Verizon Communications
106 East College Avenue, Suite 810
Tallahassee, FL 32301

Phone 850.222.6300
Fax 850.222.2912

December 27, 2005 – **VIA ELECTRONIC MAIL**

Ms. Blanca S. Bayo, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 040156-TP
Petition for Arbitration of Amendment to Interconnection Agreements With Certain Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Florida by Verizon Florida Inc.

Dear Ms. Bayo:

Enclosed is Verizon Florida's response to the motions of XO Communications Services, Inc. ("XO"); Florida Digital Network, Inc. ("FDN"); and Covad Communications Company, NuVox Communications, Inc., Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Jacksonville, LLC and XO Communications Services, Inc. ("CLEC Parties") for reconsideration and/or clarification the arbitration Order ("Order") that the Commission issued in this proceeding on December 5, 2005. Verizon also responds to FDN's Motion for Temporary Relief from Enforcement of that Order.

If there are any questions concerning this filing, please contact me at 813-483-1256.

Sincerely,

s/ Leigh A. Hyer

Leigh A. Hyer

cc: Parties of Record via electronic mail

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for arbitration of amendment To interconnection agreements with certain Competitive local exchange carriers in Florida By Verizon Florida Inc.	)))))	Docket No. 040156-TP Filed: December 27, 2005

VERIZON FLORIDA INC.'S RESPONSE TO MOTIONS FOR RECONSIDERATION AND/OR CLARIFICATION

Verizon Florida Inc. ("Verizon") responds to the motions of XO Communications Services, Inc. ("XO"); Florida Digital Network, Inc. ("FDN"); and Covad Communications Company, NuVox Communications, Inc., Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Jacksonville, LLC and XO Communications Services, Inc.[1] ("CLEC Parties") for reconsideration and/or clarification the arbitration Order ("Order") that the Commission issued in this proceeding on December 5, 2005. Verizon also responds to FDN's Motion for Temporary Relief from Enforcement of that Order.

The Commission should deny the CLECs' motions for reconsideration, because they do not meet the standard for obtaining reconsideration. None of them identifies any point of fact or law that the Commission overlooked or failed to consider in rendering its Order. *See Stewart Bonded Warehouse Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962). The CLECs merely reargue matters that have already been considered,

[1] XO filed two motions for reconsideration, one by itself and one as a member of the CLEC Parties, even though parties have no right to file multiple motions for reconsideration.

which is not appropriate in a motion for reconsideration. *See Sherwood v. State*, 111 So. 2d 96 (Fla. 3d DCA 1959).

Verizon also opposes FDN's motion for an open-ended stay of the Commission's ruling confirming the FCC's cap on unbundled DS1 transport circuits. However, as Verizon explains below, Verizon would agree to extend the existing amendment filing date of January 5 by no more than 30 days, to accommodate holiday schedules and the Commission's consideration of the reconsideration motions, including Verizon's.

Finally, the clarification XO requests is unnecessary. XO asks the Commission to clarify that CLECs may obtain transition pricing for de-listed facilities that are commingled without any physical change to those facilities. But neither the Commission's Order nor Verizon's conforming amendment proposal would preclude transition pricing for such facilities. Therefore, the issue XO raises is moot and requires no Commission ruling.

Verizon addresses below each issue raised by the CLECs.

ARGUMENT

1. The Commission Did Not Err in Applying the FCC's DS1 Transport Cap Rule as Written.

In the *Triennial Review Remand Order*,[2] the FCC adopted Rule 51.319(e)(2)(ii)(B), which states:

> Cap on unbundled DS1 transport circuits. A requesting telecommunications carrier may obtain a maximum of ten

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

> unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

The Commission applied this rule exactly as written – that is, to impose a cap of 10 DS1 circuits on each route where unbundled DS1 transport remains available. It rejected CLEC arguments that the UNE DS1 cap applies only on routes where DS3 unbundling is not required. The Commission relied on basic principles of statutory construction to find that there was no need to consider the CLECs' contention that a statement in the *TRRO* was inconsistent with the rule's unqualified cap:

> The language in the TRRO and the language in the rule can lead to different conclusions regarding the DS1 cap. However, we must look to the rule for guidance on this matter. If the parties believe the FCC's TRRO is not clear on this matter, they could seek clarification from the FCC. Therefore, for purposes of the amendment, the DS1 cap must be applied as stated in the rule, not the text of the TRRO.

Order at 36.

XO and the CLEC Parties seek reconsideration of the Commission's decision to follow the plain meaning of rule 51.319(e)(2)(ii)(B). They maintain that the Commission should instead have relied on allegedly inconsistent text in paragraph 28 of the *TRRO* to read into the FCC's rule the limitation they urge.

As the Order itself makes clear, the Commission already considered and rejected the CLECs' argument. The fact that the CLECs disagree with the Commission's conclusion is not a proper basis for reconsideration. Because the CLECs have raised no point of fact or law that the Commission overlooked, their requests for reconsideration of the DS1 cap ruling should be denied on this basis alone.

Although there is no need for the Commission to consider the merits of the CLECs' re-argument of the DS1 cap issue, Verizon explains that the Commission had no choice but to apply the UNE DS1 cap rule just as the FCC drafted it. The Commission cannot ignore basic principles of statutory construction, as well as substantive law, to conclude that the FCC's DS1 transport cap is the wrong policy for Florida. And even if the Department had occasion to look beyond the plain language of Rule 51.319(e)(2)(ii)(B) to the *TRRO* text, the discussion in that Order is consistent with the rule itself.

a. The Commission Correctly Applied the Plain Meaning Rule.

The CLECs argue that the Commission erred in applying the plain meaning of Rule 51.319(e)(2)(ii)(B) because it "casually ignored" text of the *TRRO* that they contend limits the application of the FCC's DS1 cap to only routes where unbundled DS3 transport is unavailable. *See* CLEC Parties' Motion at 3. Although the CLECs do not claim that the FCC's Rule at issue is ambiguous, they ask the Commission to read into it language stating the limitation they urge. They ask the Department to make this rule modification based on the FCC's comment in the *TRRO* that "[o]n routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits." *TRRO*, ¶ 128, *quoted in* FDN Motion at 3; CLEC Parties' Motion at 3. FDN advises the Commission that, because it recognized a potential inconsistency between the Rule and paragraph ¶ 128, it "should have invoked the rules of statutory construction to aide [sic] its interpretation"—specifically, "that one must read all provisions of a statute or rule

together to give all of the words in the statute or rule meaning" and "that all related statutes or rules must be read in pari material [sic] to give effect to each part." FDN Motion at 7-8. FDN asserts that the Commission's analysis of the DS1 cap issue "should start with the TRRO itself"—specifically, paragraph 128 of the TRRO. FDN Motion at 3.

The CLECs' theory of statutory interpretation is incorrect and impermissible under well settled Florida law. The Commission may not rely on alleged intent reflected in *TRRO* paragraph 128 to contradict the unambiguous FCC Rule stating that the DS1 cap applies "***on each route*** where DS1 dedicated transport is available on an unbundled basis." (Emphasis added.)

The Commission correctly understood that the proper starting point for its analysis was the FCC Rule itself, not the *TRRO* text. "In attempting to discern legislative intent, we first look to the actual language used in the statute." *Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005), citing *Joshua v. City of Gainesville,* 768 So. 2d 432, 435 (Fla. 2000); accord *BellSouth Telecomms., Inc. v. Meeks,* 863 So. 2d 287, 289 (Fla. 2003). "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). *See also Daniels* at 64, citing *Lee County Elec. Coop., Inc. v. Jacobs,* 820 So. 2d 297, 303 (Fla. 2002) ("When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory

construction to ascertain intent."); *Verizon Fla. Inc. v. Jacobs, et al.*, 810 So. 2d 906, 908 (Fla. 2002). ("There is no need to resort to other rules of statutory construction when the language of the statute is unambiguous and conveys a clear and ordinary meaning.") In "ascertain[ing] the legislative intent implicit in a statute, the courts are bound by the plan and definite language of the statute and are not authorized to engage in semantic niceties or speculations." *Tropical Coach Line, Inc. v. Carter*, 121 So. 2d 779, 782 (Fla. 1960). "It is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language." *State v. Jett*, 18 Fla. L. Weekly S591, S592 (Fla. Nov. 10, 1993). "Rules of statutory construction should never be used to create doubt, only remove it." *Englewood Water Dist. v. Tate*, 334 So. 2d 626, 628 (Fla. 2d DCA 1976). *See also Starr Tyme, Inc. v. Cohen*, 659 So. 2d 1064 (Fla. 1995).

The Commission correctly applied these principles, concluding that "the DS1 cap must be applied as stated in the rule," without limitating it to routes where unbundled DS3 transport is unavailable. Order at 36. The CLEC Parties call the Commission's plain reading of the rule "exceptional," but it is, in fact, the same interpretation made by nearly all Commissions to have considered the issue.

The **Texas** Commission, for example, found that: "Assuming ¶ 128 could be interpreted to permit requesting carriers to obtain more than 10 DS1 dedicated transport circuits on certain routes under certain conditions, the rule of statutory construction dictates that ¶ 128 cannot prevail over the plain meaning of

FCC's Rule §51.319(e)(2)(ii)(B)."[3] The **Rhode Island** Commission, likewise, determined that any lack of clarity in the *TRRO* itself "does not diminish the validity or clarity of the FCC's UNE Rules" imposing a 10-DS1 circuit cap on routes where DS1 transport is unbundled.[4] The **District of Columbia** Commission found that "[t]here is no exception" to the DS1 cap stated in Rule 51.319(e)(2)(ii)(B).[5] The **Massachusetts** DTE held that: "The FCC rule...is not ambiguous. It is quite clear that up to ten unbundled DS1 circuits are available 'on each route' where DS1 circuits are available on an unbundled basis.'"[6] The **Michigan** Commission "conclude[d] that the provisions of 47 CFR 51.319(e)(ii)(B) are consistent with the discussion in the *TRRO* on this issue, without the Commission inserting additional, limiting language as suggested by the Joint CLECs."[7] The **Ohio** Commission "agree[d] with SBC's argument that that the DS1 cap is applicable where there is DS1 impairment on a route

---

3 Order No. 45 Resolving Remaining Contract Disputes, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28821, at 8-9 (Tex. P.U.C. Aug. 5, 2005) ("*Texas Order*"), affirmed by the Texas P.U.C. in Order Approving Interconnection Agreements, (Aug. 29, 2005).

4 Report and Order, *Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18*, Docket 3662, at 14 (R.I. P.U.C. July 28, 2005). *See also* Arbitration Decision, Docket No. 3588, *Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements to Implement the TRO and TRRO*, at 9 ("the Commission has already adopted 'the interpretation of the FCC's TRRO which imposes a cap of 10 DS1 transport circuits on all routes where DS1 is available to be unbundled.'") (Nov. 10, 2005).

5 Order, *Petition of Verizon Washington, DC Inc. for Arbitration Pursuant to Section 252(b) of the Telecomm. Act of 1996*, TAC-19, ¶ 35 (D.C. P.S.C. Dec. 15, 2005) ("D.C. Order").

6 Reconsideration Order, *Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements*, DTE 04-33 ("Mass. Recon. Order"), at 33-34 (Mass. D.T.E. Dec. 16, 2005); *see also* Arbitration Order, at 77 (Mass. DTE July 14, 2005) ("Mass. Arb. Order") ("there is no ambiguity of the rule itself, which contains no limitation on its applicability based on the availability of unbundled DS3 transport.").

7 Order, *In the Matter, on the Commission's Own Motion, to Commence a Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters issued by SBC Michigan and Verizon*, Case No. U-14447, at 25-26 (Mich. PSC Sept. 20, 2005).

regardless of the DS3 impairment status on that route."[8] The **Maine** Commission, likewise, rejected the same arguments the CLECs make here: "We will follow general principles of statutory interpretation and find that because the language of the rule is unambiguous by itself, there is no need to resort to the text of the TRRO."[9]

FDN incorrectly named Maine as one of two states that had approved the CLECs' interpretation of the FCC's DS1 cap (FDN provided no case citations). FDN Motion at 9. The other state FDN mentioned, New York, did issue an early tariff order imposing the restriction the CLECs advocate here, but that incorrect decision is obviously the outlier, and it did not address the statutory construction issue. The Commission would be ill-advised to follow the New York Commission's lead, rather than taking guidance from all the others that have confirmed this Commission's own, correct analysis.

In an attempt to give some credence to its theory that text in an agency order can be used to contradict the clear terms of the agency's rule, FDN cites two cases, *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273 (Fla. 2000), and *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992). FDN claims these cases hold that related statutes or rules must be read together to give effect to each part; and that all provisions of a statute or rule must be read together to give each effect. FDN Motion at 7-8.

---

8 Arbitration Award, *Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the FCC's Triennial Review Order and Its Order on Remand*, Case No. 05-887-TP-UNE, at 56 (Ohio P.U.C. Nov. 9, 2005) ("Ohio Order").

9 Order, *Verizon-Maine, Proposed Schedules, Terms, Conditions, and Rates for Unbundled Network Elements and Interconnection and Resold Services*, at 32 (Me. P.U.C. Sept. 13, 2005).

Verizon does not disagree with these principles, but they have nothing to do with the CLECs' argument. The question presented here does not involve two *statutes or rules*, but just one rule and language in an order. Nothing in the cases FDN cites or any other Florida cases supports the CLECs' notion that a court or Commission can ignore the plain language of an unambiguous statute or rule and look elsewhere for legislative intent. In fact, the cases FDN cites say just the opposite. "It is a fundamental principle of statutory construction that where the language of a statute is plain and unambiguous there is no occasion for judicial interpretation." *Forsythe*, 604 So. 2d at 454. "Where the language of the Code is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the Code." *Palm Beach*, 772 So. 2d at 1282. "'Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.'" *Forsythe*, 604 So. 2d at 456. Thus, FDN's cases support Verizon, not the CLECs. Even if the Commission believes the FCC intended to limit the 10 DS1 cap to routes where unbundled DS3s are unavailable, it cannot read that limitation into Rule 51.319(e)(2)(ii)(B), which clearly imposes the cap *on each route* without limitation. As the Florida Courts have made clear, the Commission cannot rely on extrinsic sources to create ambiguity in a rule where none exists. *See Englewood,* 334 So. 2d at 628; *Starr Tyme*, 659 So. 2d 1064 (Fla. 1995).

Finally, Verizon does not disagree that the text of FCC orders may be used to inform its rules. *See* FDN Motion at 7. But that uncontroversial principle in no way supports the CLECs' new theory that text in an order may be read to *override* an unambiguous rule. The Commission correctly understood the longstanding, universally-applied rule that an unambiguous regulation must be applied as written, so that the plain language of the rule must prevail over the claim of inconsistency with the *TRRO*.

b. The FCC's Rule Is Not, in Any Event, Inconsistent with the TRRO.

The Commission observed that "[t]he language in the TRRO and the language in the rule can lead to different conclusions regarding the DS1 cap," but correctly understood that it must apply the plain meaning of Rule § 51.319(e)(2)(ii)(B) without regard to any claimed inconsistency with paragraph 128 of the *TRRO*. There is, in any event, no such inconsistency, as other Commissions have recognized.

For example, after applying the plain meaning rule, the Texas Commission explained that, in any event, "¶ 128 is not intended to be restrictive such that the 10 DS1 limit only applies to routes where DS3 dedicated transport is not available, as the CLEC Coalition asserts." This paragraph is instead "intended to emphasize and clarify that a limit of 10 DS1 dedicated transport circuits also applies to those routes where unbundled DS1 dedicated transport is available

and DS3 unbundled transport is not."[10] The Texas Commission thus correctly found "no conflict between ¶ 128 and the FCC's Rule §51.319(e)(2)(ii)(B)."[11]

The Massachusetts D.T.E., likewise, found that paragraph 128 is best read to identify only *one circumstance* in which the DS1 UNE transport cap applies, not to specify its application *only* on such routes: "The paragraph does not contain any language to indicate that 'only' routes not subject to DS3 unbundling are subject to the DS1 cap. Moreover, applying the DS1 cap to routes on which DS3 unbundling is required (in addition to routes upon which it is not required) encourages CLECs to take advantage of the efficiencies inherent in purchasing unbundled DS3s rather than numerous, unlimited, unbundled DS1s." Mass. Recon. Order at 33-34.

The District of Columbia and Ohio Commissions agreed that the exception to the cap the CLECs support makes no sense, because it would be inconsistent with the FCC's determination as to the appropriate cross-over point for the conversion of multiple DS1s to a single DS3 – that is, if a carrier has more than 10 DS1s on a route, it should be deploying a DS3 instead. The D.C. Commission thus observed that while the first sentence of paragraph 128 "appears to create an exception to the DS1 cap...the rest of the paragraph states that if a CLEC has sufficient capacity to use more than 10 DS1 transport circuits, then it can efficiently use a DS3 facility and should do so." D.C. Order ¶ 35. The Ohio Commission, likewise, "agree[d] with the FCC's reasoning and the record that for an efficient carrier who aggregates sufficient traffic on DS1 facilities,

10 *Texas Order* at 9 (emphasis in original).

11 *Id.* at 11.

which the FCC record reveals is approximately 10 DS1 transport facilities, the carrier should have generated enough revenue to be economically capable of deploying a DS3 facility or lease from an alternative provider." Ohio Order at 55-56.

In addition, as the D.C. Commission correctly pointed out, the plain reading of the FCC's rule capping DS1 circuits on each route "is bolstered by comments in a later portion of the TRRO that set a cap of 10 DS1 loops." D.C. Order at ¶ 35. Specifically, when the FCC imposed the 10 DS1 loop cap--without any exceptions--it observed that it had "'impose[d] a similar cap on the number of DS1 transport circuits that can be purchased by a given competitive LEC on a single route.'" *Id.*, quoting *TRRO* ¶ 181 n. 459.

In short, if a carrier has access to unbundled DS3 transport on a route, the carrier can purchase such unbundled access, but it may not evade the 10 DS1 cap. Likewise, if a carrier aggregates enough traffic from unbundled DS1s at a particular wire center to warrant deployment of more than 10 DS1s for transport from that office, the carrier should migrate the traffic to a DS3 (unbundled if available, special access or alternative facilities if not).

Contrary to the CLECs' speculation, there is no "hole" in the FCC's non-impairment analysis that the FCC intended to "plug" with its comments in paragraph 128. *See* CLEC Parties' Motion at 5; FDN Motion at 8. Nor is there any support for the CLECs' speculation that the FCC intended, without saying so, to "back away" only "to a limited degree" from the *TRO*'s unlawful nationwide impairment finding for DS1 dedicated transport. CLEC Parties' Motion at 7.

As Verizon has explained, it would be improper for the Commission to look beyond the plain language of Rule §51.319(e)(2)(ii)(B) to determine the FCC's intent. But if the Commission were inclined to look for evidence of intent in the text of the *TRRO*, it would find no inconsistency between that text and Rule §51.319(e)(2)(ii)(B) itself.

c. The CLECs Have Already Asked the FCC to Modify Its Rule.

In applying the FCC's DS1 cap exactly as the FCC drafted it, the Commission advised that: "If the parties believe the FCC's TRRO is not clear on this matter, they could seek clarification from the FCC." Order at 36. In fact, a number of CLECs have already asked the FCC to eliminate or modify the 10 DS1 transport cap.[12] So even if the Commission could lawfully take on the task of modifying the FCC's DS1 cap rule (and it cannot), there would be no reason to do so.

Although FDN at least obliquely acknowledges that "pending requests at the FCC may address the DS1 cap issue," it complains that the FCC "has been very slow in recent years to address reconsideration/clarification requests." FDN Motion at 8 n. 16. But impatience with the FCC's pace is not a legitimate reason for this Commission to try to usurp the FCC's exclusive authority to change or clarify its rule.

---

[12] *See* Petition for Reconsideration of CTC Comm. Corp., Gillette Global Network, Inc. d/b/a/ Eureka Networks, Globalcom, Inc., Lightwave Comm., LLC, McLeod USA, Inc., MPower Comm. Corp., PacWest Telecomm, Inc., TDS MetroCom, LLC, and US LEC Corp., filed March 28, 2005, in the FCC's *TRRO* proceeding (WC Docket No. WC 04-313 and CC Docket No. 01-338), at 23.

d. Another ILEC's Contract Provisions Cannot Override the Plain Language of Rule §51.319(e)(2)(ii)(B).

FDN and the CLEC Parties try to support their rule interpretation with a contract provision negotiated between BellSouth and the CLECs. They assert that BellSouth agreed to a provision lifting the 10 DS1 cap on routes where unbundled DS3 transport is available. FDN Motion at 2 n. 3; CLEC Parties' Motion at 8. FDN thus contends that the DS1 cap "should apply consistently from ILEC to ILEC throughout the state." FDN Motion at 2.

Verizon did not participate in BellSouth's negotiations, so it cannot know what trade-offs were made in the course of those negotiations, or how the stipulated DS1 cap provision might operate in the context of the entire agreement. But BellSouth's negotiated contract provisions are, in any event, irrelevant to the Commission's analysis here. In the BellSouth case, the Commission never made any ruling on the DS1 cap issue, so its decision there provides no guidance about the proper interpretation of the FCC's rule. And a stipulated contract provision, of course, is not precedent. Carriers are always free to agree to contract terms that exceed their legal obligations, but those provisions do not become the "rule" governing all carriers in the state. And contrary to the CLECs' position, there is no requirement for all ILECs' interconnection agreements to be the same. That result would contravene the regime of carrier-to-carrier negotiations Congress mandated in the Act. In short, whether or not BellSouth agreed to contract language limiting application of the DS1 cap, the Commission obviously cannot rely on that language to contradict the unambiguous FCC Rule.

In a footnote, FDN also claims that the Commission approved a Staff recommendation in the FDN/Sprint arbitration that restricts the application of the DS1 cap to routes where DS3 transport is unimpaired. FDN Motion at 2 n. 3. However, no order has been issued in that case, so it is not yet clear what, exactly, the Commission may ultimately say about the DS1 cap in that proceeding. Again, however, any ruling in the FDN/Sprint arbitration cannot modify the plain language of the FCC's rule. To the extent any decision purports to do so, it will be subject to reconsideration and reversal. The DS1 cap ruling the Commission has already made in its Order in this proceeding is precedent for the pending order in the FDN/Sprint arbitration, not the other way around.

2. The Commission Properly Rejected the CLECs' Proposals to Litigate Wire Center Designations in the Absence of Any Dispute Over the Availability of UNE loops and transport.

XO takes issue with the Commission's decision rejecting the CLECs' proposals to litigate, in advance of any actual dispute, Verizon's designation of the wire centers that satisfy the FCC's non-impairment criteria and to incorporate the resulting list of Department-approved wire centers into the parties' ICAs. *See* XO Motion at 3-5; Order at 33-36. XO charges that the Commission's decision "would effectively deprive Florida CLECs any opportunity to access, or undertake a meaningful review of the factual data supporting Verizon's claims that unbundling relief is available." XO Motion at 3-4 (citations omitted). XO further argues that "the possibility of future litigation initiated by Verizon, for the purpose of challenging a requesting carrier's self-certified order for UNEs . . . threatens to consume substantial CLEC resources," *id.* at 5, and it contends that the

Commission must determine the proper designations of all wire centers up front in order to "avoid the burden and expense of multiple, successor proceedings." *Id.*

As the Order makes clear, the Commission has already considered and rejected these same arguments not once, but at least twice. The Commission agreed with Verizon that its May 5, 2005 Order denying several CLECs' "emergency motions" to stay the *TRRO*'s transition plan had already addressed the CLECs' disputes with respect to verification of ILEC wire centers. Order at 35, citing Order No. PSC-05-0492-FOF-TP ("May 5 Order"). In its May 5 Order, the Commission confirmed that carriers must comply with *TRRO* paragraph 234 for ordering and provisioning high-capacity loops and transport:

> As for high capacity loops and dedicated transport, we find that a requesting CLEC shall self-certify its order for high-capacity loops or dedicated transport. Thereafter, the ILEC shall provision the high capacity loops or dedicated transport pursuant to the CLEC's certification. The ILEC may subsequently dispute whether the CLEC is entitled to such loop or transport, pursuant to the parties' existing dispute resolution provisions.

May 5 Order at 6.

The Commission explicitly rejected the CLECs' arguments that Commission intervention was necessary to obtain Verizon's back-up data for its wire center classifications, and also rejected all of the other justifications XO reiterates for up-front verification of Verizon's wire centers. *See* Order at 34-36. Indeed, XO does not even attempt to raise any point of fact or law the Commission overlooked or failed to consider in reaching its decision on this issue. Because XO's Motion simply re-argues the same points the Commission

considered and rejected, it does not satisfy the standard for reconsideration and must be denied.

XO has also improperly tried to introduce "evidence," for the first time on reconsideration, that Verizon has "consistently refused" XO's requests to provide the back-up data for Verizon's wire center designations (FDN Motion at 3-4 n. 7), and that "XO is aware that Verizon already has overstated the number of fiber-based collocators" because it counted the now-merged XO and Allegiance as separate entities in determining wire center designations. *Id.* at 4 n. 8.

As an initial matter, the Commission cannot consider these extra-record factual allegations in rendering its reconsideration decision. As FDN recites, motions for reconsideration are to be "based upon matters set forth in the record and susceptible to review." FDN Motion at 3.

XO's claims, in any event, are false. As Verizon witness Ciamporcero testified (Rebuttal Testimony at 37-38), and as Verizon explained in its Brief (at 37), Verizon informed CLECs individually by letter and on its website that it would provide back-up data for its wire center designations on request, upon execution of an appropriate non-disclosure agreement. CCG's own documents produced in discovery confirm these facts.[13] XO did, in fact, sign the non-disclosure agreement necessary for Verizon to make this confidential information available, and received Verizon's backup data several months ago—the same data that Verizon has made available to other CLECs. To the extent that XO seeks information revealing the *identity* of other CLEC collocators in particular offices,

[13] *See, e.g.*, Ex. 8, CCG's responses to Third Request for Production of Documents, nos. 7 and 10, Letters from Anthony Black, Verizon, to XO Communications Services, Inc., IDT America, and Covad.

XO has no legitimate need for such information, which is confidential and proprietary to those other carriers.

With respect to XO's statement that it is "aware" of Verizon's misclassification of XO and Allegiance as separate fiber-based collocators, XO fails to reveal that *Verizon* told XO about this mistake months ago – and then corrected it. On July 19, 2005, Verizon's counsel sent a letter to XO's Vice-President for Regulatory Affairs, in which Verizon addressed the affiliate issue and listed the wire centers in which XO and Allegiance had erroneously appeared in the same wire center, as well as the total number of fiber-based collocators in those wire centers. *Moreover, the letter made clear that Florida was not among the states where there was an affiliate miscounting problem involving XO and Allegiance.*

XO also fails to reveal that Verizon has already challenged XO's self-certifications of a number of UNE dedicated transport circuits in Florida. On July 1, 2005, Verizon sent XO a notice to initiate dispute resolution in accordance with the *TRRO*'s provision-then-dispute system, and the parties are in negotiations to try to resolve the matter through the dispute resolution provisions of their interconnection agreement. So the process the FCC established in paragraph 234 of the *TRRO* is working just as the FCC intended, and just as this Commission expected it would. If XO were genuinely concerned about needless consumption of CLEC resources and multiple proceedings (*see* FDN Motion at 5), it would not be seeking to initiate a second proceeding to address wire center

designations that are already the subject of the ongoing dispute resolution process.

3. The Commission Correctly Recognized that CLECs Must Recertify EELs Provisioned before the Effective Date of the TRO

The Commission's Order correctly states "that all [EEL] circuits must be recertified, as explained in ¶589, ¶614 and footnote 1875 of the TRO." Order at 110. The Commission established a 60-day period, from the effective date of the Order, for a CLEC "to verify and document that its current EELs comply with the TRO eligibility criteria." *Id.* at 111.

As the Commission observed, although the parties argued about the appropriate length of time for EEL re-certification, the basic question of whether CLECs must re-certify pre-existing EELs under the *TRO*'s new eligibility criteria was not a focus in the proceeding. *See* Order at 110. This is because *the parties agreed to withdraw the re-certification dispute that had originally been identified.* Issue 21(b)(3) read: "Should EELs ordered by a CLEC prior to October 2, 2003, be required to meet the FCC's service eligibility criteria?" On April 8, 2005, AT&T submitted a letter explaining that it no longer needed to pursue this issue and one other issue that it had earlier raised. It stated that, "Since AT&T is the party that initially proposed these issues, there should be no objection to withdrawing them."[14] There were, in fact, no objections to withdrawing the re-certification issue. As a result, CCG did not discuss this issue in its brief, noting that: "By agreement of the Parties, sub-issue b(3) has been

[14] Letter from Tracy W. Hatch, to Blanca Bayo, F.P.S.C. Clerk, in Docket 040156-TP, dated April 8, 2005.

withdrawn." CCG Brief at 46. Verizon's brief included a similar statement. Verizon Br. at 119.

Now, however, XO apparently seeks reconsideration of the Commission's observation that pre-existing EELs must be re-certified. XO Motion at 6-7. This request is plainly improper. XO agreed to withdraw the re-certification issue, and its brief did not address it. It cannot now resurrect withdrawn Issue 21(b)(3), and then brief that issue for the first time on reconsideration. To the extent the parties discussed the re-certification obligation at all (and XO did not), the Commission addressed their comments. But it could not address disputes that were not identified or arguments that were not raised. The Commission's confirmation of the ultimately undisputed certification obligation was appropriate and a necessary foundation for the Commission's resolution of the dispute about the time period for re-certification.

Although there is no need to debate the merits of a withdrawn issue, Verizon notes briefly that the Commission's recognition of the re-certification obligation is well-grounded in the terms of the *TRO*. The FCC required that "each DS1 EEL (or combination of DS1 loop with DS3 transport) must satisfy the service eligibility criteria." *TRO* ¶ 599. In the *TRO*, the FCC made clear that "[t]he eligibility criteria we adopt in this Order supersede the safe harbors that applied to EEL conversions in the past." TRO, ¶ 589. Thus, as the Massachusetts D.T.E. explained: "Because the new service eligibility criteria are significantly different from the requirements under the old rules, and because circuits that qualified under the former rules may not qualify under the new rules, it is only logical that

the FCC would require re-certification." Mass. Arb. Order at 130. *See also* Wash. Arb. Rep. at 175 ("It is reasonable to require CLECs to recertify any EEL arrangements existing or requests as of the effective date of the Triennial Review Order, subject to the new certification requirements.")

If the FCC had intended to grandfather pre-existing EELs, it would have done so explicitly (as it did, for example, for line sharing arrangements in its line sharing rules). The FCC's EEL eligibility rule (47 C.F.R. § 51.318(b)) does not state any distinction between EELs ordered before the effective date of the *TRO* and those ordered later, so this Commission cannot draw such a distinction, either—let alone on the basis of XO's improper motion for reconsideration.

4. There Is No Need for Clarification that De-Listed UNEs Remain Subject to Transition Pricing Where No Physical Change Is Required to Effectuate Commingling.

XO asks the Commission to clarify its ruling on implementation of the FCC's "no-new-adds" directive to state that de-listed UNEs remain subject to transition pricing where no physical change to those facilities is required to effectuate a commingling arrangement. XO Motion at 2. XO is apparently concerned that the act of commingling will be deemed a physical change that will remove de-listed UNEs, including DS1 and DS3 transport circuits, from the embedded base to which transition pricing will be applied until the end of the FCC-mandated transition period. *Id.*

The clarification XO seeks is unnecessary. XO cites page 33 of the Order as the basis for its clarification request, but nothing in the Commission's analysis

there (or elsewhere in the Order) would prohibit transition pricing for de-listed, commingled facilities where there is no physical change to the commingled circuits. Nothing in Verizon's draft conforming amendment would prohibit such transition pricing, either; Verizon believes XO prepared its request for clarification before it reviewed Verizon's conforming amendment.

Because there is nothing in the Order or Verizon's proposed conforming language that would prohibit transition pricing for de-listed facilities that are commingled without any physical changes, there is no need for the clarification XO seeks. If, however, the Commission does issue a clarification, Verizon asks it to adhere closely to exactly the clarification XO seeks—that "commingling of a de-listed...UNE does not constitute a 'change' *where no physical change to the facility takes place*." XO Motion at 2-3 (emphasis added); *see also* the title of section I of XO's Motion. In particular, the Commission should avoid any broad statements suggesting that commingling never involves changes to existing facilities, because the CLEC might request changes in some cases. Such cases would not be covered by the clarification XO requests.[15]

5. The Commission Should Deny FDN's Request to Stay the DS1 Cap Ruling

In addition to seeking reconsideration of the Commission's DS1 cap ruling, FDN asks to the Commission either to extend the date for filing conforming amendments (currently set at January 5, 2006) or to "refrain from enforcing its

[15] For example, XO could ask to commingle an existing DS1 de-listed UNE loop that is currently terminated at a collocation with a newly provisioned DS3 transport with multiplexing by asking Verizon to re-terminate the loop from the collocation to the multiplexer. In this example, the loop re-termination would be a physical change.

Order or amendments insofar as they relate to" the DS1 cap ruling. FDN Motion at 9. FDN claims that the stay request is necessary to avoid extensive facilities rearrangements that will "cause disruption to end use customer's service" if the Commission ultimately reverses its DS1 cap ruling and imposes the (unlawful) limitation on the cap that FDN requests.

The Commission should deny FDN's request. First, as FDN admits, a reconsideration motion does not stay the effect of the challenged order. There is no provision in the Commission's rules for stays pending reconsideration (only stays pending judicial review). Second, the potential harm FDN alleges is unlikely to occur and, in any event, completely within FDN's own control. There is nothing in the record about how many DS1 facilities FDN would have to transition to alternative arrangements once the FCC's 10 DS1 cap is enforced. Assuming there are any, it is not likely that the conforming amendment would be executed and the cap enforced before the Commission rules on the reconsideration petitions. And in the improbable event that the Commission adopts the unlawful interpretation of the FCC's DS1 cap rule that the CLECs urge, there will be no reason for customer disruption unless FDN fails to make the necessary arrangements for transition of the de-listed facilities (such as requesting tariffed access arrangements).

Although Verizon asks the Commission to reject FDN's request for an open-ended stay of the DS1 cap ruling and FDN's unsupported rationale for that request, Verizon would agree to a defined, limited extension for filing conforming agreements. This extension is justified not for the reasons FDN states, but

because negotiation of a conforming amendment will be difficult by the January 5 deadline due to the intervening holiday season. Specifically, Verizon would not oppose an extension of no more than 30 days to February 5, 2006, which will still allow for execution and approval of the TRO amendments by the FCC's deadline for transition of de-listed UNEs of March 11, 2006. As the Commission knows, this mandatory deadline cannot be extended for any reason.

Respectfully submitted on December 27, 2005.

By: _s/ Leigh A. Hyer_____
Leigh A. Hyer
P. O. Box 110, FLTC0717
Tampa, Florida 33601
(813) 483-1256

and

Kimberly Caswell
P. O. Box 110, FLTC0007
Tampa, Florida 33601
(727) 360-3241

Counsel for Verizon Florida Inc.