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PUC DOCKET NO. 29451

PETITION OF VERIZON SOUTHWEST FOR ARBITRATION OF AN AMENDMENT TO INTERCONNECTION AGREEMENTS WITH COMPETITIVE LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS IN TEXAS PURSUANT TO SECTION 252 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, AND THE TRIENNIAL REVIEW ORDER	§	**PUBLIC UTILITY COMMISSION OF TEXAS**

PROPOSAL FOR AWARD

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PROPOSAL FOR AWARD

I. JURISDICTION

The Communications Act of 1934 (Act), [1] as amended by the Federal Telecommunications Act of 1996 (FTA),[2] authorizes state commissions to arbitrate open issues between an incumbent local exchange carrier (ILEC) and a requesting telecommunications carrier. [3] The Act also invests state commissions with authority to approve or reject interconnection agreements (ICAs) adopted by negotiation or arbitration.[4] The Public Utility Commission of Texas (Commission) is a state commission responsible for arbitrating ICAs pursuant to the Act.

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[1] Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (codified as amended in scattered sections of 47 U.S.C.).

[2] Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 151 *et seq.*).

[3] 47 U.S.C. § 252(b).

[4] 47 U.S.C. § 252(e).

II. PROCEDURAL HISTORY

On March 10, 2004, Verizon Southwest (Verizon) filed a petition to arbitrate an amendment to the interconnection agreements between Verizon and each of the competitive local exchange carriers (CLECs), and, to the extent that their current interconnection agreements provide for access to unbundled network elements (UNEs), each of the Commercial Mobile Radio Service (CMRS) providers in Texas. Specifically, Verizon's amendment proposed to implement changes in incumbents' network unbundling obligations promulgated in the Federal Communications Commission's (FCC's) *Triennial Review Order*[5] and affirmed by the D.C. Circuit Court of Appeals in *USTA II*.[6]

On March 19, 2004, Verizon filed an updated version of its draft *TRO* Amendment and described the changes made to the amendment. Verizon's changes were made in response to the D.C. Circuit's decision in *USTA II*, which affirmed in part and vacated in part the FCC's *TRO*.

The participating parties in this proceeding are: AT&T Communications of Texas, LP, TCG Dallas, and Teleport Communications Houston, Inc. (collectively, AT&T); Sprint Communications Company, LP (Sprint); Bullseye Telecom, Inc., Cbeyond Communications of Texas, LP (Cbeyond), ComCast Phone of Texas, LLC, Covad Communications Company, IDT America Corp., ionex Communications South, Inc. (ionex), KMC Telecom V, Inc., Xspedius Communications Switched Services, LLC, and XO Communications Services, Inc. (collectively, Competitive Carrier Group (CCG)); MCImetro Access Transmission Services, LLC, MCI WorldCom Communications, Inc. (as successor to Rhythms Links, Inc.), Brooks Fiber Communications of Texas, Inc., InterMedia Communications, Inc., McLeod USA Telecommunications Services, Inc., Netspan (f/k/a Foremost Telecommunications), Supra Telecom, Time Warner Telecom of Texas, LP, and Western Communications, Inc. d/b/a Logix Communications.

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[5] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competitive Provisions of the Telecommunications Act of 1996,* and *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-388, 96-98, 98-147, Order, FCC 03-36 (Aug. 21, 2003) (*Triennial Review Order* or *TRO*).

[6] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*).

The non-participating parties to this proceeding remained in this proceeding, but were not made part of the service list, did not receive filings, was not served discovery or allowed to serve discovery, and did not otherwise participate in this proceeding.[7]

On March 25, 2004, Order No. 1 established April 13, 2004, as the deadline for which a party was to file a response to Verizon's filings. Additionally, a prehearing conference was scheduled for the purpose of determining a procedural schedule consistent with Commission rules and the 270-day FTA deadline.

On March 31, Order No. 2 memorialized the prehearing conference and generally discussed a procedural schedule for this matter.

On April 30, 2004, pursuant to Order No. 3,[8] a prehearing conference was scheduled to discuss: (1) objections of certain parties being named as parties to this docket and subsequent requests for dismissal on factual grounds; (2) numerous parties' requests for dismissal on procedural grounds; (3) procedural alternatives for resolution of this matter; and (4) parties' legal positions regarding Verizon's amendment, particularly arguments regarding merger conditions.

On May 4, 2004, Verizon filed a motion for temporary abatement of this matter until June 15, 2004, the date on which the D.C. Circuit's mandate in *USTA II* was to be issued. Several parties filed responses regarding Verizon's motion to abate.

Throughout the course of this proceeding numerous parties were dismissed as necessary parties to this proceeding.

On May 20, 2004, Verizon's motion to abate was granted until June 15, 2004. Further, Verizon was instructed to file an Amended Petition and Decision Point List (DPL) between August 2 and 26, 2004.

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[7] 1-800-Reconex, Inc., AboveNet Communications, Inc., ACN Communications, Inc., AmeriMex Communications Corp., BroadLink Telecom, LLC, Broadwing Communications, LLC (f/k/a Focal Communications), Budget Phone, Inc., Business Telecom, Inc., DSLNet Communications, L.L.C., Global Crossing Local Services, Inc., Integrated Communications Consultants, Inc., ITC DeltaCom Communications, Inc., KCC TelCom, Metropolitan Telecommunications of Texas, Inc., Navigator Telecommunications, Inc., New Edge Network, Inc., NOS Communications, Inc., Preferred Carrier Services, Inc., QuantumShift Communications., Inc., Southwestern Bell Wireless, Symatec Communications, T-Mobile USA, Telcove Operations, Inc. (f/k/a Adelphia Business Solutions of Texas L.P.), VarTec Telecom, Inc., Vycera Communications, Inc., and Z-Tel Communications, Inc.

[8] *See* Order No. 3, Setting Prehearing Conference (Apr. 30, 2004).

On August 25, 2004, Verizon sought to extend the deadline in which to file its Amended *TRO* Petition and DPL. Verizon explained that on August 20, 2004, the FCC issued interim rules which imposed "transitional" unbundling obligations with respect to the UNEs eliminated by the *USTA II* mandate (that is, mass-market switching, high-capacity loops, and dedicated transport). According to Verizon, the FCC made clear that its interim rules did not affect ILECs' rights to proceed with change-of-law proceedings, like arbitration. Further, Verizon clarified that some revision of its *TRO* Amendment filed on March 19, 2004, would likely be necessary in light of the FCC's interim rules.

On September 10, 2004, Verizon filed its updated arbitration filing and proposed arbitration schedule. Verizon's filing included a schedule to reflect a mandated 30-day negotiation period, after which Verizon would file its updated Arbitrated Petition on October 18, 2004.

On September 29, 2004, Verizon offered to delay the proceeding an additional 30 days in order to enable newly-assigned Staff to familiarize themselves with the record and to double the ordered negotiation period. Therefore, the filing date for Verizon to file an updated Petition for Arbitration was extended to November 18, 2004.

On November 18, 2004, Verizon filed its Updated Petition for Arbitration. The Updated Petition included Amendment No. 2, a joint DPL for Amendment Nos. 1 and 2, and a proposed procedural schedule. Verizon explained that it was not offering its Amendment No. 2 affirmatively but in response to AT&T's criticism and other CLECs' requests to include such subject matter in this arbitration. Verizon's Updated Petition requested bifurcation of the arbitration into two tracks dealing with the respective amendments. Specifically, Verizon urged that Amendment No. 1 review proceed separately from Amendment No. 2 review because Amendment No. 2 contained factual issues that would delay the proceeding of Amendment No. 1, which primarily addressed legal issues. Verizon suggested that Amendment No. 2 issues be taken up after the FCC acted to define the ILEC's affirmative obligations for unbundling of high-capacity loops and transports.

On December 15, 2004, this proceeding was abated[9] pending issuance of permanent UNE rules by the FCC. The Arbitrators concluded that the multitude of issues affecting the interconnection agreements of all parties to the arbitration, which entailed the outcomes of the FCC's *TRO*, the D.C. Circuit's *USTA II*, and the FCC's *Interim Rules Order,* had not been fully developed in Verizon's amendment and awaited the conclusion of the FCC's determination of permanent UNE rules.

On March 17, 2005,[10] this proceeding was unabated and the parties were directed to file a joint proposed procedural schedule, including dates for a hearing on the merits.

On May 5, 2005, tentative approval of a procedural schedule was determined and 34 additional companies were dismissed as parties from this proceeding.[11] Specifically, 13 companies signed Verizon's *TRO* amendment, and 21 companies had interconnection agreements which had expired and to which Verizon no longer provided services that were covered under their corresponding interconnection agreement.

On July 8, 2005, the Arbitrators temporarily suspended the procedural schedule in this docket as the Commission *TRO* proceeding, Docket No. 28821,[12] had not yet reached final resolution. The Arbitrators reasoned that the Commission desired and expected the parties to reflect such decisions from Docket No. 28821 in the negotiation positions in the instant docket. On September 7, 2005, the suspension was lifted. Subsequently, clarification of party status was determined.

On October 13, 2005, Verizon filed a revised proposed *TRO* Amendment reflecting Commission decisions in Docket No. 28821 as well as conforming language negotiated by the parties in Massachusetts.

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[9] *See* Order No. 17, Abatement of Arbitration (Dec. 15, 2004).

[10] *See* Order No. 18, Granting Motion to Unabate and Requesting Joint Proposed Procedural Schedule (Mar. 17, 2005).

[11] *See* Order No. 19, Granting Dismissal of Certain Parties, Requesting Clarification of Service List, and Tentative Approval of Procedural Schedule (May 5, 2005).

[12] *See* Order No. 23, Suspending Procedural Schedule (Jul. 8, 2005).

On November 8, 2005, a final revised procedural schedule was established for this proceeding.[13] Such schedule provided for briefing of DPL disputes rather than convening a hearing on the merits.

On November 14, 2005, Verizon submitted a master joint DPL.

Parties filed initial briefs on November 29, 2005, and reply briefs on December 13, 2005. Although AT&T submitted DPL issues, AT&T did not file any briefs.

The Arbitrators issued this Proposal for Award on March 6, 2006.

III. RELEVANT STATE AND FEDERAL PROCEEDINGS

Relevant Commission Decisions

Docket No. 28821

In Docket No. 28821, the Commissioners, acting as arbitrators, addressed a number of issues decided in two tracks. Track 1 addressed the terms and conditions for the portions of successor interconnection agreements to the Texas 271 Agreement adopted by the Commission in October 1999.[14] Track 2 addressed issues related to unbundled network elements.

Track 1

Given that the FCC eliminated entrance facilities as UNEs,[15] the Commission determined that a CLEC should not be able to obtain those facilities at total element long-run incremental cost (TELRIC) rates merely by characterizing those same facilities as interconnection facilities instead of entrance facilities. The Commission concluded that, whether for interconnection or for unbundled access to network elements, TELRIC rates did not apply to entrance facilities. The Commission noted that although CLECs no longer had access to entrance facilities as UNEs, CLECs would continue to have the right to obtain interconnection facilities pursuant to FTA

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[13] *See* Order No. 32, Establishing Revised Procedural Schedule (Nov. 8, 2005).

[14] *See Investigation Into Southwestern Bell Telephone Company's Entry into in-Region Interlata Service under Section 271 of the Telecommunications Act of 1996*, Docket No. 16251, Order No. 55 (Oct. 13, 1999).

§ 251(c)(2) and the FCC's rules[16] for the transmission and routing of telephone exchange service and exchange access service.[17]

Track 2

State Law Unbundling

In Track 2, the Commission determined[18] that because the FCC has "occupied the field" with respect to the issue of whether unbundled local switching is impaired on a national basis,[19] state law was no longer operative with respect to the issue of whether unbundled local switching will be made available at TELRIC rates. Accordingly, consistent with the Commission's discussion at the February 24, 2005, open meeting, the Commission did not address unbundling obligations under state law.[20]

Temporary Rider

In Track 2, after reviewing the competing contract terms, the Commission adopted the Embedded Base Temporary Rider proposed by AT&T and SBC Texas, with modifications, and applied it to all CLECs.[21] The Commission modified the Temporary Rider to ensure that it incorporated all of the *TRO* and *TRRO* requirements. The CLECs, except AT&T, had requested that the body of the ICA address the treatment of UNE-P arrangements as a transitional offering during the transition period and thereafter as a section 271 offering.[22] However, given the previously discussed decision regarding the treatment of 271 network elements in this ICA, the Commission found that ease of administration, both by the industry as a whole and by the Commission, supported a format clarifying the transitional nature of certain obligations. The

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[15] *Unbundled Access to Network Elements* and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 01-388 and CC Docket No. 01-388, Order on Remand, FCC 04-290 at paras. 137-141 (Feb. 4, 2005) (*Triennial Review Remand Order* or *TRRO*).

[16] *See* 47 C.F.R. § 51.305.

[17] *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28821, Arbitration Award, Track 1 Issues at 16 (Feb. 23, 2005) (Track 1 Award).

[18] *See Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Arbitration Award, Track 2 Issues, at 1-2 (Jun. 20, 2005) (Track 2 Award).

[19] *See TRRO* at paras. 187, 196, 199, 204, 209, 218, and 222.

[20] Open Meeting Tr. at 155 (Feb. 24,2005).

[21] *See* Track 2 Award at 23.

[22] *See* Order on Clarification and Reconsideration at 3-4 (May 11,2005).

Commission agreed that the limited life of declassified UNEs (i.e., generally March 11, 2006;[23] and September 11, 2006 for Dark Fiber Loops)[24] reinforced the need to segregate the terms and conditions applicable to these short-term arrangements from those ongoing obligations included within the five-year ICA for all other §251(c)(3) UNEs.

Transitional UNEs-Loop/Transport Availability

The Commission did not agree with SBC Texas that each and every change to a UNE during the term of the five-year contract developed in Docket No. 28821 should be self-effectuating. The Commission recognized that it would continue to address changed circumstances on a going-forward basis in accordance with the specified processes outlined in the ICA for declassifications of UNEs under the *TRO* and *TRRO*. On the other hand, the Commission also determined that it would need to address other, future, potential declassifications pursuant to the ICA's change of law provision approved in Track 1.[25] The Commission recognized that, in the future, Central Offices that were not originally classified as either Tier 1 or Tier 2 Central Offices may grow line counts or add additional collocation arrangements. Thus, on an ongoing basis, Central Offices may prospectively meet the TRRO's declassification criteria.[26] SBC Texas has asserted that the associated declassification of UNEs, such as interoffice transport and loops, should be self-effectuating under the ICA. CLECs, on the other hand, generally asserted change of law provisions should apply to this situation.

The Commission distinguished declassification of Central Offices pursuant to the existing standards established under the *TRO* and *TRRO* from changes the FCC or the courts may make in the future. In particular, the Commission found that the TRO and TRRO already changed the law; the only question became whether or when a specific Central Office meets the established criteria. Therefore, the Commission found no support for imposing an additional change of law process upon such situations. The Commission observed that it would continue to address other potential declassifications pursuant to the ICA's change of law provision approved in Track 1.

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[23] *TRRO* para. 199.

[24] *TRRO* para. 197.

[25] Track 1 Award, General Terms and Conditions DPL at 13.

[26] *TRRO* at para. 167 n.466.

Transitional UNEs - Embedded Customer Base

The Commission concluded that, in accordance with the context provided under the TRO and TRRO, the term "embedded customer base" should be read to grandfather only the existing lines of existing customers, and to disallow the growth of UNE-P lines. In other words, the Commission agreed with defining the embedded customer base as one for which no new port must be added, but for which new features may be added or deleted upon request. Having had the benefit of all parties' positions on this issue, the Commission revised its interim decision on this topic,[27] but found no basis for retroactively changing that decision or for providing true-up of rates. Also, in An effort to minimize customer impacts, the Arbitrators did not recommend an immediate cut off date; instead, the Commission found that implementation of this revised approach should become effective on October 1,2005. The Commission believed that the FCC signaled the need for CLECs to avail themselves of market alternatives to TELRIC-based UNE-P arrangements during the transition period. Consistent with that decision, the Commission endorsed the FCC's transition by CLECs from UNE-P to other arrangements prior to the March 11, 2006 deadline.

Administrative Charges-Conversion Charges

The Commission determined that charges associated with converting UNEs to Access service, including charges pursuant to the interstate access tariffs, should be disallowed. The Commission believed that the TRO made clear that CLECs do not have to pay such charges when they continue serving existing customers .using the identical, in-place facilities already used to serve these customers.[28] Given that the only change associated with the conversion is a pricing change, the Commission found no justification for imposing conversion charges in such situations. However, the Commission found that the imposition of a nominal, record change charge that would recover the actual administrative costs incurred by SBC Texas for such conversions was appropriate.

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[27] Order No. 39 Issuing Interim Agreement Amendment (Feb. 25, 2005).

[28] *TRO* at para. 587.

Docket No. 31303

In Docket No. 31303, the Commission addressed various issues related to wire center declassification.[29] These issues included: the procedure for revising wire center lists, the definition of fiber-based collocator, and the definition of affiliate. At the February 23, 2006, open meeting, the Commission considered these issues and adopted Staff's recommendations, with modification to recommended decision on the fiber-based collocator issue. The Commission decided not to restrict the timing of the ILEC's wire center designations. Moreover, the Commission found that the *TRRO* contemplated that parties would address designation disputes according to ICA dispute resolution procedures. As part of addressing wire center declassification, the Commission also decided that the ILEC should file a request to update its declassified wire center list when no CLEC self-certifies within the prescribed time. With respect to definitions, the Commission determined that: a collocator that has either fiber-optic cable or a fiber-optic cross-connect terminating in the collocation space "operates" a fiber-optic cable, and "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person.

Relevant Federal Communications Commission Decisions

Triennial Review Order

In the *TRO*, the FCC determined what elements ILECs must offer on an unbundled basis. The FCC required unbundled access to: mass market loops, certain subloops, network interface devices (NIDs), switching for mass market and operational support system (OSS) functions.[30] The FCC did not require unbundled access to: enterprise market loops, switching for enterprise market, packet switching.[31] Under certain conditions, the FCC required unbundled access to: transport, signaling networks and call-related databases.[32] In addition, the FCC redefined the dedicated transport network element as those "transmission facilities that connect incumbent

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[29] *See* Docket No. 31303, *Post Interconnection Dispute Resolution Proceeding Regarding Wire Center Classification*, .

[30] *TRO* at para. 7.

[31] *TRO* at para. 7.

[32] *TRO* at para. 7.

LEC switches or wire centers."[33] The FCC found that facilities outside of the ILEC's local network should not be considered part of the dedicated transport network element subject to unbundling.[34] Accordingly, the FCC observed that "[o]ur determination here effectively eliminates 'entrance facilities' as UNEs."[35] The FCC also noted that § 271(c)(2)(B) established an independent obligation for ILECs to provide access to loops, switching, transport, and signaling, regardless of any unbundling analysis under § 251.[36] The D.C. Circuit vacated and/or remanded portions of the *TRO* in *USTA II.*

Triennial Review Remand Order

On February 4, 2005, the FCC issued the *TRRO* in response to the remand of the *TRO* by the D.C. Circuit in *USTA II.* The *TRRO* addressed the unbundling of network elements. The FCC denied access to UNEs for service exclusively in a market that is competitive without unbundling. In particular, the FCC denied access to UNEs for the provision of mobile wireless services and long distance services.[37]

MDU Reconsideration Order

In the *MDU Reconsideration Order*,[38] the FCC reconsidered certain *TRO* determinations with regard to multiple dwelling units (MDUs) and concluded that the fiber-to-the-home (FTTH) rules will apply to predominantly residential MDUs. The FCC also clarified 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.

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[33] *TRO* at para. 7.

[34] *TRO* at para. 366.

[35] *TRO* at para. 366 n.1116.

[36] *TRO* at para. 7.

[37] *TRRO* at para. 34.

[38] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competitive Provisions of the Telecommunications Act of 1996,* and *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-388, 96-98, 98-147, Order on Reconsideration, FCC 04-191 (Aug. 9, 2004) (*MDU Reconsideration Order*).

FTTC Reconsideration Order

In the *FTTC Reconsideration Order*,[39] the FCC found that the FTTH analysis applied to FTTC loops, as well, and granted the same unbundling relief to FTTC as applied to FTTH.

Relevant Court Decisions

USTA II

In *USTA II*, the D.C. Circuit addressed the *TRO* and remanded portions of that order to the FCC for further consideration. The D.C. Circuit found that the FCC lacked authority to sub delegate the nationwide impairment determination to the states. Consequently, the D.C. Circuit vacated the FCC's decision to order unbundling of mass market switches and its impairment findings with respect to dedicated transport elements.[40] The D.C. Circuit also remanded the issue of whether entrance facilities constitute "network elements."[41]

IV. Discussion of DPL Issues

This proceeding addresses the issues in the DPL filed by the Parties on November 14, 2005.[42] This award will not specifically discuss the issues resolved by the stipulations filed on November 4, 2005.[43]

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[39] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competitive Provisions of the Telecommunications Act of 1996,* and *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-388, 96-98, 98-147, Order on Reconsideration, FCC 04-248 (Oct. 18, 2004) (*FTTC Order*).

[40] *USTA II* at 571, 574.

[41] *USTA II* at 586.

[42] Joint Decision Point List (Nov. 14, 2005) (Joint DPL).

[43] *See* Verizon's letter indicating that the active parties have agreed on the disposition of certain issues in this docket (Nov. 4, 2005).

DPL ISSUE NO. 1

How should the Amendment reflect the general conditions governing Verizon's obligation to provide access to UNEs?

CLEC's Position

The CLECs argue that Verizon's proposed language for Section 2.2 is overly broad and exceeds the terms approved by the Commission in Docket No. 28821. Specifically, AT&T noted that Verizon's language is unnecessary because the entire Amendment specifies the terms under which certain UNEs affected by the *TRO/TRRO* are provided and the terms for the provisions of other UNEs are set forth in the parties' underlying agreement.[44] CCG stated that the Amendment should reflect Verizon's obligations to provide access to UNEs under all Applicable Law, including, but not limited to State Law.[45] CCG cites Section 251(e)(3) of the Act which provides that nothing shall prohibit states from establishing or enforcing other requirements of state law in ICAs.[46] CCG explained that network elements provided pursuant to state law are intrastate telecommunications services subject to the jurisdiction of the state and thus, the Commission has the discretion to include the terms and conditions of these UNEs in this ICA.[47] Cbeyond and Logix concurred with AT&T's position. Additionally Cbeyond urged the Commission to reject Verizon's language since it would give Verizon the ability to impose its interpretation of the FCC's rules on the CLECs.[48]

Verizon's Position

Verizon argued that the purpose of this Arbitration is to implement changes in unbundling obligations under § 251, as implemented by the FCC.[49] Verizon referenced Docket No. 28821, where the Commission confirmed that an ILEC's unbundling obligations under its

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[44] Joint DPL at 1-2.

[45] CCG Initial Brief at 4-6 (Nov. 29, 2005).

[46] CCG Initial Brief at 4-6.

[47] CCG Initial Brief at 4-6.

[48] Cbeyond Initial Brief at 3-5 (Nov. 29, 2005).

[49] Joint DPL at 1-4.

ICAs were governed exclusively by §251(c)(3) as interpreted by the FCC.[50] Verizon claims that its proposed language in Sections 2.2 and 2.3 of this ICA accurately reflects its unbundling obligations under Section 251 of the FTA, the FCC's implementing rules, and the Commission's decision in Docket No. 28821. Verizon also stated that its use of the term "Federal Unbundling Rules" throughout the Amendment more simply and accurately reflects the law and the Commission's ruling in Docket No. 28821. Nevertheless, Verizon proposes additional language as an alternative, that it claims more closely tracks the language in Docket No. 28821, Track 2.[51]

Arbitrators' Decision

This DPL impacts several sections of the ICA. They include Section 2.2, Section 2.3, Section 2.6 and Sections 3.2.2, 3.2.3, 3.2.4, 3.3, 3.6.1.1, 3.6.2.1, 3.11.2, and 3.1.3.1.

Section 2.2

In this section, the parties dispute how this Amendment should reflect the general conditions governing Verizon's obligation to provide access to UNEs, commingling and combining. In the *TRO*, the FCC held that "the Act does not prohibit the commingling of UNEs and wholesale services and that section 251(c)(3) of the Act grants authority for the Commission to adopt rules to permit the commingling of UNEs and combinations of UNEs with wholesale services, including interstate access services."[52]

The Commission addressed a similar matter in Docket No. 28821, Track 2.[53] In that docket, the Commission also resolved the issue of unbundling obligations under state law. The Commission concluded that "arguments relating to unbundling obligations under state law were deemed outside of the scope of . . . this proceeding."[54] Moreover, the FCC stated that:

> If 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 decision would fail to conflict with and "substantially

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[50] Joint DPL at 1.

[51] Joint DPL at 1-4.

[52] *TRO* at 581.

[53] *See* Track 2 Award, UNE DPL at 1-3.

[54] Track 2 Award at 2.

> prevent" implementation of the federal regime, in violation of section 251(d)(3)(C).[55]

Accordingly, the Arbitrators do not address issues related to providing UNEs under state law in this proceeding. Instead, the Arbitrators adopt language consistent with the Commission's decision in Docket No. 28821.

Section 2.2

The Arbitrators modify Section 2.2 as follows:

> This Agreement sets forth the terms and conditions pursuant to which Verizon will provide ***CLEC Acronym TXT*** with access to unbundled network elements ("UNEs"), combinations of unbundled Network Elements ("Combinations"), or UNEs commingled with wholesale services ("Commingling") under Section 251(c)(3) of the Act in Verizon's incumbent local exchange areas for the provision of Telecommunications Services by ***CLEC Acronym TXT***; provided, however, that notwithstanding any other provision of the Agreement, Verizon shall be obligated to provide UNEs pursuant to this interconnection agreement only to the extent required by Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders, and may decline to provide UNEs to the extent that provision of the UNE(s) is not required by Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders. UNEs that Verizon is required to provide pursuant to Section 251(c)(3) of the Act, as determined by the FCC rules and orders are generally referred to as 251(c)(3) UNEs.

Section 2.3

The Arbitrators accept Verizon's modification to section 2.3 since Verizon merely states that it will provide UNEs consistent with Federal law. To provide clarity, the Arbitrators include a reference to the appropriate section of the Act.

> 2.3 Restrictions on ***CLEC Acronym TXT***'s Use of UNEs. Restrictions on ***CLEC Acronym TXT***'s Use of UNEs. To the extent Verizon is required to provide a UNE, Combination, or Commingling under this Amendment, ***CLEC Acronym TXT*** may use such UNE, Combination, or Commingling only for those purposes for which Verizon is required by the Federal Unbundling Rules implementing Section 251(c)(3) of the Act to provide such UNE, Combination, or Commingling to ***CLEC Acronym TXT***. By way of example and without limiting the foregoing, ***CLEC Acronym TXT*** may not access a UNE for the exclusive provision of Mobile Wireless Services or Interexchange Services.

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[55] *TRO* at para. 195.

Section 2.6 and Sections 3.2.2, 3.2.3, 3.2.4, 3.3, 3.6.1.1, 3.6.2.1, 3.11.2, and 3.1.3.1

The Arbitrators modify these sections consistent with the Commission determination in Docket No. 28821.[56] In the decision on DPL Issue No. 1, the Commission limited its reference to 47 U.S.C. § 251(c)(3) of the Act, "as determined by FCC rules and associated lawful and effective FCC and judicial orders" while rejecting references to the term "lawful."[57] Accordingly, the Arbitrators modify the proposed contract language consistent with the Commission's decision on DPL Issue No. 1, in Docket No. 28821, Track 2:

> 2.6: Limitation With Respect to Replacement Arrangements. Certain provisions of this Amendment refer to Verizon's provision of a facility, service, or arrangement to replace Discontinued Facilities. Any reference in this Amendment to Verizon's provision of a facility, service, or arrangement that Verizon is not required to provide **under the Federal Unbundling Rules implementing ~~in accordance with~~ 47 U.S.C. § 251(c)(3), as determined by effective FCC rules and associated effective FCC and judicial orders** is solely for the convenience of the Parties and shall not be construed as consent of either Party that the rates, terms or conditions upon which Verizon shall provide such facilities, services, or arrangements are subject to the requirements of 47 U.S.C. § 252.
>
> Sections 3.3, 3.6.1.1, 3.6.2.1, 3.11.2, and 3.11.3.1 "in accordance with 47 U.S.C. § 251(c)(3), as implemented by FCC rules and interpreted by FCC and judicial orders ~~, but only to the extent required by, the Federal Unbundling Rules.~~"
>
> 3.2.2 Broadband Services. Notwithstanding any other provision of the Amended Agreement (but subject to and without limiting Section 2 above **and Section 4.4 below**), when ***CLEC Acronym TXT*** seeks access to a Hybrid Loop for the provision of "broadband services," as such term is defined by the FCC, then in accordance with **47 U.S.C. § 251(c)(3), as implemented by FCC rules and interpreted by FCC and judicial orders ~~, but only to the extent required by, the Federal Unbundling Rules,~~** Verizon shall provide ***CLEC Acronym TXT*** with nondiscriminatory access under the Amended Agreement to the existing time division multiplexing features, functions, and capabilities of that Hybrid Loop, including DS1 or DS3 capacity (where impairment has been found to exist, which, for the avoidance of any doubt, does not include instances in which Verizon is not required to provide a DS1 Loop under Section 3.4.1 below or is not required to provide a DS3 Loop under Section 3.4.2 below) on an unbundled basis to establish a complete transmission path between the Verizon central office serving an end user and the end user's customer premises. This access shall include access to all features, functions, and capabilities of the Hybrid Loop that are not used to transmit packetized information.

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[56] *See* Track 2 Award, UNE DPL at 4.

[57] *See* Track 2 Award, UNE DPL at 4.

3.2.3 Narrowband Services. Notwithstanding any other provision of the Amended Agreement (but subject to and without limiting Section 2 above **and Section 4.4 below**), when ***CLEC Acronym TXT*** seeks access to a Hybrid Loop for the provision of "narrowband services," as such term is defined by the FCC, then in accordance with **47 U.S.C. § 251(c)(3), as implemented by FCC rules and interpreted by FCC and judicial orders, ~~but only to the extent required by, the Federal Unbundling Rules,~~** Verizon may either: (a) provide nondiscriminatory access, on an unbundled basis, to an entire hybrid loop capable of voice-grade service (i.e., equivalent to DS0 capacity), using existing time division multiplexing technology; or (b) provide nondiscriminatory access to a spare home-run copper loop serving that customer on an unbundled basis.

3.2.4 DLC Hybrid Loops. Notwithstanding any other provision of the Amended Agreement (but subject to and without limiting Section 2 **and Section 4.4 below**) or any Verizon Tariff or SGAT, if ***CLEC Acronym TXT*** requests, in order to provide narrowband services, unbundling of a 2 wire **analog** or 4 wire **analog** Loop currently provisioned via Integrated Digital Loop Carrier (over a Hybrid Loop), Verizon shall, **in accordance with 47 U.S.C. § 251(c)(3), as implemented by FCC rules and interpreted by FCC and judicial orders ~~and as to the extent required by, the Federal Unbundling Rules,~~** provide ***CLEC Acronym TXT*** unbundled access to a Loop capable of voice-grade service to the end user customer served by the Hybrid Loop.

DPL ISSUE NO. 2

How should the Amendment address pre-existing discontinuance rights?

CLEC's Position

AT&T argued that Verizon's proposed contract language is inconsistent with the Commission determination in Docket No. 28821, Track 2.[58] AT&T claimed that Verizon's language creates ambiguity by leaving the facilities which this Amendment addresses open ended.[59] With respect to 2.5.2, AT&T argued that Verizon should only be permitted to reject a CLEC order for a facility in a non-impaired wire center only after some affirmative action of the FCC or the Commission.[60] AT&T cautioned that by allowing rejection of orders with no affirmative action, Verizon's language would give it free reign to claim that almost any circumstance could constitute some Commission or FCC action that allowed the wire center

[58] Joint DPL at 4-5.

[59] Joint DPL at 5.

[60] Joint DPL at 5.

designation to take effect, leaving CLECs without certainty and subject to Verizon's unilateral interpretation.[61] For the above reasons AT&T urged that Verizon's language be rejected.

Sprint argued that the *TRO* and *TRRO* did not affect the change in law provisions included in the general terms and conditions of most agreements, therefore, Verizon should not be allowed to modify the underlying change in law terms via this amendment.[62]

CCG urged that Verizon's discontinuance rights must be limited to those discontinuance rights existing prior to the execution of the Amendment. CCG proposes to include contract language which states that "Notwithstanding the above, Verizon shall comply with the [ARBITRATION ORDER], including any ruling set forth in the [ARBITRATION ORDER] regarding whether the terms of the Agreement require Verizon to negotiate an amendment in order to discontinue a UNE." CCG stated that Verizon's pre-existing discontinuance rights must be effectuated in accordance with the arbitration order, including any ruling set forth in the arbitration order regarding whether the terms of the Agreement require Verizon to negotiate an amendment in order to discontinue a UNE.

Logix joined in AT&T's language and position.

Verizon's Position

Verizon argued that its proposed section, which recognizes Verizon's rights to discontinue de-listed UNEs under the Amendment, is in addition to any rights Verizon already has under existing agreements. Verizon stated that its language makes clear that the Amendment shall not be construed to limit the "future" exercise of Verizon's rights under the existing provisions in the event additional facilities are de-listed in the future. Verizon noted that in Docket No. 28821, the Commission ruled that "potential declassifications" in the future would be addressed "pursuant to the ICA's change of law provision" that the Commission had earlier approved for SBC.[63] Verizon also rejects the CCG proposal to add language, which sates that Verizon must comply with the rulings in the Arbitration Award regarding whether the terms of a particular ICA require Verizon to negotiate an amendment to discontinue a UNE. Verizon stated

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[61] Joint DPL at 5.

[62] Sprint Initial Brief at 3-4 (Nov. 29, 2005).

[63] Track 2 Award at 17-18.

that since interpretation of existing ICAs is not an issue to be resolved in this arbitration, adding such language would be unnecessary and potentially confusing.

Arbitrators' Decision

There are two disputes in this DPL. (1) Issues related to Self-effectuating clause for change of law, and (2) Dispute regarding characterizing FCC Rules and Orders.

Self-effectuating clause for change of law.

The Arbitrators agree with the CLECs that the interconnecting carrier should have the opportunity to debate and discuss change of law issues with Verizon. Verizon's proposed language suggests that Verizon could unilaterally determine the applicability of a change of law and implement the alleged change. However, both the *TRO*[64]and *TRRO*[65] support the use of change of law provisions to implement changes to agreements. Moreover, the Commission also determined in Docket No. 28821 that it "will continue to address changed circumstances prospectively in accordance with the specified processes outlined in the ICA for declassification of UNEs under the *TRO* and *TRRO*, while addressing other potential declassifications pursuant to the ICA's change of law provision approved in Track 1."[66] Accordingly, the Arbitrators modify Verizon's language to be consistent with the *TRO*, *TRRO*, FCC rules, and prior Commission decisions.

The Arbitrators reject CCG's proposed language since it adds nothing of any substance. CCG's language essentially states that Verizon must comply with Commission orders, which should already be understood. Given the preceding considerations, the Arbitrators adopt the following language for section 2.5.1:

> Verizon's rights as to discontinuance of Discontinued Facilities pursuant to this Amendment are in addition to, and not in limitation of, any rights Verizon may have under the Agreement as to discontinuance of Discontinued Facilities, and nothing contained herein shall be construed to prohibit, limit, or delay Verizon's past ~~**or future**~~ exercise of any pre-existing right it may have under the Agreement to cease providing **unbundled access to elements and facilities that are** ~~**or become**~~ Discontinued Facilities.

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[64] *See TRO* at para. 701.

[65] *See TRRO* para. 233.

[66] Track 2 Award at 17-18.

Characterizing FCC Rules and Orders

In section 2.5.2 of the contract, the parties dispute the characterization of Commission and FCC Orders. AT&T prefers the inclusion of the phrase "affirmatively orders."[67] While Verizon believes that the contract should use the phrase "or allows to go into effect." The Arbitrators find that neither of these modifications are necessary to the contract language to describe any FCC or Commission orders. The effect of any Commission or FCC order depends on the language of the order itself. Adding the word "affirmatively," or the phrase "allows to go into effect," does not clarify the effect of the order on the contract. Therefore the Arbitrators reject Verizon's and AT&T's proposed modifications of § 2.5.2.

> § 2.5.2: Without limiting Section 2.5.1 above, this Amendment itself is not intended to implement future changes in law regarding unbundling obligations (whether new affirmative unbundling obligations or cessation of existing unbundling obligations); provided, however, that, for the avoidance of any doubt, this Section 2.5.2 shall not be construed to limit Verizon's rights with respect to: (a) discontinuance of UNEs at wire centers (or on routes) that in the future become non-impaired based on the FCC's criteria referenced in Sections 3.4 and 3.5 below; (b) discontinuance of any loops or transport that in the future exceed the caps set forth in Sections 3.4 and 3.5 below; (c) Verizon's rejection of a ***CLEC Acronym TXT*** order for a *TRRO* Certification Element without first seeking dispute resolution, under Section 3.6.2.3 below, in any case where a ***CLEC Acronym TXT*** order conflicts with a future non-impaired Wire Center designation that the Commission or the FCC ~~affirmatively~~ orders, approves, ~~or allows to go into effect~~ or that is otherwise confirmed through dispute resolution, or to the extent the Commission or the FCC otherwise permits Verizon to reject CLEC orders for *TRRO* Certification Elements without first seeking dispute resolution; (d) repricing or disconnection of Discontinued Facilities at the end of the *TRRO* transition periods as provided for in Section 3.9 below; (e) discontinuance of High Capacity EELs that are determined in the future to be non-compliant under Section 3.11.2.2 or 3.11.2.7 below, (f) future implementation of any rates or charges pursuant to the terms set forth in the Pricing Attachment to this Amendment.

DPL ISSUE NO. 3

How should the Amendment address access to (a) newly built FTTH and FTTC loops; and (b) overbuilt FTTH and FTTC loops?

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[67] Joint DPL at 4-5.

CLEC's Position

CLECs generally argued that FCC's rule do not exempt Verizon from providing access to "any segment" of a FTTH or FTTC loop. While they acknowledged that § 51.319(a)(3)(i), relieves Verizon of its obligation to provide non-discriminatory access to a FTTH loop when it deploys such a loop on a premise that previously has not been served by any loop facility, they claim that including the phrase "other than a FTTH or FTTC Loop" would prevent CLEC from obtaining access to loops to which they are entitled. Specifically, CLECs believe that where there is copper from a premises to the curb (and then fiber from the curb to the CO), they are entitled to receive access to the copper segment. Additionally, CLECs claim that Verizon must provide, at the CLECs' request, up to 24 voice grade transmission paths or a DS-1 equivalent transmission path if they originally served using a DS-1 and that loops is now being retired.[68]

Verizon's Position

Verizon argued that the *TRO* ruled that CLECs are not entitled to entire, newly built fiber loop. Verizon noted that its language accurately captures the FCC's rules and CLECs' refusal to acknowledge that they are not entitled to any segment of the newly built fiber loop does not have a legitimate basis. Verizon stated that its language makes clear that it has no obligation to unbundle fiber loops that may replace other fiber loops. On the issue of channelizing DS-1 into 24 DS0s, Verizon argued that according to 47 C.F.R. § 51.319(a)(3)(ii)(C) CLECs are entitled only to "a" single voice grade path in such situations.[69]

Arbitrators' Decision

There are two issues related to fiber deployment that are disputed in the DPL. The first dispute relates to fiber deployment in the case of "new builts." The second dispute relates to separating a retired DS1 loop into 24 DS0s.

"New Builds" versus "Overbuilds"

The FCC eliminated fiber (FTTC or FTTH) unbundling obligations, except in overbuild situations. The *TRO* held that "Incumbent LECs do not have to offer unbundled access to newly

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[68] CCG Initial Brief at 8-10; Joint DPL 8-10.

[69] Verizon Initial Brief at 17-20.

deployed or 'greenfield' fiber loops."[70] The main dispute in this issue is whether CLECs are entitled to the copper portion of the loop or any segment in the case of an FTTC or FTTH deployment. The Arbitrators find that the relevant issue is not whether Verizon deploys FTTC or FTTH, but rather whether the customer had previously been served by a copper loop facility. If the customer had previously been served by copper, and Verizon deploys a "new" FTTC or FTTH, then this situation constitutes an overbuild, and Verizon must provide unbundled DS0 access to the customer. On the other hand, if there was no copper access to the customer, then Verizon is not obligated to unbundle any segment of the FTTC or FTTH, including the copper portion in the case of FTTC. The FCC found that in overbuild situations, competitive LECs should have continued access to either a copper loop or a 64 kbps transmission path.[71] Additionally, the FCC reasoned that:

> [D]eployment of overbuild FTTH loops could act as an additional obstacle to competitive LECs seeking to provide certain services to the mass market. By its nature, an overbuild FTTH deployment enables an incumbent LEC to replace and ultimately deny access to the already-existing copper loops that competitive LECs were using to serve mass market customers.[72]

Thus the FCC intended to maintain any DS0 access (either by continued access to existing copper or by access to a 64 kbps circuit on the new fiber) that may have existed in the first place. For the reasons stated above, the Arbitrators reject the CLEC's modification to Section 3.1.1.

DS-1 channelized into 24 DS0s.

The CLECs argue that they are entitled to a channelized DS1 (24 DS0s) in overbuild situations when a copper subloop over which they were providing DS1 service is retired. In explaining the carve-out, the FCC stated that "By its nature, an overbuild FTTH deployment enables an incumbent LEC to replace and ultimately deny access to the already-existing copper loops that competitive LECs were using to serve mass market customers."[73] Thus the FCC limited its carve-out for overbuilds only to mass market customers.

However, it is unclear under what circumstances CLECs might provide DS1 service over a copper loop to mass market customers in the first place. The only situation that the Arbitrators

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[70] *TRO* at para. 273.

[71] *See TRO* at para.277.

[72] *See TRO* at para.277.

[73] *See TRO* at para.277.

believe that a DS1 serves mass market customers involves predominately residential multiple dwelling units (MDUs), such as apartment buildings.[74] In the case of an MDU, Verizon could presumably retire a DS1 copper loop that aggregates multiple DS0s from several units of an MDU (e.g., a single DS1 may serve 12 apartment units, each apartment with two DS0s). In this scenario, the Arbitrators find that the retired DS1 loop is equivalent to multiple DS0 copper loops, for which the ILEC must continue to provide unbundled access. The FCC clearly intends for carriers to have continued access to either a copper loop or a 64 kbps transmission path in overbuild situations.[75] Accordingly, where an ILEC overbuilds FTTH or FTTC in place of a DS1 loop that carries multiple DS0 channels, the Arbitrators find that the ILEC must continue to provide unbundled access to the same number of 64 kbps channels served by the DS1 loop. Stated differently, if an ILEC overbuilds FTTC/FTTH to a predominantly mass market MDU in place of a DS1 that provides 24 DS0 channels, then the ILEC must continue to provide access to 24 64 kbps channels. The rationale for the FCC's "brown field" exception, to preserve access to DS0 service to residential premises, supports continued access to multiple 64 kbps channels in the residential MDU scenario. Accordingly, the Arbitrators adopt the following contract language consistent with the above discussion:

> 3.1.1: New Builds. Notwithstanding any other provision of the Amended Agreement, Verizon is not required to provide nondiscriminatory access to a FTTH or FTTC Loop, or any segment thereof, on an unbundled basis when Verizon deploys such a Loop to the customer premises of an end user that has not been served by any loop facility ~~other than a FTTH or FTTC Loop~~.
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> 3.1.2 Overbuilds. Notwithstanding any other provision of the Amended Agreement (but subject to and without limiting Section 2 above), Verizon is only required to provide nondiscriminatory access to an FTTH Loop or an FTTC Loop on an unbundled basis when Verizon has deployed such a loop parallel to, or in replacement of, an existing copper loop facility.
>
> (a) Verizon must maintain the existing copper loop connected to the particular customer premises after deploying the FTTH or FTTC Loop and provide nondiscriminatory access to that copper loop on an unbundled basis unless Verizon retires the copper loop pursuant to 47 C.F.R. § 51.319(a)(3)(iv).
>
> (b) if Verizon maintains the existing copper loops pursuant to 47 C.F.R. § 51.319(a)(3)(iii)(A), it need not incur any expenses to ensure that the existing copper loop remains capable of transmitting signals prior to

[74] The FCC described "predominately residential MDUs" in para. 6 of the *MDU Reconsideration Order.*

[75] *TRO* at para. 277 and *FTTC Reconsideration Order* at para. 14.

receiving a request for access pursuant to that paragraph, in which case Verizon shall restore the copper loop to serviceable condition upon request; and

(c) if Verizon retires the copper loop pursuant to 47 C.F.R. § 51.319(a)(3)(iv), it shall provide nondiscriminatory access to a 64 kilobits per second TDM transmission path (or an equivalent transmission path using other technologies) capable of voice grade service over the FTTH or FTTC Loop (a "Voice Grade Transmission Path") on an unbundled basis. Where the retired loop is a DS-0 copper loop Verizon need only provide a single 64kbps transmission path. Where the retired loop is a DS-1 copper loop, Verizon must provide, at the CLECs' request, up to 24 64kbps voice grade transmission paths or at Verizon's option a DS-1 equivalent transmission path, only if the CLEC originally served its mass market customer with DS0 access aggregated over a DS-1 that was retired such that each mass market customer only gets a single DS0 access or 64kbps transmission path. The rates for a Voice Grade Transmission Path under (c) above shall be the same rates applicable under the Amended Agreement to a DS0 loop to the same customer premises were such a loop available, unless and until such time as different rates for a Voice Grade Transmission Path are established pursuant to the terms set forth in the Pricing Attachment to this Amendment, in which case such different rates shall apply.

DPL ISSUE NO. 4

How should the Amendment address access to (a) Hybrid Loops for broadband services; (b) Hybrid Loops for narrowband services; and (c) IDLC Hybrid Loops?
CLEC's Position

AT&T stated that the *TRO* clarified that in the case of IDLC loops, Verizon has an obligation to either unbundle the loop using available technology or construct a copper loop. AT&T claimed that its language clarified Verizon's obligation to offer technically feasible alternatives or to construct a loop. If, however, Verizon does not offer a technically feasible means of unbundling the IDLC loop, AT&T argued that Verizon must pay the cost of construction, because Verizon has sole control over how it chose to construct its network and comply with the FCC's rules.[76]

[76] Joint DPL at 11-13.

CCG argued that Verizon must provide access to hybrid loops for the provision of broadband and narrowband services to the extent required by 47 U.S.C. § 251(c)(3), 47 C.F.R. Part 51 or other applicable law, including but not limited to, state law.[77]

Sprint claimed that a loop provided over an IDLC is a form of Hybrid Loop.[78] Sprint explained that the rules adopted by the FCC regarding Hybrid Loops require that the ILEC provide broadband services using TDM equipment and provide narrowband services using either a spare copper loop or TDM equipment.[79]

Logix joined in AT&T's language and position.

Verizon's Position

Verizon rejected AT&T's modifications to Verizon's language in § 3.2.4.2 as Verizon believes that it departs from the FCC's rules, which give the choice of the "technically feasible method of unbundled access" to the ILEC when neither a copper loop nor a UDLC arrangement is available.[80] Verizon explained that its language provides that, where a CLEC seeks an unbundled loop to serve a customer who currently receives service through IDLC, the CLEC can gain access to voice-grade service through either a copper loop or a UDLC facility. If neither a copper loop nor a UDLC facility is available, Verizon stated that it will construct one at the CLEC's request and expense. Verizon stated that its language is consistent with the language approved by the Commission for SBC.[81]

Arbitrators' Decision

Hybrid Loops

For Section 3.2, Hybrid Loops, the CLECs proposed modifying the contract as follows: "Verizon will provide AT&T with access to hybrid loops in accordance with 47 C.F.R. § 51.319(a)(2)." 47 C.F.R. § 51.319(a)(2) outlines the conditions under which an ILEC will provide hybrid loops to CLECs. The Arbitrators agree with Verizon that this Amendment is

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[77] CCG Initial Brief at 11; CCG Reply Brief at 7.

[78] Sprint Initial Brief at 5-7.

[79] Sprint Initial Brief at 5-7.

[80] Joint DPL at 11-12.

[81] Verizon Reply Brief at 10-11.

intended to implement that section and adding a general reference is confusing and may lead to disputes. The proposed language states what the FCC's regulations already require and what this Amendment would require and therefore is unnecessary.

Packet Switched Features

The Arbitrators adopts AT&T's language for section 3.2.1 as it leaves open the possibility that Verizon may provide packet switched features, if it so chooses, without imposing any additional obligations on Verizon. The Arbitrators decline to include references to any Verizon tariff or SGAT since this would unduly limit a carrier's ability to obtain service through a tariff or SGAT. The Commission previously decided in Track 1 of Docket No. 28821 that carriers should be able to obtain service through its agreement or through a tariff.[82] Therefore, the Arbitrators adopt the following language:

> 3.2.1. Packet Switched Features, Functions, and Capabilities. Notwithstanding any other provision of the Amended Agreement ~~**or any Verizon Tariff or SGAT,**~~ **Verizon shall not be required to provide** ~~*****CLEC Acronym TXT*** shall not be entitled to obtain**~~ access to the packet switched features, functions, or capabilities of any Hybrid Loop on an unbundled basis. Packet switching capability is the routing 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, and the 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 shall not be required to build any time division multiplexing (TDM) capability into new packet-based networks or into existing packet-based networks that do not already have TDM capability.

UDLC

Verizon contended that AT&T's modifications to Verizon's language in § 3.2.4.2 departed from FCC rules. Specifically, Verizon stated that the choice of the "technically feasible" method of unbundled access is up to the ILEC when neither a copper loop nor a UDLC arrangement is available.

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[82] *See* Track 1 Award, General Terms and Conditions DPL at 91.

The Arbitrators finds that AT&T's proposed language in 3.2.4.2 shifts the choice of alternative provisioning methods from the ILEC to the CLEC. The *TRO/TRRO* does not give the CLEC's the option to choose the method of provisioning.[83] The Arbitrators agree that Verizon is in the best position to decide the technology to provision alternative loops. Accordingly, the Arbitrators adopt Verizon's language.

> **3.2.4.2** If neither a copper Loop nor a Loop served by UDLC is available, ~~**then Verizon shall offer to provision a Loop by constructing the necessary copper Loop or UDLC facilities or such other technically feasible option, such as any technically feasible option identified in note 855 of the TRO, that Verizon in its sole discretion may determine to offer. If Verizon offers to provision a Loop by constructing the necessary copper Loop or UDLC facilities,**~~ then Verizon shall, upon request of ***CLEC Acronym TXT***, construct the necessary copper Loop or UDLC facilities. In addition to the rates and charges payable in connection with any unbundled Loop so provisioned by Verizon, ***CLEC Acronym TXT*** shall be responsible for the following charges ~~**only if ***CLEC Acronym TXT*** requests the construction of a copper Loop or UDLC facilities when Verizon has proposed to provide a different less costly method of technically feasible access**~~: (a) an engineering query charge for preparation of a price quote; (b) upon ***CLEC Acronym TXT***'s submission of a firm construction order, an engineering work order nonrecurring charge; and (c) construction charges, as set forth in the price quote. If the order is cancelled by ***CLEC Acronym TXT*** after construction work has started, ***CLEC Acronym TXT*** shall be responsible for cancellation charges and a pro-rated charge for construction work performed prior to the cancellation.

Verizon's dispute with Sprint for section 3.2.4

Verizon stated that it has already agreed to delete the language Sprint has stricken. Therefore, the Arbitrators adopt Sprint's modification for section 3.2.

> 3.2.4 Verizon will provide SPRINT with a Loop served by existing Universal Digital Loop Carrier ("UDLC") , IDLC TDM Capabilities, or an existing copper Loop. Standard recurring and non-recurring Loop charges will apply. ~~In addition, a non-recurring charge will apply whenever a line and station transfer is performed~~.

Verizon's dispute with Sprint on sections 3.2.4.1 and 3.2.4.2 regarding inclusion of TDM language

The Arbitrators find that Verizon has already agreed with Sprint on the issue of IDLC TDM in Section 3.2.4 ("Verizon will provide SPRINT with a Loop served by existing Universal

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[83] *See TRO* at para. 297; *see also* Track 2 Award, UNE DPL at 128.

Digital Loop Carrier ("UDLC"), IDLC TDM Capabilities, or an existing copper Loop").[84] Notwithstanding, Verizon is not obligated to unbundle any transmission path that transmits packetized information, but is still obligated to provide a IDLC TDM-based path as long as it is available and does not transmit packetized information. The FCC held that ILECs have a nondiscrimination obligation in providing features/functions/capabilities for TDM-based services over hybrid loops.[85] In addition, the FCC required ILECs to provide access to a transmission path over hybrid loops served by IDLC systems.[86] Therefore, the Arbitrators conclude that Sprint's proposed language for IDLC TDM capabilities is consistent with the FCC's decisions.

> 3.2.4.1.Verizon will ~~endeavor to~~ provide ***CLEC Acronym TXT*** with ~~an existing copper Loop or~~ a Loop served by existing Universal Digital Loop Carrier ("UDLC") , **IDLC TDM Capabilities, or an existing copper Loop**. Standard recurring and non-recurring Loop charges will apply. In addition, a non-recurring charge will apply whenever a line and station transfer is performed.
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> 3.2.4.2 If neither a copper Loop nor **TDM Capability, nor** a Loop served by UDLC is available, Verizon shall, upon request of ***CLEC Acronym TXT***, construct the necessary copper Loop or UDLC facilities. In addition to the rates and charges payable in connection with any unbundled Loop so provisioned by Verizon, ***CLEC Acronym TXT*** shall be responsible for the following charges: (a) an engineering query charge for preparation of a price quote; (b) upon ***CLEC Acronym TXT***'s submission of a firm construction order, an engineering work order nonrecurring charge; and (c) construction charges, as set forth in the price quote. If the order is cancelled by ***CLEC Acronym TXT*** after construction work has started, ***CLEC Acronym TXT*** shall be responsible for cancellation charges and a pro-rated charge for construction work performed prior to the cancellation.

DPL ISSUE NO. 5

Should the Amendment address access to NIDs? If so, how?

CLEC's Position

AT&T noted that in the *TRO* the FCC stated that "NID and subloop unbundling rules we adopt herein ensure that competitive LECs obtain a full loop, including the network termination [NID] portion of that loop or subloop, if required, yet preserves the ability of facilities-based

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[84] *See* Joint DPL at 14-15.

[85] *TRO* at para. 294.

[86] *TRO* at para. 298.

LECs to obtain access to the NID on a stand-alone basis when required."[87] AT&T claims that its language in 3.2.5 and 3.3.9 on the issue of NID properly reflect this requirement.[88] Logix joined in AT&T's language and position.

CCG argued that the Amendment should include Verizon's obligation to provide unbundled access to NIDs as well as its obligation to provide a NID as part of the local loop or Subloop.[89]

Verizon's Position

Verizon claims that NID obligations remain unchanged in the *TRO* and existing agreements already address NIDs. Therefore, Verizon asserted that there is no need to address this issue.[90]

Arbitrators' Decision

Consistent with the Commission's decision in Docket No. 28821, the Arbitrators find that language requiring Verizon to provide access to the NID is unnecessary since the NID is deregulated in Texas and therefore not under the control of Verizon.[91] In that docket the Commission found that the NID and inside wiring are deregulated and therefore are not subject to P.U.C. regulation. The Commission also noted that P.U.C. SUBST. R. §26.129, which addresses non-discriminatory treatment of a telecommunications utility by a property owner for access by the telecommunication utility to the tenant, negates any concerns raised by the CLECs.

DPL ISSUE NO. 6

How should the Amendment address access to Subloops?

CLEC's Position

AT&T stated that its Amendment to the section on subloops is consistent with the *TRO*'s requirements. AT&T explained that its language sets out in detail the definitions of subloops and

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[87] *TRO* at para. 356 n.1083.

[88] Joint DPL at 15.

[89] CCG Initial Brief at 11.

[90] Verizon Initial Brief at 12.

accessible terminals contained in the *TRO*. AT&T noted that its language provides detailed procedures for the connection of subloop elements to any technically feasible point both with respect to distribution subloop facilities and subloops in multi-tenant environments. AT&T also added that the *TRO* requires Verizon to provide AT&T with unbundled access to Verizon's copper subloops and Verizon's NIDs. AT&T stated that these requirements encompass any means of interconnection of the Verizon distribution plant to customer premises wiring.[92]

CCG argued that the Amendment should set out in detail the definitions of subloops and accessible terminals contained in the *TRO* and provide detailed procedures for the connection of subloop elements to any technically feasible point both with respect to distribution subloop facilities and subloops in multi-tenant environments. Additionally, CCG stated that the Agreement should also set forth the *TRO*'s requirements with respect to inside wire subloops.[93]

Sprint maintained that its proposed language for inside wire subloop is consistent with 47 C.F.R. § 51.319(b)(2) which includes inside wire "owned or controlled by" the ILEC.[94] Sprint also claimed that Verizon's definition is not consistent with the T2A conforming agreements.[95]

Logix joined in AT&T's language and position.

Verizon's Position

Verizon argued that the Commission has recognized that inside wire beyond the demarcation point is deregulated. Therefore, AT&T's extensive proposals for access to such wire are inappropriate and irrelevant in Texas. Verizon noted that its tariffs, like SBC's, already address the "allowed use" of inside wire. Verizon explained that because its policy and practice in Texas (as is the case in many states) is to place the demarcation point at the MPOE, there is no need for the CLEC's extensive language.[96]

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[91] *See* Track 2 Award, UNE DPL at 127.

[92] Joint DPL at 16.

[93] CCG Reply Brief at 12-13.

[94] Joint DPL at 19.

[95] Joint DPL at 18; Sprint Initial Brief at 7-8.

[96] Verizon Reply Brief at 12.

Arbitrators' Decision

The Arbitrators adopt contract language consistent with 47 C.F.R. § 51.319(b), relating to subloops. However, the Arbitrators modify the language to conform to the Commission's decision in Docket No. 28821, regarding the NID and inside wiring. In that docket the Commission found that the NID and inside wiring are deregulated and therefore are not subject to Commission regulation. The Commission also noted that P.U.C. SUBST. R. § 26.129 addresses non-discriminatory treatment of a telecommunications utility by a property owner for access by the telecommunication utility to the tenant, negating the concerns raised by the CLECs.[97]

Since inside wiring is deregulated in Texas and not under the control of Verizon, the Arbitrators exclude language requiring Verizon to provide access to that element.[98] Accordingly, the Arbitrators adopt the following language for section 3.3:

> Subloops. Verizon shall provide a requesting telecommunications carrier with nondiscriminatory access to subloops on an unbundled basis in accordance with section 251(c)(3) of the Act and this section.
>
> (1) Copper subloops. Verizon shall provide a requesting telecommunications carrier with nondiscriminatory access to a copper subloop on an unbundled basis. A copper subloop is a portion of a copper loop, or hybrid loop, comprised entirely of copper wire or copper cable that acts as a transmission facility between any point of technically feasible access in an Verizon's outside plant. 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 or held as spares.
>
> (i) Point of technically feasible access. A point of technically feasible access is any point in Verizon's outside plant where a technician can access the copper wire within a cable without removing a splice case. Such points include, but are not limited to, a pole or pedestal, the serving area interface, the network interface device, the minimum point of entry, any remote terminal, and the feeder/distribution interface. Verizon shall, upon a site-specific request, provide access to a copper subloop at a splice near a remote terminal. Verizon shall be

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[97] *See* Track 2 Award, UNE DPL at 127.

[98] *See* P.U.C. SUBST. R. § 26.129.

compensated for providing this access in accordance with 47 CFR 51.501 through 51.515.

(ii) Rules for collocation. Access to the copper subloop is subject to the FCC's collocation rules at 47 CFR 51.321 and at 47 CFR 51.323.

(2) Subloops for access to multiunit premises wiring. Verizon shall provide a requesting telecommunications carrier with nondiscriminatory access to the subloop for access to multiunit premises wiring on an unbundled basis regardless of the capacity level or type of loop that the requesting telecommunications carrier seeks to provision for its customer. The subloop for access to multiunit premises wiring is defined as any portion of the loop that it is technically feasible to access at a terminal in Verizon's outside plant at or near a multiunit premises.

(i) Point of technically feasible access. A point of technically feasible access is any point in Verizon's outside plant at or near a multiunit premises where a technician can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within to access the wiring in the multiunit premises. Such points include, but are not limited to, a pole or pedestal, the network interface device, the minimum point of entry, the single point of interconnection, and the feeder/distribution interface.

DPL ISSUE NO. 7

Should the Amendment address access to a single point of interconnection? If so, how?

CLEC's Position

AT&T argued that Verizon's amendment does not contain any provision for the construction of a single point of interconnection (SPOI). Therefore, AT&T has proposed language regarding the construction of a SPOI and related terms for accessing the SPOI.[99] CCG argued that the Amendment should provide detailed requirements covering Verizon's provision of a single point of interconnection suitable for use by multiple carriers.[100]

Logix joined in AT&T's language and position.

Verizon's Position

Verizon argued that it has not proposed any SPOI terms in Texas because they are unnecessary. Verizon stated that the SPOI is a relevant consideration only in states where the ILEC typically owns the inside wiring in a building. Verizon claims that it typically does not

[99] Joint DPL at 20.

[100] CCG Initial Brief at 15.

own the inside wiring in buildings in Texas. Hence no such terms are necessary. Verizon further explained that in Texas, where the MPOE rule applies, and the Commission has recognized that wiring past the demarcation point is unregulated, contract language on this matter is unnecessary.[101]

Arbitrators' Decision

This DPL addresses SPOI in the context of multiunit premises. The Arbitrators adopt contract language consistent with 47 C.F.R. § 51.319(b)(2)(ii), relating to single point of interconnection. However, the Arbitrators modify the language to conform to the Commission's decision in Docket No. 28821, regarding the NID and inside wiring. In Docket No. 28821, the Commission found that the NID and inside wiring were deregulated and therefore were not subject to P.U.C. regulation. The Commission also noted that P.U.C. SUBST. R. § 26.129 addresses non-discriminatory treatment of a telecommunications utility by a property owner for access by the telecommunication utility to the tenant, which negates any concerns raised by the CLECs.

Accordingly, the Arbitrators exclude language requiring Verizon to provide access to the NID and inside wiring, since NID and inside wiring are deregulated in Texas and therefore not under the control of Verizon.[102]

> 3.3.4 Single point of interconnection. Upon notification by a requesting telecommunications carrier that it requests interconnection at a multiunit premises where Verizon owns, controls, or leases wiring, Verizon shall provide a single point of interconnection that is suitable for use by multiple carriers. This obligation is in addition to the Verizon's obligations, under Section "Subloops" of this Agreement, to provide nondiscriminatory access to a subloop for access to multiunit premises wiring at any technically feasible point. If the parties are unable to negotiate rates, terms, and conditions under which the incumbent LEC will provide this single point of interconnection, then any issues in dispute regarding this obligation shall be resolved in state proceedings under section 252 of the Act.

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[101] Verizon Initial Brief at 34-35.

[102] *See* Track 2 Award, UNE DPL at 127.

DPL ISSUE NO. 8

How should the Amendment treat CLEC affiliates with respect to application of the FCC's caps on high-capacity loops and transport?

CLEC's Position

AT&T argued that its language is consistent with the FCC's rules regarding loop caps. AT&T stated that neither the rules nor the *TRRO* specify that the loop and transport caps apply to a CLEC and its affiliates. AT&T claims that its proposal tracks the *TRRO* rules almost verbatim and Verizon's modification is inconsistent with the parties' attempt to follow the *TRRO* as closely as possible. Cbeyond, Logix and CCG support AT&T's language and position.[103]

Sprint has proposed language clarifying that these provisions only apply to affiliated CLEC entities.[104]

Verizon's Position

Verizon argued that its language prevents CLECs from circumventing the mandated caps on loops. Verizon's explained that language in each of the sections describing the caps specify that the caps apply to a CLEC and its affiliates collectively, so that one company (including all affiliates) can only obtain the maximum amount of loops or transport facilities specified in the relevant FCC rule. Verizon stated that without such language an entity like AT&T (with a number of affiliates) could easily evade the FCC's caps.[105]

Arbitrators' Decision

There are two major considerations in this DPL issue: (1) Caps on DS1/DS3 and (2) CLEC affiliate issues.

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[103] Joint DPL at 23.

[104] Sprint Initial Brief at 10.

[105] Verizon Initial Brief at 36.

Caps on DS1 and DS3

The Arbitrators reaffirm the decision in Docket No. 28821 regarding DS1 and DS3 caps.[106] In that docket, the Commission addressed the caps on DS1/DS3 UNE loops as well as DS1/DS3 UNE dedicated transport. The Commission concluded that the following caps applied:

1. *DS1 UNE loops* – the ILEC is not obligated to provide a CLEC more than ten (10) DS1 UNE loops per requesting carrier to any single building in which DS1 UNE loops have not been otherwise declassified; accordingly, a CLEC may not order or otherwise obtain, and a CLEC will cease ordering DS1 UNE loops once the CLEC has obtained ten (10) DS1 UNE loops at the same building.
2. *DS3 UNE Loops* – the ILEC is not obligated to provide to CLEC more than one (1) DS3 UNE loop per requesting carrier to any single building in which DS3 loops have not been otherwise declassified; accordingly, CLEC may not order or otherwise obtain and CLEC will cease ordering unbundled DS3 loops once LCE has already obtained one (1) DS3 UNE loop to the same building.
3. *DS1 UNE Dedicated Transport* – the ILEC is not obligated to provide to a CLEC more than ten (10) DS1 UNE Dedicated Transport circuits on each route on which DS1 UNE Dedicated Transport has not been otherwise declassified; accordingly, a CLEC may not order or otherwise obtain, and a CLEC will cease ordering unbundled DS1 UNE Dedicated Transport once a CLEC has already obtained ten (10) circuits on the same route.
4. *DS3 UNE Dedicated Transport* – the ILEC is not obligated to provide to a CLEC more than twelve (12) DS3 UNE Dedicated Transport circuits on each route on which DS3 UNE Dedicated Transport has not been otherwise declassified; accordingly, a CLEC may not order or otherwise obtain, and a CLEC will cease ordering unbundled DS3 UNE Dedicated Transport once a CLEC has already obtained twelve (12) circuits on the same route.

The Arbitrators adopt contract language consistent with the decisions in Docket No. 28821. The contract language on this issue also involves the dispute regarding CLEC affiliates. Accordingly we adopt the language as shown after the discussion of the CLEC affiliates.

CLEC Affiliate

The Arbitrators agree with Verizon that it is appropriate to include contract language addressing CLEC affiliates. In the *TRRO*, the FCC established the most appropriate standard for

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[106] Track 2 Award, UNE DPL at 89-90 and 92-93.

determining impairment and the potential for competitive deployment. The FCC stated, "We have weighed carefully a variety of actual competitive indicia for determining impairment and determine that the best and most readily administered indicator of the potential for competitive deployment is the presence of fiber-based collocators in a wire center."[107] Furthermore, the FCC instructed ILECs to "count multiple collocations at a single wire center by the same or affiliated carriers as one fiber-based collocation."[108] Since the FCC determined that a CLEC and its affiliated carriers are "one fiber-based collocator" at any given wire center, then caps that apply to that particular wire center would apply to the CLEC and its affiliated carriers considered together as a single entity. Furthermore, Verizon's contract language would prevent a CLEC from "gaming" the caps by having an affiliate order loops and transport on the CLEC's behalf once the CLEC has reached the established caps.

Therefore, the Arbitrators adopt Verizon's proposed contract language as modified below.

> § 3.4.1.1.2 ***CLEC Acronym TXT*** and its Affiliates may obtain a maximum of ten unbundled DS1 **251(c)(3) UNE** Loops to any single building in which DS1 **251(c)(3) UNE** Loops are available as unbundled loops.
>
> 3.4.2.1.2 ***CLEC Acronym TXT*** and its Affiliates may obtain a maximum of a single unbundled DS3 **251(c)(3) UNE** Loop to any single building in which DS3 **251(c)(3) UNE** Loops are available as unbundled loops.
>
> 3.5.1.1.2 . ***CLEC Acronym TXT*** and its Affiliates may obtain a maximum of ten unbundled DS1**251(c)(3) UNE** Dedicated Transport circuits on each Route where DS1 **251(c)(3) UNE** Dedicated Transport is available on an unbundled basis.
>
> 3.5.2.1.2 ***CLEC Acronym TXT*** and its Affiliates may obtain a maximum of twelve unbundled DS3 **251(c)(3) UNE** Dedicated Transport circuits on each Route where DS3 **251(c)(3) UNE** Dedicated Transport is available on an unbundled basis.

DPL ISSUE NO. 9

Does the FCC's cap on DS1 transport circuits apply to all routes on which DS1 transport is available on an unbundled basis?

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[107] *TRRO* at para. 93.

[108] *TRRO* at para. 102.

CLEC's Position

Cbeyond proposed language such that the UNE DS1 cap applies only on routes where DS3 unbundling is not required. Cbeyond reasoned that paragraph 128 of the *TRRO* expresses that the limit of 10 DS1 transport circuits applies on those routes where DS3 transport is not available as a § 251 UNE (the cap is not imposed on any other transport routes). Cbeyond explained that there is no regulatory purpose to imposing a DS1 transport cap with respect to other routes. On routes where DS3 transport circuits continue to be available, i.e., on routes where CLECs continue to be impaired without access to DS3 transport circuits, Cbeyond maintains there is no regulatory purpose to be achieved by restricting the number of DS1 transport circuits that a CLEC can order.[109]

Logix stated that its language, like Cbeyond's, recognizes that the DS1 Transport Cap is not applicable when one or both end points of the circuit is a Tier 3 Wire center. Logix stated that the FCC in paragraph 126 of the *TRRO*, found impairment for DS1 Transport in Tier 2 and Tier3 wire centers and therefore access to DS1 UNE transport.[110]

Verizon's Position

Verizon responded by stating that the Commission already decided this legal issue in Verizon's favor in SBC's *TRO* arbitration. Verizon stated the Commission found that the FCC's 10 DS1-loop cap in Rule 51.319(e)(2)(ii)(B) must be applied exactly as the FCC drafted it—to impose a cap of 10 unbundled DS1 dedicated transport circuits "on each route where DS1 dedicated transport is available on an unbundled basis."[111] Verizon noted that the Commission specifically rejected CLEC arguments, like Cbeyond's, that the UNE DS1 cap applies only on routes where DS3 unbundling is not required.[112]

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[109] Cbeyond Initial Brief at 9-11.

[110] Logix Initial Brief at 4.

[111] Joint DPL at 24.

[112] Joint DPL at 24-25.

Arbitrators' Decision

The Arbitrators agree with Verizon that the Commission decided this issue in Docket No. 28821.[113] The Commission concluded that 47 C.F.R. § 51.319(e)(2)(ii)(B) limits DS1 dedicated transport circuits to 10 on each route where DS1 transport is available. On routes where DS1 dedicated transport circuits are not available, no caps are necessary. Docket No. 28821 also concluded that *TRRO* paragraph 128 is not intended to be restrictive so that the 10 DS1 limit *only* applies to routes where DS3 dedicated transport is not available. The Commission explained that paragraph 128 is intended to emphasize and clarify that a limit of 10 DS1 dedicated transport circuits *also* applies to those routes where unbundled DS1 dedicated transport is available and DS3 unbundled dedicated transport is not.

Accordingly, the Arbitrators reject the proposed additions to Section 3.5.1.1.2 by Logix and Cbeyond. No additional contract language is necessary. The language for this section will remain as adopted by Arbitrators in DPL Issue No. 8 above.

DPL ISSUE NO. 10

Should the Amendment specify that unbundled high-capacity loops and transport are "§ 251(c)(3)" facilities?

CLEC's Position

CCG contended that the agreement should include contract language that specifies that high capacity loops and transport, dark fiber loops and transport, and line sharing arrangements that are subject to this Amendment are limited to 251(c)(3) facilities and do not alter any of Verizon's obligations under the Agreement for facilities provided pursuant to applicable law, other than § 251(c)(3).[114]

Verizon's Position

Verizon argued that a reference to § 251(c)(3) is an attempt to gain access to de-listed UNEs and hence should not be included.[115]

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[113] *See* Docket No. 28821, Order No. 45 at 8-11 (Aug. 5, 2005).

[114] CCG Initial Brief at 17.

[115] Verizon Initial Brief at 39.

Arbitrators' Decision

The Commission addressed the issue of "251(c)(3)" UNEs in Docket No. 28821.[116] Additionally, in the decision on DPL Issue No. 1, the Arbitrators determined that Verizon shall provide access to UNEs according to §251(c)(3). The Arbitrators believe that using the term "251(c)(3)" to describe UNEs clarifies which UNEs are at issue in this amendment, since the FCC determines the scope of 251(c)(3) unbundling. Accordingly, the Arbitrators adopt CCG's proposed contract language for Sections 3.4.1, 3.4.2, 3.4.3.1, 3.5.1, 3.5.2, and 3.5.3 in its entirety. For section 3.10, the Arbitrators only adopt CCG's proposed contract language addressing 251(c)(3) issues. The Arbitrators will address CCG's § 3.10, which relates to new line sharing arrangements, in DPL Issue No. 21.

> 3.4.1 DS1 Loops. To the extent the Agreement otherwise requires Verizon to provide ***CLEC Acronym TXT*** with unbundled access to **§ 251(c)(3)** DS1 Loops (this section not being intended to create any such obligation in the first instance) the following provisions shall apply notwithstanding any such requirement:
>
> 3.4.2 DS3 Loops. To the extent the Agreement otherwise requires Verizon to provide ***CLEC Acronym TXT*** with unbundled access to **§ 251(c)(3)** DS3 Loops (this section not being intended to create any such requirement in the first instance) the following provisions shall apply notwithstanding any such requirement:
>
> 3.4.3.1 Effective as of March 11, 2005, and subject to the transition requirements set forth in Section 3.4.3.2 below, Verizon is not required to provide ***CLEC Acronym TXT*** with access to a **§ 251(c)(3)** Dark Fiber Loop on an unbundled basis.
>
> 3.5.1 DS1 Dedicated Transport. To the extent the Agreement otherwise requires Verizon to provide ***CLEC Acronym TXT*** with unbundled access to **§ 251(c)(3)** DS1 Dedicated Transport (this section not being intended to create any such requirement in the first instance) the following provisions shall apply notwithstanding any such requirement:
>
> 3.5.2 DS3 Dedicated Transport. To the extent the Agreement otherwise requires Verizon to provide ***CLEC Acronym TXT*** with unbundled access to **§ 251(c)(3)** DS3 Dedicated Transport (this section not being intended to create any such requirement in the first instance) the following provisions shall apply notwithstanding any such requirement:
>
> 3.5.3 Dark Fiber Transport. To the extent the Agreement otherwise requires Verizon to provide ***CLEC Acronym TXT*** with unbundled access to **§ 251(c)(3)** Dark Fiber Transport (this section not being intended to create any

[116] *See* Track 2 Award, UNE DPL at 1-2.

such requirement in the first instance) the following provisions shall apply notwithstanding any such requirement:

3.10 Line Sharing. Notwithstanding any other provision of the Amended Agreement (but subject to the conditions set forth in Section 2 above), Verizon shall provide access to **Section 251(c)(3)** Line Sharing on a transitional basis in accordance with, but only to the extent required by, 47 C.F.R. § 51.319(a)(1)(i). [For the avoidance of any doubt, the FCC's transition rules set forth in 47 C.F.R. § 51.319(a)(1)(i) became effective independently of this Amendment prior to the Amendment Effective Date, and this Section 3.10 is only intended to memorialize such rules for the convenience of the Parties].

DPL ISSUE NO. 11

Is a Commission decision determining the correct classification of a wire center required before that classification is not subject to change to a lower classification (i.e., from a Tier 1 to a Tier 2, or from a Tier 1 or 2 to a Tier 3)?

CLEC's Position

The parties dispute whether a wire center classification must be determined by the Commission. Logix reasoned that it should be assumed that only a neutral third party, such as the Commission, could be a fair arbiter of whose wire center designations are correct.[117]

Cbeyond stated that the FCC ruled in the *TRRO* that once a wire center has been determined to be classified as Tier 1 or Tier 2, it cannot be altered to a lower tier designation.[118]

Verizon's Position

Verizon argued that paragraph 234 of the *TRRO*, which establishes the ordering mechanism for high-capacity facilities, does not provide for generic state Commission proceedings to determine which ILEC wire centers meet the FCC's Tier 1 and Tier 2 criteria. Additionally, Verizon claimed that Cbeyond's deletions of the phrase "is or" in sections 3.5.5.1 and 3.5.5.2 of the contract are inappropriate since they incorrectly imply that none of Verizon's wire centers (including those on Verizon's exempt list filed with the FCC) currently meet the FCC's non-impairment criteria.[119]

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[117] Logix Initial Brief at 5-6.

[118] Cbeyond Reply Brief at 8-9.

[119] Verizon Initial Brief 42-43.

Arbitrators' Decision

Referencing the Commission in contract language

The Arbitrators disagree with Verizon that the Commission has no role in making determinations on wire center classifications. The Commission established Docket No. 31303 to address issues related to wire center classifications. In that docket, among other things, the Commission decided that parties should make an administrative filing with the Commission to update wire center declassification lists when no CLEC self-certifies within a prescribed time-frame.[120] The Commission also noted that it would review supporting documentation and administratively approve filings that meet the FCC's declassification criteria.[121] Given that the Commission has actively addressed wire center classification matters in Docket No. 31303, the Arbitrators find that it is appropriate to reference the "Texas PUC" in the contract language as proposed by Logix. Accordingly the Arbitrators adopt the language as shown below the discussion of Verizon's Dispute with Cbeyond.

Verizon's Dispute with Cbeyond

The Arbitrators agree with Cbeyond that once a wire center is classified as a Tier 1 wire center, it cannot be reclassified later. The Commission made a similar determination in Docket No. 31301. In that docket, the Commission found that once a wire center has been classified as a Tier 1 wire center, it is not subject to a later reclassification as Tier 2 or Tier 3 wire center.[122] Likewise, the FCC's rules state that a wire center classified as a Tier 2 wire center cannot later be classified as Tier 3 wire center.[123] Accordingly, the Arbitrators adopt Cbeyond's contract language on this issue.

> 3.5.5.1 Tier 1 Wire centers are those Verizon Wire Centers that contain at least four Fiber-Based Collocators, at least 38,000 Business Lines, or both. Tier 1 Wire Centers also are those Verizon tandem switching locations that have no line-side switching facilities, but nevertheless serve as a point of traffic aggregation accessible by competitive LECs. Once a Wire Center ~~is or~~ has been determined to be a Tier 1 Wire Center, that Wire Center is not subject to later reclassification as a Tier 2 or Tier 3 Wire Center.

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[120] *See* Docket No. 31303, Staff Recommendation at 5 (Feb. 23, 2006).

[121] *See* Docket No. 31303, Staff Recommendation at 5 (Feb. 23, 2006).

[122] *See* Docket No. 31303, Staff Recommendation at 5-6 (Feb. 23, 2006).

[123] 47 C.F.R. § 51.319(e)(3).

3.5.5.2 Tier 2 Wire Centers are those Verizon Wire Centers that are not Tier 1 Wire Centers, but contain at least 3 Fiber-Based Collocators, at least 24,000 Business Lines, or both. Once a Wire Center ~~is or~~ has been determined to be a Tier 2 Wire Center, that Wire Center is not subject to later reclassification as a Tier 3 Wire Center.

DPL ISSUE NO. 12

How should the pricing attachment to the Amendment be addressed?

CLEC's Position

Cbeyond objected to including a placeholder for price changes noting that prices are not being changed in this arbitration.[124] Logix makes a similar argument stating that Verizon seeks the ability to apply rates not in the contract.[125] Sprint stated that it has agreed with Verizon that new rates will not be included in the amendment. Sprint explained that it has retained language regarding Verizon's right to seek new rates in a separate proceeding but deletes specific references to Exhibit A, which is disputed here.[126] And finally, CLECs also object to including a reference to Verizon's tariff in the contract.

Verizon's Position

Verizon proposes to include a pricing attachment as a place holder if the Commission later sets rates for *TRO*-related activities. According to Verizon, under this approach, when the Commission sets rates later for *TRO*-related activities, those rates will take effect without the need to amend the ICA again. Verizon argued that there is no reason to undertake an amendment process when the Commission orders new rates. Nonetheless, Verizon stated that it would not object to entirely deleting Exhibit A, provided that Section 1 and Section 1.2 of the Pricing Attachment are amended as it proposes.[127]

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[124] Cbeyond Reply Brief at 9.

[125] Logix Reply Brief at 9.

[126] Sprint Initial Brief at 10-11.

[127] Joint DPL at 32-35.

Arbitrators' Decision

While the Arbitrators agree with the CLECs that, generally, the parties should develop pricing during negotiation and arbitration, implementing Commission ordered/approved rates in tariffs should not require an amendment to the agreement. The CLECs specifically object to Verizon including a reference to a tariff. But as Verizon notes, the Commission took a similar approach in Docket No. 28821.[128] In that case, the Commission held that ICAs could incorporate references to tariffs and that "when a change regarding such tariff is filed with the Commission, that change shall be incorporated in this agreement."[129] Furthermore, Verizon has agreed not to object to entirely deleting Exhibit A, provided that Section 1 and Section 1.2 of the Pricing Attachment are amended as it proposes. Accordingly, the Arbitrators adopt Verizon's proposed language for Section 1 and 1.2 of the Pricing Attachment.

> 1. Amendment to Agreement. The Agreement is amended to include the following provisions and the Pricing Attachment to the *TRO* Amendment ~~(including Exhibit A)~~ attached hereto, all of which shall apply to and be a part of the Agreement notwithstanding any other provision of the Agreement or a Verizon tariff or a Verizon Statement of Generally Available Terms and Conditions ("SGAT").
>
> 1.2 Charges for Services provided under the Amended Agreement shall be those set forth in ~~Exhibit A of this Pricing Attachment and in~~ the Amended Agreement (including any cross references therein to applicable tariffs). Any such ~~The~~ ~~C~~charges ~~stated in Exhibit A of this Pricing Attachment~~ shall be automatically superseded by any new Charge(s) when such new Charge(s) are required by any order of the Commission or the FCC, approved by the Commission or the FCC, or otherwise allowed to go into effect by the Commission or the FCC (including, but not limited to, in a tariff that has been filed with the Commission or the FCC), provided such new Charge(s) are not subject to a stay issued by any court of competent jurisdiction.

DPL ISSUE NO. 13

How should the Amendment address access to interconnection facilities?

CLEC's Position

AT&T argued that the *TRRO* explicitly stated that its ruling with respect to unbundled entrance facilities, a type of dedicated transport, does not affect the CLECs' right to obtain

[128] Verizon Reply Brief at 19 (Dec. 13, 2005).

access to 251(c)(2) facilities. AT&T stated that its language makes clear that the ruling does not apply to entrance facilities.[130] CCG added that the Amendment should state that Verizon will comply with the FCC's regulations, which do not require an incumbent LEC to provide "unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers."[131] Sprint claimed that its proposal is consistent with the Commission's finding in Docket No. 28821, that the cross-connect connecting the entrance facility to the ILEC's facilities used for interconnection should be priced at TELRIC.[132]

Cbeyond and Logix join in AT&T's language and position.

Verizon's Position

Verizon stated that although the FCC has eliminated UNE entrance facilities, the CLECs' language allows the possibility that the same entrance and even dedicated transport facilities could be made available under § 251(c)(2). Verizon noted that the Commission already rejected this approach in Docket No. 28821. Specifically, Verizon referenced Docket No. 28821, Track 2 where the Commission confirmed its Track 1 ruling that entrance facilities are no longer available as UNEs, and "a CLEC should not be able to obtain those facilities at TELRIC rates merely by characterizing those same facilities as interconnection facilities instead of entrance facilities."[133] Verizon concluded by stating that its proposed language exactly conforms to the Commission's prior ruling, so the CLECs' edits should be rejected.[134]

Arbitrators' Decision

Verizon has two separate but interrelated disputes regarding interconnection facilities. The first dispute, between Verizon and the CLECs (AT&T, CCG, Logix and Cbeyond), relates to the types of network facilities that Verizon must make available to CLECs for interconnection.

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[129] Docket No. 28821, Track 1 Award, General Terms and Conditions DPL at 9-12.

[130] Joint DPL at 35-36.

[131] Joint DPL at 36.

[132] Sprint Initial Brief at 12.

[133] Joint DPL at 36.

[134] Verizon Initial Brief at 44-46.

The second dispute, between Verizon and Sprint, involves whether this agreement should specify pricing standards for certain facilities.

Dispute between Verizon and the CLECs (AT&T, CCG, Cbeyond and Logix)

The Arbitrators agree with Verizon that delisted UNEs, such as entrance facilities, cannot be made available by classifying them as interconnection elements. As Verizon notes, in Track 2 of Docket No. 28821, the Commission affirmed its Track 1 ruling that entrance facilities were no longer available as UNEs. In Track 1, the Commission found that "a CLEC should not be able to obtain those facilities at TELRIC rates merely by characterizing those same facilities as interconnection facilities instead of entrance facilities."[135]

Next, Verizon and the CLECs also dispute what constitutes an interconnection facility. The Arbitrators agree with Verizon that the Commission's conclusion in Docket No. 28821, Track 2 controls. In that docket, the Commission found that "interconnection facilities referred to in the *TRO* are cross-connect facilities necessary to interconnect CLEC collocation equipment with the ILEC network."[136] Accordingly, the Arbitrators adopt the following contract language, which tracks the Commission's decision in Docket No. 28821:

> § 3.5.4 Notwithstanding any other provision of the Amended Agreement, Verizon is not obligated to provide ***CLEC Acronym TXT*** with unbundled access to Entrance Facilities, and Entrance Facilities are not subject to the transition provisions (including, but not limited to, transition rates) set forth in this Section 3.
>
> Interconnection facilities under § 251(c)(2) does not refer to the physical circuit that links the CLEC office to the Verizon office but are cross-connect facilities necessary to interconnect CLEC collocation equipment with the Verizon network.
>
> Interconnection facilities Verizon is required to provide for Section 251(c)(2) are not declassified.

Dispute between Verizon and Sprint

Sprint argued that its proposal to include TELRIC rates for cross connects in the contract language is appropriate and consistent with the Commission's finding in Docket No. 28821. Verizon disagreed with the inclusion of the term "entrance facility" in the contract language and stated that inclusion of pricing matters in this proceeding is inappropriate.

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[135] Track 1 Award at 16; Track 2 Award, UNE DPL at 33.

[136] Track 2 Award, UNE DPL at 109-110.

The Arbitrators find it appropriate to include pricing standards to clarify the agreement. Sprint's proposed contract language states that TELRIC pricing applies to: (1) cross-connects connecting entrance facilities and (2) cross-connects used to access UNEs. In the *TRO* the FCC affirmed that CLECs should have access to interconnection facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network. Additionally, the Commission found in Docket No. 28821 that "CLECs are entitled to cross-connects at TELRIC rates."[137] Therefore, language specifying the availability of cross connects at TELRIC comports with the *TRO* and the Commission's decisions.

Next, with respect to entrance facilities, in Track 1 of Docket No. 28821, the Commission ruled that entrance-facility-related cross-connects must be provided at TELRIC-based prices.[138] In that order, the Commission determined that:

> SBC Texas should provide cross connects associated with entrance facilities used for interconnection at TELRIC rates. While the *TRRO* made clear the FCC's finding of non-impairment with respect to "entrance facilities," the *TRRO* did not make a corresponding non-impairment finding for cross connects associated with entrance facilities used for interconnection purposes.[139] Because the FCC has made no non-impairment finding for cross connects and existing ICAs contain TELRIC-based cross connect rates for entrance facilities, the Commission finds that SBC Texas shall continue to offer entrance facility-related cross connects at prescribed TELRIC rates.[140]

And finally, in Track 2 of Docket No. 28821, the Commission stated that "The Commission continues this analysis and applies the same rationale to connections between § 251(c)(3) UNEs and any non-251(c)(3) element, or wholesale facility or service, setting forth terms and conditions for the provisioning of cross-connects at TELRIC rates in this ICA."[141] Therefore the Arbitrators adopt the following contract language, consistent with prior Commission decisions and the *TRO*:

> Verizon shall provide the following cross connects at TELRIC: (a) cross-connect facilities provided under this section necessary to interconnect CLEC collocation equipment with the ILEC network; (b) entrance-facility-related cross-connects i.e.

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[137] Track 2 Award at 22.

[138] *See* Docket No. 28821, Order on Clarification and Reconsideration at 3-4 (May 11, 2005).

[139] *TRRO* at paras. 136-141.

[140] Docket No. 28821, Order on Clarification and Reconsideration (May 11, 2005).

[141] Track 2 Award at 22.

cross connects associated with entrance facilities used for interconnection; and (c) cross connects used for connections between section 251(c)(3) UNEs and any non-251(c)(3) element, or wholesale facility or service

DPL ISSUE NO. 14

How should the Amendment reflect the* TRRO*'s certification process for ordering high-capacity loops and transport?

CLEC's Position

CCG stated that it generally supports the AT&T's position and language. However, CCG submits that the wire center back-up data provided by Verizon must include additional information, such as the number of (1) business lines and (2) fiber-based collocators (as defined by the CCG), in each Verizon wire center. CCG also added that the back-up data should include, but not be limited to, the particular definition of "wire center" used, the names of the fiber-based collocators counted in each wire center, line counts identified by line type, the date of each count of lines relied upon by Verizon, all business rules and definitions used by Verizon and any documents, orders, records or reports relied upon by Verizon for the assertions made.[142]

Cbeyond joined in AT&T's language and position. Cbeyond proposed an additional sentence be added to Section 3.6.1.2 to provide that a CLEC whose self-certification has been challenged by Verizon will have access to the identity of fiber-based collocators that Verizon has counted and on whose presence it relies in its classification of that wire center. Cbeyond explained that such information is essential to resolving the matter of whether Verizon's classification is correct without the necessity of discovery and discovery disputes.[143]

Verizon's Position

Verizon stated that its language in § 3.6.1.1 makes clear that part of the CLEC's reasonably diligent pre-certification inquiry includes a consideration of any list of non-impaired wire centers that Verizon has made available by notice or publication on its website, as well as any back-up data Verizon provides.[144] Verizon claimed that AT&T's addition negates the other

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[142] CCG Initial Brief at 21-22.

[143] Cbeyond Reply Brief at 12-13.

[144] Verizon Initial Brief at 48-49.

agreed-upon language in §3.6.1.1 that allows Verizon to make its wire center list available either by notice to the CLEC *or* by publication on its website. Verizon also rejected AT&T's language in § 3.6.1.2 that would impose a 10-business-day requirement upon Verizon to provide back-up data for its non-impaired wire center list. Verizon argued that this arbitrary time period is unreasonable.[145] And finally for Section 3.6.1.3, Verizon stated that AT&T has added language that would give the CLEC the option to use a letter for certification if the CLEC deems this option less "onerous" than use of Verizon's electronic ordering systems. Verizon explained that if CLECs are permitted to bypass its electronic ordering system, it would be unable to match a certification in a letter with the circuit at issue, because the CLEC would have no way of identifying it.[146]

Arbitrators' Decision

The main dispute in this DPL is over section 3.6.1.2, which outlines the types of data that Verizon must provide to support its list of non-impaired wire centers. The Arbitrators agree with Verizon that certain information such as the identity of fiber-based collocators must be masked to protect other carriers' confidential or propriety network information. However, we do agree with CCG that the information that Verizon provides must be of sufficient granularity and detail to support its assertion of non-impaired wire centers.

With regard to section 3.6.1.1, the Arbitrators agree with AT&T that Verizon should maintain an updated Wire Center List on its website. Furthermore, since Verizon has the responsibility for identifying declassified wire centers it is reasonable to expect Verizon to notify CLECs of the status of such wire centers in writing and through its website. The Arbitrators modify Verizon's and CCG's contract language consistent with the above discussion.

> 3.6.1.1 Before requesting unbundled access to a DS1 Loop, a DS3 Loop, DS1 Dedicated Transport, DS3 Dedicated Transport, or Dark Fiber Transport, including, but not limited to, any of the foregoing elements that constitute part of a Combination or that ***CLEC Acronym TXT*** seeks to convert from another wholesale service to an unbundled network element (collectively, "*TRRO* Certification Elements"), ***CLEC Acronym TXT*** must undertake a reasonably diligent inquiry and, based on that inquiry, certify that, to the best of its knowledge, ***CLEC Acronym TXT***'s request is consistent with the

[145] Joint DPL at 38.

[146] Verizon Initial Brief at 51-52.

requirements of the *TRRO* and that ***CLEC Acronym TXT*** is entitled to unbundled access to the subject element pursuant to section 251(c)(3) of the Act. ***CLEC Acronym TXT***'s reasonably diligent inquiry must include, at a minimum, consideration of any list of non-impaired Wire Centers that Verizon makes or has made available to ***CLEC Acronym TXT*** by notice and~~/or~~ by publication on Verizon's wholesale website (the "Wire Center List") and any back-up data that Verizon provides or has provided to ***CLEC Acronym TXT*** under a non-disclosure agreement or that ***CLEC Acronym TXT*** otherwise possesses~~; provided however, that~~ Verizon shall maintain an updated Wire Center List it contends are non-impaired (i.e., are Tier 1 or Tier 2) on its web site.

3.6.1.2 The back-up data that Verizon shall provide to ***CLEC Acronym TXT*** under a non-disclosure agreement pursuant to Section 3.6.1.1 above ~~may~~ shall include data regarding number of (i) Business Lines and (ii) Fiber-based Collocators, in each Verizon serving Wire Center. Back-up data shall include: line counts identified by line type, the date of each count of lines relied upon by Verizon, all business rules and definitions used by Verizon and any documents, orders, records or reports relied upon by Verizon for the assertions made. Verizon may mask the identity of fiber-based collocators in order to prevent disclosure to ***CLEC Acronym TXT*** of other carriers' confidential or proprietary network information. Verizon will provide ***CLEC Acronym TXT*** with a translation code in order for ***CLEC Acronym TXT*** to identify its fiber-based collocation locations. Verizon shall provide the back-up data required by this section no later than ten (10) business days following receipt of ***CLEC Acronym TXT***'s written request, but only if a non-nondisclosure agreement covering the back-up data is in effect between Verizon and ***CLEC Acronym TXT*** at that time. ~~Upon ***CLEC Acronym TXT***'s request, Verizon shall update the back-up data to the month in which ***CLEC Acronym TXT*** requests the back-up data; provided, however, that Verizon need not provide the back-up data for a particular Wire Center for a date later than the original date on which the data must have been current to establish the level of non-impairment (e.g., Tier 2, etc.) that Verizon asserts as to that Wire Center.~~

3.6.1.3 Since Verizon has now modified its electronic ordering system to include a method for ***CLEC Acronym TXT*** to provide the certification required by this section, ***CLEC Acronym TXT*** shall use such method, as updated from time to time, to provide such certification, so long as such method is no more onerous than providing certification by letter.

DPL ISSUE NO. 15

How should the Amendment reflect the* TRRO*'s provision-then-dispute requirements?

CLEC's Position

This dispute relates to retroactive pricing for a loop or dedicated transport facility that was provisioned as a UNE due to an inaccurate CLEC certification. The CLECs rejected Verizon's language to charge a default month-to-month pricing on elements retroactively. AT&T contended that Verizon's language on retroactive provides no incentive for Verizon to be accurate in its new designations. AT&T explained that if retroactive pricing is automatic, as Verizon proposes, then Verizon has no incentive to be accurate in its new designations because it will know that CLECs would be unlikely to order from the new wire center because they would suffer retroactive pricing if it turns out the CLEC is wrong. AT&T argued that should there be retroactive pricing, the rate should not be the highest, as Verizon suggests, but the best rate the CLEC would have received had it ordered the facility as an access in the first place.[147]

Regarding dark fiber, AT&T and the other CLECs propose to delete Verizon's § 3.6.2.2.1, which addresses the case of de-listed dark fiber transport.[148]

CLECs also objected to Verizon's language which states that Verizon should be able to reject a CLEC's order without first seeking dispute resolution where Verizon has made its non-impaired wire center list available for scrutiny.[149] Sprint proposed language that would require the parties to "continue providing services to each other during the pendency of any dispute resolution procedure," with the parties obligated to pay each other for such services.[150]

And finally, AT&T proposed replacing Verizon's language with other language that would give Verizon 30 days in which to seek retroactive pricing to the date of provisioning a loop or dedicated transport facility that was provisioned as a UNE due to an inaccurate CLEC certification.[151]

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[147] Joint DPL at 42-43.

[148] Joint DPL at 42-43.

[149] CCG Initial Brief at 25; Cbeyond Initial Brief at 19-20.

[150] Sprint Initial Brie at 14.

[151] Joint DPL at 42.

Verizon's Position

Verizon argued that the CLEC should compensate Verizon for additional charges that would have applied had the CLEC ordered the subject facility or service on a month-to-month term under Verizon's interstate special access tariff, including other applicable charges. Verizon stated that AT&T's 30 day deadline would create a new arbitrage opportunity in which the CLEC would have an incentive to invoke the *TRRO*'s provision-then-dispute process. On the issue of whether the Commission must affirmatively order or approve Verizon's wire center designations, Verizon argued that the FCC did not authorize any mandatory state pre-certification of wire centers in the absence of any ILEC challenge to a particular CLEC certification. For Dark Fiber, Verizon claimed that deleting it as the CLECs suggest would create a gap and lead to needless disputes later.[152]

Arbitrators' Decision

There are three main issues that are addressed in the disputed language: (1) retroactive pricing, (2) dark fiber, and (3) affirmative approval.

Retroactive Pricing

The Arbitrators note that the *TRRO* states that "a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent . . . ."[153] To the extent a CLEC has done its due diligence, the CLEC has satisfied its obligation. Therefore, imposing fines, late charges, and other fees, as Verizon's language suggests, would be inappropriate.

However, on the issue of retroactive pricing, the *TRRO* does not provide guidance on what pricing standard should apply. The Arbitrators find that keeping the pricing standard at UNE, or even the lowest special access price, does not provide the right incentive for the CLECs to perform due diligence in their self certification. More importantly, the CLEC would have obtained UNE pricing when not actually qualified to obtain such pricing. Therefore, the Arbitrators adopt Verizon's proposal for month-to-month special access prices. The CLECs contend that they are entitled to the "best rate" they would have received had they ordered the

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[152] Verizon Initial Brief at 49-51.

[153] *TRRO* at para. 234.

facility as access in the first place. However, determining which special access terms and pricing the CLEC would have chosen in the first place is not practical. Given the impracticality of deducing what the CLEC would have done in the past, defaulting to the month-to-month special access rate is the most reasonable option. The effective date for the retroactive pricing shall be based on the "date of provisioning," since the incorrect price would have applied from the date of provisioning going forward.

The Arbitrators also find that AT&T's limitation of 30 days to seek retroactive pricing is arbitrary and impractically short, especially considering that the FCC only provided for annual audits of compliance with certification criteria. Therefore, the Arbitrators reject AT&T's proposed language and adopt contract language consistent with this finding.

Finally, the Arbitrators find Sprint's language allowing the parties to operate under the status quo during the resolution of a bona fide dispute to be reasonable. This would allow the parties to operate without disrupting service to customers during a pending dispute. Accordingly, the Arbitrators approve of Sprint's proposed addition. Given these determinations, the Arbitrators adopt the following language:

> **3.6.2.1** Upon receiving a request from ***CLEC Acronym TXT*** for unbundled access to a *TRRO* Certification Element and the certification required by Section 3.6.1 above, and except as provided in Section 3.6.2.3 below, Verizon shall immediately process the request in accordance with any applicable standard intervals and, for the avoidance of any doubt, shall not delay processing the request on the grounds that the request is for a *TRRO* Certification Element. If Verizon wishes to challenge ***CLEC Acronym TXT***'s right to obtain unbundled access to the subject element pursuant to 47 U.S.C. § 251(c)(3) **as determined by effective FCC rules and associated effective FCC and judicial orders**,–Verizon must provision the subject element as a UNE and then seek resolution of the dispute by the Commission or the FCC, or through any dispute resolution process set forth in the Agreement that Verizon elects to invoke in the alternative.
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> 3.6.2.2. If a dispute pursuant to section 3.6.2.1 above is resolved in Verizon's favor Verizon is entitled to retroactive pricing of a facility under this Section 3.6.2.2. Repricing shall be at rates no greater than the equivalent rates ***CLEC Acronym TXT*** could have obtained in the first instance (for the facility to be repriced) had CLEC had ordered the subject facility or service on a month-to-month term from Verizon's interstate special access tariff (except as provided in section 3.6.2.2.1 below as to dark fiber). The month-to-month rates shall apply until such time as ***CLEC Acronym TXT*** requests disconnection of the subject facility or an alternative term that Verizon offers under its interstate special access tariff for the subject facility or service. The effective date for the

retroactive pricing shall be based on the "date of provisioning of the subject facility or service. ~~CLEC shall submit a disconnection request or an order to convert the UNE within thirty days of the date on which it was determined CLEC was not entitled to the UNE.~~ **The Parties shall continue providing services to each other during the pendency of any dispute resolution procedure, and the Parties shall continue to perform their payment obligations including making payments in accordance with this Agreement.**

Dark Fiber

The Arbitrators adopt Verizon's proposed 3.6.2.2.1 as modified. This section addresses the situation when Verizon prevails on a dispute regarding a CLEC's entitlement to dark fiber transport. Verizon correctly noted that the Commission approved SBC's right to disconnect rather than merely reprice dark fiber on 60 days' notice.[154] Therefore the Arbitrators adopt Verizon's language, but with a sixty day time frame consistent with the Commission's decision in Docket No. 28821.

3.6.2.2.1 In the case of Dark Fiber Transport (there being no analogous service under Verizon's access tariffs), the monthly recurring charges that Verizon may charge, and that ***CLEC Acronym TXT*** shall be obligated to pay, for each circuit shall be the charges for the commercial service that Verizon, in its sole discretion, determines to be analogous to the subject Dark Fiber Transport and, unless otherwise agreed in writing by the Parties, Verizon may disconnect the subject dark fiber facility within ~~thirty (30)~~ sixty (60) days of the date on which the dispute is resolved in Verizon's favor. In any case where ***CLEC Acronym TXT***, within ~~thirty (30)~~ sixty (60) days of the date on which the dispute is resolved in Verizon's favor, submits a valid ASR for a "lit" service to replace the subject Dark Fiber Transport facility, Verizon shall continue to provide the Dark Fiber Transport facility at the rates provided for above, but only for the duration of the standard interval for installation of the "lit" service.

Affirmative approval by the PUC

The Arbitrators disagree that Verizon may reject a CLEC order based on the wire center list that Verizon provides on its website or othewise. The Arbitrators agree with the CLECs that the Commission is the proper forum for resolving disputes regarding wire center classification. In fact, the Commission is currently addressing such issues in Docket No. 31303. Docket No. 31303 will determine the proper interpretation and application of the FCC's definitions of fiber-based collocators and business lines. However, if the Commission or the FCC makes a finding with respect to a specific wire center's classification, then Verizon may reject an order for a

[154] Track 2 Award, UNE DPL at 32-33.

TRRO certification element made unavailable by that decision, without first seeking dispute resolution. Accordingly, the Arbitrators modify Verizon's contract language as shown below:

> **3.6.2.3** Notwithstanding any other provision of the Amended Agreement, Verizon may reject a ***CLEC Acronym TXT*** order for a *TRRO* Certification Element without first seeking dispute resolution: (a) ~~in any case where ***CLEC Acronym TXT***'s order conflicts with a non-impaired Wire Center designation: set forth in the Wire Center List that Verizon has made available to ***CLEC Acronym TXT*** by notice and/or by publication on Verizon's wholesale website as of the Amendment Effective Date (subsequent revisions to the Wire Center List being governed by Section 3.6.3 below), (b) in any case~~ where ***CLEC Acronym TXT***'s order conflicts with a non-impaired Wire Center designation that the Commission or the FCC has ~~affirmatively~~ ordered or approved or that has otherwise been confirmed through previous dispute resolution~~, or (c) to the extent the Commission or the FCC otherwise permits Verizon to reject orders for *TRRO* Certification Elements without first seeking dispute resolution~~.
>
> 3.6.3.3 Nothing contained in this Section 3.6.3 shall in any way limit any right ***CLEC Acronym TXT*** may have to challenge Verizon's revision of its Wire Center Lists, including any change in a Wire Center's designation as Tier 1, Tier 2 or Tier 3.

DPL ISSUE NO. 16

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?

CLEC's Position

CCG argued that the Amendment should properly reflect the currently effective FCC requirements related to mass market local circuit switching, including the FCC's prescribed transition process. CCG urged the Arbitrators to reject Verizon's proposal which would require a CLEC to place orders for converting UNEs to alternative facilities before the end of the transition period, at which point those arrangements would no longer be subject to transitional rates. CCG proposed alternative language that would permit CLECs to submit orders to convert UNEs to alternative facilities or arrangements at any time before the end of the respective transition period, but would ensure that those orders will not take effect until the date marking the end of those transition periods – March 11, 2006 for mass market local switching – and that would also ensure that the transition rates adopted by the FCC will apply to these elements for

the entire length of the transition period. Additionally, CCG also proposed to delete the language clarifying that mass market switching does not include "four line carve out" switching. Sprint stated that Verizon should modify the amendment to reflect the Commission's decision in Docket No. 28821.[155]

Verizon's Position

Verizon contended that CCG's edits to sections 3.7 and 3.7.3 of the contract would allow CLECs to obtain new mass-market switching as a UNE after March 11, 2005, despite the *TRRO* ruling that they cannot do so. Verizon referenced Docket No. 28821, where the Commission found that no contract amendments are necessary to implement the FCC's mandatory prohibition on ordering new switching UNEs as of March 11, 2005.[156]

On the issue of four-line carve out, Verizon explained that as a practical matter, this issue is moot since Verizon implemented "four line carve out" switching in Texas several years ago pursuant to the FCC's rules that pre-existed the *TRRO*.[157]

Arbitrators' Decision

The Arbitrators find this issue to be moot because the FCC eliminated unbundled switching for the enterprise market and mass market in the *TRO* and *TRRO* respectively. The FCC required transitioning away from UNE-P services by March 11, 2006.[158] Therefore, no contract language is necessary.

DPL ISSUE NO. 17

Should the Amendment specify the information Verizon's bills for transition or true-up charges should include? If so, what information should Verizon be required to provide?

CLEC's Position

This DPL addresses the narrow issue of how Verizon should make available certain billing details whenever there is a "transition rate charge" or a "true up charge" in that bill. The

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[155] CCG Initial Brief at 26; CCG Reply Brief at 26-27.

[156] Verizon Initial Brief at 60-61.

[157] Joint DPL at 48.

[158] *TRRO* at paras. 5 and 227.

CLECs generally stated that without specific contract language it would be difficult to discern the bills and lead to unnecessary billing disputes.[159]

Verizon's Position

Verizon is concerned that including contract language regarding billing in this agreement would unnecessarily result in expensive changes to the billing system changes. Verizon also noted that including contract terms related to billing would restrict it from developing alternative solutions that might address CLEC concerns.[160]

Arbitrators' Decision

The Arbitrators recognize the CLECs' concerns that Verizon's bills should provide clarity for true ups and transition charges. However, Verizon rightly noted that the clarity that the CLECs seek may be provided in several ways and that specific contract language should not limit its options in the future. To address both parties' concerns, the Arbitrators adopt the language below. This modified language gives Verizon the flexibility it seeks while addressing the CLECs' concerns.

> 3.8.2.3 Any bills issued by Verizon that include either a transition rate charge or a true up charge, Verizon, shall provide adequate detail regarding the period and facilities for which transition and true-up rates apply, whether in the invoice itself or in separate documents. Verizon shall provide such details using generally accepted industry billing terms that would allow ***CLEC Acronym TXT*** to discern the time period for which such transition rate or true up applies, the applicable transition rate or true up, and details that enable ***CLEC Acronym TXT*** to identify the specific facilities to which the transition rate or true up amounts apply.

DPL ISSUE NO. 18

When should the CLEC be required to pay transitional charges that Verizon has already billed?

This issue has been settled.

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[159] Joint DPL at 18; CCG Initial Brief at 27.

[160] Verizon Initial Brief at 62.

DPL ISSUE NO. 19

How should the Amendment address discontinuance of TRRO embedded base customers at the end of the transition period?

CLEC's Position

AT&T stated that it should be permitted to defer the effective date of embedded base orders (for pricing purposes at least) until March 11, 2006.[161] CCG took a similar position to AT&T, but added that in the case of dark fiber, Verizon should abide by a CLEC's request to defer the effective date of the order to September 10, 2006. In § 3.9.2 the parties agree that, where the CLEC has not requested disconnection or a replacement service, then Verizon may discontinue the de-listed UNE or reprice it to an analogous service.[162] AT&T, however, proposes to delete Verizon's language which states that no further notice is necessary before Verizon reprices a de-listed element. Instead, AT&T prefers a 30 day notice prior to repricing.[163]

Logix joined in AT&T's language and position.

Verizon's Position

Verizon disputes AT&T's proposed language for 3.9.1 because it would allow CLECs to submit orders up until the last day of the transition (March 10, 2006). Verizon desires to establish a cut off date that would enable it to take into consideration standard provisioning intervals, order volumes, and any preparatory activities.[164]

Verizon also objected to AT&T's language for § 3.9.1 arguing that it would give AT&T the right to submit orders at any point during the transition period, but to then defer their effect until a later date, up until the end of the transition period. Verizon explained that its systems are not designed to accept and process an order, but delay implementing it to some later date to be designated by the CLEC. Verizon noted that the FCC permitted a full year (or 18 months in the case of dark fiber) for CLECs to complete their transition activities and stated that it would be

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[161] Joint DPL at 49.

[162] CCG Initial Brief at 28.

[163] Joint DPL at 49-50.

[164] Verizon Initial Brief at 64.

inappropriate to impose additional requirements that would encourage CLECs to forestall those activities until the last minute.[165]

For section 3.9.2, Verizon argued that it has already issued repeated notices notifying all CLECs that Verizon may reprice de-listed elements if the CLEC fails to obtain replacement arrangements by the end of the FCC's transition period.[166]

Arbitrators' Decision

In this DPL issue, the parties dispute two points related to transitioning the embedded base of discontinued facilities: (1) Section 3.9.1 deals with the cut off date for submitting orders for discontinued facilities and associated pricing issues; (2) Section 3.9.2. deals with issues related to a CLEC's failure to request disconnection or replacement service by a certain date.

Section 3.9.1 Cut of date

The Arbitrators agree with Verizon that the Amendment must make clear that if a CLEC has not made arrangements to transition its de-listed UNEs by the end of the applicable transition period, then Verizon may discontinue or reprice the service to a rate for an analogous service. However, the CLECs are entitled to transitional pricing through March 11, 2006, or September 10, 2006, in the case of dark fiber. CLECs lose transitional pricing on March 11, 2006, regardless of when the orders are processed and the facilities are switched over. This decision is consistent with the Commission's conclusion in Docket No. 28821.[167] The Arbitrators adopt the following contract language consistent with the above discussion.

> 3.9.1 If ***CLEC Acronym TXT*** wishes to replace ***CLEC Acronym TXT***'s embedded base, if any, of Discontinued Facilities that are subject to the transition periods set forth in this Section 3 with alternative services that may be available from Verizon under a separate arrangement (e.g., a separate agreement at market-based rates, arrangement under a Verizon access tariff, or resale), ***CLEC Acronym TXT*** shall order such alternative services to become effective no later than a date that allows Verizon adequate time, taking account of any standard intervals that apply, order volumes, and any preparatory activities that ***CLEC Acronym TXT*** must have completed in advance in order to implement the conversion or migration, to convert or migrate the Discontinued Facility to the replacement service by March 10, 2006 (or, in the case of dark

[165] Verizon Initial Brief at 65.

[166] Verizon Initial Brief at 66.

[167] *See* Track 2 Award at 3-6.

fiber, by September 10, 2006). CLECs are entitled to transitional pricing until March 11, 2006, (or, in the case of dark fiber, September 10, 2006), regardless of when the orders are processed and the facilities are switched over.

Section 3.9.2 Advance Notice

The Arbitrators agree with Verizon that no additional notification is necessary since the entire industry has been on notice of the March 11, 2006, and the September 10, 2006, deadlines. As Verizon notes, it has already issued repeated notices notifying all CLECs that de-listed elements may be repriced if a CLEC fails to obtain replacement arrangements by the end of the FCC's transition period. In addition, the *TRRO* and this Commission's orders leave no doubt that CLECs must transition to non-UNE replacements by the end of the transition period. Therefore the Arbitrators adopt Verizon's contract language.

3.9.2 Failure of **CLEC Acronym TXT*** to Request Disconnection or Replacement Service by the Required Date. If **CLEC Acronym TXT*** has not requested disconnection of the subject Discontinued Facility and has not submitted an timely order for a replacement service in accordance with Section 3.9.1 above by the date required in that section (taking account of any standard intervals that apply, order volumes, and any preparatory activities that ***CLEC Acronym TXT*** must have completed in advance), then Verizon may, in its sole discretion, either: (a) disconnect the subject Discontinued Facility on or at any time after March 11, 2006 (or, in the case of dark fiber, on or at any time after September 11, 2006), provided that Verizon has notified ***CLEC Acronym TXT*** in writing at least thirty (30) days in advance of the disconnection date, or (b) without further notice to ***CLEC Acronym TXT***, convert or migrate the subject Discontinued Facility to an analogous access (month-to-month term), resale, or commercial arrangement that Verizon shall identify in writing to ***CLEC Acronym TXT*** and the rates, terms, and conditions of such arrangement shall apply and be binding upon ***CLEC Acronym TXT*** as of March 11, 2006 (or, in the case of dark fiber, September 11, 2006).

DPL ISSUE NO. 20

How should the Amendment address repricing of pending conversions at the end of the transition period?

CLEC's Position

In § 3.9.1.1, the parties agree that Verizon may reprice de-listed elements at the end of the transition period in instances where Verizon cannot complete the conversion by that time. They disagree, however, about a few details relating to the application of the new rate during the period until the conversion can actually be completed. Verizon's language allows it to choose to

reprice by applying a surcharge equivalent to the replacement service. AT&T has modified Verizon's language to state that the billed surcharge is "equal to the rate for," rather than "equivalent to" the subject replacement service. AT&T explained that Verizon's proposal with respect to a surcharge, read literally, would allow Verizon to apply a surcharge where the surcharge itself is equal to the entire rate for the replacement facility, thus double billing the CLEC (both the rate for the replacement facility and for the facility it is actually using). AT&T noted that its proposal makes clear that Verizon can apply a surcharge, but only one that makes the rate the CLEC is charged equal to the rate for the replacement facility.[168] CCG and Logix joined in AT&T's position

Verizon's Position

Verizon stated that AT&T's language ignores the complexities inherent in the calculation of the surcharge designed to reflect the resale rate. Verizon explained that it is virtually impossible to perform the exact calculation AT&T's language would require, because the equation must account for the fact that Verizon collects access charges from interexchange carriers in resale situations, while the CLEC collects them in UNE-P situations.[169]

Arbitrators' Decision

Both CLECs and Verizon acknowledged that Verizon may not be able to complete conversion of delisted UNEs by the end of the transition period. Both parties also agreed that Verizon is entitled to reprice the former UNE at the end of the transition period. The dispute arises in the wording of the contract language for the surcharge necessary to recover the difference between the original UNE price and the price of the new replacement service. Citing billing concerns, Verizon argued that the surcharge language should state that the total rate be "equivalent to" that of the replacement service. The CLECs believe that Verizon's language would lead to double billing and therefore propose a language that states that the interim rate will be "equal to" the rate of the replacement service.

The Arbitrators agree with the CLECs that Verizon's language could lead to over billing. Verizon proposed language where the surcharge would "be equivalent" to the replacement

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[168] Joint DPL at 52-53.

[169] Verizon Initial Brief at 67-68.

service. Since the surcharge is used to recover the cost differential between the original UNE price, and a new non-UNE price of the replacement service, it cannot be the *equivalent* price of the replacement service; it can only equal the *difference.*

To avoid billing disputes, the surcharge that is assessed—while the conversion is taking place—should be such that the final total billed rate be equal to the rate for the subject replacement service. Accordingly, the Arbitrators adopt the CLECs' contract language on this issue. And finally, the Arbitrators find that the first line in the contract does not add any substance to the agreement and hence they delete it.

> 3.9.1.1_Repricing Pending Actual Conversion or Migration. ~~The *TRRO* transition periods may result in many requests for Verizon to process a significant number of conversions and/or migrations within a short time period. Accordingly, if~~ If ***CLEC Acronym TXT*** places a timely order pursuant to Section 3.9.1 (taking account of any standard intervals that apply, order volumes, and any preparatory activities that ***CLEC Acronym TXT*** must have completed in advance) and Verizon does not complete the conversion or migration requested by ***CLEC Acronym TXT*** as of the date requested by ***CLEC Acronym TXT*** (such requested date being no later than the date required under Section 3.9.1), then Verizon, in its sole discretion, may reprice the subject Discontinued Facility effective as of that date by application of the rate(s) that apply to the available replacement service requested by ***CLEC Acronym TXT*** until such time as Verizon completes the actual conversion or migration to that available replacement service. Because the repricing described in this Section 3.9.1.1 may inherently involve, on a temporary basis, the application of rates to a facility or service provisioned through a format for which Verizon's systems are not designed to apply such rates, Verizon, should it decide apply a rate other than one for the service ***CLEC Acronym TXT*** is actually receiving shall in its sole discretion, may effectuate such repricing by application of a surcharge such that the billed rate is equal to the rate for ~~to be equivalent to~~ the subject replacement service.
>
> 3.9.2.1 Repricing Pending Actual Conversion or Migration. If Verizon is unable to complete the conversion or migration described in Section 3.9.2 by the applicable date set forth therein, then Verizon may, but shall not be required to, reprice the subject Discontinued Facility, effective as of March 11, 2006 (or in the case of dark fiber, September 11, 2006), by application of the rate(s) that apply to the analogous access, resale, or commercial arrangement until such time as Verizon completes the actual conversion or migration described in Section 3.9.2. Because such repricing may inherently involve, on a temporary basis, the application of rates to a facility or service provisioned through a format for which Verizon's systems are not designed to apply such rates, Verizon, should it decide apply a rate other than one for the service ***CLEC Acronym TXT*** is actually receiving, shall in its sole discretion, may effectuate such repricing by application of a surcharge such that the billed rate is equal to the rate for ~~to be equivalent to~~

the applicable access, resale, or other analogous arrangement that Verizon identifies under section 3.9.2 above.

DPL ISSUE NO. 21

How should the Amendment address line sharing?

CLEC's Position

In this DPL, CCG has proposed language that would permit it to obtain line-sharing under state law and Section 271 of the Act.[170]

Verizon's Position

Verizon objects to including unbundling obligations, such as line sharing, that the FCC has eliminated.[171]

Arbitrators' Decision

The Arbitrators agree with Verizon that inclusion of line sharing obligations in this agreement is inconsistent with the *TRO*. 47 C.F.R § 51.319(a)(1)(i) obligates Verizon to provide line sharing only on a transitional basis in accordance with paragraphs (a)(1)(i)(A) and (a)(1)(i)(B) of that section. In addition, as explained in the decision in DPL Issue No. 1, the Arbitrators decline to include references to unbundling under state law. Accordingly, the Arbitrators adopt Verizon's contract language.

> 3.10 Line Sharing. Notwithstanding any other provision of the Amended Agreement (but subject to the conditions set forth in Section 2 above), Verizon shall provide access to Section 251(c)(3) Line Sharing on a transitional basis in accordance with, but only to the extent required by, 47 C.F.R. § 51.319(a)(1)(i). [For the avoidance of any doubt, the FCC's transition rules set forth in 47 C.F.R. § 51.319(a)(1)(i) became effective independently of this Amendment prior to the Amendment Effective Date, and this Section 3.10 is only intended to memorialize such rules for the convenience of the Parties].

DPL ISSUE NO. 22

AT&T Proposed Issue: What termination charges, if any, should apply to the conversion of discontinued facilities to alternative arrangements?

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[170] CCG Initial Brief at 30.

[171] Verizon Initial Brief at 30.

Verizon Proposed Issue: Should the Amendment prohibit Verizon from (a) charging existing, Commission-approved non-recurring charges and (b) asking the Commission to set additional non-recurring charges in the future for conversion of Discontinued

CLEC's Position

On the issue of non-recurring charges, AT&T stated that its proposed language comes verbatim from Docket No. 28821. Specifically, AT&T cites Docket No. 28821, where the Commission found that "SBC shall not impose any untariffed termination, reconnect, or other non-recurring charges, except for a record change charge, associated with any conversion or discontinuance of any declassified network element." AT&T's proposed language includes the term "migration" in addition to the above language.[172]

CCG argued that the Amendment should state that Verizon may not charge a CLEC any termination, reconnect or other nonrecurring charges or fees associated with the conversion or migration of Discontinued Facilities to alternative arrangements.[173]

Cbeyond and Logix join in and support AT&T's language and position.

Verizon's Position

Verizon argued that it has proposed language consistent with Docket No. 28821. Verizon noted that its proposed language states that, except as provided for in a tariff or by agreement of the parties, Verizon will not assess any non-recurring charges for conversions that do not require Verizon to perform any physical work. Verizon objects to AT&T's language arguing that it would prohibit Verizon from charging any conversion or "migration" related non-recurring charges, regardless of: the work required to perform the conversion, the existence of a tariff, or the nature of the service "migrated" to.[174]

Arbitrators' Decision

Parties contend that their language is consistent with the language adopted in Docket No. 28821. In that docket, the Commission adopted the following language:[175]

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[172] Joint DPL 54-55.

[173] CCG Initial Brief at 33.

[174] Verizon Initial Brief at 72-73.

[175] Track 2 Award, UNE DPL at 48-49.

2.18.3 Except as agreed to by the parties, SBC TEXAS shall not impose any untariffed termination charges, or any disconnect fees, re-connect fees, or charges associated with establishing a service for the first time, in connection with any conversion between a wholesale service or group of wholesale services and a UNE or combination of UNEs. Nothing in this Section 2.17.2 prohibits SBC TEXAS from imposing early termination charges otherwise applicable under the state or federal special access tariff to CLEC's termination of existing long-term contract(s) under which CLEC is obtaining a discount.

2.18.3.1 SBC TEXAS may charge applicable ~~service order charges and~~ record change charges.

Based on the prior determination by the Commission, the Arbitrators agree that including the word "migration," as proposed by AT&T, incorporates transactions not envisioned in Docket No. 28821. Therefore, the Arbitrators find that Verizon's language is consistent with prior Commission decisions and adopts its language for 3.9.3.

3.9.3 Except as provided for in a Verizon tariff or as otherwise agreed by the Parties, Verizon shall not charge ***CLEC Acronym TXT*** any fees for the conversion (i.e., records-only changes to convert circuits that are already in service, which do not require Verizon to perform any physical installation, disconnection, or similar activities) or disconnection of a Discontinued Facility.

DPL ISSUE NO. 23

Should the Amendment address terms to be applied if Verizon denies a CLEC request for access to conduit space?

CLEC's Position

AT&T proposes to add a new § 3.9A that which would require Verizon to provide high-capacity loops and transport at TELRIC prices if Verizon denies AT&T conduit space to deploy its own such facilities or if Verizon does not act on AT&T's request within 45 days.

AT&T explained that the FCC premised its non-impairment criteria for loops and transport based on conduit always being available to the CLEC seeking to self-deploy its own loop/transport facilities. AT&T claims that if there is no conduit available for a route emanating from a non-impaired wire center, then AT&T has no alternative means of providing physical connectivity between the wire centers (if transport) or to the customer (if loops).[176]

Logix and CCG join in AT&T's language and position.

Verizon's Position

Verizon argued that AT&T provision is unlawful, because it would require Verizon to keep providing de-listed high-capacity loops and transport indefinitely as UNEs. Verizon stated that only the FCC has the authority to determine if a CLEC is impaired without access to a TELRIC-priced UNE. Verizon explained that FCC established criteria for non-impairment based solely on the number of business lines and fiber-based collocators in a wire center. Once these criteria are met for a particular wire center, Verizon is entitled to discontinue provision of the relevant loop and/or transport UNEs out of that wire center.[177]

Arbitrators' Decision

In this DPL issue, AT&T proposed a section which would require Verizon to provide high-capacity loops and transport at TELRIC prices if Verizon denies AT&T conduit space. The Arbitrators agree with Verizon that the FCC recognized that conduit access would not always be made available to CLECs.[178] The *TRRO* states that all LECs are obligated under sections 251(b)(4) and 224 of the Act to provide access to poles, ducts, and conduit[179]. The FCC further added that the record contained evidence that existing conduit frequently is available for use by competitive LECs that wish to deploy their own fiber.[180] The FCC did not mandate that a LEC always have available conduit space but rather acknowledged that a LEC frequently has available conduit that would be available for use by a CLEC.

Therefore, AT&T's attempt to tie conduit availability with the non-impairment criteria for high-capacity and loops and transport has no basis in law.[181] The FCC has established non-impairment criteria based solely on the number of fiber-based collocators in a wire center as Verizon described.[182] Therefore additional conditions such as conduit availability have no merit.

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[176] Joint DPL at 56-57.

[177] Verizon Initial Brief at 74-75.

[178] Verizon Reply Brief at 32.

[179] *TRRO* at para. 77.

[180] *TRRO* at para. 77.

[181] Verizon Reply Brief at 74-75.

[182] *TRRO* para. 146.

Accordingly, the Arbitrators adopt Verizon's position of "No Language" and decline to include AT&T's section 3.9.

DPL ISSUE NO. 24

How should the Amendment address Verizon's obligations to provide commingling, combinations and conversions?

CLEC's Position

AT&T argued that its proposed language makes clear that: (1) Verizon is required to provide commingling and conversions unencumbered by additional processes or requirements (e.g., requests for unessential information) not specified in the *TRO* and that billing at UNE rates should commence in the month following the conversion; (2) AT&T is required to self-certify its compliance with any applicable eligibility criteria for high capacity EELs (and may do so by written or electronic request) and to permit an annual audit for cause by Verizon to confirm its compliance; (3) Verizon's performance in connection with commingled facilities must be subject to standard provisioning intervals and performance measures; and (4) there will be no charges for conversion from wholesale to UNEs or UNE combinations.[183]

AT&T claimed that Verizon's language does not comply with the *TRO*, as it imposes new and onerous obligations on the CLECs that will act to impede a competitor's ability to provide services through commingled facilities. AT&T objected to Verizon language requiring AT&T to re-certify that it meets the *TRO*'s eligibility requirements for DS1 and DS1 equivalent circuits on a circuit-by-circuit basis rather than through the use of a single written or electronic request. AT&T also claimed that Verizon would require AT&T to reimburse Verizon for the entire cost of an audit where an auditor finds that AT&T failed to comply with the service eligibility criteria for any DS1 circuit, which is not supported in the *TRO*.[184]

CCG argued that Verizon's proposed language limits the availability of commingling to "Qualifying UNEs." CCG stated that Verizon's language should be rejected as it would exclude UNEs that have been declassified, under § 251(c)(3), both now and in the future, without amending the interconnection agreement. CCG stated that this is inconsistent with the process

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[183] Joint DPL 54-59.

[184] Joint DPL 54-59.

mandated by the FCC in both the *TRO* and the *TRRO* and would improperly circumvent the agreement's change of law provisions.[185]

Sprint stated that the only charges that should apply are the charges in the underlying interconnection agreement or tariff until Verizon has additional charges approved by the Commission.[186]

Logix and Cbeyond support AT&T's language and position.

Verizon's Position

Verizon contended that it has proposed language consistent with the FCC's ruling. Verizon stated that its language provides that Verizon: (1) will not prohibit commingling (to the extent it is required under Section 251(c)(3) and the FCC's rules to permit commingling), and (2) will perform the functions necessary to allow CLECs to commingle any UNE or combination of UNEs with wholesale services that are obtained under a Verizon access tariff or a separate non-§ 251 agreement with Verizon (to the extent Verizon is required under federal law to do so). Verizon argued that AT&T and CCG objected to Verizon's term "Qualifying UNEs" because that term is limited to UNEs under § 251(c)(3), and AT&T and CCG seek to classify additional elements as UNEs under their theory that the Commission has unbundling authority under other sources of law. Verizon also claimed that AT&T's language would require Verizon to commingle these services with non-UNEs. Verizon contended that AT&T's position is unlawful, as the FCC's rules only require Verizon to commingle UNEs under § 251(c)(3) with other wholesale services and do not require Verizon to "commingle" two wholesale services where neither service is a UNE under § 251(c)(3).[187]

Arbitrators' Decision

Parties disputed several issues in this DPL. They include (1) blanket certification of elements, (2) assessing conversion charge, (3) commingling, and (4) impact of tariffs.

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[185] CCG Initial Brief at 33.

[186] Sprint Initial Brief at 16-17.

[187] Verizon Initial Brief at 79-82.

Blanket certification

The Arbitrators find that CLECs should be able to recertify using a single "blanket" re-certification (see the Arbitrators' Decision on DPL Issue No. 27). Also, Commission previously decided this issue in Docket No. 28821 and adopted the following language:

> Before accessing (1) a converted High-Capacity Included Arrangement, (2) a new High-Capacity Included Arrangement, or (3) part of a High-Capacity Included Arrangement that is a commingled EEL as a UNE, CLEC must certify to all of the requirements set out in Section 2.20.2. CLEC may provide this certification by completing a form provided by SBC TEXAS either on a single circuit or a blanket basis, at CLEC's option (emphasis added).[188]

Accordingly, the Arbitrators adopt the following contract language.

> CLEC may provide certification by completing a form provided by Verizon either on a single circuit or a blanket basis, at CLEC's option.

Provisioning

The Commission addressed a similar issue in Docket No. 28821. In that docket, the Commission required the ILEC to provide provisioning services in equal quality that the ILEC provides to its own customers for an equivalent service.[189] Accordingly, the Arbitrators adopt language consistent with this prior decision.

Conversion Charge

The Commission previously decided the conversion charge issue in Docket No. 28821.[190] That decision adopted the following language: "SBC Texas shall not impose any untariffed termination, reconnect, or other non-recurring charges, except for a record change charge, associated with any conversion or any discontinuance of any declassified network elements." The Arbitrators modify the contract language accordingly.

Commingling

The Commission previously decided the issue of commingling in Docket No. 28821 and adopted the following language:

> Upon request, and except as provided in FCC Rules Section 51.318 and Section 2.11 of this Agreement, SBC TEXAS shall perform the functions necessary to

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[188] Track II Award, UNE DPL at 66.

[189] Track II Award, UNE DPL at 114, 173, 179.

[190] Track II Award, UNE DPL at 121.

> Commingle a UNE or a combination of UNEs with one or more facilities or services that AT&T has obtained at wholesale from SBC TEXAS. (28821, DPL Issue No. 21, matrix p 75)

The Arbitrators modify the contract language accordingly.

The parties also dispute whether Verizon should permit commingling with a discontinued UNE during the transition period. The Arbitrators find this issue to be moot, given that the transition period ends on March 11, 2006.

Tariff Controls

The Arbitrators adopt AT&T's language as modified. The Arbitrators find that the tariff provisions must prevail since tariffs have the force and effect of law according to the filed rate doctrine.[191]

> 3.11.1 Notwithstanding any other provision of the Amended Agreement **or Verizon tariff (but subject to and without limiting the conditions set forth in Section 2 above and in Section 3.11.2 below),**
>
> **3.11.1.1** Verizon shall permit AT&T to commingle an unbundled Network Element or a combination of unbundled Network Elements **obtained under the Amended Agreement pursuant to the Federal Unbundling Rules or under a Verizon UNE tariff** ("**Qualifying** UNEs"), with **W**wholesale **S**services obtained from Verizon **under a Verizon access tariff or separate non-251 agreement ("Qualifying Wholesale Services"), to combine UNEs and also to convert wholesale services to a UNE or Combination, ~~but only to the extent and so long as commingling and provision of such Network Element (or combination of Network Elements) is required by the Federal Unbundling Rules.~~** Moreover, **~~to the extent and so long as required by the Federal Unbundling Rules (subject to Section 3.11.1.3 below),~~** Verizon shall, upon request of ***CLEC Acronym TXT***, perform the functions necessary to commingle or combine **Qualifying a** UNEs **or Combinations** with **one or more facilities or services or inputs that AT&T has obtained at Qualifying W**wholesale **Services obtained** from Verizon **and to convert wholesale services to UNEs or Combinations. Verizon shall not impose any policy or practice related to commingling, combinations or conversions that imposes an unreasonable or undue prejudice or disadvantage upon AT&T, and in no event shall Verizon impose any policy or practice relating to commingling, conversions or combinations that is inconsistent with section 3.11.3 below. Subject to Section 3.11.3.2, T**the rates, terms and conditions of the applicable access tariff **or separate non-251 agreement** will apply to **the Qualifying W**wholesale **S**services, and the rates, terms and conditions of the Amended Agreement **or the Verizon UNE tariff, as applicable,** will apply to the

[191] *See e.g., Southwestern Bell Tel. Co. V Metro-Link Telecom, Inc.*, 919 S.W.2d 687, 692 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *see also* PURA §§ 52.251 and 53.004.

Qualifying UNEs or Combinations. **In addition, if any commingling requested by ***CLEC Acronym TXT*** requires Verizon to perform physical work that Verizon is required to perform under the Federal Unbundling Rules, then Verizon's standard charges for such work shall apply or, in the absence of a standard charge, a fee calculated using Verizon's standard time and materials rates shall apply until such time as a standard charge is established pursuant to the terms set forth in the Pricing Attachment to this Amendment.**

Verizon shall cooperate fully with AT&T to ensure that operational policies and procedures implemented to effect Commingled arrangements shall be handled in such a manner as to not operationally or practically impair or impede AT&T's ability to implement new Commingled arrangements and convert existing arrangements to Commingled arrangements. ~~For the avoidance of doubt, Verizon acknowledges and agrees that the language of this Amendment complies with and satisfies the requirements of Verizon's wholesale and access tariffs with respect to Commingling and to the extent any Verizon tariff wholesale or access tariff provisions are determined to be in conflict with the provisions on this Amended Agreement, the provisions of this Amended Agreement shall prevail.~~

CLEC may provide certification by completing a form provided by Verizon either on a single circuit or a blanket basis, at CLEC's option.

3.11.1.3 "Ratcheting," as that term is defined by the FCC, shall not be required. **Qualifying** UNEs that are commingled with **Qualifying Ww**holesale **Ss**ervices are not included in the shared use provisions of the applicable tariff. ~~**Verizon may exclude its performance in connection with the provisioning of commingled facilities and services from standard provisioning intervals and from performance measures and remedies, if any, contained in the Amended Agreement or elsewhere, until such time as a legally effective order of the Commission expressly requires new standard provisioning intervals and/or performance measures and remedies for Verizon's provisioning of commingled facilities, at which time such new intervals, performance measures, and/or remedies shall apply to the extent and for so long as they remain effective.**~~

For all commingled arrangements ordered under this Agreement, Verizon will provide provisioning services equal in quality and speed (speed to be measured from the time Verizon receives the service order from CLEC) to the services Verizon provides to its end users for an equivalent service. The provisioning to support these services will be provided in an efficient manner which meets the performance metrics Verizon achieves when providing the equivalent end user services to an end user.

~~**3.11.1.4 Limitations on Section 3.11.1.**~~

~~**3.11.1.1.1 Notwithstanding Section 3.11.1 above, Verizon shall not, during the applicable TRRO transition period set forth in this Section 3, be required to commingle, or to permit the commingling of, any Discontinued Facility that**~~

~~is part of ***CLEC Acronym TXT***'s embedded base of Discontinued Facilities to which the TRRO transition provisions set forth in this Section 3 apply.~~

~~3.11.1.1.2 Nothing contained in Section 3.11.1 shall be deemed: (a) to establish any obligation of Verizon to provide ***CLEC Acronym TXT*** with access to any facility that Verizon is not otherwise required to provide to ***CLEC Acronym TXT*** on an unbundled basis under the Amended Agreement, or (b) to limit any right of Verizon under the Amended Agreement to cease providing a facility that is or becomes a Discontinued Facility.~~

DPL ISSUE NO. 25

a. Should the Amendment address the manner in which Verizon performs conversions?

b. Should the Amendment address how CLECs submit conversion requests?

c. Should the Amendment address how Verizon bills for conversion requests?

CLEC's Position

On the issue of conversions the CLECs argued that Verizon must perform wholesale facility conversions without any physical disconnection or interruption. On submitting conversion requests, CLECs desire the option of submitting conversion requests electronically or manually. And regarding billing, the CLECs contended that reduced pricing applicable to a converted circuit should start in the next billing following the request for conversion, rather than in the cycle following actual completion of the conversion.[192]

Verizon's Position

Verizon stated that while it does not typically expect to physically disconnect or alter facilities when performing a conversion, neither should it be prohibited from doing so. Verizon noted that there may be instances where the conversion cannot be completed without a minor change to the facilities. On submitting conversion requests, Verizon explained that it has invested resources into developing an electronic process, and CLECs must use this process. Verizon also claimed that its processes do not permit CLECs to submit certain conversions

[192] Joint DPL 61-62.

manually. Regarding billing, Verizon stated that the completion of the service order activities should be the trigger for new rates.[193]

Arbitrators' Decision

This DPL addresses three issues: (a) the way which Verizon performs wholesale facility conversions; (b) the process for submitting conversion requests; and (c) billing issues associated with conversion requests.

a. The manner in which Verizon performs wholesale conversions

The Arbitrators find that while Verizon should attempt to perform conversions without physically disconnecting or altering facilities, there may be circumstances when a conversion cannot be completed without a minor change to the facilities.

The Commission recognized this issue in Track 2 of Docket No. 28821. In the original Award, the Commission stated that "Conversion shall not create any disruption to CLEC's customer's service or degradation in service quality."[194] Subsequently, the Commission added the word "unavoidable" and amended the contract language as follows: "Conversion shall not create any unavoidable disruption to CLEC's customer's service or degradation in service quality."[195] Accordingly, the Arbitrators modify AT&T's contract language in a similar manner.

> 3.11.1.2 When a wholesale service employed by AT&T is replaced with UNEs, Verizon shall not, to the extent possible, physically disconnect, separate, alter or change in any other fashion equipment and facilities employed to provide the wholesale service, except at the request of AT&T. Conversion shall not create any unavoidable disruption to CLEC's customer's service or degradation in service quality. Verizon shall process expeditiously all conversions requested by AT&T without adversely affecting the service quality perceived by AT&T's end user customer.

b. The process for submitting conversion requests

CLECs wish to have the option of submitting conversion requests electronically or manually. The Arbitrators agree with Verizon that CLECs should be required to submit conversion orders electronically. In fact, Verizon noted that requests for EELs can only be made

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[193] Verizon Initial Brief 81-86.

[194] Track 2 Award, UNE DPL at 66-67.

[195] *See* Docket No. 28821, Order on Clarification and Reconsideration (Jul. 25, 2005).

electronically.[196] A manual option, in addition to the electronic interface, would circumvent the efficiencies created by the electronic interfaces. The Arbitrators adopt the following contract language consistent with this discussion:

> AT&T may request conversions of any existing service or group of services to UNEs by submitting a written or electronic request. At Verizon's option, AT&T may submit an electronic request.

c. Billing issues associated with conversion requests

The Commission found in Track 2 of Docket No. 28821 that the pricing change will take effect "following the completion of activities necessary for performing the conversion."[197] Therefore, the Arbitrators adopt similar as follows:

> Verizon shall begin billing ***CLEC Acronym TXT***, and ***CLEC Acronym TXT*** shall pay, at the pricing applicable to the equivalent UNE (if any) or Combination (if any) that Verizon is required to provide under the Federal Unbundling Rules and the Amended Agreement, as of the beginning of the next billing cycle following the completion of activities necessary for performing the conversion, including, but not limited to ***CLEC Acronym TXT***'s submission of a complete and accurate ASR (or LSR as appropriate) requesting the conversion."
>
> Except where AT&T specifically requests that Verizon physically disconnects, separates, alters or changes the equipment and facilities employed to provide the wholesale service being replaced, the conversion request shall be deemed to have been completed effective upon receipt by Verizon of the written or electronic request from AT&T and recurring charges for UNEs set forth in Verizon's applicable tariffs shall apply as of such date. Pricing changes for conversion requests submitted after the Amendment Effective Date shall become effective upon receipt by Verizon of AT&T's request and shall be made by Verizon in the first billing cycle after such request. If that bill does not reflect the appropriate charges, AT&T is nevertheless obligated to pay no more than the applicable UNE rate. Verizon shall bill AT&T pro rata for the wholesale service through the date prior to the date on which billing at UNE rates commences pursuant to this Section. The effective bill date for conversions is the first of the month following Verizon's receipt of an accurate and complete request for conversion.

DPL ISSUE NO. 26

How should the Amendment reflect Verizon's obligation to provide access to UNE combinations?

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[196] *See* Verizon Initial Brief at 85-86.

[197] *See* Track 2 Award, UNE DPL at 68.

CLEC's Position

AT&T argued that its proposed section simply memorializes Verizon's obligation to provide combinations in accordance with federal law. AT&T explained that the *TRO* specifically provides in paragraphs 573 and 574 that an ILEC must give a CLEC access to UNE combinations upon request.[198]

CCG stated that the Amendment should specify that Verizon is obligated to provide access to UNE combinations in accordance with 251(c)(3) as well as any federal and state rules and orders.[199]

Logix and Cbeyond support AT&T's language and position.

Verizon's Position

Verizon stated that AT&T's language is unnecessary. Verizon argued that its proposed use of "Federal Unbundling Rules" already assures that Verizon will provide combinations in accordance with § 251(c)(3) and the FCC's implementing rules. Verizon added that AT&T's language is inappropriate as it is confusing to insert a general, ambiguous, provision that would create a stand-alone obligation to provide combinations.[200]

Arbitrators' Decision

The Arbitrators agree with Verizon that no language is needed. The Amendment already addresses Verizon's obligation to combine (see, for example, the Arbitrators' decision on DPL Issue No. 24).

DPL ISSUE NO. 27

How should the Amendment reflect the FCC's service eligibility criteria?

CLEC's Position

AT&T contended that its proposed amendment clarifies that AT&T is required to self-certify its compliance with any applicable eligibility criteria for high capacity EELs (and may do

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[198] Joint DPL at 63.

[199] CCG Initial Brief at 35-36.

[200] Verizon Initial Brief at 88.

so by written or electronic request) and that Verizon may conduct an annual audit for cause to confirm its compliance. AT&T opposed Verizon language that seeks separate certification for each circuit, arguing that the *TRO* permits certification as to each EEL or combination of DS1 loop with DS3 transport. AT&T also noted that Verizon's 3.11.3.5 raised the question of whether conversion requests must be ASR-driven. AT&T argued that the *TRO* provided the CLEC the option to submit written or electronic requests for conversions, and the FCC gave a letter as an example of a satisfactory form of request.[201]

CCG supports AT&T's position. In addition, CCG stated that Verizon's obligations to provide commingling and conversions is subject and the scope of the Amendment which includes applicable law. CCG argued that repricing of an EEL that becomes non-compliant should not occur prior to the effective date of the Amendment and the new rate should be no greater than the lowest rate the CLEC could have otherwise obtained for an analogous access service or other analogous arrangement.[202]

Cbeyond and Logix joined in AT&T's language and position.

Verizon's Position

Verizon argued that its proposal to circuit-specific certification is consistent with FCC requirements. Verizon stated that AT&T's "batch" proposal is inconsistent with use of ASRs to provide the circuit-by-circuit certification. Verizon explained that its change management process changed its systems more than a year ago to automate the processing of conversions and this automation requires the use of ASRs.[203]

Verizon rejected AT&T's proposed deletion to Section 3.11.3.5 stating that "ASR-driven" service requests will result in a change in circuit identification. Verizon argued that AT&T contention that all conversions would result in a change in circuit ID, is not accurate. Verizon explained that conversions of certain services may not result in a change in the circuit

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[201] Joint DPL at 63-64.

[202] CCG Initial Brief at 36-37; CCG Reply Brief at 41.

[203] Verizon Initial Brief at 90-91.

ID due to the nature of the request. Therefore Verizon argued that its contract language be adopted.[204]

Arbitrators' Decision

The Amendment should include a reference to conversions a well as combination and commingling, since the FCC expressly allowed conversion:

> We conclude that carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations, so long as the competitive LEC meets the eligibility criteria that may be applicable.[205]

To maintain consistency and avoid confusion, the Arbitrators use the term "high-capacity EEL" instead of just "EEL." The FCC expressly limited the scope of eligibility criteria to high-capacity EELs:

> We do not, however, impose these additional requirements on access to UNEs other than high-capacity EELs. The record does not indicate concern over misuse of voice-grade UNE loops, high-capacity loops, or other UNEs. By contrast, it discloses significant disagreements between incumbent LECs and competitive LECs over application and administration of use restrictions on high-capacity EELs. Accordingly, although a requesting carrier must provide qualifying services to obtain access to loops, lower-capacity EELs and other UNEs and UNE combinations, we need not provide more detailed rules for application of these requirements to other elements at this time, given the lack of controversy and the greater administrative burdens that enforcing such protections places on requesting carriers, incumbent LECs, and the Commission.
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> . . . .
>
> Before accessing (1) a converted high-capacity EEL, (2) a new high-capacity EEL, or (3) part of a high-capacity commingled EEL as a UNE, a requesting carrier must certify to the service criteria set forth in Part VII.B.2.b in order to demonstrate that it is a bona fide provider of qualifying service.[206]

The Arbitrators reject Verizon's language that describes combination, conversion and commingling obligations in the negative (i.e., stating what Verizon does not have an obligation to do). This language unnecessarily confuses the scope of Verizon's obligations by not simply stating Verizon's affirmative obligations.

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[204] Verizon Reply Brief at 36-37.

[205] *TRO* at para. 586.

[206] *TRO* at paras. 592 and 624.

Blanket Certification

The Arbitrators adopt AT&T's proposed language regarding "blanket" certifications. The Commission previously addressed this issue in Docket No. 28821 in which the Commission allowed blanket certifications at the CLEC's option.[207] Moreover, blanket certifications are consistent with the FCC's goal of preventing undue delays. The FCC contemplated that self-certifications would occur expeditiously, stating that "A critical component of nondiscriminatory access is preventing the imposition of any undue gating mechanisms that could delay the initiation of the ordering or conversion process."[208] Furthermore, the FCC intentionally did not specify the form for a self-certification, but found that a "letter" sent to the incumbent LEC by a requesting carrier was a practical method.[209] The FCC neither required a separate certification for each circuit nor prohibited a single "blanket" certification aggregating the certification of multiple individually-qualified circuits.

Recertification

The Arbitrators adopt language providing for recertification within 30 days from execution of the amendment. The Arbitrators agree with AT&T that recertification measured from the date of execution would avoid problems that may arise from recertification becoming due before the filing and approval of conforming contract language.

Circuit ID

The Arbitrators find that not all changes necessarily result in a change in circuit ID. Therefore, we adopt Verizon's language for section 3.11.3.5.

Scope of Amendment

The Arbitrators decline to include CCG's language regarding the scope of the Amendment (see the Arbitrators' decision on DPL Issue No. 35).

> 3.11.3 Service Eligibility Criteria for Certain Combinations, **Conversions** and Commingled Facilities and Services. Notwithstanding any other provision of the Agreement, this Amendment **(but subject to the conditions set forth in Sections 2 and 3.11.1 above)**, or any Verizon tariff:

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[207] Track 2 Award, UNE DPL at 66.

[208] *TRO* at para. 623.

[209] *TRO* at para. 624; *TRRO* at para 234 n.658.

3.11.3.1 Verizon shall ~~not be obligated to~~ provide:

3.11.3.1.1 an unbundled DS1 Loop in combination with unbundled DS1 or DS3 Dedicated Transport, or commingled with DS1 or DS3 access services;

3.11.3.1.2 an unbundled DS3 Loop in combination with unbundled DS3 Dedicated Transport, or commingled with DS3 access services;

3.11.3.1.3 unbundled DS1 Dedicated Transport commingled with DS1 channel termination access service;

3.11.3.1.4 unbundled DS3 Dedicated Transport commingled with DS1 channel termination access service; or

3.11.3.1.5 unbundled DS3 Dedicated Transport commingled with DS3 channel termination service,

(individually and collectively "High Capacity EELs" ~~or "EELs"~~) ~~except~~ **pursuant** to the **requirements set forth in the Triennial Review Order and set forth in Rule 51.318 and pursuant to applicable sections of the Act, as determined by effective FCC rules and associated effective FCC and judicial orders** ~~extent Verizon is required by the Federal Unbundling Rules to do so, and not unless and until~~ **Before accessing a converted High Capacity EEL, a new high-capacity EEL, or part of a high-capacity commingled EEL as a UNE,** ***CLEC Acronym TXT*** **must** certify~~ies (in an ASR or, as applicable, LSR)~~ **by completing a form provided by Verizon either on a single circuit or blanket basis, at AT&T's option** to Verizon for ~~each~~ **the** DS1 **EEL**(s) ~~circuit or DS1 equivalent circuit~~ **or combination**(s) **of DS1 loop**(s) **with DS3 transport** that it/they ~~is in compliance with each of the service eligibility criteria~~ satisfies/satisfy the service eligibility criteria ~~on a circuit by circuit basis~~ as set forth in 47 C.F.R. § 51.318. ***CLEC Acronym TXT*** must remain in compliance with said service eligibility criteria for so long as ***CLEC Acronym TXT*** continues to receive the aforementioned combined, **converted** or commingled facilities and/or services from Verizon, and ***CLEC Acronym TXT*** shall notify Verizon if a certification ceases to be accurate. **The service eligibility criteria shall be applied to each ~~the~~ DS1 circuit or DS1 equivalent circuit.** If the ~~circuit~~ high capacity **EEL** is, becomes, or is subsequently determined to be, noncompliant, the noncompliant ~~circuit~~ high capacity **EEL** will be treated as described in Section 3.11.3.2 below. **The foregoing shall apply** ~~Access to unbundled network elements and combinations of unbundled network elements shall be provided by Verizon without regard to whether access is sought~~ **whether the circuits in question are being provisioned** to establish a new circuit or to convert an existing **wholesale** ~~circuit from a~~ service**, or any part thereof,** to unbundled network elements or unbundled network element combinations. For existing ~~circuits~~ high capacity **EELs**, the CLEC must re-certify **its compliance with the service eligibility requirements in writing or electronically** ~~(using an ASR or, as applicable, LSR) for each DS1 circuit or DS1 equivalent~~ within 30 days of **execution of** the ~~Amendment Effective Date~~ **Amended Agreement by both Parties.** ~~Circuits~~ High capacity **EELs** not re-certified within 30 days of the

execution of the ~~**Amendment Effective Date**~~ **Amended Agreement** shall, effective as of 30 days after **execution of** the ~~**Amendment Effective Date**~~ **Amended Agreement**, be treated as noncompliant circuits as described in Section 3.11.3.2 below.

3.11.3.5 All **ASR-driven** conversion requests will result in a change in circuit identification (circuit ID) from access to UNE or UNE to access.

DPL ISSUE NO. 28

What information should a CLEC be required to provide to Verizon to certify that it meets the FCC's service eligibility criteria?

CLEC's Position

AT&T stated that the manner in which Verizon seeks to implement service eligibility criteria does not comply with the *TRO*, and in fact seeks to impose new and onerous obligations on the CLECs. AT&T argued that instead of a streamlined self-certification process envisioned by the FCC, Verizon seeks to turn the CLEC's self-certification letter into a mechanism for auditing CLEC compliance with the eligibility criteria before the order is even provisioned. AT&T contended that the *TRO* allows AT&T to certify that it meets the criteria but Verizon would require AT&T to produce evidence or specific information regarding each of the criteria AT&T is required to satisfy. AT&T concluded that this approach contradicts the FCC's direction.[210]

Cbeyond opposed Verizon's language as it interprets it to intrusive, overly burdensome, outside of and beyond the FCC's requirements as set forth in the *TRO* Verizon's Position.[211]

CCG & Logix support AT&T's position.

Verizon's Position

Verizon claimed that its language tracks the FCC's eligibility criteria. Verizon contended that the CLECs' approach would simply entitle them to assert that their EEL requests meet the FCC's conditions without providing any of the supporting information. Verizon argued that the FCC did not suggest that a CLEC's self-certification could consist of a completely unsubstantiated single sentence (e.g., "[The CLEC] hereby certifies that it meets the criteria.") or

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[210] Joint DPL at 66-67.

simply by placing an order. To the contrary, Verizon argued, the FCC contemplated that a CLEC would show compliance with its eligibility criteria.[212]

Arbitrators' Decision

The Arbitrators find that this amendment should contain language which addresses the terms and conditions under which Verizon must provide EELs to CLECs. This issue was previously decided in Docket No. 28821, Track 2.[213] Accordingly, the Arbitrators adopt the Commission's language from that docket.[214]

> 2.12.2 Verizon is not obligated, and shall not, provide access to (1) an unbundled DS1 loop in combination, or Commingled, with a dedicated DS1 transport facility or service (DS1 EEL) or a dedicated DS3 or higher transport facility or service (DS1 EEL multiplexed onto DS3 transport), or an unbundled DS3 loop in combination, or Commingled, with a dedicated DS3 or higher transport facility or service (DS3 EEL), or (2) an unbundled dedicated DS1 transport facility in combination, or Commingled, with an unbundled DS1 loop or a DS1 channel termination service (DS1 EEL), or an unbundled dedicated DS3 transport facility in combination, or Commingled, with an unbundled DS1 loop or a DS1 channel termination service (DS1 EEL multiplexed onto DS3 transport), or with an unbundled DS3 loop or a DS3 or higher channel termination service (DS3 EEL) (collectively, the "Included Arrangements"), unless CLEC certifies that all of the following conditions are met with respect to the arrangement being sought:
>
> 2.12.2.1 CLEC (directly and not via an Affiliate) has received state certification to provide local voice service in the area being served or, in the absence of a state certification requirement, has complied with registration, tariffing, filing fee, or other regulatory requirements applicable to the provision of local voice service in that area.
>
> 2.12.2.2 The following criteria are satisfied for each Included Arrangement, including without limitation each DS1 circuit, each DS3 circuit, each DS1 EEL and each DS1 equivalent circuit on a DS3 EEL:
>
> 2.12.2.2.1 Each circuit to be provided to each customer will be assigned a local telephone number (NPA-NXX-XXXX) that is associated with local service provided within an Verizon local service area and within the LATA where the

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[211] Cbeyond Initial Brief 20-23.

[212] Verizon Reply Brief at 37; Verizon Initial Brief at 92-93.

[213] Track 2 Award, UNE DPL at 49-56.

[214] The Arbitrators note that the section numbers included in the contract language for this DPL issue reflects the language from Docket No. 28821 and may not have an equivalent in the parties' respective contracts. The Arbitrators have nevertheless maintained the same section numbers to ensure that references within the contract language to the appropriate sections remain consistent.

circuit is located ("Local Telephone Number"), prior to the provision of service over that circuit; and

2.12.2.2.2 Each DS1-equivalent circuit on a DS3, or on any other Included Arrangement, must have its own Local Telephone Number assignment, so that each DS3 EEL must have at least 28 Local voice Telephone Numbers assigned to it; and

2.12.2.2.3 Each circuit to be provided to each customer End User will have 911 or E911 capability prior to the provision of service over that circuit; and

2.12.2.2.4 Each circuit to be provided to each End User will terminate in a collocation arrangement that meets the requirements of Section 2.12.3 of this Attachment 251(c)(3) UNE; and

2.12.2.2.5 Each circuit to be provided to each End User will be served by an interconnection trunk that meets the requirements of Section 2.12.4 of this Attachment 251(c)(3) UNE; and

2.12.2.2.6 For each 24 DS1 EELs, or other facilities having equivalent capacity, CLEC will have at least one active DS1 local service interconnection trunk that meets the requirements of Section 2.12.4 of this Attachment; and

2.12.2.2.7 Each circuit to be provided to each customer End User will be served by a switch capable of providing local voice traffic.

By way of example only, the application of the foregoing conditions means that a wholesale or retail DS1 or higher service/circuit (whether intrastate or interstate in nature or jurisdiction) comprised, in whole or in part, of a UNE local loop-Unbundled Dedicated Transport(s)-UNE local loop (with or without multiplexing) cannot qualify for at least the reason that the UNE local loop-Unbundled Dedicated Transport combination included within that service/circuit does not terminate to a collocation arrangement. Accordingly, Verizon shall not be required to provide, and shall not provide, any UNE combination of a DS1 UNE local loop and Unbundled Dedicated Transport at DS1 or higher (whether as a UNE combination by themselves, with a network element possessed by CLEC, or pursuant to Commingling, or whether as a new arrangement or from a conversion of an existing service/circuit) that does not terminate to a collocation arrangement that meets the requirements of Section 2.12.3 of this Attachment 251(c)(3) UNE.

2.12.3 A collocation arrangement meets the requirements of Section 2.12 of this Attachment 251(c)(3) UNE if it is:

2.12.3.1 Established pursuant to Section 251(c)(6) of the Act and located at Verizon's premises within the same LATA as the End User's premises, when Verizon is not the collocator; or

2.12.3.2 Located at a third party's premises within the same LATA as the End User's premises, when Verizon is the collocator.

2.12.4 An interconnection trunk meets the requirements of Sections 2.12.2.2.5 and 2.12.2.2.6 of this Attachment 251(c)(3) UNE if CLEC will transmit the calling party's Local Telephone Number in connection with calls exchanged over

the trunk, and the trunk is located in the same LATA as the End User premises served by the Included Arrangement.

2.12.5 For a new circuit to which Section 2.12.2 applies, CLEC may initiate the ordering process if CLEC certifies that it will not begin to provide any service over that circuit until a Local Telephone Number is assigned and 911/E911 capability is provided, as required by Section 2.12.2.2.1 and Section 2.12.2.2.3, respectively. In such case, CLEC shall satisfy Section 2.12.2.2.1 and/or Section 2.12.2.2.3 if it assigns the required Local Telephone Number(s), implements 911/E911 capability, and provides the assigned Local Telephone Number(s) to Verizon to complete the certification within 30 days after Verizon provisions such new circuit.

2.12.5.1 Section 2.12.5 does not apply to existing circuits to which Section 2.12.2 applies, including conversions or migrations (e.g., CLEC shall not be excused from meeting the Section 2.12.2.2.1 and Section 2.12.2.2.3 requirements for existing circuits at the time it initiates the ordering process).

2.12.6 CLEC must provide the certification required by Section 2.12 on a form provided by Verizon, on a circuit-by-circuit/service-by-service/Included Arrangement-by-Included Arrangement basis.

2.12.6.1 If the information previously provided in a certification is inaccurate (or ceases to be accurate), CLEC shall update such certification promptly with Verizon.

DPL ISSUE NO. 29

When does Verizon have the right to stop providing (i.e., reprice) an EEL?

CLEC's Position

A&T argued that Verizon should not be allowed to stop providing an EEL on an unbundled basis simply because a circuit that is part of an EEL becomes delisted.[215] CCG stated that Verizon's right to reprice an EEL is limited to when the EEL, not the circuit, becomes noncompliant in accordance with the terms of this Amendment and applicable law.[216] Logix and Cbeyond supports AT&T's language and position.

Verizon's Position

Verizon stated that any obligation it has to provide EELs under the Amendment section does not override Verizon's right under other provisions to discontinue de-listed UNEs. Verizon

[215] Joint DPL at 68.

[216] CCG Initial Brief at 38.

cautioned that the contract should not leave the door open for the CLECs to later claim that existing discontinuation provisions do not apply when high-capacity facilities are de-listed in the future.[217]

Arbitrators' Decision

Parties dispute two issues in this DPL: (1) the use of the term "EEL" as opposed to "Circuit" and (2) the effective date for repricing the EEL.

EEL

The Arbitrators agree with AT&T's proposal to use the term "EEL" as opposed to the term "circuit." The Arbitrators also agree with CCG that the "EEL," not the "circuit," becomes noncompliant with the terms of applicable law. A high capacity EEL could become noncompliant either by not satisfying the service eligibility criteria or by having a component of the high capacity EEL delisted as a UNE. However, the service eligibility criteria do not apply to non-high capacity EELs (see the Arbitrators' decision on DPL Issue No. 27). Accordingly, a non-high capacity EEL may become unavailable when an EEL component becomes delisted, but the service eligibility criteria have no bearing on the availability of non-high capacity EELs.

Repricing

The Arbitrators also find that the Amendment should provide for: (1) notice to the CLEC from Verizon that an EEL is noncompliant, and (2) a timeframe in which the CLEC can address the noncompliance issue. The Arbitrators find that the term "EEL" is more appropriate than "circuit" with respect to repricing. However, we note that an EEL may become unavailable if a component element becomes delisted. Finally, consistent with the decisions on DPL Issue No. 15, we determine that Verizon should not have to provide the lowest rate for an analogous access service or arrangement. Therefore, the Arbitrators decline to include CCG's proposed language regarding the rates for a repriced EEL. Accordingly, the Arbitrators adopt the following contract language:

> 3.11.3.2 Verizon shall upon identifying an EEL which is or becomes noncompliant as described in this Section 3.11 send notice to the CLEC listing the reasons why such EEL is noncompliant. Verizon shall refrain from converting the services back to wholesale until 30 days after this notice so the CLEC shall have sufficient "time to cure" said noncompliance by bringing such EEL into

[217] Verizon Initial Brief at 94-96.

compliance if an EEL is or becomes noncompliant and ***CLEC Acronym TXT*** has not submitted an LSR or ASR, as appropriate, to Verizon requesting disconnection of the noncompliant facility and has not separately secured from Verizon an alternative arrangement to replace the noncompliant EEL, then Verizon, to the extent it has not already done so prior to execution of this Amendment, shall reprice the ~~circuit~~ **EEL**, effective thirty (30) days after the date notice was given to the CLEC on which that EEL became non-compliant, but no earlier than the effective date of the Amendment. Verizon may institute application of a new rate (or, in Verizon's sole discretion, by application of a surcharge to an existing rate) to be equivalent to an analogous access service or other analogous arrangement that Verizon shall identify in a written notice to ***CLEC Acronym TXT***. This "time to cure" does not limit any other right Verizon may have to cease providing circuits that are or become Discontinued Facilities.

DPL ISSUE NO. 30

Should the Amendment prohibit Verizon from imposing untariffed termination charges, or any disconnect fees, re-connect fees or charges associated with establishing a service for the first time in connection with any conversion between a wholesale service or a group of wholesale services and a 251(c)(3) UNE or combination of 251(c)(3) UNEs?

CLEC's Position

AT&T's argued that its proposed language is consistent with the FCC's decision in the *TRRO* and the Commission's decision in Docket No. 28821.[218] CCG maintained that the Amendment should prohibit Verizon from imposing any untariffed termination charges or any disconnect fees, re-connect fees or charges associated with establishing a service for the first time in connection with any conversion between a wholesale service or a group of wholesale services and a 251(c)(3) UNE or combination of 251(c)(3) UNEs.[219]

Cbeyond and Logix join in AT&T's language and position.

Verizon's Position

Verizon argued that the Amendment should not foreclose Verizon from charging existing, Commission-approved non-recurring charges, charges to which the parties have otherwise agreed, or charges that apply under an applicable tariff (e.g., liability for early

[218] Joint DPL at 69-70.

[219] CCG Initial Brief at 38.

termination of a term discount plan). Verizon contended that there is no basis for changing or attempting to limit such rates in this Arbitration and the Amendment should not prohibit Verizon from requesting the Commission to set non-recurring charges relating to conversions in the future.[220]

Arbitrators' Decision

The Commission previously adopted language that prohibited imposition of any untariffed termination charges, or any disconnect fees, re-connect fees, or charges. In Docket No. 28821, the Commission determined the following:

> The Commission adopts the contract language proposed by SBC Texas. As previously indicated, with a CLEC, in this instance MCI, converts a service to a UNE certain service order activities will occur, even though there is no physical rearrangement of the circuit. Therefore, it is reasonable for SBC Texas to recover record change charges when SBC Texas performs a conversion.
>
> 6.4 Except as otherwise agreed to by the Parties, SBC TEXAS shall not impose any untariffed termination charges, or any disconnect fees, re-connect fees, or charges associated with establishing a service for the first time, in connection with any conversion between a wholesale service or group of wholesale services and a ~~[Lawful]~~ 251(c)(3) unbundled Network Element or Combination of ~~[Lawful]~~ 251(c)(3) unbundled Network Elements.
>
> 6.4.1 SBC Texas may charge applicable ~~service order charges~~ and record change charges.[221]

Therefore, the Arbitrators adopt AT&T's contract language.

> 3.11.3.4 Except as provided for in a Verizon tariff (including, but not limited to, charges associated with ***CLEC Acronym TXT***'s early termination of a special access discount plan) or as otherwise agreed by the Parties, Verizon shall not charge ***CLEC Acronym TXT*** any further fees associated with conversions ("conversions" being records-only changes to convert circuits that are already in service, which do not require Verizon to perform any physical installation, disconnection, or similar activities). Except as otherwise provided hereunder, Verizon shall not impose any untariffed termination charges, or any disconnect fees, re-connect fees or charges associated with establishing a service for the first time in connection with any conversion between a wholesale service or a group of wholesale services and a 251(c)(3) UNE or combination of 251(c)(3) UNEs.

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[220] Verizon Initial Brief at 97-98.

[221] Track 2 Award, UNE DPL at 48.

DPL ISSUE NO. 31

Should CLECs be required to comply with Verizon's conversion guidelines which are not set forth in the Amendment?

CLEC's Position

AT&T argued that Verizon's proposed language would: allow Verizon's internal technical guidelines to govern the way AT&T submits conversion requests, circumvent the ICA process, and not provide certainty. CCG contended that CLECs are under no obligation to comply with Verizon's conversion guidelines which are not specified in this Amendment.[222]

Cbeyond and Logix join in AT&T's language and position.

Verizon's Position

Verizon argued that its conversion guidelines ensure that Verizon and the CLECs have a common understanding of the conversion process and that the CLECs have the information they need to ensure a smooth conversion. Verizon contended that allowing CLECs to ignore these uniform guidelines and create their own individual processes would be unworkable and inefficient for both Verizon and the CLEC.[223]

Arbitrators' Decision

The Arbitrators agree with Verizon that its conversion guidelines would ensure that all parties have a common understanding of the conversion process. Moreover, the language proposed by Verizon is similar to the language adopted by the Commission in Docket No. 28821 for DPL Issue No. 17. In that docket, the Commission approved the following terms:

> 2.17.7 In requesting a conversion of an SBC TEXAS service, CLEC must submit its orders in accordance with the agreed guidelines and ordering requirements provided by SBC-TEXAS that are applicable to converting the particular SBC TEXAS service sought to be converted. SBC TEXAS shall begin billing CLEC at the pricing applicable to the converted service arrangement (e.g., UNE Section 251 pricing if applicable) as of the beginning of the next billing cycle following the completion of activities necessary for performing the conversion, including, but not limited to, CLEC's submission of a complete and accurate LSR/ASR requesting the conversion. CLEC is responsible for payment.

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[222] Joint DPL at 70.

[223] Verizon Initial at 99.

Therefore, the Arbitrators adopt Verizon's contract language.

> All requests for conversions will be handled in accordance with Verizon's conversion guidelines. Verizon shall begin billing ***CLEC Acronym TXT***, and ***CLEC Acronym TXT*** shall pay, at the pricing applicable to the equivalent UNE (if any) or Combination (if any) that Verizon is required to provide under the Federal Unbundling Rules and the Amended Agreement, as of the beginning of the next billing cycle following the completion of activities necessary for performing the conversion, including, but not limited to ***CLEC Acronym TXT***'s submission of a complete and accurate ASR (or LSR as appropriate) requesting the conversion.

DPL ISSUE NO. 32

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

CLEC's Position

AT&T argued that under Verizon's contract language, a CLEC would be required to pay the entire cost of Verizon's annual audits if the auditor found one non-compliant circuit. AT&T contended that the *TRO* required that the CLEC pay for the cost of the audit only when there is a finding that the CLEC has failed to comply with the service eligibility criteria "in all material respects." AT&T stated that the *TRO*'s audit reimbursement requirements hinge on a finding of a material failure to comply, whereas Verizon would make non-compliance for one circuit a material failure. AT&T claimed that its proposed language ties materiality to the total of the circuits audited, consistent with the FCC's intent in creating a materiality standard. AT&T also proposed edits to the contract language that would require Verizon to show cause that the audit is "reasonably necessary" to determine AT&T's compliance with the law. Additionally, AT&T's language would require Verizon to notify the FCC of an audit.[224]

Cbeyond, CCG and Logix join in and support AT&T's language and position.

Verizon's Position

Verizon argued that AT&T's requirement that it show cause that an audit is "reasonably necessary" to determine AT&T's compliance with the law is an unlawful requirement. Verizon contended that an ILEC has the right to an audit, and therefore showing cause is not necessary.

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[224] Joint DPL at 71-72.

Verizon also objected to AT&T's language requiring Verizon to notify the FCC of an audit, stating that there is no basis in law for such requirement. On the issue of audit remedies, Verizon disagreed with AT&T's language, arguing that AT&T's proposal would deny Verizon any remedy for a CLEC's noncompliant EEL circuits, unless the CLEC failed to comply with the service eligibility criteria "in all material respects" with respect to the totality of the circuits audited.[225]

Arbitrators' Decision

(a) Reasonably Necessary

The Arbitrators agree with Verizon that AT&T's language which would require Verizon to show cause that the audit is "reasonably necessary" to determine AT&T's compliance with the law would impose an unlawful requirement for Verizon. The Arbitrators also agree that the Amendment cannot restrict an ILEC's annual audit right as the CLECs suggest.[226] Thus the Arbitrators reject AT&T's language in 3.11.3.7.

> Contract Language
> 3.11.3.7 Once per calendar year, Verizon may, pursuant to the terms and conditions of this section, obtain and pay for an independent auditor to audit ***CLEC Acronym TXT***'s compliance in all material respects with the service eligibility criteria applicable to High Capacity EELs. Any such audit shall be ~~initiated only to the extent reasonably necessary to determine AT&T's compliance with Applicable Law, and 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.

(b) FCC Notification

AT&T's language would require Verizon to notify the FCC of an audit. The Arbitrators find no such requirement in the *TRO* or *TRRO*. Morevoer, AT&T has not cited any such requirement by the FCC. However, Verizon objects to giving the CLECs 30 days written notice of an audit. Verizon also objected to AT&T's proposed language requiring that a copy of the audit be provided to AT&T at the same time it is provided to Verizon. The Arbitrators agree that the *TRO* provides that Verizon must pay the auditor until such time the cost shifts to the CLEC.

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[225] Verizon Initial Brief at 102-103.

[226] Track 2 Award, UNE DPL at 124.

The Arbitrators adopt the following contract language consistent with the above discussion.

> AT&T ~~and the FCC~~ shall ~~each~~ be given by Verizon thirty (30) days' written notice of a scheduled audit. ~~Verizon shall direct its auditor to provide a copy of its report to AT&T at the same time it provides the report to Verizon.~~ ***~~CLEC Acronym TXT*** shall convert all noncompliant EELs to the appropriate service, true up any difference in payments, and make the correct payments on a going-forward basis.~~

(c) Audit Remedies

The Arbitrators find that the Commission has already addressed audit remedies in Docket No. 28821.[227] Therefore, the Arbitrators adopt the following contract language with modifications consistent with the Commission's prior determinations.

> To the extent the independent auditor's report concludes that ***CLEC Acronym TXT*** failed to comply with the service eligibility criteria in all material respects ~~with respect to the totality of the circuits audited~~ for any DS1 or DS1 equivalent circuit, then (without limiting Verizon's rights under Section 3.11.2.2 above) ***CLEC Acronym TXT*** must convert all noncompliant circuits to the appropriate service, true up any difference in payments, make the correct payments on a going-forward basis, and reimburse Verizon for the cost of the independent auditor 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 in all material respects ~~with respect to the totality of the circuits audited~~ 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 reasonable and verifiable costs of complying with any requests of the independent auditor, and Verizon shall, within ~~six~~ thirty (~~6~~30) days of the date on which ***CLEC Acronym TXT*** submits such costs to the auditor, reimburse ***CLEC Acronym TXT*** for its reasonable and verifiable costs verified by the auditor. ***CLEC Acronym TXT*** 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.

DPL ISSUE NO. 33

How should the Amendment address routine network modifications?

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[227] Track 2 Award, UNE DPL at 54-55.

CLEC's Position

AT&T argued that routine network modifications should be defined in the ICA the same as in the *TRO*, with the determination of whether a modification is "routine" hinging on whether Verizon routinely performs the tasks associated with the modification in serving its own customers.[228]

CCG urged that the Amendment should specify that Verizon must perform all loop modification activities it performs for its own customers, including "rearrangement or splicing of cable; adding a doubler or repeater; adding an equipment case; adding a smart jack; installing a repeater shelf; adding a line card; and deploying a new multiplexer or reconfiguring an existing multiplexer." CCG also contended that Verizon should be held to performance measurements, including the requirement that Verizon provide routine network modifications within the same timeframe applicable to similar network modifications made by Verizon for its own retail customers.[229]

Cbeyond joined in AT&T's language and position but noted that it does not agree that the *TRO* limits the ILECs' obligation to perform routine network modifications to the same conditions and same manner as what the ILEC does for its own retail customer.[230]

Sprint accepted Verizon's proposed modification.[231]

Logix joined in AT&T's language and position.

Verizon's Position

Verizon explained that its proposed language requires it to provide routine network modifications as necessary to permit access to loop, dedicated transport, or dark fiber facilities (where access is otherwise required under § 251(c)(3) and the FCC's rules). Where facilities are unavailable, Verizon stated that it will not: perform trenching, pull cable, construct new loops or transport or install new aerial, buried, or underground cable, because such activities do not qualify as routine network modifications under the FCC's rules. Verizon's also noted that its

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[228] Joint DPL at 74-76.

[229] CCG Initial Brief at 40; CCG Reply Brief at 48-49.

[230] Joint DPL at 75.

[231] Joint DPL at 77.

§ 3.5.3 clarifies that the routine network modification provision does not create any independent unbundling obligations. Verizon stated that AT&T's and Cbeyond's language regarding attachment of electronics to loops is unnecessary, given the other language to which the parties have agreed.[232]

Arbitrators' Decision

In the *TRO*, the FCC required ILECs, to "make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested transmission facility has already been constructed."[233] In this DPL issue, parties dispute whether the ICA should further define routine network modifications.

Routine Network Modifications

The Arbitrators find that it unnecessary to further clarify what constitutes a routine network modification. The *TRO* defines "Routine network modifications" as "those activities that incumbent LECs regularly undertake for their own customers."[234] Examples include "rearrangement or splicing of cable; adding a doubler or repeater; adding an equipment case; adding a smart jack; installing a repeater shelf; adding a line card; and deploying a new multiplexer or reconfiguring an existing multiplexer."[235] "Routine modifications, however, do not include the construction of new wires (i.e., installation of new aerial or buried cable) for a requesting carrier."[236]

The Arbitrators find that Verizon's proposed language most accurately describes its obligations as specified in the *TRO* and *TRRO* (i.e., modifications Verizon would regularly undertake for its own customers).[237] Consistent with these considerations, the Arbitrators adopt the following contract language:

> 3.12.1 General Conditions. In accordance with, but only to the extent required by, 47 C.F.R. §§ 51.319(a)(7) and (e)(4), and subject to the conditions set forth in Section 2 above:

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[232] Verizon Initial Brief at 105-106.

[233] *TRO* at para. 632.

[234] *TRO* at para. 632.

[235] *TRO* at paras. 632- 634.

[236] *TRO* at para. 632.

[237] *See* C.F.R. § 51.319(a)(7) and (e)(4).

3.12.2 Verizon shall make such routine network modifications as are necessary to permit unbundled access by ***CLEC Acronym TXT*** to the Loop, Dedicated Transport **facilities,** or Dark Fiber Transport facilities available under the Amended Agreement (including DS1 Loops and DS1 Dedicated Transport, and DS3 Loops and DS3 Dedicated Transport), where the facility has already been constructed (but without regard to whether the facility being accessed was constructed on behalf, or in accordance with the specifications of, any carrier). Routine network modifications applicable to Loops or Transport are those modifications that Verizon regularly undertakes for its own customers and 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; adding a smart jack**;** installing a repeater shelf; adding a line card; 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 are those modifications that Verizon regularly undertakes for its own customers and 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 ***CLEC Acronym TXT*** to light a Dark Fiber Transport facility that it has obtained from Verizon under the Amended Agreement.. Verizon will place drops in the same manner as it does for its own customers. 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; securing permits or rights-of-way; constructing and/or placing new manholes, or conduits; or installing new terminals. Verizon is not obligated to perform those activities for a requesting telecommunications carrier. Verizon shall not be required to build any time division multiplexing (TDM) capability into new packet-based networks or into existing packet-based networks that do not already have TDM capability. Verizon shall not be required to perform any routine network modifications to any facility that is or becomes a Discontinued Facility.

DPL ISSUE NO. 34

How should the Amendment address performance plans and standard provisioning intervals for TRO-related and TRRO-related items?

CLEC's Position

AT&T and CCG contended that the amended ICA should appropriately reflect Verizon's obligation to comply with any applicable performance assurance plan, including metrics and

penalties, for wholesale services and unbundled network elements.[238] Cbeyond joined in AT&T's position in opposing Verizon's proposed language. Logix joined in AT&T's language and position.

Verizon's Position

Verizon asserted that its language regarding performance plans is fair and reasonable. Verizon explained that existing intervals could not have taken account of new *TRO*-related activities, including providing UNE access through routine network modifications, commingling, and new requirements relating to access to IDLC hybrid loops. Verizon stated that its language acknowledges that standard measures should not apply until the Commission or the FCC sets intervals and measures for these new activities. Verizon also proposed a compromised solution for § 3.11.1.3 that more closely tracks the language approved in Docket No. 28821.[239]

Arbitrators' Decision

The Arbitrators agree with Verizon and decline to include CCG's proposed language. The Arbitrators find that existing intervals do not address the new activities contemplated in the *TRO*. Therefore the Arbitrators adopt Verizon's proposed sections 3.2.4.3 and 3.12.1.2. The Arbitrators also adopt Verizon's alternative section 3.11.1.3 shown below:

> "Unless an effective order of the Commission or the FCC expressly requires standard provisioning intervals and performance measures and remedies for Verizon's provisioning of commingled facilities and services, Verizon may exclude its performance in connection with the provisioning of commingled facilities and services from standard provisioning intervals and from performance measures and remedies, if any, contained in the Amended Agreement or elsewhere."

DPL ISSUE NO. 35

How should the Amendment state its scope?

CLEC's Position

CCG stated that the scope of the Amendment and its applicability to the parties' rights and obligations must be clear. Specifically, CCG stated that the Amendment must be clear that the terms and conditions do not alter, modify or revise any rights and obligations under

[238] Joint DPL at 77; CCG Initial at 41-42.

applicable law contained in the Agreement, other than those Section 251 rights and obligations specifically addressed in this Amendment.[240]

Verizon's Position

Verizon argued that CCG's proposal is an attempt to preserve unbundling rights to UNEs the FCC has eliminated, by referring to "applicable law" in the underlying agreement. Verizon noted that the only law governing the *TRO/TRRO* Amendment is § 251(c)(3) and the associated FCC rules. Verizon urged the Arbitrators to reject CCG's language for the following reasons: (1) it suggests the existence of other unbundling authority; (2) is at odds with the parties' stipulation not to litigate sources of asserted unbundling authority other than § 251(c)(3) and the FCC's implementing rules; and (3) CLECs might argue that *TRO*-related obligations, such as routine network obligations and commingling, were not new obligations, and so do not require an amendment. Verizon explained that the FCC made clear that its commingling rules removed a pre-existing restriction, and that its routine network modifications rules were newly adopted in the *TRO*.[241]

Arbitrators' Decision

The Arbitrators decline to include CCG's language since it would not add anything of substance. First, the language of the Amendment itself already addresses its applicability. Second, since waiver is a voluntary relinquishment of a known right, the present compulsory arbitration of the present Amendment does not constitute a waiver. Furthermore, the fact that CCG has included a DPL issue regarding non-waiver shows that CCG does not intend for this Amendment to act as a waiver. Accordingly, the Arbitrators adopt Verizon's contract language and reject the CLEC's modification of Section 4.4 Scope of Amendment.

DPL ISSUE NO. 36

What definitions should be included in the amendment?

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[239] Verizon Initial Brief at 108-110.

[240] CCG Initial Brief at 43.

[241] Verizon Initial Brief at 109-110.

CLEC's Position

In this DPL issue, the parties dispute the following definitions: 4.7.3 Combination, 4.7.6 Dark Fiber Transport, 4.7.7 Dedicated Transport, 4.7.7 Dedicated Transport, 4.7.8 Discontinued Facility, 4.7.9 Distribution Sub-loop Facility, 4.7.14 Enhanced Extended Link, 4.7.15 Entrance Facility, 4.7.16 Feeder, 4.7.17, Federal Unbundling Rules, 4.7.20 FTTH Loop, 4.7.21 FTTC Loop, 4.7.22 Hybrid Loop, 4.7.27 Routine Network Modifications, 4.7.29, Single Point of Interconnection, 4.7.30 Sub-Loop for Multiunit Premises Access, 4.7.12 DS1 Loop, Business Line, and Fiber-Based Collocator.[242]

AT&T urged the Arbitrators to adopt its proposed definitions arguing that they comply with the *TRO*, *TRRO,* and Docket No. 28821. AT&T stated that its definitions are more complete than those proposed by Verizon. AT&T stated that Verizon's criticisms of AT&T's definitions are misplaced and fail recognize their support in the *TRO/TRRO* and Docket No. 28821.[243]

CCG, Cbeyond and Logix support AT&T's position. Logix also proposed its own definition for Fiber-Based Collocator. Additionally, Logix offered a definition for DS1 loop.[244]

Verizon's Position

Verizon raised several objections to the modifications proposed by AT&T to its contract.[245] These include:

4.7.3 Combination. AT&T's combination definition is inappropriate because the FCC did not change the definition of combination in the *TRO*.

4.7.6 Dark Fiber Transport. AT&T's definition incorrectly suggests an unlawfully broad dark fiber unbundling obligation.

4.7.7 Dedicated Transport. AT&T's definition is unacceptable because it does not clearly exclude entrance facilities, which the FCC has eliminated as UNEs.

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[242] Joint DPL at 79-86.

[243] Joint DPL at 79-80.

[244] Joint DPL at 81-82.

[245] Verizon Initial Brief at 110-121.

4.7.8 Discontinued Facility. AT&T's proposed definition would freeze the list of delisted UNEs, without allowing room for additional delisted UNEs in the future.

4.7.9 Distribution Sub-loop Facility. AT&T language incorrectly suggests that, in some cases, the NID, rather than an MPOE, defines the end point of a distribution sub-loop.

4.7.14 Enhanced Extended Link. AT&T's definition is unnecessary and conflicts with the defined term "High Capacity EEL" to which AT&T has already agreed in Section 3.11.3.1 of the amendment.

4.7.15 Entrance Facility. AT&T's definition excludes "any facilities used for interconnection or reciprocal compensation purposes provided pursuant to 47 U.S.C. § 251(c)(2);" a position the Commission rejected in Docket No. 28821.

4.7.16 Feeder. AT&T's definition is not technically accurate as it could have the effect of reinstating an unbundling obligation for a portion of the loop that the FCC has ruled is not subject to unbundling.

4.7.17 Federal Unbundling Rules. Verizon's use of "Federal Unbundling Rules" throughout the Amendment is accurate and simpler than AT&T's suggested language.

4.7.20 FTTH Loop and 4.7.21 FTTC Loop. AT&T's definitions of FTTH and FTTC Loops are unacceptable because they would allow CLECs to claim that the FCC limited fiber unbundling relief to residential premises only.

4.7.22 Hybrid Loop. AT&T deletes Verizon's sentence stating that FTTH and FTTC loops are not hybrid loops. As a result, CLECs might claim that the FCC's unbundling obligations for hybrid loops apply to fiber loops.

4.7.27 Routine Network Modifications. AT&T's definition is unnecessary, because the substantive provisions of the amendment already define the scope of routine network modifications.

4.7.29 Single Point of Interconnection and 4.7.30 Sub-Loop for Multiunit Premises Access. These definitions are not necessary as Verizon does not own inside wire subloop because of the treatment of MPOE in Texas.

Fiber-Based Collocator. This definition is unnecessary, as § 4.7.18 already provides that only carriers "unaffiliated with Verizon" may be included in the count of fiber-based collocators.

4.7.1. Business Line. Logix's language is confusing, unnecessary, and appears intended to change the meaning of the FCC's rules, so as to require Verizon to go behind the ARMIS and UNE loop figures to try to verify "business lines."

4.7.18, "Fiber-Based Collocator. Logix proposes to replace "a" collocation arrangement with "the" collocation arrangement. Verizon noted that the FCC's Rule uses "a," as Verizon's proposal does, and there is no reason to depart from the wording of the FCC rule.

4.7.12 DS1 Loop definition. Logix' definition is confusing and, at best, unnecessary, or, at worst, contrary to the FCC's intended meaning.

Arbitrators' Decision

The Arbitrators decline to include the proposed definitions for Combination, Routine Network Modification, and Single Point of Interconnection. These terms and services have already been addressed. For instance, the issue of Combination is already dealt with in the following DPLs. No. 24, 26 and 30. For Routine Network Modification, DPL Issue No. 33 resolved Verizon's obligations. Likewise, the Arbitrators resolved issues related to Single Point of Interconnection in DPL Issue No. 7. Notwithstanding, the Arbitrators agree with Verizon that the definition proposed by AT&T for Single Point of Interconnection exceeds the obligations prescribed in 47 C.F.R. 51.319(b)(2)(ii).

The Arbitrators conclude that including additional definitions for these terms could cause confusion, increase the potential for dispute, and possibly limit the scope of the decisions in this Award.

However, the Arbitrators find the following definitions to be necessary since they clarify the contract.

1. The Arbitrators adopt a definition of "Affiliate" consistent with Docket No. 31303.[246]

Affiliate. A person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.

[246] Docket No. 31303, Staff Recommendation Matrix at 3.

2. The Arbitrators adopt a definition of "Business Line" consistent with 47 C.F.R. § 51.5

Business Line. A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business liens in a wire center shall equal the sum of all incumbent LEC UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access liens, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

3. The Arbitrators adopt a definition of "Dark Fiber Transport" consistent with Docket No. 28821.

Dark Fiber Transport. An optical transmission facility within a LATA, that otherwise meets the definition of Dedicated Transport but which Verizon has not activated by attaching multiplexing, aggregation or other electronics.

4. The Arbitrators adopt a definition of "Dedicated Transport" consistent with Docket No. 28821.

Dedicated Transport. Dedicated Transport is defined as Verizon interoffice transmission facilities, within a LATA, between Verizon Wire Centers or switches, or between Verizon Wire Centers or switches and switches owned by requesting telecommunications carriers, dedicated to a particular customer or carrier. For the avoidance of any doubt, this Section 4.7.7 is subject to Section 3.5.4 above, and shall not be construed to require Verizon to provide unbundled access to Dedicated Transport that Verizon is not required to provide under Section 3.5.4.

5. The Arbitrators adopt a definition of "Discontinued Facility" consistent with *TRO*, and modify it to provide consistency with Dpl. No. 1.

Discontinued Facility. Any **251(c)(3)** facility that Verizon, at any time, has provided or offered to provide to ***CLEC Acronym TXT*** on an unbundled basis pursuant to the Agreement or a Verizon tariff, but which by operation of law has ceased or ceases to be subject to an unbundling requirement under 47 U.S.C. § 251(c)(3) or 47 C.F.R. Part 51. By way of example and not by way of limitation, Discontinued Facilities as of the Amendment Effective Date include the following, whether as stand-alone facilities or combined or commingled with other facilities: (a) any Entrance Facility, subject to Section 3.5.4 above; (b) local circuit switching that, if provided to ***CLEC Acronym TXT*** would be used for the purpose of serving ***CLEC Acronym TXT***'s customers using DS1 or above capacity Loops; (c) Mass Market Switching (subject to the transition provisions set forth herein for ***CLEC Acronym TXT***'s embedded end user customer base, if any, as of March 11, 2005); (d) Four-Line Carve Out Switching; (e) OCn Loops and, OCn Dedicated Transport; (f) subject to Sections 3.4.1, 3.4.2, and 3.6.2 above, DS1 Loops or DS3 Loops out of any Wire Center that meets the FCC's non-impairment criteria addressed in section 3.4 of this Amendment; (g) Dark Fiber Loops (subject to the transition provisions set forth herein for ***CLEC Acronym TXT*** 's embedded base of Dark Fiber Loops, if any, as of March 11, 2005); (h) subject to Sections 3.4.1 and 3.4.2 above, any DS1 Loop or DS3 Loop that exceeds the maximum number of such Loops that Verizon is required to provide to ***CLEC Acronym TXT*** on an unbundled basis under section 3 of this

Amendment; (j) subject to Sections 3.5.1 and 3.5.2 above, DS1 Dedicated Transport, DS3 Dedicated Transport, or Dark Fiber Transport on any Route that meets the FCC's non-impairment criteria addressed in section 3.5 of this Amendment; (k) subject to Sections 3.5.1, and 3.5.2 and 3.5.4 above, any DS1 Dedicated Transport circuit or DS3 Dedicated Transport circuit that exceeds the number of such circuits that Verizon is required to provide to ***CLEC Acronym TXT*** on an unbundled basis under section 3 of this Amendment; (l) the Feeder portion of a Loop (as a sub-loop element);

6. The Arbitrators adopt a definition of "Distribution Sub-loop Facility" consistent with Docket No. 28821.

Distribution Sub-Loop Facility. 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 (or NID if there is no MPOE) and Verizon's feeder/distribution interface.

7. The Arbitrators adopt a definition of "Distribution Sub-loop Facility" consistent with Docket No. 28821.

Enhanced Extended Link (EEL). A UNE combination consisting of an Unbundled Loop(s) and Unbundled Dedicated Transport, together with any facilities, equipment, or functions necessary to combine those UNEs (including, for example, multiplexing capabilities).

8. The Arbitrators adopt a definition of "Distribution Sub-loop Facility" consistent with Docket No. 28821.

Commingled EEL. An EEL made up of one or more 251(c)(3) UNEs connected to one or more (non-UNE) services or facilities obtained at wholesale (e.g., switched and special access services offered pursuant to interstate tariff).

9. The Arbitrators adopt a definition of "Fiber-based collocator" consistent with Docket No. 31303 and the *TRRO*.

Fiber-based collocator. A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that (1) terminates at a collocation arrangement within the wire center; (2) leaves the incumbent LEC wire center premises; and (3) is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C §153(1) and any relevant interpretation in this Title.

10. High-Capacity EEL. An EEL that is made up of a combination of one the following described combinations (the High-Capacity Included Arrangements"), each circuit to be provided to each customer is required to terminate in a collocation arrangement that meets the requirements below (e.g. the end of the UNE dedicated transport that is opposite the end connected to the UNE loop must be accessed by CLEC at such a CLEC collocation arrangement via a cross connect).

11. The Arbitrators adopt a definition of "High-Capacity Included agreement" consistent with Docket No. 28821.

High-Capacity Included Arrangement. This is either 1) an unbundled DS1 loop in combination , or commingled with a dedicated DS1 transport (DS1 EEL) or dedicated DS3 or higher transport facility or service (DS1 EEL multiplexed onto DS3 transport), or an unbundled DS3 loop in combination, or commingled, with a dedicated DS3 or higher transport facility or service (DS3 EEL); or 2) an unbundled dedicated DS1 transport facility in combination, or commingled, with an unbundled DS1 loop or a DS1 channel termination service (DS1 EEL multiplexed onto DS3 transport), or an unbundled DS3 or loop or a DS3 or higher channel termination service (DS3 EEL).

12. The Arbitrators adopt a definition of "Entrance Facility" consistent with Docket No. 28821.

Entrance Facility. Dedicated Transport (lit or unlit) that does not connect a pair of Verizon Wire Centers.

13. The Arbitrators adopt a definition of "Feeder" consistent with the *TRO*.

Feeder. The fiber optic cable (lit or unlit) or metallic portion of a Loop between a serving wire center and a remote terminal or feeder/distribution interface.

14. The Arbitrators adopt Verizon's proposed contract language for "Federal Unbundling Rules" since it is consistent with our decision on DPL Issue No. 1.

Federal Unbundling Rules. Any lawful requirement to provide access to unbundled network elements that is imposed upon Verizon by the FCC pursuant to both 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51. Any reference in this Amendment to "Federal Unbundling Rules" shall not include an unbundling requirement if the unbundling requirement does not exist under both 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51.

15. The Arbitrators adopt a definition of "FTTH Loop" consistent with Docket No. 28821.

FTTH Loop. A fiber-to-the-home loop (or "FTTH 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). FTTH Loops are not limited to those loops being used to provide service to residential customers.

16. The Arbitrators adopt a definition of "FTTC Loop" consistent with Docket No. 28821.

FTTC Loop. A fiber-to-the-curb loop (or "FTTC Loop") is a local loop consisting of fiber optic cable connecting to copper distribution plant that is not more than 500 feet from the customer's premises or, in the case of predominantly residential MDUs, not more than 500 feet from the MDU's MPOE. The fiber optic cable in a fiber-to-the-curb loop must connect to 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. FTTC Loops are not limited to those loops being used to provide service to residential customers.

17. The Arbitrators adopt a definition of "Hybrid Loop" consistent with Docket No. 28821 and *TRO*.

Hybrid Loop. A local Loop composed of both fiber optic cable, usually in feeder plant, and copper wire or cable, usually in the distribution plant. FTTH Loops and FTTC Loops are not Hybrid Loops.

18. The Arbitrators adopt a definition of "Sub-Loop for Multiunit Premises Access" consistent with Docket No. 28821.

Sub-Loop for Multiunit Premises Access. Any portion of a Loop that is technically feasible to access at a terminal in Verizon's outside plant at or near a multiunit premises, including inside wire owned, controlled or leased by Verizon at a multiunit customer premises between the minimum point of entry as defined in 47 C.F.R 68.105 and the point of demarcation of Verizon as defined in 47 C.F.R. 68.3. A point of technically feasible access is any point in Verizon's outside plant at or near a multiunit premise where a technician can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within to access the wiring in the multiunit premises. Such points include, but are not limited to, a pole or pedestal, the network interface device, the minimum point of entry, the single point of interconnection, and the feeder/distribution interface.

19. The Arbitrators' definition of DS1 loops is consistent with Commission determination in Docket No. 28821, Track 2.

DS1 Loop. A DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services.

V. CONCLUSION

The Arbitrators conclude that the decisions outlined in this Proposal for Award and attached matrix, as well as the conditions imposed on the parties by these decisions, meet the requirements of FTA § 251 and any applicable regulations prescribed by the FCC pursuant to FTA § 251. The Parties shall file any exceptions to this Proposal for Award by March 20, 2006.

SIGNED AT AUSTIN, TEXAS on the 6th day of March, 2006.

FTA § 252 PANEL

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