

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6932

Petition of Verizon New England, Inc., d/b/a/ Verizon)
Vermont, for Arbitration of an Amendment to)
Interconnection Agreements with Competitive Local)
Exchange Carriers and Commercial Mobile Radio)
Service Providers in Vermont, Pursuant to Section 252)
of the Communications Act, as amended, and the)
Triennial Review Order)

Order entered: 2/27/2006

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I. INTRODUCTION

The Vermont Public Service Board ("Board") opened this investigation in response to a petition filed on February 20, 2004, by Verizon New England Inc., d/b/a Verizon Vermont ("Verizon"), in which Verizon sought arbitration to amend interconnection agreements with competitive local exchange carriers ("CLECs") and commercial mobile radio service providers in Vermont.

This case was brought before the Board to decide whether and how Verizon's obligations to provide interconnection to CLECs in Vermont will change as a result of recent changes in federal rules. Several of the disputes involve the Board's continued authority to enforce Verizon's obligations, which I discuss in Section III (Discussion of Generic Issues). Following that discussion, in Section IV, I address each of the specific issues that the parties presented, and recommend how the interconnection agreements should be modified to implement the parties' ongoing obligations under those agreements.

I conclude, generally, that because Verizon entered into contracts with CLECs in Vermont, and made commitments in other proceedings under Vermont Law and with Board approval, those commitments should be honored, until those obligations are modified in accordance with the procedures set out in existing contracts, as well as Vermont and federal law.

II. BACKGROUND

The Federal Telecommunications Act

One of the primary goals of Congress in enacting the Telecommunications Act of 1996 (the "1996 Act")¹ was to open local telecommunications service markets to competition. To that end, Congress imposed certain interconnection, resale, and network access requirements on incumbent local exchange carriers ("ILECs") through Section 251 of the 1996 Act. The instant proceeding grows out of Federal Communications Commission ("FCC") decisions that implement the market-opening provisions of Section 251(c)(3), which require that ILECs make elements of their networks available on an unbundled basis to new entrants at cost-based rates, pursuant to standards set out in Section 251(d)(2).

1. The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

The 1996 Act requires that ILECs provide unbundled network elements ("UNEs") to other telecommunications carriers. In particular, Section 251(c)(3) requires ILECs to:

provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and Section 252.²

Section 251(d)(2) authorizes the FCC to determine which elements are subject to unbundling, and directs the FCC to consider, at a minimum, whether access to proprietary network elements is necessary, and whether failure to provide a non-proprietary element on an unbundled basis would impair a requesting carrier's ability to provide service. Section 252, in turn, requires that those network elements that must be offered pursuant to Section 251(c)(3) be made available at cost-based rates.

The 1996 Act also preserves a state role in addressing unbundling issues. First, Section 252 authorizes states to review and to arbitrate interconnection agreements for compliance with the requirements of Sections 251 and 252 and the FCC's implementing rules. Second, Section 251(d)(3) also preserves states' independent state law authority to address unbundling issues to the extent that the exercise of that authority poses no conflict with federal law. That section provides that:

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

In addition, the statute establishes standards to govern the pricing of UNEs in Sections 251 and 252. For UNEs, Section 251(c)(3) provides that elements shall be made available "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." Section 252 provides that:

[d]eterminations by a State Commission of the . . . just and reasonable rate for network elements for purposes of subsection [251](c)(3) . . . – (A) shall be – (i)

2. 47 U.S.C. § 251(c)(3).

based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the . . . network element . . . , and (ii) nondiscriminatory, and (B) may include a reasonable profit.

The FCC first addressed the unbundling obligations of incumbent LECs in the *Local Competition Order*, which, among other things, adopted rules designed to implement the requirements of Section 251.³ The FCC also adopted a minimum set of UNEs, requiring that ILECs provide unbundled access to local loops, network interface devices, local and tandem switching capability, interoffice transmission facilities, signaling and call-related databases, operations support systems functions, and operator services and directory assistance facilities. The FCC noted at the time that the state commissions were free to prescribe additional elements. In addition, the FCC established the Total Element Long Run Incremental Cost ("TELRIC") methodology, a forward-looking, long-run, incremental cost methodology, for the states to use in setting actual rates for UNEs.

Relevant Court Cases

In 1997, the U.S. Court of Appeals for the Eighth Circuit affirmed some parts of the *Local Competition Order* and reversed others. The FCC, MCI, AT&T, and various ILECs appealed different portions of the Eighth Circuit decision. In January 1999, the Supreme Court (1) affirmed the FCC's general authority to adopt unbundling rules to implement the 1996 Act; (2) vacated the specific unbundling rules at issue; (3) instructed the FCC to revise the standards under which the unbundling obligation is determined; and (4) required the FCC to reevaluate which network elements should be subject to unbundling under the revised standard.

In November 1999, the FCC responded to the Supreme Court's remand by issuing the UNE Remand Order, in which it reevaluated the unbundling obligations of incumbent LECs and promulgated new unbundling rules, pursuant to the Court's direction. The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") granted petitions for review, and, in

3. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996).

USTA I,⁴ it vacated and remanded those portions of the UNE Remand Order interpreting the statute's "impair" standard and establishing a nationwide list of mandatory UNEs. In support of its decision, the D.C. Circuit held that the FCC's impairment analysis was insufficiently "granular" because its analysis did not account for differences in particular markets and particular customer classes. The court also ruled that the FCC, when analyzing impairment, had failed adequately to weigh the costs of unbundling and to examine whether the costs faced by competitive providers were due to natural monopoly characteristics or to the difficulties facing new entrants in all industries. The court also vacated and remanded the FCC's line sharing requirements because the FCC had not considered the impact of intermodal competition before requiring unbundling.

In December 2001, prior to the D.C. Circuit's issuance of *USTA I*, the FCC released the Triennial Review Notice of Proposed Rule Making ("NPRM"), seeking comment on how, if at all, the unbundling regime should be modified to reflect market developments since the issuance of the UNE Remand Order. The Triennial Review NPRM sought comment on almost all aspects of the unbundling regime, including the "necessary" and "impair" standards, the "at a minimum" language of Section 251(d)(2), whether and how the FCC's previously identified UNEs should be unbundled, and whether the FCC should conduct a more granular impairment analysis. The FCC asked particular questions about crafting unbundling rules that would foster facilities investment by both ILECs and new entrants, in particular investment in facilities needed to provide broadband services. Following *USTA I*, the FCC issued a Public Notice asking commenters responding to the Triennial Review NPRM to address the issues raised in the *USTA I* decision.

The FCC's Triennial Review Order

In August 2003, the FCC released the Triennial Review Order ("*TRO*"),⁵ in which it reinterpreted the "impair" standard of Section 251(d)(2) and revised the list of UNEs that

4. *United States Telecom Association v. FCC*, 359 F.3d 544 (D.C. Cir. 2002).

5. Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*") (subsequent history omitted).

incumbent LECs must provide to requesting carriers. In the *TRO*, the FCC eliminated most unbundling requirements for broadband architectures serving the mass market. The *TRO* had the effect of limiting unbundled access to next-generation loops serving the mass market. The FCC adopted a set of tests and triggers designed to implement and enforce the 1996 Act's market opening requirements. For switching, high-capacity loops, and dedicated transport, the FCC asked the states to apply the FCC's triggers as a way of determining actual deployment and to conduct a potential deployment analysis under the FCC's new network unbundling rules.

The FCC's Triennial Review Remand Order

Various parties appealed the *TRO*, and, on March 2, 2004, the D.C. Circuit decided *USTA II*.⁶ *USTA II* upheld the *TRO* in part, but remanded and vacated several components of it. The D.C. Circuit expressly upheld the FCC's network modification requirements; its determinations regarding Section 271 access, pricing, and combination obligations; its Enhanced Extended Link ("EEL") eligibility criteria; its determination, with certain exceptions, not to require unbundling of fiber to the home ("FTTH") loops, broadband hybrid loops, enterprise switching, and most ILEC databases; and its decision not to unbundle the high frequency portion of the loop ("HFPL"). The Court also took a favorable view of certain aspects of the FCC's impairment standard.

The *USTA II* court vacated the FCC's "subdelegation" of authority to state commissions to engage in further granular impairment analyses and vacated and remanded the nationwide impairment findings for mass market switching and dedicated transport. The D.C. Circuit also remanded, but did not vacate, the FCC's distinction between "qualifying" and "non-qualifying" services, and the exclusion of entrance facilities from an impairment analysis. The Court's discussion also called into question other aspects of the Commission's unbundling framework.

To avoid excessive disruption of the local telecommunications market while it wrote new rules, the FCC released, on August 20, 2004, the Interim Order and NPRM. In the Interim Order and NPRM, the FCC required carriers, for a limited period of time, to adhere to the commitments

6. *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*) cert. denied, 125 S.Ct. 313, 316, 345 (2004).

they made in their interconnection agreements, applicable statements of generally available terms ("SGATs") and relevant state tariffs that were in effect on June 15, 2004. The FCC also set forth and sought comment on a transition plan under which, for the subsequent six months, if no final unbundling rules had been issued, the same commitments to provide network elements would apply to existing customers, but not new customers, at modestly higher rates than those available on June 15, 2004. Several parties challenged the FCC's interim requirements before the D.C. Circuit. In the Interim Order and NPRM, the FCC also sought comment on how to respond to the D.C. Circuit's *USTA II* decision.

Based on comments filed in response to that NPRM, the FCC adopted the Triennial Review Remand Order ("*TRRO*") on December 15, 2004, focusing on those issues that were remanded by the Court. The text of the *TRRO* decision was released on February 4, 2005.⁷ In the *TRRO*, the FCC retained the unbundling framework adopted in the *TRO*, but sought to clarify the impairment standard in one respect and to modify the unbundling framework in three respects. First, the FCC clarified that when evaluating whether lack of access to an ILEC network element "poses a barrier or barriers to entry . . . that are likely to make entry into a market uneconomic," the determination must be made with regard to a reasonably efficient competitor.⁸ Second, in response to the *USTA II* court's directive, the FCC modified its approach regarding carriers' unbundled access to ILECs' network elements for provision of certain services, setting aside the *TRO*'s "qualifying service" interpretation of Section 251(d)(2), but nevertheless prohibiting the use of unbundled elements exclusively for the provision of telecommunications services in sufficiently competitive markets.⁹ Third, to the extent that one may evaluate whether requesting carriers can compete without unbundled access to particular network elements, the FCC endeavored, as instructed by the D.C. Circuit, to draw reasonable inferences regarding the prospects for competition in one geographic market from the state of

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

8. *TRO* at ¶ 84.

9. *TRRO* at ¶ 22.

competition in other, similar markets. Fourth, as directed by *USTA II*, the FCC considered the appropriate role of tariffed ILEC services in the unbundling framework. The FCC determined that in the context of the local exchange markets, a rule prohibiting access to UNEs when a requesting carrier is able to compete using an incumbent's tariffed offering would be inappropriate.

Interconnection Agreements

The Board's review and approval of the Interconnection Agreements ("ICA"s) is governed by Subsection 252(a) of the 1996 Act. Any interconnection agreement negotiated under Section 252(a) must be submitted to the State commission for review under Section 252(e).¹⁰ The Board has the authority to "approve or reject the agreement, with written findings as to any deficiencies." The Board may not reject a proposed ICA in whole or in part unless it finds that the ICA or any material portion thereof discriminates against a non-party carrier or is inconsistent with the public interest. The Board may also establish and enforce other requirements of State law in its review of an ICA under Section 252(e)(3). The Board must act to approve or reject the agreement within 90 days of its submission, or the agreement is deemed approved.¹¹

An ICA is the result of arms-length negotiations between two telecommunications carriers. The Board's focus, as the 1996 Act provides, is therefore limited to the issues set forth in Section 252(e)(2)(A): whether the Agreement (or portions thereof) discriminates against a telecommunications carrier not a party to the Agreement, and whether the ICA is consistent with the public interest, convenience, and necessity. As the Board concluded previously, in making its determination, it must focus upon the potential effect of the ICA on the evolution of competition in this state, and whether the ICA raises the risk of harm to consumers (and thus is not consistent with the public interest).¹²

10. Under the 1996 Act, the Board is the "State Commission" in Vermont. 47 U.S.C.A. § 3(41).

11. 47 U.S.C. § 252(e)(4).

12. Docket 5905, Order of 11/4/96 at 12.

The Board determines whether the competition enabled by ICAs will likely benefit Vermont consumers and also, whether it will be consistent with the State's telecommunications goals as set out in 30 V.S.A. § 202c and the Telecommunications Plan adopted under Section 202d. At the same time, the ICA must not contain terms that will harm consumers or competitors, and thus promote the public interest.

Pursuant to 47 U.S.C. § 252(i), other companies seeking to interconnect may adopt the same terms and conditions as offered in an approved ICA.

The Board's approval of an ICA applies only to the terms and conditions set out therein. To the extent parties negotiate modifications or clarifications to an ICA, they are not subsumed in the Board's approval of the current ICA. The Board's Orders approving ICAs state that to the extent any proposed modifications are material, the parties will need to seek additional approvals from the Board.

I note that the ICAs in question in this arbitration, whether negotiated under Section 251, adopted pursuant to Section 252(i), the result of a previous Section 252 arbitration, and/or subsequently amended, have not been entered into evidence in this proceeding. Instead, I rely on my knowledge of the ICA approval process in Vermont, generally. Accordingly, should any party dispute any of the general ICA approval conditions referred to in this Proposal for Decision, they may assert their due-process right to present further evidence on the matter.

Summary Procedural History of Vermont Arbitration

The Board opened this investigation in response to a petition filed on February 20, 2004, by Verizon, in which Verizon sought arbitration to amend interconnection agreements with CLECs and commercial mobile radio service providers in Vermont. Verizon initially sought to amend the agreements in response to the *TRO*. As a result of the FCC's release of the *TRRO* on February 4, 2005, the issues involved in the amendment of the interconnection agreements are being reviewed in context of the *TRRO*.

Numerous CLECs appeared and/or filed responses to Verizon's February 20, 2004, petition.¹³

Various preliminary motions were filed, which the Hearing Officer deferred ruling on, as the issues in those motions are considered here, in this Proposal for Decision.

On July 22, 2004, Verizon filed a Notice of Withdrawal of Petition for Arbitration as to Certain Parties. In its Notice, Verizon stated that it was withdrawing its petition as to all but eleven carriers that were identified in the Notice.¹⁴ By Order of August 25, 2004, the Hearing Officer granted Verizon's withdrawal, subject to certain conditions. To the extent that Verizon originally sought to modify the interconnection agreements of the unlisted carriers, Verizon was allowed to withdraw its request to modify those agreements. However, any of the unlisted carriers that had requested amendments to their interconnection agreements with Verizon could continue to pursue those claims. In addition, the Hearing Officer permitted the unlisted carriers to continue to participate in this Docket, because Board rulings on policy issues in this proceeding may affect the interpretation of Verizon's obligations under the interconnection agreements that Verizon no longer seeks to modify.

On March 15, 2005, A.R.C. Networks Inc., d/b/a InfoHighway Communications Corporation ("InfoHighway"), filed a Petition and Motion for Injunctive Relief. However, InfoHighway withdrew its petition on April 7, 2005, citing its business determination that it could not devote the resources necessary to fully litigate its petition before the Board. InfoHighway stated its intent to continue to participate in this arbitration.

13. On March 29, 2004, Benjamin Marks, Esq., Sheehy Furlong & Behm, P.C., filed a MOTION FOR LEAVE TO APPEAR *PRO HAC VICE*, on behalf of Verizon. On April 13, 2005, a MOTION FOR LEAVE TO APPEAR *PRO HAC VICE* on behalf of A.R.C. Networks Inc., d/b/a Infohighway Communications Corp., IDT America Corp., KMC Telecom V, Inc., and XO Long Distance Services, Inc., was filed by Genevieve Morelli, Esq., and Heather T. Hendrickson, Esq., Kelley Drye & Warren, LLP. I grant both of these motions.

14. The interconnections that Verizon still sought to amend were for the following carriers: ACC National Telecom Corp.; AT&T Communications of New England, Inc.; AT&T Wireless Services, Inc.; CTC Communications Corp.; Devon Mobile Communications L.P.; International Telecom Ltd.; MCImetro Access Transmission Services LLC; Paetec Communications Inc.; RCN Operating Services, Inc.; Sprint Communications Company L.P.; and US WEST Interprise America Inc., d/b/a !NTERPRISE America. The remaining carriers were those for whom Verizon wishes to withdraw its arbitration request, were referred to in that Order as the "unlisted" carriers.

In an Order dated December 20, 2004, the Hearing Officer directed the parties in this proceeding to submit a list of issues that are appropriate for resolution in this proceeding. The list of disputed issues for arbitration was submitted on January 7, 2005. Parties were then instructed to file Initial Briefs and Reply Briefs addressing the disputed non-rate issues. Initial Briefs were filed on April 8, 2005, by Verizon, AT&T, CCC, and CCG. A status conference was held in this docket on April 11, 2005, at which time the parties agreed that the status of the filings would make it unnecessary to conduct technical hearings. Reply Briefs were filed on May 6, 2005.

Three CLECs or groups of CLECs (hereinafter "the CLECs" or "Complainants"¹⁵) submitted initial briefs and reply briefs in this proceeding: (1) the Competitive Carrier Group ("CCG"), comprised of InfoHighway, IDT America Corp., KMC Telecom V, Inc., and XO Long Distance Services, Inc.; (2) the Competitive Carrier Coalition ("CCC"), comprised of CTC Communications Corp. and Lightship Telecom, LLC; and (3) AT&T Communications of New England, Inc. ("AT&T"). All of these CLECs have proposed amendments to their ICAs that purport to incorporate the *TRRO's* determinations.

The discussions and proposals that follow are organized according to the list of disputed issues submitted by the parties on January 7, 2005. The Initial Briefs and Reply Briefs from all parties were voluminous. I have summarized the positions of the parties, on each of the Issues, below in this Proposal for Decision ("PFD").

III. DISCUSSION OF GENERIC ISSUES

The issues in dispute in this arbitration are numerous and complex. On many of the issues discussed below, I have concluded that the CLECs should prevail on the substantive merits of their claims. At the same time, it is unclear what specific relief the Complainants are seeking based on those claims. I am not recommending in this proceeding that the Board award relief for harm the CLECs may have incurred up to this point. Instead, I conclude from the

15. While this Arbitration was sought by Verizon, the CLECs are in many respects the complainants; in addition, for consistency with other jurisdictions, I use that term here.

CLECs' actions and arguments that they are primarily seeking an interpretation of the future obligations, terms, and language of ICAs on a going forward basis.¹⁶

For the reasons below, I conclude that Verizon should not have unilaterally discontinued UNEs as it did. Specifically, I find that because ICAs are contracts, and because federal law has not preempted state law in this area, Verizon should live up to the obligations it has made previously under both state and federal law.

The Change Process, Self-Help and Negotiations

Changing the ICAs

The parties are here to arbitrate how a change in the FCC's interpretation of 47 U.S.C. § 251 should alter their mutual obligations under the ICAs. The obligations in question are chiefly Verizon's obligations to sell UNEs to CLECs under the terms and at the rates set out in existing ICAs. The FCC's *TRO* and *TRRO* require substantial changes to those obligations, but a fundamental issue is whether the FCC orders are self-executing or whether the FCC's changes require some additional process.

The parties do not agree on whether the existing ICAs are binding contracts.¹⁷ The ICAs, however, are the result of arms-length negotiations between the parties, and they were formed under a statute that requires negotiation in good faith.¹⁸ The ICAs are in writing, and each party provides consideration for the promises of the other. They also are binding under federal law.¹⁹ Unlike most common law contracts, ICAs require advance approval from state commissions that

16. For example, InfoHighway withdrew its petition for injunctive relief based on its business decision not to pursue the matter in Vermont, and no other CLECs sought such relief. The apparent lack of substantial harm to the CLECs may be a result of the relative size or the current state of the competitive telecommunications market in Vermont. Whatever the reason, I recommend that the Board weigh the policy recommendations herein against the apparent lack of harm incurred by the Complainants in Vermont.

17. Verizon states flatly that ICAs are not contracts. Verizon Reply Brief at 12.

18. See 47 U.S.C. § 251(c)(1).

19. See 47 U.S.C. § 252(a).

the ICA is consistent with the public interest, convenience, and necessity,²⁰ but this cannot be a bar to having an agreement be enforceable as a contract.²¹ With all of these features, it is difficult to see how the ICAs can be anything but contracts. Accordingly, I reject Verizon's assertion that ICAs are not contracts.²²

Verizon has already eliminated some UNEs that it previously offered.²³ This broadens the issues in this docket. The Board must decide not only whether Verizon should prospectively offer certain UNEs, but also whether Verizon's past decision to make those UNEs unavailable is consistent with its obligations under the ICAs.²⁴

Impracticability of Performance

The law recognizes circumstances in which a contracting party's obligations are discharged because of a post-contract change in law. Generally, a party's performance under a contract is not required where, after the contract is made, that performance is made impracticable without his or her fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made.²⁵ The adoption of a new government regulation or order can be such a "basic assumption on which the contract was made."²⁶ I consider here

20. See 47 U.S.C. § s 2523(e)(1).

21. Many utility contracts, for example, require advance government approval. See, e.g., 30 V.S.A. § 229. Even with personal contracts, some, such as a contract of marriage, require advance permission or licensure.

22. Notwithstanding any disagreement over whether ICAs are contracts, there should be no dispute about the provision in the Board's approval of the ICAs at issue here that:

[t]o the extent parties negotiate modifications or clarifications to the Agreement, they are not subsumed in our approval of the current Agreement. *To the extent the changes are material, the parties will need to seek additional approvals from the Board.* (Emphasis added).

There is no disagreement that the changes contemplated by the FCC's *TRO* and *TRRO* are material.

23. Verizon states that it has "already discontinued any de-listed *TRO* UNEs [certain CLECs] may have been taking. . ." Verizon Reply Brief at 4. The CLECs Verizon refers to are those who remained in this Docket as "active parties," pursuant to *Verizon's Motion of Withdrawal* (Order of August 25, 2004).

24. No party has asked the Board to address any costs or damages incurred by Vermont CLECs that resulted from the discontinuance.

25. Restatement (Second) of Contracts Section 261 (1981).

26. Restatement (Second) of Contracts Section 264 (1981).

whether Verizon's unilateral cancellation of UNE availability was justified because the terms of the ICAs cannot practicably be performed.

To excuse a party's performance under the contract, the new regulation or order must act so that it makes it impracticable for the party to comply with the regulation or order and to perform the contract.²⁷ For example, where a contract for the sale of land is made, and the land is taken by eminent domain, the purchaser is excused. Also, where a railroad has promised to give a person a free lifetime pass, but such passes are later forbidden, the railroad is excused from performance.

Verizon's performance here has not become impracticable in the same way. Nothing in the FCC orders prohibits Verizon from voluntarily selling UNEs in Vermont. The FCC did determine that Section 251 of the 1996 Act no longer *requires* Verizon to provide certain UNEs, but this is by no means the same thing as prohibiting sale of those UNEs or declaring their sale to be contrary to public policy. Indeed, such a construction would be highly implausible. Section 251 was intended to make competition possible by making UNEs available. While the FCC has clearly concluded that Section 251 no longer requires certain UNEs, it would be implausible to argue that the agency has turned the statute around and used Section 251 to prohibit such sales.

Moreover, Verizon does not argue that the FCC's orders have invalidated the entire ICAs, but only selected provisions of the ICAs. I am not aware of any principle of contract law that allows for implied reformation of a contract through a selective application of the impracticability doctrine to only certain of the contract's provisions.

I conclude that Verizon's performance has not been excused from performance because of impracticability of compliance with the ICAs.

Change of Law Provisions - Negotiated Changes and Self-Help

Since the contracts are binding, it is necessary to determine how the contracting parties anticipated they would respond to events similar to the *TRO* and *TRRO* orders. While Verizon's ICAs have evolved over time, each contains two "change of law" provisions. Each applies whenever there is a change to "Applicable Law."

27. *Id.*, Commentary.

First, the ICAs all contain a provision requiring the parties to negotiate changes to the ICA itself following a change in Applicable Law.²⁸ Indeed, this docket was originally opened following the failure of the parties to resolve their disputes through the negotiations called for in this provision of the ICAs.

Second, each ICA also contains a "self-help" provision allowing Verizon unilaterally to cease providing a service, including UNE service, that is no longer required by Applicable Law.²⁹ For this reason, it is first necessary to define Verizon's obligations under Applicable Law before deciding whether Verizon has properly used its self-help rights under the ICAs.

Applicable Law

Requirements Under State Law

Verizon asserts that the only "applicable law" governing Verizon's unbundling obligations is Section 251 of the federal act and the FCC's implementing regulations,³⁰ and that once the FCC has decided that Section 251 does *not* require a particular UNE, no state law can decide that

28. All relevant ICAs contain the following provision or similar provisions:

4.6 If any legislative, regulatory, judicial or other governmental decision, order, determination or action, or any change in Applicable Law, materially affects any material provision of this Agreement, the rights or obligations of a Party hereunder, or the ability of a Party to perform any material provision of this Agreement, the Parties shall promptly renegotiate in good faith and amend in writing the agreement in order to make such mutually acceptable revisions to this Agreement as may be required to conform the Agreement to Applicable Law.

29. All relevant ICAs contain the following provision or similar provisions:

4.7 Notwithstanding anything in this Agreement to the contrary, if, as a result of any legislative, judicial, regulatory or other governmental decision, order, determination or action, or any change in Applicable Law, Verizon is not required by Applicable Law to provide any Service, payment or benefit, otherwise required to be provided to [CLEC] hereunder, then Verizon may discontinue the provision of any such Service, payment or benefit, and [CLEC] shall reimburse Verizon for any payment previously made by Verizon to [CLEC] that was not required by Applicable Law. Verizon will provide thirty (30) days prior written notice to [CLEC] of any such discontinuance of a Service, unless a different notice period or different conditions are specified in this Agreement (including, but not limited to, in an applicable Tariff) or Applicable Law for termination of such Service in which event such specified period and/or conditions shall apply.

30. Verizon Reply Brief at 66.

state law requires that same UNE to be made available.³¹ Verizon reasons that any additional obligations imposed pursuant to state law would "circumvent the FCC's decisions limiting incumbents' unbundling obligations."³²

The CLECs argue that the Board has previously established requirements under state law, and those obligations remain in effect. CCC argues, for example, that Verizon should not "use a change to its Section 251 obligations as an excuse to eliminate obligations arising from other applicable law or requirements."³³

I am persuaded by the CLECs' arguments. I discuss below three prior Board proceedings that have imposed state law obligations on Verizon. Two were decided under authority of state law. The third was Verizon's Section 271 case, a proceeding initiated pursuant to federal law, but in which the Board made a recommendation to the FCC concerning Verizon's ability to offer inter-LATA toll services.

Docket 5713

In 1994 the Board opened Docket 5713, a comprehensive evaluation of telecommunications competition in the state. In 1996, the Board issued an Order directing Verizon to offer unbundled network elements on a non-discriminatory basis. Specifically, the Order required Verizon to unbundle "the link" or loop, end-office switching, interoffice transport, tandem switching, signaling and ancillary services such as call completion, call assistance, directory assistance, access to E-911 services and operations support systems.³⁴

The Hearing Officer in Docket 5713 had originally recommended a two-part test for determining whether a request for unbundled service elements should be approved. He recommended that the test be whether unbundling is technically feasible and justified by

31. See also, *BellSouth Telecommunications, Inc. Request for Declaratory Ruling*, WC Docket No. 03-251, Memorandum Opinion and Order and Notice of Inquiry, FCC 05-78 (FCC rel. Mar. 25, 2005) ("*BellSouth Preemption Declaratory Ruling*").

32. Verizon Reply Brief at 1.

33. CCC Brief at 101.

34. *Investigation into NET's Tariff Filing Re: Open Network Architecture including the unbundling of NET's networks, expanded interconnection, and intelligent networks in re: Module 1*, Order of 5/29/96 ("Docket 5713 First Order") at 21-22.

adequate demand. The Board rejected the demand part of the test, holding that demand was only relevant to rates, not availability. Moreover, in its rationale, the Board cited Section 251(c)(3) of the federal Act in full, and stated that "[t]o the extent that the Hearing Officer's recommendation is not consistent with the Act, the standard in the Act should apply."³⁵

These orders establish that Verizon has been obligated, since 1996, as a matter of state law, to provide certain UNEs, including switching and interoffice transport. Therefore, Docket 5713 established requirements of Applicable Law, as that term is used in the ICAs.

The Merger and the "Competitive Checklist"

On February 26, 1997, the Board approved the merger of two of Verizon's ancestor companies.³⁶ As a condition, the Order required that the resulting merged company would take "reasonable steps to open its network to competition."³⁷ Specifically, the Board required that the company comply with the "competitive checklist" that is laid out in the Telecommunications Act of 1996.³⁸ The Board used this checklist in measuring the company's progress in opening its network to competition,³⁹ and the Board saw compliance with the checklist as an important factor in its conclusion that the merger would promote the public good and would not have anti-competitive effects.⁴⁰

In a related Order issued in 1999, the Board determined that Verizon had substantially complied with the checklist, although it did impose some additional requirements.⁴¹

In a 2000 Order ruling on a motion for reconsideration of the February 26, 1997, Order (the "2000 Order"), the Board clarified what "unbundled network elements" ("UNEs") it required

35. *Id.* at 86.

36. Those companies were Bell Atlantic Corporation and NYNEX Corporation, the holding company of New England Telephone and Telegraph Company. Docket No. 5900, Order of 2/26/97.

37. Docket 5900, Order of 9/12/97 at 7.

38. *See* 47 U.S.C. § 271(c)(2)(B).

39. Docket 5900, Order of 2/26/97 at 36, 43.

40. Docket 5936, Order of 9/12/97 at 3.

41. Docket 5900, Order of 6/29/99.

of Verizon.⁴² After comparing a list of UNEs from an earlier Board Docket with the then-current FCC list, the Board imposed the requirement that the company offer UNEs as defined in a recent FCC order, but with the addition of "Operator Services and Directory Assistance."⁴³ At that time, the FCC's list of required UNEs under Section 251 included switching and interoffice transport.

Three "competitive checklist" items are particularly relevant here. Item 2 in the competitive checklist requires "(n)ondiscriminatory access to network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1)."⁴⁴ The language of this item refers explicitly to Section 251. Now that the FCC has changed UNE requirements under Section 251(c)(3), I recommend that the Board permit those recent FCC changes to flow into checklist Item 2. In other words, I recommend that the Board construe Item 2 in a way that is more consistent with its terms by requiring no more today than the FCC today requires under Sections 251(c)(3) or 252(d)(1).

Item 5 in the competitive checklist is to provide "(l)ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." Item 6 in the competitive checklist is to provide "(l)ocal switching unbundled from transport, local loop transmission, or other services." Unlike Item 2, neither of these checklist items references Section 251 of the federal Act. I therefore conclude that they are not altered by a change in FCC policy under Section 251.

The 2000 Board Order also required Verizon to "offer UNE combinations to its competitors in a manner that is similar to the manner it offers those elements to itself in order to provide retail service."⁴⁵ These UNE combinations were intended to suit CLECs with various

42. Docket 5900, Order of 1/31/00.

43. *Id.* at 5.

44. 47 U.S.C. § 271(c)(2)(B)(ii).

45. *Id.* at 7. Verizon was also required to offer, "via its SGAT and in interconnection agreements, the same set of UNE combinations in Vermont that any of its sister companies offer to carrier customers or in other Bell Atlantic states." *Id.* at 8.

hardware configurations.⁴⁶ The Order also required the company to offer voice mail services for resale.

Verizon appealed to the Vermont Supreme Court. The Court held that state authority to promote competition had not been fully supplanted by the 1996 Act:

[D]espite the detailed requirements the 1996 Act imposed on telecommunications operations, the regulatory scheme remains a partnership between federal and state authorities, in which states are granted broad power to regulate telecommunications as long as the states do not act inconsistently with federal law.⁴⁷

Moreover, the Court noted that the 1996 Act "does not outline any limitations on state authority to regulate above and beyond the minimum requirements of the 1996 Act."⁴⁸

Specifically, Verizon had challenged the Board's authority both to require UNE combinations and its authority to require Verizon to resell voice mail. The Court affirmed the Board on both counts. Irrespective of federal law, the Court held that state law authorized the Board to issue the challenged orders, and that no "aspect of relevant federal law [was] inconsistent with the Board's decision."⁴⁹ The Court recognized that federal requirements on UNE combinations were in flux, but that, nevertheless, "*nothing in federal law prohibits the PSB from ordering such combinations* to facilitate competition in local markets."⁵⁰

In summary, Verizon's merger was approved on the condition, ultimately satisfied, that it would offer local transport and local switching as unbundled elements, as well as UNE combinations. This holding under state law was not preempted by federal law. Rather, it adds to Verizon's obligations under Applicable Law today, as that term is used in the ICAs.

46. *Id.* at 9. The Board also created some exceptions. Verizon was not required to offer combinations of elements that Verizon did not offer to itself, that were not offered at retail in Vermont; or that were technically unfeasible.

47. *Petition of Verizon New England, d/b/a/ Verizon Vermont*, 173 Vt. 327, 332 (2002).

48. *Id.* at 330.

49. *Id.*

50. *Id.* at 337 (*italics in original*).

Moreover, 47 U.S.C. § 252(a)(1) confirms that the terms of ICAs may exceed federal rules, where it states that:

[A]n incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of Section 251.

The Section 271 Docket

In February, 2002, the Board recommended to the FCC that Verizon be granted authority under Section 271 of the Communications Act for authority to provide in-region inter-LATA service ("271 Docket").⁵¹ The Board's conclusion was based upon written declarations from Verizon, as well as prefiled testimony and several days of hearings involving numerous parties. The Board concluded in the 271 Docket that granting Verizon's request was "consistent with the public interest, convenience, and necessity."⁵² The Board also observed that Verizon had complied with all of the conditions previously imposed on it.

The Board also concluded in the 271 Docket that Verizon had complied with the "competitive checklist," the same checklist that the Board had previously incorporated into its review of the Bell Atlantic/NYNEX merger. The same three checklist items mentioned above are particularly relevant here.

The Board found that Verizon satisfied item 2, nondiscriminatory access to UNEs, as defined in Sections 251 and 252.⁵³ As above, I recommend that the Board construe checklist item 2 as reflecting recent changes to the FCC's reading of Section 251. Therefore I do not recommend that item 2 increase Verizon's obligations under applicable law.

Also, as noted above, item 5 in the competitive checklist is local transport. Ultimately, the Board found that Verizon satisfied checklist item 5.⁵⁴ The Board's recommendation to the

51. Docket No. 6533, Order of 2/6/02.

52. 47 U.S.C. § 271(d)(3)(C).

53. Docket No. 6533, Order of 2/6/02, at 21.

54. *Id.* at 26.

FCC discussed in some detail the Board's concerns about Verizon's arrangements for providing "dark fiber." On most dark fiber issues the Board concluded that there were important policy and factual questions that could not be resolved from evidence directly in the record, and that a broad array of possible policies regarding dark fiber could, if necessary, be pursued in a separate proceeding.⁵⁵ The Board noted that in such a proceeding, it would have "state law authority to take these actions, and need not depend upon the terms of the Act to undergird such policies."⁵⁶ While the Board never has initiated a dark fiber proceeding, its views on state authority are illuminating here. This is strong evidence that the Board was intending the FCC requirements as a minimal base that could be supplemented in the future by state law. Accordingly, I conclude that the Board has added local transport as a required UNE under state law.

Item 6 in the competitive checklist is to provide "(l)ocal switching unbundled from transport, local loop transmission, or other services." Based on uncontested declarations from Verizon, the Board found that Verizon satisfied this item.⁵⁷ As with item 5, I conclude that the Board has added local switching as a required UNE under state law.

In an appendix to the Order in the 271 Docket, the Board included a summary of its prior decisions relating to competitive markets.⁵⁸ The recitation included the unbundling principles from Docket 5713 described above as well as a number of pricing decisions. The text specifically mentions "the link, end-office switching, interoffice transport, tandem switching, and signaling." The Board said that Verizon's continued compliance with these rulings and principles formed "a part of the basis for" its recommendation that Verizon be granted authority to provide

55. The Board did insist upon one change in Verizon policy regarding dark fiber. CLECs had complained that they faced excessive charges when investigating the use of dark fiber owned by Verizon. Many times the CLECs were required to submit multiple inquiries for routing of dark fiber between particular originating and terminating points. In this circumstance the Board required Verizon to assess a per-circuit record review charge only for such circuit or circuits where dark fiber is actually ordered. Verizon consented to this change. *See* Docket 6533, Order of 2/6/2002.

56. Docket 6533, Order of 2/6/02, at 25.

57. *Id.* at 26.

58. *Id.* at 31, Appendix B.

inter-region inter-LATA service,⁵⁹ and was "a necessary part of [Verizon's] participation in an open and competitive market in local service."⁶⁰

In the 271 Docket, the Board relied on Verizon's continued offering of UNEs, including transport, and both local and tandem switching. This reliance was not conditioned upon subsequent FCC interpretations of Verizon's obligations under Section 251 of the Act. Therefore, I conclude that Applicable Law includes Verizon's obligations arising from the 271 Docket.

Furthermore, Verizon is obligated to meet the requirements of the Verizon Performance Assurance Plan ("PAP"). This plan measures dozens of performance points regarding the quality of Verizon's service to CLECs. It provides significant financial penalties should Verizon fail to provide quality wholesale services to competitive LECs, and it was intended to prevent "backsliding" by Verizon after it obtained inter-LATA authority from the FCC. While the Vermont PAP has some unique provisions, it is broadly similar to the plans in several other Verizon states.⁶¹ The final Order in Docket 6533 anticipated that the PAP would change as technical improvements were made to the C2C guidelines. However, while the Board did anticipate further changes to the PAP, those changes were anticipated to constitute further improvements after inter-LATA entry.⁶² Nothing in the 2002 Order suggests that the Board anticipated organic changes to the PAP as the FCC modified its interpretation of Section 251. Least of all is there any evidence that the Board anticipated that the significance and effect of the

59. *Id.* at 31.

60. *Id.* at 32.

61. *Id.* at 7. The PAP is based upon technical standards called the Guidelines for Carrier-to-Carrier (C2C) Performance Standards and Reports. The C2C guidelines, originally developed by the New York Public Service Commission, were adopted for evaluating Verizon's continuing compliance with Section 271 requirements. The New York metrics are subject to updating and review by both Verizon and CLECs as part of the New York Carrier Working Group, and any change mandated by the New York Public Service Commission is subject to the Board's review.

62. Docket No. 6533, Order of 2/6/02 at 7 ("While the existing PAP is sufficient to support an application under Section 271, it can be further improved. The Board has authority under state law to mandate such further improvements.")

PAP would decline dramatically as significant UNEs, like switching and interoffice transport, became unavailable in certain portions of the state.

In summary, the Board in the 271 Docket relied on the fact that Verizon would continue to provide certain UNEs described in the competitive checklist, including switching and transport, including dark fiber. The Board's advice to the FCC was used by the FCC in granting Verizon inter-LATA authority. Having collected the prize, Verizon cannot now escape its promises. Applicable Law includes the obligations to continue to comply with the competitive checklist, except for item 2, which explicitly refers to Sections 251 and 252.

Preemption

Verizon asserts that state law obligations have been preempted by the *TRO* and *TRRO*. I reject this argument. Generally, a federal law (such as Sections 251 and 252) that establish duties for telecommunications carriers merely sets a floor for carrier requirements, and allow states to impose additional requirements that do not conflict with federal obligations. Both of these statutory provisions reserve the states' authority to impose their own independent regulatory requirements. There can be no claim of preemption where, as with UNEs, federal law intends for states authority to enforce their own regulatory requirements, in addition to the minimum requirements set by federal law.⁶³

Moreover, federal law repeatedly reserves state authority over the terms and conditions of interconnections. First, I rely upon 47 U.S.C. § 251(d)(3), which states that:

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

63. *Petition of Verizon New England, d/b/a/ Verizon Vermont*, 173 Vt. 327, 337 (2002).

Imposing state law UNE obligations on Verizon does not prevent Verizon from complying with all requirements of federal law. Therefore, this Order does not substantially prevent implementation of any federal program, and Section 251(d)(3) preserves state authority.

Second, I rely upon 47 U.S.C. § 252(e)(3). That subdivision states, in its entirety:

(3) PRESERVATION OF AUTHORITY. – Notwithstanding paragraph (2), but subject to Section 253, nothing in this Section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.⁶⁴

This reservation of state authority is qualified only by Section 253, which is inapplicable here.⁶⁵ Appearing in a section of federal law that requires state approval of ICAs, this section is, by itself, clearly sufficient to rebut any argument that Vermont has been preempted from imposing additional UNE obligations on Verizon.

Conclusion

I conclude that state law adds significant requirements to "Applicable Law" as that term appears in the ICAs. Those requirements notably include the obligation to offer switching and local transport, including dark fiber. Federal law has not preempted state-imposed obligations of this kind. Therefore, Verizon improperly activated its self-help provisions in the ICAs. Applicable Law did not permit Verizon to withdraw switching and transport unilaterally. Instead, Verizon was obligated, under the other provision of its ICAs to negotiate changes to the ICAs. Furthermore, this conclusion is consistent with the *TRRO*. In paragraph 233 of that order, the FCC directed parties in circumstances such as those presented in this case to engage in "good faith negotiation under Section 252 to arrive at mutually agreeable terms and conditions for interconnection."

64. See 47 U.S.C. § 252(e)(3).

65. 47 U.S.C. § 253 prohibits states from establishing barriers to entry.

IV. DISCUSSION OF SPECIFIC DISPUTED ISSUES

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

Verizon's Position:

Verizon's principle argument is that federal law, not state law, governs the unbundling obligations of an ILEC.

Verizon's proposed Amendment 1 to its ICAs states that Verizon is not "obligated to offer or provide access on an unbundled basis . . . to any facility that is or becomes a Discontinued Facility" (defined as a facility which "ceases to be subject to an unbundling requirement under the Federal Unbundling Rules").

AT&T's Position:

AT&T insists that the Amendment should include rates, terms and conditions that do not arise purely from federal unbundling obligations.

CCC's Position:

CCC argues that Verizon's proposal should be rejected for at least two reasons: First, under the change-of-law terms of the existing Agreements, a party may only seek arbitration of terms necessary to implement the laws that have changed. Verizon's proposal to eliminate all non-Section 251 unbundling obligations has no basis in the *TRO* (or any other change in applicable law) and therefore is beyond the proper scope of this proceeding.

Second, even if Verizon were permitted to propose terms that have no basis in the *TRO*, its particular proposal to eliminate all non-Section 251 unbundling obligations is contrary to the 1996 Act.

CCG's Position:

CCG asserts that any amendment to the existing ICA must incorporate rates, terms, and conditions that reflect Verizon's ongoing obligations under state law to provide CLECs access to its network elements on an unbundled basis. CCG contends that the 1996 Act requires that the

Board oversee the rates, terms and conditions applicable to the network elements provided by Verizon, whether under federal law or state law, to Vermont CLECs, and to impose on Verizon any unbundling obligation that is consistent with the 1996 Act and Vermont state law. The CCG states that the 1996 Act does not preempt, and in fact it expressly permits the Board to issue and enforce its own unbundling rules.

CCG relies on Section 252 of the 1996 Act to validate the states' Congressionally-imposed responsibility to "ensure" that arbitrated agreements "meet the requirements of Section 251(b) including the regulations prescribed by the [FCC] pursuant to Section 251(b)." The CCG elaborates that Section 252(e)(3) of the 1996 Act provides that "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements."

Regarding issues that have not yet been resolved, CCG states that pursuant to Section 252(c), it is the states who are tasked with arbitrating all "open issues," including those issues that might not have been resolved by the FCC. CCG asserts that this provision gives the Board independent authority under federal law to ensure that CLECs have continued access to Verizon's network elements. CCG supports this contention citing Section 251(d)(3) of the 1996 Act, which states that the FCC "shall not preclude the enforcement of any regulation, order, or policy of a State commission that establishes access and interconnection obligations of local exchange carriers."

CCG also argues that nothing in the *TRO* or the *TRRO* displace the Board's authority to order unbundling pursuant to the provisions in the 1996 Act, including obligations that arose from Section 271 proceedings.

Discussion and Proposal

The change process and the Board's authority under state and federal law, discussed in Section III above, are intertwined in Issues 1, 2, and 32 in this proceeding. Fundamentally, this dispute arises from Verizon's proposed language in Amendment 1, which limits its obligation to

provide UNEs "only to the extent required by the Federal Unbundling Rules."⁶⁶ Verizon then defines Federal Unbundling Rules in its proposed Amendment 1, Section 4.7.6, as "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."⁶⁷ For the reasons discussed above, I reject Verizon's position. I conclude that Verizon's unbundling obligations arise from a number of sources, including its existing ICAs, the Docket 5713 merger, and the Section 271 Docket. Those conditions should remain in effect at the very least until the existing ICAs are amended to reflect the changes to the FCC's unbundling rules. Moreover, as explained in more detail below, I conclude that Verizon's state law obligations, including those incurred in the Section 271 Docket, should continue in force and effect.

Simply stated, if Verizon were allowed to unilaterally abdicate the obligations it assumed in prior contractual agreements, solely because the FCC altered its rules, the validity and credibility of past and future contracts would be called into question.

As described earlier, Section 251(c)(3) of the 1996 Act requires Verizon to provide "non-discriminatory access to network elements on an unbundled basis . . . "in accordance with the term and conditions of an ICA. Further, Section 251(c)(3) allows a requesting carrier to "combine such elements . . . " However, in the *TRO* and *TRRO*, the FCC "de-listed" various UNEs from those required to be made available to CLECs. Issue 1 asks whether changes to the FCC's unbundling rules eliminate Verizon's obligations in agreements established and approved prior to March 11, 2005 (the date that the FCC chose for the transition to de-listed UNEs). Also in Issue 1, Verizon questions the Board's authority to enforce those obligations.

As discussed above, the ICAs are contracts, that were formed and approved in accordance with state and federal law. By proposing that all unbundling obligations other than those under Section 251(c)(3) are "eliminated" through federal preemption of state authority, Verizon seeks to unilaterally declare that certain terms and conditions of its existing ICAs (and other contractual agreements) are no longer applicable. As noted above, contract law does recognize that certain

66. Verizon's proposed Amendment 1, Section 4.7.3.

67. Citing, *inter alia*, 47 C.F.R. § 51.307.

contracts can become unenforceable through supervening illegality. For example, if, upon a change of federal law, the terms and conditions of a contract become contrary to public policy, the contract need not be completed.⁶⁸ However, this is a high threshold, and clearly was not met here. The FCC did not declare ICAs void in the *TRO* or *TRRO*, nor did it declare UNEs as contrary to public policy.

The FCC's unbundling rules do not supplant the states' authority, as established by Congress under the 1996 Act, to impose and enforce unbundling requirements. On the contrary, the Board retains its authority under the 1996 Act to utilize state law to enforce Verizon's unbundling obligations. Section 251 of the 1996 Act preserved state authority to require access to network elements.⁶⁹ Additionally, Section 252 empowers state commissions to "ensure" that arbitrated agreements "meet the requirements of Section 251 including the regulations prescribed by the [FCC] pursuant to Section 251."

Verizon asserts that the Board is preempted from imposing unbundling obligations on Verizon by the 1996 Act and FCC's rulings. This interpretation contravenes the clear reading of Section 252(e)(3) of the 1996 Act, which provides that:

nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

Moreover, Section 251(c)(1) still requires that such negotiations be governed by Section 252 of the 1996 Act, under which the state's role is clear. Whether negotiations are voluntary under Section 252(a)(1) or subject to compulsory arbitration under Section 252(b)(1), Congress has required that the resulting interconnection agreement is subject to approval by the Board.

Continuing state authority to establish and enforce unbundling obligations also is made clear in the *TRO* and in the February 4, 2005, *TRRO*. In Paragraph 233 of the *TRRO*, the FCC explicitly observed that "[w]e encourage the state commissions to monitor this area closely to

68. For example, a contract to sell whiskey became unenforceable upon prohibition, and racial discrimination in housing contracts became unenforceable in the mid-20th century.

69. 47 U.S.C. § 251(d)(3).

ensure that parties do not engage in unnecessary delay." This language is inconsistent with Verizon's asserted preemption of state authority over unbundling obligations.

As noted above, the Vermont Supreme Court has recognized the role of the Public Service Board, under federal law, in approving and enforcing ICAs. Similar conclusions have been reached in California,⁷⁰ Michigan,⁷¹ and Illinois,⁷² which recognize the State's role in approving and enforcing ICAs. Additionally, The Maine Supreme Judicial Court has ruled that a state commission can add UNEs to the national list under state law when the FCC has not explicitly forbidden the UNE.⁷³

Verizon also argues that the Board is preempted from imposing unbundling obligations on Verizon as a result of recent FCC rulings. In support of this argument, Verizon cites *BellSouth Telecommunications, Inc. Request for Declaratory Ruling*.⁷⁴ In that case the FCC held that a state commission could not require an LEC to provide Digital Subscriber Loop ("DSL") service to an end user customer over the same UNE loop facility that a competitive LEC uses to provide voice services to that end user. This preemption holding applied to DSL service,

70. *Petition of Verizon California Inc. (U 1002 C) for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in California Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order*, App. No. 04-03-014, Assigned Commissioner's Ruling Granting In Part Motion for Emergency Order Granting Status Quo for UNE-P Orders (Ca. PUC March 11, 2005) (SBC is obligated to engage in good faith negotiations regarding FCC rule changes and new rates for declassified UNEs).

71. *In the matter, on the Commission's own motion to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issues by SBC Michigan and Verizon*, Case No. U-1447, Order (Mich. P.U.C. Mar. 9, 2005)

72. *MCI Metro Access Transmission Services, Inc. MCI WorldCom Communications, Inc. and Intermedia Communications Inc. Petition for Arbitration of Interconnection Rates, Terms and Conditions, and Related Arrangements with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act 1996*, Docket No. 04-0469, Arbitration Decision, pp. 258-263 & 302-305 (Ill. C.C Nov. 30, 2004) (SBC obligated to continue to offer the same UNEs as required by ICAs until ICAs amended pursuant to Section 252 or in accord with Commission order).

73. *Verizon New England, Inc. v. Public Utilities Commission, et al.*, Docket No. PUC-04-406, 2005 WL 1290642, — A.2d —, 2005 ME 64.

74. *BellSouth Telecommunications, Inc. Request for Declaratory Ruling*, WC Docket No. 03-251, Memorandum Opinion and Order and Notice of Inquiry, FCC 05-78 (FCC rel. Mar. 25, 2005) ("*BellSouth Preemption Declaratory Ruling*").

however, and is not applicable here. No party in this proceeding seeks to require Verizon to sell DSL to a customer who has selected a competing carrier for voice service. I decline to extend the FCC's ruling in *BellSouth* beyond the narrow facts of that case. To do so would be contrary to Congress' intent to promote competition through both state and federal rules.

In summary, I conclude that the Board continues to have authority, under state and federal law, to ensure that the existing ICAs provide rates, terms, and conditions that do not arise from federal unbundling regulations. Moreover, I recommend that the Board utilize that authority to require continued provision of UNEs described in the competitive checklist, including switching and trunking. I conclude that Verizon's unbundling obligations under existing ICAs, under Section 271 approval conditions, and under the FCC's Bell Atlantic/GTE Merger Conditions, should remain in effect until the existing ICAs are amended to reflect the changes to the FCC's unbundling rules.

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

Verizon's Position:

Verizon states that in the event its obligation to provide access to a particular unbundled network element is eliminated – by the FCC or by a court of competent jurisdiction – Verizon has no further obligation to provide that element under the interconnection agreement. Verizon asserts that no amendment is required to implement the FCC's mandatory prohibition against CLECs ordering certain UNEs that were eliminated under the *TRRO*. Verizon acknowledges, to the extent necessary, that alternative arrangements will replace discontinued UNEs. Verizon states that if the CLEC has not specifically requested either disconnection or an alternative arrangement, Verizon may reprice the discontinued UNE at special access or resale-equivalent rates. Verizon contends that where the FCC adopts a mandatory transition period, that period cannot be extended by a state commission, as such modifications would conflict with the FCC's rules, and would therefore be preempted. Verizon insists that there is no legitimate reason to

give CLECs any more notice of the discontinuation of elements that were de-listed by the FCC some months ago.

AT&T's Position:

AT&T contends that the ICAs should be amended to reflect the 1996 Actual changes in unbundling obligations that the FCC has directed. However, AT&T objects to what it sees as Verizon's efforts to use this proceeding as a vehicle for subverting the existing change-of-law provisions in the parties' existing ICAs. AT&T argues that Verizon's proposal revises the change-of-law process that the parties have already agreed to – and that the Board has already approved. AT&T asserts that what Verizon attempts to do through its Amendment 1 is to effectively eliminate the negotiation and arbitration process for implementing changes in its unbundling and other obligations, not only now but in the future as well. AT&T insists that by expressly reaffirming the use of the Section 252 process, the FCC has eliminated any doubt that Verizon's proposal to revise the change-of-law provisions is inappropriate.

CCC's Position:

The CCC argues that the ambiguous wording of Issue 2 hides the real question posed: whether the *TRO* has rendered unlawful the change of law provisions of the existing Agreements, such that Verizon has a contractual right created by the *TRO* to demand the modification of the existing change of law terms in this arbitration proceeding. The answer to this question, they state, is, emphatically, no. The CCC asserts that Verizon's proposed Amendment would significantly alter the change of law terms of the existing Agreements.

CCG's Position:

CCG argues that for each UNE that Verizon is no longer obligated to provide as a result of the *TRO* and *TRRO*, the parties' ICA must be amended to reflect new rates, terms and conditions. The CCG asserts that the *TRRO* makes clear that the FCC's unbundling determinations are not self-effectuating, and any changes of law arising under the *TRO* and the *TRRO* should be implemented only "as directed by Section 252 of the 1996 Act," and consistent with the change of law processes set forth in carriers' individual ICAs. CCG believes that Verizon is bound by the unbundling obligations set forth in its existing ICAs with Vermont

CLECs until such time as those agreements are properly amended to incorporate the changes of law and FCC-mandated transition plans established under the *TRO* and the *TRRO*.

CCG cautions that while any amendment should reflect recent changes in federal law, those changes should not include any modification to the change of law provisions in CLECs' existing ICAs. CCG asserts that nothing in the *TRO* or the *TRRO* requires parties to amend the change of law provisions in their existing ICAs. To the contrary, CCG contends that the FCC has stated that the changes to its rules reflected in the *TRO* and the *TRRO* must be implemented using the existing change of law provisions in the agreements.

Discussion and Proposal

It follows from the discussion above that the ICAs must be amended to reflect the changes to the FCC's unbundling rules. The *TRO* decision contemplated that such contract changes were to be effectuated through negotiation and arbitration under Section 252.⁷⁵

The CLECs in this proceeding argue that Verizon seeks to subvert the change-of-law provisions in the existing ICAs by asserting that the FCC's rule changes are self-effectuating. As addressed in response to Issue 1, the existing conditions should remain in effect until the existing ICAs are amended to reflect the changes to the FCC's unbundling rules. Nothing in the *TRO* or *TRRO* contemplates altering an ICA's existing change-of-law provisions. Furthermore, the change-of-law provisions in the existing ICAs comport with the process contemplated in the *TRRO*. Here, as with all other ICAs and amendments, the path is clear: notification, negotiation, then arbitration consistent with Section 252.

A review of the *TRRO* and the existing ICAs shows that the provisions in the *TRRO* support the use of existing change-of-law language in existing interconnection agreements to effectuate the FCC's unbundling rule changes. This is wholly consistent with past practice when

75. See *In the Matter of Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers, et al.*, cc Docket Nos. 01-338, 96-98, and 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (rel. Aug. 21, 2003).

a change of law has occurred. In the *TRRO*, the FCC plainly stated that "carriers must implement changes to their [ICAs] consistent with our conclusions in this Order."⁷⁶

The process for dispute resolution is set forth in the "Dispute Resolution and Binding Arbitration" provisions of the ICAs. In accordance with these provisions of the ICAs, parties are to first "attempt to negotiate and arrive at an agreement" on appropriate modifications to the agreement, after written notice is provided by either Party.

The *TRRO* specifically identifies negotiation as the first step to replacing the de-listed UNEs. The *TRO* sets out the FCC's intent that negotiation/arbitration of contract amendments is a prerequisite to implementing applicable change of law provisions, such as those at issue here. In the *TRO*, the FCC stated:

. . . We recognize that many interconnection agreements contain change of law provisions that allow for negotiation and some mechanism to resolve disputes about new agreement language implementing new rules. . . [W]e believe that individual carriers should be allowed the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment, and to resolve disputes over any new agreement language arising from differing interpretations of our rules. Thus, to the extent our decision in this Order changes carriers' obligations under Section 251, we decline the request of several BOCs that we override the Section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions.⁷⁷

While certain substantive portions of the *TRO* were vacated and superseded by the *TRRO*, the principles set out in *TRO* ¶ 700, were not, and remain applicable in the implementation of *TRRO* provisions. The FCC did not reverse these principles in the *TRRO*, instead, it affirmed them in ¶ 233 by stating its expectation that carriers "implement the [FCC's] findings as directed by Section 252 of the 1996 Act."

Curiously, despite the FCC's initial and substantial reliance on "non-impairment" as a basis for de-listing UNEs (and Verizon's admission that "impairment" is prevalent in

76. *TRRO* at ¶ 233.

77. *TRO* at ¶¶ 700, 701.

Vermont,)⁷⁸ the parties do not seem to be questioning the relevance of the FCC's findings of nation-wide "non-impairment." This reliance despite the language used by the FCC, which indicates that Verizon may not unilaterally take any action to reject the effort of a CLEC to self-certify impairment for the purposes of the provisioning of access to dedicated transport and high-capacity loops. Rather, the FCC required ILECs to accept that such representations are facially valid and only subject to after-the-fact scrutiny.

The next step prescribed under the ICAs would be to move into the dispute resolution process. It is obvious that Verizon and the Vermont CLECs' efforts have failed to reach agreement on the appropriate modifications to implement the change of law provision relating to the elimination of the UNEs identified in the *TRRO*. Until such time as the currently effective ICA is amended to incorporate the changes addressed in the remainder of this Proposal for Decision, Verizon remains obligated to continue offering the equivalent functionality of all unbundled services it has been providing under the current ICAs, including dedicated transport, high capacity loops, dark fiber and UNE-P for both existing and new customer arrangements. Absent completion of this process, there is no legal basis for Verizon to impose its unilateral prices and terms for implementation as set forth in its Notification Letters, unless and until it has exhausted the negotiation and arbitration process.

Accordingly, the parties will be required to revise their ICAs to reflect the changes to the FCC's unbundling rules as modified in the *TRRO* and as interpreted in the following sections on substantive issues. While it is clear that the parties' ICAs must be amended, how and when such change must occur is less obvious. Those decisions, on a point by point basis, will be reflected in the remaining issue discussions herein.

Since further ICA amendments are required to be completed before replacements to existing UNE arrangements can be implemented, I recommend that the Board adopt measures to expedite that process. CLECs should not be permitted to use negotiations as a means of unreasonably delaying implementation of the *TRRO*. I disagree with Verizon's characterization of the CLECs as seeking to perpetuate the UNE-P indefinitely. To the contrary, the *TRRO*, by referencing negotiations under Section 252, envisions a limited period of negotiations under

78. See 11/7/03 letter from Verizon to Susan M. Hudson, re: Triennial Review Order.

change of law provisions, to be monitored by state commissions, after which the prohibition against new UNE-P or other UNE arrangements under Section 251 would take effect.⁷⁹

The FCC anticipated that some delay would inevitably occur in implementation. The familiar processes described in Section 252 inherently take time, and the FCC did nothing to compress those processes. Instead, it warned carriers to not "unreasonably" delay implementation of the *TRRO* and encouraged state commissions to guard against "unnecessary" delay. Had the FCC intended that ILECs would unilaterally alter the ground rules in existing ICAs, and to immediately conduct business under modified terms – that is, if the FCC had intended to avert any delay in implementation – it would have said so. But it did not. It prescribed a bilateral process with built-in time requirements.

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

Verizon's Position:

Verizon begins by stressing that the FCC eliminated switching as a UNE in the *TRRO*, saying that there would be no Section 251 unbundling requirement imposed for mass market local circuit switching nationwide. Verizon asserts that the *TRRO*'s mandatory 12-month transition plan began with the effective date of the *TRRO*, March 11, 2005. Verizon emphasizes that the *TRRO* clearly states that the transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching. Verizon points to the rates prescribed by the FCC for delisted UNEs during that transition period. Verizon's position is that the FCC's nationwide bar on new UNE orders took effect on March 11, 2005 for all carriers, and does not depend on or require any contract amendments. Verizon offers an amendment to the ICAs that would explicitly recite Verizon's obligation to continue providing the embedded base UNE-P arrangements and delisted

⁷⁹. UNE-P may still be offered under Section 271.

high-capacity loops and transport during the transition period. Verizon asserts that the CLECs' proposed amendments are designed to evade, rather than implement, the FCC's non-impairment findings, seeking to continue ordering UNE-P arrangements which the FCC has eliminated. Verizon argues that it is entitled to a clear statement that it is not obligated to provide any local circuit switching UNE to the CLECs other than as required by the FCC's unbundling rules.

In its Reply Brief, Verizon contends that the strong majority of state commissions that have considered the question have determined that the directive in the *TRRO* barring CLECs from ordering new mass market switching or de-listed high-capacity loop and transport facilities during the transition period is immediately effective, and that three federal courts have now preliminarily enjoined state commissions from enforcing orders that would have overridden the *TRRO*'s proscription on new UNE-P orders. Verizon insists that none of the CLECs' ICAs need an amendment to give contractual effect to the UNE de-listings in either the *TRO* or the *TRRO*, but that the de-listings are self-effectuating. Verizon asserts that it is unnecessary to incorporate wholesale the language of the *TRRO* into the amendment, as AT&T suggests. Verizon rejects the position of some CLECs that the CLECs are permitted to continue to add new UNE-P arrangements until the Board approves an ICA amendment. Verizon contends that the *TRRO* bars competitors from placing new orders for switching as of the effective date of the *TRRO*.

AT&T's Position:

AT&T accepts the fact that the FCC has ruled that ILECs have no obligation to provide CLECs with unbundled access to mass market local circuit switching. AT&T emphasizes that the FCC adopted a twelve-month plan for competing carriers to transition away from the use of unbundled mass-market local circuit switching. Carriers have until March 11, 2006, to modify their interconnection agreements and transition UNE-P customers to alternate service arrangements. CLECs are not allowed to add UNE-P arrangements for new customers. AT&T argues that Verizon's proposed ICA amendments do not address any of the currently effective FCC requirements related to switching. AT&T discusses the FCC's requirement for appropriate pricing for UNE-P during the transition period. AT&T points out that the *TRRO* eliminated the need to deal with the four-line carve out, as well as blurring the distinction between mass market and enterprise customers. Given this new regulatory framework, Verizon's definition of

declassified network elements, which continues to reference the four-line carve out, is obsolete. AT&T argues that the CLECs must be allowed to use existing systems for submission of maintenance and repair orders for existing customers, as well as request feature changes for existing arrangements during the transition period. AT&T states that Verizon must not be allowed to unilaterally change any UNE-P arrangement prior to the end of the transition period.

In its Reply Brief, AT&T expresses concern over Verizon's insistence that the amendments it previously filed with the Board do not need to be revised to explicitly reflect the requirements of the *TRRO*, assuring the Board that Verizon will comply with the *TRRO*'s rules. AT&T asserts that Verizon's description of that "compliance" in its Initial Brief demonstrates both the necessity for an ICA amendment that expressly incorporates the requirements set forth in the *TRRO* and the perils posed by leaving the interpretation and implementation of those rules solely to Verizon.

As an example, AT&T discusses Verizon's arguments that favor a scheme that would permit Verizon to improperly shorten the *TRRO*'s transitional periods. Specifically, AT&T alleges that Verizon's proposal for processing a CLEC's orders converting UNEs to alternative facilities would take effect before the end of the transitional period, at which point those arrangements would no longer be subject to transitional rates. AT&T argues that the *TRRO* expressly provides that it is the CLEC that will initiate the orders for converting their UNE customers to alternative arrangements – and gives them the full transitional period to accomplish that task. AT&T contends that in order to utilize the transition period, CLECs must be permitted to submit orders to convert UNEs to alternative facilities or arrangements at any time before the end of the respective transitional period. Under AT&T's proposed amendment, those orders will not take effect until the date marking the end of those transitional periods – March 11, 2006, for mass market local switching, dedicated interoffice transport and high capacity loops, and September 11, 2006, for dark fiber loops and transport. Moreover, AT&T asserts that the transitional rates adopted by the FCC will apply to these elements for the entire length of these transitional periods.

CCC's Position:

CCC's proposed ICA amendments would eliminate Verizon's obligation under Section 251 to provide unbundled local switching in combination with loops of DS1 or greater capacity, along with other services currently offered in connection with unbundled Local Switching, consistent with the requirements of the *TRO*. CCC emphasizes that the Section 271 checklist requires Verizon to unbundle "local switching," without any reference to "circuit." CCC agrees that it is no longer necessary to distinguish between "enterprise" and "mass market" customers with respect to switching. The CCC's proposal clarifies that Verizon's obligation to provide local switching should be technology neutral, including switching functionality performed by a packet switch.

In its Reply Brief, the CCC reiterates that their proposal would unambiguously and completely eliminate Verizon's Section 251 obligation to provide unbundled local switching, except for the FCC's one-year transition for switching associated with DS-0 loops. The CCC points out that Verizon's proposal contravenes the FCC's transition requirement that CLECs be permitted to continue to serve their embedded base of customers with UNE-P during the transition, which includes the ability to process moves, adds and changes. The CCC claims that Verizon's attempt to use the *TRRO* as an excuse to eliminate its Section 271 obligations is procedurally improper and, more importantly, is contrary to law; therefore, Verizon's proposal cannot be adopted.

CCG's Position:

The CCG emphasizes that the amendments to the parties' ICAs must incorporate the complete unbundling framework ordered by the FCC under the *TRO* and the *TRRO*, including the transition plan set forth for mass market local switching no longer available under Section 251 of the 1996 Act. CCG insists that such amendments must also state that CLECs will continue to have access to UNE-P priced at TELRIC rates plus one dollar until such time as Verizon successfully migrates existing UNE-P customers to competitive carriers' switches or alternative switching arrangements. CCG argues that the amendment must clarify that any UNE-P line added, moved or changed by a competitive carrier, at the request of a UNE-P customer served by the competitive carrier's network on or before March 11, 2005, is within the competitive carrier's

"embedded customer base." CCG asserts that the Board should not permit Verizon to refuse to provision UNE-P lines for new customers of competitive carriers until such time as the *TRRO* is properly incorporated into the parties' agreements through the change of law processes set forth therein, as contemplated by Section 252 of the 1996 Act.

In its Reply Brief, CCG states that its proposed amendment also restricts rate increases by Verizon, at the close of the FCC-mandated transition period, as necessary to prevent service disruptions to the end user customers of CLECs and adverse effects to service quality that may result from dramatic cost increases borne by CLECs in an unregulated market.

Further, the CCG replies with its argument that CLECs may continue to order unbundled Mass Market Local Switching for servicing their respective end user customers who were customers as of the effective date of the *TRRO*.

Discussion and Proposal

As discussed above, I am not persuaded by Verizon's arguments that the changes resulting from the FCC's *TRO* and *TRRO* are "self-effectuating." Before any revisions in unbundling terms or conditions can be effectuated (including the local switching issues of this section), they must be adopted through amendments to the ICAs, and receive approval by the Board. The revisions, including the elimination of local switching as a Section 251 unbundled element, are not effective until the ICAs are revised in conformance with the Board's Order in this proceeding, and are properly signed by the appropriate parties.

In keeping with my recommendations in Section III of this PFD, the Board should approve revisions to the parties' ICAs pertaining to the elimination of local switching as a Section 251 unbundled element, and the replacement of Section 251 circuit switching UNEs with network elements required by Section 271. The decisions of the FCC in the *TRRO* related to unbundled access to local circuit switching do not negate the obligations agreed to by Verizon in its Section 271 negotiations. The FCC discussed this issue extensively in the *TRO* at paragraphs 649-667. The FCC concluded that the Bell Operating Companies ("BOCs") must continue to provide access to those network elements described in Section 271 checklist items 4-6 and 10

(unbundled local and tandem switching is checklist item number 6), even if such access is not mandated under Section 251.

The twelve-month transition plan adopted by the FCC in the *TRRO* for competing carriers to migrate away from the use of unbundled mass-market local circuit switching under Section 251 should be used as a transition to the elements provided under Section 271. During this transition period, the parties will be expected to negotiate new rates for unbundled mass-market switching elements subject to Section 271. Pricing for transitional services will be as specified in the unbundling framework ordered by the FCC's *TRRO*, unless the parties agree to lower transitional rates. Verizon must not unilaterally alter any UNE-P arrangement prior to the end of the transition period.

Under the continuing requirements of the Section 271 checklist, Verizon may not refuse to provision UNE-P lines for existing customers of the CLECs. Further, Verizon must not be allowed to eliminate the availability of unbundled local switching based on the technology used to provide the switching function. Based on my analysis of FCC findings and the CLECs' briefs, I conclude that the local circuit switching function may be provided on a technology-neutral basis by either a circuit switch or a packet switch.

Finally, I recommend that CLECs be allowed to use Verizon's existing systems for submission of orders, including maintenance and repair orders for the CLEC customers, in order to maintain continuity and adequate service quality during the transition described herein.

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

Verizon's Position:

Verizon states that in the *TRRO*, the FCC eliminated any obligation to unbundle dark fiber loops. Verizon also declares that as a result of the *TRRO*, they are not obligated to provide unbundled access to DS1-capacity loops except at any location within the service area of a wire

center containing 60,000 or more business lines and four or more fiber-based collocators. Further, Verizon stresses that as a result of the *TRRO*, they are not obligated to provide unbundled access to DS3-capacity loops except at any location within the service area of a wire center containing 38,000 or more business lines and four or more fiber-based collocators. In addition, even where CLECs are permitted to obtain high capacity loops as UNEs, Verizon indicates that the provision of such services are subject to specific FCC-imposed caps on the total number of these facilities a CLEC may obtain along a given route. In the case of DS1 loops, Verizon states that the FCC's rules provide that a CLEC may obtain a maximum of ten unbundled DS1 loops to any single building in which DS1 loops are available as unbundled loops. In the case of DS3 dedicated transport, Verizon points out that a CLEC may obtain a maximum of one single unbundled DS3 loop to any single building in which DS3 loops are available as unbundled loops. Verizon describes the FCC's mandatory transition plan that applies to de-listed high-capacity loops; 12 months for DS1 and DS3 loops, and 18 months for dark fiber loops. Verizon declares that such transition plans apply only to the embedded base, and do not permit CLECs to add new, de-listed high-capacity loop UNEs after March 11, 2005. Verizon contends that no contract amendments are necessary to implement the FCC's mandatory transition plan, but the company is willing to include terms memorializing its commitment to continue to serve the embedded base in accordance with the *TRRO*'s transition plan.

In its Reply Brief, Verizon states that its proposal incorporates all requirements of federal law, including the *TRRO*'s ban on new adds of high-capacity loops that meet the non-impairment criteria and the *TRRO*'s transition period for the embedded base in such circumstances. Contrary to AT&T's arguments, Verizon argues that there is no need to incorporate more specific language into the parties' agreements in this regard, particularly because no contract language at all is necessary to implement these *TRRO* rulings.

Also in its Reply Brief, Verizon contends that the FCC's no-new-adds directive for de-listed high capacity facilities is immediately effective; the FCC's transition rules do not permit CLECs to add new high-capacity loop UNEs pursuant to Section 251(c)(3) where the FCC has determined that no Section 251(c) unbundling requirement exists.⁸⁰ Verizon asserts that CLECs

80. *TRRO* at ¶ 195.

are no longer permitted to add dark fiber loops, either to serve new customers or for purposes of adding facilities to serve existing customers, and are likewise barred from ordering DS1 and DS3 loops from qualifying wire centers.

Further, Verizon states that no Vermont wire centers appear on Verizon's non-impaired list for DS1 or DS3 loops.⁸¹ Verizon reasons that the CLECs have no basis for claiming that they need the Board's intervention to verify the accuracy of Verizon's data, as Verizon has offered to provide its back-up data upon the CLEC's signing a non-disclosure agreement and has already provided these data to a number of CLECs.

Finally, Verizon opposes what it perceives as AT&T's attempt to freeze the wire center list into its contract. Verizon claims that AT&T is trying to allow itself to obtain as UNEs high capacity facilities that satisfy the FCC's non-impairment criteria, in contravention of the *TRRO* and the new FCC rules.

AT&T's Position:

AT&T argues that, even though the FCC's *TRRO* limits access to high-capacity loops when specific conditions exist, Verizon remains obligated to provide high-capacity loops under most circumstances. AT&T criticizes Verizon's proposed amendments, as they do not incorporate the *TRRO* requirements for access to unbundled DS1, DS3 and Dark Fiber Loops.

AT&T emphasizes that the FCC's new rules impose four new types of limitations on the use of unbundled high capacity loops: these involve exclusive use, geographic market, quantity and type. First, AT&T says the FCC revised its rules to specifically prohibit the use of all UNEs for the exclusive provision of mobile wireless services or interexchange services. Second, AT&T points out that the FCC determined that the combination of two criteria – the number of fiber-based collocators located at the wire center and the number of business lines within the wire center's service area – provided the best evidence of impairment. Third, relying on economic criteria, the FCC determined that requesting carriers are not impaired without access to new unbundled dark fiber loops, but it provided an eighteen-month transition period for the embedded base. And finally, AT&T states that the FCC's new rules impose a cap on the number of high-capacity loops an individual CLEC may obtain to any single building.

81. See <http://www22.verizon.com/wholesale/local/order>.

AT&T emphasizes the need for the Board to adopt a process for verifying that the wire centers Verizon has identified as satisfying the *TRRO*'s criteria for high capacity loops. AT&T echoes the observation by the FCC that the information regarding the number of fiber-based collocators and business lines served in any particular wire center resides only with the ILEC. AT&T believes that it would be more efficient for the Board to conduct a generic inquiry into the wire centers identified by Verizon as part of this proceeding. AT&T recommends that Verizon be required to provide both the Board and participating CLECs with the wire-center specific information on which it relied in making its assertions. AT&T asserts that the ICAs should reflect that, to the extent wire center designations change in the future, Verizon should remain obligated to provide for a transition.

In its Reply Brief, AT&T expresses concern over Verizon's proposals, as discussed in the response to Issue 3.

CCC's Position:

The CCC's *TRO* proposal would eliminate Verizon's obligation under Section 251 to provide unbundled OCn loops. In addition, the CCC's *TRRO* amendment would eliminate Verizon's obligation under Section 251 to offer new dark fiber loops and certain DS1 and DS3 loops in accordance with the wire center thresholds established by the *TRRO*.

The CCC argues that the Board should resolve whether MCI should be deemed affiliated with Verizon in calculating the number of unaffiliated fiber-based collocators as the CCC has proposed.

CCG's Position:

The CCG asserts that the amendment to the parties' agreements must incorporate the complete unbundling framework ordered by the FCC under the *TRO* and the *TRRO*, including the transition plan set forth for high capacity (i.e., DS1 and DS3) and dark fiber loop facilities that no longer are available under Section 251 of the 1996 Act. CCG further stresses that the amendment must state that Verizon remains obligated to provide to Vermont CLECs unbundled access to its high capacity loops, including DS3 loops and DS1 loops, at any location within the service area of a Verizon wire center for which carriers would be impaired, under the criteria set forth in the *TRRO*, without access to such facilities. Further, CCG maintains that the amendment

must clearly define "business lines" and "fiber-based collocators," as those terms are defined under the *TRRO*.

CCG argues that, to the extent that Verizon identifies one or more of its wire centers in Vermont that satisfy the non-impairment criteria for high capacity loops set forth in the *TRRO*, a comprehensive list of such Verizon wire centers must be included in the amendment. CCG believes that this list must be the result of a process whereby the parties are afforded access to and a reasonable opportunity to review and verify the data Verizon believes supports its initial identification of wire center locations where non-impairment exists for DS1 and DS3 loops. CCG asserts that the amendment must establish a process for review, on an annual basis, of the list of Verizon wire centers that satisfy the FCC's criteria for unbundling relief, and must provide for a transition period during which competitive carriers may convert existing customers to alternative service arrangements. CCG argues that Verizon should not be permitted to block "new adds" by competitive carriers, under Section 251(c)(3) of the 1996 Act, until such time as the *TRRO* is properly incorporated into the parties' agreements through the change of law processes set forth therein.

In its Reply Brief, the CCG argues again that Verizon's proposed ICA amendment fails to incorporate, or even address, the specific transitional framework, including rates, ordered by the FCC for high capacity (DS1 and DS3) and dark fiber loops that Verizon no longer is obligated to provide under Section 251(c)(3) of the 1996 Act.

Discussion and Proposal

Any revisions in unbundling terms or conditions, including the high-capacity loop issues of this section, if they are to be effectuated, must be adopted through amendments to the ICAs, and receive approval by the Board. The revisions, including the elimination of high capacity or dark fiber loops as Section 251 unbundled elements, are therefore not effective until the ICAs are revised in conformance with the Board's Order in this proceeding, and are properly signed by the appropriate parties.

DS1 Loops: The FCC determined that CLECs are impaired without access to DS1-capacity loops except in wire centers meeting certain criteria. In Vermont, there are no wire

centers that meet the threshold criteria such that the FCC would require a finding of impairment. Therefore, these high-capacity DS1 Loops will continue to be provided as Section 251 unbundled elements by Verizon.

DS3 Loops: The FCC determined that CLECs are impaired without access to DS3-capacity loops except wire centers meeting certain criteria. In Vermont, there are no wire centers that meet the threshold criteria such that the FCC would require a finding of impairment. Therefore, these high-capacity DS3 Loops will continue to be provided as Section 251 unbundled elements by Verizon.

In the TRRO, the FCC also determined that CLECs are not impaired without access to Dark Fiber Loops in any instance. Thus, those loops would no longer be offered as unbundled elements under Section 251. The FCC established an 18-month plan to govern transitions away from Dark Fiber Loops. Further, the FCC made clear that the transition plan applies only to the embedded customer base, and does not permit CLECs to add new Dark Fiber Loop UNEs.

In their filings in this proceeding, the CLECs made no assertions as to whether Dark Fiber Loops should be considered a part of the local loops that must be unbundled in response to Checklist Item No. 4 in the Section 271 commitments. In its Local Competition First Report and Order (at 380), the FCC identified the types of services that should be available as a part of unbundled loops, and this definition was ultimately included as a part of Checklist Item No. 4 for Section 271 approval in the Board's Docket No. 5900. Those services included 2-wire voice-grade analog loops, 4-wire voice-grade analog loops, and 2-wire and 4-wire loops conditioned to allow the CLECs to attach requisite equipment to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and DS1-level signals. This listing makes no mention of Dark Fiber Loops. I find, therefore, that Dark Fiber Loops are not required as an unbundled element under Section 271, and may be discontinued as unbundled elements under the Section 251 provisions of the TRRO.

The FCC adopted an 18-month transition plan for competing carriers to migrate from the use of unbundled Dark Fiber Loops. As I am recommending that the effective date of the ICA revisions will not be until the final signatories of each ICA, the transition period will not begin until that date, and will extend to a date 18 months from that date. During the transition period,

the pricing for transitional services will be as specified in the unbundling framework ordered by the FCC's *TRRO*, except as directly addressed in the Board's Order. Verizon must not unilaterally modify or disconnect any unbundled Dark Fiber Loop arrangement prior to the end of the transition period. The respective CLECs will initiate the orders for converting the UNE customers to alternative arrangements at any time before the end of the respective transitional period, and they will have the full transitional period to make those changes.

The FCC adopted a twelve-month transition plan for high-capacity DS1 and DS3 Loops. As discussed, there are no such loops in Verizon's Vermont service area, as none of the wire centers in Vermont meet the FCC's non-impairment criteria. While this reduces the immediacy of implementing the FCC's transition mechanism, it raises the longer-term question regarding any transition mechanism to be used in the event that, in the future, some of Vermont's wire centers meet the non-impairment criteria. In that instance, Verizon should be required to provide 60 days' notice to its wholesale customers that it believes one or more criteria have been surpassed, and should provide detailed supporting information and data to the Board and to those CLECs which have services that may be discontinued. Such notice should further indicate whether the unbundled elements that would be discontinued under Section 251 would be subject to provision under the Competitive Checklist No. 4 of the Section 271 requirements. The affected CLECs will be given an opportunity to review and contest Verizon's findings. If the Board finds that the Verizon proposal is valid with respect to that wire center, and if there is no continuing Section 271 requirement for unbundling, the CLECs will proceed into the 12-month transition period as specified by the FCC, after which the unbundled services will be eliminated.

Inasmuch as there are no wire centers in Vermont that currently meet the FCC's thresholds for non-impairment for DS1 or DS3 Loops, there is no reason to include a wire center listing, or a placeholder for a future listing, in the ICAs.

Further, there is no reason to pursue the CCC's argument at this time regarding whether MCI should be deemed affiliated with Verizon in calculating the number of unaffiliated fiber-based collocators. The more appropriate time to make that determination would be whenever a petition is filed with respect to a wire center that may someday meet the thresholds established by the *TRRO*.

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

Verizon's Position:

First, Verizon emphasizes that the *TRRO* does not require unbundling of entrance facilities, consistent with its finding in the *TRO* that CLECs are not impaired without access to them. Verizon describes the *TRRO* criteria for routes where CLECs may not obtain DS1, DS3 or dark fiber transport. As in the case of high-capacity loops, Verizon indicates that the FCC has imposed caps on the total number of circuits a CLEC may obtain along a given route: a maximum of 10 unbundled DS1 dedicated transport circuits on each route, or 12 unbundled DS3 dedicated transport circuits per route. Verizon discusses the 12-month transition plan for DS1 and DS3 transport elements, and the 18-month transition for dark fiber transport. Verizon declares that the FCC's transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs where no unbundling requirement exists. Verizon contends that the FCC's ban on new orders for de-listed transport facilities took effect on March 11, 2005, without the need for any contract amendments.

In its Reply Brief, Verizon reiterates its belief that the *TRRO* is clear: the FCC's rules "do not permit competitive LECs to add new dedicated transport UNEs pursuant to Section 251(c)(3) where the Commission determines that no Section 251(c) unbundling requirement exists."⁸²

Verizon also indicates in its Reply Brief that there are no high-capacity transport routes that qualify for unbundling relief in Vermont today. Verizon's list filed with the FCC indicates that there is only one wire center in Vermont which meets the "Tier 2" non-impairment criteria for high-capacity transport. Verizon states that it will provide any requesting CLEC with the back-up data showing that a particular wire center meets the FCC's non-impairment criteria, upon execution of an appropriate non-disclosure agreement. Verizon indicates that this option resolves AT&T's purported concern about verifying Verizon's wire center designations.

82. *TRRO* at ¶ 142.

AT&T's Position:

AT&T expresses concern over whether Verizon applied the threshold criteria properly, and urges the Board to ascertain that Verizon has correctly identified those wire centers in which it seeks to eliminate its obligation to provide access to dedicated transport. Further, AT&T insists that the Board must adopt a process for verifying the accuracy of the wire centers Verizon has identified as satisfying the *TRRO*'s criteria. Because the information regarding the number of fiber-based collocators and business lines served in any particular wire center resides only with Verizon, AT&T argues that it is appropriate for Verizon to provide the Board, AT&T and other CLECs the wire-center specific information on which it relied in making its certifications such that future changes, if any, may be verified.

In its Reply Brief, AT&T expresses concern over Verizon's proposals, as discussed in the response to Issue 3.

CCC's Position:

The CCC amendment would eliminate Verizon's obligation under Section 251 to provide unbundled OCn dedicated transport, and would eliminate certain DS1, DS3 and dark fiber transport routes that meet the criteria established by the *TRRO*. For the same reasons as set forth in Issue 4 above, the CCC urges the Board to (1) adopt CCC's proposed definition of "Affiliate" to be used in determining the number of fiber-based collocators and (2) require that the Agreement list the wire centers that meet the non-impairment thresholds.

The CCC amendment reflects the new FCC requirement that a CLEC is limited to 10 DS1 transport circuits on a route where DS3 transport is not available as a Section 251 UNE, and 12 DS3 transport circuits on any route. The CCC argues that two clarifications are needed for a reasonable implementation of this new standard. First, the CCC maintains that Verizon's proposed terms fail to include the language from the *TRRO* that applies this limitation only to wire centers where CLECs are deemed to be non-impaired without access to DS3 transport. (CCC's proposed *TRRO* Section 6.5.2.)

Second, the CCC states that the amendment should make clear that the DS1 transport limit does not apply to the transport portion of DS1 loop-transport EEL combinations. The CCC reasons that the FCC had intended that CLECs be able to obtain up to 10 DS1 loops per building,

but if the transport cap applied to EELs, CLECs would only be able to order 10 DSL loop combinations to all of the buildings served by a wire center, combined. Therefore, the CCC insists, DS1 EELs should be subject only to the 10-per-building restriction that applies to DS1 loops.

Finally, the CCC contends that the *TRO* clarified that ILECs must continue to provide Section 251(c)(2) interconnection facilities, which includes dedicated transport facilities used for interconnection, at TELRIC rates. Consistent with this clarification, the CCC proposes language that preserves its rights in this regard which the Board should adopt.

In its Reply Brief, the CCC demonstrates that the FCC designed the DS1 loop and transport caps to prevent CLECs from evading a non-impairment determination for DS3 UNEs. The CCC points out that neither the FCC nor Verizon has explained any reason to apply such caps where DS3s are also available as Section 251 UNEs.

CCG's Position:

CCG emphasizes that the amended agreements must incorporate the complete unbundling framework ordered under the *TRRO*, including the transition plan for dedicated interoffice transport facilities – including DS1, DS3 and dark fiber transport – that no longer are available under Section 251. CCG repeats the criteria established by the FCC for a determination of impairment, and thus, for competitive carriers' access to dedicated interoffice transport facilities, including DS1 and DS3 transport facilities, and argues that those criteria should be expressly incorporated into the terms and conditions of the amendment. CCG reiterates its position that the amendment must clearly define "business lines" and "fiber-based collocators," as those terms are defined under the *TRRO*.

As in the case of high-capacity loops, CCG argues that Verizon must provide a comprehensive list of wire centers in Vermont that satisfy the non-impairment criteria for high capacity transport, and that the parties must be afforded access to and a reasonable opportunity to review and verify the data Verizon believes supports its initial identification of wire centers. CCG again asserts that the amendment must establish a process for annual review of the list of any Verizon wire centers that satisfy the criteria for unbundling relief, and must provide for a transition period during which competitive carriers may convert existing customers to alternative

service arrangements. CCG argues that Verizon should not be permitted to block "new adds" by competitive carriers, under Section 251(c)(3) of the 1996 Act, until such time as the *TRRO* is properly incorporated into the parties' agreements through the change of law processes set forth therein.

In its Reply Brief, the CCG points out that the additional contract language proposed by Verizon fails to properly address the complete transitional framework established by the *TRRO* and the FCC's modified unbundling rules.

Discussion and Proposal

As discussed above, the requirements adopted by the FCC in the *TRO* and *TRRO* are not self-effectuating. In order for any revisions in unbundling terms or conditions, including the dedicated transport issues of this section, to be implemented, they must be adopted through Board-approved amendments to the ICAs. The revisions, including the elimination of dedicated transport services as Section 251 unbundled elements, are not effective until the ICAs are revised in conformance with the Board's Order in this proceeding, and are properly signed by the appropriate parties.

The FCC found in the *TRRO* that CLECs were impaired without access to UNE transport except in limited, specific circumstances, which primarily involve only the most urban markets. In that decision, the FCC adopted a route-specific and capacity-specific approach to unbundling dedicated transport. This approach establishes categories of routes, defined by the economic characteristics of the end-points. The issue of impairment is determined by both the actual deployment of competitive facilities and by the probability of future deployment, based on inferences drawn from the existing correlations between the number of business lines and fiber-based collocations in a given ILEC wire center.

The FCC articulated very clear "administrable and verifiable" criteria in the *TRRO* for determining where CLECs will have access to unbundled transport. The FCC rules identify three categories of ILEC wire centers:

- * Tier 1 wire centers are those that have either at least 4 fiber-based collocators or at least 38,000 business lines or both. Tier 1 also includes ILEC tandem

switching locations that have no line switching but are used as a point of traffic aggregation accessible by CLECs.

* Tier 2 wire centers are those wire centers that are not Tier 1 wire centers and have either at least 3 fiber-based collocators or at least 24,000 business lines or both.

* Tier 3 wire centers include all of the ILEC wire centers that do not fall within the first two categories.

The FCC's rules establish that DS1 dedicated transport is available between any pair of ILEC wire centers, unless both the wire centers at the ends of the route are Tier 1. In addition, each CLEC is limited to a maximum of 10 DS1 circuits on a single route. DS3 dedicated transport circuits are available between any pair of ILEC wire centers, unless both ends are categorized as Tier 1 or Tier 2. In the case of DS3 circuits, each CLEC is limited to a maximum of 12 DS3 circuits on a single route. Dark fiber transport facilities will continue to be available as a UNE on routes where a wire center on either or both ends of the route is classified as Tier 3.

Verizon has indicated that currently, there are no high-capacity transport routes that qualify for the removal of unbundling requirements in Vermont. Verizon has further indicated that there is only one wire center in Vermont which currently meets the "Tier 2" non-impairment criteria for high-capacity transport. Therefore, all high-capacity DS1 and DS3 Transport services, as well as Dark Fiber Transport will continue to be provided as Section 251 unbundled elements by Verizon.

As in the case of high-capacity unbundled loops, the FCC adopted a 12-month plan for competing carriers to transition DS1 and DS3 dedicated transport to alternative facilities or arrangement in those wire centers meeting the non-impairment criteria. Recognizing the unique characteristics of dark fiber, the FCC adopted a longer, eighteen-month transition period for dark fiber.

As discussed above, the fact that Vermont has no wire centers meeting the FCC's non-impairment criteria does reduce the immediacy of implementing the FCC's transition mechanism; however, it raises a forward-looking question regarding any transition mechanism to be used in the event that, in the future, some of Vermont's wire centers do meet such criteria.

I recommend that in that instance, Verizon should be required to provide 60 days' notice to its wholesale transport customers that it believes one or more criteria have been surpassed, and

should provide detailed supporting information and data to the Board and to those CLECs which have services that may be discontinued. Such notice should further indicate whether the unbundled elements that would be discontinued under Section 251 would be subject to provision under the Competitive Checklist No. 5 of the Section 271 requirements. The affected CLECs will be given an opportunity to review and contest Verizon's findings. If the Board finds that the Verizon proposal is valid with respect to the wire centers, and if there is no continuing Section 271 requirement for unbundling, the CLECs will proceed into the 12-month transition period (18-month for dark fiber) as specified by the FCC, after which the unbundled services will be eliminated. During any such transition period, the pricing for transitional services will be as specified in the unbundling framework ordered by the FCC's *TRRO*, except as directly addressed in the Board's Order. Verizon must not unilaterally modify or disconnect any unbundled transport arrangement prior to the end of the transition period. The respective CLEC will initiate the orders for converting the UNE services to alternative arrangements at any time before the end of the respective transitional period, and they will have the full transitional period to make those changes.

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

Verizon's Position:

Verizon posits that its right to re-price existing UNE arrangements that are no longer subject to unbundling under federal law is limited only by the FCC's transitional rules applicable to mass market switching and high-capacity loop and transport facilities. Verizon argues that, to the extent it continues to provide such facilities to CLECs, it will do so through access tariffs or through separate, commercial agreements that will be negotiated between the parties outside of the Section 252 process.

In its Reply Brief, Verizon asserts that when a particular network element or arrangement is no longer subject to unbundling under Section 251(c)(3), the FCC has held that the rates, terms, and conditions for such elements do not belong in interconnection agreements established

pursuant to the process set forth in Section 252. Verizon states that, to the extent it continues to provide such facilities to CLECs, it will do so through separate, commercial agreements that will be negotiated between the parties outside of the Section 252 process.

Verizon refutes CCG's claims that the *TRRO* forbids all termination or non-recurring charges related to de-listed UNEs. Further, Verizon disagrees with AT&T's characterization that Verizon may only re-price de-listed elements in accordance with the terms of the *TRRO*, and that Verizon should not "serve as judge and jury of what is required by federal law," and argues that the *TRRO* transitional periods and rates apply under Verizon's Amendments already, and Verizon will charge any transitional rates according to the FCC's directives.

AT&T's Position:

AT&T states that insofar as this question relates to the three elements affected by the *TRRO* – that is, mass market local circuit switching, high capacity loops, and dedicated interoffice transport – the short answer is that Verizon may only "re-price" de-listed elements in accordance with the terms of the *TRRO*. AT&T indicates that it has reflected in its updated amendment, that the rates currently prescribed in the interconnection agreement will remain in effect for these "transitional declassified network elements" until the ICAs have been amended pursuant to their change of law provisions, at which time a retroactive true-up back to March 11, 2005, would occur. AT&T opposes Verizon's proposed amendments that would allow Verizon to immediately, upon delisting, reprice existing arrangements without having to go through any change of law process. Further, AT&T insists that any other rate increases and new charges that Verizon may attempt to impose, several of which are scattered throughout Verizon's proposed amendments, should be subject to Board review in appropriate cost proceedings, and not be retroactive. In addition, AT&T stresses that Verizon should be prohibited from imposing any termination or non-recurring charges for the transition of "de-listed" UNEs to alternative arrangements.

CCC's Position:

The CCC asserts that, to the extent this Issue asks for an interpretation of what Verizon is permitted to do, it can relate only to the interpretation of the existing Agreement - which cannot be part of this arbitration proceeding. The CCC argues that Verizon's existing rights and

obligations are already defined by the existing change of law provisions of its Agreements; those obligations under the Agreement remain in effect until modified in accordance with the change of law provisions of the Agreement or until the Agreement is terminated. The CCC contends that Verizon has itself explained elsewhere that these *TRO* arbitration proceedings cannot address the interpretation of existing change of law terms:

Verizon strongly disagrees with [the] suggestion that this arbitration is the proper place to resolve disputes about interpretation of existing interconnection agreements. This consolidated arbitration is intended to address amendments to existing agreements, not to interpret those agreements.⁸³

The CCC then asserts, to the extent that this Issue asks what conditions should be established in the Amendment to govern what Verizon would be permitted to do in the future (once the Amended Agreement is adopted), the CCC's discussion in Issue 2 demonstrates that there is no basis in this proceeding to amend the existing change of law terms in the manner proposed by Verizon. Therefore, CCC contends that Verizon's ability to re-price existing arrangements which are no longer subject to unbundling under federal law should continue to be governed by the change of law terms of the parties' existing Agreements.

As to the UNEs that the *TRO* determined were no longer required under Section 251, CCC declares that its proposed Amendment would allow Verizon immediately to re-price Section 251 UNEs to the rates applicable to Section 271 Network Elements (except for certain provisions established by the FCC related to grandfathered line sharing). The CCC argues that while a CLEC could reasonably propose a transition term any time a UNE is eliminated, in the case of the UNEs affected by the *TRO*, the CCC has determined at least for their purposes that transition terms are not needed. However, the CCC asserts that a transition is necessary for the UNEs that would be eliminated on the basis of the *TRRO*, and that reasonable, clear transition rules have been established by the FCC. The CCC urges the Board to make clear that these transition terms apply only to UNEs that Verizon is no longer required to unbundle at cost-based

83. Letter from Elaine M. Duncan, Vice President and General Counsel - CA-NV-HI, Verizon, to Asst. Chief Administrative Law Judge Phillip Weismehl, California Public Utilities Commission, at 3 (dated March 22, 2005) (emphasis Verizon's).

rates under Section 271, state law, or any FCC merger conditions, and that have been designated for elimination in accordance with the contract terms to implement the *TRRO*.

Where the transition rates established by the *TRRO* should apply, the CCC proposes that the amendment adopted in this arbitration establish and state the specific rates as calculated using the FCC's formulas, rather than just parroting the FCC formulas in the agreement and leaving the parties open to future disputes as to the proper implementation of those formulas.

In its Reply Brief, the CCC states that the only apparent dispute between the parties on this issue at this time is whether the ICA should include rates and terms for the transitional network elements prescribed the *TRRO* and for Section 271 network elements. The CCC observes that once the Board resolves those issues, it appears that CCC and Verizon agree that no separate determination is needed on Issue 6.

CCG's Position:

CCG states that the amendment to the parties' ICAs must include rates, terms and conditions that reflect any change to Verizon's federal unbundling obligations brought about by the *TRO* and the *TRRO* for each network element that Verizon no longer is obligated to provide under Section 251 of the 1996 Act. CCG emphasizes that Verizon may re-price existing Section 251(c)(3) arrangements only in accordance with the incremental rate increases prescribed by the FCC, and set forth in the amendment. CCG stresses that Verizon is not permitted to impose any termination or other non-recurring charge in connection with any carrier's request to transition from a current arrangement that Verizon is no longer obligated to provide under Section 251 of the 1996 Act. Notwithstanding the above, Verizon is bound by the unbundling obligations set forth in its existing ICAs with Vermont CLECs, including the rates, terms and conditions for Section 251 unbundled network elements, until such time as those agreements are properly amended to incorporate the changes of law and FCC-mandated transition plans (including transition rates) established under the *TRRO*.

In its Reply Brief, the CCG urges the Board to adopt the sections of the ICA amendment proposed by the CCG, which address implementation of the transition rates required by the FCC, under the *TRRO*, specifically, Transition Period Pricing for unbundled local circuit switching, declassified DS1 and DS3 Loops, dark fiber loops, and high-capacity dedicated transport routes.

Further, the CCG argues that Verizon is not permitted to exclude from state commission-approved interconnection agreements, arising under Section 252 of the 1996 Act, rates, terms and conditions applicable to network elements that Verizon provides to competitive LECs, on an unbundled basis, consistent with its obligations under other Applicable Law, including Section 271 of the 1996 Act and Vermont state law.

Discussion and Proposal

Again, the requirements adopted by the FCC in the *TRO* and *TRRO* are not self-effectuating. In order for any re-pricing to be implemented, including the specific transition plans established by the FCC in the *TRRO*, it must be adopted through amendments to the ICAs, and receive approval by the Board. Any revisions in pricing, including the implementation of the specific transition plans established by the FCC in the *TRRO*, are not effective until the ICAs are revised in conformance with the Board's Order in this proceeding, and are properly signed by the appropriate parties.

There are two conditions under which rates for unbundled services may change as a result of the FCC's *TRO* and *TRRO* decisions. The first scenario involves services for which the FCC has determined that certain elements must no longer be provided under Section 251, but I am recommending that those elements must continue to be provided pursuant to Section 271, as in the case of local switching. The FCC discussed this scenario at great length in the *TRO*, stating at 652 that "we reaffirm that BOCs have an independent obligation, under Section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under Section 251, and to do so at just and reasonable rates." The FCC continues at paragraph 659, "[t]he question becomes whether BOCs are required to provide unbundled switching at total element long-run incremental cost ("TELRIC") rates pursuant to Section 271(c)(2)(B)(vi). In order to read the provisions so as not to create a conflict, we conclude that Section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under Section 251, but does not require TELRIC pricing." And the FCC concludes, at 663, "Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in Section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of Sections 201

and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act. Application of the just and reasonable and nondiscriminatory pricing standard of Sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements."

Second, there are elements which the FCC has determined must no longer be provided under Section 251, and there is no clear requirement under Section 271 that these elements must be provided on an unbundled basis. An example of this scenario is the elimination of the Dark Fiber Loop element under the unbundling requirements of Section 251. Under that scenario, the CLECs must seek alternative arrangements, either through tariffed services, long-term indefeasible-right-of-use (IRU) arrangements, or other commercial arrangements with incumbent or other competitive carriers. In some instances, including the Dark Fiber Loop example, the FCC has provided a framework for a transition period in the TRRO. As discussed above, the effective date of the ICA revisions will not be until the final signatories of each ICA, and subject to Board approval. The transition period(s) will not begin until that date, and will extend to a date twelve or eighteen months from the effective date, depending on the service in transition.

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

Verizon's Position:

Verizon has proposed that it may provide notice to CLECs that it will cease providing access to a network element as a UNE in advance of the date on which the facility shall become a Discontinued Facility as to new orders that the CLECs may place, so as to give effect to Verizon's right to reject such new orders immediately on that date. Verizon asserts that it is reasonable for their amendment to recognize that Verizon has already provided written notice to the CLECs of the discontinuation of the UNEs eliminated by the *TRO*. They state that the

purpose of a notice requirement is to give parties time to prepare for the transition away from a particular UNE.

In its Reply Brief, Verizon asserts that the *TRRO* did not address what notice might be required before discontinuance of UNEs that had already been eliminated by the *TRO*. With regard to UNEs de-listed by the *TRRO*, Verizon contends the FCC established both a firm no-new-add rule effective on March 11, 2005, and a specific transition rule requiring CLECs to work out the operational details necessary to convert existing arrangements by March 11, 2006, so there is no notice issue with respect to the UNEs de-listed in the *TRRO*. Further, Verizon opposes AT&T's argument that Verizon should be required to identify the specific circuits being discontinued in its notice. Verizon contends that once it provides notice that a particular UNE has been discontinued, individual parties can work out any details of implementation with regard to particular facilities, as directed by the FCC.

AT&T's Position:

AT&T answers, "No", and refers to its response to Issue 2. Additionally, AT&T argues that Verizon's notices should be required to be specific, identifying the specific circuits being discontinued.

CCC's Position:

CCC argues that, to the extent this Issue asks for an interpretation of Verizon's rights to implement the *TRO* or *TRRO*, Verizon's existing rights and obligations are already defined by the existing change of law provisions that are in interconnection agreements. As for future changes of law, CCC contends that Verizon can no longer be permitted to discontinue a UNE simply by notice. Therefore, CCC maintains that the Board should not adopt any contract terms arising from this issue.

In its Reply Brief, CCC argues that Verizon's proposal on this issue is an attempt to amend the change-of-law terms of the existing agreements. CCC contends that since nothing in the *TRO* or *TRRO* requires such a change, it is beyond the scope of this proceeding.

In any event, CCC argues, Verizon's argument is illogical. According to CCC, Verizon's Brief states that it needs to be able to deliver notices of discontinuances prior to the effective date of a change of law to avoid further delay in implementing changes to the federal unbundling

regulations. But, as CCC points out, Verizon has already provided its notices for UNEs eliminated by the *TRO*, so a change to the timing of notices would only affect future changes of law, and make no difference to whether there is "any further delay" in implementing the *TRO*.

CCG's Position:

CCG contends that the amendment to the parties' interconnection agreements must include rates, terms and conditions that reflect any change to Verizon's federal unbundling obligations brought about by the *TRO* and/or the *TRRO*, including, without limitation, the transition plan set forth in the *TRRO* for each network element that Verizon no longer is obligated to provide under Section 251 of the 1996 Act. CCG states that the *TRRO* makes clear that the FCC's unbundling determinations are not self-effectuating, and accordingly, that Verizon and Vermont CLECs may implement changes of law arising under the *TRO* and the *TRRO* only as directed by Section 252 of the 1996 Act, and consistent with the change of law processes set forth in carriers' individual interconnection agreements with Verizon. Furthermore, CCG asserts that the *TRRO* expressly requires that Verizon and Vermont CLECs negotiate in good faith regarding any rates, terms and conditions necessary to implement [the FCC's] rule changes. Therefore, CCG reasons that the *TRRO* expressly precludes any effort by Verizon to circumvent the change in law process set forth in its interconnection agreements with Vermont CLECs by providing notice of discontinuance of any network element in advance of the date on which such agreements are properly amended to reflect changes to the FCC's unbundling rules.

In its Reply Brief, CCG alleges that Verizon is seeking to overhaul the change of law processes set forth in the Board-approved ICAs between Verizon and the CLECs, and to bypass state commission authority under section 252 by unilaterally implementing future changes to the FCC's Section 251(c)(3) unbundling rules, upon notice to affected competitive LECs. CCG asserts that Verizon must not be permitted to end-run CLEC rights and state commission authority in this manner and the ICA amendment proposed by Verizon must be rejected by the Board.

Discussion and Proposal

All UNEs described in the *TRRO* must continue to be offered as Section 251 unbundled elements in Vermont at this time, with the exception of mass-market switching and dark fiber loops. Those two elements must continue to be offered as Section 271 unbundled elements in Vermont, but may not have to be offered at TELRIC rates (see Issue 6).

As a result, there may be re-pricing of mass-market switching and dark fiber loops at the conclusion of the transition period described by the FCC in the *TRRO*, but there should be no discontinuation of services.

The *TRRO* sets out different timetables for the embedded customers versus new customers with respect to the transition period for declassified UNEs that the FCC has found no longer need to be provisioned under Section 251. With regard to dedicated transport obligations (including dark fiber and entrance facilities), the *TRRO* states: "These [12 and 18-month] transition plans shall apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs pursuant to Section 251(c)(3) where the Commission determines that no Section 251(c) unbundling requirement exists."⁸⁴ The *TRRO* contains virtually identical language regarding a transition period for embedded customers served by high capacity loops, dark fiber loops, and unbundled local switching.⁸⁵

Verizon issued Notification Letters on October 2, 2003, to the other parties informing them that Section 251 UNEs not governed by the *TRRO*'s transition plan would no longer be provided, effective on October 2, 2003. For the UNEs involved here, the FCC established numerical impairment thresholds in the *TRO*. However, Verizon's Notification Letters provide no process for determining, or disputing, whether those thresholds have been reached.⁸⁶ Thus, it

84. *TRRO* at ¶ 142.

85. *See TRRO* at ¶¶ 195 and 227.

86. While the *TRRO* in ¶ 233 also provides that a CLEC may self-certify that it is entitled to unbundled access to certain UNEs, the CLECs have not relied on this provision. Upon such self-certification, the ILEC "must immediately process the request" and utilize ICA dispute resolution mechanisms if it questions the CLEC's self-certification.

is clear that Verizon cannot unilaterally implement the terms of its Notification Letters, unless and until it has exhausted the negotiation and arbitration process.

The Complainants have disputed the discontinuation with Verizon, but have not clearly shown here the effects so far of any discontinuances.

The parties also dispute the meaning of the FCC's rulings regarding the "embedded base" to which the transition of Section 251 UNEs applies. Importantly, even when it is otherwise undisputed that a "new" UNE need not be provided, as with dark fiber, it must still be provided to the CLEC's "embedded base" during the applicable transition period created in the *TRRO*. Complainants argue, however, that the "embedded base" refers to existing customers on that date, rather than to the specific UNEs those customers are using.

Verizon's contention, that the embedded base refers to UNEs and not customers, might be more persuasive had the FCC specified that on and after March 11, 2005, the embedded base that should benefit from the transition period was limited to existing lines and UNE arrangements. However, the FCC did not take such a limited approach in its rules. Rather, the FCC chose to require that an ILEC "shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve its *embedded base of end-user customers*." Rule 51.319(d)(2)(iii). (Emphasis added). The distinction between the embedded base of lines versus the embedded base of end-user customers is critical and recognizes that the needs during the transition period of an existing CLEC customer may well go beyond the level of service provided as of March 11, 2005. By focusing on the needs of the embedded base of end-user customers rather than on lines, the FCC has ensured that the transition period will not serve as a means for an ILEC to frustrate a CLEC's end-user customers by denying the CLEC's efforts to keep its customers satisfied. Accordingly, I conclude that the Vermont CLECs have correctly interpreted the intent of the *TRRO* with regard to move, add, and change orders necessary to meet the needs of its embedded customer base during the transition period established by the FCC.

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

Verizon's Position:

Verizon contends that if there are additional costs incurred in setting up an alternative service – such as a service order – Verizon may legitimately recover those costs. Verizon has not proposed rates for setting up alternative services at this point, but it reserves the right to do so in the future. Verizon asserts that the Board cannot lawfully constrain the parties' rights to negotiate prices in the context of non-section 251 commercial agreements, which are not subject to Section 252's negotiation and arbitration requirements.

In its reply comments, Verizon denies the CLEC arguments that when a UNE is disconnected because the FCC has changed the requirements of federal law, Verizon is the "cost causer." Verizon states that it must perform several steps when conducting a conversion; for example, it must process service orders, change the circuit identification to the appropriate format, move the circuit from the unbundled billing account to a special access billing account, and update the design and inventory records in the maintenance and engineering databases. Verizon asserts that the costs associated with these functions are all caused not by Verizon, but by the CLECs who chose to order services to which they were never legally entitled. Verizon argues that it cannot be forced to bear the costs of the FCC's erroneous unbundling decisions. Verizon states that it has not proposed in this arbitration to recover any new charges relating to service conversion, and the Amendment should include no language that would foreclose Verizon from doing so later.

AT&T's Position:

AT&T declares that the short answer to this question is a resounding "no." AT&T reasons that, prior to the issuance of the *TRO* and the FCC's decision on remand from the USTA II opinion, CLECs could access certain facilities as unbundled network elements, and in fact had been purchasing those UNEs from Verizon at TELRIC rates. To the extent the determinations made by the FCC change the terms of that access, AT&T opposes Verizon's insistence on the right to assess non-recurring charges on AT&T for the discontinuation of the eliminated UNE, or for the transition of that UNE to an "alternative arrangement," such as changing a UNE-P arrangement to resale. AT&T argues that there is no basis in the basic principles of "cost causation" for Verizon's approach. AT&T emphasizes that this is not a situation in which AT&T

has imposed any non-recurring costs on Verizon, but if anything, this is a situation in which Verizon is the cost-causer. AT&T reasons that the disconnection of a UNE arrangement utilized by AT&T that occurs as a result of Verizon's desire to eliminate that arrangement as a UNE is an activity that Verizon has initiated; it is certainly not AT&T's decision to disconnect the UNE.

AT&T further argues that it is unlikely that the transition of these facilities from UNEs to alternative arrangements will cause any additional costs at all. For example, in the case in which Verizon is switching the CLEC's UNE-P customers over to an "alternative" resale arrangement, no technical work is involved - the same loop, transport and switching facilities that were being used to provide UNE-P also would be used in this alternative arrangement. At most, AT&T argues that the only "work" would simply involve a billing change.

AT&T contends that the transition from UNEs to alternative arrangements thus should be governed by the same principles articulated by the FCC's rules for the conversion of wholesale services to UNEs. AT&T stresses that Verizon should be required to perform the conversions without adversely affecting the service quality enjoyed by the requesting telecommunications carrier's end-user, and that Verizon should not be able to impose any termination charges, disconnect fees, reconnect fees, or charges associated with establishing a service for the first time in connection with the conversion between existing arrangements and new arrangements.

CCC's Position:

CCC replies that Verizon should not be permitted to assess non-recurring charges, as such conversion charges are unlawful. CCC insists that the impropriety of such charges is particularly obvious where Verizon compels a CLEC to change a UNE arrangement to an alternate service and is therefore the cost causer. CCC reasons that it is not the CLEC's desire to disconnect the UNE; to the contrary, the CLEC would still utilize the UNE arrangement if Verizon agreed to make it available. Consequently, CCC argues, in the unlikely event that Verizon incurs any costs for conversions that have not already been recovered through the non-recurring charges that Verizon assessed when the CLEC first ordered the UNE, such costs should be borne by the cost causer, Verizon.

Further, CCC points out that Verizon should not incur any costs associated with converting a UNE to an alternative service, since the same loop and transport facilities will be

used to provide the alternative arrangement. At most, CCC argues that the only "work" would simply involve a billing change. Moreover, CCC contends that because non-recurring charges that Verizon assesses when it first provisions a UNE order generally recover the costs Verizon incurs when connecting and disconnecting the UNE arrangement, any costs Verizon does incur when it transitions a UNE arrangement to an alternative service (if any) have most likely already been recovered.

CCG's Position:

CCG asserts that the transition plans ordered by the FCC for unbundled dedicated transport, high capacity loops and mass market local switching, each prescribe the rates that Verizon may impose when a "no impairment" finding exists and the *TRRO* do not permit any additional charges, including non-recurring charges, for the disconnection of a "de-listed" UNE or the establishment of an alternative service arrangement.

CCG emphasizes that the cost of converting unbundled network elements to alternative arrangements, including arrangements made available by Verizon in order to comply with its obligations under Section 271, should be incurred by the "cost causer," i.e., Verizon.

In its Reply Brief, CCG reiterates that the Board should not permit Verizon to impose on competitive LECs nonrecurring charges for converting a UNE or combination of UNEs to an alternative service arrangement where, as here, Verizon is the "causer" of any additional costs incurred as the result of such conversions. CCG further asserts that Verizon has conceded it is unable to produce, at this time, cost studies supporting that nonrecurring charges for functions undertaken by Verizon to convert UNEs and combinations of UNEs to alternative service arrangements are a legitimate means of cost recovery for services that Verizon provides to CLECs. CCG therefore urges the Board to reject the contract language proposed by Verizon that would permit Verizon in the future to assess nonrecurring charges for converting UNEs or combinations of UNEs to alternative service arrangements.

Discussion and Proposal

Verizon should not be allowed to impose any termination charges, disconnect fees, reconnect fees, or charges associated with establishing a service for the first time in connection with the conversion between existing arrangements and new arrangements.

The FCC's Rule 47 C.F.R. Section 51.316(c), in discussing conversion of unbundled network elements or services, states:

"Except as agreed to by the parties, an incumbent LEC 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 an unbundled network element or combination of unbundled network elements."

I agree with AT&T's position that, prior to the issuance of the *TRO* and the FCC's decision on remand from the *USTA II* opinion, CLECs could access certain facilities as unbundled network elements, and had been purchasing those UNEs from Verizon at TELRIC rates. However, to the extent the determinations made by the FCC change the terms of that access, it is not reasonable to allow Verizon to assess non-recurring charges for the discontinuation of the eliminated UNE, or for the transition of that UNE to an "alternative arrangement," such as changing a UNE-P arrangement to resale.

Further, there is no foundation in the basic principles of "cost causation" for the use of non-recurring charges in this situation. In many instances, the conversion will consist of merely a billing change. Verizon's arguments regarding the recovery of their costs of converting the services ring hollow. First, as discussed above, Verizon is not required to discontinue the provision of UNE services to its competitors; it is Verizon's choice to do so when permitted by the rules of the FCC, the ICA, and the Board. Second, most TELRIC studies for non-recurring charges include costs of connecting and disconnecting services, as pointed out by the CLECs. To the extent Verizon were to be allowed to assess non-recurring charges for these conversions, the result might very well be a double-recovery of Verizon's costs.

Verizon has not proposed rates for setting up alternative services at this point, but it reserves the right to do so in the future. Verizon asserts that the Board cannot lawfully constrain the parties' rights to negotiate prices in the context of non-section 251 commercial agreements, which are not subject to Section 252's negotiation and arbitration requirements. While that may

be true with respect to commercial agreements, the real issue in this proceeding is the Board's authority under section 252. If Verizon wishes to propose changes to the ICAs addressing non-recurring rates for UNE conversions, the Board will address their proposals at that time.

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

The parties have proposed a large number of definitions that they contend are appropriate and reflect federal law. I will present a recommendation on each item contested in this proceeding, grouped as appropriate, followed by a discussion and summaries of comments by each party.

1. "Affiliate"

Recommendation:

I recommend that the Board decline to adopt the definition for the term "affiliate" submitted by the CLECs. The term "Affiliate" is defined sufficiently by the FCC's Rules. The proposals to change the FCC definition(s) submitted by the parties in this proceeding are designed to promote the interests of the submitting parties.

Discussion:

CCC has proposed the inclusion of the following definition of "Affiliate":

"Affiliate includes all entities that are affiliates as defined by and also includes any entities that have entered into a binding agreement that, if consummated, will result in their becoming affiliates as so defined. The term "Verizon" includes all Affiliates of Verizon."

This term is currently defined in 47 U.S.C. § 153 (1) and 47 U.S.C. § 53.3:

Affiliate. An affiliate is 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 part, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.

Verizon opposes the inclusion of the CLECs' definition, as it is to be used for purposes of counting the number of collocators in a wire center to include "carriers that have entered into merger and/or other consolidation agreements, or otherwise announced their intention to enter

into the same." Verizon states that this attempt to count Verizon and MCI (and SBC and AT&T) as a single entity because of their announced merger is contrary to law. Verizon argues that unless and until the Verizon/MCI merger closes, they are independent companies, and are required by law to conduct themselves as such. Verizon contends that Verizon and MCI are not affiliates under federal law, and that the CLECs cannot override that law in their contracts.

2. "Applicable Law"

Recommendation:

I recommend the Board accept the language proposed by AT&T. The implications of the definition of Applicable Law have been discussed at length in Section III above, and I find that the definition proposed by AT&T best encompasses my conclusions.

Discussion:

AT&T and CCG propose to define "Applicable Law" as:

Applicable Law. All laws, rules and regulations, including, but not limited to, the Act (including but not limited to 47 U.S.C. 251 and 47.U.S.C. 271), effective rules, regulations, decisions and orders of the FCC and the Board, and all orders and decisions of courts of competent jurisdiction.

Verizon argues that all of the CLECs' references to unbundling under anything other than Section 251(c)(3) and Part 51 are unlawful and must be rejected.

3. "Business Line"

Recommendation:

There is no need to add the definition of "Business Line" to the Amendment, as it currently resides in the federal rules. Even if the definition of "Business Line" were to be added, I see no need to add CCG's amended language to the FCC definition.

Discussion:

The term "Business Line" was added in the *TRRO* and is currently defined in 47 U.S.C. § 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 lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. 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 lines, (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."

CCG proposes to append the following language to the FCC's definition:

Business lines do not include (i) dedicated or shared transport; (ii) ISPs' transport facilities; (iii) lines used to serve subsidiaries or affiliates of the ILEC; (iv) data lines, or any portions of data lines, not connected to the end-office for the provision of switched voice services interconnected to the PSTN; (v) unused capacity on channelized high capacity loops; (vi) lines used for VoIP unless such facilities are switched at the wire center; and (vii) any lines not confirmed by the ILEC to conform to the above requirements. Verizon may not "round up" when calculating 64 Kbps equivalents for high capacity loops (e.g., a 144 Kbps service is equal to two business lines, not three). In addition, when calculating data speeds for purposes of determining 64 Kbps equivalents, an ILEC must use the lowest data speed associated with the line when sold to the customer, not a higher potential use or a higher one-way speed. For Centrex services, each 9 Centrex extensions shall be counted as a single Business Line.

Verizon argues that this proposed definition should not be included in the *TRO* Amendment and that CCG's modification should not be accepted.

4. "Call-Related Databases"

Recommendation:

I recommend that the definition proposed by Verizon should be adopted. Verizon's proposed definition includes the appropriate FCC definitional language without including self-serving policy language from the rule.

Discussion:

The FCC Rule 47 C.F.R. § 51.319(d)(4)(i)(B) and (B)(1) provide the following definition for "Call-Related Databases":

(B) Call-related databases. Call-related databases are defined as databases, other than operations support systems, that are used in signaling networks for billing and collection, or the transmission, routing, or other provision of a telecommunications service.

(1) Call-related databases include, but are not limited to, the calling name database, 911 database, E911 database, line information database, toll free calling database, advanced intelligent network databases, and downstream number portability databases by means of physical access at the signaling transfer point linked to the unbundled databases.

Verizon proposes the following definition for "Call-Related Databases":

"Call-Related Databases. Databases, other than operations support systems, that are used in signaling networks for billing and collection, or the transmission, routing, or other provision of a telecommunications service. Call-related databases include, but are not limited to, the calling name database, 911 database, E911 database, line information database, toll free calling database, advanced intelligent network databases, and downstream number portability databases."

CCG proposal is identical to Verizon's proposal for this term.

CCC argues that Verizon suggests a general, imprecise definition that could invite litigation, and proposes its own definition for "Call-Related Databases":

Call-Related Databases. The calling name database, line information database, toll free calling database, advanced intelligent network databases, and downstream number portability databases.

5. "Circuit Switch"

"Local Circuit Switching"

"Local Switching"

The discussions regarding the definitions for these terms are interrelated and can be examined together.

Recommendation:

The Board should not adopt any of the definitions submitted by the parties. The parties' proposed definitions do not track precisely with FCC rules. The terms "Circuit Switch," "Local Switching," and "Local Circuit Switching" are described and defined sufficiently by the FCC's

TRO, *TRRO*, and Rules. The proposals submitted by the parties in this proceeding appear, for the most part, designed to promote the interests of the submitting parties.

Discussion:

The CLECs all propose to define "Circuit Switch" as follows:

Circuit Switch. A device that performs, or has the capability of performing switching via circuit technology. The features, functions, and capabilities of the switch include the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks.

Verizon argues that the CLECs' switch and switching definitions and provisions are all intended to allow them to argue that packet switches are subject to unbundling obligations. Verizon contends that the FCC has never required unbundling of packet switches, and that the Board cannot approve language that is contrary to the FCC's rules. Verizon asserts that neither the *TRO* nor the *TRRO* changed the definition of circuit switches, so there is no need to consider a new definition in this proceeding intended to address changes in the FCC's unbundling rules.

The FCC's Rules define "Local Circuit Switching" (47 C.F.R. § 51.319(d)(1)) as follows:

- (i) Local circuit switching encompasses all line-side and trunk-side facilities, plus the features, functions, and capabilities of the switch. The features, functions, and capabilities of the switch shall include the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks.
- (ii) Local circuit switching includes all vertical features that the switch is capable of providing, including custom calling, custom local area signaling services features, and Centrex, as well as any technically feasible customized routing functions.

CCG's proposed definition of Local Circuit Switching states:

Local Circuit Switching is a function provided by a Circuit Switch or Packet Switch and encompasses all line-side and trunk-side facilities, plus the features, functions, and capabilities of the switch. Local circuit switching includes all vertical features that the switch is capable of providing, including customer calling, custom local area signaling services features, and Centrex, as well as any technically feasible customized routing functions. Specifically, this includes the line-side and trunk-side facilities associated with the line-side port on a circuit switch in Verizon's network, plus the features, functions, and capabilities of that switch, unbundled from loops and transmission facilities, including, but not limited to, (a) the line-side Port

(including but not limited to the capability to connect a Loop termination and a switch line card, telephone number assignment, dial tone, one primary directory listing, pre-subscription, and access to 911); (b) line and line group features (including but not limited to all vertical features and line blocking options that the switch and its associated deployed switch software are capable of providing that are provided to Verizon's local exchange service Customers served by that switch); (c) usage (including but not limited to the connection of lines to lines, lines to trunks, trunks to lines, and trunks to trunks); and (d) trunk features (including but not limited to the connection between the trunk termination and a trunk card). The term Local Switching does not include Tandem Switching."

Verizon argues, to the contrary, the FCC's Rule 51.319(d) makes clear that local circuit switching does include tandem switching. 47 C.F.R. § 51.319(d) states as follows:

(d) Local circuit switching. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to local circuit switching, including tandem switching, on an unbundled basis, in accordance with Section 251(c)(3) of the Act and this part and as set forth in paragraph (d) of this section.

Verizon proposes to define "Local Switching" as:

Local Switching. The line-side and trunk-side facilities associated with the line-side port, on a circuit switch in Verizon's network (as identified in the LERG), plus the features, functions, and capabilities of that switch, unbundled from loops and transmission facilities, including: (a) the line-side Port (including the capability to connect a Loop termination and a switch line card, telephone number assignment, dial tone, one primary directory listing, pre-subscription, and access to 911); (b) line and line group features (including all vertical features and line blocking options the switch and its associated deployed switch software are capable of providing that are provided to Verizon's local exchange service Customers served by that switch); (c) usage (including the connection of lines to lines, lines to trunks, trunks to lines, and trunks to trunks); and (d) trunk features (including the connection between the trunk termination and a trunk card).

Verizon asserts that the CLECs' definitions are designed to support their argument that local circuit switching may be provided by a packet switch.

6. "Combination"

Recommendation:

While the FCC provided discussion on the combination of UNEs in its *TRO* and *TRRO*, and established a rule (47 C.F.R. § 51.315) regarding such combinations, the FCC did not establish a definition for "Combination" in its rules. If the Board were to establish a definition for this somewhat generic term, interpretations of Amendment language in favor of, or against, specific parties could be skewed. I therefore recommend that the Board abstain from providing a definition in this instance, and let the Agreements stand on their own.

Discussion:

The CLECs' proposed definition of "Combination" is as follows:

Combination. The provision of unbundled Network Elements in combination with each other, including, but not limited to, the Loop and Switching Combinations and Shared Transport Combination (also known as Network Element Platform or UNE-P) and the Combination of Loops and Dedicated Transport (also known as an EEL).

Verizon asserts that neither the *TRO* nor the *TRRO* altered the definition of combinations, so there is no need for a new definition in the Amendment. In addition, Verizon opposes the CLECs' proposed definition as it cross-references other definitions that are themselves erroneous because they would permit continuation of de-listed UNEs under other than Section 251(c)(3) and the FCC's Rules. Verizon objects to the CLECs' proposals that would require Verizon to combine or commingle UNEs (even de-listed UNEs) under Section 271, stating that these provisions are inappropriate because they assume the continued availability of UNE-P, which the FCC eliminated in the *TRRO*.

7. "Commingling"

Recommendation:

I recommend that the Board decline to adopt any of the definitions of "Commingling" submitted by the parties. The proposals for the definition of "Commingling" submitted in this proceeding appear, for the most part, designed to promote the interests of the submitting parties, and do not track precisely with FCC rules.

Discussion:

In its *TRO* decision, the FCC added a definition of "Commingling" to 47 C.F.R. § 51.5, as follows:

Commingling. Commingling means the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services. Commingling means the act of commingling.

AT&T and CCG propose to define "Commingling" as:

[t]he connecting, attaching or otherwise linking of a Network Element, or a Combination of Network Elements, to one or more facilities or services that [the CLEC] has obtained at wholesale from Verizon pursuant to any other method other than unbundling under Section 251(c)(3) of the Act, or the combining of a Network Element, or a Combination of Network Elements, with one or more such facilities or services.

CCC proposes to define "Commingling" as:

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

CCC asserts that its proposed inclusion of commingling of Section 271 Network Elements is explained in its response to Issue 12.

Verizon contends that the CLECs' proposed commingling definitions are unlawful because they incorrectly suggest, explicitly or implicitly, that CLECs might be allowed to commingle UNEs with elements obtained under Section 271 or sources of law other than Section 251(c)(3) and the FCC's implementing rules. Verizon insists that the FCC, in its *TRO*, explicitly declined to require commingling under Section 271. Verizon argues that the Amendment cannot impose obligations that the FCC has specifically ruled do not exist, and that, therefore, the CLECs' language must be rejected.

8. "Conversion"

Recommendation:

I recommend that the Board not approve a definition for "conversion" in this instance, and let the Agreements stand on their own. While the FCC provided discussion on the conversion of UNEs in its *TRO* and *TRRO*, and established a rule (47 C.F.R. § 51.316) regarding such conversions, the FCC chose not to establish a definition for "Conversion" in its rules. If the Board were to establish a definition for this somewhat pedestrian term, interpretations of Amendment language in favor of, or against, specific parties could be skewed.

Discussion:

CCC proposes a new definition of "Conversion" as:

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

AT&T and CCG provide no similar proposals for this term.

Verizon maintains that CCC's proposed definition is improper in that it refers to Section 271, which is not pertinent to this proceeding. Verizon asserts that, to the extent a CLEC wishes to convert special access facilities (which are not covered by Section 252) to Section 271 elements (also not covered by Section 252), the conversion involves non-section-252 elements at all stages. Verizon contends that because such conversions are not subject to Section 252, they cannot be addressed in an interconnection agreement negotiated and arbitrated under that section.

9. "Dark Fiber Loop"

Recommendation:

I recommend that the Board decline to adopt AT&T's definition, because it goes beyond a definition by discussing interconnection policy and obligations. I recommend that the Board adopt Verizon's proposal for "Dark Fiber Loop."

Discussion:

As added by the *TRRO*, 47 C.F.R. §51.319(a)(6) states that:

Dark fiber is fiber within an existing fiber optic cable that has not yet been activated through optronics to render it capable of carrying communications services.

Verizon proposes a definition of "Dark Fiber Loop" as follows:

Dark Fiber Loop. Consists of fiber optic strand(s) in a Verizon fiber optic cable between Verizon's accessible terminal, such as the fiber distribution frame, or its functional equivalent, located within a Verizon wire center, and Verizon's accessible terminal located in Verizon's main termination point at an end user customer premises, such as a fiber patch panel, and that Verizon has not activated through connection to electronics that 'light' it and render it capable of carrying telecommunications services.

AT&T's proposed definition is that "Dark Fiber Loop":

Consists of fiber optic strand(s) in a Verizon fiber optic cable between Verizon's accessible terminal, such as the fiber distribution frame, or its functional equivalent, located within a Verizon wire center, and Verizon's accessible terminal located in Verizon's main termination point at an end user customer premises, such as a fiber patch panel, which fibers are "in place" or can be made spare and continuous via routine network modifications in Verizon's network and that Verizon has not yet activated through optronics that "light" it and render it capable of carrying communications services. It also includes strands of optical fiber existing in aerial, buried, or underground cables which may have lightwave repeater (regenerator or optical amplifier) equipment interspliced to it at appropriate distances, but which has no attached line terminating, multiplexing, or aggregation electronics.

Verizon notes that its proposed definition combines the FCC's definition of "loop" in 47 C.F.R. § 51.319(a)(1) with the definition for "dark fiber" in 47 C.F.R. § 51.319(a)(6)(i).

Verizon reasons that a definition of dark fiber loop is still appropriate in the *TRO* Amendment, even though the FCC has ruled that ILECs have no obligation to provide dark fiber loops, and has established an 18-month period for CLECs to transition away from these facilities. Verizon asserts that the principal problem with the CLECs' treatment of dark fiber loops is that none of them recognizes that Verizon's obligation to unbundle these facilities has been eliminated (except for the FCC-prescribed transition obligations that apply to the embedded base). CCC and CCG maintain that dark fiber loops may still be unbundled under state law or Section 271.

Verizon also observes that dark fiber loops are, likewise, not in AT&T's list of "Declassified Network Elements" and its definition does not recognize the FCC's finding that "requesting carriers are not impaired without access to unbundled dark fiber in any instance." Moreover, Verizon notes that AT&T's proposed definition adds language to Verizon's proposed definition of dark fiber that would make dark fiber loops available when fibers "can be made spare and continuous via routine network modifications." Verizon urges the Board to reject the CLECs' dark fiber loop proposed definitions, because they take the position that the Board may force Verizon to unbundle these facilities, despite the FCC's non-impairment ruling.

10. "Dark Fiber Transport"

Recommendation:

I recommend that the Board adopt AT&T's proposed definition for "Dark Fiber Transport." Of all the definitions submitted by the various parties, AT&T's proposal is the simplest and the most comparable to the FCC's definition.

Discussion:

As added by the *TRRO*, 47 C.F.R. §51.319(e)(2)(iv) states that:

dark fiber transport "consists of unactivated optical interoffice transmission facilities.

Verizon proposes to define "Dark Fiber Transport" as follows:

Dark Fiber Transport. An optical transmission facility within a LATA, that Verizon has not activated by attaching multiplexing, aggregation or other electronics, between Verizon switches (as defined in the LERG) or wire centers. Dark fiber facilities between (i) a Verizon wire center or switch and (ii) a switch or wire center of [the CLEC] or a third party are not Dark Fiber Transport.

Verizon's proposed definition emphasizes that dark fiber between a Verizon wire center or switch and a switch or wire center of another party are not Dark Fiber Transport. Verizon states that this is in accordance with the FCC's definition of dedicated transport to include only facilities between incumbent LEC wire centers or switches.

CCC argues that Verizon's proposal to amend the existing definition for this term adds unnecessary and unwarranted complexity to a complex-enough proceeding. CCC asserts that this

term is already defined in interconnection agreements, and that nothing in the *TRO* or *TRRO* alters the definition of this terms.

AT&T proposes to define "Dark Fiber Transport" as:

Unactivated optical interoffice transmission facilities that meet the criteria for Dedicated Transport [as defined by AT&T].

Verizon asserts that AT&T's proposed definition expressly and impermissibly contradicts the FCC's express limitation of dedicated transport to transmission facilities between ILEC wire centers or switches. AT&T's suggested definition does include facilities "between Verizon wire centers or switches and requesting telecommunications carriers' switches or wire centers, including DS1, DS3, and OCn-capacity level services as well as dark fiber, dedicated to a particular customer or carrier."

CCG's proposed definition of "Dark Fiber Transport" states as follows:

Un-activated optical transmission facilities within a LATA, without attached multiplexing, aggregation or other electronics, between any two designated Verizon switches or wire centers (including Verizon switching equipment located at CLEC's premises).

Verizon states that CCG's proposed definition appears to correctly recognize that facilities are only available between Verizon wire centers or switches, but adds language stating that a Verizon wire center or switch would include "Verizon switching equipment located at CLEC's premises." Verizon contends that this language is not in the FCC's definition and that there is, in any event, no need to waste time debating whether it belongs in the amendment, because Verizon has no switching equipment located at CLEC's premises.

11. "Declassified Network Elements"

"Discontinued Facility"

Recommendation:

I recommend that the Board decline to include Verizon's definition of "Discontinued Facility" in the Amendments. I also recommend that the Board decline to include in the Amendments the definition for "Declassified Network Elements" proposed by AT&T and CCG.

Verizon's proposed language is troublesome in that it attempts to wrap a good deal of policymaking into a single definition. If the FCC had established the overarching term of "Discontinued Facility," there might be added credence for that approach. However, this catch-all term is fraught with opportunity for misunderstanding and disputes.

The definitions provided by AT&T and CCG for "Declassified Network Elements" are similarly constrained by their specificity. Once again, the parties are attempting to consolidate a large group of policy determinations into one definitional term, presumably to shorten their references in other sections of the ICA. Inclusion of this term in the Amendments will reduce the clarity and understanding of the agreement rather than provide assistance and clarification.

Discussion:

AT&T's proposed Amendment establishes a definition for "Declassified Network Elements" that sets out a list of facilities or classes of facilities for which the *TRO* has made a general finding of non-impairment.

Declassified Network Elements are the following 47 U.S.C. 251(c)(3) facilities, whether as stand-alone facilities or combined with other facilities (except "d", below): (a) Entrance Facility; (b) Enterprise Switching; (c) OCn loops and OCn Dedicated Transport; (d) the stand-alone Feeder portion of a loop; (e) Line Sharing, subject to any transition period set forth in the *TRO*; (f) Call-Related Database, other than the 911 and E911 databases, that is not provisioned in connection with AT&T's use of Verizon's Mass Market Switching; (g) Signaling or Shared Transport that is provisioned in connection with AT&T's use of Verizon's Enterprise Switching.

AT&T argues that Verizon's competing definition of "Discontinued Facility" is inaccurate for several reasons; it inappropriately includes the four-line carve-out, entrance facilities that are part of a loop and items that are available under Section 252(c)(2) of the Act. Additionally, AT&T contends that Verizon's proposed definition has a very broad "catch-all" at the end of the paragraph, and allows for "rolling" declassification without pursuit of change of law proceedings if, in the future, Verizon determines that additional network elements should be declassified. AT&T points out that its proposed amendment also explicitly differentiates between the network elements declassified by the *TRO* and the "transitional declassified network elements" established in the *TRRO*.

CCG's proposed definition of "Declassified Network Elements" states:

Any facility that Verizon was obligated to provide to CLEC on an unbundled basis pursuant to the Agreement or a Verizon tariff or SGAT, but which, except as otherwise provided in Section 3.9 below, Verizon is no longer obligated to provide on an unbundled basis under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51. Declassified Network Elements include the following: (a) Enterprise Switching; (b) Mass Market Switching; (c) OCn Loops and OCn Dedicated Transport; (d) High Capacity Loops (but only to the extent service eligibility criteria have not been met as further described in Section 3.3.1); (e) DS1 and DS3 Dedicated Transport (but only to the extent service eligibility criteria have not been met as further described in Section 3.6.1); (f) the Feeder portion of a Loop; (g) Packet Switching; (h) Entrance Facilities; and (i) Dark Fiber Loops. The Declassified Network Elements as contemplated under this Section do not impact any separate obligations of Verizon to provide such Network Elements under other applicable state or federal law, including 47 U.S.C. § 271.

Verizon does not propose a definition for "Declassified Network Elements," opting instead to propose a definition for "Discontinued Facility." Verizon complains that AT&T's proposed definition of Declassified Network Elements limits the definition to the network facilities that the FCC declassified as UNEs in the *TRO*, and thereby argues for a definition that would include as yet unidentified facilities that might be declassified by the FCC at some point in the future. Verizon states that it proposes to define a "Discontinued Facility" as one that Verizon has provided as a UNE, but that is no longer subject to an unbundling requirement under the "Federal Unbundling Rules."

Discontinued Facility. Any facility that Verizon, at any time, has provided or offered to provide to ***CLEC Acronym TXT*** on an unbundled basis pursuant to the Federal Unbundling Rules (whether under the Agreement, a Verizon tariff, or a Verizon SGAT), but which by operation of law has ceased or ceases to be subject to an unbundling requirement under the Federal Unbundling Rules. By way of example and not by way of limitation, Discontinued Facilities include the following, whether as stand-alone facilities or combined with other facilities: (a) any Entrance Facility; (b) Enterprise Switching; (c) Mass Market Switching; (d) Four-Line Carve Out Switching; (e) OCn Loops and OCn Dedicated Transport; (f) DS1 Loops or DS3 Loops out of any wire center at which the Federal Unbundling Rules do not require Verizon to provide ***CLEC Acronym TXT*** with unbundled access to such Loops; (g) Dark Fiber Loops; (h) any DS1 Loop or DS3 Loop that exceeds the maximum number of such Loops that the Federal Unbundling Rules require Verizon to provide to ***CLEC Acronym TXT***

on an unbundled basis at a particular building location; (i) DS1 Dedicated Transport, DS3 Dedicated Transport, or Dark Fiber Transport on any route as to which the Federal Unbundling Rules do not require Verizon to provide ***CLEC Acronym TXT*** with unbundled access to such Transport; (j) any DS1 Dedicated Transport circuit or DS3 Dedicated Transport circuit that exceeds the number of such circuits that the Federal Unbundling Rules require Verizon to provide to ***CLEC Acronym TXT*** on an unbundled basis on a particular route; (k) the Feeder portion of a Loop; (l) Line Sharing; (m) any Call-Related Database, other than the 911 and E911 databases; (n) Signaling; (o) Shared Transport; (p) FTTP Loops (lit or unlit); (q) Hybrid Loops (subject to exceptions for TDM and narrowband services (i.e., equivalent to DS0 capacity)); and (r) any other facility or class of facilities as to which the FCC has not made a finding of impairment that remains effective, or as to which the FCC makes (or has made) a finding of nonimpairment.

Verizon asserts that if it its unbundling obligations to federal law, it will ensure that its contracts implement federal law, without the need for protracted and expensive multi-party proceedings like this one. Verizon argues that the AT&T and CCG proposed definitions eviscerate the definition of "Discontinued Facility" by limiting it to certain network elements delisted in the *TRO* and by pointing to potential sources of unbundling obligations other than Section 251(c)(3) and 47 C.F.R. Part 51, including state law, Section 271, and undefined "Applicable Law."

AT&T contends that Verizon's proposed definition of Discontinued Facility is inaccurate for several reasons. First, AT&T argues that Verizon's proposed definition inappropriately includes the four-line carve out, entrance facilities that are part of a loop, and items that are available under Section 252(c)(2) of the Act. Additionally, AT&T objects to the very broad "catch-all" at the end of the paragraph, and the fact that the proposed definition allows for "rolling" declassification without pursuit of change of law proceedings in the future. AT&T claims that its revised amendment properly captures the current state of unbundling, and leaves to the parties' interconnection agreements the process for changing the treatment of network elements that may be declassified in the future, if any.

CCC argues that Verizon's proposal for "Discontinued Facility" should be rejected in favor of CCC's more specific language defining each of the specific UNEs that are no longer

required under Section 251. CCC insists that Verizon's one-size-fits all definition of this term could lead to confusion and disputes.

12. "Dedicated Transport"

Recommendation:

I recommend that the Board refrain from adding to the Amendments a definition of "Dedicated Transport" to the Amendment, because it currently resides in the federal rules.

Discussion:

As added by the *TRRO*, 47 C.F.R. §51.319(e)(1) states the following:

For purposes of this Section, dedicated transport includes incumbent LEC transmission facilities between wire centers or switches owned by incumbent LECs, or between wire centers or switches owned by incumbent LECs and switches owned by requesting telecommunications carriers, including, but not limited to, DS1-, DS3-, and OCn-capacity level services, as well as dark fiber, dedicated to a particular customer or carrier.

Verizon proposes to define "Dedicated Transport" as follows:

Dedicated Transport. A DS1 or DS3 transmission facility between Verizon switches (as identified in the LERG) or wire centers, within a LATA, that is dedicated to a particular end user or carrier. Transmission facilities or services provided between (i) a Verizon wire center or switch and (ii) a switch or wire center of ***CLEC Acronym TXT*** or a third party are not Dedicated Transport.

AT&T's proposed language closely tracks the definition of "dedicated transport" promulgated by the FCC in accordance with the new unbundling requirements set forth in Section 51.319(e):

Dedicated Transport includes Verizon transmission facilities between Verizon switches or wire centers, (including Verizon switching equipment located at AT&T wire centers), or between Verizon wire centers or switches and requesting telecommunications carriers' switches or wire centers, including DS1-, DS3-, and OCn-capacity level services, as well as dark fiber, dedicated to a particular customer or carrier.

Verizon contends that, because dedicated transport encompasses dark fiber transport, the CLECs' dedicated transport definitions present the same problems as their dark fiber transport definitions, and they must be rejected. Verizon asserts that the definitions of AT&T and CCC

would still require Verizon to unbundle "OCn-capacity level services," even though the FCC in the *TRO* eliminated all unbundling of OCn transport.

CCG's proposed definition of "Dedicated Transport" states:

Transmission facilities, within a LATA, between Verizon switches or wire centers, (including Verizon switching equipment located at CLEC's premises), within a LATA, that are dedicated to a particular end user or carrier.

CCC puts forward a definition of "Dedicated Transport" which states:

Dedicated Transport includes Verizon transmission facilities between wire centers or switches owned by Verizon, or between wire centers or switches owned by Verizon and switches owned by requesting telecommunications carriers, including, but not limited to, DS1-, DS3-, and OCn-capacity level transmission facilities, as well as dark fiber, dedicated to a particular customer or carrier.

CCC contends that the *TRRO* did change the definition of Dedicated Transport, but while CCC's proposed definition is identical to the FCC's definition of dedicated transport, Verizon's definition is completely different from and would unduly narrow the FCC's definition.

13. "Dedicated Transport Route"

"Route"

Recommendation:

I recommend that the Board reject AT&T's proposed definition for "Route", because the term is extremely general for any definition. However, I recommend that the Board approve the language proposed by AT&T for the definition of "Dedicated Transport Route."

Discussion:

FCC Rule 47 C.F.R. § 51.319(e) includes a definition of "Route" within its description of dedicated transport:

(e) Dedicated transport. *** A "route" is a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches. A route between two points (e.g., wire center or switch "A" and wire center or switch "Z") may pass through one or more intermediate wire centers or switches (e.g., wire center or switch "X"). Transmission paths between identical end points (e.g., wire center or switch

"A" and wire center or switch "Z") are the same "route," irrespective of whether they pass through the same intermediate wire centers or switches, if any.

CCC and CCG propose a definition of "Dedicated Transport Route" that tracks closely with the FCC's definition, with the exception of using "Verizon" rather than "incumbent LEC."

AT&T proposes virtually the same definition for "Route," rather than "Dedicated Transport Route."

Verizon contends that the FCC has already defined the term "Route", so there is no need to add the same language into the ICAs and freeze into the contract a definition that the FCC may later change. Verizon argues that its amendment already captures the FCC's definition without freezing the exact text of the current regulation.

14. "DS1 Dedicated Transport"

"DS3 Dedicated Transport"

Recommendation:

I recommend that the Board decline to add definitions of "DS1 Dedicated Transport" or "DS3 Dedicated Transport" to the Amendments, because those definitions currently reside in the federal rules.

Discussion:

The CLECs propose a definition for DS1 Dedicated Transport which states: "Dedicated Transport having a total digital signal rate of 1.544 Mbps." Further, they provide a definition for DS3 Dedicated Transport which states: "Dedicated Transport having a total digital signal rate of 44.736 Mbps."

As adopted through the *TRRO*, 47 C.F.R. § 51.319(e)(2)(ii) includes the following language:

Dedicated DS1 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 1.544 megabytes per second and are dedicated to a particular customer or carrier.

Also adopted through the *TRRO*, 47 C.F.R. § 51.319(e)(2)(iii) includes the following language:

Dedicated DS3 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 44.736 megabytes per second and are dedicated to a particular customer or carrier.

15. "DS1 Loop" and "DS3 Loop"

Recommendation:

I recommend that the Board decline to add these definitions to the parties' ICAs, as they are clearly and adequately spelled out in the FCC's Rules. Further elaboration should not be included with definitions, but should more reasonably be left to other portions of the agreements. Some of the proposals submitted with respect to this term appear, for the most part, designed to promote the interests of the submitting parties. For instance, Verizon's proposal to link its proposed definitions to its own technical reference documents does not give the Agreement the transparency it should be afforded. Likewise, AT&T's attempt to link its proposed definition to its arguments regarding routine network modifications should not be allowed. If the parties wish to add definitions for these terms they should craft definitions that track precisely with FCC rules.

Discussion:

As added by the *TRRO*, 47 C.F.R. §51.319(a)(4)(i) states that 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.

Also, as added by the *TRRO*, 47 C.F.R. §51.319(a)(5)(i) states that a:

DS3 loop is a digital local loop having a total digital signal speed of 44.736 megabytes per second.

Verizon proposes to define "DS1 Loop" as follows:

DS1 Loop. A digital transmission channel, between the main distribution frame (or its equivalent) in an end user's serving wire center and the demarcation point at the end user customer's premises, suitable for the transport of 1.544 Mbps digital signals. This loop type is more fully described in Verizon TR 72575, as revised from time to time. A DS1 Loop requires the electronics necessary to provide the DS1 transmission rate. DS1 Loops are sometimes also known as DS1 'Links.'

Similarly, Verizon submits a definition of "DS3 Loop" as follows:

DS3 Loop. A digital transmission channel, between the main distribution frame (or its equivalent) in an end user's serving wire center and the demarcation point at the end user customer's premises, suitable for the transport of isochronous bipolar serial data at a rate of 44.736 Mbps (the equivalent of 28 DS1 channels). This loop type is more fully described in Verizon TR 72575, as revised from time to time. A DS3 Loop requires the electronics necessary to provide the DS3 transmission rate. DS3 Loops are sometimes also known as DS3 'Links.'

CCC objects to Verizon's proposed definitions of DS1 and DS3 Loop, asserting that the definitions should not include references to Verizon's internal technical documents.

AT&T's proposed definitions of these terms basically track Verizon's, but with one important modification. AT&T seeks to define both DS1 and DS3 loops as "including any necessary Routine Network Modifications." For a DS1 Loop, AT&T proposes:

A digital transmission channel, including any necessary Routine Network Modifications, between the main distribution frame (or its equivalent) in an end user's serving wire center and the demarcation point at the end user customer's premises, suitable for the transport of 1.544 Mbps digital signals. A DS1 Loop includes the electronics necessary to provide the DS1 transmission rate.

For a DS3 Loop, AT&T proposes:

A digital transmission channel, including any necessary Routine Network Modifications, between the main distribution frame (or its equivalent) in an end user's serving wire center and the demarcation point at the end user customer's premises, suitable for the transport of isochronous bipolar serial data at a rate of 44.736 Mbps (the equivalent of 28 DS1 channels). A DS3 Loop includes the electronics necessary to provide the DS3 transmission rate.

CCC objects to Verizon's proposed definitions of DS1 and DS3 Loop, asserting that the definitions should not include references to Verizon's internal technical documents.

CCG's proposed definitions state that a DS1 Loop is a:

digital transmission channel suitable for the transport of 1.544 Mbps digital signals. A DS1 Loop includes the electronics necessary to provide the DS1 transmission rate . . .

and that a DS3 Loop is a:

digital transmission channel suitable for the transport of isochronous bipolar serial data at a rate of 44.736 Mbps (the equivalent of 28 DS1 channels). A DS3 Loop includes the electronics necessary to provide the DS3 transmission rate.

CCC asserts that it is not necessary to define DS1 and DS3 Loops because they are already defined in the Agreements and there has been no change of law with respect to their definition.

16. "Enterprise Customer"

CCC's proposed definition for "Enterprise Customer" is in its Initial Brief. In its Reply Brief, CCC withdrew its request to define "Enterprise Customer," as the term is no longer needed to implement the terms of any party's proposal.

17. "Enterprise Switching"

Recommendation:

The establishment of this definition will not serve to avoid disagreements on the implementation of the *TRO* and *TRRO*. However, the adoption of either the definition provided by Verizon, AT&T, or CCG is acceptable.

Discussion:

Verizon, AT&T and CCG propose essentially the same definition for "Enterprise Switching," as follows:

Enterprise Switching. Local Switching or Tandem Switching that, if provided to [a CLEC], would be used for the purpose of serving [the CLEC's] customers using DS1 or above capacity loops.

Verizon argues that enterprise switching was de-listed in the *TRO*, as the FCC issued a national finding that "competitors are not impaired with respect to the DS1 enterprise customers that are served using loops at the DS1 capacity and above." Verizon states that it gave notice of the discontinuation of enterprise switching in May 2004, and that this element was discontinued for most CLECs last August 2004 (that is, the CLECs with clear contract language permitting discontinuation without an amendment). Verizon states that a failure to distinguish between

enterprise switching and mass-market switching would incorrectly subject enterprise switching to the FCC's transition period which was imposed for mass-market switching in the *TRRO*.

CCC argues that this definition is not relevant after the adoption of the *TRRO*, which explicitly decided that it was no longer necessary to draw the line between the enterprise and mass markets with respect to unbundled switching.

18. "Entrance Facility"

Recommendation:

The term "Entrance Facility" is described and defined adequately by the FCC's *TRRO* and Rules. Therefore, I recommend that the Board need not approve a definition of this term.

Discussion:

In the *TRRO*, the FCC defined entrance facilities as "the transmission facilities that connect competitive LEC networks with incumbent LEC networks," and adopted Rule 47 C.F.R. § 51.319(e)(2)(i) which provides that an ILEC "is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of ILEC wire centers."

Verizon proposes to define "Entrance Facility" as follows:

Entrance Facility. A transmission facility (lit or unlit) or service provided between (i) a Verizon wire center or switch and (ii) a switch or wire center of [the CLEC] or a third party.

Verizon asserts that its definition is consistent with the FCC's determination that an ILEC is not obligated to provide a CLEC with unbundled access to dedicated transport that does not connect a pair of ILEC wire centers.

AT&T agrees with Verizon's proposed definition, but then seeks to add the limitation that entrance facilities do not include "facilities used for interconnection or reciprocal compensation purposes provided pursuant to 47 U.S.C. § 251(c)(2)." CCC and CCG take the same approach, but their proposals refer more generally to interconnection facilities under Section 251(c)(2).

Verizon argues that the ICAs should not confuse the definition of entrance facilities with the obligation to provide interconnection facilities at cost-based rates, and states that the CLECs' additions are inappropriate in this proceeding. Further, Verizon contends that the CLECs' treatment of entrance facilities in their Amendments also violate the *TRRO* because it would

subject entrance facilities to the FCC's transition periods for the embedded base of de-listed UNEs. Verizon notes that the FCC stated, "We find no justification in the record for making entrance facilities available on a transitional basis."

19. "Feeder"

Recommendation:

I recommend that the Board approve the parties' proposed definition for the term "Feeder."

Discussion:

The parties have all proposed the same definition for "Feeder," as follows:

The fiber optic cable (lit or unlit) or metallic portion of a loop between a serving wire center and a remote terminal (if present) or feeder/distribution interface (if no remote terminal is present).

20. "Fiber-Based Collocator"

Recommendation:

The term "Fiber-Based Collocator" is described and defined sufficiently by the FCC's *TRRO* and Rules. CCG's proposal is clearly designed to promote its policy interests with respect to the affiliate/merger issue. I recommend that the Board accept the definition submitted by AT&T and CCC, because it tracks closely with FCC rules.

Discussion:

The FCC adopted a definition of "Fiber-Based Collocator" in 47 C.F.R. § 51.5. as a part of its decision in 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.

AT&T and CCC have proposed versions almost identical to the FCC's Rule, with the exception of substituting "Verizon" for "incumbent LEC."

CCG has proposed a definition for "Fiber Based Collocator", starting with the FCC's language, but with significant modification:

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 herein. 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 definition: (i) the term affiliate is defined by 47 U.S.C. § 153(1) and any relevant interpretation thereof; (ii) carriers that have entered into merger and/or other consolidation agreements, or otherwise announced their intention to enter into the same, will be treated as affiliates and therefore as one collocator; provided, however, in the case one of the parties to such merger or consolidation arrangement is Verizon, then the other party's collocation arrangement shall not be counted in the Fiber-based Collocation determination; (iii) a Comparable Transmission Facility means, at a minimum, the provision of transmission capacity equivalent to fiber-optic cable; (iv) the network of a Fiber-based Collocator may only be counted once in making a determination of the number of Fiber-based Collocators, notwithstanding that such single Fiber-based Collocator leases its facilities to other collocators in a single wire center; provided, however, that a collocating carrier's dark fiber leased from an unaffiliated carrier may only be counted as a separate fiber-optic cable from the unaffiliated carrier's fiber if the collocating carrier obtains this dark fiber on an IRU basis."

Verizon responds that there is no need for a contract definition of "fiber-based collocator," and that the CLECs include this term only to advance their position that the Board should establish a process to identify Verizon wire centers that meet the FCC's non-impairment criteria. Verizon further opposes some CLECs' attempt to define the term "affiliate" for purposes

of counting the number of collocators in a wire center to include "carriers that have entered into merger and/or other consolidation agreements, or otherwise announced their intention to enter into the same."

21. "FTTP Loop" "FTTH Loop" "FTTC Loop"

Recommendation:

I recommend that the Board decline to adopt Verizon's consolidated definition of "Fiber-to-the-Premises (FTTP)". In conforming the parties' ICAs to the decisions made in the *TRO* and *TRRO*, it is not reasonable to adopt yet another definition for a complex issue describing the fiber in the loop scenarios. While Verizon contends that it makes sense to consolidate the two separate concepts of FTTH ("pure" fiber network) and FTTC (hybrid loop network) into one definition (FTTP), that new term has not been recognized or discussed by the FCC in its orders, and has not been incorporated in any way into the federal rules.

The FCC's Rules 47 C.F.R. § 51.319(a)(3)(i)(A) and (B) have been revised within the past several months as a result of the *TRO*, *TRRO*, and the FTTC proceedings. These definitions of FTTH and FTTC that have been recently examined by the FCC should be incorporated into the parties' ICAs, with related language modified to reflect the addition.

Discussion:

The FCC has explicitly defined "Fiber-to-the-Home (FTTH) Loops" in FCC Rule 47 C.F.R. § 51.319(a)(3)(i)(A):

Fiber-to-the-home loops. A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, serving an end user's customer premises or, in the case of predominantly residential multiple dwelling units (MDUs), a fiber optic cable, whether dark or lit, that extends to the multiunit premises' minimum point of entry (MPOE).

Further, the FCC has explicitly defined "Fiber-to-the-Curb (FTTC) Loops" in FCC Rule 47 C.F.R. § 51.319(a)(3)(i)(B):

Fiber-to-the-curb loops. A fiber-to-the-curb loop is a local loop consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises or, in the case of predominantly residential MDUs, not more than 500 feet from the MDU's MPOE. The fiber optic cable in a fiber-to-the-curb loop must connect to a copper distribution

plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premises.

In this proceeding, Verizon has proposed a definition for an "FTTP Loop" as:

FTTP Loop. A Loop consisting entirely of fiber optic cable, whether dark or lit, that extends from the main distribution frame (or its equivalent) in an end user's serving wire center to the demarcation point at an end user's customer premises or to a serving area interface at which the fiber optic cable connects to copper or coaxial distribution facilities that extend to the end user's customer premises demarcation point, provided that all copper or coaxial distribution facilities extending from such serving area interface are not more than 500 feet from the demarcation point at the respective end users' customer premises; provided, however, that in the case of predominantly residential multiple dwelling units (MDUs), and FTTP Loop is a loop consisting entirely of fiber optic cable, whether dark or lit, that extends from the main distribution frame (or its equivalent) in the wire center that serves the multiunit premises: (a) to or beyond the multiunit premises' minimum point of entry (MPOE) as defined in 47 C.F.R. § 68.105, or (b) to a serving area interface at which the fiber optic cable connects to copper or coaxial distribution facilities that extend to or beyond the multiunit premises' MPOE, provided that all copper or coaxial distribution facilities extending from such serving area interface are not more than 500 feet of the MPOE at the multiunit premises.

Verizon asserts that the *TRO* provided that Verizon need not unbundle a loop consisting entirely of fiber in "greenfield" situations.⁸⁷ Verizon points out two additional clarifications that have been made to that Section, the most important of which ruled that a fiber loop need not reach all the way to the customer premises (or to the MPOE in the case of an MDU) to qualify for the FTTP exemption from unbundling. Verizon indicates that fiber loops meeting this definition are sometimes referred to as "fiber-to-the-curb" or "FTTC," but, for the sake of simplicity, Verizon's amendment uses only the term "FTTP Loop." Further, Verizon states that the result of the FCC's recent decisions is that FTTP loops (which are packet-based and contain no TDM capability) are not required to be unbundled to any type of location (regardless whether the location is characterized as mass market, enterprise, residential, business, or otherwise),

87. Verizon notes that Section 51.319(a)(3)(i) as originally attached to the *TRO* spoke in terms of fiber loops that are deployed to a "residential unit," but this was subsequently changed to refer to "end user customer premises."

whether dark or lit. Thus, Verizon argues that the CLECs are wrong to the extent that their amendments suggest that a fiber-only loop must be unbundled if it is not used for purposes of serving a "mass-market customer."

Verizon opposes AT&T's proposal to include a clause noting that "FTTH Loops do not include such intermediate fiber-in-the-loop architectures as fiber-to-the-curb (FTTC), fiber-to-the-node (FTTN), and fiber-to-the-building (FTTB)." Verizon argues that the FCC has explicitly held that "fiber-to-the-curb" architectures are exempt from unbundling requirements, and the current version of rule 51.319 classifies "fiber-to-the-curb" alongside "fiber-to-the-home." Verizon contends that, because there is no distinction between the two types of facilities for purposes of the FCC's unbundling rules, there is no need to define them separately, rather than to use an inclusive term, as Verizon has proposed.

The CLECs assert that the Amendment should follow the format of the FCC's rules, and define FTTH and FTTC loops separately. CCC contends that the FCC rules do not define FTTP loop, and that there is no basis to do so here. CCC argues that, in consolidating the definitions of FTTH and FTTC loops into a single FTTP definition, Verizon omitted key and necessary phrases from the FCC rules.

22. "Hot Cut"

Recommendation:

I recommend that the Board decline to approve adding a definition for the term "Hot Cut" to the Amendments' Definitions Section. This term has been adequately discussed and defined in the *TRO* and the *TRRO*. Hot cuts will be an important part of the transition mandated by the FCC, and are important in continuing transfers of customers from Verizon to the CLECs, and vice versa. However, it is not important that a specific definition for the term "Hot Cut" be added to these amendments.

Discussion:

The CLECs have generally proposed definitions for "Hot Cut" as:

The transfer of a loop from one carrier's switch to another carrier's switch or from one service provider to another service provider.

Verizon opposes the CLECs' inclusion of "Hot Cut," because such provisions are not appropriate for consideration in this proceeding, and because they have nothing to do with federal unbundling obligations. Verizon argues that when the FCC eliminated switching as a UNE, it explicitly found that the ILECs' – in particular, Verizon's – hot cut processes were satisfactory. The FCC specifically rejected CLECs' "speculative" concerns about hot cut procedures. Verizon contends that the CLECs' hot cut definition is relevant only to the CLECs' hot cut proposals, which would guarantee the continued availability of unbundled mass market switching under the parties' agreement until such time as the CLECs' proposed performance metrics and remedies are implemented to their satisfaction. Verizon asserts that the CLECs' proposal would specifically override the FCC's mandatory transition plan for UNE-P.

23. "House and Riser Cable"

"Inside Wire Subloop"

Recommendation:

I recommend that the Board decline to approve adding a definition for the term "House and Riser Cable" to the Amendments' Definitions Section, because that term has been retired by the FCC. I also recommend that the Board should approve the definition for the term "Inside Wire Subloop" as proposed by AT&T because it contains the specificity and appropriate references to FCC Rules. Finally, I recommend that Verizon and CCC incorporate this definition of "Inside Wire Subloop" into the definitions and terms of their amended ICA.

Discussion:

Verizon and CCC propose the following definition for "House and Riser Cable":

House and Riser Cable. A distribution facility in Verizon's network, other than in an FTTP Loop, between the minimum point of entry ('MPOE') at a multiunit premises where an end user customer is located and the Demarcation Point for such facility, that is owned and controlled by Verizon.

Verizon admits that this definition is based on the FCC's definition of "inside wire," but includes the FCC's recent determination that the definition of FTTH loops includes fiber loops

deployed to the minimum point of entry (MPOE) of MDUs, regardless of the ownership of the inside wiring.

AT&T and CCG have proposed definitions of "Inside Wire Subloop" for essentially the same thing as Verizon's "House and Riser Cable." These CLECs argue that house and riser cable is not a term used in the relevant FCC rules. As defined by CCG, an "Inside Wire Subloop" is as follows:

Inside Wire Subloop. As set forth in FCC Rule 51.319(b), a Verizon-owned or controlled distribution facility in Verizon's network between the minimum point of entry ("MPOE") at a multiunit premises where an end user customer is located and the Demarcation Point for such facility.

As proposed by AT&T:

Inside Wire Subloop. The Inside Wire Subloop network element, as set forth in FCC Rule 51.319(b), is defined as any portion of the loop that is technically feasible to access at a terminal in the incumbent LEC's outside plant at or near a multiunit premises, e.g., inside wire owned or controlled by the incumbent LEC between the premises' minimum point of entry (MPOE), as defined in FCC Rule 68.105 and the incumbent LEC's demarcation point as defined in FCC Rule 68.3.

Verizon asserts that the definitions proposed by AT&T and CCC for the term "Inside Wire Subloop," by omitting the clarification that Verizon's language contains, attempts to impose unbundling obligations on the portion of an FTTP loop that extends beyond the minimum point of entry. CCC agrees that to the extent subloops are attached to FTTH facilities, they are not FTTH loops and would be subject to subloop unbundling requirements.

24. "Hybrid Loop"

Recommendation:

I recommend that the Board decline to approve adding a definition for the term "Hybrid Loop" to the Amendments' Definitions Section, because it is currently clearly stated in the federal rules. The proposals of all parties contain elements that are directed at promoting specific policy goals, and should be rejected.

Discussion:

The FCC defines "Hybrid Loop" in 47 C.F.R. § 319(a)(2):

A hybrid loop is a local loop composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant.

For this proceeding, Verizon proposes a definition for "Hybrid Loop" as follows:

Hybrid Loop. A local loop composed of both fiber optic cable and copper wire or cable. An FTTP Loop is not a Hybrid Loop.

CCC opposes Verizon's proposal, as it would improperly appear to expand the restrictions on Hybrid Loops to all customers, which was clearly neither contemplated nor required by the *TRO*.

AT&T proposes the following definition for "Hybrid Loop":

Hybrid Loop. Any local loop composed of both fiber optic cable and copper wire or cable, including such intermediate fiber-in-the-loop architectures as FTTN and FTTB. FTTH Loops are not Hybrid Loops.

CCG's proposed definition of "Hybrid Loop" is the same as AT&T's, except that it omits the sentence "FTTH Loops are not Hybrid Loops."

Verizon argues that the proposals of AT&T and CCG add language that is inconsistent with the current law, because they would define a hybrid loop as "including such intermediate fiber-in-the-loop architectures as FTTN and FTTB."

CCC propose the following definition for "Hybrid Loop":

Hybrid Loop is a local Loop that serves a Mass Market Customer and is composed of both fiber optic cable and copper wire or cable between the main distribution frame (or its equivalent) in an end user's serving wire center and the demarcation point at the end user's customer premises.

Verizon opposes CCC's definition, as it deletes Verizon's sentence stating that an "FTTP Loop is not a Hybrid Loop." Verizon asserts that the FCC classifies FTTC-type architectures with FTTP, not with "Hybrid Loops," so Verizon contends that the CLECs' proposed definitions are unlawful.

25. "Line Conditioning"

Recommendation:

I recommend that the Board decline to approve adding a definition for the term "Line Conditioning" to the Amendments' Definitions Section, because it is currently clearly stated in the federal rules.

Discussion:

AT&T and CCG propose adding a new definition for "Line Conditioning," which mirrors the FCC's Rule 47 C.F.R. § 319(a)(1)(iii)(A):

The removal from a copper loop or copper Subloop of any device that could diminish the capability of the loop or Subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders.

Verizon argues that the FCC did not create any new line conditioning obligations in the *TRO*, so there is no basis for inserting any new line conditioning definition into the ICAs. Verizon further asserts that the Board cannot adopt any language that purports to re-impose a line-sharing obligation that the FCC definitively eliminated in the *TRO*.

26. "Line Sharing"

Recommendation:

The definition of "Line Conditioning" is currently clearly stated in the federal rules, and there is no real need to add this term to the Amendment.

Discussion:

The proposals by the parties are remarkably similar, and mirror the FCC's definition closely. The only difference between the identical proposals provided by Verizon and CCC, and those proposed by AT&T and CCG are the use of "Inside Wire Subloop" in the place of "House and Riser Cable."

The AT&T/CCG proposal for the definition of "Line Sharing" states as follows:

The process by which CLEC is providing xDSL service over the same copper Loop that Verizon uses to provide voice service by utilizing the frequency range on the copper loop above the range that carries analog circuit-switched voice transmissions (the High Frequency Portion of the Loop, or "HFPL"). The HFPL includes the features, functions, and capabilities of the copper Loop that are used to establish a complete transmission path between Verizon's distribution frame (or its equivalent) in its Wire Center and the demarcation point at the end user's customer premises, and includes the high frequency portion of any inside wire (including any Inside Wire Subloop) owned or controlled by Verizon.

27. "Line Splitting"

Recommendation:

I recommend that the Board decline to approve adding a definition for the term "Line Splitting" to the Amendments' Definition Section, because it is currently clearly stated in the federal rules.

Discussion:

The definitions of "Line Splitting" proposed by the CLECs all reflect the FCC Rule 47 C.F.R. § 51.319(a)(1)(ii), stating:

The process in which one competitive LEC provides narrowband voice service over the low frequency portion of a copper loop and a second competitive LEC provides digital subscriber line service over the high frequency portion of that same loop.

Verizon contends that there is no basis for inserting new provisions related to line splitting, including definitions, and that the FCC's line splitting rules pre-date the *TRO*, and these obligations are already embodied in existing ICAs.

28. "Loop Distribution"

"Subloop Distribution Facility"

Recommendation:

I recommend that the Board approve the definition for "Loop Distribution" as proposed by Verizon and CCG. The language proposed by AT&T and CCG for "Subloop Distribution Facility" goes beyond a definition and into the substance of an unbundling obligation.

Discussion:

CCC proposed definition for "Subloop Distribution Facility" is as follows:

The copper portion of a Loop in Verizon's network that is between the minimum point of entry ("MPOE") at an end user customer premises and Verizon's feeder/distribution interface.

The AT&T and CCG definitions for "Loop Distribution" state:

The portion of a Loop in Verizon's network that is between the point of demarcation at an end user customer premises and Verizon's

feeder/distribution interface. It is technically feasible to access any portion of a Loop at any terminal in Verizon's outside plant, or inside wire owned or controlled by Verizon, as long as a technician need not remove a splice case to access the wire or copper of the Subloop; provided, however, near Remote Terminal sites, Verizon shall, upon site-specific request by a CLEC, provide access to a Subloop at a splice.

Verizon objects to the AT&T and CCG proposed definitions because they appear to be less concerned with defining a term, than with describing the substance of an unbundling obligation. Verizon urges the Board not to adopt that sort of "confusing and unnecessary" definition.

Verizon states that it does not object to inclusion of CCC's proposed definition of "Subloop Distribution Facility," as it comports with FCC Rule 51.319(b)(1), and was taken from the amendment that Verizon proposed in its initial arbitration petition in this proceeding.

29. "Mass Market Customer"

Recommendation:

I recommend that the Board decline to approve a definition for "Mass Market Customer." There appears to be no reason to include such a definition in the Agreements.

Discussion:

CCC has proposed a definition for a "Mass Market Customer" as follows:

A Mass Market Customer is an end user customer who is either (a) a residential customer; or (b) a business customer whose premises are served by telecommunications facilities with an aggregate transmission capacity (regardless of the technology used) of less than four DS-0s. (CCC Amendment § 5.12)

The *TRO* left unresolved the issue of the appropriate number of DS0 lines that distinguishes mass market customers from enterprise market customers for unbundled local circuit switching. In the *TRRO*, however, the FCC determined that it did not need to resolve that issue because it had eliminated unbundled access to local circuit switching for the mass market, as well. The transition period adopted in the *TRRO* applies to all unbundled local circuit switching arrangements used to serve customers at less than the DS1 capacity level.

30. "Mass Market Switching"

Recommendation:

It appears redundant to include a reference to "four-line carve-out" as well as noting that mass market switching is only provided to an end user customer with three or fewer DS0 Loops. As discussed by CCC, the need for this definition is marginal; however, to the extent that a definition is adopted, it should be the one proposed by AT&T or CCG.

Discussion:

Verizon's proposed Amendment defines "Mass Market Switching" as:

Mass Market Switching. Local Switching or Tandem Switching that, if provided to [the CLEC], would be used for the purpose of serving [a CLEC] end user customer with three or fewer DS0 Loops. Mass Market Switching does not include Four Line Carve Out Switching.

The definitions proposed by AT&T and CCG are similar to Verizon's, except that they leave out the reference to the Four-Line Carve-Out.

CCC argues that a definition of Mass Market Switching is no longer relevant after the adoption of the *TRRO*, which explicitly decided that it was no longer necessary to draw the line between the enterprise and mass markets with respect to unbundled switching. CCC points out that the only relevant distinction under the new rules is switching provided for DS1+ customers, which was eliminated as a Section 251 UNE by the *TRO*, and switching for customers served by DS0s.

Verizon asserts that their definition appropriately reflects federal law. They contend, with respect to CCC's objection, that the distinction between mass-market switching, on the one hand, and enterprise and four-line carve-out switching, on the other, remains relevant. Verizon notes that, while the *TRRO* banned all new additions of UNE switching, ILECs must continue to serve the mass market embedded base until conversions are completed by March 11, 2006. Further, Verizon claims that the four-line carve-out rule is still relevant for the embedded base, in that Verizon is entitled to discontinue unbundled switching as to competitors that have ordered four or more DS0 lines. Verizon argues that it is, therefore, still necessary for the next year or so to retain the definitions and terms relating to different types of switching.

31. "Mobile Wireless Service"

Recommendation:

There is no need to add the definition of "Mobile Wireless Service" to the Amendment, because it is currently clearly stated in the federal rules.

Discussion:

The FCC added this definition to 47 C.F.R. § 51.5 as a part of the *TRRO* decision:

Mobile wireless service. A mobile wireless service is any mobile wireless telecommunications service, including any commercial mobile radio service.

CCC states that its proposed definition of this term is taken from the text of the FCC rules, whereas Verizon proposes to exclude any definition and rely instead on the supposed self-effectuation of the FCC rules.

Verizon contends that the FCC has already defined the term, so there is no need to add the same language into the ICAs and freeze into the contract a definition the FCC may later change.

32. "Packet Switch"

"Packet Switching"

"Packet Switched"

Recommendation:

There is, first of all, no need for all three of these definitions. It is clear that the CLECs are attempting to use a definition to bolster their arguments on whether a packet switch can perform circuit switching functions, thus making a packet switch available for unbundling under their proposals. (*See* Issue 3, et al.) The FCC's Rules are not of much help in this matter, as the only definition comes from within their discussion on Hybrid Loops. Therefore, I recommend that the Board decline to approve the inclusion of a definition for these terms, until the parties craft clearer definitions.

Discussion:

The repetition of these terms at first appears to be based simply on the inflection or declination of the verb, "switch." Certainly, the parties seem to get tangled up in these terms

when criticizing or supporting each others' various positions. As with other definitions, the parties tend to overreach, adding substance and policy obligations to the raw definitions.

The definition proposed by CCG of "Packet Switch" states:

Packet Switch. A network device that performs switching functions primarily via packet technologies. Such a device may also provide other network functions (e.g., Circuit Switching). Circuit Switching, even if performed by a Packet Switch, is a network element that Verizon is obligated to provide on an Unbundled Network Element basis.

AT&T's proposed definition of "Packet Switch" states:

Packet Switch. A network device that performs switching functions primarily via packet technologies. Such a device may also provide other network functions (e.g., Circuit Switching).

Verizon contends that the CLECs' proposed switching definitions and provisions would impermissibly impose packet switching unbundling obligations on Verizon. Verizon asserts that this definition is incorrect and contrary to law, insofar as it implies an obligation to unbundle packet switches. Verizon points out that the FCC directly held – without exception – that "we decline to unbundle packet switching as a stand-alone network element." Verizon insists that it is not obligated to provide circuit switching on a UNE basis under any circumstances, no matter what technology is used. Verizon argues that no state commission has authority to contradict the FCC's binding judgment in this regard.

Verizon supports its arguments by citing the FCC recognition that "to the extent there are significant disincentives caused by unbundling of circuit switching, incumbents can avoid them by deploying more advanced packet switching." Verizon further states that the FCC determined that allowing incumbents to avoid unbundling obligations would give them "every incentive to deploy these more advanced networks, which is precisely the kind of facilities deployment we wish to encourage," while giving "competitors" the "incentives to build comparable facilities to compete." Verizon emphasizes that the FCC's determination contradicts the CLECs' suggestion that packet switches can still be unbundled depending on their "function."

CCG's proposed definition of "Packet Switching" (which is identical to Verizon's suggested definition of "Packet Switched") states:

Packet Switched. 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, or 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.

Both of these proposals come from the FCC's discussion of the packet switching facilities, features, functions, and capabilities of Hybrid Loops in 47 C.F.R. § 51.319(a)(2)(i), and not from a discussion on the packet switches themselves.

Verizon criticizes AT&T's proposed definition of "Packet Switching," as it omits everything after the parenthetical phrase. Further, Verizon objects to CCG's proposed definition of "Packet Switch" for much the same reason as AT&T's.

33. "Routine Network Modifications"

Recommendation:

I recommend that the Board decline to approve adding any of the definitions for "Routine Network Modifications" submitted by the parties. The FCC has clearly and adequately defined this term in Rule 47 C.F.R. § 51.319 (a)(8)(ii). If the parties wish to have a specific definition in the Amendments, they should craft a definition that tracks precisely with FCC rules.

Discussion:

The FCC has defined "Routine Network Modification" in 47 C.F.R. § 51.319 (a)(8)(ii) as follows:

A routine network modification is an activity that the incumbent LEC regularly undertakes for its own customers. Routine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; and attaching electronic and other equipment that the incumbent LEC ordinarily attaches to a DS1 loop to

activate such loop for its own customer. They also include activities needed to enable a requesting telecommunications carrier to obtain access to a dark fiber loop. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the construction of a new loop, or the installation of new aerial or buried cable for a requesting telecommunications carrier.

CCG's definition of "Routine Network Modifications" states:

"Routine Network Modifications are those prospective or reactive activities that Verizon is required to perform for CLEC and that are of the type that Verizon regularly undertakes when establishing or maintaining network connectivity for its own retail customers. Routine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; and attaching electronic and other equipment that the incumbent LEC ordinarily attaches to a DS1 loop to activate such loop for its own customer. They also include activities needed to enable a requesting telecommunications carrier to obtain access to a dark fiber loop."

AT&T's definition contains only the first sentence of the same definition:

Routine Network Modifications are those prospective or reactive activities that Verizon is required to perform for AT&T and that are of the type that Verizon regularly undertakes when establishing or maintaining network connectivity for its own retail customers.

Verizon contends that its proposed definition of "Routine Network Modifications" tracks the FCC's rulings on this issue. Verizon asserts that its proposed definition makes clear that its obligations to perform such modifications are limited to facilities that have already been constructed, and it lists the FCC's examples of routine network modifications from the *TRO*.

Verizon argues that the CLECs would impose no meaningful limitations on Verizon's network modification obligations. They all fail to recognize the essential "no-new-construction" limitation, and use the most expansive possible language to impose obligations the FCC never did. Verizon states that it is not clear what "prospective or reactive" might mean, and argue that such language would allow the CLECs to claim that just about anything is a routine network modification. Verizon further objects to the CLECs' attempt to expand Verizon's obligation

beyond those activities Verizon would routinely undertake to activate service for its customers to activities it might undertake to "maintain network connectivity" for its customers.

Verizon reiterates here that it is entitled to recover its costs of providing services to the CLECs, and that there is no support for the CLECs' assertions that Verizon's existing UNE rates already recover the costs of the routine network modifications ordered in the *TRO*. Although Verizon is no longer asking the Board to set routine network modifications rates in this arbitration, Verizon asserts that the Board should recognize that Verizon may do so in the future.

34. "Section 271 Network Elements"

Recommendation:

I recommend that the Board decline to include a definition for this term, as it will reduce the clarity and understanding of the agreement rather than provide assistance and clarification. Once again, one of the parties (CCC) is attempting to consolidate a broad policy grouping or concept into one definitional term, presumably to shorten its references in other Sections of the ICA. Also, CCC appears to be using this definition to pursue its arguments with respect to the inclusion of Section 271 issues in this proceeding.

Discussion:

CCC proposes a definition for "Section 271 Network Elements" as follows:

Section 271 Network Elements are network elements provided by Verizon pursuant to Section 271 of the Act or Section 4 of this Amendment.

Verizon reiterates that, for all the reasons stated below in response to Issue 32, Section 271 is outside of the scope of this proceeding and no Section 271 obligations can be addressed in the arbitrated amendment.

35. "Shared Transport"

Recommendation:

I recommend that the Board decline to approve adding a definition of "Shared Transport" to the Amendment, as it is currently clearly identified and defined in FCC Rule 47 C.F.R. § 51.319 (d)(4)(i)(C).

Discussion:

CCC proposes a definition for "Shared Transport" as follows:

Shared Transport is unbundled transport shared by more than one carrier (including Verizon) between end office switches, between end office switches and tandem switches, and between tandem switches, in Verizon's network.

CCC contends that this definition is consistent with FCC Rule 47 C.F.R. § 51.319 (d)(4)(i)(C).

Verizon states no objection to this definition.

36. "Signaling"

Recommendation:

The definition proposed here is taken from a definition of "Signaling Networks" contained in FCC Rule 47 C.F.R. § 51.319(d)(4)(i)(A). There is no justification or explanation as to why this definition is needed in the amendment. Recognizing the complexities of signaling in telecommunications, one is left to wonder why this simplistic definition is needed in the interconnection agreements. With that preamble, and with a lack of support or discussion by the parties, there appears to be no pressing need to add the definition of "Signaling" to the Amendment, as it is currently clearly identified in the federal rules.

Discussion:

AT&T and CCG have proposed the same definition of "Signaling," stating:

Signaling includes, but is not limited to, signaling links and signaling transfer points.

Verizon does not address this definition in their initial briefs.

37. "Subloop for Multiunit Premises Access"

Recommendation:

I recommend that the Board decline to approve adding a definition for this term, because the relevant portion of the definitions currently reside in the federal rules. Also, each of the CLECs and Verizon have started with the FCC's definition, have added components of policy, and thus have transformed the definition into a policy statement.

Discussion:

The FCC Rule 47 C.F.R. § 51.319(b)(2) defines this term as follows:

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 the incumbent LEC's outside plant at or near a multiunit premises.

CCG proposes a definition of "Subloop for Multiunit Premises Access" as follows:

Subloop 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. For access to copper Subloops, it is technically feasible to access any portion of a Loop at any terminal in Verizon's outside plant, or inside wire owned or controlled by Verizon, as long as a technician need not remove a splice case to access the wire or copper of the Subloop; provided, however, near Remote Terminal sites, Verizon shall, upon site-specific request by CLEC, provide access to a Subloop at a splice.

CCC's proposed definition of "Subloop for Multiunit Premises Access" is similar, stating that it:

Subloop for Multiunit Premises Access is any portion of a Loop, regardless of the type or capacity, that is technically feasible to access at a terminal in Verizon's outside plant at or near a multiunit premises. It is not technically feasible to access a portion of a Loop at a terminal in Verizon's outside plant at or near a multiunit premises if a technician must access the facility by removing a splice case to reach the wiring within the cable.

Verizon's proposed definition states:

Sub-Loop for Multiunit Premises Access. Any portion of a loop, other than an FTTP loop, that is technically feasible to access at a terminal in Verizon's outside plant at or near a multiunit premises. It is not technically feasible to access a portion of a Loop at a terminal in Verizon's outside plant at or near a multiunit premises if a technician must access the facility by removing a splice case to reach the wiring within the cable.

CCC notes that the only difference between CCC and Verizon proposals is that the Verizon proposal would exempt FTTP loops from the definition. CCC asserts that a reference to FTTP (or FTTH) loops makes no sense with respect to subloops. CCC points out that the FCC Rules explain that a FTTH loop consists entirely of fiber optic cable, in which case there should be no subloops. To the extent subloops are attached to FTTH facilities, CCC argues that they are not FTTH loops and they would be subject to subloop unbundling requirements.

Verizon contends that the definition it puts forth tracks federal law, and asserts that its proposed definition reflects the FCC's determination that the definition of FTTH loops includes fiber loops deployed to the minimum point of entry (MPOE) of MDUs, regardless of the ownership of the inside wiring. Verizon argues that, because such FTTP facilities to predominately residential multiunit premises are treated the same as other fiber facilities, Verizon's proposed definition is appropriate and reflects federal law.

38. "Tandem Switching"

Recommendation:

I recommend that the Board approve the definition for "Tandem Switching" as proposed by AT&T for inclusion in the Amendments' Definition Section, because it is more concise and is essentially contained within the definitions of the other parties.

Discussion:

Verizon, CCC, and CCG all propose the same definition of "Tandem Switching":

The trunk-connect facilities on a Verizon circuit switch that functions as a tandem switch, plus the functions that are centralized in that switch, including the basic switching function of connecting trunks to trunks, unbundled from and not contiguous with loops and transmission facilities. Tandem Switching creates a temporary transmission path between interoffice trunks that are interconnected at a Verizon tandem switch for the purpose of routing a call. A tandem switch does not provide basic functions such as dial tone service.

AT&T has proposed a shorter definition of "Tandem Switching," as follows:

Tandem Switching creates a temporary transmission path between interoffice trunks that are interconnected at a Verizon tandem switch for the purpose of routing a call. A tandem switch does not provide basic functions such as dial tone service.

None of the parties appear to take issue with each others' definitions, except that they are marginally different.

39. "Tier 1 Wire Center"

"Tier 2 Wire Center"

"Tier 3 Wire Center"

Recommendation:

I recommend that the Board decline to approve adding a definition for the terms "Tier 1 Wire Center," "Tier 2 Wire Center," and "Tier 3 Wire Center" to the Amendments' Definition Section, because the relevant portions of the definitions currently reside in the federal rules. To the extent that reporting or validation requirements are needed, they should not be contained in the definitions.

Discussion:

CCG has proposed to include definitions for "Tier 1 Wire Center," "Tier 2 Wire Center," and "Tier 3 Wire Center" in the amended agreements. CCG proposal mirrors the requirements of FCC Rule 47 C.F.R. § 51.319(e)(3), but in addition, provide a listing of information to be provided by Verizon in order to make the determination of which wire centers will be included in each tier.

Verizon contends that these terms in CCG proposed Amendment are relevant only to the determination of the wire centers that satisfy the FCC's non-impairment criteria for high-capacity loops and transport, and as such do not belong in the ICAs. Verizon further contends that CCG improperly seeks to use this definition to impose onerous data-production requirements on Verizon that do not appear in the FCC's rules.

40. "UNE-P"**Recommendation:**

I recommend that the Board decline to approve adding a definition for the term "UNE-P". While the concepts of UNE-P arrangements have been thoroughly discussed by the FCC in the *TRO* and the *TRRO*, there has been no compelling need to incorporate a formal definition in the federal rules or ICAs to date. Further, with a lack of support or discussion by the parties, there appears to be no pressing need to add the definition of "UNE-P" to the Amendments in this proceeding.

Discussion:

AT&T and CCG propose the same definition of "UNE-P" as follows:

A leased combination of the loop, local switching, and shared transport UNEs.

Neither AT&T nor CCG provided substantive arguments as to why this definition should be included in the ICAs.

Verizon asserts that there is no basis for adding a definition of "UNE-P" to the ICAs, because the *TRO* and the *TRRO* did not change the definition of UNE-P; rather, the *TRRO* eliminated UNE-P.

41. "Wire Center"

Recommendation:

I recommend that the Board decline to approve adding a definition for the term "Wire Center" because it is defined adequately by the FCC's Rules. The proposals by the CLECs in this proceeding appear to be designed to promote the interests of the submitting parties.

Discussion:

CCC and AT&T add a definition of "wire center" to their ICAs by combining the definition of "Wire Center" and the definition of "Central Office" from the FCC's Rules, 47 C.F.R. § 51.5 and 47 C.F.R. § 36 (Appendix):

Wire Center is the location of a Verizon local switching facility containing one or more central offices. The wire center boundaries define the area in which all customers served by a given wire center are located. "Central office" is a switching unit, in a telephone system which provides service to the general public, having the necessary equipment and operations arrangements for terminating and interconnecting subscriber lines and trunks or trunks only. There may be more than one central office in a building.

Verizon objects to the inclusion of this definition, as it relates to determination of which ILEC offices qualify for unbundling relief, which is not an appropriate inquiry in this docket.

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

Verizon's Position:

Verizon contends that implementation of the FCC's mandatory transition plan in the *TRRO* does not depend on any particular contract language, including any change-of-law provisions in existing agreements. Verizon declares that the transition plan for the UNEs at issue in the *TRRO* takes effect immediately even though change-of-law processes with respect to the CLEC's embedded base of de-listed UNEs might take up to 12 months (18 months, for dark fiber facilities) under the FCC's plan. Verizon asserts that the FCC firmly shut the door on any possibility of using the change-in-law process as an excuse to circumvent the *TRRO* itself or to avoid following the relevant transition plans. Further, Verizon contends that the FCC repeatedly and explicitly stated that the transition period does not apply to the "no-new-adds" prohibition. In addition, Verizon insists that the FCC's timeframe for conclusion of a *TRO* amendment in Vermont expired without any substantive progress toward an arbitrated amendment, due to delays caused by the CLECs. Verizon further contends that a second question in Issue 10 involves whether "the establishment of UNE rates, terms and conditions for new UNEs, UNE combinations, or commingling be subject to the change of law provisions of the parties' interconnection agreements." Verizon argues that the FCC has not established any new UNEs in the *TRO* or the *TRRO*; therefore, new unbundling obligations cannot be implemented in the absence of any rates or terms for their provision.

In its Reply Brief, Verizon asserts that the FCC's determinations in the *TRRO* – its no-new-adds order and its transition rules – do not depend for their implementation on the language of any particular interconnection agreement. Verizon argues that, with regard to those elements that were de-listed in the *TRO*, the FCC has held that the parties should implement the provisions of the *TRO* through the Section 252 process and change-of-law mechanisms in their interconnection agreements, where necessary. With regard to elements that may be eliminated in the future, Verizon asserts that its proposed amendment properly provides that its unbundling obligations are limited to those imposed under federal law. With regard to the additional unbundling obligations imposed by the *TRO*, Verizon asserts that the FCC determined that such new obligations should be implemented through contractual processes, as appropriate, and again,

this proceeding will resolve the parties' disputes about the terms and conditions under which the *TRO* obligations will be implemented.

AT&T's Position:

AT&T asserts that in the *TRRO*, the FCC repeatedly referred to the process for negotiation and arbitration established by Section 252, including the requirement to amend ICAs to reflect changes occasioned by the FCC's Order itself. AT&T insists that if Verizon has a contractual obligation to provision a particular unbundled network element, then it should be required to adhere to the provisions of that contract to amend the agreement. AT&T states that if the FCC relieves Verizon of its obligation under federal law to provide a particular unbundled network element, then Verizon should invoke the change of law provisions of the contract and notify the other party that it seeks to negotiate an amendment to the contract to change its obligations. AT&T argues that eliminating Verizon's obligation to follow contractual change of law provisions, and permitting Verizon to unilaterally implement the requirements of the 1996 Act, would essentially gut the principal mechanism that Congress established for implementing the 1996 Act. For these reasons, AT&T states that Verizon should be required to follow change of law provisions in its existing interconnection agreements and should not be allowed to eliminate those contract protections going forward.

CCC's Position:

CCC responds, "Yes," and refers to its responses to Issues 2, 6, and 30.

In its Reply Brief, CCC asserts that, for the same reasons that Verizon has argued repeatedly for years, the *TRO* and *TRRO* can only be implemented in accordance with the change of law terms of the parties' agreements. CCC emphasizes that Verizon has changed its position from its prior insistence on requiring an interconnection agreement before providing CLECs with any of the benefits of FCC unbundling rules to now proclaiming that the *TRRO* is "self-effectuating." CCC contends that Verizon's new position flies in the face of its past rationale: i.e., if Congress had intended the 1996 Act to be implemented in that manner, it never would have needed to create the interconnection agreement process in the first place. CCC contends that Verizon has expressly argued in the past that regulators could not impose new rules that would override a contract without regard to the terms of the agreement. CCC points out that

the FCC said clearly that it did not intend to override contract terms or the Section 252 process; instead, it specifically provided that the *TRRO* be implemented in accordance with the Section 252 negotiations process.⁸⁸

CCG's Position:

CCG answers that Verizon is required to follow the change of law and dispute resolution provisions set forth in its interconnection agreements with Vermont CLECs to discontinue any network element that Verizon no longer is obligated to provide under Section 251 of the 1996 Act.

Discussion and Proposal

As discussed earlier in the PFD, the *TRRO* and an interpretation of contract law make clear that the FCC's unbundling determinations are not self-effectuating. Verizon and Vermont CLECs may implement changes in law arising under the *TRO* and the *TRRO* only as directed by Section 252 of the 1996 Act, and consistent with the change in law processes set forth in carriers' individual interconnection agreements with Verizon. Verizon is bound by the unbundling obligations set forth in its existing ICAs with Vermont CLECs until such time as those agreements are properly amended to incorporate the changes in law and, when applicable, the FCC-mandated transition plans and rates established under the *TRRO*.

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

Verizon's Position:

Verizon proposes that it may implement any rate increases or new charges established by the FCC by issuing a schedule of rates, for effect no earlier than the date established by the FCC. Further, Verizon has proposed language during negotiations to more specifically recognize Verizon's right to use a true-up, as specified in the *TRRO*, to apply any rate increases.

88. See *TRRO* at ¶ 233.

In its Reply Brief, Verizon contends that no CLEC identifies any substantive problem with Verizon's proposal for implementation of FCC-prescribed rate changes. Verizon contends that Verizon's existing interconnection agreements typically already give automatic effect to any FCC-ordered rate increases. Verizon asserts that Section 3.5 of Amendment 1 reflects the fact that the FCC may prescribe rate increases or new charges, and that Verizon may implement those new rates by issuing a rate schedule specifying an effective date no earlier than any date established by the FCC.

AT&T's Position:

AT&T responds that this question is clearly answered by the *TRRO*, and has already been addressed in the discussion of Issues 3-6 above. AT&T argues that Verizon's proposed amendments are not consistent with the process established by the FCC in the *TRRO* for implementing rate changes, that they should be rejected, and AT&T's revised amendment should be adopted.

CCC's Position:

CCC answers that as it has explained in responses to Issues 2 and 6, the changes in law that result from the *TRO* and *TRRO* can only be implemented in accordance with the existing change-of-law terms of the Agreements. CCC states that its *TRRO* amendment provides that the effective date of any new rates established by the amendment shall be in accordance with the existing change-of-law provisions, and that any proposal that contravenes these existing change-of-law provisions must be rejected.

CCC states that while its *TRO* Amendment sets forth the FCC's formula for establishing the new transition rates, CCC proposes that the Arbitrator require the parties to apply the FCC's formula to calculate precise rates to be included in a rates attachment to the Amendment, so that the rates will be clearly established and not vulnerable to dispute after the conclusion of the arbitration.

As to rate increases or new charges arising from "elsewhere," CCC says that it is not clear what this issue is referring to and in any event objects to their inclusion in this proceeding.

In its Reply Brief, CCC objects to Verizon's proposal that it be permitted to apply retroactively the new transition rates established under this Amendment back to an unspecified

date that would appear on a "schedule issued by Verizon." CCC urges the Board to reject Verizon's proposed term, even before the Board considers whether it may be appropriate to amend the contracts with the inclusion of new true-up terms.

CCC asserts that the Board cannot in this proceeding impose a generally-applicable provision for true-up either for the UNEs impacted by the *TRO* or *TRRO*. CCC argues that the *TRRO* can only be implemented in the agreements in accordance with their existing change of law terms. Where the existing agreements instead provide for changes of law to be implemented in new amendments, which would become effective upon execution, CCC contends that Verizon cannot travel back in time to redraft the rules of the contract that apply to this round of the change in law, regardless of the FCC's reference to true-up in the *TRRO*. According to CCC, that is because the parties have already determined, as a matter of contract, how changes in law are to be implemented. If the Board were to impose true-up in such a situation, states CCC, it would be upsetting the contractual relationship on which parties have relied and which the Board had previously approved – a contractual relationship that Verizon has elsewhere claimed that "state commissions are bound to honor." CCC claims that if a contract bars automatic implementation and makes no reference to true-up, it clearly bars retroactive true-up as well.

CCG's Position:

CCG agrees that the amendment to the parties' interconnection agreements must include rates, terms and conditions that reflect any change to Verizon's federal unbundling obligations brought about by the *TRO* and the *TRRO*, including without limitation the transition plan set forth in the *TRRO* for each network element that Verizon no longer is obligated to provide under Section 251 of the 1996 Act.

In its Reply Brief, CCG reiterates that Verizon must implement rate increases and new charges applicable to Section 251(c)(3) UNEs "de-listed" by the FCC, under the *TRRO*, through the change of law processes set forth in the Board-approved interconnection agreements between Verizon and CLECs, and consistent with the element-specific transition plans and transition rates established by the FCC for unbundled local circuit switching, high capacity (DS1 and DS3) and dark fiber loops, and high capacity (DS1 and DS3) and dark fiber dedicated interoffice transport.

Discussion and Proposal

Any rate changes determined by the FCC in its unbundling rules as a result of the *TRRO*, as described in Issue 6, must be addressed through changes to the parties' ICAs as a part of this or subsequent proceedings, and in accordance with the existing change-of-law provisions of the current ICAs. Verizon is bound by the rates and terms set forth in its existing ICAs with Vermont CLECs until such time as those agreements are properly amended to incorporate the changes in law and the FCC-mandated transition plans (and transition rates) established under the *TRRO*.

Some comments addressed the need for a retroactive true-up back to the effective date of the *TRRO* (March 11, 2005). Inasmuch as I determine that any revisions in terms and conditions are not effective until the ICAs are revised in conformance with the Board's Order in this proceeding, and are properly signed by the appropriate parties, there should be no need for a true-up.

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

Verizon's Position:

Verizon's proposed language provides that Verizon will not prohibit commingling of UNEs with wholesale services (to the extent it is required under federal law to permit commingling). Verizon's amendment also provides that it will perform the functions necessary to allow CLECs to commingle or combine UNEs with wholesale services. Verizon does propose to apply a nonrecurring charge to offset what it asserts are its costs of implementing and managing commingled arrangements, and such charge will apply to each UNE circuit that is part of a commingled arrangement. Verizon contends that it may exclude its performance from standard provisioning measures and remedies, if any, since any such measures and remedies were established before Verizon became subject to the new requirements under the *TRO* and thus do not account for the additional time and activities associated with those requirements. Verizon opposes the CLECs' arguments that CLECs should not be required to certify, on a

circuit-by-circuit basis, that any combined facilities satisfy the eligibility criteria that the FCC established in the *TRO* and *TRRO*.

In its Reply Brief, Verizon observes that the CLECs raise relatively few substantive objections to Verizon's commingling language, and the few points they raise are without merit. Verizon states that the CLECs argue that it should not be allowed to recover any costs incurred with commingling, and while Verizon has not proposed specific rates for commingling in this proceeding, it would be inappropriate to foreclose the possibility of such charges if they are appropriately justified. Responding to CCC's argument that Verizon had the duty to provision commingled circuits upon the effective date of the *TRO*, Verizon contends that the CLECs' attempt to seek retroactive pricing for commingling is impermissible and unfair. Verizon states that if the CLECs wish to have some items priced retroactively, then the Board should permit Verizon to retroactively price all the elements that were de-listed in the *TRO* 19 months ago. Answering the claim by CCC that Verizon's language limits the availability of commingling to "Qualifying UNEs," Verizon contends that its proposal specifically allows commingling between "Qualifying UNEs" and "Qualifying Wholesale Services" (i.e., "wholesale services obtained from Verizon under a Verizon access tariff or separate non-251 agreement"). Verizon asserts that CCC is attempting to create a commingling requirement as to Section 271 elements; however, obligations with respect to Section 271 are not properly addressed in this proceeding but instead must be addressed to the FCC. Verizon points out that the FCC has never required Verizon to combine or commingle network elements under Section 271 at all, and the Board cannot create any such obligations here.

AT&T's Position:

AT&T explains that commingling allows competitive carriers to use some of the spare capacity they have on their leased special access trunk groups to carry local traffic such that competitors do not have to maintain two under-utilized trunk groups (one for local traffic and one for toll traffic) where one would suffice. AT&T points out that Verizon is now required to permit CLECs like AT&T to commingle UNEs or UNE combinations it obtains from Verizon with other wholesale facilities.

AT&T states that its proposed amendment makes clear that: (1) as of October 2, 2003, Verizon is required to provide commingling and conversions unencumbered by additional processes or requirements (e.g., requests for unessential information) not specified in *TRO*; (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 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.

AT&T asserts that the manner in which Verizon seeks to implement the FCC's requirements does not comply with the *TRO*, and in fact, imposes new and onerous obligations on the CLECs that will impede their ability to provide services through commingled facilities. Among other things, AT&T emphasizes that Verizon's amendment requires that: (1) AT&T should be required to re-certify that it meets the *TRO*'s eligibility requirements for existing DS1 and DS1 equivalent circuits on a circuit-by-circuit basis rather than through the use of a single written or electronic request; (2) Verizon's performance in connection with commingled facilities should not be subject to standard provisioning intervals and performance measures; and (3) Verizon is entitled to apply a non-recurring charge for each circuit that AT&T requests to convert from a wholesale service to UNE or UNE combination, as well as other fees not contemplated by the *TRO* (for example, "retag fees"). AT&T further asserts that Verizon would require AT&T to reimburse Verizon for the entire cost of an audit when an auditor finds no AT&T material failure to comply with the service eligibility criteria for any DS1 circuit.

AT&T urges the Board to reject Verizon's effort to force the CLECs to "re-certify" existing arrangements on a circuit-by-circuit basis – a make-work process for which Verizon offers no legitimate justification. AT&T states that its eligibility for these circuits has already been established, and forcing AT&T – or any other CLEC – to go through this process will unnecessarily increase costs. AT&T contends that competitors should be permitted to re-certify all prior conversions in one batch. For future conversions requests, rather than requiring competitors to certify individual requests on a circuit-by-circuit basis, AT&T proposes that competitors should be permitted to submit orders for these as a batch.

AT&T argues that the amendment also should make Verizon subject to order and provisioning metrics and performance measures and remedies for these facilities. AT&T states that the commingled arrangements that CLECs order include UNEs that already are subject to such metrics and remedies. AT&T believes there is no reason, either technical or logical, that Verizon's provisioning of commingled UNEs should be excluded from appropriate provisioning intervals and performance incentives simply because they are being provided in combination with other wholesale services. AT&T argues that without metrics and remedies, Verizon would have little incentive to ensuring that CLEC orders for these arrangements are provisioned in a timely and efficient manner.

AT&T recommends that the recurring and non-recurring charges contained in the Verizon access tariff apply to the access portion of the "commingled" arrangement, and that the recurring and non-recurring charges contained in the interconnection agreement apply to the UNE portion of the commingled arrangement, prorated as appropriate.

AT&T argues that it should not be required to foot the entire cost of a service eligibility audit as proposed by Verizon. AT&T reasons that Verizon should be able to pass along the total cost of an audit only if the independent auditor concludes that AT&T failed to comply with the service eligibility criteria "in material respects." AT&T claims that if the auditor finds AT&T materially in compliance with the service eligibility criteria, then Verizon should have to pay AT&T's costs of complying with any requests of the independent auditor.

In its Reply Brief, AT&T argues that there is a common dispute between AT&T and Verizon in Issues 12, 13, 21 and 25: Verizon's effort to impose an onerous pre-ordering audit requirement on CLECs seeking to order EELs and UNE combinations and to convert existing circuits to UNEs. AT&T contends that the FCC rejected the proposals of the ILECs such as Verizon that had sought to require other conditions on the CLECs as a pre-condition to ordering an EEL or converting existing circuits to EELs, such as pre-audits and other requirements that the FCC described as constituting unjust, unreasonable and discriminatory terms and conditions for obtaining access to UNE combinations.

CCC's Position:

CCC responds, "Yes. Under the *TRO*, Verizon is obligated to offer commingling." CCC highlights its definition of "Commingling," stating that it requires Verizon to permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including facilities leased under Section 271. CCC points out that the FCC failed to address this issue in the *TRO* (in fact, it made two diametrically opposed statements in the original order, and then deleted both of them by errata, leaving the matter unresolved). CCC urges the Board to order Verizon to permit commingling of Section 251 UNEs and Section 271 items. CCC argues that, consistent with the FCC's finding that a restriction on commingling would be patently unlawful, CCC's proposal ensures that commingling will be provisioned in a just, reasonable and lawful manner.

Further, CCC's proposal prohibits commingling charges for many of the same reasons conversion charges are unlawful. Further, CCC contends, because ILECs are not required to perform commingling in order to continue serving their own customers, commingling charges are inconsistent with an ILEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms, and conditions. CCC further argues that such charges are inconsistent with Section 202 of the 1996 Act, which prohibits carriers from subjecting any person or class of persons to any undue or unreasonable prejudice or disadvantage. CCC therefore urges the Board to reject Verizon's attempt to assess commingling charges, and should adopt CCC's proposal that provides that the rate applicable to each portion of a commingled facility or service (including nonrecurring charges) cannot exceed the rate for that portion if it were purchased separately.

With respect to timing, CCC's proposal recognizes that Verizon had the duty to provision commingled circuits upon the effective date of the *TRO*.

CCG's Position:

CCG asserts that it has consistently maintained that Verizon's obligation under federal law to permit requesting carriers to commingle UNEs and combinations of UNEs ("Combinations) with services that Verizon provides on a wholesale basis existed prior to the *TRO*. CCG maintains that the amendment must include language clarifying the scope of

Verizon's obligation to permit requesting carriers to commingle UNEs and UNE Combinations with services obtained from Verizon at wholesale.

CCG claims that Verizon's language limits the availability of commingling to "Qualifying UNEs," which Verizon uses to exclude UNEs that have been declassified under Section 251(c)(3), both now and in the future, without amending the interconnection agreement. CCG states that such a restriction improperly seeks to circumvent the agreements' change in law provisions, and is inconsistent with the FCC's determination in both the *TRO* and the *TRRO* that changes in federal law are to be implemented consistent with Section 252 and the change in law provisions in the parties' interconnection agreements.

In its Reply Brief, CCG recognizes that Verizon's obligation under federal law to permit requesting carriers to commingle UNEs and combinations of UNEs Combinations with services that Verizon provides on a wholesale basis existed prior to the *TRO*; nevertheless, in an abundance of caution and to ensure the continued availability of commingled UNEs and UNE Combinations, CCG submits that the Amendment should include language clarifying the scope of Verizon's commingling obligations. CCG asserts that Verizon's representation that its proposed amendment "will not prohibit commingling of UNEs with wholesale services," and "provides that Verizon will perform the functions necessary to allow CLECs to commingle or combine UNEs with wholesale services" is not consistent with the language in its proposed Amendment, which limits CLECs' ability to commingle in many respects. CCG reiterates its opposition discussed in their Initial Brief regarding Verizon's proposed language that limits the availability of commingling to "Qualifying UNEs" and allows Verizon to retain the right to deny commingling for any "Discontinued Facility." CCG argues that the FCC did not limit CLECs' rights to commingle only "Qualifying UNEs" and did not disallow commingling of discontinued facilities, i.e., a facility no longer subject to unbundling under Section 251(c)(3). CCG points out that, in the *TRRO*, the FCC eliminated the "Qualifying UNE" definition. CCG further discusses that, in the *TRO*, the FCC directed parties to use Section 252 and change in law provisions to effectuate the new unbundling rules and declined "the request of several BOCs that we override the Section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with the renegotiation of contract provisions." CCG also opposes Verizon's

proposal that would limit CLECs' ability to engage in commingling by reserving the right to assess recurring and non-recurring charges on CLECs that are not supported by the *TRO* and the *TRRO*. Further, CCG joins the position of AT&T and disputes Verizon's proposed service eligibility criteria set forth in its proposed Amendment. CCG explicitly states in its proposed Amendment that it will "certify its compliance with the criteria set forth in Rule 51.318," which does not require carriers to "re-certify" existing UNE and UNE Combination arrangements, as Verizon proposes in its Amendment. Moreover, and as discussed in more detail in response to Issue 17, CCG urges the Board not to allow Verizon to exempt itself from provisioning intervals, performance measurements and associated remedies when commingling facilities for CLECs.

Discussion and Proposal

The ICAs should be amended to address changes arising from the *TRO* with respect to commingling of UNEs with wholesale services, EELs, and other combinations. As directed by the FCC, Verizon must be required to effectuate commingling by modifying its ICAs to expressly permit connections with UNEs and UNE combinations.

In the *TRO*, the FCC modified its rules to remove earlier restrictions on when competitive carriers could commingle or combine loops or loop-transport combinations with tariffed special access services. The FCC determined that the commingling restrictions put CLECs at an unreasonable competitive disadvantage by forcing them either to operate two functionally equivalent networks – one network dedicated to local services and one dedicated to long distance and other services – or to choose between using UNEs and using more expensive special access services to serve their customers.⁸⁹ The FCC therefore required Verizon to effectuate commingling by modifying its interstate access service tariffs to expressly permit connections with UNEs and UNE combinations. From that directive, it follows that Verizon must effectuate commingling in the ICAs.

In addition, I recommend that the Board reject Verizon's contention that it should exclude its performance from standard provisioning measures and remedies. Verizon's provision of commingled UNEs must be subject to order and provisioning metrics and performance measures

89. *TRO* at ¶ 581.

and remedies for these facilities, just as the UNEs within those orders are already subject to such metrics and remedies. There is no reason that Verizon's provisioning of commingled UNEs should be excluded from appropriate provisioning intervals and performance incentives simply because they are being provided in combination with other wholesale services.

I also recommend that Verizon's proposal with respect to re-certification on a circuit-by-circuit basis be rejected. CLECs should be permitted to re-certify all prior conversions in one batch; for future conversions requests, rather than requiring competitors to certify individual requests on a circuit-by-circuit basis, the CLECs should be permitted to submit orders for these as a batch, also.

ISSUE 13 Should the interconnection agreements be amended to address changes arising from the *TRO* with respect to conversion of wholesale services to UNEs/UNE combinations? If so, how?

Verizon's Position:

Verizon's position in its Initial Brief and Reply Brief regarding this issue was merged with its discussion on Issue 12.

AT&T's Position:

AT&T contends that, with the FCC's reaffirmation of the elimination of commingling restrictions and the elimination of qualifying services criteria in the *TRRO*, AT&T needs to have Verizon convert high-priced special access and wholesale services to UNEs, unless precluded by service eligibility criteria, so that AT&T can be cost competitive with Verizon. According to AT&T, since conversions are essentially a mere billing change, Verizon should make the conversions to UNEs and UNE rates effective with the next month's billing.

In its Reply Brief, AT&T argues that there is a common dispute between AT&T and Verizon in Issues 12, 13, 21 and 25: Verizon's effort to impose an onerous pre-ordering audit requirement on CLECs seeking to order EELs and UNE combinations and to convert existing circuits to UNEs. AT&T contends that the FCC rejected the proposals of the ILECs such as Verizon that had sought to require other conditions on the CLECs as a pre-condition to ordering

an EEL or converting existing circuits to EELs, such as pre-audits and other requirements that the FCC described as constituting unjust, unreasonable and discriminatory terms and conditions for obtaining access to UNE combinations.

CCC's Position:

CCC responds, "Yes," and refers to its Brief and Reply Brief on Issue 21.

CCG's Position:

CCG answers that the parties' interconnection agreements should be amended to reflect that competitive carriers may convert tariffed services provided by Verizon to UNEs or UNE combinations, provided that the service eligibility criteria established by the FCC, under the *TRO*, are satisfied. CCG claims that neither the D.C. Circuit's USTA II decision nor the *TRRO* displaced the FCC's earlier findings with regard to competitive carriers' rights to convert Verizon wholesale services to UNEs or combinations of UNEs, as permitted by the *TRO*.

CCG points out that Verizon proposes no language governing conversions, presumably because Verizon disagrees with the FCC that Verizon should be required to permit CLECs to convert wholesale services to UNEs; therefore, the Board should adopt the CLEC language.

In its Reply Brief, CCG emphasizes that Verizon did not address, in its Initial Brief, its obligation arising under the *TRO* to convert UNEs and UNE combinations to wholesale services, and wholesale services to UNEs or UNE combinations, provided that the competitive LEC requesting such conversions has properly certified compliance with the service eligibility criteria established by the FCC for serving a particular customer. CCG asserts that, consistent with the *TRO*, and as discussed in response to Issue No. 21, the terms and conditions applicable to conversions must be expressly included in the Amendment to the parties' interconnection agreements.

Discussion and Proposal

I recommend that the ICAs be amended to address changes arising from the *TRO* with respect to conversion of wholesale services to UNEs/UNE combinations. The ICA revisions should be consistent with all changes to the FCC's rules to date, including the revisions to FCC Rule 47 C.F.R. § 51.316.

The FCC was clear in the *TRO* concerning ILEC obligations to permit conversions of wholesale services. The FCC's Rule 47 C.F.R. § 51.316, in discussing conversion of unbundled network elements or services, states:

- (a) Upon request, an incumbent LEC shall convert a wholesale service, or group of wholesale services, to the equivalent unbundled network element, or combination of unbundled network elements, that is available to the requesting telecommunications carrier under Section 251(c)(3) of the Act and this part.
- (b) An incumbent LEC shall perform any conversion from a wholesale service or group of wholesale services to an unbundled network element or combination of unbundled network elements without adversely affecting the service quality perceived by the requesting telecommunications carrier's end-user customer.

Finding that these conversions are "largely a billing function," the FCC also concluded that conversions should be performed in an expeditious manner.

Verizon's proposal to impose specific certification and audit processes on CLECs seeking to order EELs and UNE combinations and to convert existing circuits to UNEs are addressed in Issues 21 and 25.

ISSUE 14 Should the ICAs be amended to address changes, if any, arising from the *TRO* with respect to Issues 14(a) through 14(j):

Verizon's Position:

Verizon stresses its position that this arbitration is not a free-for-all for parties to propose changes to terms in their underlying agreements that they may not like. Verizon insists that the Board should not entertain CLEC proposals that relate to unbundling obligations that predate the *TRO*, including line splitting, line conditioning, and NIDs (among other issues). Verizon argues that the scope of this proceeding is limited to modification of the ICAs in order to effectuate the changes in unbundling obligations brought about by the *TRO* and the *TRRO*.

AT&T's Position:

AT&T contends that the parties' ICAs should be amended to address changes arising from the *TRO* with respect to line sharing, line splitting, line conditioning, and the maintenance, repair and testing of copper loops and subloops. AT&T states that while Verizon's proposed

amendments have no comparable provisions, AT&T's proposed language at Section 3.3 on this issue appropriately implements the *TRO* requirements, and especially the line splitting and line conditioning requirements of 47 C.F.R. § 51.319(a)(1)(ii).

CCC's Position:

CCC argues that the Board should resolve the threshold dispute as to which markets the FCC's FTTH, FTTC and Hybrid Loops rules apply. CCC contends that Verizon appears to have reversed their position taken in recent FCC filings, and is now attempting improperly to extend these rules to most of the enterprise market. CCC asserts that Verizon's proposed amendment is contrary to the numerous indications by the FCC that the broadband unbundling relief was designed for and applies to only the mass market. CCC points out, however, that the FCC has not to date precisely defined the cutoff between the mass market and "enterprise" customers. CCC contends that, in order to implement the broadband loop rules in accordance with Section 251 and the *TRO*, the Board must delineate the point between the enterprise and mass markets and apply these rules only to the latter.

CCG's Position:

CCG claims that the parties' interconnection agreements should be amended to reflect any changes to the FCC's unbundling rules arising under the *TRO* that were not vacated by the D.C. Circuit in *USTA II*, or modified by the FCC in the *TRRO* or other FCC order. CCG says the amendment should expressly incorporate the requirements of the *TRO* and the FCC's rules with regard to the following: line splitting; newly built fiber-to-the-home and fiber-to-the-curb loops; overbuilt fiber-to-the-home and fiber-to-the-curb loops; access to hybrid loops for the provision of broadband services; access to hybrid loops for the provision of narrowband services; retirement of copper loops; line conditioning; packet switching; network interface devices (NIDs); and line sharing.

Discussion and Proposal

The specific changes adopted by the FCC in the *TRO* related to the sub-parts of this issue are not self-effectuating, and therefore, I recommend the these changes be codified in the parties' ICAs in order to become effective.

ISSUE 14(a) Line Splitting**Verizon's Position:**

Verizon emphasizes that in the *TRO*, the FCC merely reaffirmed the FCC's line splitting requirement adopted earlier, continuing to find that ILECs must provide line splitting. Verizon asserts that since the requirement to provide line splitting is not a new obligation, there is no basis for addressing this issue in this arbitration. Moreover, to the extent any CLEC may lack line splitting provisions in its existing contract, Verizon points out that its standard line splitting amendment is available, and has been available since 2001.

In its Reply Brief, Verizon reiterates that the FCC's *TRO* did not change any line-splitting rules; therefore, these rules are already implemented in existing agreements.

AT&T's Position:

AT&T argues that the parties' ICAs should be amended to address changes arising from the *TRO* with respect to line splitting. In particular, AT&T states that its amendment includes procedures consistent with the rule that require Verizon to use a splitter collocated at the central office to enable AT&T to engage in line splitting and to condition a copper loop at no cost to AT&T where AT&T seeks access in order to ensure that the copper loop is suitable for providing digital subscriber line services. In addition, AT&T says that its amendment sets out a procedure for Verizon's maintenance, repair and testing in connection with line splitting.

CCC's Position:

CCC takes no position on this issue, but reserves the right to do so in the future.

CCG's Position:

In its Initial Brief, CCG refers to the global statement above for their position on all elements of Issue 14.

In its Reply Brief, CCG asserts that the amendment should incorporate the FCC's rules with regard to line splitting as set forth at 47 C.F.R. § 51.319(a)(1)(ii). Moreover, CCG argues, their proposed amendment provides that to the extent that the FCC issues further orders regarding line sharing or the Board issues its own line sharing rules, CCG retains the ability to avail itself of any rights under "Applicable Law." CCG recognizes that Verizon has not proposed any language for line splitting in its Amendment, as it claims that line splitting is not a new

obligation, and therefore "there is no basis for addressing this issue in this arbitration." CCG points out that there are issues addressed in this arbitration, such as commingling, that are not new obligations, and in order to avoid any doubt as to the nature and extent of the parties' obligations, CCG has included language in its proposed Amendment to address such issues.

Discussion and Proposal

I recommend that the parties' ICAs should contain language consistent with the FCC's decision in the *TRO* with respect to line splitting.

The *TRO* addresses line splitting requirements in 47 C.F.R. § 51.319(a)(1)(ii):

Line splitting. An incumbent LEC shall provide a requesting telecommunications carrier that obtains an unbundled copper loop from the incumbent LEC with the ability to engage in line splitting arrangements with another competitive LEC using a splitter collocated at the central office where the loop terminates into a distribution frame or its equivalent. Line splitting is the process in which one competitive LEC provides narrowband voice service over the low frequency portion of a copper loop and a second competitive LEC provides digital subscriber line service over the high frequency portion of that same loop.

Verizon offers its "standard line splitting amendment" to CLECs which do not have such language in their ICA. To the extent that the Verizon "standard" amendment does not comport with the above requirement, the language should be modified to reflect the FCC Rule.

ISSUE 14(b) Newly built and Overbuilt FTTP, FTTH or FTTC loop changes

Verizon's Position:

Verizon asserts that the FCC determined in the *TRO* that CLECs are not impaired, on a national basis, without unbundled access to loops consisting of fiber from the central office to the customer premises, known as fiber-to-the-premises or FTTP loops, and that ILECs do not have to offer unbundled access to newly deployed or "greenfield" fiber loops. Verizon insists that its amendment provides simply that "in no event shall [the CLEC] be entitled to obtain access to an FTTP Loop (or any segment or functionality thereof) on an unbundled basis" where the FTTP loop is newly built to serve a new customer. Verizon stresses that this language is consistent with the FCC's rules.

In its Reply Brief, Verizon states that it has responded to the "FTTH"/"FTTP" issue in its response to Issue 9. With respect to CCC's claims that Verizon has omitted the FCC's statement concerning the serving area interface and limitations on the copper distribution subloop, Verizon responds that its Amendment 2 (Section 4.7.14) already provides language that replicates that language.

Verizon responds to CCC's argument that fiber and hybrid loops be unbundled for enterprise customers, and that the FCC limited unbundling obligations only as to mass-market customers. Verizon points to 47 C.F.R. § 51.319(a)(3)(ii) which currently states that an ILEC "is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC deploys such a loop to an end user's customer premises that previously has not been served by any loop facility. Verizon asserts that this indicates that the FCC's exception for FTTC/FTTH does not apply to just residential units, but to all "customer premises."

Moreover, Verizon notes that although the Mixed-use Multiple Dwelling Units ("MDU") Reconsideration Order indicated that the FCC granted unbundling relief as to FTTP loops serving "MDUs that are predominantly residential in nature," the FCC's FTTC Order clarified that "incumbent LECs are not obligated to build TDM capability into new packet-based networks or into existing packet-based networks that never had TDM capability." Verizon points out that, as to dark fiber loops, the *TRRO* found that CLECs are not impaired without access to dark fiber loops in any instance; therefore, FTTP loops – which are packet-based and contain no TDM capability – are not required to be unbundled to any type of location, whether dark or lit.

Furthermore, Verizon argues that the FCC has made clear that its loop unbundling requirements do not vary with the type of customer served, holding that even though it classified various types of loops as "enterprise" or "mass market," this analytical approach does not mean that loop unbundling obligations pertain only to one specific customer type. Verizon points out that, in the *TRO*, the FCC reiterated this point:

We reiterate that we do not tailor our rules to restrict or limit unbundling based on the size or class of the customer served. A large enterprise customer's particular loop capacity demand at a given service location is determined by multiple factors unique to that customer's needs at that specific location, rather than the size of that customer. Merely because large enterprise customers are typically the only type

of customer that purchase OCn capacity loops does not equate to the fact that OCn loops are the only type of loop such customers demand. *TRO*, 316 (emphasis added).

AT&T's Position:

AT&T argues that the ICA should be amended to address these issues. Specifically, the Board should adopt AT&T's proposed provisions that properly implement the FCC's Rules regarding Verizon's obligation to provide access to a narrowband transmission path in newly built FTTH and certain overbuild FTTH situations.

AT&T offers its view that the primary disagreement between AT&T's proposed language and Verizon's proposed language is that AT&T uses the acronym "FTTH", while Verizon uses the acronym "FTTP". AT&T argues that its proposed language – with the acronym FTTH – is consistent with the FCC's rules.

With regard to new builds, AT&T agrees that the FCC rules specifically provide that Verizon is "not required to provide nondiscriminatory access to a fiber-to-the-home loop on an unbundled basis when the ILEC deploys such a loop to an end user's customer premises that previously has not been served by any loop facility." However, for overbuilds, where Verizon presently has facilities in place to residential subdivisions but retires the copper facilities, AT&T asserts that Verizon is obligated to provide AT&T with a 64 -kilobit transmission path capable of voice grade service. However, by attempting to define this fiber deployment as Fiber to the Premises or FTTP, rather than Fiber to the Home as the FCC has defined it, AT&T alleges that Verizon is seeking to limit its unbundling obligations, which violates federal law.

CCC's Position:

CCC observes that Verizon's proposal refers to fiber-to-the-premises ("FTTP") loops, which is not a term addressed by the FCC or FCC rules, but apparently refers to FTTH and FTTC loops together. CCC argues that Verizon's proposed definition of FTTP blurs important portions of the FCC's definition of FTTC loops, and they should be kept separate. In addition, CCC contends that Verizon's references to "serving" wire centers in its proposed FTTP definition are not supported by the FCC definitions and should be deleted.

CCC states that although the FCC's FTTH rules do not expressly exclude enterprise customers, they clearly were not intended to apply to most business customers. CCC asserts that

Verizon apparently recognizes that the FTTH, FTTC and Hybrid Loop rules only apply in the mass market, and it in its comments in the *TRRO* proceeding it urged the FCC to draw the line between the enterprise and mass markets for the implementation of the broadband rules.

However, CCC contends that the FCC did not provide an answer in the *TRRO*, and there is no guarantee that the FCC will provide definitive guidance regarding this issue in the near future, if at all. CCC opposes adoption of Verizon's proposal, as it would arguably permit Verizon to draw the line wherever it sees fit. CCC proposes a cutoff based upon the FCC's "four line carve out" rule, which in the past has served as a reasonable proxy of the demarcation between the enterprise and mass markets.

CCC states that the FCC, in affirming that the FTTH rules apply only to mass market loops, has held that in the case of mixed-use multiple dwelling units ("MDUs"), the FTTH rules would apply only to those that are "predominantly residential." CCC asserts that the Board must establish a definition for a "primarily residential" MDU, and CCC recommends that it be "an apartment building, condominium building, cooperative or planned unit development that allocates more than ninety percent of its total square footage to residences."

With respect to newly built Fiber-to-the Home ("FTTH") loops, CCC states that the only issue on which CCC and Verizon disagree is whether this term applies to loops other than mass market loops, as Verizon attempts to extend these provisions to enterprise loops.

CCG's Position:

In its Initial Brief, CCG refers to the global statement above for their position on all elements of Issue 14.

In its Reply Brief, CCG asserts that the Amendment should include provisions addressing newly built and overbuilt FTTH loops. CCG urges the Board not to allow Verizon to alter the meaning of FCC terms in its Amendment, as it does in the use of the term Fiber-to-the-Premises ("FTTP"), as opposed to the term Fiber-to-the-Home ("FTTH") as used by the FCC. Further, CCG asserts that Verizon has sought to end-run the change-of-law and arbitration process with regard to FTTH loops, omitting change-of-law language in its FTTH Section.

Discussion and Proposal

The parties' ICAs should contain language consistent with the FCC's decision in the *TRO* with respect to newly built FTTH and FTTC loops. As addressed in Issue 9, Verizon's references to "FTTP" should not be included. The ICA revisions should be made consistent with all changes to the FCC's rules to date, including the revisions to 47 C.F.R. § 51.319(a)(3) arising from the FCC's MDU and FTTC decisions.

The most significant contention between Verizon and the CLECs on this issue is whether the requirements apply only to mass market loops, as the CLECs accuse Verizon of extending the provisions to enterprise loops. The rule adopted by the FCC contains no distinction between mass market and enterprise customers, unless one considers the "Home" designation in "Fiber-to-the-Home" (47 C.F.R. § 51.319(a)(3)(ii)):

New builds. An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC deploys such a loop to an end user's customer premises that previously has not been served by any loop facility.

However, the FCC's discussion in the FTTC Order referred to the requirements for mass market FTTC loops, as is clear in Paragraph 2 of the FCC's FTTC Order:

In the [TRO], the Commission limited the unbundling obligations imposed on mass market FTTH deployments to remove disincentives to the deployment of advanced telecommunications facilities in the mass market. We find here that those policy considerations are furthered by extending the same regulatory treatment to incumbent LECs' mass market FTTC deployments. Similarly, just as we found no impairment with respect to mass market FTTH loops in the [TRO], we also find that the level playing field for incumbents and competitors seeking to deploy FTTC loops, and increased revenue opportunities associated with those deployments, demonstrates that requesting carriers are not impaired without access to mass market FTTC loops. (Footnotes omitted.)

Further, Paragraph 14 states:

Accordingly, we do not require incumbent LECs to provide unbundled access to new mass market FTTC loops for either narrowband or broadband services.

I recommend that the language incorporated into the parties' ICAs mirror the FCC's Rules; this should limit the application to mass market fiber loops for new builds or "greenfield" applications.

ISSUE 14(c) Overbuilt FTTP loops

Verizon's Position:

Verizon stresses that, although the FCC eliminated unbundling obligations for new FTTP loops, it held that ILECs must offer unbundled access to FTTP loops "for narrowband services only," in so-called "fiber loop overbuild situations" – that is, where the ILEC builds a new FTTP loop to serve a customer currently served by a copper loop and then "elects to retire existing copper loop. Verizon contends that its language appropriately provides that if Verizon deploys an FTTP loop to replace a copper loop used for a particular end-user customer, and if Verizon retires that copper loop such that there are no other copper loops available to serve that customer, then Verizon will provide "nondiscriminatory access on an unbundled basis to a transmission path capable of providing DS0 voice grade service to that end user's customer premises."

AT&T's Position:

AT&T previously stated its position on this issue as a part of Issue 14c.

CCC's Position:

CCC's proposals generally agree that Verizon may decline requests to provision an overbuild FTTH loop where it offers the alternative of nondiscriminatory access on an unbundled basis to a transmission path capable of providing DS0 voice grade service to the customer's premises. However, CCC points out that there are subtle differences in the two proposals, starting with CCC's inclusion of the additional specification that this path support be at transmission of at least 64 kilobits per second, which is explicitly specified as a requirement by the FCC. Unlike Verizon's proposal, CCC states that its proposal also establishes the rate for such access, in particular by capping the rate at the rate applicable to a DS0 UNE loop to the same premises. CCC asserts that its proposal also gives Verizon the option, instead of offering the voice grade channel, to continue to offer the unbundled copper loop to CLECs.

CCC urges the Board to reject two parts of Verizon's proposed terms. First, CCC argues that it should reject Verizon's statement that it would provide the voice grade channel "only to the extent required by 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51." Also, CCC urges the Board to reject Verizon's proposed language in the FTTH Overbuild Section of the agreement that "in no event shall CLEC be entitled to obtain access to an [FTTH Loop] on an unbundled basis where Verizon has deployed such a Loop to the customer premises of an end user that previously was not served by any Verizon Loop other than an FTTP Loop."

CCG's Position:

In its Initial Brief, CCG refers to the global statement above for their position on all elements of Issue 14.

In its Reply Brief, CCG states that its proposed language tracks FCC's rule 51.319(a)(3)(ii) with regard to overbuilt FTTH loops, including the requirement that if Verizon retires copper loops as a result of an overbuild, Verizon must provide "nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the fiber-to-the-home loop on an unbundled basis." CCG claims that Verizon is attempting to limit any other possible source of law that impacts its obligation to provide FTTH loops in overbuild situations. Specifically, CCG argues that Verizon's proposed Amendment limits its unbundling obligation "only to the extent required by 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51." CCG urges the Board not to allow Verizon to preemptively prohibit competitive carriers from utilizing any applicable law other than Section 251(c)(3) to maintain continued access to FTTH loops.

Discussion and Proposal

I recommend that the parties' ICAs contain language consistent with the FCC's decision in the *TRO* with respect to overbuilt FTTH and FTTC loops. As addressed in Issue 9, Verizon's references to "FTTP" should not be included. The ICA revisions should be made consistent with all changes to the FCC's rules to date, including the revisions to rules arising from the FCC's *FTTC* and *MDU* decisions. FCC Rule 47 C.F.R. § 51.319(a)(3)(iii) states:

- (iii) Overbuilds. An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb

loop on an unbundled basis when the incumbent LEC has deployed such a loop parallel to, or in replacement of, an existing copper loop facility, except that:

- (A) The incumbent LEC must maintain the existing copper loop connected to the particular customer premises after deploying the fiber-to-the-home loop or the fiber-to-the-curb loop and provide nondiscriminatory access to that copper loop on an unbundled basis unless the incumbent LEC retires the copper loops pursuant to paragraph (a)(3)(iv) of this Section.
- (B) An incumbent LEC that maintains the existing copper loops pursuant to paragraph (a)(3)(iii)(A) of this Section need not incur any expenses to ensure that the existing copper loop remains capable of transmitting signals prior to receiving a request for access pursuant to that paragraph, in which case the incumbent LEC shall restore the copper loop to serviceable condition upon request.
- (C) An incumbent LEC that retires the copper loop pursuant to paragraph (a)(3)(iv) of this Section shall provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the fiber-to-the-home loop or fiber-to-the-curb loop on an unbundled basis.

ICA revisions should strictly follow the language of the FCC Rules. As stated in Issue 14(b) above, the Rules should be viewed as referring to mass market applications.

ISSUE 14(d) Access to Hybrid Loops

Verizon's Position:

Verizon stresses that the FCC declined in its *TRO* to require ILECs to unbundle the capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market. Verizon contends that its language provides that, if a CLEC requests a hybrid loop for broadband services, Verizon will provide "the existing time division multiplexing features, functions, and capabilities of that Hybrid Loop (but no features, functions or capabilities used to transmit packetized information) to establish a complete time division multiplexing transmission path between the main distribution frame (or equivalent) in a Verizon wire center service to the demarcation point at the end user's customer premises."

In its Reply Brief, Verizon agrees that the language of Verizon's proposed Amendment 2 highlighted by CCC, suggesting that it would not be obligated to provision DS1 or DS3 capacity hybrid loops unless the FCC readopted DS1 and DS3 loop rules after September 13, 2004, is no longer necessary, since the FCC has done so.

AT&T's Position:

AT&T asserts that CLECs are entitled to access an entire unbundled loop, regardless of the telecommunications service that a carrier wishes to provide, and regardless of the underlying loop architecture Verizon uses to provide the loop functionality. AT&T reasons that nothing in a "Next Generation Digital Loop Carrier" ("NGDLC") architecture changes the fact that the connection from the customer's premises to the central office is still a "loop." In addition, AT&T believes the electronics associated with the next-generation loop architecture should be considered part of the loop. Specifically, AT&T contends that the line cards with Digital Subscriber Line Access Multiplexer ("DSLAM") functionality and Optical Concentration Devices ("OCDs") perform transmission-oriented functions when placed in next-generation loop architecture.

AT&T argues that even if physical, adjacent, and virtual collocation may be useful to some competitors in limited circumstances, remote terminal collocation is not a practical mass-market solution and cannot provide a substitute for access to an entire loop. AT&T proposes language that is intended to ensure that Verizon is not able to impede AT&T's unbundled access to all of the Time Division Multiplex features and capabilities of Verizon's network assets under the guise of a network upgrade or by adding packet capabilities in a digital loop carrier that otherwise serves legacy, TDM loops.

CCC's Position:

CCC points out several significant differences between CCC's proposal and Verizon's amendment, in addition to the requirement that the Hybrid Loop terms should be limited to the mass market, as described above. It is CCC's understanding that the parties agree that Verizon is required to provide access to time division multiplexing features, functions, and capabilities of Hybrid Loops. However, CCC points out that Verizon's language fails to include a requirement that such access is provided in a nondiscriminatory manner. In addition, CCC points out that Verizon's proposed amendment includes extensive language, drafted prior to the adoption of the

TRRO, suggesting that it would not be obligated to provision DS1 or DS3 capacity hybrid loops unless the FCC readopted DS1 and DS3 loop rules after September 13, 2004. Since the FCC has done so, there is no need for Verizon's language.

Next, CCC asserts that Verizon's proposal would insert unnecessary language that would limit its obligation to provide Time Division Multiplex ("TDM") access to the extent required by federal regulations, and CCC contends that these provisions are unnecessary and potentially contrary to law. Finally, CCC notes that its proposal includes the definition of Packet Switching, because this is the only Section in the amendment where the term "Packet Switching" is used.

CCG's Position:

In its Initial Brief, CCG refers to the global statement above for their position on all elements of Issue 14.

In its Reply Brief, CCG points out that its proposed language states that Verizon must provide access to hybrid loops for the provision of broadband and narrowband services, "only to the extent required by 4 U.S.C. § 251(c)(3), 47 C.F.R. Part 51 or other Applicable Law." CCG asserts that Verizon's claim that "Applicable Law" expands the scope of Verizon's unbundling obligation of hybrid loops for broadband and narrowband services is incorrect. CCG also agrees with AT&T's position that Verizon should not be permitted to limit the type of electronics that are available for access to high-capacity loops, but rather that "the electronics associated with the next-generation loop architecture should be considered part of the loop."

Discussion and Proposal

I recommend that the parties' ICAs contain language consistent with the FCC's decision in the *TRO* with respect to access to hybrid loops for the provisioning of broadband services. The FCC's determinations with respect to hybrid loops for the provisioning of broadband services should be applied to mass market customers.

In constructing loops, carriers often install feeder plant facilities made of fiber. This fiber feeder carries traffic from the carrier's central office to a centralized field location called a remote terminal. From the remote terminal, traffic then travels over distribution plant (typically made of copper) to and from customers. The result is a "hybrid loop," i.e., those local loops consisting of

both copper and fiber optic cable (and associated electronics, such as Digital Loop Carrier systems).

The FCC Rule (47 C.F.R. § 51.319(a)(2)(ii)) is specific in its description of the use of a hybrid loop for broadband services:

(ii) Broadband services. When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of broadband services, an incumbent LEC shall provide the requesting telecommunications carrier with nondiscriminatory access to the time division multiplexing features, functions, and capabilities of that hybrid loop, including DS1 or DS3 capacity (where impairment has been found to exist), on an unbundled basis to establish a complete transmission path between the incumbent LEC's central office and an 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.

The parties agree that Verizon is required to provide access to time division multiplexing features, functions, and capabilities of Hybrid Loops, and that such access must be provided on a nondiscriminatory basis.

There remains a conflict between Verizon and the CLECs regarding whether the FCC's findings with respect to the application of its Hybrid Loops clauses apply only to mass market customers. The FCC clearly states in the TRO, "we adopt a national approach that relieves incumbent LECs of unbundling requirements for the next-generation network capabilities of their hybrid loops, while at the same time ensures requesting carriers have access to the transmission facilities they need to serve the mass market."⁹⁰

ISSUE 14(e) Hybrid loops for narrowband services

Verizon's Position:

Verizon emphasizes that in the *TRO*, the FCC limited ILECs' unbundling obligations to the features, functions, and capabilities of hybrid loops that are not used to transmit packetized information. Verizon states that if a CLEC requests a hybrid loop for the purpose of providing narrowband service, the ILEC is required to provide an entire non-packetized transmission path

90. *TRO* at ¶ 286.

capable of voice-grade service between the central office and customer's premises. Verizon insists that the FCC limited the unbundling obligations for narrowband services to the TDM-based features, functions, and capabilities of these hybrid loops. ILECs may elect instead, according to Verizon, to provide a homerun copper loop rather than a TDM-based narrowband pathway over their hybrid loop facilities if the incumbent LEC has not removed such loop facilities.

Verizon states that its language provides that if a CLEC seeks to provide narrowband services via a hybrid loop, Verizon may either provide (a) a "spare home-run copper Loop serving that customer on an unbundled basis," or (b) a "DS0 voice-grade transmission path between the main distribution frame (or equivalent) in the end user's serving wire center and the end user's customer premises, using time division multiplexing technology." Verizon objects to AT&T's language that would require Verizon to provide a copper loop at AT&T's discretion, rather than giving Verizon the choice of whether to use a spare copper loop.

In its Reply Brief, Verizon criticizes AT&T's proposal on this issue, stating that it appears to expand upon the FCC's rules in at least two ways. First, Verizon asserts that AT&T would give itself the right to force Verizon to provide an unbundled copper loop, removing Verizon's discretion to choose when to provide a spare home-run copper loop and when to provide a voice-grade transmission path (not to mention the fact that AT&T would require unconstrained routine network modifications, apparently at no charge, to make its access to the copper loop possible). Second, Verizon argues that AT&T's proposal specifies either a copper loop or an "entire Hybrid Loop capable of voice-grade service," in contrast to the FCC's finding that ILECs must simply provide access to a voice-grade transmission path, not the entire hybrid loop. Verizon contends that, by specifying access to the whole loop, AT&T is attempting to gain access to precisely the thing that the FCC said it could not have-the packet-switched features of the hybrid loop.

AT&T's Position:

See AT&T position on Issue 14d.

CCC's Position:

Other than CCC's argument that the Hybrid Loop terms should be limited to the mass market, as described above, the only significant differences between CCC's proposal and

Verizon's amendment have to do with the parties' differences on access to hybrid loops for the provision of broadband services.

CCG's Position:

In its Initial Brief, CCG refers to the global statement above for their position on all elements of Issue 14. In its Reply Brief, Issues (d) and (e) are combined.

Discussion and Proposal

I recommend that the parties' amended ICAs contain language consistent with the FCC's decision in the *TRO* with respect to access to hybrid loops for the provisioning of narrowband services. The FCC's determinations with respect to hybrid loops for the provisioning of narrowband services should be applied in the context of mass market customers.

The FCC's discussion of hybrid loops for narrowband services in the *TRO* is contained in the "Loop Impairment by Customer Market - Mass Market Loops" portion of the Order, Section VI(A)(4)(a)(v)(B)(ii). The FCC Rule for hybrid loops for narrowband services is contained at 47 C.F.R. § 51.319(a)(2)(iii):

(iii) Narrowband services. When a requesting telecommunications carrier seeks access to a hybrid loop for the provision of narrowband services, the incumbent LEC 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 time division multiplexing technology; or

(B) Provide nondiscriminatory access to a spare home-run copper loop serving that customer on an unbundled basis.

ISSUE 14(f) Retirement of Copper Loops

Verizon's Position:

Verizon indicates that it will provide notice of its intention to retire copper facilities in a manner consistent with the FCC's rules.

In its Reply Brief, Verizon argues that the FCC has already established the requirements Verizon must follow when it retires copper loops under 47 C.F.R. § 51.319(a)(3)(iii), and the

Board cannot adopt the conflicting requirements the CLECs propose.

AT&T's Position:

AT&T contends that while the *TRO* permits, under certain circumstances, the retirement of copper loops or subloops that have been replaced with fiber, except with respect to FTTH loops, it requires Verizon to follow certain network modification and disclosure requirements when retiring copper loops and subloops. AT&T argues that Verizon's proposed amendment inadequately addresses issues concerning the retirement of copper loops, and should be rejected.

CCC's Position:

CCC opposes Verizon's position that the amendments need not address this issue, stating that the *TRO* explicitly recognized that state commissions may impose additional requirements with respect to copper retirement. CCC contends that additional terms are in fact warranted in the wake of the *TRO* because the new broadband rules give Verizon additional incentive to retire copper loops, and proposes the requirement that reasonable and adequate notice of any proposed retirement of copper loops or subloops be given before such facilities are retired. CCC emphasizes the importance of this issue, as the new rules exempting certain fiber facilities from unbundling gives ILECs an incentive to replace copper facilities with fiber facilities in order to deny UNE access to CLECs.

In its Reply Brief, CCC reiterates that the *TRO* explicitly required ILECs to comply with any additional state rules, thus leaving the door open for states to impose additional rules for copper retirement that may be needed to further state or federal policy. CCC states that it does not in any way advocate terms that would require Verizon to broadly preserve outdated networks or that would deter Verizon from investing in new network technologies. The principal new state requirement proposed by CCC is strictly limited to copper loops that a CLEC is already using to provide service to an existing end user customer. If Verizon seeks to retire such a loop, CCC suggests it would have several options. CCC contends that it could move the CLEC to an alternative UNE that supports the CLEC's existing services, or terminate its provision of the loop to CLEC if it demonstrates that allowing the CLEC to continue using that loop to serve its customer would be unreasonable and contrary to the public interest. Under CCC's proposal, there is only one scenario on which Verizon would be required to continue to provide a copper loop to CLEC: (1) if the CLEC is providing an existing service to a Vermont end user customer

over a copper loop; (2) there is no alternative Verizon facility to which the CLEC could continue to offer its existing services at existing rates and terms to that customer without the copper loop; and (3) termination of the CLEC's access would serve no legitimate public interest. CCC's proposal also requires Verizon to provide 6 months' notice of a planned copper retirement.

CCG's Position:

In its Initial Brief, CCG refers to the global statement above for their position on all elements of Issue 14.

In its Reply Brief, CCG points out that FCC Rule 51.319(a)(3)(iii) requires Verizon to comply with network modification and disclosure requirements before retiring any copper loop or copper subloop that has been replaced with a FTTH loop. CCG addresses Verizon's claims that AT&T's (and CCG's) proposed language gives CLECs 180 days notice, which is inconsistent with the FCC's rules. However, CCG argues that a notice of retirement will be deemed "approved" 90 days after the FCC issues a Public Notice; therefore, the 90 days only applies from the time the retirement notice goes on public notice. CCG argues that it does not encompass the entire notice period, and that 180 days is a reasonable notice period considering the modifications CLECs must undertake to accommodate Verizon's copper loop or subloop replacement. Further, CCG disagrees with Verizon's dispute regarding the language proposed by AT&T and CCG because it includes a reference to copper subloop, even though the FCC uses the exact same term in its rules. CCG asserts that Verizon is again attempting to redefine FCC-established terms to its benefit and such effort should be rejected by the Board.

Discussion and Proposal

I recommend that the parties' ICAs should contain language consistent with the FCC's decision in the *TRO* with respect to the retirement of copper loops. Verizon should be required to file notice, with the Board and affected CLECs, of intent to retire copper loops at least 180 calendar days before the actual change.

In its *TRO*, the FCC declined to prohibit ILECs from retiring copper loops or subloops that they have replaced with fiber; however, the FCC added that any state requirements that currently apply to an ILEC's copper loop or subloop retirement practices will continue to apply.⁹¹

91. *TRO* at ¶ 271.

The FCC further clarified that incumbent LECs must provide notice of such retirement in accordance with their rules, as specified in 47 C.F.R. § 51.319(a)(3)(iii):

(iii) Retirement of copper loops or copper subloops. Prior to retiring any copper loop or copper subloop that has been replaced with a fiber-to-the-home loop, an incumbent LEC must comply with:

(A) The network disclosure requirements set forth in Section 251(c)(5) of the Act and in § 51.325 through § 51.335; and

(B) Any applicable state requirements.

In order to examine the impact of such changes on customer service and to explore means to mitigate that impact, Verizon should be required to file notice, with the Board and affected CLECs, of intent to retire copper loops at least 180 calendar days before the actual change.

In the *TRO*, the FCC stated that "when a copper loop is retired and replaced with a FTTH loop, we allow parties to file objections to the incumbent LEC's notice of such retirement."⁹²

ISSUE 14(g) Line Conditioning

Verizon's Position:

Verizon asserts that the FCC did not adopt any new rules in the *TRO* related to line conditioning. Instead, Verizon says the *TRO* directly stated that "we readopt the [FCC's] previous line and loop conditioning rules for the reasons set forth in the UNE Remand Order." Because the requirement to provide line conditioning is not a new obligation, Verizon claims there is no need to address this issue in this generic proceeding to address changes of law.

In its Reply Brief, Verizon reiterates that the FCC did not adopt any new rules related to line conditioning as set forth in the UNE Remand Order.⁹³ Verizon further points out that the Board has already approved rates for line conditioning, and Verizon is not asking the Board to change them. Verizon also opposes CCC argument that since line conditioning is a type of routine network modification, reference to conditioning is appropriate in that Section of the

92. 18 FCC Rcd at 17147, 282.

93. *UNE Remand Order*, 15 FCC Rcd at 3775, 172.

amendment. Verizon reiterates, that unlike the obligation to perform routine network modifications, the obligation to perform line conditioning pre-dated the *TRO* and was unchanged by it; it is therefore unnecessary to address line conditioning in this proceeding.

AT&T's Position:

AT&T's proposed language requires Verizon to condition a copper loop, at no cost, where AT&T seeks access to a copper loop, the high frequency portion of a copper loop, or a copper subloop to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not Verizon offers advanced services to the end-user customer on that copper loop or copper subloop. In contrast, AT&T argues that Verizon's proposed contract language does not contain provisions spelling out its obligation to perform line conditioning.

AT&T contends that Verizon's amendment would require CLECs to pay additional charges for line conditioning, including charges for the removal of load coils and bridged taps, in addition to the non-recurring rates that CLECs pay for an xDSL capable loop. AT&T claims that Verizon's proposal is not authorized by federal law and should be rejected.

In its Reply Brief, AT&T opposes Verizon's proposed contract language which does not contain provisions spelling out its obligation to perform line conditioning. AT&T's proposed language requires Verizon to condition a copper loop, at no cost, where AT&T seeks access to a copper loop, the high frequency portion of a copper loop, or a copper subloop to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not Verizon offers advanced services to the end-user customer on that copper loop or copper subloop. AT&T cites 642 of the *TRO*, where the FCC concluded that Verizon is obligated to provide access to "xDSL-capable stand alone copper loops because competitive carriers are impaired without such loops." AT&T further opposes Verizon's proposal that would require CLECs to pay additional charges for line conditioning, including charges for the removal of load coils and bridged taps, in addition to the non-recurring rates that CLECs pay for an xDSL capable loop, contrary to FCC Rules.

CCC's Position:

CCC states that Verizon is taking a position that line conditioning need not be addressed in this proceeding, since its obligation to perform line conditioning predates the *TRO*. CCC notes, however, that Verizon does not dispute that its obligation to perform routine network modifications is within the scope of this proceeding. CCC contends that line conditioning is a type of routine network modification, and reference to conditioning is appropriate in that Section of the *TRO* amendment.

CCG's Position:

In its Initial Brief, CCG refers to the global statement above for their position on all elements of Issue 14.

In its Reply Brief, CCG maintains that the Amendment must specifically list Verizon's obligations with regard to line conditioning. CCG further argues that line conditioning is part of the underlying loop and, therefore, Verizon may not assess charges above the TELRIC-based rates the CLEC must pay for the unbundled loop.

Discussion and Proposal

I recommend that the parties' ICAs contain language consistent with the FCC's decision in the *TRO* with respect to Line Conditioning. The definition of Line Conditioning is discussed in response to Issue 9 and is contained in the FCC's Rule 47 C.F.R. § 319(a)(1)(iii)(A). The specific unbundling requirements for Line Conditioning are addressed in the FCC's Rule 47 C.F.R. § 51.319(a)(1)(iii).

In the *TRO*, the FCC concluded that Verizon is obligated to provide access to xDSL-capable stand alone copper loops because competitive carriers are impaired without such loops. The *TRO* pointed out that in order to provide xDSL-capable loops, line conditioning is often necessary because of the characteristics of xDSL service (i.e., certain devices added to the local loop in order to facilitate the provision of voice services, disrupt the capability of the loop in the provision of xDSL services, in particular, bridge taps, load coils and other equipment disrupt xDSL transmissions). Because providing a local loop without conditioning the loop for xDSL services would fail to address the impairment CLECs face, the FCC requires ILECs to provide line conditioning to requesting carriers.

The FCC's Rule allows for specific charges to be assessed by Verizon for Line

Conditioning; specifically, such charges must be in accordance with the FCC's TELRIC pricing principles, and must be in compliance with rules governing non-recurring costs in Section 51.507(e).

ISSUE 14(h) Packet Switching

Verizon's Position:

Verizon reasons that the FCC found, on a national basis, that competitors are not impaired without access to packet switching, including routers and DSLAMs, and therefore declined to unbundle packet switching as a stand-alone network element. Verizon's proposed amendment clarifies that, in the case of hybrid loops, CLECs "shall not be entitled to obtain access to the Packet Switched features, functions, or capabilities of any Hybrid Loop on an unbundled basis." Verizon opposes any proposals by CLECs to gain access to packet switching that is allegedly used to provide circuit switched services, as it is contrary to FCC rulings.

In its Reply Brief, Verizon opposes the CLECs' claim that Verizon should continue to provide them with circuit switching capability to serve their UNE-P customers during the twelve-month transition period established in the *TRRO*. Verizon contends that the CLECs' proposal is unlawful, as the FCC has expressly rejected the argument that packet switching should be unbundled, even where Verizon may use packet switches to provide circuit switching functionality. Verizon states that the FCC even held that the replacement of a circuit switch with a packet switch eliminates any unbundling requirement – even if the sole purpose of such deployment is to avoid having to continue to provide unbundled switching.

AT&T's Position:

AT&T asserts that its main disagreement with Verizon on this issue involves the situation in which AT&T's UNE-P customers are served off of a Verizon switch that has both packet switching and circuit switching capability. In those circumstances, AT&T contends that Verizon is required to continue to provide AT&T with circuit switching capability to serve its UNE-P customers during the twelve-month transition period established in the *TRRO*, until such time as Verizon is no longer required to provide UNE-P.

AT&T asserts that there is a fundamental need to protect the CLEC's customers from the disruption caused by Verizon's unilateral efforts to disconnect existing services. Also, AT&T

contends that the CLECs themselves must be able to rely on the orderly transition periods established by the FCC in the *TRRO* to prepare their own ordering and other back-office systems to process orders for alternative facilities. These mutual needs must be met in tandem, according to AT&T, and any future efforts by Verizon to avoid its contractual or transition obligations should be discouraged. Thus, AT&T argues that the interconnection agreement should contain a provision regarding packet switching requiring that Verizon provide AT&T with twelve months notice for any switch change that would eliminate the availability of circuit switching prior to March 11, 2006, and ensuring that regardless of Verizon's decision to deploy packet switching, it is obligated to continue to provide local circuit switching functionality to AT&T for its UNE-P customers until such time as Verizon is no longer required to provide mass market local circuit switching as an unbundled element.

CCC's Position:

CCC contends that the amended ICAs should reflect the fact that the FCC's rules with respect to the unbundling of packet switching do not permit Verizon to evade its obligation to provide access to local switching where it replaces its circuit switch with a packet switch and uses the packet switch to perform local switching functionality. Instead, CCC advocates that Verizon's obligation to provide local switching should be technology neutral.

In its Reply Brief, CCC argues that Verizon is incorrect in its assertion that its obligation to provide unbundled local switching under the *TRRO* transition terms does not apply when it has deployed a packet switch to perform this function, citing what it believes to be FCC decisions in support. Contrary to this assertion, Verizon is obligated to provide unbundled switching pursuant to FCC rules that require ILECs to "provide a requesting telecommunications carrier with nondiscriminatory access to local circuit switching, including tandem switching, on an unbundled basis, in accordance with Section 251(c)(3) of the 1996 Act . . ." This unbundling is to include "all line-side and trunk-side facilities, plus the features, functions, and capabilities of the switch." CCC contends that Verizon's packet switches, when they replace a traditional TDM-based switch, are in fact performing a local circuit switching function, notwithstanding that they can also perform packet switching. CCC states that this is, in fact, the reason for applying the term "circuit" to this type of connection. CCC contends that Verizon's arguments are mistaken because they rely upon the distinction between a packet switch and a circuit switch -

two pieces of equipment that provide the same local switching function.

CCG's Position:

In its Initial Brief, CCG refers to the global statement above for their position on all elements of Issue 14.

In its Reply Brief, CCG states that its proposed language acknowledges the FCC's decision in the Triennial Review Order that CLECs are not impaired without access to packet switching, including routers and DSLAMs, and its language addresses Verizon switches that have both packet and switching capability. CCG contends that, in such situations, the "circuit switching, even if performed by a Packet Switch, is a network element that Verizon is obligated to provide on an Unbundled Network Element basis." CCG opposes Verizon's position that such language is contrary to federal law because the FCC has held that packet switching need not be unbundled; however, Verizon completely ignores the fact that the FCC's findings relate to packet switching used to provide broadband services. CCG argues that when packet switching is being used as a substitute for circuit switching primarily to provide voice service to local customers, such circuit switching should be provided as a UNE. CCG asserts that the FCC's definition of "local switching" proves that Verizon must provide UNEs for voice circuits regardless of the underlying technology employed, and it does not matter whether the underlying switch is circuit or packet-based.

Discussion and Proposal

I recommend that the parties' ICAs contain language consistent with the FCC's decision in the *TRO* with respect to Packet Switching. Under the terms of the *TRO*, Verizon no longer has an obligation to provide the CLECs with packet switching functionality as an unbundled network element.

As discussed in Issue 9, the FCC has defined "packet switching capability" as "routing or forwarding packets, frames, cells or other data units based on address or other routing information contained in the packets, frames, cells or other data units" as well as the functions performed by DSLAMs. The FCC reaffirmed in the *TRO* their finding, on a national basis, that competitors are not impaired without access to packet switching, including routers and DSLAMs. The FCC declined to unbundle packet switching as a stand-alone network element. The FCC

further made clear that this conclusion applies to both the mass market and the enterprise market.⁹⁴

The CLECs strongly argue that the FCC's decisions (by Orders and Rules) have addressed the packet switching functionality rather than the packet switch device itself. This is consistent with the FCC's avoidance of referring to specific technologies, but rather, attempting to refer to capabilities and functions whenever possible.

Continuing that distinction, it is relevant in this proceeding to separate packet switching and circuit switching from the technologies used to accomplish those functionalities. Circuit switching functionalities may well be provided by a device that also provides packet switching functionalities. The circuit switching function, no matter how it is provided, is the subject of the *TRRO*'s transition mechanism discussed further in Issue 3, above.

ISSUE 14(i) Network Interface Devices ("NIDs")

Verizon's Position:

Verizon contends that in its *TRO*, the FCC did not change, but merely reaffirmed, its previous rules: "We conclude that the NID should remain available as a UNE as the means to enable a competitive LEC to connect its loop to customer premises inside wiring." Because Verizon's contracts already address the current NID requirements, which did not change with the *TRO*, Verizon believes there is no reason to address them in this proceeding, and has not proposed any new language regarding access to NIDs.

In its Reply Brief, Verizon opposes AT&T's proposal that the amendment should include new terms regarding the NID, as the *TRO* did not alter the rules governing unbundling of NIDs. Verizon states that the FCC determined that the NID "should remain available as a UNE as the means to enable a competitive LEC to connect its loop to customer premises inside wiring."

AT&T's Position:

AT&T urges the Board to adopt provisions that accurately reflect Verizon's obligations with respect to providing unbundled access to Network Interface Devices, and AT&T's proposed contract amendment language properly reflects this determination. AT&T asserts that Verizon's

94. *TRO* at ¶ 537.

proposed contract amendments do not address either issue.

CCC's Position:

CCC takes no position on this issue, but reserves the right to do so in the future.

CCG's Position:

In its Initial Brief, CCG refers to the global statement above for their position on all elements of Issue 14.

In its Reply Brief, CCG states that its proposed language addressing NIDs sets forth Verizon's obligation to provide unbundled access to NIDs as well as its obligation to provide a NID as part of the local loop. CCG disagrees with Verizon's position that the Amendment need not include any NID provisions as it believes this item is adequately covered in both its contract and tariffs. CCG urges the Board not to allow for any ambiguity with regard to Verizon's obligation to provide access to NIDs and should not force the CLECs in this proceeding to look to Verizon's "standard agreement" or tariffs to determine their rights. Additionally, CCG urges the Board to remain very cautious of Verizon's use of its tariffs as an outside source to this Amendment and the underlying Agreement, as Verizon might use tariff amendments in an effort to end-run any change in law obligations under the Agreement.

Discussion and Proposal

I recommend that the parties' ICAs contain language consistent with the FCC's decision in the *TRO* with respect to Network Interface Devices. The FCC's Rule 47 C.F.R. § 319(c) defines the NID and describes the specific unbundling requirements that apply:

(c) Network interface device. Apart from its obligation to provide the network interface device functionality as part of an unbundled loop or subloop, an incumbent LEC also shall provide nondiscriminatory access to the network interface device on an unbundled basis, in accordance with Section 251(c)(3) of the Act and this part. The network interface device element is a stand-alone network element and is defined as any means of interconnection of customer premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device used for that purpose. An incumbent LEC shall permit a requesting telecommunications carrier to connect its own loop facilities to on-premises wiring through the incumbent LEC's network interface device, or at any other technically feasible point.

The parties' Amendment language should closely mirror the FCC's Rule.

ISSUE 14(j) Line Sharing**Verizon's Position:**

Verizon asserts that its proposal identifies line sharing as a "Discontinued Facility," and is therefore sufficient to bring the agreements into accord with federal unbundling rules. Verizon claims that to the extent that the FCC mandated a transition period or grandfathering for pre-existing line sharing arrangements in the *TRO*, Verizon is required to comply with this transition plan without an amendment, and regardless of any change-of-law provisions in its existing agreements. Further, Verizon contends that the FCC adopted the line sharing transition plan pursuant to 47 U.S.C. § 201 – not Section 251 – so there are no grounds, in any event, to incorporate such requirements into the Vermont ICAs as certain CLECs propose.

In its Reply Brief, Verizon objects to CCC's proposal to amend the agreements specifically to incorporate the FCC's grandfathering period for line-sharing, which has been eliminated as a UNE. Verizon points out that these requirements are already present in Rule 51.319(a)(1)(i)(B), and Verizon has and will continue to abide by them. It is unnecessary and inappropriate to amend agreements under Section 252 to put in place that temporary grandfathering period that the FCC adopted pursuant to its Section 201 authority, particularly when there has been no dispute about Verizon's compliance with the FCC's line sharing transition plan. Verizon offers, and some CLECs have signed, separate non-251 agreements under which it provides any line sharing that it remains obligated to provide under the FCC's transitional rules.

AT&T's Position:

AT&T contends that while the *TRO* eliminates over time Verizon's obligation to provide line-sharing as a UNE under federal law, it requires Verizon to continue existing line-sharing arrangements for customer locations where AT&T began providing xDSL service using line sharing prior to October 2, 2003, and this should be included in the amendment.⁹⁵

CCC's Position:

CCC agrees that Verizon has an ongoing obligation to provide certain grandfathered line

95. *TRO* at ¶ 255-270.

sharing arrangements, specifically, existing line sharing arrangements (1) that were initially ordered between October 2, 2003, and October 1, 2004, in accordance with the terms of 47 C.F.R. §51.319(a)(1)(i)(B); and (2) that were initially ordered prior to October 2, 2003, at existing rates, for so long as a CLEC has not ceased providing xDSL service to that end user customer at the same location over that loop or subloop.

CCG's Position:

In its Initial Brief, CCG refers to the global statement above for their position on all elements of Issue 14.

In its Reply Brief, CCG maintains that line sharing should remain a part of the Amendment. CCG asserts that, as discussed at length in CCG's response to Issue Nos. 1 and 32, the Board has authority under the 1996 Act to utilize Section 271 and state law to maintain Verizon's unbundling obligations. CCG argues that, at a minimum, Verizon is obligated to continue providing line sharing to CLECs under Checklist Item 4 of Section 271. CCG asserts that Verizon is both an ILEC and a Bell Operating Company, and Section 271 of the 1996 Act imposes separate and independent obligations on ILECs who are also BOCs operating under Section 271 authority. As a consequence, CCG argues that the FCC's transition plan applies to ILECs for whom the obligation to provide access to line sharing was removed pursuant to the FCC's Section 251 unbundling analysis, but not to BOCs, like Verizon, who have an independent obligation to provide access to line sharing under Section 271. CCG has briefed the issue of Applicable Law in response to Issues 1, 29 and 32.

Discussion and Proposal

I recommend that the parties' ICAs include language consistent with the FCC's decision in the *TRO* with respect to Line Sharing, as reflected in 47 C.F.R. § 319(a)(1)(i). I reject Verizon's argument that this issue is not associated with Section 251. The FCC revised its Line Sharing rules in the *TRO* under the authority of Section 251, and those rules (which reside in Section 319 related to specific unbundling requirements) are predominantly an interconnection issue.

After the D.C. Circuit vacated the FCC's Line Sharing rules, the FCC reexamined its position in the *TRO* and eliminated Line Sharing as an unbundled element, with a three-year transition period for grandfathered arrangements. To the extent that the transition period remains

in effect for some arrangements, the language should be included in the ICAs.

ISSUE 15 What should be the effective date of the Amendment to the parties' agreements?

Verizon's Position:

Verizon answers that the effective date of Amendment 1 or 2 should be the date of execution by the parties and approval by the Board, unless the parties agree to specify a different effective date. Verizon contends that the CLEC proposal in this proceeding to adopt an earlier date would be inconsistent with the *TRO*, and unfair in that it would allow some parties to obtain a retroactive benefit.

In its Reply Brief, Verizon points out that the CLECs appear to agree with Verizon that the Amendment should be effective upon Board approval; however, they propose a different effective date – specifically, the *TRO*'s October 2, 2003, effective date – for implementation of the *TRO*'s provisions as to routine network modifications, commingling, and conversions. Verizon argues that nothing in the *TRO* or the FCC's rules requires Verizon to provide retroactive pricing for any of these services. Verizon asserts that the CLECs have no basis to claim entitlement to any retroactive pricing adjustments, and if the Board wishes to consider retroactive pricing, it should do so for the UNEs de-listed in the *TRO*, as well.

AT&T's Position:

AT&T contends that, as a general matter the effective date of the parties' amendment to the interconnection agreement should be on the date the amendment is executed by the parties, following arbitration, and redrafting of an amendment to reflect the Board's order in this matter. However, as discussed in connection with Issues 11 and 12 above, AT&T asserts that Verizon must permit commingling and conversions upon the *TRO*'s effective date so long as the requesting carrier certifies that it has met certain eligibility criteria. AT&T's proposal makes clear that (1) as of October 2, 2003, 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*. Moreover, AT&T contends that the rates for new

EELs/conversions should be those applicable as of the date AT&T first made its request for those arrangements to Verizon.

AT&T urges submission of the final agreement to occur expeditiously after the Board has ruled on the various issues in this arbitration proceeding and the parties have agreed to language that implements the Arbitrator's decision. AT&T further urges the Board to be watchful of a party's effort to try to take a proverbial "second bite at the apple" by proposing compliance language that does not genuinely conform to the Board's order.

CCC's Position:

CCC also argues that Verizon must permit commingling and conversions upon the *TRO*'s effective date so long as the requesting carrier certifies that it has met any required eligibility criteria. CCC also proposes that CLECs should receive pricing for new EELs and converted UNEs as of the date they made such requests to Verizon.

CCG's Position:

CCG states that the amendments should be effective as of the date of the last signature, except with respect to the transition rates for network elements that Verizon no longer is obligated to provide under Section 251 of the 1996 Act, as expressly provided by the *TRRO*. To the extent that any provision of the Amendment should be given retroactive effect, as required by the FCC, CCG argues that the Amendment must state the effective date of the specified provision of the Amendment and the controlling FCC rule or order.

With regard to any rates, terms and conditions set forth in the Amendment applicable to commingling and conversions, CCG responds that the effective date of such provisions will be, as required by the FCC, October 2, 2003, the effective date of the *TRO*.

Discussion and Proposal

As earlier addressed, the *TRRO* and an interpretation of contract law make clear that the FCC's unbundling determinations are not self-effectuating. Verizon and Vermont CLECs may implement changes in law arising under the *TRO* and the *TRRO* only as directed by Section 252 of the 1996 Act, and consistent with the change in law processes set forth in carriers' individual interconnection agreements with Verizon. Verizon is bound by the unbundling obligations set forth in its existing ICAs with Vermont CLECs until such time as those agreements are properly

amended to incorporate the changes in law and, when applicable, the FCC-mandated transition plans and rates established under the *TRRO*.

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

Verizon's Position:

Verizon's proposed language provides that if a CLEC seeks to provide narrowband services via a 2-wire or 4-wire loop that is currently provisioned via IDLC, Verizon will provide a "Loop capable of voice-grade service to the end user customer." Verizon's language further states that Verizon will provide the CLEC with an existing copper loop or a Universal Digital Loop Carrier ("UDLC") loop, where available, at the standard recurring and non-recurring charges. If, and only if, neither a copper loop nor a UDLC loop is available, the CLEC has the option of requesting Verizon to construct the necessary copper loop or UDLC facilities. In that case, the CLEC will be responsible for certain charges associated with the construction of that new loop facility, including an engineering query charge, an engineering work order nonrecurring charge, and construction charges. Verizon opposes the language proposed by AT&T that requires Verizon to provide, at the CLEC's option, a choice of an existing copper loop, a UDLC loop, or an unbundled TDM channel on the Hybrid Loop. Verizon also opposes CLEC proposals that imply incorrectly that Verizon could be forced to construct a new copper loop at the CLEC's request for free.

In its Reply Brief, Verizon reiterates that its proposal contains several solutions for unbundled access to hybrid, IDLC fed loops that are reasonable and completely consistent with the *TRO* requirements. Verizon responds to AT&T's contention that Verizon should be required to undertake "engineering solutions" to provide access to IDLC loops in every instance, stating that nothing in the FCC's rules gives the CLEC the discretion to decide how Verizon will provide access to IDLC-fed loops. Verizon opposes AT&T's amendment which would allow it to dictate the access method and the right to force Verizon to provide an unbundled copper loop, "using Routine Network Modifications as necessary," without any mention of AT&T having to pay for

any such modifications or construction. Verizon further contests AT&T's proposal that would give AT&T the right to insist on "UNE-P at TELRIC" if a spare copper facility or UDLC system was not available, as under the *TRRO*, AT&T has no right to new UNE-P arrangements. In addition, Verizon disagrees with AT&T's assumption, without any support, that building new loops or UDLC systems is uniformly more expensive than "engineering solutions." Verizon argues that, in fact, new construction is often less expensive than network reconfiguration, particularly where Verizon's ordering, provisioning, and maintenance systems do not support the CLEC's proposed access method (e.g., "hairpinning").

Verizon also replies to CCC's claims that "Verizon's attempt to assess additional nonrecurring charges in connection with IDLC hybrid loops should be rejected because Verizon has not demonstrated a proper basis for such additional charges above and beyond the standard recurring and nonrecurring loop charges that Verizon already proposes to apply." Verizon states that whenever it performs an LST, it is entitled to be compensated for the costs it incurs to do so. Even though Verizon is not proposing any line and station transfer charge in this arbitration, Verizon urges the Board to reject any CLEC language foreclosing Verizon from charging for line and station transfers in the future.

AT&T's Position:

AT&T contends that Verizon has not provided a genuine offer to meet the requirement that ILECs must present requesting carriers a technically feasible method of unbundled access. Instead, AT&T argues that Verizon has proposed a costly, time consuming and discriminatory process for providing AT&T and other CLECs with access to unbundled loops served by IDLC systems, and that this is directly contrary to Verizon's express obligation to unbundle IDLC loops. AT&T further states that the problems with Verizon's proposals are exacerbated by the imminent sunset of its obligation to provide unbundled local switching or UNE-P, and urges that Verizon's proposal should be rejected.

According to AT&T, Verizon's proposal states that when AT&T requests an unbundled loop to serve a customer location that is served by an IDLC system, it will "endeavor" to provide AT&T with an unbundled loop over either existing copper or a loop served by Universal DLC. However, if neither of these options is available, AT&T points out Verizon's proposal that it will

construct either a copper loop or Universal DLC system at AT&T's expense. In addition to the large special construction non-recurring cost ("NRC") for the unbundled loop, AT&T opposes Verizon's proposal to charge AT&T an additional charge of \$238.97 whenever a line and station transfer is performed; "an engineering query charge" of \$115.12 for the preparation of a price quote; "an engineering work order charge" of \$535.94; plus "all construction charges as set forth in the price quote."

AT&T argues that there is no reason why Verizon should construct loop plant or a UDLC system to provide AT&T with access to an unbundled loop served by an IDLC system. AT&T claims there are several engineering solutions that are available – as Verizon recognized when it was providing information to the FCC during the *TRO* proceedings – and that can be implemented by Verizon. AT&T argues that during the course of the *TRO* proceedings, when Verizon was advocating at the FCC that CLECs could use their own switching equipment and unbundled loops from Verizon to serve mass-market customers, Verizon apparently saw no impediments to providing loops served by IDLC systems.

AT&T urges the Board to reject Verizon's costly, time consuming and discriminatory proposal – and its unsupported and inflated rates – to require that AT&T pay to construct facilities to obtain access to an unbundled loop to its customer presently served by a Verizon IDLC system. Instead, as set forth in AT&T's revised amendment, AT&T urges the Board to direct Verizon to provide a technically feasible method of unbundled access as it told the FCC it could do, including, if necessary, providing a UNE-P arrangement at TELRIC rates.

CCC's Position:

CCC's proposal reflects the *TRO*'s requirement that when a CLEC orders an unbundled loop to serve a retail customer currently being served by Verizon over IDLC, Verizon must provide this service "either through a spare copper facility or through the availability of Universal DLC systems" or, if neither is available, Verizon must provide the requesting CLEC a "technically feasible method of unbundled access." By contrast, CCC argues that Verizon's proposal should not be adopted because, among other reasons, it fails to provide that Verizon must offer unbundled access to hybrid loops served by IDLC systems by using, among other things, a "hairpin" option; i.e., configuring a semi-permanent path and disabling certain switching functions. CCC states that this option, among others, is specifically required by the *TRO*, and its

omission from Verizon's proposed language is improper.

CCC states that Verizon's attempt to assess additional nonrecurring charges in connection with IDLC hybrid loops should be rejected because Verizon has not demonstrated a proper basis for such additional charges above and beyond the standard recurring and nonrecurring loop charges that Verizon already proposes to apply. According to CCC, nothing in the *TRO* supports the imposition of such additional charges, and Verizon bears the burden of proof in supporting its proposal.

In its Reply Brief, CCC disagrees with Verizon's complaint that CCC's proposal seeks "free loop construction." CCC points out that Verizon's own proposal provides that if neither a copper loop nor a loop served by UDLC is available, Verizon shall, upon request of a CLEC, construct the necessary copper loop or UDLC facilities." CCC argues that while normally Verizon is not obligated to construct facilities for a CLEC, here the only debate is over the appropriate rate for access to such loops. CCC's proposal would require CLECs to pay the non-recurring and recurring charges applicable to unbundled loops, which the Board has previously determined are appropriate for other copper UNE loops that Verizon had previously constructed.

CCG's Position:

CCG states that the amendment should require that, where a requesting carrier seeks access to a hybrid loop for the provision of narrowband services, Verizon must provide nondiscriminatory access to either an entire unbundled hybrid loop capable of providing voice-grade service, using time division multiplexing technology, or a spare home-run copper loop serving that customer on an unbundled basis. CCG further states that, in the event that a requesting carrier specifies access to an unbundled copper loop in its request to Verizon, the Amendment should obligate Verizon to provide an unbundled copper loop, using Routine Network Modifications as necessary, unless no such facility can be made available via Routine Network Modifications.

CCG states that the *TRO* does not permit Verizon to recover any additional charge in connection with a competitive LECs' request to provide narrowband services through unbundled access to a loop where the end user is served via IDLC. Thus, to the extent that Verizon incurs additional costs in connection with providing unbundled access to the hybrid loop where the end

user is served by IDLC, CCG argues that such cost should be reflected in the Board-approved TELRIC rates for hybrid loops.

In its Reply Brief, CCG opposes Verizon's proposed language which states that it will "endeavor" to provide CLECs with an existing copper loop or a loop served by a UDLC, but if no such loop exists, Verizon will construct the loop facilities, with a host of charges, including engineering, construction and ordering charges. CCG reiterates that Verizon should not be permitted to use this unbundling obligation as a profit mechanism by establishing a host of non-TELRIC charges CLECs must pay for Verizon to meet its statutory obligations.

Discussion and Proposal

Verizon is required to provide CLECs access to unbundled loops where the customer is served by an IDLC system. In most cases, this will be either through a spare copper facility or through the availability of UDLC systems. If neither of these options is available, Verizon must present the CLECs a technically feasible method of unbundled access. I conclude that Verizon must provide unbundled access to hybrid loops served by IDLC systems by configuring existing equipment, adding new equipment, or both. Unbundled access to the hybrid loop, for the purpose of providing narrowband services, must be provided at Board-approved TELRIC rates.

In the *TRO*, the FCC confirmed that Verizon has an obligation to provide CLECs access to unbundled loops where the customer is served by an IDLC system. As the FCC recognized, providing this transmission path "may require incumbent LECs to implement policies, practices, and procedures different from those used to provide access to loops served by Universal DLC systems." The FCC further recognized that "in most cases, this will be either through a spare copper facility or through the availability of Universal DLC systems. Nonetheless even if neither of these options is available, incumbent LECs must present requesting carriers a technically feasible method of unbundled access."⁹⁶

The FCC goes on to say that the ILECs can provide unbundled access to hybrid loops served by IDLC systems by configuring existing equipment, adding new equipment, or both. For example, it can provide a UNE loop over IDLC systems by using a "hairpin" option, i.e.,

96. *TRO* at ¶ 297.

configuring a "semi-permanent path" and disabling certain switching functions. In addition, the FCC noted that some IDLC systems can simulate UDLC systems, or operate in "UDLC Mode." The FCC further states that unbundled access to IDLC-fed hybrid loops can frequently be provided through the use of cross-connect equipment, which is equipment ILECs typically use to assist in managing their DLC systems. Finally, the FCC describes testimony in the *TRO* proceeding that equipment manufacturers either already account for an ILEC's regulatory obligations in designing equipment (and software used to upgrade that equipment) or are planning to do so.⁹⁷

With respect to the parties' arguments related to rates and non-recurring charges, I reiterate that the unbundled loop element for providing narrowband services should be provided at Board-approved TELRIC rates. Further, Verizon should only be allowed to charge Board-approved non-recurring charges for the installation of narrowband loops served by DLC systems.

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

- (a) **unbundled loops in response to CLEC requests for access to IDLC-served hybrid loops;**
- (b) **commingled arrangements;**
- (c) **conversion of access circuits to UNEs;**
- (d) **Loops or Transport (including Dark Fiber Transport and Loops) for which Routine Network Modifications are required;**
- (e) **batch hot cut, large job hot cut and individual hot cut processes;**
- (f) **network elements made available under Section 271 of the 1996 Act or under state law.**

Verizon's Position:

Verizon argues that this proceeding is not the place to address performance metrics that have been fully considered elsewhere. Verizon points out that the Vermont Performance Assurance Plan ("PAP") uses the standards and measures set forth in the New York C2C Guidelines, which involve routine processes that Verizon employs for various tasks. Verizon

97. *TRO* at ¶ 297, footnote 855.

contends that the 1996 Activities set forth in items (a)-(d) of this issue – which are new and non-standard – must be excluded from existing, standard measures. With respect to Issue 17(e) above, Verizon has objected to the inclusion of this issue in the arbitration, and that issue has been withdrawn. Regarding Issue 17(f), Verizon insists that any obligations that it may have under Section 271 are matters for the FCC to address, and any unbundling obligations beyond those imposed under federal law are preempted under Section 251(d)(3) and general preemption principles. Verizon asserts that issues relating to Section 271 or state law are not properly a part of this proceeding.

In its Reply Brief, Verizon reiterates that the existing, Board-approved performance measurements would not properly measure and assess these activities, which are new and do not follow the standardized processes addressed in those measurements. Verizon recommends that any modifications to the measurements necessary to address these new FCC requirements should be addressed in the New York Carrier Working Group forum. Further, Verizon addresses CCC's argument that Verizon "agreed to comply with applicable performance assurance plans in Vermont, including metrics and penalties, as a condition of approval of its Section 271 application," pointing out that the Vermont Verizon 271 Order did not address the non-standard and non-routine activities at issue here, but was limited to standardized and routine processes.

AT&T's Position:

AT&T opposes the Verizon proposal to specifically exempt itself from the requirements for the provision of IDLC loops, for the provision of Commingled arrangements, and for the Performance Plans for the provision of UNEs requiring Routine Network Modifications. AT&T argues that the Board should require Verizon to meet the standard provisioning intervals or performance measurements that are contained in any plan adopted and approved by this Board, and should be subject to any potential remedy payments for failure to meet those requirements.

AT&T highlights an example of exempting UNEs requiring Routine Network Modifications from applicable performance metrics and remedies, describing as an example that such exemptions may allow Verizon to perform on a systematically slower schedule than it provides to its own retail customers, thus negating the purpose of the FCC's ruling. AT&T urges continued application of appropriate metrics and remedies in order to ensure that Verizon's provisioning to CLECs is at parity with its provisioning to its own retail customers.

CCC's Position:

CCC contends that the amended interconnection agreements should reflect Verizon's obligation to comply with any applicable performance assurance plan, including metrics and penalties, for its provisioning of unbundled network elements and wholesale services, including unbundled loops in response to CLEC requests for access to IDLC-served hybrid loops; commingled arrangements; conversion of access circuits to UNEs; loops or transport (including dark fiber transport and loops) for which routine network modifications are required; batch hot cuts, large job hot cut and individual hot cut process; and network elements made available under Section 271 of the 1996 Act or under state law.

CCC points out that Verizon has already agreed to comply with applicable performance assurance plans in Vermont, including metrics and penalties, as a condition of approval of its Section 271 application. CCC states that there is no reason for the Board to allow Verizon to disavow existing performance assurance plans at this juncture. CCC contends that the performance assurance safeguards remain necessary to ensure that Verizon continues to satisfy its Section 271 obligations, which were not changed by the *TRO*.

CCG's Position:

CCG argues that Verizon should be subject to standard provisioning intervals or performance measurements, and potential remedy payments in the parties' underlying agreement or elsewhere for unbundled loops provided by Verizon in response to a carrier's request for access to IDLC-served hybrid loops, commingled arrangements, conversion of access circuits to UNEs, Loops and Transport (including Dark Fiber Transport and Loops) for which routine network modifications are required; and network elements made available by Verizon under Section 271 of the 1996 Act. CCG asserts that, to the extent that existing interconnection agreements include any such intervals, measurements, or payments, their applicability is not affected by the requirements the FCC adopted in the *TRO* and *TRRO*.

CCG states that conversions and commingling are largely billing changes that have no impact on provisioning intervals or performance measurements. Even to the extent that a new UNE order includes commingling, CCG says that Verizon has offered no evidence to demonstrate that provisioning such orders is any different than provisioning an order for the same facilities when commingling is not involved. In the absence of any such evidence, CCG

contends that Verizon has identified no basis on which it can or should be relieved of its obligations to meet any performance metrics for orders for conversions or commingling.

CCG asserts the same concerns with respect to routine network modifications, stating that Verizon has offered no contrary evidence and thus has failed to identify any grounds on which the Board should relieve Verizon of its obligation to comply with service intervals or metrics when Verizon must undertake routine network modifications to provision a UNE order.

In its Reply Brief, CCG re-states its position that Verizon should be required to meet provisioning intervals, performance measurements and be subject to potential remedy payments for the facilities and services addressed above. CCG argues that the Board must make clear in this arbitration proceeding that Verizon is not exempt from performance responsibilities for facilities and services provided in the Agreement. With respect to IDLC loops, CCG addresses Verizon's reliance on the FCC's WorldCom Virginia Arbitration decision, but states that Verizon fails to recount that the FCC in no way absolved Verizon of any performance accountability.

With regard to routine network modifications, CCG agrees with AT&T's statement that "Routine Network Modifications are already contemplated in the 1996 Activities in the Verizon cost study that establishes the non-recurring and recurring charges for High Capacity Loops and Transport." CCG argues that Verizon can't have it both ways, i.e., enjoy the cost recovery for its routine network modifications, yet be exempt from any performance accountability. Responding to arguments related to performance metrics for commingling and conversions, CCG maintains that there is no reason that commingling arrangements and conversions of access circuits to UNEs should impact a provisioning interval or performance measurement. CCG asserts that commingling and conversions are largely billing changes, and Verizon has provided no justification for its proposed language that would exclude such functions from performance intervals, measurements and remedies.

With regard to batch cuts and hot cuts, CCG argues that it is imperative that the Board establish performance intervals, measurements and associated remedies. CCG contends that, because UNE-P is being phased out, adequate hot cut and batch cut processes are essential to the successful transfer of CLECs' UNE-P lines to other arrangements. Finally, to the extent the Board finds that certain UNEs, declassified under Section 251(c)(3), are, in fact, required under Section 271 of the 1996 Act, the FCC merger conditions, or Vermont law, CCG argues that

Verizon should be subject to the same provisioning intervals, performance measurements, and penalties as if such UNEs were ordered under Section 251(c)(3) of the 1996 Act. For all of these reasons, CCG urges the Board to reject Verizon's language that would completely exclude itself from provisioning intervals, performance measurements, and associated remedies, and ensure that Verizon is held accountable for providing adequate service to Vermont CLECs and consumers.

Discussion and Proposal

I recommend that the amended ICAs reflect Verizon's obligation to comply with any applicable performance assurance plan, including metrics and penalties, for its provisioning of the services delineated in this Issue 17. Verizon has already agreed to comply with applicable performance assurance plans in Vermont, including metrics and penalties, as a condition of approval of its Section 271 application. Verizon has provided no justification for its proposed ICA language that would summarily exclude such functions from performance intervals, measurements and remedies. Verizon should be held to the PAP's provisioning intervals, performance measures, and associated remedies in order to ensure that Verizon's provisioning to CLECs is at parity with its provisioning to its own retail customers.

The measures and standards in the Vermont PAP have been taken directly from the Guidelines for Carrier-to-Carrier ("C2C") Performance Standards and Reports developed in New York. The New York metrics are subject to updating and review by both Verizon and CLECs as part of the New York Carrier Working Group ("CWG"), and any change mandated by the New York Public Service Commission is subject to the Board's review. To the extent that any intervals, measurements, or remedies for the activities listed in Issue 17(a)-(f) are examined further by the CWG, proposed changes to those requirements should be thoroughly evaluated and approved by the Board.

ISSUE 18 How should subloop access be provided under the *TRO*?

Verizon's Position:

With respect to sub-loop access, Verizon's proposal provides that CLECs "may obtain access to the Distribution Sub-Loop Facility at a technically feasible access point located near a Verizon remote terminal equipment enclosure It is not technically feasible to access the

sub-loop distribution facility if a technician must access the facility by removing a splice case to reach the wiring within the cable." With respect to the feeder portion of the loop, Verizon classifies "feeder" as a "Discontinued Facility" in its proposal.

Responding to the CLECs' provisions regarding the fiber feeder portion of a loop being limited to Mass Market customers, Verizon argues that the restriction to "Mass Market customer" is without foundation in the *TRO*, and should not be added.

Verizon states that its language mirrors the FCC's determination that ILECs are not required to construct a single point of interconnection ("SPOI") at a multiunit premises unless: (1) it has distribution facilities to the premises and owns and controls (or leases and controls) the house and riser cable at the premises; and (2) the CLEC commits that it will place an order for access to the subloop element via the newly-provided SPOI. Verizon asserts that, where these conditions are satisfied, their amendment provides that the parties shall negotiate in good faith an amendment memorializing the terms, conditions, and rates under which Verizon will provide a SPOI. Verizon criticizes CCC's and AT&T's proposed language regarding SPOIs, saying they do not accurately reflect the requirements of federal law.

With respect to inside wire subloops, Verizon asserts that its language provides that a CLEC "may access a House and Riser Cable only between the Minimum Point of Entry ("MPOE") for such cable and the demarcation point at a technically feasible access point." Further, Verizon contends that its language is in accordance with FCC Rules, providing that "[i]t is not technically feasible to access inside wire sub-loop if a technician must access the facility by removing a splice case to reach the wiring within the cable." Verizon criticizes AT&T's language, saying that it includes several specific requirements that are not present in the *TRO*, such as the requirement that Verizon be given 30 days to provide a written proposal to AT&T regarding points of access, and requiring negotiation over such points between 10 to 40 days after Verizon's written proposal. In addition, Verizon criticizes AT&T's proposal which includes "near verbatim quotes of the rules," arguing that it is often better to cite the FCC's rule rather than quote the rule, allowing the agreements to change automatically if and when the FCC's rule itself changes.

In its Reply Brief, Verizon addresses the complaints by CCC and AT&T regarding installation requirements, responding that Verizon has used a framework for access that has

already been reviewed and approved by the Board in Verizon's SGAT. Further, Verizon responds to the CLEC arguments that only fiber feeder subloops to Mass Market Customers were affected by the *TRO*, stating that nothing in 253 of the *TRO* or the FCC's rules transforms the FCC's general elimination of unbundled access to fiber feeder into a positive unbundling obligation as to business customers. Verizon continues, stating that as noted under Issue 13, the FCC specifically held that "while we adopt loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops do not vary based on the customer to be served."⁹⁸

Verizon addresses AT&T's argument that CLECs should be allowed to use their own technicians to work on Verizon's equipment in some instances, stating that it is critical for Verizon to maintain the security and integrity of its network. Verizon opposes the proposal that any CLEC will be able to obtain access and make modifications to Verizon's network, regardless of whether its technicians are qualified or competent to work on Verizon's plant. Verizon points out that these provisions have already been approved by the Board.

Verizon responds to AT&T's complaints regarding the need for language related to providing a SPOI at a multi-unit premises in the event a CLEC asks for a SPOI, stating that it is not feasible to incorporate into this amendment "one-size-fits-all" SPOI terms, as there are site-specific differences that may vary significantly. Verizon points out some of the variables that must be considered in each situation, concluding that if and when a CLEC requests a SPOI, the only workable approach is for the parties to negotiate the details specific to that request at that time.

Verizon then addresses AT&T's argument that Verizon refuses to reserve House and Riser cable for competitors. Verizon states that it already owns the cable and presumably will be using it to serve its customer until such time as the CLEC places an order. Verizon reasons that if AT&T or any other CLEC were allowed to reserve the cable, then it might use a "reservation" to block out other CLECs until such time as it might decide to place an order.

AT&T's Position:

AT&T points out that the *TRO* requires Verizon to provide CLECs with unbundled

98. *TRO* at ¶ 210.

access to Verizon's copper subloops and Verizon's network interface devices, encompassing any means of interconnection of the Verizon distribution plant to customer premises wiring. Further, AT&T emphasizes that the *TRO* requires Verizon to provide AT&T with access to any technically feasible access point located near a Verizon remote terminal for the subloop facilities.

AT&T contends that access to subloop facilities is particularly important in the case of multiunit premises, as CLECs face significant barriers to obtaining access to provide service to customers located in the multiunit environment. This is particularly true, according to AT&T, in view of the exclusive access to these premises that the incumbent providers previously have enjoyed. AT&T criticizes Verizon's proposed amendment, stating that it fails to fully reflect the requirements of the *TRO* on this issue and leaves issues unresolved that could subsequently result in new disputes that will require Board intervention. AT&T points out that Verizon's proposal does not even provide a definition of subloops (although Verizon defines "Sub-Loop for Multiunit Premises Access"). Further, AT&T asserts that Verizon's proposal does not comply with the *TRO*'s requirement to provide access "at or near" the customer premises. AT&T urges the Board to have the language of the ICA track the requirements of the FCC's order to avoid disputes in this area. In addition, AT&T contends that Verizon refuses to reserve House and Riser cable for competitors. AT&T states that it is willing to accept this limitation, if and only if, Verizon is expressly willing to contract to abide by the same limitation. AT&T also objects to Verizon's proposal to impose a variety of restrictions on AT&T's access to inside wire subloops. AT&T provides several examples of such restrictions.

AT&T objects to Verizon's proposal whereby Verizon would perform all installation work on Verizon equipment in connection with AT&T's use of Verizon's House and Riser Cable. AT&T sees this as an effort to force AT&T to use only Verizon's technicians to enable access to subloops not authorized by the *TRO*, and that this restriction would result in unnecessary delays and increased costs in providing service to customers. AT&T proposes that connections to subloops (including the NID), including but not limited to directly accessing the cross-connection device owned or controlled by Verizon, may be performed by AT&T technicians or its duly authorized agents, at its option, (i) without the presence of Verizon technicians, and (ii) at no additional charge by Verizon. AT&T's language also makes it clear that, "Such connecting work performed by AT&T may include but is not limited to lifting and re-terminating of cross

connection or cross-connecting new terminations at accessible terminals used for Subloop access. AT&T states that, contrary to Verizon's characterization of AT&T's proposal, AT&T is not seeking unlimited access to Verizon equipment, like the splice case.

AT&T also states that Verizon does not propose a method for dealing with issues relating to Single Points of Interface ("SPOI"). AT&T states that Verizon's proposal would require the parties to negotiate another amendment to the ICA at some future date to memorialize the terms, conditions and rates under which Verizon would provide a SPOI at a multiunit premises. However, AT&T believes that the Board should resolve it in this proceeding, under the terms AT&T has proposed in its proposed amendment.

CCC's Position:

CCC urges the Board to reject Verizon's proposed inside-wire subloop language because it has no basis in the *TRO*, but instead imposes arbitrary operational provisions and restrictions for the provisioning of inside wire. As an example, CCC contends that Verizon has been unable to explain some of these restrictions, such as a requirement that a CLEC "shall install its facilities no closer than fourteen (14) inches of the point of interconnection for such cable." CCC contends that such a requirement cannot be found in the FCC rules, and Verizon has suggested no legitimate purpose for the restriction. CCC proposes more general language that requires Verizon to provide Subloops for Multiunit Premises to the extent required by any applicable Verizon tariff or SGAT, and any applicable federal and state commission rules, regulations, and orders.

CCC's proposal requires Verizon to provide unbundled access to the Subloop Distribution Facilities at a technically feasible access point located near a Verizon remote terminal equipment enclosure at the rates and charges provided for Unbundled Subloop Arrangements (or the Distribution Subloop) in the Agreement. CCC's proposal also recognizes that it is not technically feasible to access the Subloop Distribution Facility if a technician must access the facility by removing a splice case to reach the wiring within the cable.

CCC states that its proposal properly reflects that only fiber feeder subloops to Mass Market Customers were affected by the *TRO*, as The FCC's discussion of fiber feeder subloops was limited to their provision to Mass Market Customers. CCC opposes Verizon's proposal to extend the limitation on provisioning of feeder to all feeder, including feeder to end users other

than Mass Market Customers.

In its Reply Brief, CCC argues that Verizon's proposal is superfluous, and adds minutiae related to access to House and Riser Cable that have no basis whatsoever in the *TRO*. Because these provisions are not derived from the *TRO*, CCC does not agree to these terms for "implementation" and argues that Verizon has provided no legitimate reason for them. Instead, CCC proposes that the entire Section of the Amendment related to Subloops for Multiunit Premises should require Verizon to provide access to them to the extent required by any applicable Verizon tariff of SGAT, and any applicable federal and state commission rules, regulations and orders. Under this approach, CCC contends that the Board would preserve the status quo related to House and Riser Cable, which is largely unchanged by the *TRO*, and avoid rendering prior Board decisions obsolete.

As for Verizon's argument that the Feeder portion of a Subloop is not limited to Subloops provided to Mass Market customers, CCC asserts that Verizon is mistaken, as discussed above in connection with Issue 14.

CCG's Position:

CCG argues that the amendment should state that Verizon no longer is required to provide, under the parties' existing interconnection agreements, unbundled access to the feeder portion of the subloop on a standalone basis, but that it should not affect the right of Vermont CLECs to purchase, on an unbundled basis, access to the feeder portion of the loop consistent with Verizon's SGAT and applicable tariff.

CCG asserts that the amendment should expressly state Verizon's obligations to provide to competitive LECs a SPOI at a multi-unit premises. Moreover, CCG contends that Verizon's obligation to provide a SPOI is in addition to, and not in lieu of, its obligation to provide unbundled access to a subloop for access to a multiunit premises, including any inside wire, at any technically feasible point. CCG states that the amendment must specify that Verizon is not entitled to recover any charges for construction of a SPOI at a competitive LEC's request in addition to Board-approved TELRIC rates. CCG argues that the amendment should include reasonable guidelines for construction of the SPOI, including a time certain during which construction of the SPOI must be completed by Verizon, as well as a description of the rights and obligations of the requesting carrier in the event that such construction is delayed.

CCG argues that the amendment should address unbundled access to Inside Wire Subloop in a multi-tenant environment, including a proper definition for the "subloop for access to multiunit premises wiring." CCG contends that near remote terminal sites, Verizon must be required to provide access to a copper subloop at a splice.⁹⁹ Also, CCC argues that the amendment must require that Verizon provide to any requesting telecommunications carrier nondiscriminatory access to the subloop for access to multiunit premises wiring on an unbundled basis regardless of the capacity level or type of loop. CCG concludes by reiterating support for its definition of the "Inside Wire Subloop."

In its Reply Brief, CCG reiterates that the FCC's rules require Verizon to provide CLECs with unbundled access to Verizon's copper subloops and network interface devices, and Verizon must not be allowed to utilize the amendment process to narrow the definition of such access. CCG asserts that Verizon seeks to limit CLECs' ability to obtain access to subloops by failing to provide clear definitions of the applicable subloops and limiting the location where a CLEC can obtain access to a subloop.

Discussion and Proposal

Subloop access is discussed and defined in detail in 47 C.F.R. § 319(b), and I recommend that the parties' ICAs be conformed with those requirements. Details regarding hybrid fiber loops are contained in the FCC's Rule 47 C.F.R. § 319(a)(2), and likewise should be reflected in the parties' ICA provisions.

In response to CLEC arguments on the enterprise market applicability, the position taken in Issue 14(b) and (c) is reiterated here: the Rules should be limited to mass market applications.

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

99. See 47 C.F.R. § 51.319(b)(1)(i).

Verizon's Position:

Verizon declares to the best of its knowledge, the situation described in this issue does not exist anywhere in the real world, and in particular in Vermont. Verizon indicates that there is no instance where Verizon owns "local switching equipment" installed at a CLEC premise, nor does Verizon intend to establish any such arrangement in Vermont. Verizon contends that it is therefore unnecessary for the Amendments to address this hypothetical issue.

In its Reply Brief, Verizon reiterates that to the best of its knowledge, there is no instance in Vermont where it owns "local switching equipment" installed at a CLEC premises, nor does Verizon intend to establish any such arrangement in Vermont at this time. Verizon responds to allegations by CCC that the definition of "reverse collocation" is not restricted to the reverse collocation of ILEC switching equipment. Verizon argues that the *TRRO* is consistent, referring to "any incumbent LEC switches with line-side functionality that terminate loops that are 'reverse collocated' in non-incumbent LEC collocation hotels, and stating that the unbundling obligation arises only where the ILEC actually places "local switching equipment" with "line side functionality" on a CLEC's "premises". Verizon emphasizes that nowhere in the *TRO* did the FCC state that if the ILEC had any type of equipment "reverse collocated" in any way that the facilities from the reverse collocation to the ILEC's wire centers and switches would be unbundled as transport.

AT&T's Position:

AT&T contends that the transmission path between Verizon's local circuit switching equipment located in AT&T facilities and the Verizon serving wire center should be treated as unbundled transport, as required by the FCC. AT&T argues that the FCC distinguished a reverse collocation arrangement from an entrance facility; therefore, Verizon continues to be obligated to provide such unbundled dedicated transport under the terms set forth in the *TRRO*. In addition, AT&T reiterates its support for its definition of "Dedicated Transport" that reflects the FCC's orders.

CCC's Position:

CCC asserts that Verizon is required to provision dedicated transport between Verizon switches or other equipment that is reverse collocated at a non-Verizon premises, including but not limited to collocation hotels. CCC agrees that Verizon is relieved of provisioning entrance

facilities on an unbundled basis pursuant to Section 251. CCC's proposal clarifies that Verizon transmission facilities that terminate at reverse collocations at any CLEC premises remain dedicated interoffice transport eligible for UNE status and should not be considered entrance facilities.

CCC states that, in readopting its prior definition of dedicated transport in the *TRRO*, the FCC noted that "wire center" includes any ILEC "switches with line-side functionality that terminate loops that are 'reverse collocated' in non-incumbent LEC collocation hotels." CCC opposes Verizon's interpretation that this FCC statement specifically limits the definition of transport, in reverse collocation situations, to include only those instances where the ILEC collocates local switching equipment in a collocation hotel. CCC contends that the FCC did not narrow the definition of transport established in the *TRO* as it relates to reverse collocation, and points to the FCC's eligibility criteria, which recognize that reverse collocation includes "the installation of incumbent LEC equipment at the premises of a competitive LEC or any other entity not affiliated with that incumbent LEC, regardless of whether the incumbent LEC has a "cage."

CCG's Position:

CCG points out that the FCC requires that the transmission path between Verizon's local circuit switching equipment located in a CLEC's facilities and the Verizon serving wire center should be treated as unbundled transport. CCG urges the Board to approve contract language containing a definition of "Dedicated Transport" that reflects the FCC's findings, as they have proposed.

In its Reply Brief, CCG states that Verizon's approach with regard to reverse collocation, i.e., not to address this issue in the Amendment, is unacceptable. CCG asserts that the purpose of the Amendment is to account for all changes in law that resulted from the *TRO* and *TRRO* and not just those changes that Verizon believes are applicable.

Discussion and Proposal

Verizon has indicated that this scenario does not exist and is not likely to happen. Nonetheless, I recommend that the parties' ICAs should reflect that, to the extent that Verizon has local switching equipment, as defined by the FCC's rules, "reverse collocated" in a CLEC's

premises, the transmission path from that point back to Verizon's wire center shall be unbundled as transport between Verizon switches or wire centers. It should be noted that the FCC has not equated a "reverse collocation" arrangement with an "entrance facility."

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

Verizon's Position:

Verizon declares that the *TRO* did not purport to establish new rules regarding CLECs' rights to obtain interconnection facilities under Section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Further, Verizon asserts that the Parties' existing interconnection agreements contain negotiated (or arbitrated) terms regarding such interconnection architecture issues, and there has been no change in law that would justify renegotiation (or arbitration) of such issues here. Verizon insists that CLECs should not be permitted to renegotiate (or re-arbitrate as the case may be) those complex issues here.

In its Reply Brief, Verizon reiterates its position that the law relating to interconnection trunks was not affected or changed by either the *TRO* or the *TRRO*, and the Board should not entertain this issue in this proceeding. Verizon addresses CCC's claim that the FCC made "clarifications" of the 251(c)(2) rules in the *TRO*, stating that CCC does not identify any clarification; instead, the passages that it cites from the *TRO* and the *TRRO* all merely indicate that the FCC was preserving pre-existing rules.

AT&T's Position:

AT&T answers in the affirmative, and argues that the specific obligation that should be reflected in the amendment is the requirement that interconnection trunks established for the transmission and routing of telephone exchange service and exchange access, and not for the purpose of "backhauling" traffic, are interconnection facilities under Section 251(c)(2) that must be provided at TELRIC.

AT&T asserts that, although in the *TRO* the FCC revised the definition of dedicated transport to exclude entrance facilities, the FCC was very clear that this conclusion did not alter the obligations of Verizon to continue to provide interconnection trunks, pursuant to Section

251(c)(2) of the 1996 Act, at TELRIC prices.

CCC's Position:

CCC also answers "Yes," saying that Verizon must provide interconnection facilities at TELRIC, pursuant to Section 251(c)(2) and 252(d)(1) (which includes tandem switching, as well as transport facilities and equipment between a CLEC switch and a Verizon tandem switch or other point of Interconnection designated by the CLEC), that are used for the exchange of traffic between the CLEC and Verizon.

CCC argues that since the *TRRO* relieved ILECs of their obligation to offer entrance facilities and dedicated interoffice transport (in certain instances) at TELRIC rates, it is critical that the amendment makes clear that CLECs have the right to obtain such facilities at TELRIC-based rates for interconnection purposes. CCC avers that if the amendment does not reflect this clarification, Verizon will inevitably force CLECs to pay special access prices for interconnection facilities.

CCG's Position:

CCG agrees that the Amendment must reflect that interconnection trunks between a Verizon wire center and a CLEC wire center established for the transmission and routing of telephone exchange service and exchange access, and not for the purpose of "backhauling" traffic, are interconnection facilities under Section 251(c)(2) that must be provided at TELRIC rates.

In its Reply Brief, CCG opposes the position of Verizon, which has proposed no language to reflect the FCC's holding that interconnection facilities are distinct from entrance facilities, and claiming that the *TRO* and the *TRRO* did not impact any of the parties' preexisting rights regarding interconnection facilities. CCG argues that, considering the amount of time and resources expended on negotiating and arbitrating this Amendment, the Board must include all language that reflects the FCC's findings in the *TRO* and *TRRO* to avoid any misunderstanding between the parties that could result in future disputes.

Discussion and Proposal

I conclude that interconnection trunks between a Verizon wire center and a CLEC wire center should be provided at TELRIC rates. In the *TRRO*, the FCC found that CLEC carriers are

not impaired without access to entrance facilities as an unbundled network element. However, the FCC stated that the decision not to unbundle entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to Section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service.¹⁰⁰ Further, the FCC clearly stated that CLECs will have access to these facilities at cost-based (TELRIC) rates to the extent that they require them to interconnect with the ILEC's network.

ISSUE 21 What obligations, if any, with respect to the conversion of wholesale services (e.g., special access circuits) to UNEs or UNE combinations (e.g., EELs), or vice versa ("Conversions") should be included in the Amendment to the parties' interconnection agreements?

Verizon's Position:

Verizon's language states that a CLEC's certification required to convert existing services to EELs or to order new EELs:

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

Verizon asserts that this language precisely implements the criteria established in the *TRO*. Verizon opposes CLEC attempts to reduce the level of information they provide, or any notion that they are entitled simply to assert that their EEL requests meet the FCC's conditions without providing any of the supporting information.

In its Reply Brief, Verizon addresses the CLECs' complaints that it would be unduly

100. *TRRO* at ¶ 140.

onerous to provide the level of detail described in Verizon's Amendment 2 and in the *TRO*, and suggesting that they instead should be entitled simply to assert that their EEL requests meet the FCC's conditions without providing any of the supporting information. Verizon argues that the FCC clearly did not suggest that a CLEC's self-certification could consist of a completely unsubstantiated single sentence, and in fact, the FCC specified that it "expect[ed] that requesting carriers will maintain the appropriate documentation to support their certifications" and held that demonstrating compliance with each of the eligibility criteria would not "impos[e] undue burdens upon" CLECs.¹⁰¹ Verizon argues that if a CLEC indeed has the "appropriate documentation," it should be no burden upon that CLEC simply to send a letter describing how it meets the EEL criteria.

AT&T's Position:

AT&T points out, as a predicate matter, that it is important that the Amendment recognize Verizon's obligation to provide CLECs with access to EELs. AT&T contends that the FCC plainly envisioned a streamlined, nondiscriminatory process for CLECs to order new EELs and to convert existing special access arrangements to EELs. AT&T opposes Verizon's proposed language specifically regarding the information that AT&T and other CLECs would be required to provide in its "self certification" of satisfaction of the service eligibility criteria, as it is much more onerous than is required or allowed by the FCC's Rules. AT&T argues that the language appears to be designed to impede AT&T and other CLECs from utilizing the EELs that Verizon is obligated to provide.

As an example, AT&T points to the Verizon proposal that would require CLECs to provide the specific local telephone number assigned to each DS1 circuit or DS1-equivalent, the date each circuit was established in the 911/E911 database, the specific collocation termination facility assignment for each circuit and a "showing" that the particular collocation arrangement was established pursuant to the provisions of the federal Act dealing with local collocation and the interconnection trunk circuit identification number that serves each DS1 circuit. AT&T contends that Verizon has no legal or persuasive basis for these extraordinary requirements that are not contained in the FCC rules.

101. *TRO* at ¶¶ 622, 629.

Under the FCC's rules, AT&T states that it should only have to send a letter "self-certifying" that the DS1 EEL circuit or the 28 DS1-equivalent circuits of a DS3 EEL has a local telephone number assigned and the date established in the 911 or E911 database. AT&T argues that it should not be required to provide the specific telephone number or the date that the telephone number was established in the 911/E911 database. AT&T further argues that there is no requirement in the FCC's rule that AT&T provide the "interconnection trunk circuit identification number" for each DS1 EEL or DS1-equivalent of a DS3 EEL.

AT&T argues that much of the information requested in Verizon's proposal amounts to an impermissible "pre-audit" that was rejected by the FCC as being a discriminatory "gating mechanism," and its proposed language seeking to impose such an obligation on the CLECs through an interconnection amendment should be rejected.

In its Reply Brief, AT&T argues that there is a common dispute between AT&T and Verizon in Issues 12, 13, 21 and 25: Verizon's effort to impose an onerous pre-ordering audit requirement on CLECs seeking to order EELs and UNE combinations and to convert existing circuits to UNEs. AT&T contends that the FCC rejected the proposals of the ILECs such as Verizon that had sought to require other conditions on the CLECs as a pre-condition to ordering an EEL or converting existing circuits to EELs, such as pre-audits and other requirements that the FCC described as constituting unjust, unreasonable and discriminatory terms and conditions for obtaining access to UNE combinations.

CCC's Position:

It is CCC's position that the heart of this issue pertains to Verizon's obligations with respect to the conversion of wholesale facilities to EELs or UNEs and vice versa. CCC asserts that as of October 2, 2003, Verizon was required to perform the functions necessary for CLECs to Convert any facility or service, provided that the CLEC would be entitled to place a new order for the UNE, UNE Combination or other facility or service resulting from a Conversion.¹⁰² CCC has defined the term "Conversion" in *TRO* Section 5.3 to include "all procedures, processes and functions that Verizon and a CLEC must follow to Convert any Verizon facility or service other than an unbundled network element (e.g., special access services) or group of Verizon

102. *TRO* at ¶¶ 585-589.

facilities or services to the equivalent UNEs or UNE Combinations or Section 271 Network Elements, or the reverse." CCC argues that its definition recognizes that the term Conversions should be bidirectional and is therefore proper.

CCC contends that its proposal that a CLEC be able to initiate conversion requests in writing or by electronic notification is entirely reasonable. CCC objects to Verizon's proposal that conversion procedures be governed solely by its conversion guidelines, asserting that it is highly inappropriate because Verizon controls those terms and can unilaterally change them at any time.

Specifically with respect to subpart 21(a), CCC responds that a CLEC is only required to certify that it satisfies the eligibility criteria of Rule 51.318(b), and that nothing in the *TRO* requires a CLEC to provide the type of information that Verizon demands. CCC argues that the FCC has explicitly stated that "carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations, so long as the competitive LEC meets the eligibility criteria that may be applicable."

In its Reply Brief, CCC argues that Verizon demands such detailed information that it would effectively require a CLEC to submit to an unlawful pre-audit before Verizon will process or provision an order for new EELs or conversion of existing circuits to EELs, rather than the mere "self-certification" required by the FCC. Such a requirement for detailed information, states CCC, is an unlawful "delay" or "gating" tactic foreseen, and prohibited, by the FCC. According to CCC, the FCC determined that the ordering process for EELs and conversions should meet "the basic principles of entitling requesting carriers unimpeded UNE access upon self-certification, subject to later verification" in order to prevent "the imposition of any undue gating mechanisms that could delay the initiation of the ordering or conversion process." CCC urges the Board to hold that Verizon's information requirements constitute an unlawful gating requirement, a pre-audit and unlawful self-help measures, and, therefore, reject Verizon's proposed language and adopt CCC's language.

CCG's Position:

CCG asserts that the parties' interconnection agreements should be amended to incorporate changes in law that address Verizon's obligation to provide "new" EELs, in addition to EELs converted from existing special access circuits. CCG contends that Verizon is required

to provide access to new and converted EELs unencumbered by additional processes or requirements not specified in the *TRO*. Further, CCG states that CLECs must self-certify compliance with the applicable service eligibility criteria for high capacity EELs, by manual or electronic request, and permit a limited annual audit by Verizon to confirm their compliance with the FCC's high capacity EEL service eligibility criteria. Next, CCG maintains that Verizon's performance relative to EEL facilities must be subject to standard provisioning intervals and performance measures. Further, CCG avers that Verizon may not impose charges for conversion from wholesale service to UNEs or Combinations, other than a records change charge. In addition, CCG urges the Board to permit competitive carriers to re-certify prior conversions in a single batch, and to certify requests for future conversions in one batch, rather than to certify individual requests on a circuit-by-circuit basis.

CCG states that the amendment should require that competitive carriers comply with the service eligibility requirements established by the *TRO* and Section 51.318 of the FCC's rules. Specifically, CCG argues, to obtain a new or converted EEL under the *TRO* and Section 51.318 of the FCC's rules, the Amendment should require that a competitive carrier supply self-certification to Verizon of the following information: (1) state certification to provide local voice service, or proof of registration, tariff and compliance filings; (2) that at least one local number is assigned to each DS1 circuit prior to provision of service over that circuit; (3) that each circuit has 911/E911 capability prior to the provision of service over that circuit; (4) that the circuit terminates to a collocation or reverse collocation; (5) that each circuit is served by an interconnection trunk in the same LATA over which a calling party number ("CPN") will be transmitted; (6) that one DS1 interconnection trunk (over which CPN will be passed) is maintained for every 24 DS1 EELs; and (7) that the circuit is served by a Class 5 switch or other switch capable of providing local voice traffic.

In its Reply Brief, CCG asserts that the CLECs are not required to provide detailed information regarding each circuit – just the self-certification. CCG further contends that, while the FCC's rules specify a streamlined process of self-certification, Verizon's proposed Amendment attempts to impose various conditions that appear designed to constrain CLECs' ability to utilize EELs, and therefore must be rejected by the Board.

Discussion and Proposal

EELs are the combination of one or more segments of unbundled (DS-0, DS1 and DS3) loops with unbundled (typically DS1 and DS3) dedicated transport. At the option of the CLEC, an EEL may or may not include multiplexing and the loop portion is not limited to just DS1 loop types. EELs are essentially long loops – loops that have been extended from the legacy ILEC wire center to a location where AT&T has a switch or some other network appearance.

Because it is not practical or prudent for a CLEC such as AT&T to physically collocate in every wire center, the availability of EELs is critical to the ability to compete in the local exchange market. Indeed, EELs provide a natural bridge between resale or UNE-P to UNE-L. If volumes of a CLEC's dedicated transport traffic (and the transport component of EELs) cross the economic break-even point to warrant self-provisioning given a particular transport route's construction cost (driven by rights-of-way, distance, and other cost factors), a CLEC such as AT&T can then establish collocation in that end office, construct its own transport facilities or obtain third-party transport, and roll service from EELs to UNE-L (or completely off of UNEs if it has its own or controlled loop facilities). As the FCC concluded in the *TRO*, "EELs facilitate the growth of facilities-based competition in the local market."

The FCC has explicitly obligated Verizon to provide CLECs with access to EELs. This obligation, as well as the criteria for ordering or converting existing circuits to EELs, is contained in FCC rule 47 C.F.R. § 51.318. As the FCC stated in the *TRO*, "Our rules currently require incumbent LECs to make UNE combinations, including loop-transport combinations, available in all areas where the underlying UNEs are available and in all instances where the requesting carrier meets the eligibility requirements."

These determinations were not altered in the *TRRO*. To the contrary, in the *TRRO* the FCC noted that the *USTA II* court affirmed the EELs eligibility criteria that were established in the *TRO*. Specifically, the FCC reiterated its previous finding in the *TRO* and stated "to the extent that the loop and transport elements that comprise a requested EEL circuit are available as unbundled elements, then the incumbent LEC must provide the requested EEL." Thus, the EEL's eligibility requirements have been in place since the effective date of the *TRO*, and they have not been changed by either the *USTA II* decision or the FCC in the *TRRO*.

As discussed above with respect to Issues 4 and 5, the *TRRO* provides specific criteria to

determine in which wire centers Verizon will no longer have an obligation to provide unbundled DS1 and DS3 Loops and unbundled DS1 and DS3 dedicated transport. Therefore, in locations where Verizon's obligation to provide unbundled DS1 and DS3 Loops and unbundled DS1 and DS3 dedicated transport has not been removed – in other words, as reflected in Verizon's FCC filing, in just about every wire center in Verizon's Rhode Island territory – Verizon is required to provide AT&T and other CLECs with EELs. This obligation exists in both the situation in which AT&T is placing an order for a new EEL circuit and in which it is converting an existing circuit (for example a T-1 access circuit) to an EEL, so long as certain service criteria eligibility are met.

The FCC established specific service eligibility criteria for a CLEC to self-certify when ordering either a new EEL or convert existing circuits to an EEL. Those service eligibility criteria are set forth in FCC rule 47 C.F.R. § 51.318, which requires a CLEC to be certificated by the state and provide self-certification that each DS1 circuit and each DS1-equivalent circuit on a DS3 EEL meet the following criteria:

- (i) Each circuit to be provided to each customer will be assigned a local number prior to the conversion of that circuit;
- (ii) Each DS1-equivalent circuit on a DS3 enhanced extended link must have its own local number assignment, so that each DS3 must have at least 28 local voice numbers assigned to it;
- (iii) Each circuit to be provided to each customer will have 911 or E911 capability prior to the conversion of that circuit;
- (iv) Each circuit to be provided to each customer will terminate in a collocation arrangement that meets the requirements of paragraph (c) of this Section;
- (v) Each circuit to be provided to each customer will be served by an interconnection trunk that meets the requirements of Section (d) of this Section;
- (vi) For each 24 DS1 enhanced extended links or other facilities having equivalent capacity, the requesting telecommunications carrier will have at least one active DS1 local service interconnection trunk that meets the requirements of paragraph (d) of this Section; and
- (vii) Each circuit to be provided to each customer will be served by a switch capable of switching local voice traffic.

The FCC imposed no further requirements for information from the requesting CLEC other than the self-certification letter. In fact, the FCC rejected the proposals of the incumbent

LECs, such as Verizon, that had sought to require other onerous conditions on the CLECs as a pre-condition to order an EEL or convert existing circuits to EELs: Pre-audits and other certain requirements were described by the FCC as constituting "unjust, unreasonable and discriminatory terms and conditions for obtaining access to UNE combinations."

The FCC prescribed that a requesting carrier's "self certification" that it satisfied the service eligibility criteria "is the appropriate mechanism to obtain promptly the requested circuit" and found that "a critical component of nondiscriminatory access is preventing the imposition of undue gating mechanisms that could delay the initiation of the ordering or conversion process."

The FCC further prescribed that this "self certification" process would be subject to "later verification based on cause" in a limited annual audit process. The FCC found that a requesting carrier's self-certification of satisfying the qualifying service eligibility criteria for EELs "is the appropriate mechanism to obtain promptly the requested circuit."

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

Verizon's Position:

Verizon's language states that a CLEC's certification required to convert existing services to EELs or to order new EELs:

must contain the following information for each DS1 circuit or DS1 equivalent:

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

Verizon asserts that this language precisely implements the criteria established in the

TRO. Verizon opposes CLEC attempts to reduce the level of information they provide, or any notion that they are entitled simply to assert that their EEL requests meet the FCC's conditions without providing any of the supporting information.

In its Reply Brief, Verizon addresses the CLECs' complaints that it would be unduly onerous to provide the level of detail described in Verizon's Amendment 2 and in the *TRO*, and suggesting that they instead should be entitled simply to assert that their EEL requests meet the FCC's conditions without providing any of the supporting information. Verizon argues that the FCC clearly did not suggest that a CLEC's self-certification could consist of a completely unsubstantiated single sentence, and in fact, the FCC specified that it "expect[ed] that requesting carriers will maintain the appropriate documentation to support their certifications" and held that demonstrating compliance with each of the eligibility criteria would not "impos[e] undue burdens upon" CLECs.¹⁰³ Verizon argues that if a CLEC indeed has the "appropriate documentation," it should be no burden upon that CLEC simply to send a letter describing how it meets the EEL criteria.

AT&T's Position:

AT&T points out, as a predicate matter, that it is important that the Amendment recognize Verizon's obligation to provide CLECs with access to EELs. AT&T contends that the FCC plainly envisioned a streamlined, nondiscriminatory process for CLECs to order new EELs and to convert existing special access arrangements to EELs. AT&T opposes Verizon's proposed language specifically regarding the information that AT&T and other CLECs would be required to provide in its "self certification" of satisfaction of the service eligibility criteria, as it is much more onerous than is required or allowed by the FCC's Rules. AT&T argues that the language appears to be designed to impede AT&T and other CLECs from utilizing the EELs that Verizon is obligated to provide.

As an example, AT&T points to the Verizon proposal that would require CLECs to provide the specific local telephone number assigned to each DS1 circuit or DS1-equivalent, the date each circuit was established in the 911/E911 database, the specific collocation termination facility assignment for each circuit and a "showing" that the particular collocation arrangement

103. *TRO* at ¶¶ 622, 629.

was established pursuant to the provisions of the federal Act dealing with local collocation and the interconnection trunk circuit identification number that serves each DS1 circuit. AT&T contends that Verizon has no legal or persuasive basis for these extraordinary requirements that are not contained in the FCC rules.

Under the FCC's rules, AT&T states that it should only have to send a letter "self-certifying" that the DS1 EEL circuit or the 28 DS1-equivalent circuits of a DS3 EEL has a local telephone number assigned and the date established in the 911 or E911 database. AT&T argues that it should not be required to provide the specific telephone number or the date that the telephone number was established in the 911/E911 database. AT&T further argues that there is no requirement in the FCC's rule that AT&T provide the "interconnection trunk circuit identification number" for each DS1 EEL or DS1-equivalent of a DS3 EEL.

AT&T argues that much of the information requested in Verizon's proposal amounts to an impermissible "pre-audit" that was rejected by the FCC as being a discriminatory "gating mechanism," its proposed language seeking to impose such an obligation on the CLECs through an interconnection amendment should be rejected.

In its Reply Brief, AT&T argues that there is a common dispute between AT&T and Verizon in Issues 12, 13, 21 and 25: Verizon's effort to impose an onerous pre-ordering audit requirement on CLECs seeking to order EELs and UNE combinations and to convert existing circuits to UNEs. AT&T contends that the FCC rejected the proposals of the ILECs such as Verizon that had sought to require other conditions on the CLECs as a pre-condition to ordering an EEL or converting existing circuits to EELs, such as pre-audits and other requirements that the FCC described as constituting unjust, unreasonable and discriminatory terms and conditions for obtaining access to UNE combinations.

CCC's Position:

It is CCC's position that the heart of this issue pertains to Verizon's obligations with respect to the conversion of wholesale facilities to EELs or UNEs and vice versa. CCC asserts that as of October 2, 2003, Verizon was required to perform the functions necessary for CLECs to Convert any facility or service, provided that the CLEC would be entitled to place a new order

for the UNE, UNE Combination or other facility or service resulting from a Conversion.¹⁰⁴ CCC has defined the term "Conversion" in *TRO* Section 5.3 to include "all procedures, processes and functions that Verizon and CLEC must follow to Convert any Verizon facility or service other than an unbundled network element (e.g., special access services) or group of Verizon facilities or services to the equivalent UNEs or UNE Combinations or Section 271 Network Elements, or the reverse." CCC argues that its definition recognizes that the term Conversions should be bidirectional and is therefore proper.

CCC contends that its proposal that a CLEC be able to initiate conversion requests in writing or by electronic notification is entirely reasonable. CCC objects to Verizon's proposal that conversion procedures be governed solely by its conversion guidelines. CCC asserts it is highly inappropriate because Verizon controls those terms and can unilaterally change them at any time.

Specifically with respect to subpart 21(a), CCC responds that a CLEC is only required to certify that it satisfies the eligibility criteria of Rule 51.318(b), and that nothing in the *TRO* requires a CLEC to provide the type of information that Verizon demands. CCC argues that the FCC has explicitly stated that "carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations, so long as the competitive LEC meets the eligibility criteria that may be applicable."

In its Reply Brief, CCC argues that Verizon demands such detailed information that it would effectively require a CLEC to submit to an unlawful pre-audit before Verizon will process or provision an order for new EELs or conversion of existing circuits to EELs, rather than the mere "self-certification" required by the FCC. Such a requirement for detailed information, states CCC, is an unlawful "delay" or "gating" tactic foreseen, and prohibited, by the FCC. According to CCC, the FCC determined that the ordering process for EELs and conversions should meet "the basic principles of entitling requesting carriers unimpeded UNE access upon self-certification, subject to later verification" in order to prevent "the imposition of any undue gating mechanisms that could delay the initiation of the ordering or conversion process." CCC urges the Board to hold that Verizon's information requirements constitute an unlawful gating

104. *TRO* at ¶¶ 585-589.

requirement, a pre-audit and unlawful self-help measures, and, therefore, reject Verizon's proposed language and adopt CCC's language.

CCG's Position:

CCG asserts that the parties' interconnection agreements should be amended to incorporate changes in law that address Verizon's obligation to provide "new" EELs, in addition to EELs converted from existing special access circuits. CCG contends that Verizon is required to provide access to new and converted EELs unencumbered by additional processes or requirements not specified in the *TRO*. Further, CCG states that CLECs must self-certify compliance with the applicable service eligibility criteria for high capacity EELs, by manual or electronic request, and permit a limited annual audit by Verizon to confirm their compliance with the FCC's high capacity EEL service eligibility criteria. Next, CCG maintains that Verizon's performance relative to EEL facilities must be subject to standard provisioning intervals and performance measures. Further, CCG avers that Verizon may not impose charges for conversion from wholesale service to UNEs or Combinations, other than a records change charge. In addition, CCG urges the Board to permit competitive carriers to re-certify prior conversions in a single batch, and to certify requests for future conversions in one batch, rather than to certify individual requests on a circuit-by-circuit basis.

CCG states that the amendment should require that competitive carriers comply with the service eligibility requirements established by the *TRO* and Section 51.318 of the FCC's rules. Specifically, CCG argues, to obtain a new or converted EEL under the *TRO* and Section 51.318 of the FCC's rules, the Amendment should require that a competitive carrier supply self-certification to Verizon of the following information: (1) state certification to provide local voice service, or proof of registration, tariff and compliance filings; (2) that at least one local number is assigned to each DS1 circuit prior to provision of service over that circuit; (3) that each circuit has 911/E911 capability prior to the provision of service over that circuit; (4) that the circuit terminates to a collocation or reverse collocation; (5) that each circuit is served by an interconnection trunk in the same LATA over which a calling party number ("CPN") will be transmitted; (6) that one DS1 interconnection trunk (over which CPN will be passed) is maintained for every 24 DS1 EELs; and (7) that the circuit is served by a Class 5 switch or other switch capable of providing local voice traffic.

In its Reply Brief, CCG asserts that the CLECs are not required to provide detailed information regarding each circuit – just the self-certification. CCG further contends that, while the FCC's rules specify a streamlined process of self-certification, Verizon's proposed Amendment attempts to impose various conditions that appear designed to constrain CLECs' ability to utilize EELs, and therefore must be rejected by the Board.

Discussion and Proposal

In order to satisfy the FCC's service eligibility criteria to convert existing services to high-capacity EELs or order new high-capacity EELs, the CLEC must provide Verizon with a letter attesting that the CLEC meets the following three criteria, on a circuit-by-circuit basis. As required by 47 C.F.R. § 318(b):

(1) The requesting telecommunications carrier 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.

The following criteria are satisfied for each combined circuit, including each DS1 circuit, each DS1 enhanced extended link, and each DS1-equivalent circuit on a DS3 enhanced extended link:

- (i) Each circuit to be provided to each customer will be assigned a local number prior to the provision of service over that circuit;
- (ii) Each DS1-equivalent circuit on a DS3 enhanced extended link must have its own local number assignment, so that each DS3 must have at least 28 local voice numbers assigned to it;
- (iii) Each circuit to be provided to each customer will have 911 or E911 capability prior to the provision of service over that circuit;
- (iv) Each circuit to be provided to each customer will terminate in a collocation arrangement that meets the requirements of paragraph (c) of this Section;
- (v) Each circuit to be provided to each customer will be served by an interconnection trunk that meets the requirements of paragraph (d) of this Section;
- (vi) For each 24 DS1 enhanced extended links or other facilities having equivalent capacity, the requesting telecommunications carrier will have at least one active DS1 local service interconnection trunk that meets the requirements of paragraph (d) of this Section; and
- (vii) Each circuit to be provided to each customer will be served by a switch capable of switching local voice traffic.

No certification is necessary for requesting carriers to obtain access to loops, transport, subloops, and other stand-alone UNEs, as well as EELs combining lower-capacity loops, although carriers must provide a qualifying service over those UNEs to obtain them.

Due to the logistical issues inherent in provisioning new circuits, the ability of requesting carriers to begin ordering without delay is essential. Upon receiving a request from a CLEC certifying to meeting the criteria, the incumbent LEC should immediately process the conversion.

In order to increase the efficiency of the conversion process, the parties are encouraged to develop a mechanism whereby more than one certification may be submitted with each letter. This does not absolve the CLEC of meeting the criteria on a circuit-by-circuit, or DS1-EEL equivalence as described in the *TRO* at ¶ 599, but may assist in processing the conversion requests.

The FCC further prescribed that the self-certification process would be subject to "later verification based on cause" in a limited annual audit process.¹⁰⁵ In the *TRO*, the FCC further rejected the proposals of ILECs such as Verizon that had sought to require other conditions on the CLECs as a pre-condition to order an EEL or convert existing circuits to EELs, such as pre-audits and other certain requirements were discussed by the FCC as constituting "unjust, unreasonable and discriminatory terms and conditions for obtaining access to UNE combinations."¹⁰⁶

(a) (b) Conversion of existing circuits/services to EELs:

(b1) Should Verizon be prohibited from physically disconnecting, separating or physically altering the existing facilities when a CLEC requests a conversion of existing services/circuits unless the CLEC requests such facilities' alteration?

Verizon's Position:

Verizon points out that its amendment does not provide for separation or other physical alteration of existing facilities when a CLEC requests an EEL conversion. Verizon states that,

105. *TRO* at ¶ 622.

106. *TRO* at ¶ 577.

while it would not expect a standard conversion to require any physical alteration of the facilities used for wholesale services that may be converted to UNEs, a uniform prohibition on all alterations might preclude those that could be necessary to convert wholesale services to UNEs in particular instances. Verizon contends that removal of the parties' flexibility to address situations that depart from the norm would likely just delay requested conversions, thereby frustrating the CLECs' claimed desire for a "seamless" migration of service. Moreover, Verizon argues that removing only its flexibility in this regard, while allowing the CLECs the ability to request a change to the facilities as part of an EEL conversion, is simply one-sided and unfair. If a CLEC requires changes in its facilities to conform them to UNE requirements, Verizon argues that it must make those changes first, before the facilities would qualify for EEL conversion.

In its Reply Brief, Verizon reiterates the positions taken in its Initial Brief.

AT&T's Position:

AT&T argues that the FCC Rules do not permit Verizon to physically disconnect, separate or physically alter the existing facilities when AT&T requests the conversion of existing access circuits to an EEL unless AT&T specifically requests that such work be performed. AT&T points out that the *TRO* stated, "Converting between wholesale services and UNEs or UNE combinations should be a seamless process that does not alter the customer's perception of service quality." AT&T asserts that, in fact, the FCC considered such conversions to be "largely a billing function." AT&T charges that any attempt by Verizon to turn these conversions into a far more costly and inefficient process should be rejected.

AT&T argues that, although the *TRO* declined to adopt a specific time frame for the completion of conversions, it recognized that the process was largely a matter of changing billing – and one that "should be performed in an expeditious manner in order to minimize the risk of incorrect payments." AT&T's proposed amendment provides that pricing changes for conversion requests submitted after the effective date of the Amendment will be effective upon Verizon's receipt of the conversion request, and will be made in the first billing cycle after the request.

CCC's Position:

CCC also emphasizes that the FCC held that "Converting between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer's perception of service quality." CCC argues that it is absolutely critical that Verizon not

physically disconnect, separate, change or alter the existing facilities when it performs conversions unless the CLEC requests alterations to its facilities; otherwise, there exists a far greater potential for customer service quality to be degraded, suspended or cut off.

In its Reply Brief, CCC points out that Verizon is objecting to a specific FCC directive when it objects to a "prohibition" that might preclude Verizon from physically disconnecting, separating, or physically altering existing facilities when converting tariffed services to an EEL. Further, CCC reiterates the FCC decision that converting between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer's perception of service quality.

CCG's Position:

CCG argues that the amendment to the parties' ICAs should state that, when existing circuits or services employed by a competitive carrier are converted to an EEL, Verizon shall not physically disconnect, separate, alter or change in any fashion equipment and facilities employed to provide the wholesale service, except at the request of the competitive carrier.

In its Reply Brief, CCG reiterates its earlier arguments, stating that allowing Verizon unfettered access to alter existing facilities would inappropriately jeopardize service quality and must not be permitted by the Board.

Discussion and Proposal

I recommend that Verizon should be required to perform any conversion without adversely affecting the service quality perceived by the requesting telecommunications carrier's end-user customer. It is important that Verizon not physically disconnect, separate, change or alter the existing facilities when it performs conversions unless the CLEC requests alterations to its facilities.

47 C.F.R. § 51.316(b) specifically provides:

An incumbent LEC shall perform any conversion from a wholesale service or group of wholesale services to an unbundled network element or combination of unbundled network elements without adversely affecting the service quality perceived by the requesting telecommunications carrier's end-user customer.

(b2) What type of charges, if any, and under what conditions, if any, can Verizon impose when CLECs convert existing access circuits/services to UNE loop and transport combinations?

Verizon's Position:

Verizon first addresses AT&T's opposition to its right to charge a "retag fee" and/or other non-recurring charges to cover Verizon's costs related to conversions, stating that AT&T has misinterpreted paragraph 587 of the *TRO*, which limits discriminatory charges for conversions. Verizon asserts that the FCC's concern was that ILECs might impose "wasteful and unnecessary charges," but it did not hold that ILECs are barred from recovering legitimate expenses. Verizon contends that a "retag fee" is one such legitimate expense, allowing Verizon to recover its cost of physically retagging a circuit that a CLEC requests to convert from special access to UNEs. Verizon has also proposed a nonrecurring charge for each UNE circuit that is part of a commingled arrangement, and Verizon states that this charge is intended to offset its costs of implementing and managing commingled arrangements. Verizon contends that since certain specific costs are triggered by the commingling of services (on a per circuit basis), it would be appropriate to charge per commingled circuit. Verizon argues that it is entitled to recover its costs of conversions, and to be compensated for the costs of retagging a circuit or any other activity performed for a CLEC. Verizon points out that it is no longer proposing new rates for conversions at this stage, however, argues that nothing in the Amendment should foreclose Verizon from later seeking such rates.

In its Reply Brief, Verizon responds to the CLECs' complaints regarding charges for conversions, stating that the FCC did not hold that ILECs are barred from recovering legitimate expenses. Verizon asserts that, contrary to AT&T's argument, a "retag fee" is an example of a legitimate expense, as it compensates Verizon for the cost of physically retagging a circuit that a CLEC requests to convert from special access to UNEs. Verizon reiterates that it is not proposing new rates for conversions at this stage, but reserves the right to do so later upon submission of a cost study.

AT&T's Position:

AT&T contends that Verizon is not authorized to impose non-recurring charges (including, but not limited to termination charges, disconnect and reconnect fees) on a

circuit-by-circuit basis when wholesale services (e.g., special access facilities) are being converted to EELs; in fact, the FCC's Rules expressly prohibit such charges.

AT&T points out that Verizon's proposed Amendment 2 imposes several non-recurring charges on CLEC conversion orders, including service order and installation fees and a "re-tagging fee" for each circuit. AT&T provides an example showing that in the case of a DS1 EEL order, this would mean additional charges to the CLEC of \$1,265.52. AT&T contends that charges of this level are clearly in excess of any forward-looking costs that Verizon conceivably could incur to make the "simple billing change" described by the FCC. AT&T argues that Verizon's proposed retagging fee is a band-aid approach to Verizon's inventory systems, and is plainly not recoverable as a forward-looking cost. AT&T asserts that, because these rates are plainly unreasonable and discriminatory, they should be rejected.

CCC's Position:

CCC urges the Board to strictly prohibit Verizon from imposing any Conversion charges. CCC points out that the FCC recognized that once a CLEC "starts serving a customer, there exists a risk of wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time." Further, CCC states that the FCC found that such charges could deter legitimate conversions from wholesale services to UNEs or UNE combinations, or could unjustly enrich an incumbent LEC as a result of converting a UNE or UNE combination to a wholesale service.

CCG's Position:

CCG also argues that the amendment should expressly preclude Verizon from imposing additional charges on any competitive carrier in the absence of a CLEC request for conversion of existing access circuits or services to UNE loops and transport.

In its Reply Brief, CCG argues that FCC rules expressly prohibit non-recurring charges on a circuit-by-circuit basis when wholesale services (e.g., special access facilities) are being converted to EELs, and such charges are inconsistent with Section 202 of the 1996 Act, which prohibits carriers from subjecting any person or class of persons to undue or unreasonable prejudice or disadvantage. CCG opposes Verizon's proposal for a "retag fee" and other nonrecurring charges as legitimate cost recovery items, asserting that Verizon may not legally impose these charges.

Discussion and Proposal

I recommend, as discussed in Issue 6 above, that Verizon should not be allowed to impose any untariffed termination charges, or any disconnect fees, reconnect fees, or charges associated with establishing a service for the first time in connection with the conversion between existing arrangements and new arrangements. If Verizon wishes to propose changes to the ICAs through the addition of non-recurring rates for UNE conversions, the Board will address their proposals at that time.

Specifically, 47 C.F.R. § 51.316(c) provides:

Except as agreed to by the parties, an incumbent LEC 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 an unbundled network element or combination of unbundled network elements.

In promulgating this Rule, the FCC recognized that:

[O]nce a competitive LEC starts serving a customer, there exists a risk of wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time. We agree that such charges could deter legitimate conversions from wholesale services to UNEs or UNE combinations, or could unjustly enrich an incumbent LEC. Because incumbent LECs are never required to perform a conversion in order to continue serving their own customers, we conclude that such charges are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just reasonable and nondiscriminatory rates, terms and conditions.¹⁰⁷

(b3) Should EELs ordered by a CLEC prior to October 2, 2003, be required to meet the FCC's service eligibility?

Verizon's Position:

Verizon recounts that, prior to the *TRO*, the FCC had imposed safeguards to prevent CLECs from using a combination of UNEs known as an EEL to displace special access, a result

107. *TRO* at ¶ 587.

that the FCC determined would undermine existing facilities-based competition in the highly competitive special access market. Verizon further recalls that the FCC required that UNEs be used to provide "a significant amount" of local exchange service, and it prohibited commingling of UNEs and special access. Verizon goes on to say that, in the *TRO*, the FCC modified its EEL eligibility requirements. Verizon opposes various CLECs' proposals deleting Verizon's language requiring re-certification in accordance with these new standards, since at the time the FCC established its new eligibility criteria, it made clear that those criteria apply to all EELs, with no exceptions or grandfathering for pre-existing EELs that a CLEC might have obtained under the old rules. Verizon asserts that, although the FCC identified three specific instances in which a CLEC must certify that its EEL order satisfies these criteria, the FCC did not suggest that those examples were the only such instances, nor did the FCC indicate that existing EELs would be grandfathered and could remain in service regardless of whether they satisfied the current certification criteria. Because the new rules differ from the old ones, Verizon argues that an EEL that qualified under the old criteria will not necessarily continue to qualify under the new criteria.

Verizon therefore contends that CCC's argument that the *TRO* envisioned two tracks of EELs eligibility, such a position is based on a misinterpretation of the FCC's decision to decline to require retroactive billing to any time before the effective date of the *TRO*. Verizon argues that the FCC's determination that no retroactive charges could be imposed for EELs that were ordered in the past does not mean that such EELs could be maintained where ILECs are no longer required to provide them – to the contrary, the FCC explicitly held that "[t]he eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past."

In its Reply Brief, Verizon again addresses the CLECs' proposals deleting Verizon's language requiring re-certification in accordance with the new standards imposed by the *TRO*. Verizon argues that the CLECs are incorrect: the FCC established new EEL eligibility criteria in the *TRO*, and there is no guarantee that an EEL that met the old criteria will still meet the new criteria, as it is required to do. Verizon asserts that the FCC adopted the service eligibility requirements on a circuit-by-circuit basis, so each DS1 EEL must satisfy the service eligibility criteria, allowing no exception from the new criteria for pre-existing EELs.

AT&T's Position:

AT&T urges the Board to reject Verizon's effort to force the CLECs to "re-certify" existing arrangements on a circuit-by-circuit basis – a make-work process for which Verizon offers no legitimate justification. AT&T states that its eligibility for such circuits has already been established, and forcing AT&T – or any other CLEC – to go through this process will unnecessarily increase costs. Further, AT&T asserts that the Board should permit competitors to re-certify all prior conversions in one batch. For future conversions requests, AT&T urges, rather than requiring competitors to certify individual requests on a circuit-by-circuit basis, the Board should permit competitors to submit orders for these as a batch.

CCC's Position:

CCC states that, under Verizon's proposal, any EEL provided prior to the effective date of the *TRO*, October 2, 2003, must satisfy the eligibility criteria established as of October 2, 2003. CCC points out that the *TRO*'s eligibility requirements do not, however, apply retroactively and only apply prospectively. CCC argues that, if that was the case, the FCC would not have limited this statement to "new" orders but would have discussed old orders as well which it didn't.

CCC's proposal mirrors the FCC decision, in that (1) if a circuit qualifies under the new standards but did not qualify under the old standards, a CLEC cannot recover the excessive charges prior to the effective date; (2) if a circuit does not qualify under the new standards but did qualify under the old standards, the ILEC may not recover past losses; and (3) EELs may continue to be provided under the old standards up to the effective date.

CCG's Position:

CCG maintains that any EEL provided by Verizon to a competitive carrier prior to October 2, 2003, should not be required to meet the service eligibility criteria set forth in the *TRO* and Section 51.318 of the FCC's rules.

In its Reply Brief, CCG argues that Verizon may not force CLECs to "re-certify" existing arrangements on a circuit-by-circuit basis, as Verizon has presented no legitimate justification for this process when eligibility for these circuits has already been established.

Discussion and Proposal

EELs ordered prior to the effective date of the *TRO* (October 2, 2003) should not require re-certification of the CLEC regarding service eligibility.

The FCC stated in the *TRO* that "new orders for circuits are subject to the eligibility criteria."¹⁰⁸ Further, the FCC stated in paragraph 589 of the *TRO* that "[t]he eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past.

(b4) For conversion requests submitted by a CLEC prior to the effective date of the amendment, should CLECs be entitled to EELs/UNE pricing effective as of the date the CLEC submitted the request (but not earlier than October 2, 2003)?

Verizon's Position:

Verizon asserts that several CLECs want the *TRO*'s new commingling and conversion obligations to take effect retroactively to the October 2, 2003, effective date of the *TRO*, rather than upon the effective date of the Amendment, in order to receive more favorable UNE pricing for the facilities at issue for the time before the Amendment took effect. Verizon argues, however, that the FCC declined in the *TRO* to override existing contracts to order automatic implementation of its rules as of a date certain, instead requiring carriers to use Section 252 to amend their agreements, where necessary, to implement the *TRO* rulings.

Verizon contends that the delay in implementing amendments was due to the CLECs' continuing obstruction, and they should not be rewarded for ignoring the FCC's directive to promptly amend their contracts by awarding them at least two years' worth of the difference between their existing contract rate that applies under the special access tariff and the lower contract rate for UNE EELs. Verizon further asserts that accepting the CLECs' retroactive billing proposal would impose a substantial, unanticipated, and unjustified liability on Verizon.

In its Reply Brief, Verizon restates its positions from the Initial Brief. In addition, Verizon points out that conversions were not required prior to the *TRO*; in fact, Verizon asserts that the FCC's discussion of conversions makes clear that this was a new obligation. Verizon states that the FCC introduced the subject of conversions by noting, "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

108. *TRO* at ¶ 623.

criteria that may be applicable."¹⁰⁹

AT&T's Position:

AT&T responds, "Yes" and elaborates that the FCC made clear that Verizon's obligation to provide for conversions commenced upon the effective date of the Order. Thus, AT&T argues, while the FCC declined to require retroactive billing "to any time before the effective date of the order," it concluded that the eligibility criteria it was establishing in the *TRO* superseded the "safe harbors that applied to EEL conversions in the past."¹¹⁰ AT&T contends that the FCC held that for pending conversion requests, CLECs "are entitled to the appropriate pricing up to the effective date of this Order."

CCC's Position:

CCC also answers in the affirmative, stating that, under the *TRO*, Verizon must process conversion requests upon the effective date of the *TRO* so long as the requesting carrier certifies that it has met the *TRO*'s "eligibility criteria that may be applicable."

CCC argues that Verizon's position that an amendment is generally required before conversions are performed defies these FCC holdings and is a blatant attempt to preserve unjust riches. CCC indicates that the FCC never prohibited conversions and recognized once a CLEC starts serving a customer using special access, ILECs have an obvious incentive to thwart or frustrate a CLEC's attempt to convert circuits. CCC points out that the FCC emphasized that ILECs may accomplish this by assessing "wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a UNE service for the first time" and that "such charges could deter legitimate conversions from wholesale services to UNEs or UNE combinations, or could unjustly enrich an incumbent LEC as a result of converting a UNE or UNE combination to a wholesale service." Although CCC indicates that the FCC was speaking in terms of charges, the same holds true with respect to delaying tactics, such as Verizon's position that agreements must be amended before conversions are performed, especially if interconnection agreements do not explicitly bar conversion requests.

109. *TRO* at ¶ 586.

110. *Id.* at ¶ 589.

CCG's Position:

CCG indicates its position that the amendment should expressly state that conversion requests issued by a competitive carrier after the effective date of the *TRO* and before the effective date of the Amendment shall be subject to EELs/UNEs pricing available under the *TRO*.

In its Reply Brief, CCG states that, although the FCC declined to require retroactive billing, to any time before the effective date of the *TRO*, the FCC made clear that Verizon's obligation to provide for conversions commenced upon the effective date of the Order and "[t]o the extent pending requests have not been converted . . . competitive LECs are entitled to the appropriate pricing up to the effective date of this Order." CCG asserts that Verizon has mischaracterized the CLECs' attempts to enforce their rights under the law as "continuing obstruction" in the arbitration process. CCG argues that, in accordance with the *TRO*, therefore, CLECs are entitled to UNE pricing effective as of the date the CLEC submitted its conversion request.

Discussion and Proposal

The parties' ICAs have not been amended to reflect pricing changes that resulted from the *TRO*. Consistent with my decision regarding the continuing applicability of the existing ICAs before they are amended, I reason that any revised EEL/UNE pricing does not go into effect until the effective date of the ICAs in this proceeding. To the extent pending requests have not been converted, CLECs are entitled to the appropriate pricing in the current ICAs up until the effective date of the amended ICAs in this proceeding.

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

Verizon's asserts that its language mirrors the FCC's requirements, and gives specific language references to support its contention. Verizon points out that AT&T and CCC disagree with Verizon's requirement that a CLEC reimburse Verizon for the entire cost of an audit where an auditor finds that the CLEC failed to comply with the service eligibility criteria for any DS1

circuit. Verizon contends that AT&T is wrong, that the FCC clearly imposed such an obligation on CLECs that fail eligibility audits. Indeed, Verizon asserts that this is only fair, given that Verizon will also reimburse the CLEC for its audit-related costs if it passes the audit.

In its Reply Brief, Verizon asserts that its language regarding audits is fair to both sides, in that it requires Verizon to pay for an audit that the CLEC passes, while requiring the CLEC to pay for an audit that it fails. Verizon claims that the CLECs attempt to convert this symmetrical obligation into a one-sided requirement that Verizon must pay for all audits unless the CLEC failed to comply in all material respects. Verizon argues that the disagreement here is semantic: Verizon's position is simply that if a CLEC has ordered an EEL for which it was not eligible, it should be liable for the costs of an audit. Verizon addresses CCC's assertion that Verizon should be limited to one audit per 12-month period, rather than one per calendar year, stating that CCC is arguing against a straw man; it presents no reason to think that Verizon or anyone else will attempt to demand an audit two months in a row. Verizon reasons that if the CLEC failed the audit, there would be no need to repeat the audit a mere month later; and if the CLEC passed the audit, Verizon would not repeat the process and find itself liable for paying the CLEC's expenses a second time. Verizon further addresses CCC's complaint that "Verizon's proposal that a CLEC keep books and records for a period of eighteen (18) months after an EEL arrangement" terminates is "unreasonably long and unduly burdensome." Verizon responds that the FCC expects that requesting carriers will maintain the appropriate documentation to support their certifications, and because an audit may be performed on an annual basis, it would defeat the purpose of the audit if a CLEC could disconnect a circuit, and then destroy the records for that circuit. Verizon further asserts that the records must remain available for a reasonable period after the audit concludes, because they might be needed for purposes of addressing disputes arising from the audit. Verizon next responds to CCC's claim that Verizon's language regarding the conversion of a noncompliant circuit has no legal basis, as the *TRO* specifies that the CLEC must "convert all noncompliant circuits" if the "independent auditor's report" finds that the CLEC failed the audit. Verizon argues that the point again appears to be semantic: there is no dispute that such noncompliant circuits must be converted to legal arrangements, and Verizon's proposed Amendment provides for such conversions.

AT&T's Position:

AT&T does not object to the audit rights prescribed by the FCC, and in fact has proposed language that implements the FCC Rules and requirements regarding the ordering of new EELs and the conversion of existing circuits to EELs.

CCC's Position:

CCC's proposed audit terms are consistent with the *TRO*, permitting Verizon to obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria and recognize that "an annual audit right strikes the appropriate balance between the incumbent LECs' need for usage information and risk of illegitimate audits that impose costs on qualifying carriers." In contrast, CCC opposes Verizon's proposal that it be entitled to an audit once per calendar year rather than once per 12-month period. CCC points out that the *TRO* specifically refers to an "annual audit" and contemplates that a full year would have to elapse between audits.

CCC's proposal also requires that Verizon give a CLEC thirty (30) days' written notice of a scheduled audit. CCC asserts that this was a requirement the FCC previously established in the Supplemental Order Clarification that the *TRO* did not alter. In addition, consistent with the *TRO*, CCC proposes that audits be performed in accordance with the standards established by the American Institute for Certified Public Accountants, and requires that the auditor's report be provided to the CLEC at the time it is provided to Verizon.¹¹¹ Furthermore, CCC's proposal incorporates the *TRO*'s concept of materiality that governs this type of audit and recognizes that "to the extent the independent auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor." CCC objects to Verizon's proposed language, claiming it is entirely deficient with respect to recovering the cost of the audit

CCC claims that the payment of reimbursements is symmetrical under CCC's *TRO* proposal, whereas it is not under Verizon's. In particular, CCC proposes that Verizon pay the CLEC, or vice versa (depending upon the result of the audit), within thirty (30) days of receiving the costs of the audit. CCC asserts that, under Verizon's proposal, a CLEC is required to reimburse Verizon within thirty (30) days but Verizon does not have the same obligation.

111. *TRO* at ¶ 626.

CCC contends that Verizon's proposal that a CLEC keep books and records for a period of eighteen (18) months after an EEL arrangement is terminated is highly inappropriate and should be rejected, as it is unreasonably long, unduly burdensome, and not required by the *TRO*.

CCC finally asserts that Verizon's request to convert a noncompliant circuit at its own volition without CLEC consent has no legal basis. Verizon's attempt to convert circuits is also a form of self-help that contravenes the *TRO*.

CCG's Position:

CCG contends that the Amendment must include all requirements applicable to Verizon's right to audit CLEC compliance with the FCC's service eligibility criteria established under the *TRO*.

In its Reply Brief, CCG supports the limited audit rights set forth in the *TRO*, in which the FCC notes that "an annual audit right strikes the appropriate balance between the incumbent LECs' need for usage information and risk of illegitimate audits that impose costs on qualifying carriers." However, CCG urges the Board not to allow Verizon to impose more onerous audit requirements on CLECs that would give Verizon the explicit authority to bully CLECs with burdensome audits. CCG notes that the FCC said that states are in a better position to address the implementation of audits; therefore, the Board must ensure that Verizon is required to abide by both the letter and the spirit of the FCC's requirements.

Discussion and Proposal

As established in the *TRO*, Verizon has the right to obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria.¹¹² The auditor must perform its evaluation in accordance with the standards established by the American Institute for Certified Public Accountants, which will require the auditor to perform an "examination engagement" and issue an opinion regarding the requesting carrier's compliance with the qualifying service eligibility criteria. The independent auditor's report will conclude whether the competitive LEC complied in all material respects with the applicable service eligibility criteria. If the auditor concludes that the CLEC failed to comply with the service

112. *TRO* at ¶ 626-628.

eligibility criteria, that carrier must true-up any difference in payments, convert all noncompliant circuits to the appropriate service, and make the correct payments on a going- forward basis. In addition, if the auditor concludes that the CLEC failed to comply in all material respects with the service eligibility criteria, the CLEC must reimburse Verizon for the cost of the independent auditor.

Similarly, if the auditor concludes that the CLEC complied in all material respects with the eligibility criteria, Verizon must reimburse the audited CLEC for its costs associated with the audit.

With respect to the parties' arguments regarding the meaning of an annual audit, I find that next year's audit should not begin less than 365 days from the beginning of this year's audit.

ISSUE 22 How should the Amendment reflect an obligation that Verizon perform routine network modifications necessary to permit access to loops, dedicated transport, or dark fiber transport facilities where Verizon is required to provide unbundled access to those facilities under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51?

Verizon's Position:

Verizon's language provides that "Verizon shall make such routine network modifications, at the rates and charges set forth in the Pricing Attachment to this Amendment, as are necessary to permit access" by the CLEC to the UNE, "where the facility has already been constructed." Verizon asserts that nothing in its proposed language limits routine network modifications to any particular services at all, provided that the modifications meet the FCC's governing standard. Verizon states that it does not seek through this arbitration to litigate charges for the non-recurring rate elements for which the Board has not already set approved rates. Verizon emphasizes that, nevertheless, nothing in the Amendment should foreclose it from charging for those activities where Board-approved rates for an activity performed by Verizon on behalf of a CLEC already exist.

In its Reply Brief, Verizon responds to AT&T's and CCC's arguments that, as to routine network modifications, there has been no "change in law" that triggers the contract amendment process, and that Verizon has always had a duty to provide routine network modifications.

Verizon asserts that both arguments are incorrect. Verizon asserts that the Triennial Review NPRM had specifically asked "about the extent to which incumbent LECs have an obligation to modify their existing networks in order to provide access to network elements," and the FCC then concluded that "[t]he routine modification requirement that we adopt today resolves a controversial competitive issue that has arisen repeatedly."¹¹³ Verizon points out that, in any event, both AT&T and CCC have proposed routine network modification language for the *TRO* amendment, because such language does not exist today in their contracts.

Further, Verizon points out AT&T's criticism of Verizon's routine network modification definition because it limits such modifications to "splicing of 'in-place' cable at 'existing splice points.'" Verizon argues that it cannot be required to lay new cable or otherwise perform new construction. Verizon asserts that AT&T's definition is unlawful because it would expand upon Verizon's obligations under federal law.

Verizon further addresses the CLECs' argument that Verizon is already compensated for routine network modifications by its recurring charges for the element in question. Verizon reiterates that it is not seeking to charge for routine network modifications in Vermont at this time; however, Verizon has the right to seek cost recovery in the future. Verizon then addresses CCC's argument that if a CLEC's UNE request is denied on the basis of no facilities available, Verizon should have a 24-month continuing obligation to advise the CLEC within 60 days if and when Verizon later provides any retail or wholesale services to any customer at the same premises. Verizon states that this extreme proposal has no basis in fact or law; Verizon does not "discriminate in its provisioning" and no one has alleged otherwise. Verizon states that if it denies a UNE request because no new facilities are already available, and the CLEC believes the denial was improper, it can raise a complaint at that time. Verizon speculates that the real reason for CCC's proposal seems to be to force Verizon to notify CCC when it builds new facilities to serve new customers, thus giving the CLECs an unfair competitive advantage in identifying and locating potential new customers at Verizon's expense.

AT&T's Position:

AT&T contends that the FCC required Verizon to perform the routine network

113. *TRO* at ¶ 632.

modifications necessary to permit AT&T access to loops and dedicated transport. AT&T states that the *TRO* requires ILECs to make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested transmission facility has already been constructed.

AT&T argues that there should be no need to amend the ICA to reflect Verizon's obligation to provide routine network modifications because that requirement pre-dated the *TRO*. AT&T states that the *TRO* simply clarified Verizon's existing obligation, rejecting Verizon's bogus "no build" policy as anticompetitive and discriminatory on its face.

Nevertheless, AT&T has proposed language – because it claims that Verizon has refused to comply with its obligations absent an amendment – that correctly reflects the FCC's rules. However, AT&T does not in any way concede by its response that there has been a "change in law." Likewise AT&T reserves its rights to pursue all remedies available for Verizon's unlawful "no build" practice.

AT&T opposes Verizon's proposed language on this issue that AT&T asserts continues to demonstrate its antipathy to that obligation, does not describe all of the routine network modification activities specified in the FCC Rules and the *TRO*, and also attempts to weaken its obligation in certain areas. AT&T also opposes Verizon's language that excludes routine network modifications from the ambit of existing metrics and remedies plans. AT&T asserts that subjecting Verizon's performance of this obligation to metrics and remedies is consistent with the principle the FCC used to impose the obligation to provide routine network modifications in the first place – parity between Verizon's wholesale performance and its retail operations.

But perhaps the even more fatal problem with Verizon's Amendment, according to AT&T, is that Verizon tries to condition its obligation by asserting that it will only make routine network modifications subject to its ability to impose certain rates and charges on the requesting CLEC. AT&T argues that the *TRO* itself is quite clear that AT&T shall not be obligated to pay separate fees for routine network modifications to any UNE or UNE combination unless and until Verizon demonstrates that such costs are not already recovered from monthly recurring rates for the applicable UNE(s) or from another cost recovery mechanism.

AT&T contends it is critical for the Board to address this matter in the proper light of years of active non-compliance by Verizon, which the FCC found was anti-competitive and

facially discriminatory, and the Board should stand ready to engage all available enforcement mechanisms in opposition to any continuation of this anti-competitive scheme.

CCC's Position:

CCC argues that Verizon's amendment fails to comply with the FCC's clarification of its rules in the *TRO* that reaffirmed Verizon's obligation to perform routine network modifications on behalf of CLECs on a nondiscriminatory basis pursuant to Section 251.

CCC also urges the Board to reject Verizon's proposal to exempt UNEs requiring routine modifications from the performance plan adopted by the Board. According to CCC, it would be nonsensical to abandon the performance plan, one of the Board's principal mechanisms for curbing discrimination and other anticompetitive acts, for a category of UNEs for which Verizon has been singled out by the FCC for its record of intentional discrimination. In addition, CCC argues for the adoption of additional measures to reduce the likelihood that a CLEC UNE request will continue to be improperly denied on the basis of no facilities. Further, CCC's proposal states that where a CLEC UNE request is denied on the basis of no facilities available, Verizon would have a 24-month continuing obligation to advise the CLEC within 60 days if and when Verizon later provides any retail or wholesale services to any customer at the same premises that were the subject of a "no facilities" determination by Verizon. CCC contends that, in the absence of such a provision, it would be extremely difficult for CLEC and the Board to identify and prosecute circumstances where Verizon unlawfully discriminates in its provisioning. Additionally, CCC opposes Verizon's proposal to limit its obligations to offer routine network modifications to the extent required by 47 U.S.C § 251(c)(3) and 47 C.F.R. Part 51, which is inappropriate as explained in CCC's response to Issue 1.

CCG's Position:

CCG states that it has consistently maintained that Verizon's obligation under federal law to provide routine network modifications to permit access to its network elements that are subject to unbundling under Section 251 of the 1996 Act and part 51 of the FCC's rules existed prior to the *TRO*. Therefore, according to CCG, because the *TRO* provides only clarification with respect to Verizon's obligation to provide routine network modifications, the *TRO* does not constitute a "change of law" under the parties' agreements for which a formal amendment is required.

Consistent with the *TRO*, however, CCG argues that the amendment should define

Routine Network Modifications as those prospective or reactive activities that Verizon regularly undertakes when establishing or maintaining network connectivity for its own retail customers. Further, CCG asserts that the amendment should specify that the costs for Routine Network Modifications are already included in the existing rates for the UNEs set forth in the parties' interconnection agreements, and accordingly, that Verizon may not impose additional charges in connection with its performance of routine network modifications.

In its Reply Brief, CCG first notes that it is unnecessary to amend the Agreement to reflect this requirement, as there has been no "change in law" to require an amendment. CCG insists that its proposed Amendment accurately reflects the FCC's task-oriented approach for routine network modifications. CCG reiterates its position that there is no support in the *TRO* for permitting Verizon to impose a charge to perform routine network modifications.

Discussion and Proposal

I recommend that the parties' ICAs contain language consistent with the FCC's decision in the *TRO* with respect to routine network modifications, as established in 47 C.F.R. § 51.319(e)(5). The ICA amendment should describe routine network modifications in the same manner and in the same detail as they are described by the FCC's Rules and in the *TRO*.

In the *TRO*, the FCC required incumbent LECs to make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested transmission facility has already been constructed.¹¹⁴

47 C.F.R. § 51.319(e)(5) makes the obligation explicit, stating:

Routine network modifications.

(i) An incumbent LEC shall make all routine network modifications to unbundled loop facilities used by requesting telecommunications carriers where the requested loop facility has already been constructed. An incumbent LEC shall perform these routine network modifications to unbundled loop facilities in a nondiscriminatory fashion, without regard to whether the loop facility being accessed was constructed on behalf, or in accordance with the specifications, of any carrier.

114. *TRO* at ¶ 632.

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

Further, as discussed in Issue 8, Verizon should not be allowed to assess additional charges for routine network modifications.

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

Verizon's Position:

Verizon states that it filed its arbitration petition to eliminate any doubt regarding its right to cease providing unbundled access to facilities as to which its unbundling obligation under Section 251 of the 1996 Act has been removed. Verizon declares that it cannot lawfully be required under any interconnection contract to continue providing unbundled access to facilities that are no longer UNEs under Section 251. Verizon has therefore proposed an amendment that makes clear that the limitations on Verizon's unbundling obligations established in the core provisions of the Amendment are "[n]otwithstanding any other provision of this Agreement, this Amendment, or any Verizon tariff or SGAT." Verizon asserts that, because the Amendment will be binding as a matter of federal law, it supersedes any inconsistent obligation, wherever it may be found.

In its Reply Brief, Verizon points out that, to the extent any CLEC's contract purports to require Verizon to keep providing de-listed UNEs, the very purpose of this proceeding is to alter

these contract provisions. Verizon asserts that, to the extent there are terms in the existing contracts that permit Verizon to discontinue provision of particular network elements once the FCC has de-listed those elements, those terms retain their binding force, and Verizon's proposed language makes that clear as well. Verizon states that it has already exercised its rights under such terms. Verizon addresses the CLECs' claims that Verizon's proposed language is vague and ambiguous, could cause confusion as to the parties' rights and obligations, and should not be used as an excuse to eliminate obligations arising from other applicable law or requirements. Verizon responds that its language removes any ambiguity that might arise in the absence of terms that make clear that federal law defines the parties' obligations with regard to provision of UNEs notwithstanding any other provisions in other regulatory instruments. Further, Verizon asserts that there is no "applicable law" governing Verizon's unbundling obligations other than Section 251 and the FCC's implementing regulations. Verizon contends that, to the extent that contract terms already permit discontinuation of UNEs without an amendment once the FCC eliminates an unbundling obligation, the Amendment will not affect those rights. But if terms in the existing agreements purport to require Verizon to continue providing de-listed UNEs until completion of an amendment, Verizon argues that the very purpose of this proceeding is to change the CLECs' purported rights under those provisions.

AT&T's Position:

AT&T opposes Verizon's position that the ICA should be amended to specifically reserve rights to discontinue UNEs that it claims exist in documents outside of the ICA, such as its tariffs. AT&T argues that this proposal should be rejected as superfluous and a potential source of confusion. AT&T contends that Verizon should not be allowed to attempt to preserve and use some unidentified and unrelated rights external to the ICA; moreover, Verizon does not identify with specificity any tariffs or other documents that might be implicated.

CCC's Position:

CCC states that it is their understanding that this Issue refers to Verizon's oft-repeated provisions that it will not provide a particular network element "Notwithstanding any other provision of the Amended Agreement . . . or any Verizon Tariff or SGAT" and other similar language. CCC argues that it is both unlawful and procedurally improper for Verizon to attempt to so broadly limit its obligations in this manner. In particular, CCC contends that there is no

basis for Verizon to use a change to its Section 251 obligations as an excuse to eliminate obligations arising from other applicable law or requirements.

In its Reply Brief, CCC argues that if Verizon believes the new FCC rules support a change to its tariffs, it should propose tariff amendments through the normal and proper channels, rather than make a backdoor attempt to nullify its tariffs in a manner that has no basis in the FCC orders.

CCG's Position:

CCG responds that the parties should retain their pre-Amendment rights under the agreement, tariffs and SGATs.

In its Reply Brief, CCG reiterates its position that parties should retain their pre-Amendment rights under the Agreement, tariffs and SGATs. CCG argues that Verizon is seeking to use this Amendment to limit its unbundling obligations only to the extent required by 251(c)(3), and is thus in conflict with the "Applicable Law" definition in its Agreements, which encompasses Section 271 of the 1996 Act, the FCC's merger conditions and Vermont state law. CCG states that it has negotiated with Verizon and participated in this arbitration so that its rights will be governed by the terms and conditions of the Agreement, including the Amendment, and urges the Board not to allow Verizon to "end-run" the interconnection amendment process by filing tariff changes that could undermine the terms and conditions resulting from this arbitration.

Discussion and Proposal

At issue here is whether the limitations on Verizon's unbundling obligations established in the core provisions of the Amendment are "[n]otwithstanding any other provision of this Agreement, this Amendment, or any Verizon tariff or SGAT."

The CLECs are persuasive in their arguments that Verizon's proposed language serves to significantly limit Verizon's obligations. Moreover, Verizon does not specify which tariffs or which other documents might be invoked by its proposed language. If Verizon believes that the new FCC regulations support a change to specific tariffs or SGATs, it should propose amendments to those documents through the normal and proper channels.

ISSUE 24 Should the Amendment set forth a process to address the potential effect on

the CLECs' customers' services when a UNE is discontinued?**Verizon's Position:**

Verizon stresses that its Amendment 1 sets out a clear and fair process for transitioning away from UNE arrangements when Verizon is no longer required to provide such an arrangement under Section 251(c)(3). Verizon states that, under its proposal, it will provide at least ninety days' notice that a given UNE has been discontinued, at which point it will stop accepting new orders for the UNE in question. Further, Verizon states that its proposal provides that, during the 90-day notice period, a CLEC that wishes to continue to obtain access to the facilities used to provide the discontinued UNE arrangement can make an alternative arrangement (whether through a separate, commercial agreement, an applicable Verizon special access tariff, or resale). If the CLEC has not selected any of those options, Verizon's states that its language provides that it can reprice the discontinued UNE in question at a rate equivalent to the applicable special access or resale rate.

In its Reply Brief, Verizon reiterates the positions taken in its Initial Brief. Verizon then addresses and opposes CCG's proposal for the Board to ensure that loss of service to a CLEC's customers does not result from Verizon's discontinuance of that particular UNE. Verizon asserts that neither the *TRO* nor the *TRRO* conditions unbundling relief on assurances that no CLEC's customer will lose service. Verizon argues that the CLECs have known for over two years now which UNEs were de-listed in the *TRO*, so they have no excuse for failing to prepare for the transition.

AT&T's Position:

AT&T states that the FCC's adoption of specific transition requirements in the *TRRO* is important for several reasons, including the need to maintain service stability for existing customers, protection against a tidal wave of maintenance issues and service rearrangements, and stability of prices/costs so that AT&T can properly analyze business decisions. By adopting these transition plans, AT&T contends that the FCC provided CLECs with the tools to control to the greatest degree both its customers' experience and the firm's business needs. AT&T asserts that any adverse modification to these time frames or rates would make an already difficult transition unworkable, and would be inconsistent with the FCC rules. AT&T urges that these

transition mechanisms be reflected in the parties' ICAs.

AT&T points out that its proposal specifically discusses conversion from transitional declassified network elements (those UNEs for which the FCC established transitional provisions in the *TRRO*), and transitional provisions for declassified network elements (those UNEs that were declassified by the *TRO* or earlier). AT&T contends that Verizon should be required to perform the conversions without adversely affecting the service quality enjoyed by the requesting telecommunications carrier's end-user. AT&T argues again that Verizon should not be able to impose any termination charges, disconnect fees, reconnect fees, or charges associated with establishing a service for the first time, in connection with the conversion between existing arrangements and new arrangements.

CCC's Position:

CCC's states that its concerns that fall within the scope of this issue are addressed in: (1) CCC's proposed terms for transition rules that apply to Section 251 UNEs eliminated by the *TRRO*, (*see* also CCC's responses to Issue 6 and 8); and (2) CCC's contract provisions relating to Conversions (*see* also CCC's response to Issue 21). If a UNE is discontinued, CCC argues that CLECs must be able to convert it without disruption or impairment of service to a tariffed service where one exists.

CCG's Position:

CCG states that the amendment should include a process to address the potential effect on CLECs' customers' services when a Section 251(c) UNE is discontinued, to ensure that loss of service to a CLECs' customers does not result from Verizon's discontinuance of that particular UNE. Also, CCG argues that the amendment should further include transition periods for discontinued Section 251(c)(3) UNEs as required by the *TRRO*, of sufficient duration to enable the CLECs to have the time to make the necessary arrangements to obtain or construct replacement facilities.

In its Reply Brief, CCG urges the Board to implement the transition framework established in the *TRRO* into the Amendment to protect Vermont consumers from potential service disruption as a result of Verizon's discontinuance of certain UNEs. CCG states that it has proposed transition language that follows the framework established in the *TRRO* with specific identification processes, notice periods and dispute provisions that fill-in the details of the FCC's

transition framework and provide a comprehensive plan that can be adopted by the Board. CCG argues that Verizon has not included adequate transition language in its proposed Amendment.

Discussion and Proposal

As discussed above, no changes may be made to the character of unbundled services offered by Verizon without amendments to the parties' ICAs. The ICAs themselves offer some degree of customer protection, as they should control and limit parties' ability to unilaterally alter service arrangements. Throughout this proposal, I have recommended that the ICAs contain language that prohibits unilateral changes.

In some instances, the unbundled elements currently provided under Section 251 are being discontinued and replaced with comparable arrangements under Section 271, with only pricing changes. In other instances, discontinued UNEs must be replaced with alternative arrangements, either through tariffed services or other commercial arrangements with incumbent or other competitive carriers. CLECs must be given the time and opportunity to convert their discontinued services to alternative facilities or arrangements. The FCC has provided transition mechanisms in the *TRRO* for some of these services that will be discontinued. No further proposals have been received from the parties, or will be suggested here, that would further these customer protections.

ISSUE 25 How should the Amendment implement the FCC's service eligibility criteria for combinations and commingled facilities and services that may be required under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51?

Verizon's Position:

Verizon responds that this Issue was addressed in the context of Issue 21, and Verizon refers the Board to that discussion.

AT&T's Position:

AT&T states that it has addressed this Issue in response to Issues 12 and 21, above, and will not repeat those arguments here, but rather incorporate them by reference.

In its Reply Brief, AT&T argues that there is a common dispute between AT&T and

Verizon in Issues 12, 13, 21 and 25: Verizon's effort to impose an onerous pre-ordering audit requirement on CLECs seeking to order EELs and UNE combinations and to convert existing circuits to UNEs. AT&T contends that the FCC rejected the proposals of the ILECs such as Verizon that had sought to require other conditions on the CLECs as a pre-condition to ordering an EEL or converting existing circuits to EELs, such as pre-audits and other requirements that the FCC described as constituting unjust, unreasonable and discriminatory terms and conditions for obtaining access to UNE combinations.

CCC's Position:

CCC states that its proposed language is appropriate and properly recognizes the limited instances when a CLEC must certify to Verizon that it satisfies the FCC's service eligibility requirements for combinations and commingled facilities. CCC opposes Verizon's proposed certification requirements, as they are not limited to specific instances identified by the FCC Rule, and instead generally apply to each DS1 circuit or DS1 equivalent circuit. In addition, CCC opposes Verizon's language that contemplates applying the eligibility criteria to non-UNEs despite the fact that the rules do not apply to them.

Moreover, CCC opposes Verizon's proposal as being inconsistent with the *TRO* because it seeks to impose onerous eligibility requirements that a CLEC must satisfy before it may obtain combinations, as discussed in Issue 21. CCC argues again that nothing in the *TRO* requires a CLEC to provide the sort of information demanded by Verizon.

With respect to means upon which certification is made, CCC proposes that a CLEC can self-certify in writing or by electronic notification. CCC's proposal is perfectly reasonable, whereas the FCC has found that specific certification procedures demanded by ILECs "would impose an undue gating mechanism that could delay the initiation of the ordering or conversion process."

CCG's Position:

As discussed more fully in response to Issue 21 above, CCG argues that the amendment should expressly incorporate the FCC's service eligibility criteria set forth in the *TRO* and Section 51.318 of the FCC's rules for combinations and commingled facilities and service.

Discussion and Proposal

As addressed above in relation to Issue 21(a), the parties' ICAs should be amended to

closely mirror the *TRO*'s requirements added to FCC rule 47 C.F.R. § 51.318, requiring self-certification on the part of the requesting CLEC. The CLEC must certify in writing that it has met the criteria (however, the CLEC need not necessarily provide detailed information on each and every point of the criteria to Verizon). In keeping with the FCC's discussion in the *TRO*, Verizon should not be allowed to impose any restrictive conditions, such as a pre-ordering audit requirement, on CLECs seeking to order EELs and UNE combinations or to convert existing circuits to UNEs.

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

Verizon's Position:

Verizon responds that as it has stated in response to Issue 2, it is not required to negotiate, and cannot be forced to arbitrate, issues that are not related to Verizon's unbundling obligations under Section 251(c)(3) of the 1996 Act. Verizon contends that the 1996 Act makes clear that a state commission's authority is limited to implementation of the unbundling obligations under Section 251(c)(3) and the FCC's implementing regulations. Verizon argues that since it has not agreed to negotiate terms of commercial agreements for UNE replacements as part of its *TRO* Amendment, the Board may not arbitrate these terms. Verizon argues that, while commercial agreements are not subject to negotiation or arbitration under Section 252, a reference to commercial arrangements appropriately signifies that CLECs have other options in case of the elimination of a UNE. Verizon states that its amendment refers to commercial agreements solely for the convenience of the parties, in order to describe the 1996 Action Verizon will take (i.e., application of the applicable access tariff rate or other applicable rate) if the CLEC, upon discontinuance of a UNE, does not replace the UNE with a commercial arrangement (or other alternative arrangement).

In its Reply Brief, Verizon contests CCC's argument that Verizon's language should not refer to commercial agreements as an alternative to Section 251/252 agreements, and that instead, Verizon has an obligation to offer rates, terms and conditions for network elements in

interconnection agreements under Section 271 and other applicable law. Verizon states that, as addressed under Issues 1 and 32, those sources of law should not be considered in this proceeding. Verizon reiterates that the reference is simply for clarity, and Verizon would consider omitting any reference to commercial agreements as long as it is clearly understood that Verizon has the right to reprice discontinued UNEs if a CLEC fails to execute a commercial agreement. But whereas Verizon states that it has included references to commercial agreements solely to confirm that these agreements are one option for replacing discontinued UNEs, Verizon asserts that the CLECs seek to avoid any reference to commercial agreements because they wish to perpetuate unbundling obligations that the FCC has eliminated.

AT&T's Position:

AT&T argues that the amendment should not address commercial agreements for the reasons set forth in the discussion of Issue 23 and incorporated herein by reference.

CCC's Position:

CCC urges rejection of Verizon's claims that its proposed language is necessary because it has not agreed to negotiate terms and conditions of commercial agreements for replacement services for any of the Discontinued Facilities under the auspices of Sections 251 and 252 or as part of the negotiations over a *TRO* or *TRRO* Amendment.

As explained in the response to Issues 1 and 32, CCC argues that Verizon has an obligation to offer rates, terms and conditions for network elements in interconnection agreements under Section 271 and other applicable law (i.e., Bell Atlantic/GTE Merger Conditions) even if Verizon has been relieved of offering such network elements pursuant to Section 251(c)(3). Further, CCC explains further in response to Issue 32, such issues can be arbitrated under Section 252(b). Therefore, CCC believes that Verizon's proposed language is unnecessary and would be a source of possible conflict and confusion, and has no basis in the *TRO*. CCC points out that services provided under a commercial agreement should be subject to Commingling and Conversion to the same extent as tariffed services, which is consistent with the *TRO*.

In its Reply Brief, CCC argues that it is clear from the briefs that the dispute in Issue 26 is not whether the Amendments should mention "commercial agreements," but whether the default alternative arrangement for a former UNE should be a network element provided pursuant to (1)

a commercial agreement or (2) Section 271. If the Board were to conclude in Issue 32 that Verizon has no obligation to provide network elements under Section 271, CCC states that references to commercial agreements along the lines of those proposed by Verizon could be reasonable. If, however, Verizon continues to be subject to Section 271, CCC argues that, according to the plain terms of the statute, CCC's proposal to make such elements the default transition option is more sensible and consistent with the 1996 Act.

CCG's Position:

CCG asserts that there is no basis for the amendment to address commercial agreements between Verizon and individual Vermont CLECs that may be negotiated in the future. CCG maintains, however, that commercial agreements incorporating Verizon's ongoing obligations under Section 271 are within the scope of interconnection agreements.

In its Reply Brief, CCG argues that Verizon is not permitted to exclude from state commission-approved interconnection agreements, arising under Section 252 of the 1996 Act, agreed upon rates, terms and conditions applicable to network elements that Verizon provides to competitive LECs, on an unbundled basis, consistent with its obligations under other Applicable Law, including Section 271 of the 1996 Act and Vermont state law. CCG asserts that the Board should reject efforts by Verizon to minimize its federal and state law unbundling obligations through commercial contracts intended to evade state commission oversight, under Section 252 of the 1996 Act.

Discussion and Proposal

In its *TRO* and *TRRO*, the FCC has determined that a number of services provided by Verizon are no longer subject to the unbundling requirements of Section 251 of the 1996 Act. Unless the CLEC can obtain comparable unbundled services through the provisions of Section 271, the CLEC must seek alternative arrangements with incumbent or competitive carriers, either through tariffed services, long-term indefeasible-right-of-use ("IRU") arrangements, or other commercial arrangements.

Based on my analysis of the parties' comments and relevant FCC decisions, I conclude that, to the extent that Verizon has entered into an agreement with a CLEC addressing Verizon's ongoing obligations to provide network elements, on an unbundled basis, under any applicable law or Board decision (such as the Section 271 approval or the Verizon merger proceeding),

those agreements must be treated by the Board as an "interconnection agreement," subject to the requirements of Section 252 of the 1996 Act, and should continue to be reflected in the parties' ICAs.

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

Verizon's Position:

Verizon objects to this issue on the same grounds as other non-TRO issues described above. Verizon argues that the *TRO* did not change the rules with respect to testing, maintaining, or repairing copper loops, and existing contracts already address these matters, to the extent parties deemed necessary when the agreements were negotiated and/or arbitrated. Verizon asserts that it would be improper, as well as a waste of resources, to complicate this proceeding by arbitrating non-TRO provisions that are already included in existing contracts.

AT&T's Position:

AT&T states that the parties' agreement should be amended to address changes arising from the *TRO* with respect to line sharing, line splitting, line conditioning, and the maintenance, repair and testing of copper loops and subloops.

CCC's Position:

CCC contends that Verizon should be required to provide physical loop test access points for CLECs to engage in testing, maintaining and repairing copper loops and subloops, on a nondiscriminatory basis. CCC states that its proposal for the inclusion of such language comes directly from the *TRO*, where the FCC required ILECs to provide access points for copper loop maintenance. CCC urges the Board to reject Verizon's position that the disputed language is not necessary and adopt CCC's proposal.

CCG's Position:

CCG states that the amendment should require Verizon to provide an access point for CLECs to engage in testing, maintenance and repair of copper loops and copper subloops. CCG asserts that the FCC made clear in the *TRO* that incumbent LECs are required to provide access to physical loop test access points on a nondiscriminatory basis for the purpose of loop testing,

maintenance, and repair activities.

In its Reply Brief, CCG argues that the language in the Amendment must ensure the CLECs receive adequate access to test, maintain and repair copper loops and subloops. CCG criticizes Verizon, stating that it has taken its standard tactic, failing to propose any language for those issues, maintaining that including language to cover loop access for testing and repair would be "a waste of resources."

Discussion and Proposal

I conclude that Verizon must provide an access point for CLECs to engage in testing, maintaining and repairing copper loops and copper subloops. In the *TRO*, the FCC established the following rule at 47 C.F.R. § 51.319(a)(1)(iv)(A):

An incumbent LEC shall provide, on a nondiscriminatory basis, physical loop test access points to a requesting telecommunications carrier at the splitter, through a cross-connection to the requesting telecommunications carrier's collocation space, or through a standardized interface, such as an intermediate distribution frame or a test access server, for the purpose of testing, maintaining, and repairing copper loops and copper subloops.

ISSUE 28 What transitional provisions should apply in the event that Verizon no longer has a legal obligation to provide a UNE? Does Section 252 of the 1996 Act apply to replacement arrangements?

Verizon's Position:

Please see Verizon's responses to Issues 1 and 2. Verizon declares that the second question in this Issue is now moot, in that the FCC has now issued permanent rules with the *TRRO*. Verizon states that Section 252 does not apply to arrangements to replace network elements no longer required to be unbundled under that Section.

AT&T's Position:

AT&T states that it has previously discussed the appropriate transition requirements in regard to unbundled circuit switching, UNE-P, high capacity loops and dedicated transport in Issues 3 through 6 above. Rather than repeat that discussion, AT&T incorporates it by reference here.

CCC's Position:

CCC states that a one-size-fits-all solution would be inconsistent with FCC regulations and unsound policy, because different transition provisions will be appropriate in different circumstances. CCC points out, for example, the *TRRO* established different transition terms for dark fiber than for other affected Section 251 UNEs, and also different terms for UNEs being requested to serve the CLECs' existing customer base as opposed to new customers. While CCC indicates that it is not seeking transition terms for most Section 251 UNEs eliminated by the *TRO*, the Board should consider specifically-tailored transition terms, as needed, depending on the particular circumstances of the UNE at issue.

CCC notes that it has addressed the rates that should be applicable to the transitional *TRRO* UNEs, and that Verizon should not be permitted to impose charges for moving UNEs to alternative arrangements. CCC repeats its position that Verizon must provide moves, adds and changes for transitional UNEs. Further, CCC argues that the Agreements should include reasonable terms to govern the migration and conversion of transitional UNEs to alternative arrangements. CCC's Amendment would require CLECs to submit orders to convert or migrate UNEs that are no longer available to alternative arrangements by the end of the applicable transition period. To the extent Verizon does not complete the requested conversion or migration by the last day of the applicable transition period, CCC states that Verizon must continue to provide the UNE until such time as Verizon completes the migration of the UNE to the alternate arrangement. CCC's proposal requires Verizon to perform all conversions and migrations of Section 251 UNEs eliminated by the *TRRO* in a seamless manner without customer disruption or adverse effects to service quality.

CCC's amendment also allows Verizon to seek reclassification if facts change that cause a wire center to cross one of the FCC non-impairment thresholds. CCC has proposed a process that would enable Verizon to discontinue its provision of such UNEs where appropriate, and in such instance provide an appropriate transition for CLECs. CCC contends that when Section 251 UNEs are eliminated by this process in the future, the *TRRO* recognizes that CLECs are entitled to "appropriate" transition terms, and CCC has provided a comprise proposal for transition terms. CCC asserts that any future changes to Verizon's unbundling obligations that arise from a change in law can only be implemented in accordance with the change in law provisions of the

Agreement in effect at that time.

In its Reply Brief, CCC observes that Verizon's brief, in a single sentence response to this Issue, states that the transition rates and terms prescribed by the *TRRO* cannot be incorporated into a Section 252 interconnection agreement. CCC argues that this contention not only conflicts with the ILECs' long-standing argument that they do not have to provide anything to CLECs that is not included in a Section 252 agreement, but it is also refuted by the FCC's orders. CCC asserts that the *TRRO*'s transition terms are plainly a successor to the interim transition terms the FCC adopted in its August 2004 Interim Order, which held that any Section 252 interconnection agreement or amendment during that period should "reflect the transitional structure" the Order created. CCC points out that the *TRRO* indicated that the transitional scheme should be included in Section 252 interconnection agreements, as it noted that carriers could adopt alternative transitional terms in interconnection agreements pursuant to Section 252(a)(1). If instead, the amended agreements do not require Verizon to provide access to these facilities, CCC contends that Verizon could later return to its argument that CLECs are not entitled to any form of access that is not implemented in their agreements.

CCG's Position:

CCG points out that the FCC has established transition periods for the UNEs for which it found no impairment under Section 251(c)(3), and those transition periods should be incorporated into the Amendment. Similarly, CCG contends that those transition periods should apply whenever Verizon wire centers are found to satisfy the criteria the FCC has established for determining when there is no impairment under Section 251(c)(3) for high-capacity loops and dedicated transport.

Discussion and Proposal

Consistent with my earlier conclusions, I find that this question pertains only to those UNEs that the FCC has determined should not be provided under Section 251, and for which there is no corresponding Section 271 obligation. In those instances, I conclude that the Board should adopt revisions to the parties' ICAs that reflect the decisions of the FCC in the *TRRO*, including the FCC's transition plans for services that will no longer be provided as Section 251 UNEs.

I, therefore, foresee the following scenario for the transition period. The pricing for

transitional services will be as specified in the unbundling framework ordered by the FCC's *TRRO*, except as directly addressed in the Board's Order. Verizon will not unilaterally change any UNE-P arrangement prior to the end of the transition period. The respective CLEC will initiate the orders for converting their UNE customers to alternative arrangements at any time before the end of the respective transitional period, and they will have the full transitional period to make those changes.

In light of Vermont's specific circumstances with respect to high-capacity loops and transport, and dark fiber transport (i.e., none of Vermont's wire centers or transport routes meet the criteria for non-impairment), it is important that the Board consider later transition frameworks that will take effect whenever non-impairment criteria may be met. Based in part on CCC's proposal, I recommend that the Board develop a process that would enable Verizon to discontinue its provision of certain UNEs in the event that wire center characteristics "cross" the non-impairment thresholds. I have previously described that process in response to Issues 4 and 5, above.

I have previously addressed the issue concerning the applicability of Section 252 to replacement arrangements in response to Issue 26, above.

ISSUE 29 **Should Verizon be required to negotiate terms for service substitutions for UNEs that Verizon no longer is required to make available under Section 251 of the 1996 Act?**

Verizon's Position:

Verizon states that this Issue has been addressed under Issues 2 and 26; those responses apply here, as well.

AT&T's Position:

AT&T incorporates by reference its discussion of Issues 2 through 8, 10 and 11, saying that those discussions are responsive to the questions posed here.

CCC's Position:

CCC states that the agreements should reflect all of Verizon's unbundling obligations, including its Section 271 obligations, and should not be artificially limited to its obligations

arising under Section 251.

As for service substitutions for UNEs that Verizon may at some future date obtain relief from its existing Section 251 obligations, CCC asserts that terms for such service substitutions are not necessary, because the existing change-of-law language is sufficient to handle future contingencies as they may arise.

In its Reply Brief, CCC asserts that Congress required that Verizon's rates and terms for Section 271 UNEs be established in Section 252 interconnection agreements.

CCG's Position:

CCG argues that Verizon is subject to an ongoing independent federal unbundling obligation, under Section 271 of the 1996 Act, to provide to Vermont CLECs those network elements and combinations of network elements set forth in the "Competitive Checklist," including but not limited to unbundled local circuit switching, line sharing, high capacity (DS1 and DS3) loops and high capacity (DS1 and DS3) dedicated interoffice transport facilities, regardless of whether the same network elements and combinations of network elements are subject to the unbundling obligations under Section 251(c)(3). CCG asserts that, even to the extent that Verizon has been granted Section 251(c)(3) unbundling relief, under the *TRO* and *TRRO*, Verizon must provide to Vermont CLECs the same network elements and combinations of network elements, on an unbundled basis, subject to rates, terms and conditions that are "just, reasonable and nondiscriminatory." CCG further contends that the rates, terms and conditions for such network elements provided by Verizon must be negotiated, and as necessary, arbitrated by the Board, as required by Section 252 of the 1996 Act.

Discussion and Proposal

I recommend that Verizon be required to negotiate terms for service substitutions. While the FCC may limit the scope of specific unbundled elements to be offered under Section 251(c)(3), Verizon remains bound by its other agreements with respect to unbundling obligations. As discussed in Section III, above, Verizon remains bound, as a matter of state law and under Section 271 of the Act, to meet the requirements of the competitive checklist.

As discussed in Issue 6, the FCC discussed the Section 271 scenario at great length in the *TRO*, stating that:

we reaffirm that BOCs have an independent obligation, under Section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under Section 251, and to do so at just and reasonable rates.¹¹⁵

And the FCC concludes:

Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in Section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of Sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act. Application of the just and reasonable and nondiscriminatory pricing standard of Sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements.¹¹⁶

For services that are not to be continued under Section 271, Verizon also remains obligated to negotiate rates, terms, and conditions for its service substitutions or alternative arrangements that are just, reasonable, and nondiscriminatory. As directed by the FCC in the *TRRO*:

We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by Section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under Section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.¹¹⁷

ISSUE 30 Should the FCC's permanent unbundling rules apply and govern the parties' relationship when issued, or should the parties not become bound by the FCC order issuing

115. *TRO* at ¶ 652.

116. *Id.* at ¶ 663.

117. *TRRO* at ¶ 33, footnotes omitted.

the rules until such time as the parties negotiate an amendment to the ICA to implement them, or Verizon issues a tariff in accordance with them?

Verizon's Position:

Verizon maintains that the parties have no discretion to determine when the FCC's unbundling rules will apply. By explicit directive of the FCC, the *TRRO* and the rules adopted in that order took effect on March 11, 2005,¹¹⁸ and all parties must comply with them, including the mandatory transition plan. Verizon refers the Board to its Opposition to Petition for Emergency Declaratory Relief filed on March 10, 2005, and its Letter Opposition to Motion for Injunctive Relief filed on March 16, 2005, in this docket, and incorporates these Opposition filings here. Verizon also refers the Board to Verizon's response to Issue 10 herein, which also addresses this Issue.

AT&T's Position:

AT&T incorporates by reference its discussion of Issues 2 through 8, 10 and 11, as those discussions are responsive to the questions posed here.

CCC's Position:

CCC asserts that both the *TRO* and the *TRRO* expressly provide that the new rules must be implemented through the interconnection agreement change of law processes, and are not self-executing. As CCC points out, the *TRRO* recognizes that while the order became effective on March 11, 2005, the changes to the parties' relationships should take effect "upon the amendment of the relevant interconnection agreements, including any applicable change of law processes."¹¹⁹ CCC reports that a Federal District Court in Illinois recently held that the *TRRO* does not go into effect automatically and that negotiations are "a predicate to implementation of the *TRO* Remand Order." In any event, CCC states that the determination of the effective date of the changes that result from the *TRO* and *TRRO* are controlled solely by the existing change of law terms. *See* CCC response to Issue 2.

In its Reply Brief, CCC argues that, contrary to Verizon's assertion, FCC rules are not

118. *See TRO* at ¶ 235.

119. *TRRO* at ¶ 147.

"self-effectuating." Instead, CCC contends that the determination of the effective date of the changes that result from the *TRO* and *TRRO* are controlled solely by the existing change of law terms, which Verizon has itself previously explained are binding on state commissions.

CCG's Position:

CCG argues that the FCC has required parties to amend their interconnection agreements to incorporate the FCC's latest unbundling rules. CCG also adds that the *TRRO* thus is not self-effectuating, it takes effect only after the parties have negotiated and, if necessary arbitrated, the rates, terms, and conditions necessary to implement changes in Section 251(c)(3) unbundling obligations through amendments to their interconnection agreements.

Discussion and Proposal

As discussed previously, in order for the FCC's revisions in unbundling rules to be effectuated, they must be adopted through amendments to the ICAs, and approved by the Board. I am recommending that the Board adopt revisions to the ICAs that reflect the decisions of the FCC in the *TRRO* related to the elimination of certain unbundled elements under Section 251 of the 1996 Act. As discussed above, the revisions should not be effective until the parties' ICAs are amended in conformance with the Board's Order in this proceeding, and properly signed by the appropriate parties. To the extent that the transition framework adopted by the FCC is utilized, it will not begin until the effective date of the approved, amended ICAs.

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

Verizon's Position:

Verizon answers that all carriers must comply with the mandatory transition plan the FCC established in its *TRRO*, which distinguishes between the embedded base and new orders. As discussed previously, the FCC has established a twelve-month transition period for the embedded base, including transitional rates, for mass-market switching, dedicated transport, and high-capacity loops, and an eighteen-month transition period for dark fiber loops and transport. Verizon stresses that the FCC's transition plan does not permit CLECs to add new UNEs where

the FCC has determined that no Section 251(c) unbundling obligation exists. *TRRO* 5, 142, 195, 199, 227. Thus, Verizon asserts that TELRIC rates do not apply to elements that are no longer subject to unbundling under the *TRRO* – even for the embedded base. Verizon states that its Amendment captures its obligations under the *TRRO*. As noted in the discussion of Issue 3, above, Verizon has offered to add terms to its Amendment 1 confirming its obligation to comply with the FCC's transition rules. Verizon objects to the CLECs' transition terms, however, as Verizon believes it would allow them to override the FCC's no-new-adds directive and to keep ordering new arrangements of the de-listed UNEs throughout the transition period. With respect to UNE-P, Verizon stresses that the FCC's transition period for the embedded base does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching.¹²⁰ With respect to loop and transport UNEs, Verizon states that the FCC's transitional rules do not allow any new UNE arrangements that do not meet the new criteria, without exception for elements ordered to serve existing customers.

In its Reply Brief, Verizon addresses the arguments of some CLECs which seek a ruling that any UNE-P line added, moved, or changed by a competitive carrier, at the request of a pre-existing customer is within the competitive carrier's embedded customer base. Verizon argues that the CLECs' position is inconsistent with the language and policy of the *TRRO*. Verizon states that since numerous CLECs, including parties to this proceeding, have filed petitions asking the FCC to reconsider the *TRRO* on precisely this issue, there is no need for the Board to consider the same issue. Verizon asserts that the terms of the *TRRO* already make clear that CLECs are not allowed to add new lines for existing customers or to obtain de-listed UNEs when existing customers move to different locations.

AT&T's Position:

AT&T states that this issue appears to implicate the transitional rates adopted by the FCC in the *TRRO* for UNEs that are being discontinued. AT&T contends that if an element is a UNE, Verizon is obligated to provide it at TELRIC rates, whether or not the customer is "new" or part of the embedded base.

For purposes of applying the transitional rates for discontinued UNEs adopted by the

120. See *TRRO* at ¶ 227.

FCC, however, AT&T points out that it is important to distinguish between pre-existing customers – for whom the transitional rates would apply – and "new" customers – who conceivably could be subject to some alternative pricing arrangement. AT&T's proposed amendment thus addresses situations in which Verizon may seek to apply different rates for elements that are used to provide service to "new customers." AT&T's proposal defines "new customers," explicitly excluding from that term AT&T's existing customers whose connectivity is changed (e.g., as a result of a change in the technology that is used to serve them) on or after March 11, 2005. AT&T's proposal also provides that AT&T will provide Verizon with the information necessary to identify new customers and Verizon shall apply its rate for new customers only to those orders identified by AT&T as orders relating to new customers.

CCC's Position:

CCC argues that this distinction is relevant only to UNEs subject to the transition rules established by the *TRRO*, which is addressed in CCC's response to Issues 6, 28 and Supplemental Issue 4.

In its Reply Brief, the CCC asserts that this distinction is relevant only to UNEs subject to the transition rules established by the *TRRO*, which is addressed in CCC's response to Issues 6, 28 and Supplemental Issue 2.

CCG's Position:

CCG asserts that the Amendment must define competitive carriers' "embedded customer base" for which the prescribed transition plan will apply. For UNEs that Verizon no longer is obligated to provide under Section 251(c)(3) of the 1996 Act at TELRIC rates, CCG argues that the Amendment should clarify that any UNE added, moved or changed by a competitive carrier for a customer served by the competitive carrier's network on or before March 11, 2005, is within the competitive carrier's "embedded customer base" for which the FCC-mandated transition plan applies. Consistent with the *TRRO*, CCG urges the Board not to permit Verizon to block "new adds" by competitive carriers, under Section 251(c)(3), until such time as the *TRRO* is properly incorporated into the parties' agreements through the change of law processes set forth therein, as contemplated by Section 252 of the 1996 Act.

CCG cites numerous state commission decisions to order ILECs, including Verizon, to continue processing, after March 11, 2005, orders by CLECs for network elements, including

local circuit switching, that Verizon no longer is obligated to provide under Section 251(c)(3) of 1996 Act. According to CCG, those state commissions flatly rejected the incumbent LECs' position that the *TRRO*, or any transition mechanism arising thereunder, is "self-effectuating." Thus, CCG points out, the FCC's proscription against the continued provision of unbundled local switching (and UNE-P) under Section 251(c)(3), like other limitations on unbundling ordered by the FCC in the *TRRO*, may be implemented only by amendment to carriers' existing ICAs, and subject to state commission oversight under Section 252 of the 1996 Act.

Discussion and Proposal

All UNEs provided under Section 251 must be provided at TELRIC rates. The UNEs that are currently available must be offered, at TELRIC rates, until the effective date of the parties' amended ICAs, whether the customer is "new" or part of the embedded base.

ISSUE 32 Should the Amendment address Verizon's Section 271 obligations to provide network elements that Verizon no longer is required to make available under Section 251 of the 1996 Act? If so, how?

Verizon's Position:

Verizon opposes the CLECs' proposals to include Section 271 obligations in the Section 252 Amendment under arbitration. Verizon argues that Congress granted "sole authority to the [FCC] to administer . . . Section 271" and intended that the FCC exercise "exclusive authority . . . over the Section 271 process." By contrast, Verizon states that the only role Congress identified for state commissions in Section 271 is with respect to an "application" for long-distance approval, and there Congress provided that "the [FCC] shall consult with the State commission of [that] State" so that the FCC (not the state commission) can "verify the compliance of the Bell operating company with the requirements of [Section 271](c)."¹²¹ Verizon asserts that Congress gave state commissions no role after approval of such an application, and the FCC has never held that it has the obligation to consult with a state commission before ruling on a complaint under Section 271(d)(6).

121. 47 USC § 271 (d) (2)(b).

Verizon further insists that the detailed procedures in Sections 251 and 252 confirm that state commissions have no authority to regulate 271 elements. Verizon asserts that, with respect to state commissions' authority to set rates, Section 252(d)(1) is quite specific and only applies for the purposes of implementation of Section 251(c)(3). Further, Verizon argues that because Congress gave the FCC – and the FCC alone – authority to determine whether a BOC complies with Section 271, that authority rests exclusively with the FCC.

Verizon contends that state law regulation of 271 elements (even if it were permitted, and it is not) would be contrary to the FCC's expressed preference for commercial agreements with respect to those elements. Verizon claims that the possibility of state commission review and potential modification of voluntary commercial agreements encourages parties to attempt to use the regulatory process to improve further on the terms of a negotiated deal, thus diminishing their ability to resolve issues with any certainty at the bargaining table.

Verizon contends that the FCC has made clear that elements provided under Section 271 are not UNEs; that the obligation to provide UNEs arises only under Section 251(c)(3). Verizon points out that the obligation under Section 271 – which never uses the term "unbundled network element" – is "independent" of "any unbundling analysis under Section 251." Verizon notes that the FCC has therefore held that the TELRIC prices that apply to UNEs do not apply to Section 271 elements. Moreover, Verizon asserts, Section 271 elements do not have to be offered as part of a "combination," and thus there is no such thing as a Section 271 Platform.

Verizon argues that the D.C. Circuit considered and rejected the precise argument favored by the CLECs on this issue (i.e., that because Section 271(c)(1)(A) and (c)(2)(A) refer to Section 252 agreements, Section 271 obligations are therefore to be enforced in Section 252 arbitrations). Verizon states that the D.C. Circuit held that "the CLECs have no serious argument" that Section 251 obligations apply to Section 271's checklist items four, five, six, and ten (i.e., unbundled elements). Thus, Verizon asserts that the CLECs' suggested references to Section 271 are inappropriate, and that this Amendment is intended to implement unbundling obligations under Section 251.

In its Reply Brief, Verizon rebuts the CLECs' claims that a Bell company "can . . . comply with Section 271 duties only by entering into interconnection agreements 'under Section 252.'" Verizon argues that the reference in Section 271(c)(1)(A) to "agreements that have been

approved under Section 252" does not provide state commissions with authority to regulate Section 271 elements.

AT&T's Position:

The Amendment should include language requiring Verizon to provide Section 271 UNEs under the same terms and conditions as it was providing them under the Agreement, and at rates that comply with Section 271's "just and reasonable" pricing standard. This is reflected in AT&T's proposed Amendment at Section 3.11.3.

Contrary to Verizon's claim, the Board is not preempted from requiring Verizon to comply with its Section 271 obligations. Indeed, there is no merit to the claim that Congress provided states only a consultative role under Section 271. Nowhere does Section 271 provide the FCC with exclusive authority to establish the rates, terms and conditions over services provided pursuant to the competitive checklist, nor does it preempt state commissions from exercising authority they otherwise have been granted under federal or state law. In fact, the text of the statute demonstrates that Congress fully expected that state commissions would in the first instance set the rates, terms and conditions for Section 271 items.

Specifically, under the terms of Section 271(c)(1)(A) and Section 271 (c)(2)(A), which is entitled "Agreement required," before Verizon can offer in-region interLATA services in a state, it must satisfy the express condition that it provides the competitive checklist items (listed in Section 271(c)(2)(B)) through "binding agreements that have been approved under Section 252." Where negotiations fail, it is the state commission that must conduct arbitrations pursuant to Section 252 to form an interconnection agreement that can be approved "under Section 252." A Bell company can thus comply with Section 271 duties only by entering into interconnection agreements "under Section 252" (Section 271(c)(1)(A)) that specify terms and conditions for Section 271's checklist items. And in arbitrating interconnection agreements, state commissions plainly will in the first instance set the rates, terms and conditions for Section 271 checklist items.

Thus, the Board plainly has the authority to enforce the unbundling obligations imposed on Verizon under Section 271. Moreover, the need for the Board to recognize and exercise this authority has become even more pronounced in view of the elimination of certain UNEs under Section 251 in the wake of the *TRO* and *TRRO*. Accordingly, the Board should ensure that

Verizon's continuing unbundling obligations under Section 271 are properly reflected in the ICA Amendment.

CCC's Position:

Yes. Pursuant to 47 U.S.C. §§ 271(c)(2)(B)(iv),(v),(vi), & (vii), Verizon is required to provide requesting carriers with access to specifically-enumerated network elements including loop transmission, transport, switching and call-related databases ("Section 271 network elements"). This obligation is wholly independent of Verizon's duty to offer UNEs pursuant to Section 251(c)(3). In its proposed Amendment, CCC proposes rates, terms and conditions associated with Section 271 network elements. Verizon refuses, however, to incorporate any language that recognizes its obligation to offer such facilities on the grounds both that the Amendment should be narrowly limited to what Section 251(c)(3) requires, and that the Board has no authority either to implement Section 271 or to arbitrate this issue in a Section 252 arbitration proceeding.

Verizon's Section 271 obligations are unequivocal, directly applicable, and arbitrable. The relevant provisions of Sections 271 and 252 and their interrelationship require that (1) the rates, terms and conditions associated with Section 271 network elements must be contained in an interconnection agreement or SGAT approved by a state commission pursuant to Section 252; and (2) a dispute over the rates, terms and conditions for Section 271 network elements is an "open issue" that may be presented to a state commission within the context of a Section 252 arbitration. In addition, the Board has independent and explicit authority to order that such provisions be included in an interconnection agreement. The Board should find that CCC's proposed contract language associated with Verizon's obligation to offer Section 271 network elements is "just and reasonable," and require its incorporation in the agreements.

CCG's Position:

Yes. Notwithstanding the legal conclusions set forth in the TRO and the TRRO, Verizon remains obligated, under existing federal law, to provide to Vermont CLECs those network elements and combinations of network elements set forth in Section 271(c)(2)(B) of the 1996 Act, including without limitation, local circuit switching, line sharing, high capacity loops and high capacity dedicated transport facilities. The FCC repeatedly has emphasized that Section 271 of the 1996 Act imposes on the BOCs, including Verizon, a separate and distinct unbundling

obligation applicable to the "Competitive Checklist" network elements, regardless of whether the same network elements are subject to the unbundling obligations imposed by Section 251(c)(3).

The Amendment to the parties' ICAs must expressly incorporate Verizon's ongoing obligation to provide to Vermont CLECs those network elements and combinations of network elements contained in Section 271 of the 1996 Act. Moreover, the Amendment should establish that network elements and combinations of network elements provided by Verizon, under Section 271 of the 1996 Act, be priced at the last TELRIC-compliant rates for such network elements until such time as the Board may conduct its own pricing proceeding to establish "just, reasonable and nondiscriminatory" rates.

Discussion and Proposal

As discussed in Section III, above, and after evaluating the parties' comments and the FCC's decisions, I conclude that Verizon's obligations under Section 271 should continue in force and effect until the rates for those elements are incorporated into amended ICAs. In making this recommendation, I rely on the FCC's ruling in the *TRO* that:

[W]e continue to believe that the requirements of Section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under Section 251. Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance market that are unique to the BOCs. As such, BOC obligations under Section 271 are not necessarily relieved based on any determination we make under Section 251 unbundling analysis.¹²²

This is consistent with the D.C. Circuit's holding in *USTA II*, which upheld the FCC's ruling in the *TRO* that the BOCs have a statutory obligation to provide Section 271 checklist elements, independent of their Section 251 obligations. The Court also upheld the FCC's findings that the specific unbundling obligations in Section 251(c)(3) (such as TELRIC pricing and combinations) do not apply to Section 271 checklist elements. The Court found that Section 271 unbundling is "governed by the general nondiscrimination requirement of Section 202," which provided the basis for the FCC's commingling rules in the first place. The Court did not

122. *TRO* at ¶ 653.

determine that BOCs are permitted to discriminate in the provision of Section 271 unbundled checklist items by preventing commingling of those Section 271 items with Section 251 UNEs.¹²³

I am not persuaded by Verizon's argument that *USTA II* supports the absence of state authority over Section 271. If Verizon were correct in its assertion that the competitive checklist is an obligation that it does not have to live up to in its individual dealings with CLECs, then the Section 271 checklist would be rendered essentially meaningless.¹²⁴ Instead, I conclude that the Board's recommendation to the FCC that Verizon's Section 271 application be approved was conditioned and based upon Verizon's continued provision of the elements it was obligated to provide at the time. In *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Commission*, the Seventh Circuit references the nexus between the Section 271 checklist and Section 252 ICAs:

Under Section 271(d)(2)(B) the FCC consults with the state commission to verify that the BOC has (1) one or more state-approved interconnection agreements with a competitor, pursuant to Sections 251 and 252, or a Statement of Generally Available Terms and Conditions (SGAT) under which it will offer local service, and (2) *that the interconnection agreements or the SGAT satisfies the 14-point competitive checklist set out in Section 271(c)(2)(B)*.¹²⁵

The Seventh Circuit made clear that "interconnection agreements" must satisfy the competitive checklist. The ICAs could not satisfy the checklist if the state commissions responsible for approving them refused to arbitrate the rates, terms, and conditions of Section 271 checklist items.

In summary, under the FCC's rulings, recent court opinions, and Applicable Law as discussed in Section III above, Verizon's unbundling obligations that arose from its Section 271 application should continue.

123. The 1996 Actual text of the D.C. Circuit's ruling on this issue is as follows: "We agree with the [FCC] that none of the requirements of Section 251(c)(3) applies to items four, five, six and ten on the Section 271 competitive checklist. Of course, the independent unbundling under Section 271 is presumably governed by the general nondiscrimination requirement of Section 202. But as the only challenge the CLECs have presented to the FCC's Section 271 combination rules is grounded in an erroneous claim of a cross-application of Section 251, we do not pass on whether the Section 271 combination rules satisfy the Section 202 nondiscrimination requirement."

124. This conclusion is supported by the argument that if, hypothetically, Verizon were seeking its Section 271 approval today, it would be offering switching and transport, which it now claims it need not.

125. *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, (7th Cir. 2004).

SUPPLEMENTAL ISSUE 1: Should the Agreement identify the central offices that satisfy the FCC's criteria for purposes of application of the FCC's loop and transport unbundling rules? If so, how?

Verizon's Position:

Verizon contends that the ICAs should not identify the central offices that satisfy the FCC's non-impairment criteria for loops and/or transport under the *TRRO*. Consequently, Verizon argues, the Board should never reach the second question in this Issue and should not determine in this arbitration which central offices satisfy the FCC's non-impairment criteria. Instead, Verizon recommends that the Board leave any disputes over whether particular central offices qualify for unbundling – if any such disputes arise – to the parties' dispute resolution procedures. Verizon asserts that the FCC established a complete system by which CLECs may order and obtain access to UNE loops and transport consistent with the new unbundling rules, without changing their existing interconnection agreements.

Verizon states that it has already publicly filed with the FCC and the Board a list of its central offices in Vermont that satisfy the *TRRO*'s non-impairment criteria for high-capacity loops and transport. Verizon asserts that the list shows that no Vermont wire centers qualify for relief from DS1 or DS3 loop unbundling, and only one wire center qualifies as a Tier 2 office under the FCC's non-impairment criteria for dedicated transport. Therefore, Verizon declares that high-capacity loops and transport UNEs will remain available for now in cases where they are available today. If and when any offices qualify for relief, Verizon says it will notify CLECs promptly.

That having been established, Verizon sets out a number of additional reasons why the Board should not determine which Verizon central offices satisfy the various unbundling criteria for loops and transport, and the issue should not be addressed in the amended ICAs.

AT&T's Position:

As discussed above in response to Issue 4, AT&T argues that the wire center designations, after verification by the Board, should be incorporated into the ICA. AT&T asserts that these designations should apply for the term of the carriers' agreements, avoiding market

disruption and allowing for the certainty needed for business planning. AT&T believes that such an approach would be consistent with the FCC's rationale behind establishing a permanent wire center classification. As was discussed in response to Issues 4 and 5 above, AT&T urges the Board to verify Verizon's designation of the wire centers in which it claims the FCC criteria have been met for both high capacity loops and dedicated interoffice transport. AT&T asserts that Verizon thus should be required to provide both the Board and participating CLECs with the wire-center specific information on which it relied in making its assertions.

CCC's Position:

CCC answers in the affirmative, as it opposes Verizon's theory that the agreements need not specify the central offices from which certain UNEs will or will not be available because Verizon will determine the list itself and provide it to the CLECs. CCC states that there is a high likelihood that if the CLECs' rights are left to be determined by Verizon, the CLECs and consumers will be deprived of the full benefits promised under the 1996 Act. CCC asserts that the lists now propounded by the ILECs throughout the country would eliminate DS1 loops to far more consumers in far more wire centers than first reported. According to CCC, regulators have started to insist upon review of the underlying data and assumptions in the ILEC lists, and almost immediately thereafter ILECs have started to "discover" errors in their lists. CCC argues that it would be unreasonable and contrary to the *TRRO* for the Board to allow Verizon to impose its wire center lists for Vermont without any objective third-party scrutiny. CCC asserts that the Board, and not Verizon, should make the initial determinations of which wire centers in Vermont meet the non-impairment thresholds established by the *TRRO*. CCC states that there needs to be some reliable and timely process that assures that CLECs are able to make accurate determinations as to the eligibility of a wire center for unbundling, preferably before the CLEC would place an order for the UNE.

Moreover, CCC asserts that, because wire centers may need to be added to the list or upgraded to a different classification (e.g., Tier 2 to Tier 1), effective dates of such changes could be called into question without having official lists that are attached to the Amendment. CCC contends that the Board cannot reasonably approve terms that would allow Verizon to terminate its provision of existing UNEs at a central office simply on the basis of some future update to a Verizon website that Verizon believes that the wire center has moved into a different

classification.

CCC points out that the *TRRO* requires CLECs to "undertake a reasonably diligent inquiry" before submitting high-capacity loop and transport UNE orders, and, based on that inquiry to confirm that to the best of its knowledge its request is not inconsistent with the applicable standards. However, since these determinations of eligibility can hinge on information that may be exclusively in the possession of Verizon, CCC argues that it should reasonably be able to satisfy this diligence requirement upon a review of the non-impairment lists made available by Verizon. Accordingly, CCC's proposal would enable CLECs in most cases to make a quick, practical determination as to whether it could self-certify a particular UNE order.

Further, CCC's proposal implements the explicit requirement of 234 of the *TRRO* that even when Verizon disputes a CLEC's UNE order, Verizon must provision first and dispute later. In addition, CCC's proposal would apply the self-certification and dispute process to all UNEs, not just high-capacity loops and transport. While not required by the *TRRO*, CCC argues that it is sensible and practical for the parties and for the Board to have uniform procedures, especially when those procedures have been designed as a self-enforcing means of implementing the standards of the 1996 Act while reducing the likelihood of litigation.

In its Reply Brief, CCC argues that Verizon's position on Supplemental Issue 1 is simple, and wrong. CCC asserts that the Board cannot lawfully agree with Verizon's position that these rules should not be included in the agreements at all. CCC contends that since the *TRRO* is not self-effectuating, the self-certification process will only be binding when it is implemented into the agreement. In addition, supplemental terms are needed in the contract because the *TRRO* does not include every necessary detail that is needed for an effective process.

CCC claims that Verizon is content to leave the self-certification process incomplete and outside the contract, because if the system does not function effectively, it is CLECs and their customers that will suffer the consequences. CCC opposes Verizon's position that there should be no transition terms for these facilities, saying that Verizon not only ignores the factual commonality between present and future UNE eliminations, but also blatantly ignores the fact that the FCC explicitly stated that it expected ILECs "to negotiate appropriate transition" terms for these UNEs affected later by the *TRRO*.

Further, CCC continues its opposition to Verizon's argument that the Board should not

determine in this arbitration which central offices satisfy the FCC's non-impairment criteria, that it should leave this issue for later dispute resolution cases. CCC argues that Verizon is wrong in its assertion that CLECs would suffer "no harm" from the delay that would occur by deferring these determinations to after-the-fact disputes.

CCG's Position:

CCG states that the parties must include in the Amendment to existing interconnection agreements the complete unbundling framework ordered by the FCC for high capacity (DS1 and DS3) loops and dedicated transport facilities that Verizon no longer is obligated to provide under Section 251(c)(3) of the 1996 Act, including a comprehensive list of Verizon wire centers and routes that satisfy the FCC's requirements for unbundling relief. CCG asserts that, to properly implement the unbundling framework set forth in the *TRRO*, the Board must determine whether a wire center or route designated by Verizon to satisfy the FCC's criteria for unbundling relief, in fact, satisfies that criteria on the basis of the data provided by Verizon, including without limitation: the number of Business Lines and Fiber-Based Collocators existing in each Verizon wire center; the definition of "wire center" used by Verizon; 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 on 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. In addition, CCG insists that the Amendment must include a provision for dispute resolution by the Board, to ensure that the information relied on by Verizon is adequate under the FCC's rules.

In its Reply Brief, CCG reiterates that in order to properly implement the transitional framework ordered by the FCC under the *TRRO*, the Amendment necessarily must specify the central office and wire center locations for which unbundling relief, under Section 251(c)(3) of the 1996 Act has been granted.

Discussion and Proposal

As addressed in Issue 4, above, there are no wire centers in Vermont that meet the threshold criteria for DS1 and DS3 Loops such that the FCC would require a finding of impairment, and that therefore these high-capacity loops will continue to be provided on an unbundled basis by Verizon. Further, as discussed in Issue 5, above, Verizon has indicated that there are no high-capacity transport routes that qualify for unbundling relief in Vermont today.

Verizon has indicated that there is only one wire center in Vermont which meets the "Tier 2" non-impairment criteria for high-capacity transport. Therefore, all high-capacity DS1 and DS3 Transport services, as well as Dark Fiber Transport should continue to be provided on an unbundled basis by Verizon.

The parties have presented no compelling argument to include a wire center listing – or a placeholder for a future listing – in the parties' ICAs, and I will not support it here. I have presented, in response to Issues 4 and 5, a process for responding to a request by Verizon to add wire centers to the list of those meeting the FCC's threshold criteria. That process includes notice and an opportunity for parties to examine the data and respond appropriately to the filings.

SUPPLEMENTAL ISSUE 2: What are the parties' obligations under the *TRRO* with respect to additional lines, moves and changes associated with a CLEC's embedded base of customers?

Verizon's Position:

Verizon points out that CLECs are not allowed to add new lines for existing customers or to obtain de-listed UNEs when existing customers move to different locations. Verizon claims the addition of new lines for existing customers or adding new lines at a different location falls within the plain terms of the FCC's prohibition on new adds after March 11, 2005.

AT&T's Position:

To avoid disruption in the CLECs' ability to serve their existing customers during the applicable transition periods – indeed, in order to ensure that CLECs can continue to provide reliable service to their embedded customer base – AT&T argues that the CLECs must have access to certain UNEs to meet the existing customers' needs. AT&T stresses that, at a minimum, this access must include the ability to order new features or other feature changes to the customer's current UNE-P arrangement.

CCC's Position:

CCC states that the *TRRO* provides that CLECs subject to the transition rules may not obtain "new" UNE-P arrangements or "new" dedicated transport or loop UNEs that have been designated for elimination, but required ILECs to continue to provide UNEs to serve the CLECs'

"embedded customer base" until March or September 2006, depending on the type of UNE. According to CCC, the FCC explained that its purpose of this transitional requirement was to assure adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition. Given this purpose, CCC believes that it is clear that the FCC's reference to the "customer base" applies to any UNEs or changes to existing UNEs that are needed to serve these customers, and not just to the precise facilities currently used to serve those customers. Thus, CCC's *TRRO* Amendment requires Verizon during the transition to continue to provision moves, adds and changes for the CLEC's existing customers. CCC opposes Verizon's proposed terms that appear to reject any move, add or change order needed to provide uninterrupted service to these embedded customers. CCC contends that Verizon's proposal to deprive CLECs' embedded base of the ability to order moves, adds and changes would undermine the purpose of the transition rules. CCC insists that, had the FCC intended to limit Verizon's obligations to the facilities it had already provisioned, there would have been no need to refer to the customer base. Several state commissions have agreed.

In its Reply Brief, CCC opposes Verizon's position that CLECs are not allowed to add new lines for existing customers or obtain de-listed UNEs when existing customers move to different locations. CCC argues that Verizon's position is inconsistent with the plain meaning of the *TRRO*. CCC admits that some provisions of the *TRRO* did reference UNE-P arrangements rather than UNE-P customers; however, CCC contends that relevant provisions addressing the transition terms make clear that the FCC never limited the embedded base transition period to include only existing lines and UNE-P arrangements.

As to high capacity loops and dedicated transport, CCC asserts that the *TRRO* requires that, at a minimum, an ILEC provision moves, adds and changes associated with a CLEC's embedded customers until the interconnection agreement between ILEC and the CLEC is amended.

CCG's Position:

CCG consistently has maintained that Verizon is not permitted to unilaterally implement any aspect of the *TRRO* without first executing an amendment to its existing interconnection agreements with Vermont carriers. CCG argues that the unbundling relief granted to Verizon under the *TRRO* for UNE-P arrangements using unbundled access to local circuit switching

under Section 251(c)(3) of the 1996 Act is without force and effect until such time as Verizon executes an amendment to its existing interconnection agreements with Vermont carriers whereby the availability of unbundled local switching is eliminated as a Section 251(c)(3) network element. Thus, CCG argues that a Section 251(c)(3) UNE-P customer may be added to the network of a CLEC prior to the effective date of a formal, written amendment implementing the *TRRO*. CCG further contends that the rates that Verizon may charge such customer are the Section 251(c)(3) UNE rates for the combination of network elements that comprise UNE-P.

CCG asserts that the *TRRO* (at ¶ 227) states that the transition plan provided for Section 251(c)(3) UNE-P arrangements applies to each carrier's "embedded customer base," and not merely embedded UNE-P lines or arrangements. As discussed in response to Issue 31, CCG's reading of the *TRRO* has been recognized by numerous state commissions, and therefore CLECs are entitled to add new lines, and make modifications or rearrangements, as necessary, to accommodate the business needs of their existing customers during the transition period established by the FCC. Therefore, a contrary reading of the *TRRO* would severely limit the ability of CLECs' customers to receive telecommunications services without disruption during the transition period, and thus is contrary to the objectives of the transition plan for UNE-P arrangements established by the FCC.

In its Reply Brief, CCG again asserts that the respective rights and obligations of Verizon and competitive LECs applicable to "additional lines, moves and changes" of a competitive LECs' embedded end user customers must be included in the Amendment to the parties' existing Board-approved interconnection agreements. CCG argues that, under the *TRRO*, Verizon must continue to provide to competitive LECs' "embedded" end user customers, throughout the element-specific transition periods established by the FCC, all network elements that Verizon no longer is obligated to provide under Section 251(c)(3) of the 1996 Act and the FCC's modified unbundling rules.

Discussion and Proposal

I have concluded that the obligations of Verizon and the Vermont CLECs remain as specified in the current ICAs until such time as those provisions are amended and approved. Consistent with this positions regarding the effective date of the ICA amendments, all obligations remain in place; it therefore follows that a Section 251 UNE-P customer may be added to the

network of a CLEC up until the effective date of the ICA amendment implementing the *TRRO*.

With respect to the issue of additional lines, moves, and changes, the FCC was not clear in the *TRRO* concerning the treatment of the CLECs' customer base during the transition plan for services that will no longer be unbundled under Section 251. Nor was the FCC clear regarding the transition plan for services that would be migrated to re-priced services under Section 271 obligations. However, the FCC clearly showed its concern that there must be no disruption in the CLECs' ability to serve their existing customers during the applicable transition periods. The FCC never limited the embedded base transition period to include only existing lines and existing UNE-P arrangements. To the extent that the discontinued Section 251 services are to be migrated to Section 271 services, it is not reasonable to limit the additions and changes during the transition. Lacking a clear statement that the FCC's bar extends to individual customer lines, I conclude that the CLECs should be permitted to accommodate the business needs of their existing customers by adding new lines, making modifications or rearrangements, ordering new features or changing features during the transition period. Such orders may be subject to revised pricing in accordance with the amended ICA and the FCC's transition mechanism.

V. CONCLUSION

On the generic issues of Verizon's unbundling obligations, I conclude that the Board is not preempted by changes in FCC rules, and that Verizon should continue its existing provision of the unbundled network elements governed by its existing ICAs, until those ICAs are amended to reflect the new rules. Additionally, I find that Verizon made other commitments under state and federal law, which it should likewise continue to honor.

Regarding the specific issues presented, my recommendations incorporate whichever party's proposed language is most consistent with my findings on the fundamental, generic issues.

Dated at Montpelier, Vermont, this 31st day of August, 2005.

s/John Randall Pratt
John Randall Pratt
Hearing Officer

VI. BOARD DISCUSSION

The Department supported the Hearing Officer's Proposal for Decision ("PFD") and recommended that we adopt it. Verizon submitted extensive comments asking us to reject the majority of the Hearing Officer's recommendations. In general terms, Verizon maintains that adoption of the PFD would require Verizon to continue to offer UNEs even where the FCC has now ruled that such unbundling is not required. The CLECs filed no comments.

Issue 1: Extent of Federal Mandates

Verizon maintains that the PFD has one fundamental flaw: according to Verizon, the Board may not require any unbundling obligations that are inconsistent with the FCC's unbundling rules, even to the extent that those obligations rest upon state law. Verizon points out that the FCC has ruled that states may not impose unbundling once the FCC has found that a particular element need not be unbundled. Verizon argues that the PFD ignores the FCC's finding that CLECs are not impaired without access to the now-delisted UNEs, even though in Vermont they are impaired. Moreover, Verizon argues that prior Board decisions cited by the PFD (Dockets 5713, 6533, and 5900) do not provide independent authority for unbundling that survives the FCC's more recent determinations. Specifically, Verizon states that Dockets 5713 (the Board's investigation into unbundling) and 5900 (the merger of Bell Atlantic and NYNEX) are preempted by the *TRRO* and that Docket 6533 (the Board's recommendation on Verizon's petition to the FCC for authority to offer interstate long distance service) created no obligations as enforcement of Section 271 of the Act lies with the FCC.

The effects of this major legal error, contends Verizon, permeate the PFD. Thus, Verizon argues that the PFD would require Verizon to continue to provide UNE-P and dark fiber loops, contrary to explicit statements in the *TRRO* that LECs no longer need to offer them as of March 11, 2005, to new customers. Similarly, Verizon claims that the PFD fails to reflect the price increase for UNE-P services that occurred March 11, 2005.

As the PFD discusses, in the *TRRO*, the FCC has altered the unbundling obligations of the incumbent LECs. For example, the FCC has now ruled that CLECs are not impaired without access to mass-market switching capabilities (including UNE-P), dark fiber loops, and entrance facilities. In addition, in larger central offices (which do not exist in Vermont), the FCC has

found that CLECs are not impaired without access to high-speed transport, dark fiber transport and high-capacity loops. These rulings establish the obligations of LECs under Section 251 of the Act, effective March 11, 2005.

Verizon's argument, however, rests on the premise that the state of Vermont is precluded from being more stringent than the FCC, by requiring (or continuing in effect) additional unbundling. Here, we are not convinced that the state is precluded from enforcing such requirements. First, as the Hearing Officer explained in the PFD, Section 251(d)(3) reserves state requirements. As Verizon points out, under subparagraph (d)(3)(C), these requirements are preserved only to the extent that they do not substantially prevent implementation of Section 251 and the FCC has found that continued unbundling of certain elements would prevent such implementation. Thus, Verizon maintains that states retain no authority. It is not clear, however, that such a broad reading can be sustained, since it would permit the FCC to unilaterally eliminate the preservation of state authority (since states could be neither more nor less stringent).

In addition to Section 251(d)(3), Section 252(e)(3) of the Act also preserves state authority in the context of arbitrations of interconnection agreements. Contrary to Verizon's assertions, nothing in this section indicates that states' ability to impose more stringent requirements applies only to Section 251 UNEs. In fact, the provision specifically cites the states' ability to ensure service quality, which may have little bearing on the Section 251 UNEs. The only limitation in Section 252(e)(3) is that the separate state requirements must be consistent with Section 253 of the Act, which prohibits barriers to entry. Quite obviously, requiring Verizon to provide additional UNEs would not present such a barrier.

As the PFD cites, the Board also has independent authority arising from Docket 6533, Verizon's petition for a recommendation from the Board on its entry into the long-distance market under Section 271 of the Act. As Verizon points out, enforcement of Section 271 obligations rests largely with the FCC. Thus, for issues related to whether Verizon still complies with a particular checklist item, recourse would be to the FCC. However, during the Section 271 process, and in order to receive a favorable recommendation with the Board, Verizon voluntarily made certain commitments to the Board (upon which we relied). Specifically, Verizon and the Board reached an agreement concerning the form and content of the Performance Assurance

Plan, including the specific elements.¹²⁶ These elements included several of the UNEs that Verizon now seeks to discontinue offering, including UNE-P. Verizon cannot unilaterally abrogate that agreement.

Finally, the Board's review of the merger between Bell Atlantic and NYNEX relies upon state law jurisdiction that is not preempted. As one of the conditions of the merger, the Board required Bell Atlantic (now Verizon) to demonstrate compliance with the competitive checklist under Section 271. This condition, which Bell Atlantic accepted through its decision to proceed with the merger, was necessary to overcome any potential anti-competitive consequences arising from the merger. And, we made clear at the time that this was a state law decision, even though we used the Section 271 requirements as a benchmark.¹²⁷ In fact, at the request of the parties (including Bell Atlantic), we ruled that our determination would have no precedential effect on the anticipated Section 271 review.¹²⁸

Turning to the specifics of the merger review, our final decision generally did not contain specific mandates upon Verizon and thus would not provide a basis for requiring the Company to continue to offer now-delisted UNEs. However, the Board specifically addressed the offering of UNE-P:

The essential point is that where a set of existing individual network elements already serve a single customer, that same set must be offered to CLECs in a way that permits them to be purchased in groups. Bell Atlantic is not required to physically connect anything that it has not already connected to serve the same customer. Rather, Bell Atlantic must refrain from disconnecting UNEs that it would ordinarily provide in a continuous manner for its own customer.¹²⁹

This condition rested exclusively on state authority to ensure that the merger would not be anti-competitive. The FCC's subsequent decisions do not affect it.

The fact that we are not preempted would permit us to require Verizon to continue to provide certain UNEs that the FCC has now delisted. The question before the Board thus

126. See Docket 6533, Comments on Federal Proceeding date 2/6/02 at 7.

127. Docket 5900, Order of 6/29/99 at 8.

128. Docket 5936, Order of 6/4/98 at 3.

129. Docket 5900, Order of 6/29/99 at 105.

becomes whether we should follow the PFD's recommendation. Here, we find that the benefits of continuing to require Verizon's offering of the delisted UNEs do not outweigh the costs (including the time and uncertainty associated with the inevitable litigation that would follow such an order). For the reasons set out in the following paragraphs, therefore, we find it appropriate to modify the unbundling obligations to be consistent with the *TRRO*, rather than mandating that Verizon continue to offer them in Vermont.

First and foremost, it is not clear that requiring Verizon to continue to offer the delisted UNEs will provide a significant benefit to competition in the state of Vermont. Even with the availability of these UNEs, competition has developed slowly in the state, as we recently found in Docket 6959.¹³⁰ In addition, much of the competition that has evolved is concentrated in more densely populated areas and has not extended to the rest of the Verizon's service territory. For example, the companies that have deployed services based upon UNE-P have sold only to urban and suburban zones and made no efforts to expand their service to other customers (in fact, they have stopped the marketing for even those services). At the outset of competition, such limited deployment was to be expected as companies sought to manage their entry into a new market, but companies have now had sufficient time to offer more widespread competition so that all Vermonters can benefit. In light of the limited scope of the competitive entry (and the fact that the competitor relying most heavily on UNE-P has now been acquired by Verizon), we see insufficient benefits to prolonging UNE-P availability at the SGAT prices.

Second, there is no evidence that (except for UNE-P) competitors are relying to any significant degree upon the availability of these UNEs to enter the Vermont market. For example, as the FCC found in the *TRRO*, competitors generally use their own switches rather than purchasing UNEs from Verizon.

Finally, we recognize some benefits from consistency with other states. Following the *TRRO*, most of the states have adjusted unbundling obligations to be consistent with that Order. Many of the competitors relying upon UNEs that operate in Vermont also operate in many other states. Absent a showing that the competitive market will be enhanced by maintaining some of the delisted UNEs, we expect that consistency with other states will make operation in Vermont

130. Order of 9/26/05.

easier for these larger companies.¹³¹

Thus, we find that, although we could require Verizon to continue to offer at least some of the delisted UNEs, we will instead require that the amended interconnection agreements reflect the reduction in unbundling obligations set out in the *TRRO*.

Issue 2: Need to Modify Interconnection Agreements

The Hearing Officer concluded that, even where the FCC has specifically directed that prices for UNEs must change by a specific date or that CLECs may not order certain new UNEs, the FCC's Orders are not self-executing. Instead, the PFD states that Verizon and other parties must first amend the interconnection agreements. Thus, for example, the FCC's directive to increase prices for UNE-P arrangements effective March 11, 2005, would not take effect until the interconnection agreements incorporated those requirements.

Verizon maintains that many of the FCC's *TRRO* mandates apply immediately and do not require parties to interconnection agreements to amend those agreements first. Verizon cites to the fact that the FCC's Order concerning UNE-P availability and pricing, and the availability of certain unbundled transport and loops, is mandatory and applies irrespective of the terms of the individual agreements. Moreover, Verizon contends that the interconnection agreements at issue in this proceeding already provide that Verizon may cease provision of UNEs once the Company is no longer required to do so under federal law. Finally, Verizon argues that its position merely brings the unbundling obligations in interconnection agreements in line with federal law, since the FCC has established a new unbundling regime.

The *TRRO* contains two apparently conflicting mandates. First, the FCC ruled that certain UNEs would no longer be available to serve new customers.¹³² Elsewhere, the FCC stated that the changes to the interconnection and unbundling obligations should be implemented through interconnection agreements. Specifically, ¶ 233 states:

We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus,

131. We have made similar choices in the context of wholesale service quality; Verizon's Performance Assurance Plan largely relies upon wholesale standards negotiated in New York.

132. See, for example, ¶ 227, which addresses UNE-P arrangements.

carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes.

As Verizon states in its comments, other states and several federal courts have interpreted this apparent conflict by ruling that ¶ 233 does not apply, notwithstanding the rather clear directions contained therein. We find that these two provisions can be read to give effect to both, however. Consistent with ¶ 233, Verizon and its competitors must negotiate the specific terms and conditions of the modified agreements. These terms must fully implement the FCC mandate, which may require that some elements (such as pricing for UNE-P) have retroactive effect. Similarly, it may be necessary to compensate Verizon at rates similar to those contained in commercial agreements for any services that it provided that were no longer required (such as furnishing UNE-P to new customers). As stated in the PFD, parties must file these modified agreements within 60 days of this Order.

Issue 3: Unbundled Access to Local Switching

Verizon maintains that the *TRRO* establishes a bar on unbundling of mass market switching. The Company objects to the PFD's requirement that it continue to unbundle local switching until the interconnection agreements are revised in conformance with the Board's Order in this docket.

Verizon's arguments rely upon its view that the FCC's new unbundling requirements are both self-effectuating and mandatory. However, as we discuss in the previous section, we find that, except where the interconnection agreement clearly permits Verizon to discontinue the provision of delisted UNEs, Verizon and its competitors still must negotiate amendments to interconnection agreements to implement the new FCC requirements, which amendments must be consistent with the *TRRO*, including, where appropriate, retroactive effects and true-ups.

Issue 4: DS1, DS3, and Dark Fiber Loops

Verizon argues that the PFD departs from the mandates of the *TRRO* with respect to DS1,

DS3, and dark fiber loops in 3 ways. First, Verizon maintains that, with respect to the dark fiber loops, the PFD continues to allow their purchase. We have addressed this argument above in Issue 2; Verizon must implement the FCC's requirements by amending its interconnection agreements, although those agreements must have retroactive effect. Thus, competitors will be effectively barred from purchasing new dark fiber loops consistent with the *TRRO*.

Second, Verizon asserts that the PFD erroneously allows CLECs 18 months from the amendment to an interconnection agreement to arrange alternatives to dark-fiber loops. Verizon states that this period is inconsistent with the *TRRO* which allowed an 18-month transition period from its date of issuance (March 11, 2005). We agree with Verizon. The *TRRO* sets out an 18-month transition period.¹³³ The interconnection agreements that Verizon renegotiates following this order should reflect that period and require completion of all transitions by September 11, 2006.

Third, Verizon objects to the PFD's allowance of a transition period for high-capacity loops that become exempt from unbundling obligations in the future. The PFD had recommended that, once a wire center becomes exempt from high-capacity loop unbundling requirements in the future, CLECs be provided 60-days' notice, an opportunity to object, and then 12 months to arrange alternative facilities. Verizon maintains that the Board should adopt a shorter 90-day period for the transition. We are not persuaded by Verizon that, once a wire center has sufficient collocations so that Verizon may discontinue the provision of these high-capacity loops, 90 days is an adequate period for the CLEC to transition to other alternatives. This is particularly true if the CLEC chooses to deploy its own facilities. However, we do not find the extended period set out in the PFD to be reasonable; the *TRRO* allows only 12 months for the transition at a large number of wire centers nationwide. Accordingly, we require that the revised interconnection agreements incorporate a 6-month transition period once a wire center meets the threshold set out in the *TRRO*.

Issue 5: Unbundled Access to Dedicated Transport

At the present time, Verizon still must provide unbundled access to dedicated transport as

133. *TRRO* at ¶ 191.

no wire center in Vermont meets the threshold delineated in the *TRRO* at which Verizon may discontinue unbundling. The PFD set out a transition mechanism — which is the same as that for high-capacity loops discussed in Issue 4 — that would apply if Verizon is freed from unbundling obligations on certain routes.

Verizon raises the same objections that it raised to the transition periods for high-capacity loops. The Company also proposes that we adopt a shorter, 90-day, transition period. For the same reasons that we adopted a 6-month transition period for high-capacity loops, we require that the modified interconnection agreements incorporate a 6-month period (starting at the time the threshold is met).

Issue 6: Repricing of Arrangements that are No Longer Subject to Unbundling

_____ For certain network elements that are no longer subject to unbundling under the *TRRO*, the FCC adopted transition pricing mechanisms. The PFD recommends that the new prices commence only after the interconnection agreements are modified and that there is no "true-up" for the period between March 11, 2005, and the date of modification. The PFD also states that the Board may continue to regulate the rates even after the unbundling obligation is terminated. Verizon objects to these two provisions of the PFD.

First, Verizon maintains that a failure to "true-up" charges is inconsistent with the *TRRO*. Based upon our conclusion above that the modified interconnection agreements must reflect the requirements of the *TRRO*, we find a "true-up" provision is appropriate. Such a mechanism is necessary to ensure that the modified interconnection agreements fully reflect the *TRRO*.

Second, Verizon asserts that the Board may not continue to regulate rates for Verizon's sale of network elements that it is no longer required to unbundle. As we discussed above, we conclude that, although, the Board may have independent jurisdiction, we will nonetheless follow the conclusions set out in the *TRRO*. The effect of this decision is that we will not presently regulate the rates for the network elements that the FCC no longer requires Verizon to offer.

Issue 7: Notification of Discontinuance

This issue relates to the notice that Verizon must provide CLECs if it seeks to discontinue offering delisted UNEs. Verizon maintains that, as to UNEs delisted as a result of the *TRO*, its

previous notification to CLECs (dated October 3, 2003) is adequate. The PFD sets out this position and we accept it. In addition, Verizon maintains that no notice is required for UNEs delisted by the *TRRO*. In previous sections, we have concluded that, contrary to Verizon's position, we do not find the *TRRO* to be self-executing; rather Verizon and CLECs must implement it through appropriate changes to their interconnection agreements. Moreover, although the FCC has removed Verizon's obligation to unbundle certain elements, nothing prevents Verizon from voluntarily continuing to offer the pre-existing arrangements. Thus, we conclude that, notwithstanding the FCC's rulings, Verizon still must provide notice to CLECs that it will discontinue the provisioning of the delisted UNEs from the *TRRO*.

Verizon also raises concerns about the PFD's discussion of the provision of new UNE-P arrangements to existing customers, which Verizon maintains is irrelevant to the notice issue. We agree. This issue is addressed below as part of Supplemental Issue 2.

Issue 9: Definitions

Verizon maintains that the PFD's definition of "Applicable Law" is incorrect in that it includes Board "decisions and orders." Verizon argues, consistent with the arguments that we address above, that the only applicable law is the FCC's unbundling obligations.

As we discuss above, we do not accept Verizon's conclusion that Vermont law is now completely preempted. In addition to our previous analysis, which we need not repeat, we note that Section 251(d) of the Act continues to authorize state regulation where not inconsistent with federal law. For example, in areas in which unbundling is still required, the Board could impose more stringent standards upon Verizon. To preserve this authority, we adopt the PFD's recommendation.

Verizon also contests the PFD's recommended definition of Dark Fiber Transport. Verizon maintains that the PFD wrongly includes entrance facilities in the definition, even though these are now delisted. Second, Verizon states that the PFD could be read to suggest that OCn-level facilities are not subject to unbundling, notwithstanding a clear directive to the contrary in the *TRO*. Verizon asks that we make clear the Dark Fiber Transport is limited to facilities that are subject to unbundling under the *TRO* and *TRRO*. We agree with Verizon on both issues.

Issue 10: Change of Law Provisions

Verizon objects to the recommendation in the PFD that the bar on provision of new mass market switching UNEs and de-listed high-capacity facilities would only take effect after the amendment of interconnection agreements. For the reasons set out in our discussion of Issue 2, above, we disagree with Verizon; modification of interconnection agreements is necessary to implement the *TRRO*, although the requirements may relate back to the date of the FCC's Order.

Issue 11: Implementation of Rate Increases and New Charges

Verizon maintains that any rate increases authorized by the *TRRO* may be made retroactive to the dates set out in that Order and may be subject to true-up. Verizon argues that the PFD incorrectly bars such retroactive application. As we discussed in Issues 2 and 6, the modified interconnection agreements necessary to implement the *TRRO* must be consistent with the requirements of the *TRRO*. Thus, we agree with Verizon that the rate adjustments mandated by the *TRRO* should apply retroactively and be subject to true-up.

Issue 12: Commingling of UNEs with Other Combinations

The FCC's *TRO* removed restrictions on the commingling of UNEs with other wholesale requirements. The PFD reflects the FCC's changed policy. Verizon objects to two aspects of the PFD. First, Verizon asserts that the PFD is incorrect when it recommends that commingled UNEs be subject to the existing wholesale performance metrics and remedies in the PAP. These new commingled combinations, Verizon contends, are more complex and "do not follow the standardized processes addressed in those measurements."

To the extent that the PFD can be read as a modification of the PAP and the carrier-to-carrier metrics, we agree with Verizon. The Board has established a specific process for revising the wholesale service quality standards — one that relies upon negotiations in New York. We are not convinced that there is a need to expand the measures in this docket. However, it is possible that some of the commingled arrangements will fall within the specific measures that are now tracked in the PAP and defined in some detail in the carrier-to-carrier standards. Where a specific UNE comes within the existing standards, we find no basis for excluding it simply because it involves a commingled arrangement.

Verizon's second objection relates to certification by CLECs that each DS1 EEL or combination of a DS1 loop with DS3 transport meets the FCC's revised service eligibility criteria. The PFD recommends that CLECs be permitted to recertify in a batch. Verizon argues that each circuit must meet the certification requirement individually.

Verizon is correct that the FCC rules require that CLECs must certify that each circuit meets the eligibility criteria. The amendment must reflect this requirement. This does not require, however, that CLECs must submit each certification individually – only that each circuit must qualify individually. Thus, CLECs may submit certifications in a batch, so long as they meet the individual certification requirement.

Issue 14(a): Line Splitting, Line Conditioning and Network Interface Devices

The PFD recommends that the Board require parties to reopen interconnection agreements to include terms and conditions related to line splitting, line conditioning and network interface devices. Verizon argues that the Board should not resolve this issue as the Company's unbundling obligations on these issues were unchanged by the recent FCC decisions. Verizon also argues that, for interconnection agreements that do not include such terms, the amended agreements would need to contain many operational details that could not be completed within the 60 days provided in the PFD.

Under Section 252 of the Act, any party may initiate negotiations towards an interconnection agreement or an amendment thereto. If the parties are unable to reach agreement, either party may seek arbitration from the Board by filing a petition.¹³⁴ The other party to the negotiation is entitled to file a response and "provide such additional information as it wishes." The Board then resolves the dispute as to each issue "set forth *in the petition and the response*."¹³⁵

Here, Verizon initiated the arbitration proceeding. Other parties, in their responses, have asked the Board to resolve the issues addressed in this section. Under federal law, these issues are validly before the Board for resolution, even though they were not raised by Verizon in its

134. Section 252(b)(1).

135. Section 252(b)(2)(C) (emphasis added).

petition. Moreover, the parties seeking these changes to the interconnection agreements have maintained that, even though the FCC did not modify the applicable regulatory requirements, it did clarify Verizon's obligations; thus, even if we accepted Verizon's rationale, we would still find it reasonable to incorporate the clarified requirements.

Issue 14(b): Fiber and Hybrid Loops

The PFD adopts Verizon's proposed amendment that would implement the FCC's bar on unbundling obligations for new FTTP loops, overbuilt FTTP loops and broadband capabilities of hybrid loops. However, the PFD recommends that the scope of this amendment be limited to mass market customers. Verizon asserts that nothing in the *TRO* limits the FCC's revised unbundling requirements to mass market customers. According to Verizon, the FCC made clear that the relief from the obligation to unbundle these facilities applies to all customer classes.

We agree with Verizon. As the Hearing Officer describes, both the *TRO* and the subsequent *FTTC* Order focus their discussion of the relaxed unbundling requirements on mass market provision of these facilities. For example, in the *FTTC* Order's discussion of the *TRO*, the FCC states:

In the Triennial Review Order, the Commission limited the unbundling obligations imposed on mass market FTTH deployments to remove disincentives to the deployment of advanced telecommunications facilities in the mass market.¹³⁶

However, in paragraphs 209–210 of the *TRO*, the FCC also made clear that, although it had segmented its discussion of loops based upon the primary market to be served, the unbundling obligations and limitations "do not vary based on the customer to be served." The rules set out in 47 CFR § 319 reflect this ruling and are not limited by customer class. Thus, we accept Verizon's request that the relaxed unbundling for these fiber facilities apply to all customer classes.

Issue 14(f): Retirement of Copper Loops

The PFD recommends that, in situations in which Verizon proposes to retire a copper

136. 19 F.C.C.R. 20293, 20294.

loop and replace it with fiber facilities, Verizon must provide 180 days' notice to the Board and affected CLECs. Verizon maintains that the 180-day time period is inconsistent with federal requirements, specifically 47 CFR § 51.333(b)(2). Instead, Verizon asks that the Board adopt the 90-day notice period embodied in federal law.

Verizon's arguments raise both legal and policy issues. Legally, we conclude that the PFD is consistent with federal law. Section 51.333(b)(2) does not establish a 90-day notice period; rather it requires that Verizon provide *at least* 90-days' notice of the proposed change. The PFD is consistent with that provision. Moreover, 47 CFR § 51.319(a)(3)(iv)(B) requires that, in addition to the notice provisions, Verizon must comply with applicable state requirements.

From a policy perspective, however, we accept Verizon's request that we establish a 90-day period. In most instances, CLECs will be able to make reasonable efforts to transition from the copper loops to other facilities to serve the customer. In the event that they cannot do so, Section 51.333 provides a specific procedure for objections to the retirement and for the FCC to resolve the dispute. These should permit the CLECs a reasonable opportunity to persuade the FCC that additional time is needed to complete the transition. Moreover, the shorter notice period may encourage Verizon to install the fiber facilities more rapidly, which will benefit consumers through the additional service offerings that are enabled.

Issue 14(h): Packet Switching

The FCC has concluded that Verizon is not obligated to unbundle packet switching as a stand-alone element. The PFD recommends that we apply this new limitation on unbundling only to packet-switching functionality. Thus, if a packet switch were installed and used to provide circuit-switching functionality, Verizon would still be obligated to provide it. Verizon argues that the FCC has explicitly addressed this issue and rejected the distinction made by the PFD.

We accept Verizon's contention and modify the PFD accordingly. The FCC, in ¶¶ 537–541, states that unbundling of packets switching is not required. Those provisions make no distinction between the functionality and the switching itself; to the contrary, ¶ 540 stated that they decline to permit any limited exceptions. Moreover, in responding to arguments raised by

dissenters, the FCC makes clear that LECs can avoid unbundling obligations by replacing circuit switches with packet switches.¹³⁷ The restriction in the PFD is not consistent with these requirements.

Issue 15: Effective Date

Verizon supports the PFD's recommendation that the amendment to the interconnection agreement should be effective upon Board approval. However, the Company objects to the extent that the PFD suggests that the FCC's rules do not take effect until after such approval.

We have addressed this issue above (see Issues 1–5).

Issue 16: Narrowband Service for End Users Served by IDLC

Verizon can generally meet its unbundling obligations through use of existing network facilities. If these are not available, federal law requires that Verizon provide CLECs a "technically feasible method of unbundled access." Verizon has proposed that it would meet this obligation by deploying new facilities, with the CLEC charged for the additional cost.

The PFD recommends that Verizon's charges for new facilities should be at TELRIC rates. The PFD also states that Verizon should be permitted to charge "board-approved non-recurring charges for the installation of narrowband loops served by DLC systems." Verizon objects to this recommendation arguing that it should be entitled to recover its full cost of constructing new copper loops.

We accept the PFD's recommendation that recurring charges for new facilities must be set at TELRIC rates. As to the non-recurring charges, we agree with Verizon that the PFD is ambiguous. Thus, we clarify that, if Verizon needs to deploy new copper facilities or new DLC capacity, Verizon may recover its added costs through non-recurring charges. These charges, however, must be reasonable and must take into account the fact that the new facilities may serve more than simply the CLEC. For example, Verizon may need one copper pair to enable a CLEC to provide service, but chooses to deploy a cable with 24 such pairs; the cost of deploying the facilities should be shared among all of the prospective users, not simply the CLEC. The Board

137. *TRO*, ¶ 447, n. 1365.

retains jurisdiction to review such charges.

Issue 17: Provisioning of Elements

At the present time, Verizon has in place a Performance Assurance Plan ("PAP") that measures the Company's provision of wholesale services and assesses penalties for non-compliance with the standards. The PAP does not, however, measure all activities, including a number of non-standardized measures.

For several non-standardized arrangements that are not specifically measured by the PAP, the PFD recommends that the Board require Verizon to comply with any applicable PAP requirements. Verizon objects to this recommendation. The Company argues that, unless and until they are changed, its PAP obligations should be limited to measures specifically delineated in the PAP and that extending its obligations to new facilities is inappropriate.

We do not fully understand Verizon's objection. The PFD does not expand the PAP to cover non-standardized measures, but instead simply requires that Verizon meet "applicable" requirements. The PAP, and the carrier-to-carrier standards that underlie it, very clearly define the unbundling performance that is being measured. If a PAP standard does not apply to the specific non-standard arrangement, then Verizon should not include it in the PAP results. This is consistent both with Verizon's arguments and the language of the PFD.

Issue 18: Sub-Loop Access

Verizon largely supports the PFD's recommendations concerning sub-loop access. However, Verizon asserts that the PFD incorrectly limits the amendment to mass market applications. According to Verizon, the FCC has no such limitation in its rules or Order.

We reach the same conclusion here as we do for the fiber facilities discussed in Issues 14(b)–(d), above, and for the same reasons. The amendment should apply to all customer classes, not merely the mass market customers.

Issue 20: Pricing of Interconnection Trunks

The PFD requires that Verizon provide interconnection trunks between a Verizon wire center and a CLEC wire center to CLECs at TELRIC rates. Verizon maintains that the PFD is

based upon a blurring of the distinctions between the LECs' duty to provide interconnection under Section 251(c)(2) of the Act and the unbundling obligations in Section 251(c)(3). Verizon contends that LECs have no obligation to unbundle facilities used for the purpose of interconnection. Rather, Verizon must provide a point at which the CLEC will interconnect using its own facilities. Verizon notes that the FCC has determined that CLECs are not impaired without access to entrance facilities. Verizon asserts that the PFD's recommendation would effectively undermine this determination by requiring the Company to provide the identical facility at the same rates.

We concur with Verizon. In paragraphs 365 and 366 of the *TRO*, the FCC (in addressing the obligation to provide dedicated transport) makes an explicit distinction between facilities within Verizon's network and those that connect Verizon's network to other CLECs. In ¶ 365, the FCC finds that "the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic." In the following paragraph, the FCC observes that "transmission links that simply connect a competing carrier's network to the incumbent LEC's network are not inherently a part of the incumbent LEC's local network" and are thus not included within the definition of dedicated transport. Further on, the FCC specifically states that these facilities are not subject to unbundling. Accordingly, we accept Verizon's proposed change.

Issue 21: EELs

In the *TRO*, the FCC modified its requirements associated with EELs. Verizon asks that we require CLECs to recertify that existing EELs qualify under the new criteria. The PFD recommended against including such a recertification requirement.

The *TRO* does not specifically address the issue of whether CLECs should be required to recertify existing EELs. Considering that the changed rules may call into question the validity of some existing arrangements and the fact the Verizon has the right to audit CLECs' compliance with the eligibility criteria periodically, we find that it is appropriate to require recertification within 180 days of this Order.

Verizon also objects to the PFD's recommendations concerning an audit of CLECs. The *TRO* found that LECs have a limited right to audit compliance with service eligibility criteria "on

an annual basis." Verizon has interpreted this provision to be a calendar year; the PFD instead recommends that Verizon wait at least 365 days before requesting another.

We accept Verizon's proposal, which is consistent with the FCC's ruling.

Issue 22: Network Modifications to Permit Access to UNEs

Verizon asserts that the PFD's language concerning network modifications is consistent with FCC requirements. However, Verizon contends that the PFD's recommendation that the Board bar Verizon from imposing additional charges for such modifications is unnecessary. Instead, Verizon asks that the Board not foreclose the possibility of such charges, modifying the amendment to state that the Board will address such charges when and if Verizon proposes them.

We find Verizon's recommended change to be reasonable.

Issue 25: Eligibility for Combinations and Commingled Facilities

Verizon raises the same exceptions here as it did to Issue 21. Our conclusion to Issue 21 applies to this issue as well.

Issue 26: Commercial Agreements

Verizon challenges the PFD's determination that commercial agreements represent interconnection agreements subject to Board review under section 252 of the Act. Verizon maintains that, once the FCC has removed Verizon's unbundling obligations under Section 251(c)(3) of the Act, those facilities are no longer subject to negotiation and arbitration under Section 252.

In Issues 1 and 2, we have addressed the state's jurisdiction following the *TRO* and *TRRO*, concluding that we are not fully preempted. We do not find that it is necessary to declare now that all commercial agreements must be submitted to the Board for review and approval. Consistent with our determination to accept the relaxed unbundling requirements set out in the *TRRO*, there is no reason to review many of these agreements that simply reflect this new unbundling regime. To the extent that the state retains independent jurisdiction over the terms and conditions of certain network elements, any agreement that embodies those terms may require Board approval (although not as an interconnection agreement under Section 252).

Issue 27: Access Points to Enable Testing, Maintenance and Repair

Verizon objects to including this issue in the amended interconnection agreements on the same basis that it raised for Issues 14(a), (g), and (i), namely that the *TRO* did not modify the rules applicable to this issue. Our ruling on the previous issue applies here; these issues were validly raised in the response to Verizon's arbitration request under Section 252 of the Act.

Issue 28: Transitional Provisions

Verizon's arguments concerning transition provisions are addressed in our discussions of Issues 2–5, above.

Issue 29: Negotiation Requirements for Service Substitutions

Verizon objects to the PFD's recommendation that Verizon be required to negotiate terms for service substitutions to replace delisted UNEs. Verizon maintains that the Board has no authority to regulate the availability or terms and conditions of any substitutes for UNEs that it no longer needs to offer.

We conclude that it is not necessary to direct Verizon to negotiate service substitutions (in the form of commercial agreements) to replace the now de-listed UNEs. To a large extent, our acceptance of the *TRRO*'s conclusion means that Verizon has no affirmative state law obligation to supply many of these facilities. If a party believes that Verizon is not negotiating in good faith concerning service substitution for a network element, it may raise the issue with the Board in the future.

Issue 30: Implementation of *TRRO*

Verizon challenges the Hearing Officer's recommendations on the same basis that the Company raised for Issues 2–5. We have addressed this issue above.

Issue 31: Difference in Unbundling Depending on Whether Customer is New or Existing

This issue is addressed in Issues 3–5, above, and Supplemental Issue 2, below.

Issue 32: Section 271 Obligations

The PFD found that Section 271 of the Act created an independent basis for requiring Verizon to unbundle many network elements. Based upon this provision, and the state's role in the Section 271 process, the PFD concludes that states have the ability to independently enforce the Section 271 obligations.

Verizon objects to this conclusion. Verizon states that, under Section 252, the state role is limited to enforcing federal duties and does not extend to enforcement of Section 271. In addition, Verizon argues that jurisdiction over Section 271, after approval by the FCC, is exclusively with the FCC.

In large part, we have addressed this question above in Issue 1. In general, enforcement of Section 271 obligations rests with the FCC, not the state. However, to the extent that Verizon made specific commitments to the state of Vermont during the Section 271 process, and asked the state to rely upon those commitments, the Company's agreement represents a binding arrangement enforceable by the Board. This applies most clearly to the PAP, which Verizon has asked us to rely upon not only in the Section 271 process, but also as an alternative to state-developed wholesale service quality standards. It would also apply to other specific commitments that Verizon made to the state.

Supplemental Issue 2: Unbundling related to Additional Lines, Moves and Changes

As discussed above, the FCC has now barred the addition of new UNE-P arrangements (as well as on certain high-capacity facilities). The FCC also required a transition of existing UNE-P customers to alternative services within one year. Verizon maintains that the PFD erroneously implements these FCC requirements when it recommends that the Board permit CLECs to add new lines, make modifications to existing arrangements, and order or change features during the transition period. From Verizon's perspective, the ban is absolute. Verizon also raises policy considerations. According to Verizon, it makes little sense to allow new UNE-P arrangements that will immediately be subject to transition by March 11, 2006.

We find the *TRRO* ambiguous on this point. As Verizon points out, ¶ 227 prohibits the addition of new UNE-P arrangements. However, that paragraph, in addressing the transition from UNE-P to other arrangements, states that it applies to the "embedded customer base." By

inference, this would apply not only to existing arrangements, but also to new or modified UNE-P facilities used to serve existing UNE-P customers. This supports the recommendation set out the PFD. We also are not convinced by Verizon's policy argument. It may make little sense for a CLEC to order a new UNE-P facility to serve an existing customer and then immediately transition to other arrangements. However, if a CLEC determines that such an approach is the best option, the FCC does not appear to foreclose it. Thus, we accept the Hearing Officer's recommendation.

VII. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The findings, conclusions and recommendations of the Hearing Officer are adopted.
2. Within 60 days of this Order, the parties shall jointly file, for Board approval, amendments to their Interconnection Agreements, that contain the terms, conditions, and definitions adopted in this Order.

Dated at Montpelier, Vermont, this 27th day of February, 2006.

s/James Volz)	
)	PUBLIC SERVICE
s/David C. Coen)	
)	BOARD
)	
s/John D. Burke)	OF VERMONT

OFFICE OF THE CLERK

FILED: February 27, 2006

ATTEST: s/Judith Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.