BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

Petition of Verizon Northwest Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Washington Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order	**DOCKET NO. UT-043013**

COMPETITIVE CARRIER COALITION'S MOTION TO DISMISS AND RESPONSE TO PETITION FOR ARBITRATION OF VERIZON NORTHWEST INC.

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1. Focal Communications Corp. of Washington, Allegiance Telecom of Washington, Inc., DSLnet Communications, LLC, Integra Telecom of Washington, Inc., Adelphia Business Solutions Operations, Inc. (Telcove), Pac-West Telecomm, Inc., ICG Telecom Group, Inc. and McLeodUSA Telecommunications Services, Inc. (collectively the "Competitive Carrier Coalition" or "Coalition") hereby submits their response to the Petition for Arbitration ("Petition"), as updated on March 19, 2004, of Verizon Northwest Inc. ("Verizon") that seeks to amend the interconnection agreements of CLECs to reflect a change in law in accordance with the FCC's *Triennial Review Order* ("*TRO*").[1]

2. As a preliminary matter and as explained below, Verizon's Petition should be dismissed on numerous grounds. First, the Petition is premature because Verizon is required,

[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), corrected by Errata, 18 FCC Rcd 19020 (2003) ("Triennial Review Order Errata"). In its Petition, Verizon contends that its Petition is being filed pursuant to the transition process the FCC established in that Order.

pursuant to the Bell Atlantic/GTE Merger Conditions, to offer UNEs under its existing agreements until the *TRO* is final and non-appealable. At this time, the *TRO* is nowhere near being close to that. Second, Verizon's Petition fails to comply with significant procedural requirements that are mandated by law. Third, consideration of Verizon's petition would be a waste of Commission resources when the law on which the Petition purports to be based is still undetermined. Finally, with respect to the rates and terms Verizon seeks to impose for routine network upgrades, Verizon's obligation in this regard is not a product of a change of law and Verizon is already recovering the costs for such upgrades in its recurring UNE rates.

3. If the Commission does not dismiss or stay Verizon's Petition for these reasons, it should reject and/or modify substantial portions of Verizon's proposed amendment because it fails to comply fully with the requirements of section 251 of the Act.[2] Verizon's proposal contains numerous terms that are inconsistent with the requirements of the *TRO* or with other statutory and regulatory provisions.

DISCUSSION

I. The Commission Should Dismiss Verizon's Petition.

A. Verizon's Petition is Premature Because There has Not Been an Effective Change of Law.

4. The Commission should not entertain Verizon's arbitration request at this time because, contrary to the assertions in the Petition, Verizon's legal duty to offer UNEs has not yet been modified by the *TRO*. Verizon has an independent legal obligation pursuant to the Bell Atlantic/GTE Merger Conditions to offer UNEs, as its interconnection agreements currently

[2] In submitting this response, the Competitive Carrier Coalition does not concede that any particular interconnection agreement between Verizon and individual members of the Coalition needs to be amended to reflect a change of law. In addition, the Competitive Carrier Coalition reserves its rights, and any other grounds it may have, to appeal, contest, dispute, or challenge any aspect of Verizon's Petition or the TRO.

require, until there is a *final and non-appealable* decision that requires Verizon to do otherwise.[3] The *TRO* plainly is not a "non-appealable" order, inasmuch as appeals of it are actually pending.

5. Verizon accepted this legal obligation as a condition of receiving FCC approval of the merger of its predecessor companies, Bell Atlantic Corporation ("BA") and GTE Corporation ("GTE"). On June 16, 2000, the FCC approved, subject to explicit conditions, the merger of the two companies. Verizon proposed, and the Commission adopted, a series of conditions intended to mitigate potential public interest harms from the merger and to enhance competition in the local exchange and exchange access markets in previous Bell Atlantic and GTE serving areas.[4] One of those conditions was that Verizon continue to make UNEs available under the UNE Remand and Line Sharing Orders until the date on which the Commission orders in those proceedings, *and any subsequent proceedings*, become final and non-appealable.[5]

6. Paragraph 39 of the Bell Atlantic/GTE Merger Conditions specifically states as follows:

> Bell Atlantic/GTE shall continue to make available to telecommunications carriers, in the Bell Atlantic/GTE Service Area within each of the Bell Atlantic/GTE States, the UNEs and UNE combi-

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[3] This Bell Atlantic/GTE Merger Condition was designed to protect CLECs from the negative impacts associated with this merger and only applies to the narrowing of Verizon's obligations to offer UNEs. To the extent the *TRO* has increased or expanded the availability of UNEs and/or UNE combinations, *e.g.*, commingling, the Merger Condition is inapplicable.

[4] *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, FCC 00-221 (2000) ("*Bell Atlantic/GTE Merger Order*"). The actual Merger Conditions appear as Appendix D to the Order.

[5] *See Bell Atlantic/GTE Merger Order*, Appendix D ¶ 39 (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) ("UNE Remand Order") and *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98 (rel. Dec. 9, 1999) ("Line Sharing Order")).

> nations required in [the UNE Remand and Line Sharing Orders] ... in accordance with those Orders until the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by Bell Atlantic/GTE in the relevant geographic area. The provisions of this Paragraph shall become null and void and impose no further obligation on Bell Atlantic/GTE after the effective date of final and non-appealable Commission orders in the UNE Remand and Line Sharing proceedings, respectively.[6]

When it approved the Bell Atlantic and GTE merger with this condition, the FCC discussed the effect of the UNE condition in the following terms:

> In order to reduce uncertainty to competing carriers from litigation that may arise in response to our orders in the UNE Remand and Line Sharing proceedings, *from now until the date on which the Commission's orders in those proceedings, and any subsequent proceedings, become final and non-appealable,* Bell Atlantic and GTE will continue to make available to telecommunications carriers, in accordance with those orders, each UNE and combination of UNEs that is required under those orders, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide the UNE or combination of UNEs in all or a portion of its operating territory. This condition only would have practical effect in the event that our rules adopted in the UNE Remand and Line Sharing proceedings [which includes subsequent proceedings] are stayed or vacated.[7]

7. This condition is still in effect, because the FCC's *UNE Remand* and *Line Sharing* Orders never became final and non-appealable, and the *TRO* is an outgrowth of those same proceedings. Both the *UNE Remand* and *Line Sharing* Orders were appealed to the D.C. Circuit, and that court remanded both decisions (and vacated the *Line Sharing* rules) to the FCC in its first *USTA* decision.[8] The FCC then consolidated the remands of these two orders with its

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[6] *Bell Atlantic/GTE Merger Order*, Appendix D ¶ 39. By its own terms, this condition continues to apply until the date of a final and non-appealable decision, even though other provisions of the Merger Conditions may have expired.

[7] *Bell Atlantic/GTE Merger Order*, ¶ 316 (emphasis added).

[8] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

ongoing Triennial Review rulemaking.[9] The *TRO* is expressly captioned as an "Order on Remand" in both the *UNE Remand* docket (CC Docket No. 96-98) and the *Line Sharing* docket (CC Docket No. 98-147). Indeed, the appeals from the *TRO* were transferred to the D.C. Circuit because the order was an outgrowth of that court's earlier decision,[10] and the case was assigned to the *USTA* panel for the same reason.[11] Thus, as long as the Triennial Review proceeding remains pending before the FCC, neither the *UNE Remand* nor the *Line Sharing* proceeding has been terminated by a final, non-appealable order.

8. Of course, the *TRO* itself is far from being final and non-appealable. The D.C. Circuit recently vacated and/or remanded many significant provisions of the *TRO*, and this decision, in turn, is expected to be appealed to the Supreme Court; if and when the appeals are completed, and if the case is then remanded, the FCC presumably will have to prescribe new rules that address defects the D.C. Circuit identified.[12] The Bell Atlantic/GTE merger conditions described above were expressly designed to protect CLECs from the uncertainty associated with this litigation prior to its ultimate conclusion.

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[9] *See* FCC Public Notice DA 02-1291, Wireline Competition Bureau Extends Reply Comment Deadline for the Triennial Review Proceedings (rel. May 30, 2002) (extending the deadline for reply comments in the *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (Triennial Review) proceeding until July 17, 2002 so that parties can incorporate their analysis of *USTA I* into their reply comments); *see TRO* (citing *USTA I* numerous times as the legal backdrop and basis upon which the FCC rendered its decision).

[10] *Eschelon Telecom, Inc. v. FCC*, 345 F.3d 682 (8th Cir. 2003).

[11] *United States Telecom Association v. FCC*, No. 00-1012 (D.C. Cir. Mar. 2, 2004) ("*USTA II*"), slip op. at 10-11.

[12] *USTA II* at 61-62; FCC News, Statement of FCC Commissioner Michael J. Copps, Kevin J. Martin, and Jonathan S. Adelstein on the D.C. Circuit's Decision to Eliminate the FCC's Rules (rel. Mar. 3, 2004); FCC News Release, Statement of FCC Chairmen Michael K. Powell Regarding the D.C. Circuit Decision on Triennial Review (rel. March 2, 2003); FCC News, Commissioner Abernathy Reacts to Triennial Review Decision by D.C. Circuit Court of Appeals (rel. Mar. 2, 2004), *available at* http://www.fcc.gov.

9. Accordingly, Verizon's request that the Commission arbitrate and amend interconnection agreements to reflect determinations made in the *TRO* is premature until new FCC rules are final and non-appealable. Because Verizon has an independent and continuing legal obligation in the meantime under the Bell Atlantic/GTE Merger Conditions to offer UNEs pursuant to the UNE Remand and Line Sharing Orders, Verizon's arbitration petition should be dismissed.

B. Verizon Did Not Comply with Filing Requirements that Are Mandated by Law.

10. Even if Verizon's Petition were not premature for the reasons stated above, it would still be procedurally defective. Because of the inflexible time limits for arbitration imposed by the Telecom Act,[13] Section 252(b)(2) imposes several explicit duties *on the petitioning party*,[14] which seeks to invoke the Commission's time and attention (as well as the time and resources of the responding parties) In particular, 47 U.S.C. § 252(b)(2)(A) requires that:

> A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning –
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> (i) the unresolved issues;
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> (ii) the position of each of the parties with respect to those issues; and
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> (iii) any other issue discussed and resolved by the parties.[15]

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[13] Telecommunications Act of 1996, *codified at* 47 USC § 251 *et seq.*

[14] Section 252(b) of the Act requires that state commissions resolve unresolved issues raised in an arbitration within approximately nine months from the date a request to negotiate was made. Because arbitration petitions can only be filed between the 135 and 160th day (or approximately 4.5 months) after such a request was made, state commissions have approximately 4.5 months to resolve the outstanding issues. This is an exceedingly tight schedule for the resolution of arbitration petitions, especially now with all the litigation going on to implement the TRO.

[15] 47 U.S.C. § 252(b)(2)(A).

As discussed below, however, Verizon's Petition does not even attempt to meet this up-front burden and, therefore, should be dismissed.

11. *First*, Verizon has not specifically identified the "unresolved issues" or disputed contract language for any CLEC. Verizon only offers blanket and generic statements that parties have issues with contract rates, terms and conditions. However, that is not enough. Section 252 mandates that the party requesting arbitration identify and present the issues to the Commission clearly and distinctly, which Verizon failed to do.[16] This filing requirement is critical because the Section 252 arbitration process will not work within its time limits if the issues are not laid out in a clear manner on the date the petitioner files its arbitration petition.

12. Because Verizon's Petition is deficient in this regard, the Commission should dismiss it. Otherwise, the Commission will need to consume valuable time narrowing down the issues, a process that will effectively begin after the responses to the arbitration petition are due, and will reduce even further the time available for actual resolution of issues in dispute. Verizon has had four months since it sent its October 2 letter to anticipate and prepare for the filing of its generic Petition. It is improper for Verizon to now file a boilerplate Petition, devoid of necessary facts, that seeks to shift the burden onto the CLECs and/or the Commission to both identify and resolve disputed issues on an expedited basis.

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[16] In its Petition, Verizon avers that CLECs were untimely in responding to Verizon's proposed amendment and therefore it did not have sufficient time to ascertain what issues CLEC have with Verizon's proposed amendment and their related positions prior to filing its Petition. Verizon Petition at 5. Contrary to these assertions, several CLECs, including members of the Coalition in this state and/or other states, were timely in providing redlines of Verizon's amendment back to Verizon. However, rather than seek comment from these CLECs regarding the issues they have with Verizon's proposal, their positions, and determine an outline of common issues and positions among CLECs, Verizon filed its Petition against all CLECs, which it has an interconnection agreement with in a given state, that did not contain this information as the law requires. Verizon had plenty of time to pull that information together prior to the date the arbitration window closed; *i.e.*, March 10, 2004, but didn't. Its failure in this regard should be deemed fatal to its Petition.

13. *Second*, in disregard of Section 252(b)(2)(A)(ii), Verizon did not submit "the position of each of the parties" with respect to each the issues in its Petition. Without this information, the Commission has no sense of the scope of the issues or how close or how far apart the parties are in resolving the issues. Moreover, although Verizon requests that the arbitration be dealt with on a consolidated basis, particular issues that each CLEC may have with Verizon's proposed amendment vary according to each CLEC's individual needs, the nature of its interconnection agreement with Verizon, and any negotiation history with Verizon that has already taken place. In this regard, Verizon has not made any attempt to outline the common issues CLECs have expressed with respect to Verizon's proposed amendment that would somehow justify mass consolidation and arbitration of the issues.[17]

14. *Third*, Verizon failed to mention "any other issue discussed and resolved by the parties." Nothing in Verizon's Petition explains what occurred during the negotiations process, what attempts were made by Verizon to conduct negotiations, or where and why negotiations broke down and or how issues were resolved by the parties. Nor could it because Verizon's only desire was to arbitrate rather than negotiate.

15. *Fourth*, Verizon has failed to comply with this Commission's procedural requirements associated with filing an arbitration petition. In particular, when filing an arbitration petition, the petitioner must, *inter alia*, (1) "[i]nclude a brief statement of each unresolved issue and a summary of each party's position with respect to each issue;" (2) provide a "current draft of the interconnection agreement . . . with all agreed positions in standard typeface and all unresolved issues in bold typeface;" and (3) provide a "legal brief that addresses the disputed issues, including discussion of how the parties' positions, and any conditions requested, meet or

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[17] *See supra* text accompanying note 16.

fail to the requirements of" sections 251 and 252 of the Act, the FCC's implementing regulations and orders, and this commission's regulations and orders.[18] Notwithstanding these clear requirements of law, Verizon did not even attempt to meet its up-front burden as the petitioning party to identify the disputed and agreed upon issues as well as the positions of the parties. Verizon failed to identify or describe "each unresolved issue and a summary of each party's position with respect to each issue" and provide a legal brief regarding the disputed issues as mandated by the commission's rules. Further, Verizon failed to provide a "current draft" of the interconnection agreement setting forth the resolved and unresolved issues as required by the commission's rules.[19]

16. Significantly, the North Carolina Utilities Commission ordered that Verizon's consolidated arbitration petition that was filed on February 20, 2004, which is virtually identical to the one filed in Washington, be continued *indefinitely* because, *inter alia*, Verizon did not comply with the Commission's arbitration procedural rules.[20] Moreover, staff of the Virginia State Corporation Commission have filed a motion to dismiss a similar arbitration petition that Verizon filed in Virginia due to Verizon's failure to comply with procedural requirements and abuse of Section 252(g) of the Act.[21]

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[18] WAC 480-07-630(5).

[19] *See supra* text accompanying note 17.

[20] *In the Matter of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Docket No. P-19, Sub 477, Order Continuing Proceeding Indefinitely, at 2 (N.C.U.C. Mar. 3, 2004) ("*N.C. Order Continuing Proceeding Indefinitely*") (noting that Verizon's arbitration petition was deficient because it did not include prefiled testimony or a matrix summary, and did not appear to be signed by North Carolina counsel). Significantly, in its order, the North Carolina Commission specifically advised "Verizon that it may avail itself of the provisions of Section 252(e)(5), wherein the arbitration may be referred to the FCC." *Id.* This Commission could take a similar approach and make a similar suggestion to Verizon.

[21] *Petition of Verizon Virginia Inc. and Verizon South Inc. Petition for Arbitration*, Case No. PUC-2004-00030, Staff Motion to Dismiss, at 4 (filed Mar. 24, 2004).

17. For the foregoing reasons, the Commission should immediately dismiss Verizon's Petition before further time and effort is wasted in attempting to prosecute this proceeding. Verizon's failure to provide the information discussed above in its Petition violates federal law and is sufficient grounds to dismiss Verizon's Petition without further ado. Verizon is not above the law and its acts that fail to comply with the law should not be tolerated.[22]

C. Consideration of Verizon's Petition Would Be Wasteful of Administrative Resources.

18. Even if the above-stated grounds for dismissal did not exist, it would be a waste of this Commission's resources to consider Verizon's Petition at this time, when the law on which the Petition purports to be based is still undetermined. The *TRO* cannot be relied on as the law of the land, because *USTA II* vacated and/or remanded various aspects of this decision. However, *USTA II* cannot be relied on because it is widely know that this decision, which has not gone into effect (and may not if it is stayed), will be appealed to the Supreme Court. And, even if *USTA II* does take effect, that decision remands various issues to the FCC for further consideration, which may result in still further changes in the law.[23] Given this, it makes no sense whatsoever to arbitrate Verizon's proposed amendment if the law that needs to be applied is in a state of flux and the amendment will need to be modified in short order reflect the upcoming rounds of court or FCC decisions. Instead, dismissal of Verizon's Petition is appropriate at this time if Verizon does not withdraw it voluntarily. Otherwise, the Commission will be stuck in an endless cycle of amending and re-amending interconnection agreements to conform to every intermediate court ruling and every set of FCC rules that remains subject to appeal. Rather

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[22] Verizon would not be precluded from seeking to use the arbitration process at some appropriate future date, as long as Verizon complies with all applicable procedural requirements.

[23] As a practical matter, if the *USTA II* decision goes into effect, the negotiation and arbitration windows established in the TRO will be effectively reset.

than waste resources by following this course of action, the Commission should not entertain this arbitration until the law settles.

19. Two other commissions have recognized this and refused to move forward with respect to similar Petitions for Arbitration that Verizon filed in Maryland and North Carolina. In particular, on March 15, 2004, the Maryland Public Service Commission ("Maryland PSC") dismissed Verizon's consolidated arbitration petition, which is virtually identical to the petition that initiated this proceeding. The Maryland PSC ruled that "the Commission believes that Verizon's Petition for Arbitration is premature, as the status of the law it seeks to use as a trigger for its change of law provision is unclear."[24] In addition, the North Carolina Utilities Commission, in staying the Verizon TRO amendment arbitration proceeding *indefinitely,* stated that "the FCC rules are under challenge on many fronts. It makes no sense to begin an arbitration where the underlying rules may be changed in midstream."[25] This Commission should come to the same conclusion.

20. The FCC's well-publicized recent request to the industry that carriers focus their attention on negotiating rather than litigating is further reason why the Commission should dismiss this arbitration. On March 31, 2004, the FCC requested that telecommunications carriers and trade associations begin a period of commercial negotiations to arrive at commercially

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[24] *Verizon Maryland Petition for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Maryland Pursuant to Section 252 of the Communications Act, as Amended, and the Triennial Review Order*, Letter from Felecia L. Greer, Executive Secretary, to David A. Hill, Verizon, at 1 (March 15, 2004) (dismissing Verizon's Petition without prejudice).

[25] *N.C. Order Continuing Proceeding Indefinitely*, at 2.

acceptable arrangements for the availability of unbundled network elements.[26] On April 5, Verizon CEO Ivan Seidenberg advised the FCC that Verizon "support[ed] the Commission's approach" and expressed Verizon's position that "[c]ommercial negotiations are the best way to arrive at appropriate wholesale arrangements, rather than through the regulatory and litigation process."[27] Numerous CLECs and all the major CLEC trade associations have agreed to participate in these negotiations. It would be inefficient and wasteful for the Commission to proceed with this arbitration concomitantly since carriers will be giving a higher priority to negotiating and settling issues at this time. It will be extremely burdensome on the parties, especially smaller CLECs, to arbitrate while industry-wide negotiations are taking place. Indeed, if CLECs are forced to negotiate and arbitrate at the same time, there would unfortunately be a greatly reduced chance that a CLEC would be able to reach any commercial agreement with Verizon. Not only that, but if this arbitration is looming during such negotiations, Verizon will have far less incentive to engage in bona fide good faith negotiations during the negotiations process. At bottom, dismissal of the Petition is consistent with the FCC's request, as well as Verizon's response to the request, because doing so will ensure that carriers focus on negotiations rather than litigation at this time.

21. Significantly, in the wake of the D.C. Circuit's recent decision in *USTA II*, Verizon has requested that the nine month state Triennial Review implementation proceedings be stayed and has argued that it would be "futile" or even "feckless" for state commissions to

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[26] FCC News, Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein On Triennial Review Next Steps (rel. Mar. 31. 2004).

[27] Letter from Ivan Seidenberg, Chairman and Chief Executive Officer, Verizon to Honorable Chairman Powell and Commissioners, FCC (April 5, 2004).

continue with such proceedings.[28] While the Coalition does not endorse Verizon's view on a stay of the 9-month case, it certainly would be "feckless" and "futile" to proceed with this arbitration if the impairment proceedings were stayed, because the parties here would be attempting to establish agreement terms to apply in the absence of any guiding law. There is certainly no clarity with respect to what unbundling rules should apply in an arbitration proceeding. Furthermore, because the state of flux of this legal standard, it would be inefficient for the Commission to move forward with these arbitrations knowing that it will have to repeat this process in short order and possibly numerous times until there are final rules in place.

22. Amazingly, Verizon states in its Petition that its "amendment will bring the agreements into conformity with present law in a manner that does not waste the parties' (or the Commission's) resources on needless technical drafting efforts." However, by forcing the start of an arbitration of a proposed Amendment that Verizon has recently updated to reflect the legal turmoil caused by *USTA II* and because it is expected that this decision will be appealed, Verizon is doing just that – it is forcing parties and the Commission to waste resources on needless technical drafting efforts. Incredibly, Verizon wants this Commission to arbitrate an amendment based on the *TRO* and *USTA II* at the same time it is asking state commissions nationwide *not* to complete their nine-month *TRO* impairment proceedings due to *USTA II*. Verizon's tacking back and forth between what is efficient and what is not is inconsistent and self-serving. The well

[28] Verizon made these assertions in its March 3, 2004 motions to stay the Massachusetts and New Jersey Triennial Review implementation proceedings, D.T.E. 03-60 and Docket No. TO03090705, respectively.

rooted doctrine of judicial estoppel precludes Verizon from taking such contrary positions.[29] Therefore, dismissal of Verizon's Petition is appropriate at this time.

D. Verizon's Request to Amend Interconnection Agreements with Rates and Terms Associated with Routine Network Modifications Should be Dismissed.

23. Apart from dismissing Verizon's Petition for the reasons expressed above, the Commission has separate grounds for dismissing the portions of Verizon's Petition that seek to amend the agreement to reflect rates, terms, and conditions for routine network modifications needed to provision UNEs. In the *TRO*, the FCC did not establish new law regarding Verizon's obligation in this regard but rather clarified that Verizon's refusal to perform such modifications violated existing law.[30] Therefore, no amendment is required because no change of law occurred. Verizon's obligations in this regard are self-effectuating.

24. With respect to the charges Verizon seeks to assess for routine network modifications, Verizon is already recovering these costs in its UNE rates. Indeed, as discussed herein, the FCC recognizes in the *TRO* that the costs Verizon seeks to recover in its Petition are often already recovered in Verizon's recurring UNE rates. The FCC stated that "costs associated with modifications may be reflected in the carrier's investment in the network element, and labor costs associated with modification may be recovered as part of the expense associated with that investment (*e.g.*, through application of annual charge factors (ACFs))." The FCC further emphasized that "The Commission's rules make clear that there may not be any double recovery

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[29] *See, e.g., Scarano v. Central R.R. Co. of N.J.*, 203 F.2d 510, 513 (3d Cir. 1953) (doctrine prevents party from assuming inconsistent position); *Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996) judicial estoppel precludes inconsistent allegations); *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996) (doctrine precludes party from adopting contrary positions); *American Nat'l Bank of Jacksonville v. FDIC*, 710 F.2d 1528, 1536 (11th Cir. 1983) (doctrine prevents parties' mockery of the justice system by inconsistent pleadings).

[30] *TRO* at n.1940 (finding Verizon's no-facilities "policy to be discriminatory on its face").

of these costs ...." *TRO* at ¶ 640. Moreover, the Virginia State Corporation Commission has already rejected Verizon's attempt in the *TRO* Amendment to impose additional charges for network modifications, finding that Verizon's costs for these routine modifications are already built into its existing UNE rates and therefore must be provided at no additional charge. *See Petition of Cavalier Telephone*, Case No. PUC-2002-00088 (Virginia S.C.C. January 28, 2004) at 8. The same holds true here. Therefore, Verizon's Petition to arbitrate rates and terms associated with routine network modifications is unjustified and should be dismissed.

II. Response to the TRO Amendment Proposed by Verizon

25. If the Commission does not dismiss Verizon's Petition for the reasons set forth in the preceding section, it must determine whether the amendment terms proposed by Verizon "meet the requirements of section 251 [of the Telecom Act], including the regulations prescribed by the [FCC] pursuant to section 251[.]" 47 USC § 252(c)(1). As explained below, substantial portions of Verizon's proposal do not meet these requirements, and therefore should be modified by the Commission. Accordingly, the Coalition has proposed an alternative amendment that satisfies the requirements of Section 251, the *TRO* and other applicable law, including but limited to *USTA II*.[31]

26. The format of the Coalition response follows the format used by Verizon in its Petition for Arbitration.[32] As discussed above, Verizon failed to identify adequately each of the

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[31] See Attachment 1, Competitive Carrier Coalition's Proposed Alternative to Verizon's Proposed TRO Amendment ("TRO Attachment"). Verizon has proposed nearly-identical amendments in each of its states. The multi-state Coalition has prepared only one alternative for all of the states for this initial response. To the extent that variation exists between the Verizon template and its proposal to this Commission, the Coalition reserves the right to supplement its alternative accordingly.

[32] Contact information for the individual Respondents is provided at the end of this Response.

issues to be arbitrated in this proceeding. Instead, Verizon offered only short descriptions of the provisions it has proposed to implement the *TRO*.[33]

A. Amendment Terms and Conditions

27. Verizon's Position: In the event that the D.C. Circuit or the Supreme Court stays any provisions of the *TRO*, any terms and conditions in the TRO Attachment or the Pricing Attachment that relate to the stayed provisions shall be suspended and shall have no force or effect, until the stay is lifted.

28. Proposed Revisions: The Commission should require that the reservation of rights in Section 6 be reciprocal so that its provisions would apply to both Verizon and the CLEC. It would be unjust and unreasonable to allow provisions of the Agreement, including Verizon's unbundling obligations, to be suspended without providing for reasonable interim replacement terms. Instead, the Coalition proposes that provisions of the agreement affected by judicial review should revert to the terms and conditions in the Agreement prior to the Amendment until revisions can be renegotiated by the parties. This language is necessary to provide some certainty to the parties in the event the *TRO* were reversed or vacated. The Coalition proposal is more just and reasonable under the circumstances. Section 251(c)(3) makes clear that Verizon has *some* obligation to provide non-discriminatory access to unbundled network elements. While the particulars of that requirement are being reassessed by the FCC and the

[33] As indicated above, Verizon filed essentially identical arbitration Petitions in numerous States, and made little or no attempt to conform to state-specific procedural requirements. The Coalition has been forced by Verizon's action to prepare simultaneously responses to these Petitions in numerous States within a very short time, and due to resource constraints has been unable to adapt this response to any specific State procedural requirements. The Coalition respectfully submits that, if this Response violates any State-specific requirements, it is only because Verizon's Petition did so as well, and the proper remedy is to dismiss Verizon's Petition.

state commissions, the best evidence of Verizon's obligation to provide UNEs is the terms and conditions under which Verizon has already agreed to provide them.

B. General Conditions (TRO Attachment § 1)

29. Verizon Position: Section 1 states that Verizon shall be required to offer UNEs under the terms of the amended agreement only to the extent required by both § 251(c)(3) and Part 51 of the FCC rules. The language further specifies that Verizon may decline to offer UNEs if it is not required by both § 251(c)(3) and Part 51 to do so.

30. Proposed Revisions: The Commission should revise Sections 1.1 and 1.2 of the General Terms and Conditions to preclude Verizon from refusing to provide UNEs that are required by other provisions of applicable law, such as § 271 of the Telecom Act or terms and conditions related to UNEs established by state commissions, and not to limit UNE terms and conditions to only those established by the FCC in the implementation of Section 251(c)(3). Section 252(e)(3) specifically preserves state commission authority to establish or enforce other requirements of state law, and section 252(e)(4)(C) authorizes a state commission to "impos[e] appropriate conditions" to implement the requirements of section 251. Accordingly, Verizon's proposal would not "meet the requirements of Section 251 [of the Telecom Act]," as required by section 252(c), unless it provides for the possibility of additional requirements ordered by this Commission.[34]

31. The Commission should also revise Section 1.2 to reflect the FCC rules that CLECs may provide additional services using UNEs, and that ILECs may not impose limitations, restrictions, or requirements on requests for, or on the use of UNEs for the service a

[34] Throughout Attachment 1, the Coalition proposes similar revised language wherever Verizon proposed its limiting language in this regard in the TRO Attachment. *See, e.g.,* Attachment 1, §§ 2.3, 2.4, 2.7, 2.8, 2.18, 2.19, 3.1.1.1, 3.1.1.2, 3.1.2.2, 3.1.3.2, 3.1.3.3, 3.1.4, 3.2.1.1, 3.3.1.2, 3.3.1.2.2, 3.3.2, 3.4.1, 3.4.3, 3.5.1, 3.5.2, 3.5.3, 3.6.1, 3.6.2.1.5, 3.7.1, 3.9.1.

requesting telecommunications carrier seeks to offer. 47 C.F.R. § 51.309(a). The revisions should also incorporate terms and conditions regarding UNEs established by the FCC in connection with its implementation of Section 271. 47 U.S.C. § 271(c)(2)(B).

32. The Commission should delete change-of-law language proposed by Verizon in Section 1.3 because the Agreements already have change-of-law provisions. This additional language either conflicts with that existing language, or is superfluous. The Coalition proposal is more "just and reasonable" than Verizon's proposal because Verizon has offered no reason for differing requirements when the law changes with respect to UNEs than with respect to any other aspect of Verizon's obligations under the Telecom Act.

33. The Coalition proposes a new Section 1.4 to make the reservation of rights by Verizon in Section 1.3 reciprocal to CLECs. There is no reason Verizon should be permitted a reservation of rights without permitting the same to CLECs. Again, Verizon's proposal is not only not "just and reasonable," but it would discriminate against CLECs by not providing them with rights equal to those requested by Verizon.

C. Glossary (TRO Attachment § 2)

34. Verizon Position: Verizon's amendment contains a Glossary defining the terms used therein. Verizon asserts that the definitions are derived from the definitions established by the FCC in the *TRO* and are consistent with D.C. Circuit's decision in *USTA II*.

35. Proposed Revisions: The Coalition proposes definitions of certain additional terms that relate to requirements of the *TRO* that Verizon had omitted from its proposed Amendment. These definitions are: "Dark Fiber Loop", "Enterprise Customer", and "Mass Market Customer". The definitions were derived from language in the *TRO* and its implementing regulations. *See* 47 C.F.R. §§ 51.319(a)(6) (dark fiber loops); *TRO* ¶ 497 (mass market customers and enterprise customers).

36. The Commission should also revise certain other definitions to be consistent with the *TRO*. Section 2.4, "Dedicated Transport", should include interoffice facilities between a Verizon wire center and a CLEC wire center if Verizon has deployed interconnection facilities in the CLEC wire center. This concept of "reverse collocation" is specifically in the FCC rules. Verizon's definition seems to be based on paragraph 369 of the *TRO*, which states that "we limit the dedicated transport network element to those incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between switches or wire centers owned by incumbent LECs." *TRO* ¶ 369. However, Verizon ignores footnote 1126 to this text, which states that ILEC transport may be unbundled as UNEs to reverse collocations where "an incumbent LEC has local switching equipment, as defined by the Commission's rules." Taken together, these provisions of the *TRO* indicate that a CLEC wire center in which the ILEC has collocated switching equipment must be treated the same as an ILEC wire center in the definition of dedicated transport. The specific language proposed by the Coalition is derived from footnote 1183 defining "reverse collocation."

37. The Commission should revise Verizon's references to its internal publications in Sections 2.7 and 2.8 (Verizon's Sections 2.6 and 2.7), the definitions of "DS1 Loops" and "DS3 Loops", to make clear that such publications may not be applied in any manner that is inconsistent with provisions of the Agreement or applicable law. This proposed revision is more "just and reasonable" than Verizon's proposal, which appears to allow Verizon to revise its technical publications at any time in any manner it sees fit. The Coalition proposal provides more fairness and certainty for CLECs, and reduces the likelihood of anticompetitive conduct by Verizon.

38. The Commission should also revise Section 2.10, "Enterprise Switching", to be more precise. Verizon's proposal defined Enterprise Switching as switching "for the purpose of

serving" customers using DS1 or above capacity loops. The Coalition proposal eliminates the ambiguous "purpose" requirement and replaces it with a more objective standard of "to serve" Enterprise Customers. The latter proposal is more "just and reasonable" because it provides for more certainty. Rather than examining the "purpose" of a CLEC's particular use of UNE switching, the Coalition proposal draws a bright line at switching actually used to serve Enterprise Customers. The definition of Enterprise Switching also incorporates the definition of Enterprise Customers described below.

39. The Commission should also revise the definition of "Enterprise Switching" to reflect that this term does not include stand-alone Tandem Switching. Verizon has a general obligation under the *TRO* to provide unbundled switching, including Tandem Switching. 47 C.F.R. § 51.319(d). Verizon's proposal is not just and reasonable because it would exclude all Tandem Switching, which would be contrary to the FCC regulations.

40. The Commission should revise the definitions of "FTTH Loop" and "Hybrid Loop" to encompass only loops to a Mass Market Customer. The FCC's discussion of FTTH Loops, *TRO* ¶¶ 273-284, and Hybrid Loops, *TRO* ¶¶ 285-297, was limited to their provision to Mass Market Customers. Verizon's proposal would expand the restrictions on FTTH Loops to all customers, when that was clearly not contemplated or required by the *TRO*. For example, the *TRO*'s extensive discussion of dark fiber loops would be rendered meaningless if the FCC intended to eliminate the unbundling requirements for fiber loops to both mass market and enterprise customers. Thus, Verizon's proposal would be inconsistent with the FCC regulations implementing Section 251, as required by Section 252(c).

41. The Coalition also proposes that definitions of "House and Riser Cable" and "Sub-Loop for Multiunit Premises Access" should be revised to be consistent with language in

the *TRO* regarding FTTH loops. Under Verizon's proposal, any subloop in a FTTH loop would not be subject to unbundling, whereas the *TRO* limited this exception only to the fiber optic facility in a FTTH loop. Rule 51.319(a)(3) explains 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, they are not FTTH loops and they would be subject to subloop unbundling requirements. Verizon's proposal would not be consistent with the FCC regulations implementing Section 251.

42. Consistent with the definition of Enterprise Switching above, the Commission should adopt a definition of "Mass Market Customer". Based upon the *TRO* discussion of the "mass market" and "enterprise" concepts, and the existing the four-line carve out rule, the Coalition proposes to define Mass Market Customer as any residential customer, and any business customer with an aggregate telecommunications capacity of less than 4 DS0s (regardless of the technology used). All other retail and wholesale business customers would be defined as Enterprise Customers.

43. Likewise, the Commission should require that the definition of "Nonconforming Facility" be revised to be consistent with language in the *TRO* regarding availability of the Feeder portion of the Loop UNE for TDM and narrowband applications. Verizon's proposal would conflict with language elsewhere in the Amendment that acknowledges that Verizon must provide the Feeder portion of the Loop as a UNE in certain circumstances. In addition, the inclusion of Feeder as a Nonconforming Facility was revised to limit such inclusion to fiber Feeder provisioned to serve a Mass Market Customer, in accordance with the terms of the *TRO*. The FCC's discussion of fiber Feeder subloops, ¶ 253, was limited to their provision to Mass Market Customers. Finally, the Commission should reject Verizon's inference that unbundling

obligations could be eliminated in a legally binding manner by some means other than a final and non-appealable finding of non-impairment by the Commission or the FCC. Verizon has identified no such third means of eliminating its legal obligation, and in any case, this hypothetical possibility can be addressed if and when it becomes necessary through the Agreement's change of law provisions.

44. The Commission should also revise this definition to remove certain restrictions on EELs provided by Verizon prior to the effective date of the *TRO*, October 2, 2003. Under Verizon's proposal, any EEL provided prior to October 2, 2003 must satisfy the eligibility criteria established as of October 2, 2003. This eligibility requirement is not required by the *TRO*. Paragraph 589 of the *TRO* provides with respect to EELs:

> As a final matter, we decline to require retroactive billing to any time before the effective date of this Order. The eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past. To the extent pending requests have not been converted, however, competitive LECs are entitled to the appropriate pricing up to the effective date of this Order.

45. This language establishes that (1) if a circuit qualifies under the new standards but did not qualify under the old standards, a CLEC cannot recover the excessive charges prior to the effective date; (2) if a circuit does not qualify under the new standards but did qualify under the old standards, the ILEC may not recover past losses; and (3) EELs may continue to be provided under the old standards up to the effective date.

46. The third sentence in the paragraph indicates that the FCC envisions a dual-track EEL qualification system. To illustrate, a request pending at the time of the *TRO* would have been submitted under the old "safe harbors" eligibility criteria. Those circuits would be entitled to be priced at "the appropriate pricing" applicable to those circuits at the time; *i.e.*, the pricing applicable to circuits that satisfied the former eligibility criteria. The language suggests that a

CLEC may "lock in" the appropriate pricing for the circuit. By locking in the appropriate price, some circuits would continue to qualify as EELs under the old standards, while other circuits would have to satisfy the new standards before being priced at UNE rates.

47. The Coalition also proposes that Section 2.17 in Verizon's proposal, "Packet Switching", should be relocated to Section 3.1.3.1. This definition is discussed as part of that section below.

48. The definition of "Route" should also be revised to reflect "reverse collocation" arrangements that would qualify an interoffice transport facility as a UNE as discussed above with respect to Dedicated Transport. Furthermore, Verizon's parenthetical in the definition "(or as applicable, a class or grouping of such transmission paths in a particular market)" should be deleted. Verizon submits that this modification reflects the D.C. Circuit's reversal of the FCC's route-specific market definition for analyzing impairment with respect to high-capacity facilities. Contrary to Verizon's contentions, *USTA II* did not redefine the FCC's definition rather it held that the FCC did not explore certain alternatives when the FCC established its route-specific impairment analysis of dedicated transport.[35]

D. Loops (TRO Attachment § 3.1)

49. Proposed Revisions: Verizon's proposal does not address DS0 loops. Language should be added, derived from Rule 51.319(a)(1), to state Verizon's general obligation to provide unbundled access to all loops, and to make clear that Verizon must continue to provide DS0 UNE loops. This revision is necessary in order for the Amendment's discussion of loops to be consistent with the FCC rules implementing section 251, as required by section 252(c).

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[35] *USTA II*, slip op. at 29.

1. High Capacity Loops (TRO Attachment § 3.1.1)

50. Verizon's Position: Verizon's draft amendment states that it would allow CLECs to obtain unbundled access to DS1 and DS3 loops only to the extent required by federal law (251(c)(3) and Part 51). Verizon would, however, limit CLECs to only two unbundled DS3 loops (or their equivalent) to any single end-user location. Verizon's obligation to provide unbundled DS1 and DS3 loops to a specific end-user location would terminate if the Commission finds, pursuant to the procedures prescribed by the FCC, that there is no impairment on the route to that location. Any DS1 or DS3 loops previously made available to CLEC at the subject end user location shall be considered Nonconforming Facilities immediately on the effective date of the non-impairment finding and thereafter.

51. Proposed Revisions: The Commission should revise Sections 3.1.1.1 and 3.1.1.2, and add new Section 3.1.1.3, to clarify that Verizon must provide access to UNEs in accordance with all applicable state and federal law, and not only selected federal laws. Section 252(e)(3) specifically preserves state commission authority to establish or enforce other requirements of state law, and section 252(e)(4)(C) authorizes a state commission to "impos[e] appropriate conditions" to implement the requirements of section 251. Accordingly, Verizon's proposal would not "meet the requirements of Section 251 [of the Telecom Act]," as required by section 252(c) unless it provides for the possibility of additional requirements ordered by this Commission.[36]

52. The Commission should approve the Coalition's new section 3.1.1.3, Dark Fiber Loops, which has been added to make clear that Verizon must provide Dark Fiber Loops as

[36] As noted previously and for these reasons, the Coalition proposes similar revised language wherever Verizon proposed its limiting language in this regard in the TRO Attachment. *See supra* note 33.

required by paragraphs 311-314 of the *TRO* and Rule 51.319(a)(6). Verizon's proposal would not satisfy section 252(c) because it is not consistent with the FCC regulations implementing section 251.

53. New subsections 3.1.1.3.1 and 3.1.1.3.2 set forth terms necessary for the effective implementation of Verizon's dark fiber unbundling obligations, including terms for accurate determination of available facilities through a Dark Fiber Inquiry process and field surveys. These terms are based upon the FCC's determinations in the Cavalier-Verizon Virginia arbitration.[37] Because the FCC applied the same standards for arbitration that this Commission must apply pursuant to section 252(c), the Coalition proposal adopting language from the Cavalier-Verizon arbitration proceeding is consistent with federal law and should be approved.

54. Further, the Commission should revise Section 3.1.1.4, "Nonimpairment," as follows: (1) the reservation of rights should be made reciprocal. As discussed above, non-reciprocal terms are neither just and reasonable nor non-discriminatory. (2) The section should be clarified to refer only to the rights and obligations of the parties under Section 251 of the Act. Because the Act requires an impairment analysis only for UNEs, obligations under other provisions should not be altered as a result of a finding of non-impairment. This revision is necessary for the Amendment to be consistent with section 251 of the Act. (3) The phrase "or class or grouping of locations in a particular" should be deleted from the types of loops that Verizon would not have to provide on an unbundled basis. The *TRO* requires an analysis of impairment for high capacity local loops on a customer-location basis. 47 C.F.R. § 51.319(a)(5). It does not

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[37] *Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration*, WC Docket No. 02-359, Memorandum Opinion and Order, DA 03-3947 (rel. Dec. 12, 2003) ("*FCC Cavalier Arbitration Decision*").

provide for "classes of locations" to be considered as a basis for non-impairment. This revision is necessary to be consistent with the FCC regulations implementing section 251. Moreover, *USTA II* did not address high-capacity loops in its decision, let alone redefine the FCC's route-specific definition for analyzing impairment with respect to them. (4) In conjunction with edits to Section 3.9 (Verizon's Section 3.8), discussed below, the transition process in the event of the withdrawal of any UNEs should be revised to initiate only after a change in law is final and non-appealable. The Coalition proposal is "just and reasonable" because it reduces unnecessary litigation and disruption to CLECs and their customers during periods in which the law is in flux and the UNEs designated for withdrawal could be restored.

2. Fiber to the Home ("FTTH") Loops (TRO Attachment § 3.1.2), Hybrid Loops (TRO Attachment § 3.1.3-.4), and Line Sharing (TRO Attachment § 3.2)

55. Verizon's Position: The language in Verizon's amendment seeks to implement its interpretation of the new rules regarding these facilities.

56. Proposed Revisions: The Commission should revise Section 3.1.2.2, Overbuilds, to add additional criteria that must be satisfied in order for Verizon to assert that a FTTH loop does not have to be provided on an unbundled basis. The language proposed is derived from paragraph 277 of the *TRO* and from FCC Rule 51.319(a)(3). The proposed change is necessary in order for the Amendment to comply with FCC regulations implementing section 251.

57. Sections 3.1.3.2 and 3.1.3.3, regarding Hybrid Loops, should also be revised to be consistent with applicable FCC Rule 51.319(a)(2)(ii) and (iii). Verizon's proposal misstated language from the rule and, among other things, removed the word "nondiscriminatory."

58. The Commission should revise Section 3.1.4.1, regarding IDLC Hybrid Loops, to remove language regarding a particular non-recurring charge. The section already states that standard recurring and non-recurring Loop charges will apply. Verizon's proposal is not neces-

sary unless the proposed charges are non-standard non-recurring charges, in which case Verizon has no basis to impose them on CLECs. The Coalition proposal is "just and reasonable" because it prevents Verizon from imposing unwarranted and unnecessary expenses on competitive carriers.

59. Section 3.1.4.2, regarding IDLC Hybrid Loops, should require that Verizon must provide unbundled access to hybrid loops served by IDLC systems by using a "hairpin" option; *i.e.*, configuring a semi-permanent path and disabling certain switching functions. This option is required by footnote 855 of the *TRO*.

60. The Commission should delete language from Sections 3.1.4.3 and 3.1.4.4, regarding IDLC Hybrid Loops, that has no basis in the *TRO*. Verizon's proposal requires CLECs to pay for charges that were not authorized by the *TRO*. Further, Verizon's language attempts to shield Verizon from provisioning intervals and performance measurement requirements. None of these proposed provisions are "just and reasonable" because they impose unlawful charges on competitive carriers and they protect Verizon from full compliance with its provisioning obligations.

61. Section 3.2.1 should also be revised to remove the statement that Verizon has no obligation to provide Line Sharing. As indicated by the section itself, Verizon does have a limited obligation to provide Line Sharing. Other language referring to a separate agreement was removed on the grounds that applicable Rule 51.319(a)(1)(i)(B) provides a sufficient basis to determine the rights of the parties regarding Line Sharing. The Coalition proposal would more clearly implement the FCC regulations regarding Verizon's Section 251 obligations.

62. The Coalition has also proposed moving Verizon's definition of Packet Switching from the Glossary to Section 3.1.3.1. This is the only section in the amendment where the term

"Packet Switching" is used. The Coalition has proposed its inclusion here so that it may note that has agreed to this definition only because it was adopted by the FCC in 47 C.F.R. § 51.319(a)(2)(i). The Coalition believes that it is inappropriate to classify DSLAM functionality as "packet switching," and reserves its right to so argue in future proceedings.

E. Subloops (TRO Attachment § 3.3)

63. Verizon's Position: The language in Verizon's amendment seeks to implement Verizon's interpretation of the new rules regarding these facilities.

64. Proposed Revisions: The Commission should require Section 3.3, Subloops, to be substantially revised because Verizon proposed language that had no basis in the *TRO*. The Coalition proposes instead that Verizon be required to provide Subloops to the extent required by any applicable Verizon tariff or SGAT, and any applicable federal and state commission rules, regulations, and orders. Some state commissions, and in particular the New York Public Service Commission, have completed thorough proceedings regarding Subloops, especially regarding House and Riser facilities in multi-tenant buildings. Verizon's proposal would have the effect of rendering all of those proceedings irrelevant. Instead, Verizon should be required to return to those state commissions and seek whatever changes to those state commission requirements that may be necessary, if any, to make them consistent with state and federal law. As discussed above, Verizon is obligated to comply with any additional state law requirements or conditions imposed by state commissions in the course of an arbitration. Verizon's proposal would have the effect of avoiding these obligations.

65. Section 3.1.3.4, Feeder, should be revised to reflect that only fiber Feeder subloops to Mass Market Customers were affected by the *TRO*. The FCC's discussion of fiber Feeder subloops, ¶ 253, was limited to their provision to Mass Market Customers. Accordingly, the Coalition Proposal is consistent with the FCC regulations implementing section 251.

F. Circuit Switching (TRO Attachment § 3.4.1-3.4.2)

66. Verizon's Position: Under Verizon's proposed amendment, CLECs are entitled to obtain unbundled access to mass-market circuit switching as 251(c)(3) and Part 51 require. CLECs may not, however, obtain switching for providing service to enterprise customers or to any customers subject to the "four-line carve out" rule. The draft amendment follows the FCC's transitional rules for CLECs currently obtaining circuit switching to serve enterprise customers by allowing them 90 days to move their customers to alternative service arrangements. In addition, Verizon's proposed language (in Verizon's Section 3.8.1.2) requires it to provide "at least thirty (30) days advanced written notice of the date on which Verizon will cease provisioning Enterprise Switching" to any given CLEC. Verizon also has offered to "continue provisioning Enterprise Switching to the CLEC under the terms of the Amended Agreement during a transitional period, which transitional period shall end on the date set forth in the notice." Finally, the amendment provides that Verizon's obligation to supply mass market switching will end (subject to an applicable "rolling access" plan) if the board issues a finding of non-impairment.

67. Proposed Revisions: The Commission should require Section 3.4, Unbundled Local Circuit Switching, to be revised to require Verizon to provide stand-alone Tandem Switching. Nothing in the *TRO* permits Verizon to avoid its obligation to provide stand-alone Tandem Switching on an unbundled basis. In fact, Rule 51.319(d) requires Verizon to provide non-discriminatory access to local switching, including tandem switching, on an unbundled basis. Verizon's proposal omits this requirement.

68. The section should also be revised to remove the limitation proposed by Verizon that it provide unbundled local circuit switching only to the extent required by Section 251(c)(3) and the FCC local competition rules. Verizon's obligations regarding UNEs are not so limited

because they are derived not only from Section 251(c)(3), but also from other sources, including orders from state commissions imposing additional requirements, FCC decisions outside the context of local competition (such as merger approval orders), and other sections of the Telecom Act (such as Section 271). As discussed above, in order for the Amendment to be consistent with section 251 and the FCC regulations implementing section 251, the language regarding Verizon's obligations to provide UNEs must reflect other requirements imposed by state and federal regulators. In any case, this paragraph is superfluous because the extent of Verizon's obligations is already described in section 1.2 of the TRO Attachment.

69. Further, the word "conditional" in section 3.4.1 should be deleted because it is superfluous. Verizon is obligated to provide switching in accordance with applicable law. There is nothing conditional about this obligation.

70. Section 3.4.2, "Nonimpairment," should be revised to add specificity to the transitional "rolling" access to unbundled switching. This proposed language is derived from Rule 51.319(d)(2)(iii). As revised, the proposed language would be consistent with the applicable FCC regulations.

G. Signaling/Databases (TRO Attachment § 3.4.3)

71. Verizon's Position: The language in Verizon's amendment seeks to implement Verizon's interpretation of the new rules regarding these facilities.

72. Proposed Revisions: Apart from requiring Verizon to offer services pursuant to applicable law (as previously discussed), the Coalition has no other proposed revisions to this section of the Amendment.

H. Interoffice Facilities (TRO Attachment § 3.5)

73. Verizon's Position (Verizon at 19-21): The language in Verizon's amendment seeks to implement its interpretation of the FCC rules established in the *TRO* regarding these facilities.

74. Proposed Revisions: The Commission should revise Section 3.5.2.1, Dedicated Transport, and Section 3.5.3, Dark Fiber Transport, to include interoffice facilities between a Verizon wire center and a CLEC wire center if Verizon had deployed interconnection facilities in the CLEC wire center. This concept of "reverse collocation" is discussed above under the definition of "Dedicated Transport" in the Glossary (Section 2), and the change here is appropriate for the same reasons.

75. A new section to the Amendment, 3.5.4, should be added regarding interconnection facilities between a CLEC wire center and the ILEC wire center in which the CLEC has established a point of interconnection ("POI"). The proposed language makes clear that interconnection facilities and equipment provided pursuant to section 251(c)(2) are not UNEs provided pursuant to section 251(c)(3), and the rights and obligations applicable to § 251(c)(3) UNEs are not applicable to § 251(c)(2) interconnection facilities. This result is made clear by paragraph 365 of the *TRO*. The FCC explained that "transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic" were "[u]nlike the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection." Thus, the FCC distinguished facilities provided as UNEs under section 251(c)(3) from interconnection facilities provided under section 251(c)(2).

76. Even though section 251(c)(2) interconnection facilities are not UNEs, they must be provided under the same pricing principles as UNEs. They are also subject to the same section 252 arbitration provisions as UNEs, so it is appropriate to deal with them in this proceed-

ing. Section 251(c)(2)(D) requires interconnection facilities to be provided "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with ... the requirements of this section and Section 252." This is identical to the pricing standard for UNEs found at section 251(c)(3), which must be provided "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with ... the requirements of this section and Section 252." The pricing standards under Section 252(d)(1) apply specifically and equally to section 251(c)(2) interconnection facilities and section 251(c)(3) network element charges. The pricing standard developed by the FCC to implement section 252(d) is TELRIC. Thus, the facilities provided by Verizon to interconnect in order to exchange traffic with a CLEC, such as interconnection trunks between a Verizon wire center and the CLEC wire center, are interconnection facilities under section 251(c)(2) that must be provided at TELRIC.

77. The Coalition proposes adding new subsections 3.5.3.1.1 and 3.5.3.1.2 to set forth terms necessary for the effective implementation of Verizon's dark fiber transport unbundling obligations, including terms for accurate determination of available facilities through a Dark Fiber Inquiry process and field surveys. These terms are based upon the FCC's determinations in the Cavalier-Verizon Virginia arbitration.[38] These terms were ordered by the FCC in an arbitration proceeding conducted under section 252 and are consistent with section 251 and 252 of the Act.

I. Combinations and Commingling (TRO Attachment § 3.6)

78. Verizon's Position: Verizon's amendment seeks to implement Verizon's interpretation of the FCC rules established in the *TRO* regarding these facilities.

[38] *FCC Cavalier Arbitration Decision*, ¶¶ 103-113.

79. Proposed Revisions: The Coalition proposes that Section 3.6.1, Commingling, be revised to be consistent with the *TRO*. First, language proposed by Verizon regarding prohibitions on commingling has been deleted as unnecessary. To the extent commingling is prohibited in the future, the Agreement can be modified under the terms of the change-of-law provisions. As a result, the Coalition proposal is just and reasonable. Second, Verizon's proposal to impose a non-recurring charge for commingling of elements has been deleted because such charges are specifically prohibited by paragraph 587 of the *TRO*. Third, Verizon's proposal that provisioning intervals or performance measurements not apply to commingled network elements has been deleted because there is no basis in the *TRO* for the language proposed by Verizon. There is no reason to treat commingled network elements apart from other network elements in terms of provisioning intervals or performance measurements. Verizon's proposal does not satisfy its obligation to offer just and reasonable terms of service.

80. The Commission should revise Section 3.6.2.1, regarding service eligibility criteria, to reflect that EELs that were provided prior to October 2, 2003 are not required to satisfy the eligibility criteria established by the *TRO*. As discussed above, paragraph 589 of the *TRO* makes clear that the FCC envisioned two tracks of EELs eligibility.

81. Section 3.6.2.2 must be substantially revised to be consistent with the *TRO*. In this section, Verizon seeks to impose onerous eligibility requirements that a CLEC must satisfy before it may obtain EELs. Nothing in the *TRO* requires a CLEC to provide the sort of information demanded by Verizon. A CLEC is only required to certify that it satisfies the eligibility criteria of Rule 318(b) for each DS1 circuit or DS1 equivalent. If Verizon seeks to contest the CLEC certification, it may exercise its audit rights. The changes proposed are necessary to make the Amendment consistent with the *TRO*.

82. Section 3.6.2.3 should be deleted in its entirety and Section 3.6.2.5 should be revised to remove references to certain non-recurring charges related to EELs. In these sections, Verizon seeks to impose a type of non-recurring charge that was specifically prohibited by paragraph 587 of the *TRO*.

83. Section 3.6.2.6 should also be deleted in its entirety. In this section, Verizon seeks to exclude all conversions of special access circuits into EELs from provisioning intervals and performance measurement requirements. To the extent such requirements apply to EEL conversions, nothing in the *TRO* permits Verizon to treat them as Verizon proposes. Verizon's proposal is not just and reasonable because it seeks to shield Verizon from its provisioning and performance standards.

84. The Commission should also require Section 3.6.2.7, regarding Audits for compliance with the service eligibility criteria, to be substantially revised to be consistent with the *TRO*. First, Verizon is entitled only to one audit of a CLEC's books in a 12-month period, not once per calendar year as Verizon has proposed. The *TRO* refers to an "annual audit." *TRO* ¶ 626. In order for an audit to be considered "annual," a full year would have to elapse between audits. Under Verizon's proposal, Verizon could audit a CLEC's books in December, and then audit again in January of the following year. In that case, the two audits would be separated by a month, not by a year as the term "annual audit" requires. Second, Verizon's proposed allocation of responsibilities of payment for the auditor is not consistent with the *TRO*. Verizon's proposal was biased in Verizon's favor, and thus not just or reasonable. Third, Verizon's proposal that a CLEC keep books and records for a period of eighteen (18) months is not supported by anything in the *TRO*. The proposed interval is unreasonably long and unduly burdensome.

J. Routine Network Modifications (TRO Attachment § 3.7)

85. Verizon's Position: Verizon's proposed Section 3.7 offers a minimalist and incomplete reflection of the FCC's clarification of its rules in the *TRO* that reaffirmed Verizon's obligation to perform routine network modifications on behalf of CLECs on a nondiscriminatory basis pursuant to Section 251.

86. Proposed Revisions: The Coalition has proposed more detailed terms to better assure the effectuation of the requirements of the Act as reemphasized by the *TRO*.[39] Verizon's well-established record of evasion of its obligations, which the FCC explicitly condemned in the *TRO*, necessitates more detailed rules to enable verification and enforcement of Verizon's obligations. See *TRO* at fn. 1940, finding Verizon's policy "discriminatory on its face."

87. Accordingly, the Coalition's proposed Section 3.7.1 more clearly reflects Verizon's legal obligations. The Commission should reject Verizon's apparent attempt to continue to discriminate in provisioning of Dark Fiber Loop and Transport UNEs, and adopt the Coalition's terms that apply the nondiscrimination terms to all elements. *See TRO* at ¶ 638 (finding that the network modification rules apply to all transmission facilities, including dark fiber).

88. In addition, the Commission should reject Verizon's attempt to double-recover its supposed costs for performing routine network modifications. While the *TRO* permits Verizon to recover its costs, it recognizes that these costs are often already recovered by an ILEC's recurring UNE rates. The FCC found that "costs associated with modifications may be reflected in the carrier's investment in the network element, and labor costs associated with modification

[39] As stated in Section I of this Response, Verizon's obligation to perform routine network modifications was required by existing law prior to the release of the *TRO*, and therefore is not an appropriate subject for arbitration under change-of-law clauses. The Commission should delete proposed Section 3.7 from the amendment for this reason. By submitting alternative language for the Commission's consideration in the event that it does not dismiss Verizon's Petition, the Coalition does not waive its argument that this language is not properly subject to arbitration.

may be recovered as part of the expense associated with that investment (*e.g.*, through application of annual charge factors (ACFs))." Continuing, the FCC held that its "rules make clear that there may not be any double recovery of these costs ...." *TRO* at ¶ 640. The Virginia State Corporation Commission has already rejected Verizon's attempt in the *TRO* Amendment to impose additional charges for network modifications, finding that Verizon's costs for these routine modifications are already built into its existing UNE rates and therefore must be provided at no additional charge. *See Petition of Cavalier Telephone*, Case No. PUC-2002-00088 (Virginia S.C.C. January 28, 2004) at 8.

89. The Commission should also reject Verizon's baseless proposal in Section 3.7.2 to exempt UNEs requiring routine modifications from the performance plan adopted by the Commission. It would be nonsensical to abandon the performance plan, one of the Commission's principal mechanisms for curbing discrimination, for a category of UNEs for which Verizon has been singled out by the FCC for its record of intentional discrimination. Verizon's proposal is tantamount to a suggestion that corporations found guilty of securities fraud should receive a special exemption from further SEC investigations. Thus, the Commission should deny Verizon's thinly-veiled attempt to continue its practice of discrimination with respect to network modifications, and should instead adopt the Coalition's modified version of Section 3.7.2.

90. In view of Verizon's record of discrimination and evasion of its obligations, the Commission should adopt additional measures to reduce the likelihood that a CLEC UNE request will continue to be improperly denied on the basis of no facilities. In view of the FCC's clarification of Verizon's obligation to perform routine network modifications, rejected orders should be at most a rare occurrence. Under the Coalition's proposed Section 3.7.3, if Verizon

rejects a UNE request on the basis of no facilities, it would be required to provide detailed information, including the location of all facilities that were reviewed in making the determination; a description and estimated cost of non-routine modifications that would be necessary to fulfill the UNE request, and a proposed timetable and charge to the CLEC for the non-routine modifications that would be sufficient to provision the requested facility. This exercise will reduce the probability of error, assist all parties in the identification of alternative solutions, and facilitate enforcement by greatly increasing the transparency of the process.

91. The Coalition's proposed Section 3.7.4 would serve as an additional protective measure to ensure that Verizon does not continue to unlawfully discriminate against CLECs. Where a CLEC UNE request is denied on the basis of no facilities available, Verizon would for a 24-month period have a continuing obligation to advise the CLEC within 60 days if and when Verizon later provides any retail or wholesale services to any customer at the same premises that were the subject of CLEC's request using facilities that were, at the time of the CLEC request, deemed unavailable to CLEC. This notification shall include, at a minimum, a description of all work that was performed in the interim period that enabled service to be offered over the facility. In the absence of such a provision, it would be extremely difficult for CLEC and the Commission to identify and prosecute instances in which Verizon has unlawfully discriminated in its provisioning. If Verizon fails to so notify CLEC, or if it can subsequently be determined by Verizon, the CLEC or the Commission that the facility should have been made available to the CLEC at the time of its request, Verizon shall pay to CLEC a performance remedy of $1000 per incident, in addition to and not exclusive of all other available remedies.. Given Verizon's record of noncompliance, meaningful and enforceable penalties are necessary to incent Verizon to comply with its obligations.

K. Section 271 Obligations (TRO Attachment New Section § 3.8)

92. Verizon's Position: Verizon did not propose terms to govern its obligations under Section 271 of the Act.

93. Proposed Revisions: The Coalition has proposed terms to secure its rights under Section 271(c)(2)(B) of the Act with respect to facilities that Verizon is no longer required to offer under Section 251. Inclusion of these terms in the interconnection agreement is necessary to enable reasonable transition terms for affected UNEs. Verizon's exclusion of these terms from the proposed Amendment is merely the latest incantation of its position that Section 271 does not impose any independent obligation to provide access to certain network elements. Verizon's position has been repeatedly rejected by the FCC, most recently in the *TRO*. *See TRO* ¶ 653 ("we continue to believe that the requirements of Section 271(c)(2)(B) establish an independent obligation for the BOCs to provide access to loops, switching, transport and signaling regardless of any unbundling analysis under Section 251."); *see also TRO* at ¶¶ 652, 654-655 (rejecting Verizon's arguments).

94. The Coalition proposes in Section 3.8.2 the continued utilization of the TELRIC-based rates set forth in the parties' Agreement for network elements provided pursuant to Section 271. The Coalition is mindful of the FCC's determination in the *TRO* that state commissions are not required to apply the pricing standards of Section 252 to these facilities. However, Verizon has not proposed alternative rates in its Amendment, nor has it provided any cost support information to establish that different rates would be just and reasonable as required by the *TRO*. Therefore, the rates established by the Commission in its prior UNE cost proceedings, which are already a part of the parties' Agreements, remain the most suitable, presumptively lawful pricing scheme available for the Commission to adopt in this proceeding. Given that existing contract rates are a viable alternative, it would be unnecessary and inefficient for the Commission to

conduct a new evidentiary cost proceeding for these network elements, especially when Verizon has not even proposed rates or a cost study. The Coalition's Section 3.8.2 therefore should be adopted.

95. Finally, in Section 3.8.3, the Coalition proposes that Verizon continue to be required to provide combinations of network elements provided pursuant to Section 271. Even if these elements are not subject to nondiscrimination standards of Section 251, they remain subject to the requirements of state law and of Sections 201 and 202. Any refusal to provide such combinations to CLECs, even as it performs them for its own affiliates and operations, would be unreasonable and discriminatory in violation of these applicable standards. The Coalition's Section 3.8.3 is necessary to ensure that Verizon's provisioning of Section 271 elements is reasonable and nondiscriminatory.

L. Non-Conforming Facilities (TRO Attachment § 3.9 (Verizon Section § 3.8))

96. Verizon's Position: The language in Verizon's amendment seeks to establish transition rules for facilities that are no longer available as UNEs; *i.e.*, where CLECs are deemed not impaired without access to the facilities.

97. Proposed Revisions: The CLEC coalition proposes substantial revisions to Section 3.9.2, Other Nonconforming Facilities, to provide a reasonable transition period for UNEs that are no longer to be provided on an unbundled basis. The FCC "expect[ed] states will require an appropriate period for competitive LECs to transition from [UNEs] that the state finds should no longer be unbundled. *TRO* ¶¶ 339, 417. Verizon's proposed transition terms are inadequate and unreasonable.

98. Section 3.9.2 modifies Verizon's proposed Section 3.8.2 to create a series of prerequisites before Verizon could revoke a CLEC's existing unbundled access to a facility. First, Verizon should be required to wait until the elimination of a particular UNE was final and non-

appealable. While the *TRO* urges timely implementation of its terms, actions that strip existing UNEs from CLECs while appeals remain pending would only produce unnecessary litigation, confusion and disruption. As demonstrated most recently by the D.C. Circuit's *USAT II* decision reversing and remanding portions of the *TRO*, rushed implementation while appeals remain pending would likely result in premature deprivation and disruption that would disserve the purposes of the Act or the public interest. Second, the section should require Verizon's notification letter to identify Nonconforming Facilities individually by circuit identification number for circuits, or other comparable identifying descriptions for other facilities. In the absence of such a requirement, it would be more likely that Verizon would make errors in the designation of Nonconforming Facilities, and more likely that CLEC would misinterpret which facilities were in fact scheduled for transition. Provision of this information would assist all parties and would reduce the likelihood that disputes and complaints would need to be brought to the commission. Third, for facilities that can be converted to an alternative Section 271 offering or a special access service, Verizon should be required to continue to provide the UNE for at least 90 days after providing notice to the CLEC; for all other facilities, Verizon must continue to offer the facility for at least 180 days, to allow the CLEC a reasonable opportunity to procure or construct alternative facilities. Fourth, where Nonconforming Facilities are terminated or are converted to alternative arrangements, Verizon should be prohibited from charging the CLEC for conversion or termination fees for this involuntary conversion, or for installation of the "new" converted service. Verizon will have been compensated once for installing the facility, and should not be compensated a second time for making a mere billing conversion. Fifth, Verizon should be prohibited from terminating any UNE if there is a pending dispute as to whether the UNE is Nonconforming. Under Verizon's proposal, a CLEC would have no timely recourse if Verizon

were to make an erroneous designation of a facility as Nonconforming. The Coalition proposal would prevent Verizon from terminating the UNE pending resolution of CLEC's good faith challenge to the designation.

99. Verizon's proposed section 3.8.3 regarding Nonconforming Facilities should be deleted in its entirety as being inconsistent with the requirements of the Act. Verizon proposes that any negotiations to provide a service or facility to replace a nonconforming facility should not be considered a negotiation under Section 251 of the Act, and therefore not subject to arbitration under Section 252. The *TRO* expressly affirmed the negotiation and arbitration process of Section 252 as the appropriate means of implementing any changes to the parties' agreements with respect to unbundled network elements. See *TRO* ¶ 701.

M. Pricing Attachment to TRO Amendment

100. Verizon's Position: The language in Verizon's Pricing Attachment seeks to implement the FCC rules established in the *TRO* regarding these facilities.

101. Proposed Revisions: Because Verizon's costs for routine network modifications are already recovered by their existing TELRIC cost studies that were used to calculate UNE rates under the Agreement, as discussed under Section 3.7 above, a Pricing Attachment is unnecessary. In the event that the Commission concludes that existing TELRIC rates do not contemplate a particular type of modification, the Coalition proposes that the Commission establish an interim rate of zero for all modifications (subject to true-up) and open a separate, generic TELRIC proceeding to determine appropriate permanent rates for Verizon's performance thereof.

CONCLUSION

102. The Commission should dismiss this proceeding and/or portions of Verizon's Petition for the reasons set forth in Section I of this Response. Alternatively, the Commission should adopt the amendment proposed by the Competitive Carrier Coalition.

DATED this 13th day of April, 2004.

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ATTACHMENT 1

Competitive Carrier Coalition's Proposed Alternative to Verizon's Proposed TRO Amendment