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

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)

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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

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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

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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

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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

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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]

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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.

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13. On March 29, 2004, Benjamin Marks, Esq., Sheehey 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 Telcom 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

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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

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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."

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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

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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

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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

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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. On 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

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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.

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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

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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

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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

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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–
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> (A) establishes access and interconnection obligations of local exchange carriers;
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> (B) is consistent with the requirements of this Section; and
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> (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."

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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 Unbunding Rules."[66] Verizon then defines Federal Unbunding 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

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

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

contracts can become unenforcable 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 unbunding 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

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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,

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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 association 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

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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.

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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.

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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

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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

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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 thehe 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. Commingle 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. Commingle 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 of 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 E911databases; (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 de-listed 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 for 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),

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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.