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 PETITION FOR COMMISSION REVIEW OF ARBITRATOR'S REPORT AND DECISION

1. Verizon Northwest Inc. ("Verizon") asks the Commission to review certain of the Arbitrator's rulings in the Report and Decision, Order No. 17, issued July 8, 2005 ("Report"). Although the Arbitrator did not select Verizon's proposed amendment language in a number of instances, her Report for the most part reflects an accurate understanding of Verizon's network unbundling obligations. In some cases, however, the Arbitrator's recommendations would not carry out her stated intent of assuring consistency with the FCC's rulings in the *Triennial Review Order*[1] and the *Triennial Review Remand Order.*[2] With respect to these recommendations,

[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).

Verizon suggests clarifications or modifications that will produce an amendment that comports with the FCC's decisions. Specifically, the Commission should (1) clarify that there is no need to conduct a generic inquiry into Verizon's list of wire centers satisfying the FCC's criteria for unbundling relief for high-capacity facilities; (2) modify definitions of certain terms to be consistent with the FCC's Rules; (3) decline to add amendment provisions that relate to pre-*Triennial Review Order* obligations and contract terms; (4) reject the Report's recommendation for Verizon to bear all costs of an EEL audit even when the audit proves that the CLEC did not comply with the FCC's EEL eligibility criteria; (5) adopt reasonable terms for Verizon's provision of EELs; and (6) clarify that Verizon may continue to charge its Commission-approved UNE disconnect rates.

I. The Commission Should Find That There Is No Need to Open a Generic Inquiry to Verify Verizon's List of Wire Centers Exempt from Unbundling Obligations for High-Capacity Facilities. (Issues 4 and 5)

2. In the *Triennial Review Remand Order*, the FCC established tests for determining impairment for high-capacity loop and transport facilities served out of particular wire centers. Once a wire center meets the relevant test, Verizon need not offer unbundled access to those facilities provided out of that wire center.

3. Specifically, as to loops, the FCC held that CLECs may not obtain unbundled access to DS3 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." Unbundled DS1 loops are unavailable "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.

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[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*").

4. As to dedicated transport (except for entrance facilities, for which the FCC made a nationwide non-impairment finding), CLECs may not obtain unbundled 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. The FCC has designated such wire centers "Tier 1" wire centers. So Verizon need not unbundle DS1 transport facilities on routes connecting two Tier 1 wire centers. *TRRO*, ¶ 126.

5. 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.*, known as "Tier 2" wire centers.[3] In other words, Verizon need not unbundle DS3 transport or dark fiber transport facilities connecting any combination of Tier 1 and Tier 2 wire centers. *Id.* ¶¶ 130, 133.

6. The FCC established a specific process to implement its rules governing access to high-capacity loops and transport. Under paragraph 234 of the *TRRO*, before submitting an order for a high capacity loop or transport facility, the CLEC must undertake "a reasonably diligent inquiry" and, based on that inquiry, certify that, to the best of its knowledge, it is entitled to unbundled access to the facility under the *TRRO* criteria. If the request "indicates that the UNE meets the relevant factual criteria," the ILEC must process the request. To the extent that an incumbent LEC seeks to challenge a particular CLEC request, the ILEC must bring the dispute "before a state commission or other appropriate authority." *TRRO*, ¶ 234. In order to minimize disputes, the FCC's system is "based upon objective and readily obtainable facts" (that is, fiber-based collocator and business line counts).[4]

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[3] Tier 3 wire centers are defined as "all those that are not Tier 1 or Tier 2 wire centers." *TRRO*, ¶ 123.

[4] *TRRO*, ¶¶ 99, 234. In this regard, the FCC observed that [b]oth incumbent LECs and competitive LECs agree that fiber-based collocation data are relatively simply to identify and collect." *Id.* ¶ 99. And

7. To expedite implementation of its new unbundling rules, the FCC's Wireline Competition Bureau asked Verizon and other ILECs to file, by February 18, 2005, a list identifying which wire centers satisfy the FCC's non-impairment criteria for high-capacity loops and transport.[5] As the Arbitrator's Report notes, that list shows that none of Verizon's Washington wire centers currently qualify for loop unbundling relief, and virtually none qualify for transport unbundling relief.[6] In the latter regard, Verizon has only one Tier 1 and one Tier 2 wire center. Therefore, UNE DS1 transport remains available on all routes (because there are no routes that connect two Tier 1 wire centers) and UNE DS3 transport and dark fiber transport remain available on all routes except for one (*i.e.*, the route connecting the Tier 1 wire center with the Tier 2 wire center). No CLEC has tried to order DS3 transport or dark fiber transport on this route since the *TRRO* took effect, so there has been no need for Verizon to challenge any orders in Washington.

8. Given the continued availability of high capacity loop and transport UNEs out of Verizon's wire centers, the Arbitrator agreed that there was no need to include a list of exempt wire centers in the amendment. Report at 40. Nevertheless, the Arbitrator recommended a generic proceeding to develop and update Verizon's exempt wire center list,[7] finding that parties

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because business line counts "are an objective set of data that incumbent LECs already have created for other regulatory purposes," the FCC is "confident in the accuracy of the thresholds, and a simplified ability to obtain the necessary information." *Id.* ¶ 105.

[5] Letter from J. Carlisle, Chief, FCC Wireline Competition Bureau, to S. Guyer, Verizon Senior Vice-President, Federal Regulatory Affairs, dated Feb. 4, 2005.

[6] Report, ¶¶ 105, 113; *see also* Ex Parte Letter from Suzanne A. Guyer, Senior Vice President, Federal Regulatory Affairs, Verizon, to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, FCC, CC Docket Nos. 98-141, 98-184, and 01-338, WC Docket No. 04-313 (filed Feb. 18, 2005). As the Arbitrator noted, Verizon's website also provides a public list of all wire centers in the United States that fit the FCC's criteria. *See* http://www22.verizon.com/wholesale/local/order.

[7] Specifically, she suggested conducting this generic inquiry in the open Docket No. UT-053025, the examination of the *TRRO*'s impact on the competitive environment in Washington. *Id*, ¶¶ 105, 117.

should "have a central list of ineligible wire centers, as well as pertinent information about eligible wire centers that is accurate, verified, and made available to the public." *Id.* at 45-46. A generic inquiry would, in the Arbitrator's view, solve the "problem...that each CLEC that seeks to avail itself of transport circuits using a listed wire center must request verifying information from Verizon." *Id.* at 46

9. This generic approach would be inconsistent with the TRRO, as well as pointless. It is inconsistent because it deviates from the process the FCC established in paragraph 234 of the TRRO. As explained—and as the Arbitrator herself recognizes—the FCC's system requires the CLEC to self-certify its entitlement to the facility, whereupon the ILEC will provision the facility and then "bring a dispute before a state commission or other authority if it contests the CLECs' access to the UNE." Report, ¶ 111. The FCC did not contemplate a mandatory state commission pre-certification proceeding allowing CLECs to challenge Verizon's wire center designations, in the abstract, in the absence of any request for access to an exempt wire center.

10. As the FCC made clear, if there are any disputes about whether a particular wire center meets the FCC's non-impairment criteria, ***the ILEC*** must bring the dispute to the appropriate authority. If that occurs, *Verizon* may seek the Commission's involvement to settle the dispute. But unless and until a CLEC tries to order DS3 or dark fiber transport on the single exempt route in Washington, and unless and until Verizon challenges that certification, there is nothing for the Commission to do under the process the FCC established. Verizon cannot be required to accept any alternative system for implementing the FCC's unbundling rules for high-capacity loops and transport. *See* Mass. Arb. Order[8] at 280 (rejecting the CLECs' proposed generic wire center inquiry).

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[8] *Petition of Verizon New England, Inc. d/b/a/ Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts*

11. Even if the Commission could lawfully require Verizon to accept an alternative to the FCC's case-by-case dispute resolution process, a generic proceeding would be a waste of time and resources in Washington. The Arbitrator's recommendation rests on the mistaken notion that there is some "problem" with the existing, case-specific approach the FCC prescribed. The generic inquiry suggestion is rooted in her concern about multiple CLECs having to request and verify back-up data for the same exempt wire centers every time they order transport out of those offices. Report, ¶ 117. But, as noted, Verizon has claimed an exemption for DS3 and dark fiber transport unbundling on only a *single* transport route. No CLEC has tried to order facilities on that route since they were de-listed, and none may ever do so. And there is currently no possibility of a dispute as to UNE loops or UNE DS1 transport because these facilities remain available in all wire centers. Particularly given these facts, it would certainly *not* be "more efficient" to conduct a purely theoretical generic inquiry into Verizon's wire center list now, rather than waiting to see if any disputes ever arise and addressing them on a case-by-case basis, as the FCC intended.

12. Indeed, this is exactly the conclusion the Massachusetts D.T.E. reached: "The CLECs' [generic wire center inquiry] proposal...would require us to resolve the matter as to each wire center on Verizon's list filed with the FCC before a dispute, if ever, arises. Committing our resources to this endeavor would be less efficient than waiting until an actual dispute, if any, arises." Mass. Arb. Order at 279.

13. The Massachusetts D.T.E., likewise, understood that there is no basis for believing that establishing a generic wire center inquiry now will "ensure more accurate self-certifications and fewer disputes" in the future, if and when Verizon claims additional wire center exemptions

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Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order, Docket No. D.T.E. 04-33, Arbitration Order, July 14, 2005 (hereinafter, "Mass. Arb. Order")(relevant portions attached hereto as Exhibit A).

Report, ¶¶ 105-06. "[A] Department-approved list of non-impaired wire centers would only determine which wire centers meet the FCC's non-impairment thresholds at a given point in time," not whether "[a]dditional wire centers may meet the FCC's thresholds and be exempt from unbundling in the future." Mass. Arb. Order at 280. Initiating an inquiry into Verizon's existing wire center designations now can reveal nothing about the propriety of any additional unbundling exemptions Verizon may claim in the future.

14. The Commission should decline to engage in the generic inquiry the Arbitrator recommends, because it is an unneeded solution in search of a non-existent problem. It is also inconsistent with the procedures established by the FCC. In the absence of any Verizon challenge of any CLEC certification of eligibility for high-capacity facilities, there is no reason for the Commission to do anything.[9] Indeed, the Arbitrator has not asked the Commission or the parties to take any specific action, but has just "encouraged" parties to "file comments in and participate in any workshops or proceedings in Docket No. UT-053025." Report, ¶ 106. Therefore, the Commission need not overrule the Arbitrator to find that *at this time*, there is no need for parties to initiate efforts to verify or develop any wire center list in Docket No. UT-053025. There are better uses for the Commission's and the parties' resources than investigating a wire center list that by and large confirms the continued availability of UNE loops and transport in Washington.

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[9] Even if there were a live dispute about Verizon's designation of its two exempt wire centers, the CLECs would not need the Commission's intervention to verify the accuracy of those designations, as they have incorrectly suggested in this case. Verizon has notified CLECs that it will provide its back-up data when a CLEC signs a non-disclosure agreement, and has already provided these data to a number of CLECs. Moreover, if a generic inquiry were conducted, these data could not be "made available to the public," as the Arbitrator assumes (Report, ¶ 117), because they include competitively sensitive details about individual CLECs' operations.

II. The Commission Should Clarify That the Amendment's "Business Switched Access Line" Definition Must Be Consistent with the FCC's Definition. (Issue 9)

15. A "Business Switched Access Line" definition is relevant only for determining which wire centers satisfy the FCC's non-impairment criteria for high-capacity loops and dedicated transport. As discussed above, the FCC has prescribed the mechanism for exempting wire centers from unbundling and for case-by-case ILEC challenges to CLEC orders. Implementation of that system did not require any amendments to the parties' existing interconnection agreements, and, in any event, the FCC already defined "Business line" in 47 C.F.R. § 51.5. Therefore, Verizon did not propose a definition for the term in the amendment.

16. The Arbitrator, however, ruled that a definition of Business Switched Access Line was necessary to be consistent with her rulings on Issues 4 and 5, which require the parties to modify Verizon's amendment to more explicitly reflect the FCC's transition plans for de-listed switching, loops, and transport. Report, ¶ 154. The Arbitrator thus adopted AT&T's definition as "consistent with the FCC's definition in 47 C.F.R. § 51.5." *Id.*

17. Verizon is not challenging the Arbitrator's decision to include a business line definition in the amendment (although this definition is unnecessary), but it asks the Commission to modify the AT&T language the Arbitrator recommended. AT&T's proposed definition includes only a part of the FCC definition, omitting important clarifying language. To avoid unnecessary disputes, and to more clearly effect the Arbitrator's intent, the definition should track the FCC's definition, not AT&T's incomplete gloss.

18. AT&T defines "Business Switched Access Line" as "a Verizon switched access line used to serve a business customer, whether by Verizon itself or by a competitive LEC that leases the line from the Verizon." (AT&T Am., § 2.1.) The FCC's corresponding definition is "Business line," a broader term than "Business Switched Access Line." 47 U.S.C. § 51.5. And while

AT&T's "Business Switched Access Line" definition is consistent with the *first sentence* of the FCC's "Business line" definition, AT&T omitted the rest of the FCC's definition. In particular, AT&T left out the FCC's statement making clear that: "The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, *plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements.*" *Id.* (emphasis added).

19. There is a risk that omission of this language, combined with AT&T's modification of the term itself, will encourage CLECs to claim that the business line count for purposes of determining unbundling relief in a particular wire center includes only business switched access lines, and not "all UNE loops connected to that wire center," as the FCC's definition requires. Any more restrictive definition could make it harder for Verizon to prove that particular wire centers meet the FCC's criteria for unbundling relief (in the event Verizon challenges a CLEC's self-certification) and thus would have the effect of modifying the FCC's underlying unbundling determination. That result is plainly not what the Arbitrator intended; a simple clarification can nip this issue in the bud.

20. To satisfy the Arbitrator's objective of consistency with the FCC definition and to avoid future disputes about application of the FCC's non-impairment criteria, Verizon asks the Commission to reject AT&T's "Business Switched Access Line" definition and instead require the amendment to use the term, "Business line," and to specify simply that it is as defined in the FCC's rule, 47 U.S.C. § 51.5.

III. The Commission Should Clarify That the Amendment's Dark Fiber Transport and Dedicated Transport Definitions Must Be Consistent with the *TRRO*. (Issues 9 and 19)

21. The Arbitrator ruled that the amendment's "Dark Fiber Transport" and "Dedicated Transport" definitions should include CCG's and AT&T's respective references to "reverse collocation," even though there are no such references in the FCC's definitions of these terms, and even though Verizon has no intention of "reverse collocating" at CLEC premises. *See* Report, ¶¶ 168, 171, 378, 380; Verizon Opening Brief, ¶ 214; Verizon Reply Brief, ¶ 92. The Arbitrator found the reverse collocation references should be included to recognize that, if Verizon ever does establish reverse collocations, the FCC requires it to unbundle the transmission path back to Verizon's wire center. Report, ¶ 380.

22. Although Verizon disagrees that any reference to reverse collocation is necessary, it does not challenge that decision here. Rather, Verizon asks the Commission to clarify that the references to reverse collocation in the amendment's Dark Fiber Transport and Dedicated Transport definitions must be consistent with the FCC's unbundling obligations, as the Arbitrator intended. In their current formulation, they are not, because they would deem any "Verizon switching equipment located at [CLEC's] premises" to be a wire center for purposes of determining Verizon's transport unbundling obligations. (AT&T Am., § 2.9 ("Dedicated Transport" definition); CCG Am., § 2.5 ("Dark Fiber Transport" definition).

23. These references are too broad and vague, and could be construed to impermissibly expand Verizon's unbundling obligations. In footnote 251 of the *TRRO*, the FCC explained that its definition of the term "wire center" in connection with dedicated transport "includes any incumbent LEC switches *with line-side functionality* that terminate loops that are 'reverse collocated' in non-incumbent LEC collocation hotels." *TRRO* ¶87, n. 251 (emphasis added).

Thus, the FCC has made clear that only ILEC switches with *line-side functionality* that are located in CLEC collocation hotels may be considered Verizon wire centers for purposes of defining dedicated transport—not, as the CLECs' references indicate, any "Verizon switching equipment" located at the "CLEC premises."

24. Citing the FCC's discussion in note 251 of the *TRRO*, the Massachusetts D.T.E. confirmed that "the FCC did not incorporate equipment other than *line-side* switching facilities into its definition of ILEC wire centers for the purpose of dedicated transport." Mass. Arb. Order at 222 (emphasis added). The D.T.E. rejected CLECs' "attempt to expand the universe of qualifying reverse collocation arrangements" beyond what the FCC intended. *Id.* at 222.

25. This Commission should do the same. Even though Verizon does not have any reverse collocated equipment that could be considered "switching equipment," AT&T's and CCG's vague language invites interpretations that may be contrary to the FCC's specific definition of "wire centers" between which Verizon must unbundle transport. In order to accurately reflect the scope of the FCC's transport unbundling obligations, as the Arbitrator intended, the Commission should reject the CLECs' broad references to "Verizon switching equipment." It should instead require the amendment's dark fiber transport and dedicated transport definitions to specify that only "Verizon switches with line-side functionality that terminate loops" (*TRRO* n. 251) that are located in CLEC collocation hotels may be considered Verizon wire centers for purposes of identifying transport routes potentially subject to unbundling. This will make clear that the transport unbundling obligation arises only where Verizon actually places switches with line-side functionality in a CLEC collocation hotel, not to the potentially broader situation involving any equipment that a CLEC might argue constitutes "switching equipment."

IV. The Commission Should Modify the Recommended EEL Definition to Make Clear that "Transmission Functionality" Is Not a UNE. (Issue 9)

26. Enhanced extended links, or "EELs," are "UNE combinations consisting of unbundled loops and unbundled transport (with or without multiplexing capabilities)."[10] The Arbitrator approved AT&T's definition of "Enhanced Extended Link (EEL) Combination" (Report, ¶ 177), which provides:

> An EEL consists of, at AT&T's option, any two or more of the following: an unbundled loop, *transmission functionality such as concentration and multiplexing*, and unbundled dedicated transport. An EEL provides AT&T the capability to serve a customer by extending a customer's loop from the customer's premises (including points where customer loops are aggregated) to another premise or office designated by AT&T). AT&T may order new EELs and/or request the conversion of existing services to EEL functionality.

AT&T Amendment, § 2.14 (emphasis added).

27. With this language, AT&T apparently contemplates that, in cases where dedicated transport is not available as a UNE (*e.g.*, because it is on a non-impaired route), AT&T could still order multiplexing as a "UNE" separately from transport, to be combined with a UNE loop. But AT&T has no such right; its definition is unlawful, because it incorrectly suggests that multiplexing or other "transmission functionality" is a stand-alone UNE that a CLEC may obtain separate from transport. Under the FCC's rules, an EEL is a combination of a loop UNE and a transport UNE. It is not a combination of a loop UNE *or* a transport UNE with multiplexing or any other "transmission functionality." Indeed, as the *TRO* indicates, the unbundled transport piece of the EEL may come "with or without multiplexing capabilities." *TRO*, ¶ 575. But neither multiplexing nor any other purported "transmission functionality" is itself a UNE.

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[10] *See TRO*, ¶ 575.

28. CLEC efforts to obtain contract language suggesting entitlement to multiplexing as a UNE are not new. In Verizon Virginia's arbitration with MCI, AT&T and Cox Telecom before the FCC's Wireline Competition Bureau, MCI proposed language that might have been construed to require Verizon to provide multiplexing as a separate element. The Bureau rejected this language, stating that "the multiplexer is a feature, function, or capability of dedicated transport," not a UNE, and directed the parties to modify the contract language accordingly.[11] Verizon asks this Commission to do the same. Because AT&T's definition may be misread to suggest that multiplexing or another "transmission functionality" (whatever that undefined term is supposed to mean) is a UNE, it should be fixed.

29. AT&T's definition is, moreover, inconsistent with the EEL definition in Verizon's Commission-approved UNE tariff. Tracking the FCC's TRO language, the tariff defines an EEL as "a combination of unbundled loops, unbundled dedicated transport, and includes multiplexing where required." (Verizon Northwest Inc. UNE Tariff, WN-U21, Section 4 ("UNE Tariff").) The tariff thus properly reflects that multiplexing is not a UNE, but is, instead, a component of transport that is available as part of a loop-transport combination.

30. AT&T's definition also fails to conform to the FCC's rules because it includes the sentence: "An EEL provides AT&T the capability to serve a customer by extending a customer's loop from the customer's premises (including points where customer loops are aggregated) to another premise or office designated by AT&T." A UNE EEL, however, does not allow AT&T to extend a loop to another "premise" or to any "office designated by AT&T." UNE EELs simply allow AT&T to combine a UNE loop with UNE transport, which may or may

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[11] Memorandum Opinion & Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Comm. Act for Preemption of the Jurisdiction of the Virginia State Corp. Comm'n Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, etc.*, DA 02-1731, 2002 FCC Lexis 3544, ¶ 500 (July 17, 2002).

not be available on a particular route that runs to AT&T's "designated" office. And, under the FCC's rules, in no event may the "designated" office be an office that is not a Verizon wire center. 47 C.F.R. 51.319(e).

31. In order to be consistent with federal law (as well as Verizon's tariff), and to prevent future disputes about the scope of Verizon's obligation to provide EELs, the Commission should reject AT&T's EEL definition. If the Commission believes an EEL definition is necessary, then it should instead require the amendment to incorporate the existing EEL definition in Verizon's Commission-approved tariff (or, as an alternative, cross-reference the FCC's definition in 47 C.F.R. § 51.5).[12]

V. The Commission Should Require Reasonable Conversion Terms. (Issue 21)

32. For conversions from existing circuits or services to EELs, the Arbitrator recommended, among other things, that (1) a conversion should be deemed effective upon receipt of the conversion request (Report, ¶ 451); (2) billing changes "should be reflected in the next billing cycle after the conversion request" (*id.*, ¶ 430); and (3) Verizon cannot physically disconnect or change existing facilities to do a conversion without the CLEC's consent (*id.*, ¶416). Verizon asks the Commission to reconsider the first pair of rulings and to clarify that the conforming language must accurately reflect the Arbitrator's condition that Verizon may perform facilities changes with the CLEC's consent.

A. There Is No Reason to Depart from Established Practice of Charging for a Service When It Is Provided. (Issue 21(b)(2) & (b)(4))

33. The first two rulings erroneously presume that conversion requests are satisfied immediately upon their submission, so billing for the new arrangements should start in the next

[12] This is the FCC's definition: "An enhanced extended link or EEL consists of a combination of an unbundled loop and unbundled dedicated transport, together with any facilities, equipment, or functions necessary to combine those network elements."

billing cycle. These rulings disregard practical concerns and established practice. Conversions, like any other activity Verizon undertakes for a CLEC, should be deemed completed for purposes of billing when the actual work of the conversion is completed pursuant to the standard conversion process. There is no reason for departing from this simple, commonly accepted principle.

34. Furthermore, Verizon cannot be expected to immediately implement billing changes in all cases. If, for example, a CLEC sends Verizon orders for 100 EEL conversions on the last day of a billing cycle, it would be impossible for Verizon to process these requests before the next billing cycle starts the next day. Contrary to the Arbitrator's suggestion, the FCC did not expect parties to implement this kind of inflexible rule. Report, ¶ 430. Indeed, the FCC rejected CLECs' proposals to require completion of billing changes within 10 days of a conversion request—nine days more than the Arbitrator here has recommended. *TRO*, ¶ 588.

35. Faced with these same issues, the Massachusetts D.T.E. "agreed[d] with Verizon that billing for a conversion should begin after the conversion work is completed." Mass. Arb. Order at 136. It also ruled that the tariffed 30-day interval for completion of conversion requests was reasonable on an interim basis, until the industry task force (the New York Carrier Working Group) addresses conversion intervals. *Id.* at 136-37. Verizon asks the Commission to, likewise, approve a more reasonable standard. Specifically a standard of 30 days, unless the conversion order exceeds a designated number of circuits (to be negotiated by the parties in the conforming amendment stage), would recognize practical realities while protecting against undue delays in completing conversions.

B. The Amendment Language Should Explicitly Reflect the Arbitrator's "Consent" Standard. (Issue 21(b)(1))

35. With respect to the issue of how Verizon performs a conversion, the Arbitrator appeared to adopt the CLECs' language stating that when a facility is converted, "Verizon shall not physically disconnect, separate, alter or change in any other fashion equipment and facilities employed to provide the wholesale service, except at the request of [CLEC]." Report, ¶ 416; Focal Am., § 2.3.2; AT&T Am., 2.3.2. However, the Arbitrator also made clear that her decision "does not preclude Verizon from notifying a CLEC of a potential problem with a conversion requiring disconnection, separation, alteration or change, but precludes Verizon from taking the action without the consent of the CLEC." Report, ¶ 416. Consistent with the Arbitrator's ruling, Verizon asks the Commission to clarify that the conforming amendment language should explicitly embody the Arbitrator's ruling that Verizon may perform facilities changes with the CLEC's consent (rather than having to wait for a CLEC "request" for a facilities change).

36. As Verizon explained in its briefs, Verizon does not seek amendment terms affirmatively providing for separation or other physical alteration of existing facilities when a CLEC requests an EEL conversion, and Verizon would not expect a standard conversion to require any such changes. But an effective prohibition on all alterations might preclude those that could be necessary to convert wholesale services to UNEs in particular instances. As the Massachusetts D.T.E. correctly observed, "without this flexibility, CLEC orders would be delayed."[13]

37. The Arbitrator here, likewise, understood that Verizon might need to disconnect or change facilities to perform a conversion in some cases, so she specified that such actions could be done with the CLEC's consent. The particular language the Arbitrator recommended,

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[13] Mass. Arb. Order, at 138. In rejecting the CLECs' proposed prohibition on facilities changes, the Massachusetts D.T.E. also cited the need to "allow[] Verizon to manage its own network in the manner that it regards most appropriate." *Id.* at 137.

however, might be construed as inconsistent with this condition, because it permits changes only at "the request of CLEC." *See* Focal Am., § 2.3.2. Verizon, therefore, asks the Commission to clarify that the conforming language should reflect the Arbitrator's ruling that Verizon may perform facilities changes with "the consent of the CLEC." Report, ¶ 416. This language will make clear that Verizon may seek facilities changes necessary to perform an efficient conversion.

VI. The Commission Should Reject Language Attempting to Restate Pre-TRO Interconnection Rights and Obligations Under Section 251(c)(2). (Issues 9 and 20)

38. The Arbitrator stated that "[t]he FCC did not alter, in either the Triennial Review Order, or the Triennial Review Remand Order, its decision that ILECs are obligated to provide interconnection trunks to CLECs for the purpose of the transmission and routing of telephone exchange service and exchange access at cost based rates." She further observed that "Verizon is correct that there is no change in law requiring a change in the terms of access to interconnection trunks." Report, ¶¶ 384-85. The Arbitrator, nevertheless, approved language, in the context of issues 9 and 20, that purports to address Verizon's provision of access to interconnection facilities under section 251(c)(2). Report, ¶¶ 181, 385. In doing so, the Arbitrator intended to "document the continuing obligation in the agreement" because it would be "useful...to prevent future disputes." *Id.* at ¶ 385.

39. In fact, approving this unnecessary language would likely have just the opposite effect. Although the Arbitrator's stated intention was to confirm existing obligations, the language she approved could conflict with existing contracts. In addition, AT&T's "reciprocal compensation" reference in the "Entrance Facility" definition makes no sense.

A. The Recommended Language Is Unnecessary and Might Conflict with Existing Contract Terms.

40. As the Report recites, the *TRO* eliminated all unbundling for entrance facilities and the *TRRO* confirmed that CLECs had no right to such facilities. Report ¶ 180, citing *TRRO*, ¶ 137 & 47 C.F.R. § 51.319(e)(2)(i). In doing so, the FCC noted "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." *TRRO*, ¶ 140.

41. The CLECs proposed, and the Arbitrator approved, language purporting to confirm that the *TRRO* did not change their rights to section 251(c)(2) interconnection facilities. AT&T added the italicized language below to the parties' otherwise mutually agreed definition of "Entrance Facility":

> 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 AT&T or a third party, *but excluding any facilities used for interconnection or reciprocal compensation purposes provided pursuant to 47 U.S.C. § 251(c)(2).*

AT&T Amendment, § 2.16 (emphasis added).

42. MCI added this new provision to the amendment:

> In accordance with Paragraph 140 of the TRRO, nothing in this Section [10] nor the FCC's finding of non-impairment with respect to entrance facilities alters [CLEC's] right to obtain interconnection facilities (entrance facilities or dedicated transport) pursuant to Section 251(c)(2) of the Act or to obtain access to such facilities at cost-based rates in order to interconnect [CLEC's] network with Verizon's network for the exchange of traffic.

MCI Amendment, § 10.6.

43. The Commission should reject both parties' new language, because it is not necessary to implement any changes of law in the *TRO* or *TRRO*, which is the only purpose of this arbitration. As the Arbitrator acknowledged, neither the *TRO* nor the *TRRO* changed Verizon's obligations with respect to interconnection facilities. *See, e.g., TRO*, ¶ 366 ("we do not alter the

Commission's interpretation of this obligation"). Therefore, there is no reason to address interconnection issues in the *TRO* amendment.

44. As the Massachusetts D.T.E. correctly found in rejecting language like that the CLECs here proposed, "[t]he FCC made no findings, clarifications, or statements in the Triennial Review Order or Triennial Review Remand Order that changed the parties' rights and responsibilities concerning interconnection facilities" so "it is unnecessary for the parties to amend their agreements with respect to interconnection facilities." Mass. Arb. Order at 224. *See also id.* at 90 (rejecting the CLECs' "entrance facilities" definition because the term was already defined prior to the *TRO* and *TRRO*).

45. Including language addressing pre-*TRO* interconnection obligations in the *TRO* amendment might not be cause for much concern if the language were merely unnecessary, but benign. But that is not the case here. Because interconnection regulations did not change with the *TRO* or *TRRO*, the underlying interconnection agreements already address interconnection obligations imposed under current federal law, or, in some cases, negotiated alternatives. These interconnection architecture terms are usually in a number of interrelated provisions. They address not only the parties' financial responsibility for interconnection facilities under section 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, the types of interconnection trunks the parties will use, the extent to which either party is likely to originate a disproportionate amount of traffic, and the per-minute rate of compensation for the exchange of traffic. It would be unreasonable to add new contract language on one aspect of interconnection—where *no* rules have changed—without regard to how their new (and unnecessary) language might affect the

complex, integrated network architecture provisions in the parties' interconnection agreements. CLECs should not be permitted to re-negotiate or re-arbitrate those complex issues here.

46. For example, Level 3's Agreement expressly provides that Verizon's intrastate access tariff rates shall apply if Level 3 wishes to establish interconnection using entrance facilities.[14] The MCI language the Arbitrator selected, however, states that the amendment does not alter the CLECs' "right" to obtain entrance facilities or dedicated transport at "cost-based" rates for interconnection under section 251(c)(2). Any such "right," if it exists, would be contained in the CLECs' existing, Commission-approved interconnection agreement provisions that address interconnection. To the extent Verizon's tariffed access rates referenced in those agreements are deemed not to be "cost-based," (Verizon's access tariffs, of course, are not subject to TELRIC or other "cost-based" pricing under section 252(d)), the Arbitrator's recommended language could be construed to conflict with the terms of existing contracts. But because the FCC did not change the law with respect to interconnection facilities, there is no basis to change the existing provisions addressing interconnection facilities – provisions that were either negotiated and agreed to by the CLECs, or arbitrated by the Commission, under the same FCC standards that continue to apply after the *TRRO*.

47. The ALJ did not take account of these or other, similar provisions contained in any interconnection agreements,[15] or of other more complex arrangements in which the rates for

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[14] Level 3 Agreement, Amendment No. 3, dated November 1, 2004 (attached as Exhibit B), § 7.1(a) ("Each mutual POI established under this Section 7.1(a) may be accomplished by Level 3 through: (1) a collocation site established by Level 3 at the relevant Verizon Tandem Wire Center, (2) a collocation site established by a third party at the relevant Verizon Tandem Wire Center, or (3) transport (and entrance facilities where applicable) ordered and purchased by Level 3 from Verizon at the applicable Verizon **intrastate access rates and charges**.") (emphasis added).

[15] *See, e.g.*, Bullseye Agreement, Interconnection Attachment § 2.1.3 (methods of interconnection include "an Entrance Facility and transport obtained from Verizon (and any necessary multiplexing) pursuant to the applicable Verizon **access Tariff**, from the BullsEye network to the Verizon-IP." (emphasis added); United Communications Agreement, Interconnection Attachment, § 2.1.2.3 (methods

interconnection facilities are intricately intertwined with, and expressly conditioned upon, various related provisions dealing with the types of traffic exchanged between the parties and negotiated intercarrier compensation rates for various types of traffic.[16]

48. Even if there were a legitimate basis to require a change to existing agreements (which there is not), the ALJ did not give any consideration to how to integrate her ruling into the existing complex, interrelated terms in any, let alone all, of Verizon's interconnection agreements, including those which may expressly forbid any changes for specific periods of time.

49. The recommended, unnecessary language will undermine, rather than promote, the Arbitrator's objective of reducing future disputes. This language would confuse, rather than clarify, the parties' existing contractual obligations (which are not the same in all contracts). Because there has been no change of law with respect to Verizon's obligation to provide interconnection facilities, there is no reason to introduce new interconnection language into the contract. Doing so without considering the effect of such language on already existing language would be arbitrary and capricious.

50. Although no new language is necessary, if the Commission, for some reason, feels compelled to adopt some, it should more closely track the FCC's language in the *TRRO*,[17]

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of interconnection include "an Entrance Facility and transport leased from Verizon (and any necessary multiplexing) pursuant to the applicable Verizon **access Tariff**, from the UNICOM POI to the Verizon-IP") (emphasis added).

[16] *See* Level 3 Agreement, Amendment No. 3, *supra*, at § 2 (intercarrier compensation rates for traffic exchange are contingent upon compliance with interconnection architecture terms set forth in §§ 6 and 7 of the amendment).

[17] Verizon suggests the following language, if the Commission decides any is needed: "As required by the Commission's decision in Docket UT-043013 in light of Paragraph 140 of the *Triennial Review Remand Order*, the discontinuation of Entrance Facilities as set forth in this Amendment does not alter any right [CLEC] may have under the existing Agreement to obtain interconnection facilities at cost-based rates pursuant to section 251(c)(2) of the Act."

making sure to omit language (like MCI's parenthetical) incorrectly suggesting "interconnection facilities" means "entrance facilities or dedicated transport."

B. AT&T's Reference to Facilities Used for Reciprocal Compensation Purposes Makes No Sense.

51. AT&T's section 2.16 would require Verizon to provide "any facilities used for interconnection or reciprocal compensation purposes provided pursuant to 47 U.S.C. § 251(c)(2)," despite the FCC's elimination of UNE entrance facilities. Aside from the above-discussed problems with this provision, its reference to section 251(c)(2) "facilities used for...reciprocal compensation purposes" makes no sense.

52. Section 251(c)(2) addresses facilities for interconnection, not reciprocal compensation. There is no such thing as a facility "used for reciprocal compensation purposes," either under section 251(c)(2) or otherwise. The transport facilities Verizon leases to CLECs are used for transmission of traffic, not for "reciprocal compensation purposes." Reciprocal compensation is not a "use" for transport facilities. It is, instead, a type of intercarrier compensation that may apply to traffic carried over transport facilities, depending on the nature and jurisdiction of that traffic.

53. AT&T's language does not relate to anything in the *TRO*, the *TRRO*, the Act, or the FCC's regulations. It appears intended solely to give AT&T a platform to claim an unjustified, expanded right to reciprocal compensation. In light of the protracted, expensive battles about reciprocal compensation over the past years, the Commission should be especially careful to avoid approving any language that might generate new reciprocal compensation disputes. In this case, there is no reason to consider any reciprocal compensation language, let alone AT&T's nonsensical reference to reciprocal compensation in the Entrance Facility definition. The

Commission should reject this reference, along with the rest of the last clause in AT&T's section 2.16.

VII. The Commission Should Reject Unnecessary Language Concerning the Pre-TRO Obligations of Line Conditioning, Line Splitting, and Testing, Maintaining and Repairing Copper Loops and Subloops. (Issues 9, 14(a), 14(g), and 27.)

54. The Arbitrator has recommended including in the amendment AT&T's provisions addressing line splitting (but without the "other Applicable Law" reference) and loop maintenance, testing, and repair, Report, ¶¶ 205, 207, 296, 512; AT&T Am., §§ 2.23, 2.25, 3.2.10, 3.3, as well as MCI's line conditioning provision Report, ¶ 328-29; MCI Am., § 7.4.

55. All of this language is inappropriate in a *TRO* amendment because neither the *TRO* nor the *TRRO* changed the law with respect to these activities, which Verizon was required to perform before the *TRO* issued. In this regard, the FCC made clear that is was merely "readopting" already existing requirements, not changing them.[18] Although the FCC concluded that restating its existing requirements was desirable, the requirements reflected in those rules were not new. For this reason, the Massachusetts D.T.E. rejected the same CLEC arguments and language the Arbitrator here accepted. It correctly observed that "[T]he purpose of this Amendment is to reflect those rights and obligations which have changed as a result of the Triennial Review Order and the Triennial Review Remand Order." Because the FCC merely restated, but did not change, the parties' obligations with respect to line splitting, line

[18] *See, e.g., TRO*, ¶¶ 251 ("The Commission previously found that existing rules require incumbent LECs to permit competing carriers to engage in line splitting....We reaffirm those requirements...."); 252 ("We also readopt the Commission rules requiring incumbent LECs to provide access to physical loop test access points on a nondiscriminatory basis for the purpose of loop testing, maintenance, and repair activities....We do not anticipate that the incumbent LECs will have any difficulty implementing such an obligation because the Commission required as much from the in its *Line Sharing Reconsideration Order* [citation omitted]"); 642 ("we readopt the Commission's previous line and loop conditioning rules for the reasons set forth in the *UNE Remand Order* [citation omitted]".

conditioning, or testing, maintenance and repair access point, the D.T.E. rejected any new language concerning these pre-*TRO* obligations.[19]

56. This Commission should do so, as well. As in the case of the interconnection facilities issue discussed above, many existing contracts already contain line conditioning, line splitting, and loop repair, testing and maintenance access point terms, to the extent the CLECs were interested in obtaining such terms.[20] Again, the Arbitrator did not consider the effect of new amendment language addressing the same issues as the underlying contracts. This new language may conflict with existing negotiated or arbitrated terms, thereby increasing the likelihood of disputes about Verizon's contractual obligations—again, contrary to the Arbitrator's objective of reducing the potential for disputes.

57. Moreover, trying to "cut and paste" pre-*TRO* obligations into the *TRO* amendment produces terms that do not reflect existing law. For example, MCI's line conditioning provision would require Verizon to "condition a copper Loop at the request of [CLEC] when seeking access to a copper Loop or any portion of a copper Loop, *including, without limitation, the high frequency portion of a copper Loop.*" MCI Amendment, § 7.4. To this extent this provision

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[19] *See* Mass. Arb. Order, at 90 (finding no need to amendment the agreements to define terms, including line conditioning and line splitting "that were already defined and were not modified as a result of the Triennial Review Order and the Triennial Review Remand Order"); 174 ("Although the FCC may have grouped the [line splitting] rules under a new heading in the Triennial Review Order, the rules themselves pre-date the Triennial Review Order....Because the line splitting rules in the Triennial Review Order do not represent a change in the parties' obligations, but rather a restatement of them, the Amendment shall not contain any terms or conditions related to line splitting."; 182 ("As the FCC's rules concerning line conditioning were not altered by the Triennial Review Order or the Triennial Review Remand Order, there is no need to include an amendment pertaining to line conditioning."); 254 ("Since the FCC reaffirmed an existing requirement [as to access for testing, maintenance, and repair], we find that there is no need to include a provision in the Amendment addressing this issue. As we have stated, the purpose of this arbitration is only to implement changes in law resulting from the Triennial Review Order and the Triennial Review Remand Order.")

[20] As Verizon pointed out in its Opening Brief (at 83), Verizon has offered line conditioning and line splitting terms in its standard contract for years.

might be read to require unlimited access to the high frequency portion of the loop ("HFPL"), it ignores the FCC's elimination of line sharing.[21]

58. Finally, line splitting, line conditioning, and loop maintenance and repair obligations cannot be implemented without associated operational terms. Where an existing contract does not include language for any of these obligations (because the CLEC may not have sought such terms), the Commission should clarify that they cannot be implemented without negotiating operational details and rates, to the extent the Commission has not already approved rates for the activity at issue.

59. As an example of the kinds of operational issues parties would need to negotiate before Verizon can provide a new service, Verizon has attached (as Exhibit C) its line splitting amendment signed last year with MCI.[22] The amendment describes how the line splitting service will be provided, addressing, among other things, the requirement for a prior, negotiated arrangement with the other CLEC splitting the line; the use of Verizon's operations support systems; how the specific items in the line splitting arrangement are to be combined; what information the CLEC must provide to Verizon about the technology it plans to deploy and how this information will be conveyed.; responsibility for providing any splitters used; migration from an existing UNE configuration to a line splitting arrangement; and the rates that apply to the line splitting service. Without these kinds of details, Verizon cannot provide the service.

60. In short, the Arbitrator overlooked or did not thoroughly consider the effect of approving amendment terms governing the same, pre-*TRO* obligations that are already covered in existing

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[21] *See TRO*, ¶ 255-66 ("We find that allowing competitive LECs unbundled access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled creates better competitive incentives than the alternatives." *Id.* at 260).

[22] As approved by the Commission. *Request for Approval of Fully Negotiated Amendment to Interconnection Agreement by Verizon Northwest Inc. and MCIMetro Access Transmission Services, LLC*, Docket No. UT-033063, Order Granting Amendment No. 3, May 24, 2005.

negotiated or arbitrated provisions. There was no consideration of how the new language might modify the existing contracts, and no legal justification for any such modification. The Commission should thus reject the new provisions for line conditioning, line splitting, and loop maintenance, repair, and testing. As Verizon pointed out in its briefs (Initial Brief at 74-75, 83; Reply Brief at 57), if particular CLECs wish to change their agreements to address (or re-address) these items, then Verizon will work with such CLECs individually to incorporate comprehensive provisions for these pre-*TRO* requirements.

VIII. The Proposed Sub-Loop Definition Should Be Revised, Consistent with FCC Rules.

61. The Arbitrator adopted AT&T's definition of "Sub-Loop," because she concluded it "is consistent with the FCC's definition of 'copper subloops.'" Report, ¶ 222. This conclusion is erroneous, because AT&T's sub-loop definition omits key terms of the FCC's corresponding definition in an attempt to impermissibly expand Verizon's sub-loop unbundling obligations.

62. AT&T's section 2.35 defines "Sub-loop" as:

> a portion of a copper loop, or hybrid loop, between any technically feasible point in Verizon's outside plant, including inside wire owned, controlled or leased by Verizon, and the end-user customer premises. A subloop includes all intermediate devices (e.g. repeaters and load coils), and includes the features, functions, and capabilities of the loop. A subloop includes two-wire and four-wire analog voice grade subloops and two-wire and four-wire subloops conditioned for digital service, regardless of whether the subloops are in service or held as spares.

The FCC's corresponding rule, "***Copper*** subloops," states, in relevant part:

> A ***copper*** subloop is a portion of a copper loop, or hybrid loop, ***comprised entirely of copper cable that acts as a transmission facility*** between any point of technically feasible access in an incumbent LEC's outside plant, including inside wire owned or controlled by the incumbent LEC, and the end-user customer premises. A ***copper*** subloop includes all intermediate devices (***including*** repeaters and load coils) ***used to establish a transmission path between a point of technically feasible access and the demarcation point at the end-user customer premises***, and includes the features, functions, and capabilities of the copper loop. ***Copper*** subloops include two-wire and four-wire analog voice-grade subloops as well as two-wire and four-wire subloops conditioned ***to transmit the digital***

signals needed to provide digital subscriber line services, regardless of whether the subloops are in service of held as spares.

47 C.F. R. § 51.319(b)(1) (emphasis added).

63. AT&T's "Sub-Loop" definition does not accurately reflect the FCC's definition. The bolded type in the above-quoted rule shows the language AT&T omitted from its sub-loop definition. AT&T's deletions of the FCC's repeated references to "copper," both in the text of the definition and the defined term itself, suggest that Verizon's sub-loop unbundling obligation extends to *fiber* subloops, as well as copper sub-loops. But the FCC did not impose any such obligation. The above-quoted FCC rule and the text of the TRO repeatedly and unambiguously limit sub-loop unbundling to just *copper*. Indeed, the FCC explicitly stated that "we do not require incumbent LECs to provide access to their fiber feeder loop plant on an unbundled basis as a subloop UNE." *TRO*, ¶ 253.

64. Because AT&T's sub-loop definition erroneously suggests the existence of a fiber sub-loop unbundling requirement, the Commission should reject it as inconsistent with the FCC's rules. Consistent with the Arbitrator's intent, the amendment should instead use the FCC's term, "copper sub-loop" and should accurately reflect the FCC's definition of that term in Rule 51.319(b)(1).[23]

IX. The Commission Should Reject the Arbitrator's Recommendation Revising the FCC's Materiality Standard and Reimbursement Rules for EEL Audits.

65. Prior to the *TRO*, the FCC had imposed safeguards to prevent CLECs from using EELs (a combination of loop and transport UNEs) to displace tariffed special access services, a result that

[23] AT&T also omits the FCC's language describing the types of intermediate devices included in a copper subloop—that is, "intermediate devices (***including*** repeaters and load coils) ***used to establish a transmission path between a point of technically feasible access and the demarcation point at the end-user customer premises***." 47 C.F.R. 51.319(b)(1) (emphasis added). Removing the FCC's language specifying the kinds of intermediate devices required impermissibly expands Verizon's sub-loop unbundling obligation. Again, the Commission should order language that is consistent with the FCC Rule, as the Arbitrator intended.

the FCC determined would undermine existing facilities-based competition in the highly competitive special access market.[24] The FCC modified its EEL eligibility requirements in the *TRO* (*TRO*, ¶¶ 601-611), but retained its previous rule "requiring competitive LECs to 'reimburse that incumbent if the audit uncovers non-compliance with the local usage options.'" *Id.*, ¶ 627 n. 1907, quoting *Supplemental Order Clarification*, 15 FCC Rcd at 9603-04, ¶ 31. "Thus, to the extent the independent auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor." 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." *TRO*, ¶ 628.

66. The Arbitrator found that Verizon's audit language "does not sufficiently address the FCC's concern with material compliance," which the Arbitrator interpreted to mean "compliance for most or all of the circuits at issue in the audit." Report, ¶ 470. She derived this audit standard from a Webster's Dictionary definition of "material." Report at ¶ 470, citing Webster's New Collegiate Dictionary (1977) at 709.

67. In fact, Verizon's audit provision exactly reflects the FCC's materiality standard the Arbitrator erroneously found Verizon did not adequately address. The relevant language states:

> Once per calendar year, Verizon may obtain and pay for an independent auditor to audit [CLEC's] compliance ***in all material respects*** with the service eligibility criteria applicable to High Capacity EELs. Any such audit shall be performed ***in accordance with the standards established by the American Institute for Certified Public Accountants***, and may include, at Verizon's discretion, the examination of a sample selected in accordance with the independent auditor's judgment. To the extent the independent auditor's report concludes that [CLEC]

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[24] *See* Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*").

> failed to comply with the service eligibility criteria for any DS1 or DS1 equivalent circuit, then...[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. Should the independent auditor confirm ***CLEC Acronym TXT***'s compliance with the service eligibility criteria for each DS1 or DS1 equivalent circuit, then ***CLEC Acronym TXT*** shall provide to the independent auditor for its verification a statement of ***CLEC Acronym TXT***'s out-of-pocket costs of complying with any requests of the independent auditor, and Verizon shall then reimburse ***CLEC Acronym TXT*** for its out-of-pocket costs within thirty (30) days of the auditor's verification of the same.

Verizon Amendment 2, § 3.4.2.7 (emphasis added).

68. Verizon's language explicitly recites the FCC's standard of "compliance in all material respects" and requires, as the FCC did, performance of the audit in accordance with the standards of the American Institute for Certified Public Accountants ("AICPA"). *TRO*, ¶ 626. It also properly recognizes that the FCC's EEL eligibility criteria are circuit-specific. *See TRO*, ¶ 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.").

69. In adopting the same language Verizon proposes here, the Massachusetts D.T.E. found:

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

Mass. Arb. Order, at 132.

70. The Massachusetts D.T.E. correctly understood that the FCC requires the *independent auditor* to apply the AICPA standards to determine materiality in a particular case, in accordance with the FCC's circuit-specific eligibility criteria. In fact, the FCC specifically referenced

AICPA Attestation Standard § 6.36, "explaining the concept of materiality." *TRO*, ¶ 626 n. 1906. The FCC did not intend for each state Commission to establish its own materiality standard, as the Arbitrator's recommendation suggests, let alone to do so on the basis of reference to a dictionary definition, rather than the governing AICPA Standards the FCC specifically required for the audits. The Commission cannot override the FCC's directive that the audit must be performed in accordance with the AICPA Standards, including the materiality concept in those standards.

71. Because the Arbitrator's "materiality" recommendation disregards the FCC's basic audit principles, the Commission should reject it and instead approve Verizon's "nearly verbatim" account of the FCC's audit rulings. (Verizon Amendment 2, § 3.4.2.7.)

X. The Commission Should Clarify that Verizon May Charge the Disconnect Rates the Commission Already Approved. (Issue 8).

72. The Arbitrator observed that Verizon had not yet proposed a charge for disconnecting a UNE when a CLEC requests such disconnection, rather than converting to a replacement service. She thus found that Verizon must file a tariff or change the pricing exhibit to its *TRO* amendment "prior to charging disconnection or other charges." (Report at ¶ 149.)

73. Given the number of issues presented in this arbitration, the Arbitrator may have overlooked the nature and current status of Verizon's disconnect charges. The reason Verizon did not propose any UNE disconnect charges is because they already appear in its Commission-approved UNE tariff. Verizon's UNE Tariff, section 5, lists rates for disconnecting loops, ports, entrance facilities, interoffice transport facilities, and EELs. Elsewhere in her Report, the Arbitrator made clear that Verizon may continue to charge rates already approved by the Commission (Report, ¶¶ 329, 531), so it appears that she did not intend to deny Verizon the right to charge any such rates. To remove any ambiguity in the Arbitrator's ruling, however, Verizon

asks the Commission to clarify that it need not file any new tariffs or interconnection agreement amendments to charge the disconnect fees already in its tariff. It would be pointless for Verizon to file another tariff for exactly the same activity. The process of disconnecting a UNE because it has been de-listed is no different from disconnecting it for any other reason. Verizon does not ask a CLEC why it is disconnecting a service when it receives a disconnect order; it just fulfills the order. If the Commission approves the Arbitrator's recommendation, Verizon will have the right to charge the tariffed disconnect fees for some carriers, but will have to give the service away for free to others. There is no lawful reason for discriminating among carriers based on the *reason* they order a service, whether it is disconnection or any other service. Because there is no cost or other basis for such discrimination, it would be unreasonable and unlawful. *See* 47 U.S.C. § 251(c)(2)(D).

74. Therefore, Verizon asks the Commission to clarify that it may continue to charge its already-approved, tariffed disconnect rates, just as it may continue to charge other Commission-approved rates.

XI. Conclusion

75. Verizon asks the Commission to clarify or, if necessary, modify the Arbitrator's rulings in accordance with Verizon's requests in this Petition.

Respectfully submitted on August 8, 2005.

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