BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Amendment for 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 VERIZON'S OPENING BRIEF

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1. Verizon Northwest, Inc. ("Verizon"), in accordance with the schedule established by the Arbitrator, files this Initial Brief. The issues addressed in this brief should be resolved in Verizon's favor, consistent with federal law and this Commission's precedent.

I. INTRODUCTION

2. Verizon initiated this proceeding, as the FCC had urged, to bring existing interconnection agreements into conformity with federal law governing incumbents' obligations to provide unbundled access to certain elements of their existing telephone networks. Interconnection agreements under the 1996 Act implement the obligations of section 251(b) and (c), including the network unbundling obligation of section 251(c)(3). In the years following the adoption of the 1996 Act, however, the FCC repeatedly adopted unbundling rules that were unlawfully overbroad. With the 2003 *Triennial Review Order*,[1] the FCC finally began the process of placing meaningful limitations on incumbents' unbundling obligations under section 251(c)(3), a process that it continued in the *Triennial Review Remand Order*.[2]

3. Implementation of those limitations is of critical public policy importance, as the FCC and the courts have affirmed repeatedly. Overbroad unbundling obligations have discouraged investment in innovative facilities and hindered meaningful competition. To the extent any existing interconnection agreements perpetuate such obligations, those agreements must be brought up to date. Verizon initiated this proceeding believing that enforcement of the

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[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) *("USTA II"), cert. denied, NARUC v. United States Telecom Ass'n,* 125 S.Ct. 313, 316, 345 (2004).

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

straightforward requirements of federal law should be a relatively simple matter. The pitched resistance of CLECs, intent on perpetuating unauthorized regulatory arbitrage at the expense of real competition, instead turned this proceeding (and similar proceedings in other states) into an extended procedural battle.[3] The time has come to cut the Gordian knot.

4. While the underlying subject matter — unbundling of local telecommunications networks can be dauntingly complex, the proper purpose and outcome of this proceeding are simple. FCC unbundling regulations have forced Verizon to surrender its facilities to rivals, at prices that the Supreme Court has characterized as all-but-confiscatory. *See Verizon Communications Inc. v. FCC*, 535 U.S. 467, 489 (2002). When FCC regulations *cease* to require such unbundling, Verizon should be able to stop providing it. That unarguable principle requires that the Commission grant Verizon's petition and adopt its proposed amendment.

A. Regulatory Background

5. Until 2003, the FCC's rules effectively required incumbents to share their entire networks with their competitors, thus reducing or eliminating the incentives for those competitors to build any of their own facilities. The Supreme Court reversed the first set of rules in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), and when the FCC tried to re-impose a similar set of maximum unbundling rules, the D.C. Circuit vacated those rules in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

6. After the *USTA I* remand, the FCC issued its *Triennial Review Order* in an attempt to delineate unbundling obligations that would meet the standards of the 1996 Act. In that order, the FCC noted the "limitations inherent in competition based on the shared use of infrastructure through network unbundling," and stated "that excessive network unbundling

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[3] The lucrativeness of the prior arbitrage opportunities is illustrated by the fact that the CLEC community has spent millions of dollars in lawyers' fees to delay the enforcement of federal law.

requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology." 18 FCC Rcd at 16984, ¶ 3.

7. Thus, the FCC eliminated or reduced the scope of many unbundling obligations, at least for broadband facilities. To take just a few examples, it held that "incumbent LECs do not have to provide unbundled access to the high frequency portion of their loops," *id.* at 16988, ¶ 7, that "[i]ncumbent LECs do not have to offer unbundled access to newly deployed or 'greenfield' fiber loops or to the packet-switching features, functions, and capabilities of their hybrid loops," *id.*, that ILECs "are no longer required to unbundle OCn loops," *id.*, that ILECs do not have to offer "unbundled local circuit switching when serving the enterprise market," *id.* at 16989, ¶ 7, that ILECs "are not required to unbundle packet switching, including routers and Digital Subscriber Line Access Multiplexers (DSLAMs)," *id.*, and that ILECs "are only required to offer unbundled access to their signaling network when a carrier is purchasing unbundled switching," *id.*

8. The FCC further stated that these reductions in unbundling obligations would "help stabilize the telecommunications industry, yield renewed investment in telecommunications networks, and increase sustainable competition in all telecommunications markets for the benefit of American consumers." *Id.* at 16985, ¶ 6. To accomplish these beneficial ends, the FCC provided that negotiations over new interconnection agreements should begin "*immediately*," because any "delay in the implementation of the new rules we adopt in this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry." *Id.* at 17405, ¶ 703 (emphasis added). The FCC stated that "parties may not refuse to negotiate *any subset* of the rules we adopt herein." *Id.* at 17406, ¶ 706 (emphasis added).

9. Moreover, the FCC stated that "state commission[s] should be able to resolve" any disputes over contract language arising from the order "*at least* within the nine-month timeframe envisioned for new contract arbitrations under section 252." *Id.* at 17406, ¶ 704 (emphasis added). Finally, the FCC stated that even where parties' agreements contemplate implementing a change in law only if it has become "final and unappealable," the parties should still implement the *Triennial Review Order* immediately, because the elimination of prior unbundling obligations (as opposed to the enactment of new obligations) had already become final and unappealable when the FCC's prior unbundling rules were vacated. Thus, "[g]iven that the prior UNE rules have been vacated and replaced *today* by new rules, we believe that it would be *unreasonable and contrary to public policy* to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order." *Id.* at 17406, ¶ 705 (emphasis added).

10. In the D.C. Circuit's *USTA II* decision, the *Triennial Review Order* was vacated or remanded in several places where it *still* retained overly broad unbundling obligations (or sub-delegated authority to state commissions), particularly with regard to narrowband facilities and high-capacity facilities used to serve business customers.[4] The order, however, was essentially affirmed insofar as it *cut back* on unbundling obligations.[5] The D.C. Circuit's mandate issued on June 16, 2004, and the Supreme Court denied certiorari.[6]

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

[5] *See, e.g.*, *USTA II*, 359 F.3d at 582 (upholding FCC's decision not to unbundle broadband capacity of hybrid loops); *id.* at 584 (upholding FCC's decision not to unbundle "fiber-to-the-home" loops); *id.* at 585 (affirming FCC's decision not to unbundle line sharing); *id.* at 587 (upholding FCC's decision not to unbundle enterprise switching); *id.* at 587-88 (upholding FCC's decision not to unbundle signaling or call-related databases except in narrow circumstances); *id.* at 588 (upholding FCC's decision to require unbundling of shared transport only in situations where switching is unbundled); *id.* at 589 (upholding

11. The FCC then issued its *Interim Rules Order*,[7] in which it required ILECs, on an interim basis, to "continue providing unbundled access to [mass-market circuit] switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004." 19 FCC Rcd at 16784 (footnotes omitted). That interim obligation ends today, March 11, the effective date of the unbundling rules adopted in the *Triennial Review Remand Order*. *Id.*

12. In the *TRRO*, the FCC set forth rules to replace the unbundling rules that had been vacated in *USTA II*. Among other things, the FCC prohibited the use of UNEs "exclusively for the provision of telecommunications services in the mobile wireless and long distance markets," established specific impairment tests and transition plans (complete with pricing) for high-capacity (DS1, DS3, and dark fiber) transport and loops, confirmed (under an alternative legal theory) its previous elimination of any unbundling obligation as to entrance facilities, and eliminated any unbundling obligation as to mass market switching, for which it also created a specific transition plan. *Id.* ¶ 5. As to all of the UNEs at issue — high-capacity loops and transport, mass-market switching — the FCC explicitly held that its transition plan applies *only* as to the "embedded customer base." *Id.* Hence, this plan ""do[es] not permit competitive LECs to add new dedicated transport UNEs in the absence of impairment," "to add new high-capacity loop UNEs in the absence of impairment," or "to add new switching UNEs" as of March 11, 2005, in any circumstance. *Id.* The "no-new-adds" directive does not depend on any particular

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FCC's decision that section 271 does not require either section 251 TELRIC pricing for elements unbundled only under section 271 or the combination of elements); and *id.* at 592-93 (upholding FCC's eligibility criteria for CLEC access to the Enhanced Extended Link).

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

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

interconnection agreement language. Although the FCC contemplated that carriers would negotiate arrangements to implement the FCC's *permanent* unbundling rules and to transition the embedded base (*e.g.*, to change the list of UNEs available under interconnection agreements and to work out operational details of the transition), no contract amendment is required to implement the immediate no-new-add directive included in the transition rules.[8]

13. Consistent with the *TRRO's* explicit ban on new UNE-Ps, a number of state regulatory commissions have rejected CLECs' attempts to seek sanction to continue to order UNE-Ps. For example, on March 9, 2005, the Indiana Utility Regulatory Commission refused to order SBC to accept orders for new UNE-P customers after March 10, 2005, finding that

> [W]e cannot reasonably conclude that the specific provision of the TRRO to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements.[9]

14. Similarly, on March 8, 2005, the Rhode Island Public Utilities Commission unanimously adopted, on an interim basis, Verizon's tariff revision that implements the *TRRO's* no-new UNE-Ps directive, and rejected the CLECs' requests that that Commission ignore the FCC's clear mandate.[10] On March 9, 2005, the Texas PUC declined to require SBC to accept new UNE-P customer orders, although it did require SBC to provide new lines to the embedded

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

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

[10] Open Hearing, *Verizon RI Tariff filing to implement the FCC's New Unbundled (UNE) Rules Regarding as Set Forth in the TRO Remand Order issued February 4, 2005,* Docket 3662 (R.I.PUC Mar. 8, 2005), *available at* http://www.ripuc.org/eventsactions/docket/3662page.html.

customer base.[11] Similarly, the Ohio Public Utilities Commission found that "the FCC had very clearly determined that, effective March 11, 2005, the ILECs unbundling obligations with regard to mass market local circuit switching . . . would no longer apply to serve new customers, " and declined to require SBC to continue to add new UNE-P customers.[12]

15. The state commissions of Maryland and Massachusetts have refused CLECs' attempts to convert implementation of the *TRRO* into an emergency requiring commission intervention. While the Maryland PSC would allow petitioner CLECs, in the normal course of things, to file "*individualized* petitions based upon their *particular* interconnection agreements and *specific* provisions of the *TRRO*," it reminded the parties that "the rights of all parties shall be determined by the parties' interconnection agreements and the FCC's applicable rules."[13] That is, whatever the CLECs' particular grievance, the FCC's ban on new UNE-P orders by CLECs would take effect March 11, 2005. Similarly, in Massachusetts, the state commission declined to take emergency action to block implementation of the UNE-P ban on March 11, 2005, but would only consider the issues as part of ongoing arbitration proceedings.[14]

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[11] *See* Proposed Order on Clarification, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement,* Docket No. 28821, at 1-2, (Texas PUC Mar. 9, 2005).

[12] *See* Entry, *In re Emergency Petition for a Declaratory Ruling Prohibiting SBC Ohio from Breaching its Existing Interconnection Agreements and Preserving the Status Quo with Respect to Unbundled Network Element Orders,* Case No. 05-298-TP-UNC & 05-299-TP-UNC, at 3, (Ohio PUC Mar. 9, 2005). The Ohio PUC did, however, require SBC to continue to provision new lines for the "embedded customer base" for an interim period. *Id.*

[13] Letter, *Emergency Petition from MCI for a Commission Order Directing Verizon to continue to Accept New Unbundled Network Element Platform Orders*, ML No. 96341, at 2, (Md. PSC Mar. 10, 2005) (emphses added). The PSC granted MCI's request to withdraw, and held CLECs petitions to intervene mooted. It allowed the parties to pursue their dispute in Case No. 9026 under a typical hearing schedule.

[14] *See* Briefing Questions to Additional Parties, *Petition of Verizon New England for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers pursuant to Section 252 and the TRO,* Case No. 04-33, (Ma. DTE Mar. 10, 2005).

B. Verizon's Amendments

16. In light of these developments in federal law, Verizon has proposed amendments to certain existing interconnection agreements that are designed to serve two basic goals.

17. *First,* Amendment 1 is designed to establish in unmistakable terms that Verizon's unbundling obligations under its interconnection agreements are the same as its obligations under section 251(c)(3) and the FCC's implementing rules. There is no lawful basis for imposing any different unbundling obligations in those agreements: as will be explained below with respect to Issue 1, the FCC's regulations establish not only Verizon's unbundling obligations, but also the *limits* on those obligations. By tying Verizon's obligations under its agreements to the obligations imposed under section 251(c)(3) and the FCC's implementing rules, Verizon's Amendment provides for automatic implementation of any subsequent reductions in unbundling obligations without the wasteful and prolonged procedure that is underway here.[15] When the FCC eliminates an unbundling obligation, that decision can be and should be implemented through the parties' interconnection agreements as well, without the need for any amendment to the agreement's language (thereby precluding the need for recurring proceedings such as this in the future).

18. This is not a novel or extraordinary approach. As Verizon previously explained, most of its existing interconnection agreements already make clear that Verizon, without

[15] Most of Verizon's existing interconnection agreements already make clear that Verizon, without amending the agreements, may cease providing UNEs that it is no longer required to provide. *See generally* Order Allowing Verizon to Withdraw Its Petition as to 52 Carriers, Denying Withdrawal as to 18 Carriers; Determining Effect of Order No. 08 on Specific Interconnection Agreements Order No. 12 ("Order No. 12") (describing Verizon's position in this regard). Where amendments clearly are not required, Verizon has already implemented discontinuance of various UNEs as to which the *Triennial Review Order* removed Verizon's unbundling obligation. Even Verizon's agreements with CLECs that Verizon did not propose to dismiss from this arbitration may allow Verizon to cease providing such UNEs, and Verizon continues to reserve any rights it may have in this regard. Moreover, as discussed further *infra*, no amendment is required to implement the FCC's mandatory prohibition against CLECs adding certain UNEs eliminated under the *TRRO*.

amending the agreements, may cease providing UNEs that it has no section 251 obligation to unbundle. Indeed, in an earlier Order in this docket, the Arbitrator agreed that "the agreements allow Verizon to take unilateral action under the agreements upon certain changes in law, and the parties may subsequently amend the agreements to address the changes in law."[16]

19. *Second*, Amendment 2 fleshes out Verizon's remaining unbundling obligations, particularly to the extent that the *Triennial Review Order* imposed new requirements.

20. Accordingly, the Commission should promptly address the merits of the parties' positions with regard to the issues set forth below.

II. ISSUE-BY-ISSUE ANALYSIS

21. In the sections that follow, Verizon explains its positions on each of the issues jointly identified by the parties. CLECs have submitted several alternative proposals, including those sponsored by AT&T and the Competitive Carrier Group (CCG),[17] MCI, Sprint, the Competitive Carrier Coalition,[18] and WilTel.[19] Those alternative proposals are inconsistent with binding federal law and should be rejected.

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[16] Order No. 12, at 25. Where amendments were not required, Verizon has already implemented discontinuance of various UNEs as to which the *Triennial Review Order* removed Verizon's unbundling obligation. Even Verizon's agreements with CLECs that Verizon did not propose to dismiss from this arbitration may allow Verizon to cease providing such UNEs, and Verizon continues to reserve any rights it may have in this regard. Moreover, as discussed above and *infra*, no amendment is required to any contract in order to implement the FCC's mandatory prohibition against CLECs adding UNEs eliminated under the *TRRO*.

[17] The CCG here includes: Advanced TelCom, Inc., BullsEye Telecom, Inc, Comcast Phone of Washington LLC, Covad Communications Co., and KMC Telecom V Inc. *See* Letter of Brooks E. Harlow to the Wash. UTC (Oct. 21, 2004) (noting that AT&T and this group of CLECs had "engaged in certain joint efforts to develop a draft amendment"). For ease of reference, Verizon will refer to the "AT&T Amendment" throughout this brief; in all such instances (except where noted), the same reference applies to the Amendment submitted by the other CLEC group as well.

[18] The Competitive Carrier Coalition includes: Focal Communications Corp. of Washington, ICG Telecom Group, Inc., Integra Telecom of Washington, Inc., McLeodUSA Telecommunications Services, Inc., and Pac-West Telecomm, Inc.

[19] On virtually all issues, WilTel agrees with AT&T's position.

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

Relevant Provisions: Verizon Amendment 1, §§ 2.1, 2.3, 3.1, 4.7.3, 4.7.6; Verizon Amendment 2, §§ 2.1, 2.3, 2.4, 3.1, 3.2.2, 3.2.3, 3.2.4, 3.3.1, 3.4.1.1, 3.4.1.2.1, 3.4.1.2.2, 3.4.2.1, 3.4.2.2, 3.5.1, 3.5.3, 4.7.5; AT&T Amendment, §§ 1.1, 1.2, 2.0, 2.5, 2.6, 2.7, 2.10, 2.11, 2.23, 3.2.1.1, 3.2.1.2, 3.2.3.1, 3.2.3.2, 3.2.4, 3.2.5, 3.3.1, 3.4, 3.5.1, 3.5.1.1, 3.5.3, 3.6.2, 3.6.3, 3.8.1, 3.9, 3.9.5[20]; MCI Amendment (numerous provisions where it simply deletes Verizon's references to federal law but without referencing alternative sources of law); Sprint Amendment, § 4.5; CCC Amendment §§ 1, 1.4.4, 1.5.4.1.1, 1.5.4.1.2, 1.7.1, 3.1, 3.1.2, 4; WilTel Amendment, §§ 2.1, 3.1, 4.7.3.[21]

22. No. Verizon proposed its Amendments and filed its Petition to bring its interconnection agreements into compliance with sections 251 and 252, as interpreted by the FCC. No other source of law can override the FCC's delineation of unbundling obligations. Furthermore, the 1996 Act makes clear that state commission authority under the 1996 Act is limited to implementation of the unbundling obligations under section 251(c)(3) and the FCC's implementing regulations.

23. In accordance with these findings, the Commission should reject CLEC proposals to define unbundling obligations by reference to "Applicable Law," to the extent they define that term to include state law, the conditions imposed in the FCC's Order approving the *Bell Atlantic/GTE* merger, or anything other than section 251(c)(3) and the FCC's unbundling rules. *See, e.g.*, AT&T Amendment §§ 1.1, 2.0 (Wash. UTC filed Oct. 22, 2004).

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[20] Conversent agrees with AT&T here.

[21] Sprint's redline of Verizon's Amendment does not alter the provisions that refer to federal law.

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

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

25. This Commission's Staff noted that this Commission cannot order unbundling that a federal court has rejected: "It would not be legally sustainable for this Commission to adopt the FCC's provisional national impairment findings for mass market switching and dedicated transport because those were discredited by the court as inconsistent with Section 251." Commission Staff's Response to Joint CLECs' Motion to Maintain the Status Quo, *Petition of QWEST Corporation to Initiate a Mass-Market Switching and Dedicated Transport Case Pursuant to the Triennial Review Order*, Docket No. UT-033044, ¶ 7 (Wash. UTC filed May 25, 2004) ("Commission Staff's Response"). Other state commissions correctly recognize this principle. The Virginia commission, for example, held that "*USTA II* establishes that no unbundling can be ordered in the absence of a valid finding by the FCC of impairment under 47

U.S.C. § 251(d)(2)" and that any state-commission imposed UNE obligations would therefore "violate federal law."[22] The Florida and Indiana Commissions have, likewise, found that the impairment determinations necessary to require unbundling are "reserved for the FCC, not the states."[23] And the Massachusetts commission explicitly rejected a CLEC's "suggestion that Section 252(e)(3) preserves the ability of the States to require unbundling where the FCC finds that it is not required," because this reading of the Act "would discount improperly the preemptive effect of federal regulation under Section 251."[24]

26. These Commissions were plainly correct in rejecting CLEC arguments that state law can justify the imposition of unbundling obligations where, as here, the FCC has not required unbundling under section 251(c)(3). In the 1996 Act, Congress recognized that the FCC must strike a balance between encouraging competitive entry by requiring incumbents to provide access to hard-to-duplicate elements of existing networks, on the one hand, and discouraging the construction of new facilities by allowing competitors access to facilities that they could efficiently construct on their own, on the other. Thus, as the D.C. Circuit explained, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in

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

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

[24] Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17, *Proceeding by the Department on its Own Motion to Implement the Requirements of the FCC's Triennial Review Order Regarding Switching for Mass Market Customers,* D.T.E. 03-60, at 22 (Mass. DTE Dec. 15, 2004); see also Order Dismissing Remaining Issues, *Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in M.D.T.E. No. 17, filed with the Department by Verizon New England, Inc. d/b/a Verizon Massachusetts on May 5 and June 14, 2000, to become effective October 2, 2000*, D.T.E. 98-57 Phase III-D, at 15-17 (Mass. D.T.E. Jan. 30, 2004) (finding that the DTE could not lawfully override the FCC's determination not to unbundle packet switching).

innovation and creating complex issues of managing shared facilities," while, at the same time, "a broad mandate can facilitate competition by eliminating the need for separate construction of facilities where such construction would be wasteful." *USTA I*, 290 F.3d at 427.

27. Unlimited unbundling is *not* a goal of the 1996 Act. As the Supreme Court has said, if "Congress had wanted to give blanket access to incumbents' networks," it "would simply have said . . . that whatever requested element can be provided must be provided." *Iowa Utils. Bd.*, 525 U.S. at 390. The FCC's "targeted" unbundling approach in the *TRRO* is therefore intended to satisfy "the guidance of courts to weigh the costs of unbundling, and ensures that our rules provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition." *TRRO* ¶ 2.

28. Precisely because the FCC's rules strike a balance, imposition of additional unbundling obligations beyond those required under federal law would upset the balance and thus conflict with federal policy. Thus, the FCC recognized that,

> [i]f a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, *we believe it unlikely that such [a] decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C).*

Triennial Review Order, 18 FCC Rcd at 17101, ¶ 195 (emphasis added). As the FCC explained to the D.C. Circuit, "[i]n the UNE context, . . . a decision by the FCC not to require an [incumbent carrier] to unbundle a particular element essentially reflects a 'balance' struck by the agency between the costs and benefits of unbundling that element. Any state rule that struck a different balance would conflict with federal law, thereby warranting preemption." Brief for

Respondents at 93, *United States Telecom Ass'n v. FCC,* Nos. 00-1012 *et al.* (D.C. Cir. filed Jan. 16, 2004) ("FCC Brief") (citations omitted) (attached as Exhibit A).

29. The FCC's decisions in the *Triennial Review Order* and the *TRRO* to limit incumbents' unbundling obligations thus "take[] on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," thereby preempting any inconsistent state regulation or requirement. *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); *see also* FCC Brief at 93 n.41 ("For example, the [FCC] declined to unbundle the packetized functionality of ILEC loops. *A state requirement to reverse that decision would substantially prevent implementation of the Act.*") (emphasis added). This Commission's Staff has reached the same conclusion. *See* Commission Staff's Response at ¶ 7 (footnote omitted).

B. The 1996 Act Requires State Commissions To Implement the Requirements of Federal Law and Does Not Preserve Inconsistent State Requirements

30. The 1996 Act specifically provides that, in the absence of voluntary agreement between the parties, the terms of interconnection agreements must conform to the requirements imposed under the federal statute and the FCC's implementing regulations. Thus, section 252(c) provides that, "[i]n resolving by arbitration . . . any open issues and imposing conditions upon the parties to the agreement, a State commission *shall* . . . ensure that such resolution and conditions *meet the requirements of section 251 of this title, including the regulations prescribed by the [FCC] pursuant to section 251 of this title.*" 47 U.S.C. § 252(c) (emphases added). Likewise, section 252(e) provides that a state commission must approve an arbitrated agreement unless "it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251" or section 252's pricing standards. *Id.* § 252(e)(2)(B). Accordingly, the Act itself dictates what law "applies" in the event that

parties are unable to negotiate terms to implement the obligations imposed under section 251(b) and (c) — that is, section 251 and the FCC's implementing regulations.

31. The CLECs cannot rely on any of the 1996 Act's "savings clauses" to justify imposition of unbundling obligations under state law that exceed or are inconsistent with the requirements of federal law. The Supreme Court has consistently warned against "plac[ing] more weight on the saving clauses than those provisions can bear, either from a textual standpoint or from a consideration of the whole federal regulatory scheme." *United States v. Locke*, 529 U.S. 89, 105 (2000). And in *Geier v. American Honda Motor Co.*, the Supreme Court made clear that a savings clause "does not bar the ordinary working of conflict pre-emption principles," and, therefore, that courts must "'decline[ ] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'" 529 U.S. 861, 869-70 (2000) (quoting *Locke*, 529 U.S. at 106).

32. Section 251(d)(3) provides as follows:

> In prescribing and enforcing regulations to implement the requirements of this section, the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that –
> (A) establishes access and interconnection obligations of local exchange carriers;
> (B) is consistent with the requirements of this section; and
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. § 251(d)(3). Thus, such state access requirements are preserved only if they are both "consistent" with federal law and do "not substantially prevent implementation of the requirements of this section and the purposes of this part." *Id.*[25] But where the FCC has

[25] Some CLECs have claimed that section 251(d)(3)'s reference to "the requirements of this section" does not apply to FCC regulations. But Congress explicitly defined "the requirements of section 251" as incorporating the FCC's implementing rules. Section 252(c)(1) requires state commissions to resolve interconnection disputes in accordance with "the requirements of section 251 of this title, *including* the regulations prescribed by the [FCC] pursuant to section 251 of this title." 47 U.S.C. § 252(c)(1) (emphasis added). Thus, FCC regulations clearly qualify as "requirements of section 251" and can have

expressly made a balance between too much unbundling and too little, a state commission order upsetting that balance would necessarily be inconsistent with the "requirements" of section 251, and would "substantially prevent implementation" of section 251. Section 251 therefore provides no protection for state law orders that might interfere with the federal unbundling scheme.

33. The Act's next savings clause — section 252(e)(3) — provides no more support for state unbundling requirements. That section provides as follows:

> Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

47 U.S.C. § 252(e)(3). This section does not apply to unbundling obligations in the first place. As noted, Congress required a state commission arbitrating an interconnection agreement to apply "the requirements of section 251 of this title, *including the regulations prescribed by the [FCC] pursuant to section 251.*" *Id.* § 252(e)(2)(B) (emphasis added). Thus, when Congress provided in the very next subsection (§ 252(e)(3)) that a state commission may establish or enforce "*other* requirements of State law," *id.* § 252(e)(3) (emphasis added), it was referring to state law requirements *other than* "requirements of section 251" — *i.e.*, other than those issues already addressed by the federal statute. As confirmation, Congress specifically listed "intrastate

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preemptive effect. This is exactly what the FCC itself concluded in the *Triennial Review Order*. *See* 18 FCC Rcd at 17100, ¶ 193 n.614.

Moreover, section 251 itself requires the FCC to "complete all actions necessary to establish regulations to *implement the requirements of this section.*" 47 U.S.C. § 251(d)(1) (emphasis added). Section 251(d)(3), in turn, uses the same words to describe state laws that do not "substantially prevent *implementation of the requirements of this section.*" *Id.* § 251(d)(3) (emphasis added). The FCC's regulations are therefore the means by which the "requirements of this section" are "implement[ed]," and the FCC is free to preempt any state law that interferes with that "implementation."

telecommunications service quality standards or requirements" as the kinds of "other requirements" it intended — that is, matters that are clearly not covered by section 251. *Id.*

34. The Act's third savings clause – section 261(c) – provides as follows:

> Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the [FCC's] regulations to implement this part.

Id. § 261(c). Like section 251(d)(3), this provision clearly provides for the preemption of any state requirement that is "inconsistent with . . . the [FCC's] regulations." And just as clearly, where the FCC has positively eliminated or circumscribed unbundling requirements, any state law that goes further would be just as "inconsistent" with the federal policy as was the state tort law scheme struck down in *Geier*.

C. The *Bell Atlantic/GTE Merger Order* Does Not Require Verizon to Provide Delisted UNEs

35. Some CLECs may contend that the FCC's Order approving the merger of GTE and Bell Atlantic nearly five years ago[26] requires Verizon to continue providing indefinitely the UNEs required by the FCC's *UNE Remand Order*[27] and *Line Sharing Order*.[28] But this Commission already rejected that argument in this very docket, finding that any unbundling obligations imposed by the *Merger Order* have expired.[29] In its Order denying the CLECs'

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[26] Memorandum Opinion and Order, *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control*, 15 FCC Rcd 14032 (2000) ("*Merger Order*").

[27] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*") (subsequent history omitted).

[28] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*") (subsequent history omitted).

[29] *See* Order Denying Motions to Dismiss; Granting Joint CLECs' Motion; Requiring Verizon to Maintain Status Quo, Order No. 5, ¶ 42 (Wash. PUC June 15, 2004) ("Order No. 5").

motions to dismiss Verizon's arbitration petition, the Commission concluded that the merger "conditions would never end" under the CLECs' interpretation of the *Merger Order*, leading to the "absurd result that other ILECs, such as Qwest and BellSouth, may amend their agreements, while Verizon may not." *Id.* The Commission specifically found that the "*UNE Remand* and *Line Sharing* proceedings, and any subsequent proceedings, have become final and non-appealable with the effect of the [*USTA I*] decision." Order No. 5, ¶ 42. That decision was not appealed, and is now the law of the case. *See, e.g.*, *Petition of Puget Sound Power & Light Co. for an Order Regarding the Accounting Treatment of Residential Exchange Benefits*, Nineteenth Supplemental Order, Docket Nos. UE-920433, UE-920499, UE-921262, 1994 Wash. UTC LEXIS 68 (Wash. UTC 1994) (treating two prior decisions as "law of the case"). The Commission should thus reject out of hand any CLEC claims that the *Merger Order* requires Verizon to continue providing UNEs the FCC has eliminated.

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

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

37. The CLECs' proposed alternatives must be rejected because they specifically define Verizon's unbundling obligations to include sources of law *other than* federal law. (*See., e.g.*, AT&T's proposed § 1.1, "Applicable Law.") The CLECs' definitions violate the Act, which provide that section 251 and the FCC's regulations govern section 252 interconnection agreements. Indeed, AT&T's amendment takes the approach that state-law unbundling determinations would preempt contrary federal rules — an incorrect and, indeed, unconstitutional result. *See, e.g.*, AT&T Amendment, § 3.1.13. CCC does the same thing. Its proposed section 1 provides that nothing in the amendment "shall alter Verizon's obligations to provide access to network elements pursuant to any law or requirement other than Section 251 of the Act." MCI deletes all of Verizon's § 2.1, which makes clear that Verizon's unbundling obligations are determined by federal law, and leaves out necessary provisions that would properly incorporate the FCC's limitations on unbundling. The Commission cannot lawfully adopt any of the CLECs' proposals, because they explicitly contemplate that Verizon's unbundling obligations are governed by sources other than federal law, and that these other sources can override the FCC's rules.[30]

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

Relevant Provisions: Verizon Amendment 1, §§ 2.1, 2.3, 3.1, 3.2, 4.7.3, 4.7.6; Verizon Amendment 2, §§ 2.1, 2.3, 2.4, 2.5, 3.5.3, 4.7.5; AT&T Amendment, §§ 1.1, 1.2, 2.0, 2.6, 3.1, 3.9; MCI Amendment, §§ 3.1, 3.2, 8, 9.7.5; Sprint Amendment,

[30] AT&T has also proposed adding to the interconnection agreement numerous provisions that set forth in detail certain aspects of the FCC's *Interim Rules Order* (AT&T Amendment, §§ 3.1, 3.1.1, 3.1.2, 3.1.3, 3.1.4, 3.1.5, 3.1.6, 3.1.7, 3.1.8, 3.1.9, 3.1.10, 3.1.11, 3.1.12, 3.1.13). These provisions are moot, because the requirements of the *Interim Rules Order* expired on the March 11, 2005 effective date of new rules adopted in the *TRRO*.

§§ 2.3, 4.5; CCC Amendment § 1; WilTel Amendment, § 2.3, 3.1, 3.2, 4.7.3.

38. **A.** Verizon's proposed Amendment makes clear that, in the event Verizon's obligation to provide access to a particular unbundled network element is eliminated – by the FCC or by a court of competent jurisdiction – Verizon has no further obligation to provide that element under the interconnection agreement either. Thus, Amendment 1 provides that "Verizon shall be obligated to provide access to unbundled Network Elements ("UNEs") . . . only to the extent required by the Federal Unbundling Rules." Verizon Amendment 1, § 2.1. Section 3.1 goes on to provide that, to the extent that Verizon has not already ceased provision of a Discontinued Facility (as defined in section 4.7.3), Verizon shall provide 90 days written notice of its intent to cease provision of such access.[31] For the UNEs at issue in the *Triennial Review Order*, of course, the CLECs have already had abundant notice — since Verizon's October 2, 2003 letter — that the network elements at issue are no longer available as UNEs.[32] Thus, for the avoidance of doubt, section 3.1 provides that the "Parties acknowledge that Verizon . . . has provided [the CLECs] with any required notices of discontinuance of certain Discontinued Facilities."[33] As explained under Issues 3 and 4, *infra*, however, no amendment is required to implement the FCC's mandatory prohibition against CLECs ordering UNEs eliminated under the *TRRO* as of March 11, 2005.

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

[32] Verizon's October 2, 2003, Notice of Discontinuation covered OCn transport; OCn loops; dark fiber transport between Verizon switches or wire centers and CLEC switches or wire centers; dark fiber feeder subloop; newly built fiber to the home; overbuilt fiber to the home; hybrid loops, subject to exceptions for time division multiplexing and narrowband applications; and line sharing.

[33] As noted above, most of Verizon's contracts already permit Verizon to discontinue delisted UNEs without an amendment, so Verizon has implemented the *TRO*'s rulings in these cases, pursuant to its notices.

39. Verizon's proposed amendment also acknowledges, to the extent necessary, that alternative arrangements will replace discontinued UNEs.[34] Thus, under section 3.2, if the CLEC wishes to continue to obtain access to the discontinued UNE, it is free to do so under a separate arrangement with Verizon (*i.e.*, a commercial agreement, an applicable Verizon special access tariff, or resale). The CLEC, of course, may also self-provision the subject arrangement or obtain it from a third-party provider. If the CLEC has not specifically requested either disconnection or an alternative arrangement, Verizon may reprice the discontinued UNE at special access or resale-equivalent rates. *Id.*

40. The Amendment does not establish any particular transition periods (beyond the 90-day notice of discontinuation), but would require Verizon to comply with any measures the FCC establishes. Typically, if a UNE is discontinued, CLECs will have plenty of advance notice, and the FCC will itself determine how the transition is to occur. In the *TRO*, for instance, the FCC declined to establish an explicit transition period, but found that the nine-month timeframe for completion of amendments under section 252 would, in practical terms, provide a transition period. *See TRO* ¶ 701, 703. Of course, over 17 months later, amendments still have not been executed, due to the CLECs' relentless efforts to avoid implementation of binding federal law.

41. The FCC thus took a different approach in the *TRRO*, where it prescribed an explicit plan to transition CLECs off of delisted UNEs. It established strict temporal constraints (12 months for mass-market switching and high-capacity facilities; 18 months for dark-fiber facilities) for carriers to amend their contracts to reflect the permanent unbundling rules and

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

negotiate arrangements to move their embedded base of delisted UNEs to alternative arrangements. The FCC emphasized that its transition plan "applies only to the embedded customer base, and does not permit competitive LECs to add new switching UNEs," *TRRO* ¶¶ 5, 199; "do[es] not permit competitive LECs to add new dedicated transport UNEs in the absence of impairment," *id.* ¶¶ 5, 143; and "do[es] not permit competitive LECs to add new high-capacity loop UNEs in the absence of impairment," *id.* ¶¶ 5, 195. Thus, the FCC's no-new-adds aspect of its transition plan applies without the need for any contract amendments. *See, e.g.*, Indiana Order at 7 ("[W]e cannot reasonably conclude that the specific provision of the TRRO to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements.").

42. Unless they mutually agree to do something else, parties must comply with any transition periods the FCC has established or will establish in the future. Verizon's Amendment, therefore, does not attempt to establish any transition measures that might be inconsistent with the FCC's directives. Once the FCC establishes such a valid transition period, there is no lawful basis by which a state commission may extend the transition period or change the transition terms. Such modification would automatically come into conflict with the FCC's choices, and would therefore be preempted. Once the FCC establishes such a valid transition period, there is no lawful basis by which a state commission may extend the transition period, or change the terms and conditions that the FCC has selected. Such modification would automatically come into conflict with the FCC's choices, and would therefore be preempted.

43. The Commission should therefore reject proposals that seek to postpone implementation of federal law by adopting lengthy and cumbersome "transition" processes. *See*,

e.g., WilTel Amendment, § 2.3. For example, MCI proposes that Verizon must give any CLEC advance notice of "its desire to discontinue accepting orders" for a delisted UNE. MCI Amendment, § 8.2 (Wash. UTC filed Oct. 22, 2004). Under MCI's proposal, Verizon would not even be allowed to give such notice until the "Transition Commencement Date," which MCI defines as the date that an unbundling determination by the FCC becomes "final" and "non-appealable." *Id.* § 8. Thus, MCI seeks to impose a condition that the FCC, in the *Triennial Review Order*, specifically rejected, finding that "it would be unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal." *TRO* ¶ 705. The fact that the CLECs have ignored the FCC's exhortation for the past year and a half proves that the Commission should reject any language giving the CLECs any leeway to override the FCC-mandated transition plan or otherwise delay implementation of federal law.

44. Furthermore, even beyond the specifics of the FCC's holdings, the circumstances surrounding the adoption and review of the *Triennial Review Order* demonstrate the unreasonableness of MCI's proposal. The portions of the *Triennial Review Order* addressing, for example, broadband elements and enterprise switching did not become final and non-appealable until *October 12, 2004*, when the Supreme Court denied petitions for certiorari. This is more than *one year* after the *Triennial Review Order*'s effective date and more than 15 months after the FCC released that order. Under MCI's proposal, Verizon would have had to wait more than a year simply to *initiate* the contract amendment process. The effect of MCI's language would be to grant an automatic stay of all FCC rules that reduced or eliminated unbundling obligations, even if the FCC and the reviewing courts refused requests to stay such rules.

45. The Commission should reject the rest of MCI's section 8.2, as well. When Verizon is permitted to discontinue providing a UNE, MCI purports to place on Verizon the burden of identifying with precision each and every UNE arrangement that *MCI itself* had previously ordered. *See* MCI Amendment, § 8.2 (requiring Verizon to provide, for each UNE arrangement, the "Verizon account number," CLEC "identification number," "street address," "CLLI codes," "and any and all other information reasonably available to Verizon"). Although Verizon agrees that it may be necessary to engage in business-to-business discussions with a CLEC to ensure that the appropriate UNE arrangements are discontinued, there is no justification for placing the burden exclusively on Verizon to identify those arrangements, particularly as part of the notice of discontinuance. Many CLECs lease tens of thousands of unbundled facilities, and some CLECs lease in the hundreds of thousands. MCI (as well as other CLECs), having ordered those arrangements to provide service to their customers, is in just as good a position as Verizon to specifically identify the affected UNE arrangements. Any requirement for Verizon to provide the detailed information requested by MCI would be an unnecessary and burdensome undertaking, with no practical result except to delay Verizon's ability to discontinue the subject UNEs.

46. AT&T's suggested "Transitional Provisions" are likewise unlawful. As an initial matter, AT&T proposes to limit the facilities subject to these provisions to "OCn Loops; OCn transport; Packet Switching; Local Switching that serves capacities of DS1 and above; and Feeder Subloop as a stand-alone UNE." AT&T Amendment, § 3.9.1.[35] That is wrong:

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[35] AT&T's amendment also would give the CLEC the option of requiring Verizon to continue to provide OCn Loops, OCn transport, and Local Switching that serves capacities of DS1 and above — even after those facilities have become "Declassified Network Element" —upon the terms set forth in Exhibit A to AT&T's amendment. *See* AT&T Amendment, Exhibit A (describing detailed terms and conditions for continued access to OCn loops, OCN transport, and enterprise switching). As discussed earlier, the 1996 Act makes clear that a state commission's authority under the 1996 Act is limited to implementation of

additional UNEs were discontinued under the *TRO* — such as fiber to the premises loops, the broadband capabilities of hybrid loops, and line sharing — and the Amendment should make clear that the CLECs have no right to unbundled access to these facilities, or to the mass-market switching and high capacity loop and transport facilities that were delisted in the *TRRO*. As noted, although Verizon's Amendment was drafted before release of the *TRRO*, there was no need to rewrite the Amendment because its change-of-law provisions accommodates the *TRRO*'s no-impairment findings, as well as potential elimination of other UNEs in the future. This is a reasonable approach that conserves the parties' and the Commission's resources by avoiding lengthy, complex proceedings like this one in the future.

47. In addition, as compared to Verizon's proposed 90-day notice period, AT&T seeks a minimum of 180 days' notice before Verizon can discontinue providing a UNE that the FCC or a court has found that Verizon is no longer obligated to provide under section 251(c)(3). *See* AT&T Amendment, §§ 3.9.2, 3.9.3. This six-month notice period would be subject to indefinite extension if AT&T chose to raise disputes relating to the transition to an alternative, lawful arrangement. There no reason to allow AT&T to stall the transition to UNE replacements for months, if not years, especially when AT&T will always have "off-the-shelf" lawful alternatives that it can select, such as resale or special access, as well as commercial arrangements. AT&T cannot be permitted to perpetuate unbundling obligations long after the

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the unbundling obligations under section 251(c)(3) and the FCC's implementing regulations. Verizon has not agreed to negotiate as part of this amendment, nor may the Commission arbitrate, the terms upon which Verizon may offer services to replace facilities or arrangements that Verizon is no longer required to provide as UNEs under section 251(c)(3) and the FCC's implementing regulations. *See Coserv Ltd. Liab. Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003).

FCC or a court has eliminated them. AT&T's proposal provides no incentive for AT&T to transition from UNEs to lawful alternatives in an expeditious fashion.[36]

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

49. This treatment is not inequitable, as some CLECs argue. *See, e.g.*, MCI Opp. at 3. Verizon's proposed language recognizes that there is a fundamental difference between rules that *eliminate* an unbundling obligation and those that *create* a new unbundling obligation.[37] When an incumbent's obligation to provide access to an element under section 251(c)(3) is eliminated, the details of any subsequent arrangements are no longer within the scope of interconnection agreements, as the FCC has held. *See, e.g.*, *Qwest Declaratory Ruling*,[38] 17 FCC Rcd at 19341, ¶ 8 n.26 (holding that the various provisions of § 252 apply to "only those agreements that contain an ongoing obligation relating to section 251(b) or (c)"); *see also Coserv*, 350 F.3d at

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[36] AT&T also proposes a provision pertaining to section 271 obligations (§ 3.9.5), which are plainly inapplicable to Verizon in Washington, where Verizon is not a Bell Operating Company. *See* 47 U.S.C. §§ 153(4), 271(c)(2)(B). Accordingly, the Commission should reject this provision.

[37] Hence, WilTel's proposed section 2.3 is precisely backwards, in that it allows automatic implementation of any future re-establishment of unbundling obligations, while requiring any unbundling elimination to be negotiated to a written agreement before implementation. *See* WilTel Amendment, § 2.3.

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

488 ("An ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252."). For future purposes — as displayed by the relative brevity of Verizon's Amendment 1 — the parties are left to establish a market-based arrangement for prices, terms, and conditions (or CLECs may purchase service out of existing tariffs or on a resale basis). By contrast, if a new unbundling obligation arises under section 251, the parties need to negotiate (and to arbitrate, if necessary) the operational details — and, importantly, the rates that will be set forth in new contract terms to which both parties are bound. Indeed, while non-section 251 agreements are not subject to state commission involvement, section 252 contemplates that state commissions will be involved in either approving (section 252(a)) or arbitrating (section 252(b)) any interconnection agreements that implement section 251's unbundling duties.

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

Relevant Provisions: Verizon Amendment 1, § 4.7.3; AT&T Amendment, §§ 2.6, 3.1, 3.5; MCI Amendment, § 8.1; CCC Amendment § 1.1.

50. In the *TRRO*, the FCC eliminated switching as a UNE: "we impose no section 251 unbundling requirement for mass market local circuit switching nationwide." *TRRO* ¶ 199. It found that "the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and we therefore determine not to unbundle that network element." *Id.* ¶ 210. Hence, the FCC held that "we bar unbundling . . . where — as here — unbundling would seriously undermine infrastructure investment and hinder

the development of genuine, facilities-based competition." *Id.* ¶ 218.[39] The new rules confirm that "[a]n incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops," 47 C.F.R. § 51.319(d)(2)(i), and that "[r]equesting carriers may not obtain new local switching as an unbundled network element," *id.* § 51.319(d)(2)(iii).

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

52. The FCC also adopted a price increase to take effect during that transition period. Specifically, the FCC required that "unbundled access to local circuit switching during the transition period be priced at the higher of (1) the rate at which the requesting carrier leased UNE-P on June 15, 2004 plus one dollar, or (2) the rate the state public utility commission

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

establishes, if any, between June 16, 2004, and the effective date of this Order, for UNE-P plus one dollar." *Id.* ¶ 228.

53. The FCC's ban on new UNE orders is effective as of March 11, 2005, as to all carriers nationwide. *See* Verizon's response to Issue 10, *infra*. As for the embedded base of customers served by those CLECs whose interconnection agreements require explicit amendment to implement new federal law, Verizon's Amendment appropriately accounts for the *TRRO* requirements. Amendment 1 already provides that "Verizon shall not be obligated to offer or provide access on an unbundled basis at rates prescribed under Section 251 of the Act to any facility that is or becomes a Discontinued Facility, whether as a stand-alone UNE, as part of a Combination, or otherwise." Amendment 1, § 3.1. In turn, "Discontinued Facility" is defined to include "[a]ny facility that Verizon, at any time, has provided or offered to provide to [the CLEC] on an unbundled basis pursuant to the Federal Unbundling Rules (whether under the Agreement, a Verizon tariff, or a Verizon SGAT), but which by operation of law has ceased or ceases to be subject to an unbundling requirement under the Federal Unbundling Rules." *Id.* § 4.7.3. Clearly, switching is now a "Discontinued Facility" that Verizon must be permitted to cease providing (consistent with any FCC transition requirements), so the Commission should adopt Verizon's language.

54. The various CLEC proposals on the table are, by their own admission, outdated, and several CLECs have said that they intend to propose new contract language in the near future. Although there is no need for Verizon to propose a new Amendment, it remains willing to discuss potentially desirable modifications in ongoing negotiations with interested CLECs. Verizon will address any new CLEC proposals in its reply brief.[40]

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[40] CCC and AT&T incorrectly suggest that the switching element should be defined to allow access to packet switches, which is not required under FCC rules. *See* Verizon's response to Issue 14, *infra*.

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

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

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

56. As with switching, the FCC adopted specific transition rules that apply to existing UNE arrangements that fail to meet the FCC's criteria for continued unbundling. Specifically, the FCC adopted "a twelve-month plan for competing carriers to transition to alternative facilities or arrangements" as to DS1 and DS3 loops, while adopting "a longer, eighteen-month, transition plan for dark fiber loops." *Id.* ¶ 195. Again, these transition plans "shall apply only to the embedded customer base, and do not permit competitive LECs to add new high-capacity loop UNEs pursuant to section 251(c)(3) where the [FCC] has determined that no section 251(c) unbundling requirement exists." *Id.* During that transition period, the high-capacity loop in

question shall be available "at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the loop element on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order, for that loop element." *Id.* ¶ 198.

57. As noted above with regard to switching, the FCC's ban on new orders takes effect on March 11, 2005. For the embedded customer base served by carriers whose interconnection agreements appear to require amendment before discontinuation of delisted UNEs, Verizon's Amendment appropriately accounts for the FCC's elimination of unbundled access to certain high-capacity loops. *See* Verizon's response to Issue 3, *supra* (switching). Verizon will, of course, continue to make these facilities available to the embedded base as required under the FCC's mandatory 12-month transition plan (18 months for dark-fiber loops).

58. Here as elsewhere, the CLECs (except for the CCC) admit that the *TRRO* should be implemented, but they have yet to propose any language that would recognize the FCC's delistings. Verizon's language will accommodate the TRO and TRRO delistings, as well as any in the future, so it should be adopted.

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

Relevant Provisions: Verizon Amendment 1, §§ 3.1, 4.7.3; AT&T Amendment, §§ 3.6.2, 3.6.3.

59. In the *TRRO,* the FCC reaffirmed its earlier decision eliminating any unbundling obligation as to all "entrance facilities" (transmission facilities that connect competitive LEC networks with incumbent LEC networks). *TRRO* ¶ 66. It declined to apply the impairment test it established for other types of dedicated transport because "entrance facilities are less costly to

build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices." *Id.* ¶ 138. Given these facts, the FCC established no transition period for entrance facilities, which it had already de-listed in the *Triennial Review Order* as of October 2, 2003.

60. For other high-capacity transport elements, the FCC held that CLECs may not obtain DS1 transport for routes connecting two wire centers "each of which contains at least four fiber-based collocators *or* 38,000 or more business lines," *id.* ¶ 66, and that CLECs may not obtain DS3 or dark fiber transport on routes connecting two wire centers "each of which contains at least three fiber-based collocators *or* at least 24,000 business lines," *id.* It found that "the thresholds we choose are designed to capture areas that have or are likely to have significant competitive transport." *Id.* ¶ 111.

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

62. As with loops and switching, the FCC's ban on new orders takes effect on March 11, 2005. For the rest of the embedded customer base served by carriers whose interconnection

agreements may require amendment, Verizon's Amendment appropriately embodies the FCC's elimination of unbundling obligations for high-capacity transport UNEs in the absence of impairment under the FCC's criteria. The CLECs have not proposed any language that would properly implement the TRRO delistings, to the Commission should adopt Verizon's language.

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

Relevant Provisions: Verizon Amendment 1, §§ 3.2, 3.3; Verizon Amendment 2, § 2.5; AT&T Amendment, § 3.9.5; MCI Amendment, § 8.2.3; WilTel Amendment, §§ 2.3, 3.5.[41]

63. Where a particular network element or arrangement is no longer subject to unbundling under section 251(c)(3), the FCC has held that the rates, terms, and conditions for such elements are not subject to the standards set forth in sections 251 and 252. *See, e.g.*, *Qwest Declaratory Ruling*, 17 FCC Rcd at 19341, ¶ 8 n.26 (holding that the various provisions of section 252 apply to "only those agreements that contain an ongoing obligation relating to section 251(b) or (c)"). To the extent Verizon continues to provide such facilities to CLECs, it will do so through access tariffs or through separate, commercial agreements that will be negotiated between the parties outside of the section 252 process. Nothing in the 1996 Act authorizes state commissions to review the rates, terms, and conditions in such separate, non-section 252 arrangements. While the Amendment, for the sake of clarity, may refer to the fact that the parties may establish separate commercial arrangements for non-section 251 elements (*see* Verizon Amendment 1, § 3.2), it should do no more than that. *See* Verizon's response to Issue 26, *infra*. In particular, the Amendment should not contain any provisions — such as those proposed by AT&T (Amendment, § 3.9.5) — purporting to govern the *specific* terms on which

[41] Sprint did not alter the text of section 2.5 in its Amendment.

Verizon continues to provide access to facilities that no longer need to be provided as UNEs under section 251(c)(3).

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

Relevant Provisions: Verizon Amendment 1, § 3.1; AT&T Amendment, § 3.9.1; MCI Amendment, § 3.1; WilTel Amendment, § 2.1, 3.1, 3.2.[42]

64. Verizon has proposed that it may provide notice to CLECs that it will cease providing access to a network element as a UNE "in advance of the date on which the facility shall become a Discontinued Facility as to new orders that [the CLECs] may place, so as to give effect to Verizon's right to reject such new orders immediately on that date." Verizon Amendment 1, § 3.1. This language is necessary to avoid any undue delay in implementing changes to federal unbundling regulations (such as the nearly-18-month delay in implementing the *TRO* rulings in the contracts at issue).

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

[42] Sprint's Amendment does not appear to address this scenario.

press release (February 20, 2003) announcing the FCC's *TRO* decision and the effective date of that decision (October 2, 2003), which was released on August 21, 2003. As to the *TRRO*, nearly three months passed between the initial press release (December 15, 2004) and the effective date (March 11, 2005).

66. It is entirely reasonable for Verizon to rely on notices of discontinuation sent before the Amendment's effective date .[43] The CLECs have already had more than ample notice of the *TRO* rulings and time to transition delisted services to non-UNE replacements. For example, in the *TRO*, the FCC determined that CLECs are not impaired without access to enterprise switching. This ruling took effect on December 31, 2003. On May 18, 2004, Verizon gave all CLECs 90 days' written notice that Verizon would not provide enterprise switching as of August 22, 2004, and invited CLECs to negotiate replacement arrangements. Verizon did, in fact, discontinue enterprise switching for most carriers (and transitioned them to alternative arrangements), because their contracts clearly permitted Verizon to do so without an amendment. However, Verizon has continued to provide unbundled enterprise switching to CLECs whose contracts may be misconstrued to require an amendment before discontinuing delisted UNEs. Therefore, by resisting Verizon's efforts to arbitrate contract amendments incorporating the *TRO* delistings, these CLECs have retained access to an element that was discontinued by the FCC well over a year ago. Under the current schedule, it is unlikely that amendments will be executed before late summer, at the earliest. By that time, two years will have passed since release of the TRO and well over a year will have passed since Verizon formally notified carriers of discontinuation of enterprise switching. Given the unduly long period of time these CLECs

[43] *See* Amendment 1, § 3.1. WilTel, by contrast, seeks to prevent Verizon from providing notice any "earlier than the effective date of the removal of Verizon's obligation to provide such Discontinued Facility under the Unbundling Rules." WilTel Amendment, § 3.2. This would prevent Verizon from providing notice even as to rules that all parties know will take effect on a future date certain.

have had to prepare themselves for discontinuation of enterprise switching, there is no legitimate reason for CLECs to insist on another notice that allows them to keep enterprise switching for another three months after the Amendment takes effect.

67. The same logic holds true for other services delisted in the *TRO*, but which some CLECs may still attempt to retain on an unbundled basis (*e.g.*, OCn loops and transport; dark fiber channel terminations and entrance facilities; dark fiber feeder subloop; and hybrid loops). Those rulings took effect on October 2, 2003 (even before the enterprise switching ruling did), and Verizon gave notice of discontinuation that same day. As with enterprise switching, these services were discontinued for all carries but those Verizon designated as having contracts that might be construed to require amendment.

68. Finally, Verizon's language makes clear that Verizon cannot implement a rule before its effective date, nor can Verizon implement it if the rule is stayed either by the FCC or a court of competent jurisdiction. To the extent that CLECs believe that additional time — beyond any transition period the FCC has decided to adopt or any decision by a reviewing court to withhold its mandate — is required to make transitional arrangements upon the elimination of a particular UNE, they should seek a stay from the FCC or from the court. This is exactly what CLECs attempted to do when the FCC, in the *Triennial Review Order*, held that certain elements did not need to be provided as UNEs and when the D.C. Circuit, in *USTA II*, vacated the FCC's adoption of certain UNE rules.

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

Relevant Provisions: Verizon Amendment 2, §§ 3.4.2.4, 3.4.2.5; AT&T Amendment, § 3.7.2.2; CCC Amendment, § 2.3; MCI Amendment, § 5.3.[44]

[44] Sprint did not change Verizon's language. *See* Sprint Amendment, §§ 3.5.2.4, 3.5.2.5.

69. If there are additional costs incurred in setting up an alternative service — such as a service order — Verizon may legitimately recover those costs. Verizon has not proposed rates to recover such costs at this point, but it reserves the right to do so in the future. In any event, the Commission cannot impose any constraints on Verizon's ability to negotiate non-recurring charges in the context of non-section 251 commercial agreements or other arrangements that are not subject to section 252.

70. AT&T argues that it would be unfair to assess disconnection charges when a UNE is disconnected. This Commission, however, has already approved several instances in which Verizon assesses a non-recurring charge for disconnect orders on existing lines. (See Dockets UT-960369, UT-960370, UT-970371). Those charges are reflected in Verizon's approved UNE tariff, WN U-21, Section 5, *passim*. AT&T's amendment thus purports to prohibit Verizon from recovering its costs even through charges already approved by the Commission. AT&T's amendment thus purports to prohibit Verizon from recovering its costs even through charges already approved by the Commission.

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

71. Verizon's definitions are appropriate and reflect federal law, and they should be adopted. In the following sections, Verizon first explains its position on its own definitions that the CLECs have disputed or amended. Then, Verizon discusses the additional definitions that CLECs have proposed. Finally, Verizon lists those definitions as to which there is no substantive dispute.

A. CLEC Disagreements with Verizon's Proposed Definitions

1. "Dark Fiber Loop," Verizon Amendment 2, § 4.7.2; AT&T Amendment, § 2.5.[45]

72. Verizon's definition provides that a dark fiber loop "[c]onsists of fiber optic strand(s) in a Verizon fiber optic cable between Verizon's accessible terminal, such as the fiber distribution frame, or its functional equivalent, located within a Verizon wire center, and Verizon's accessible terminal located in Verizon's main termination point at an end user customer premises, such as a fiber patch panel, and that Verizon has not activated through connection to electronics that 'light' it and render it capable of carrying telecommunications services." Verizon Amendment 2, § 4.7.2. This definition combines the FCC's definition of "loop" in 47 C.F.R. § 51.319(a)(1) ("The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises.") with its definition for "dark fiber" in *id.* section 51.319(a)(6)(i) ("Dark fiber is fiber within an existing fiber optic cable that has not yet been activated through optronics to render it capable of carrying communications services.").

73. By contrast, AT&T's definition is unduly verbose, confusing, and unlawful. It begins by saying that dark fiber "shall be as defined in FCC Rule 51.319," but then proceeds to offer three separate sentences that re-define "dark fiber," all in redundant fashion.[46] Moreover,

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[45] The CCC and MCI have inexplicably deleted Verizon's dark-fiber loop definition, but Sprint has left it intact.

[46] Specifically, AT&T's definition provides:

> Without limiting the foregoing, such facilities include the physical transmission media (e.g., optical fiber) which are "in place" or can be made spare and continuous via routine network modifications in Verizon's network, but are not being used to provide service, and which Verizon shall provide on an unbundled basis pursuant to 47 U.S.C. § 251(c)(3), 47 C.F.R. Part 51 or other Applicable Law. Dark Fiber is fiber within an

its definition of "Applicable Law" sweeps in state law and other sources that have nothing to do with Verizon's obligations under section 251 of the Act. This approach is improper for all the reasons discussed under Issue 1.

74. Verizon's language, unlike the CLECs', comports with the Act and the FCC's regulations, and should be adopted.

2. "Dark Fiber Transport," Verizon Amendment 2, § 4.7.3[47]; AT&T Amendment, § 2.5; CCG Amendment, § 2.5.

75. Verizon defines "Dark Fiber Transport" as an "optical transmission facility within a LATA, that Verizon has not activated by attaching multiplexing, aggregation or other electronics, between Verizon switches (as identified in the LERG) or wire centers." Verizon Amendment 2, § 4.7.3. Verizon also clarifies that: "Dark fiber facilities between (i) a Verizon wire center or switch and (ii) a switch or wire center of [the CLEC] or a third party are not Dark Fiber Transport." *Id.*

76. Verizon's language is preferable to AT&T's for the reasons discussed under "Dark Fiber Loop" above: AT&T's language is unnecessarily wordy, redundant (*see supra* note 46), and refers to its unlawful definition of "Applicable Law," as does CCG's. AT&T's language improperly suggests that something other than the FCC's rules under section 251 might be used to define "Dark Fiber Transport." In addition, CCG's proposed definition is also

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> existing fiber optic cable that has not yet been activated through optronics to render it capable of carrying communications services. It also includes strands of optical fiber existing in aerial, buried, or underground cables which may have lightwave repeater (regenerator or optical amplifier) equipment interspliced to it at appropriate distances, but which has no attached line terminating, multiplexing, or aggregation electronics.

AT&T Amendment, § 2.5. AT&T uses the same wording as a preliminary definition of "Dark Fiber Transport" as well.

[47] Sprint agrees with Verizon's definition.

objectionable in that it refers to "Verizon switching equipment located at CLEC's premises," a description that does not apply to any of Verizon's switches, and is thus unnecessary.

3. "Dedicated Transport," Verizon Amendment 2, § 4.7.4[48]; AT&T Amendment, § 2.7.

77. Verizon defined "Dedicated Transport" as a "DS1 or DS3 transmission facility between Verizon switches (as identified in the LERG) or wire centers, within a LATA, that is dedicated to a particular end user or carrier." Verizon Amendment 2, § 4.7.4. This language describes Dedicated Transport just as the FCC's describes it in 47 C.F.R. § 51.319(e)(1) ("[D]edicated transport includes incumbent LEC transmission facilities between wire centers or switches owned by incumbent LECs, or between wire centers or switches owned by incumbent LECs and switches owned by requesting telecommunications carriers, including, but not limited to, DS1-, DS3-, and OCn-capacity level services, as well as dark fiber, dedicated to a particular customer or carrier.").

78. AT&T's definition includes transmission paths that attach to "Verizon switching equipment located at AT&T's premises," *i.e.*, reverse collocation. But Verizon is not aware of any reverse collocation arrangements that exist in the real world, and there is no need for a definition section to provide for something that does not exist.

4. "Discontinued Facility," Verizon Amendment 1, § 4.7.3; Verizon Amendment 2, § 4.7.5; AT&T Amendment, § 2.6; MCI Amendment, § 9.7.5; Sprint Amendment, § 4.7.5; WilTel Amendment, § 4.7.3; "Declassified Network Elements," CCG Amendment, § 2.6.

79. Under Verizon's Amendments, a "Discontinued Facility" is one that Verizon has provided as a UNE, but that is no longer subject to an unbundling requirement under the Federal Unbundling Rules. As examples, Verizon lists some ten specific UNEs that the FCC held in the

[48] MCI and Sprint agree with Verizon's definition.

Triennial Review Order are not required to be unbundled. In addition, Verizon concludes its list by including "any other facility or class of facilities" that is no longer unbundled under federal law. Thus, Verizon's definition of "Discontinued Facility" captures the effect of federal law, both as it stands now and as it may be modified in the future.

80. In their proposed amendments, MCI, Sprint, CCG, and AT&T all eviscerate the definition of "Discontinued Facility" by limiting it to certain specifically enumerated network elements that have *already* been eliminated by final and nonappealable orders, and even then the CLECs purport to re-impose unbundling obligations by reference to state law or section 271. But the purpose of the new amendment — as a matter of law and in the interest of conserving parties' and the Commission's resources in the event of future changes in the FCC's unbundling rules — should be to create an appropriate framework to ensure that Verizon's unbundling obligations under the agreement correspond to the requirements of section 251(c)(3) and the FCC's implementing rules without resort to protracted, multi-party proceedings, such as this one. Verizon's Amendment would bring the contracts at issue in line with most of its others, which clearly do not require amendment to implement changes in unbundling obligations.

81. In addition, AT&T inexplicably shortened the list of delisted elements to a mere four: enterprise switching, OCn loops and transport, feeder loop, and packet switching. AT&T Amendment, § 2.6. As discussed above, *see supra* notes 4-5, the FCC in the *Triennial Review Order* found no impairment, and did not impose unbundling obligations, with respect to numerous other elements, including entrance facilities, 4-line carve-out switching, line sharing, call-related databases not provided in conjunction with switching, signaling or shared transport that is linked to de-listed switching, FTTP loops, and hybrid loops for broadband purposes. *See generally Triennial Review Order*, 18 FCC Rcd at 16988-90, ¶ 7 (listing modifications to UNE

unbundling requirements). There is thus no legitimate reason for excluding these items from the list of discontinued facilities.

82. Likewise, the CCG's definition is unlawful because it makes an exception for packet switching "when used to provide circuit-switching functionality." CCG Amendment, § 2.6. No such exception applies under the FCC's rules, as discussed below under Issue 14, so the Commission must reject CCG's language.

83. WilTel changes Verizon's definition by adding the requirement that discontinued facilities be "identified through the process set forth in this Amendment for the identification and implementation of any change in obligations under the Unbundling Rules." WilTel Amendment, § 4.7.3. This circular language is unacceptable because it may leave open the possibility of re-imposing unbundling obligations under state law or other sources. (*See* Verizon's response to Issue 2.)

5. "DS1 Loop," Verizon Amendment 2, § 4.7.8[49]; AT&T Amendment, § 2.10. "DS3 Loop," Verizon Amendment 2, § 4.7.9[50]; AT&T Amendment, § 2.11.

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

85. Similarly, Verizon defines DS3 Loop as a "digital transmission channel, between the main distribution frame (or its equivalent) in an end user's serving wire center and the

[49] Sprint agrees with Verizon's definition. MCI and the CCC delete it.

[50] Sprint agrees with Verizon's definition. MCI and the CCC delete it.

demarcation point at the end user customer's premises, suitable for the transport of isochronous bipolar serial data at a rate of 44.736 Mbps (the equivalent of 28 DS1 channels)." *Id.* § 4.7.9. Verizon's language further specifies that "[t]his loop type is more fully described in Verizon TR 72575, as revised from time to time," and that "[a] DS3 Loop requires the electronics necessary to provide the DS3 transmission rate." *Id.*[51]

86. AT&T's language for both definitions, by contrast, improperly refers to all "Applicable Law," which improperly suggests that something other than the FCC's regulations implementing section 251(c)(3) might define "DS1 Loop" or "DS3 Loop" — a possibility the Commission's Staff has already rejected. This reason alone justifies rejection of AT&T's language, and adoption of Verizon's.

6. "Enterprise Switching," Verizon Amendment 2, § 4.7.10.[52]

87. Verizon's Amendment defines this element as "Local Switching or Tandem Switching that" the CLEC would use to serve "customers using DS1 or above capacity Loops." Verizon Amendment 2, § 4.7.10. The main dispute over this definition is in MCI's Amendment,

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[51] The Florida commission specifically approved Verizon's reference to Verizon TR 72575, a technical standards reference. *See* Final Order on Arbitration, *Petition for Arbitration of Open Issues Resulting from Interconnection Negotiations with Verizon Florida Inc. by DIECA Communications, Inc. d/b/a/ Covad Communications Co.*, Docket No. 020960-TP (Fla. PSC Oct. 13, 2003).

In that proceeding, Covad argued that "the use of Verizon's TR 72575 will create the possibility of misinterpretation and confusion, and that Verizon could unilaterally change its TR 72575 to the detriment of Covad . . . ." *Id.* at 55. The Florida PSC pointed out, however, that Covad could not "provide any specific instances where the application of TR 72575 caused any conflicts" with the standards of the American National Standards Institute (ANSI). *Id.* at 56. Moreover, if ANSI revised its standards at some future date, "one company could be operating with revised ANSI standards where another may not." *Id.* It therefore seems "logical that a company should have a blueprint as to how a particular ANSI standard . . . is being implemented within its network," *i.e.*, TR 72575. *Id.* Indeed, "[i]t is in Verizon's best interest to ensure that it does not cause interconnection problems with the circuits that are defined within TR 72575 and that are currently provisioned or are in the process of being provisioned for its wholesale or retail customers." *Id.* "The inclusion of the technical reference which acts as a blueprint applying the industry standards will not be a detriment to Covad." *Id.*

[52] Sprint does not edit Verizon's definition.

which excludes the term "Tandem Switching."[53] MCI deleted all references to "Tandem Switching," on the grounds that it is no longer a separately listed UNE in the FCC's unbundling rules. But this objection is beside the point. In the basic rule that applies to switching, the FCC specifically speaks of "local circuit switching, *including tandem switching*." 47 C.F.R. § 51.319(d) (emphasis added). It makes no sense to strip the Amendment of all references to tandem switching simply because the FCC discusses it as *part of* the "local circuit switching" UNE, rather than in a separate rule. MCI's deletion is inappropriate, and should not be adopted.

7. "Entrance Facility," Verizon Amendment 2, § 4.7.11.[54]

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

8. "Four-Line Carve Out Switching," Verizon Amendment 2, § 4.7.13.[55]

89. The "Four-Line Carve Out" rule — which creates an exemption for unbundling as to circuit switching at locations with more than four DS0 lines — was implemented in

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[53] The CCC deletes Verizon's definition.

[54] All CLECs delete this definition, except for Sprint, which agrees with it.

[55] Sprint does not modify Verizon's definition.

Washington several years ago, after the rule was first instituted in the UNE Remand Order.56 Now that the FCC has eliminated DS0 mass-market switching as an UNE entirely, this issue is moot.

9. "FTTP Loop," Verizon Amendment 2, § 4.7.14; AT&T Amendment, § 2.14; Sprint Amendment, § 4.7.15; WilTel Amendment, § 4.7.9.

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

91. Verizon's definition reflects federal regulations, as clarified by the FCC after release of the TRO. In 47 C.F.R. § 51.319(a)(3)(i)(A) and (B), the FCC provides that "[a] fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, serving an end user's customer premises or, in the case of predominantly residential multiple dwelling units (MDUs), a fiber optic cable, whether dark or lit, that extends to the multiunit premises' minimum point of entry (MPOE)," and that "[a] fiber-to-the-curb loop is a local loop consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises or, in the case of predominantly residential MDUs, not more

[56] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3835, 3840, ¶¶ 306, 313 (1999) ("*UNE Remand Order*"), *petitions for review granted, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003).

than 500 feet from the MDU's MPOE. The fiber optic cable in a fiber-to-the-curb loop must connect to a copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premises."57

92. AT&T's proposed deletion from the definition of "FTTH Loop," AT&T Amendment, § 2.14, is unacceptable. While Verizon's definition (Amendment 1, § 4.7.9) makes clear that, in the case of multi-unit dwellings, the FTTP loop extends to the minimum point of entry (MPOE) as defined under 47 C.F.R. § 68.105, AT&T has deleted that portion of Verizon's definition. As noted above, Verizon's definition is in accord with the most current version of the federal rules, as clarified by the FCC in October 2004. AT&T's deletion should therefore be rejected.

93. Similarly, AT&T would add a clause noting that "FTTH Loops do not include such intermediate fiber-in-the-loop architectures as fiber-to-the-curb (FTTC), fiber-to-the-node (FTTN), and fiber-to-the-building (FTTB)." That is not the law. As noted above, the FCC has explicitly held that "fiber-to-the-curb" architectures are exempt from unbundling requirements, and the current version of Rule 51.319 classifies "fiber-to-the-curb" and "fiber-to-the-home" together. *See* 47 C.F.R. § 51.319(a)(3)(i). The Commission should therefore reject AT&T's language.[58]

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[57] The FCC recently held that incumbents need not unbundle "fiber-to-the-curb" facilities. *See* Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 20293 (2004) ("*FTTC Order*").

Sprint appended the following sentence: "FTTP Loops do not include facilities to predominately business MDUs or enterprise customers." Sprint Amendment, § 4.7.15. This is incorrect, as noted in Verizon's discussion of its definition for "Sub-Loop for Multiunit Premises Access" under Issue 9, *infra*.

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

10. "House and Riser Cable," Verizon Amendment 2, § 4.7.15; "Inside Wire Subloop," AT&T Amendment, § 2.17; "House and Riser Cable," CCC Amendment, § 5.7; Sprint Amendment, § 4.7.16.[59]

94. Verizon defines "House and Riser Cable" as "[a] distribution facility in Verizon's network, other than in an FTTP Loop, between the minimum point of entry ('MPOE') at a multiunit premises where an end user customer is located and the Demarcation Point for such facility, that is owned and controlled by Verizon." Verizon Amendment 2, § 4.7.15. This is in accord with the FCC's definition of "inside wire" as "all loop plant owned or controlled by the incumbent LEC at a multiunit customer premises between the minimum point of entry as defined in § 68.105 of this chapter and the point of demarcation of the incumbent LEC's network as defined in § 68.3 of this chapter." 47 C.F.R. § 51.319(b)(2). And, as discussed below, Verizon's definition also reflects the FCC's recent determination that the "definition of FTTH loops includes fiber loops deployed to the minimum point of entry (MPOE) of MDUs, regardless of the ownership of the inside wiring." *MDU Reconsideration Order*,[60] 19 FCC Rcd at 15856, ¶ 1; *see also id.* at 15857-58, ¶ 4 ("[T]o the extent fiber loops serve MDUs that are predominantly residential in nature, those loops should be governed by the FTTH rules.").

95. AT&T's language, by contrast, is inconsistent with governing law in that it (a) fails to exclude FTTP facilities as do the FCC rules, and (b) fails to specify that the facilities must be "owned or controlled" by Verizon. AT&T Amendment, § 2.17.

96. The Commission should thus adopt Verizon's language.

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[59] The CCC's definition is virtually identical in all substantive respects to Verizon's. Sprint agrees with Verizon's definition.

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

11. "Hybrid Loop," Verizon Amendment 2, § 4.7.16; AT&T Amendment, § 2.16; CCC Amendment, § 5.8; MCI Amendment, § 9.7.12.

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

98. AT&T, however, adds language that is inconsistent with current law — specifically, the phrase, "including such intermediate fiber-in-the-loop architectures as FTTC, FTTC, and FTTB." AT&T Amendment, § 2.16. Similarly, both MCI and CCC delete Verizon's sentence observing that an "FTTP Loop is not a Hybrid Loop." As noted above, the FCC has classified FTTC-type architectures with FTTH, not with "Hybrid Loops," so the CLECs' definitions are improper.

12. "Local Switching," Verizon Amendment 2, § 4.7.19; AT&T Amendment, § 2.21; MCI Amendment, § 9.7.14; CCC Amendment, § 5.11.

99. Verizon defines "Local Switching" to include "[t]he line-side and trunk-side facilities associated with the line-side port, on a circuit switch in Verizon's network (as identified in the LERG), plus the features, functions, and capabilities of that switch." Verizon Amendment, § 4.7.19. Its definition then lists several "features" that are part of the Local Switching element. *Id.*

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

101. MCI's definition adds the following sentence: "Local Switching includes the circuit switching functionalities of any switching facility regardless of the technology used by

that facility." MCI Amendment, § 9.7.14(iii). By that sentence, MCI apparently seeks unbundled access to packet switches in violation of the FCC's clear ruling to the contrary. *See* Verizon's discussion of packet switching in response to Issue 14, *infra*.

13. "Mass Market Switching," Verizon Amendment 2, § 4.7.20[61]; AT&T Amendment, § 2.23; MCI Amendment, § 9.7.16.

102. Verizon's Amendment defines "Mass Market Switching" as "Local Switching or Tandem Switching that, if provided to [the CLEC], would be used for the purpose of serving a [CLEC] end user customer with three or fewer DS0 Loops. Mass Market Switching does not include Four Line Carve Out Switching." Verizon Amendment 2, § 4.7.20. This definition appropriately reflects federal law, including the still-existing Four-Line Carve-Out rule (47 C.F.R. § 51.319(d)(2)(ii)).

103. The CLECs' definitions are inadequate in comparison. AT&T's definition is unacceptable because it refers to AT&T's unlawfully broad definition of "Applicable Law." MCI's language incorrectly deletes Verizon's reference to tandem switching, which, as explained above, is part of the local switching element.

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

14. "Other DS0 Switching," Verizon Amendment 2, § 4.7.21.

105. Verizon defines this element as "Local Switching or Tandem Switching that, if provided to [the CLEC], would be used for the purpose of serving a [CLEC] end user customer with four or more DS0 Loops; provided, however, that Other DS0 Switching does not include Four-Line Carve Out Switching." Verizon Amendment 2, § 4.7.21. Sprint accepts this definition, but all other CLECs delete it. Given that the FCC's *Interim Rules Order* has expired, this issue should be moot.

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[61] Sprint does not edit Verizon's definition. The CCC deletes Verizon's definition.

15. "Packet Switched," Verizon Amendment 2, § 4.7.22; AT&T Amendment, § 2.25.

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

107. AT&T's Amendment, § 2.25,[62] omits the clauses starting with (and including) "the ability to forward the voice channels." This omission departs from the FCC's rule, in an effort to gain unbundling rights greater than those that the FCC has conferred. There is no reason for the Commission to adopt less than the FCC's full definition, as quoted by Verizon's Amendment.

16. "Sub-Loop for Multiunit Premises Access," Verizon Amendment 2, § 4.7.24; AT&T Amendment, § 2.29; Sprint Amendment, §§ 4.7.15, 4.7.25; CCC Amendment, § 5.15.[63]

108. Verizon's definition provides that "Sub-Loop for Multiunit Premises Access" is any portion of a loop, other than an FTTP loop, that "is technically feasible to access at a terminal in Verizon's outside plant at or near a multiunit premises." Verizon Amendment 2, §

[62] The CCG's Amendment differs from AT&T's in this respect. The CCC simply deletes Verizon's definition, as does MCI.

[63] MCI simply deletes Verizon's definition.

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

109. The CLECs delete the portion of Verizon's definition that excludes FTTP subloops. *See, e.g.*, AT&T Amendment, § 2.29; Sprint Amendment, § 4.7.25; CCC Amendment, § 5.15. But Verizon's definition reflects the FCC's determination that the "definition of FTTH loops includes fiber loops deployed to the minimum point of entry (MPOE) of MDUs, regardless of the ownership of the inside wiring." *MDU Reconsideration Order*, 19 FCC Rcd at 15856, ¶ 1; *see also id.* at 15857-58, ¶ 4 ("[T]o the extent fiber loops serve MDUs that are predominantly residential in nature, those loops should be governed by the FTTH rules.").[64] Because such FTTP facilities to residential multiunit premises are treated the same as other fiber facilities, Verizon's definition is appropriate and reflects federal law.

110. Sprint adds the following sentence: "Multiunit Premises Subloop does not include FTTP Loops to predominately residential multiunit premises but does include fiber facilities to predominately business multiunit premises." Sprint Amendment, § 4.7.25. This

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[64] Sprint adds a sentence that is incorrect for the same reason: "Inside wire and House and Riser Cable are categories of Multiunit Premises Subloop." Sprint Amendment, § 4.7.25.

addition is incorrect: As an initial matter, the FCC's errata to its recent *FTTC Order* noted that, "in rule section 51.319(a)(3)(ii), titled 'New builds,' we replace the words 'a residential unit' with the words 'an end user's customer premises.'"[65] Thus, the current version of 47 C.F.R. § 51.319(a)(3)(ii) provides: "An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC deploys such a loop to *an end user's customer premises* that previously has not been served by any loop facility." *FTTC Order Errata*, 2004 FCC LEXIS 6241, at *1 (emphasis added). This indicates that the FCC's exception for FTTC/FTTH does not apply just to residential units, but to all "customer premises."

111. Moreover, while the *MDU Reconsideration Order* indicated that the FCC granted unbundling relief as to FTTP loops serving "MDUs that are predominantly residential in nature," 19 FCC Rcd at 15857-58, ¶ 4, the FCC's *FTTC Order* clarified that "incumbent LECs are not obligated to build TDM capability into new packet-based networks or into existing packet-based networks that never had TDM capability." *FTTC Order*, 19 FCC Rcd at 20303-04, ¶ 20. As to dark fiber loops, the *TRRO* found that "[c]ompetitive LECs are not impaired without access to dark fiber loops in any instance." *TRRO* ¶ 5. The combined result of these holdings is that FTTP loops – which are packet-based and contain no TDM capability – are not required to be unbundled to any type of location, whether dark or lit. Sprint's addition is therefore incorrect and should be rejected.

112. AT&T adds the following clause: "near Remote Terminal sites, Verizon shall, upon site-specific request by [CLEC], provide access to a Subloop at a splice." AT&T

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[65] Errata, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 2004 FCC LEXIS 6241, at *1 (FCC Oct. 29, 2004) ("*FTTC Order Errata*").

Amendment, § 2.29. Similarly, Sprint adds the following sentences: "Points of technically feasible access include those locations where a technician can access the wire or fiber within without removing a splice case. The NID, the SPOI, and the FDI are examples of points of technically feasible access." Sprint Amendment, § 4.7.25. Regardless of whether these statements may match current federal law, they are improperly included in the definition because they are all geared to describing obligations and duties, rather than to defining terms. The "Definitions" section of the Amendment is not the appropriate place for such language, which should appear, if at all, elsewhere in the agreement. The Commission should therefore reject Sprint's and AT&T's additions.

17. "Federal Unbundling Rules," Verizon Amendment 1, § 4.7.6; WilTel Amendment, § 4.7.6.[66]

113. WilTel defines "Unbundling Rules" to pertain to any "non-stayed" requirement as to unbundling that arises not only from 47 U.S.C. § 251 or 47 C.F.R. Part 51, but also from "47 U.S.C. § 271, any applicable state law or regulation, any orders and decisions of courts of competent jurisdiction," or "any effective rules, decisions and orders of the FCC or the Commission." WilTel Amendment, § 4.7.6. As Verizon explained above, it is improper to refer to state law in this Amendment, *see* Verizon's response to Issue 1, *supra*, and section 271 does not apply to Verizon's operations in Washington, *see supra* note 36.

B. New CLEC-Proposed Definitions

1. "Applicable Law," AT&T Amendment § 2.0.

114. AT&T defines "Applicable Law" to include "[a]ll laws, rules and regulations" from whatever source. That definition (and all of the sections that refer to it) is thus unlawful.

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[66] The CCC deletes this definition on the ground that the *TRRO* and any matters therein should not be arbitrated here. All other CLECs, to Verizon's knowledge, agree with this definition.

For all the reasons explained above, the only law that is applicable to Verizon's obligation to provide UNEs is section 251(c)(3) and the FCC's regulations implementing that section. Because AT&T plainly seeks a broader definition to support its claims that this Commission may re-impose UNE obligations the FCC has eliminated, AT&T's definition must be rejected. *See supra* pp. 10-19.

2. "Circuit Switch," AT&T Amendment, § 2.2.

115. AT&T defines "Circuit Switch" as "[a] device that performs, or has the capability of performing switching via circuit technology. The features, functions, and capabilities of the switch include the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks." This definition improperly refers to any "device that *performs, or has the capability of performing*" circuit switching, a reference that appears to be written so as to capture packet switches. Such an implication is erroneous, as explained further in Verizon's response to AT&T's definition of "Packet Switch," *infra*. In addition, this definition is superfluous, in that neither the *Triennial Review Order* nor the *TRRO* changed the basic definition of "circuit switches."

3. "Combination," AT&T Amendment, § 2.3; MCI Amendment, § 9.7.2.

116. AT&T defines "Combination" as "[t]he provision of unbundled Network Elements in combination with each other, including, but not limited to, the Loop and Switching Combinations and Shared Transport Combination (also known as Network Element Platform or UNE-P) and the Combination of Loops and Dedicated Transport (also known as an EEL)." MCI's definition is the same.

117. This definition is erroneous in that it incorrectly assumes the availability of the "Network Element Platform or UNE-P." As noted above, the FCC eliminated UNE-P in the

TRRO. Verizon's obligations to provide UNE-P are limited to those the FCC imposed under its mandatory transition plan, discussed above. In addition, the definition cross-references other definitions that are themselves erroneous in relying on all "Applicable Law." *See, e.g.*, AT&T Amendment, § 2.7 ("Dedicated Transport"). Finally, neither the *Triennial Review Order* nor the *TRRO* substantively altered the definition of "combinations," so there is no need to address it in the *TRO* Amendment.

4. "Commingling," AT&T Amendment, § 2.4; MCI Amendment, § 9.7.3; CCC Amendment, § 5.2.

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

119. These definitions are inappropriate because they appear intended to allow CLECs to claim that they should be allowed to commingle UNEs with elements obtained under section 271, which does not even apply to Verizon's operations in Washington, *see supra* note 36 . Thus, there is no need to consider the other problems with this definition.

120. Verizon has offered in negotiations with the CCG to agree to language that simply refers to 47 C.F.R. § 51.5, which would have the advantage of tracking any subsequent modifications to the FCC's definition.

5. "Hot Cut," AT&T Amendment, § 2.15.

121. AT&T includes a definition of "Hot Cut" ("[t]he transfer of a loop from one carrier's switch to another carrier's switch; or from one service provider to another service provider") in its proposed Amendment. Any hot cut definition should not be included in the parties' interconnection agreements, because it has nothing to do with federal unbundling obligations. When the FCC eliminated switching as a UNE, it explicitly found that the ILECs' — in particular, Verizon's — hot cut processes were satisfactory, and specifically rejected CLECs' "speculative" concerns about hot cut procedures. *See* Verizon's response to Issue 3 *supra*; *Triennial Review Order,* 18 FCC Rcd at 17103,17109-10, ¶¶ 199, 210. AT&T's hot cut definition in its amendment is part of its hot cut proposal, which would guarantee the continued availability of unbundled mass market switching under the parties' agreement until such time as AT&T's proposed performance metrics and remedies are implemented to AT&T's satisfaction. AT&T's hot cut proposal is unlawful (and its hot cut definition pointless), because the FCC has unconditionally eliminated the requirement to unbundle mass market switching, and state commissions have no authority to impose their own hot cut conditions before Verizon may cease providing UNE switching. AT&T's proposal would, moreover, specifically override the FCC's mandatory transition plan for UNE-P.[67]

122. Verizon cannot be required to provide unbundled access to any item for which the FCC has eliminated unbundling obligations. Under *USTA II,* the decision-making regarding impairment is reserved for the FCC, not the states. Therefore, it would be a waste of time and resources for the Commission to consider the CLECs' proposal to condition the elimination of mass-market switching on this Commission's approval of hot cut processes and metrics.

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[67] *See* AT&T's and CCG's proposed *TRO* amendment, § 3.10 & Exhibits B & C.

123. Indeed, a U.S. District Court in Michigan recently preempted a Michigan Public Service Commission ("MPSC") hot cut proceeding like the one AT&T seeks in the context of this arbitration.[68] The MPSC had initiated a batch hot cut proceeding pursuant to the *TRO*, but refused to close the proceeding despite the D.C. Circuit's invalidation of the FCC's subdelegation scheme. Instead, in a June 29, 2004 order, the MPSC adopted an interim batch hot cut process and ordered the parties to negotiate a final batch hot cut process. Michigan Bell appealed that order, arguing that the hot cut procedures the MPSC mandated were preempted by federal law. *See Michigan Bell*, slip op. at 2-3.

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

> Their position is undermined by the simple fact that the state-imposed requirements are at odds with *USTA II* and the subsequent Order and Notice. It is incongruous for the *USTA II* Court to find that Congress prohibited the FCC from passing unbundling decisions to the state, but found the states could seize the authority themselves.[69]

125. Consistent with this reasoning, the Indiana Utility Regulatory Commission shut down its hot cut proceeding in January, concluding, as the *Michigan Bell* court did, that a state cannot maintain a hot cut proceeding linked to an invalid delegation of authority to evaluate impairment: "[S]tate decision-making authority to determine whether CLECs are not impaired in the context of the batch cut process is inseparable from the FCC's [vacated] national finding. . . . We do not think it is reasonable to conclude that the delegation to establish a batch hot cut

[68] *See Michigan Bell Tel. Co., Inc. v. Mich. Pub. Serv. Comm'n*, No. 04-60128 (E.D. Mich. Jan. 6, 2005)

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

process has survived *USTA II*, since its survival would only be in a form not contemplated by the FCC."[70]

126. Through litigation of their hot cut proposal, the CLECs hope to convince the Commission to seize unbundling authority from the FCC. Their hot cut proposal would require this Commission to disregard the FCC's conclusion that "[i]ncumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching";[71] to override the FCC's transition plan; and to determine for itself when and under what conditions UNE mass-market switching might be discontinued.

127. The Commission cannot adopt such a proposal, and it would be a waste of time and resources to consider it. The Commission has enough to do without undertaking the pointless inquiry AT&T proposes into establishing hot cut processes, pricing, performance measures, and remedies as a basis for a *state* non-impairment determination. By refusing to consider these complex factual issues from this arbitration, the Commission will be better able to adhere to the schedule it has established, and the FCC's deadline to complete any amendments by March 11, 2006.

6. "Line Conditioning," AT&T Amendment, § 2.18.

128. AT&T's Amendment adds a new definition for "Line Conditioning": "The removal from a copper loop or copper Subloop of any device that could diminish the capability of the loop or Subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders."

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

[71] *TRRO* ¶ 5.

129. As discussed below (*see infra* pp. 81-82), the FCC did not create any new line-conditioning rules in the *Triennial Review Order*. Accordingly, this proceeding should not address line conditioning, and there is no reason to include AT&T's definition in the amendment.

7. "Line-splitting ," AT&T Amendment, § 2.20, MCI Amendment, § 9.7.13; CCC Amendment, § 5.10.

130. As discussed below, the FCC's line-splitting rules pre-date the *Triennial Review Order* and do not constitute a change of law. *See infra* pp. 73-74. Accordingly, the amendment should not contain any provisions related to line-splitting , including definitions.

8. "Route," AT&T Amendment, § 2.26.

131. AT&T defines "Route" by quoting Rule 51.319(e) almost verbatim. AT&T does not use the term "Route" in any other part of its Amendment; the definition is therefore unnecessary. In addition, it is preferable in most cases to refer to the citation of a rule, rather than quoting it (thus locking in the FCC's current regulations, even though the FCC might amend those regulations at any time).

9. "Routine Network Modifications," AT&T Amendment, § 2.27; CCG Amendment, § 2.27.

132. AT&T defines this element as "those prospective or reactive activities that Verizon is required to perform for AT&T and that are of the type that Verizon regularly undertakes when establishing or maintaining network connectivity for its own retail customers." It is not clear what "prospective or reactive" means or could be interpreted to mean, and such terminology does not appear in the *Triennial Review Order* or the FCC's rules. To the extent CLECs insist that "routine network modifications" should be defined further in Verizon's Amendment, Verizon is willing to insert language to track the FCC's own language, stating that a routine network modification is an activity "that the incumbent LEC regularly undertakes for its own customers." 47 C.F.R. § 51.319(a)(7)(ii). Verizon has offered such language to certain

CLECs in negotiations. In addition, CCG's Amendment adds a list of examples of routine network modifications. This list is duplicative of what Verizon already includes in Amendment 2, § 3.5.1.1. It is therefore superfluous.

10. "Loop," MCI Amendment, § 9.7.15.

133. The *Triennial Review Order* did not substantively change the pre-existing definition of "loop" in 47 C.F.R. § 51.319(a). There is thus no need to modify agreements to add a definition for this term (or to amend the definition that is already included in existing agreements). The Commission should therefore reject MCI's addition.

11. "Loop Distribution," AT&T Amendment, § 2.22; "Subloop Distribution Facility," CCC Amendment, § 5.16.

134. AT&T adds a definition for "Loop Distribution" that in large part is identical to its definition for "Subloop for Multiunit Premises Access":

> The portion of a Loop in Verizon's network that is between the point of demarcation at an end user customer premises and Verizon's feeder/distribution interface. It is technically feasible to access any portion of a Loop at any terminal in Verizon's outside plant, or inside wire owned or controlled by Verizon, as long as a technician need not remove a splice case to access the wire or copper of the Subloop; provided, however, near Remote Terminal sites, Verizon shall, upon site-specific request by AT&T, provide access to a Subloop at a splice.

135. This definition is subject to the same objection outlined above: Most of it is concerned not with defining a term, but with describing the substance of an unbundling obligation. The Commission should not adopt that sort of confusing and unnecessary "definition."

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

12. "Packet Switch," AT&T Amendment, § 2.24.

137. AT&T defines "Packet Switch" as "a network device that performs switching functions primarily via packet technologies." Then it adds: "Such a device may also provide other network functions (e.g., Circuit Switching). Circuit Switching, even if performed by a Packet Switch, is a network element that Verizon is obligated to provide on an Unbundled Network Element basis."

138. AT&T's definition in incorrect and contrary to law, insofar as it implies an obligation to unbundle packet switches as a stand-alone element. In the *Triennial Review Order*, the FCC acknowledged that "using packet-switched technology, carriers can transmit voice, fax, data, video, and other over a single transmission path at the same time," 18 FCC Rcd at 17114, ¶ 220. Nonetheless, the FCC directly held – without exception – that "we decline to unbundle packet switching as a stand-alone network element." *Id.* at 17321, ¶ 537.

139. Moreover, the FCC recognized that "to the extent there are significant disincentives caused by unbundling of circuit switching, *incumbents can avoid them* by deploying more advanced packet switching." *Id.* at 17254, ¶ 447 n.1365 (emphasis added). Allowing incumbents to avoid unbundling obligations would give them "every incentive to deploy these more advanced networks, which is precisely the kind of facilities deployment we wish to encourage," while giving "competitors" the "incentives to build comparable facilities to compete." *Id.* That determination contradicts AT&T's suggestion that packet switches can still be unbundled depending on their "function." (*See also infra* Issue 14.h.)

140. The Commission should reject AT&T's definition as contrary to federal law.

13. "UNE-P," AT&T Amendment, § 2.31

141. AT&T defines "UNE-P" as "a leased combination of the loop, local switching, and shared transport UNEs." AT&T defines "UNE-P" as "a leased combination of the loop, local switching, and shared transport UNEs." There is no need to include this definition of "UNE-P," which did not change with the *TRO* or *TRRO*. Moreover, there is no reason for new terms in the Amendment to address an element that Verizon is no longer required to provide, except to the embedded base under the terms of the FCC's transition plan. The Commission should therefore reject AT&T's proposal.

14. "Conversion," CCC Amendment, § 5.3.

142. The CCC defines "Conversion" as "all procedures, processes and functions that Verizon and CLEC must follow to Convert any Verizon facility or service other than an unbundled network element (e.g., special access services) or group of Verizon facilities or services to the equivalent UNEs or UNE Combinations or Section 271 Network Elements, or the reverse. Convert means the act of Conversion." This definition is improper in that it refers to Section 271, which is not pertinent in Washington, *see supra* note 36.

15. "Enterprise Customer," CCC Amendment, § 5.4; "Mass Market Customer," CCC Amendment, § 5.12.

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

144. Verizon objects to these definitions in that they are improperly used elsewhere in the CCC's Amendment, purportedly to limit unbundling relief to mass-market customers while

adding spurious unbundling obligations as to enterprise customers. It is true that the FCC noted at the beginning of its loop section in the *Triennial Review Order* that because different markets are typically served by different loop types, it would first "analyze those loops generally provisioned to mass market customers and then analyze the high-capacity loops generally provisioned to enterprise customers." *Triennial Review Order*, 18 FCC Rcd at 17109, ¶ 209. But the FCC also squarely held that this analytical approach does *not* mean that loop unbundling obligations pertain only to one specific customer type: "while we adopt loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops *do not vary based on the customer to be served*." *Id.* at 17110, ¶ 210 (emphasis added). In other words, if a "very small business or residential customer typically associated with the mass market" orders a DS1 for some reason, that DS1 will not be subject to unbundling. *Id.* at 17109, ¶ 210 Conversely, if a business customer seeks to service a "remote business location[] staffed by only a few employees where high-capacity loop facilities are not required," that business customer can order an unbundled DS0. *Id.* In short, the unbundling rules do not change depending on the identity of the end-user.

16. "Section 271 Network Elements," CCC Amendment, § 5.13.

145. As stated above, *see supra* note 36, section 271 does not apply to Verizon's operations in Washington.

17. "Shared Transport," CCC Amendment, § 5.14.

146. The CCC defines "Shared Transport" as "unbundled transport shared by more than one carrier (including Verizon) between end office switches, between end office switches and tandem switches, and between tandem switches, in Verizon's network." Verizon only

recently received CCC's new proposed Amendment, and is willing to consider an appropriate definition of "Shared Transport."

C. Undisputed Definitions

147. To the best of Verizon's knowledge, no CLEC substantively disputes the following definitions: "Call-Related Databases," Verizon Amendment 2, § 4.7.1, "DS1 Dedicated Transport," *id.* § 4.7.6,[72] "DS3 Dedicated Transport," *id.* § 4.7.7,[73] "Feeder," *id.*, § 4.7.12, "Interim Rule Facilities," *id.* § 4.7.17,[74] "Line Sharing," *id.* § 4.7.18, "Signaling," *id.* § 4.7.23,[75] and "Tandem Switching," *id.* § 4.7.25.[76]

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

Relevant Provisions: AT&T Amendment, § 3.1.12

148. **A.** The first question may be sub-divided into two parts: The *TRRO* and the *Triennial Review Order.*

149. First, implementation of the FCC's mandatory transition plan in the *TRRO* does *not* depend on any particular contract language, including any change-of-law provisions in existing agreements. Pursuant to the FCC's explicit directive, the transition plan for the UNEs at issue in the *TRRO* takes effect even while change-of-law processes with respect to the CLEC's

[72] The CCC deletes this definition pursuant to its general belief that the *TRRO* and any matters therein should not be arbitrated here.

[73] *See supra note 73.*

[74] The CCC and AT&T delete this definition.

[75] *See supra note 73.*

[76] The sole exception is MCI, which deleted all references to tandem switching. Those deletions are wrong, for the reason explained above.

embedded base of de-listed UNEs might take up to 12 months (18 months, for dark fiber facilities) under the FCC's plan.

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

151. In other words, the FCC clearly held that (1) the *TRRO* would go into effect immediately, as of March 11, 2005; (2) the transition plans would begin immediately as well; (3) carriers would have up to 12 months (18 months for dark fiber) to modify their interconnection agreements to implement the FCC's *permanent* unbundling rules (*e.g.*, to change the list of UNEs available under interconnection agreements, to work out operational details of the transition). The FCC firmly shut the door on any possibility of using the change-in-law process as an excuse to circumvent the *TRRO* itself or to avoid following the relevant transition plans.

152. If the FCC had meant for the change-in-law process to take precedence, it would have held that the relevant transition plans would take effect after negotiations, rather than on a certain date March 11, 2005. Instead, the FCC repeatedly and explicitly stated that the transition period does not apply to the "no-new-adds" prohibition. It would make no sense for the FCC to

have ruled that the transition plan "does not permit competitive LECs to add new switching UNEs" as of March 11, 2005 (*TRRO* ¶ 5), but then to have given carriers 12 (or 18) months to complete an amendment before they could implement this prohibition, as the CLECs argue.

153. Second, as for the *Triennial Review Order* — that is, as to UNEs other than mass-market switching, and high-capacity loops and transport — the FCC determined that "the section 252 process described above provides good guidance even in instances where a change of law provision exists." 18 FCC Rcd at 17405, ¶ 704. The FCC noted that it "expect[ed] that parties would begin their change of law process promptly," that "negotiations and any timeframe for resolving the dispute would commence immediately," and that "a state commission should be able to resolve a dispute over contract language *at least* within the nine-month timeframe envisioned for new contract arbitrations under section 252." *Id.* at 17405-06, ¶ 704 (emphasis added).[77]

154. Indeed, in various motions to dismiss filed earlier in this proceeding, several CLECs argued that Verizon had failed to negotiate according to the terms of change-in-law provisions in interconnection agreements. *See, e.g.*, AT&T Motion to Dismiss Verizon's Updated Petition Issues Regarding *USTA II*, Docket No. UT-043013, at 1-3 (Wash. UTC filed April 13, 2004). The Commission squarely rejected such allegations in Order No. 5. Specifically, it found that the "multiple allegations" by the parties "support only the fact that there is extreme polarization on the issues, and that parties are reluctant to agree to the other parties' proposals." Order No. 5, ¶ 35. It would be impossible to determine the facts "without conducting evidentiary hearings on the allegations," but any such evidentiary proceeding "would be a waste of all parties' and the Commission's resources." *Id.* Moreover, "while dismissing a

[77] As Verizon has pointed out in this proceeding, some interconnection agreements are already written so as to allow changes in law to be implemented immediately.

petition for failure to negotiate in good faith may be an appropriate remedy where negotiations may prove fruitful, it is clear that arbitration is necessary in this case and that dismissal is not the best solution." *Id.*

155. Thus, this Commission has already addressed the question whether Verizon can lawfully conduct this proceeding, and has rejected the CLECs' claims that federal law should be implemented only through a piecemeal process that might differ as to each individual CLEC. That decision is the law of the case, and should be followed.[78]

156. Verizon initiated negotiations 18 months ago, and filed for arbitration nearly a year ago to modify its agreements, where necessary, to implement the *TRO* rulings.[79] But — in no small part because of CLECs' procedural wrangling and delaying tactics — the FCC's timeframe for conclusion of a *TRO* amendment expired without any substantive progress toward

[78] To the extent that any carrier argues that its interconnection agreement provides for resort to private arbitration, as opposed to arbitration before the Commission, that argument is procedurally barred. *See, e.g., Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 759 (9th Cir. 1988) ("Shearson's extended silence and much-delayed demand for arbitration indicates a conscious decision to continue to seek judicial judgment on the merits of [the] arbitrable claims. This choice was inconsistent with the agreement to arbitrate those claims.") (internal quotation marks omitted); *Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, 304 F.3d 753, 756 (7th Cir. 2002) ("A contractual right to arbitrate may be waived expressly or implicitly, and a party that chooses a judicial forum for the resolution of a dispute is presumed to have waived its right to arbitrate."). While carriers have, in some cases, argued that Verizon failed to exhaust the negotiation process before initiating this proceeding — an argument that rings particularly hollow in light of the extensive subsequent opportunities for negotiation between Verizon and all CLECs — none has challenged the Commission's authority to resolve the issues raised by Verizon's petition.

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

an arbitrated amendment, even to implement the *TRO* rulings that have been final and unappealable for many months now.

157. Thus, to the extent that the CLECs suggest that their contracts require another protracted "negotiation" period before continuing with arbitration, the Commission should again reject that suggestion as an inappropriate procedural maneuver designed to delay implementation of binding federal law. It would be pointless to require another negotiation period, and another petition for arbitration, when the parties' basic positions concerning a *TRO* amendment — such as whether Verizon's unbundling obligations are governed exclusively by federal law or whether the states can re-impose unbundling obligations the FCC has eliminated — have not changed.

158. **B.** The second question in Issue 10 involves whether "the establishment of UNE rates, terms and conditions for *new* UNEs, UNE combinations, or commingling be subject to the change of law provisions of the parties' interconnection agreements." The FCC has not established any new UNEs in the *TRO* or the *TRRO*. But if it creates new UNEs in the future, such new UNE requirements should be subject to the normal change-in-law process under the various agreements, and the UNEs at issue should be priced in accordance with Verizon's Amendment, which calls for tariffing or amending the contract. *See* Amendment 1, § 2.3; Amendment 2, § 2.3;*see* also Verizon's response to Issue 2, *supra* p.p. 26-27 (pointing out fundamental disparity between elimination of unbundling obligations, and implementing any new unbundling obligation).

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

Relevant Provisions: Verizon Amendment 1, § 3.5; AT&T Amendment, § 3.9.5

159. Verizon's Amendment 1 provides that Verizon may implement any rate increases or new charges by issuing a schedule of those new rates to take effect on the same terms that the

FCC may require. *See* Verizon Amendment 1, § 3.5. Such a rate schedule is subject to the qualification that no new rates will take effect if the FCC order or rulemaking in question has been made the subject of a stay issued by a court of competent jurisdiction. *See id.* Any new rates prescribed by the FCC shall be "in addition to, and not in limitation of," any rate increases imposed by this Commission or that are otherwise lawfully applicable under the Amended Agreement or tariff. *Id.*

160. Verizon's existing interconnection agreements typically already give automatic effect to any FCC-ordered rate increases; indeed, if the FCC's prescribed transition periods expire, an amendment would no longer be necessary to implement this aspect of the FCC's mandatory transition plan. Although no amendment is needed for this purpose, section 3.5 appropriately reflects the fact that the FCC may prescribe rate increases or new charges — as it did when it established a transitional regime for line-sharing in the *Triennial Review Order*, and as it has now done with regard to the embedded base of mass-market switching and various high-capacity loops and transport in the *TRRO*.[80] Such new charges are adopted with a specific effective date. (Indeed, the FCC provided that if new rates take place via change-in-law processes at some later point, the rates shall be subject to true-up back to the March 11, 2005 effective date. *See TRRO* ¶ 145 n.408, ¶ 198 n.524, ¶ 228 n.630.) Verizon is entitled to implement such rate increases as of the effective date established by the FCC — but not earlier — simply by providing notice. The possibility of differing interpretations of any FCC rule provides no basis for deferring implementing of the rule on the date set by the FCC: any disputes over charges can be resolved through the ordinary billing dispute process. As with

[80] By contrast, AT&T's language (§ 3.9.5) would require Verizon to continue to provide delisted elements at TELRIC under section 271. As explained above, Verizon is not even subject to section 271 in Washington, so AT&T's proposal is pointless.

Verizon's other proposals, this provision ensures proper incorporation of new, binding federal law without the need to resort to complicated proceedings — like this one — which CLECs may attempt to use for delay.

161. The CLECs largely agree that where the FCC has specifically prescribed rate increases, those increases should go into effect on the FCC's terms.[81] The CCC, however, argues that changes in law resulting from the *TRRO*, or other changes desired by a party, should not be part of this proceeding at this time. This position is unwarranted. The *TRRO* is the most recent expression of binding federal law, and it is effective as of March 11, 2005 – including the fact that new rates will be subject to true-up back to that date, regardless of whether the CCC arbitrates over the *TRRO* now or later.

Issue 12: Should the interconnection agreements be amended to address changes arising from the Triennial Review Order with respect to commingling of UNEs with wholesale services, EELs, and other combinations? If so, how?

Relevant Provisions: Verizon Amendment 2, § 3.4; Sprint Amendment, §§ 3.4.1.1, 3.5.1.1, 3.5.1.2.1; MCI Amendment, § 4; AT&T Amendment, § 3.7; CCC Amendment, § 2.

162. Verizon's proposed language provides that Verizon (1) will not prohibit commingling of UNEs with wholesale services (to the extent it is required under federal law to permit commingling), *see* Verizon Amendment 2, § 3.4.1.1. The Amendment also provides that Verizon will perform the functions necessary to allow CLECs to engage in commingling or combinations of UNEs with wholesale services. *See id.* The rates, terms, and conditions of the applicable access tariff or separate non-251 agreement will apply to the wholesale services. *See*

[81] To the extent that any CLEC argues that rate decreases ordered by a state commission should go into effect as well, the FCC has given ILECs the option of accepting a state commission's new rates entirely or not at all. *See TRRO* ¶ 145 n.408 ("To the extent that a state public utility commission order raises some rates and lowers others for dedicated transport, the incumbent LEC may adopt either all or none of these dedicated transport rate changes."); *see also id.* ¶ 198 n.524 (same for loops).

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

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

164. To its § 3.5.1.2.1, Sprint adds that "Verizon will continue to provide commingling for Interim Rule Facilities pursuant to the terms and conditions for Interim Rule Facilities that were in effect as of June 15, 2004," and that as for the new final rules, "[t]he parties agree to incorporate these rates, terms, and conditions in an amendment to this Agreement." Sprint Amendment, § 3.5.1.2.1. As for the first change, the FCC did not impose any commingling

obligations under its Interim Rules, so Verizon has no commingling obligations that can or should be "continued" under the Interim Rules. In any event, the Interim Rules have now been superseded by the final unbundling rules in the *TRRO*. As for Sprint's second addition, it is unlawful because it impermissibly suggests that the FCC's mandatory transition plan in the *TRRO* cannot take effect until the parties have negotiated or arbitrated an amendment. As explained above, the FCC's transition plan, including the no-new-adds directives, is self-effectuating, and the Commission cannot override that plan by requiring contract amendments as a condition to its implementation.

165. In other respects, the CLECs' objections are addressed below under Issue 21.

Issue 13: Should the interconnection agreements be amended to address changes arising from the Triennial Review Order with respect to conversion of wholesale services to UNEs/UNE combinations? If so, how?

166. This question is fully addressed below under Issue 21.

Issue 14: Should the ICAs be amended to address changes, if any, arising from the *TRO* with respect to:
a) Line-splitting ;
b) Newly built FTTP, FTTH, or FTTC loops;
c) Overbuilt FTTP, FTTH, or FTTC loops;
d) Access to hybrid loops for the provision of broadband services;
e) Access to hybrid loops for the provision of narrowband services;
f) Retirement of copper loops;
g) Line conditioning;
h) Packet switching;
i) Network Interface Devices (NIDs);
j) Line sharing?

167. This proceeding is intended to address parties' disputes about the scope of the unbundling relief provided in the *TRO* and the *TRRO*. Thus, Verizon's Amendment 2 incorporates language to address, for example, FTTP loops and hybrid loops. But the Commission should not entertain CLEC proposals that relate to unbundling obligations that

predate the *Triennial Review Order*, including line-splitting , line conditioning, and NIDs (among other issues). This arbitration is not a free-for-all for parties to propose changes to terms in their underlying agreements that they may not like. CLEC proposals to litigate non-*TRO* items fail to acknowledge that existing agreements already address these issues. Their proposals likewise fail to include standard operational provisions, including recurring and non-recurring charges, which have already been negotiated or arbitrated under existing agreements. To the extent a few CLECs (if any) have "holes" in their agreements, Verizon has offered to negotiate appropriate provisions with them. But the Commission has enough issues to resolve in this time-constrained proceeding without entertaining items that are not related to changes in unbundling obligations as a result of the *TRO* or *TRRO*. This reasoning informs Verizon's discussion of the various sub-issues presented here.

a) Line-splitting

Relevant Provisions: AT&T Amendment, § 3.3(A); MCI Amendment, § 6; CCC Amendment, § 1.5.2

168. As it had in earlier orders, in The *Triennial Review Order*, the FCC continued to find that ILECs must provide the option of line-splitting , which is defined as describing the "scenario where one competitive LEC provides narrowband voice service over the low frequency of a loop and a second competitive LEC provides xDSL service over the high frequency portion of that same loop." 18 FCC Rcd at 17130, ¶ 251. This requirement merely reaffirmed and clarified a decision reached in 2001. *See id.* ("The Commission previously found that existing rules require incumbent LECs to permit competing carriers to engage in line-splitting . . . . We reaffirm those requirements."); *see also* Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of

Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 2101, 2109, ¶ 16 (2001) ("[W]e clarify that existing [FCC] rules support the availability of line-splitting .").

169. Because the requirement to provide line-splitting is not a new obligation — indeed, this Commission started a collaborative line-splitting proceeding in 2002[82] — it would not be appropriate to address this issue in this arbitration. For this reason, Verizon has not proposed any language with respect to line-splitting in its amendment. Moreover, Verizon has offered its standard line-splitting amendment to any CLEC that does not yet have line-splitting provisions in its interconnection agreement, so no CLEC can complain that litigation of this issue here is necessary to implement their line-splitting rights. Numerous CLECs across Verizon's region have signed this Amendment.

b) Newly built FTTP loops

Relevant Provisions: Verizon Amendment 2, § 3.1; AT&T Amendment, § 3.2.2.1; MCI Amendment, § 7.1; CCC Amendment, § 1.3

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

[82] Thirty-Eighth Supplemental Order, *Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, 2002 Wash UTC LEXIS 370 (Wash. UTC Sept. 23, 2002) ("Thirty-Eighth Supp. Order").

loops as well, defined as "local loop[s] consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises or, in the case of predominantly residential MDUs, not more than 500 feet from the MDU's MPOE." *FTTC Order*, 19 FCC Rcd at 20311, App. B - Final Rules; 47 C.F.R. § 51.319(a)(3)(i)(B).[83]

171. Verizon's Amendment 2 accordingly provides simply that "in no event shall [the CLEC] be entitled to obtain access to an FTTP Loop (or any segment or functionality thereof) on an unbundled basis" where the FTTP loop is newly built to serve a new customer. Verizon Amendment 2, § 3.1. This language is consistent with the FCC's rules, and no CLEC substantively disagrees. *See, e.g.*, AT&T Amendment § 3.2.2.1 (acknowledging that Verizon need not provide access to any new FTTP loop); Sprint Amendment, § 3.2 (same); CCC Amendment, § 1.3.1.[84] Verizon's language should therefore be adopted.

c) Overbuilt FTTP loops

Relevant Provisions:	Verizon Amendment 2, § 3.1; AT&T Amendment, § 3.2.2.2; MCI Amendment, § 7.1; CCC Amendment, § 1.3.2; Sprint Amendment, § 3.1.

172. Although the FCC eliminated unbundling obligations for new FTTP loops, it held that ILECs must offer unbundled access to FTTP loops "for narrowband services only," in so-called "fiber loop overbuild situations" — that is, where the ILEC builds a new FTTP loop to serve a customer currently served by a copper loop and then "elects to retire existing copper

[83] The CCC argues that it has not proposed terms related to FTTC loops because the FCC's rules with respect to such facilities were not adopted in the *TRO* and were not made part of Verizon's request for arbitration. First, Verizon's Amendment and arbitration petition did, in fact, put at issue the scope of the FCC's FTTP rules (*see, e.g.*, Amendment 1, § 4.7.9 (defining FTTP Loops); Amendment 2, § 4.7.14 (same)). Second, there is no justification for ignoring governing federal law, of which CCC is well aware.

[84] The CCC urges that the *TRO* only relieved Verizon of offering FTTP loops to mass-market customers. This position is incorrect, as explained above in Verizon's response to Issue 9(16) (definition of "Sub-Loop for Multiunit Premises Access").

loop[]." *Triennial Review Order*, 18 FCC Rcd at 17142, ¶ 273. If the ILEC "keep[s] the existing copper loop connected to a particular customer," it does not have to unbundle the narrowband portion of the FTTP loop. *Id.* at 17144-45, ¶ 277.

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

174. Sprint adds the following sentence to its section 3.1: "[a]ny retirement of copper Loops or sub-loops will follow 47 C.F.R. Part 51.319(a)(3)(iv)." That rule, however, applies generically to all copper-loop retirements and is not specific to overbuilt FTTP loops. There is no need for the amendment provision Sprint proposes.

d) Hybrid loops for broadband

Relevant Provisions: Verizon Amendment 2, § 3.2.2; AT&T Amendment, § 3.2.3.1; Sprint Amendment, § 3.3.2; CCC Amendment, § 1.4.2

175. In constructing loops, carriers often install "feeder plant" made of fiber. This fiber feeder carries traffic from the carrier's central office to a centralized location called a "remote terminal." From the remote terminal, traffic then travels over "distribution plant" (typically made of copper) to and from the actual customers. *Triennial Review Order*, 18 FCC

Rcd at 17112, ¶ 216. The result is "hybrid loops," *i.e.*, those "local loops consisting of both copper and fiber optic cable (and associated electronics, such as DLC systems)." *Id.* at 17149, ¶ 288 n.832.

176. In the *Triennial Review Order*, the FCC "decline[d] to require incumbent LECs to unbundle the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market." *Id.* at 17149, ¶ 288. Nor do ILECs have to provide "unbundled access to any electronics or other equipment used to transmit packetized information over hybrid loops, such as the xDSL-capable line cards installed in DLC systems or equipment used to provide passive optical networking (PON) capabilities to the mass market." *Id.* The FCC found that "incumbent LECs remain obligated, however, to provide unbundled access to the features, functions, and capabilities of hybrid loops that are not used to transmit packetized information," *i.e.*, a "complete transmission path over their TDM networks." *Id.* at 17149, ¶ 289. The FCC noted that certain DS1 and DS3 services "are non-packetized, high-capacity capabilities provided over the circuit switched networks of incumbent LECs," and "[t]o provide these services, incumbent LECs typically use the features, functions, and capabilities of their networks as deployed to date – *i.e.*, a transmission path provided by means of the TDM form of multiplexing over their digital networks." *Id.* at 17152, ¶ 294.

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

user to the demarcation point at the end user's customer premises." Verizon Amendment 2, § 3.2.2.

178. AT&T's counter-proposal, by contrast, is not consistent with binding federal law. First, AT&T's proposed section 3.2.3.1 does not clearly limit Verizon's obligations to those imposed by section 251(c)(3) and the FCC's implementing regulations but instead includes a reference to "other Applicable Law," which, as Verizon has explained, is unlawful, because it contemplates imposition of unbundling obligations under sources other than the FCC's rules implementing section 251(c)(3) of the Act. Second, AT&T omits the FCC's limitation that Verizon is required to unbundle only *existing* time division multiplexing features. *See FTTC Order*, 19 FCC Rcd at 20303-04, ¶ 20 ("we clarify that incumbent LECs are not obligated to build TDM capability into new packet-based networks or into existing packet-based networks that never had TDM capability"). Furthermore, AT&T fails to include important conditions governing the use of all UNEs, as set forth in Section 2 of Verizon's proposed Amendment.[85]

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

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[85] Here too, the CCC argues that the *TRO* only relieved Verizon of offering Hybrid Loops to mass market customers. This is incorrect, as the FCC's loop rules apply across the board. *See* Verizon's Response to Issue 18, *infra*, and *Triennial Review Order*, 18 FCC at 17109¶¶ 209-210.

Sprint adds the following italicized text here, and then adds an explanatory comment:

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

Sprint Amendment, § 3.3.2. In negotiations, Verizon has accepted that change.

e) Hybrid loops for narrowband services

Relevant Provisions: Verizon Amendment 2, § 3.2.3; AT&T Amendment, § 3.2.3.2; MCI Amendment, § 7.2.1; CCC Amendment, § 1.4.3

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

181. Verizon's language accordingly provides that if a CLEC seeks to provide narrowband services via a hybrid loop, Verizon may either provide (a) a "spare home-run copper Loop serving that customer on an unbundled basis," or (b) a "DS0 voice-grade transmission path between the main distribution frame (or equivalent) in the end user's serving wire center and the end user's customer premises, using time division multiplexing technology." Verizon Amendment 2, § 3.2.3. By contrast, although the FCC says that "Incumbent LECs may elect" to provide a copper rather than a TDM-based narrowband pathway over a hybrid loop, AT&T's language would *require* Verizon to provide a copper loop at AT&T's sole choice. AT&T Amendment, § 3.2.3.2. The *Triennial Review Order*, however, plainly gave Verizon — not the

CLECs — the choice whether to use a spare copper loop. Furthermore, as with AT&T's proposed section 3.2.3.1, the proposed provision inappropriately refers to "other Applicable Law," which, as explained, AT&T defines to include state law and section 271 obligations, which have nothing to do with the section 251 unbundling obligations the parties are litigating here. (Similarly, CCC's Amendment removes any reference to section 251, CCC Amendment, § 1.4.3.) In addition, AT&T's reference to the "entire hybrid loop capable of voice-grade service" is potentially misleading, because it is undisputed that a CLEC may not demand access to the "entire" loop, but only a voice-grade transmission path.

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

f) Retirement of copper loops

Relevant Provisions: AT&T Amendment, §§ 3.2.2.2-3.2.2.10; MCI Amendment, § 7.3; CCC Amendment, § 1.5.4

183. In the *Triennial Review Order*, the FCC stated that "when a copper loop is retired and replaced with a FTTH loop, we allow parties to file objections to the incumbent LEC's notice of such retirement." 18 FCC Rcd at 17147, ¶ 282. Likewise, the FCC's rules provide that "prior to retiring any copper loop or copper subloop that has been replaced with a fiber-to-the-home loop, an incumbent LEC must comply with: (A) The network disclosure requirements set forth in section 251(c)(5) of the Act and in § 51.325 through § 51.335; and (B) Any applicable state requirements." 47 C.F.R. § 51.319(a)(3)(iii).

184. Verizon will provide notice of its intention to retire copper facilities in a manner consistent with the FCC's rules. AT&T and the CCC, however, propose that Verizon be required to provide 180 days notice before retiring copper facilities, AT&T Amendment, § 3.2.2.7; CCC Amendment, § 1.5.4.1, which departs from the FCC's notice requirement (47 C.F.R. § 51.333(b)(ii) & (f)) establishing the applicable timetable and procedures. Under the

FCC's rules, Verizon may provide notice to affected CLECs and then file a certification with the FCC; the FCC then issues a public notice. *See id.* In the absence of an objection filed within 10 days, the notice is deemed approved on the 90th day after the release of the Commission's public notice of filing. (Such objections are likewise deemed denied if they have not been ruled upon within the 90-day period.).

185. The CLEC proposals depart from the FCC's rules in other respects as well. AT&T and the CCC would require CLEC approval before a copper loop is retired, *see* AT&T Amendment, § 3.2.2.6; CCC Amendment, § 1.5.4.1.2, but the FCC regulation bars such a requirement. AT&T's proposed section 3.2.2.7 refers generally to "copper subloops," even though the FCC has specifically held that its regulations do not apply to "copper feeder plant." *Triennial Review Order*, 18 FCC Rcd at 17147, ¶ 283 n.829. And AT&T's sections 3.2.2.8, 3.2.2.9, and 3.2.2.10 contain additional onerous and unreasonable requirements that are not in the FCC's regulations.[86]

186. The CLEC provisions cannot alter the provisions of binding FCC rules. To the contrary, the FCC's expedited procedures were adopted in recognition of the significant consumer benefit to be derived from network modernization. Any provision that discourages or delays such investment would be not only unlawful, but also contrary to sound policy.

g) Line conditioning

Relevant Provisions: AT&T Amendment, § 3.3(B); MCI Amendment, § 7.4

187. In the *Triennial Review Order*, the FCC did not adopt any new rules related to line conditioning. Instead, it directly stated that "we readopt the [FCC's] previous line and loop

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

conditioning rules for the reasons set forth in the *UNE Remand Order*." 18 FCC Rcd at 17378-79, ¶ 642 (citing *UNE Remand Order*, 15 FCC Rcd at 3775, ¶ 172). Indeed, this Commission has already addressed loop conditioning by Verizon under the FCC's rules. *See, e.g.*, Forty-Fifth Supplemental Order Approving Compliance Tariff Filing, *Continued Costing and Pricing Proceeding for Interconnection, Unbundled Network Elements, Transport and Termination, and Resale*, Docket No. UT-003013, 2003 Wash UTC LEXIS 2, at *5 (Wash. UTC Jan. 7, 2003) (specifically finding that "Verizon's proposed rate structure [for loop conditioning] in its compliance filing is consistent with Commission orders"). Because the requirement to provide line conditioning is not a new obligation, there is no need to address this issue in this generic proceeding to address changes in unbundling obligations. As in the case of line-splitting , Verizon has offered line conditioning terms in its standard contract for years. To the extent particular CLECs' agreements (if any) omit such terms, Verizon has offered to negotiate with such CLECs outside of this arbitration to incorporate the terms into their agreements.

h) Packet Switching

Relevant Provisions: Verizon Amendment 2, § 3.2.1; CCC Amendment, § 1.4.1; AT&T Amendment, §§ 2.21, 2.24

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

Amendment 2, § 3.2.1. Verizon's language is consistent with the FCC's rules, and should be adopted.

189. Various CLECs have proposed, on the other hand, that they should gain access to packet switching that is allegedly used to provide circuit switched services. CCC's Amendment asserts that, "[w]here Verizon is required to provide unbundled Local Switching, it is not relieved of such requirement by virtue of its performance of local switching functionality using facilities other than a circuit switch." CCC Amendment, § 1.1.2; *see also* AT&T Amendment, §§ 2.21, 2.24 (defining "Local Circuit Switching" to include packet switches, and claiming that "Circuit Switching, even if performed by a Packet Switch, is a network element that Verizon is obligated to provide on an Unbundled Network Element basis").

190. Verizon assumes that, in light of the FCC's recent determination that circuit-switching is not subject to unbundling in any circumstances, the CLECs will drop this argument. In any event, the argument is squarely precluded by federal law. The FCC has always held that packet switching need not be unbundled: In the *Local Competition Order*, the FCC expressly "decline[d] to find, as requested by AT&T and MCI, that incumbent LECs' packet switches should be identified as network elements" that must be unbundled.[87] In the *UNE Remand Order*, the FCC again determined that it would "not order unbundling of the packet switching functionality as a general matter," creating only "one limited exception" that is not relevant here.[88] For this reason, Verizon's current interconnection agreements, virtually all of which were approved before release of the *Triennial Review Order*, do not obligate Verizon to unbundle packet switching. The *Triennial Review Order* confirms that any such order would violate

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

[88] *UNE Remand Order,* 15 FCC Rcd at 3835, 3840, ¶¶ 306, 313.

federal law. The FCC again "decline[d] to unbundle packet switching as a stand-alone network element," finding, "on a national basis, that competitors are not impaired without access to packet switching." *Triennial Review Order*, 18 FCC Rcd at 17321, ¶ 537; *see id.* at 17323, ¶ 539 ("there do not appear to be any barriers to deployment of packet switches that would cause us to conclude that requesting carriers are impaired with respect to packet switching"). The FCC also found that its "limited exception to its packet-switching unbundling exemption is no longer necessary." *Id.* at 17321, ¶ 537. Where the FCC has expressly found that competitors are not impaired without UNE access to a network element, state commissions have no authority to require unbundling of that element; any state law purporting to require unbundling would be preempted. *See id.* at 17098-01, ¶¶ 191-195.

191. Finally, in the *Triennial Review Order*, the FCC expressly encouraged carriers to replace circuit switches with packet switches, even while recognizing that the result of such replacement would be the elimination of the incumbent's unbundling obligations. As the FCC explained, "to the extent there are significant disincentives caused by unbundling of circuit switching, incumbents can *avoid* them by deploying more advanced packet switching." *Id.* at 17254, ¶ 447 n.1365 (emphasis added). This Commission has no authority to contradict the FCC's binding judgment in this regard.

i) Network Interface Devices (NIDs)

Relevant Provisions: AT&T Amendment, § 3.4.9

192. Network interface devices, or NIDs, were included in the initial set of UNEs in 1996. The FCC defined "NID" as "a cross-connect device used to connect loop facilities to inside wiring." *Local Competition Order*, 11 FCC Rcd at 15697, ¶ 392 n.852. The FCC later modified the definition of a NID "to include all features, functions, and capabilities of the

facilities used to connect the loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism." *UNE Remand Order*, 15 FCC Rcd at 3801, ¶ 233. In the *Triennial Review Order*, the FCC did not change, but merely reaffirmed, its previous rules: "We conclude that the NID should remain available as an UNE as the means to enable a competitive LEC to connect its loop to customer premises inside wiring." 18 FCC Rcd at 17196, ¶ 356. In addition, this Commission has considered Verizon's rates for NIDs (as included in subloops), *see, e.g.*, Thirty-Eighth Supp. Order, and Verizon's model ICA in Washington already includes terms and conditions for access to the NID, both as a stand-alone element and as needed for access to loops or subloops. Because Verizon's contracts already addresses the current NID requirements, which did not change with the *TRO*, there is no reason to address them in this proceeding. Verizon, therefore, has not proposed any new language regarding its pre-existing obligation to provide access to NIDs as UNEs, and none is necessary.

j) Line Sharing

Relevant Provisions: AT&T Amendment, § 3.3; CCC Amendment, § 1.5.1; MCI Amendment, § 9.7.5

193. In the *Triennial Review Order*, the FCC determined that CLECs are not impaired without unbundled access to the high-frequency portion of the loop and eliminated ILECs' obligation to provide access to line-sharing as a UNE. *See Triennial Review Order*, 18 FCC Rcd at 17132-33, ¶ 255. The FCC also established under its section 201 authority a federal rule governing treatment of existing line-sharing arrangements and a transitional rule governing CLECs' right to establish new line-sharing arrangements. *See id.* at 17137-39, ¶¶ 264-265. Even as to those on-going section 201 obligations, the FCC reaffirmed that CLECs may obtain unbundled access to the HFPL only where "the incumbent LEC is providing, and continues to provide, analog circuit-switched voiceband services on the particular loop." *Id.* at 17140, ¶ 269.

194. In Verizon's Amendment 1, Verizon identifies line sharing as a "Discontinued Facility" in section 4.7.3. This suffices to bring the agreements into accord with federal unbundling rules. To the extent that the FCC mandated a transition period or grandfathering for pre-existing line sharing arrangements, *Id.* 17137-39, ¶¶ 264-265, Verizon is required to comply with this transition plan without an amendment, and regardless of any change-of-law provisions in its existing agreements. In addition, the FCC adopted the line sharing transition plan pursuant to 47 U.S.C. § 201 — not section 251 — so there are no grounds, in any event, to incorporate such requirements into the Washington interconnection agreements as certain CLECs propose. *See, e.g.*, AT&T Amendment, § 3.3.1.2; CCC Amendment, §§ 1.5.1.1, 1.5.1.2.[89] Because interconnection agreements are designed to implement the requirements of section 251 and the FCC's rules adopted thereunder – not other provisions of federal law – the agreements should not be amended to address any transitional arrangements governing line sharing adopted under section 201. Verizon will comply with any valid FCC-mandated transition period or grandfathering requirement, and has reached a number of commercial line sharing agreements under which Verizon will provide the CLECs with line sharing in Washington and other states outside of the 251/252 process – including an agreement with Covad that was praised by the FCC's Chairman.

[89] MCI proposes to amend the definition for "Discontinued Element" so as to add the following italicized phrase: "Line sharing *(subject, however, to the FCC's rules regarding the transition of Line Sharing).*" MCI Amendment, § 9.7.5. As stated above, Verizon must and will comply with any FCC transitional rules, which do not depend for their implementation upon amendment of the interconnection agreements.

Issue 15: What should be the effective date of an Amendment to the parties' agreements?

Relevant Provisions: Verizon Amendment 1, Preamble; Verizon Amendment 2, Preamble; CCC Amendment, §§ 2.1, 2.3, 2.3.4.4; AT&T Amendment, § 3.7.1

195. The effective date of Amendment 1 or 2 should be the date of execution by the parties and approval by this Commission, unless the parties agree to specify a different effective date. This Commission regularly holds that amendments to interconnection agreements are effective on the date of Commission approval. *See, e.g.*, Order Approving Negotiated Twelfth Amended Agreement, *Request of XO Washington, Inc., and Qwest Corp. for Approval of Negotiated Agreement Under the Telecommunications Act of 1996*, Docket No. UT-960356, 2004 Wash UTC LEXIS 90, at *5 (Wash. UTC Feb. 11, 2004) ("The Amended Agreement between XO Washington, Inc., and Qwest Corporation, which the parties filed on January 20, 2004, is approved and *effective as of the date of this Order*.") (emphasis added). Sprint and MCI agree with Verizon.

196. AT&T – joined by the CCC, CTC, and WilTel – also agree with Verizon's position, except that they would require a different effective date — specifically, the *TRO*'s October 2, 2003 effective date – for implementation of the *TRO*'s commingling and conversions provisions. The sole reason for a unique effective date for these provisions is so that a CLEC would receive *pricing* for new EELs/conversions as of the date it made its request to Verizon. As Verizon discusses below in response to issue 21(b)(4), the CLEC proposal here would be inconsistent with the *TRO* – which requires that new unbundling obligations be implemented through an amendment process – and unfair, in that it would allow some parties to pick and choose particular provisions to except from the contract's effective date just to give them a retroactive benefit.

Issue 16: How should CLEC requests to provide narrowband services through unbundled access to a loop where the end user is served via Integrated Digital Loop Carrier (IDLC) be implemented?

Relevant Provisions: Verizon Amendment 2, § 3.2.4; AT&T Amendment, § 3.2.4; MCI Amendment, § 7.2.2; CCC Amendment, § 1.4.4; Sprint Amendment, § 3.3.4

197. Carriers use digital loop carrier ("DLC") systems to aggregate the many copper subloops that are connected to a remote terminal location. At the remote terminal, a carrier multiplexes (*i.e.*, aggregates) such signals onto a fiber or copper feeder loop facility and transports the multiplexed signal to its central office. These DLC systems may be integrated directly into the carrier's switch (*i.e.*, Integrated DLC systems or "IDLC") or not (*i.e.*, Universal DLC systems or "UDLC"). As the FCC has explained, "Universal DLC systems consist of a 'central office terminal' and a 'remote terminal,' *i.e.*, a DLC system in the carrier's central office terminal mirrors the deployment at the remote terminal. . . . By contrast, an Integrated DLC system does not require the use of a central office terminal because the DLC system is integrated into the carrier's switch (thus, the naming convention)." *Triennial Review Order*, 18 FCC Rcd at 17113, ¶ 217 n.667 (citation omitted).

198. In those cases where the ILEC is required to unbundle a loop for an end-user customer who is currently served over IDLC architecture, the FCC recognized that, in most cases, the ILEC will be able to do this "through a spare copper facility or through the availability of Universal DLC systems," but that, "if neither of these options is available, incumbent LECs must present requesting carriers a technically feasible method of unbundled access." *Id.* at 17154, ¶ 297. The unbundling obligation is limited, however, to narrowband services: "we limit the unbundling obligations for narrowband services to the TDM-based features, functions, and capabilities of these hybrid loops." *Id.* at 17154, ¶ 296. In that situation, "we require incumbent

LECs to provide an entire non-packetized transmission path capable of voice-grade service (*i.e.*, a circuit equivalent to a DS0 circuit) between the central office and customer's premises." *Id.* at 17153, ¶ 296.

199. Accordingly, Verizon's proposed language provides that if a CLEC seeks to provide narrowband services via a 2-wire or 4-wire loop that is currently provisioned via IDLC, Verizon will provide a "Loop capable of voice-grade service to the end user customer." Verizon Amendment 2, § 3.2.4. Verizon's language further states that Verizon will provide the CLEC with an existing copper loop or a UDLC loop, where available, at the standard recurring and non-recurring charges. *See id.* § 3.2.4.1. If, and only if, neither a copper loop nor a UDLC loop is available, the CLEC has the option of requesting Verizon to construct the necessary copper loop or UDLC facilities. *See id.* § 3.2.4.2. In that case, the CLEC will be responsible for certain charges associated with the construction of that new loop facility, including an engineering query charge, an engineering work order non-recurring charge, and construction charges. *See id.*

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

201. The CLEC proposals also appear to imply incorrectly that Verizon could be forced to construct a new copper loop at the CLEC's request for free. *See* CCC Amendment, §

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

202. Sprint adds the following italicized language: "3.3.4.1 Verizon will endeavor to provide [the CLEC] with an existing copper Loop, a Loop served by existing Universal Digital Loop Carrier ("UDLC") *or a DS0 voice-grade transmission path between the main distribution frame (or equivalent) in the end user's serving wire center and the end user's customer premises, using time division multiplexing technology*." Then, to the next section, Sprint adds the italicized language: "3.3.4.2 If neither a copper Loop, *TDM transmission path*, nor a Loop served by UDLC is available, ..." Sprint's additions are inappropriate, in that Sprint appears to suggest that Verizon might be obligated to provide a "TDM transmission path" over something *other than* an existing copper loop or UDLC loop, contrary to the FCC's rules.

203. Only Verizon's proposed language correctly implements the FCC's rules, so it should be adopted.

Issue 17: Should Verizon be subject to standard provisioning intervals or performance measurements and potential remedy payments, if any, in the underlying Agreement or elsewhere, in connection with its provision of

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

Relevant Provisions: Verizon Amendment 2, § 3.2.4.3; AT&T Amendment, §§ 3.2.4, 3.2.8; MCI Amendment, § 7.2.

b) Commingled arrangements;

Relevant Provisions: Verizon Amendment 2, § 3.4.1.1; MCI Amendment, § 4.1;

c) conversion of access circuits to UNEs;

Relevant Provisions: Verizon Amendment 2, § 3.4.2.6; MCI Amendment, § 5.5

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

Relevant Provisions: Verizon Amendment 2, § 3.5.2; AT&T Amendment, § 3.8.2; CCC Amendment, § 3.1.1

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

Relevant Provisions: AT&T Amendment, § 3.10.2; CCC Amendment, § 1.9.2

204. Until May 2004, Verizon was obligated, as part of the *Bell Atlantic/GTE Merger Order*, to report its performance in provisioning certain services to CLECs in Washington.[90] These measurements were based on a subset of the measurements developed through collaborative processes overseen by the California Public Utilities Commission, and have been modified from time to time to take account of changes that the California commission has approved. The requirement that Verizon report its performance under the measurements established in the *Bell Atlantic/GTE Merger Order* expired in May 2004. Accordingly, there are no current performance measurement reports that Verizon must provide in Washington that could include Verizon's performance in unbundled loops in response to CLEC requests for access to IDLC-served hybrid loops.

[90] *See Merger Order*, 15 FCC Rcd 14032, App. D, § V & Attach. A.

205. In any event, such orders would appropriately be excluded from the performance measurements that Verizon previously reported under the Merger Order. As the FCC noted in the *Massachusetts 271 Order*,[91] for example, the measurements at issue involved routine and standardized processes that Verizon employs for various tasks. *See, e.g.*, *Massachusetts 271 Order*, 16 FCC Rcd at 9011, ¶ 44 n.124 (noting that measurements concerned "Verizon's calculation of results for a series of metrics measuring Verizon's performance of pre-ordering, ordering, provisioning, maintenance and repair, billing, network performance and operator services functions"). In other words, those measurements were based on the standardized processes that Verizon employs for routine tasks.

206. The measurements contained several exclusions for orders that require non-standard processing, such as when an order is delayed as a result of actions of the end-user customer. For example, providing a CLEC with an unbundled loop to serve a customer currently served using IDLC involves non-standard processes, and generally requires additional provisioning time. *See*, *e.g.*, Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd 27039, 27318-19, ¶¶ 575-578 (2002) (agreeing with Verizon that it needed extra time for provisioning IDLC loops). Thus, the activities set forth in items (a)-(d) above – which are new and non-standardized – should likewise be excluded from existing, standard measures.

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

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

208. Verizon objects to including any consideration of hot cuts in this proceeding, as noted above in response to Issue 9(B)(5) (AT&T's definition of "Hot Cut"). With regard to Verizon's batch hot cut process, the FCC specifically singled out Verizon's hot cut procedures, approved by the New York Commission, as sufficient to eliminate any past concerns about ILECs' hot cut performance. *See TRRO* ¶¶ 211, 213-14. The FCC observed that "any inadequacies in carriers' hot cut performance can be addressed through . . . complaints pursuant to section 271(d)(6)" (*not* through TRO amendment arbitrations). *Id.* ¶ 211. In addition, given the *TRRO*'s effective elimination of the switching UNE, the hot cut issue can be addressed (if need be) through inter-carrier commercial negotiations that will take place outside of sections 251 and 252.

Issue 18: How should sub-loop access be provided under the *TRO*?

Relevant Provisions: Verizon Amendment 2, §§ 3.3.1, 3.3.2; AT&T Amendment, §§ 3.2.3.3, 3.4; CCC Amendment, §§ 1.6, 1.7; Sprint Amendment, § 3.4

209. In Washington, Verizon does not own inside wire subloops. Therefore, the FCC's new rules governing the provisioning of such subloops as UNEs are inapplicable here, and Verizon's Amendment 2 does not include terms relating to such subloops. To the extent that various CLECs have proposed language related to the inside wire subloop,[92] their proposals were

[92] *See, e.g.*, AT&T Amendment, §§ 3.4, 3.4.1, 3.4.2, 3.4.3, 3.4.4, 3.4.5, 3.4.6, 3.4.7, 3.4.8, 3.4.9.

apparently drafted for use in other states where Verizon does own inside wire subloops. Such proposals are inapplicable here and should be rejected.

210. Verizon has proposed, in Amendment 2, provisions addressing the FCC's new UNE rule for *distribution* subloop facilities, which Verizon does own in Washington. *See* Verizon Amendment 2, § 3.3.1. In the *Triennial Review Order*, the FCC "define[d] the copper subloop UNE as the distribution portion of the copper loop that is technically feasible to access at terminals in the incumbent LEC's outside plant (*i.e.*, outside its central offices)," and held further that "any point on the loop where technicians can access the cable without removing a splice case constitutes an accessible terminal." 18 FCC Rcd at 17132, ¶ 254. Verizon accordingly provides that CLECs "may obtain access to the Distribution Sub-Loop Facility at a technically feasible access point located near a Verizon remote terminal equipment enclosure. . . . It is not technically feasible to access the sub-loop distribution facility if a technician must access the facility by removing a splice case to reach the wiring within the cable." Verizon Amendment 2, § 3.3.1.

211. Sprint makes a few minor modifications. Where Verizon's language states that CLECs can gain access "at a technically feasible access point located near a Verizon remote terminal equipment enclosure," *id.*, Sprint would split this sentence in two: CLECs can gain access "at a technically feasible access point within Verizon's outside plant. Verizon offers access near a Verizon remote terminal equipment enclosure . . . ." Sprint Amendment, § 3.4.2. Verizon's language, however, is closer to the federal rules, which explicitly require the ILEC to "provide access to a copper subloop at a splice *near a remote terminal*." 47 C.F.R. § 51.319(b)(1)(i) (emphasis added).

212. Next, Sprint appends the following language: "except that Verizon will provide access near a remote terminal at a splice near a remote terminal on a site-specific request. In such cases and for other requests not covered by the rates and charges included in the Amended Agreement, pricing will be determined on an individual case basis and will be TELRIC based." Sprint Amendment, § 3.4.2. Verizon's language, however, already covers the possibility of "an access point located near a Verizon remote terminal," and the sentence referring to TELRIC is superfluous (TELRIC necessarily applies to FCC-mandated unbundling).

213. Verizon's language is consistent with the FCC's rule, and it should be adopted.

Issue 19: Where Verizon collocates local circuit switching equipment (as defined by the FCC's rules) in a CLEC facility/premises (*i.e.*, reverse collocation), should the transmission path between that equipment and the Verizon serving wire center be treated as unbundled transport? If so, what revisions to the parties' agreements are needed?

Relevant Provisions: AT&T Amendment, §§ 2.5(B), 2.7

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

Issue 20: Are interconnection trunks between a Verizon wire center and a CLEC wire center, interconnection facilities under section 251(c)(2) that must be provided at TELRIC?

Relevant Provisions: CCC Amendment, § 1.8; AT&T Amendment, § 3.6.2.2

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

216. Sprint claims that interconnection facilities were at issue in *TRRO* ¶ 140. But paragraph 140 simply states that "our finding of non-impairment with respect to entrance facilities *does not alter* the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service." *Id.* (emphasis added). In other words, the FCC merely acknowledged that section 251(c)(2), which requires access to "the facilities and equipment" used by CLECs for "interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access . . . ." continues to impose the same obligations as before. 47 U.S.C. § 251(c)(2). Nothing in the *TRO* or *TRRO* expands upon or alters any pre-existing rights or obligations relating to the use of interconnection facilities under

section 251(c)(2), so it would be improper to litigate any such issues in this proceeding to address *changes* in unbundling rules.

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

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?

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

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

Amendment 2, § 3.4.2.3. This language precisely implements the criteria established in the *Triennial Review Order*, where the FCC required the following: (a) the CLEC must certify the "local number assignment to a DS1 circuit," 18 FCC Rcd at 17356, ¶ 602, (b) "each DS3 must have at least 28 local voice numbers," *id.*, (c) the date of each circuit's establishment, which would enable the CLEC to certify "that it will not begin to provide service until a local number is assigned and 911 or E911 capability is provided," *id.*, (d) the CLEC should specify the collocation termination connecting facility assignment for each circuit, because "termination of a circuit into a section 251(c)(6) collocation arrangement in an incumbent LEC central office is an effective tool to prevent arbitrage," *id.* at 17356, ¶ 604, and (e) the interconnection trunk information, which would enable the CLEC to certify that "each EEL circuit" was "served by an interconnection trunk in the same LATA as the customer premises served by the EEL," *id.* at

17358, ¶ 607. Finally, the FCC stated "that each EEL circuit must be served by a Class 5 switch or other switch capable of providing local voice traffic." *Id.* at 17360, ¶ 610.

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

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

b) Conversion of existing circuits/services to EELs:

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

Relevant Provisions: CCC Amendment, § 2.3.2; AT&T Amendment, § 3.7.2.4

220. Verizon's Amendment does not provide for separation or other physical alteration of existing facilities when a CLEC requests an EEL conversion. While Verizon would not expect a standard conversion to require any physical alteration of the facilities used for wholesale services that may be converted to UNEs, an inflexible, uniform prohibition on all alterations might preclude those that Verizon might find necessary to convert wholesale services to UNEs in particular instances. Removing the parties' flexibility to address situations that depart from the norm would likely just delay requested conversions.

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?

Relevant Provisions: Verizon Amendment 2, §§ 3.4.1.1, 3.4.2.4, 3.4.2.5; AT&T Amendment, § 3.7.2.2; CCC Amendment, § 2.3; MCI Amendment, § 5.3.[93]

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

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

[93] Sprint apparently agrees with Verizon on this issue.

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

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

225. Verizon is therefore entitled to recover its costs of conversions (Amendment 2, § 3.4.2.4), and to be compensated for the costs of retagging a circuit (*id.* § 3.4.2.5). When Verizon incurs costs for conversions, retagging circuits, or any other activity performed for a CLEC, it is entitled to recover its costs of doing so. Contrary to the CLECs' claims, the FCC has not

prohibited conversion charges, and the *TRO* Amendment should not do so, either. Verizon thus asks the Commission to approve the rates it has proposed in the pricing attachment to its Amendment 2 on an interim basis, subject to true-up upon completion of a later cost proceeding.

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

Relevant provisions: Verizon Amendment 2, § 3.4.2.1.

226. Prior to the *Triennial Review Order*, the FCC had imposed safeguards to prevent CLECs from using a combination of UNEs known as an EEL to displace special access,[94] a result that the FCC determined would undermine existing facilities-based competition in the highly competitive special access market. Specifically, the FCC required that UNEs be used to provide "a significant amount" of local exchange service, and it prohibited "commingling" of UNEs and special access. The D.C. Circuit upheld those safeguards. *See Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002).

227. In the *Triennial Review Order*, however, the FCC modified its EEL eligibility requirements. *See* 18 FCC Rcd at 17356-61, ¶¶ 601-611. Various CLECs propose deleting Verizon's language requiring re-certification in accordance with these new standards. But when the FCC established its new eligibility criteria, it made clear that those criteria apply to *all* EELs, with no exceptions or grandfathering for pre-existing EELs that a CLEC might have obtained under the old rules. *See id.* at 17355, ¶ 599 ("We apply the service eligibility requirements on a circuit-by-circuit basis, so *each DS1 EEL* (or combination of DS1 loop with DS3 transport) *must satisfy the service eligibility criteria*.") (emphases added). Although the FCC identified three

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

specific instances in which a CLEC must provide a certification that its EELs satisfy these criteria, the FCC did not suggest that those examples were the only such instances. Nor did the FCC indicate that existing EELs would be grandfathered and could remain in service regardless of whether they satisfied the current certification criteria. Because the new rules differ from the old ones, an EEL that qualified under the old criteria will not necessarily continue to qualify under the new criteria.

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

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

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

Relevant provisions: AT&T Amendment, § 3.7.1; CCC Amendment, §§ 2.1, 2.3, 2.3.4.4.

230. Several CLECs argue that the *TRO*'s new commingling and conversion obligations should take effect retroactively to the October 2, 2003 effective date of the *TRO*, rather than upon the effective date of the Amendment, as all other provisions will. AT&T Amendment, § 3.7.1; CCC Amendment, §§ 2.1, 2.3, 2.3.4.4. The CLECs' admitted rationale for

this unique carve-out to the otherwise effective date of the Amendment is solely to receive more favorable UNE pricing for the facilities at issue for the time before the Amendment took effect. *See* CCC Amendment, § 2.3.4.4. But the FCC in the *TRO* declined to override existing contracts to order automatic implementation of its rules as of a date certain (as it did with the *TRRO* transition plan). Instead, it required carriers to use section 252 to amend their agreements, where necessary, to implement the *TRO* rulings: "[T]o the extent our decision in this Order changes carriers' obligations under section 251, we decline the request . . . that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions." 18 FCC Rcd. at 17404, ¶ 701.

231. The FCC, of course, expected any necessary amendments to be completed by no later than July of last year, nine months from the *TRO*'s effective date — and amendments *would* have been completed within that timetable but for CLECs' efforts to delay this arbitration proceeding. The CLECs' continuing obstruction means that they were not able to proceed to arbitration of any amendments terms, including those that are favorable to them. The CLECs should not be rewarded for ignoring the FCC's directive to promptly amend their contracts by awarding them two years' worth (or more, by the time amendments are executed) of the difference between their existing contract rate that applies under the special access tariff from which the CLEC ordered the circuits as channel termination facilities and the lower contract rate for UNE EELs. Accepting the CLECs' retroactive billing proposal would impose a substantial, unanticipated, and unjustified liability on Verizon. It would also be inequitable to allow the CLECs to implement rates favorable to them back to October 2, 2003, but not to give Verizon the benefit of access or other non-section 251 rates for UNEs that the *TRO* eliminated effective as of October 2, 2003. Of course, the CLECs have not suggested this reciprocal approach.

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

Relevant Provisions: Verizon Amendment 2, § 3.4.2.7; AT&T Amendment, § 3.7.2.8; CCC Amendment, § 2.2.3; Sprint Amendment, § 3.5.2.1.

232. ILECs have the right to "obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria." *Triennial Review Order*, 18 FCC Rcd at 17369, ¶ 626. The auditor "must perform its evaluation in accordance with the standards established by the American Institute for Certified Public Accountants," and the audit may "include an examination of a sample selected in accordance with the independent auditor's judgment." *Id.* If the auditor "concludes that the competitive LEC failed to comply with the service eligibility criteria, that carrier must true-up any difference in payments, convert all noncompliant circuits to the appropriate service, and make the correct payments on a going-forward basis." *Id.* at 17370, ¶ 627. In addition, if the auditor "concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor." *Id.* Similarly, if the auditor "concludes that the requesting carrier complied in all material respects with the eligibility criteria, the incumbent LEC must reimburse the audited carrier for its costs associated with the audit." *Id.* at 17370, ¶ 628.

233. Verizon's language mirrors the FCC's requirements. Specifically, Verizon provides that it "may obtain and pay for an independent auditor to audit [the CLEC's] compliance in all material respects with the service eligibility criteria," and that the "audit shall be performed in accordance with the standards established by the American Institute for Certified Public Accountants, and may include, at Verizon's discretion, the examination of a sample selected in accordance with the independent auditor's judgment." Amendment 2, §

3.4.2.7. If the "report concludes that [the CLEC] failed to comply with the service eligibility criteria for any DS1 or DS1 equivalent circuit, then [the CLEC] must convert all noncompliant circuits to the appropriate service, true up any difference in payments, make the correct payments on a going-forward basis, reimburse Verizon for the entire cost of the audit within thirty (30) days after receiving a statement of such costs from Verizon." *Id.* On the other hand, if the auditor confirms the CLEC's "compliance with the service eligibility criteria for each DS1 or DS1 equivalent circuit, then [the CLEC] shall provide to the independent auditor for its verification a statement of [the CLEC's] out-of-pocket costs of complying with any requests of the independent auditor, and Verizon shall then reimburse [the CLEC] for its out-of-pocket costs within thirty (30) days of the auditor's verification of the same." *Id.* Verizon also provides that the CLEC "shall maintain records adequate to support its compliance with the service eligibility criteria for each DS1 or DS1 equivalent circuit for at least eighteen (18) months after the service arrangement in question is terminated." *Id.*

234. AT&T disagrees with Verizon's requirement that a CLEC reimburse Verizon for the entire cost of an audit where an auditor finds that the CLEC failed to comply with the service eligibility criteria for any DS1 circuit (*see* Amendment 2, § 3.4.2.7).[95] Indeed, AT&T claims that this requirement has no basis in the *Triennial Review Order*. AT&T is wrong; as described above, the FCC clearly imposed such an obligation on CLECs that fail eligibility audits. Indeed, this is only fair, given that Verizon will also reimburse the CLEC for its audit-related costs if it passes the audit (as required by *Triennial Review Order*, 18 FCC Rcd at 17370, ¶ 628).

235. WilTel believes that the standard of noncompliance with the criteria should require "*material*" noncompliance before a CLEC would pay auditing costs and/or have to

[95] Likewise, the CCC complains about Verizon's proposed allocation of responsibilities of payment for the audit.

convert the circuits and true-up payments, etc. But Verizon's language is perfectly symmetrical, in that (1) it requires the CLEC to reimburse Verizon when it fails the audit; and (2) it requires Verizon to reimburse the CLEC when it passes the audit. In any event, WilTel's suggestion should make little difference, as any failure to comply with the FCC's requirements that resulted in provision of EELs for which the requesting carrier was ineligible would be material, and there is no sense in inserting a subjective standard that could lead to disputes.

236. The CCC also has several disagreements with Verizon's proposed language. For example, it argues that Verizon is entitled only to one audit of a CLEC's books in a 12-month period, not once per calendar year as Verizon has proposed, and that, in order for an audit to be considered "annual," a full year would have to elapse between audits. It further claims that, under Verizon's proposal, Verizon could audit a CLEC's books in December, and then audit again in January of the following year. *Id.* But the CCC is arguing against a straw man; it presents no reason to think that Verizon or anyone else will attempt to demand an audit two months in a row. Indeed, if the CLEC failed the audit, there would be no need to repeat the audit a mere month later; and, if the CLEC passed the audit, Verizon would hardly wish to repeat the process and find itself liable for paying the CLEC's expenses a second time. Even in the exceedingly unlikely event that Verizon did request an audit in December and then again in January, it would then automatically have to wait at least 12 months until the *next* audit, because the next "calendar year" would not begin until the following January.

237. Verizon's language encompasses the far more likely situation in which, for example, Verizon might need to audit a given CLEC in September of one year, and then in August of the next year. The CCC's language, by contrast, would rigidly and unnecessarily

prevent the next year's audit from taking place before a full 12 months had elapsed, no matter how pressing the need for an audit at that time.

238. The CCC also complains that Verizon's proposal that a CLEC keep books and records for a period of 18 months after an EEL arrangement is terminated is not supported by anything in the *Triennial Review Order*, and that the proposed interval is unreasonably long and unduly burdensome. But given that this information resides only with the CLEC, it is not unduly burdensome for the CLEC to keep the information on hand in the event of an audit. Indeed, under both the CCC's and Verizon's proposals, an audit might take 18 months or even more after the EEL arrangement in question was ordered (*i.e.*, an EEL arrangement might be ordered in early 2005 and audited in late 2006). Given the possibility for such a delay, an 18-month recordkeeping obligation is consistent with the nature and purpose of the audit requirement. As the FCC said, "[a]lthough we do not establish detailed recordkeeping requirements in this Order, we do expect that requesting carriers will maintain the appropriate documentation to support their certifications." *Triennial Review Order*, 18 FCC Rcd at 17370, ¶ 629.

239. Sprint proposes to add the following language: "To be clear, the service eligibility criterion contained in 47 C.F.R. § 51.318 does not apply to DS1 channel terminations combined with DS1 or DS3 access service." Sprint Amendment, § 3.5.2.1. This addition is improper and unnecessary. The Amendment should not address any potential for combining access services with other access services. Instead, such matters are controlled by Verizon's access tariffs. In addition, nothing in Verizon's Amendment purports to apply the service eligibility criteria to the situation Sprint describes.

Issue 21: How should the Amendment reflect an obligation that Verizon perform routine network modifications necessary to permit access to loops, dedicated transport, or dark fiber transport facilities where

Verizon is required to provide unbundled access to those facilities under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51?

Relevant Provisions: Verizon Amendment 2, § 3.5; AT&T Amendment, § 3.8; CCC Amendment, § 3; Sprint Amendment, § 3.6.[96]

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

> rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; and attaching electronic and other equipment that the incumbent LEC ordinarily attaches to a DS1 loop to activate such loop for its own customer. They also include activities needed to enable a requesting telecommunications carrier to obtain access to a dark fiber loop. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the construction of a new loop, or the installation of new aerial or buried cable for a requesting telecommunications carrier.

47 C.F.R. § 51.319(a)(7)(ii). Accordingly, Verizon's language provides that "Verizon shall make such routine network modifications, at the rates and charges set forth in the Pricing

[96] With minor exceptions, Sprint does not modify Verizon's language here. MCI's Amendment does not have a section on routine network modifications.

Attachment to this Amendment, as are necessary to permit access" by the CLEC to the UNE, "where the facility has already been constructed." Verizon Amendment 2, § 3.5.1.1. Just as in the FCC's rule and the *Triennial Review Order*, Verizon's language specifies that:

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

Verizon Amendment 2, § 3.5.1.1.

241. AT&T adds this sentence: "Determination of whether a modification is 'routine' shall be based on the tasks associated with the modification, not on the end-user service that the modification is intended to enable." AT&T Amendment, § 3.8.1. In an attempt to support this language, it argues that Verizon's language limits routine network modifications to only those that support services that mimic a Verizon end-user service offering, and only to the exact same degree that Verizon would do for its own customers, and urges that it should be to offer unique and differentiable services by coupling UNEs with AT&T-deployed new technologies. But AT&T's addition is unnecessary: Nothing in Verizon's language limits routine network modifications to any particular services at all, provided that the modifications meet the FCC's governing standard.

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

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

244. AT&T, MCI, CTC, CCC, and Conversent also claim that Verizon is already compensated for routine network modifications by its recurring charges for the element in question. They provide no objective evidence to support this claim, which is not true.

245. The Commission has already set rates for some elements in Verizon's pricing schedule, and Verizon is not seeking to change those here. As to the rates that have not been set by the Commission, Verizon proposes to charge them on an interim basis, pending completion of a cost case. Verizon did not submit a cost study in this phase of the case because, until the FCC released its new rules, Verizon could not determine the precise parameters of such a study. Therefore, there was insufficient time to prepare thorough studies for the numerous jurisdictions in which arbitration proceedings are underway. In addition, cost proceedings are typically protracted and raise complicated fact issues. Given the FCC's directive to promptly conclude proceedings to implement the no-impairment rulings in the *TRO* and the *TRRO*, and the number of non-cost issues the Commission must consider, it is not reasonable to litigate and resolve costing and pricing issues in this phase of the proceeding. Therefore, Verizon recommends that the Commission adopt the rates specified in Verizon's pricing attachment to Amendment 2,

including the routine network modification rates, on an interim basis, pending completion of a pricing proceeding to be held later. To the extent Verizon is required to provide the services covered in Amendment 2, it is also entitled to payment for them. The interim rates will assure cost recovery until the Commission can set permanent rates.

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

Issue 23: Should the parties retain their pre-Amendment rights arising under the Agreement, tariffs, and SGATs?

Relevant Provisions: Verizon Amendment 1, §§ 2.1, 2.3, 3.1, 3.4, 4.5, 4.7; Verizon Amendment 2, §§ 1, 2.1, 2.3, 2.4, 3.1, 3.2.1, 3.2.2, 3.2.3, 3.2.4, 3.3.1, 3.4.1, 3.4.1.2.2, 3.4.2, 3.5.3, 4.5, 4.7; AT&T Amendment, §§ 1.1, 2, 3.2.2.3, 3.2.3.1, 3.2.3.2, 3.2.3.3, 3.2.4, 3.3, 3.6.2, 3.6.3, 3.7.1; MCI Amendment, §§ 3.1, 3.4; WilTel Amendment, § 3.4.

247. Verizon filed its arbitration petition to eliminate any doubt regarding its right to cease providing unbundled access to facilities as to which its unbundling obligation under section 251 of the Act has been removed. Verizon cannot lawfully be required under any interconnection contract to continue providing unbundled access to facilities that are no longer UNEs under section 251. Moreover, most agreements (or tariffs or SGATs, where applicable) already contain provisions that clearly authorize Verizon to cease providing at least some discontinued UNEs, so there is no basis for giving a few carriers the discriminatory advantage of being able to retain UNEs that have been discontinued for all other carriers. Accordingly, Verizon's Amendment specifically reserves any existing rights that Verizon has to cease providing discontinued UNEs.

248. At the same time, Verizon's proposed Amendment makes clear that the limitations on Verizon's unbundling obligations established in the core provisions of the Amendment are "[n]otwithstanding any other provision of this Agreement, this Amendment, or

any Verizon tariff." Verizon Amendment, §§ 2.1, 3.1; *see also* Verizon Amendment 2, §§ 2.4, 3.5.3. Because the Amendment will be binding as a matter of federal law, it supersedes any inconsistent obligation, wherever it may be found.

249. AT&T, WilTel, CCC, and CTC have complained that Verizon has not specified any particular tariffs that will continue to apply, and claim that inclusion of such vague and ambiguous language in the Agreement can only cause confusion as to the parties' rights and obligations. The challenged language is clear and important: it makes clear that the Amendment defines the parties' obligations with regard to provision of unbundled network elements notwithstanding *any* other provisions in other regulatory instruments. No party should need to conduct an exhaustive review of every tariff that might potentially affect a term or condition or right, and then to incorporate particular tariff references into the Agreement. For the reasons explained above, that properly reflects the requirements of federal law.

250. Finally, WilTel twice adds the qualifier: "provided that such other rights do not conflict with this Amendment." WilTel Amendment, § 3.4. This addition would render Verizon's provision ineffective: the whole point is to specify that discontinuance rights that are in addition to the Amendment might exist elsewhere.

Issue 24: Should the Amendment set forth a process to address the potential effect on the CLECs' customers' services when a UNE is discontinued?

Relevant Provisions: AT&T Amendment, § 3.9; MCI Amendment, § 8.

251. Verizon's Amendment 1 sets out a clear and fair process for transitioning away from UNE arrangements when Verizon is no longer required to provide such an arrangement under section 251(c)(3) (in the event the FCC does not prescribe a different transition process). Under section 3.1, Verizon will provide at least ninety days' notice that a given UNE has been

discontinued, at which point Verizon will stop accepting new orders for the UNE in question. Section 3.2 then provides that, during the 90-day notice period, a CLEC that wishes to continue to obtain access to the facilities used to provide the discontinued UNE arrangement can make an alternative arrangement (whether through a separate, commercial agreement, an applicable Verizon special access tariff, or resale). If the CLEC has not selected any of those options, Verizon's language provides that Verizon can reprice the discontinued UNE in question at a rate equivalent to the applicable special access or resale rate. *See* Verizon Amendment 1, § 3.2.

252. The CLECs are, of course, free to take measures they deem appropriate to address potential effects on their own end users' services. They will have plenty of time to do so; for example, as discussed at length above, the FCC has imposed a 12-month transition period for the CLECs' embedded base of de-listed mass-market switching, loops, and transport, and an 18-month period for embedded dark fiber loops and transport.

253. The potential impact of a UNE discontinuation is, therefore, wholly within the CLECs' control. Verizon will not disconnect any CLEC unless the CLEC chooses that option. In the event that a CLEC elects to stop providing service to its customers following the discontinuance of a UNE, it is the responsibility of the CLEC — not Verizon — to provide its customers with appropriate notice. It would not be appropriate to address a CLEC's obligations to its customers in the context of an interconnection agreement between an ILEC and a CLEC.

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

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?

Relevant Provisions:

255. This Issue was addressed in the context of Issue 21, and Verizon refers the Commission to that discussion.

Issue 26: **Should the Amendment reference or address commercial agreements that may be negotiated for services or facilities to which Verizon is not required to provide access as a Section 251 UNE?**

Relevant Provisions: Sprint Amendment 2, § 3.5.2.2.

256. As discussed in response to Issue 2, Verizon is not required to negotiate, and cannot be forced to arbitrate, issues that are not related to Verizon's unbundling obligations under section 251(c)(3) of the Act. While commercial agreements are not subject to negotiation or arbitration under section 252, a reference to commercial arrangements appropriately signifies that CLECs have other options in case of the elimination of a UNE. Thus, section 3.2 of Verizon's Amendment 1 makes clear that a CLEC may "continue to obtain access to a Discontinued Facility under a separate arrangement."

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

258. Verizon would consider omitting any reference to commercial agreements provided that the Amendment is otherwise clear as to Verizon's right to take such action upon a CLEC's failure to put in place an alternative arrangement. The principal reason that CLECs object to references to commercial agreements, however, is that they argue that a commercial agreement would almost never become an issue because any "gap" in Verizon's unbundling

obligation would, they argue, always be filled by an obligation under some other "Applicable Law," which is incorrect for reasons explained herein.

Issue 27: Should Verizon provide an access point for CLECs to engage in testing, maintaining and repairing copper loops and copper subloops?

Relevant Provisions: None.

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

Issue 28: What transitional provisions should apply in the event that Verizon no longer has a legal obligation to provide a UNE? How should the Amendment address Verizon's obligations to provide UNEs in the absence of the FCC's permanent rules? Does section 252 of the 1996 Act apply to replacement arrangements?

Relevant Provisions: Verizon Amendment 1, § 3.1; MCI Amendment, § 8; WilTel Amendment, §§ 2.1, 2.3, 3.1, 3.2.

260. This Issue has been addressed under Issues 1 and 2; those responses apply here, as well. In addition, the second question in Issue 28 is obviously moot now that the *TRRO* has issued.

Issue 29: Should Verizon be required to negotiate terms for service substitutions for UNEs that Verizon no longer is required to make available under section 251 of the Act?

Relevant Provisions: None.

261. *See* Verizon's response to Issue 2.

Issue 30: **Should the FCC's permanent unbundling rules apply and govern the parties' relationship when issued, or should the parties not become bound by the FCC order issuing the rules until such time as the parties negotiate an amendment to the ICA to implement them, or Verizon issues a tariff in accordance with them?**

Relevant Provisions: None.

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

263. Verizon refers the Commission to its response to Issue 10, which also addresses this issue.

Issue 31: Do Verizon's obligations to provide UNEs at TELRIC rates under applicable law differ depending upon whether such UNEs are used to serve the existing customer base or new customers? If so, how should the Amendment reflect that difference?

Relevant Provisions: AT&T Amendment, § 3.1.7.

264. All carriers must comply with the mandatory transition plan the FCC established in its *Triennial Review Remand Order*, which distinguishes between the embedded base and new orders. For the embedded base, the FCC has established a 12-month transition period, including transitional rates, for mass-market switching, dedicated transport, and high-capacity loops; and an 18-month transition period for dark fiber loops and transport. The FCC's transition plan does not permit CLECs to add new UNEs where the FCC has determined that no section 251(c) unbundling obligation exists. *See TRRO* ¶¶ 5, 142, 195, 199, 227.

265. Verizon's Amendment captures Verizon's obligations under the *TRRO*. Once Verizon's obligation to provide a UNE has been *completely* eliminated (*i.e.*, any FCC-prescribed transition periods are over), then, by federal law, Verizon is not required to provide that item at TELRIC rates to any customer, new or existing. As discussed, there is no need for an amendment to reflect the FCC's mandatory transition plan, because that plan implements automatically, by FCC fiat, as of March 11, 2005.

266. AT&T's definition of UNE obligations for "new customers," however, would allow AT&T to override the FCC's no-new-adds directive and to keep ordering delisted UNEs for new customers until "the Amendment Effective Date," which will be several months beyond the March 11, 2005 cut-off the FCC has mandated. AT&T Amendment, § 3.1.7. This directly contravenes the FCC's order that, for mass-market switching (and thus the UNE-P) and de-listed high-capacity loops and transport, no new facilities may be added after March 11, 2005, irrespective of any provisions of section 252 agreements. AT&T also cannot circumvent the

FCC's no-new-adds directive by including language that provides that "new customers" do not include "existing customers for which AT&T is providing additional or expanded services or facilities on or after the effective date of this Amendment." Id. Under such an approach, AT&T would be able to order UNE-P arrangements, high-capacity loops or transport (where unimpaired under the FCC's criteria), or any other discontinued elements in order to provide additional service to an "existing" customer. The Commission must reject AT&T's language because it would give AT&T rights beyond those granted in TRRO and the Triennial Review Order, neither of which allows CLECs to keep purchasing additional de-listed UNEs for existing customers. Indeed, both the federal courts and the FCC concur that unbundling obligations must be "targeted" such that overly broad "unbundling does not frustrate sustainable, facilities-based competition." TRRO ¶ 2; see also USTA II. It would frustrate this goal if AT&T (or other CLECs) were able to maintain and even expand their leased UNEs simply on the basis that they are serving "existing" customers.

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

Relevant Provisions: Verizon Amendment 2, Pricing Attachment.

267. Yes. The FCC's new rules, particularly as to routine network modifications, require Verizon to provide services to requesting CLECs for which no prices have yet been established under existing interconnection agreements. Verizon has the right to be compensated for performing such services. Accordingly, Verizon should be permitted to charge the rates listed in the Amendment 2 Pricing Attachment on at least an interim basis, pending submission of an appropriate cost study in the future. *See* Verizon's response to Issue 21.

III. CONCLUSION

268. The Commission should adopt Verizon's proposed amendment.

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ORAL ARGUMENT SCHEDULED FOR JANUARY 28, 2004

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 00-1012 (AND CONSOLIDATED CASES)

UNITED STATES TELECOM ASSOCIATION, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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VII. PETITIONERS' CHALLENGES TO FCC PREEMPTION OF STATE AUTHORITY TO REQUIRE UNBUNDLING ARE UNRIPE.

The states (and, to a lesser extent, the CLECs) challenge the *Order* on grounds that the FCC unlawfully preempted state authority to impose unbundling requirements on ILECs. State Br. 4-9, 17-22; CLEC Br. 44-45. The CLECs acknowledge, however, that this "preemption issue is not ripe." CLEC Br. 44.

Although the states suggest otherwise, the *Order* did *not* preempt states from adding to the unbundling requirements that the FCC adopted. In the *Order*, the Commission simply observed that section 251(d)(3) "preserves states' authority to impose unbundling obligations ... *only* if" such obligations are "consistent with the Act" and do "not substantially prevent the implementation" of the federal regime. *Order* ¶193 (JA 123) (emphasis added); *see also* 47 U.S.C. §§251(d)(3)(B)-(C). The agency also said that parties could petition the FCC for a declaratory ruling that a particular state unbundling obligation exceeds the statutory limits on state authority. *Order* ¶195 (JA 124). On this subject, the Commission stated: "If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has ... declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of section 251(d)(3)(C)." *Ibid.*

The FCC's "announcement of its intent to preempt inconsistent state regulations should they arise does not constitute reviewable final action by the agency." *Alascom v. FCC,* 727 F.2d 1212, 1219 (D.C. Cir. 1984). By inviting parties to seek rulings on specific state actions, the Commission "has expressed its willingness to consider on an individualized basis whether any state rule that might in the future be adopted is inconsistent with national policy." *Id.* at 1220.

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Any future proceedings of this sort will likely revolve around specific factual issues. "The presence of such fact-intensive inquiries mandates deferral of review until an actual preemption of a specific state regulation occurs." *Ibid.* In view of these considerations, the Court should dismiss the states' preemption claim as unripe.

Even if this claim were ripe, it is unfounded. It rests largely on section 251(d)(3), which preserves state authority to adopt unbundling rules so long as they are "consistent with the requirements" of section 251 and do "not substantially prevent implementation of the requirements" of section 251 "and the purposes of this part." 47 U.S.C. §251(d)(3). But section 251(d)(3) authorizes preemption of state requirements that "substantially prevent implementation of the requirements" of section 251; and it recognizes the FCC's power to prescribe and enforce "regulations to implement the requirements" of section 251. *Ibid.* Thus, by the statute's own terms, any state law that undermines the FCC's implementing rules would "substantially prevent implementation of the requirements" of section 251. In that circumstance, the Act permits preemption.

Contrary to the states' contention, Congress has explicitly defined "the requirements of section 251" to incorporate the FCC's implementing rules. Section 252(c)(1) requires state commissions to resolve interconnection disputes in accordance with "the requirements of section 251, *including* the regulations prescribed by the Commission pursuant to section 251." 47 U.S.C. §252(c)(1) (emphasis added). This language leaves no doubt that FCC regulations are "requirements of section 251."

To be sure, an implementing regulation in some circumstances might be permissive rather than mandatory; and a state rule requiring something that the federal agency permits but

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does not require would not necessarily undermine a federal statutory requirement. In the UNE context, however, a decision by the FCC not to require an ILEC to unbundle a particular element essentially reflects a "balance" struck by the agency between the costs and benefits of unbundling that element. *USTA*, 290 F.3d at 427; *Order* ¶¶4-5, 235 (JA 7-8, 144). Any state rule that struck a different balance would conflict with federal law, thereby warranting preemption.[41]

The states' contrary position ignores a long line of Supreme Court precedent. The federal government has the power to preempt any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). In assessing whether such a conflict exists, the Supreme Court has emphasized that "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153 (1982). "The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC,* 486 U.S. 57, 64 (1988). Unless Congress expressly states otherwise, a statutory "saving clause" that

[41] For example, the Commission declined to unbundle the packetized functionality of ILEC loops. A state requirement to reverse that decision would substantially prevent implementation of the Act.

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preserves some state authority does not diminish the preemptive force of federal regulations. *Geier v. American Honda Motor Co.,* 529 U.S. 861, 869-74 (2000).[42]

VIII. NASUCA LACKS STANDING.

The Court should dismiss NASUCA's petition for lack of standing. A party invoking federal jurisdiction bears the burden of establishing Article III standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). This Court has declared that "a petitioner whose standing is not self-evident should establish its standing" by submitting arguments, affidavits, and other relevant evidence "at the first appropriate point in the review proceeding" (in this case, in the petitioner's opening brief). *Sierra Club v. EPA,* 292 F.3d 895, 900 (D.C. Cir. 2002). NASUCA has not satisfied this threshold requirement. Its brief never explains how the agency actions it challenges have injured the consumer interests it represents. Having failed to demonstrate any concrete or particularized injury, NASUCA lacks standing. *Rainbow/PUSH Coalition v. FCC,* 330 F.3d 539 (D.C. Cir. 2003).

In any event, NASUCA's arguments lack merit. Contrary to NASUCA's assertion (Br. 6-11), there is nothing unlawful about the Commission's sensible plan to improve hot cut performance. That initiative was reasonably designed to advance the statute's procompetitive goals by removing a significant barrier to market entry. *Order* ¶¶460, 487 (JA 287, 309-10). NASUCA also is wrong to suggest (Br. 11-12) that the FCC's revised impairment test eliminated

[42] The Supreme Court's recognition of the preemptive force of federal regulations casts serious doubt on the Eighth Circuit's ruling that section 251(d)(3) does not permit the FCC to preempt state rules that are "merely" inconsistent with FCC regulations. *See Iowa Utilities Board,* 120 F.3d at 806-07 (cited in States Br. 7-8). That legally dubious conclusion does not bind this Court in any event. The Eighth Circuit's ruling rested in part on that court's flawed assumption that Congress intended to confine FCC regulation of local telecommunications competition to a few expressly designated areas. The Supreme Court firmly rejected that premise. *See AT&T,* 525 U.S. at 378 n.6.

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any real distinction between the two access standards prescribed by section 251(d)(2). The "necessary" standard for unbundling proprietary network elements under section 251(d)(2)(A) requires a determination that lack of access would "*preclude* a requesting carrier from providing the services it seeks to offer." *UNE Remand Order* ¶44 (emphasis in original); *see also Order* ¶¶170-171 (JA 108-09). By contrast, the Commission's impairment test under section 251(d)(2)(B) requires a finding that lack of unbundled access would "*likely*" make market entry "*uneconomic*." *Id.* ¶84 (JA 58) (emphasis added).

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CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of March, 2005, served the true and correct original, along with the correct number of copies, of ***Verizon's Opening Brief*** and ***Certificate of Service*** upon the WUTC, via the method(s) noted below, properly addressed as follows:

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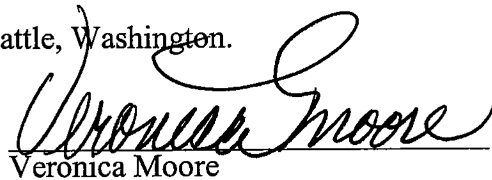
DATED this 11th day of March, 2005, at Seattle, Washington.



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