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February 14, 2006 – **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 Inc.'s Brief in Support of its Proposed TRO Amendment Language for filing in the above matter. Service has been made as indicated on the Certificate of Service. If there are any questions concerning this filing, please contact me at 813-483-1256.

Sincerely,

/s Leigh A. Hyer

Leigh A. Hyer

LAH:tas

Enclosures

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via U.S. mail on February 14, 2006 to the parties on the attached list.

_____/s Leigh A. Hyer_____

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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: February 14, 2006

BRIEF OF VERIZON FLORIDA INC. IN SUPPORT
OF ITS PROPOSED TRO AMENDMENT LANGUAGE

As directed in the Commission's Order on Arbitration,[1] the parties have attempted to negotiate final language of an Amendment to their existing interconnection agreements that would implement the FCC's determinations in the *Triennial Review Order*[2] ("*TRO*") and *Triennial Review Remand Order*[3] ("*TRRO*") and this Commission's rulings. With regard to those issues where the parties have been unable to agree on specific contract language, Verizon Florida Inc. ("Verizon") files this memorandum to urge that the Commission adopt Verizon's proposed Amendment language and reject the CLECs' proposals. The language that Verizon has proposed with respect to those remaining issues (which appears in the Amendment in brackets and boldface) is reasonable, best effectuates the FCC's *TRO* and *TRRO*, and is consistent with the Commission's orders in this docket. The CLECs' language (which appears in brackets,

[1] Order on Arbitration, *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.*, Docket No. 040156-TP (Dec. 5, 2005) ("Order on Arbitration").

[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded*, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

[3] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*"), *petitions for review pending, Covad Communications Co., et al. v. FCC, et al.*, Nos. 05-1095, *et al.* (D.C. Cir., to be argued Feb. 24, 2006).

boldface and underlined) is not faithful to governing law. Verizon generally addresses the issues in the order in which they appear in the Amendment.[4]

Section 2.2 / Section 4.4 – Scope of Amendment

Section 2.2, as proposed by Verizon, addresses the scope of the Amendment, establishing the basic principle that Verizon's obligation to provide access to UNEs, UNE combinations, or UNEs commingled with wholesale services "under the terms of this Amendment" is limited to the requirements of "Federal Unbundling Rules." That provision thus reflects the basic understanding underlying this proceeding, namely, that "existing ICAs should be amended to reflect the changes in unbundling requirements resulting from the FCC's *TRO*, *USTA II*,[5] and the *TRRO*." Order on Arbitration at 13. In fact, the CLECs stipulated that any "rates, terms, and conditions that do not arise from federal unbundling regulations pursuant to 47 U.S.C. sections 251 and 252" will *not* be litigated in this arbitration; and they expressly agreed that to "defer any argument they might have that Verizon has unbundling obligations, independent of sections 251 and 251, including under state law or the Bell Atlantic/GTE merger conditions."[6] For these reasons, "[a]rguments regarding unbundling obligations that Verizon may or may not have independent of §§ 251 and 252" are outside the scope of this proceeding. Order on Arbitration at 13. There can thus be no serious dispute that Verizon's proposed Section 2.2 accurately reflects the parties' rights and obligations "under the terms of this Amendment."

[4] Certain disputes over language may reflect more basic substantive disagreements that can be more clearly discussed by reference to the sections of the Amendment that squarely address those underlying issues. For example, Section 1 reflects the parties' disagreement over inclusion of a pricing attachment; that issue is discussed in connection with several issues below. CLECs also propose inserting the words "access to" in Section 2.1; the words are surplusage, do not appear in the corresponding federal regulation (47 C.F.R. § 51.309(a)), and have not been included in comparable provisions in other states; the Commission should not include them here.

[5] *USTA v. FCC*, 359 F.3d 554, 565-68 (D.C. Cir.) ("*USTA II*"), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

[6] Letter re Issue Stipulations to Ms. Blanca S. Bayo, Director, FPSC, from all parties, filed in this docket on April 26, 2005, at 2.

The CLECs nevertheless object to the inclusion of Section 2.2 (though they propose no alternative provision) and have proposed language throughout the Amendment that is inconsistent with the scope of this proceeding, Verizon's obligations, and their own Stipulation. Thus, CLECs have proposed adding language to Section 4.4 of the Amendment – which addresses the Scope of the Amendment and its affect on pre-existing obligations under the parties' ICAs – that is at best confusing surplusage and at worst an attempt to undo the parties' stipulation and this Commission's holding concerning the scope of Verizon's obligations under the Amendment.

Agreed language in Section 4.4 provides, in accordance with this Commission's holding, that the "Amendment shall amend, modify and revise the Agreement only to the extent set forth expressly herein" and shall not "be deemed to amend or extend the term of the Agreement, or to affect the right of a Party to exercise any right of termination it may have under the Agreement." But the CLECs go on to propose that the Amendment "**does not alter, modify or revise any rights and obligations under applicable law contained in the Agreement, other than those *Section 251* rights and obligations contained in the Agreement.**" (Emphasis added).

This language is unnecessary, because the agreed terms of Section 4.4 noted above properly limit the scope of the Amendment. It is also misleading, because it incorrectly implies that the current interconnection agreements ("ICAs") impose some *other, non-Section 251* rights and obligations that would not be governed by the Amendment. The CLECs' Section 4.4 language – which CLECs refer to throughout the Amendment – could be read to imply that although the Amendment may allow Verizon to cease providing UNEs no longer required by Section 251, the Agreement itself may nevertheless impose on Verizon some other, non-Section 251 obligation to provide the same facilities and services to the CLECs. The CLECs insist on

this language even though they cannot identify any such non-Section 251 law, and even though they agreed that the purpose of this proceeding was to implement, in the parties' agreements, the limitations on Verizon's unbundling obligations imposed in the *TRO* and the *TRRO*.

Indeed, the CLECs propose to insert references to Section 4.4 into each of the specific sections of the Amendment that implement the TRO's and *TRRO*'s limitations on the availability of particular UNEs, such as fiber-to-the-home ("FTTH") loops, hybrid loops, high capacity loops and dedicated transport. Thus, the CLECs would have the Amendment imply that while Verizon need not provide unbundled access to, say, greenfield FTTH loops pursuant to Section 251, the Agreement may still require Verizon to provide unbundled access to those fiber loops pursuant to some other source of law.

This is simply wrong. Verizon's obligations to provide unbundled access to FTTH loops and the other UNEs at issue here, to the extent it has any, exist solely pursuant to Section 251. The FCC's regulations establish not only Verizon's unbundling obligations, but also the *limits* on those obligations. While the Commission left open in the Order on Arbitration the possibility that some future proceeding "outside of this arbitration" might address unbundling obligations under state law or some other source of law, it made crystal clear that the parties' Agreements "should be amended to reflect" the current terms of federal law. Order on Arbitration at 13. Any suggestion that non-Section 251 obligations exist under the terms of the Amended Agreement is inconsistent with the explicit terms of the Commission's Order on Arbitration and the very purpose of this proceeding. The Commission should therefore reject the CLECs' proposed language seeking to undermine the effective implementation of the *TRO*, the *TRRO*, and this Commission's orders by rejecting the CLECs' proposed addition to Section 4.4 and CLECs' proposed references through the Amendment to that Section.

Section 2.3

Just as Verizon's proposed Section 2.2 provides that Verizon's obligations under the Amended Agreement are defined by Federal Unbundling Rules, Section 2.3 provides that Verizon is required to provide UNEs under the Amended Agreement "**only for those purposes for which Verizon is required by the Federal Unbundling Rules to provide**" such facilities. CLECs have agreed that this provision is necessary, but attempt to limit it to the statement that a CLEC "may not access a UNE for the exclusive provision of Mobile Wireless Services or Interexchange Services." *See also TRRO* ¶ 34. But they refuse to agree to the more general statement of principle, even though that statement correctly reflects the obligations imposed under federal law. CLECs cannot plausibly argue that Verizon should be required to provide UNEs or combinations for purposes *not* authorized under Federal Unbundling Rules. Section 251(c)(3) itself limits the obligation to provide access to UNEs to carriers that seek to provide telecommunications services. *See* 47 U.S.C. § 251(c)(3). And the *TRRO* "den[ies] access to UNEs in cases where the requesting carrier seeks to provide service exclusively in a market that is sufficiently competitive without the use of unbundling." *TRRO* ¶ 34. These limitations are properly reflected in Verizon's proposed language, and the Commission should adopt it.

Section 2.4 – Discontinuance Rights Under the Amendment

The Commission determined that the Amendment should include "rates, terms, and conditions relating to the changes in unbundling obligations resulting from the *TRO* and the *TRRO*," that "no new change-of-law provisions need to be included in the" Amendment. Order on Arbitration at 16. Accordingly, Verizon omitted proposed language that CLECs argued created a new change of law provision – as to the few ICAs that arguably did not already contain terms authorizing Verizon to discontinue provision of facilities no longer subject to unbundling –

by allowing automatic discontinuance of facilities that may be de-listed in the future. Section 2.4 is thus a back-stop provision that addresses the discontinuance process for elements that the FCC has de-listed, and for which the FCC did not adopt a specific transition rule. First, Section 2.4 makes clear that Verizon may cease providing any element that it is no longer required to provide under the *TRO* and *TRRO* to the extent it has not already done so. Second, Sections 2.4.1 and 2.4.2 provide the process that Verizon may follow in cases where CLECs fail to order arrangements to replace de-listed UNEs or UNE combinations. Disputes remain with regard to this language.

Section 2.4: CLECs first attempt to insert a reference to their proposed Section 4.4 in an apparent effort to inject doubt about whether the Amendment governs the parties' rights and obligations. That is improper for the reasons already discussed – as the Commission held, the purpose of the Amendment is to effectuate the FCC's determinations in the *TRO* and *TRRO*, including in particular its determinations that certain network facilities are no longer subject to unbundling at all. CLECs also object to language recognizing that Verizon may have had pre-existing discontinuance rights under the Agreement "**or otherwise**," but the reference to other sources of such rights, besides the pre-existing Agreement, is necessary and should be adopted. For example, the *TRRO*'s no-new-adds prohibition is self-effectuating without regard to the terms of any individual ICA; likewise, CLECs may have adopted an ICA with the explicit agreement that the adoption does not include UNEs that had been discontinued as of the date of the adoption. Thus, a reference solely to the "Agreement" would not accurately reflect Verizon's discontinuance rights in all cases.

Sections 2.4.1: Agreed language provides that, if CLECs fail to place an order to replace a de-listed facility, Verizon may replace or reprice the facility. The parties' disagreements relate

to what replacement arrangements Verizon may put in place, the appropriate price for those arrangements, and what happens if the CLECs fail to pay. First, Verizon proposes, in addition to a special-access arrangement, Verizon may also put in place "**a resale arrangement, or other analogous arrangement**," while the CLECs propose "**other alternative wholesale arrangement**." Verizon's language – which makes clear that Verizon may put a resale arrangement in place – is appropriate, particularly because in some circumstances there may be no appropriate special-access alternative.

Second, under language that is largely agreed, if special access arrangements are put in place, the tariffed rate shall be the month-to-month access rate, unless the CLEC is already "subscribed to an applicable special access term/volume plan or other special access tariff arrangement, pursuant to which [the CLEC] would be entitled to a **different [lower]** rate." The CLECs' language, which would apply the tariffed rate only if it were "lower," is inappropriate. If the CLEC has already "subscribed" to a pertinent tariff, then that rate should apply. Anything else would allow the CLEC to escape the tariffed obligations that it agreed to when "subscrib[ing]" in the first place. CLECs also propose that, if Verizon puts in place an arrangement other than a special access arrangement, then Verizon "**will assess a rate that is not greater than the lowest rate the CLEC could have otherwise obtained for an equivalent or substantially similar wholesale service**." That proposal is clearly inappropriate, because it would eliminate any incentive for CLECs to comply with their obligation to order replacement arrangements in cases where UNE obligations have been eliminated. Under the CLECs' proposed language, the CLEC could be no worse off than if they had followed the rules and replaced de-listed UNEs. Verizon's proposal, by contrast, does not impose any penalty, but neutrally and accurately reflects the price of the wholesale arrangement that Verizon provides.

No CLEC need be subject to those charges if they simply replace de-listed facilities in a timely way.

Third, Verizon proposes language makes clear that Verizon "**may disconnect the subject Discontinued Facility (or the replacement service to which the Discontinued Facility has been converted) if [the CLEC] fails to pay when due any applicable new rate or surcharge billed by Verizon.**" That language is necessary to protect Verizon's legitimate interest in avoiding mounting bad debt and endless disputes. When a particular facility is no longer subject to unbundling, the CLEC has a plain obligation to make arrangements to replace that facility with a lawful wholesale arrangement (or to stop taking service from Verizon entirely). Once a CLEC fails to make such arrangements *and* fails to honor its obligation to pay the rate that applies under the Agreement, Verizon should be permitted to terminate service. No business can be reasonably compelled to provide service for free, let alone for the benefit of its direct competitors. Verizon's proposal is reasonable and should be adopted.

Section 2.5 – Pre-Existing Discontinuance Rights

Section 2.5.2: Section 2.5.2 is intended to clarify that the Amendment itself does not implement *future* changes of law (as the Commission has held), and then clarifies that this limitation itself does not prevent Verizon from giving effect to certain provisions of the *TRO* and *TRRO* that may be implemented in the future. Although the parties have agreed to most of the provision, CLECs object to Verizon's language noting that it may, pursuant to the Amendment, implement any rates or charges that the Commission may establish in the future for any functions that Verizon is required to perform under the Amendment. Verizon's proposal in this regard is appropriate: if, in a later proceeding, new charges for these functions are established, Verizon should be able to begin charging them without the necessity for Amendment of any existing

agreement. That is part and parcel of the implementation of "rates, terms, and conditions relating to the changes in unbundling obligations resulting from the *TRO* and the *TRRO*." *Id.*[7] Accordingly, Verizon's proposed language is consistent with the Order on Arbitration and should be included.

Section 3.1 – FTTH and FTTC loops

Section 3.1.1. In the *Triennial Review Order*, the FCC found that CLECs are not impaired, on a national basis, without unbundled access to "loops consisting of fiber from the central office to the customer premises," known as fiber-to-the-premises ("FTTP") or FTTH loops. *TRO* ¶ 211. The FCC has held that its finding of no impairment also applies to "fiber-to-the-curb" ("FTTC") loops, defined as "local loop[s] consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises or, in the case of predominantly residential MDUs, not more than 500 feet from the MDU's MPOE."[8] The Order on Arbitration recognizes this. *See* Order on Arbitration at 66.

Verizon's proposed Amendment accordingly provides that a CLEC shall not be entitled to obtain "access to a [newly built] FTTH or FTTC Loop, **or any segment thereof**, on an unbundled basis. . . ." This language accurately reflects the requirements of federal law and this Commission's Order on Arbitration, which explicitly provides that, "in no event is Verizon obligated to offer unbundled access to FTTP loops (*or any segment or functionality thereof*) which terminate at an end user's customer premises that previously has not been served by any Verizon loop facility." *Id.* (emphasis added). The CLECs' proposal to delete the phrase "or any

[7] To the extent CLECs argue that this language is inconsistent with Verizon's agreement to withdraw the pricing attachment originally submitted with Amendment 2, *see* Order on Arbitration at 13, they are incorrect for reasons that Verizon explains in connection with its discussion of the pricing attachment below.

[8] 47 C.F.R. § 51.319(a)(3)(i)(B) (as modified by Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 20293 (2004) ("*FTTC Reconsideration Order*"), App. B (Final Rules)).

segment thereof" thus conflicts with this Commission's determination. Indeed, to the extent the CLECs suggest that, where Verizon builds a fiber loop that includes copper from a premises to the curb (and then fiber from the curb to the central office), Verizon must unbundle the copper segment, the whole point of the *FTTC Reconsideration Order* was to explain that the FCC's no-impairment finding as to fiber loops includes those loops that have copper distribution facilities leading from the premises to the curb. *See FTTC Reconsideration Order* ¶ 10. Conversely, if the CLECs are attempting to argue that they are entitled to FTTH subloops, they are wrong there too: The FCC's subloop rule applies only to "copper subloop[s]," which are "comprised entirely of copper wire or copper cable." 47 C.F.R. § 51.319(b)(1). The Commission should therefore reject the CLECs' objection to Verizon's language.

Verizon's language also appropriately clarifies that a "greenfield" FTTH or FTTC loop is one that terminates at a customer premises that had not been previously served by any loop facility "**other than a FTTH or FTTC Loop.**" This is fully consistent with the federal definition of "overbuild" which is limited to deployment of fiber loops "parallel to, or in replacement of, an existing *copper* loop facility." 47 C.F.R. § 51.319(a)(3)(ii) (emphasis added); *see also* Order on Arbitration at 68 (referring to ILEC decision to "retire existing *copper* loops and replace them with FTTH loops") (emphasis added); *TRO* ¶ 7 ("[O]nly in fiber loop overbuild situations where the incumbent LEC elects to retire *existing copper loops* must the incumbent LEC offer unbundled access to those fiber loops for narrowband service only.") (emphasis added); *id.* ¶ 273 ("Only in fiber loop overbuild situations where the incumbent LEC elects to retire *existing copper loops* must the incumbent LEC offer unbundled access to those fiber loops . . . .") (emphasis added); *id.* ¶ 277 ("pre-existing copper loops").

Verizon's language makes clear that if Verizon upgrades an existing FTTH or FTTC loop, the upgraded loop still qualifies as "newly built" fiber, which Verizon has no obligation to unbundle. This is plainly the correct result: the rule requiring provision of a DS0 level transmission path in the case of overbuilt loops is designed to *preserve* the obligation to provide access to the equivalent of a pre-existing copper loop. It was *not* intended to create *new* unbundling obligations for advanced fiber facilities. Because the proposed insertion properly implements federal law and the Commission's orders, it should be adopted.

Section 3.1.2. The parties' dispute with regard to overbuilt loops primarily relates to the dispute discussed above with regard to the scope of the Amendment. Federal law dictates the limits of Verizon's obligations with regard to provision of a voice-grade transmission path in cases where Verizon replaces an existing copper loop with an FTTH or FTTC loop; furthermore, the Commission has recognized that issues of state law are not properly introduced into the Amendment.[9]

Verizon has also proposed language recognizing that, once rates are established for a Voice Grade Transmission Path, those rates should apply as set forth in Verizon's proposed pricing attachment. As noted above with regard to Section 2.5.2, such language is necessary and appropriate in light of the Commission's determination that the Amendment should include "rates, terms, and conditions relating to the changes in unbundling obligations resulting from the *TRO* and the *TRRO*," Order on Arbitration at 16, and should be included.

[9] The CLECs also propose a reference to the Arbitration Orders in this provision and elsewhere in the Amendment. The reference is unnecessary: the Amendment throughout conforms to the Arbitration Orders and will be interpreted by the Commission, in the event of any dispute, in accordance with those orders. By inserting the phrase haphazardly, the CLECs merely create potential confusion.

Section 3.2 – Hybrid Loops

This section addresses Verizon's obligations with respect to unbundling of hybrid loops – that is, loops composed of both fiber optic cable and copper wire or cable. In general, the parties have agreed to language that implements the FCC's determination that Verizon has no obligation to provide access to the packet switched or broadband features of such loops, and need only provide a voice-grade transmission path over such loops. *See generally* Order on Arbitration at 69-75. The parties' disagreement with regard to wording of Sections 3.2.1, 3.2.2, and 3.2.3, and 3.2.4 is limited to Verizon's objection to CLEC efforts to advance the argument that the limitations on unbundling in the *TRO* and *TRRO* may be over-ridden by state law or some other source of law. As the Commission has noted, that issue is out of the case, and the Amendment must accurately reflect the requirements of federal law. Accordingly, CLECs' efforts to insert references to their proposed Section 4.4 are inappropriate. Amendment § 3.2.1.

Section 3.2.4.1 / Section 3.2.4.2 – IDLC Loops

In those cases where the ILEC is required to unbundle a loop for an end-user customer who is currently served over IDLC architecture, in most cases, the ILEC will be able to do this "through a spare copper facility or through the availability of Universal DLC systems," but, "if neither of these options is available, incumbent LECs must present requesting carriers a technically feasible method of unbundled access." *TRO* ¶ 297. The Commission ruled that, if neither spare copper nor UDLC loops are available, "Verizon must present to the CLEC a technically feasible method of unbundled access that is not solely restricted to new construction." Order on Arbitration at 95.

The parties have two disputes with regard to this issue. First, in Section 3.2.4.1, Verizon proposes that, when Verizon provisions a loop using existing spare copper or UDLC, a non-

recurring "line and station transfer" ("LST") charge may be imposed. That proposal is fully in keeping with the parties' agreement that Verizon may "continue to apply any rates the Commission has established." *Id.* at 120. For example, as this Commission has noted, numerous CLECs participated in the "New York DSL Collaborative," where "the parties had developed a process for conducting LSTs" on the assumption that LSTs "involve[] additional installation work, including a dispatch, and will require an additional charge."[10] The Commission thus held that "it is appropriate for Verizon to charge for LSTs." Final Order on Arbitration, 2003 Fla. PUC LEXIS 670, at *122. Because Verizon must perform an LST in connection with provisioning spare copper or UDLC in place of an IDLC loop, such a charge is warranted.

Second, Verizon's language in Section 3.2.4.2, in accordance with the Commission's Order, provides that Verizon "**shall offer . . . such other technically feasible option, such as any technically feasible option identified in note 855 of the TRO, that Verizon in its sole discretion may determine to offer.**" This language gives full effect to the Commission's requirement that Verizon offer a technically feasible option in addition to construction, and should be adopted.

Verizon's proposal also provides that where construction of a new copper loop or UDLC facility is necessary in order to provision the CLEC's order, the CLEC must pay for the build-out, including charges for an engineering query and an engineering work order and the actual costs of construction as set forth in the price quote. This is reasonable: section 252(d)(1) guarantees Verizon's right to charge a reasonable rate for unbundled access based on the cost of providing service. If a CLEC chooses to order construction when Verizon offers it, it must pay the costs that it causes. Although the CLECs object to this language, they propose no alternative,

[10] Final Order on Arbitration, *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, 2003 Fla. PUC LEXIS 670, at *119 (Fla. PSC Oct. 13, 2003) ("Final Order on Arbitration").

and thus have no language to govern the situation where a CLEC requests new construction. While such construction may be unlikely, there is no justification for excluding language that would govern any eventual CLEC request for such construction.

Section 3.3 – Sub-Loops

The parties' disagreements are mostly limited to CLECs' efforts to insert language that would qualify the binding effect of federal law under the Amendment. For the reasons discussed above, the Commission should reject that language.

Section 3.3.2: With regard to Distribution sub-loops, CLECs object to language noting Verizon's right to charge for these facilities when provided on an unbundled basis. Such charges are unquestionably authorized, *see* 47 U.S.C. § 252(d)(1), and CLECs have raised no objection to this language in other states. The Commission should adopt Verizon's proposal.

Section 3.4 / Section 3.5 – High Capacity Loops and Transport

The parties have generally agreed to language to implement the *TRRO*'s limitations on unbundling with regard to high-capacity loops and transport. There are two disagreements that affect DS1, DS3, and dark fiber loops and transport.

First, the CLECs propose inserting the phrase "**Section 251(c)(3)**" throughout these sections to modify the facility at issue, *e.g.*, "**Section 251(c)(3)** DS1 Dedicated Transport." The CLECs' proposal is unnecessary and confusing. It does not affect the substance of the provisions and is not needed to implement either the *TRO* or the *TRRO*. Moreover, like the CLECs' proposed insertion in Section 4.4 discussed above, the insertion here would misleadingly imply that some other source of law could require Verizon to provide unbundled access to high capacity facilities. As noted above, however, there is no law other than Section 251(c)(3) that requires Verizon to provide unbundled access to high capacity facilities, and the CLECs cannot

point to any. In any event, the purpose of this proceeding is to bring the Amended Agreement into conformity with the requirements of the *TRO* and the *TRRO*. *See* Order on Arbitration at 13, 16. The CLECs' proposal is inconsistent with the parties' stipulation, the Commission's order, and federal law, and should be rejected.

Second, Verizon has proposed language that would make clear that any applicable cap on high-capacity loops or transport – *i.e.*, the rule limiting a requesting carrier to 10 DS1 loops to a single building or 10 DS1 circuits on a single transport route – would apply to a CLEC "**and its Affiliates**." This language is necessary so that one company (including all affiliates) will be able to obtain only the maximum amount of loops or transport facilities specified in the relevant FCC rule. Otherwise, a carrier with more than one affiliate could easily evade the FCC's caps: for example, when one affiliate reached the 10 DS1-loop cap, the carrier would be able to order another 10 loops through another affiliate. CLECs would also have an incentive to create new affiliates solely to avoid the caps. The Commission should adopt Verizon's language to prevent this result.

Section 3.5.4 – Entrance Facilities

The FCC held in the *TRO* and reconfirmed in the *TRRO* that Entrance Facilities are not subject to unbundling. *See TRRO* ¶¶ 136-138. Section 3.5.4 implements that determination. But the CLECs attempt to insert once again the phrase "**Section 251(c)(3)**" as a modifier and to limit the provision to "**such** Entrance Facilities."

In the case of Entrance Facilities, the CLECs have argued that Verizon may be required to offer such facilities at TELRIC rates pursuant to section 251(c)(*2*), which governs interconnection. *See* Order on Arbitration at 105 (describing CLEC arguments). But the Commission has expressly held that "[t]he FCC rules regarding interconnection facilities and an

ILEC's obligations under § 251(c)(2) did not change" and there was thus "no need to address this issue in this proceeding." *Id.* at 106. Section 251(c)(2) requires only that ILECs "provide, for *the facilities and equipment of any requesting telecommunications carrier*, interconnection with the local exchange carrier's network . . . at any technically feasible *point within* the carrier's network." 47 U.S.C. § 251(c)(2) (emphases added). That statute does not require that the ILEC provide any transport "facilities" – such as entrance facilities or interconnection trunks – *to* the competitor. Rather, an ILEC must provide only a "point within" its own network, so that the CLEC can connect *its own* "facilities and equipment." Nothing in § 251(c)(2) implies that the "facilities and equipment" would belong to the ILEC; rather, the very face of § 251(c)(2) states that the only "facilities and equipment" in question are those of the "requesting telecommunications carrier."

Similarly, the FCC's previous "interpretation" of § 251(c)(2) – which was "not alter[ed]" by the *TRO* (*see TRO* ¶ 366) – makes clear that the § 251(c)(2) does not require ILECs to provide the very transport facilities with which CLECs can send their traffic onto an ILEC's network. For example, in the *Local Competition Order*,[11] the FCC emphasized that § 251(c)(2) "allows competing carriers to *choose the most efficient points* at which to exchange traffic with incumbent LECs," whereas the "unbundling obligation of section 251(c)(3) *further* permits new entrants, where economically efficient, to *substitute incumbent LEC facilities* for some or all of the facilities the new entrant would have had to obtain in order to compete." *Local Competition Order* ¶ 172 (emphases added). Thus, the FCC was clear in distinguishing the two statutory obligations: § 251(c)(2) allows CLECs to choose a "point" at which to interconnect with the ILEC's network, while § 251(c)(3) "further" allows CLECs to obtain access to ILEC "facilities"

[11] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") (subsequent history omitted).

on an unbundled basis. Thus, given that the FCC has now eliminated entrance facilities under § 251(c)(3), the CLECs' sole remaining option under § 251(c)(2) is to "choose the most efficient points" at which to connect *their own* entrance facilities with the ILEC's facilities.

Several recent state commission decisions confirm that § 251(c)(2) does not provide any basis for requiring Verizon to provide entrance facilities at TELRIC rates.[12] As the Texas Public Utilities Commission held, the phrase "interconnection facilities" under § 251(c)(2) "*does not refer to the physical circuit that links the CLEC office to the ILEC office*. The Commission finds the interconnection facilities referred to in the TRO are cross-connect facilities necessary to interconnect CLEC collocation equipment with the ILEC network." Texas Track II Arb. Award, Decision Matrix at 109-10.

The Commission should therefore reject CLECs' effort to imply that Verizon is required to provide unbundled access to entrance facilities under § 251(c)(2).

Section 3.6.1 – CLEC Self-Certification of Eligibility for High-Cap Facilities

The parties agree that, before requesting unbundled access to high-capacity facilities, the CLEC must undertake a reasonably diligent inquiry and then certify that, to the best of its knowledge, the request is consistent with the *TRRO*. *See* Amendment § 3.6.1.1. The parties

[12] *See* Arbitration Award, Commission Decision Matrix, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the SBC Texas 271 Agreement*, Docket No. 28821 (Tex. PUC June 17, 2005) ("Texas Track II Arb. Award"); Arbitrator's Determinations of UNE Issues, *Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P.*, Docket No. 05-BTKT-365-ARB, at 50 (Kan. Corp. Comm'n June 6, 2005) (finding that, "[h]owever the [CLECs] decide[ ] to interconnect with SWBT's network, it cannot be through entrance facilities unless SWBT chooses to allow it," and rejecting CLECs' language in favor of SWBT's), *aff'd*, Order No. 15: Commission Order on Phase II UNE Issues, *Petition of CLEC Coalition for Arbitration against Southwestern Bell Telephone L.P. d/b/a SBC Kansas under Section 252(b)(1) of the Telecommunications Act of 1996*, Docket No. 05-BTKT-365-ARB, at 17 (Kan. Corp. Comm'n July 18, 2005); Arbitration Decision, *Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket 05-0442, 2004 WL 3050537, at *68 (Ill. Commerce Comm'n Nov. 2, 2005) ("Illinois Arb. Decision"); *accord* Arbitration Decision, *MCImetro Access Transmission Services, Inc., et al. Petition for Arbitration*, No. 04-0469, 2004 WL 3119795, at *82 (Ill. Commerce Comm'n Nov. 30, 2004) ("[T]he interconnection obligation under Section 251(c)(2) extends only to the physical linking of networks; it does not obligate an ILEC to provide facilities to connect the networks. In other words, the only obligation in Section 251(c)(2) is to provide 'interconnection,' namely, the 'linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic,' 47 C.F.R. § 51.5.").

have been unable to resolve a few discrete disagreements regarding their respective responsibilities.

Section 3.6.1.1: First, there is a narrow disagreement regarding the scope of CLECs' responsibility to undertake a reasonably diligent inquiry. There is no disagreement that the CLEC must "at a minimum" consider any list of non-impaired wire centers that Verizon makes available, along with back-up data. Verizon proposes that a CLEC should also consider additional information that is "**otherwise available**" to the CLEC, for example, market information to which the CLEC has access. The CLECs, however, would limit this additional information to information that the CLEC "**otherwise possesses**." The CLECs' language authorizes CLECs to remain willfully ignorant of information that is reasonably available to them and that they suspect may be adverse. Verizon's language – intended to refer to information that is *reasonably* available – gives effect to the FCC's requirement that the CLEC undertake a reasonably diligent *inquiry*. The Commission should thus adopt Verizon's language.

Section 3.6.1.2: In Section 3.6.1.2, the parties have generally agreed that Verizon may provide the CLECs with "data regarding the number of Business Lines and fiber-based collocators at non-impaired Wire Centers" under an appropriate non-disclosure agreement. There remain, however, a few disputes.

First, the CLECs propose that "**Verizon shall provide the back-up data required by this section no later than ten (10) business days**" after Verizon receives a CLEC's written request. But a 10-day timeframe is arbitrary and unreasonable. If multiple CLECs request the same voluminous back-up data within the same period, Verizon might not be able to meet all of these requests within a 10-day period. Verizon expects to be able to produce back-up data reasonably promptly, but 10 days – which may translate into as few as five *business* days – is an

unduly short timeframe in some instances, given the variables involved in producing data in response to one or a number of CLEC requests.

Second, the CLECs propose that, on a CLEC's request, "**Verizon shall update the back-up data to the month in which [the CLEC] requests; provided, however, that Verizon need not provide the back-up data for a particular Wire Center for a date later than the original date on which the data must have been current to establish . . . non-impairment.**" This language can only make mischief. All that matters is that Verizon provide data to establish that the Wire Center has satisfied the *TRRO*'s non-impairment criteria at some time, because the FCC has determined that, once a wire center satisfies the non-impairment criteria, it cannot move back to impaired status. *See TRRO* ¶ 167 n.466. There simply is no occasion where it would be relevant to furnish *updated* data about a wire center.

Section 3.6.2.2 – True-Up for Provision-Then-Dispute

The *TRRO* set up a "provision-then-dispute process" for high-capacity loops and transport. After an ILEC receives "a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria," the ILEC "must immediately process the request," and raise any dispute later. *Id.* ¶ 234. The parties have agreed to implement this *TRRO* process, and have further agreed that, if Verizon disagrees with a CLEC's self-certification, it will "seek resolution of the dispute by the Commission or the FCC." Amendment § 3.6.2.1.

The parties have been unable to agree on language in Section 3.6.2.2 to govern Verizon's remedy when a dispute is resolved in Verizon's favor. All parties agree that, if such a dispute is resolved in Verizon's favor, Verizon is entitled to retroactive compensation – a true-up – to reflect the difference between TELRIC rates for UNEs and otherwise available rates, such as

month-to-month special access rates. Verizon's proposal would require the CLEC to compensate Verizon at the applicable month-to-month rate under Verizon's access tariff for the analogous service. By contrast, the CLECs propose that "**re-pricing shall be at rates no greater than the lowest rate**s" that the CLEC "**could have obtained**" had it "**not ordered such facility as a UNE**."

The CLEC's proposal is inappropriate. Where Verizon wins a self-certification dispute, the facility in question was never a UNE in the first place, and the CLEC's certification to the contrary was, at a minimum, erroneous. Thus, it is incorrect to argue (as the CLECs will likely do) that Verizon's language would somehow unduly discourage CLECs from self-certifications. To the contrary, CLECs *should* have incentives to make a "reasonably diligent inquiry" (*TRRO* ¶ 234) and to self-certify only where such certification is justified.

The CLECs' proposed language would give CLECs every incentive *always* to order a facility as a UNE – even if the CLEC knows or suspects that such an order is unlawful – because the CLEC could be no worse off than if they had followed the rules. Verizon's proposal, by contrast, does not impose any penalty, but neutrally and accurately reflects the fact that the CLEC has obtained a month-to-month special access facility at UNE rates. The CLEC should not gain the benefit of any available discounts on such facilities, because such discounts generally require volume and term commitments that the CLEC will not have made in ordering a UNE on a month-to-month basis. Verizon is entitled to be made whole, and that is what its proposed provision would accomplish.

Section 3.6.2.2.1: In Section 3.6.2.2.1, Verizon has proposed terms to address the case of non-impaired dark fiber transport, for which there is "**no analogous service under Verizon's access tariffs**." For dark fiber transport that is no longer subject to unbundling, Verizon

proposes that the "**monthly recurring charges**" shall be "**the charges for the commercial service that Verizon, in its sole discretion, determines to be analogous to the subject Dark Fiber Transport**." This language is appropriate, as there is no tariffed analogue to unbundled Dark Fiber Transport, and the CLECs have proposed no alternative, thus leaving a gap in the Amendment. To delete the entire section, as the CLECs would do, is clearly improper, as it would leave Verizon with no viable options when it wins a dispute before the Commission over the availability of dark fiber transport in a particular location. In such situations, the CLECs have no entitlement to keep using Verizon's dark fiber transport at UNE rates; and, if the CLEC does not submit a valid ASR, Verizon has a right to discontinue or reprice the service. The Commission should adopt Verizon's language.

Section 3.6.2.3 – When Verizon may reject self-certified orders

In Section 3.6.2.3, the parties agree that, under certain circumstances, Verizon may reject orders for high-capacity facilities without first seeking dispute resolution (*i.e.*, upon Commission or FCC approval of any updates to Verizon's wire center list). The parties' only disagreement (other than the disagreement over the reference to the CLECs' proposed Section 4.4, which has already been discussed repeatedly) concerns the CLECs' proposed insertion of the word "**affirmatively**" to describe the approval of Verizon's Wire Center designation. The insertion is inappropriate. To the extent that a responsible tribunal establishes a process whereby Verizon's Wire Center designations are to be deemed approved – even if the approval is not "affirmative" – there is no reason why the parties should not give effect to that lawful determination. The Commission should reject the CLECs' proposal.

Sections 3.9.1, 3.9.1.1, and 3.9.2 – Transition away from Discontinued Elements

1. In Sections 3.9.1 and 3.9.2, the parties address the orders that CLECs must submit for their UNE services to be transitioned to alternative arrangements by the end of the *TRRO* transition period, March 11, 2006.

The first dispute centers on Verizon's language that would require the CLECs to submit such orders no later than "**a date that allows Verizon adequate time, taking account of any standard intervals that apply, order volumes, and any preparatory activities that [the CLEC] must have completed in advance in order to implement the conversion or migration, to convert or migrate the Discontinued Element to the replacement service by March 10, 2006**." Amendment § 3.9.1. The CLECs, instead, would eliminate such language, apparently on the theory that they have the right to submit their conversion orders "**at any time**" up to, and including, March 10, 2006. As well, in Section 3.9.2, Verizon's proposed language would allow it to reprice, disconnect, or migrate the service itself if the CLEC has not submitted a "timely" order "**taking account of any standard intervals that apply, order volumes, and any preparatory activities that [the CLEC] must have completed in advance.**" *Id.* §§ 3.9.1.1, 3.9.2. This right to reprice or disconnect would arise only after March 11, 2006, if the CLEC neglects to take the actions necessary to complete a migration by that date.

Verizon's language is appropriate and should be adopted. By contrast, the CLECs' language would allow it to submit orders up until the last day of the transition (March 10, 2006), with no lead time. This is unadministrable: Verizon cannot be expected immediately to process CLECs' transition orders submitted at the last minute on the last day of the transition period. Indeed, this notion is inconsistent with the *TRRO*, where the FCC directed that each CLEC "*shall* migrate its embedded base . . . to an alternative arrangement *within* 12 months of the effective

date of the *Triennial Review Remand Order*." 47 C.F.R. § 51.319(d)(2)(ii) (emphases added).[13] Verizon's language thus reasonably recognizes that CLECs must submit orders sufficiently before the end of the transition period to give Verizon time to perform the activities necessary to implement the requested conversion, taking into account standard intervals and order volumes. *See* Texas Track II Arb. Award at 25 ("The Commission believes that the FCC has signaled the need for CLECs to avail themselves of market alternatives to TELRIC-based UNE-P arrangements during the transition period. Consistent with this decision, the Commission endorses the FCC's transition by CLECs from UNE-P to other arrangements prior to the March 11, 2006 deadline.").

2. In Section 3.9.1, the CLECs propose to add language stating that, **"[u]pon [a CLEC's] request, Verizon shall defer the effectiveness of [conversion] orders to a later date, but no later than March 10, 2006 (or, in the case of dark fiber, September 10, 2006).**" The CLECs' intent is to preserve transitional pricing throughout the transition period, even if the arrangements are migrated earlier to an arrangement with a higher price. As noted above, however, the FCC did not specify that all conversions will take place on March 10, 2006, for the purpose of applying rates. To the contrary, the FCC held that, "[d]uring the twelve-month transition period . . . competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar *until the incumbent LEC successfully migrates* those UNE-P customers . . . to alternative access arrangements." *TRRO* ¶ 199 (emphasis added). Likewise, the 12-month transition period – including pricing – "does not supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis." *Id.*

[13] *See also TRRO* ¶ 199 (stating that the "transition plan . . . requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements *within* twelve months of the effective date of this order") (emphasis added).

Thus, after the successful migration of former UNE arrangements, any entitlement to transition pricing ends. *See* Texas Track II Arb. Award, Temporary Rider Attach. at 5 (providing that SBC's obligation to serve the embedded base ends on the "earlier" of the "CLEC's disconnection," or the "CLEC's transition of an Affected Loop-Transport Element(s) to an alternative arrangement," or March 11, 2006); Illinois Arb. Order at 78 ("The Commission disagrees with CLECs that the transition rate should remain in effect for the entire transition period, even if transition is completed before the deadline. The terms of an agreement go into effect at the time the agreement say it does."); D.C. Final Order[14] ¶ 22 (holding that the "modified UNE pricing lasts only until the conversion to alternative arrangements, not during the transition period after conversion").

Finally, it is logistically difficult for Verizon to provision an arrangement without making corresponding billing changes, particularly when alternative service arrangements are not necessarily identical to the UNEs that they replace. Accordingly, because Verizon's proposed language comports precisely with the FCC's rules and because the CLECs' language imposes obligations that exceed anything required by the *TRRO*'s transition plans, the Commission should adopt Verizon's proposal.

3. The CLECs also propose that, if a CLEC "**challenges Verizon's designation that certain loop and/or transport facilities are Discontinued Facilities, Verizon shall continue to provision the subject elements as UNEs, and then seek [dispute] resolution**." Amendment § 3.9.2.1. This language is unnecessary and improper. The Amendment already permits CLECs to order UNEs pursuant to a provision-then-dispute regime, and Verizon may reject orders only in defined circumstances. If a CLEC is entitled to continue to obtain access to a facility as a

[14] Order, *Petition of Verizon Washington, D.C. for Arbitration*, TAC-19 (D.C. PSC Dec 15, 2005) ("D.C. Final Order").

UNE under these provisions, then it may do so. The CLEC language proposed in Section 3.9.2.1 contains none of the protections or remedies that are guaranteed to Verizon under the provision-then-dispute regime established in Section 3.6. Thus the language does not acknowledge that there are certain circumstances – for example, where a responsible tribunal has already approved Verizon's wire center designations – where Verizon need not honor a CLEC's request for a UNE. And the language fails to provide an appropriate remedy for Verizon if the CLEC dispute turns out not to have merit. The provision-then-dispute section will address these issues. The Commission should therefore reject the language the CLECs seek to insert here.

More fundamentally, by reserving the right to continue to receive transitional pricing on any Discontinued Facilities which the CLEC places in dispute (and by failing to impose any deadline on when the CLEC must bring such a dispute), the CLECs seek to reserve to themselves the unilateral power to extend the FCC's transition periods. The Commission has already rejected other attempts by the CLECs to extend those transition periods, and it should reject this additional effort as well.

Moreover, the CLECs have had ample time in which to bring to the Commission for resolution any legitimate dispute over Verizon's designation of wire centers that satisfy the FCC's non-impairment criteria and thus no longer support UNEs under the FCC's new rules. In addition, the CLECs have been fully aware of which wire centers Verizon maintains meet the FCC's non-impairment criteria since February of 2005, when Verizon filed its list of those wire centers with the FCC and posted it on its website. The Commission should not allow a CLEC to extend transitional pricing of a facility by sitting on its rights for a year or more while Verizon prepares to convert thousands of circuits and then, just before or even after the close of the transition period, assert a dispute as to the accuracy of Verizon's wire center designations.

Finally, the CLECs offer no justification for preserving transitional pricing for a disputed facility beyond the close of the transition period. The FCC's rules provide for no exceptions to the 12-month limitation on the availability of transition rates (or 18-months for dark fiber). In order to preserve the FCC's "date certain" on which the transition periods must end, the Commission should reject the CLECs' proposal and thereby require all CLECs to pay post-transition rates following expiration of the transition periods, including where the CLEC has failed to raise and resolve within the FCC-mandated transition period any dispute over whether a given facility was properly classified as a Discontinued Facility. Any policy allowing CLECs to continue to receive transitional rates until such disputes are resolved would only encourage CLECs to bring such disputes, even on marginal grounds, in order to extend the low transition rates as long as possible. On the other hand, to the extent a CLEC could possibly have a valid basis for not having raised and resolved any such dispute within the FCC-mandated transition period, it would not be harmed by a requirement that it pay post-transition rates while litigating the proper status of the facilities, since it could seek reimbursement from Verizon if it were to prevail in the dispute.

Section 3.10A – Line Conditioning

The Order on Arbitration recognized that the FCC's line conditioning requirement pre-dates the *TRO*. *See* Order on Arbitration at 77, 82 & n.35. The Commission nevertheless held that existing ICAs that provide for line conditioning should be updated to reflect the clarifications of the line-conditioning duty contained in the *TRO*. *See id.* at 81-82. But the Commission made clear that its holding applies to ICAs that already include line conditioning terms. *See id.* at 82 ("this Commission's existing line conditioning rates *included in the existing ICAs* do not require amendment") (emphasis added).

Verizon has accordingly proposed language in the Amendment to implement the Commission's decision, making clear that, "**[t]o the extent the Agreement requires Verizon to provide Line Conditioning, Verizon shall provide such Line Conditioning in a non-discriminatory manner in accordance with 47 C.F.R. § 51.319(a)(1)(iii).**" CLECs, however, dispute this language, and instead seek to impose a duty to perform line conditioning even if line conditioning was not required under the Amended Agreement (that is, "**[n]otwithstanding any other provision of the Amended Agreement**"). The CLECs' approach, however, is unacceptable, because they have failed to include necessary loop qualification processes, other operational terms, and rates in their proposal. These necessary terms are included in existing ICAs to the extent they contain a line conditioning obligation, but they are not, of course, included in ICAs that do not currently provide for line conditioning.

If CLECs insist on adding a line conditioning obligation where no such obligation existed previously, Verizon has proposed terms that properly refer to the governing operational limitations and rates. In addition, if the CLECs' proposal to include substantive line-conditioning terms is accepted, it is particularly important for the Commissions also to include Verizon's proposed pricing attachment, which includes the applicable, Commission-approved rates for bridge tap and load coil removal. *See id.* at 82 (requiring payment of existing Commission-approved rates for line conditioning).

The CLECs' approach, however, is unnecessary – indeed, one CLEC has already agreed that Verizon's proposed approach is adequate, and Verizon has made clear that if there is any need to negotiate a separate line conditioning amendment later, Verizon will promptly do so. Accordingly, the Commission should adopt Verizon's proposed language or, in the alternative, its proposed line conditioning terms.

Section 3.11 – Commingling and Combinations

Section 3.11 addresses CLECs' right to commingle UNEs with non-UNE wholesale services, as well as CLECs' ability to order UNE combinations – that is, EELs. The parties' disagreements are relatively narrow.

Section 3.11.1.1: There is no dispute that commingling refers to the use of UNEs in combination "with any non-section 251(c)(3) wholesale services and facilities obtained from Verizon under a Verizon access tariff or separate non-251 agreement or as Section 251(c)(4) resale under the Agreement ('Wholesale Services')." CLECs, however, seek to insert the phrase "**including but not limited to any services offered**" before the words "under a Verizon access tariff or separate non-251 agreement or as Section 251(c)(4) resale under the Agreement." The insertion is inappropriate – CLECs have never identified any wholesale service *other than* those already identified in the agreed language, and the language thus serves no legitimate purpose.

The parties also agree that, once the Commission authorizes appropriate charges in connection with any physical work that Verizon performs in connection with commingled arrangements, such charges will apply. The only disagreement is the appropriate language to refer to those charges. For reasons that Verizon explains below in connection with its discussion of the Pricing Attachment, its language – which refers to that attachment – is appropriate.

Section 3.11.1.3A: CLECs propose including language that requires Verizon to provide access to combinations in accordance with 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51. However, the FCC's general requirement for ILECs to combine network elements pre-existed the *TRO* and the *TRRO*, and the amendment already addresses in detail the changes in the FCC's rules regarding EELs. Thus it is inappropriate to interject an ambiguous, stand-alone requirement for Verizon to provide undefined "UNE Combinations," particularly when the very

purpose of other provisions of the amendment is to implement the discontinuance of UNE-platform combinations. Moreover, it is not clear what combinations the CLECs seek to obtain under this provision, or what operational provisions or rates might be appropriate. Accordingly, the CLECs' language should not be included.

Section 3.11.2.2: This section provides that if an EEL is or becomes non-compliant with the FCC's eligibility criteria, Verizon may reprice that EEL as of the date of non-compliance if the CLEC has neither submitted "an LSR or ASR" to disconnect the facility nor secured an alternative arrangement to replace the EEL. Section 3.11.2.2 also provides that in re-pricing the former EEL, Verizon may apply a new rate or a surcharge to be equivalent to "an analogous access service or other analogous arrangement that Verizon shall identify in a written notice to [the CLEC]." Although the parties have agreed on this language, the CLECs seek to append additional terms, similar to the language they seek in Section 3.6.2.3, providing that the new rate "**shall be no greater than the lowest rate [the CLEC] could have otherwise obtained for an alternative service or wholesale arrangement**." This language is inappropriate: it is unduly burdensome to require Verizon to determine in each instance the lowest rate the CLEC theoretically could have obtained for analogous services had it not ordered the subject facility as a UNE combination or commingled facility or had it submitted a timely request for disconnection. Given that re-pricing will be necessary only where the CLEC has improperly obtained an EEL without right and/or has failed to request disconnection, it is the CLEC, not Verizon, that should bear the consequences. Moreover, a guarantee that a former EEL will be re-priced at the "lowest possible" replacement rate will only encourage CLECs to seek EELs where their entitlement is questionable and to ignore their responsibilities to submit timely requests for

disconnection or make alternative arrangements where the EEL fails to meet or no longer meets the FCC's eligibility criteria.

Section 3.11.2.3: The parties' agreement here is narrow and non-substantive, but Verizon's language is accurate and has been agreed by CLECs in other states. The Commission should likewise adopt it here.

Section 3.11.2.4: Verizon has proposed language making clear that charges for EELs conversions will be as specified in the Pricing Attachment. Where those charges are included in the attachment, they are existing, *Commission-approved* charges. *See* Pricing Attachment, Exhibit A, notes. The Commission has explicitly ruled that such charges should be assessed. As the Commission recently clarified, "[i]t was not our intent . . . to prohibit Verizon from charging *any existing rates*." Order on Recon.[15] at 4. The Commission "never intended to override existing rates." *Id.* The Pricing Attachment is consistent with that holding.

Furthermore, to the extent there are no existing, Commission-approved rates, Verizon has agreed to perform required functions without charge, and it has further agreed that no rates that the Commission (or the FCC) later approves will be retroactive, unless the Commission (or the FCC) so provides. *See* Pricing Attachment § 1.3. The CLECs can thus have no legitimate objection to Verizon's proposal.[16]

Section 3.12 – Routine Network Modifications

Section 3.12.1: This section sets forth the general terms governing routine network modifications. The parties agree that the provisions set forth in this section are intended to be

[15] Order Denying Motions for Reconsideration and Granting Clarification of Certain Portions of Order No. PSC-05-1200-FOF-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.*, Docket No. 040156-TP (Feb. 3, 2006) ("Order on Recon") (emphasis added).

[16] The parties disagree over the placement of the phrase "in all material respects" in Section 3.11.2.9, which deals with audits. Verizon's proposed placement is more accurate.

"[i]n accordance with 47 C.F.R. § 51.319(a)(8) and (e)(5)," which are the applicable provisions of the FCC's new *TRO* rules. The CLECs propose to add the phrase "**or applicable law**" to this term and object to Verizon's clarification that its obligations are limited to "**the extent required by**" federal law. The only laws that impose an obligation on Verizon to perform routine network modifications, however, are the FCC's rules. Once again, the CLECs wish to make the Amendment as vague and open-ended as possible, but their proposal is inconsistent with the Commission's Order on Arbitration, which makes clear that the only law implemented through the Amendment is section 251(c)(3) and the FCC's implementing rules, not any other law. And, in any event, the CLECs can point to no other "applicable law" that imposes an obligation on Verizon to perform routine network modifications.

Section 3.12.1.1: The parties agree that Verizon shall perform routine network modifications in a nondiscriminatory manner, but the CLECs propose inserting the following language: "**and shall perform routine network modifications at least equal in quality with the manner in which Verizon performs the same functions for itself, its Affiliates or its customers**." This insertion is inaccurate, inconsistent with the parties' agreement elsewhere, and unnecessary. The Amendment includes in the definition of "Nondiscriminatory Access" the requirement that "to the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that Verizon provides to a requesting telecommunications carrier shall be at least equal in quality to that which Verizon provides to itself." Amendment § 4.7.29. This is the correct legal standard to govern Verizon's obligations to provide access to UNEs, including the performance of routine network modifications. The Commission should therefore reject the CLECs' language.

Section 3.12.1.1: CLECs duplicate an already existing Amendment section and within it have proposed including language **"[f]or avoidance of doubt**," which notes that there are no rates in place for routine network modifications; the proposed language also provides that any future charges will not be retroactive unless the Commission so orders. The Commission should reject the CLECs' proposed insertion which is inaccurate and unnecessary. First, to the extent that Verizon performs functions for which there are Commission rates in place – for example, removal of bridge taps or load coils – the Commission has explicitly ruled that Verizon should be able to impose those charges. *See* Order on Recon. at 4. Second, the proper place to address the effect of future rates is in Verizon's proposed pricing attachment, with deals with the issue systematically and comprehensively. The Commission should reject the CLECs' proposal.

Section 4.4 – Scope of Amendment

As explained above, the CLECs' proposed reference in Section 4.4 to "**rights and obligations under applicable law . . . other than Section 251**" is improper and should be rejected. As explained above, the agreed purpose of this proceeding is to ensure that the Amended Agreements "reflect the changes in unbundling requirements from the FCC's *TRO*, *USTA II*, and *TRRO*." Order on Arbitration at 13; *see supra* at 3-4. Indeed, to the extent that section 251 obligations have been defined by the FCC in the *TRO*, the *TRRO*, or other orders, any purported "applicable law" that contradicts or undermines the FCC's rules is preempted. Given the preemptive effect of federal law, with respect to the matters addressed by the Amendment, there are no "rights and obligations" under other sources of law.

The CLECs also seek to insert the disclaimer that "**execution of this Amendment shall not be construed as a waiver with respect to whether Verizon, prior to the Amendment Effective Date, was obligated under the Agreement to perform certain functions required**

by the TRO." The CLECs thus attempt to preserve the claim they asserted in the main case that the ICAs require Verizon to implement the FCC's new rules on commingling and conversions as of the effective date of the *TRO* in October of 2003. The Commission, however, has already rejected that argument, holding that Verizon's obligations are "effective with the effective date of an amendment." Order on Arbitration at 59 (commingling); 61 (conversions). The CLECs' proposed provision should be rejected.

Section 4.5 – Reservation of Rights

The parties' disagreement here – over the scope of rights reserved – is narrow. Verizon opposes the use of the phrase "**other *applicable* law**," because the phrase itself assumes an incorrect conclusion that there *is* other applicable law. (Emphasis added). Verizon has proposed a more neutral and at least as capacious term – "**otherwise**." CLECs have no legitimate reason to dispute it.

Section 4.7.2 – "Call-Related Databases"

CLECs object to the inclusion of the phrase "**but are not limited to**" in the definition of call-related databases, a phrase that makes clear that the list of databases in the definition is not exhaustive. The phrase is taken straight from the FCC's regulations. *See* 47 C.F.R. § 51.319(d)(4)(i)(B)(1). The CLECs' proposed alteration to the FCC's definition must be rejected.

Section 4.7.3 – "Commingling"

The parties' disagreement concerns whether it is appropriate to quote from the FCC's regulation defining "commingling," 47 C.F.R. § 51.5, as the CLECs' have proposed, or whether the Amendment should simply include a cross-reference to the regulation ("**Shall have the meaning as defined in 47 C.F.R. § 51.5**"), as Verizon has proposed. CLECs have no legitimate

basis for objecting to the cross-reference, which adds certainty to the parties' rights and obligations. To the extent that the FCC or a court has occasion to interpret the regulation, Verizon's approach would eliminate any dispute over whether such interpretations would be automatically incorporated into the Amended Agreement as well. Verizon's approach thus ensures that the terms contained in the FCC's regulations are given the meaning attributed to them by the FCC and are not taken out of context. That approach is sensible and fair to all parties, and should be adopted.

Section 4.7.6 – "Dedicated Transport"

Two disagreements separate the parties. First, consistent with the *TRO* and *TRRO*, Verizon has proposed language to make clear that dedicated transport includes only Verizon transmission facilities "within a LATA." The CLECs reject this term, but they cannot reasonably argue that the FCC intended for dedicated transport to cross LATA boundaries, in light of the FCC's statement that, "We limit our definition of dedicated transport under section 251(c)(3) to those transmission facilities connecting incumbent LEC switches and wire centers *within a LATA*." *TRO* ¶ 365 (footnote omitted; emphasis added). The FCC's intraLATA limitation on dedicated transport should be incorporated into the definition used in the Amendment.

Second, the parties have been unable to agree on language to effectuate the FCC's determination that Entrance Facilities are not subject to unbundling. As discussed above with regard to Section 3.5.4, the FCC has determined – and several state commissions have reconfirmed – that incumbent LECs simply are not required to provide access to entrance facilities at TELRIC rates. For avoidance of doubt, Verizon proposes noting in the definition of "Dedicated Transport" that Verizon is not required to provide unbundled access to entrance

facilities. The CLECs propose qualifying that limitation with a cross-reference to their proposed Section 3.5.4. For the reasons discussed above, that qualification is inappropriate and the Commission should reject it.

Section 4.7.7 – "Discontinued Facility"

The parties generally agree that a "Discontinued Facility" is one that Verizon has provided on an unbundled basis but which is no longer subject to unbundling under section 251(c)(3) and the FCC's rules. Disagreements over language generally reflect disputes that have already been described above.

First, as in Sections 3.4 and 3.5 above, CLECs seek to insert the modifier "**Section 251(c)(3)**" before the word "facility" in the definition. As discussed above, the proposed insertion does not affect the substance of the provisions, is not needed to implement either the *TRO* or the *TRRO*, and would misleadingly imply that some other source of law could require Verizon to provide unbundled access to high capacity facilities. Because the CLECs' approach is inconsistent with the parties' stipulation, the Commission's order, and federal law, it should be rejected. *See supra* pp. 3-4.

Second, CLECs propose adding the phrase "**as of the date of this Amendment**" to describe discontinued facilities. The language is unnecessary, because agreed language already defines the facilities at issue as those that "*ha[ve] ceased*" to be subject to unbundling. (Emphasis added). The language does not refer to elements that, in the future, may cease to be subject to unbundling and is therefore already consistent with the Commission's rulings.

Third, CLECs object to the inclusion of the phrase "**By way of example and not by way of limitation** . . . **include the following**." That phrase is simply intended to prevent any dispute about whether a facility that qualifies under the general definition but that may not be

specifically enumerated is included. The language protects Verizon's rights under federal law and does not affect any legitimate CLEC interest, and should be approved. Verizon's proposed item (s), which refers to "**any other facility or class of facilities as to which the FCC has not made a finding of impairment that remains effective, or as to which the FCC has made a finding of non-impairment**," is to the same effect and should likewise be included.

Fourth, the parties disagree about the description of the entrance facilities that are no longer subject to unbundling. CLECs object to the phrase "**(lit or unlit)**," but that language is consistent with the agreed definition of entrance facility and should be included. At the same time, Verizon objects to any cross-reference to the CLECs' Section 3.5.4, both with regard to entrance facilities and dedicated transport, which seeks improperly to subvert the FCC's determination that entrance facilities are no longer subject to unbundling. That issue is discussed under Section 3.5.4 above.

Fifth, CLECs object to the use of the defined term "**Enterprise Switching**" and instead seek to spell out the definition within the definition of "Discontinued Facility." As a matter of draftsmanship, it makes little sense to have a definition within a definition, and the Commission should instead adopt Verizon's proposed definition of "**Enterprise Switching**" in Section 4.7.13. The only substantive disagreement between the parties in this regard is that CLECs omit the reference to "**Tandem Switching**" in their proposed definition. But the FCC has made clear that tandem switching is include within the definition of local circuit switching, *see* 47 C.F.R. § 51.319(d), and Verizon's language is therefore appropriate.

Section 4.7.13 – "Enterprise Switching"

This issue is discussed immediately above.

Section 4.7.17 – "Fiber-Based Collocator"

The definition of "fiber-based collocator" is relevant to the determination whether a particular wire center satisfies the FCC's non-impairment criteria for relief from unbundling obligations for high-capacity facilities. The parties' dispute over the language in this provision relates to the treatment of MCI and its affiliates, which became affiliated with Verizon early in 2006. Under the FCC's order approving the combination of Verizon and MCI, Verizon voluntarily agreed that, within 30 days of the closing date of the transaction, Verizon would submit a revised list of wire centers that qualify for relief from unbundling obligations for high-capacity facilities, excluding MCI and its affiliates from the number of fiber-based collocators in each wire center.[17] Verizon has done so.

The only substantive disagreement between the parties is whether the merger condition is prospective – *i.e.*, whether the list that Verizon submitted affects Verizon's obligations going forward – or whether, as the CLECs claim, it is "**retroactive to March 11, 2005**."[18] Verizon's proposal is consistent with the terms of the merger condition and should be adopted. Nothing in the FCC's order provides that the relief to which Verizon agreed was retroactive, and it makes no sense to infer such an agreement in the absence of explicit language. For Verizon to go back and determine how CLEC orders and billing would be affected over the last eleven months if MCI had been an affiliate during that entire period would be a significant logistical challenge; furthermore, because the merger conditions do not apply retroactively, it would be unlawful, in

[17] *See* Memorandum Opinion and Order, *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfers of Control*, 20 FCC Rcd 18433, Appendix G, "Unbundled Network Elements," ¶ 2 (2005).

[18] The CLECs also propose adding language referring to Verizon's obligation to submit revised data and wire center lists to the FCC to reflect the exclusion of MCI's collocation arrangements from the number of Fiber-Based Collocators. That reference is inappropriate, because the obligation to make that submission arises under the terms of the FCC's order, not the *TRO*, *TRRO*, or, indeed, section 251(c)(3) or the FCC's implementing regulations. Furthermore, Verizon has *already* made the submission that the CLECs would refer to, and the CLECs' language is, for that reason, all-the-more inappropriate. The Commission should reject it.

light of the FCC's rules against downgrading the non-impairment status of wire centers once they meet the applicable non-impairment criteria, to undo the non-impairment status of any wire center as to any past period.

In all events, because enforcement of the merger conditions is a matter for the FCC, and not for this Commission, it would be inappropriate for the Commission to impose additional obligations under the Amendment that have not been clearly articulated by the FCC itself. Nothing prevents a CLEC from pursuing a claim that Verizon has failed to comply with an obligation under the merger condition with the FCC. The Commission should accordingly adopt Verizon's proposed language.

Pricing Attachment

CLECs object to the inclusion of Verizon's proposed pricing attachment, but their objections are unwarranted. In the Order on Arbitration, the Commission noted that Verizon had withdrawn its request that the Commission adopt "*new* rates proposed" in its Pricing Attachment, noting as well that the stipulation "does not affect Verizon's right to continue to apply any rates the Commission has established," and that Verizon had "agree[d] that . . . it will provide the services elements, and arrangements that are not already covered by rates . . . to the extent required by federal law and the Commission's determinations . . ., even though this arbitration will not establish rates." Order on Arbitration at 120-21 (emphasis added). In the Order on Reconsideration, the Commission reconfirmed that it had not "intended to override existing rates either approved previously by us or included in an interconnection agreement between the parties," and therefore granted Verizon's request for clarification in this regard. Order on Recon. at 4.

Verizon's proposed pricing attachment accurately reflects the parties' stipulations and the Commission's orders, and should be adopted. First, it includes rates that were approved by the Commission in Order No. PSC-02-1574-FOF-TP, Docket 990649B-TP. *See* Pricing Attachment, Exhibit A, Notes. Second, it captures rates from existing ICAs that the Commission has likewise approved. Third, it does not include any rates in cases where the Commission has not approved one. Furthermore, it makes clear that any charge that is later established "shall not be retroactive absent a Commission or FCC decision to the contrary." Pricing Attachment § 1.3. The CLECs themselves proposed similar language in the body of the Amendment. Fourth, it provides that if the Commission later establishes a rate for a particular function, it shall apply without the need to further amend the Agreement. *See id.*

CLECs have raised no substantive objection to the Pricing Attachment, and CLECs have agreed to it in other states. It should be adopted.

Respectfully submitted on February 14, 2006.

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