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March 11, 2005

VIA E-MAIL AND OVERNIGHT DELIVERY

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
PO Box 47250
Olympia, WA 98504-7250

Re: Docket No UT-043013 – Initial Brief of Focal Communications Corp. of Washington

Dear Ms. Washburn:

Enclosed for filing in the above-referenced docket, please find the original and twelve (12) copies of Focal Communications Corp. of Washington's ("Focal") Initial Brief. Consistent with Judge Anne Rendahl's email of March 10, 2005, this Brief is being filed electronically today, with hard copies to follow by overnight mail. Please date-stamp the enclosed extra copy of this filing and return it in the enclosed, self-addressed, postage prepaid envelop provided.

Should you have any questions regarding this filing, please do not hesitate to contact me.

Sincerely yours,

Edward W. Kirsch

Edward W. Kirsch
Counsel for Focal Communications Corp.
of Washington

Enclosures

cc: Service List

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Amendment to Interconnection Agreements of **VERIZON NORTHWEST INC.** **with** **COMPETITIVE LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS IN WASHINGTON** **Pursuant to 47 U.S.C. Section 252(b), and the *Triennial Review Order.***	)	**Docket No. UT-043013** **INITIAL BRIEF OF FOCAL COMMUNICATIONS CORP. OF WASHINGTON**

INITIAL BRIEF

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Dated: March 11, 2005

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Amendment to Interconnection Agreements of	)	**Docket No. UT-043013**
VERIZON NORTHWEST INC.	)	
with	)	
COMPETITIVE LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS IN WASHINGTON	)	**INITIAL BRIEF OF FOCAL COMMUNICATIONS CORP. OF WASHINGTON**
Pursuant to 47 U.S.C. Section 252(b), and the *Triennial Review Order.*	)	

1. Pursuant to Order No. 15 in the above referenced docket, Focal Communications Corp. of Washington ("Focal") hereby files its Initial Brief regarding disputed issues arising from Verizon Northwest Inc.'s ("Verizon") proposed amendment ("Amendment") to implement the Federal Communications Commission's ("FCC's") Triennial Review Order.[1] Focal's principal place of business is located at 200 North LaSalle Street, Suite 1100, Chicago, Illinois 60601.

2. This Brief alleges violation by Verizon of the following rules and statutes: 47 U.S.C. §§ 202(a), 251(c), 252(d); 47 C.F.R. §§ 51.316, 51.318; 51.319; the FCC's Triennial Review Order; and a breach of the terms and conditions of the Interconnection Agreement between Focal and Verizon.

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[1] In *re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.,* 18 FCC Rcd 16,978, CC Docket Nos. 01-338, 96-98 & 98-147, Report and Order and Order on Remand (rel. Aug. 21, 2003) ("Triennial Review Order" or "*TRO*").

STATEMENT OF THE FACTS

3. On February 26, 2004, Verizon filed with the Washington Utilities and Transportation Commission ("Commission") a Petition for consolidated arbitration of an amendment to inter-connection agreements with 77 CLECs and CMRS providers in Washington. On March 22, 2004, the Commission extended the time for responses to Verizon's Petition for arbitration to April 13, 2004, in part, because Verizon provided an updated version of its proposed amendment in response to the D.C. Circuit's decision in *United States Telecom Association v. FCC.*[2] On April 13, 2004, Focal and other carriers filed their Response to Verizon's Petition. On November 3, 2004, Verizon filed an updated version of its proposed Amendment 2 regarding its obligation to provide, among other items, routine network modifications and commingling of UNEs. On January 14, 2005, the Commission issued its Order No. 15 requiring the parties to submit simultaneous briefs on the issues identified in the joint issues list by March 11, 2005. In Order No. 15, Administrative Law Judge Ann E. Rendahl granted Verizon's oral request for an extension of time until January 19, 2005, to file a joint issues list. The Joint Issues List was filed on January 19, 2005. The Parties have disagreed as to whether there are disputed material facts associated with some of the issues in this proceeding. At this time, Focal is not aware of any disputed material facts associated with the issues it has briefed (*i.e.,* Issues 8, 9, 12, 21, and 25), except that there may be disputed issues regarding fees and rates. Focal reserves the right to respond to any such issues raised in the parties' Initial Briefs or at a later time.

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[2] *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

STATEMENT OF ISSUES AND ARGUMENT

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?

4. No. This would constitute a Conversion charge and, as explained in paragraph 19, below, such charges are unlawful. Beyond that, if Verizon compels a CLEC to change a UNE arrangement to an alternate service, Verizon, if anyone, is the cost causer. The disconnection of a UNE arrangement caused by the elimination of Verizon's obligation to provide that arrangement as a UNE is an activity that Verizon has unilaterally initiated. It is certainly not the CLEC's desire to disconnect the UNE. To the contrary, the CLEC would still utilize the UNE arrangement if Verizon agreed to make it available. Consequently, in the unlikely event that Verizon incurs any costs for conversions that have not already been recovered through the non-recurring charges that Verizon assessed when the CLEC first ordered the UNE, such costs should be borne by the cost causer, who is Verizon in this case.

5. In the ordinary case, however, Verizon should not experience any costs associated with converting a UNE to an alternative service. For example, in the case in which Verizon is converting the CLEC's UNE loop or transport facilities to an "alternative" special access arrangement, there is no technical work involved because *the same loop and transport facilities will be used to provide the alternative arrangement.* At most, the only "work" required of Verizon would simply involve a billing change, which should be automated. The FCC has already found that "Converting between wholesale services and UNEs (or UNE combinations) is largely a billing function."[3] The Commission should therefore reject any attempt by Verizon to assess such

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[3] *TRO*, ¶ 588.

nonrecurring charges when it converts a UNE arrangement to an alternative service, except where the CLEC affirmatively requests a rearrangement or replacement of facilities.

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

6. The Amendment should include definitions of the terms Commingling and Conversion which are needed to implement the Amendment and the *TRO*. While Verizon defines in its Amendment various terms of interest to it, Verizon inexplicably has failed to propose substantive definitions for these key terms. Focal proposes a definition for Commingling at Section 5.2, and a definition of Conversion at Section 5.3 of its proposed revisions to the terms of the Amendment that closely tracks the *TRO*.[4] These key terms should be defined in a single section, rather than scattered throughout the document, for the convenience of the parties.[5]

7. The additional definitions needed to implement the Amendment are defined by Focal as follows:

Commingling means the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, or Section 271 Network Elements purchased from Verizon to any one or more facilities or services (other than unbundled network elements) that CLEC has obtained from Verizon, or the combining of an unbundled network element, or a combination of unbundled network elements, or Section 271 Network Elements with one or more such facilities or services. Commingle means the act of Commingling.

Conversion means all procedures, processes and functions that Verizon and CLEC must follow to Convert any Verizon facility or service other than an unbundled network element (*e.g.*, special access services) or group of Verizon facilities or services to the equivalent UNEs or UNE

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[4] Exhibit 1, Focal Communications Corp. of Washington's Proposed Terms, at §§ 5.2, 5.3 ("Focal Amendment").

[5] Focal's proposal includes several recommended new terms and definitions, the necessities for which are explained herein. The new terms are as follows: Commingling (*See* Focal's Response to Issue 12; Focal Amendment § 5.2); Conversion (*See* Focal's Response to Issue 20; Focal Amendment § 5.3).

Combinations or Section 271 Network Elements, or the reverse. Convert means the act of Conversion.[6]

8. Focal's proposed definitions for Commingling and Conversion should be adopted because the Focal's proposal comports with the requirements established by the FCC in the *TRO*.

ISSUE 12: Should the interconnection agreements be amended to address changes arising from the *TRO* with respect to commingling of UNEs with wholesale services, EELs, and other combinations?

9. Yes. Under the *TRO*, Verizon is obligated to offer commingling. As discussed below, Focal's commingling language should be included in the Amendment because it tracks the *TRO* and is otherwise appropriate.[7] *First*, consistent with the *TRO,* the Focal's definition of "Commingling" recognizes that this involves 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 section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services."[8]

10. *First*, consistent with the FCC's finding that a restriction on commingling would be patently unlawful,[9] Focal's proposal ensures that commingling will be provisioned in a just, reasonable and lawful manner.[10]

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[6] Focal Amendment, at §§ 5.2, 5.3. Focal's proposed definitions for Commingling and Conversions discuss section 271 Network Elements because the proposed Amendment is a standard Amendment to be used across all the Verizon states.

[7] *See* Focal Amendment §§ 2.1, 5.2; *see* 47 C.F.R. § 51.318(b); *TRO*, ¶¶ 579-84.

[8] *TRO*, ¶ 579.

[9] *See TRO*, ¶ 581.

[10] *See* Focal Amendment § 2.1.

11. *Second*, Focal's proposed language prohibits commingling charges for the same reason conversion charges are unlawful.[11] ILECs have an incentive to impose "wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges" and such charges could deter legitimate commingling of wholesale services and UNEs or UNE combinations, or could unjustly enrich an incumbent LEC as a result of refusing to commingle a UNE or UNE combination with a wholesale service.[12] Furthermore, because ILECs are never required to perform commingling in order to continue serving their own customers, commingling "charges are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms, and conditions."[13] Moreover, "such charges are inconsistent with section 202 of the Act, which prohibits carriers from subjecting any person or class of persons (*e.g.*, competitive LECs purchasing UNEs or UNE combinations) to any undue or unreasonable prejudice or disadvantage."[14] Given this, the Commission should reject any attempt by Verizon to assess commingling charges and should ensure that the rate applicable to each portion of a commingled facility or service (including nonrecurring charges) should not exceed the rate for that portion if it were purchased separately.

12. *Third*, Focal's language recognizes that Verizon had the duty to provision commingled circuits upon the effective date of the *TRO*. As explained in Focal's response to Issue 21(b)(4),

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[11] *See* Focal's Response to Issue 21(b)(2) and Focal Amendment § 2.1.1.

[12] *See TRO*, ¶ 581.

[13] *See TRO*, ¶ 587.

[14] *See TRO*, ¶ 587.

Verizon was obligated to perform conversions at that time. By the same token, Verizon was likewise obligated to permit commingling upon that date as well.

13. Finally, in approving Focal's proposed language, the Commission can quickly dispense with Verizon's proposed commingling language[15] because it limits commingling to UNE or combination of UNEs obtained under 47 U.S.C. § 251(c)(3) or under a Verizon UNE tariff ("Qualifying UNEs") with wholesale services obtained from Verizon under a Verizon access tariff or separate non-§ 251 agreement that it characterizes as "Qualifying Wholesale Services."[16] The Amendment should permit commingling of unbundled network elements made available pursuant to other applicable law such as Section 271, the *BA/GTE Merger Conditions*[17] or state law.[18] Moreover, Verizon's "Qualifying UNE" term is tied to the FCC's *Interim UNE Order,*[19] which is outdated because the *TR Remand Order*[20] superceded it. Verizon's language is also objectionable because it limits commingling to wholesale services obtained from Verizon under a Verizon access tariff or a separate non-251 agreement.[21] To the extent that Verizon is required to offer § 271 network elements in specific states, Focal's proposed terms capture those obliga-

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[15] *See* Verizon Amendment 2, §§ 3.4.1 *et seq.*

[16] *See* Verizon Amendment 2, §§ 3.4.1.1. & 3.4.1.2.

[17] *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, FCC 00-221 (2000) ("BA/GTE Merger Conditions").

[18] The Commission need not determine the precise scope of such non-§ 251 obligations in this proceeding.

[19] *Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (rel. Aug. 20, 2004) ("Interim UNE Order").

[20] *Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-179 (rel. Feb. 4, 2005) ("TR Remand Order").

[21] Verizon Amendment 2, § 3.4.1.1.

tions and a separate agreement should not be required. As to Verizon's requests that it be permitted to (a) assess a nonrecurring charge on each UNE circuit that is part of a commingled arrangement and (b) not have performance standards to its provisioning of commingling requests, these requests are equally inappropriate. Moreover, Verizon's reservation of rights language in its proposed Amendment 2 at Section 3.4.1.2.2 should not be included in the amendment because, Verizon's proposal basically permits Verizon to cease providing a UNE without first seeking a contract amendment.

ISSUE 21: What obligations, if any, with respect to EELs should be included in the Amendment to the parties' interconnection agreements?

14. As discussed herein, Focal's proposed language for conversions is consistent with the *TRO* and recognizes that as of October 2, 2003, Verizon was required to perform the functions necessary for CLECs to Convert any facility or service, provided that the CLEC would be entitled to place a new order for the UNE, UNE Combination or other facility or service resulting from a Conversion.[22] Focal has defined the term "Conversion" in Section 5.3 to include "all procedures, processes and functions that Verizon and CLEC must follow to Convert any Verizon facility or service other than an unbundled network element (*e.g.*, special access services) or group of Verizon facilities or services to the equivalent UNEs or UNE Combinations or Section 271 Network Elements, or the reverse. Convert means the act of Conversion." The definition is consistent with FCC Rule 51.316, which provides:

> Upon request, an incumbent LEC shall convert a wholesale service, or group of wholesale services, to the equivalent unbundled network element, or combination of unbundled network elements, that is available to the requesting telecommunications carrier under section 251(c)(3) of the Act and this part.

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[22] *See* Focal Amendment §§ 2.3, 5.3; *TRO*, ¶¶ 585-589.

15. In addition, the FCC's finding that conversions can go the opposite direction is contemplated in Focal's proposed language. In promulgating FCC Rule 51.316, the FCC recognized that it was technically feasible "to convert UNEs and UNE combinations to wholesale services and vice versa."[23] In evaluating both types of conversions, it declined to "establish procedures and processes that ILECs and CLECs must follow to convert wholesale services (*e.g.*, special access services offered pursuant to interstate tariff) to UNEs or UNE combinations and the reverse, *i.e.*, converting UNEs or UNE combinations to wholesale services."[24] In making this statement, the FCC was obviously cognizant that ILECs may want to convert UNEs to special access or some other alternative service as they are relieved of offering such facilities on an unbundled basis pursuant to 251(c)(3). Accordingly, Focal's definition recognizes that the term Conversions should be bidirectional and is therefore proper.

16. Focal proposes that a CLEC be able to initiate conversion requests in writing or by electronic notification.[25] Verizon's proposal that conversion procedures be governed solely by its conversion guidelines is highly inappropriate because Verizon controls those terms and can unilaterally change them at any time.[26] Further, nothing in the *TRO* requires that CLECs follow these guidelines and thus there is no need to reference them in the amendment. Given Verizon's past practices and conduct associated with routine network modifications, CLECs have legitimate fears that by referencing these guidelines, Verizon is providing itself a mechanism to undercut its legal obligations and have a back door means to (1) avoid any decisions made in this

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[23] *TRO*, n.1809.

[24] *TRO*, ¶ 585.

[25] Focal Amendment § 2.3.1.

[26] Verizon Amendment 2, § 3.4.2.6.

arbitration about conversions that are adverse to it and (2) "impose an undue gating mechanism that could delay the initiation of the ordering or conversion process."[27] Accordingly, Verizon's attempt to do this through its proposed language (regardless of whether it is intentional) should be rejected.

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

17. As explained in response to Issue 25 below, a CLEC is only required to certify that it satisfies the eligibility criteria of Rule 51.318(b).[28] Nothing in the *TRO* requires a CLEC to provide the type of information that Verizon demands.[29] If Verizon seeks to contest the CLEC certification, it may exercise its audit rights.[30] Moreover, the FCC has explicitly stated that "carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations, so long as the competitive LEC meets the eligibility criteria that may be applicable."[31] As indicated in response to Issue 25, the eligibility criteria apply in a limited set of circumstances. As the FCC stated, "to the extent a competitive LEC meets the eligibility requirements and a particular network element is available as a UNE pursuant to our impairment analysis, it may convert the wholesale service used to serve a customer to UNEs or UNE combinations...."[32] Focal's language properly reflects the FCC's holdings and provides that Verizon shall permit and shall perform the functions necessary for a

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[27] *TRO*, ¶ 623.

[28] *TRO*, ¶¶ 623-624

[29] Verizon Amendment 2, § 3.4.2.3.

[30] *TRO*, n.1900.

[31] *TRO*, ¶ 586.

[32] *TRO*, ¶ 586; 47 CFR § 51.316(b).

CLEC to convert any facility or service, provided that the CLEC would be entitled under the terms of the amended Agreement or applicable law or any tariff or contract to place a new order for the UNE, UNE Combination or other facility or service resulting from a conversion.[33]

B. Conversion of existing circuits/services to EELs:

1. Should Verizon be prohibited from physically disconnecting, separating, or physically altering the existing facilities when a CLEC requests a conversion of existing circuits/services to an EEL unless the CLEC requests such facilities alteration?

18. Yes. The FCC held that "Converting between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer's perception of service quality."[34] The FCC also recognized that "conversions may increase the risk of service disruptions to competitive LEC customers" and that requesting carriers should establish ... any necessary operational procedures to ensure customer service quality is not affected by conversions."[35] With this FCC mandate, it is 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. Otherwise, there exists a far greater potential for customer service quality to be degraded, suspended or cut off. Focal's proposed terms[36] operate to limit the risk of service disruptions as envisioned by the *TRO* and therefore should be adopted.

2. What type of charges, if any, and under what conditions, if any, can Verizon impose when CLECs convert existing access circuits/services to UNE loop and transport combinations?

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[33] Focal Amendment § 2.2.

[34] *TRO*, ¶ 586.

[35] *TRO*, ¶ 586.

[36] Focal Amendment §§ 2.3.2, 2.3.3.

19. The Commission should strictly prohibit Verizon from imposing any Conversion charges.[37] The FCC has already concluded that such charges are patently unlawful under the Act. In particular, the FCC found that:

> Because incumbent LECs are never required to perform a conversion in order to continue serving their own customers, we conclude that such charges are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms, and conditions.[38] Moreover, we conclude that such charges are inconsistent with section 202 of the Act, which prohibits carriers from subjecting any person or class of persons (*e.g.*, competitive LECs purchasing UNEs or UNE combinations) to any undue or unreasonable prejudice or disadvantage.[39]

In rendering this decision, the FCC recognized that once a CLEC "starts serving a customer, there exists a risk of wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time."[40] The FCC further found that "such charges could deter legitimate conversions from wholesale services to UNEs or UNE combinations, or could unjustly enrich an incumbent LEC as a result of converting a UNE or UNE combination to a wholesale service."[41] For these reasons, Focal's proposed language should be adopted because it prohibits Verizon from imposing such charges.[42]

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

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[37] Verizon proposes that certain charges, including retag fees, for conversions apply for each circuit converted. *See* Verizon Amendment 2, §§ 3.4.2.4 & 3.4.2.5.

[38] 47 U.S.C. § 251(c)(3).

[39] *TRO*, ¶ 587 (*citing* 47 U.S.C. § 202(a)).

[40] *TRO*, ¶ 587; *See* 47 C.F.R. § 51.316(c).

[41] *TRO*, ¶ 587.

[42] Focal Amendment § 2.3.

20. No. Under Verizon's proposal, any EEL provided *prior to the effective date of the TRO*, October 2, 2003, must satisfy the eligibility criteria established as of October 2, 2003. The *TRO's* eligibility requirements do not, however, apply retroactively and only apply prospectively. Paragraph 589 of the *TRO* specifically provides:

> As a final matter, we decline to require retroactive billing to any time before the effective date of this Order. The eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past. To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this Order.

This language establishes that (1) if a circuit qualifies under the new standards but did not qualify under the old standards, a CLEC cannot recover the excessive charges prior to the effective date; (2) if a circuit does not qualify under the new standards but did qualify under the old standards, the ILEC may not recover past losses; and (3) EELs may continue to be provided under the old standards up to the effective date.

21. The *TRO* expressly envisions a dual-track EEL qualification system. To illustrate, a request pending prior to the effective date of the *TRO* would have been submitted under the old "safe harbors" eligibility criteria. Those circuits would be entitled to be priced at "the appropriate pricing" applicable to those circuits at the time; *i.e.*, the pricing applicable to circuits that satisfied the former eligibility criteria. This statement further contemplates that a CLEC may "lock in" the appropriate pricing for the circuit. By locking in the appropriate price, some circuits would continue to qualify as EELs under the old standards, while other circuits would have to satisfy the new standards before being priced at UNE rates.

22. The FCC clearly did not intend to have the *TRO*'s new EEL eligibility criteria run afoul of the *ex post facto* prohibition [*i.e.*, the prohibition against enacting laws that apply retroactively and negatively affect a person's rights]. Verizon's proposed language does just that and for these

reasons, should be rejected. Accordingly, the Commission should adopt Focal's proposed terms.[43]

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)?

23. Yes. Under the *TRO*, Verizon must process conversion requests upon the effective date of the *TRO* so long as the requesting carrier certifies that it has met the TRO's "eligibility criteria to that may be applicable."[44] The FCC emphasized that the "ability of requesting carriers to begin ordering without delay is essential"[45] and that "conversions should be performed in an expeditious manner," unencumbered by additional processes or requirements.[46] It specifically noted that CLECs "may convert existing special access services to combinations of loop and transport network elements, but only to the extent such conversions meet the service eligibility criteria for EELs adopted herein."[47]

24. Verizon's position that an amendment is required before conversions are performed defies the *TRO* and is a blatant attempt to preserve unjust riches. As explained above, the FCC recognized that once a competitive LEC starts serving a customer using special access, ILECs have an obvious incentive to thwart or frustrate a CLEC's attempt to convert circuits. The FCC

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[43] *See* Focal Amendment § 2.3.4.4. The Commission must also reject Verizon's language (Verizon Amendment 2, §§ 3.4.2.1, 3.4.2.2) that permits Verizon 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. Even if the *TRO* required CLECs to recertify existing EELs (which it does not), the *TRO* specifically forbids Verizon from engaging in self-help. *See TRO*, 623,¶ 623 n.1900.

[44] *TRO*, ¶ 586.

[45] *TRO*, ¶ 623.

[46] *TRO*, ¶ 587-88.

[47] *TRO*, ¶ n.1808.

emphasized that ILECs may accomplish this by assessing "wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a UNE service for the first time." The FCC also agreed that "such charges could deter legitimate conversions from wholesale services to UNEs or UNE combinations, or could *unjustly enrich* an incumbent LEC as a result of converting a UNE or UNE combination to a wholesale service."[48] Although the FCC was speaking in terms of charges, the same holds true with respect to delaying tactics, such as Verizon's position that agreements must be amended before conversions are performed.

25. Moreover, what is good for the goose is good for the gander. "Because incumbent LECs are never required to perform a conversion in order to continue serving their own customers,"[49] Verizon's amendment requirement is tantamount to imposing conversion charges, which the FCC found to be "inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms, and conditions."[50] Indeed, such requirements or charges "are inconsistent with section 202 of the Act, which prohibits carriers from subjecting any person or class of persons (*e.g.*, competitive LECs purchasing UNEs or UNE combinations) to any undue or unreasonable prejudice or disadvantage."[51] As the FCC found, a "critical component of nondiscriminatory access is preventing the imposition of any undue gating mechanisms that could delay the initiation of the

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[48] *TRO*, ¶ 587.

[49] *See TRO*, ¶ 587 (emphasis added)

[50] *TRO*, ¶ 587 (citing 47 U.S.C. § 251(c)(3)).

[51] *TRO*, ¶ 587 (citing § 202(a)).

ordering or conversion process."[52] Verizon's Amendment requirement for conversions does just that and is therefore unlawful. Focal's proposed language comports with the *TRO* and should therefore be adopted.[53]

26. When a CLEC requests a conversion that involves no physical alterations to the facilities, Focal proposes that the conversion orders be deemed to have been completed effective upon receipt by Verizon of the written or electronic request from CLEC, and recurring charges for the replacement facility or service should apply as of that date.[54] As previously explained, the FCC, in order to minimize the risk of incorrect payments, 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." [55] Because of this and, as previously explained, because ILECs are unjustly enriched by not assessing the appropriate charges when the conversion request is made (and otherwise have absolutely no financial incentive to promptly process a conversion request), it is just and reasonable that the conversion order be deemed completed upon Verizon receipt of the CLEC's written or electronic conversion request and that recurring charges for the replacement facility or service apply as of that date.

27. However, when a CLEC specifically requests that Verizon perform physical alterations to the facilities being converted, Focal proposes that the conversion order be deemed completed upon the earlier of (a) the date on which Verizon completes the requested work or (b) the standard interval for completing such work (in no event to exceed 30 days), regardless of whether

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[52] *TRO*, ¶ 623.

[53] *See* Focal Amendment §§ 2.3 and 2.3.4.4.

[54] *See* Focal Amendment § 2.3.4.1.

[55] *TRO*, ¶ 588.

Verizon has in fact completed such work.[56] Focal's proposal is reasonable because if facility rearrangements or changes are requested, thirty (30) calendar days provides a sufficient amount of time for Verizon to accomplish such work and recognizes that Verizon otherwise has no incentive to perform the conversion in any reasonable time period.

28. Along with the date upon which conversions are deemed complete, Focal also proposes that 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.[57] Focal's proposed language further 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 any bill does not reflect the appropriate charge adjustment, a CLEC may withhold payment in an amount that reflects the amount of the adjustment that should have been made on the bill for the applicable Conversions.[58]

C. What are Verizon's rights to obtain audits of CLEC compliance with the FCC's service eligibility criteria?

29. Focal's proposed audit terms are consistent with the *TRO* and should be adopted.[59] They permit Verizon to "obtain and pay for an independent auditor to audit, on an annual basis [(*i.e.*, one time in any 12-month period)], compliance with the qualifying service eligibility criteria" and recognize that "an annual audit right strikes the appropriate balance between the incumbent LECs' need for usage information and risk of illegitimate audits that impose costs on qualifying

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[56] *See* Focal Amendment § 2.3.4.2.

[57] Focal Amendment § 2.3.4.3.

[58] Focal Amendment § 2.3.4.3.

[59] *See* Focal Amendment § 2.2.3.

carriers."[60] In contrast, Verizon proposes that it be entitled to a audit once per calendar year rather than once per 12-month period.[61] However, the *TRO* specifically refers to an "annual audit" and contemplates that a full year would have to elapse between audits. Under Verizon's proposal, Verizon could audit a CLEC's books in December, and then audit again in January of the following year. In that case, the two audits would be separated by a month, not by a year as required by the *TRO*.

30. Focal's proposal also requires that Verizon give a CLEC thirty (30) days' written notice of a scheduled audit. This was a requirement the FCC previously established in the *Supplemental Order Clarification*[62] that the *TRO* did not alter.[63] In addition, consistent with the *TRO*, Focal proposes that audits be performed in accordance with the standards established by the American Institute for Certified Public Accountants. Out of fairness, it also requires that the auditor's report be provided to the CLEC at the time it is provided to Verizon.

31. Furthermore, Focal's proposal incorporates the *TRO*'s concept of materiality that governs this type of audit and recognizes that "to the extent the independent auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor."[64] Verizon's proposed language is entirely deficient in this regard. Indeed, Verizon

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[60] *TRO*, ¶ 626.

[61] Verizon Amendment 2, § 3.4.2.7.

[62] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183 (rel. June 2, 200) ("*Supplemental Order Clarification*").

[63] *TRO*, ¶ 622 n.1898 (noting that the Commission found that and ILEC must provide at least 30 days written notice to a carrier that has purchased an EEL that it will conduct an audit).

[64] *TRO*, ¶ 628.

seeks the entire cost of the audit regardless of the materiality.[65] Verizon's language entirely fails to recognize that under the *TRO*, a CLEC is only obligated to reimburse Verizon for the "cost of the independent auditor" if the audit reveals the CLEC "failed to comply in all material respects." [66] The *TRO* found that reimbursement for the cost of the auditor (not "the entire cost of the audit" as Verizon requests) in these circumstances strikes the appropriate balance that (1) provides an incentive for competitive LECs to request EELs only to the extent permitted by the *TRO*, and (2) "eliminates the potential for abusive or unfounded audits, so that incumbent LEC will only rely on the audit mechanism in appropriate circumstances."[67] Unlike Verizon's language, Focal's language fairly and properly addresses these competing concerns.

32. Focal's proposal also reflects the FCC's holding that "to the extent 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."[68] The FCC explained that such costs would "account for the staff time and other appropriate costs for responding to the audit (*e.g.*, collecting data in response to the auditor's inquiries, meeting for interviews, etc)."[69]

33. Moreover, payment of reimbursements is symmetrical under Focal's proposal, whereas it is not under Verizon's. In particular, Focal proposes that Verizon pay the CLEC, or vice versa (depending upon the result of the audit), within thirty (30) days of receiving the costs of the audit. However, under Verizon's proposal, a CLEC is required to reimburse Verizon within

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[65] *See* Verizon Amendment 2, § 3.4.2.7.

[66] *TRO*, ¶ 628.

[67] *TRO*, ¶ 627-28.

[68] *TRO*, ¶ 628

[69] *TRO*, n.1908.

thirty (30) days but Verizon does not have the same obligation.[70] Rather, Verizon requires that the CLEC provide to the independent auditor for its verification a statement of the CLEC's out-of-pocket costs of complying with an requests of the independent auditor and that Verizon will reimburse the CLEC within thirty (30) of the auditor's verification. This added process is unnecessary and undercuts the need for immediate payment. Should Verizon challenge the CLECs costs, Verizon always has the right to dispute the charges; however, payment must be made 30 days after Verizon receives the CLECs costs so that the "potential for abusive or unfounded audits" by Verizon are eliminated or at least minimized.[71]

34. Furthermore, Verizon's proposal that a CLEC keep books and records for a period of eighteen (18) months after an EEL arrangement is terminated is highly inappropriate and should be rejected.[72] The *TRO* does not require that CLECs keep such information for this period of time for terminated arrangements. Apart from having no basis in the *TRO*, this interval is unreasonably long and unduly burdensome.

35. Finally, Verizon's request to convert a noncompliant circuit at its own volition without CLEC consent (Verizon Amendment 2, § 3.4.2.2) has no legal basis. The *TRO* specifically states that "[t]o the extent the independent auditor's report concludes that the competitive LEC failed to comply with the service eligibility criteria, that carrier must … convert all noncompliant circuits

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[70] *See* Verizon Amendment 2, § 3.4.2.7.

[71] *See TRO*, ¶ 628.

[72] Verizon Amendment 2, § 3.4.2.7.

to the appropriate service."[73] Verizon's attempt to convert circuits is a form of self-help that contravenes the *TRO*.[74]

36. Accordingly, the Commission should adopt the audit provisions proposed by the Focal and find that Verizon's competing language is inconsistent with the *TRO* and unreasonable.

ISSUE 25: 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?

37. Focal's proposed language is appropriate and properly recognizes the limited instances when a CLEC must certify to Verizon that it satisfies the FCC's service eligibility requirements for combinations and commingled facilities.[75] Significantly, FCC Rules 51.318(a) and (b) specifically provide:

> (a) Except as provided in paragraph (b) of this section, an incumbent LEC shall provide access to unbundled network elements and combinations of unbundled network elements without regard to whether the requesting telecommunications carrier seeks access to the elements to establish a new circuit or to convert an existing circuit from a service to unbundled network elements.
>
> (b) An incumbent LEC need not provide access to (1) an unbundled DS1 loop in combination, or commingled, with a dedicated DS1 transport or dedicated DS3 transport facility or service, or to an unbundled DS3 loop in combination, or commingled, with a dedicated DS3 transport facility or service, or (2) an unbundled dedicated DS1 transport facility in combination, or commingled, with an unbundled DS1 loop or a DS1 channel termination service, or to an unbundled dedicated DS3 transport facility in combination, or commingled, with an unbundled DS1 loop or a DS1 channel termination service, or to an unbundled DS3 loop or a DS3

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[73] *TRO*, ¶ 627.

[74] *TRO*, ¶ 623 n.1900 (explaining that ILECs should not "engage in self-help").

[75] *See* Focal Amendment § 2.2. The FCC has noted that "[n]o certification is necessary for requesting carriers to obtain access to loops, transport, subloops, and other stand-alone UNEs, as well as EELs combining lower capacity loops." *TRO*, n.1899.

> channel termination service, unless the requesting telecommunications carrier certifies that all of the following conditions are met:[76]

Focal's proposal specifically incorporates the language of FCC Rule 51.318(b), which sets forth the *precise* instances when a CLEC must certify that it complies with the FCC's service eligibility criteria. Incredibly, Verizon's proposed certification requirements are not limited to these instances and it proposes that they generally apply to each DS1 circuit or DS1 equivalent circuit.[77] However, the FCC Rule is far more specific than Verizon's sweeping proposal, and requires that the eligibility criteria be 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."[78] In addition, Verizon's language contemplates applying the eligibility criteria to non-UNEs despite the fact that the rules do not apply to them.

38. Moreover, unlike Focal's proposed terms, Verizon's proposed Section 3.4.2.3 is inconsistent with the *TRO* because it seeks to impose onerous eligibility requirements that a CLEC must satisfy before it may obtain combinations. Unbelievably, Verizon demands that:

> Each written certification to be provided by ***CLEC Acronym TXT*** pursuant to Section 3.4.2.1 above must contain the following information for each DS1 circuit or DS1 equivalent: (a) the local number assigned to each DS1 circuit or DS1 equivalent; (b) the local numbers assigned to each DS3 circuit (must have 28 local numbers assigned to it); (c) the date each circuit was established in the 911/E911 database; (d) the collocation termination connecting facility assignment for each circuit, showing that the collocation arrangement was established pursuant to 47 U.S.C. § 251(c)(6), and not under a federal collocation tariff; (e) the interconnection trunk circuit identification number that serves each DS1 circuit. There must be one such identification number per every 24 DS1 circuits; and (f) the local switch that serves each DS1 circuit. When

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[76] 47 C.F.R. §§ 51.318(a) and (b).

[77] Verizon Amendment 2 § 3.4.2.1.

[78] 47 CFR § 51.318(b)(2).

> 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.[79]

Nothing in the *TRO* requires a CLEC to provide the sort of information demanded by Verizon. A CLEC is only required to certify that it satisfies the eligibility criteria of Rule 51.318(b).[80] If Verizon seeks to contest the CLEC certification, it may exercise its audit rights.[81]

39. With respect to means upon which certification is made, Focal proposes that a CLEC must self-certify in writing or by electronic notification. Focal's proposal is perfectly reasonable and any limitation in this regard "would impose an undue gating mechanism that could delay the initiation of the ordering or conversion process."[82] Accordingly, Focal's proposed language should be adopted.

CONCLUSION AND RELIEF

40. For the foregoing reasons, the Commission should issue an order requiring Verizon to modify its Proposed Amendment to incorporate the contract language proposed by Focal.

DATED this 11th day of March, 2005.

Respectfully Submitted,

By Edward Kirsch

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[79] Verizon Amendment 2, § 3.4.2.3.

[80] *TRO*, ¶¶ 623-624

[81] *TRO*, n.1900.

[82] *TRO*, ¶ 623.

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EXHIBIT 1

PROPOSED TERMS OF FOCAL COMMUNICATIONS CORP. OF WASHINGTON

2. **Commingling, Conversions and Combinations**

2.1 Commingling. Notwithstanding any other provision of the Agreement or any Verizon tariff or SGAT, and subject to the conditions set forth in the following Section 2.2, as of October 2, 2003, Verizon shall permit and shall perform the functions necessary for CLEC to Commingle. Verizon shall not impose any policy or practice related to Commingling that imposes an unreasonable or undue prejudice or disadvantage upon CLEC. In addition, Verizon shall cooperate fully with CLEC to ensure that operational policies and procedures implemented to effect Commingled arrangements shall be handled in such a manner as to not operationally or practically impair or impede CLEC's ability to implement new Commingled arrangements or Convert existing arrangements to Commingled arrangements in a timely and efficient manner and in a manner that does not affect service quality, availability, or performance from the end user's perspective. For the avoidance of doubt, Verizon acknowledges and agrees that the Commingling provisions of this Amendment do not conflict with any Verizon tariff. Verizon shall not change its tariffs in any fashion that impacts the availability or provision of Commingling under this Amendment or the Agreement, unless Verizon and CLEC have amended this Amendment and the Agreement in advance to address Verizon's proposed tariff changes.

2.1.1 Rates, Terms and Conditions for Commingled Facilities and Services. The rates, terms and conditions of the applicable tariff or contract will apply to services other than network elements, and the rates, terms and conditions of this Amended Agreement or the Verizon UNE tariff, as applicable, will apply to UNEs or Combinations of UNEs or to Section 271 Network Elements. Notwithstanding any other provision of the Agreement or any Verizon tariff or SGAT, Verizon shall not impose any charge to Commingle, and the rate applicable to each portion of a Commingled facility or service shall not exceed the rate for that portion if it were purchased separately.

2.2 Service Eligibility Criteria for Certain Combinations and Commingled Facilities and Services. CLEC must self-certify in writing or by electronic notification to Verizon that it is in compliance with the service eligibility criteria set forth in 47 C.F.R. § 51.318(b) when ordering new: (a) unbundled DS1 Loops in combination with unbundled DS1 or DS3 Dedicated Transport, or commingled with DS1 or DS3 access services; (b) unbundled DS3 Loops in combination with unbundled DS3 Dedicated Transport, or commingled with DS3 access services; (c) unbundled DS1 Dedicated Transport commingled with DS1 channel termination access service; (d) unbundled DS3 Dedicated Transport commingled with DS1 channel termination access service; or (e) unbundled DS3 Dedicated Transport commingled with DS3 channel termination service.

2.2.1 For facilities ordered after the date on which the [***State Commission TXT***] approves this Amendment, CLEC must remain in compliance with said service eligibility criteria for so long as CLEC continues to receive the aforementioned combined or commingled facilities and/or services from Verizon.

2.2.2 These criteria shall apply whether the circuits in question are being provisioned to establish a new circuit or to Convert an existing facility or service, or any part thereof, to unbundled network elements.

2.2.3 On an annual basis (*i.e.*, one time in any 12-month period), Verizon may, pursuant to the terms and conditions of this section, obtain and pay for an independent auditor to audit CLEC's compliance in all material respects with the service eligibility criteria applicable to EELs. Such annual audit will be initiated only to the extent reasonably necessary to determine CLEC's compliance with Applicable Law. Verizon shall give CLEC thirty (30) days' written notice of a scheduled audit. Any such audit shall be performed in accordance with the standards established by the American Institute for Certified Public Accountants and may include, at Verizon's discretion, the examination of a sample selected in accordance with the independent auditor's judgment. Verizon shall direct its auditor to provide a copy of its report to CLEC at the same time it provides the report to Verizon. To the extent the independent auditor's report concludes that CLEC failed to comply in all material respects with the service eligibility criteria, then CLEC will promptly take action to correct the noncompliance and true up any difference in payments and reimburse Verizon for the cost of the independent auditor within thirty (30) days after receiving a statement of such costs from Verizon. Should the independent auditor confirm CLEC's compliance in all material respects with the service eligibility criteria, then CLEC shall provide to the independent auditor a statement of CLEC's costs of complying with any requests of the independent auditor, and Verizon shall then reimburse CLEC for its costs associated with the audit within thirty (30) days after receiving CLEC's statement. CLEC shall maintain records adequate to support its compliance with the service eligibility criteria for each DS1 or DS1 equivalent circuit.

2.3 Conversions. Notwithstanding any other provision of the Agreement or any Verizon tariff or SGAT, as of October 2, 2003, Verizon shall permit and shall perform the functions necessary for CLEC to Convert any facility or service, provided that the CLEC would be entitled under the terms of the amended Agreement or applicable law or any tariff or contract to place a new order for the UNE, UNE Combination or other facility or service resulting from a Conversion. Verizon shall not impose any charges for or associated with Conversions. This includes, but is not limited to, termination charges, or any disconnect fees, re-connect fees, retag fees, or charges associated with establishing service for the first time.

2.3.1 CLEC may request Conversions by submitting a written or electronic request.

2.3.2 When a facility or service is Converted at the request of CLEC, Verizon shall not physically disconnect, separate, alter or change in any other fashion equipment and facilities utilized to provide the facility or service, except at the request of CLEC.

2.3.3 Verizon shall process expeditiously all Conversions requested by CLEC in a seamless manner without adversely affecting the service quality perceived by CLEC or CLEC's end user customer.

2.3.4 Effective Date of Conversion Requests and Timing of Billing Changes.

2.3.4.1 Except where CLEC specifically requests that Verizon physically disconnect, separate, alter or change the equipment and facilities employed to provide the facility or service being replaced, the Conversion order shall be deemed to have been completed effective upon receipt by Verizon of the written or electronic request from CLEC, and recurring charges for the replacement facility or service shall apply as of such date.

2.3.4.2 Where CLEC specifically requests that Verizon physically disconnect, separate, alter or change the equipment and facilities employed to provide the facility or service being replaced, the Conversion order shall be deemed to have been completed and recurring charges for the replacement facility or service shall apply upon the earlier of (a) the date on which Verizon completes the requested work or (b) the standard interval for completing such work (in no event to exceed 30 days), regardless of whether Verizon has in fact completed such work.

2.3.4.3 Verizon shall bill CLEC pro rata for the facility or service being replaced through the date prior to the date on which billing at rates applicable to the replacement facility or service commences pursuant to this Section, and the applicable rate for the replacement facility or service thereafter. These billing adjustments should appear on the bill for the first complete month after the date on which the Conversion is deemed effective in accordance with the provisions of this Amendment. If any bill does not reflect the appropriate charge adjustment, CLEC may withhold payment in an amount that reflects the amount of the adjustment that should have been made on the bill for the applicable Conversions.

2.3.4.4 Effective Date of Past Requests to Convert to UNEs: Notwithstanding any other provision of this Amendment or the Agreement, and for the avoidance of any doubt, requests by CLEC to Convert any non-UNE to a UNE or Combination of UNEs made on or after the effective date

of the TRO (October 2, 2003), but before the date on which the [***State Commission TXT***] approves this Amendment ("Past Requests"), shall be deemed to have been completed on the date Verizon received the Past Request and retroactive adjustments between the applicable UNE charges and the previously applicable charges shall be calculated back to the date that Verizon received the Past Request. The UNE charges for all Conversion requests (including any retroactive adjustments) shall be reflected in the first billing cycle following the Effective Date of this Amendment. If that bill does not reflect the appropriate UNE charges, CLEC is nevertheless obligated to pay no more than the applicable UNE rate.

5. Definitions

5.2 Commingling means the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, or Section 271 Network Elements purchased from Verizon to any one or more facilities or services (other than unbundled network elements) that CLEC has obtained from Verizon, or the combining of an unbundled network element, or a combination of unbundled network elements, or Section 271 Network Elements with one or more such facilities or services. Commingle means the act of Commingling.

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

CERTIFICATE OF SERVICE
Docket No. UT-043013

I hereby certify that I have this day served this document upon all parties of record in this proceeding by electronic mail and by overnight delivery:

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Dated this 11th day of March, 2005