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July 15, 2003

VIA HAND DELIVERY

Blanca S. Bayo, Director
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Re: Docket No.: 020960-TP

Dear Ms. Bayo:

On behalf of DIECA Communications, Inc. d/b/a Covad Communications Company (Covad), enclosed for filing and distribution are the original and 15 copies of the following:

- DIECA Communications, Inc. d/b/a Covad Communications Company's Notice of Filing Supplemental Authority.

Please acknowledge receipt of the above on the extra copy and return the stamped copy to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Arbitration of open issues resulting from interconnection negotiations with Verizon Florida, Inc. by DIECA Communications, Inc. d/b/a Covad Communications Company.

Docket No.: 020960-TP
Filed: July 15, 2003

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DIECA Communications, Inc. d/b/a Covad Communications Company's Notice of Filing Supplemental Authority

DIECA Communications, Inc. d/b/a Covad Communications Company (Covad) hereby files this Notice of Supplemental Authority. Attached hereto is the Arbitration Order of the New Public Service Commission in the arbitration proceeding between Covad and Verizon New York, *Petition of Covad Communications Company, Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York, Inc.*, Case 02-C-1175, entered on June 26, 2003, after the conclusion of the hearing in this case.

COVAD COMMUNICATIONS COMPANY

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing DIECA Communications, Inc. d/b/a Covad Communications Company's Notice of Filing Supplemental Authority has been provided by (*) hand delivery (**) electronic mail or (***) U.S. Mail this 15th day of July 2003, to the following:

(*) (**) Lee Fordham
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Vicki Gordon Kaufman

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 02-C-1175 - Petition of Covad Communications Company, Pursuant to Section 252 (b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York Inc.

ARBITRATION ORDER

Issued and Effective: June 26, 2003

TABLE OF CONTENTS

TABLE OF CONTENTS

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of New York on June 18, 2003

COMMISSIONERS PRESENT:

William M. Flynn, Chairman
Thomas J. Dunleavy
James D. Bennett
Leonard A. Weiss
Neal N. Galvin

CASE 02-C-1175 - Petition of Covad Communications Company, Pursuant to Section 252 (b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York Inc.

ARBITRATION ORDER

(Issued and Effective June 26, 2003)

BY THE COMMISSION:

INTRODUCTION

On September 10, 2002, Covad Communications Company filed a petition for arbitration, pursuant to §252 of the Telecommunications Act of 1996 (the 1996 Act), of open issues in its interconnection negotiations with Verizon New York Inc. Verizon filed its response on October 5, 2002. Following discovery, exchanges of pleadings and an on-the-record technical conference, the parties have stipulated that the formal request for arbitration was submitted such that the deadline for this decision is August 12, 2003.

Covad initially identified 42 issues for arbitration. Through continued negotiations and the discussion at the technical conference, many of those issues have been resolved, and only 21 issues are presented here for decision. (An additional issue, number 30, has been deferred by agreement of

the parties until after we reach our decision in Case 00-C-0127, related to DSL over digital loop carrier.)

To clarify the matters to be considered at the technical conference noted above, the parties submitted two rounds of briefs before the conference. The conference was held on February 4, 2003 before Administrative Law Judge Joel A. Linsider, joined by John Graham and Michael Rowley of Department of Public Service Staff. Subject matter experts for both parties were sworn, and the record of their discussion comprises 300 pages of stenographic transcript. Following the conference, the parties were invited to exchange "best and final offers," and briefs and reply briefs on all open issues ensued.[1] Each party's brief is accompanied by the jointly prepared "Revised Proposed Language Matrix," setting forth the final version of their competing proposed contractual wording for each of the outstanding issues.

The interconnection agreement (the Agreement), most provisions of which have been agreed to by the parties, comprises 50 sections, a Glossary, and several attachments. Disputed passages appear in the agreement-in-chief as well as in the Glossary, the Additional Services Attachment, the Unbundled Network Elements (UNEs) Attachment, and the Pricing Attachment.

OVERVIEW OF PARTIES' POSITIONS

Covad

Covad identifies what it considers to be two overarching issues: (1) Verizon's refusal to include in the interconnection agreement many items on which the parties agree substantively; and (2) Verizon's efforts to deny Covad a customized interconnection agreement suited to Covad's unique status as a carrier that specializes in offering advanced broadband and DSL services.

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[1] The pre-conference briefs and the technical conference did not consider issues identified at the outset as legal rather than factual. Those issues are treated for the first time in the post-conference briefs.

With respect to the first issue, Covad insists that it needs the protection afforded by memorializing Verizon's obligations in the contract instead of relying on Verizon's acknowledgement of a statutory requirement. It sees a risk of future litigation if the contractual wording is omitted, particularly given what it characterizes as Verizon efforts to limit its statutory obligations.

As for the second issue, Covad asserts its legal right to an agreement that conforms to its business needs. Noting Verizon's contentions that our policy of uniform treatment for industry participants suggests deferring various issues to other forums (such as the Carrier-to-Carrier Working Group and the Billing and Collections Task Force), Covad insists that doing so would undermine the negotiation and arbitration process contemplated by the 1996 Act. It maintains its special needs, as a broadband and DSL carrier, must be taken into account.

Verizon

Verizon asserts that the open issues relate to two broad areas: the parties' business relationship and the scope of Covad's right to access to Verizon's network. It maintains, with respect to both sets of issues, (1) that Covad is seeking accommodations unauthorized by the 1996 Act and that we are powerless to impose and (2) that Covad is seeking to relitigate, without showing unique distinguishing characteristics, matters already resolved in multilateral proceedings. It cites in this regard our Verizon/AT&T arbitration order, where we held that

> AT&T and other CLECs should obtain access to Verizon's dark fiber facilities pursuant to the tariff provisions that have been implemented consistent with the requirements of the UNE Remand Order. AT&T has not shown any unique circumstances that distinguish it from other CLECs. Consequently, the new agreement need only incorporate by reference the applicable tariff provisions.[2]

[2] Case 01-C-0095, Verizon-AT&T Interconnection Agreement, Order Resolving Arbitration Issues (issued July 30, 2001)(the AT&T Order), pp. 66-67.

Discussion

There is no need to deal in general terms with Covad's overarching issues. Questions of how much wording to incorporate into the agreement and how to balance the interest in uniformity with the interest in recognizing a particular company's particular needs--matters best resolved, in the first instance, by agreement of the parties--can be dealt with item by item. Accordingly, in the remainder of this order, we consider and resolve the issues one by one. For convenience only, we will follow the issue categories supplied by Verizon. As a final introductory matter, we stress that our paraphrases of the parties' proposed contract provisions are intended only to help the reader understand the issue and do not necessarily set forth all terms of those provisions. Where we resolve an issue in favor of one party's wording or the other's, it is the actual proposed wording and not our paraphrase that governs.

CHANGE OF LAW--ISSUE 1

Verizon proposes, for §4.7 of the Agreement, wording that would permit it to discontinue, after a 45-day transition period, any service or other benefit under the agreement if a change of law (statutory, regulatory, or judicial) terminated its obligation to provide it. Covad's wording would require continued performance under the contract during any renegotiation or dispute resolution unless it were determined by us, by the FCC, or by a court that the contract must be modified to bring it into compliance with the 1996 Act. A corresponding dispute pertains to §1.5 of the UNE Attachment, related to termination of a UNE or UNE combination in the event the legal obligation to provide it is ended by change of law.

Verizon contends we are obligated, under federal law, to resolve disputes over interconnection terms in accordance with federal law as it exists at the time of decision. Because federal law changes over time, a contractual provision such as the one it proposes is needed to eliminate discriminatory inconsistencies among interconnection agreements entered into at various times and ensure that all CLECs stand on an equal

footing. Arguing that Covad's wording could contractually obligate Verizon to continue providing a service indefinitely, even after its legal obligation to make the service available had been terminated, Verizon argues that its proposed 45-day transition period fairly balances its own interest in terminating the service against Covad's interest in stability. In Verizon's view, the matter has become even more important with the impending release of the FCC's order in its Triennial Review proceeding, whose provisions will be subject to judicial review and possible modification after the agreement at issue here is entered into.

Verizon acknowledges that, in the AT&T Order, we approved wording identical to that now proposed by Covad. We there found it "provides suitable procedures for continuing services when further negotiations and disputes occur"; Verizon "respectfully disagrees" with that conclusion.[3]

In support of its proposal, Covad cites our decision in the AT&T Order as well as the FCC's rejection, in the Virginia Arbitration Award,[4] of wording proposed by Verizon that resembled Verizon's wording here. It notes that agreed-upon §4.6 of the Agreement commits both parties, in the event of change of law, to renegotiate in good faith with the aim of conforming the Agreement to applicable law, and it asserts that Verizon's proposed §4.7 would one-sidedly allow Verizon to discontinue service pending such renegotiation, on the basis of its own interpretation of the changed law, 45 days after the change occurs. It suggests its status as a broadband and DSL carrier may lead to uncertainty about the applicability of various pertinent legal decisions, making interpretation

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[3] AT&T Order, p. 8; Verizon's Initial Brief, p. 5, fn. 5.

[4] Petition of WorldCom, Inc. 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 Expedited Arbitration, CC Docket Nos. 00-218 & 00-249, Memorandum Opinion and Order, DA 02-1731, §717 (Chief, Wireline Competition Bureau, rel. July 17, 2002)("Virginia Arbitration Award").

particularly important, and asserts Verizon has a history of interpreting decisions in its favor broadly while interpreting unfavorable decisions narrowly.

Covad's own proposal, it argues, properly maintains the status quo until any disputes over the implications of a change of law are resolved. Moreover, because the wording is included in the AT&T agreement, implicates no other provision of the AT&T agreement, and is no more costly to implement here than in AT&T, Covad asserts it is entitled to the wording under the "opt-in" provision of §252(i) of the 1996 Act.

Finally, Covad urges rejection of Verizon's wording in §1.5 of the UNE Attachment, which allows Verizon to terminate the provision of any UNE that it no longer is bound to provide under applicable law. It contends that all change of law situations should be addressed under §§4.6 and 4.7, and that the special provision for UNEs introduces uncertainty and ambiguity.

Verizon responds that "opt-in" is an alternative to arbitration that Covad had not previously pursued and that, in any event, it applies only to agreements' substantive provisions, not their procedural ones. It notes that the Virginia Arbitration Award was issued by the Wireline Competition Bureau rather than the FCC itself and is based on the specific record of that case. It sees little if any risk of ambiguity in whether an order terminates a legal obligation; objects to being held to the obligation pending resolution of any ambiguity that might arise; and charges that the indefinite delay made possible by Covad's wording gives Covad the incentive to adopt unreasonable interpretations of an order solely to prolong its access to the element or service at issue--something that Covad, in turn, suggests Verizon has done in order to avoid offering an element or service. Verizon defends its wording in §1.5 as needed to clarify that the §4.7 procedures apply to orders terminating the obligation to provide a UNE or UNE combination.

While Verizon may be right that Covad cannot now request to opt in to the provision of the AT&T contract, the fact remains that our decision in the AT&T Order,

notwithstanding Verizon's arguments to the contrary, fairly balances the interests at stake. Verizon's assurance that there would be little if any ambiguity in whether an order terminates an obligation gives too little credit to the resourcefulness and persistence of parties to these disputes and their advocates, and the sort of protection Covad seeks is not unreasonable. We see no need to depart from our decision on this issue in AT&T, and Covad's wording should be included.

BILLING ISSUES

Back-Billing (Issues 2 and 9)

Covad urges inclusion, as §9.1.1 of the Agreement, of a provision stating that "neither Party will bill the other Party for previously unbilled charges that are for services rendered more than one year prior to the current billing date." Conforming cross-references to that limitation would be included as well in §9.5 (failure to bill timely does not effect a waiver) and §48 (failure or delay in asserting remedies does not effect a waiver). Verizon would omit that clause, effectively allowing back-billing, pursuant to the generally applicable statute of limitations (in CPLR §213(2)), to reach back six years.

Asserting that the one-year limitation is consistent with our regulations[5] and FCC precedent, Covad maintains the uncertainty associated with more far-reaching exposure would impair relations with its own customers--the ultimate billed parties--and impede its ability to certify its financial statements as required by the SEC. It objects to deferring the matter to the Billing and Collection Task Force, as Verizon

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[5] Covad recognizes that our regulations do not specify the maximum back-billing period for non-residential telephone customers. It points, however, to 16 NYCRR 13.9, which limits back-billing of a commercial gas, electric, or steam customer to a one-year period, unless the utility can show that the customer knew or should have known the initial bill to have been incorrect, and 16 NYCRR 609.10 (telephone) and 11.14 (gas, electric and steam), which limit back-billing of residential customers to two years.

suggests, pointing to a February 5, 2003 letter from Secretary Deixler advising the parties to that proceeding that back-billing limitations should be addressed in interconnection negotiations. The six-year statute of limitations provided for in the CPLR, Covad continues, applies only where the matter is not otherwise dealt with by contract, and it contends the courts have sustained our authority to require a shorter period.[6]

Covad asserts we have held the back-billing limitations to strike the proper balance between the utility's right to payment for services and its obligation to bill accurately. It disputes the significance of Verizon's claim that it backbills beyond one year only rarely, and it argues, again contrary to Verizon's claim, that it has demonstrated the adverse effect of back-billing on its operations: recouping backbilled charges from the end-user is difficult; the prospect of backbilled charges affects the finality of SEC filings; and back-billing exacerbates existing problems with Verizon's billing, such as unsupported charges, misapplied credits, and dilatory dispute resolution.

Verizon contends that New York's six-year statute of limitations applies, as a matter of both state and federal law, unless the parties voluntarily agree to something different. It asserts the 1996 Act gives us no authority to depart from the generally applicable state statute of limitations and that FCC decisions pointed to by Covad involved the billing of end-user customers, not other carriers; Covad's reply brief disputes the latter point.

In any event, Verizon continues, Covad has established no facts that would warrant such a departure even if authorized. Verizon notes Covad could identify only a single instance, which took place 18 months ago, of back-billing beyond a year; points to our statement, at the end of the Billing Task Force proceedings, that back-billing did not now pose a substantial

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[6] It cites Glens Falls Communication Corporation v. PSC, 667 N.Y.S.2d 793 (1998).

problem;[7] and asserts the record here shows no basis for departing from that finding. It argues the New York courts have held the CPLR's six-year statute to apply to inter-utility back-billing,[8] and it asserts it has every incentive to bill promptly and that the only question is the point at which Covad should enjoy a windfall if it fails to do so.

In its reply brief, Verizon argues that Covad misreads Glens Falls Communication, which held merely that CPLR §213(2) applied only to contracts and did not preclude our limiting an overcharge recoupment to two years when the claim arose from a tariff rather than a contract. It again cites the Secretary's letter deferring the back-billing issue to interconnection agreements, but takes it as reflecting our determination that back-billing was not a substantial enough problem to warrant generic resolution.

Covad, in its reply brief, reiterates the need to limit back-billing in order to ensure finality of financial figures for purposes of SEC filings.

Verizon is right that in the absence of special provisions, the six-year statute of limitations provided for in the CPLR governs. There is no generic provision departing from the six-year statute in the context of interconnection agreements, and Covad's one instance of a serious difficulty provides no basis for requiring a specific departure from the six-year statute in its case. Verizon's proposed wording should be used.[9]

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[7] Case 00-C-1945, letter from Secretary Deixler (February 5, 2003).

[8] It cites Capital Props. Co. v. PSC, 91 A.D.2d 726, 457 N.Y.S.2d 635 (App.Div. 1982).

[9] In so holding, we do not necessarily accept all of Verizon's arguments in support of its position. In particular, we are unpersuaded that we lack jurisdiction to vary the six-year period.

Timing of Responses to Billing Claims (Issue 4)

Covad would include, in the billing dispute provisions of the Agreement (§9.3), a requirement that the billing party acknowledge receipt of a notice of disputed amounts within two business days and provide an explanation of its position within 30 days. Verizon would omit the requirement.

Both parties recognize that similar requirements are imposed by the interim Carrier-to-Carrier (C2C) guidelines,[10] expected to be put into final form and presented for our approval before long. Verizon maintains that should suffice; Covad sees a need for contractual language to deal not only with transactions not encompassed by the C2C guidelines but also to provide added incentive for compliance with the guidelines where applicable.

More specifically, Covad contends Verizon often fails to meet these deadlines. It asserts that in the Verizon East region, the average time to resolve billing claims is 221 days for high-capacity access/transport; 95 days for resale/UNE, and 76 days for collocation; at the time of briefing it had more than 10 billing disputes in New York that had been open longer than 30 days.[11] Verizon responds that Covad has identified no instance in which it failed to respond to a claim within 28 days; it suggests the fact that a claim remains open may simply mean that Covad has not accepted Verizon's response and has escalated the claim to higher levels.

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[10] Metrics BI-3-04 and BI-3-05 require, respectively, that 95% of CLEC billing claims be acknowledged within two business days and resolved within 28 calendar days after the acknowledgement is sent. That response time may be more generous than the one proposed here by Covad, which requires a substantive response within 30 days after the dispute is received. Covad regards the additional rigor as a minor change warranted in any event by Verizon's past performance; Verizon sees it as more substantial and wholly unjustified. Verizon notes as well that Covad's proposal here omits the 95% standard as well as various other provisions and exclusions in the metric.

[11] Covad's Post-Conference Initial Brief, p. 19.

At the technical conference, the Judge distinguished between disputes covered by the metrics--as to which he believed Covad bore the burden of showing why the metrics did not suffice--and those not covered by the metrics, which he regarded as properly treated by the Agreement.[12] With respect to the former, Covad insists Verizon's dilatory responses to UNE billing claims have resulted in misapplication of payments, unnecessary late fees, and potentially unwarranted service disconnections. Among the items in the latter category are access services, with respect to which Verizon urges deferral of the issue to the Carrier Working Group (CWG); Covad, however, sees a need for standards to be applied now, given the uncertainty regarding whether and when the CWG will reach consensus. Covad points as well to an apparent disagreement over whether collocation and transport disputes are covered by the metrics, seeing that as further warrant for dealing with the matter in the interconnection agreement. Verizon responds that collocation and transport are subject to the metrics except insofar as they are offered as well pursuant to Verizon's access tariffs, which are independent of Verizon interconnection obligations under the 1996 Act. To the extent they are so offered, Verizon argues, billing disputes are raised pursuant to the tariff, not this Agreement.

More generally, Verizon takes the position that the issue is being resolved on an industry-wide basis and that Covad has shown a need neither for special treatment nor for copying the performance metrics into the interconnection agreement. On the contrary, Verizon argues, including the metrics in the Agreement would be prejudicial in the event we were later to change the rules of general applicability; Covad responds that any such changes could be handled pursuant to the Agreement's change of law provisions, which Verizon has not shown to be inadequate. Covad contends as well that we rejected, in the AT&T Order, Verizon's objection to including performance measurements in interconnection agreements; Verizon would

[12] Tr. 217.

distinguish that case as involving pre-existing metrics already in place pursuant to the parties' previous agreement.

Verizon also sees no need for potential payments beyond those for which it would be liable under its Performance Assurance Plan (PAP). As for services not covered by the C2C standards, Verizon contends they should be considered in the CWG, to which Covad is free to bring them.

Parties are free to agree on service quality metrics that differ from those we set generically and to include those agreed-upon metrics in their interconnection agreements. Where parties fail to agree, however, the metrics set generically should apply, for they represent the best result of a process designed to take account of and balance the various interests at stake. The parties here have not reached agreement on departures from the general carrier-to-carrier metrics, and those metrics, accordingly, should govern to the extent they apply; prospective changes in those metrics should be handled through the Agreement's change-of-law provisions.

As for items not covered by existing performance metrics, Verizon is right to favor their being treated through the Carrier Working Group, which provides an ongoing opportunity for all participants in the market to address issues like these. In the event Covad believes there are extraordinary circumstances warranting faster action on a specific matter in which it has a unique interest, it should present its concerns to Staff, which will evaluate them and bring them before us if necessary.

Late Payment Charges on Disputed Bills (Issue 5)

Covad would include in §9.4, concerning late payment charges, a provision tolling such charges when Verizon takes longer than 30 days to respond substantively to Covad's dispute of a bill. It also would exclude past late payment charges from the balance on which late payment charges are computed. Verizon objects to both provisions.

Covad regards the tolling provision as adding to Verizon's incentive to respond promptly and as ensuring that it

not profit by its own lapse. It argues, contrary to Verizon's view, that our policy in the retail context does not allow late payment charges on disputed amounts, and it insists that even if late payment charges associated with billings found to be improper are ultimately refunded, Covad still suffers by having to pursue that refund. It stresses that it seeks not the total elimination of late payment charges but only their limitation to 30 days where Verizon takes longer to resolve a dispute.

Verizon asserts its position, which it maintains is consistent with our rules for retail customers, is that where a billing dispute is resolved in Verizon's favor, Covad should be required to pay compounded late-payment charges for the entire period in which the amount owed went unpaid. Covad pointed to the adverse effect on it of a drawn-out dispute that was ultimately resolved partly in its favor, but Verizon insists that case was unusual and that, in any event, it waived the late payment charge there; Covad replies that if that is Verizon's usual practice, it should be reflected in the Agreement. Verizon suggests Covad can avoid late payment charges by paying the bill and then filing the complaint, with a right to refund of any overpayment. Failing that, Verizon maintains it "is not a bank and should not have to finance its competitors' ongoing business operations by providing interest-free, forced loans merely because a competitor filed a billing dispute."[13] Covad insists, however, that "Verizon, as master of the billing process, is the party that can ultimately make the process more seamless and less difficult for all concerned."[14]

Covad is correct that Verizon has greater control than Covad over the pace of billing dispute resolutions, and that where Verizon takes unduly long to resolve a dispute, late payment charges should not continue to accumulate and compound. At the same time, Covad should have a disincentive to filing billing disputes that lack merit. A fair resolution of the conflicting interests here is to adopt Covad's wording but to

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[13] Verizon's Post-Conference Initial Brief, p. 15.

[14] Covad's Post-Conference Reply Brief, p. 8.

toll the accumulation of late payment charges after 60 days rather than after only 30; in that way, Covad will have protection against the truly egregious cases it claims to be concerned about.

DISPUTE RESOLUTION

Submission to Arbitration (Issue 7)

Covad would provide (in a proposed §14.3 of the Agreement) for disputes affecting service to either party's end-users to be submitted to binding arbitration after only five business days of negotiation and for the arbitration to be conducted under the American Arbitration Association's expedited procedures.

Covad contends we have the authority to impose such a requirement (which it maintains is needed in service-related disputes that affect not only the parties to the agreement but also their end-users) and that we did so in AT&T, where we found the agreed-upon ADR process inadequate and required our expedited dispute resolution process to be added as an option that could be elected by either party. It notes our rejection in AT&T of Verizon's argument that parties may not be required to submit to arbitration against their will and points to AT&T's observation in that case that Verizon had unsuccessfully raised the objection in every arbitration in which ADR had been proposed. In Covad's view, the 1996 Act confers the needed authority, inasmuch as the arbitration process it establishes, designed to remedy inadequacies in the negotiation process, would be undercut if a party could not be required to subject itself to provisions to which it objected.

Verizon continues to dispute our authority here, arguing that New York and federal courts have made clear that arbitration is "a matter of consent, not coercion."[15] Noting our statement in AT&T that we "have the authority to require [binding arbitration] provisions in interconnection agreements

[15] Verizon's Post-Conference Initial Brief, p. 16.

established pursuant to the [1996] Act,"[16] it contends that decision did not address the legal issues raised by Verizon and was, in fact, contrary to state and federal law. It insists no provision of the 1996 Act expressly modifies either the Federal Arbitration Act or New York arbitration law and that the 1996 Act states that it does not modify existing law unless expressly provided. Verizon adds that the absence of binding arbitration procedures does not preclude expedited resolution of service-related disputes, inasmuch as either party would be able to invoke our Expedited Dispute Resolution (EDR) procedure.

Covad responds that Verizon raised its legal objections in AT&T and that we nonetheless rejected its position there. It suggests as well that the AT&T Order included EDR as an option available to either party because the regular ADR procedures there provided for were inadequate for prompt resolution of service-related disputes; it says its proposal here, to move to ADR after only five days, would address that concern.

We rejected Verizon's arguments against imposing a dispute resolution process in an interconnection arbitration not only in the most recent AT&T case but also in its predecessor.[17] Verizon has shown no reason to depart here from well-established precedent, and Covad's wording should be adopted.

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[16] AT&T Order, p. 10.

[17] Cases 96-C-0723, et al., New York Telephone Company/AT&T Interconnection, Opinion No. 96-31 (issued November 29, 1996), pp. 61-63. AT&T there argued, persuasively, that we have ample authority under the 1996 Act to adopt a dispute resolution process for an interconnection agreement. It is the intention of the 1996 Act, AT&T maintained, that interconnection agreements achieved under its auspices be effectively implemented (citing 47 U.S.C. §§252(b)(4)(C) and 252(c)(2)), and, AT&T observed, the 1996 Act provides that "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" (47 U.S.C. §252(e)(3)).

Termination (Issue 8)

Verizon's §43.2 would permit Verizon to terminate the Agreement, on not less than 90 days notice, with respect to any operating territory if it sells its operations in that territory to a third person. Covad would modify the provision to allow not termination but only assignment of the agreement to the purchaser of the operations.

Verizon argues that federal law does not require it to condition a sale of its operations on the purchaser's agreeing to assignment of the interconnection agreement. It reasons that once it sells its operations in a particular area, it ceases to be the ILEC with respect to that territory and has no associated interconnection obligations under the 1996 Act. It cites our observation, in AT&T, that such matters are best addressed in our review of any proposed transfer of Verizon's assets under PSL §99(2).

Covad contends Verizon's wording would put it at unwarranted risk, since it can compete effectively only when it has the assurance that Verizon's withdrawal from a territory will not undermine Covad's ability to provide service there. It argues that its own proposed wording is consistent with conditions typically included in a wide range of business contracts, and it maintains that Verizon simply "cannot terminate the agreement upon assignment," for "the assignment of rights to a buyer, as a matter of hornbook assignment law, does not extinguish the obligor's obligation to the obligee, in this instance Verizon's obligations to Covad."[18] Covad adds that the parties discussed, at the technical conference, a requirement that Covad be given 270 days to negotiate a new interconnection agreement with the purchasing carrier but that Verizon never agreed to that proposal. Verizon, in its reply brief, asserts Covad is not now proposing that wording, which, in any event, would be commercially unreasonable; and Covad's reply brief indeed does not mention it.

[18] Covad's Post-Conference Reply Brief, p. 10.

Verizon responds as well that no provision of federal law authorizes imposition of the requirement at issue and again cites AT&T, where we said that, in the event of a sale, it would be reasonable to expect that Verizon would negotiate terms to ensure continued performance. It adds that Covad's proposed language is confusing surplusage, since it is worded permissively and would not prevent Verizon from terminating its obligations if it sold an exchange and did not assign the Agreement to a purchaser--something that Covad, as noted, takes the position Verizon may not do.

Covad, like any customer of Verizon, has legitimate interests in continuity of service, but those interests, as we said in AT&T, are best addressed in our review of any contemplated transfer under PSL §99(2). In conducting that review, we would expect arrangements to be made for continuity of service. That said, it appears reasonable, in view of Covad's need to arrange service terms with the new provider, to require a longer notice period than the 90 days proposed by Verizon. Verizon's wording should be adopted, but the notice period should be lengthened to 150 days.

Future Causes of Action (Issue 10)

Covad would include, in §48 of the Agreement, the following wording:

> No portion of this Principle [sic] Document or the parties' Agreement was entered into "without regard to the standards set forth in the subsections (b) and (c) of section 251," 47 U.S.C. §§251 (b) and (c), and therefore nothing in this Principal Document or the Parties' Agreement waives either Party's rights or remedies under Applicable Law, including 47 U.S.C. §§206 & 207.

In addition, it would add to §2.11 of the Agreement's Glossary, defining, "Applicable Law," a statement that references to "Applicable Law" are meant to incorporate verbatim the text of the law referred to, as if fully set forth in the Agreement. Verizon would omit both provisions.

In support of its proposed wording, Covad notes that §§206 and 207 of the Communications Act of 1934 provide for a complaint to the FCC or a federal court action for damages related to a carrier's failure to comply with the Act, including §§251 (b) and (c) of the 1996 Act, which set forth the standards for interconnection. The United States Court of Appeals for the Second Circuit has held, however, that because §252(a)(1) of the 1996 Act allows for interconnection agreements to be negotiated without regard to the standards in subsections (b) and (c), the entry into a negotiated agreement can extinguish the CLEC's right to recover under §§206 and 207.[19] According to Covad, its wording is intended to address that decision by making it clear that the Agreement was not negotiated "without regard" to the §251 standards--a position, it asserts, that Verizon does not dispute.

Covad argues further that, in view of the parties' obligation under the 1996 Act to negotiate in good faith, their negotiated agreements represent their good faith attempts to comply with the requirements of the 1996 Act. It cites a Fourth Circuit decision[20] holding that negotiated provisions may have been arrived at "with regard" to the 1996 Act and therefore may be reformed if the controlling law changes; otherwise, parties would have an incentive to submit all issues to arbitration so as to ensure reformation in the event of a change of law. Its wording, Covad explains, would avoid the need for a court to decide later which negotiated provisions of the Agreement were arrived at "with regard" to the 1996 Act; it is clear, in its view, that the entire Agreement has that status. Omitting the wording, it contends, would penalize it for not having arbitrated every issue; render future litigation more complex

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[19] Trinko v. Bell Atlantic Corp., 305 F.3d 89 (2nd Cir. 2002), cert. granted 538 U.S. ___ (2003), cited at Covad's Post-Conference Initial Brief, p. 31. (Arbitrated provisions are not subject to this concern, Covad adds, because a state commission must resolve open issues in a manner consistent with §251.)

[20] AT&T of the Southern States, Inc. v. BellSouth Telecommunications, Inc., 229 F.3d 457 (4th Cir. 2000).

than necessary; and be tantamount to our encouraging arbitration at the expense of negotiation.

Verizon objects, arguing that whether our approval of an interconnection agreement affects a CLEC's right to relief under §§206 and 207 is a matter for the courts, lying beyond our jurisdiction. In any event, Verizon continues, wording in an interconnection agreement could not overrule the Second Circuit's decision, based on its interpretation of the statute, that there is no right to relief under §§206 and 207 with respect to either the negotiated or the arbitrated provisions of an interconnection agreement.[21] It adds, however, that inclusion of the wording could impair its ability to defend against such an action were Covad ever to assert it. Covad, in response, disavows any attempt to address a legal issue and says it is merely clarifying a factual point to avert a later challenge to it. Verizon, however, maintains Covad's wording is factually inaccurate, inasmuch as some provisions of the Agreement reflect Verizon's willingness to go beyond the requirements of federal law and, accordingly, are not based on §251(b) and (c).

Covad's proposal, in effect, would have us create a federal cause of action where one might not otherwise exist; that does not appear appropriate. It also is unclear, for the reasons identified by Verizon, that the wording proposed by Covad is accurate or that it would achieve its stated goal. Accordingly, Covad's proposal here is rejected.

OPERATIONS SUPPORT SYSTEMS

Access to Information About Loops (Issue 12)

Section 8.1.4 of the "Additional Services Attachment" to the Agreement governs the Operations Support Systems (OSS) information Verizon is to provide to Covad. Covad would include wording that obligates Verizon to "provide such information about the loop to Covad in the same manner that it provides the information to any third party and in a functionally equivalent manner to the way that it provides such information to itself";

[21] See Verizon's Post-Conference Reply Brief, p. 17.

Verizon would omit the wording. In addition, the parties offer competing wording for §8.2.3 of the Additional Services Attachment, related to Verizon's duty to provide Covad access to the pre-ordering function. Covad seeks "nondiscriminatory access to the same detailed information about the loop at the same time and manner that is available to Verizon and/or its affiliate." Verizon offers such access "within the same time interval as is available to Verizon and/or its affiliate."

Covad contends its wording simply memorializes Verizon's obligation in this regard. Verizon is required to offer requesting carriers nondiscriminatory access to OSS functions that are analogous to those Verizon provides to itself or its affiliates, and the nondiscrimination standard means access "equivalent in terms of quality, accuracy, and timeliness"; in particular, Covad says, the access provided must permit the competing carrier to perform the functions at issue in "substantially the same time and manner as Verizon."[22] Covad asserts Verizon does not contest the scope of its obligation but prefers simply to refer to federal law; Covad, however, sees a need for explicit contractual wording to make the scope of Verizon's obligation unequivocal and avoid future delays and possible litigation.

Verizon does not dispute its obligation to offer nondiscriminatory access to loop qualification information but contends the Agreement already provides for that. Its proposed wording for §8.2.3, it continues, makes its obligation even more explicit; and it cites FCC orders finding that it is complying with that obligation. Covad's wording, in Verizon's view, by referring to the manner in which the information is provided instead of simply regulating the type of information and the time within which it is to be provided, lacks any basis in the 1996 Act or FCC determinations thereunder.

In response, Covad vigorously disputes Verizon's argument that its obligations do not extend to providing the

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[22] Covad's Post-Conference Initial Brief, p. 35 and Post-Conference Reply Brief, p. 12, citing the FCC's Bell Atlantic-New York 271 Order, 15 FCC Rcd at 3991, ¶85.

information at issue in the same "manner." It cites, in addition to the Bell Atlantic-New York §271 Order, (1) the provision of 47 C.F.R. 51.311 that requires an ILEC to provide requesting carriers access to UNEs in a manner no less favorable than the ILEC's own access and (2) the FCC's UNE Remand Order, which discusses loop qualification information in considerable detail and declares, among other things, the ILEC's obligation to allow requesting carriers to obtain loop information in the same manner (i.e., electronically or manually) as the ILEC itself.[23]

Covad's proposed §8.1.4 would simply import Verizon's existing obligation into the Agreement. In view of the apparent importance of the matter to Covad, the wording should be included. The dispute over §8.2.3 relates, at bottom, to whether non-discrimination requires providing loop information to Covad in the same manner or only in the same time interval as is available to Verizon or its affiliate. Non-discrimination in this regard is more a matter of enabling the CLEC to perform the function in the same manner as Verizon or its affiliate than of the precise way in which the information is to be provided. That result can be achieved by adopting into §8.2.3 the wording proposed by Covad for §8.1.4: Covad should be afforded "nondiscriminatory access to the same detailed information about the loop at the same time and in a manner functionally equivalent to what is available to Verizon and/or its affiliate."

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[23] Covad's Post-Conference Reply Brief, p. 13, citing In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-68, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (1999) ("UNE Remand Order"), ¶¶427, 429-431.

Timing of Firm Order Commitments (Issue 13[24])

Covad would include a §8.2.4 in the Additional Services Attachment, declaring Verizon's obligation to return firm order commitments (FOCs) within two hours of receiving the local service request (LSR) for a stand-alone loop that has been prequalified mechanically; within 72 hours where the LSR is subject to manual prequalification; and within 48 hours for UNE DS1 loops. Verizon would omit the provision.

Verizon contends the pertinent intervals are set forth in the C2C Guidelines as part of a comprehensive plan establishing performance standards, exclusions, and definitions as well as intervals; failure to meet the standards may warrant remedy payments pursuant to the PAP. Verizon therefore charges Covad with trying to modify the PAP unilaterally. It asserts Covad has misstated the intervals in the Guidelines (for example, the two-hour interval applies only to prequalified orders that flow through) and disregarded important details about how compliance is determined. Even were those errors to be corrected, the omission of other details of the metric, including the 95% on-time standard, materially changes it. Verizon sees no need to establish unique intervals for Covad's orders, and it disputes Covad's disavowal of any effort to seek performance standards differing from those in the Guidelines.

Covad contends that it simply wants to codify into the contract, as the law permits, some particularly important intervals; it agrees with the Judge's suggestion at the technical conference that Covad was looking for a provision that Verizon says Covad doesn't need but whose presence would not harm Verizon.[25] It attributes the omission from its proposal of various details in the C2C Guidelines to Verizon's intransigence, contending that Verizon refused to negotiate

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[24] Covad considers issue 32, also related to intervals, together with this one; Verizon treats it under UNEs, inasmuch as it relates to line-shared loops, and we do the same.

[25] Tr. 172. Verizon attributes that observation to Covad's inaccurate representation of what it was seeking here. (Verizon's Post-Conference Reply Brief, p. 18, n. 23.)

these matters and relied solely on its position that such standards should be excluded from interconnection agreements. Covad goes on to note the importance to it of these intervals; contends the C2C Guidelines and PAP were intended to work together with interconnection agreements; and asserts that the AT&T agreement included performance metrics even though some of them duplicated C2C Guidelines.

Verizon responds by stressing the differences between the C2C guidelines and what Covad is here requesting; it argues as well that even if the provisions were identical, including them in the Agreement could harm Verizon by exposing it to a breach of contract claim in addition to regulatory remedies. Verizon also disputes Covad's claim to a unique interest in these intervals, and it therefore insists there is no need to depart from industry-wide standards.

The AT&T Order establishes that parties may negotiate performance metrics different from the C2C guidelines and include them in their interconnection agreements. Here, the parties have not reached agreement on the custom-tailored metrics; Covad alleges the reason is that Verizon declined to negotiate the point, instead maintaining only that no metrics should be included. We have no basis for setting metrics that depart from the generic ones, but Verizon has not shown why the matter should be excluded from the contract. Covad's proposed wording should be modified to track the carrier-to-carrier guidelines precisely and, as so modified, should be included in the agreement.

UNBUNDLED NETWORK ELEMENTS

Access to UNEs and UNE Combinations; Loop Capacity Constraints (Issues 19 and 23)

The parties offer competing wording for §§1.2, 3.3.1, 3.3.2, and 16 of the UNE Attachment to the Agreement. The differences may be summed up as follows:

- Covad would require Verizon to provide a UNE or UNE combination to the extent "the facilities necessary" to provide it were available in Verizon's network; Verizon

would propose to provide it only to the extent "such UNE or Combination, and the equipment and facilities necessary to provide" it were available.

- Verizon would undertake no obligation to construct or deploy new facilities or equipment to offer any UNE or Combination; Covad would require construction or deployment of new equipment to the extent it would be constructed or deployed upon request of a Verizon end user.

- Verizon would build no new copper facilities in connection with the offering of an IDSL-Compatible Metallic Loop; Covad would require Verizon to undertake new construction to the same extent it would for its own customers and to relieve capacity constraints to provide IDSL loops to the same extent and on the same terms as it would for its own customers.

- Verizon would build no new copper facilities in connection with the offering of an SDSL-Compatible Metallic Loop; Covad would require Verizon to undertake new construction to the same extent it would for its own customers.

- To the extent Verizon's PSC NY No. 10 tariff does not reflect current law, Covad would require Verizon to provide UNE Combinations in whatever manner is necessary to comply with applicable law; Verizon would omit that provision.

Verizon sees two issues here: (1) whether it is required to build facilities to provide UNEs to Covad when the needed facilities are not available, and (2) the terms on which it provides Covad access to new UNE combinations. With respect to new facilities, Verizon denies it has any obligation under federal law to construct new facilities to provide a CLEC unbundled access, even if it would undertake such construction for its own retail customers; it cites a Sixth Circuit decision holding that the 1996 Act does not forbid such discrimination.[26] Though it lacks any such obligation, Verizon nevertheless "will provision or connect any existing inventory parts of a loop to provide a UNE to a location, and that would include cross

[26] Verizon's Post-Conference Initial Brief, pp. 24-25, citing Michigan Bell Tel. Co. v. Strand, 305 F.3d 580 (6th Cir. 2002).

connects, line cards, [and] any existing inventory piece."[27] Verizon maintains the FCC has held its practices to comply with the 1996 Act, and it reserves the right to propose new language if warranted by the FCC's order in the Triennial Review proceeding when released.

Regarding new UNE combinations, Verizon contends both we and the FCC have held applicable requirements to be satisfied by Verizon's bona fide request (BFR) process for ordering new UNE combinations. It suggests Covad's proposed wording would circumvent the BFR process, and sees no basis for doing so.

Covad, for its part, contends its request is supported by federal and state law requiring Verizon to provide UNEs and UNE combinations and to relieve capacity constraints in a nondiscriminatory manner.[28] Referring to the extensive discussion in its pre-conference briefs, Covad argues that new construction may be required "when it is a routine, customary, or necessary activity." The ILEC is obligated, under applicable law, to modify its facilities where necessary to accommodate interconnection or access to network elements, and equipment is "necessary" where the inability to deploy the equipment would, as a practical, economic, or operational matter, preclude the obtaining of interconnection or access. That is the situation here, Covad claims, for it cannot gain access to the associated DS1 and DS3 UNEs if Verizon does not make the same network modifications and expansions for CLECs that it makes for its retail customers. These modifications, which are routine, are needed to provide Covad equivalent, not "superior" access to network elements.

Covad finds further support for its position in the FCC's February 20, 2003 news release on its Triennial Review decision. It cites a statement there that ILECs "are required to make routine network modifications to UNEs used by requesting carriers where the requested facility has already been constructed...includ[ing] deploying multiplexers to existing

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[27] Tr. 79.

[28] Covad's Post-Conference Initial Brief, pp. 42 et seq.

loop facilities and undertaking the other activities that [ILECs] make for their own retail customers."[29]

Covad asserts these principles are reflected in its proposed contract language, which would require Verizon to undertake only routine network modifications, commensurate with those undertaken for its own customers, as contemplated by the FCC. With specific reference to §16 (provision of UNE combinations as required by applicable law, even if not provided for in the tariff), Covad rejects Verizon's suggestion that the tariffed BFR process is sufficient. It explains that it is seeking nothing more than applicable law requires--UNEs and UNE combinations that Verizon regularly provides its retail customers--and that the burdensome and prolonged BFR process, used mainly for special requests and new types of UNEs, should not become a means for delaying Verizon's compliance with its legal obligations.

In response, Verizon acknowledges, with respect to construction of the new facilities, the FCC's comments in its news release and points as well to our own pending proceeding (Case 02-C-1233) on the matter, in which Covad filed a brief raising the arguments it offers here. Verizon suggests the matter be resolved generically, with the decisions in those two proceedings forming the basis for the language ultimately to be adopted here.

With respect to new UNE combinations, Verizon again asserts its BFR process is, and has been held by the FCC to be,[30] sufficient to discharge Verizon's obligation to provide technically feasible UNE combinations not already available under a tariff or interconnection agreement. It charges Covad with confusing the issue by objecting to use of the BFR process in the no-facilities context, a different matter and one in which Verizon never proposed to apply it; Verizon referred to the BFR process only in the UNE combination context, and it

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[29] Quoted at Covad's Post-Conference Initial Brief, p. 46.

[30] Verizon Virginia Inc. - In-Region InterLATA Services, 17 FCC Rcd 21880 (2000) (Virginia §271 Order) ¶60.

objects to any wording that would allow Covad to order a new UNE combination without submitting a BFR just as every other CLEC is required to do.

With the clarification provided by Verizon in its reply brief, it appears that the BFR process is adequate for its intended purpose of requesting new UNE combinations; there is no need to afford Covad a method of doing so that differs from the process used by other CLECs. Verizon is also correct that the no-facilities issue is being handled generically, by the FCC as well as by us; this agreement should include a provision incorporating the generic resolution of the no-facilities issue when it is reached.

Installation Appointment Windows (Issue 22)

An agreed-upon portion of §1.9 of the UNE Attachment allows for Covad to request an appointment window when the provisioning of a loop requires dispatching a Verizon technician to an end-user's premises. Verizon undertakes to make a good faith effort to meet the appointment window but does not guarantee it. Covad is not required to pay the non-recurring dispatch charge for dispatches that do not occur, but it is required to pay the charge if the customer contact is unavailable through no fault of Verizon.

Covad requests, however, and Verizon objects to, the inclusion of several additional terms: (1) if a dispatch does not occur, Covad may request a new appointment window outside the normal provisioning interval; (2) in that event, Covad need not pay the associated non-recurring dispatch charge; and (3) for each additional failure to meet the same customer, Verizon will pay Covad a missed appointment fee equal to the non-recurring dispatch charge.

The agreed-upon provision was added following the Technical Conference, where it became clear that Verizon's current practice with respect to offering and making good-faith efforts to meet appointment windows is satisfactory to Covad.[31]

[31] Tr. 113.

Covad remains concerned, however, about the effect of a failure by Verizon to dispatch; its proposed wording would specify the remedy in such instances.

In support of its proposal, Covad emphasizes the adverse effects it suffers when Verizon fails to meet an appointment commitment; these include not only a waste of Covad's resources but also a diminution in Covad's customer good will. The penalty for missed appointments, it argues, will enhance Verizon's incentive to perform. Covad maintains that the Performance Assurance Plan, which addresses missed appointments, is not intended to displace remedies in interconnection agreements but to complement them; it cites statements to that effect by Verizon itself as well as by us and the FCC. Covad points also to the penalties we have applied to missed appointments in the retail context, asserting there is ample precedent for its concern and proposed remedy here.

Verizon objects to all three elements of Covad's proposal, which it regards as ambiguous and otherwise flawed. On the basis of discussion at the technical conference, Verizon understands item (1) to mean that Covad may request a guaranteed appointment in exchange for accepting a longer-than-standard provisioning interval. But, Verizon contends, Covad has no right to guaranteed appointment windows, which Verizon does not offer to its retail customers. Item (2), exempting Covad from the non-recurring dispatch charge, would constitute, Verizon argues, a discriminatory departure from the tariff terms, which require such a charge. And item (3), the penalty provision, is criticized by Verizon as inconsistent with its refusal to guarantee appointment windows; improperly worded so as to impose the penalty even if the failure is the fault of Covad or its customer; and unnecessary in light of the PAP's penalties that apply if Verizon's percentage of missed CLEC appointments exceeds that for retail customers. Verizon adds that because the legal standard is parity between CLEC and retail service, federal law would be violated by a penalty that might be applied even where service to Covad is better than to retail customers.

In response, Covad denies its proposal is ambiguous, maintaining that it clearly sets out the consequences of a missed appointment: (a) Covad would be able to contact Verizon's provisioning center directly and obtain a new appointment without submitting another LSR or paying another nonrecurring dispatch charge; (b) in such an instance, Covad should have assurance that the rescheduled appointment will be met, and it would be willing to accept an interval longer than the standard in order to accommodate the concerns that Verizon cites in objecting to guaranteed appointments; and (c) Verizon would be given a disincentive to missing subsequent appointments. Covad suggests its proposal would be consistent with our commitment to ensuring that utilities meet appointments, and it disputes Verizon's claim that it is seeking performance beyond parity: it maintains that Verizon or its customers would be unlikely to countenance a missed appointment and that Covad and its customers are entitled to the same timeliness of service.

Verizon, in reply, continues to object to guaranteed appointment windows and to see no need for remedies beyond those in the PAP. It asserts Covad has never claimed that Verizon's performance in meeting provisioning appointments is worse for CLECs than for retail customers and that the FCC reached the opposite decision in the Bell Atlantic-New York §271 Order.

The agreed upon portion of UNE Attachment §1.9 should be included in the Agreement. As for Covad's proposed addition, it is fair that consequences attach to a missed appointment, and interconnection agreements may contain penalty provisions that complement those of the PAP. Covad's proposal, however, comes too close to a guarantee, which Verizon reasonably declines to offer. As a fair balancing of the interests (and unless the parties agree on some other terms), one-half of the non-recurring charge should be waived with respect to an appointment that, having been rescheduled after having been missed through no fault of Covad or the end-use customer, is missed again through no fault of Covad or the end-use customer and rescheduled a second time. The Agreement should state as well that to request rescheduling after an appointment has been

missed, Covad may contact Verizon's provisioning center directly, without submitting a new LSR, and that it retains the option of requesting either the standard provisioning interval or an appointment window outside the standard interval.

Loop Categories (Issue 24)

Section 3.6 of the UNE Attachment sets forth procedures related to Covad's deployment of new loop technologies not listed in the Agreement or Verizon's tariff. Among other things, if Verizon creates a new loop type specifically for the new loop technology, Covad agrees to convert previously-ordered loops to the new loop type and to use the new loop type on a going forward basis. Covad would specify that such conversion is to be "at no cost," while Verizon would omit those words; the provision is otherwise fully agreed on.

Covad characterizes the provision overall as reflecting Verizon's obligation (1) not to prevent Covad from deploying a new technology that complies with industry standards on the ground that Verizon itself has not yet deployed the technology and (2) not to refuse a request by Covad to deploy a certain technology over a loop if it complies with industry standards. It charges that the contemplated conversion fee it seeks to preclude would penalize Covad for its speed in deploying a new technology before Verizon does so.

Covad goes on to argue that it should be unaffected by Verizon's narrow definition of its loop offerings, pointing to the FCC's statement, among others, that ILECs may not unilaterally determine the technologies deployed over UNE loops. Covad nevertheless has agreed voluntarily to convert previously ordered UNE loops to new loop types Verizon designates for new technologies. But because that conversion is necessitated by Verizon's inability to offer the new technology and by the manner in which Verizon designates its loop products, Covad claims, it should not be required to bear its cost. Covad adds that Verizon in fact benefits from the information about the demand for new technology that it gains from Covad's UNE order

and that the prospect of conversion costs of unknown magnitude greatly increases Covad's risk in deploying new technology.

Verizon takes the view that converting loops from one type to another imposes costs and that Covad, as the cost-causer, should pay the tariffed rates, which we have approved, for the conversion offers. It notes that when CLECs converted previously ordered ISDN loops to an xDSL loop type, they paid the associated conversion charges.

Covad responds that Verizon is, in fact, the cost-causer inasmuch as the cost is incurred because Verizon has decided to recategorize its loop facilities; there is no change in the service offering (as there was in the ISDN to xDSL conversion cited by Verizon) and no need for Verizon to modify its network to accommodate Covad. Covad suggests as well that TELRIC pricing precludes recovery of these costs, for a forward-looking network would already accommodate the technology Covad seeks to offer.

Verizon's response disavows cost responsibility, arguing that loop types are codes developed by national, industry-wide bodies and that the existence of a loop type designed for a new loop technology to be deployed by Covad does not depend on whether Verizon is also offering that technology. It insists as well that Covad derives service-related benefits from the creation of the new loop type.

Covad has not established that Verizon is the sole cost-causer here; at a minimum, there is shared cost responsibility, for the cost would not be incurred if the CLEC were not taking service and had not ordered a new type of loop. Accordingly, a provision exempting Covad from all cost responsibility here would be inappropriate. Verizon's introduction of the new loop types that might trigger a need for changes on the part of Covad or other CLECs would be subject to tariffing, and the precise level of cost to be borne by the CLEC could be set in that tariff and reviewed in that context.

Cooperative Loop Testing (Issue 27)

Following the Technical Conference, both parties revised their proposals for UNE Attachment §3.12, on cooperative line testing, but the two versions still differ substantially. The principal issue relates to the degree of specificity to be included in the Agreement: Covad sees a need for certain testing procedures to be spelled out; Verizon puts greater stress on allowing for newer, more technologically advanced processes. The parties disagree on certain cost provisions as well.

Verizon's wording defines cooperative testing as "a procedure whereby a Verizon technician, either through Covad's automated testing equipment or jointly with a Covad technician, verifies that an xDSL Compatible Loop or Digital Designed Link is properly installed and operational prior to Verizon's completion of the order." Verizon notes that Covad has developed, and Verizon is using, automated testing equipment (Interactive Voice Response [IVR]) that makes the process substantially more efficient and no less effective; and it complains that Covad's wording would nevertheless require manual cooperative testing for the next three years and limit the use of IVR to isolating the location of a trouble. It also objects to Covad's restrictions on the use of additional new cooperative testing procedures; Verizon's wording would allow changes with respect to testing by simple mutual agreement, without requiring amendment of the Agreement. Covad, in response, disavows any intention to require amendment of the agreement, asserting it simply seeks written confirmation of any agreed-upon revised process.

Covad asserts that because it offers primarily advanced services over UNE loops, cooperative testing is particularly important to it; and it therefore wants to specify in the Agreement what is involved in cooperative testing, "rather than leaving it to the imagination of the parties."[32] In view of Verizon's concern that the Agreement might specify antiquated testing processes, Covad says, it amended its initial

[32] Covad's Post-Conference Initial Brief, p. 57.

proposal so as not to detail a specific process but, instead, to take a more functional approach, identifying when testing will be done, the types of tests to be performed, when tests must be repeated, the standard by which loops are to be judged, and the activities for which the IVR may be used. Covad expresses concern that Verizon's proposed wording remains too vague and reserves to Verizon the right to determine unilaterally whether testing is to be automated or manual; according to Covad, it continues to need manual testing to verify, among other things, that Verizon's technician is at the correct demarcation point--a recurring need, according to Covad.

Covad objects as well to what it characterizes as Verizon's unlawful effort to impose cooperative testing charges. It maintains further that Verizon should not be permitted to bill Covad for loop repairs that resulted from a Verizon trouble.

In response, Verizon insists the record shows IVR offers the same capabilities as manual testing and fails to substantiate the claim that Verizon's technician, in many instances, is not at the correct location. It notes that performance metrics with respect to loops subject to cooperative testing would have brought any problems to our attention.

The key here is to maintain Covad's entitlement to the Cooperative Testing capabilities it enjoys today while not precluding the use of technological advances that could make the process more efficient, thereby benefiting all concerned. Because the currently available automated system falls short of obviating all manual intervention, the foregoing interests can best be served by adopting Verizon's wording here, with the addition of a sentence along these lines: "If Cooperative Testing is performed through the use of IVR or another automated mechanism, the testing process should conclude with acceptance of the loop's status in a person-to-person exchange."

Contesting the Loop Prequalification Requirement (Issue 28)

UNE Attachment §3.8 provides that when Covad requests an xDSL loop that has not been prequalified, Verizon will send

the order back to Covad for qualification and (except for BRI ISDN loops, which need not be prequalified) will not accept the service order until the loop has been prequalified on a mechanized or manual basis. Verizon's wording goes on to recite the parties' agreement that "Covad may contest the prequalification finding for an order or set of orders"; Covad would substitute the word "requirement" for "finding."

Covad asserts it needs the right to contest a prequalification requirement because Verizon's prequalification tool has proven to be unreliable on certain types of orders, falsely reporting some loops as non-qualifiers and requiring Covad to incur manual loop qualification charges in order to pursue the order. Covad describes some of the faulty results produced by the tool--related to loop length and to presence of DLC on the loop--and it insists it therefore needs to have the right to contest any requirement that an order or set of orders must pass prequalification. Covad contends as well that there is no FCC requirement that a CLEC prequalify a loop; on the contrary, the FCC may contemplate that prequalification is not necessary.

Verizon maintains that it provides Covad access to the same loop qualification information Verizon itself uses; that the FCC has found, in several §271 proceedings, that the information Verizon provides satisfies its requirements under the 1996 Act; and that while the information may not be perfect, there is no requirement that it be perfect as long as any inaccuracies affect Verizon and competitive carriers equally. To deal with what Verizon characterizes as the rare circumstances in which the databases are inaccurate, Verizon's wording allows Covad to dispute loop qualification information with respect to particular loops. But Verizon sees no need to grant Covad the right to challenge the prequalification requirement itself.

Covad responds that it should not be required to pay for loop qualification when it knows the information would be inaccurate. It characterizes Verizon's parity argument as "effectively arguing that it is ok if CLECs are mired in

mediocre and inaccurate information as long as Verizon is as well,"[33] and it suggests the real losers in that event would be the customers.

Verizon's pre-qualification tool may not be perfect, but perfection is not the standard; parity is. Covad has not shown a need for a unique provision here; if changes are needed, they may be pursued as a modification of the carrier-to-carrier guidelines. Here, Verizon's wording should be used.

Line and Station Transfers (Issue 29)

A "line and station transfer" (LST) refers to a procedure in which Verizon rearranges loops to permit the provision of xDSL service to a CLEC customer currently served by digital loop carrier (DLC), which cannot handle DSL; it involves replacement of the DLC loop with a spare loop that meets the necessary technical specifications for the service requested by the CLEC. Procedures for LSTs were developed in the DSL Collaborative in Case 00-C-0127, and agreed-upon wording in §3.10 of the UNE Attachment states that Verizon performs LSTs in accordance with those procedures. The parties nevertheless dispute several aspects of §3.10 (and §3.7, which also refers to LSTs in certain situations). As a general matter, Verizon maintains the settlement should apply and that there is no reason to depart from it here; Covad questions Verizon's reading of the settlement.

One dispute concerns the charge, if any, for an LST. Covad, which objects to any LST charge, contends that despite our having adopted a settlement agreement related to LSTs in the DSL Collaborative, we have not considered the propriety of a charge for LSTs. It argues that such a charge is precluded by the non-discrimination provisions of the 1996 Act if Verizon imposes no such charge on its own customers (as it does not). Moreover, it says, the charge is precluded by TELRIC costing principles, for the loops in a forward-looking network would be capable of carrying both voice and DSL-based traffic, obviating

[33] Covad's Post-Conference Reply Brief, p. 25.

LSTs and implying a double-count if CLECs are charged both for the forward-looking network and for LSTs. Covad cites a recent decision of the Pennsylvania Commission endorsing these arguments and rejecting a charge for LSTs. Finally, Covad suggests that one reason LSTs are needed is Verizon's refusal to make fiber loops using DLC available as a UNE, a matter under review in Case 00-C-0127; Covad sees that as additional warrant for requiring Verizon to provide LSTs at no charge.

Verizon contends the settlement related to LSTs adopted in Case 00-C-0127, to which Covad was a party, recognizes that an LST "involves additional installation work including a dispatch and will require an additional charge."[34] It urges us to reject what it characterizes as Covad's present effort to renege on that agreement.

Covad responds that in agreeing to an additional charge, it assumed that we would set the charge, which we have not yet done. It adds that its agreement to the charge at that time did not mean the charge would remain in place indefinitely, in the face of changed market conditions and technology.

A second disputed item is Covad's wording that would require its approval before an LST is conducted. It sees that as particularly necessary if a charge is imposed, in which case Covad would have to decide whether it wanted to incur the cost of using the service. Verizon asserts that the foregoing settlement agreement provides for LSTs to be performed "in all cases." Verizon nevertheless is developing, in consultation with CLECs (including Covad) a uniform process by which CLECs can request LSTs on an order-by-order basis; but pending implementation of that process, it would adhere to the terms of the settlement.

Covad responds that the agreement's wording is directed toward ensuring that Verizon does not evade its responsibility to provide LSTs but does not permit Verizon to

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[34] Case 00-C-0127, Provision of Digital Subscriber Line Services, Opinion No. 00-12 (issued October 31, 2000), Attachment 2. For our adoption of that provision, see id., p. 25, fn. 1.

impose an LST on a CLEC that does not want one--something that, in any event, would make no sense.

Finally, Covad sees no need for a general extension of normal provisioning intervals for LSTs; it asserts they are routinely performed and that Verizon's retail provisioning intervals are unaffected by whether an LST needs to be done. It recognizes, however, that the usual provisioning interval for a line-shared loop--shorter than for a stand-alone loop--might be too short to accommodate an LST, and it would, in that instance, apply the interval for a stand-alone loop.

Here, too, Verizon contends the settlement, in recognizing that an LST "involves additional work," does not distinguish between line-shared loops and others. It argues that the standard provisioning intervals of xDSL-capable loops do not include the time needed for an LST and that Covad should not be permitted to renege on its agreement.

Covad responds that Verizon's retail provisioning intervals do not depend on whether an LST needs to be performed, nor do BellSouth's wholesale intervals. It suggests a provisioning interval longer than that applicable to Verizon's retail customers will put it at a competitive disadvantage.

It is difficult to read the agreement in the DSL collaborative other than as contemplating a charge for LSTs, and Covad's effort to avoid that charge is unpersuasive. Covad is much more persuasive in arguing against being required to accept an LST willy-nilly, particularly given that a charge will be applicable; its wording with respect to that issue is adopted. Covad also reasonably contends that parity precludes a longer provisioning interval where LST's are required. The Agreement should be worded consistent with these determinations.

Line Partitioning (Issue 31)

Covad would include in the Agreement's UNE Attachment a §4.2, setting forth Verizon's obligation to offer "line partitioning," a service identical to line sharing except that the analog voice service on the loop is provided by a third-party carrier reselling Verizon's voice services rather than by

one using UNE-P (line splitting) or by Verizon itself (line sharing). The section sets forth the preconditions to the offering of line partitioning and states that it is otherwise subject to all the terms and conditions of line sharing. Verizon, which disavows any obligation to offer line partitioning, would omit the section.

Covad emphasizes that it is not seeking to have the high-frequency/xDSL portion of the loop made available for resale; "rather, [it] is asking that Verizon make the voice services it provides over the voice grade portion of the loop available on a resale basis at the same time that it makes the high-frequency/xDSL portion of the loop available to Covad as a network element via Line Sharing."[35] It argues that the refusal to offer line partitioning constitutes discrimination against resellers unable to resell voice services when another CLEC, such as Covad, provisions DSL over the high-frequency portion of the loop; and that we have the authority to mandate a resale offering to address that discrimination.

Covad disputes Verizon's suggestion that the FCC's rejection of Covad's request in its Virginia §271 Order means Verizon has no obligation to provide line partitioning. That decision, according to Covad, never considered whether Verizon was treating UNE-P providers preferentially and discriminating against resellers; Covad therefore asks that we now consider that discrimination and end it.

Verizon regards the issue as resolved by both the FCC's Virginia §271 Order and our decision in the AT&T Order, where we said, "Verizon's position is correct."[36] It sees no need to revisit the issue, particularly given the FCC's determination, in its Triennial Review proceeding, that the high frequency portion of the loop is not a UNE.

Verizon disputes as well, as a matter of law and of fact, the claim that it is discriminating against resellers and in favor of UNE-P providers. It points, among other things, to

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[35] Covad's Post-Conference Initial Brief, p. 69.

[36] AT&T Order, p. 68.

the FCC's rejection of that claim in the Virginia §271 Order and its recognition there that Verizon permits resale of DSL service over resold voice lines "so that customers purchasing resold voice are able to obtain DSL services from a provider other than Verizon."[37]

In response, Covad sees no need to take account here of the Triennial Review decision, inasmuch as line sharing is now available and may remain so if the FCC's decision is overturned. It likewise discredits Verizon's reference to our AT&T Order, which, according to Covad, fails to reflect that AT&T's request there was that Verizon resell the high frequency portion of the loop, something Covad is not seeking. It charges Verizon with failing to recognize its legal obligation to make any retail telecommunications service available for resale and with discrimination in refusing to allow resellers to resell Verizon voice services when another CLEC is using the high-frequency portion of the loop.

Verizon responds that Covad, not itself a reseller, lacks standing to complain on the resellers' behalf. It adds that a customer taking DSL service from Covad in a line sharing or line splitting arrangement is perfectly free to move to a reseller for voice service; but once the reseller is providing the voice service, Verizon is no longer the voice provider and Covad is no longer entitled to access to the high-frequency portion of the line as a UNE.

Verizon's suggestion that Covad lacks standing to raise the issue of discrimination against resellers loses sight of the fact that Covad sees the alleged discrimination as redounding to its own detriment. Verizon's other arguments against being required to offer line partitioning are more substantial though not ultimately persuasive. We see no current legal impediment to line partitioning, and we are inclined in principle to direct that it be offered as a mechanism to enhance the choices available to customers. But any such decision on a

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[37] FCC's Virginia §271 Order, ¶151, quoted at Verizon's Post-Conference Initial Brief, p. 37.

broad policy matter may have effects on market players beyond those represented in this bilateral proceeding, and we will therefore issue a notice inviting comment before deciding whether to go forward. To ensure that line partitioning is made available as soon as possible after any decision to require it and is not delayed by the need to negotiate terms, Covad's proposed wording should be included in the Agreement, but with the specification that it is to take effect only after the offering of line partitioning is required by law. (In the event a regulatory decision to require line partitioning were challenged in court, Verizon's obligations in this regard under the Agreement would be suspended only in the event the regulatory decision were stayed by the court.)[38]

Interval for Provisioning Line-Shared Loops (Issue 32)

Covad proposes a §4.3 for the UNE Attachment, setting forth the provisioning interval for Line Sharing Loops. It would be two business days, the tariffed standard interval, or the standard interval required by applicable law, whichever was shortest. Verizon would omit the provision.

As in the case of Issue 13, the underlying question here is whether performance standards in the C2C Guidelines should be incorporated into an interconnection agreement. In issue 13, Covad sought to incorporate the Guidelines' standard into the Agreement; here, Covad seeks a provisioning interval for line sharing shorter by one day than that in the Guidelines. It regards its proposal as tailoring the interval to its needs on a matter of special importance to it, inasmuch as its customers are interested in getting their broadband service as quickly as possible; and it cites the AT&T Order as precedent for allowing some departures from C2C metrics where a CLEC seeks additional protections.

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[38] We recognize, of course, that our decision here may be affected by the FCC's Triennial Review order, and we will take account of that order, once it is issued, as may be warranted.

In Covad's view, a two-day interval is feasible.[39] The C2C's three-day interval was a negotiated result reached nearly three years ago, at which time the participants discussed the possibility of later reducing the interval for line sharing, which requires less work than a stand-alone service installation. Verizon is now more accustomed to providing line-shared loops; it can perform cross-connection work for a hot-cut within two days; and BellSouth can provision line-shared loops within two days. Verizon had expressed concern about the workforce management implications of a shorter interval, but Covad dismisses that concern, noting it has never exceeded the forecast of expected demand that it periodically provides on a central-office-by-central-office basis. It suggests Verizon is insisting on a longer interval to protect itself against some other carrier hitting it with orders that exceed forecasts, and it sees no reason to penalize Covad, which has never done so, on that account.

Verizon contends the three-day interval is on a par with that for retail orders, and Covad has no right to a superior two-day commitment. Nor, it continues, should Covad be treated more favorably than other CLECs, and any change in the line-sharing interval therefore should take place on an industry-wide basis. It expresses concern that a two-day interval would affect its ability to fill orders for new voice service and react to fluctuations in demand; denies that Covad needs the shorter interval in order to compete effectively; and asserts that line-sharing orders are more complicated than hot cuts.

In response, Covad expresses surprise at Verizon's argument about exceeding parity, given its statement that the existing standard requires 95% of CLEC line-sharing orders to be provisioned within three days even if that is better-than-parity performance. It adds that it attempted but failed to change the interval generically, through the Change Management Forum,

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[39] Covad and Verizon both base their points here on the discussion at the technical conference.

showing Verizon's ability to frustrate that process; that Verizon's concern about an adverse effect on its ability to provide new voice service is belied by BellSouth's ability to meet a two-day standard; and that Covad's demand forecasts will obviate Verizon's work force management concerns.

Verizon's response reiterates its arguments that Covad has no legal entitlement to better-than-parity performance; that any change in the standard should be made generically, through the Change Management Process (which allows for a complaint to the Commission if necessary); that the three-day interval is needed for Verizon to provision all of central-office work (not just line-sharing orders) on a given day; and that CLEC forecasts provided only semi-annually do not provide adequate notice of specific, short-term spikes in demand.

Covad's interest in a shorter provisioning interval is understandable, but it has not made a case for departure here from the generic standard. It may, of course, pursue generic change through the Change Management Process or the Carrier Working Group.

PRICING (ISSUES 37 AND 38)

Issue 37 relates to the rates to be charged; issue 38 relates to notice of rate changes. In its post-conference reply brief, Covad notes the connection between the issues and treats them together; we do likewise.

With respect to Issue 37, the parties offer competing wording for §§1.3, 1.4, and 1.5 of the Pricing Attachment; the nub of the dispute is Covad's objection to reliance on tariffed rates not specifically approved by us or by the FCC. More specifically, Verizon's wording would provide that (1) the charges for a service shall be those stated in the providing party's tariff; (2) where the tariff is silent, the charges will be those in Appendix A to the Pricing Attachment; and (3) the charges in Appendix A would be automatically superseded by (a) any applicable tariff charges and (b) any new charges required, approved, or otherwise allowed to go into effect by us or by the FCC.

Covad would modify item (1) above to provide that the charges for a service shall be those approved by us or by the FCC; to recite Verizon's representation that the charges in Appendix A are such approved rates; and to provide that if we or the FCC have not approved certain charges now included in Appendix A, Verizon will retroactively charge the approved rates when they become available. Covad would omit Verizon's item (2) and, in item (3), would omit circumstance (a) and allow Appendix A charges to be automatically superseded only in circumstance (b).

Covad's objection to Verizon's wording grows out of its concern about Verizon being able to charge a rate that has not been approved by us or by the FCC or to change an approved rate simply by making a tariff filing. Covad asserts a need to be able to rely on the approved rates contained or referenced in the Pricing Appendix, which would otherwise be mere placeholders; and it cites the FCC's statement, in the Virginia Arbitration Award, that a carrier cannot use tariffs to circumvent the Commission's decision. Covad takes no comfort from Verizon's observation that the only tariffs that could supersede a rate in the Agreement would be those we or the FCC had allowed to go into effect; it argues that merely allowing a tariff to take effect does not mean that we have permanently approved the rate or held that it should supersede rates in previously approved interconnection agreements. Covad objects as well to being required to monitor all tariff filings to ensure Verizon is not trying to impose unapproved rates.

Verizon argues that the hierarchy of rate sources set out in its wording--tariffs; Appendix A if no tariff; later-filed tariff or PSC or FCC order--is consistent both with our statement in AT&T that interconnection agreements "should absorb tariff amendments" and with the agreed-upon language of Appendix A, which cross-references Verizon's tariffs "as amended from time to time."[40] Covad's wording, in contrast, clashes with our

[40] Verizon's Post-Conference Initial Brief, p. 41, citing AT&T Order, p. 5.

preference for tariff-based uniform rates for all CLECs, a preference consistent with the anti-discrimination provisions of the 1996 Act and that avoids allowing a CLEC to game the system by maintaining more favorable rates than those available to all other CLECs.

Verizon disputes as well what it takes to be Covad's premise of a legally significant distinction between Commission-approved rates contained in an effective tariff and rates that "merely appear" in the tariff. Under the filed rate doctrine, it explains, it is obligated to charge the rates in its effective tariffs, regardless of whether the regulatory agency has approved them in an order or simply allowed them to take effect. It therefore disavows any obligation to warrant that the rates in Appendix A are those approved by us or the FCC. It contends that Covad's proposal for retroactive adjustments are based on the same faulty premise and, in any event, would be unlawful in the absence of a Commission order issued under appropriate statutory authority.

Concerning notice of rate changes (Issue 38) Covad initially proposed a requirement that Verizon provide it notice of tariff filings that affected rates. At the technical conference, it was agreed that Covad receives notice of such filings, and Covad accordingly revised its proposed §1.9 of the Pricing Attachment to require Verizon to provide it "advance actual written notice" of any non-tariffed revisions that establish new charges or seek to change the charges specified in Appendix A. In addition, Verizon must provide an updated Appendix A, for informational purposes only, within 30 days of any such rates becoming effective. Verizon would omit the provision entirely.

Verizon views the provision as superfluous. It argues that because Appendix A simply cross-references Verizon's tariff, the only way it could be changed without a tariff amendment would be by amendment of the Agreement--something of which Covad would necessarily have notice. To the extent the Agreement provides for new charges other than through the filing of a tariff, such as in compliance with an order from us or the

FCC, that process would inherently provide notice to Covad. And Verizon sees no need for post-effectiveness updates to Appendix A; since Covad will receive notice of such rate changes before they take effect, there is no need for additional notice thereafter, and Covad can update the Appendix itself.

Covad sees the matter differently, noting that agreed-upon §1.8 of the Pricing Attachment provides, where there is no rate specified in a tariff, in Appendix A, or in a Commission order, for a rate agreed to by the parties in writing. It contends that Verizon has a track record of imposing new, non-tariffed charges without notifying Covad and giving it the opportunity to agree or not. The ensuing billing disputes, which have included disagreements over whether the rates at issue had, in fact, been approved, were complex, lengthy, and burdensome; they could have been avoided had Verizon put Covad on notice, via a revised Appendix A, of the non-tariffed rate it planned to assess. Accordingly, Covad sees a need for the provision it proposes.

In its reply brief, Covad, as noted, links the two issues, asserting that its underlying interest in both is "to ensure that the horrible billing experiences it previously encountered with Verizon...[involving] rates that were not specifically approved by the Commission...nor agreed to by the Parties, do not happen again."[41] To avoid such incidents, Covad argues, (1) Verizon should be precluded from assessing or billing charges that are not set forth in a tariff by the Commission or otherwise approved by the Commission or the FCC; and (2) if Verizon wishes to bill any such rate, it should first notify Covad of the rate--via a revised Appendix A--and not begin charging it until Covad has agreed to it in writing.

Verizon's response reiterates its argument that only a tariff "allowed to go into effect"--in contrast to what Covad terms a "mere tariff filing"--can amend an existing tariff and thus change a rate. As for Covad's concern about having to monitor all tariff filings, Verizon points to our rejection of

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[41] Covad's Post-Conference Reply Brief, p. 31.

AT&T's similar concern and our decision in that case that the interconnection agreement should be allowed to absorb tariff amendments and changes.[42] It contends as well that all rate-change mechanisms in its wording entail notice of the change and that there is, accordingly, no need for a separate notice provision; that providing a revised Appendix A in connection with each rate change imposes administrative burdens on Verizon without significantly benefiting Covad; and that Covad has identified not a "track record" but only a single instance of Verizon failing to provide notice of a rate change. It cites, in this regard, the FCC's repeated findings that isolated problems do not establish that an ILEC has failed to live up to its obligations.

Covad's position on Issue 37, premised on a supposed distinction between an "approved" tariff and one merely allowed to go into effect, may betoken a misunderstanding of the tariff process. Proposed tariff amendments are subjected to scrutiny and are allowed to go into effect only if they pass that scrutiny. The review process should include notice and comment, and there is opportunity for Covad and other parties to make their views known. Covad's apparent concern that a tariff "allowed to go into effect" receives no review, or only cursory view, is unwarranted, and its wording on this issue is rejected.

With respect to Issue 38, Covad is certainly entitled to "advance actual written notice" of any non-tariffed rate change, and the agreement should so provide. But we see no reason for Verizon thereafter to do Covad's housekeeping work on its behalf and provide an updated Appendix A; given the information it is to receive, Covad can prepare the updated Appendix itself.

The Commission orders:

1. The remaining issues posed by the petition for arbitration filed in this proceeding are resolved in the manner described in this order.

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[42] AT&T Order, p. 5.

2. Covad Communications Company and Verizon New York Inc. shall complete the preparation of an interconnection agreement consistent with the determinations in this order and shall file an executed copy of that interconnection agreement within 30 days of the issue date of this order.

3. This proceeding is continued.

By the Commission,

(SIGNED) JANET HAND DEIXLER
Secretary