administrative Law Judge
UT 043013 Service list

[1] *See also Petition of Verizon New York Inc. for Consolidated Arbitration to Implement Changes in Unbundled Network Element Provisions in Light of the Triennial Review Order*, Case No. 04-C-0314, Ruling Holding Proceeding In Abeyance Pending Amended Filings, Denying Motion to Dismiss with Prejudice, Requiring Verizon to Rebut Proposed Resolution of Routine Network Modifications Issue, and Granting Stipulated Dismissals, at 1-2 (N.Y. P.S.C. Aug. 12, 2004) (attached as Exhibit A).

EXHIBIT A

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 04-C-0314 - Petition of Verizon New York Inc. for Consolidated Arbitration to Implement Changes in Unbundled Network Element Provisions in Light of the Triennial Review Order

CASE 04-C-0318 - Petition of AT&T Communications of New York, Inc. for Arbitration of Interconnection Agreement Amendments

RULING HOLDING PROCEEDING IN ABEYANCE PENDING AMENDED FILINGS, DENYING MOTION TO DISMISS WITH PREJUDICE, REQUIRING VERIZON TO REBUT PROPOSED RESOLUTION OF ROUTINE NETWORK MODIFICATIONS ISSUE, AND GRANTING STIPULATED DISMISSALS

(Issued August 12, 2004)

ELIZABETH H. LIEBSCHUTZ, Administrative Law Judge:

Under consideration in these consolidated cases are petitions for arbitration to amend interconnection agreements filed by Verizon New York Inc. and AT&T Communications of New York, Inc. Since the petitions were filed on March 10, 2004, parties have filed motions to dismiss the Verizon petition, to dismiss the Verizon response to the AT&T petition, to dismiss Verizon's update to its petition, to hold the proceeding in abeyance pending further filings, and to dispose of certain matters raised by the petitions summarily on the merits. Intervening developments, most significantly the D.C. Circuit's USTA II decision, have likely impacted the position of the parties set forth in the petitions and responses. Consequently, an update is necessary to properly identify the issues that remain unresolved and in need of arbitration by this Commission. Such an updating offers the opportunity for Verizon to describe the various positions of the parties on each issue in dispute,

consistent with the requirements of 47 U.S.C. §252. The proceeding will be held in abeyance until such a revised and updated filing is submitted, with the notable exception of the routine network modifications issue.

In the initial responses to the Verizon petition as well as in motion papers relating to a subsequent Verizon motion to hold the proceeding in abeyance, the parties have singled out for separate treatment the issue of Verizon's obligation to make routine network modifications necessary to make high-capacity loops available as Unbundled Network Elements (UNEs). Because this issue is unaffected by the USTA II holding and has been the subject of extensive comments by the parties, it appears appropriate to move forward separately on this issue without further delay. Consequently, Verizon will be offered an opportunity to rebut my proposal to reject its proposed additional charges for making such modifications and its exemption from performance standards, as discussed below.

PROCEDURAL HISTORY

Verizon and AT&T filed their petitions for arbitration in Cases 04-C-0314 and O4-C-0318, respectively, on March 10, 2004. Those petitions seek to amend interconnection agreements to implement new rules regarding the provision of UNEs set forth in the Federal Communications Commission's Triennial Review Order (or TRO)[1] On March 19, 2004, Verizon filed an update to its petition in an attempt to take account of the order of the U.S. Court of Appeals for the District of Columbia Circuit in United States Telecommunications Assn. v. Federal Communications

[1] FCC 03-36, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket No. 01-338, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; CC Docket No. 96-98, Implementation of the Local Competitive Provisions of the Telecommunications Act of 1996; CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability (released August 21, 2003).

Comm., 359 F.3d 554 (D.C. Cir. 2004) (USTA II), which vacated significant portions of the Triennial Review Order. However, the USTA II Court stayed the effect of its own vacatur order, initially until May 1, 2004, later extended to June 15, 2004, in anticipation that the decision would be promptly appealed.

On April 5, 2004, Verizon answered AT&T's petition by incorporating its own petition by reference as an answer. It also moved to consolidate the two proceedings. On April 13, 2004, answers to Verizon's petition were filed by Sprint Communications Company L.P.; Cablevision Lightpath, Inc.; Level 3 Communications; LLC; MCI;[2] DFT Local Services Corporation; Time Warner Telecom-NY. L.P.; USADataNet Corporation; Cricket Communications, Inc.; AT&T; Z-Tel Communications, Inc.; the Competitive Carrier Coalition (CCC);[3]

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[2] "MCI" refers to Brooks Fiber Communications of New York Inc., Intermedia Communications Inc., MCI WORLDCOM Communications Inc., MCI WORLDCOM Communications Inc. (as successor to Rhythms Link Inc.) and MCImetro Access Transmission Services LLC.

[3] At the time of its April 13, 2004 answer, CCC consisted of Allegiance Telecom of New York, Inc.; ACN Communication Services, Inc.; Adelphia Business Solutions Operations, Inc., d/b/a Telcove; CoreComm New York, Inc.; CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corporation of New York; ICG Telecom Group, Inc.; Lightship Telecom, LLC; LightWave Communications, Inc.; PAETEC Communications, Inc.; and RCN Telecom Services, Inc. Since then, Gillette Global Network, Inc., d/b/a Eureka Networks has joined the Coalition.

and the Competitive Carrier Group (CCG).[4] Many of these answers address the merits of Verizon's petition, stating the parties' positions on each of the new interconnection agreement clauses proposed by Verizon. However, many of the parties also moved to dismiss Verizon's petition in its entirety or at least as to the party responding. Verizon and MCI submitted responses to the motions on April 21, 2004, and CCC submitted a further reply on April 23, 2004.

AT&T moved to strike Verizon's response to its petition. Also, AT&T separately moved to dismiss or strike Verizon's March 19, 2004 update to petition,[5] to which Verizon responded on April 22, 2004.

On May 5, 2004, Verizon moved to hold Case 04-C-0314 in abeyance until June 15, 2004, the date anticipated for the USTA II decision to go into effect. Verizon's motion was granted by ruling issued June 9, 2004. Pursuant to that ruling, the case has been held in abeyance for 41 days from the date of the motion until June 15, 2004. Accordingly, the target date for conclusion of the case was changed from July 2, 2004 to August 12, 2004. The ruling also consolidated the two captioned cases; thus the abeyance has applied to both proceedings. The

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[4] The April 13, 2004 answer of CCG indicated that the group consisted of A.R.C. Networks, Inc. d/b/a InfoHighway Communications Corporation, Broadview Networks Inc., Broadview NP Acquisition Corp., BullsEye Telecom Inc., Business Telecom Inc., Choice One Communications of New York Inc., Cordia Communications Corp., Covad Communications Company, DSCI Corporation, Global Crossing Local Services Inc., IDT America Corp., KMC Telecom. Inc., KMC Telecom V, Inc., Line Systems Inc., Spectrotel Inc., Talk America Inc., Telecon Communications Corp., Winstar of New York LLC, and XO New York Inc. In an updated response to a Verizon motion filed May 13, 2004, CCG amends its membership list by deleting KMC Telecom, Inc., KMC Telecom V, Inc. and Winstar of New York, LLC and adding Smart Choice Communications LLC to the Group. On June 9, 2004, QTel, LLC joined the Group.

[5] Z-Tel also argued for dismissal of Verizon's update in its Motion to Dismiss and Response.

ruling noted that all other motions previously filed in Cases 04-C-0314 and 04-C-0318 remain pending and under consideration. Although, as the ruling noted, Verizon had indicated it would propose a new schedule after June 15, it has not done so.

NEED FOR REVISION AND UPDATE OF THE PETITIONS

Sprint, CCC, CCG, BridgeCom, and Z-Tel challenge Verizon's petition as failing to comply with the requirements of 47 U.S.C. §252, which governs the duty of a petitioner in an interconnection agreement arbitration. Section 252 requires the petitioning party to provide the state commission all relevant documentation concerning (i) the unresolved issues; (ii) the position of each of the parties with respect to those issues; and (iii) any other issue discussed and resolved by the parties.[6] According to these parties, Verizon has not reflected in its petition any of the issues they discussed, which issues were resolved or remain open, or the position of each of the parties with respect to those issues.[7] CCC asserts that, without the information required to be filed by §252(b)(2), the Commission has no sense of the scope of the issues or how close or far apart the parties are in resolving the issues.[8]

CCC, Sprint, and Z-Tel request that Verizon's petition be dismissed for failure to comply with §252. BridgeCom asks that the proceeding be held in abeyance pending Verizon's filing

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[6] 47 U.S.C. §252(b)(2).

[7] Sprint Motion to Dismiss and Response to Petition at 6-7; CCC Motion to Dismiss and Response to Petition at 7; BridgeCom Response at 13; CCG Answer at 2-3, 8-9, 13; Z-Tel Motion to Dismiss and Response at 10-12.

[8] CCC Motion to Dismiss and Response to Petition at 7-8.

of a petition that fully complies with the statute.[9] CCG asserts that, notwithstanding Verizon's failure to meet the §252 requirements, Verizon's petition should not be dismissed. Rather, CCG asserts, this proceeding is an efficient vehicle for the resolution of many outstanding issues that affect so many carriers.[10]

In response, Verizon asserted that its petition complies with §252 "to the extent practicable in a consolidated proceeding to amend existing agreements."[11] Moreover, Verizon asserts, no party has been prejudiced, because each party has had the opportunity to respond to the petition and articulate its position that way.[12] Finally, Verizon argues, even if it has failed to comply with §252, dismissal is a drastic and unwarranted remedy. Rather, the Commission should move forward on the basis of the petition and filed responses.[13]

In addition to the complaints regarding Verizon's failure to fully set forth the issues to be resolved and each party's position on those issues, other CLECs asserted that the entire arbitration proceeding was inappropriate at that time, due to the uncertainty caused by the D.C. Circuit's reversal of the Triennial Review Order and the stay of the D.C. Circuit's USTA II order. CCC made this argument, asserting that the law on which the petition purported to be based was still

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[9] As do Sprint and CCC, BridgeCom cites the order of the North Carolina Utilities Commission, which continued its interconnection proceeding indefinitely, pending such a filing by Verizon, based on an arbitration petition virtually identical to the one Verizon filed in New York. See In the Matter of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers, Docket No. P-19, Sub 477, Order Continuing Proceeding Indefinitely (N.C.P.U.C. March 3, 2004).

[10] CCG Answer at 4.

[11] Verizon Response at 3, 11.

[12] Verizon Response at 12.

[13] Id.

undetermined.[14] According to CCC, the TRO could not be relied on as the law of the land, because USTA II vacated and/or remanded various aspects of the TRO. However, CCC asserted, USTA II could not be relied on because it had not yet gone into effect and might never go into effect if it were stayed pending appeal to the Supreme Court.[15] Moreover, CCC continued, even if USTA II did take effect, the decision merely remands various issues to the FCC for further consideration, which would likely result in still further changes of law once the FCC responds upon remand.[16] Similarly, Cablevision Lightpath asserted that it was inappropriate to move forward with Verizon's arbitration, given the state of flux and the additional FCC and court actions that were anticipated.[17] CCC noted that the Maryland Public Service Commission had dismissed a virtually identical petition on this ground.[18] Cricket asserted that proceeding in the face of such uncertainty would be wasteful of party and PSC resources.[19]

In response to this argument, Verizon noted that there were a number of "critically important" issues addressed by the Triennial Review Order that were either not challenged on appeal or, on appeal, were expressly affirmed by the D.C. Circuit.[20] Consequently, Verizon argued, the vacatur of portions of the TRO by USTA II provides no reason for postponing the task of amending interconnection agreements to incorporate these key rulings.[21]

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[14] CCC Motion to Dismiss and Response to Petition at 9.

[15] Id.

[16] Id. at 9-10.

[17] Cablevision Lightpath Response to Petition at 7.

[18] CCC Motion to Dismiss and Response to Petition at 10.

[19] Cricket Response at 3, 4-6.

[20] Verizon Opposition to Motions to Dismiss at 14-15. Included on Verizon's list was the requirement that ILECs make routine network modifications to unbundled transmission facilities.

[21] Id. at 14.

Since these arguments were made, and since my June 9, 2004 ruling, the USTA II stay has been lifted and the D.C. Circuit's order has consequently gone into effect. The regulatory landscape has therefore changed dramatically. Significant portions of the Triennial Review Order are vacated, although, as noted, other portions have been affirmed and remain in effect. Press reports indicate the FCC has already voted on interim rules, and the order reflecting that vote and setting forth such interim rules may be issued imminently. Meanwhile, the reports state that the FCC is also considering permanent rules to respond to the concerns expressed by the D.C. Circuit in USTA II. As a result, some of the issues set forth in the arbitration petitions can be considered in a more definitive context, while other issues continue to remain under a cloud of uncertainty. Moreover, the market continues to respond to these legal developments, affecting carriers' business plans. Under these circumstances, it is necessary for both Verizon and AT&T to update their petitions to indicate which issues continue to require resolution through arbitration before this Commission. Therefore, the proceeding will be held in abeyance while the petitioning parties prepare and submit such updated petitions.

In order for the updated petitions to properly identify which issues remain candidates for arbitration, Verizon and AT&T must necessarily reevaluate each issue and obtain updated positions from the parties regarding each issue. As noted above, the passage of time and occurrence of significant events may have altered many of the parties' positions on these issues, which changes must be reflected in this docket. Consequently, I will require Verizon and AT&T to state, with respect to each proposed change to their interconnection agreements, each party's position on the issue and an explanation of how and why those positions differ from their

own.[22] It is hoped that the result of this effort will be some resolution and narrowing of the issues to be presented for arbitration. In any event, it will be essential for the issues to be clearly and comprehensively set forth in this manner before the arbitration can proceed to the next step.

Because I am thus directing Verizon to make a new filing in compliance with 47 U.S.C. §252 as part of this update process, there is no longer a need to rule on those motions to dismiss (Sprint, Z-Tel and CCC) or to hold the case in abeyance (BridgeCom) that were predicated on Verizon's alleged failure to comply with that section. Similarly, AT&T's motion to dismiss Verizon's "update" to the petition is made moot by this ruling. The motions seeking delay until the resolution of uncertainty regarding the governing law (CCC, Cablevision Lightpath, Cricket) have essentially been granted, consistent with this ruling.

This ruling also renders moot Z-Tel's motion to dismiss on the ground that Verizon failed to initiate negotiations properly either under change of law provisions of the interconnection agreement or under 47 U.S.C. §252. Whatever miscommunication may have occurred between Verizon and Z-Tel is no longer germane. Z-Tel now has adequate notice of Verizon's desire to amend the parties' interconnection agreement, and I urge the two parties to negotiate the issues of concern to them while Verizon is preparing its updated petition.

Sprint's motion to dismiss Verizon's petition with prejudice for Verizon's alleged failure to negotiate in good faith is denied. Sprint accompanied its motion with an affidavit and exhibits that do establish a prima facie case for the relief it requested. However, in response, Verizon has rebutted Sprint's evidence sufficiently to cast doubt upon the

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[22] Verizon's obligation to set forth in detail the position of each party to its interconnection agreements with respect to each proposed change is limited to those parties that have filed responses to its petition in this proceeding.

allegations of Verizon's bad faith. The affidavits of both Sprint and Verizon demonstrate substantial delay and failure to conduct negotiations properly by Verizon. Although Verizon's affidavit reveals that Verizon did speak with Sprint representatives, Verizon did not provide substantive responses to Sprint's counterproposal until a phone conference in late February (close to when arbitration petitions were filed in some other states) and did not provide those responses in writing until March 11, 2004, the day after the petition was filed here. Verizon's papers suggest that it was at least attempting to respond to Sprint. I cannot conclude that Verizon's performance was motivated by or carried out in bad faith. As noted above, Sprint's alternative request for relief, namely that the petition be dismissed without prejudice to refile, is essentially addressed through the update process.

There remain the motions to dismiss the Verizon petition on the grounds that there has been no change of law requiring an amendment. These motions, filed by CCC, Z-Tel and Cablevision Lightpath, variously assert that the conditions imposed by the FCC in approving the Bell Atlantic-GTE merger require the preservation of the status quo until there are final, non-appealable FCC rules regarding provision of UNEs or a final, non-appealable Court order in one or more "paths" of litigation on FCC UNE rules. These motions, and the legal argument behind them, are expressly not addressed by this ruling and remain pending in this proceeding. Meanwhile, however, the parties should proceed to negotiate in good faith on updated interconnection agreements, while this argument is preserved.[23]

Holding the petitions in abeyance pending updated filings necessarily requires the fashioning of a revised

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[23] Of course, the dramatic change of circumstances that necessitates an update here may also have affected the validity or relevance of this argument or parties' interest in pursuing it. Parties are free to indicate whether they wish to withdraw or continue to press the argument (without re-briefing it, please).

schedule. Under the framework established by the Telecommunications Act, a party may petition a state commission to arbitrate any open issues during the period from the 135th to the 160th day after the date of an initial request for negotiation of an interconnection agreement.[24] Because this ruling requires the resubmission of such petitions, the schedule thereafter will assume the petitions are re-filed on Day 135 following a request for negotiation.[25] Following such a resubmission, parties to the interconnection agreement will have an opportunity to respond within 25 days, as set forth in §252(b)(3), and the schedule will proceed thereafter accordingly.[26]

RESOLUTION OF ROUTINE NETWORK MODIFICATIONS ISSUE

The issue of "routine network modifications" stands out as meriting separate treatment here. This issue is unaffected by the recent USTA II decision and therefore should not require any update; it has been the subject of extensive comments, including requests for separate procedural treatment, in this proceeding; and it has been examined in detail in Case 02-C-1233. In my June 9, 2004 ruling holding this case in abeyance, I noted that it would be inappropriate to rule on this issue while otherwise putting the case on hold. Now that this ruling sets forth a procedure for moving forward in the case, it is appropriate to address this issue now.

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[24] 47 U.S.C. §252(b)(1).

[25] Several parties challenged Verizon's service of its petition as untimely. Verizon and AT&T must follow the service requirements of 47 U.S.C. §252(b)(2)(B) when they file their updated petitions.

[26] Depending on the dates upon which Verizon and AT&T choose to resubmit petitions in conformance with this ruling, there may be a need to address each petition on a separate schedule. That issue need not be resolved now; rather, it can be addressed, upon appropriate motion, if the need arises.

In Iowa Utilities Board. v. FCC, the Eighth Circuit held that §251(c)(3) of the Telecommunications Act of 1996 requires "unbundled access only to an incumbent LEC's existing network - not to a yet unbuilt superior one."[27] At some point thereafter, Verizon began to take the position that, under this holding, it was not obligated to make any modifications to its network in order to make a loop available as an unbundled network element to a requesting CLEC. For example, if there was no apparatus or doubler case, no repeater equipment, no multiplexer, or if an existing multiplexer required some reconfiguration, Verizon would reject the UNE loop order, asserting that no UNE loop was available to meet the request. Rather, Verizon would provide the loop through its special services tariff at a higher rate. Thereafter, when the CLEC had paid the special services charges for some period of time, the CLEC would then convert its requests to one for a UNE loop, which at that point had attained the status of being "available."

The competitive carriers who felt aggrieved by this Verizon policy took their complaints to both the Federal Communications Commission and to this Commission. On the state level, this Commission provided as part of the Verizon Incentive Plan that a "UNE/EELs" task force be created to examine the issue of availability of facilities. Following the report of that task force, the Commission instituted Case 02-C-1233 to further address the issue, which at that point had become narrowed to provision of high capacity loops (DS1 and DS3) as UNEs. In its instituting order, dated September 25, 2002, the Commission identified three issues to be addressed in the proceeding:

1. What is the appropriate legal standard for determining the scope of Verizon's obligation to provide a high-capacity

[27] 120 F.3d 753, 813 (8th Cir. 1997), aff'd in part and remanded, AT&T v. Iowa Utils. Bd., 525 U.S. 366 (1999).

UNE loop upon a competitive carrier's request when Verizon declares that the facilities are not available?

2. What parameters, if any, should be placed upon the definition of facilities as "not available"?

3. What is Verizon's duty to consider CLEC forecasts in its network planning and construction processes, and how should that network forecasting impact upon the "availability" of high-capacity loops?

Meanwhile, the FCC sought comment in the Triennial Review Notice of Proposed Rulemaking on the extent to which incumbent LECs have an obligation to modify their existing networks in order to provide access to network elements.[28] The FCC's Triennial Review Order, addressing these issues, was issued before a Commission decision in Case 02-C-1233. In the Triennial Review Order, the FCC articulated the requirement that an incumbent LEC must perform all loop modification activities that it performs for its own customers.[29] The FCC pointed out that the "continually evolving and dynamic nature of telecommunications networks" made it unwise for it to list the precise electronics that an incumbent LEC must add to the loop in order to transform a DS0 voice-grade loop to an unbundled DS1 loop. However, by way of illustration, it noted that the sorts of routine network modifications that incumbent LECs do perform for their own customers and thus are required to perform for CLECs include rearrangement or splicing of cable, adding a

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[28] Notice of Proposed Rulemaking, 16 FCC Rcd 22781, CC Docket No. 01-338, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; CC Docket No. 96-98, Implementation of the Local Competitive Provisions of the Telecommunications Act of 1996; CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability (December 2001) (Triennial Review NPRM), at ¶¶65-66.

[29] Triennial Review Order at ¶634.

doubler or repeater, adding an equipment case, adding a smart jack, installing a repeater shelf, adding a line card, and deploying a new multiplexer or reconfiguring an existing multiplexer.[30]

Verizon has undertaken to implement the FCC's Triennial Review Order through proposed amended language to its interconnection agreements. Having proposed that language through its industry letter sent to all parties on October 2, 2003, Verizon requested, by letter dated October 8, 2003, that this Commission close Case 02-C-1233, since all issues had been resolved by the Triennial Review Order and implemented through Verizon's proposed interconnection agreement amendments. Verizon's proposal to close Case 02-C-1233 was issued for comment pursuant to a notice from this Commission. In extensive comments filed in that docket, numerous parties protested Verizon's implementation of the FCC rule.

At this point, the comments in Docket 02-C-1233 and in this present proceeding converge. Despite the somewhat long and convoluted procedural history, the facts and issues are narrow and precise. The parties agree that Verizon must perform these routine network modifications, whenever necessary to meet a CLEC's request for a DS1 or DS3 UNE loop, short of digging a new trench to lay new lines, to the same extent that Verizon would perform the work for its own customers. The differences between the parties come down to three issues: first, whether Verizon can impose new charges for carrying out the network modifications; second, whether Verizon should be excused from performance standards for loop provisioning in cases where routine network modifications are necessary; and third, whether the FCC's requirement that Verizon perform the modifications is self-executing or must await renegotiation and amendment of interconnection agreements in accordance with change of law provisions or the process set forth in the Triennial Review Order.

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[30] Id.

This ruling sets forth the issues as they have been joined to date, together with my view as to how I would be inclined to rule on them. I will afford Verizon a further opportunity to make its case through evidentiary submissions and/or further comments. Therefore, this ruling is similar to an order to show cause. Verizon is directed to file and serve its response within 40 days following this ruling. Further procedures will be established thereafter, depending on the nature of Verizon's filing.

New Charges

The language proposed by Verizon includes a requirement that CLECs pay for these modifications through a series of non-recurring charges. Those charges amount to approximately $1,900 for many of the modifications at issue here. In responding to Verizon's arbitration petition, AT&T, Conversent, and CCC state that Verizon is already recovering the cost of routine network modifications in its monthly recurring charges for UNE loops or in other approved charges, so that no new charges are justified here. AT&T argues that Verizon bears the burden to demonstrate that it is not recovering the costs elsewhere. CCC points to a decision of the Virginia utility commission in ruling on a dispute between Verizon and Cavalier Telephone, which rejected similar charges by Verizon. MCI and BridgeCom do not address the charges in the text of their answers, but they delete Verizon's imposition of the charges in their mark-up of the proposed amendment. CCG refers to the charges as substantial and discriminatory. Conversent argues that, even if Verizon is not being fully compensated through recurring loop rates, its remedy is to petition the Commission to revise those rates, not to use the interconnection agreement process here.

Similarly, in Case 02-C-1233, Allegiance, Conversent Communications of NY LLC, AT&T (joined by Broadview, MCI and Global Crossing), Covad, Choice One, and Cavalier Telephone LLC all protested Verizon's imposition of new charges to perform

routine network modifications.[31] Choice One argued that, because these costs are recovered elsewhere, Verizon should not be permitted a double recovery of its costs. Choice One and Covad cite Triennial Review Order &640 as supporting their position that these costs are already reflected in recurring loop rates and that there should not be any double recovery. Allegiance asserts that Verizon's position cannot be reconciled with the FCC's determination that Verizon performs the same modifications for its retail customers with relatively low expense and minimal delays. Conversent characterizes Verizon's proposed amendment as requiring CLECs to pay a fee above TELRIC for UNE loops. Verizon asserts, to the contrary, that its current UNE rates do not include these costs. It goes no further to demonstrate this point because it asserts that the issue cannot be resolved on a motion to dismiss.

The CLECs are correct that both the investment in the equipment that must be added in making routine network modifications and the labor cost of doing so should already be included in existing recurring and non-recurring charges for UNEs, and the burden is on Verizon to prove otherwise. To date, Verizon has not done so, either in this proceeding or in Case 02-C-1233. Moreover, as Conversent argues, to the extent the routine network modifications are not fully reflected in such UNE rates, Verizon's proper remedy may be to make that demonstration in a filing to revise those rates, rather than through negotiation or arbitration of interconnection agreements in this proceeding. Therefore, my inclination is to dismiss Verizon's proposed charges from this proceeding. Verizon will be afforded an opportunity to explain why these charges are justified. In its filing, Verizon should address both the factual issue as to

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[31] Of the parties commenting in Case 02-C-1233, AT&T and MCI are parties here; Allegiance is represented by CCC; and Broadview, Choice One, Covad, and Global Crossing are represented by CCG. Conversent has not actively participated here, although it placed itself on the Active Parties List. Cavalier is not certificated in New York.

whether current UNE rates include routine network modifications and the procedural issue as to whether changes in cost recovery should properly be addressed in this arbitration or in a different forum.

Performance Standards

Verizon's proposed language provides that, in the event it must make routine network modifications to provide UNE loops, it should be excused from performance standards and related incentive mechanisms that would otherwise apply to its provision of UNE loops. AT&T, MCI, CCG, Sprint, and CCC object to Verizon's exclusion of facilities requiring routine network modifications from standard provisioning intervals and performance measures. Sprint asserts that the performance standard should be parity with Verizon's own retail operations. CCC proposes additional performance measures to provide the appropriate incentives for Verizon's behavior in making these modifications. CCG asserts that, since these network modifications are, by definition, "routine," they do not justify special exemption from Verizon's performance plan. CCG also asserts that the Triennial Review Order says nothing that would justify such an exemption.

In its comments in Case 02-C-1233, Covad asserts that Verizon's exemption runs directly contrary to Triennial Review Order ¶639, which provides, in part:

> Lastly, to the extent that certain routine network modifications to existing loop facilities affect loop provisioning intervals, contained in, for example, section 271 performance metrics, we expect that states will address the impact of these modifications as part of their recurring reviews of incumbent LEC performance.

Under Covad's interpretation, this paragraph means that loops for which routine network modifications are made are expressly included in performance measures, which may therefore be modified if necessary.

Verizon did not address this issue specifically in responding to the motions to dismiss, presumably because of its

belief that the issue is not properly resolved on a procedural motion. Therefore, it should be afforded the opportunity to respond fully.

I am inclined to agree that the Triennial Review Order language regarding performance reviews is the proper solution to this issue. It expressly anticipates that loops provisioned with routine network modifications will be included in all performance measures and incentive plans. As CCG points out, this should not be a hardship given that these tasks are, by definition, "routine." Moreover, as the FCC has found, Verizon performs the same tasks for its own customers at low cost and minimal delay. Therefore, my inclination, again, is to dismiss Verizon's proposed language from this arbitration. Such a ruling would be without prejudice to Verizon's efforts to advocate for modification of performance standards in the Carrier-to-Carrier Proceeding[32] or for modification of incentives in the Performance Assurance Plan[33] to account for any changes brought about by the FCC's resolution of this issue. Verizon will be given an opportunity to demonstrate why such a ruling should not be issued.

Change of Law versus Self-Effectuating Interpretation

In Verizon's view, the requirements that it now make routine network modifications to its facilities in order to make high capacity UNE loops available to CLECs is a change of law that should be implemented through changes to its interconnection agreement language. Until such amendments are agreed upon, Verizon continues to refuse to make the routine network modifications. The CLECs argue that the FCC's ruling was not a change of law but rather merely a clarification of an existing obligation. As such, they argue, it is self-effectuating, without the need for change-of-law procedures.

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[32] Case 97-C-0139.

[33] Case 99-C-0949, Order Amending Performance Assurance Plan (issued January 24, 2003).

There may not be a single correct answer to this issue. I have not reviewed each of the 200 underlying interconnection agreements at issue in this proceeding. No party has quoted from its interconnection agreement to show that there is language inconsistent with Verizon's performance of routine network modifications in the agreement; neither has any party asserted that such language is absent from its agreement. Moreover, it is premature to make such a determination until the issues of Verizon's charges and performance measures, described above, are finally resolved. Therefore, I leave it to the parties to determine whether their agreements will require new language to carry out a final ruling that may issue on this matter. To the extent such language is necessary, a final ruling would direct the parties to negotiate and finalize such language forthwith and to amend their agreements as to that provision, piecemeal, even while the rest of this proceeding remains pending. It is thus my intent to assure that this issue is resolved and reflected, to the extent necessary, in revised interconnection agreements so as to take effect as soon as possible. Thus resolution of the routine network modifications issue will not be delayed while other issues remain outstanding in this case.

GRANT OF STIPULATED MOTIONS TO DISMISS

I have received four motions to dismiss reflecting instances where parties have reached a final interconnection agreement and therefore do not need or want to be included in this consolidated arbitration. Each such motion is accompanied by a stipulation setting forth the pertinent facts and Verizon's consent to dismiss that party from the case. The parties concerned are Smart SMR of New York Inc. ("Nextel"); Nextel Partners of Upstate New York, Inc. d/b/a Nextel Partners;

Verizon Wireless Messaging Services, LLC, d/b/a Verizon Wireless, f/k/a Airtouch Paging; and Cellco Partnership d/b/a Verizon Wireless. These motions are granted, and these four parties are dismissed from the proceeding.

(SIGNED) ELIZABETH H. LIEBSCHUTZ

CERTIFICATE OF SERVICE
Docket No. UT-043013

I hereby certify on the date given below that true and correct copies of the Competitive Carrier Coalition's Response to Verizon's Procedural Schedule dated September 3, 2004 which are being filed in the above-referenced docket, were sent by Federal Express, overnight delivery or U.S. Mail to:

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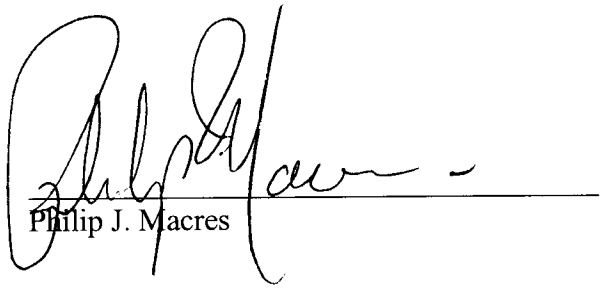
Dated this 3rd day of May, 2004



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