Kimberley Pena

050171

From: Kimberley Pena
Sent: Friday, February 23, 2007 9:26 AM
To: Nancy Sims
Cc: Meza, James; Hendrix, Jerry D; Nonnye Grant; Hong Wang; Ann Cole
Subject: RE: Mailing Name for d/b/a (BellSouth/AT&T)

Per this e-mail, we will do so. Thank you.

PARTIES

Nonnye, FYI.

From: Sims, Nancy H [mailto:Nancy.Sims@bellsouth.com]
Sent: Thursday, February 22, 2007 5:17 PM
To: Kimberley Pena
Cc: Meza, James; Hendrix, Jerry D
Subject: Mailing Name for d/b/a (BellSouth/AT&T)

Kim,
As discussed, please use the d/b/a of "AT&T Florida" as the mailing name for BellSouth Telecommunications, Inc. The d/b/a of "AT&T Florida" and the d/b/a of "AT&T Southeast" were both approved by FPSC Order No. PSC-07-0114-FOF-TP, but for correspondence purposes in Florida, the "AT&T Florida" d/b/a should be used.

If you have any questions, please let me know.
Thank you,
Nancy Sims
(850)577-5555
Director Regulatory Relations - Florida

*****

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Tpme 12/26/07 Kmp

DOCUMENT NO. DATE
00343-08 01/14/08
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Handout by Verizon - Item 4 4/5/05 agenda 041269, 050171, and 050172 - TF

AMENDMENT NO. 1

to the

INTERCONNECTION AGREEMENT

between

VERIZON FLORIDA INC., F/K/A GTE FLORIDA INCORPORATED

PARTIES

and

GANOCO, INC. D/B/A AMERICAN DIAL TONE

1. General

1.5 Without limiting Verizon's rights pursuant to Applicable Law or any other section of the Agreement, this Combinations Attachment and the Pricing Appendix to the Combinations Attachment to terminate its provision of a Combination, if Verizon provides a Combination to Ganoco, and the Commission, the FCC, a court or other governmental body of appropriate jurisdiction determines or has determined that Verizon is not required by Applicable Law to provide such Combination, Verizon may terminate its provision of such Combination to Ganoco. If Verizon terminates its provision of a Combination to Ganoco pursuant to this Section 1.5 and Ganoco elects to purchase other services offered by Verizon in place of such Combination, then: (a) Verizon shall reasonably cooperate with Ganoco to coordinate the termination of such Combination and the installation of such services to minimize the interruption of service to Customers of Ganoco; and, (b) Ganoco shall pay all applicable charges for such services, including, but not limited to, all applicable installation charges.

2. Combinations Provisions

Subject to the conditions set forth in Section 1, Verizon shall be obligated to provide a combination of Network Elements (a "Combination") only to the extent provision of such Combination is required by Applicable Law. To the extent Verizon is required by Applicable Law to provide a Combination to Ganoco, Verizon shall provide such Combination in accordance with, and subject to, requirements established by Verizon that are consistent with Applicable Law (such requirements, the "Combo Requirements"). Verizon shall make the Combo Requirements publicly available in an electronic form.

DOCUMENT NUMBER-DATE
00343 JAN 14 8
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AMENDMENT NO. 1

to the

INTERCONNECTION AGREEMENT

between

VERIZON FLORIDA INC., F/K/A GTE FLORIDA INCORPORATED

and

GANOCO, INC. D/B/A AMERICAN DIAL TONE

This Amendment No. 1 (the "Amendment") shall be deemed effective on July 17, 2002 (the "Effective Date") by and between Verizon Florida Inc., f/k/a GTE Florida Incorporated ("Verizon"), a Florida corporation with offices at 201 N. Franklin Street, Tampa, Florida 33602-5167, and Ganoco, Inc. d/b/a American Dial Tone, a Florida corporation with offices at 802 2nd Street N., Safety Harbor, Florida 34695 ("Ganoco"). Verizon and Ganoco being referred to collectively as the "Parties" and individually as a "Party". This First Amendment covers services in the State of Florida (the "State").

WITNESSETH:

WHEREAS, pursuant to an adoption letter dated March 15, 1999 (the "Adoption Letter"), Ganoco adopted in the State of Florida, the interconnection agreement between AT&T Communications of the Southern States, Inc. and Verizon (the "Terms"); and

WHEREAS, subsequent to the approval of the Terms Ganoco notified Verizon that it desired to amend the Terms; and

WHEREAS, pursuant to Section 252(a)(1) of the Act, the Parties wish to amend the Terms; and

WHEREAS, the Federal Communications Commission (the "FCC") issued an order on November 5, 1999 in CC Docket No. 96-98 (the "UNE Remand Order"), and issued a supplemental order on November 24, 1999 in the same proceeding, which orders became effective in part as of February 17, 2000 and fully effective as of May 17, 2000; and

WHEREAS, Verizon is prepared to provide combinations in accordance with, but only to the extent required by, Applicable Law.

NOW, THEREFORE, in consideration of the mutual promises, provisions and covenants herein contained, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Amendment of Agreement. The Parties agree that the terms and conditions set forth in the Combinations Attachment and the Pricing Appendix to the Combinations Attachment attached hereto shall amend, modify and revise the Agreement and shall govern Verizon's provision of combinations to Ganoco.

2. Conflict between this Amendment and the Terms. This Amendment shall be deemed to revise the terms and provisions of the Terms to the extent necessary to give effect to the terms and provisions of this Amendment. In the event of a conflict between the

terms and provisions of this Amendment and the terms and provisions of the Terms, this Amendment shall govern, *provided, however,* that the fact that a term or provision appears in this Amendment but not in the Terms, or in the Terms but not in this Amendment, shall not be interpreted as, or deemed grounds for finding, a conflict for purposes of this Section 2.

3. Counterparts. This Amendment may be executed in one or more counterparts, each of which when so executed and delivered shall be an original and all of which together shall constitute one and the same instrument.

4. Captions. The Parties acknowledge that the captions in this Amendment have been inserted solely for convenience of reference and in no way define or limit the scope or substance of any term or provision of this Amendment.

5. Scope of Amendment. This Amendment shall amend, modify and revise the Terms only to the extent set forth expressly in Section 1 of this Amendment, and, except to the extent set forth in Section 1 of this Amendment, the terms and provisions of the Terms shall remain in full force and effect after the date first set forth above.

SIGNATURE PAGE

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the Effective Date.

GANOCO, INC. D/B/A AMERICAN DIAL TONE	**VERIZON FLORIDA INC.**
By: ______________________	By: ______________________
Printed: ______________________	Printed: Steven J. Pitterle
Title: ______________________	Title: Director – Contract Negotiations
Date: ______________________	Date: ______________________

Combinations Attachment

1. General

1.1. Verizon shall provide to Ganoco, in accordance with the Terms, as amended (hereinafter referred to in this Combinations Attachment as the "Agreement"), this Combinations Attachment and the Pricing Appendix to the Combinations Attachment (including, but not limited to, Verizon's applicable Tariffs) and the requirements of Applicable Law, access to Verizon's Network Elements in combinations (Combinations); provided, however, that notwithstanding any other provision of the Agreement, this Combinations Attachment and the Pricing Appendix to the Combinations Attachment, Verizon shall be obligated to provide Combinations to Ganoco only to the extent required by Applicable Law and may decline to provide Combinations to Ganoco to the extent that provision of such Combinations is not required by Applicable Law.

1.2. Except as otherwise required by Applicable Law: (a) Verizon shall be obligated to provide a Combination pursuant to the Agreement, this Combinations Attachment and the Pricing Appendix to the Combinations Attachment only to the extent such Combination, and the equipment and facilities necessary to provide such Combination, are available in Verizon's network; (b) Verizon shall have no obligation to construct or deploy new facilities or equipment to offer any Combination; and, (c) Verizon shall not be obligated to combine Network Elements that are not already combined in Verizon's network. Consistent with the foregoing, should Ganoco engage in a pattern of behavior that suggests that Ganoco either i) knowingly induces Verizon Customers to order Telecommunications Services from Verizon with the primary intention of enabling Ganoco to convert those Telecommunications Services to Combinations, or ii) itself orders Telecommunications Services from Verizon without taking delivery of those Telecommunications Services in order to induce Verizon to construct facilities that Ganoco then converts to Combinations, then Verizon will provide written notice to Ganoco that its actions suggest that Ganoco is engaged in a pattern of bad faith conduct. If Ganoco fails to respond to this notice in a manner that is satisfactory to Verizon within fifteen (15) business days, then Verizon shall have the right, with thirty (30) calendar days advance written notice to Ganoco, to institute an embargo on provision of new services and facilities to Ganoco. This embargo shall remain in effect until Ganoco provides Verizon with adequate assurances that the bad faith conduct shall cease. Should Ganoco repeat the pattern of conduct following the removal of the service embargo, then Verizon may elect to treat the conduct as an act of material breach in accordance with the provisions of the Agreement that address default.

1.3. Ganoco may use a Combination only for those purposes for which Verizon is required by Applicable Law to provide such Combination to Ganoco. Without limiting the foregoing, Ganoco may use a Combination (a) only to provide a Telecommunications Service and (b) to provide Exchange Access services only to the extent that Verizon is required by Applicable Law to provide such Combination to Ganoco in order to allow Ganoco to provide such Exchange Access services.

1.4. Notwithstanding any other provision of the Agreement, this Combinations Attachment and the Pricing Appendix to the Combinations Attachment:

1.4.1. To the extent Verizon is required by a change in Applicable Law to provide to Ganoco a Combination that is not offered under the

Agreement, this Combinations Attachment, and the Pricing Appendix to the Combinations Attachment to Ganoco as of the Effective Date, the terms, conditions and prices for such Combination (including, but not limited to, the terms and conditions defining the Combination and stating when and where the Combination will be available and how it will be used, and terms, conditions and prices for pre-ordering, ordering, provisioning, repair, maintenance and billing) shall be as provided in an applicable Verizon Tariff, or, in the absence of an applicable Verizon Tariff, as mutually agreed in writing by the Parties.

1.4.2. Verizon shall not be obligated to provide to Ganoco, and Ganoco shall not request from Verizon, access to a proprietary advanced intelligent network service.

1.5. Without limiting Verizon's rights pursuant to Applicable Law or any other section of the Agreement, this Combinations Attachment and the Pricing Appendix to the Combinations Attachment to terminate its provision of a Combination, if Verizon provides a Combination to Ganoco, and the Commission, the FCC, a court or other governmental body of appropriate jurisdiction determines or has determined that Verizon is not required by Applicable Law to provide such Combination, Verizon may terminate its provision of such Combination to Ganoco. If Verizon terminates its provision of a Combination to Ganoco pursuant to this Section 1.5 and Ganoco elects to purchase other services offered by Verizon in place of such Combination, then: (a) Verizon shall reasonably cooperate with Ganoco to coordinate the termination of such Combination and the installation of such services to minimize the interruption of service to Customers of Ganoco; and, (b) Ganoco shall pay all applicable charges for such services, including, but not limited to, all applicable installation charges.

1.6. Nothing contained in the Agreement, this Combinations Attachment and the Pricing Appendix to the Combinations Attachment shall be deemed to constitute an agreement by Verizon that any item identified in the Agreement, this Combinations Attachment and the Pricing Attachment to the Combinations Attachment as a Network Element is (i) a Network Element under Applicable Law, or (ii) a Network Element Verizon is required by Applicable Law to provide to Ganoco on an unbundled basis or in combination with other Network Elements.

1.7. Notwithstanding anything else set forth in the Agreement, this Combinations Attachment or the Pricing Appendix to the Combinations Attachment and subject to the conditions set forth in this Section 1 of this Combinations Attachment, Verizon shall provide access to Verizon's Combinations subject to charges based on rates and/or rate structures that are consistent with Applicable Law (collectively, the "Rates" and, individually, a "Rate"). Certain of these Rates are set forth in the Pricing Appendix to the Combinations Attachment, which Rates Verizon shall charge Ganoco and Ganoco agrees to pay to Verizon. Ganoco acknowledges, however, that certain Rates are not set forth in the Pricing Appendix to the Combinations Attachment as of the effective date of this Combinations Attachment ("Effective Date") but that Verizon is developing such Rates and Verizon has not finished developing such Rates as of the Effective Date. When Verizon finishes developing a Rate not included in the Pricing Appendix to the Combinations Attachment as of the Effective Date, Verizon shall notify Ganoco in writing of such Rate in accordance with, and subject to, the notices provision of the Agreement and thereafter shall bill Ganoco, and Ganoco shall pay to Verizon, for services provided under this Combinations Attachment on the Effective Date and thereafter in accordance with such Rate. Any notice

provided by Verizon to Ganoco pursuant to this Section 1.7 shall be deemed to be a part of the Pricing Appendix to the Combinations Attachment immediately after Verizon sends such notice to Ganoco and thereafter.

2. Combinations Provisions

Subject to the conditions set forth in Section 1, Verizon shall be obligated to provide a combination of Network Elements (a "Combination") only to the extent provision of such Combination is required by Applicable Law. To the extent Verizon is required by Applicable Law to provide a Combination to Ganoco, Verizon shall provide such Combination in accordance with, and subject to, requirements established by Verizon that are consistent with Applicable Law (such requirements, the "Combo Requirements"). Verizon shall make the Combo Requirements publicly available in an electronic form.

Pricing Appendix to the Combinations Attachment

1. **General**

1.1. As used in this Appendix, the term "Charges" means the rates, fees, charges and prices for a Service.

1.2. Except as stated in Section 2, below, Charges for Services shall be as stated in this Section 1.

1.3. The Charges for a Service shall be the Charges for the Service stated in the Providing Party's applicable Tariff.

1.4. In the absence of Charges for a Service established pursuant to Section 1.3, the Charges shall be as stated in Exhibit A of this Pricing Appendix.

1.5. The Charges stated in Exhibit A of this Pricing Appendix shall be automatically superseded by any applicable Tariff Charges. The Charges stated in Exhibit A of this Pricing Appendix also shall be automatically superseded by any new Charge(s) when such new Charge(s) are required by any order of the Commission or the FCC, approved by the Commission or the FCC, or otherwise allowed to go into effect by the Commission or the FCC (including, but not limited to, in a Tariff that has been filed with the Commission or the FCC), provided such new Charge(s) are not subject to a stay issued by any court of competent jurisdiction.

1.6. In the absence of Charges for a Service established pursuant to Sections 1.3 through 1.5, if Charges for a Service are otherwise expressly provided for in the Agreement, the Combinations Attachment or this Pricing Appendix to the Combinations Attachment, such Charges shall apply.

1.7. In the absence of Charges for a Service established pursuant to Sections 1.3 through 1.6, the Charges for the Service shall be the Providing Party's FCC or Commission approved Charges.

1.8. In the absence of Charges for a Service established pursuant to Sections 1.3 through 1.7, the Charges for the Service shall be mutually agreed to by the Parties in writing.

2. **Ganoco Prices**

Notwithstanding any other provision of the Agreement, the Combinations Attachment and this Pricing Appendix to the Combinations Attachment, the Charges that Ganoco bills Verizon for Ganoco's Services shall not exceed the Charges for Verizon's comparable Services, except to the extent that Ganoco's cost to provide such Ganoco Services to Verizon exceeds the Charges for Verizon's comparable Services and Ganoco has demonstrated such cost to Verizon, or, at Verizon's request, to the Commission or the FCC.

3. **Section 271**

If Verizon is a Bell Operating Company (as defined in the Act) and in order to comply with Section 271(c)(2)(B) of the Act provides a Service under the Agreement, the Combinations Attachment and this Pricing Appendix to the Combinations Attachment that Verizon is not required to provide by Section 251 of the Act, Verizon shall have the right to establish Charges for such Service in a manner that differs from the manner in which

under Applicable Law (including, but not limited to, Section 252(d) of the Act) Charges must be set for Services provided under Section 251.

4. **Regulatory Review of Prices**

Notwithstanding any other provision of the Agreement, the Combinations Attachment and this Pricing Appendix to the Combinations Attachment, each Party reserves its respective rights to institute an appropriate proceeding with the FCC, the Commission or other governmental body of appropriate jurisdiction: (a) with regard to the Charges for its Services (including, but not limited to, a proceeding to change the Charges for its services, whether provided for in any of its Tariffs, in Exhibit A, or otherwise); and (b) with regard to the Charges of the other Party (including, but not limited to, a proceeding to obtain a reduction in such Charges and a refund of any amounts paid in excess of any Charges that are reduced).

Exhibit A

I. Prices for Combinations

Monthly Recurring Charges

UNE-P Pricing

MRCs. The MRC for a UNE-P will generally be equal to the sum of the MRCs for the combined UNEs (e.g. the total of the UNE loop charge plus the UNE port charges in the Agreement (see Note A) plus: UNE local switching (per minute originating usage plus T/O factor to determine terminating minutes) based on UNE local switching rates in the Agreement plus UNE shared transport and tandem switching (based on factors for percent interoffice and tandem switch usage, plus assumed transport mileage of 10 miles and 2 terms) based on UNE shared transport rates in the Agreement plus UNE Vertical Services charges (optional per line charges, if allowed by the Agreement).

(Note A): UNE platforms are available in four loop/port configurations as shown below. If the price for any component of these platforms is not set forth herein, Verizon will use the ICB process to determine the appropriate price and TBD pricing shall apply.

UNE Basic Analog Voice Grade Platform consists of the following components:
UNE 2-wire Analog loop; and
UNE Basic Analog Line Side port

UNE ISDN BRI Platform consists of the following components:
UNE 2-wire Digital loop; and
UNE ISDN BRI Digital Line Side port

UNE ISDN PRI Platform consists of the following components:
UNE DS1 loop; and
UNE ISDN PRI Digital Trunk Side port

UNE DS1 Platform consists of the following components:
UNE DS1 loop; and
UNE DS1 Digital Trunk Side port

EEL Pricing

MRCs. The MRCs for an EEL will generally be equal to the applicable MRCs for UNEs and Multiplexing that comprise an EEL arrangement (e.g. UNE Loop, IDT, CDT, Multiplexing, & Clear Channel Capability).

NRCs.

Optional NRCs will apply as ordered by the CLEC including such charges as Expedites, Coordinated Conversions, loop Conditioning, etc.

Operator Services and Directory Assistance Services (OS/DA). If Ganoco does not initially utilize available customized routing services to re-route OS/DA calls to its own or another party's operator services platform, Verizon will bill the CLEC for OS/DA calls at a market-based ICB rate pending Ganoco's completion of a separate OS/DA agreement.

NON-RECURRING CHARGES

LOCAL WHOLESALE SERVICES	Ordering 100% Manual	Ordering Semi-Mech	Provisioning Initial Unit	Addt'l Unit
ENHANCED EXTENDED LINK Loop portion (In addition, IDT and CDT charges apply if applicable to the EEL arrangement)				
Advanced - Basic - Initial	$ 88.39	$ 56.13	$10.50	N/A
Advanced - Basic - Subsequent	$ 38.02	$ 21.89	$ 10.50	N/A
DS1/DS3 - Initial	$ 97.94	$ 65.68	$10.50	N/A
DS1/DS3 - Subsequent	$ 38.02	$ 21.89	$ 10.50	N/A
DS3 to DS1 Multiplexing	N/A	N/A	$450.00	N/A
DS1 to DS0 Multiplexing	N/A	N/A	$800.00	N/A
Changeover Charge - (Conversion from Special Access to EELs or Transport)				
Advanced - Basic (2-wire and 4-wire) Changeover (As Is)	$161.87	$99.77	$41.64	n/a
Advanced - Basic (2-wire and 4-wire) Changeover (As Is)- Additional MOG (Mass Order Generator) Only	$7.52	$4.56	$41.64	n/a
Advanced - Complex (DS1 and above) Changeover (As Is)	$179.37	$117.27	$41.64	n/a
Advanced - Complex (DS1 and above) Changeover (As Is)- Additional MOG (Mass Order Generator) Only	$7.52	$4.56	$41.64	n/a

UNE PLATFORM				
Exchange - Basic - Initial	$ 31.57	$ 22.13	$ 28.23	$ 26.58
Exchange - Basic - Subsequent	$ 16.44	$ 13.26	$ 1.08	$ 1.08
Exchange - Basic - Changeover	$ 19.93	$ 15.54	$ 0.90	$ 0.90
Exchange - Complex Non-Digital - Initial	$ 41.35	$ 27.53	$162.41	$ 31.70
Exchange - Complex Non-Digital - Subsequent (Port Feature)	$ 16.44	$ 13.26	$ 5.89	$ 5.89
Exchange - Complex Non-Digital - Subsequent (Switch Feature Group)	$ 20.82	$ 13.26	$ 22.73	$ 22.73
Exchange - Complex Non-Digital - Changeover (As Is)	$ 22.35	$ 17.96	$ 3.61	$ 3.61
Exchange - Complex Non-Digital - Changeover (As Specified)	$ 30.08	$ 21.31	$ 20.97	$ 3.61
Exchange - Complex Digital - Initial	$ 41.35	$ 27.53	$205.75	$ 28.18
Exchange - Complex Digital - Subsequent (Port Feature)	$ 16.44	$ 13.26	$ 5.15	$ 5.15
Exchange - Complex Digital - Subsequent (Switch Feature Group)	$ 20.82	$ 13.26	$ 22.73	$ 22.73
Exchange - Complex Digital - Changeover (As Is)	$ 22.35	$ 17.96	$ 4.18	$ 4.18
Exchange - Complex Digital - Changeover (As Specified)	$ 30.08	$ 21.31	$ 80.98	$ 4.18
Advanced - Complex - Initial	$ 48.35	$ 34.53	$681.24	$303.66
Advanced - Complex - Subsequent	$ 20.82	$ 13.26	$ 65.81	$ 48.47
Advanced - Complex - Changeover (As Is)	$ 24.06	$ 19.67	$ 51.51	$ 34.17
Advanced - Complex - Changeover (As Specified)	$ 37.08	$ 28.31	$ 82.31	$ 64.97
INTEROFFICE DEDICATED TRANSPORT (IDT) (Also applies to IDT portion of an EEL arrangement)				
Advanced - Basic - Initial - DS0	$ 127.99	$ 93.43	$ 767.26	N/A
Advanced - Basic - Subsequent - DS0	$ 66.59	$ 48.49	$155.28	N/A
Advanced - Complex - Initial - DS1 and above	$ 140.52	$ 105.96	$769.06	N/A
Advanced - Complex - Subsequent - DS1 and above	$ 66.59	$ 48.49	$ 133.00	N/A
CLEC DEDICATED TRANSPORT (CDT) (Also applies to CDT portion of an EEL arrangement)				
Entrance Facility/Dedicated Transport DS0 - Initial	$ 127.99	$ 93.43	$650.96	N/A
Entrance Facility/Dedicated Transport DS0 - Subsequent	$ 66.59	$ 48.49	$ 119.58	N/A
Entrance Facility/Dedicated Transport DS1/DS3 - Initial	$ 140.52	$ 105.96	$692.19	N/A
Entrance Facility/Dedicated Transport DS1/DS3 - Subsequent	$ 66.59	$ 48.49	$ 122.07	N/A
Clear Channel Capability	N/A	N/A	$90.00	N/A

Application of NRCs

Ordering and Provisioning:

Initial Service Order (ISO) applies to each Local Service Request (LSR) and Access Service Request (ASR) for new service. Charge is Manual (e.g. for a faxed order) or Semi-Mechanized (e.g. for an electronically transmitted order) based upon the method of submission used by the CLEC.

Subsequent Service Order applies to each LSR/ASR for modifications to an existing service. Charge is Manual or Semi-Mechanized based upon the method of submission used by the CLEC.

Advanced ISO applies per LSR/ASR when engineering work activity is required to complete the order.

Exchange ISO applies per LSR/ASR when no engineering work activity is required to complete the order.

Provisioning – Initial Unit applies per ISO for the first unit installed. The Additional Unit applies for each additional unit installed on the same ISO.

Basic Provisioning applies to services that can be provisioned using standard network components maintained in inventory without specialized instructions for switch translations, routing, and service arrangements.

Complex Provisioning applies to services that require special instruction for the provisioning of the service to meet the customer's needs.

Examples of services and their Ordering/Provisioning category that applies:

Exchange-Basic: 2-Wire Analog, 4-Wire Analog, Standard Sub-Loop Distribution, Standard Sub-Loop Feeder, Drop and NID.

Exchange-Complex: Non-loaded Sub-Loop Distribution, Non-load Sub-Loop Feeder, Loop Conditioning, Customized Routing, ISDN BRI Digital Line Side Port and Line Sharing.

Advanced-Basic: 2-Wire Digital Loop, 4-Wire Digital Loop

Advanced-Complex: DS1 Loop, DS3 Loop, Dark Fiber, EELs, and ISDN PRI Digital Trunk Side Port

Conditioning applies in addition to the ISO, for each Loop or Sub-Loop UNE for the installation and grooming of Conditioning requests.

DS1 Clear Channel Capability applies in addition to the ISO, per DS1 for the installation and grooming of DS1 Clear Channel Capability requests.

Changeover Charge applies to UNE-P and EEL orders when an existing retail, resale, or special access service is already in place.

Service Inquiry – Dark Fiber applies per service inquiry when a CLEC requests Verizon to determine the availability of dark fiber on a specific route.

EELs

The NRCs that generally apply to an EEL arrangement are applicable ordering & provisioning charges for EEL Loops, IDT, CDT, Multiplexing and Clear Channel Capability.

Custom Handling (These NRCs are in addition to any Preordering or Ordering and Provisioning NRCs):

Service Order Expedite applies if Ganoco requests service prior to the standard due date intervals and the expedite request can be met by Verizon.

Coordinated Conversion applies if Ganoco requests notification and coordination of service cut-over prior to the service becoming effective.

Hot Coordinated Conversion First Hour applies if Ganoco requests real-time coordination of a service cut-over that takes one hour or less.

Hot Coordinated Conversion Per Additional Quarter Hour applies, in addition to the Hot Coordinated Conversion First Hour, for every 15-minute segment of real-time coordination of a service cut-over that takes more than one hour.

Design Change Charge applies to EELs & Transport orders for design changes requested by the CLEC.

BELLSOUTH

ORAL ARGUMENT ATTACHMENTS 1-9 Re: TRRO

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

ORDER ON REMAND

Adopted: **December 15, 2004** **Released:** **February 4, 2005**

By the Commission: Chairman Powell and Commissioner Abernathy issuing separate statements; Commissioner Martin issuing a separate statement at a later date; Commissioners Copps and Adelstein dissenting and issuing separate statements.

TABLE OF CONTENTS

Para.

I. INTRODUCTION **1**

II. EXECUTIVE SUMMARY **5**

III. BACKGROUND **6**

IV. UNBUNDLING FRAMEWORK **20**

A. Reasonably Efficient Competitor 24
B. Service Considerations 29
1. Background 30
2. Prohibition on Unbundling for Exclusive Service to Competitive Markets 34
C. Reasonable Inferences 41
D. Relevance of Tariffed Alternatives 46
1. Limited Scope of Inquiry 49
2. Statutory Concerns 50
3. Administrability 54
4. Risk of Abuse 59
5. Relevance of Current Use of Special Access 64

V. DEDICATED INTEROFFICE TRANSPORT **66**

A. Summary 66
B. Background 67
C. Impairment Analysis – Interoffice Transport 69
1. General Operational and Economic Characteristics of Transport 69
2. Proxy Approach to Impairment 78
3. Application to Record Evidence of Deployment 125

2. In our *Triennial Review Order*, we recognized the marketplace realities of robust broadband competition and increasing competition from intermodal sources, and thus eliminated most unbundling requirements for broadband architectures serving the mass market.[2] Our efforts there made it easier for companies to invest in equipment and deploy the high-speed services that consumers desire. The *Triennial Review Order* had the effect of limiting unbundled access to next-generation loops serving the mass market. In this Order, the Commission takes additional steps to encourage the innovation and investment that come from facilities-based competition.[3] By using our section 251 unbundling authority in a more targeted manner, this Order imposes unbundling obligations only in those situations where we find that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition. This approach satisfies the guidance of courts to weigh the costs of unbundling, and ensures that our rules provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition.[4]

3. This Order imposes unbundling obligations in a more targeted manner where requesting carriers have undertaken their own facilities-based investments and will be using UNEs in conjunction with self-provisioned facilities. By adopting this approach, we spread the benefits of facilities-based competition to all consumers, particularly small- and medium-sized enterprise customers. We believe that the

[2] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, para. 278 (2003) (*Triennial Review Order*), *corrected by* Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004).

[3] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3701, para. 7 (1999) (*UNE Remand Order*); *see also Triennial Review Order*, 18 FCC Rcd at 16984, para. 3 (discussing "the difficulties and limitations inherent in competition based on the shared use of infrastructure").

[4] In this Order on Remand, the Commission puts into place new rules applicable to incumbent LECs' unbundling obligations with regard to mass market local circuit switching, high-capacity loops, and dedicated interoffice transport. These new rules moot various petitions that asked the Commission to stay the application of certain rules adopted in the *Triennial Review Order*. Accordingly, we dismiss as moot the August 27, 2003, emergency joint petition for stay filed by the CHOICE Coalition; the September 4, 2003, joint petition for stay filed by BellSouth, Qwest, SBC, Verizon, and the United States Telecom Association; the September 22, 2003, emergency petition for stay filed by Sage Telecom; the emergency stay petition filed by DCSI Corporation *et al.* on September 22, 2003; the September 25, 2003, emergency petition for stay filed by NuVox; and the September 26, 2003, petition for emergency stay filed by Allegiance Telecom, Cbeyond, El Paso Global Networks, Focal, McLeodUSA, Mpower, and TDS Metrocom. *See* Coalition for High-Speed Online Internet Competition and Enterprise Emergency Joint Petition for Stay, CC Docket Nos. 01-338, 96-98, 98-147 (filed Aug. 27, 2003); BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., the United States Telecom Association, and the Verizon Telephone companies, Joint Petition for Stay, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 4, 2003); Sage Telecom, Inc. Emergency Petition for Stay, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 22, 2003); DCSI Corporation, Emergency Stay Petition, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 22, 2003); NuVox Communications, Inc. Emergency Petition for Stay, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 25, 2003); Allegiance Telecom, Inc., Cbeyond Communications, LLC, El Paso Global Networks, Focal Communications Corporation, McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp. and TDS Metrocom, LLC Petition for Emergency Stay, CC Docket Nos. 01-338, 96-98, 98-147 (filed Sept. 26, 2003).

impairment framework we adopt is self-effectuating, forward-looking, and consistent with technology trends that are reshaping the industry. As we recognize below, the long distance and wireless markets are sufficiently competitive for the Commission to decline to unbundle network elements to serve those markets. Our unbundling rules are designed to remove unbundling obligations over time as carriers deploy their own networks and downstream local exchange markets exhibit the same robust competition that characterizes the long distance and wireless markets.

4. The approach that we take here was helped immensely by the efforts of our state colleagues to develop evidence concerning the state of development of facilities-based competition in their respective states. The state commissions' impressive efforts to carry out the tasks set out for them in our *Triennial Review Order* led to the development of significant evidence of competitive deployment that we used to guide our impairment analysis. The evidence filed with us from those state proceedings provided more detailed evidence of competitive deployment than we have had before us in many past proceedings, and enabled us to draw reasonable inferences from such facilities deployment, as instructed by the D.C. Circuit, in developing the unbundling rules we adopt today. Likewise, the efforts of state commissions, as well as incumbent and competitive LECs, in seeking to develop batch hot cut processes in response to the *Triennial Review Order* have had pro-competitive results relevant to our present analysis.

II. EXECUTIVE SUMMARY

5. The executive summary of this Order is as follows:

- **Unbundling Framework.** We clarify the impairment standard adopted in the *Triennial Review Order* in one respect and modify our application of the unbundling framework in three respects. *First*, we clarify that we evaluate impairment with regard to the capabilities of a *reasonably efficient* competitor. *Second*, we set aside the *Triennial Review Order*'s "qualifying service" interpretation of section 251(d)(2), but prohibit the use of UNEs exclusively for the provision of telecommunications services in the mobile wireless and long distance markets, which we previously have found to be competitive. *Third*, in applying our impairment test, we draw reasonable inferences regarding the prospects for competition in one geographic market based on the state of competition in other, similar markets. *Fourth*, we consider the appropriate role of tariffed incumbent LEC services in our unbundling framework, and determine that in the context of the local exchange markets, a general rule prohibiting access to UNEs whenever a requesting carrier is able to compete using an incumbent LEC's tariffed offering would be inappropriate.

- **Dedicated Interoffice Transport.** Competing carriers are impaired without access to DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines. Competing carriers are impaired without access to DS3 or dark fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines. Finally, competing carriers are not impaired without access to entrance facilities connecting an incumbent LEC's network with a competitive LEC's network in any instance. We adopt a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity dedicated transport where they are not impaired, and an 18-month plan to govern transitions away from dark fiber transport. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs in the absence of impairment. During the transition periods, competitive carriers will retain access to unbundled dedicated transport at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115 percent of the rate

the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.

- **High-Capacity Loops.** Competitive LECs are impaired without access to DS3-capacity loops except in any building within the service area of a wire center containing 38,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are impaired without access to DS1-capacity loops except in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are not impaired without access to dark fiber loops in any instance. We adopt a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity loops where they are not impaired, and an 18-month plan to govern transitions away from dark fiber loops. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new high-capacity loop UNEs in the absence of impairment. During the transition periods, competitive carriers will retain access to unbundled facilities at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the unbundled loops on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.

- **Mass Market Local Circuit Switching.** Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching. We adopt a 12-month plan for competing carriers to transition away from use of unbundled mass market local circuit switching. This transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new switching UNEs. During the transition period, competitive carriers will retain access to the UNE platform (*i.e.*, the combination of an unbundled loop, unbundled local circuit switching, and shared transport) at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004, plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for this combination of elements, plus one dollar.

III. BACKGROUND

6. The Communications Act requires that incumbent LECs provide unbundled network elements (UNEs) to other telecommunications carriers. In particular, section 251(c)(3) requires incumbent LECs to provide requesting telecommunications carriers with "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and section 252."[5] Section 251(d)(2) authorizes the Commission to determine which elements are subject to unbundling, and directs the Commission to consider, "at a minimum," whether access to proprietary network elements is "necessary," and whether failure to provide a non-proprietary element on an unbundled basis would "impair" a requesting carrier's ability to provide service.[6] Section 252, in turn, requires that those network elements that must be offered pursuant to section 251(c)(3) be made available at cost-based rates.[7] The Commission has previously summarized the long and complex history of our

[5] 47 U.S.C. § 251(c)(3).

[6] *See id.* § 251(d)(2).

141. The evidence described above convinces us that competitive LECs are not impaired without access to entrance facilities.[395] We also conclude that it would be inappropriate to apply the same impairment test to entrance facilities that we have adopted for other types of dedicated transport.[396] As we have explained, entrance facilities are characterized by unique operational and economic characteristics that justify separate treatment: they are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices.[397] For these reasons, we do not apply our test for other types of dedicated transport to entrance facilities.

E. Transition Plan

142. Because we remove significant dedicated transport unbundling obligations, as described above, we find it prudent to establish a plan to facilitate the transition from UNEs to alternative transport options, including special access services offered by the incumbent LECs.[398] Specifically, for DS1 and DS3 dedicated transport we adopt a twelve-month plan for competing carriers to transition to alternative facilities or arrangements, including self-provided facilities, alternative facilities offered by other carriers, or special access services offered by the incumbent LEC. As discussed below, we find it is appropriate to adopt a longer, eighteen-month transition plan for dark fiber transport. These transition plans shall apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists.[399]

[395] We find no justification in the record for making entrance facilities available on a transitional basis, as ALTS suggests, until carriers have achieved sufficient volumes to make self-deployment efficient. ALTS *et al.* Comments at 90. As we explained above, the record shows that self-deployment or alternative wholesale provisioning of entrance facilities are viable alternatives given the possibilities for traffic aggregation and efficient location of competitive LEC switches. These factors demonstrate that requesting carriers are able to enter the market on an economic basis without unbundled access to entrance facilities, and we therefore decline to require such unbundling.

[396] *See Triennial Review Order*, 18 FCC Rcd at 17204, para. 367 ("[T]he economics of dedicated facilities used for backhaul between networks are sufficiently different from transport within an incumbent LEC's network that our analysis must adequately reflect this distinction.") We thus reject commenters' suggestions that entrance facilities should be subject to the same test that applies to dedicated transport between incumbent LEC facilities. *See* AT&T Comments at 50-52; Loop-Transport Coalition Comments at 87; ATX, Bayring, *et al.* Reply at 48; McLeod Reply at 37.

[397] *See* AT&T Comments at 32 (noting that entrance facilities, compared to other transmission facilities, are better suited to self-deployment because they involve "enormous traffic" and "very short distances").

[398] To the extent that a particular dedicated transport facility no longer subject to unbundling pursuant to section 251(c)(3) has been used as part of an EEL, our existing rules governing conversions and commingling apply. *See Triennial Review Order*, 18 FCC Rcd at 17348-50, paras. 585-89 (conversions); *id.* at 17342-48, paras. 579-84 (commingling).

[399] We recognize that some dedicated transport facilities not currently subject to the nonimpairment thresholds established in this Order may meet those thresholds in the future. We expect incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms for such facilities through the section 252 process.

143. We believe it is appropriate to adopt a longer transition period for DS1 and DS3 dedicated transport than was proposed in the *Interim Order and NPRM*,[400] because we find that the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, including decisions concerning where to deploy, purchase, or lease facilities.[401] Consequently, carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. At the end of the twelve-month period, requesting carriers must transition the affected DS1 or DS3 dedicated transport UNEs to alternative facilities or arrangements.

144. Because incumbent LECs generally do not offer dark fiber as a tariffed service regulated under sections 201 and 202 of the Act,[402] and because it may take time for competitive LECs to negotiate IRUs or other arrangements with incumbent or competitive carriers, we find that a more lengthy transition plan is warranted for transitioning carriers from the use of UNE dark fiber to alternative facilities.[403] Moreover, we find that "lit" DS3 or OCn services are sufficiently different from dark fiber not to qualify as a ready substitute.[404] Because incumbent LECs offer no tariffed service comparable to dark fiber, we find that, if no impairment is found for a particular route on which a competitive LEC utilizes unbundled dark fiber, the risk of service disruption is significantly higher than for DS3 and DS1 unbundled transport, for which comparable service offerings are available under tariff. The record reveals that, even under ideal situations, deploying fiber transport facilities can take up to several years.[405] For these reasons, we adopt an eighteen-month transition period for dark fiber transport facilities similar to the twelve-month transition period that we adopt for DS1 and DS3 transport.[406] We expect that the extra time will be sufficient to allow carriers the time necessary to migrate to alternative fiber arrangements, including self-deployed fiber.

145. We do, however, adopt the *Interim Order and NPRM*'s proposal regarding transition pricing of unbundled dedicated transport facilities for which the Commission determines that no section 251(c) unbundling requirement exists.[407] Thus, during the relevant transition period, any dedicated transport UNEs that a competitive LEC leases as of the effective date of this Order, but for which the Commission determines that no section 251(c) unbundling requirement exists, shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for

[400] *See Interim Order and NPRM*, 19 FCC Rcd at 16799, para. 29 (proposing a six-month period).

[401] *See, e.g.*, ALTS *et al.* Comments at 70-72 & n.113 (discussing the steps carriers must take to transition away from unbundled incumbent LEC transmission facilities).

[402] *See* 47 U.S.C. §§ 201, 202.

[403] Alpheus Comments at 57, 66; Alpheus Reply at 29.

[404] *See, e.g.*, Alpheus Comments at 66.

[405] *Id.* at 61.

[406] Thus, for dark fiber transport, carriers have eighteen months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. At the end of the 18-month period, requesting carriers must transition the affected dark fiber dedicated transport UNEs to alternative facilities or arrangements.

[407] These transitional pricing requirements apply to DS1, DS3, and dark fiber dedicated transport links alike.

the transport element on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order, for that transport element.[408] We believe that the moderate price increases help ensure an orderly transition by mitigating the rate shock that could be suffered by competitive LECs if TELRIC pricing were immediately eliminated for these network elements, while at the same time, these price increases, and the limited duration of the transition, provide some protection of the interests of incumbent LECs in those situations where unbundling is not required.[409] Of course, the transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period. The transition mechanism also does not replace or supersede any commercial arrangements carriers have reached for the continued provision of transport facilities or services.

VI. HIGH-CAPACITY LOOPS

A. Summary

146. In this section, we apply section 251(d)(2)(B) to incumbent LECs' DS1, DS3, and dark fiber loops, consistent with the requirements of *USTA II*. Specifically, we evaluate a requesting carrier's ability to utilize third-party alternatives to high-capacity loops, or to self-deploy such loops, to serve particular locations in an economic manner. Based on the evidence in the record, we make the following determinations:

- *DS3 Loops.* We find that requesting carriers are impaired without access to DS3-capacity loops at any location within the service area of an incumbent LEC wire center containing fewer than 38,000 business lines or fewer than four fiber-based collocators. Thus, requesting carriers are not impaired without access to DS3-capacity loops at any location within the service area of a wire center containing 38,000 or more business lines and four or more fiber-based collocators.

- *DS1 Loops.* We find that requesting carriers are impaired without access to DS1-capacity loops at any location within the service area of an incumbent LEC wire center containing fewer than 60,000 business lines or fewer than four fiber-based collocators. Thus, requesting carriers are not impaired without access to DS1-capacity loops at any location within the service area of a wire center containing 60,000 or more business lines and four or more fiber-based collocators.

- *Dark Fiber Loops.* We find that requesting carriers are not impaired without access to unbundled dark fiber loops in any instance.

B. Background

147. As the Commission explained in the *Triennial Review Order*, loops are the transmission facilities between a central office and the customer's premises, *i.e.*, "the last mile" of a carrier's network

[408] *Interim Order and NPRM*, 19 FCC Rcd at 16797-99, para. 29. These prices apply to both lit and dark fiber transport. To the extent that a state public utility commission order raises some rates and lowers others for dedicated transport, the incumbent LEC may adopt either all or none of these dedicated transport rate changes. Dedicated transport facilities no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable change of law processes.

[409] *See Interim Order and NPRM*, 19 FCC Rcd at 16799, para. 30.

connection, which also indicates that the two are not interchangeable.[513] Finally, at least two competitors maintain that, based on their internal data, they rarely lose enterprise customers to cable providers.[514]

194. Second, to the extent that intermodal providers are serving enterprise customers at the DS1 or higher capacity, the impairment analysis we adopt today for high-capacity loops will account for that competition. For example, as with our dedicated transport test, our reliance on fiber-based collocation captures intermodal competitors' facilities, including those using fixed-wireless and cable facilities, which often collocate in at least some locations.[515] Further, as we explained in our discussion of dedicated interoffice transport, our impairment analysis is designed to assess revenue opportunities, and denies unbundling based in part on those opportunities regardless of whether they will be seized by wireline competitive LECs or intermodal competitors.[516] Thus, our tests for high-capacity loops will recognize collocation by intermodal providers, as well as the revenue opportunities available to such providers, and each will contribute toward a finding of "no impairment."

D. Transition Plan

195. Because we remove significant high-capacity loop unbundling obligations formerly placed on incumbent LECs, as described above, we find it prudent to establish a plan to facilitate the transition from UNEs to alternative loop options.[517] Specifically, we adopt a twelve-month plan for competing carriers to transition to alternative facilities or arrangements, including self-provided facilities, alternative facilities offered by other carriers, or tariffed services offered by the incumbent LEC. As discussed below, we find it is appropriate to adopt a longer, eighteen-month, transition plan for dark fiber loops. These transition plans shall apply only to the embedded customer base, and do not permit competitive LECs to add new high-capacity loop UNEs pursuant to section 251(c)(3) where the Commission has determined that no section 251(c) unbundling requirement exists.

196. We believe it is appropriate to adopt a longer transition period for DS1 and DS3 loops than the six-month transition period that was proposed in the *Interim Order and NPRM*, because we find that the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, including decisions concerning where to deploy,

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[513] *See* ALTS *et al.* Comments at 33; McLeodUSA Reply at 2.

[514] NuVox, for example, states that only a tiny fraction of its customer losses between January and October 2004 were to cable companies, and even those may have been to wireline competitive LEC affiliates. NuVox Nov. 22, 2004 *Ex Parte* Letter at 3-5. Cbeyond similarly asserts that very few telephone numbers have been ported from Cbeyond to a cable company or vice versa. Cbeyond Nov. 19, 2004 *Ex Parte* Letter at 4. None of the BOCs provide comparable numbers indicating how many enterprise customers they have lost to cable providers. Qwest, for example, indicates that it has lost lines to Cox in Omaha, but those losses are to the circuit-switched telephony service offered by Cox's competitive LEC affiliate, rather than to its cable operation. Qwest Reply at 50.

[515] *See supra* para. 95.

[516] *See id.*

[517] To the extent that a particular high-capacity loop no longer subject to unbundling pursuant to section 251(c)(3) has been used as part of an EEL, our existing rules governing conversions and commingling apply. *See Triennial Review Order*, 18 FCC Rcd at 17348-50, paras. 585-89 (conversions); *id.* at 17342-48, paras. 579-84 (commingling).

purchase, or lease facilities.[518] Consequently, carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. At the end of the twelve-month period, requesting carriers must transition all of their affected high-capacity loops to alternative facilities or arrangements.[519]

197. Because incumbent LECs generally do not offer dark fiber loops as a tariffed service regulated under sections 201 and 202 of the Act,[520] and because it may take time for competitive LECs to negotiate IRUs or other arrangements with incumbent or competitive carriers, we find that a more lengthy transition plan is warranted for transitioning carriers from the use of unbundled dark fiber to alternative facilities.[521] Thus, as in the case of dark fiber transport,[522] we adopt an eighteen-month transition period for dark fiber loops.[523] We expect that the extra time is necessary to permit carriers the time necessary to migrate to alternative fiber arrangements, including self-deployed fiber.

198. We adopt the *Interim Order and NPRM*'s proposal regarding transition pricing of unbundled high-capacity loops for which the Commission determines that no section 251(c) unbundling requirement exists. Thus, during the relevant transition period, any high-capacity loop UNEs that a competitive LEC leases as of the effective date of this Order, but for which the Commission determines that no section 251(c) unbundling requirement exists, shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the loop element on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order, for that loop element.[524] We believe that the moderate price increases help ensure an orderly transition by mitigating the rate shock that could be suffered by competitive LECs if TELRIC pricing were immediately eliminated for these network elements, while at the same time, these price increases, and the limited duration of the transition (which will require current UNE purchasers to more quickly make new service arrangements), provide significant protection of the

[518] *See, e.g.*, ALTS *et al.* Comments at 70-72 & n.113 (discussing the steps carriers must take to transition away from unbundled incumbent LEC transmission facilities).

[519] We recognize that some high-capacity loops with respect to which we have found impairment may in the future meet our thresholds for non-impairment. For example, as competition grows, competitive LECs may construct new fiber-based collocations in a wire center that currently has more than 38,000 business lines but 3 or fewer collocations. In such cases, we expect incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms through the section 252 process.

[520] *See* 47 U.S.C. §§ 201, 202.

[521] Alpheus Comments at 57; Alpheus Reply at 29.

[522] *See supra* para. 144.

[523] Thus, for dark fiber loops, carriers have eighteen months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. At the end of the eighteen-month period, requesting carriers must transition the affected dark fiber loop UNEs to alternative facilities or arrangements.

[524] *Interim Order and NPRM*, 19 FCC Rcd at 16797-99, para. 29. These prices apply to DS1, DS3, and dark fiber loops. To the extent that a state public utility commission order raises some rates and lowers others for high-capacity loops, the incumbent LEC may adopt either all or none of these high-capacity loop rate changes. High-capacity loops no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable change of law processes.

interests of incumbent LECs in those situations where unbundling is not required.[525] Of course, the transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period. The transition mechanism also does not replace or supersede any commercial arrangements carriers have reached for the continued provision of high-capacity loop facilities or services.

VII. MASS MARKET LOCAL CIRCUIT SWITCHING

A. Summary

199. We reexamine incumbent LECs' obligations to unbundle mass market local circuit switching in light of the D.C. Circuit's vacatur of our previous rules. In particular, we have revised our approach to impairment pursuant to *USTA II*'s instruction to draw appropriate inferences about potential competition in one market from evidence of competitive deployment in another market. Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide.[526] We conclude, based on the record here, and the reasonable inferences we draw from it, that competitive LECs not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets. Additionally, we find that the BOCs have made significant improvements in their hot cut processes that should better situate them to perform larger volumes of hot cuts ("batch hot cuts") to the extent necessary.[527] We find that these factors substantially mitigate the *Triennial Review Order*'s stated concerns about circuit switching impairment. Moreover, regardless of any limited potential impairment requesting carriers may still face, we find that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and therefore we conclude not to unbundle pursuant to section 251(d)(2)'s "at a minimum" authority. Finally, we adopt a transition plan that 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. This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching. During the twelve-month transition period, which does not supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis, 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

[525] *See id.* at 16799, para. 30.

[526] Competitive LECs have used unbundled local circuit switching exclusively in combination with incumbent LEC loops and shared transport in an arrangement known as the unbundled network element platform (UNE-P).

[527] A hot cut is a largely manual process requiring incumbent LEC technicians to manually disconnect the customer's loop, which was hardwired to the incumbent LEC switch, and physically re-wire it to the competitive LEC switch, while simultaneously reassigning (*i.e.*, porting) the customer's original telephone number from the incumbent LEC switch to the competitive LEC switch. *Triennial Review Order*, 18 FCC Rcd at 17266, para. 465 n.1409. Since the *Triennial Review Order* was adopted, major users of UNE-P, such as AT&T, have announced that they are abandoning that method of entry into the mass market in favor of alternatives such as VoIP, thus reducing the likely volume of hot cuts required in the absence of unbundled local circuit switching.

space in the incumbent LEC's central office can be dealt with adequately through the Commission's rules governing access to collocation, which is a more direct way of remedying any such problems.[622]

225. Finally, we note that there are many costs that all competitors in a market – incumbent LECs and competitive LECs alike – must incur and recover.[623] We again do not reach a national finding of impairment on the basis of such costs. Commenters cite a number of costs associated with using existing circuit switches to serve the mass market that "are simply disparities faced by virtually any new entrant in any sector of the economy, no matter how competitive the sector."[624]

D. Transition Plan

226. Because unbundled local circuit switching will no longer be made available pursuant to section 251(c)(3), we establish a transition plan to migrate the embedded base of unbundled local circuit switching used to serve mass market customers to an alternative service arrangement.[625] In particular, eliminating unbundled access to incumbent LEC switching on a flash cut basis could substantially disrupt service to millions of mass market customers, as well as the business plans of competitors.[626]

227. We require competitive LECs to submit the necessary orders to convert their mass market customers to an alternative service arrangement within twelve months of the effective date of this Order. This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to

(Continued from previous page)
of the Act and giving some substance to the 'necessary' and 'impair' requirements."); *see also*, *e.g.*, *USTA II*, 359 F.3d at 570; *USTA I*, 290 F.3d at 425-26.

[622] *See, e.g.*, 47 C.F.R. § 51.323(k)(3) (requiring incumbent LECs to make available adjacent space collocation where physical collocation space is exhausted).

[623] *See, e.g.*, Qwest Reply at 76 n.216.

[624] *USTA I*, 290 F.3d at 426. Moreover, the competitive carrier cost-based arguments fail to take into consideration that "average unit costs are necessarily higher at the outset for any new entrant into virtually any business." *USTA I*, 290 F.3d at 427. In the *Triennial Review Order*, the Commission found that the record was insufficient to support an impairment finding based on several theoretical sources of potential economic impairment, including costs associated with using existing circuit switches to serve the mass market, such as the purchase of additional analog equipment, costs to acquire additional collocation space, the purchase of additional cabling and power, as well as overhead and marketing costs. *Triennial Review Order*, 18 FCC Rcd at 17251, 17285-86, paras. 441, 485. Commenters in this proceeding cite a number of these sorts of costs. *See, e.g.*, ALTS *et al.* Comments at 93; PACE Coalition, *et al.* Comments at 70, 75; *see also*, *e.g.*, ACN Reply at 2 (citing the current financial climate as hindering its ability to obtain the financing necessary to convert to a UNE-L strategy).

[625] The *Triennial Review Order* left unresolved the issue of the appropriate number of DS0 lines that distinguishes mass market customers from enterprise market customers for unbundled local circuit switching. *See Triennial Review* Order, 18 FCC Rcd at 17293, para. 497. We need not resolve that issue here because, in this Order, we eliminate unbundled access to local circuit switching for the mass market, as well. The transition period we adopt here thus applies to all unbundled local circuit switching arrangements used to serve customers at less than the DS1 capacity level as of the effective date of this Order. The transition for local circuit switching for the DS1 enterprise market was established in the *Triennial Review Order*, 18 FCC Rcd at 17318, para. 532.

[626] *See Interim Order and NPRM*, 19 FCC Rcd at 16794, 16795-96, paras. 20, 24 (discussing need for transition to avoid harmful disruption in the telecommunications markets).

section 251(c)(3) except as otherwise specified in this Order.[627] The transition we adopt is based on the incumbent LECs' asserted ability to convert the embedded base of UNE-P customers to UNE-L on a timely basis while continuing to meet hot cut demand for new UNE-L customers. We believe it is appropriate to adopt a longer, twelve-month, transition period than was proposed in the *Interim Order and NPRM*.[628] We believe that the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversions.[629] Consequently, carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. By the end of the twelve month period, requesting carriers must transition the affected mass market local circuit switching UNEs to alternative facilities or arrangements.

228. We do, however, adopt the *Interim Order and NPRM*'s proposal that unbundled access to local circuit switching during the transition period be priced at the higher of (1) the rate at which the requesting carrier leased UNE-P on June 15, 2004 plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for UNE-P plus one dollar.[630] We believe that the moderate price increases help ensure an orderly transition by

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[627] The requesting carrier shall continue to have access to shared transport, signaling, and call-related databases as provided in the *Triennial Review Order* for those arrangements relying on unbundled local circuit switching that have not yet been converted to alternative arrangements. *Triennial Review Order*, 18 FCC Rcd at 17319-20, 17323-34, paras. 533-34, 542-60. We note that TSI's petition for reconsideration of the *Triennial Review Order* that requests that the Commission find signaling elements to be competitively available either through third party providers or through self-provisioning and that competitive LECs do not need mandatory access to signaling was not timely filed. TSI Telecommunications Services, Inc. Petition for Reconsideration, CC Docket No. 01-338 (filed Oct. 3, 2003). In any event, even if we were to consider TSI's petition, because we otherwise generally eliminate unbundled switching, and with it unbundled access to signaling, we dismiss that petition as moot.

[628] *See Interim Order and NPRM*, 19 FCC Rcd at 16799, para. 29 (proposing a six-month period).

[629] *See, e.g.*, Letter from James Bradford Ramsay, General Counsel, NARUC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 at 3 (filed Dec. 8, 2004) (stating that the transition plan must provide time for competitive LECs "to revise their business plans and decide to deploy any needed infrastructure, generate needed capital for economically sound deployments, negotiate alternative arrangements, or withdraw from particular markets"); Letter from Ruth Milkman, Counsel for MCI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket No. 01-338 at 1-2 (filed Dec. 7, 2004) (asserting that any transition for mass market local circuit switching needs to accommodate the possibility that some competitive LECs will need to partner with other competitive LECs that already "have in place the equipment and facilities necessary to serve customers via UNE-L"); New York Department of Public Service Comments at 12-13 (proposing that the transition proposed in the *Interim NPRM* be lengthened by an additional six months due in part to the need for additional time for carriers and consumers to adapt to the new circumstances); *supra* para. 215 (discussing evidence that some competing carriers may seek alternative service arrangements rather than relying on UNE-L); *see also* Michigan-Based CLEC Coalition Comments at 8 (proposing a twelve month transition plan for mass market local circuit switching).

[630] *Interim Order and NPRM*, 19 FCC Rcd at 16797-99, para. 29. To the extent that a state public utility commission order raises some rates and lowers others for the aggregate combination of loops, shared transport, and switching (*i.e.*, UNE-P), the incumbent LEC may adopt either all or none of these UNE platform rate changes. This choice by the incumbent LEC shall not diminish the effectiveness of the state commission order with respect to UNE loop rates (when not ordered as part of the UNE platform). UNE-P arrangements no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable change of law processes.

mitigating the rate shock that could be suffered by competitive LECs if TELRIC pricing were immediately eliminated for these network elements, while at the same time, these price increases, and the limited duration of the transition, provide some protection of the interests of incumbent LECs in those situations where unbundling is not required.[631] We expect incumbent LECs to meet hot cut demand, and to work to prevent unnecessary customer disruption. To the extent that specific problems arise, carriers are free to petition for waiver of this requirement with respect to their particular circumstances.[632] Of course, the transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period. The transition mechanism adopted today also does not replace or supersede any commercial arrangements carriers have reached for the continued provision of UNE-P or for a transition to UNE-L.[633]

VIII. REMAINING ISSUES

A. Conversions

229. We determined in the *Triennial Review Order* that competitive LECs may convert tariffed incumbent LEC services to UNEs and UNE combinations, provided that the competitive LEC seeking to convert such services satisfies any applicable eligibility criteria.[634] The *USTA II* court upheld this determination.[635] The BOCs have nevertheless urged us in this proceeding to prohibit conversions entirely.[636] Given our conclusion above that a carrier's current use of special access does not demonstrate a lack of impairment,[637] we conclude that a bar on conversions would be inappropriate.

230. We decline to adopt an across-the-board prohibition on conversions for three reasons. First, the scope of the purported problem that a conversion bar is designed to remedy is far smaller than several commenters suggest. The BOCs argue that unless the conversion rule is repealed, a tremendous number of existing special access channel terminations will be converted to UNEs by interexchange carriers.[638] But the rules we adopt today already prevent the use of UNEs – and therefore also prevent the conversion

[631] *See id.* at 16799, para. 30.

[632] 47 C.F.R. § 1.3.

[633] *See, e.g.*, MCI, *MCI and Qwest Reach Commercial Agreement for Wholesale Services*, Press Release (May 31, 2004), *available at* *http://global.mci.com/news/news2.xml?newsid=10710&mode=long&lang=en&width=530&langlinks=off*; SBC, *SBC, Sage Telecom Reach Wholesale Telecom Services Agreement*, Press Release (Apr. 3, 2004), *available at* *http://www.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=21080*.

[634] *Triennial Review Order*, 18 FCC Rcd at 17348-50, paras. 585-89.

[635] *USTA II*, 359 F.3d at 592-93.

[636] *See* BellSouth Comments at 37-38; Qwest Comments at 71-76; SBC Comments at 93-94; Verizon Comments at 75-77.

[637] *See supra* Part IV.D.

[638] *See, e.g.*, Qwest Dec. 8, 2004 Newman/Crain *Ex Parte* Letter at 2 (describing the efforts of one interexchange carrier in Qwest's region to convert special access channel terminations to UNEs); BellSouth Dec. 7, 2004 Special Access *Ex Parte* Letter at 5 (arguing that continuing to permit conversions "would create the possibility of a massive wealth transfer between carriers through a shift [from special access circuits] to unbundled facilities").

B. Implementation of Unbundling Determinations

233. We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act.[654] Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.[655] We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes.[656] We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

234. We recognize that our rules governing access to dedicated transport and high-capacity loops evaluate impairment based upon objective and readily obtainable facts, such as the number of business lines or the number of facilities-based competitors in a particular market.[657] We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in parts IV, V, and VI above and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3).[658] Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements.[659] In other words, the incumbent LEC must provision the UNE and

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[654] 47 U.S.C. § 252.

[655] *Id.*

[656] 47 U.S.C. § 251(c)(1); 47 U.S.C. § 252(b)(5).

[657] *See supra* Parts V.C.2, VI.C.2.

[658] As in the past, we do not believe it is necessary to address the precise form that such a certification must take, but we note that a letter sent to the incumbent LEC by a requesting carrier is a practical method of certification. *See Triennial Review Order*, 18 FCC Rcd at 17369, para. 624; *Supplemental Order Clarification*, 15 FCC Rcd at 9602-03, para. 29. Although we again decline to adopt specific record-keeping requirements, we expect that requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification. *See Triennial Review Order*, 18 FCC Rcd at 17370, para. 629; *Supplemental Order Clarification*, 15 FCC Rcd at 9604, para. 32.

[659] We do not adopt auditing rules for the self-certifications relating to our impairment rules for dedicated transport and high-capacity loops. We decline to adopt an auditing requirement because, in contrast to EELs self-certifications, the requesting carrier seeking access to the UNE certifies only to the best of its knowledge, and is unlikely to have in its possession all information necessary to evaluate whether the network element meets the factual impairment criteria in our rules. However, these rules do not supersede any audit rights included in any interconnection agreements or other commercial arrangements. *See, e.g.*, *Supplemental Order Clarification*, 15 FCC Rcd at 9604, para. 32 (noting that some interconnection agreements contain audit rights). Further, we retain our existing certification and auditing rules governing access to EELs. *See* 47 C.F.R. § 51.318.

subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority.[660]

IX. PROCEDURAL MATTERS

A. Effective Date of Rules

235. Given the need for prompt action, the requirements set forth here shall take effect on March 11, 2005, rather than 30 days after publication in the Federal Register. Commission rules permit us to render an order effective sooner than 30 days after publication in the Federal Register where good cause exists.[661] Similarly, section 553(d) of the Administrative Procedures Act (APA)[662] permits any agency to make a rule effective less than 30 days after its publication as "provided by the agency for good cause found and published with the rule."[663] Consistent with our rules and the APA, we find in this instance that there exists good cause to make this Order effective on March 11, 2005.

236. We find such good cause exists in this instance because making the rules effective on March 11 will serve the public interest by preventing unnecessary disruption to the marketplace. In adopting the interim unbundling requirements, which the rules we adopt today supplant, the Commission provided that they would remain in effect only until the earlier of (1) six months after the effective date of the *Interim Order and NPRM*, or (2) the effective date of the rules adopted in this order.[664] The Commission also provided for transitional requirements to take effect for the six months following expiration of the interim rules.[665] We find that it would be contrary to the public interest and unnecessarily disruptive to the market to permit a gap between the expiration of the interim unbundling requirements and the effective date of the rules that we adopt today, during which the previously adopted transitional requirements would be effective for a short period of time. The Commission has exercised its section 553(d) authority based on considerations such as the need to avoid regulatory confusion and industry disruption arising from the delayed applicability of newly adopted rules.[666] These considerations are applicable here, and counsel implementation, by March 11, 2005, of the rules adopted herein.

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[660] Of course, this mechanism for addressing incumbent LEC challenges to self-certifications is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements. 47 U.S.C. § 252(a)(1).

[661] *See* 47 C.F.R. §§ 1.103(a), 1.427(b).

[662] 5 U.S.C. § 500 *et seq.*

[663] 5 U.S.C. § 553(d)(3).

[664] *See Interim Order and NPRM*, 19 FCC Rcd 16783, 16794, para. 21.

[665] *See id.* at 16797-98, para. 29.

[666] *See Omnipoint Corp v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996).

4. Section 51.319 is amended by: removing paragraphs (a)(7) and (e)(4); redesignating paragraphs (a)(8) and (a)(9) as (a)(7) and (a)(8), respectively; redesignating paragraph (e)(5) as (e)(4); and revising paragraphs (a), (d), and (e) to read as follows:

§ 51.319 Specific unbundling requirements.

(a) * * *

(4) DS1 loops. (i) Subject to the cap described in paragraph (a)(4)(ii), an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS1 loop on an unbundled basis to any building not served by a wire center with at least 60,000 business lines and at least four fiber-based collocators. Once a wire center exceeds both of these thresholds, no future DS1 loop unbundling will be required in that wire center. A DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services.

(ii) Cap on unbundled DS1 loop circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 loops to any single building in which DS1 loops are available as unbundled loops.

(iii) Transition period for DS1 loop circuits. For a 12-month period beginning on the effective date of the Triennial Review Remand Order, any DS1 loop UNEs that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (a)(4)(i) or (a)(4)(ii) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the loop element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that loop element. Where incumbent LECs are not required to provide unbundled DS1 loops pursuant to paragraphs (a)(4)(i) or (a)(4)(ii) of this section, requesting carriers may not obtain new DS1 loops as unbundled network elements

(5) DS3 loops. (i) Subject to the cap described in paragraph (a)(5)(ii), an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS3 loop on an unbundled basis to any building not served by a wire center with at least 38,000 business lines and at least four fiber-based collocators. Once a wire center exceeds both of these thresholds, no future DS3 loop unbundling will be required in that wire center. A DS3 loop is a digital local loop having a total digital signal speed of 44.736 megabytes per second.

(ii) Cap on unbundled DS3 loop circuits. A requesting telecommunications carrier may obtain a maximum of a single unbundled DS3 loop to any single building in which DS3 loops are available as unbundled loops.

(iii) Transition period for DS3 loop circuits. For a 12-month period beginning on the effective date of the Triennial Review Remand Order, any DS3 loop UNEs that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (a)(5)(i) or (a)(5)(ii) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the loop element on June

15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that loop element. Where incumbent LECs are not required to provide unbundled DS3 loops pursuant to paragraphs (a)(5)(i) or (a)(5)(ii) of this section, requesting carriers may not obtain new DS3 loops as unbundled network elements.

(6) Dark fiber loops. (i) An incumbent LEC is not required to provide requesting telecommunications carriers with access to a dark fiber loop on an unbundled basis. Dark fiber is fiber within an existing fiber optic cable that has not yet been activated through optronics to render it capable of carrying communications services.

(ii) Transition period for dark fiber loop circuits. For an 18-month period beginning on the effective date of the Triennial Review Remand Order, any dark fiber loop UNEs that a competitive LEC leases from the incumbent LEC as of that date shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the loop element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that loop element. Requesting carriers may not obtain new dark fiber loops as unbundled network elements.

* * * * *

(d) Local circuit switching.

(1) * * *

(2) DS0 capacity (*i.e.*, mass market) determinations.

(i) An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops.

(ii) Each requesting telecommunications carrier shall migrate its embedded base of end-user customers off of the unbundled local circuit switching element to an alternative arrangement within 12 months of the effective date of the Triennial Review Remand Order.

(iii) Notwithstanding paragraph (d)(2)(i) of this section, for a 12-month period from the effective date of the Triennial Review Remand Order, an incumbent LEC shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve its embedded base of end-user customers. The price for unbundled local circuit switching in combination with unbundled DS0 capacity loops and shared transport obtained pursuant to this paragraph shall be the higher of: (A) the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or (B) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that combination of network elements, plus one dollar. Requesting carriers may not obtain new local switching as an unbundled network element.

(3) * * *

(C) Shared transport. Shared transport is defined as the transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network.

(e) Dedicated transport. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to dedicated transport on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part, as set forth in paragraphs (e) through (e)(4) of this section. A "route" is a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches. A route between two points (*e.g.*, wire center or switch "A" and wire center or switch "Z") may pass through one or more intermediate wire centers or switches (*e.g.*, wire center or switch "X"). Transmission paths between identical end points (*e.g.*, wire center or switch "A" and wire center or switch "Z") are the same "route," irrespective of whether they pass through the same intermediate wire centers or switches, if any.

(1) Definition. For purposes of this section, dedicated transport includes incumbent LEC transmission facilities between wire centers or switches owned by incumbent LECs, or between wire centers or switches owned by incumbent LECs and switches owned by requesting telecommunications carriers, including, but not limited to, DS1-, DS3-, and OCn-capacity level services, as well as dark fiber, dedicated to a particular customer or carrier.

(2) Availability.

(i) Entrance facilities. An incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport that does not connect a pair of incumbent LEC wire centers.

(ii) Dedicated DS1 transport. Dedicated DS1 transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dedicated DS1 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 1.544 megabytes per second and are dedicated to a particular customer or carrier.

(A) General availability of DS1 transport. Incumbent LECs shall unbundle DS1 transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are Tier 1 wire centers. As such, an incumbent LEC must unbundle DS1 transport if a wire center at either end of a requested route is not a Tier 1 wire center, or if neither is a Tier 1 wire center.

(B) Cap on unbundled DS1 transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

(C) Transition period for DS1 transport circuits. For a 12-month period beginning on the effective date of the Triennial Review Remand Order, any DS1 dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(ii)(A) or (e)(2)(ii)(B) of this section, shall be

available for lease from the incumbent LEC at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled DS1 transport pursuant to paragraphs (e)(2)(ii)(A) or (e)(2)(ii)(B) of this section, requesting carriers may not obtain new DS1 transport as unbundled network elements.

(iii) Dedicated DS3 transport. Dedicated DS3 transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dedicated DS3 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 44.736 megabytes per second and are dedicated to a particular customer or carrier.

(A) General availability of DS3 transport. Incumbent LECs shall unbundle DS3 transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are either Tier 1 or Tier 2 wire centers. As such, an incumbent LEC must unbundle DS3 transport if a wire center on either end of a requested route is a Tier 3 wire center.

(B) Cap on unbundled DS3 transport circuits. A requesting telecommunications carrier may obtain a maximum of 12 unbundled DS3 dedicated transport circuits on each route where DS3 dedicated transport is available on an unbundled basis.

(C) Transition period for DS3 transport circuits. For a 12-month period beginning on the effective date of the Triennial Review Remand Order, any DS3 dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(iii)(A) or (e)(2)(iii)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled DS3 transport pursuant to paragraphs (e)(2)(iii)(A) or (e)(2)(iii)(B) of this section, requesting carriers may not obtain new DS3 transport as unbundled network elements.

(iv) Dark fiber transport. Dedicated dark fiber transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dark fiber transport consists of unactivated optical interoffice transmission facilities.

(A) General availability of dark fiber transport. Incumbent LECs shall unbundle dark fiber transport between any pair of incumbent LEC wire centers except where, though application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are either Tier 1 or Tier 2 wire

centers. As such, an incumbent LEC must unbundle dark fiber transport if a wire center on either end of a requested route is a Tier 3 wire center.

(B) Transition period for dark fiber transport circuits. For an 18-month period beginning on the effective date of the Triennial Review Remand Order, any dark fiber dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(iv)(A) or (e)(2)(iv)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled dark fiber transport pursuant to paragraphs (e)(2)(iv)(A) or (e)(2)(iv)(B) of this section, requesting carriers may not obtain new dark fiber transport as unbundled network elements.

(3) Wire center tier structure. For purposes of this section, incumbent LEC wire centers shall be classified into three tiers, defined as follows:

(i) Tier 1 wire centers are those incumbent LEC wire centers that contain at least four fiber-based collocators, at least 38,000 business lines, or both. Tier 1 wire centers also are those incumbent LEC tandem switching locations that have no line-side switching facilities, but nevertheless serve as a point of traffic aggregation accessible by competitive LECs. Once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center.

(ii) Tier 2 wire centers are those incumbent LEC wire centers that are not Tier 1 wire centers, but contain at least 3 fiber-based collocators, at least 24,000 business lines, or both. Once a wire center is determined to be a Tier 2 wire center, that wire center is not subject to later reclassification as a Tier 3 wire center.

(iii) Tier 3 wire centers are those incumbent LEC wire centers that do not meet the criteria for Tier 1 or Tier 2 wire centers.

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition of Verizon California Inc. (U 1002 C) for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in California Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order	Application 04-03-014 (Filed March 10, 2004)

Assigned Commissioner's Ruling Granting In Part Motion for Emergency Order Granting Status Quo for UNE-P Orders

Introduction

On March 1, 2005, a joint motion was filed by MCI, Inc. on behalf of its subsidiary MCImetro Access Transmission Services, LLC ("MCImetro") and its other California local exchange subsidiaries that have adopted MCImetro's interconnection agreement with Verizon California, Inc. (collectively "MCI"); nii Communications, Ltd., ("nii"); Wholesale Air-Time, Inc. ("WAT") (collectively "Joint CLECs"); and The Utility Reform Network ("TURN") (collectively "Joint Movants"). In the Motion, Joint Movants allege that Verizon California Inc. (Verizon), by and through its parent company, Verizon Communications Corporation (Verizon) has stated that beginning on March 11, 2005, Verizon will reject all orders for new lines utilizing the unbundled network element platform (UNE-P). The Movants claim that in doing so Verizon would be taking steps that are inconsistent with Verizon's initiation of this arbitration proceeding, would unilaterally prejudge Verizon's still pending motions to withdraw certain parties from this proceeding, and breach its interconnection agreements with Joint CLECs. Each of the interconnection agreements in question, patterned after that between Verizon and MCImetro, provides that that Verizon shall provision unbundled network elements (UNEs) in combinations, including the "UNE Platform (UNE-P).

It is alleged that Verizon will take this action pursuant to its interpretation of the legal effect of the Federal Communication Commission's (FCC) recently issued Triennial Review Remand Order, released February 4, 2005 (TRRO). On February 10, 2005, at its website, Verizon provided a notice to CLECs with which it has interconnection agreements, Exhibit A in the Joint Motion, which identifies various facilities on which the FCC made findings of non-impairment with respect to various unbundled network elements, including those comprising the UNE-P, in the TRRO. The Verizon notice states that these "discontinued facilities" will not be available for addition under §251(c)(3) of the Telecommunications Act of 1996 and is subject to a transition period.

The Joint Movants thus seek a Commission order forbidding Verizon from rejecting such UNE-P orders pending compliance with the change of law provisions in the respective Interconnection Agreements and completion of this arbitration proceeding.

The Joint Movants concurrently filed a request for an order shortening time to respond to the motion by no later than 5:00 p.m., Friday, March 4, 2005, in order to enable the Commission to issue Joint Movants' requested relief prior to Verizon's implementation of its planned action to reject Joint CLECs' UNE-P orders beginning on March 11, 2005. Joint Movants argued that the shortening of time is therefore necessary to avoid substantial harm to the competitive marketplace and to consumers that Joint Movants allege would result from Verizon's planned actions. Verizon and SBC California objected to any shortening of time, contending the Movants could have made their request earlier.

Based on the representation that Movants were endeavoring to reach some resolution prior to filing their motion and that neither Verizon nor SBC California contend that the date on which Verizon will decline to offer new UNE-P arrangements is other than the date alleged by Movants, the Joint Movants' request for an order shortening time for responses to the Motion was granted by Administrative Law Judge Ruling (ALJ) on March 2, 2005.

Joint Movants seek a Commission order forbidding Verizon from rejecting such UNE-P orders pending compliance with the change of law provisions in the respective ICAs. Joint Movants claim that affected CLECs will be unable to place UNE-P orders in California after March 10, 2005, unless this Commission takes affirmative action to

forbid Verizon from rejecting such UNE-P orders pending compliance with the change-of –law provisions in their respective interconnection agreements. Unless such Commission action is taken, Joint Movants claim that CLECs will sustain immediate and irreparable injury because they will be unable to fill service requests for existing and new UNE-P customers.

Pursuant to the schedule set by the ALJ, Verizon filed a response in opposition to the Joint Motion on March 4, 2005. AT&T Communications of California, Inc., TCG Los Angeles, Inc., TCG San Diego, Inc, and TCG San Francisco (jointly AT&T) and Anew Telecommunications, Corp. d/b/a Call America, DMR Communications, Navigator Telecommunications, TCAST Communications and CF Communications, LLC. d/b/a Telekenex (jointly Small CLECs) filed responses in support of the Joint Motion.

The ALJ also specifically identified two questions to be addressed in parties' responses relating to ¶ 227 of the TRRO. The ALJ also authorized replies, filed on March 7, 2005, to the Verizon response limited to these two questions and by Verizon to the AT&T and Small CLEC responses. In response to a March 7, 2005, email request, Joint Movants were granted leave to file a reply pursuant to Rule 45(g) on March 8, 2005.

Sequence of Events Leading to the Motion

On March 10, 2004 Verizon initiated this arbitration intended to address various interconnection agreement issues under change of law provisions and in light of the issuance of the Federal Communication's Commission's (FCC) Triennial Review Order on August 21, 2003. A number of uncertainties developed concerning the status of the TRO, including a federal court decision invalidating portions of the TRO and remanding the matter to the FCC. By ruling, the assigned ALJ questioned parties as to the need for the arbitration to go forward at that time. Ultimately Verizon filed a request on May 6, 2004 to hold the arbitration in abeyance for a brief period. On December 2, 2004, Verizon filed an updated amendment to its petition for arbitration and requested resumption. However, at that time the FCC issuance of what would become known as the TRRO, was imminent, but had not yet occurred.

On February 4, 2005, the FCC issued the TRRO, determining, among other things, that the ILECs are not obligated to provide unbundled local switching pursuant to

[1]Section 251(c)(3) of the Federal Act. The FCC made the TRRO effective as of March 11, 2005. The FCC adopted a transition plan that calls for CLECs to move their UNE-P embedded customer base to alternative service arrangements within twelve months of the effective date of the TRRO and noted the purpose of the transition plan was to avoid substantially disrupting service to millions of mass market customers, as well as to the business plans of competitors. (TRRO, ¶ 226). The FCC also prescribed the basis for pricing during the transition period for unbundled switching provided pursuant to Section 251 (c)(3).

Verizon issued, via its website for CLECs, a "Notice of FCC Action Regarding Unbundled Network Elements" on February 10, 2005 (Verizon Notice, attached as Exhibit A to the Joint Motion) in which in which Verizon notified CLECs that the TRRO had been released and, among other things, that Verizon would cease processing orders for new UNE-P lines starting March 11, 2005. Verizon provided notification to CLECs concerning how it intended to modify its service offerings in response to the TRRO and offered various "alternative arrangements" for CLEC review.

With respect to UNE-P Verizon noted it "is developing a short-term plan that is designed to minimize disruption to your existing business operations. This new commercial services offering would allow your continued use of Verizon's network ... for a limited period of time while a longer term commercial agreement is negotiated." Verizon goes on to state: "In any event, to the extent you have facilities or arrangements that will become Discontinued Facilities [including UNE-P], please contact your Verizon Account Manager no later than May 15, 2005 in order to review your proposed transition plans. Should you fail to notify Verizon of your proposed transition plans by that date, Verizon will view such failure as an act of bad faith intended to delay implementation of the TRO Remand Order and take appropriate legal and regulatory actions." (Joint Motion, Ex. A at p. 3).

At almost the same time, on February 14, 2005, Verizon wrote to the assigned ALJ requesting that in light of the issuance of the TRRO this arbitration should proceed

[1] Even though the FCC's new unbundling rules end unbundling of certain UNEs under Section 251(c)(3), Verizon has commercial agreements that offer arrangements functionally equivalent to these UNEs, including UNE-P to existing and new customers, and under Section 251(c)(2) it cannot deny similar arrangements to other carriers without facing a charge of discrimination.

as quickly as possible. Verizon stated: "On February 4, 2005, the FCC issued its Triennial Review Remand Order ("TRRO"), memorializing the final unbundling rules the FCC adopted on December 15, 2004. The TRRO requires carriers to amend their interconnection agreements, to the extent necessary to implement the FCC's findings, within twelve months (or eighteen months with respect to the no-impairment findings for dark fiber loops and transport) from the March 11, 2005 effective date of the Order. See id. at ¶¶ 143, 196, 227. The FCC expects ILECs and CLECs to promptly implement the Commission's findings as directed by section 252 of the Act, and has asked state commissions to "ensure that parties do not engage in unnecessary delay." Id. at ¶ 233. Verizon's request included a proposed schedule. This request was being considered when the Joint Motion was filed.

Parties' Positions

Joint Movants argue that Verizon's proposed actions would constitute breach of the Joint CLECs' interconnection agreements in at least two respects: (1) by rejecting UNE-P orders that it is bound by the ICA to accept and process and (2) by refusing to comply with the change-of-law or intervening law procedures established by the ICAs.

In support of its Motion, Joint Movants attached the "Affidavit of Dayna Garvin," the designated contract notices manager for interconnection agreements between MCI's California local service entities and Verizon. Based on Garvin's interactions with MCI mass market business units, Garvin asserts that MCI will be adversely affected in its efforts to provide reasonably adequate service to its mass market customers if Verizon rejects request for new UNE-P orders beginning on March 11, 2005. Garvin asserts that Verizon's refusal to accept new orders will prevent MCI from obtaining new customers, and its refusal to access moves, adds and changes relating to the embedded base of existing customers will lead to inadequate service for those customers.

Joint Movants argue that the TRRO requires that its change-of-law provisions be implemented through modifications to the parties' ICAs. In this regard, the TRRO (¶ 233) requires that parties "implement the [FCC's] findings" by making "changes to their interconnection agreements consistent with our conclusions in this Order."

Thus, this requirement of the TRRO recognizes that some period of time may be necessary for parties to negotiate the appropriate changes to their interconnection agreements to conform to the change of law provisions.

Verizon opposes the Joint Motion in its entirety. Verizon argues that there is no basis for the Commission to prohibit Verizon from terminating its offering of new UNE-P arrangements effective March 11, 2005, since Verizon is merely complying with the requirements of the TRRO. Although the FCC adopted a 12-month transition period from the effective date of the TRRO, Verizon argues that this period only applies to the embedded customer base of existing UNE-P lines, citing TRRO ¶ 199.

Discussion

Parties' pleadings raise issues concerning the timing of implementation of the provisions of the TRRO relating to new UNE-P arrangements. Specifically, the question is whether the provisions of the TRRO regarding elimination of new UNE-P arrangements form a sufficient basis for Verizon to unilaterally implement the February 10, 2005 Verizon Notice on March 11, 2005, even though parties have not yet completed the process outlined in the ICA to negotiate appropriate amendments relating to applicable changes of law under the TRRO. As a basis for resolving the issues in the Joint Motion, the relevant authority is in the provisions of the TRRO and the provisions of the ICAs outlining the sequence of events to occur in order to implement applicable changes of law.

Applicability of Exceptions Under ¶ 227

The TRRO does, in fact, set different timetables for the embedded customer base versus new customers with respect to the transition period. The TRRO states: "The [12-month] transition period shall apply only to the embedded customer base, and *does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order*."(¶ 227).

Verizon interprets this language as prohibiting the CLECs from adding any new UNE-P arrangements after the effective date of the TRRO. Verizon views this prohibition as self-effectuating, and interprets the limiting clause "except as otherwise

specified," as referring merely to carriers' option of voluntarily negotiating "alternative arrangements...for the continued provision of UNE-P," as referenced in ¶ 228.

By contrast, the Joint Movants interpret the clause "except as otherwise specified in this order," as referring to ¶ 233. Specifically, Joint Movants interpret ¶ 233 as entitling Joint CLECs to continue adding new UNE-P customers after March 11, 2005, until the current interconnection agreements are amended to prohibit it. Joint Movants also interpret the reference to "new UNE-P arrangements" to be limited to arrangements for new customers, not including subsequent changes or additions to UNE-P arrangements for existing UNE-P customers.

Parties thus disagree as to whether "new arrangements" refer only to new customers or also include modifications to service arrangements of the existing UNE-P customer base made after March 11, 2005 and whether the exception clause permits the continued provision of UNE-P to new and existing customers pending the development of a new ICA.

We will interpret ¶ 227 and the term "new arrangements" in light of the whole order.

First, we note that the FCC has clearly stated that "Incumbent LECs have *no* obligation to provide competitive LECs with unbundled access to mass market local circuit switching." (TRRO, ¶ 5, emphasis added) In addition, it is clear that the FCC desires an end to the UNE-P, for it states "... we exercise our "at a minimum" authority and conclude that the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, *justify a nationwide bar on such unbundling*." (TRRO ¶ 204, emphasis added by italics.) Therefore, since there is no obligation and a national bar on the provision of UNE-P, we conclude that "new arrangements" refers to any new UNE-P arrangement, whether to provide service for new customers or to provide a new arrangement to existing services. The TRRO clearly bars both.

Other parts of the TRRO also support this interpretation. In particular, the FCC also states: "... we establish a transition plan to migrate *the embedded base of unbundled local circuit switching used to serve mass market customers to an alternative service arrangement*." (TRRO ¶207, emphasis added by italics, footnote omitted) Note that this last statement refers to "the embedded base of unbundled local circuit switching;" it does *not* refer to an "*embedded base of customers.*" This statement suggests that there is a need only to

transition those already having the UNE-P service, and that there is no need to transition customers who buy the UNE-P service over the next twelve months.

Even when the FCC discusses market disruption caused by the withdrawal of UNE-P service, the FCC limits its discussion to the taking away of service from customers who already possess UNE-P. Although the FCC notes in ¶226 that "eliminating unbundled access to incumbent LEC switching on a flash cut basis could substantially disrupt service to millions of mass market customers, as well as the business plans of competitors," this statement is contained in the section of the TRRO titled "Transition Plan." Thus, the FCC's concerns over the disruption to service caused by the withdrawal of UNE-P are focused on those customers undergoing a transition away from UNE-P. This statement does not indicate that the FCC believes that the failure to provide new UNE-P services to still more customers would be disruptive. Indeed, common sense indicates that it would more disruptive to provide a service to a new customer that would only be withdrawn in 12 months than to refrain from providing such a service that will be discontinued.

In summary, the only reasonable interpretation of the prohibition of "new service arrangements" is that this term embraces any to any arrangements to provide UNE-P services to any customer after March 11, 2005.

Concerning "the *except as otherwise specified in this Order*" exception contained in ¶ 227, we see that as referring to the need to negotiate serving arrangements, particular as to the customers undergoing transition or already holding service. In particular, the TRRO still contemplated a transitional process to pursue contract negotiations so that CLECs could continue to offer services to new customers and existing customers.

In particular, the TRRO also states:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. [footnote omitted] Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. [footnote omitted] We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. [footnote omitted] We

> expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. *We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.* (TRRO, ¶ 233, emphasis added by italics)

This clearly indicates that the FCC did not contemplate that ILEC's would unilaterally dictate to CLECs the changes to their interconnection agreements necessary to implement the FCC's findings in the TRRO. Just as clearly, the California Commission was afforded an important role in the process by which ILECs and CLECs resolve their differences through good faith negotiations. Moreover, the Commission was encouraged by the FCC to monitor the implementation of the accessible letters issued by SBC to ensure that the parties do not engage in unnecessary delay.

The warning against unreasonable delay is meaningful only where a process for contract negotiation was contemplated to implement change of law provisions that could extend beyond March 11, 2005.

Thus, the centerpiece of the FCC's TRRO is the negotiation process envisioned to take place during the transition period. To date, there have been few negotiations between Verizon and the petitioners that would lead to interconnecti on agreement amendments that conform to the FCC's TRRO. Therefore, to afford the parties additional time to negotiate the applicable ICA amendments necessary to transition and to continue to serve the CLECS embedded customer base as contemplated by the TRRO, Verizon is directed to continue processing CLEC orders for the embedded base of customers, including additional UNE-Ps, until no later than May 1, 2005. Verizon is directed to not unilaterally impose those provisions of the accessible letter that involve the embedded customer base until the company has either negotiated and executed the applicable interconnection agreements with the involved CLECs or May 1, 2005 has been reached. During this negotiation window, all parties are instructed to negotiate in good faith interconnection agreement amendments to implement the FCC ordered changes. Commission staff is empowered to work with the parties to ensure that meaningful negotiations take place consistent with the FCC's directive to monitor the negotiation process to ensure that the parties do not engage in unnecessary delay.

In summary, we see three different situations and different implications of the TRRO:

1. For new CLEC customers seeking new serving arrangements, UNE-P is unavailable as of March 11, 2005.
2. For existing CLEC customers seeking new serving arrangements involving UNE-P, Verizon will process new orders for UNE-Ps while negotiations to modify the ICA's continue, but will do so only until May 1, 2005 at the latest.
3. During the transition period until March 11, 2006, absent a new ICA, ILECs must continue to maintain the existing serving arrangements involving UNE-P that CLEC customers currently have, but the TRRO has authorized ILECs to increase the price of UNE-P by $1.

Process for Implementing Applicable ICA Amendments for UNE-P Replacement

Since further ICA amendments are required, no party shall be permitted to use negotiations as a means of unreasonably delaying implementation of the TRRO or attempting to defeat the intent of the TRRO. The TRRO envisioned a limited period of negotiations, to be monitored by state commissions, after which the UNE-P prohibition against new arrangements would take effect.

The dispute resolution provisions of the MCI Agreement are contained in the General Terms and Conditions, §14. The pertinent provisions are:

14. Dispute Resolution

> 14.1 Except as otherwise provided in this Agreement, any dispute between the Parties regarding the interpretation or enforcement of this Agreement or any of its terms shall be addressed by good faith negotiation between the Parties. To initiate such negotiation, a Party must provide to the other Party written notice of the dispute, pursuant to Section 29 of the General Terms and Conditions, that includes both a detailed description of the dispute or alleged nonperformance and the name of an individual who will serve as the initiating Party's representative in the negotiation. The other Party shall have ten Business Days to designate its own representative in the negotiation. The Parties' representatives shall meet at least once within thirty (30) days after the date of the initiating Party's written notice in an attempt to reach a good faith resolution of the dispute. Upon agreement, the Parties' representatives may utilize other alternative dispute resolution procedures such as private mediation to assist in the negotiations.

> 14.2 If the Parties have been unable to resolve the dispute within thirty (30) days of the date of the initiating Party's written notice, either Party may pursue any remedies available to it under this Agreement, at law, in equity, or otherwise, including, but not limited to, instituting an appropriate proceeding before the Commission, the FCC, or a court of competent jurisdiction. In addition, the Parties may mutually agree to submit a dispute to resolution through arbitration before the American Arbitration Association; provided that, neither Party shall have any obligation to agree to such arbitration and either Party may in its sole discretion decline to agree to submit a dispute to such arbitration.

§29 of the General Terms and Conditions requires that the notice of a dispute be in writing and delivered to specified individuals. The Joint Movants contend that by ignoring these dispute resolution provisions, Verizon CA has breached the Agreement.

Thus, in accordance with these provisions of the ICA, parties are to first pursue "diligent efforts" to agree on appropriate modifications to the agreement. According to the Affidavit of Garvin, with reference to the Masoner letter in Exhibit 1 of the Joint Motion, Verizon did not engage in any negotiations with MCI regarding the subject matter of the February 10 Verizon Notice. Verizon replies that for more than two weeks after it advised CLECs that it would no longer accept new UNE-P orders after March 11, 2005, the CLECs did nothing. Garvin states that MCI wrote to Verizon on February 18, 2005, indicating that it considered the February 10 Notice to be an anticipatory breach of MCI's ICA, as well as a violation of the notice, change of law, and dispute resolution terms thereof. (Exhibit 1 of Joint Motion.)

In any event, parties' efforts have failed to produce agreement on the appropriate modifications to implement the change of law provision relating to the elimination of UNE-P. As noted above, Verizon remains obligated to continue offer new serving arrangements involving UNE-P for existing customers until no later than May 1, 2005 or until an agreement is reached As noted above, the FCC has also prescribed the basis for pricing of the embedded UNE-P base during the transition period as provided pursuant to Section 251 (c)(3). The pricing of new UNE-P arrangements added before May 1, 2005 should likewise apply the same transition pricing.

IT IS RULED that:

1. The Motions of Joint Movants and Small CLECs are hereby denied in part and granted in part in accordance with the terms and conditions outlined above.

2. Verizon shall continue to honor its obligations under the TRRO in accordance with the discussion outlined above.
3. Verizon has no obligation to process CLEC orders for UNE-P to serve new customers.
4. Parties are directed to proceed expeditiously with good faith negotiations toward amending the ICA in accordance with the TRRO.
5. If parties have not reached an agreement on the necessary amendments for new arrangements to serve new orders placed by existing CLEC customers, Verizon shall continue processing CLEC orders for UNE-Ps (for these existing customers) until no later than May 1, 2005.

Dated March 11, 2005 in San Francisco, California.

/s/ MICHAEL R. PEEVEY
MICHAEL R. PEEVEY
Assigned Commissioner

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail, to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Assigned Commissioner's Ruling Granting in Part Motion for Emergency Order Granting Status Quo for UNE-P Orders on all parties of record in this proceeding or their attorneys of record.

Dated March 11, 2005, at San Francisco, California.

/s/ TERESITA C. GALLARDO
Teresita C. Gallardo

NOTICE

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NOTICE

BELLSOUTH TELECOMMUNICATIONS, INC.	CASE NUMBER
vs.	1:05-CV-674-CC
MCI METRO ACCESS TRANSMISSION, SERVICES, LLC, ET AL	

TYPE OF CASE : CIVIL

TAKE NOTICE THAT A PROCEEDING IN THIS CASE HAS BEEN RESET FOR THE PLACE, DATE AND TIME SET FORTH BELOW BEFORE JUDGE CLARENCE COOPER.

U. S. DISTRICT COURT	COURTROOM: 1705
75 SPRING STREET, S.W.	TIME: **9:30 AM**
ATLANTA, GEORGIA 30303-3361	DATE: **APRIL 1, 2005**

TYPE OF PROCEEDINGS: Hearing on Plaintiff's Emergency Motion for Preliminary Injunction.

LUTHER D. THOMAS, CLERK

BY: s/ Patsy L. Springs
COURTROOM DEPUTY

DATE: March 21, 2005

TO: Counsel of Record

3

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STATE of INDIANA

INDIANA UTILITY REGULATORY COMMISSION
302 W. WASHINGTON STREET, SUITE E-306
INDIANAPOLIS, INDIANA 46204-2764

http://www.state.in.us/iurc/
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FILED

MAR 0 9 2005

INDIANA UTILITY REGULATORY COMMISSION

COMPLAINT OF INDIANA BELL TELEPHONE COMPANY, INCORPORATED D/B/A SBC INDIANA FOR EXPEDITED REVIEW OF A DISPUTE WITH CERTAIN CLECS REGARDING ADOPTION OF AN AMENDMENT TO COMMISSION APPROVED INTERCONNECTION AGREEMENTS	)	CAUSE NO. 42749

You are hereby notified that on this date the Presiding Officers in this Cause make the following Entry:

1. **Background**. On February 25, 2005, the following competitive local exchange carriers ("CLECs") and Respondents in this proceeding: Acme Communications, Inc., eGIX Network Services, Inc., Cinergy Communications Company, Midwest Telecom of America, Inc., MCImetro Access Transmission Services LLC, MCI WorldCom Communications, Inc, Intermedia Communications, Inc., Trinsic Communications, Inc., and Talk America Inc. (collectively "Joint CLECs") filed a *Joint Motion for Emergency Order Preserving Status Quo for UNE-P Orders* ("Motion") with the Indiana Utility Regulatory Commission ("Commission"). The Motion asserts that the Complainant in this Cause, Indiana Bell Telephone Company, Incorporated d/b/a/ SBC Indiana ("SBC Indiana"), which is an incumbent local exchange carrier ("ILEC"), has stated that it intends to take action on or before March 11, 2005, to reject Joint CLECs' unbundled network element platform[1] ("UNE-P") orders. Such action, according to the Joint CLECs, will cause them irreparable harm and will breach SBC Indiana's currently effective, Commission-approved interconnection agreements with the Joint CLECs. The Joint CLECs request that the Commission, on or before March 7, 2005, issue a directive requiring SBC Indiana to (1) continue accepting and processing the Joint CLECs' UNE-P orders, including moves, adds, and changes to the Joint CLECs' existing embedded customer base, under the rates, terms and conditions of their respective interconnection agreements and (2) comply with the change of law provisions of the interconnection agreements in implementing the Federal Communication Commission's ("FCC's") *Triennial Review Remand Order* ("TRRO").[2]

[1] The unbundled network element platform consists of a complete set of unbundled network elements (local circuit switching, loops and shared transport) that a CLEC can obtain from an ILEC in order to provide an end-to-end circuit.

[2] Order on Remand, *In re Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No.01-338, 2005 WL 289015 (FCC Feb. 4, 2005).

Based on Joint CLEC's allegation that an emergency situation exists, a Docket Entry was issued on March 1, 2005, that modified the times, as found in 170 IAC 1-1.1-12, for SBC Indiana to file a Response to the Motion and for Joint CLECs to file a Reply to a Response. A Response and a Reply were timely filed on March 2 and March 4, 2005, respectively.

The Motion is in response to a statement in recent SBC Indiana Accessible Letters to Joint CLECs that, beginning March 11, 2005, SBC Indiana will no longer accept UNE-P orders. According to SBC Indiana, its plan to no longer accept UNE-P orders beginning March 11, 2005, is in compliance with that part of the FCC's February 4, 2005 TRRO which states that, as of the effective date of the TRRO (March 11, 2005), CLECs are not permitted to add new UNE-P arrangements using unbundled access to local circuit switching. Joint CLECs argue that such action by SBC Indiana would be a unilateral action in violation of SBC Indiana's interconnection agreements with the Joint CLECs.

2. <u>Joint CLECs' Position</u>. Joint CLECs point to the provision in each interconnection agreement that requires SBC Indiana to provide UNE-P to the CLEC at specified rates. Joint CLECs further state that any modification to an interconnection agreement made necessary by a change in law requires adherence to each agreement's specified change of law process which typically includes notice, negotiation and, if necessary, dispute resolution. Therefore, according to the Joint CLECs, SBC Indiana is required to continue to provide UNE-P to the Joint CLECs until such time as each agreement's change of law process has been fulfilled with respect to the change of law directive in the TRRO.

Joint CLECs contend that adherence to change of law processes will be substantive undertakings with respect to the TRRO's ruling that ILECs are no longer required to provide unbundled switching, because SBC Indiana is under obligations independent of Sections 251/252 of the federal Telecommunications Act of 1996[3] ("Act") to provide UNE-P to the Joint CLECs. Joint CLECs posit that, notwithstanding the TRRO's finding that ILECs are no longer required to make UNE-P available to CLECs, State statute and prior Commission Orders, Section 271 of the Act, and the *SBC/Ameritech Merger Order*[4] require SBC Indiana to continue to make UNE-P available to the Joint CLECs. The Joint CLECs also argue that the TRRO itself requires carriers to implement the findings in the TRRO by implementing appropriate changes to their interconnection agreements.

Joint CLECs point not only to the terms of their interconnection agreements and language in the TRRO as requiring adherence to the requisite change of law provisions, but also to our January 21, 2005 Docket Entry in this Cause that, in denying certain Motions to Dismiss filed by certain CLEC Respondents, stated we would require factual

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[3] The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

[4] *Applications of Ameritech Corp. and SBC Communications Inc. For Consent to Transfer Control*, 14 FCC Rcd 14712 (1999).

evidence relevant to each interconnection agreement's change of law provisions in order to determine if Commission intervention was an appropriate remedy. Joint CLECs conclude that it is appropriate for the Commission to preserve the status quo as to all of the issues raised in the applicable Accessible Letters by requiring SBC Indiana to engage in the relevant change of law processes that are mandated by the parties' interconnection agreements, by the FCC in the TRRO, and in our January 21, 2005 Docket Entry in this Cause.

3. SBC Indiana's Position. SBC Indiana contends that the language of the TRRO is unambiguous and even repetitive in its express forbiddance of new UNE-P orders as of March 11, 2005. SBC Indiana claims, therefore, that the provisions of the Accessible Letters that are the subject of Joint CLECs' Motion are merely SBC Indiana's plan to implement, and are in full compliance with, the TRRO. SBC Indiana further argues that implementation of the FCC's clear prohibition against new UNE-P as of March 11, 2005, does not require negotiations between carriers that have entered into interconnection agreements.

SBC Indiana also contends that the Commission lacks jurisdiction to stay an action of the FCC; that only the FCC itself or a federal court of appeals has such jurisdiction. As a result, according to SBC Indiana, any dispute with the FCC's bar on continued access to UNE-P as of March 11, 2005, must come as a challenge to the FCC order itself and not SBC Indiana's planned implementation of it.

4. The TRRO. In a further attempt to adopt rules implementing the Act's requirement that the FCC determine those unbundled network elements to which CLECs "at a minimum" need access in order to compete, the FCC issued its Triennial Review Order[5] ("TRO") on August 21, 2003. Among other things, the TRO found that CLECs were competitively impaired without unbundled access to ILECs' circuit switching for the mass market. The FCC determined that this impairment was primarily due to delays and other problems associated with ILECs' hot cut[6] processes. Accordingly, all state commissions, including this Commission, were directed to either determine that there was no such impairment in a particular market or develop a "batch" hot cut process that would efficiently provision multiple CLEC orders for circuit switching. As a result, this Commission initiated three Causes to address the directives of the TRO, including one proceeding devoted to developing a batch hot cut process.

Major parts of the TRO were almost immediately challenged in the Federal District Court of Appeals for the D.C. Circuit, which eventually vacated major portions of the TRO. In the end, appeals to the U.S. Supreme Court to reverse the D.C. Circuit were unsuccessful. Among other findings, the D.C. Circuit vacated the rules that allowed states to conduct impairment analyses and the FCC's national finding of impairment for

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[5] *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003).

[6] The physical process by which a customer is removed from the switch of one carrier and added to the switch of another carrier is referred to as a "hot cut."

mass market switching. The Court remanded those vacated parts of the TRO back to the FCC to make findings consistent with the Court's determinations. The result of that remand is the FCC's TRRO.

5. <u>The TRRO's Reasoning for Eliminating UNE-P</u>. In ruling to eliminate UNE-P, the FCC determined, based on the record developed during the TRO remand proceeding, that CLECs:

> . . . . not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets. Additionally, we find that the BOCs have made significant improvements in their hot cut processes that should better situate them to perform larger volumes of hot cuts ("batch hot cuts") to the extent necessary. We find that these factors substantially mitigate the *Triennial Review Order's* stated concerns about circuit switching impairment. Moreover, regardless of any limited potential impairment requesting carriers may still face, we find that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and therefore we conclude not to unbundled pursuant to section 251(d)(2)'s "at a minimum" authority.[7]

The FCC elaborated on its concern that unbundling of mass market circuit switching has created a disincentive for CLECs to invest in facilities-based competition, by stating:

> Five years ago, the Commission [FCC] expressed a preference for facilities-based competition. This preference has been validated by the D.C. Circuit as the correct reading of the statute. Since its inception, UNE-P was designed as a tool to enable a transition to facilities-based competition. It is now clear, as discussed below, that, in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment. Accordingly, consistent with the D.C. Circuit's directive, we bar unbundling to the extent there is any impairment where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition. . . . The record demonstrates the validity of concerns that unbundled mass market switching discourages competitive LEC investment in, and reliance on, competitive switches. . . . . Competitive LECs have not rebutted the evidence of commenters showing that competitive LECs in many markets have recognized that facilities-based carriers could not compete with TELRIC-based UNE-P, and therefore have made UNE-P their long-term business strategy. Indeed, some proponents of UNE-P effectively concede that it discourages infrastructure investment, at least in some cases. Some

[7] *TRRO*, ¶ 199.

> competitive LECs have openly admitted that they have no interest in deploying facilities. Particularly in residential markets, facilities-based competitive LECs have been unable to compete against other competitors using incumbent LECs' facilities at TELRIC-based rates, and are thus discouraged from innovating and investing in new facilities.[8]

6. <u>**Discussion and Findings**</u>. As noted above, the Joint CLECs have argued not only that the TRRO's change of law with respect to unbundling mass market circuit switching must be effectuated through the change of law provisions found in the parties' interconnection agreements, but also that Indiana statute and prior Commission Orders, Section 271 of the Act, and the *SBC/Ameritech Merger Order* independently require unbundling. In its Response to the Motion, SBC Indiana devotes a lengthy discussion to its refutation of each of these independent authority arguments. However, the Joint CLECs make clear in their Reply that they are not asking the Commission to resolve the issue of the applicability of these independent authorities. Instead, the Joint CLECs state that they raise these other authorities to demonstrate the sort of issues that must first be negotiated between SBC Indiana and the Joint CLECs and, if necessary, brought to dispute resolution.

The main issue we face in ruling on the Motion is whether the requirement of the FCC's TRRO prohibiting new UNE-P orders as of March 11, 2005, must be effectuated through the provisions of the parties' interconnection agreements regarding change of law, negotiation and dispute resolution, resulting in the possible and likely availability of new UNE-P orders after March 10, 2005, or if the FCC's intent is an unqualified elimination of new UNE-P orders as of March 11, 2005.

The FCC is clear in its decision to eliminate UNE-P: "Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide."[9] This determination in the TRRO is then incorporated in the accompanying FCC rules: "An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops."[10]

The one qualification that the FCC makes with respect to this clear directive is to allow a one year transition period for existing UNE-P customers.

> Finally, we adopt a transition plan that 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. This transition period shall apply only to the embedded customer base, and

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[8] *Id.* at ¶¶ 218, 220.

[9] *Id.* at ¶ 199.

[10] 47 C.F.R. § 51.319(d)(2)(i).

> does not permit competitive LECs to add new customers using unbundled access to local circuit switching. During the twelve-month transition period, which does not supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis, 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 the competitive LECs' switches or to alternative access arrangements negotiated by the carriers.[11]

Joint CLECs do not address the ramifications of the relief sought in their Motion vis-à-vis the stated transition directives of the TRRO. One reading of the TRRO is that the embedded base is a snapshot of those customers being served by UNE-P, and those customers for whom a request to be served by UNE-P has been made, as of March 10, 2005. If CLECs can continue adding new UNE-P customers after March 10, 2005, pending modification of their interconnection agreements pursuant to change of law provisions, how is the composition of the embedded base to be determined? We assume Joint CLECs would contend that new UNE-P customers added after March 10, 2005, would be added to the embedded base. If so, are these post-March 10th customers also subject to transitioning off of UNE-P by March 11, 2006? The Joint CLECs, however, might consider these questions premature in light of their primary assertion, as stated in the Motion: "Unless and until the Agreements are amended pursuant to the change of law process specified in the Agreements, SBC Indiana must continue to accept and provision the Joint CLECs' UNE-P orders at the specified rates."[12]

We do not find Joint CLECs' position to be the more reasonable interpretation of the TRRO. First, as stated earlier, the FCC is clear in its intent to eliminate UNE-P. It is also clear that the FCC intends to eliminate UNE-P from its existing requirement to be unbundled pursuant to section 251 of the Act. For some purposes, pursuant to sections 251/252 of the Act, interconnection agreements exist so parties can implement the unbundling requirements of the Act. If mass market circuit switching is no longer an element required to be unbundled pursuant to sections 251/252 of the Act, it can therefore no longer be required to be unbundled within the context of an interconnection agreement for the stated purposes of sections 251/252.

We also find the FCC's language of the TRRO and accompanying rules unambiguous as to the intent that access to UNE-P for new customers not be required after March 10, 2005. In its clear directive to eliminate future UNE-P, and eventually UNE-P that serves the embedded customer base, the FCC wants to ensure that existing UNE-P customers are not abruptly removed from the network. Therefore, the FCC creates a one-year transition period, the purpose of which is to allow CLECs to make alternative arrangements for these customers. We read the TRRO to say that as of March 11, 2005, ILECs are not required, pursuant to section 251 of the Act, to accept new UNE-P orders for new customers. In addition, as of March 11, 2006, all UNE-P customers in

[11] *TRRO*, ¶ 199.

[12] Motion, p. 10.

existence and all customer orders pending for such service as of March 10, 2005, must be transitioned off of UNE-P. Of course, ILECs and CLECs are free to negotiate the continued provisioning of UNE-P-like service.

As noted above, the TRRO creates the transition period by stating: "Finally, we adopt a transition plan that 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."[13] The effective date of the TRRO is March 11, 2005. The FCC then goes on to state: "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[14] We interpret the TRRO to say that the establishment of a one-year transition period is solely for the purpose of allowing an orderly movement of a CLEC's embedded customer base off of UNE-P, and even though UNE-P can continue to exist during this one-year transition period with respect to an embedded customer base, CLECs are not permitted to add new UNE-P customers during the transition period. We find the more reasonable interpretation of the language of the TRRO is the intent to not allow the addition of new UNE-P customers after March 10, 2005.

Clearly, too, the TRRO requires ILECs and CLECs to negotiate their interconnection agreements consistent with the findings in the TRRO:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.[15]

However, we cannot reasonably conclude that the specific provision of the TRRO to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements. To reach the conclusion proposed by the Joint CLECs would confound the FCC's clear direction provided in the TRRO, with no obvious way to

[13] *TRRO*, ¶ 199.

[14] *Id.*

[15] *Id.* at ¶ 233.

return to the transition timetable established in the TRRO. Had the FCC remained silent on the timing and pricing for the transition of the CLEC embedded customer base, it is more plausible that the parties would need to negotiate, and this Commission possibly arbitrate, the continued availability of UNE-P for new customers. Instead, the FCC is clear that, barring mutual agreement by the parties, UNE-P will no longer be available to new customers after March 10, 2005. This clear FCC directive leaves little room for the interpretation advocated by the Joint CLECs. For these reasons, we find our conclusion herein to be consistent with our finding in the January 21, 2005 Entry in this Cause that we will look to the parties' interconnection agreements in reviewing change of law issues. The elaboration that this Entry provides is that we cannot ignore the requirements of the changed law itself. The TRRO sets forth a default arrangement for the elimination of UNE-P. Unless and until the parties mutually agree to adopt an alternative arrangement instead of the default provisions of the TRRO, we must look to the FCC's directives in the TRRO for the elimination of UNE-P for new customers.

In their Motion, Joint CLECs raised some practical concerns about the effects of their inability to obtain UNE-P after March 10, 2005. Therefore, we find it appropriate to use this Entry to provide guidance on some of the disagreements that may arise as a result of this Entry's ruling. Joint CLECs express the concern in their Motion that ". . . if a CLEC customer requests remote call forwarding to his or her vacation home on March 1, 2005, and then asks the CLEC on March 12, 2005 to remove the remote call forwarding so that calls revert to their usual location, the CLEC will be unable to remove the call forwarding feature from the customer's account because of SBC's rejection of the CLEC's change request."[16] We disagree. We think the TRRO is clear in its intent that a CLEC's embedded base (its UNE-P customers, and those customers for which UNE-P has been requested, as of March 10, 2005) not be disrupted. We would expect an embedded base customer to be able to acquire or remove any feature associated with circuit switching during the transition period.

Joint CLECs have also expressed concern that the agreement being offered by SBC Indiana for continued service after March 10, 2005, would require the immediate imposition of rates higher than the transition pricing established in the TRRO.[17] We do not find this to be an unreasonable position for SBC Indiana to take. Clearly, the intent of the one-year transition period, and its associated pricing, is to allow for a planned, orderly, and non-disruptive migration of existing UNE-P customers off of UNE-P to an alternative arrangement at an established price for the transition period. Our interpretation is that the transition period is not designed to be a period in which CLECs that negotiate an agreement to continue their service with SBC Indiana are then entitled

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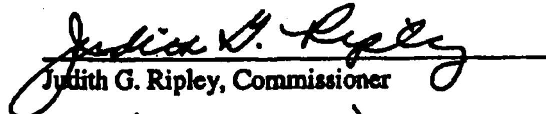
[16] *Motion*, p. 9.

[17] 47 C.F.R. § 51.319(d)(2)(iii) provides the following pricing requirements for UNE-P during the transition period: "The price for unbundled local circuit switching in combination with unbundled DS0 capacity loops and shared transport obtained pursuant to this paragraph shall be the higher of: (A) the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or (B) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that combination of network elements, plus one dollar. Requesting carriers may not obtain new local switching as an unbundled network element."

to continue with the same transition pricing. Once a CLEC agrees to continue its existing service arrangement, the issue of transitioning and the associated reasons for transition pricing cease.

It is our finding, therefore, that SBC Indiana, pursuant to the clear FCC directives in the TRRO, is not required to accept UNE-P orders for new customers after March 10, 2005. As to the Motion's request that we order SBC Indiana to comply with the change of law provisions of the interconnection agreements in implementing the TRRO, we do not make such an order, but nonetheless express our expectation that both SBC Indiana and all affected CLECs will make changes to their interconnection agreements consistent with the requirements of the TRRO. Accordingly, the Motion is denied.

IT IS SO ORDERED.



Judith G. Ripley, Commissioner

William G. Divine, Administrative Law Judge

3-9-05

Date

STATE OF INDIANA

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FILED
MAR 0 9 2005
INDIANA UTILITY
REGULATORY COMMISSION

COMPLAINT OF INDIANA BELL TELEPHONE COMPANY, INCORPORATED D/B/A SBC INDIANA FOR EXPEDITED REVIEW OF A DISPUTE WITH CERTAIN CLECS REGARDING ADOPTION OF AN AMENDMENT TO COMMISSION APPROVED INTERCONNECTION AGREEMENTS	)	**CAUSE NO. 42749**

You are hereby notified that on this date the Presiding Officers in this Cause make the following Entry:

1. Background. On February 25, 2005, the following competitive local exchange carriers ("CLECs") and Respondents in this proceeding: Acme Communications, Inc., eGIX Network Services, Inc., Cinergy Communications Company, Midwest Telecom of America, Inc., MCImetro Access Transmission Services LLC, MCI WorldCom Communications, Inc, Intermedia Communications, Inc., Trinsic Communications, Inc., and Talk America Inc. (collectively "Joint CLECs") filed a *Joint Motion for Emergency Order Preserving Status Quo for UNE-P Orders* ("Motion") with the Indiana Utility Regulatory Commission ("Commission"). The Motion asserts that the Complainant in this Cause, Indiana Bell Telephone Company, Incorporated d/b/a/ SBC Indiana ("SBC Indiana"), which is an incumbent local exchange carrier ("ILEC"), has stated that it intends to take action on or before March 11, 2005, to reject Joint CLECs' unbundled network element platform[1] ("UNE-P") orders. Such action, according to the Joint CLECs, will cause them irreparable harm and will breach SBC Indiana's currently effective, Commission-approved interconnection agreements with the Joint CLECs. The Joint CLECs request that the Commission, on or before March 7, 2005, issue a directive requiring SBC Indiana to (1) continue accepting and processing the Joint CLECs' UNE-P orders, including moves, adds, and changes to the Joint CLECs' existing embedded customer base, under the rates, terms and conditions of their respective interconnection agreements and (2) comply with the change of law provisions of the interconnection agreements in implementing the Federal Communication Commission's ("FCC's") *Triennial Review Remand Order* ("TRRO").[2]

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[1] The unbundled network element platform consists of a complete set of unbundled network elements (local circuit switching, loops and shared transport) that a CLEC can obtain from an ILEC in order to provide an end-to-end circuit.

[2] Order on Remand, *In re Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No.01-338, 2005 WL 289015 (FCC Feb. 4, 2005).

Based on Joint CLEC's allegation that an emergency situation exists, a Docket Entry was issued on March 1, 2005, that modified the times, as found in 170 IAC 1-1.1-12, for SBC Indiana to file a Response to the Motion and for Joint CLECs to file a Reply to a Response. A Response and a Reply were timely filed on March 2 and March 4, 2005, respectively.

The Motion is in response to a statement in recent SBC Indiana Accessible Letters to Joint CLECs that, beginning March 11, 2005, SBC Indiana will no longer accept UNE-P orders. According to SBC Indiana, its plan to no longer accept UNE-P orders beginning March 11, 2005, is in compliance with that part of the FCC's February 4, 2005 TRRO which states that, as of the effective date of the TRRO (March 11, 2005), CLECs are not permitted to add new UNE-P arrangements using unbundled access to local circuit switching. Joint CLECs argue that such action by SBC Indiana would be a unilateral action in violation of SBC Indiana's interconnection agreements with the Joint CLECs.

2. Joint CLECs' Position. Joint CLECs point to the provision in each interconnection agreement that requires SBC Indiana to provide UNE-P to the CLEC at specified rates. Joint CLECs further state that any modification to an interconnection agreement made necessary by a change in law requires adherence to each agreement's specified change of law process which typically includes notice, negotiation and, if necessary, dispute resolution. Therefore, according to the Joint CLECs, SBC Indiana is required to continue to provide UNE-P to the Joint CLECs until such time as each agreement's change of law process has been fulfilled with respect to the change of law directive in the TRRO.

Joint CLECs contend that adherence to change of law processes will be substantive undertakings with respect to the TRRO's ruling that ILECs are no longer required to provide unbundled switching, because SBC Indiana is under obligations independent of Sections 251/252 of the federal Telecommunications Act of 1996[3] ("Act") to provide UNE-P to the Joint CLECs. Joint CLECs posit that, notwithstanding the TRRO's finding that ILECs are no longer required to make UNE-P available to CLECs, State statute and prior Commission Orders, Section 271 of the Act, and the *SBC/Ameritech Merger Order*[4] require SBC Indiana to continue to make UNE-P available to the Joint CLECs. The Joint CLECs also argue that the TRRO itself requires carriers to implement the findings in the TRRO by implementing appropriate changes to their interconnection agreements.

Joint CLECs point not only to the terms of their interconnection agreements and language in the TRRO as requiring adherence to the requisite change of law provisions, but also to our January 21, 2005 Docket Entry in this Cause that, in denying certain Motions to Dismiss filed by certain CLEC Respondents, stated we would require factual

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[3] The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

[4] *Applications of Ameritech Corp. and SBC Communications Inc. For Consent to Transfer Control*, 14 FCC Rcd 14712 (1999).

evidence relevant to each interconnection agreement's change of law provisions in order to determine if Commission intervention was an appropriate remedy. Joint CLECs conclude that it is appropriate for the Commission to preserve the status quo as to all of the issues raised in the applicable Accessible Letters by requiring SBC Indiana to engage in the relevant change of law processes that are mandated by the parties' interconnection agreements, by the FCC in the TRRO, and in our January 21, 2005 Docket Entry in this Cause.

3. SBC Indiana's Position. SBC Indiana contends that the language of the TRRO is unambiguous and even repetitive in its express forbiddance of new UNE-P orders as of March 11, 2005. SBC Indiana claims, therefore, that the provisions of the Accessible Letters that are the subject of Joint CLECs' Motion are merely SBC Indiana's plan to implement, and are in full compliance with, the TRRO. SBC Indiana further argues that implementation of the FCC's clear prohibition against new UNE-P as of March 11, 2005, does not require negotiations between carriers that have entered into interconnection agreements.

SBC Indiana also contends that the Commission lacks jurisdiction to stay an action of the FCC; that only the FCC itself or a federal court of appeals has such jurisdiction. As a result, according to SBC Indiana, any dispute with the FCC's bar on continued access to UNE-P as of March 11, 2005, must come as a challenge to the FCC order itself and not SBC Indiana's planned implementation of it.

4. The TRRO. In a further attempt to adopt rules implementing the Act's requirement that the FCC determine those unbundled network elements to which CLECs "at a minimum" need access in order to compete, the FCC issued its Triennial Review Order[5] ("TRO") on August 21, 2003. Among other things, the TRO found that CLECs were competitively impaired without unbundled access to ILECs' circuit switching for the mass market. The FCC determined that this impairment was primarily due to delays and other problems associated with ILECs' hot cut[6] processes. Accordingly, all state commissions, including this Commission, were directed to either determine that there was no such impairment in a particular market or develop a "batch" hot cut process that would efficiently provision multiple CLEC orders for circuit switching. As a result, this Commission initiated three Causes to address the directives of the TRO, including one proceeding devoted to developing a batch hot cut process.

Major parts of the TRO were almost immediately challenged in the Federal District Court of Appeals for the D.C. Circuit, which eventually vacated major portions of the TRO. In the end, appeals to the U.S. Supreme Court to reverse the D.C. Circuit were unsuccessful. Among other findings, the D.C. Circuit vacated the rules that allowed states to conduct impairment analyses and the FCC's national finding of impairment for

[5] *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003).

[6] The physical process by which a customer is removed from the switch of one carrier and added to the switch of another carrier is referred to as a "hot cut."

mass market switching. The Court remanded those vacated parts of the TRO back to the FCC to make findings consistent with the Court's determinations. The result of that remand is the FCC's TRRO.

5. <u>The TRRO's Reasoning for Eliminating UNE-P</u>. In ruling to eliminate UNE-P, the FCC determined, based on the record developed during the TRO remand proceeding, that CLECs:

> . . . . not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets. Additionally, we find that the BOCs have made significant improvements in their hot cut processes that should better situate them to perform larger volumes of hot cuts ("batch hot cuts") to the extent necessary. We find that these factors substantially mitigate the *Triennial Review Order's* stated concerns about circuit switching impairment. Moreover, regardless of any limited potential impairment requesting carriers may still face, we find that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and therefore we conclude not to unbundled pursuant to section 251(d)(2)'s "at a minimum" authority.[7]

The FCC elaborated on its concern that unbundling of mass market circuit switching has created a disincentive for CLECs to invest in facilities-based competition, by stating:

> Five years ago, the Commission [FCC] expressed a preference for facilities-based competition. This preference has been validated by the D.C. Circuit as the correct reading of the statute. Since its inception, UNE-P was designed as a tool to enable a transition to facilities-based competition. It is now clear, as discussed below, that, in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment. Accordingly, consistent with the D.C. Circuit's directive, we bar unbundling to the extent there is any impairment where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition. . . . The record demonstrates the validity of concerns that unbundled mass market switching discourages competitive LEC investment in, and reliance on, competitive switches. . . . Competitive LECs have not rebutted the evidence of commenters showing that competitive LECs in many markets have recognized that facilities-based carriers could not compete with TELRIC-based UNE-P, and therefore have made UNE-P their long-term business strategy. Indeed, some proponents of UNE-P effectively concede that it discourages infrastructure investment, at least in some cases. Some

[7] *TRRO*, ¶ 199.

competitive LECs have openly admitted that they have no interest in deploying facilities. Particularly in residential markets, facilities-based competitive LECs have been unable to compete against other competitors using incumbent LECs' facilities at TELRIC-based rates, and are thus discouraged from innovating and investing in new facilities.[8]

6. Discussion and Findings. As noted above, the Joint CLECs have argued not only that the TRRO's change of law with respect to unbundling mass market circuit switching must be effectuated through the change of law provisions found in the parties' interconnection agreements, but also that Indiana statute and prior Commission Orders, Section 271 of the Act, and the *SBC/Ameritech Merger Order* independently require unbundling. In its Response to the Motion, SBC Indiana devotes a lengthy discussion to its refutation of each of these independent authority arguments. However, the Joint CLECs make clear in their Reply that they are not asking the Commission to resolve the issue of the applicability of these independent authorities. Instead, the Joint CLECs state that they raise these other authorities to demonstrate the sort of issues that must first be negotiated between SBC Indiana and the Joint CLECs and, if necessary, brought to dispute resolution.

The main issue we face in ruling on the Motion is whether the requirement of the FCC's TRRO prohibiting new UNE-P orders as of March 11, 2005, must be effectuated through the provisions of the parties' interconnection agreements regarding change of law, negotiation and dispute resolution, resulting in the possible and likely availability of new UNE-P orders after March 10, 2005, or if the FCC's intent is an unqualified elimination of new UNE-P orders as of March 11, 2005.

The FCC is clear in its decision to eliminate UNE-P: "Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide."[9] This determination in the TRRO is then incorporated in the accompanying FCC rules: "An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops."[10]

The one qualification that the FCC makes with respect to this clear directive is to allow a one year transition period for existing UNE-P customers.

> Finally, we adopt a transition plan that 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. This transition period shall apply only to the embedded customer base, and

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Joint CLECs do not address the ramifications of the relief sought in their Motion vis-à-vis the stated transition directives of the TRRO. One reading of the TRRO is that the embedded base is a snapshot of those customers being served by UNE-P, and those customers for whom a request to be served by UNE-P has been made, as of March 10, 2005. If CLECs can continue adding new UNE-P customers after March 10, 2005, pending modification of their interconnection agreements pursuant to change of law provisions, how is the composition of the embedded base to be determined? We assume Joint CLECs would contend that new UNE-P customers added after March 10, 2005, would be added to the embedded base. If so, are these post-March 10th customers also subject to transitioning off of UNE-P by March 11, 2006? The Joint CLECs, however, might consider these questions premature in light of their primary assertion, as stated in the Motion: "Unless and until the Agreements are amended pursuant to the change of law process specified in the Agreements, SBC Indiana must continue to accept and provision the Joint CLECs' UNE-P orders at the specified rates."[12]

We do not find Joint CLECs' position to be the more reasonable interpretation of the TRRO. First, as stated earlier, the FCC is clear in its intent to eliminate UNE-P. It is also clear that the FCC intends to eliminate UNE-P from its existing requirement to be unbundled pursuant to section 251 of the Act. For some purposes, pursuant to sections 251/252 of the Act, interconnection agreements exist so parties can implement the unbundling requirements of the Act. If mass market circuit switching is no longer an element required to be unbundled pursuant to sections 251/252 of the Act, it can therefore no longer be required to be unbundled within the context of an interconnection agreement for the stated purposes of sections 251/252.

We also find the FCC's language of the TRRO and accompanying rules unambiguous as to the intent that access to UNE-P for new customers not be required after March 10, 2005. In its clear directive to eliminate future UNE-P, and eventually UNE-P that serves the embedded customer base, the FCC wants to ensure that existing UNE-P customers are not abruptly removed from the network. Therefore, the FCC creates a one-year transition period, the purpose of which is to allow CLECs to make alternative arrangements for these customers. We read the TRRO to say that as of March 11, 2005, ILECs are not required, pursuant to section 251 of the Act, to accept new UNE-P orders for new customers. In addition, as of March 11, 2006, all UNE-P customers in

[11] *TRRO*, ¶ 199.

[12] Motion, p. 10.

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Clearly, too, the TRRO requires ILECs and CLECs to negotiate their interconnection agreements consistent with the findings in the TRRO:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.[15]

However, we cannot reasonably conclude that the specific provision of the TRRO to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements. To reach the conclusion proposed by the Joint CLECs would confound the FCC's clear direction provided in the TRRO, with no obvious way to

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[13] *TRRO*, ¶ 199.

[14] *Id.*

[15] *Id.* at ¶ 233.

return to the transition timetable established in the TRRO. Had the FCC remained silent on the timing and pricing for the transition of the CLEC embedded customer base, it is more plausible that the parties would need to negotiate, and this Commission possibly arbitrate, the continued availability of UNE-P for new customers. Instead, the FCC is clear that, barring mutual agreement by the parties, UNE-P will no longer be available to new customers after March 10, 2005. This clear FCC directive leaves little room for the interpretation advocated by the Joint CLECs. For these reasons, we find our conclusion herein to be consistent with our finding in the January 21, 2005 Entry in this Cause that we will look to the parties' interconnection agreements in reviewing change of law issues. The elaboration that this Entry provides is that we cannot ignore the requirements of the changed law itself. The TRRO sets forth a default arrangement for the elimination of UNE-P. Unless and until the parties mutually agree to adopt an alternative arrangement instead of the default provisions of the TRRO, we must look to the FCC's directives in the TRRO for the elimination of UNE-P for new customers.

In their Motion, Joint CLECs raised some practical concerns about the effects of their inability to obtain UNE-P after March 10, 2005. Therefore, we find it appropriate to use this Entry to provide guidance on some of the disagreements that may arise as a result of this Entry's ruling. Joint CLECs express the concern in their Motion that ". . . if a CLEC customer requests remote call forwarding to his or her vacation home on March 1, 2005, and then asks the CLEC on March 12, 2005 to remove the remote call forwarding so that calls revert to their usual location, the CLEC will be unable to remove the call forwarding feature from the customer's account because of SBC's rejection of the CLEC's change request."[16] We disagree. We think the TRRO is clear in its intent that a CLEC's embedded base (its UNE-P customers, and those customers for which UNE-P has been requested, as of March 10, 2005) not be disrupted. We would expect an embedded base customer to be able to acquire or remove any feature associated with circuit switching during the transition period.

Joint CLECs have also expressed concern that the agreement being offered by SBC Indiana for continued service after March 10, 2005, would require the immediate imposition of rates higher than the transition pricing established in the TRRO.[17] We do not find this to be an unreasonable position for SBC Indiana to take. Clearly, the intent of the one-year transition period, and its associated pricing, is to allow for a planned, orderly, and non-disruptive migration of existing UNE-P customers off of UNE-P to an alternative arrangement at an established price for the transition period. Our interpretation is that the transition period is not designed to be a period in which CLECs that negotiate an agreement to continue their service with SBC Indiana are then entitled

[16] *Motion*, p. 9.

[17] 47 C.F.R. § 51.319(d)(2)(iii) provides the following pricing requirements for UNE-P during the transition period: "The price for unbundled local circuit switching in combination with unbundled DS0 capacity loops and shared transport obtained pursuant to this paragraph shall be the higher of: (A) the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or (B) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that combination of network elements, plus one dollar. Requesting carriers may not obtain new local switching as an unbundled network element."

to continue with the same transition pricing. Once a CLEC agrees to continue its existing service arrangement, the issue of transitioning and the associated reasons for transition pricing cease.

It is our finding, therefore, that SBC Indiana, pursuant to the clear FCC directives in the TRRO, is not required to accept UNE-P orders for new customers after March 10, 2005. As to the Motion's request that we order SBC Indiana to comply with the change of law provisions of the interconnection agreements in implementing the TRRO, we do not make such an order, but nonetheless express our expectation that both SBC Indiana and all affected CLECs will make changes to their interconnection agreements consistent with the requirements of the TRRO. Accordingly, the Motion is denied.

IT IS SO ORDERED.

Judith G. Ripley, Commissioner

William G. Divine, Administrative Law Judge

3-9-05

Date

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Brian J. Moline, Chair
Robert E. Krehbiel
Michael C. Moffet

In the Matter of a General Investigation to Establish a Successor Standard Agreement to the Kansas 271 Interconnection Agreement, Also Know as the K2A.	))))	Docket No. 04-SWBT-763-GIT

ORDER GRANTING IN PART AND DENYING IN PART FORMAL COMPLAINT AND MOTION FOR AN EXPEDITED ORDER

The above captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having examined its files and records. and being duly advised in the premises, the Commission makes the following findings:

Background

1. On March 5, 2004, the Commission opened this docket to provide a proceeding to establish a successor agreement to the Kansas 271 Agreement (K2A). On November 18, 2004. the Commission issued an Order Denying Motion to Abate Arbitrations. Directing Arbitrations to Continue on Certain Issues. and Adopting Certain Terms on an Interim Basis. In this order, the Commission bifurcated the pending arbitrations. ordering the issues regarding UNEs, reciprocal compensation. and performance measurements to be decided in Phase II, and the remaining issues to be decided in Phase I. November 18. 2005 Order, 9-10. On January 4. 2005. the Commission granted SWBT's Petition for

Reconsideration and/or Clarification, and set forth deadlines for the Phase I arbitrator's award of February 16, 2005, and a final Commission order by May 16, 2005. With respect to Phase II, the Commission set the deadline for the arbitrator's award for April 29, 2005. The final Commission order on the Phase II arbitration is scheduled to be issued on June 30, 2005.

2. On March 3, 2005, Birch Telecom of Kansas, Inc., Cox Kansas Telcom, L.L.C., ionex communications, Inc., NuVox Communications of Kansas, Inc. and Xspedius Communications, L.L.C. (collectively, CLEC Coalition) filed their Formal Complaint and Motion for an Expedited Order (Complaint). The CLEC Coalition in their Complaint sought an order preventing Southwestern Bell Telephone, L.P. (SWBT) from amending or breaching its existing interconnection agreements with the CLEC Coalition members. Complaint, 1. The CLEC Coalition alleged that SWBT intends to amend or breach these interconnection agreements on March 11, 2005. Complaint, 1. On March 8, 2005, Navigator Telecommunications, LLC (Navigator) filed its Application to Join in Complaint Filed by CLEC Coalition. On March 7, 2005, AT&T Communications of the Southwest, Inc. and TCG Kansas City, Inc. (AT&T) filed its Response to the CLEC Coalition's Complaint. On March 8, 2005, Prairie Stream Communications was added to the CLEC Coalition.

3. On March 4, 2005, the Commission issued its Order Establishing Procedural Schedule, requiring a response from SWBT by March 8, 2005, at 12:00 p.m. and setting the matter for oral argument on March 10, 2005. On March 7, the Staff of the Commission (Staff) filed its Response to Formal Complaint and Motion for Expedited

Order. SWBT filed its Answer and Response to Motion for Expedited Review on March 8, 2005. On March 8, 2005, the Citizens' Utility Ratepayer Board (CURB) filed its Response to the CLEC Coalition's Formal Complaint and Motion for Expedited Order.

4. The Commission heard oral arguments on the Complaint on March 10, 2005.

FCC Background

5. The Federal Communications Commission issued its Order on Remand in CC Docket No. 01-338 (TRRO) following remand in *United States Telecom Ass'n v. FCC* 359 F.3d 554 (D.C. Cir. 2004). In the TRRO, the FCC clarified its unbundling framework under which impairment is to be evaluated. TRRO, ¶ 5. Also, it promulgated new impairment standards for dedicated interoffice transport, high-capacity loops, and mass market local circuit switching. TRRO, ¶ 5. Within the context of the new standards for impairment, the FCC specified various terms of transition for the CLEC's embedded customer base. TRRO, ¶ 5.

Jurisdiction

6. The Commission has jurisdiction over this matter pursuant to 47 U.S.C. § 252(b).

Self-Effectuating Nature of FCC Order

7. The CLEC Coalition argues that changes in the legal landscape effected by the FCC's TRRO should be incorporated into the existing interconnection agreements through negotiation prior to affecting the legal relationship between the CLECs and SWBT. Complaint, 2. This can be done, it maintains, through the section 252 process, which refers to the present arbitrations discussed above. Complaint, 2-3. Therefore, the

CLEC Coalition seeks an order from the Commission declaring that the CLECs can continue to have access to SWBT's network pursuant to existing arrangements until the changes in the TRRO can be negotiated and implemented into new interconnection agreements.

8. SWBT disagrees with the CLEC Coalition's position, maintaining that the TRRO is self-effectuating and immediately bars CLECs from adding new customers based upon a UNE-P basis. Response, 9-10. SWBT explains that it makes no sense to hold otherwise. As the FCC has clearly espoused a desire to move away from UNE-P, it makes no sense to continue to permit CLECs to make these arrangements even on a temporary basis. Response, 10.

9. The Commission agrees with SWBT's position regarding the self-effectuating nature of the TRRO as to serving new customers. First, the CLECs are incorrect to maintain that there is an existing interconnection agreement. Rather, the Commission extended the terms relating to UNEs, intercarrier compensation, and performance measurements on an interim basis. November 18, 2004 Order, 10-11. There is no basis for this Commission to order the parties to maintain a status quo while negotiating a new interconnection agreement within the legal context set forth by the FCC in its TRRO. Rather, as to new customers, the FCC has issued its rules regarding impairment and SWBT and the CLECs must abide by those rules for the simple reason that no contrary agreement exists. While some terms of the interconnection agreement were extended by the Commission, that extension is no longer valid in light of the FCC's order. Second, the Commission agrees with SWBT that the FCC is clear in that as of March 11, 2005, the

mass market local circuit switching and certain high-capacity loops are no longer available to CLECs on an unbundled basis for new customers TRRO, ¶ 227 ("This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order."). It does not make sense to delay implementation of these provisions by permitting an interconnection scheme contrary to the FCC's rulings to persist. Last, any harm claimed by the CLECs to be irreparable today is no different from the harm that they must inevitably face in the relatively short term as a result of implementing the FCC's new rules. On the other hand, the sooner the FCC's new rules can be implemented, the sooner rules held to be illegal can be abrogated.

Embedded Customer Base

10. The CLEC Coalition argues the "embedded customer base" referred to in the TRRO to which the transition period applies, refers to customers, not existing lines Complaint, 9. SWBT takes the opposite position, arguing that the embedded customer base to which the transition period applies does not permit the CLECs to add new elements. SWBT Response, 3.

11. The Commission agrees with the CLEC Coalition regarding the meaning of "embedded customer base." First, the Commission finds that based on the language of the regulation adopted by the FCC's TRRO that it is the intent of the FCC that the transition period apply to customers, not lines. In the final regulations, the FCC ordered that ILECs are not required to provide access to local circuit switching on an unbundled

basis. 47 C.F.R. § 51.319(d)(2)(ii). However as to the "embedded base of end-user customers," the ILEC must provide such access. 47 C.F.R. § 51.319(d)(2)(iii). Consistent with the CLEC Coalition's position, the Commission interprets this language as referring to customers, not lines

12. Second, the Commission is concerned with matters raised by the counsel for the CLEC Coalition in oral argument suggesting certain technical difficulties associated with mixing services based on a UNE-P basis and services based on a resale or commercial agreement basis for the same customer. Accordingly, the Commission finds that it is the intent of the FCC in its TRRO to permit CLECs to consistently serve its customer base, which includes adding services, lines, and servicing customers at new locations.

13. Last, the Commission finds that SWBT has a clear remedy in monetary terms in the event this Commission's definition of embedded customer base is wrong. Any changes in the arrangements of the parties will be subject to a true up. Therefore, the CLECs may be forced to compensate SWBT for the use of its facilities not at the unbundled rate, but at some other rate based upon resale or a commercial agreement. On the other hand, there is no similar remedy of true down for the CLECs. If the CLECs pay the rate based on a commercial agreement or resale, this arrangement will be outside the jurisdiction of the Commission and not subject to a revision in the future. After balancing the interests of the parties, the extent of injury the parties might suffer, and the interests of the public, the Commission concludes the balance of interests weighs in favor

of the CLECs in interpreting the FCC's intent in using the term "embedded customer base."

CLEC Access to Data Supporting Wire Centers

14. Staff raises an additional point in its response not addressed by the CLEC Coalition. Staff Response, ¶ 8. Staff is concerned that the data supplied by SWBT needed by the CLECs for making decisions on whether to self-certify that they are entitled to orders for dedicated transport and high-capacity loops is not accessible. Staff Response, ¶ 8. SWBT points out that the data supporting its wire center determinations is on file with the FCC and can be viewed, subject to the terms of a protective order. At oral argument, SWBT assured the Commission that, subject to the FCC protective order the information is now or will be shortly made available in Kansas. If after review CLECs self-certify in areas SWBT has determined to be ineligible, SWBT must follow the procedures outlined in ¶ 234 by processing the order and contesting the certification at the Commission.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. The Commission grants in part and denies in part the Complaint. The FCC's TRRO is to govern the relationship between SWBT and the CLECs as to new customers. As to the embedded customer base of the CLEC, as that phrase is defined and interpreted above, SWBT and the CLECs are ordered to continue working under the terms of Phase I of the arbitration, in addition to those terms extended by the Commission's November 15, 2004 and January 4, 2005 Orders. The final deadline for an arbitrator's award is scheduled for April 29, 2005, at which time it will replace this order and become the

interim order of the Commission until the Commission finally approves the contracts filed pursuant to the Commission's order on the arbitration

B. This Order is to be served by facsimile transmission to the attorneys for SWBT and the CLEC Coalition. Other parties are to be served by mail.

C. A party may file a petition for reconsideration of this Order within fifteen (15) days from the date of service of this Order. K.S.A. 66-118b; K.S.A. 2004 Supp. 77-529(a)(1).

D. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further order or orders, as it may deem necessary

BY THE COMMISSION IT IS SO ORDERED.

Moline, Chr.; Krehbiel, Comm.; Moffet, Comm.

Dated: MAR 1 0 2005

ORDER MAILED

MAR 1 1 2005

Susan K. Duffy
Executive Director

sre

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STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

VERIZON-MAINE
Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)

March 17, 2005

ORDER

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we deny MCImetro Access Transmission Services LLC's (MCI) Petition for Emergency Declaratory Relief and the CLEC Coalition's[1] Motion for Temporary Order. We also remind Verizon of its obligation to follow federal law concerning certification of wire centers for purposes of ordering certain loop and transport unbundled network elements (UNEs). Finally, we put Verizon on notice that we may pursue the imposition of penalties for any failure to comply with our September 3, 2004 Order in this Docket, which requires Verizon to include all of its wholesale offerings in its wholesale tariff, including UNEs provided pursuant to section 271 of the Telecommunications Act of 1996 (TelAct), and to continue provisioning 271 UNEs at "Total Element Long Run Incremental Cost (TELRIC)" rates until we, or the Federal Communications Commission (FCC), approve new rates.

II. BACKGROUND

On February 4, 2005, the FCC issued its *Triennial Review Order Remand Order (TRRO).*[2] In the *TRRO*, the FCC eliminated certain unbundling requirements pursuant to section 251 of the TelAct and established new criteria for access to certain loop and transport UNEs. *TRRO* at ¶ 5. The effective date of the *TRRO* is March 11, 2005. On February 10, 2005, in a letter posted on its website (UNE Industry Letter), Verizon announced that on March 11, 2005, it would stop accepting orders for those UNEs which the FCC had de-listed in the *TRRO*.

On March 2, 2005, MCI filed a Petition for Emergency Declaratory Relief (Petition), asserting the need for injunctive relief to prevent Verizon from rejecting orders for de-listed UNEs, including UNE-Ps. In MCI's view, Verizon is obligated to provide

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[1] A coalition comprised of Mid-Maine Communications, Oxford Networks and Pine Tree Network.

[2] *Triennial Review Remand Order, Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers ("TRRO"),* FCC Docket Nos. 04-313, 01-338 *Order on Remand*, FCC 04-290, issued Feb. 4, 2005, effective Mar. 11, 2005.

access to the de-listed UNEs pursuant to the September 2, 1997 Interconnection Agreement between MCI and Verizon and, by announcing its intent to stop accepting orders for such UNEs on March 11, 2005, Verizon is in anticipatory breach of the agreement.

On March 2, 2005, Verizon issued a second Industry Letter (Wire Center Industry Letter) attaching a list of rate centers it asserted met the FCC's new business line/fiber collocator criteria related to submission of orders for DS1 and DS3 loops and transport. Verizon further stated that by issuing its letter it was placing CLECs "on notice of the Wire Center classifications" thereby providing them with "actual or constructive knowledge" of the wire center classification. Finally, Verizon informed CLECs that if they should "attempt to submit an order for any of the aforementioned network elements notwithstanding your actual or constructive knowledge . . . Verizon will treat each such order as a separate act of bad faith carried out in violation of federal regulations and a breach of your interconnection agreements, and will pursue any and all remedies available to it."

On March 4, 2005, the CLEC Coalition joined in MCI's request by filing a Motion for Temporary Order (Motion). On March 7, 2005, A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation (InfoHighway) filed a Petition to Intervene and Comments in Support of MCI's Petition.[3]

Verizon responded to MCI's Petition by filing opposition papers on March 8, 2005, (Ver. Opp.) arguing that the FCC's *TRRO* takes precedence over any provisions of the Interconnection Agreement that are contrary to it. Verizon also claims that we lack the authority to provide the relief sought by MCI's Petition.

On March 10, 2005, MCI withdrew its Petition, explaining that it had entered into an interim commercial agreement for UNE-P replacement services. Later that same day, the CLEC Coalition filed a letter-brief in which it addressed Verizon's response to the MCI Petition, and urged that its own request for injunctive relief be granted despite the fact that the party first seeking such relief (MCI) had withdrawn its request. Finally, in a series of e-mail messages sent on March 10 and 11, 2005, Verizon, the CLEC Coalition, and InfoHighway described the rulings of several regulatory agencies in other states that have recently confronted the same issues raised by the MCI Petition.

A special deliberative session was held on March 11, 2005, to consider the pending motions.

[3] We grant InfoHighway's petition to intervene.

III. POSITIONS OF THE PARTIES

A. The CLECs

According to the CLECs,[4] Verizon's obligation to provide UNEs derives from their interconnection agreements with Verizon. The *TRRO* triggered the so-called "change of law" provisions in the interconnection agreements – provisions which require the parties to "arrive at mutually acceptable modifications or cancellations," of the interconnection agreement whenever such changes are "required by a regulatory authority or court in the exercise of its lawful jurisdiction." In the view of the CLECs, Verizon cannot unilaterally impose its understanding of what the *TRRO* requires. Instead, the parties must negotiate changes to the interconnection agreement in light of the *TRRO*. Injunctive relief is necessary to prevent Verizon from implementing its plan to discontinue the provision of certain UNEs, as described in Verizon's February 10, 2005, Industry Letter, and thereby disrupting the status quo during the negotiation period.

The CLECs also argue that while the *TRRO* removes certain UNEs from the list of those which must be offered pursuant to section 251(c)(3) of the TelAct, it has no bearing on Verizon's separate and continuing obligation to provide those UNEs pursuant to section 271 of the TelAct. Thus, the CLECs request that we enforce our September 3, 2004 Order requiring Verizon to meet its commitment to us in our 271 Proceeding[5] to file a wholesale tariff and to continue to provide 271 UNEs at TELRIC rates until the wholesale tariff is approved.

B. Verizon

Verizon takes issue with the CLECs' characterization of the "change of law" provisions of the interconnection agreements. According to Verizon, those provisions are meant merely to ensure that the language of interconnection agreements is updated to reflect new rules issued by the FCC – rules that Verizon insists are binding on the parties as soon as they are pronounced. The request for emergency injunctive relief is misguided, claims Verizon, because the *TRRO* changed the status quo, effective March 11, 2005, and subsequent changes to interconnection agreements will serve only to acknowledge the new state of affairs.

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[4] The CLEC Coalition and InfoHighway explicitly adopted the arguments of MCI before MCI withdrew its Petition, and also articulated their own arguments. For the purposes of this Order, we will treat the arguments of these parties collectively as those of the "CLECs."

[5] *Inquiry Regarding the Entry of Verizon-Maine into the InterLATA Telephone Market Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 2000-849.

Verizon also claims that its obligation to provide UNEs, as memorialized in the interconnection agreements, derives solely from section 251 of the TelAct, and "not state law, section 271, or anything else." Verizon Opp. at 4. Even if section 271 did form the basis for such obligations, Verizon adds, the Commission is powerless to act because the FCC is "solely responsible for interpretation and enforcement of any section 271 obligations." *Id.* Thus, Verizon contends not only that we should deny the petitions for emergency injunctive relief but also that we lack the authority, under concepts of federal preemption, to impose the relief sought by the CLECs and enforce our September 3, 2004 Order.

IV. DECISION

A. Implementation of the *TRRO*

We have considered the arguments of all parties, the language of the *TRRO*, decisions reached by other state commissions, and the practical implications of our decision. We find that the FCC intended that its new rules de-listing certain UNEs be implemented immediately rather than be the subject of interconnection agreement amendment negotiations before becoming effective. We further find that it is in the best interests of all parties to implement the changes required by the *TRRO* immediately and move forward on the pending litigation of other contested issues. The decisions set forth in the *TRRO* come after years of seemingly endless litigation involving the FCC and federal courts; delaying the implementation of the new rules will only delay the inevitable.

As a practical matter, it is not obvious to us what issues would remain to be negotiated concerning the section 251 UNEs de-listed by the FCC; the FCC has been clear that these UNEs are no longer required to be unbundled under section 251. The end result after going through the step of amending the interconnection agreements will be the same as enforcing the March 11th deadline immediately, *albeit* with some delay. We recognize that there may be other provisions in the *TRRO* which require negotiations before the interconnection agreements can be amended. We encourage parties to move forward swiftly with those negotiations and stand ready to address any disputes that may be brought before us.

In addition, we reject the reasoning of the Georgia Public Service Commission in its March 8, 2005 Order (Docket No. 19341-U) regarding the applicability of the *Mobile Sierra*[6] doctrine because the contracts at issue here contain change of law provisions and therefore already contemplate regulatory changes. Further, the Georgia PSC seems to be saying that, without a showing of heightened public interest, the FCC cannot unilaterally override an interconnection agreement but can, without a showing of

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[6] The *Mobile Sierra* doctrine allows the government to modify the terms of a private contract upon a finding that such modification will serve the public need. *United States Gas Pipeline Co. v. Mobile Gas Service Corp.,* 350 U.S. 332 (1956); *Fed. Power Comm'n v. Sierra Pac. Power Co.,* 350 U.S. 348 (1956).

heightened public interest, order parties to amend their agreements to be consistent with the FCC's new rules. We do not find this distinction persuasive.

Finally, as Verizon correctly noted, the FCC stated repeatedly throughout its Order that ILECs would have no obligation to provide CLECs with access to the de-listed UNEs and that the transition plan does not permit CLECs to add new de-listed UNEs. We find the FCC's specificity regarding these issues to be clear and thus, we do not believe it to be appropriate or necessary to ascribe anything but their plain meaning to the FCC's directives. Accordingly, we deny the requests of MCI and the CLEC Coalition for an order staying implementation of the FCC's rules pending interconnection agreement negotiations.

B. Self-Certification of Wire Centers

As stated above, the FCC's new rules place limitations on a CLEC's ability to order certain loops and transport UNEs, depending upon the number of business lines and/or fiber collocators associated with the particular wire center in which it would like to purchase the UNE. The FCC, however, clearly found that CLECs, after a diligent inquiry, could self-certify that a particular wire center does not meet the FCC's criteria. *TRRO* at ¶ 234. Further, upon submission of an order involving self-certification, an ILEC must provision the order first and then dispute the classification of the wire center in front of a state commission pursuant to the dispute resolution procedures of most interconnection agreements. *Id.*

While the March 2, 2005 Industry Letter posted by Verizon on its website does not explicitly state that it will not follow the FCC's rules, i.e. that it will reject a CLEC order involving a rate center contained on Verizon's list, it comes very close. Indeed, apart from appearing unnecessarily hostile, the language is inconsistent with the spirit of the *TRRO* and with the specific findings in paragraph 234. Thus, we remind Verizon of its obligation to comply with the FCC's rules and paragraph 234 of the *TRRO*. We also remind CLECs that they must make a good faith inquiry concerning the characteristics of any wire center that might be implicated by the FCC's criteria. If necessary, we will investigate the factual underpinnings of Verizon and/or CLEC assertions concerning the characteristics of wire centers in Maine which may meet the FCC's criteria.

C. Enforcement of Verizon's 271 Obligations

Having resolved the motions pending before us, we need go no further. Nonetheless, prompted by certain comments made by Verizon in its Brief in Opposition to the motions, we remind Verizon of its continuing obligation to comply with both the standing orders of this Commission, including our Order of September 3, 2004, and section 271 of the TelAct. The following discussion is intended to summarize, but not in any way to supplant or modify, our findings of September 3, 2004. In our view, this summary is sufficient to put Verizon on notice that any failure on its part to comply with

our September 3rd Order may lead to the imposition of penalties pursuant to 35-A M.R.S.A. § 1508-A.

On September 3, 2004, we issued an order in this proceeding requiring Verizon to include all of its wholesale offerings in its state wholesale tariff, including UNEs provided pursuant to section 271 of the TelAct. We further specified that Verizon must file prices for all offerings contained in the wholesale tariff for our review for compliance with federal pricing standards, i.e. TELRIC for section 251 UNEs and "just and reasonable" rates pursuant to sections 201 and 202 of the Communications Act of 1934 for section 271 UNEs. Finally, we held that Verizon must continue to provision 271 UNEs at TELRIC prices pending approval of the wholesale tariff and/or new rates. Verizon did not seek reconsideration of the Order nor did it appeal the Order pursuant to 35-A M.R.S.A. § 1320.

Now, some six months after we issued our Order, Verizon asserts that the Order has no force and that Verizon has no obligation to comply with its requirements. We find Verizon's assertions both troubling and procedurally improper. Unless and until a Commission order is amended, vacated, or otherwise modified pursuant to the requirements of Title 35-A or other applicable law, the order retains the force of law and must be obeyed. Accordingly, our September 3, 2004 Order in this proceeding stands and Verizon must comply with it or risk being found in contempt of a Commission order and subject to the fining provisions of 35-A M.R.S.A. § 1508-A. Verizon remains free, as it has been since September 3rd, to request that the Commission alter or amend its September 3rd Order. It is not free, however, to unilaterally determine that it does not have to comply.

We take very seriously the commitments Verizon made to us during our 271 proceeding and expect that Verizon will honor those commitments. We will not repeat the reasoning and rationale supporting our assertion of jurisdiction to enforce Verizon's 271 commitments. We laid that reasoning out quite clearly in our September 3rd Order and find that there has been no intervening change in law that would impact our analysis.[7]

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[7]The cases cited by Verizon can, and have been, distinguished. First, in both *Verizon North Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002) and *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441 (7th Cir. 2003), the state commissions ordered the incumbent local exchange carrier (ILEC) to file a state wholesale tariff pursuant to state authority, which is entirely different from Verizon voluntarily agreeing to file a wholesale tariff in exchange for this Commission's support of its federal 271 application. Further, this Commission has never stated that the wholesale tariff would replace the obligation of parties to enter into interconnection agreements. Second, *Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (7th Cir. 2004), involved a state commission's assertion of authority to order a performance assurance remedy plan under state law. Again, this is clearly distinguishable from the situation here in Maine where Verizon agreed to file a wholesale tariff.

Verizon has had over six months since our September 3rd Order to submit a tariff for its 271 obligations and/or obtain FCC approval of the specific rates it intends to charge for 271 UNEs. Verizon has taken no action. Thus, the interim provisions that we put in place, i.e. the requirement that Verizon continue to provision 271 UNEs at TELRIC rates until other rates are approved, continues to govern. To the extent that there is legitimate disagreement concerning which UNEs qualify as 271 UNEs, we encourage the parties to bring those issues to us as soon as possible. We note that the Hearing Examiner in this proceeding recently issued a procedural order with an attached matrix outlining the status of all UNEs and requesting legal argument from the parties concerning their correct categorization. Thus, we expect that in the absence of particular disagreements, we will have an opportunity to resolve the issue of which UNEs are considered 271 UNEs within the next couple of months.

A decision by Verizon to ignore the requirements of our September 3rd Order may trigger application 35-A M.S.A. §1508-A. Indeed, to the extent that Verizon fails to comply with the September 3rd Order by refusing to provision uncontested 271 UNEs, such as unbundled switching, on the grounds that our September 3rd Order is not enforceable, it is suspect to an enforcement proceeding pursuant to 35-A M.R.S.A. §1508-A(1)(B). If Verizon refuses to provision a 271 UNE based on a good faith disagreement concerning whether the UNE qualifies as a 271 UNE, we will conduct a proceeding to determine whether the UNE qualifies. If Verizon continues to refuse to provision the UNE after we find that it does qualify, it risks the initiation of enforcement and penalty proceedings.

Dated at Augusta, Maine, this 17th day of March, 2005.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

VERIZON-MAINE
Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)

March 17, 2005

ORDER

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we deny MCImetro Access Transmission Services LLC's (MCI) Petition for Emergency Declaratory Relief and the CLEC Coalition's[1] Motion for Temporary Order. We also remind Verizon of its obligation to follow federal law concerning certification of wire centers for purposes of ordering certain loop and transport unbundled network elements (UNEs). Finally, we put Verizon on notice that we may pursue the imposition of penalties for any failure to comply with our September 3, 2004 Order in this Docket, which requires Verizon to include all of its wholesale offerings in its wholesale tariff, including UNEs provided pursuant to section 271 of the Telecommunications Act of 1996 (TelAct), and to continue provisioning 271 UNEs at "Total Element Long Run Incremental Cost (TELRIC)" rates until we, or the Federal Communications Commission (FCC), approve new rates.

II. BACKGROUND

On February 4, 2005, the FCC issued its *Triennial Review Order Remand Order (TRRO).*[2] In the *TRRO*, the FCC eliminated certain unbundling requirements pursuant to section 251 of the TelAct and established new criteria for access to certain loop and transport UNEs. *TRRO* at ¶ 5. The effective date of the *TRRO* is March 11, 2005. On February 10, 2005, in a letter posted on its website (UNE Industry Letter), Verizon announced that on March 11, 2005, it would stop accepting orders for those UNEs which the FCC had de-listed in the *TRRO*.

On March 2, 2005, MCI filed a Petition for Emergency Declaratory Relief (Petition), asserting the need for injunctive relief to prevent Verizon from rejecting orders for de-listed UNEs, including UNE-Ps. In MCI's view, Verizon is obligated to provide

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[1] A coalition comprised of Mid-Maine Communications, Oxford Networks and Pine Tree Network.

[2] *Triennial Review Remand Order, Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers ("TRRO"),* FCC Docket Nos. 04-313, 01-338 *Order on Remand*, FCC 04-290, issued Feb. 4, 2005, effective Mar. 11, 2005.

access to the de-listed UNEs pursuant to the September 2, 1997 Interconnection Agreement between MCI and Verizon and, by announcing its intent to stop accepting orders for such UNEs on March 11, 2005, Verizon is in anticipatory breach of the agreement.

On March 2, 2005, Verizon issued a second Industry Letter (Wire Center Industry Letter) attaching a list of rate centers it asserted met the FCC's new business line/fiber collocator criteria related to submission of orders for DS1 and DS3 loops and transport. Verizon further stated that by issuing its letter it was placing CLECs "on notice of the Wire Center classifications" thereby providing them with "actual or constructive knowledge" of the wire center classification. Finally, Verizon informed CLECs that if they should "attempt to submit an order for any of the aforementioned network elements notwithstanding your actual or constructive knowledge . . . Verizon will treat each such order as a separate act of bad faith carried out in violation of federal regulations and a breach of your interconnection agreements, and will pursue any and all remedies available to it."

On March 4, 2005, the CLEC Coalition joined in MCI's request by filing a Motion for Temporary Order (Motion). On March 7, 2005, A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation (InfoHighway) filed a Petition to Intervene and Comments in Support of MCI's Petition.[3]

Verizon responded to MCI's Petition by filing opposition papers on March 8, 2005, (Ver. Opp.) arguing that the FCC's *TRRO* takes precedence over any provisions of the Interconnection Agreement that are contrary to it. Verizon also claims that we lack the authority to provide the relief sought by MCI's Petition.

On March 10, 2005, MCI withdrew its Petition, explaining that it had entered into an interim commercial agreement for UNE-P replacement services. Later that same day, the CLEC Coalition filed a letter-brief in which it addressed Verizon's response to the MCI Petition, and urged that its own request for injunctive relief be granted despite the fact that the party first seeking such relief (MCI) had withdrawn its request. Finally, in a series of e-mail messages sent on March 10 and 11, 2005, Verizon, the CLEC Coalition, and InfoHighway described the rulings of several regulatory agencies in other states that have recently confronted the same issues raised by the MCI Petition.

A special deliberative session was held on March 11, 2005, to consider the pending motions.

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[3] We grant InfoHighway's petition to intervene.

III. POSITIONS OF THE PARTIES

A. The CLECs

According to the CLECs,[4] Verizon's obligation to provide UNEs derives from their interconnection agreements with Verizon. The *TRRO* triggered the so-called "change of law" provisions in the interconnection agreements – provisions which require the parties to "arrive at mutually acceptable modifications or cancellations," of the interconnection agreement whenever such changes are "required by a regulatory authority or court in the exercise of its lawful jurisdiction." In the view of the CLECs, Verizon cannot unilaterally impose its understanding of what the *TRRO* requires. Instead, the parties must negotiate changes to the interconnection agreement in light of the *TRRO*. Injunctive relief is necessary to prevent Verizon from implementing its plan to discontinue the provision of certain UNEs, as described in Verizon's February 10, 2005, Industry Letter, and thereby disrupting the status quo during the negotiation period.

The CLECs also argue that while the *TRRO* removes certain UNEs from the list of those which must be offered pursuant to section 251(c)(3) of the TelAct, it has no bearing on Verizon's separate and continuing obligation to provide those UNEs pursuant to section 271 of the TelAct. Thus, the CLECs request that we enforce our September 3, 2004 Order requiring Verizon to meet its commitment to us in our 271 Proceeding[5] to file a wholesale tariff and to continue to provide 271 UNEs at TELRIC rates until the wholesale tariff is approved.

B. Verizon

Verizon takes issue with the CLECs' characterization of the "change of law" provisions of the interconnection agreements. According to Verizon, those provisions are meant merely to ensure that the language of interconnection agreements is updated to reflect new rules issued by the FCC – rules that Verizon insists are binding on the parties as soon as they are pronounced. The request for emergency injunctive relief is misguided, claims Verizon, because the *TRRO* changed the status quo, effective March 11, 2005, and subsequent changes to interconnection agreements will serve only to acknowledge the new state of affairs.

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[4] The CLEC Coalition and InfoHighway explicitly adopted the arguments of MCI before MCI withdrew its Petition, and also articulated their own arguments. For the purposes of this Order, we will treat the arguments of these parties collectively as those of the "CLECs."

[5] *Inquiry Regarding the Entry of Verizon-Maine into the InterLATA Telephone Market Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 2000-849.

Verizon also claims that its obligation to provide UNEs, as memorialized in the interconnection agreements, derives solely from section 251 of the TelAct, and "not state law, section 271, or anything else." Verizon Opp. at 4. Even if section 271 did form the basis for such obligations, Verizon adds, the Commission is powerless to act because the FCC is "solely responsible for interpretation and enforcement of any section 271 obligations." *Id.* Thus, Verizon contends not only that we should deny the petitions for emergency injunctive relief but also that we lack the authority, under concepts of federal preemption, to impose the relief sought by the CLECs and enforce our September 3, 2004 Order.

IV. DECISION

A. Implementation of the *TRRO*

We have considered the arguments of all parties, the language of the *TRRO*, decisions reached by other state commissions, and the practical implications of our decision. We find that the FCC intended that its new rules de-listing certain UNEs be implemented immediately rather than be the subject of interconnection agreement amendment negotiations before becoming effective. We further find that it is in the best interests of all parties to implement the changes required by the *TRRO* immediately and move forward on the pending litigation of other contested issues. The decisions set forth in the *TRRO* come after years of seemingly endless litigation involving the FCC and federal courts; delaying the implementation of the new rules will only delay the inevitable.

As a practical matter, it is not obvious to us what issues would remain to be negotiated concerning the section 251 UNEs de-listed by the FCC; the FCC has been clear that these UNEs are no longer required to be unbundled under section 251. The end result after going through the step of amending the interconnection agreements will be the same as enforcing the March 11th deadline immediately, *albeit* with some delay. We recognize that there may be other provisions in the *TRRO* which require negotiations before the interconnection agreements can be amended. We encourage parties to move forward swiftly with those negotiations and stand ready to address any disputes that may be brought before us.

In addition, we reject the reasoning of the Georgia Public Service Commission in its March 8, 2005 Order (Docket No. 19341-U) regarding the applicability of the *Mobile Sierra*[6] doctrine because the contracts at issue here contain change of law provisions and therefore already contemplate regulatory changes. Further, the Georgia PSC seems to be saying that, without a showing of heightened public interest, the FCC cannot unilaterally override an interconnection agreement but can, without a showing of

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[6] The *Mobile Sierra* doctrine allows the government to modify the terms of a private contract upon a finding that such modification will serve the public need. *United States Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

heightened public interest, order parties to amend their agreements to be consistent with the FCC's new rules. We do not find this distinction persuasive.

Finally, as Verizon correctly noted, the FCC stated repeatedly throughout its Order that ILECs would have no obligation to provide CLECs with access to the de-listed UNEs and that the transition plan does not permit CLECs to add new de-listed UNEs. We find the FCC's specificity regarding these issues to be clear and thus, we do not believe it to be appropriate or necessary to ascribe anything but their plain meaning to the FCC's directives. Accordingly, we deny the requests of MCI and the CLEC Coalition for an order staying implementation of the FCC's rules pending interconnection agreement negotiations.

B. Self-Certification of Wire Centers

As stated above, the FCC's new rules place limitations on a CLEC's ability to order certain loops and transport UNEs, depending upon the number of business lines and/or fiber collocators associated with the particular wire center in which it would like to purchase the UNE. The FCC, however, clearly found that CLECs, after a diligent inquiry, could self-certify that a particular wire center does not meet the FCC's criteria. *TRRO* at ¶ 234. Further, upon submission of an order involving self-certification, an ILEC must provision the order first and then dispute the classification of the wire center in front of a state commission pursuant to the dispute resolution procedures of most interconnection agreements. *Id.*

While the March 2, 2005 Industry Letter posted by Verizon on its website does not explicitly state that it will not follow the FCC's rules, i.e. that it will reject a CLEC order involving a rate center contained on Verizon's list, it comes very close. Indeed, apart from appearing unnecessarily hostile, the language is inconsistent with the spirit of the *TRRO* and with the specific findings in paragraph 234. Thus, we remind Verizon of its obligation to comply with the FCC's rules and paragraph 234 of the *TRRO*. We also remind CLECs that they must make a good faith inquiry concerning the characteristics of any wire center that might be implicated by the FCC's criteria. If necessary, we will investigate the factual underpinnings of Verizon and/or CLEC assertions concerning the characteristics of wire centers in Maine which may meet the FCC's criteria.

C. Enforcement of Verizon's 271 Obligations

Having resolved the motions pending before us, we need go no further. Nonetheless, prompted by certain comments made by Verizon in its Brief in Opposition to the motions, we remind Verizon of its continuing obligation to comply with both the standing orders of this Commission, including our Order of September 3, 2004, and section 271 of the TelAct. The following discussion is intended to summarize, but not in any way to supplant or modify, our findings of September 3, 2004. In our view, this summary is sufficient to put Verizon on notice that any failure on its part to comply with

our September 3rd Order may lead to the imposition of penalties pursuant to 35-A M.R.S.A. § 1508-A.

On September 3, 2004, we issued an order in this proceeding requiring Verizon to include all of its wholesale offerings in its state wholesale tariff, including UNEs provided pursuant to section 271 of the TelAct. We further specified that Verizon must file prices for all offerings contained in the wholesale tariff for our review for compliance with federal pricing standards, i.e. TELRIC for section 251 UNEs and "just and reasonable" rates pursuant to sections 201 and 202 of the Communications Act of 1934 for section 271 UNEs. Finally, we held that Verizon must continue to provision 271 UNEs at TELRIC prices pending approval of the wholesale tariff and/or new rates. Verizon did not seek reconsideration of the Order nor did it appeal the Order pursuant to 35-A M.R.S.A. § 1320.

Now, some six months after we issued our Order, Verizon asserts that the Order has no force and that Verizon has no obligation to comply with its requirements. We find Verizon's assertions both troubling and procedurally improper. Unless and until a Commission order is amended, vacated, or otherwise modified pursuant to the requirements of Title 35-A or other applicable law, the order retains the force of law and must be obeyed. Accordingly, our September 3, 2004 Order in this proceeding stands and Verizon must comply with it or risk being found in contempt of a Commission order and subject to the fining provisions of 35-A M.R.S.A. § 1508-A. Verizon remains free, as it has been since September 3rd, to request that the Commission alter or amend its September 3rd Order. It is not free, however, to unilaterally determine that it does not have to comply.

We take very seriously the commitments Verizon made to us during our 271 proceeding and expect that Verizon will honor those commitments. We will not repeat the reasoning and rationale supporting our assertion of jurisdiction to enforce Verizon's 271 commitments. We laid that reasoning out quite clearly in our September 3rd Order and find that there has been no intervening change in law that would impact our analysis.[7]

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[7]The cases cited by Verizon can, and have been, distinguished. First, in both *Verizon North Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002) and *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441 (7th Cir. 2003), the state commissions ordered the incumbent local exchange carrier (ILEC) to file a state wholesale tariff pursuant to state authority, which is entirely different from Verizon voluntarily agreeing to file a wholesale tariff in exchange for this Commission's support of its federal 271 application. Further, this Commission has never stated that the wholesale tariff would replace the obligation of parties to enter into interconnection agreements. Second, *Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (7th Cir. 2004), involved a state commission's assertion of authority to order a performance assurance remedy plan under state law. Again, this is clearly distinguishable from the situation here in Maine where Verizon agreed to file a wholesale tariff.

Verizon has had over six months since our September 3rd Order to submit a tariff for its 271 obligations and/or obtain FCC approval of the specific rates it intends to charge for 271 UNEs. Verizon has taken no action. Thus, the interim provisions that we put in place, i.e. the requirement that Verizon continue to provision 271 UNEs at TELRIC rates until other rates are approved, continues to govern. To the extent that there is legitimate disagreement concerning which UNEs qualify as 271 UNEs, we encourage the parties to bring those issues to us as soon as possible. We note that the Hearing Examiner in this proceeding recently issued a procedural order with an attached matrix outlining the status of all UNEs and requesting legal argument from the parties concerning their correct categorization. Thus, we expect that in the absence of particular disagreements, we will have an opportunity to resolve the issue of which UNEs are considered 271 UNEs within the next couple of months.

A decision by Verizon to ignore the requirements of our September 3rd Order may trigger application 35-A M.S.A. §1508-A. Indeed, to the extent that Verizon fails to comply with the September 3rd Order by refusing to provision uncontested 271 UNEs, such as unbundled switching, on the grounds that our September 3rd Order is not enforceable, it is suspect to an enforcement proceeding pursuant to 35-A M.R.S.A. §1508-A(1)(B). If Verizon refuses to provision a 271 UNE based on a good faith disagreement concerning whether the UNE qualifies as a 271 UNE, we will conduct a proceeding to determine whether the UNE qualifies. If Verizon continues to refuse to provision the UNE after we find that it does qualify, it risks the initiation of enforcement and penalty proceedings.

Dated at Augusta, Maine, this 17th day of March, 2005.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

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CLOSED MAR 15 2005

FILED
MAR 15 2005
CLERK'S OFFICE
U.S. DISTRICT COURT
EASTERN MICHIGAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

MCIMETRO ACCESS TRANSMISSION SERVICES LLC,

Plaintiff,

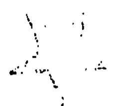
v.

MICHIGAN BELL TELEPHONE COMPANY, d/b/a SBC MICHIGAN,

Defendant.

Civil Action No. 05-70885

Hon. Arthur J. Tarnow



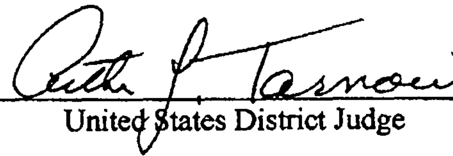
Magistrate Judge Pepe

ORDER OF DISMISSAL AND DISSOLUTION OF PRELIMINARY INJUNCTION

This matter is before the Court on the parties' Stipulation of Dismissal and for Dissolution of Preliminary Injunction, and the Court having reviewed the stipulation, it is:

1. ORDERED AND ADJUDGED, that this matter be and hereby is DISMISSED, and that
2. The Preliminary Injunction issued by the Court on March 11, 2005 be and hereby is DISSOLVED as moot.

IT IS SO ORDERED this 15th Day of March, 2005.



United States District Judge

FILED
MAR 15 2005
CLERK'S OFFICE
DETROIT

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of competitive local exchange carriers to initiate a Commission investigation of issues related to the obligation of incumbent local exchange carriers in Michigan to maintain terms and conditions for access to unbundled network elements or other facilities used to provide basic local exchange and other telecommunications services in tariffs and interconnection agreements approved by the Commission, pursuant to the Michigan Telecommunications Act, the Telecommunications Act of 1996, and other relevant authority.	Case No. U-14303
In the matter of the application of **SBC MICHIGAN** for a consolidated change of law proceeding to conform 251/252 interconnection agreements to governing law pursuant to Section 252 of the Communications Act of 1934, as amended.	Case No. U-14305
In the matter of the application of **VERIZON NORTH INC. and CONTEL OF THE SOUTH, INC., d/b/a VERIZON NORTH SYSTEMS**, for a consolidated change-of-law proceeding to conform interconnection agreements to governing law.	Case No. U-14327
In the matter on the Commission's own motion, to resolve certain issues regarding hot cuts.	Case No. U-14463

At the March 29, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

ORDER

On September 30, 2004, the Competitive Local Exchange Carriers Association of Michigan (CLEC Association), LDMI Telecommunications, Inc. (LDMI), MCImetro Access Transmission Services LLC (MCI), XO Michigan, Inc. (XO), AT&T Communications of Michigan, Inc. (AT&T), TCG Detroit, TDS Metrocom, LLC (TDS), Talk America Inc., TelNet Worldwide, Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a Superior Spectrum, Inc., Grid 4 Communications, Inc., CMC Telecom, Inc., C.L.Y.K. Inc., d/b/a Affinity Telecom, Inc., JAS Networks, Inc., Climax Telephone Company, and ACD Telecom, Inc. (ACD), (collectively, the CLEC coalition), petitioned the Commission to conduct an investigation pursuant to its authority under the Michigan Telecommunications Act (MTA), 1991 PA 179, as amended, MCL 484.2101 *et seq.*, to investigate the effect, if any, in Michigan of the *vacatur* of the rules promulgated by the Federal Communications Commission (FCC) in its Triennial Review Order[1] and the effect of the FCC's August 20, 2004 interim order on remand.[2] To the extent that these developments are determined by the Commission to constitute a change of law, the CLEC coalition seeks a decision from the Commission on the appropriate procedures for modification of the terms in current tariffs and interconnection agreements. The CLEC coalition also requests the Commission to order SBC Michigan (SBC) and Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems (Verizon), to show cause why the Commission should not order

[1]Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, 16984 (2003) (*TRO*), vacated in part, *United States Telecom Assn* v *FCC*, 359 F3d 554 (DC Cir 2004) (*USTA* II).

[2]In the Matter of 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 04-179 (rel'd August 20, 2004).

them to continue to provide competitive local exchange carriers (CLECs) with nondiscriminatory access to network elements and facilities as currently required by tariffs and interconnection agreements approved by the Commission pursuant to the MTA and Sections 251 and 252 of the federal Telecommunications Act of 1996 (FTA), 47 USC 251 *et seq.*, at cost-based rates.

On the same day, SBC filed an application requesting that the Commission convene a proceeding to ensure that SBC's interconnection agreements adopted under Sections 251 and 252 of the FTA remain consistent with federal law. In so doing, SBC alleged that its existing interconnection agreements continue to include network elements that the FCC previously required incumbent local exchange carriers (ILECs) to provide on an unbundled basis, but which are no longer required to be unbundled by FCC order or judicial decision. SBC asserted that, by addressing all out-of-compliance interconnection agreements in a single proceeding, the Commission could fulfill the FCC's goal of a speedy transition, while preserving the scarce resources of the Commission, SBC, and the CLECs.

On October 26, 2004, Verizon petitioned the Commission to approve amendments to the interconnection agreements between itself and certain CLECs. According to Verizon, the agreements of these CLECs could be interpreted to require amendment before Verizon may cease providing unbundled network elements (UNEs) eliminated by the TRO or *USTA II*. Verizon insisted that absent the Commission's intervention, "the CLECs will not conform their agreements to governing law, despite the FCC's directives to do so and contractual requirements to undertake good faith negotiation of contract amendments." Verizon application, ¶ 16, p. 7. Verizon also maintained that a number of CLECs have sought to impede and delay the process by asking this Commission to investigate the legal effect of the *USTA II* mandate and the FCC's interim order. Verizon contended that its proposed interconnection amendment makes clear that Verizon's

unbundling obligations will be governed exclusively by Section 251(c)(3) of the FTA, 47 CFR Part 51, and the FCC's interim order. Further, the proposed language indicates that, when federal law no longer requires unbundled access to particular elements, Verizon may cease providing such access upon appropriate notice.

Given the commonality of the issues raised by these three applications, in an order dated November 9, 2004, the Commission consolidated these matters and set a schedule for the filing of comments and reply comments by December 22, 2004 and January 18, 2005, respectively.

On December 22, 2004, the Commission received initial comments from SBC, Sprint Communications Company, L.P., Allegiance Telecom of Michigan, Inc., MCI, the CLEC Association, ACD Telecom, Inc., Talk America, TDS and XO, the Commission Staff (Staff), and Verizon.

On January 18, 2005, the Commission received reply comments from SBC, Verizon, the CLEC Coalition, Talk America, TDS, and XO, and the Staff.

On February 4, 2005, the FCC issued its order on remand[3] adopting new rules governing the network unbundling obligations of ILECs in response to *USTA II*, which overturned portions of the FCC's UNE rules announced in the *TRO.* Because the new rules issued by the FCC in the *TRRO* appeared to significantly affect the outcome of this proceeding, the Commission provided that all interested persons should be given an additional opportunity to submit comments and reply comments by February 24, 2005 and March 3, 2005, respectively. Those parties filing such additional comments or replies include: SBC, Verizon, the CLEC Coalition, MCI, AT&T and TCG Detroit, Clear Rate Communications, Inc., and the Staff.

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[3]In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313 and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, rel'd February 4, 2005. (*TRRO*)

Thereafter, the Commission determined in an order dated February 24, 2005, that the parties should be given an opportunity to present oral argument directly before the Commission. It therefore scheduled a public hearing for March 17, 2005, at which the parties were invited to present their positions and respond to questions posed by the Commission. The Commission stated its intent to issue an order in these proceedings by March 29, 2005.

On March 15, 2005, Attorney General Michael A. Cox (Attorney General) filed comments.[4]

On March 17, 2005, the Commission was present for a public hearing during which the following parties acted on the opportunity to present oral argument and to respond to the Commission's questions: SBC, Verizon, the CLEC Coalition, LDMI, Talk America, TDS and XO, the CLEC Association, MCI, AT&T, CIMCO Communications, Inc., CoreComm Michigan, Inc., and PNG Telecommunications Inc., and the Attorney General.

Discussion

Certain critical issues arise in these proceedings. First, the parties dispute whether the Commission may or should require the ILECs to continue providing unbundled network element platform (UNE-P) or other elements for which the FCC has found no impairment. A finding of impairment is necessary to require provision of any UNE pursuant to Sections 251 and 252 of the FTA. Second, they do not agree on the appropriate method for transitioning ILEC/CLEC contractual relations from where the Michigan industry is now and where it must be by the FCC's deadline of March 11, 2006. Third, MCI raises issues regarding the availability and process of hot cuts to transition UNE-P customers to other service platforms.

[4]SBC initially objected to the filing of those comments as untimely, but withdrew the objection at the March 17, 2005 public hearing.

Provision of UNEs

The CLECs argue that the Commission has the authority and the responsibility to require that the ILECs continue to provide UNEs pursuant to state law, which authority, they argue, is expressly preserved by the FTA. They argue that, pursuant to Section 355 of the MTA, MCL 484.2355, at a minimum, the ILECs must unbundle the loop and the port of all telecommunications services. The Commission's authority to require this unbundling, they argue, is preserved by §§251(d)(3), 252(e)(3), and 261(c) of the FTA. They quote the United States Court of Appeals for the Sixth Circuit (Sixth Circuit), as follows:

> When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. In fact, it expressly *preserved* existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition, stating that the Act does not prohibit state commission regulations "if such regulations are not inconsistent with the provisions of the [FTA]." 47 USC 261. Additionally, Section 251(d)(3) of the Act states that the [FCC] shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act.
>
> The Act permits a great deal of state commission involvement in the new regime it sets up for the operation of local telecommunications markets, "as long as state commission regulations are consistent with the Act."

Michigan Bell v MCIMetro Access Transmission Services Inc, 323 F3d 348, 358 (CA 6, 2003).

Further, they argue, the Sixth Circuit expressly rejected SBC's argument that a requirement would be inconsistent with federal law if it merely were different. They state that the Court determined that a state commission may enforce state law regulations "even where those regulations differ from the terms of the Act." *Id.* at 359. The CLECs take the position that as long as the disputed state regulation promotes competition, it is not inconsistent with the federal Act. Therefore, they argue, the Commission is not preempted by the FCC's orders from requiring the ILECs to provision UNEs pursuant to the terms and conditions in the Commission-approved interconnection agreements. They urge the Commission to take prompt action to prevent SBC

from acting unilaterally to either withdraw its wholesale tariffs for UNEs or to alter the interconnection agreements to exclude these UNEs.

Moreover, the CLECs argue, SBC has a duty to provide unbundled loops, transport, and switching pursuant to Section 271 of the FTA. MCI and AT&T agree and argue that irrespective of the ILECs' duties under Section 251, SBC must comply with the conditions required for the FCC's approval of its application pursuant to Section 271. Thus, these parties argue, SBC may not unilaterally remove local switching, loops, or transport from its interconnection agreements or its tariffs. Rather, it must negotiate pursuant to the provisions of its interconnection agreements any amendments, including pricing. Although the FCC provided a procedure for SBC to request forbearance from enforcement of its Section 271 obligations, MCI argues, SBC has not yet taken any of the steps laid out to obtain such a ruling.

Further, MCI argues, if a carrier believes a state law requirement is inconsistent with the federal Act, it must seek a declaratory ruling to that effect from the FCC. It argues that the FCC's brief to the United States Supreme Court in opposition to the petitions for *certiorari* from *USTA II* reflects that the FCC has not preempted any state law on unbundling. In that brief, the FCC denied that it had preempted any state unbundling rule, and stated that it "is uncertain whether the FCC ever will issue a preemptive order of this sort in response to a request for declaratory ruling." Brief at 20.

Verizon and SBC argue that the Commission is preempted from requiring the ILECs to provide any UNE for which the FCC has found there is no impairment. They argue that the Commission should promptly approve their respective proposed amendments to bring interconnection agreements into conformity with the FCC's *TRO* and *TRRO.* Because the FCC's orders preempt the Commission, they argue, there is no reason to waste time considering whether the

Commission may re-impose unbundling obligations that the FCC has eliminated. Therefore, they argue, the Commission should dismiss the CLECs' application and approve the ILECs' proposed amendments.

SBC and Verizon further argue that the Commission's authority under state law may be lawfully exercised only in a manner that is consistent with the federal Act and FCC rules and regulations. MCL 484.2201. In their view, the Commission may not require the ILECs to provide UNEs that the FCC has found are not required to alleviate impairment.

SBC adds that the FCC is the sole enforcer of any obligations pursuant to Section 271 of the federal Act. Thus, it argues, this proceeding is not an appropriate forum for a Commission determination as to whether SBC is required to provide certain UNEs solely under Section 271, without reference to the duties imposed under Sections 251 and 252 of the FTA.

The Commission is not persuaded that it is preempted by either the federal Act or the FCC's orders from requiring the ILECs to provide UNEs under authority granted by the MTA and preserved in the FTA. The Commission's authority to impose requirements on telecommunications carriers in addition to, but consistent with, those prescribed by the FCC is preserved in the FTA sections cited by the CLECs. Moreover, that authority has been affirmed by the Sixth Circuit as argued by the CLECs. Thus, the Commission finds that it also possesses the authority necessary to appropriately direct the resolution of the method of industry transition as addressed in the following section. However, the Commission notes that Section 201(2) of the MTA, MCL 484.2201(2), requires Commission action to be consistent with the FTA and the FCC's rules and orders. Requiring the continued provision of UNE-P would be inconsistent with the FCC's detailed findings and plan for transition in the *TRO* and *TRRO*.

Moreover, at this time, the Commission is not persuaded that competition would be advanced by exercising its authority to require the provision of UNEs in addition to those that the FCC has found must be provided pursuant to 47 USC 251(c)(3). Such a finding likely would lead to further litigation and promote confusion rather than competition, which would be inconsistent with the intent of the MTA as well as the FTA. If a CLEC believes that the FCC has erroneously found no impairment on a particular UNE, it may take steps provided by law to seek a change in that ruling.

The *TRRO* provides a period of transition to the UNEs available under its new final rules from the UNEs now available pursuant to the current interconnection agreements, which were negotiated and arbitrated under previous determinations concerning what elements must be provided by the ILECs pursuant to Section 251(c)(3) of the FTA. For most of the UNEs that were available, but are no longer under that subsection, the *TRRO* provides a 12-month transition period. For dark fiber related elements, the FCC provided 18 months. During the transition, the FCC directed that ILECs must permit CLECs to serve their embedded customer base with UNEs available under their interconnection agreements, but with an increased price. However, the FCC stated that CLECs would not be permitted to expand the use of UNE-P or the use of other UNEs no longer required to be made available pursuant to Section 251(c)(3).

In the March 9, 2005 order in Case No. U-14447, the Commission found that ILECs must honor new orders to serve a CLEC's embedded customer base. The Commission stopped short of stating that CLECs were not entitled to new orders of UNEs for new customers. At this time, the Commission affirmatively finds that the CLECs no longer have a right under Section 251(c)(3) to order UNE-P and other UNEs that have been removed from the list that must be offered to serve new customers. This does not, however, foreclose any right that may exist pursuant to Section 271 for a CLEC to order these UNEs. Moreover, the Commission notes that although certain UNEs

are no longer required to be provided pursuant to Section 251(c)(3), parties may negotiate for provision of those same facilities and functions on a commercial market basis.

Transition

SBC and Verizon propose that the Commission review and approve their respective proposed amendments to the interconnection agreements and then impose those amendments on the CLECs where necessary.[5] These parties point to the provisions in the *TRO* and *TRRO* that indicate the FCC's intent that the transition away from the provision of the elements no longer required should be swift.

Verizon notes that the Commission has already initiated a collaborative to address the transition issues concerning the amendments of interconnection agreements to conform to federal law. It argues that the Commission need not consider those same transitional questions here.

In its reply comments, Verizon recognizes that many of the changes wrought by the *TRO* and the *TRRO* require the parties to negotiate amendments, which are being addressed in the Case No. U-14447 collaborative process. However, it argues, the prohibition on CLECs obtaining new UNE-Ps or high-capacity facilities no longer subject to unbundling does not depend on the particular terms of any interconnection agreement and should be implemented immediately. Verizon argues that the transition rules bar CLECs from ordering new UNEs that are no longer subject to unbundling under section 251(c)(3), without regard to the terms of any agreement.

SBC argues that the Commission is legally bound to implement the FCC's determinations, consistent with the pertinent court rulings including *USTA II* for all ILECs and CLECs. It argues that the Commission should move quickly to ensure that the unbundling rights and obligations of

[5]Verizon asserts that only the interconnection agreements with the CLECs named in Verizon's application are at issue here. The remaining agreements, according to Verizon, need no amendment to comply with federal law.

all carriers operating in Michigan comport with governing law and mandates of the FCC. It argues that it is appropriate for the Commission to ensure compliance with the federal unbundling regime in a single consolidated proceeding, pursuant to Section 252(g) of the FTA, 47 USC 252(g), instead of on a carrier-by-carrier basis.

The CLECs argue that the FCC explicitly contemplated that parties would negotiate amendments to their interconnection agreements pursuant to their change of law or dispute resolution provisions. They argue that the FCC could not and did not order a unilateral change to contracts that the parties currently have in place. They argue that the Commission should dismiss the applications by SBC and Verizon to approve their proposed amendments, and require instead that the parties negotiate in good faith in light of the change in law that the *TRO* and *TRRO* represent. The CLECs propose that the Commission adopt a process that allows parties initially to attempt to negotiate implementation of the *TRRO* and the resulting new unbundling rules. However, if negotiations fail on some issues, consistent with the terms and conditions for dispute resolution, the Commission should resolve disputes that arise in the most efficient manner available.

AT&T recommends the following steps to preserve the CLEC's right to negotiate under the FTA, and to promote uniformity and efficiency:

1. Consistent with the terms of their respective interconnection agreements, following the effective date of the FCC's rules (March 11, 2005) carriers shall attempt to negotiate any required changes to their interconnection agreements. As required by the *TRRO*, these negotiations should proceed without "unreasonable delay."[6]

2. At the end of such negotiations, the parties should submit amendments to their interconnection agreements for Commission approval or file petitions identifying their individual dispute. To the extent necessary, and consistent with any notice and due process requirements, the Commission may entertain any filed disputes in party-to-party and or consolidated proceedings.

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[6] *TRRO,* ¶ 233.

3. To the extent the Commission believes necessary, it should schedule collaboratives to identify the common and unique issues in the individual petitions for dispute resolutions. At that time, the Commission should also establish an efficient framework for resolving the identified issues.

4. Nothing in this proposal should be construed to prohibit individual parties from requiring that the individual terms and conditions of the change of law and/or dispute resolution provisions of their respective interconnection agreements continue to apply, including any right to seek bilateral arbitration of disputes by the Commission. Similarly, nothing in this proposal should be construed to prohibit individual parties from negotiating amendments to an interconnection agreement in a time frame shorter than what is proposed herein, and the Commission should make this statement in any order issued.

AT&T Supplemental Comments, pp. 7-8.

In its initial comments, the CLEC coalition proposed a framework that contemplated significantly more time. It argued that the CLECs should be given 45 days after March 11, 2005 to study the new rules and prepare proposed amendments to their interconnection agreements. Thereafter, the CLEC coalition noted that most interconnection agreements have a 60- or 90-day time frame for negotiations before dispute resolution procedures begin. Then, according to the CLEC coalition, the parties should have a two-week window to either submit an amendment or file petitions identifying their individual disputes. Finally, the CLEC coalition proposed that the Commission should entertain any filed disputes in a consolidated docket, with time limits for submitting those disputes.

The Commission finds that the most appropriate process for moving the industry through the transition period provided in the *TRRO* is to close these three cases and open up the interconnection agreements for negotiation, within the collaborative initiated in Case No. U-14447. The parties will be provided 60 days from the date of this order[7] to complete the requirements of their change of law and dispute resolution provisions, and to negotiate for and submit a joint application

[7]The 45-day period established for the collaborative is, therefore, extended.

for approval of an amendment to their interconnection agreements to bring their contracts into compliance with the requirements of the *TRO* and the *TRRO*. During that same 60-day period, the parties in the collaborative shall work to establish no more than four versions of an amendment to the interconnection agreements. All parties to the collaborative that have not otherwise agreed to an amendment, must agree to one of the four or fewer versions established in the collaborative. If the parties to a single contract do not agree which of the versions should be included in the interconnection agreement, the parties shall submit that disagreement to the Commission, which will determine the appropriate amendment through baseball-style arbitration.

Hot Cuts

MCI argues that in the *TRRO*, the FCC ruled that for purposes of Section 251, there is no impairment without unbundled local switching. That ruling, according to MCI, was based on the availability of batch hot cut processes. See, *TRRO*, ¶¶ 211, 217. Thus, MCI argues, batch hot cuts must be included in any amendments to the interconnection agreement to comply with the FCC's recent rulings. Moreover, MCI argues, the FCC explicitly indicated that forums to address concerns about the sufficiency of batch hot cut processes include state commission enforcement processes and Section 208, 47 USC 208, complaints to the FCC.

MCI acknowledges the January 6, 2005 order in *Michigan Bell* v *Lark et al.*(ED MI, Southern Division, Case No. 04-60128, Hon Marianne O. Battanni) prevents the Commission from enforcing the Commission's June 28, 2004 order in Case No. U-13891 regarding batch hot cuts. However, it insists that Judge Battanni's order does not prevent the Commission from addressing and resolving disputes about batch hot cuts as part of the amendment process to interconnection agreements. It says that the basis of Judge Battanni's ruling was that the Commission was acting on unlawfully delegated authority from the FCC in determining whether impairment existed with

respect to unbundled switching. Because the FCC has now made its determination concerning impairment, the Commission is free to act on batch hot cut issues. It says that the exact process to be used and the rates will need to be addressed in the interconnection agreement amendments.

SBC responds that, in the *TRRO*, the FCC approved the hot cut processes presented by SBC as adequate to avoid a finding of impairment. It argues that parties are free to negotiate mutually acceptable "refinements" in batch hot cut processes. However, SBC argues, batch hot cut processes have nothing to do with conforming the parties' interconnection agreements to the requirements of federal law.

Verizon responds that it has not named MCI as a party to its application to conform its contracts to federal law, and MCI does not mention Verizon in its hot cuts discussion. However, Verizon argues that the FCC did not instruct states to address hot cuts in *TRRO* amendments (or elsewhere). It argues that the FCC expressly found that the ILECs' hot cut processes—pointing in particular to Verizon's—were sufficient and that the concerns about the ILECs' ability to convert the embedded base of UNE-P customers in a timely manner are rendered moot by the transition period. *TRRO* ¶ 216. Verizon argues that no authority cited by MCI permits the Commission to ignore a federal court decision forbidding it to pursue adoption of batch hot cut processes.

The Commission is persuaded that it should promote settlement of hot cut process issues and doing so does not contravene Judge Battani's order. To that end, the Commission opens a new docket for resolving those issues, Case No. U-14463, in which all filings and actions related to hot cuts will be determined. The Commission finds that within 14 days of the date of this order, the CLECs shall submit to the ILECs the number of lines that need to be moved via hot cut and a plan for those moves, i.e., from and to what configuration and the process desired. Within 14 days after receipt of the plan, if the parties cannot agree on the process or price, they shall submit their last

best offer to Orjiakor Isiogu, Director of the Commission's Telecommunications Division, who will act as mediator. Within 30 days of receipt of those last best offers, Mr. Isiogu shall submit his recommended plan to the Commission. The parties will have seven days to object. However, any objection must in good faith assert that the recommendation is technically infeasible or unlawful. Without timely objections, the mediator's recommendation will be final. If the parties are able to agree, no filing need be made.

The Commission has selected Case No. U-14463 for participation in its Electronic Filings Program. The Commission recognizes that all filers may not have the computer equipment or access to the Internet necessary to submit documents electronically. Therefore, filers may submit documents in the traditional paper format and mail them to the: Executive Secretary, Michigan Public Service Commission, 6545 Mercantile Way, P.O. Box 30221, Lansing, Michigan 48909. Otherwise, all documents filed in this case must be submitted in both paper and electronic versions. An original and four paper copies and an electronic copy in the portable document format (PDF) should be filed with the Commission. Requirements and instructions for filing electronic documents can be found in the Electronic Filings Users Manual at: http://efile.mpsc.cis.state.mi.us/efile/usersmanual.pdf. The application for account and letter of assurance are located at http://efile.mpsc.cis.state.mi.us/efile/help. You may contact Commission staff at (517) 241-6170 or by e-mail at mpscefilecases@michigan.gov with questions and to obtain access privileges prior to filing.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 *et seq.*; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151

et seq.; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. Case No. U-14303, Case No. U-14305, and Case No. U-14327 should be closed.

c. The parties should be directed to negotiate amendments to their interconnection agreements consistent with the discussion in this order, within the Commission-initiated collaborative proceeding in Case No. U-14447.

d. Case No. U-14463 should be opened for the purpose of resolving issues concerning hot cuts.

THEREFORE, IT IS ORDERED that:

A. Case No. U-14303, Case No. U-14305, and Case No. U-14327 are closed.

B. The parties are directed to negotiate amendments to their interconnection agreements consistent with the discussion in this order, within the Commission-initiated collaborative proceeding in Case No. U-14447.

C. Case No. U-14463 is opened for the purpose of resolving issues concerning hot cuts, as discussed in this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(S E A L)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

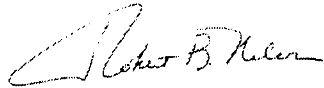
By its action of March 29, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

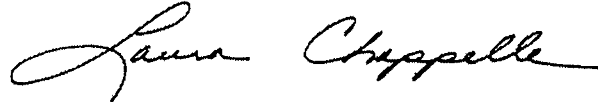
Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

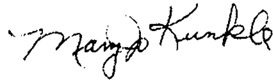


Commissioner



Commissioner

By its action of March 29, 2005.



Its Executive Secretary

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
New York on March 16, 2005

COMMISSIONERS PRESENT:

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

CASE 05-C-0203 – Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC'S Triennial Review Order on Remand.

ORDER IMPLEMENTING TRRO CHANGES

(Issued and Effective March 16, 2005)

BY THE COMMISSION:

INTRODUCTION

On February 10, 2005, Verizon New York Inc. (Verizon) filed proposed revisions to its P.S.C. No. 10 – Communications tariff. The changes, designed to implement the Federal Communications Commission's (FCC) Triennial Review Order on Remand (TRRO),[1] allow Verizon to discontinue providing various unbundled network elements and establish transition periods and price structures for existing services. Additionally, these tariff revisions incorporate previous Verizon commitments regarding

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[1] In the Matter of 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, Order on Remand, 2005 FCC Lexis 912 (released February 4, 2005) (TRRO). This action stems from the D.C. Circuit's March 2, 2004 decision which remanded and vacated several components of the FCC's earlier Triennial Review Order.

unbundled network switching which were made to the Commission in the April 5, 1998 Pre-Filing Statement of Bell Atlantic- New York in Case 97-C-0271 (PFS) in connection with Verizon's application to the FCC for relief from restrictions on providing long distance services. The tariff changes had an effective date of March 12, 2005. Inasmuch as they were not suspended, they are now in effect.

The TRRO addressed several impairment standards: mass market local circuit switching, DS1, DS3, and dark fiber transport, and high-capacity loops. Mass market local switching, and therefore the unbundled network element platform (UNE-P), was eliminated as a network element with no prospective obligation by ILECs to provide new UNE-P arrangements to competitive local exchange carriers (CLECs). In addition, a transition period for migration of CLECs' embedded customer base to new arrangements was established. During the transition period, the price for existing UNE-P lines would rise to TELRIC plus one dollar or the state commission approved rate as of June 16, 2004, plus one dollar, whichever was higher. In addition, the FCC found that CLECs are impaired without unbundled access to DS1 loops unless there are four or more fiber-based collocators and at least 60,000 business lines in the wire center. CLECs are impaired without unbundled access to DS3 loops unless there are four or more fiber-based collocators and at least 38,000 business lines in the wire center. Finally, CLECs are impaired without unbundled access to DS1 transport, except on routes connecting a pair of wire centers that both contain at least four fiber-based collocators or at least 38,000 business lines. The impairment standard for DS3 and dark fiber transport between wire centers was at least three fiber-based collocators or at least 24,000 business access lines. Transition periods were set for CLECs losing unbundled access to DS1 and DS3 and dark fiber transport and loops. The FCC also found no impairment as to dark fiber loops.

In addition to the tariff filing, on February 10, 2005, Verizon posted an industry notice on its website informing CLECs of its planned TRRO implementation and advising CLECs that no orders for new facilities or arrangements delisted as unbundled network elements by the FCC would be processed on or after March 11, 2005. CLECs

without alternative arrangements in place before March 11, 2005 would pay transitional rate increases allowed by the FCC for existing lines for delisted network elements. Verizon also offered an interim UNE-P replacement services agreement and, in its tariff, described below, committed to continue providing UNE-P in Zone 2 in New York pursuant to the PFS.

On February 25, 2005, comments were filed on the revised tariff, and related matters, by a coalition of CLECs: Allegiance of New York; A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation; BridgeCom International, Inc.; Broadview Network, Inc.; Trinsic Communications, Inc.; and XO New York, Inc. (Joint CLECs). A petition for emergency declaratory relief was filed on February 28, 2005 by MCI Metro Access Transmission Services (MCI Petition), which was subsequently withdrawn on March 10, 2005.[2] Comments on the tariff filing were also filed by Conversent Communications of New York, LLC (Conversent) on March 2, 2005. Verizon filed reply comments in support of its tariff on March 8, 2005. Additionally, on March 9, 2005, Covad Communications Company and IDT America Corp. (Covad) filed joint comments in support of the MCI Petition, as did AT&T Communications of New York, Inc., Teleport Communications Group, Inc., TC Systems, Inc., Teleport Communications New York, and ACC Corp. (AT&T).[3] Finally, on March 9, 2005, the Joint CLECs filed a Response to the Verizon Reply.

In this order we review the proposed tariff changes and filed comments. We first consider the tariff changes themselves and conclude that several modifications

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[2] Although MCI withdrew its petition for emergency declaratory relief, Covad and IDT America filed comments in support of that petition on March 9, 2005. Therefore, the issues raised in the MCI Petition will be considered.

[3] The Joint CLECs filed their comments in Case 04-C-0420 and MCI filed its comments in Case 04-C-0314. AT&T and Covad filed in support of the MCI Petition. As all comments deal, in pertinent part, with the tariff filing at issue in this case, the comments have been construed as also being filed in Case 05-C-0203.

are required. Apart from those modifications, we believe the tariff properly implements the TRRO. We also consider issues raised as to whether Verizon's tariff properly implements the PFS, and conclude that it does. Finally, we consider how the tariff changes affect Interconnection Agreements.[4]

TARIFF FILING

Local Switching and UNE-Platform Service

The TRRO allows for the phase-out of local circuit switching as an Unbundled Network Element (UNE) required to be provided by incumbent local exchange carriers. Thus, UNE-Platform service (UNE-P)[5] would no longer be available. Verizon's tariff revisions give CLECs one year (until March 11, 2006) to transition existing UNE-P customers to their own facilities or make other arrangements for local circuit switching. CLECs will pay the state approved Total Element Long Run Incremental Cost (TELRIC) rate as of June 15, 2004 plus one dollar. However, Verizon will continue to provide UNE-P arrangements to CLECs through December 21, 2007 in Zone 2 wire centers pursuant to the PFS.[6] New orders for UNE-P service will be accepted through December 21, 2005 for these wire centers only. After March 11, 2006, the rate for service in Zone 2 wire centers will transition to Verizon's applicable resale rate.

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[4] Although issues were raised regarding state unbundling authority and the effect of the Merger Order, we decline to deal with them in this tariff proceeding designed to implement the TRRO.

[5] UNE-P is a combination of network elements that includes local circuit switching, a switch port, and a subscriber loop.

[6] Zone 2 wire centers are those located in less densely populated areas and are identified in Appendix A to P.S.C. No. 10 – Network Elements tariff. The provision of local circuit switching in these wire centers is still subject to the FCC's four line carve out rule, which allowed Verizon to discontinue switching service for four lines and above (at a single customer location) from certain central offices in New York City.

Pricing proposal for Zone 2

Verizon's tariff provides that the PFS transitional pricing for Zone 2 wire centers will be in effect until March 10, 2006. During the interval of March 11, 2006 to December 21, 2007, the tariff indicates the price will be increased over time to rates equivalent to resale rates. However, no proposal for incremental price increases has been submitted. To ensure sufficient clarity exists for this transition, Verizon is required to file its proposal for price increases to resale rates for the Zone 2 wire centers by April 30, 2005.

Adding features

Joint CLECs object to Verizon's tariff on the grounds that it does not allow CLECs to submit feature change orders for their embedded UNE-P customers. Verizon responds that it does not object to making such changes, for as long as it is required to continue to maintain embedded platform arrangements. Verizon also published this clarification in "TRRO UNE-P Mass Market Discontinued Facilities Frequently Asked Questions" posted on its website. Thus, since the tariff does not preclude feature changes, no tariff revision is required.

Four Line Carve Out

Under the Triennial Review Order (TRO)[7], the FCC permitted ILECs to discontinue providing UNE-P for business customers with four or more lines (four line carve-out customers) or enterprise switching customers (those with local circuit switching

[7] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-146, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶497 (footnotes omitted) (2003) ("TRO"); Errata, 18 FCC Rcd 19020 (2003), vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004), cert. denied 125 S.Ct. 313, 316, 345 (2004).

at DS1 and higher capacity levels). Last year, Verizon filed tariff revisions indicating its intent to bill for those services in a limited number of central offices at resale rates via a surcharge on tariffed TELRIC rates. However, Verizon chose not to file the rate for that surcharge for inclusion in its tariffs. Although the Commission is investigating whether the surcharge should be tariffed, it has permitted Verizon to depart from TELRIC pricing.

The Joint CLECs assert that because Verizon has not withdrawn its tariff for UNE-P service at TELRIC rates, enterprise switching and four line carve out customers are included in the embedded base of customers as of the date the TRRO was issued. Thus, the Joint CLECs argue that under the TRRO, CLECs are entitled to ongoing provision of this service until March 2006 at TELRIC plus $1, irrespective of the provisions of the earlier TRO order.

Verizon responds that switching for enterprise and four line carve out customers was eliminated as a UNE by the FCC, the courts and this Commission prior to the effective date of the TRRO. Tariff provisions were allowed to go into effect that removed the obligation to provide this UNE.

The FCC permitted ILECs to discontinue providing local circuit switching to enterprise and four line carve out customers at TELRIC rates. In Case 04-C-0861, the Commission is investigating the process by which Verizon revised its rates for a limited number of enterprise and four line carve out customers by imposing a surcharge without filing the rate in its tariff. While the process that Verizon utilized is under review, that does not require us to frustrate the clear goal of the FCC to remove the obligation to provide such services at TELRIC rates. Thus, the Joint CLECs argument is rejected.

DS1 and DS3 Loops and Transport

With respect to dedicated transport, Verizon's tariff provides that DS1 (24 voice channels per line) dedicated transport will no longer be available as a UNE at TELRIC prices where the connected wire centers (building where Verizon terminates the local wire loop) both have at least four fiber collocators or at least 38,000 business access lines. Additionally, DS3 (672 voice channels per line) and "dark fiber" (fiber that

has been lit by the CLEC using its own electronics, rather than the incumbent) transport will no longer be available as a UNE where the wire centers have at least three fiber collocators or at least 24,000 business lines. CLECs have until March 11, 2006 to transition existing lines from DS1 and DS3 dedicated transport, and until August 11, 2006 to transition from dark fiber transport. During the transition CLECs will pay 115% of the state approved TELRIC rate available on June 15, 2004.

Verizon's tariff provides that DS1 high-capacity local loops will no longer be available as a UNE at TELRIC prices where the local area is served by a wire center having at least 60,000 business lines and at least four fiber collocators. DS3 loops will no longer be available as a UNE where the wire center serving area (the area of a local exchange served by a single wire center) has at least 38,000 business lines and at least four fiber collocators. Dark fiber loops will no longer be available as a UNE, irrespective of the number of lines and collocators in the wire center. CLECs have until March 11, 2006 to transition from DS1 and DS3 UNE loops and until September 11, 2006 to transition from dark fiber UNE loops. During the transition CLECs will have to pay 115% of the state approved TELRIC rate available on June 15, 2004.

Negative construction

The Joint CLECs submitted specific objections to the language in Verizon's tariff revisions with respect to DS1 and DS3 loops and transport. For example, it took issue with language that identified when Verizon was not obligated to provide unbundled access to DS1 loops. The FCC rules were written in the affirmative, thus the CLECs argue that Verizon's tariffs should also be written in the affirmative to "define the rights of the CLEC that continue to obtain access to loops and transport". (Joint CLECs at p. 25.) Because the tariffs are written in the negative, identifying the circumstances under which Verizon is not obligated to provide various elements, the Joint CLECs contend that the CLECs' entitlement is left unclear.

Verizon's tariff identifies its obligations under the TRRO to provide UNEs in light of the applicable restrictions established by the FCC. That Verizon chose to state the obligation in the negative does not prejudice the CLECs. The CLECs failed to indicate any specific obligation for providing DS1 and DS3 loops and transport that the tariff would allow Verizon to evade. Verizon's tariff reasonably reflects the obligations set forth in the TRRO.

Certification of ineligible wire centers

Under the FCC's TRRO, CLECs are required to determine whether they can continue to place orders for loop or transport UNEs at TELRIC. Verizon has filed lists with the FCC that designate which wire centers meet the various criteria identified in the TRRO in order for CLECs to determine which dedicated transport and high –capacity loops will remain eligible as UNEs. Verizon's tariff requires CLECs, prior to submitting a request for UNE services, to review the lists in making their determinations as to whether the wire centers involved meet the applicable criteria for continued UNE eligibility. In the event an order is submitted for a location not eligible for the requested UNE (dedicated transport or high–capacity loop), the tariff provides that Verizon will institute the applicable dispute resolution process.[8] Under most of the interconnection agreements currently in effect, it is anticipated those disputes would be submitted to this Commission for resolution.

Conversent objects because Verizon does not include the list of wire centers for UNEs which are still available in the tariff. They contend that this does not meet the requirements of Public Service Law '92, which requires filing rates, charges,

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[8] The TRRO makes clear that an ILEC challenging a UNE request "must provision the UNE and subsequently bring any dispute regarding access to the UNE before a state commission or other appropriate authority". Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order on Remand 2005 FCC Lexis 912, ¶234 (issued February 4, 2005).

terms, and conditions of the services Verizon provides. Additionally, the Joint CLECs contend that the list of ineligible wire centers that Verizon filed with the FCC must be vetted by the applicable regulatory authority and that Verizon must demonstrate changes in facts prior to amending such lists.

Verizon's response contends that Public Service Law does not preclude references to information available elsewhere and that it was not required to include the list of wire centers not qualifying for UNEs in its tariff. It analogizes to methods and procedures, as well as business rules, which CLECs are able to obtain via Verizon's website.

To ensure adequate notice and process, we will direct Verizon to file the list of exempt wire centers as part of its tariff. Under the TRRO, once a wire center is determined to be a Tier 1 wire center and thus exempt from provision of DS1 service as a UNE, that wire center is not subject to reclassification as a Tier 2 or Tier 3 wire center in order to make DS1 UNEs available at a later date. This permanent classification calls for the review and approval process inherent in tariffing. Also, wire centers can be added to the list or upgraded to a different classification. Without the official records provided through tariffing, effective dates could be questioned. If the affected wire centers are included in the tariff, then there will be specific effective dates that can be used in order to resolve disputes that are allowed under the TRRO. These could result in true-ups that can be done more efficiently with "bright line" effective dates.

Verizon will be required to amend its tariff to include the list of wire centers which no longer qualify for certain UNEs. The supporting documentation also should be provided to Staff for review and analysis.[9] Verizon, of course, can request confidential treatment under the Commission's rule. Any subsequent changes to the list

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[9] Documentation includes but is not limited to the number of business lines under the FCC's ARMIS reports and wire center inspection results.

should also be provided to the Commission via tariff filings with supporting documentation.

The Joint CLECs argue that the revised tariff provides Verizon a conclusive right to determine whether to fill a CLEC order for service, which goes beyond the FCC's order. It contends that the FCC clearly instructed CLECs to perform due diligence before submitting an order for service, but that the CLEC can weigh all evidence including that which contradicts Verizon's list of exempt wire centers.

Verizon contends that the issue is not whether it will process an order submitted by a CLEC, but whether a CLEC can submit an order in bad faith for a wire center that does not meet the objective criteria established in the TRRO. Verizon notes that it has made the lists publicly available and requested that any errors be brought to its attention.

We do not agree with the Joint CLECs' assessment regarding an ILEC's responsibility to provide access to a UNE when the order is submitted by a CLEC. A CLEC will not be considered to have performed its due diligence if it submits an order for a wire center that is on the Commission approved tariff list of exempt wire centers. Thus, we will not require a tariff amendment requiring Verizon to process orders that clearly conflict with the approved tariff list of exempt wire centers.

Backbilling

The Joint CLECs object to the tariff provision that, in the event the applicable dispute resolution process found a CLEC was not entitled to a UNE at a specific location, would allow Verizon to backbill for such service. The CLEC would be billed from the provision date of the service for the difference in price between the UNE rate and the rate that would otherwise be charged for the use of such element. The Joint CLECs contend that the TRRO does not provide for such backbilling and the applicable rate is not set forth in the tariff.

Verizon responds that backbilling would only be implemented after the appropriate dispute resolution process has found the CLEC was not entitled to UNE rates

in the wire center. It notes that the rate would be the applicable charge for a non-UNE equivalent for the transport or loop facility ordered.

The CLECs are correct that the TRRO does not speak to the ability of ILECs to bill for the foregone charges when a CLEC mistakenly requests access to a UNE in an ineligible rate center. However, the TRRO does not prohibit such a provision. Without such backbilling, there is little incentive for a CLEC to refrain from placing orders in an ineligible rate center. It is reasonable for Verizon to assert its right to backbill for services for which it would otherwise be entitled to charge a higher price. However, it is expected that backbilling can be mostly avoided by having Verizon's list of exempt wire centers vetted through the tariff process.

Post-transition arrangements

Verizon's tariff requires CLECs to place orders for conversion or discontinuance of UNEs in sufficient time according to applicable intervals. These intervals are referenced in the Carrier-to-Carrier guidelines that are available to all CLECs, and links to the appropriate information were provided in Verizon's January 6, 2005 compliance filing in Case 97-C-0139.

The CLECs argue that Verizon's tariff burdens CLECs in requiring them to place orders to transition services from UNEs early enough to ensure that orders can be fulfilled by the end of the FCC mandated transition periods. It contends more appropriate language would require Verizon to process orders placed for discontinuance or conversion of UNEs within the transition period and to continue TELRIC rates if Verizon is unable to fully process the order before the end of the applicable transition period. The CLECs also argue for grooming plans and efficient processes for conversions to be developed under interconnection agreements.

Verizon's response notes that its tariff prevents CLECs from extending the TRRO mandated transition periods. It points out that the tariff provides that if an order is placed with the applicable provisioning intervals, the service will not be disconnected.

The FCC set a transition period for all the tasks, both CLEC and ILEC, necessary for an orderly transition to be completed.[10] The TRRO does not allow a carrier placing an order one day before the end of the transition period to continue to get TELRIC pricing for the service because the ILEC was unable to process the order. The grooming plans and efficient processes for conversions under interconnection agreements recommended by the CLECs are not precluded by Verizon's tariff. However, if an order were placed for conversion of the service prior to the end of the transition period, but not within the applicable provisioning interval, requiring Verizon to continue to provide the service at resale rates would seem a reasonable alternative to disconnection. If no order is placed within the transition period, disconnection, as set forth in the tariff, is reasonable. Therefore, Verizon is directed to amend its tariff to allow for conversion to analogous service at the applicable resale rate in the event an order for conversion is placed before the end of the FCC mandated transition period, even if the order cannot be completed within the transition period. This is analogous to the conversion process for interoffice transmission facilities under an earlier Triennial Review Order that Verizon proposed in Case 03-C-1442.

Dark fiber loops

The Joint CLECs submit that Verizon's tariff should be amended to recognize Verizon's obligation to perform network modifications to provision DS1 and DS3 loops to include activating dark fiber strands under the same circumstances that Verizon would perform the work for its customers.

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[10] TRRO,¶¶142-145, 195 -198.

The Commission's February 9, 2005 order in Cases 04-C-0314 and 04-C-0318 directing Verizon to perform routine network modifications is sufficient to address this concern. In that order the Commission refrained from providing an exhaustive list of work that falls within the parameters of routine network modifications. Verizon is already on notice that it must perform such work for CLECs if it does so for its own customers. Thus, the Joint CLECs' contentions are not persuasive.

DS1 transport caps

The Joint CLECs and Conversent contend that Verizon's tariff unfairly restricts the number of DS1 circuits to 10 unbundled DS1 loops. They cite the TRRO provision that indicates that the 10-loop cap is only applicable where the FCC found non-impairment for DS3 transport.[11] Verizon responds that the TRRO and its attached regulation are inconsistent. We read the TRRO as a whole as intending to apply the 10-loop cap only where the FCC found non-impairment for DS3 transport. That is the most logical and reasonable interpretation of the FCC's action. Verizon is directed to modify its tariff accordingly.

Conclusion

The changes Verizon has made to its tariff implement the FCC's designated transition periods and price structures for dedicated transport, high capacity loops, and local circuit switching. In addition, Verizon has incorporated the additional commitments it made to the Commission to provide unbundled local circuit switching in the PFS, which go beyond the requirements of the TRRO. The proposed tariff revisions are reasonable and customers have been notified. Therefore, the tariff revisions listed on Appendix A should continue in effect. Verizon is directed to amend its tariff to allow for conversion of DS1 and DS3 loop and transport services to analogous services at the applicable resale rate in the event an order for conversion is placed before the end of the

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[11] TRRO, ¶ 128.

FCC mandated transition period, even if the order cannot be completed within the transition period. Further, Verizon should amend its tariff to include the list of wire centers which no longer qualify for certain UNEs. The supporting documentation also should be provided to Staff for review and analysis. Verizon should amend its tariff concerning the 10-loop cap for DS1 services. Lastly, Verizon is required to file by April 30, 2005 its proposal for price increases to resale rates for the Zone 2 wire centers.

PRE-FILING STATEMENT

Background and Comments

On April 6, 1998, in connection with its application to provide in-region long distance service, Bell Atlantic-New York (hereinafter Verizon), made additional commitments to the Commission, beyond those required by section 271, to ensure competition in New York.[12] With respect to combining network elements, Verizon committed to offer UNE-P for specified duration periods and "until such methods for permitting competitive LECs to recombine elements are demonstrated to the Commission. This commitment, when met, will permit competing carriers to purchase from Bell Atlantic-New York and connect all of the pieces of the network necessary to provide local exchange service to their customers."[13] In order to define methods available to CLECs to combine elements, the Commission instituted a proceeding.[14]

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[12] The major areas addressed were: (1) combining network elements; (2) terms and conditions enabling CLECs to connect their facilities to Verizon's; (3) testing Verizon's Operations Support Services (OSS) for pre-order, ordering, billing, customer migration, order changes, and maintenance and repair performance; and, (4) establishing an incentive system to maintain competition and service performance.

[13] Case 98-C-0690, Combining Unbundled Elements, Order Initiating Proceeding (issued May 6, 1998).

[14] Id.

Joint CLECs maintain that Verizon's Pre-filing Statement (PFS) imposes additional UNE-P provisioning obligations on Verizon in New York despite the TRRO's discontinuation of Verizon's section 251 obligations regarding UNE-P. Joint CLECs assert that the TRRO tariff filing does not reflect those PFS obligations which Joint CLECs maintain consist of providing UNE-P at TELRIC or cost-based rates until December 22, 2005 in Zone 2 and during a 2-year transition at a Commission approved increased price once the Commission finds that two conditions have been met: (1) assembly or a reasonable process enabling CLECs to combine unbundled loops; and, (2) a seamless and ubiquitous hot cut process. According to Joint CLECs, if the Commission found that both conditions had been met before December 22, 2003 in Zone 1 and December 22, 2005 in Zone 2, then the two-year transition for Zone 1 would end on December 22, 2005 and on December 22, 2007 for Zone 2. However, they claim the assembly and hot cut pre-transition conditions have not been met and, therefore, Verizon must continue to provide UNE-P at cost-based TELRIC rates in New York pursuant to the terms of the PFS.

In addition, Joint CLECs contend that the PFS requires Verizon to accept orders for new UNE-P lines after March 11, 2005 and until the two-year transition has ended. The TELRIC plus $1 dollar tariffed rate violates the terms of the PFS, according Joint CLECs, because it is not a Commission approved transitional rate.

The MCI Petition states that irreparable harm will occur if new UNE-P orders are not provisioned after March 10, 2005, and that the PFS requires Verizon to provide UNE-P in New York regardless of Verizon's federal obligations. The MCI Petition asserts that Verizon has not met the assembly condition, and therefore, the two-year transition has not begun. The MCI Petition further asserts that this failure was acknowledged by the Commission in Case 98-C-0690 when the Commission found "that only in conjunction with the continued provision of UNE combinations by Verizon pursuant to the Pre-filing Statement did Verizon provide recombination methods sufficient to support foreseeable competitive demand."

Verizon maintains that its TRRO tariff filing regarding PFS terms and rates is consistent with its PFS obligations. Verizon, the Joint CLECs and MCI agree that the PFS duration period for Zone 1 ended on December 21, 2003 and will end December 21, 2005 for Zone 2. However, Verizon contends that the transition period for each zone began automatically after the duration period ended, while Joint CLECs state that the beginning of the PFS transition period is contingent upon a Commission determination that two preconditions, assembly and hot cuts, have been fulfilled. As authority for a transition automatic start, Verizon cites a Commission Notice Requesting Comments in Case 04-C-0420 which describes Verizon's continuing obligation to provide UNE-P beyond the duration period: "[a]t the end of the duration period Verizon committed to continue the availability of the platform for an additional two years, albeit at a price that would increase to substantially the cost of resold lines."

Verizon asserts that no new customers may be added once the duration period has ended, that the PFS silence regarding new platform obligations, combined with fulfillment of the hot cut and assembly conditions, precludes any interpretation except that the transition period was intended to provide time for CLECs to find alternative arrangements for existing UNE-P customers.

As to meeting the PFS assembly and hot cut conditions, Verizon maintains that it has met both conditions and that Commission certification of that satisfaction, effected by a formal approval process, is not required by the PFS. According to Verizon, it has amply demonstrated the performance of both conditions to the Commission's satisfaction.

The price for new and existing UNE-P arrangements in Zone 2 is set at TELRIC plus one dollar during the remainder of that PFS duration period. Verizon states this FCC transition price is consistent with PFS obligations because the PFS requires UNE rates set by the Commission in accordance with federal law. According to Verizon, TELRIC plus one dollar is the price for UNE-P after March 11, 2005 until March 11, 2006.

Compliance With Assembly Condition

In Opinion 98-18,[15] the Commission examined Verizon's Pre-filing Statement combination obligations. The Commission concluded that "[a]fter exhaustive analysis of the strengths and shortcomings of these options [referring to methods CLECs could use to recombine elements themselves], consideration of competitors' proposals, and collaboration, we are requiring the provision of every technically feasible method available today. These methods, with certain modifications, are sufficient to support foreseeable competitive demand in a reasonable and non-discriminatory manner, in conjunction with its provision of element combinations pursuant to the Pre-Filing."[16] Verizon subsequently implemented its Assembly Products in tariffs, which were approved. Opinion No. 98-18 and Verizon's Assembly Products tariff were designed to permit CLECs to assemble or combine a Verizon loop and Verizon port (i.e., switch). Although the Commission's finding in Opinion No. 98-18 recognized that the assembly options would be offered in conjunction with the UNE platform, we find no reason to conclude that Verizon's assembly offerings would not continue to enable carriers to combine the Verizon link and port themselves. We also note the availability of commercial agreements for UNE-P replacement services for new UNE-P customers.[17]

In their March 9 Response, the Joint CLECs claim that Verizon has no functioning method that enable CLECs to combine a Verizon loop with a Verizon port as required by the PFS. The Joint CLECs claim that Verizon's assembly product focuses on combining a Verizon loop with a CLEC switch, not a Verizon switch. Such allegations

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[15] Opinion No. 98-18, Opinion and Order Concerning Methods for Network Element Recombination (issued November 23, 1998).

[16] Id. at 3.

[17] For example, see MCI's March 10, 2005 letter withdrawing its Petition for Emergency Declaratory Relief.

were made in the Joint CLEC original filing and accompanied by an offer of affidavits to demonstrate the alleged lack of assembly. The Joint CLECs did not, however, supply facts upon which we could conclude that Verizon does not provide a functioning method of assembly. In view of Opinion No. 98-18, which examined methods by which Verizon would combine Verizon loops and Verizon ports, and the Verizon Assembly Products tariff, which has been in effect since January 2001, conclusory contrary statements by the Joint CLECs are simply not adequate to demonstrate that Verizon has failed to provide a product that CLECs may or may not demand.

Compliance With Hot Cut Condition

Joint CLECs suggest that compliance with the PFS hot cut condition might be premised upon Commission review of Verizon's hot cut processes in Case 02-C-1425 with a concomitant transition date coinciding with issuance of the Order in August 2004. Verizon states that Commission review of hot cut processes in Case 02-C-1425 was just one determination regarding the efficacy of the hot cut process. In 2002, the Commission reviewed Verizon's hot cut process and concluded that the process was effective and "well-refined."[18] In addition, Verizon indicates Carrier-to-Carrier metrics demonstrate high levels of performance regarding Verizon's hot cut process[19] and ISO 9000 certification demonstrating conformance with best practices.[20]

We conclude that Verizon has had, since the end of the Zone 1 duration period in December 2003, a reasonable hot cut process. The loop migration process has performed well and has met our metrics. We find Verizon has met its PFS commitment for hot cuts.

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[18] Case 02-C-1425, Order Instituting Proceeding (issued November 22, 2002).

[19] See monthly C2C reports in Case 97-C-0139.

[20] Case 02-C-1425 Hearing Record, Tr. 53-55.

Demonstrated compliance with the assembly and hot cut conditions resolves the issue of Commission certification that the standards have been met and the timing of the transition period in Zones 1 and 2. Therefore, the two-year transition period in Zone 1 will end on December 21, 2005 and the two-year transition period in Zone 2 will end on December 21, 2007.

Transition Availability of UNE-P for New Customers

Joint CLECs maintain that the PFS' silence regarding availability of UNE-P for new customers during the two-year transition argues for an interpretation allowing CLECs to order new UNE-P arrangements while transitioning from the platform. Verizon maintains that the same silence precludes such interpretation.

There is no express term in the PFS authorizing CLECs to order new UNE-P services during the transition period. To imply such a term is unreasonable given the context and language of the PFS and that the transition period was intended to facilitate a smooth process for migrating existing UNE-P customers from the Verizon provided regulated platform. Adding customers while that transition is underway could undermine efforts for that smooth and seamless transition. Therefore, new UNE-P arrangements will not be available in Zone 1 pursuant to the PFS where the transition period ends on December 21, 2005 and will not be available in Zone 2 once the transition period begins on December 22, 2005.

Joint CLECs point out in their March 9 Response that Verizon's argument that the PFS doesn't apply to new customers during the two year PFS transition period is inconsistent not only with the PFS but with Verizon's own interpretation of the PFS. They note that in April 2004, in response to the Commission's March 29, 2004 Notice in Case 04-C-0420 (March 29 Notice) in connection with the USTA II vacatur of the FCC's Triennial Review Order, Verizon stated that the PFS transition charge for UNE-P should be implemented as a separate rate element to be applied to any new or existing UNE-P arrangement.

The key issue raised by the March 29 Notice was the establishment of a surcharge and not the more refined point of whether new customers would be served after

the expiration of the duration period. This plus the fact that the surcharge levels being considered in the March 29 Notice were higher than the FCC's $1 UNE-P surcharge, lead us to conclude that Verizon's April 2004 statement expresses a willingness to offer a higher rate for new customers, but is not a definitive statement concerning the scope of the PFS. Moreover, in its April 2004 pleading Verizon points to other PFS language indicating that its suppression of access charge billing will continue for *existing platforms after the expiration of the availability of new platforms.* This language more directly supports the distinction between the broad UNE-P commitment during the duration period and the more limited (i.e., existing customers only) commitment during the two year transition period following the duration period.[21]

In short, the PFS both expressly obligates Verizon to provide UNE-P for the four and six year duration periods[22] and describes the transition period as the period after the expiration of the availability of new platforms.[23] For all the reasons set forth above we reject the Joint CLECs' interpretation.

Transition Pricing

Zone 2

Joint CLECs claim that they are entitled to TELRIC or cost-based pricing in Zone 2 through December 21, 2005, the duration period for that zone. Verizon points to the fact that the Zone 2 duration period and FCC transition period run concurrently until December 21, 2005 and that the PFS transition period for Zone 2 runs concurrently with the FCC transition period after December 21, 2005 until March 11, 2006. Verizon

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[21] Even if the Joint CLECs' view of the scope of the PFS obligation were accepted, because the TRRO eliminated Verizon's obligation to provide new UNE-P arrangements, they would not be entitled to the FCC surcharge (TELRIC plus $1) for new UNE-P customers.

[22] Pre-filing Statement pp. 8-9.

[23] Id. at p. 8.

has filed a proposed FCC TRRO transition rate of TELRIC plus $1. After the FCC UNE-P transition ends on March 11, 2006, the price for UNE-P arrangements will increase to resale rates by December 21, 2007, the end of the transition period for Zone 2. This increase in price during the transition is consistent with the PFS.

Contrary to Joint CLECs' claim, the PFS does not entitle CLECs to TELRIC rates. No PFS citation has been offered to support the contention that UNE-P under the PFS can only be priced at TELRIC rates. When the PFS was filed in April 1998, the FCC's TELRIC rule was not in effect because it had been overturned by the 8th Circuit. We find that the $1 increase during the remainder of the duration period in Zone 2 is reasonable.

Zone 1

The two-year transition period in Zone 1 ends on December 21, 2005 and runs concurrently with the FCC transition period, which begins on March 11, 2005. Verizon, therefore, will apply the FCC TRRO transition rate of TELRIC plus $1 during that period and through the entire FCC transition period, rather than a higher PFS rate. After the FCC UNE-P transition ends, any remaining UNE-P arrangements will be discontinued or converted to alternative arrangements. Verizon's proposed increase in price during the Zone 1 transition is consistent with the PFS, which specifies that increases in transition rates are subject to Commission approval. The increased rate for the remainder of the transition period in Zone 1, TELRIC plus $1, is reasonable.

SECTION 271

Covad and IDT America maintain that Verizon has an obligation to continue providing access to UNE-P, apart from TRRO determinations, and cite 47 U.S.C. section 271 as authority. Although they admit that the FCC declined to require combining network elements no longer impaired pursuant to 47 U.S.C section 251, the MCI Petition contends that 47 U.S.C. section 202's nondiscrimination provisions provide a basis for combining non-impaired network elements since allowing only Verizon to

offer customers bundled switching would discriminate against CLECs. Joint CLECs also contend that Verizon's section 271 obligations remain despite the FCC's non-impairment findings and that it is essential that the PFS assembly condition be met in order to combine network elements.

In addition to jurisdictional arguments, Verizon cites the TRRO provision in which the FCC "declined to require BOCs, pursuant to section 271, to combine network elements that are no longer required to be unbundled under section 251.[24]

Given the FCC's decision to not require BOCs to combine 271 elements no longer required to be unbundled under section 251, it seems clear that there is no federal right to 271-based UNE-P arrangements.

INTERCONNECTION AGREEMENTS

Comments

Joint CLECs assert that specific provisions in their Interconnection Agreements regarding change of law and/or material change, which require bilateral negotiation, prohibit Verizon from unilaterally amending those Interconnection Agreements through its proposed tariff filing. In addition, Joint CLECs argue that the FCC's TRRO directs that changes should be implemented through the Interconnection Agreement amendment process and that Verizon's tariff filing is not a substitute for that process.

The MCI Petition states that Interconnection Agreements with Verizon cannot be abrogated by Verizon's unilateral tariff filing. Specifically, MCI states that until its Interconnection Agreement with Verizon is amended, Verizon must continue to provide UNE-P at cost based prices. The MCI Petition points to a prior instance in which Verizon sought to immediately discontinue providing services no longer required by the FCC, i.e. enterprise switching and four-line carve-out, in which Verizon acknowledged

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[24] TRO ¶ 655, n. 1990.

that it had an obligation to follow change of law provisions in the MCI/Verizon Interconnection Agreement rather than summarily suspend provisioning of the service.

Conversent states that the TRO calls for implementing FCC required changes through the 47 U.S.C. Section 252 arbitration process and the TRRO mirrors that implementation and transition plan by also directing negotiated change. By precluding negotiation of key issues, e.g. wire centers where high-capacity loops and dedicated transport will or will not be provided, Conversent claims that Verizon's TRRO tariff filing usurps the process called for by the FCC in the TRRO.

AT&T contends that the specific change of law language in its Interconnection Agreements with Verizon preserves the status quo as to TRRO implementation until the Interconnection Agreements are amended. Similarly, Covad cites a section of its Interconnection Agreement that requires parties to negotiate changes in law which are then not effective unless executed in writing. According to IDT, its Interconnection Agreement specifies that regulatory and judicial changes must be negotiated and the status quo maintained during the pending negotiations. These provisions preclude Verizon from withdrawing network elements previously required pursuant to section 251, according to Covad and IDT.

Verizon states that the TRRO's directives take effect on March 11, 2005 and Interconnection Agreement terms "cannot override an FCC directive." The 12-month conversion process for UNE-P customers outlined in the TRRO, applies only to existing, not new customers, according to Verizon. Therefore, the FCC's decision to delist UNEs and specify that the transition period applies to embedded customers only expressly prohibits CLECs from ordering new UNE-arrangements after March 11, 2005.

In addition, Verizon argues that the FCC's intent to immediately effect discontinuation of certain UNEs is evidenced by the March 11, 2005 expiration date, of the FCC's Interim Rules Order, which imposed a temporary obligation to provide UNEs, and the effective date of the TRRO, which relieves Verizon and other ILECs of any obligation to provide certain UNEs, also March 11, 2005.

Verizon counters MCI's argument that the TRRO allows CLECs to order new UNE-P service until changes are made to existing Interconnection Agreements by pointing to the express prohibition in the TRRO against adding new UNE-P customers and the FCC's finding that continuing new UNE-P arrangements would "seriously undermine infrastructure investment and hinder the development of genuine facilities-based competition."[25]

Verizon states that it is not violating change of law provisions nor unilaterally amending Interconnection Agreements by filing its TRRO tariff because the change of law provisions invoked require compliance in the first instance with effective law, followed by a negotiation process to conform Interconnection Agreements. In addition, applicable law provisions in Verizon/CLEC Interconnection Agreements direct the CLECs to follow applicable law. In this instance, according to Verizon, applicable law eliminates its obligation to provide new UNE-P arrangements on or after March 11, 2005.

Discussion

The issue presented is whether our approval of the Verizon tariff and the clear statements of the TRRO regarding new customers for delisted UNEs satisfy or override change of law provisions in Interconnection Agreements regarding entitlement to ordering and receiving new network elements delisted in the TRRO, including UNE-P arrangements, after March 11, 2005.

The TRRO, in ¶233, makes reference to a negotiated process for implementing changes. Based on this language the TRRO should be implemented through interconnection agreements as necessary. However, for CLECs that have interconnection agreements with provisions allowing such amendment via tariff changes, changes will be effected via the tariff change process. The AT&T/Verizon

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[25] TRRO ¶ 218.

Interconnection Agreement, for example, incorporates tariffs and envisions that tariff changes may flow through to the interconnection agreement.[26] In view of the notice provided by the tariff filing, the comment process thereon, and our review of both the tariff and comments, we find that this change process properly balances CLECs' interest in avoiding unilateral changes and the FCC's and Verizon's interest in avoiding unnecessary delay in implementing the TRRO's clear mandates. Therefore, the Commission declines to invoke its authority to prevent the tariff changes from flowing through to interconnection agreements, where provided for by interconnection agreements.

Further, to the extent other interconnection agreements do not incorporate tariff terms for UNE offerings and where changes must first be negotiated, we find that the change of law provision in those agreements should be followed to incorporate the transition pricing on delisted elements for the embedded base. Because the terms of the transition are clearly specified in the TRRO, this process should not be complex.[27] Moreover, to be consistent with the TRRO, the amendment should provide for a true-up to the TRRO transition rate for the embedded base of customers back to March 11, 2005, the effective date of the TRRO.[28]

Finally, with regard to new customers and interconnection agreements, based on our careful review of the TRRO, we conclude that the FCC does not intend that

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[26] See Case 01-C-0095, Joint Petition of AT&T Company of New York Inc., TCG New York, Inc. and ACC Telecom Corp. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York Inc., Order Resolving Arbitration Issues (issued July 30, 2001) p. 8. Many of the CLECs that have filed comments in this proceeding have opted into the ATT/Verizon interconnection agreement.

[27] The FCC made clear that the UNE-P price should be increased by $1 and loops and transport in affected wire centers should be increased to 115% for the transition period.

[28] TRRO n. 408, n. 524, n. 630.

new UNE-P customers can be added during the transition period as the TRRO "does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to Section 251(c)(3)." TRRO ¶ 227. Although TRRO ¶233 refers to interconnection agreements as the vehicle for implementing the TRRO, had the FCC intended to use this process for new customers, we believe it would have done so more clearly. Paragraph 233 must be read together with the FCC directives that UNE-P obligations for new customers are eliminated as of March 11, 2005. Providing a true-up for new UNE-P customers would run contrary to the express directive in TRRO ¶227 that no new UNE-P customers be added.

CONCLUSION

Based on our review of the Verizon tariffs and the comments thereon, we conclude that several modifications to Verizon's tariff are required. Apart from these modifications, we believe the tariff properly implements the TRRO and Verizon's Pre-filing Statement commitments. Finally, we decline to prevent the tariff changes from flowing through to interconnection agreements that rely on tariffs for UNE terms.

The Commission orders:

1. The tariff revisions listed on Appendix A are allowed to continue in effect as filed, and newspaper publication of the changes proposed by the amendment and further revision directed by order clauses 2, 3, 4 and 5 are waived pursuant to §92(2) of the Public Service Law.

2. Within ten days of the issuance of this Order, Verizon New York Inc. shall file tariff amendments allowing for conversion of DS1 and DS3 loop and transport services to analogous services at the applicable resale rate in the event an order for conversion is placed before the FCC-mandated transition period, even if the order for conversion cannot be completed within the transition period.

3. Within ten days of the issuance of this Order, Verizon New York Inc. shall file tariff amendments to include the list of wire centers which no longer qualify

for UNEs. The supporting data and documentation upon which it based its determinations shall be provided to Staff for review and analysis at the same time.

4. By April 30, 2005, Verizon New York Inc. shall file its proposal for UNE-P price increases to resale rates for the period between March 11, 2006 and December 21, 2007 for the Zone 2 wire centers.

5. Within ten days of the issuance of this Order, Verizon New York Inc. shall file tariff amendments to apply the 10-loop cap for DS1 service only where there is non-impairment for DS3 transport.

6. The petitions for suspension, investigation and emergency relief are denied, except to the extent consistent with the foregoing Order.

7. This proceeding is continued pending compliance with the above ordering clauses following which it shall be closed.

By the Commission,

(SIGNED) JACLYN A. BRILLING
Secretary

Appendix A

Tariff pages in effect March 12, 2005:

PSC NY No. 10 – COMMUNICATIONS

Preface –
Original Page 8

Section 5 –
2nd Revised Page 1.2
Original Pages 1.3 through 1.12

Appendix D –
Original Page 1

Issued: February 10, 2005

Effective: March 12, 2005

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Emergency Petition of LDMI Telecommunications, Inc., MCImetro Access Transmission Service, LLC, and CoreComm Newco, Inc. for a Declaratory Ruling Prohibiting SBC Ohio from Breaching its Existing Interconnection Agreements and Preserving the Status Quo with Respect to Unbundled Network Element Orders.	)	Case No. 05-298-TP-UNC
In the Matter of the Petition of XO Communications Services, Inc., for an Emergency Order Preserving the Status Quo and Prohibiting Discontinuance of Certain Unbundled Network Element Services.	)	Case No. 05-299-TP-UNC

ENTRY

The Commission finds:

(1) On February 4, 2005, the Federal Communications Commission (FCC) released its Order on Remand (TRRO) in CC Docket No. 01-338 in response to certain issues that had been vacated and remanded in part back to the FCC by the D.C. Circuit Court in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004). Among other things, the FCC in the TRRO put into place new rules applicable to incumbent local exchange carriers' (ILECs') unbundling obligations with regard to mass market local circuit switching, high-capacity loops and dedicated interoffice transport.

Recognizing that it had removed significant unbundling obligations, the FCC directed that, for the embedded customer base, a transition period and transition pricing would apply during which the impacted competitive local exchange carriers (CLECs) would be able to continue purchasing the involved unbundled network elements. During the transition period, the ILECs and the CLECs were directed to modify their interconnection agreements, including completing any change of law processes to perform the tasks necessary for an orderly

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transition to alternative facilities or arrangements. The FCC determined the effective date of these new rules to be March 11, 2005.

(2) On February 11, 2005, SBC made available on its CLEC website five accessible letters through which the company outlined the manner in which each of the SBC ILECs would implement the provisions of the FCC's new rules adopted in the TRRO.

(3) On March 4, 2005, MCImetro Access Transmission Services, LLC, LDMI Telecommunications, Inc. and CoreComm Newco, Inc. filed a petition (Case No. 05-298-TP-UNC) and a motion for emergency relief seeking a declaratory ruling prohibiting SBC Ohio from breaching its existing interconnection agreements and preserving the status quo with respect to unbundled network element orders. Similarly, on that same day, XO Communications Services, Inc. filed its own petition (Case No. 05-299-TP-UNC) seeking an emergency order preserving the status quo and prohibiting discontinuance of certain unbundled element (UNE) services.

The joint petitioners assert that, in order to avoid suffering irreparable damage to their businesses, the Commission must issue a directive no later than March 10, 2005, requiring SBC Ohio to continue accepting and processing the joint petitioners' orders for the UNE-platform, including moves and adds, to the joint petitioners' existing embedded customer base, as well as orders for DS1 and DS3 loops or transport, and dark fiber pursuant to the rates, terms and conditions of their respective interconnection agreements. The joint petitioners further request that SBC Ohio be directed to comply with the change of law provisions of the respective interconnection agreements regarding implementation of the TRRO. As a final matter, the joint petitioners request that the negotiation process contemplated as part of the change of law provisions in the interconnection agreements include the provisions of the TRRO and of the Triennial Review Order that are more favorable to the joint applicants.

(4) SBC Ohio filed responses opposing the joint petitioners' petitions for emergency relief and preserving the status quo on March 8, 2005.

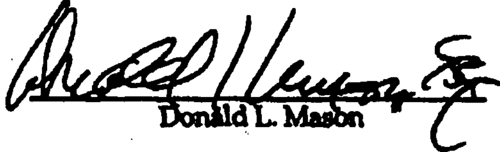
ORDERED, That a copy of this entry shall be served upon MCImetro Access Transmission Services, LLC, LDMI Telecommunications, Inc., CoreComm Newco, Inc., XO Communications Services, Inc., SBC Ohio, their respective counsel and upon all other parties of interest in this matter.

THE PUBLIC UTILITIES COMMISSION OF OHIO

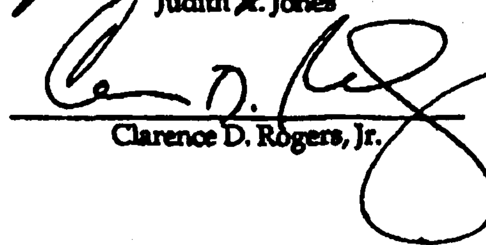
Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones



Donald L. Mason



Clarence D. Rogers, Jr.

JRJ/ct

Entered in the Journal

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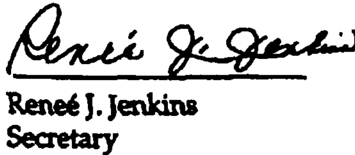

Reneé J. Jenkins
Secretary

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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, MARCH 24, 2005

PETITION OF

A.R.C. NETWORKS INC. d/b/a
INFOHIGHWAY COMMUNICATIONS, INC.,
and XO COMMUNICATIONS, INC.

CASE NO. PUC-2005-00042

For a Declaratory Ruling Directing Verizon
to Continue to Provision Certain UNEs and
UNE Combinations

ORDER DISMISSING AND DENYING

On March 14, 2005, A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation, and XO Communications, Inc. (collectively, "Petitioners"), filed with the State Corporation Commission ("Commission") their "Petition for Emergency Declaratory Relief" ("Petition") seeking an action from this Commission to prevent Verizon Virginia Inc. ("Verizon") "from breaching its interconnection agreements . . . by prematurely ending the offering of certain unbundled network elements ("UNEs") and UNE combinations."

On March 15, 2005, DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad") filed a motion supporting the Petition and requesting permission to participate in the proceeding.

By this Order, the Commission dismisses the Petition and denies Covad's motion. Petitioners seek a declaratory ruling but do not cite any Commission rule under which the Petition ostensibly is filed or upon which the Commission may grant the requested relief, thus warranting dismissal of the Petition. Furthermore, although not cited by the Petitioners, we note that Covad's motion references 5 VAC 5-20-100 of the Commission's Rules of Practice and Procedure ("Rules"), which, at Subpart C, states that "Persons having no other adequate remedy

may petition the commission for a declaratory judgment." That rule also states that any such "petition shall meet the requirements of 5 VAC 5-20-100 B," and the requirements of 5 VAC 5-20-100 B state that the petition shall contain "a certificate showing service upon the defendant." The Petition, however, does not include a certificate showing service upon the defendant. Thus, even if we conclude that the Petitioners implicitly filed for a declaratory ruling under 5 VAC 5-20-100 C, the Petition did not comply with the Rules and accordingly is dismissed.

We find that this matter also should be dismissed if the Petition was properly filed in accordance with 5 VAC 5-20-100 C of the Commission's Rules. Specifically, the Petitioners do not establish that they have "no other adequate remedy," as required by 5 VAC 5-20-100 C. In addition, the Petitioners do not identify the specific contractual provisions that Verizon allegedly intends to breach, and, to the extent that this is a purely contractual dispute, it "may be more appropriately addressed by courts of general jurisdiction."[1] Furthermore, Petitioners assert that Verizon's obligations to continue the provision of certain services arise from the so-called Triennial Review Remand Order recently issued by the Federal Communications Commission ("FCC") in *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (released February 4, 2005). Thus, insofar as the matters raised by the Petition require construction of this FCC ruling, the parties may have an adequate – and more appropriate – remedy by seeking relief from that agency.

Finally, our dismissal of the Petition renders Covad's motion moot and, thus, it is hereby denied.

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[1] *See Petition of Cavalier Telephone, LLC v. Verizon Virginia Inc., For enforcement of interconnection agreement*, Case No. PUC-2002-00089, Final Order at 2 (Jan. 31, 2003).

Accordingly, IT IS HEREBY ORDERED THAT:

(1) The Petition filed by A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation and XO Communications, Inc., is DISMISSED.

(2) The motion filed by DIECA Communications, Inc., d/b/a Covad Communications Company is DENIED.

(3) This matter is dismissed and the papers herein shall be transferred to the file for ended causes.

AN ATTESTED COPY HEREOF shall be sent by the Clerk of the Commission to: Andrea Pruitt Edmonds, Esquire, Kelley Drye & Warren LLP, 8000 Towers Crescent Drive, Suite 1200, Vienna, Virginia 22182; Eric M. Page, Esquire, LeClair Ryan, P.C., 4201 Dominion Boulevard, Suite 200, Glen Allen, Virginia 23060; Lydia R. Pulley, Esquire, Vice President, Secretary, and General Counsel, Verizon Virginia Inc., 600 East Main Street, Suite 1100, Richmond, Virginia 23219-2441; C. Meade Browder, Jr., Senior Assistant Attorney General, Division of Consumer Counsel, Office of Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219; and the Commission's Office of General Counsel and Division of Communications.