

the paging carrier's network." TSR Wireless, 15 FCC Rcd at 11177 n.70.¹⁷ See Qwest Corp., 252 F.3d at 468.

Second, the Commission determined that section 51.703(b) does not prohibit LECs from charging paging carriers for facilities used to permit wide area calling "or similar services." 15 FCC Rcd at 11166, 11184 (¶¶ 1, 30). The Commission pointed out that such services "are not necessary for interconnection or for the provision of [a paging carrier's] service to its customers." 15 FCC Rcd at 11184 (¶ 30). Wide area calling services instead permit a paging carrier to "'buy down' the cost of . . . toll calls to make it appear to end users that they have made a local call rather than a toll call." 15 FCC Rcd at 11184 (¶ 30). This is advantageous to the paging carrier because it allows more calls to paging subscribers to be considered local (non-toll) and thus to make the paging service more useful to those subscribers. Because LECs are under no obligation "to provide such services at all," the Commission found that "it would seem incongruous for LECs who choose to offer these services not to be able to charge for them." 15 FCC Rcd at 11184 (¶ 30).

C. Qwest-Mountain Arrangements

On July 24, 2000, Qwest informed Mountain and other paging companies by letter that it was revising its billing policies in order to comply with TSR Wireless.¹⁸ Qwest specified that it

¹⁷ In the damages phase of that proceeding, the Commission reiterated that TSR Wireless "unambiguously permitted LECs to charge paging carriers for 'transiting traffic.'" Metrocall v. Southwestern Bell Telephone Co., 16 FCC Rcd 18123, 181226 (¶ 8) (2001) ("Metrocall Order"), recon. denied, 17 FCC Rcd 4781 (2002) ("Metrocall Reconsideration"). On the basis of that holding, the Commission determined that the complainant in TSR Wireless was not entitled to damages because the amount the complainant owed the LEC for transiting charges exceeded the unlawful facilities charges that the complainants had paid.

was “eliminating charges for the portion of local interconnection facilities used to deliver traffic that originates on Qwest’s network and terminates on [the paging company’s] network.”¹⁹ As a result, Qwest “would no longer bill paging companies for any interconnection facilities charges except transit charges.”²⁰ On the basis of its calculation that 26.2 percent of the traffic on its paging interconnection facilities in Colorado was transiting traffic, Qwest stated that it would reduce Mountain’s facilities charges beginning in August 2000 by 73.8 percent.²¹

Qwest stated that it would continue to assess tariffed charges for facilities and services that are not essential for interconnection, including wide area calling services and non-recurring charges for DID numbers.²² Qwest pointed out that the Commission in TSR Wireless had recognized that a LEC is entitled to charge its own end users for toll calls that are delivered at no charge to paging companies. Qwest stated that it would charge paging companies who elect to “buy down’ the cost of such toll calls to make it appear to the ILEC’s end users that they have made a local call rather than a toll call,” as permitted by TSR Wireless.²³

Qwest offered the paging companies several configuration and billing options. At the request of a paging carrier, Qwest offered to reconfigure a paging carrier’s foreign exchange,

¹⁸ Letter by Vickie Boone, Qwest Corp. (July 24, 2000), *attached to Mountain Communications Complaint, Exh. XXIII (“Qwest July 2000 Letter”)* (J.A.); Joint Statement of Mountain Communications And Qwest Corporation (Oct. 18, 2000) at 8 (¶ 22) (“Stipulated Facts”) (J.A.); “Answer and Affirmative Defenses of Qwest Corp.” (Oct. 2, 2000) at 17 (“Answer”) (J.A.).

¹⁹ Qwest July 2000 Letter at 1 (J.A.); Stipulated Facts at 8 (¶ 22) (J.A.).

²⁰ Qwest July 2000 Letter at 1 (J.A.); Stipulated Facts at 8 (¶ 22) (J.A.).

²¹ Stipulated Facts at 8 (¶ 22) (J.A.).

²² Qwest July 2000 Letter at 1-2 (J.A.); Stipulated Facts at 8 (¶ 22) (J.A.).

²³ Qwest July 2000 Letter at 2, quoting TSR Wireless, 15 FCC Rcd at 11184 (¶ 30) (J.A.).

wide area calling, reverse billing or 800 number arrangements in a way that allows Qwest to collect toll charges from its own end user customers. Under that option, Qwest would deliver “its traffic to [the paging carrier’s] network at no charge”²⁴ and would charge paging carriers for transiting traffic only.

For Mountain, such a reconfiguration would result in Qwest’s free delivery of all calls originated by Qwest’s end users within the MTA directly to Mountain’s point of connection in Pueblo. Mountain would obtain Pueblo DID numbers from Qwest for all its subscribers (including those who were not located in Pueblo), and Qwest would assess toll charges for any interexchange intraLATA calls made by Qwest’s subscribers to Mountain’s subscribers. Under this approach, a Qwest subscriber outside the Pueblo service area who called a Mountain subscriber would have to pay toll charges to Qwest, even though the Mountain subscriber might be physically located in the same service area as the calling party. For example, Qwest would assess toll charges on its subscriber in the Colorado Springs local service area who called a Mountain subscriber also physically located in Colorado Springs, because the Mountain subscriber had a Pueblo DID paging number.²⁵

Alternatively, if the paging carrier chose to retain arrangements that permitted Qwest’s end user customers to avoid such toll charges when calling the pager’s subscriber, Qwest said that the paging carrier would have to pay Qwest at the “appropriate tariff or contract rates for

²⁴ Qwest July 2000 Letter at 3 (J.A.).

²⁵ See Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1-2 (¶ 3) (J.A.). If Mountain establishes a POC in Walsenburg and Colorado Springs, Qwest stated that “[e]ach of these POCs and the delivery of all local calls to these POCs by Qwest would be free to the paging carrier.” *Id.* at 2 (¶ 4) (J.A.).

these optional arrangements.”²⁶ Qwest stated that it considered the first 20 miles of Type 1 facilities to be local interconnection facilities and thus would charge paging carriers only for the transiting traffic associated with those facilities whether or not it obtained optional toll suppression arrangements.²⁷

Mountain elected to retain a Type 1²⁸ facilities arrangement whereby it obtains DID numbers separately in Walsenburg, Pueblo, and Colorado Springs, with dedicated toll facilities, obtained from Qwest, connecting these numbers to Mountain’s single POC in Pueblo. As noted above, this arrangement permits a Qwest end user located in the same local service area with a Mountain subscriber to dial a local number to reach that subscriber without incurring toll charges. Mountain did not choose the option of obtaining free interconnection facilities for all calls placed by Qwest customers within a MTA – an option under which Qwest would have assessed toll charges on its end-users located outside of Pueblo for calls placed to Mountain subscribers. Under the arrangement favored by Mountain, then, Qwest lost some toll revenues it otherwise would have collected and Mountain received the advantage of having calls to its customers unburdened by toll charges that might have discouraged usage and thus might have made its paging service less attractive.

²⁶ Qwest July 2000 Letter at 3 (J.A.).

²⁷ Qwest July 2000 Letter at 2 (J.A.); Stipulated Facts at 8 (¶ 22) (J.A.).

²⁸ Type 1 and Type 2 interconnections are forms of interconnection that LECs offer to CMRS carriers. Under Type 1 interconnection, the LEC owns the switch serving the wireless network, whereas under Type 2 interconnection the wireless carrier owns the switch. See Petitions of Sprint PCS and AT&T Corp., 17 FCC Rcd 13192, 13197 n.36 (2002), petition for review filed, AT&T Corp. v. FCC, D.C. Circuit No. 02-1221 (filed July 9, 2002).

II. Administrative Proceedings

A. Mountain's Complaint and Responsive Pleadings

On September 12, 2000, Mountain filed a formal complaint against Qwest. Complaint (J.A.). Mountain claimed inter alia that Qwest had violated sections 51.703(b) and 51.709(b) of the Commission's rules by levying charges for the delivery of calls to Mountain's system. Complaint at 9-10 (¶¶ 36-40) (J.A.).²⁹ Mountain argued that Qwest was responsible not only for the costs associated with terminating traffic that originated on Qwest's own facilities, but also for the costs associated with transiting traffic that originated on the networks of other carriers. Complaint at 11 (¶ 44) (J.A.).

In an Answer filed on October 2, 2000, Qwest denied that it charges "paging carriers for the portion of local interconnection facilities used to deliver traffic that originates on Qwest's network." Answer (October 2, 2000) at ii (J.A.). Qwest asserted that it "bills Mountain only for that portion of the Type 1 paging facilities used to deliver so-called 'transiting traffic,' that is, traffic not originated on Qwest's local network."³⁰ Qwest asserted that the Commission in TSR Wireless had ruled that LECs may assess charges for transiting traffic, and it argued that Mountain could not collaterally attack TSR Wireless in this complaint proceeding. Answer at 10-11, 21, 24 (J.A.).

Qwest denied Mountain's claim that it recovers the costs of delivering transit traffic from other sources. Qwest stated that the costs of the dedicated facilities at issue in this case "are not

²⁹ Even though Mountain filed its complaint against Qwest, it charged unlawful conduct by U S West Communications, a company that subsequently merged with Qwest and "currently operates as Qwest." Complaint at 1 (J.A.). The references to Qwest in this brief include U S West, where appropriate.

³⁰ Answer, Exh. 1 (Decl. of Vickie Boone) at 3 (J.A.).

recovered in any switched charge” or in any other form.³¹ Although Qwest acknowledged that it “assesses charges on the originating carrier for transporting and switching traffic that originates on that carrier’s network,” it claimed that “those charges do not encompass the dedicated facilities connecting Qwest’s network and a paging provider’s network.”³²

Qwest rejected Mountain’s claim that Qwest is the originating party for all traffic that is terminated on Mountain’s network. Qwest asserted that the Commission in TSR Wireless had made clear that the originating LEC is the LEC whose customer places the call, not the LEC that delivers the traffic to the paging company. Answer at 21-22 (J.A.). Qwest reiterated that TSR Wireless expressly permits a LEC to charge a paging company for the delivery of traffic that originates on another LEC’s facilities. Answer at 21-22 (J.A.).

Qwest also asserted that TSR Wireless permits a LEC to charge a paging carrier for wide-area and similar calling arrangements that allow the paging carrier to offer customers a paging number in a local calling area in which the paging carrier has no point of contact. According to Qwest, such calling arrangements, which enable Qwest customers in an extended calling area to call paging customers without incurring toll charges that Qwest otherwise would collect, “‘are not necessary for interconnection’ and thus need not be provided at all, much less for free.” Answer at 11, quoting TSR Wireless, 15 FCC Rcd at 11184 (¶ 30) (J.A.). Qwest emphasized that Mountain has the option of receiving traffic throughout its MTA at no charge, provided that

³¹ Answer at 10-11 (J.A.). See *id.* Declaration of Vickie Boone at 3 (“Qwest only recovers the costs of [facilities used for transiting traffic] from Mountain and does not receive any compensation for them from originating carriers”).

³² Answer Exh. 3 (Declaration of Sheryl R. Fraser) at 2 (J.A.).

the arrangement allows Qwest to collect applicable toll charges from its own end users. Answer at 11-12 (J.A.).

As an affirmative defense, Qwest claimed inter alia that Mountain had not shown that it had been injured by Qwest's alleged violations. Answer at 35-36 (J.A.). Qwest pointed out that Mountain had not paid Qwest "anything for any paging facilities that it has purchased since February 1998, including the transiting charges upheld in TSR Wireless." Answer at iii, 36 (J.A.). According to Qwest, Mountain owed an outstanding balance of more than \$21,000 (including late payment charges) attributable to charges permitted by TSR Wireless.³³

B. Staff Order

On February 4, 2002, the Commission's staff, on delegated authority, denied Mountain's complaint. Staff Order, 17 FCC Rcd 2091 (J.A.). The staff found first that sections 51.703(b) and 51.709(b) of the Commission's rules do not bar the LECs from charging paging carriers for transiting traffic. 17 FCC Rcd at 2094-95 (¶¶ 7-10) (J.A.). The staff pointed out that the Commission in TSR Wireless³⁴ and the subsequent Texcom Order³⁵ had construed those rules to allow a LEC to charge paging carriers for the transport of transiting traffic. Staff Order, 17 FCC Rcd at 2094-95 (¶¶ 8-10) (J.A.).

The staff also upheld the lawfulness of Qwest's charges for the dedicated toll facilities that connect Mountain's DID numbers in Colorado Springs and Walsenburg to Mountain's sole POC in Pueblo. 17 FCC Rcd at 2096-97 (¶¶ 11-13) (J.A.). The staff determined that Qwest's

³³ Answer, Exh. 1 (Declaration of Vicki Boone) at 4 (J.A.).

³⁴ TSR Wireless, 15 FCC Rcd at 11177 n.70.

³⁵ Texcom, Inc. d/b/a Answer Indiana v. Bell Atlantic Cor., d/b/a/ Verizon Communications, 16 FCC Rcd 21493, 21494 (¶ 4) (2001) ("Texcom Order"), recon. denied, 17 FCC Rcd 6275 (2002) ("Texcom Reconsideration").

provision of dedicated toll facilities that enable Mountain to offer its subscribers a local number in several local calling areas is “an optional service that is not necessary for interconnection.” 17 FCC Rcd at 2097 (¶ 13) (J.A.). The staff reasoned that Qwest would have assessed toll charges on its end users located outside the Pueblo local calling area for calls to Mountain’s subscribers if Mountain had not obtained this arrangement. The staff thus concluded that Mountain, in effect, had entered into a wide area calling arrangement with Qwest, and relying on TSR Wireless, the staff held that Qwest is entitled to charge Mountain for that arrangement. 17 FCC Rcd at 2097 (¶ 13) (J.A.).

C. Commission Order.

Mountain petitioned the Commission to review the Staff Order.³⁶ The Commission on July 25, 2002, denied Mountain’s petition. Order, 17 FCC Rcd 15135 (J.A.).

The Commission affirmed that Qwest may charge Mountain for the cost of facilities used to transport transiting traffic, finding that the staff properly had determined that TSR Wireless permits LECs to assess charges on paging carriers for transiting traffic. Order, 17 FCC Rcd at 15136-37 (¶¶ 2-3) & n.8 (J.A.). The Commission also found that Mountain had not provided support for its claim that Qwest recovers the costs of these facilities from another source. 17 FCC Rcd at 15136-37 (¶¶ 2-3) (J.A.). The Commission noted that Qwest is not a terminating carrier for the transiting traffic it sends to Mountain and thus is unable to recover reciprocal compensation payments for such traffic. 17 FCC Rcd at 15137 (¶ 3) (J.A.).

The Commission also rejected Mountain’s challenge to Qwest’s charges for the dedicated toll facilities that connect the DID numbers in Colorado Springs and Walsenburg to Mountain’s

³⁶ Petition for Reconsideration filed by Mountain (March 5, 2002) (J.A.).

interconnection point in Pueblo. 17 FCC Rcd at 15137-39 (¶¶ 4-7) (J.A.). The Commission agreed with its staff that Qwest lawfully can charge Mountain for this type of arrangement because it is a form of wide area calling within the meaning of TSR Wireless. By procuring DID numbers in Walsenburg, Pueblo, and Colorado Springs, and obtaining dedicated lines from Qwest to connect these DID numbers to its POC in Pueblo, “Mountain ensures that calls to the DID numbers in each of the relevant Qwest central offices appear local and involve no toll charges to [Qwest’s end-user customers] in those areas.” 17 FCC Rcd at 15135 (¶ 5) (J.A.). Mountain’s facilities configuration in effect “prevents Qwest from charging its customers for what would ordinarily be toll calls to access Mountain’s network” 17 FCC Rcd at 15138 (¶ 5) (J.A.).³⁷

Although the Commission acknowledged the similarity of the network configuration at issue in TSR Wireless to Mountain’s arrangement with Qwest, the Commission rejected Mountain’s claim that TSR Wireless barred Qwest from charging Mountain for the dedicated toll facilities at issue in this case. 17 FCC Rcd at 15138-39 (¶ 6) (J.A.). The Commission pointed out that TSR Wireless permitted a LEC to charge a CMRS carrier for wide area calling service arrangements that are not necessary to effectuate interconnection. 17 FCC Rcd at 15139 (¶ 6) (J.A.). The Commission explained that Mountain was free to reorder its DID numbers and cancel the dedicated toll facilities connecting those numbers to its single POC, and instead permit Qwest to bill its own end users for toll calls. Mountain’s choice not to pursue that

³⁷ The Commission rejected Mountain’s claim that the lack of a written agreement shows that Mountain and Qwest did not enter into a wide area calling arrangement: “Mountain’s ordering and acceptance of the T-1 facilities from a tariff that create[s] a wide area calling arrangement constitutes an agreement between the parties regarding the provisioning of this service.” 17 FCC Rcd at 15135 (¶ 5) (J.A.).

alternative and to maintain an arrangement that “prevents Qwest from charging its customers for what would ordinarily be toll calls” meant that the challenged charges were lawful. 17 FCC Rcd at 15139 (¶ 6) (J.A.).³⁸

SUMMARY OF ARGUMENT

1. The Commission reasonably applied its own regulations in determining that the facilities charges at issue in this case were lawful charges for facilities used in providing wide area calling or equivalent services. TSR Wireless describes wide area calling or equivalent services as optional services with a toll suppression function. The Commission reasonably held that Mountain’s facilities arrangement with Qwest was a form of wide area calling service. The facilities arrangement was optional because Mountain had the choice of obtaining free delivery of all its paging traffic to its POC by permitting Qwest to modify its facilities configuration. And the facilities arrangement had a toll suppression function because it eliminates some intraLATA toll charges that Qwest otherwise would have assessed upon its own customers.

The Commission reasonably rejected Mountain’s argument that these charges are identical to the facilities charges invalidated in TSR Wireless. The Commission in TSR Wireless construed section 51.703(b) to bar LECs from charging for the delivery of LEC-originated intraMTA, intraLATA traffic to the paging carrier’s POC. Unlike TSR Wireless, this case does not involve Qwest’s refusal to provide the delivery of intraMTA, intraLATA traffic that Qwest originates to Mountain’s POC. Rather, the charges in question are for an optional service that is

³⁸ As with transiting traffic, the Commission found unpersuasive Mountain’s claim that permitting Qwest to charge for the dedicated toll facilities would result in “double recovery.” 17 FCC Rcd at 15139 (¶ 7) (J.A.). The Commission found that Qwest is unable to recover the costs of those facilities through reciprocal compensation charges and that Mountain provided no evidence that Qwest recovers its transport costs for those facilities from another source. 17 FCC Rcd at 15139 (¶ 7) (J.A.).

designed to reduce significantly the toll charges that Qwest otherwise would collect from its own end-users for calling Mountain's subscribers. Because these optional facilities qualify as a wide area calling arrangement under TSR Wireless, section 51.703(b) does not bar Qwest from charging Mountain for them.

2. The Commission reasonably upheld Qwest's charges for transiting traffic. The Commission in TSR Wireless and in subsequent decisions repeatedly has upheld the lawfulness of LECs' charges for the delivery of transiting traffic. The Commission reasonably followed precedent in adjudicating Mountain's complaint without considering alternative approaches. Indeed, the Commission's responsibility as an adjudicator is to decide a complaint under the law in effect at the time of the complaint. Qwest relied upon the policy established in TSR Wireless and its progeny in charging Mountain for the delivery of transiting traffic. It was reasonable for the Commission not to consider applying a new policy retroactively in this adjudication.

The Commission's policy on transiting charges is reasonable and consistent with cost-causation principles. Mountain offers – and charges its subscribers for – the ability to receive messages between a calling party's premises and Mountain's subscriber's pager. The transiting traffic is a necessary part of the service Mountain provides to its end-users. In contrast, transiting traffic is not part of any service that Qwest offers to its subscribers. The Commission's determination that Qwest lawfully charged Mountain for transiting traffic does not violate principles of cost causation.

The Court should not consider the intervenors' claim that Qwest's charges for transiting traffic violate section 51.709(b). Mountain did not raise a section 51.709(b) issue on review, and the intervenors may not present issues not raised by the petitioner. If the Court reaches the section 51.709(b) issue, it should reject the intervenors' claim. By its express language section

51.709(b) is limited to traffic between "two carriers' networks," and transiting traffic, by definition, is the transport of traffic among at least three carriers' networks. Moreover, the construction of section 51.709(b) advanced by the paging carriers is inconsistent with agency precedent.

3. The Court lacks jurisdiction to consider Mountain's claim that the Commission erred in not providing an explanation for its statement in footnote 13 of the Order that a terminating carrier may seek reimbursement for transiting costs from originating carriers through reciprocal compensation. Because Mountain did not raise any argument about footnote 13 in a petition for reconsideration before the agency, section 405 bars the Court from considering it. Mountain also has not shown how it is injured by footnote 13 and thus has no standing to challenge it. Furthermore, the Court's subject-matter jurisdiction to review agency orders does not extend to the review of non-decisional statements such as the one in footnote 13. If the Court considers the issue, it should reject Mountain's argument. While the Commission has a duty to justify its orders, it is under no obligation to provide an explanation for every statement set forth in its written decisions.

STANDARD OF REVIEW

To prevail on review, Mountain must show that the Order is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the court presumes the validity of agency action. E.g., Davis v. Latschar, 202 F.3d 359, 365 (D.C. Cir. 2000). The court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment. E.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-16 (1971).

The Court's review of an agency's interpretation of its own regulations is "particularly deferential." Davis, 202 F.3d at 365.³⁹ The Court must "give 'controlling weight' to the Commission's interpretation of its own regulation 'unless it is plainly erroneous or inconsistent with the regulation.'"⁴⁰ Deference to the expert agency's interpretation "is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994) (internal quotations omitted.).

ARGUMENT

I. **THE COMMISSION REASONABLY HELD THAT QWEST HAD LAWFULLY CHARGED MOUNTAIN FOR FACILITIES USED IN A FORM OF WIDE AREA CALLING.**

A. **The Charges Challenged In This Case Are For Dedicated Toll Facilities That Are Part Of A Wide Area Calling Arrangement.**

TSR Wireless established that section 51.703(b) does not prohibit LECs from charging paging carriers for facilities used in wide area calling "or similar services." 15 FCC Rcd at 11166, 11184 (¶¶ 1, 30). Wide area calling or equivalent services as described in TSR Wireless have two characteristics. First, they are optional services that are "not necessary for interconnection or for the provision of [a paging carrier's] service to its customers." 15 FCC Rcd at 11184 (¶ 30). Second, these services have a toll suppression function that, at the expense

³⁹ See also Omnipoint Corp. v. FCC, 78 F.3d 620, 631 (D.C. Cir. 1996), quoting National Medical Enterprises v. Shalala, 43 F.3d 691, 697 (D.C. Cir. 1995).

⁴⁰ Biltmore Forest Broadcasting FM, Inc. v. FCC, 321 F.3d 155, 160 (D.C. Cir. 2001), quoting High Plains Wireless L.P. v. FCC, 276 F.3d 599, 607 (2002).

of the originating LEC, provides benefits to the paging carrier by enabling the paging carrier to “buy down’ the cost of . . . toll calls to make it appear to end users that they have made a local call rather than a toll call.” 15 FCC Rcd at 11184 (¶ 30). By eliminating the toll charges, Mountain makes its paging service more attractive to its own subscribers, who may expect to receive more calls because they are free to the callers. As shown below, the arrangement by which Mountain acquires DID numbers from Qwest in Pueblo, Walsenburg and Colorado Springs and obtains dedicated toll facilities from Qwest connecting these DID numbers to its sole point of connection POC in Pueblo has both characteristics of a wide area calling or equivalent service. See Order, 17 FCC Rcd at 15137-39 (¶¶ 4-6) (J.A.).

It is conceded that this arrangement is not necessary for interconnection or for Mountain’s provision of paging service.⁴¹ The record shows that Qwest offers Mountain a variety of interconnection configurations for the termination of traffic to Mountain’s customers.⁴² Some of these options provide for the free delivery of intraLATA calls placed by Qwest’s subscribers through any POC (or multiple POCs) that Mountain selects within the MTA.⁴³ For example, Qwest offers to deliver without charge all calls placed by its subscribers within the LATA through Mountain’s Pueblo POC, so long as Mountain obtains and uses DID numbers for its subscribers from the closest central office to that POC.⁴⁴ Thus, if Mountain obtained Pueblo

⁴¹ See Staff Order, 17 FCC Rcd at 2079 (¶ 13) (J.A.).

⁴² See, e.g., Qwest July 2000 Letter at 3 (J.A.); Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) (J.A.).

⁴³ Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A.).

⁴⁴ Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A.).

DID numbers and assigned them to all of its subscribers, calls to those subscribers would not generate charges to Mountain. As another option, if Mountain were to establish a separate POC in Walsenburg “for its paging subscribers that prefer a Walsenburg telephone number, and a third POC in Colorado Springs for its paging subscribers that prefer a Colorado Springs telephone number,” “[e]ach of these POCs and the delivery of all local calls to these POCs by Qwest would be free.”⁴⁵

Mountain’s arrangement with Qwest also satisfies the second criterion of a wide area calling service because it eliminates some intraLATA toll charges that Qwest otherwise could collect from its own customers who call Mountain’s paging subscribers. This arrangement permits Mountain – with a single POC in Pueblo – to “obtain telephone numbers rated in each exchange [Colorado Springs, Pueblo and Walsenburg] so Qwest customers in one local calling area can avoid toll charges when calling a Mountain customer located in the same calling area.” Petitioner’s Brief at 10. This is so even though the calls in many cases would pass from one calling area to another (Pueblo) in order to reach the called paging customer through Mountain’s single POC in Pueblo. Under many state regulatory policies, LECs ordinarily impose toll charges on calls that originate in one service area and terminate in another. Mountain’s arrangement enables the paging carrier to “ensure[] that calls to the DID numbers in each of the relevant Qwest central offices appear local and involve no toll charges to callers in those areas.” Order, 17 FCC Rcd at 2097 (¶ 13) (J.A.).⁴⁶

⁴⁵ Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 2 (¶ 4) (J.A.).

⁴⁶ See Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A.).

Mountain claims that its arrangement with Qwest is not a form of wide area calling as defined by TSR Wireless. Mountain first contends that the arrangement here cannot be a wide area calling service because “there is no record evidence to support” the Commission’s finding that this arrangement prevents Qwest from charging its customers “for what would ordinarily be toll calls to access Mountain’s network.” Petitioner’s Brief at 38, quoting Order, 17 FCC Rcd at 15139 (¶ 5) (J.A.). Mountain’s claim that the Commission’s finding lacks evidentiary support is simply wrong. Substantial record evidence shows that Mountain’s arrangement enables Qwest end-users outside of the Pueblo service area to avoid toll charges they otherwise would pay when they call Mountain subscribers physically located in the same local calling area.⁴⁷ By acquiring DID numbers in Colorado Springs and Walsenburg and dedicated toll facilities connecting those numbers to its POC in Pueblo, Mountain enables that Qwest customers in Colorado Springs and Walsenburg to avoid toll charges when calling Mountain subscribers located within the same exchange.

Contrary to Mountain’s assertion, the fact that “Qwest is free to impose toll charges if a customer in one of its local calling areas (e.g., Colorado Springs) calls a Mountain customer in a different local calling area (e.g., Pueblo)” does not undercut the Commission’s finding that its arrangement is a form of wide area calling. Petitioner’s Brief at 38. Nothing in TSR Wireless states that a wide area calling or equivalent service must eliminate all toll charges. The Commission reasonably construed TSR Wireless to classify as a form of wide area calling an optional arrangement that “allows a paging carrier to subsidize the cost of calls from a LEC’s

⁴⁷ See, e.g., Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) (J.A.); “Qwest Corporation’s Opposition to Mountain’s Petition for Reconsideration of Memorandum Opinion and Order” (Mar. 18, 2002) at 6 (J.A.).

customers to the paging carrier's customers," even if the arrangement does not eliminate all toll fees. Order, 17 FCC Rcd at 15137 (¶ 5) (J.A.). See TSR Wireless, 15 FCC Rcd at 11184 (¶ 30).

Mountain asserts that calls to DID numbers associated with the Walsenburg or Colorado Springs central office are charged as local calls whenever they are placed by persons calling from Walsenburg or Colorado Springs. Although its argument is not clear, Mountain apparently contends that the Commission erred in finding that its arrangement is a wide area calling service that suppresses toll calling because calls that originate and terminate in the same local calling area should not be subject to toll charges. As noted above, however, Mountain's arrangement provides Mountain with DID numbers associated with the Walsenburg or Colorado Springs central office and the dedicated facilities used to transport messages to those numbers from Mountain's POC in Pueblo and this, in turn, enables Qwest end-users located in Walsenburg and Colorado Springs to avoid toll charges when calling Mountain subscribers. Although Mountain's arrangement with Qwest provides a different form of toll suppression from one that directly affects the rates of individual calls, that fact does not undercut the reasonableness of the Commission's determination that Mountain's arrangement is a form of wide area calling.

Equally unavailing is Mountain's claim that its arrangement cannot be a form of wide area calling because Mountain did not order the specific reverse billing arrangement denominated as "wide area calling" in Qwest's intrastate tariff.⁴⁸ The Commission in TSR Wireless stated explicitly that LECs, consistent with section 51.703(b), were entitled to charge

⁴⁸ "A 'reverse billing arrangement' is one in which the LEC assesses a per minute usage charge to the CMRS carrier, in place of a toll charge to the originator of the call." Order, 17 FCC Rcd at 15137 n.18 (J.A.).

paging carriers for “‘wide area calling’ or similar services.” 15 FCC Rcd at 11166, 11184 (¶¶ 1, 30). The language of TSR Wireless itself establishes that the category of “‘wide area calling’ or similar services” for which LECs can charge paging carriers is broader than the specific reverse billing arrangement in Qwest’s Colorado tariff. As the Commission explained, a “reverse billing arrangement is only one of several types of wide area calling services.” Order, 17 FCC Rcd at 15138 (¶ 5) (J.A.).⁴⁹

Finally, Mountain argues that the Order is arbitrary because it “remove[s] the ability of a CMRS carrier to maintain a single point of interconnection within a LATA.” Petitioner’s Brief at 39. According to Mountain, “a CMRS carrier will need a point of interconnection in each local calling area to avoid incurring facilities charges imposed upon it by a LEC.” Id. In fact, the evidence of record shows that the Order has no effect on Mountain’s ability, if it chooses, both to maintain its single POC in Pueblo and to obtain “free interconnection facilities for all calls placed by Qwest customers within the LATA.”⁵⁰ In that case, an end user outside the Pueblo local services area would incur toll charges on calls delivered by Qwest to Mountain’s POC in Pueblo, which is why the arrangement with Mountain includes a toll suppression feature.

⁴⁹ Mountain also claims that its arrangement cannot reasonably be classified as a form of wide area calling service because Mountain uses a Type 1 rather than a Type 2 interconnection. E.g., Petitioner’s Brief at 39. The Commission in TSR Wireless described wide area calling or similar services as optional services with a toll suppression function, not as services that conformed to specific technical characteristics. Nothing in TSR Wireless or any other Commission decision suggests that the category of “‘wide area calling’ or similar services” (15 FCC Rcd at 11166, 11184 (¶¶ 1, 30)) is limited to services that use a Type 2 interconnection or have other specific technical characteristics.

⁵⁰ Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A.).

As noted above, Mountain made a business decision to acquire a specific type of network configuration in which it obtains DID numbers in Colorado Springs, Walsenburg and Pueblo and obtains dedicated toll facilities connecting these DID numbers to its single POC in Pueblo. Although that particular configuration includes a form of wide area calling, Mountain retains the option of reconfiguring its network to eliminate the wide area calling feature and its associated charges. For example, “Mountain is free to cancel both the DID numbers [associated with the Colorado Springs and Walsenburg central offices] and the dedicated toll facilities connecting those DID numbers to Mountain’s single point of connection.” Order, 17 FCC Rcd at 15139 (¶ 6) (J.A.). Qwest then would supply Mountain with DID numbers from its central office in Pueblo and would deliver all calls originated by its end users in the LATA to Mountain’s single POC at no charge.⁵¹

Mountain thus is wrong in suggesting that the charges in question are a result of its election to establish a single POC. Rather, the charges are attributable to Mountain’s business decision to maintain a network arrangement – including the single POC, but also including DID numbers from three central offices and dedicated toll facilities connecting those offices with the single POC – that incorporates wide area calling.

B. The Commission Reasonably Found That Qwest’s Charges to Mountain Were Not Traffic Or Facilities Charges Proscribed By Section 51.703(b) And TSR Wireless.

The Commission in TSR Wireless interpreted section 51.703(b) to prohibit a LEC from assessing charges for delivering intraLATA traffic originated on its network to the POC (or

⁵¹ Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A.).

POCs) selected by the paging carrier. TSR Wireless, 15 FCC Rcd at 11176 (¶ 18). The Commission also construed section 51.703(b) to forbid a LEC from requiring paging carriers to pay for such delivery “by merely re-designating the ‘traffic’ charges as ‘facilities’ charges.” 15 FCC Rcd at 11181 (¶ 25). Neither section 51.703(b) nor any other rule prohibits a LEC from assessing charges for optional wide area calling or similar services. 15 FCC Rcd at 1183-84 (¶¶ 30-31).

The Commission in this case reasonably concluded that the challenged charges were not delivery or facilities charges proscribed by section 51.703(b) and TSR Wireless. It is undisputed that Qwest offered Mountain – and continues to offer Mountain – the delivery of all intraMTA, intraLATA calls from Qwest end-users to Mountain’s POC free of charge.⁵² Where Mountain does not procure an optional wide area calling arrangement that reduces the toll charges Qwest assesses on its own customers, Qwest is required by the rule to transport for free every intraMTA, intraLATA call made by a Qwest end-user directly to Mountain’s POC.

In contrast to TSR Wireless, this case does not involve Qwest’s refusal to provide free delivery of intraLATA traffic that it originates to the paging carrier’s POC in violation of section 51.703(b). Rather, this case involves Qwest’s charges for dedicated toll facilities as part of an optional wide area calling arrangement that has the effect of suppressing certain toll charges that Qwest otherwise would collect from its own end-users. The Commission in TSR Wireless established that section 51.703(b) does not forbid LECs to charge for that type of arrangement. The Commission’s interpretation of section 51.703(b) in this case is consistent with the relevant

⁵² See Qwest July 2000 Letter at 3 (J.A.); Qwest Corporation’s Brief on the Disputed Material Issues at 11 & Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A.). Under this option, Mountain would obtain from Qwest DID numbers associated with the central office closest to Mountain’s POC.

administrative precedent, including TSR Wireless. Indeed, Qwest revised its billing and interconnection practices explicitly to comply with TSR Wireless.⁵³

The paging companies argue that the technical features of Mountain's arrangement in this case are "identical in all material respects" to the arrangement in TSR Wireless, except for the length of the dedicated lines. Petitioner's Brief at 32. See Paging Carriers Intervenors' Brief at 13-14. Because the Commission held that some of Qwest's charges in TSR Wireless were unlawful facilities fees, the paging carriers argue that the Commission departed from administrative precedent in not concluding that Qwest's charges in this case also were proscribed facilities charges.

The Commission recognized that "the network configuration discussed in the TSR Wireless Order is similar to Mountain's arrangement with Qwest," but it explained in detail why the technical similarities were not decisionally significant. Order, 17 FCC Rcd at 15138 (¶ 6) (J.A.). TSR Wireless establishes that LECs cannot charge for facilities that are necessary for the delivery of Qwest-originated intraLATA traffic. The charges in this case, however, are for an optional arrangement that is "not necessary to effectuate interconnection." Order, 17 FCC Rcd at 15139 (¶ 6) (J.A.). Qwest gave Mountain the option of receiving free delivery of all intraLATA calls originated by its end-users, and required Mountain to pay only for an optional configuration that effectively reduced Qwest's own toll revenues and enhanced the value of Mountain's services to its subscribers. The Commission reasonably explained why it classified the charges in this case as permissible wide area calling fees rather than as unlawful facilities charges.

⁵³ See Qwest July 2000 Letter (J.A.).

The paging carriers in large part fail to mention – let alone attempt to refute – the Commission’s reasons for distinguishing Qwest’s charges in this case from the facilities charges found unlawful in TSR Wireless. Although “an agency may not ‘treat like cases differently,’”⁵⁴ it is not arbitrary for the Commission, as it did here, to consider the differences between the case before it and a prior ruling, and to explain the reasons for reaching different conclusions. See, e.g., Melcher v. FCC, 134 F.3d 1143, 1150 (D.C. Cir. 1998).

C. The Paging Carriers’ Contention That The Commission Erred By Ignoring The Virginia Arbitration Order Is Not Properly Before the Court, And Is Without Merit In Any Event.

The paging carriers claim that the Order is inconsistent with the Virginia Arbitration Order, an almost contemporaneous interlocutory staff ruling that addresses the terms and conditions of interconnection agreements between Verizon Virginia and three competitive LECs.⁵⁵ Several parties filed applications for review of the Virginia Arbitration Order with the Commission, and one hotly contested issue in that pending administrative proceeding is whether the staff decision is consistent with the Order in this case.⁵⁶ The Commission has not yet ruled on the merits of this issue (or indeed more generally on whether the Virginia Arbitration Order reflects agency policy). Appellate counsel thus take no position on whether that staff decision

⁵⁴ Freeman Engineering Associates v. FCC, 103 F.3d 169, 178 (D.C. Cir 1997), quoting Airmark Corp. v. FAA, 758 F.2d 685, 691 (D.C. Cir. 1985).

⁵⁵ Petition of WorldCom, 17 FCC Rcd 27039 (WCB, 2002), petitions for reconsideration and applications for review pending (“Virginia Arbitration Order”).

⁵⁶ See, e.g., “Verizon’s Application for Review of the Wireline Competition Bureau’s October 8, 2002 Order Approving the Interconnection Agreements,” CC Docket No. 00-249, Petition of Cox Virginia Telcom (filed August 16, 2002) at 15-19; “Opposition of Cox Virginia Telecom, Inc.,” CC Docket No. 00-249, Petition of Cox Virginia Telcom (filed Sept. 10, 2002) at i-ii, 10-12.

was correct. The Court can and should resolve this case without addressing the merits of the paging carriers' claim that the Order is inconsistent with the Virginia Arbitration Order. The Court lacks jurisdiction to consider that argument, and, in any event, the Commission is not required to conform its decisions with a decision of its staff.

Section 405 of the Communications Act bars judicial review of issues of law or fact on which the Commission "has been afforded no opportunity to pass." 47 U.S.C. § 405.⁵⁷ By requiring a litigant to raise an argument before the Commission as a condition precedent to judicial review, section 405 provides the agency with "an opportunity to cure any defect" in its order.⁵⁸ Because Mountain did not argue in this case, in a petition for reconsideration or in any other pleading,⁵⁹ that the Commission had an obligation to issue a ruling that was consistent with the Virginia Arbitration Order, section 405 denies the Court jurisdiction to consider that argument on review.

Even if the issue were properly before the Court, the paging companies are wrong in claiming that the Commission had a legal obligation to adhere to the Virginia Arbitration Order or to justify a departure from its staff's ruling. "It is well established that 'the positions of an agency's staff do not preclude the agency from subsequently reaching its own conclusion.'" MacLeod v. ICC, 54 F.3d 888, 891 (D.C. Cir. 1995), quoting San Luis Obispo Mothers for Peace

⁵⁷ See, e.g., United States Cellular Corp. v. FCC, 254 F.3d 78, 83 (D.C. Cir. 2001).

⁵⁸ Freeman Engineering Associates, Inc. v. FCC, 103 F.3d 169, 181 (D.C. Cir. 1997). See FTC Communications, Inc. v. FCC, 750 F.2d 226, 231 (D.C. Cir. 1984); Rogers Radio Communications Services v. FCC, 593 F.2d 1225, 1229 (D.C. Cir. 1978).

⁵⁹ While the Virginia Arbitration Order was decided after the pleadings had been filed in the administrative pleading below, Mountain could have brought the issue to the Commission's attention in a petition for reconsideration of the Order.

v. NRC, 789 F.2d 26, 34 (D.C. Cir.) (en banc), cert. denied, 479 U.S. 923 (1986).⁶⁰ Staff rulings such as the Virginia Arbitration Order thus are “irrelevant to [the Court’s] analysis of the Commission’s fidelity to its own precedents.” Id. See Community Care Foundation v. Thompson, 318 F.3d at 227. This Court has emphasized that the FCC does not depart from precedent merely because it does not adhere to the decisions of “a subordinate body of the Commission.” Amor Family Broadcasting Group v. FCC, 918 F.2d 960, 962 (D.C. Cir. 1991). Just as this Court is not bound by the decisions of the federal district courts, the Commission is not bound by the decisions of its staff.⁶¹

Application of this principle is even more compelling where, as here, the staff order itself remains subject to further agency review. The Commission not only has not endorsed the Virginia Arbitration Order, but it is currently considering whether to vacate, modify or affirm it. It would be anomalous for the Court to require the Commission to adhere to a staff ruling while the agency is considering whether to affirm or overturn it on direct review. Such a ruling would

⁶⁰ See generally Community Care Foundation v. Thompson, 318 F.3d 219, 227 (D.C. Cir. 2003) (“[T]here is no authority for the proposition that a lower component of a government agency may bind the decision making of the highest level”).

⁶¹ See Serono Laboratories, Inc. v. Shalala, 158 F.3d 1313, 1320 (D.C. Cir. 1998), quoting San Luis Obispo Mothers For Peace v. NRC, 789 F.2d at 33 (“position of an agency’s staff, taken before the agency itself decided the point, does not invalidate the agency’s subsequent application and interpretation of its own regulation”). Cf. Wood v. Thompson, 246 F.3d 1026, 1034 (7th Cir. 2001) (agency not bound by decision of administrative law judge).

interject the Court prematurely into an ongoing administrative proceeding and have a disruptive effect on the ongoing administrative process.⁶²

D. The Paging Carriers' Claim That The Commission Failed To Follow Required Procedures Is Not Properly Before The Court, And In Any Event It Lacks Merit.

Mountain and its supporting intervenors argue that the Order is procedurally defective because the Commission effectively repealed section 51.703(b) without employing the notice and comment procedures set forth in section 4 of the Administrative Procedure Act, 5 U.S.C. § 553. Because that procedural argument was never raised before the Commission, section 405 bars the Court from considering it on review. See Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1169-71 (D.C.Cir.1994) (section 405 bars petitioner from arguing for the first time on review that the FCC violated APA notice and comment requirements); City of Brookings Municipal Telephone Co. v. FCC, 822 F.2d 1153, 1163 (D.C.Cir.1987) (same).

In any event, the paging carriers are wrong in claiming that the Order effectuated a de facto repeal of section 51.703(b). The Commission in its Order adjudicated Mountain's complaint that Qwest had violated section 51.703(b). In the course of that adjudication, the Commission interpreted section 51.703(b) not to prohibit the challenged charges because they were assessed for an optional wide area calling service, rather than for the delivery of LEC-

⁶² The argument that the Commission should have considered the Virginia Arbitration Order "precedent" also is undercut by the sequence of the decisions. The Staff Order in this case was released on February 4, 2002, more than five months before the Virginia Arbitration Order was released on July 17, 2002. The Commission's Order in this case was released on July 25, 2002 – just five days after the staff released the Virginia Arbitration Order. There is no reason to assume that the Commission itself was even aware of the staff's Virginia Arbitration Order when it adopted and released its Order in this case. In these circumstances, the requirement of section 405 that the agency have the opportunity in the first instance to address an issue is particularly compelling.

originated intraLATA traffic. The Commission's ruling thus construed and applied section 51.703(b); it did not repeal that regulation. Section 51.703(b) remains fully in effect and continues to prohibit LECs from imposing charges on paging carriers for facilities necessary for the delivery of LEC-originated intraMTA, intraLATA traffic. Although the paging carriers may not agree with the way the Commission construed and applied section 51.703(b), their disagreement does not transform this section 208 adjudication into a procedurally defective rulemaking. See Everett v. United States, 158 U.S. F.3d 1364 (D.C. Cir. 1998).

II. THE COMMISSION REASONABLY UPHELD QWEST'S CHARGES FOR TRANSITING TRAFFIC.

A. The Commission's Decision Is Consistent With Administrative Precedent.

The Commission has made clear that "paging carriers themselves must pay . . . for 'transiting traffic.'" See Qwest Corp., 252 F.3d at 468. Before Mountain filed its complaint, the Commission in TSR Wireless explicitly had declared that its rules permit the LECs to charge paging carriers for the transport of transiting traffic. 15 FCC Rcd at 11177 n.70. In subsequent complaint orders, the Commission has reaffirmed that it is lawful for LECs to assess such charges on paging carriers. Metrocall Order, 16 FCC Rcd 18123; Metrocall Reconsideration, 17 FCC Rcd 4781; Texcom Order, 16 FCC Rcd at 21494 (¶ 4); Texcom Reconsideration, 17 FCC Rcd 6275. The Commission consistently has denied every complaint filed by a paging carrier challenging the lawfulness of LECs' charges for delivering transiting traffic.

The paging carriers do not deny that TSR Wireless and its progeny upheld LEC charges to paging carriers for transiting traffic. Mountain acknowledges that the Commission declared that "[c]omplainants [paging carriers] are required to pay for 'transiting traffic.'" Mountain Brief at 41, quoting TSR Wireless, 15 FCC Rcd at 11177 n.70. The paging carriers argue instead

that TSR Wireless and the Texcom orders – the paging carriers ignore the Metrocall orders – were wrongly decided. Mountain Brief at 41-42; Paging Carriers Intervenor Brief at 22. That argument is not properly before the Court and in any event lacks merit.

The Court lacks jurisdiction to entertain the paging carriers' collateral challenge to the Texcom orders and TSR Wireless. Mountain's petition for review invokes the Court's jurisdiction to review the Order, not prior Commission decisions that have been affirmed (TSR Wireless) or were not challenged in Court within the 60 day period prescribed by the Hobbs Act (Texcom). See 28 U.S.C. §§ 2342(a), 2344; 47 U.S.C. § 402(a). The paging carriers' claims that the Texcom orders and TSR Wireless are "unexplained," "without legal support," or "incompatible with cost causation principles" thus are not properly before the Court. See Mountain Brief at 42; Paging Carriers Intervenors' Brief at 22.

In any event, the paging carriers' challenge to the Commission's adherence to administrative precedent in adjudicating Mountain's complaint can only be characterized as frivolous. The Commission, in section 208 adjudications, "has an obligation to decide the complaint under the law currently applicable." AT&T Corp. v. FCC, 978 F.2d 727, 732 (D.C. Cir. 1992), cert. denied, 509 U.S. 913 (1992). See also American Message Centers v. FCC, 50 F.3d 35, 41 (D.C. Cir 1995). As Mountain acknowledges elsewhere, the Commission's duty as an adjudicator is "to apply existing rules and orders to the facts presented." Mountain Brief at 5. As shown above, the existing law – established by TSR Wireless and its progeny – permits LECs to charge paging carriers for the transport of transiting traffic.

Mountain and its supporting intervenors argue that it would be better for the Commission to bar LECs from charging paging carriers for transiting traffic and to permit the LECs to recover the costs of delivering that traffic from the originating carriers. Appellate counsel take no

position on whether the Commission should adopt that policy prospectively. The Commission is conducting a rulemaking to consider changes in its existing intercarrier compensation rules and policies, and the agency has not yet decided what changes, if any, it will implement.⁶³

The merits of the policy proposal advanced by the paging carriers, however, are irrelevant to the Court's disposition of this case. As noted above, the Commission adhered to existing law in adjudicating the section 208 complaints. Even if the Commission in the Order had been persuaded that the paging carriers' approach was preferable, it would have been inappropriate for the Commission to apply that new policy retroactively in this adjudication. The Court distinguishes between cases in which the agency adopts "a new policy for a new situation,"⁶⁴ and those that entail the "substitution of new law for old law that was reasonably clear."⁶⁵ In the latter situation, an agency may "protect the settled expectations of those who had relied" on the previous policy by giving the new policy "prospectively-only effect."⁶⁶ Indeed, as this Court has stated, "an agency may be prevented from applying a new policy retroactively to parties who detrimentally relied on the previous policy."⁶⁷ Qwest in charging Mountain for the transport of transiting traffic relied upon the policy established in TSR Wireless and its progeny, and the Commission reasonably adhered to that policy in this adjudication.

⁶³ Developing a Unified Intercarrier Compensation Regime, 16 FCC Rcd 9610 (2001) ("Intercarrier Compensation NPRM").

⁶⁴ Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1554 (D.C. Cir. 1993), quoting New England Telephone, 826 F.2d 1101, 1110 (D.C. Cir. 1987).

⁶⁵ Verizon Telephone Cos. v. FCC, 269 F.3d 1098, 1109 (D.C. Cir. 2001), quoting Williams Natural Gas, 3 F.3d at 1554.

⁶⁶ Public Service Company of Colorado v. FERC, 91 F.3d 1478, 1488 (D.C. Cir. 1996), quoting Williams Natural Gas, 3 F.3d at 1554.

⁶⁷ New England Telephone Co. v. FCC, 826 F.2d 1101, 1110 (D.C. Cir. 1987).

**B. The Commission's Policy Is Reasonable
And Consistent With Agency Regulations.**

Mountain argues that permitting LECs to charge paging carriers for transiting traffic defies "simple economic logic" and "contravenes cost-causation principles." Mountain Brief at 41, 42. According to Mountain, the costs associated with that traffic result from the "unilateral demands of the originating carrier," and should be recovered from that carrier. Mountain Brief, at 43.

Both Mountain and the originating LEC provide a communications service between the premises of the calling party and the pager of Mountain's subscriber. The originating LEC charges its subscribers for the ability to send messages to the pagers of Mountain's customers, and Mountain charges its subscribers for the ability to receive those messages.⁶⁸ The transiting traffic thus is an essential component of the end-to-end service that Mountain provides to its customers.

In contrast, transiting traffic is not part of any service that Qwest offers to its end-users. "[T]he only relationship between the [transiting] LEC's customers and the call is the fact that the call traverses the LEC's network on its way to the terminating carrier." Texcom Order, 16 FCC Rcd at 21495 (¶ 6). As between Qwest and Mountain, Mountain is the cost-causer, *i.e.*, the carrier responsible for the transiting traffic. The Commission's determination that Qwest lawfully charged Mountain for the transport of transiting traffic thus is consistent with "cost-causation principles" and economic logic. The Commission recognizes that other legitimate

⁶⁸ Petitions of Sprint and AT&T Corp., 17 FCC Rcd at 13199 (¶ 14). See CMRS Calling Party Pays Service Offering, 14 FCC Rcd 10861 (¶ 2) (1999) ("[T]he presubscribed customer of a CMRS provider – the 'called party' – generally pays all charges associated with incoming calls."). The Commission has stated that CMRS carriers do not strictly follow a calling party pays regime because those carriers "typically still charge their subscribers for incoming calls." Id. at 9624 n.54.

compensation schemes could be devised. The existence of other reasonable approaches, however, does not make the Commission's policy choice arbitrary and capricious.

Finally, Mountain argues cryptically that the Order "appears inconsistent" with unspecified "FCC intercarrier rules." Mountain Brief at 40. Mountain apparently contends the Commission's rules require a Calling Party Network Pays ("CPNP") approach for all types of carrier interconnection.⁶⁹ That contention is incorrect. Although CPNP is one approach to intercarrier compensation, it is not the only approach sanctioned by the Commission's regulations.⁷⁰ As the Commission has made clear, the intercarrier compensation rules "allow a LEC to charge a paging carrier for traffic that transits the LEC's network and terminates on the paging carrier's network as long as the traffic does not originate on the LEC's network."

Texcom Order, 16 FCC Rcd at 21495 (¶ 5).

C. The Intervenors' Argument That Qwest's Charges For Transiting Traffic Violate Section 51.709 Is Not Properly Before The Court And In Any Event Is Without Merit.

The paging carrier intervenors make a separate argument not raised by Mountain on review: that the Commission erred in not interpreting section 51.709(b) to bar Qwest from charging Mountain for the transport of transiting traffic. See 47 C.F.R. § 51.709(b). Paging Carriers Intervenors' Brief at 22-24. The Court should not permit the intervenors to raise an

⁶⁹ Under a CPNP regime, the calling party's carrier compensates the called party's carrier for terminating the call. Inter-carrier Compensation NPRM, 16 FCC Rcd at 9614 (¶ 9).

⁷⁰ See Inter-carrier Compensation NPRM, 16 FCC Rcd at 9613 (¶ 5). Recognizing that its "complex system of intercarrier compensation regulations . . . treat[s] different types of carriers and different types of services disparately," the Commission instituted a proceeding to revise its rules to establish a "unified approach to intercarrier compensation." 16 FCC Rcd at 9612, 9613 (¶¶ 2, 5)

issue that the petitioner did not raise. If the Court entertains the argument, however, it should find no inconsistency between the Order and section 51.709(b).

The Supreme Court has observed that “one of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues.” Vinson v. Washington Gas Co., 321 U.S. 489, 498 (1944). In the absence of an “extraordinary case[]”⁷¹ of the sort not presented here, the Court will refuse to permit intervenors to argue issues not presented by the principal parties.⁷² Although Mountain argued before the Commission that Qwest’s charges for transiting traffic violated section 51.709(b), Mountain has chosen not to pursue that issue on review.⁷³ Mountain’s opening brief does not even mention section 51.709(b), let alone argue that the Commission

⁷¹ National Association of Regulatory Utility Commissioners v. ICC, 41 F.3d 721, 730 (D.C. Cir. 1994).

⁷² E.g., Louisiana Public Service Commission v. FERC, 174 F.3d 218, 224 n.5 (D.C. Cir. 1999); SBC Communications v. FCC, 56 F.3d 1484, 1489-90 (D.C. Cir. 1995). Illinois Bell Telephone Co. v. FCC, 911 F.2d 776, 786 (D.C. Cir. 1990).

⁷³ Mountain may not resurrect the section 51.709(b) issue by presenting it in its reply brief. The Court will not consider an argument raised by a party on review for the first time in a reply brief. See, e.g., Kimberlin v. Department of Justice, 318 F.3d 228, 232 n.2 (D.C. Cir. 2003); Benkelman Telephone Co. v. FCC, 220 F.3d 601, 607 n.10 (D.C. Cir. 2000).

misconstrued that rule. The Court should not permit the intervenors to expand the scope of this review proceeding.⁷⁴

In any event, the Commission reasonably interpreted section 51.709(b) not to prohibit Qwest from charging Mountain for the transport of transiting traffic. Both the language of the rule and administrative precedent support that construction.

Section 51.709(b) provides that “the rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers’ networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier’s network.”⁷⁵ Transiting traffic, however, always involves the transport of traffic among at least three carriers’ networks: the originating carrier, the transiting carrier(s) and the terminating carrier. The text of section 51.709(b) thus does not address transiting traffic.

The intervenors contend that section 51.709(b) “on its face” precludes Qwest from charging for traffic it delivers “to Mountain from a third carrier.” Paging Carrier Intervenors’ Brief at 23. Under well-established law, however, a statute or regulation “must, if possible, be

⁷⁴ The intervenors in seeking leave to file a separate brief told the Court that “it appears that the particular interconnect architecture utilized by Mountain and Qwest is substantially different from that used by most” intervenors. “Joint Submission By Petitioner and Petitioner-Intervenors Regarding Proposed Briefing Format,” (Dec. 19, 2002) at 3. The intervenors stated that a separate brief would enable them to argue that “the principles announced in the Mountain Orders should not be applied to their own interconnection situations.” *Id.* at 4. In their separate brief, however, the intervenors assert that “Mountain’s interconnection arrangement with Qwest is similar to arrangements between many wireless carriers and incumbent LECs.” Paging Carriers Intervenors’ Brief at 5. *See also id.* at 17 (“[T]he Mountain/Qwest arrangement is no different from that which exists whenever a CMRS carrier establishes a single interconnection point serving multiple local calling areas.”). The intervenors have not justified their attempt to enlarge the issues on review.

⁷⁵ 47 C.F.R. § 51.709(b) (emphasis added).

construed in such fashion that every word has some operative effect.”⁷⁶ The intervenor’s construction ignores the limiting phrase “between two carriers’ networks” in section 51.709(b), in violation of that principle of statutory and regulatory construction.

Moreover, the Commission’s construction comports with administrative precedent. The Commission in Texcom held that section 51.709(b) “governs the division of the cost of dedicated transition facilities between two carriers,” and thus “does not apply in the transiting traffic context, where the traffic . . . originates instead with a third carrier.” Texcom, 16 FCC Rcd at 21496 (¶ 8). The Commission in this case followed Texcom in rejecting the interpretation of section 51.709(b) advanced by the intervenors in this case. See also Qwest Corp. v. FCC, 252 F.3d at 468.

III. MOUNTAIN’S CLAIM THAT THE COMMISSION ERRED BY FAILING TO EXPLAIN HOW A TERMINATING CARRIER MAY BE REIMBURSED FOR TRANSITING COSTS IS NOT PROPERLY BEFORE THE COURT AND IN ANY EVENT HAS NO MERIT.

The Commission in footnote 13 of the Order observed that “a terminating carrier may seek reimbursement of [transiting] costs from originating carriers through reciprocal compensation.” Order, 17 FCC Rcd at 15137 n.13 (J.A.). Mountain argues that the Commission committed reversible error because it did not explain in this adjudication how such reimbursement would occur. Mountain also contends that footnote 13 is unworkable. For three independent reasons, the Court lacks jurisdiction to consider these arguments.

⁷⁶ Dole Food Co. v. Patrickso, 123 S.Ct 1655, 1661 (2003), quoting United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992).

First, Mountain did not bring to the Commission's attention any of the arguments about footnote 13 that it presents in its brief. Section 405 thus bars the Court from considering these arguments on review. See United States Cellular Corp. v. FCC, 254 F.3d at 83.

Second, Mountain lacks standing to challenge footnote 13. To establish standing, a litigant must establish that it suffers an actual or imminent injury that is fairly traceable to the challenged agency action and is likely to be redressed by a favorable decision. See, e.g., Vermont Agency of Natural Resources v. United States, 529 U.S. 765, 771 (2000). The Commission's general observation that terminating carriers may seek reimbursement of transiting traffic costs from originating carriers through reciprocal compensation does not even arguably subject Mountain to any actual or imminent harm.

Third, the Commission's non-decisional observation that terminating carriers "may seek" reimbursement of transiting costs from originating carriers is not within the Court's jurisdiction to review the agency's action. As the Supreme Court repeatedly has recognized, courts review "judgments, not statements in opinions."⁷⁷ The task of a federal appellate court thus is not to review an agency's observations in isolation, but rather to determine whether an alleged legal error "resulted in an erroneous judgment." Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842, reh. denied, 468 U.S. 1227 (1984). In FCC v. Pacifica Foundation, 438 U.S. 726, reh. denied, 439 U.S. 883 (1978), for example, the Supreme Court held that "general statements" in Commission adjudications that "do not change the character of its order" are unreviewable. 438 U.S. at 734.

⁷⁷ E.g., Johnson v. DeGrandy, 512 U.S. 997, 1003 n.5 (1994); California v. Rooney, 483 U.S. 307, 311, reh. denied, 483 U.S. 1056 (1987).

Congress codified this well-established restraint on the judicial reviewing power by authorizing the courts of appeals to review only Commission "orders." 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a). As this Court has held, the statutory term "order" operates as a limitation on the Court's subject-matter jurisdiction by denying review of non-decisional statements in Commission opinions. See American Telephone & Telegraph Co. v. FCC, 602 F.2d 401, 407 (D.C. Cir. 1979).

The Commission's statement in footnote 13 that terminating carriers "may seek" reimbursement of transiting traffic charges from originating carriers is not a part of the judgment reviewable by this Court. The Order adjudicated a complaint filed by Mountain against a single carrier, Qwest, alleging that Qwest unlawfully had assessed charges for the delivery of transiting traffic. The Order did not adjudicate Mountain's entitlement vel non to the reimbursement of transiting traffic charges from originating carriers. Indeed, Mountain in its complaint did not ask for such reimbursement. The Order did not adjudicate issues not raised in the complaint or determine the liability of parties not before it.

If the Court nonetheless reaches the issue, it should reject Mountain's claim that the Commission had a duty to explain how its reciprocal compensation rules would operate to permit a terminating carrier to seek reimbursement of transiting charges.⁷⁸ Although the Commission is required to articulate a rational basis for its decision, there is no requirement that it provide an explanation for non-decisional observations or statements contained in an order.

⁷⁸ Although Mountain complains that footnote 13 is unexplained and unworkable, it does not claim that the Commission was wrong in stating that "a terminating carrier may seek reimbursement of [transiting] costs from originating carriers." Order, 17 FCC Rcd at 15137 n.13 (J.A.). Indeed, Mountain told the Court that there is "no issue over the originating carrier's ultimate responsibility to pay for all transit charges." Mountain Brief at 39 (emphasis omitted).

Equally unpersuasive is Mountain's assertion that the alleged "reimbursement scheme" mentioned in footnote 13 is "unworkable" because Qwest does not "send Mountain the information it needs to identify and bill the originating carrier." Mountain Brief at 45. The Commission in footnote 13 observed generally that terminating carriers "may seek" reimbursement from originating carriers; it did not decide that Mountain necessarily is entitled to such reimbursement. That is hardly surprising, since the record evidence shows that Mountain had not paid Qwest's transiting traffic bills.⁷⁹ Mountain does not explain how it could obtain reimbursement for transiting traffic charges without paying those charges in the first instance. And, although Mountain complains that Qwest did not "send" it information on the identity of the originating carriers, Mountain does not claim that it asked Qwest for that information.⁸⁰

⁷⁹ Answer at iii, 36 (J.A.).

⁸⁰ There is no merit to Mountain's claim that the Commission's observation in footnote 13 conflicts with the staff's Virginia Arbitration Order, 17 FCC Rcd 27039. As shown in Section I.C., the Commission has no legal obligation to conform its judgments with staff decisions. A fortiorari the Commission does not err merely because dicta in a footnote allegedly "is inconsistent with the views of its . . . staff." Mountain Brief at 44.

CONCLUSION

The Court should deny the petition for review.

Respectfully submitted,

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June 19, 2003

In the United States Court of Appeals for the
District of Columbia Circuit

MOUNTAIN COMMUNICATIONS, INC.,

PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED
STATES OF AMERICA,

RESPONDENTS.

No. 02-1255

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13509 words.

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June 19, 2003

**Before the
Federal Communications Commission
Washington DC 20554**

In the Matter of)	
)	
Performance Measurements and Standards for Unbundled Network Elements and Interconnection)	CC Docket No. 01-318
)	
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance)	CC Docket No. 98-56
)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability)	CC Docket No. 98-147
)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling)	CC Docket Nos. 98-147, 96-98, 98-141

COMMENTS OF COVAD COMMUNICATIONS COMPANY

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Introduction

Covad Communications Company (Covad), by its attorney, hereby respectfully submits comments in support of the Notice of Proposed Rulemaking (Notice) seeking to adopt federal performance measures and standards and associated penalties to foster compliance with the market-opening provisions of section 251 of the Telecommunications Act of 1996 (1996 Act).¹ As the largest national provider of broadband services using digital subscriber line (DSL) technology, Covad is uniquely positioned to offer evidentiary support for the need to adopt clear, enforceable national rules requiring unbundled network elements (UNEs) and collocation to be provisioned in a timely and quality manner. For example, Covad is one of the largest, if not the largest, user of standalone² unbundled loops and linesharing UNEs in the nation. With over 350,000 customers, Covad has experience ordering hundreds of thousand of UNEs from all of the Bell Operating Companies.³

Because the services that Covad seeks to offer via those UNEs compete directly with the retail service offerings of the Bell companies that are required by law to make those UNEs available, Covad has also experienced rampant anticompetitive provisioning

¹ The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

² Non UNE-P loops, e.g.

³ Covad's comments address the legal and policy questions raised in the notice, and also propose specific performance metrics. Those performance metrics address the particular measures, business rules, and standards necessary to ensure nondiscriminatory UNE provisioning to Covad. Covad understands that Worldcom has undertaken a comprehensive and detailed metric analysis, including input from across the competitive LEC sector, and is proposing metrics to the Commission as a result of that effort. Covad applauds Worldcom's thorough undertaking and, to the extent they are consistent with metrics proposed by Covad, supports Worldcom's submission to the Commission. In particular, Covad supports the metrics proposed by Worldcom that address collocation, interconnection, billing, and other areas of competitive significance not addressed in Covad's proposed metrics. Because the provisioning of DSL-compatible loops and linesharing UNEs poses specific problems for Covad, Covad is submitting its own metrics to the Commission in order to provide a basis for adoption of metrics that address those problems. Covad's proposed metrics do not address any issues other than UNE loops and linesharing, and thus Covad endorses and supports Worldcom's metrics to the extent they address other metric categories. The Commission is well aware of the particular discrimination incumbent LECs have demonstrated against providers of DSL-

practices of the incumbent phone companies. Because the incumbents have both the incentive and ability to impede Covad's service offerings, and because that incentive and ability will not change until the incumbent LECs are structurally separated, only the regulatory process can ensure that incumbent LECs provide bottleneck network elements in a timely manner. This proceeding thus marks the next chapter in the process of unbundling the nation's embedded monopoly telecommunications network: ensuring that such unbundling is undertaken in a reasonable, timely, and quality manner.

This proceeding is not concerned with the question of the necessity of unbundled last mile connectivity to competitive entry. Indeed, in the very first paragraph of its Notice, the Commission states that it is seeking comments on measures that would attach to those network elements that "are critically important to ensuring that competitive LECs can enter the market for local exchange services as contemplated by the Telecommunications Act of 1996."⁴ As the Commission correctly points out in the Notice, the 1996 Act is "premised on the notion that federal and state regulators can and should promote competition by requiring incumbent LECs to provide inputs to other LECs so that the latter may compete with the incumbent for customers."⁵ There is no question that incumbent LECs do not have incentive to voluntarily cede market share to competitors – the regulatory process must impose such obligations. Because of the incentive and ability of the incumbent monopolists to "interpret" those obligations in such a way as to thwart competitive entry, the Commission has always been forced to delineate those obligations with great specificity (often repetitively). In other words, the

based services, given the incumbent carriers' ability and incentive to take anticompetitive action to shore up their own retail DSL offerings.

⁴ NPRM at ¶ 1.

⁵ NPRM at ¶ 2.

Commission merely stating an obligation to unbundle is not, of itself, sufficient to fulfill Congress' mandate to the Commission to "promote competition." More importantly it is insufficient to satisfy the Commission's affirmative statutory duty to "encourage the deployment" of broadband services.⁶

Recently released FCC statistics on the nationwide deployment of broadband service reveal two very clear trends – one good, and one bad.⁷ On the good side, it is clear that deployment of broadband services in the U.S. is exploding. The Commission found, based on carrier submissions of data, that high-speed ADSL service deployment grew by an amazing 435% in the year 2000.⁸ Further, the deployment is geographically more widespread than ever. Consumers in 97% of the most densely populated zip codes have access to broadband services, which is not particularly surprising. What is more surprising is that the percentage of consumers in the lowest-density population centers (measured by zip code) in the U.S. who had access to broadband services *doubled* in the year 2000. In sum, broadband services are not only expanding in numbers, they are expanding geographically as well, ensuring that consumers in even the most rural parts of the country will soon enjoy ubiquitously available broadband service.

The good news, therefore, is that broadband services are widely deployed across the country, particularly services deployed over the telephone network. The bad news, however, is that the promise of the 1996 Act – that such services would be deployed by a

⁶ Section 706 of the Telecommunications Act of 1996 provides, in pertinent part: "The Commission shall . . . encourage the deployment on a reasonable any timely basis of advanced telecommunications capability to all Americans . . ." 47 U.S.C. § 157 nt.

⁷ See "Federal Communications Commission Releases Data On High-Speed Services For Internet Access," CCB/IAD Report released Aug. 9, 2001, available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0801.pdf.

⁸ Interestingly, the rate of growth of ADSL services (up 108%) in the second half of last year was nearly twice that of cable modem services (up 57%). For the full year, ADSL deployment was up a whopping 453%, whereas cable modem services were up only 153%.

wide variety of competitors – has not been realized. In fact, recent news events on the death of CLECs suggest that these overall deployment trends may soon start a rapid decline. At the end of 2000, incumbent telephone companies had a virtual monopoly on that broadband deployment. Indeed, the Commission found that the four Bell Operating Companies – SBC, Verizon, BellSouth, and Qwest – controlled over 86% of ADSL deployment. Adding in the non-BOC incumbent LECs, the Commission found that incumbent phone companies have control of over 92% of all ADSL deployment. Less than 8% of ADSL deployment belongs to competitive service providers. With only 8% broadband penetration by competitors, the Commission should be concerned that the 1996 Act is not working as advertised.

The significance of this disparity in numbers is twofold. First, it puts a new gloss on the perpetual Bell Operating Company claims that only a combination of regulatory relief and legislative override of the core market-opening provisions of the 1996 Act can give the BOCs a fighting chance in the broadband marketplace. At its most basic, the BOCs' argument is that they are handicapped by their unbundling obligations and have no hopes of deploying broadband services so long as such limitations on their deployment capabilities remain in force. Importantly, they never demonstrate exactly how their ability to deploy services is handicapped, preferring to rely on rhetoric and red herring arguments to make their case for "deregulation." Indeed, they cannot base their arguments on substance – when these four companies, with a combined 92% market share, claim they are impeded in their ability to deploy service, any informed policymaker should see through the smoke and mirrors to the real agenda.

Second, it should be clear by now that the Bell companies love being monopolies, but they hate their unbundling obligations. Regardless of the economic rationality of the BOCs' decision to fight competitive entry in every available venue, the significance of this universal BOC policy of blocking competition is having a predictable effect. Where once there were three nationwide DSL CLECs, now there is only one. Where once there were dozens of smaller, regionally focused DSL CLECs, now such carriers number in the low single digits. If there is such an explosion in demand for broadband services, why have most of the DSL CLECs closed their doors? And more importantly, what must the FCC do to ensure that the 92% BOC control of the ADSL market goes down, and not up?

As the nation's leading provider of broadband services using digital subscriber line (DSL) technology, Covad is among the largest users of standalone unbundled local loops and linesharing in the nation. In the five years since Congress opened the local telecommunications market to competition, the UNE provisioning practices of incumbent LECs have stood as the single greatest impediment to the deployment of competitive broadband services to consumers. Because of the lack of specific, enforceable federal rules requiring incumbent LECs to provision functioning UNEs to requesting carriers in a timely manner, incumbents have been given a six year free pass to deny, delay, and degrade the UNEs they provide to competitive LECs. A UNE provisioned a month late is no better than a UNE never provisioned at all. No customer is going to await service for so long, especially when another option – retail broadband service from the very same incumbent LEC that denied a timely wholesale UNE – is usually available in a matter of days.

Six years after passage of the Act, incumbent LECs have universally refused to embrace competition. Incumbent LECs have chosen to treat competitive LECs not as the “valuable wholesale customers” they claim (when looking for regulatory favoritism), but rather as retail competitors who can be suppressed with consistent discrimination in the provision of wholesale services. The litany of court challenges, regulatory obstacles, and legislative initiatives aimed at undoing the central market-opening provisions of the Act are too numerous to recount in full here.⁹ It is sufficient to note the fundamental economic reality that incumbent LECs have the clear incentive, and even clearer ability, to suppress competition by denying loops entirely, delaying them when outright denial does not work, and degrading the loops’ condition when simple delay fails to cause the competitor to lose a customer.

When the Commission first adopted its loop unbundling rules in 1996, it did not adopt specific provisioning intervals, but rather noted that “it is vital that we reexamine our rules over time in order to reflect developments in the dynamic telecommunications industry.”¹⁰ Six years later, the most significant barrier to competitive entry is the UNE provisioning practice of incumbent LECs. Nearly two years ago, ALTS filed a petition asking the Commission to adopt, among other things, loop and linesharing provisioning intervals. That petition, followed by the Commission’s Notice issued in December, gives the Commission an opportunity to honor its commitment to reexamine its rules to see what competitive barriers can and should be lifted.

⁹ A tiny sampling: Southwestern Bell v. FCC et al., 168 F.3d 1344 (D.C. Cir. 1999) (seeking to overturn orders regulating rates and conditions for physical collocation); Southwestern Bell Telephone et al. v. FCC et al., 153 F.3d 597 (8th Cir. 1998) (challenging shared transport as a UNE); BellSouth v. FCC et al., 144 F.3d 58 (D.C. Cir. 1998) (claiming § 274 of the Act is a bill of attainder); BellSouth v. FCC et al., 162 F.3d 678 (D.C. Cir. 1998) (claiming § 271 is a bill of attainder); SBC v FCC, 981 F. Supp. 996 (N.D. Tex. 1997) (claiming § 271 is a bill of attainder); USTA v. FCC, 00-1012 (D.C. Cir.) (challenging adoption of line sharing UNE).

This Commission is at a crossroads in its efforts to open the local market to effective competition. Once again, the competitive community is before the Commission, highlighting the most egregious barriers to entry that remain, and asking the Commission to take a few, simple steps to remove those barriers. Competitive LECs are not asking for a litany of new rules, nor are competitors asking for the Commission to in any way handicap the ability to incumbent phone companies to continue to deploy broadband services at whatever rate they choose.

Covad respectfully submit that granting the ALTS petition and establishing the UNE provisioning intervals advocated therein is the only way the Commission can protect consumers' ability to secure the widest possible range of competitive broadband services. The very serious problems associated with loop and linesharing provisioning should not be swept under the rug or hidden away in the attic—the Commission must address them fully, openly and aggressively. If the Commission fails to preserve the ability of competitive LECs to secure timely and reasonable access to loops, the Commission risks the eventual loss of an entire industry of competitive providers. All that will be left in the DSL world will be the incumbent LECs, who will have won their battle to crush competition and regain their longstanding monopolies.

As it stands today, competitive LECs have been without an effective remedy for the discriminatory UNE practices of incumbent LECs. The obligation on incumbents to provide unbundled access to loops and linesharing UNEs capable of supporting xDSL services has been in place since 1996, but incumbent LECs have devised numerous measures to handicap competitive LECs in their quest to secure the UNEs to which they are entitled by law. Despite the fact that federal rules have been on the books for over

¹⁰ *Local Competition First Report and Order* at ¶ 58.

five years, enforcement of those rules has been mired in the minutiae of court challenges, political fights, and bureaucratic handwringing. It is time to put in place UNE provisioning rules that will make the ILECs' obligations abundantly clear to ILECs, CLECs, and regulatory authorities.

The most pervasive ILEC maneuver around the current federal rules is the timeliness of UNE provisioning.¹¹ Without a federal rule requiring incumbent LECs to provide a loop in a certain, predictable period of time, competitive LEC are severely hampered in their efforts to compete effectively in the broadband marketplace. A loop provisioning interval will accomplish numerous goals vital to the protection of the competitive broadband industry.

The Commission has authority to adopt national performance metrics and benchmarks.

As the Commission properly concluded in the *Notice*, the Commission's authority to adopt national UNE performance metrics and measures "is clear."¹² The Commission's authority derives from numerous statutory provisions and general agency discretion. In the statute, section 251 of the Act imposes on all incumbent LECs the duty to provide to requesting telecommunications carriers interconnection, access to UNEs, and collocation, at "rates, terms and conditions that are just, reasonable, and

¹¹ The clearest evidence of the dysfunction in the Commission's UNE enforcement process is that incumbent LECs support it. For example, in comments filed in opposition to the ALTS loop petition, GTE (now Verizon), argued that allegations of anticompetitive loop provisioning practices "are best dealt with through the complaint process." GTE Comments at 3. SBC stated in its comments that "the proper remedy is a complaint with the state commission or the FCC." SBC Comments at 24. Why are the BOCs unanimous in their preference for existing rules and procedures? Because those procedures virtually guarantee, based on a five year, zero-enforcement record of the FCC, that the BOCs will never face any penalty for their discriminatory UNE practices.

¹² NPRM at ¶ 14.

nondiscriminatory.”¹³ A court reviewing the Commission’s definitions of “just, reasonable and nondiscriminatory” will grant “substantial deference to the agency’s interpretation of the statute because ‘the reasonableness for assessing the wisdom of ...policy choices and resolving the struggle between competing views of the public interest are not judicial ones, and because of the agency’s greater familiarity of the with the ever changing facts and circumstances surrounding the subjects regulated.’”¹⁴ As such, the Commission is free to enact specific rules interpreting the “just, reasonable, and nondiscriminatory” language of section 251(c)(3) as requiring incumbent LECs to provision UNEs in a certain number days, and at a certain level of quality.¹⁵

The Commission’s general statutory authority, sections 201 and 202 of the Act, also provides statutory support for the Commission’s actions in this proceeding. Specifically, section 201(b) of the Act provides that “[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”¹⁶ As the Supreme Court has held, section 201(b) extends the Commission’s rulemaking authority to “to implementation of the local-competition provisions” of the 1996 Act.¹⁷ Indeed, the Supreme Court bluntly concluded: “We think that the grant in 201(b) means what it says: the FCC has rulemaking authority to carry out the “provisions of this Act,” which include §§ 251 and 252, added by the Telecommunications Act of 1996.”¹⁸ Thus, the Commission clearly possesses adequate statutory authority to adopt rules defining the exact parameters of the incumbent LECs’

¹³ 47 U.S.C. § 251(c)(2), (c)(3), (c)(6).

¹⁴ *AT&T et al v. FCC*, 220 F.3d 607, 621 (D.C. Circuit 2000) (quoting *FDA et al v. Brown and Williamson*, 529 U.S. 120, 132 (2000)).

¹⁵ See, e.g., *AT&T et. al v. Iowa Utilities Board*, 220 F.3d 607 (D.C. Cir. 2000) (FCC has broad authority to interpret the requirements of the market-opening provisions of the 1996 Act).

¹⁶ 47 U.S.C. § 201(b).

¹⁷ *AT&T et al v. Iowa Utilities*, 119 S.Ct. 721; 729 (1999).

obligation to provide UNEs pursuant to “just, reasonable, and nondiscriminatory” terms and conditions.

Finally, section 706 of the 1996 Act requires the Commission to act affirmatively to promote the deployment of broadband services. Specifically, section 706 requires the Commission to “encourage the deployment on a reasonable any timely basis of advanced telecommunications capability to all Americans”¹⁹ Given the Commission’s longstanding recognition that competition, not monopoly, is the best means of ensuring that consumers have access to the widest possible variety of innovative broadband services, the Commission is under a statutory obligation to promote the availability of competitive broadband services.

The Commission has already set forth the proper procedural groundwork for the adoption of national performance metrics and measurements.

The Commission need not look far for the procedural backdrop for the adoption of federal provisioning intervals. As far back as 1997, the Commission noted the need for federal benchmarks related to section 251(c)(3) unbundling obligations. Specifically, in its *Performance Metrics NPRM*, the Commission tentatively concluded that it should “adopt model performance measures and reporting requirements” – including several new performance measures for unbundled loops.²⁰ In early 2000, the Commission sought and received extensive comment on the ALTS petition for adoption of federal provisioning

¹⁸ *AT&T et al v Iowa Utilities*, 119 S.Ct. 721, 730 (1999).

¹⁹ 47 U.S.C. § 157 nt.

²⁰ *Performance Measures NPRM* at ¶¶ 50, 57. “Although we believe that it is appropriate to consider how performance standards might be used, we tentatively conclude that it is premature at this time for us to propose specific standards. We understand that several states are considering performance standards and encourage states in these efforts. Nevertheless, we do not believe that we have developed a sufficient record to consider proposing performance standards at this time.” *Performance Measures NPRM* at ¶ 125. Thus, the Commission did not adopt performance measures at that time because it wanted a fuller record on the subject.

intervals, and every commenting party – with the exception of the four Bell companies – strongly encouraged the Commission to adopt performance benchmarks. In addition, the Commission has always reserved the right to impose additional, more detailed provisioning rules “in order to reflect developments in the dynamic telecommunications industry.”²¹ The developments in the competitive LEC industry have not been positive, and the Commission now has the record before it to support the UNE performance metrics and measures that would deny incumbent phone companies the ability to squelch out the remaining competitors.

Adoption of national UNE metrics and measurements is the most procompetitive, simplest step to preserving and promoting broadband competition.

The absence of a provisioning interval is a gaping hole in the Commission’s otherwise pro-competitive loop rules. No amount of reconsiderations, reassertions, and restatements of the fundamental principles of UNE provisioning (all of which the Commission has undertaken on numerous occasions) can overcome one simple fact: taking a long time to provision a loop is the easiest and safest way for an incumbent LEC to stifle competition. It is easy because it requires only the passage of time, and no other effort, to successfully prevent competitive LECs from turning up service to a customer. It is safe because in the absence of a federal provisioning rule, incumbent LECs are effectively insulated from any FCC enforcement action.

By adopting a national provisioning rule, the Commission will provide, for the first time, a clear benchmark that will provide competitive LECs an enforceable remedy

²¹ *Local Competition First Report and Order* at ¶ 59 (“We recognize that it is vital that we reexamine our rules over time in order to reflect developments in the dynamic telecommunications industry. We cannot anticipate all of the changes that will occur as a result of technological advancements, competitive

for discriminatory UNE provisioning practices. Covad has experienced consistent, anticompetitive delays in UNE provisioning from all incumbent LECs from which it have ordered unbundled loops. Despite the serious harm to competition and consumers, Covad have been unable to secure an effective regulatory remedy for these anticompetitive practices. The Commission has thus far been hesitant to exercise its Title II authority to pursue enforcement action against incumbent LECs for UNE practices, most likely because of the absence of a clear rule that would facilitate such enforcement. At the state level, the vast majority of states do not have rules regarding provisioning intervals, and an even greater number of states lack the resources to conduct enforcement proceedings. As such, in order to obtain effective loop provisioning remedies across the country, Covad would first have to win the implementation of a state provisioning rule, and then pursue an enforcement action, in every jurisdiction in the country. These very obstacles to effective competition have already led the Commission to conclude that only concrete national rules could protect and promote competitive entry: as the Commission first concluded in 1996, “national rules will reduce the need for competitors to revisit the same issue in 51 different jurisdictions, thereby reducing administrative burdens and litigation for new entrants and incumbents.”²²

National UNE delivery intervals will also facilitate enforcement of interconnection agreements through private litigation and arbitration—because a national benchmark should facilitate the writing of clear interconnection agreements. As the Commission recognized in the *First Local Competition Order*, interconnection negotiations between a competitive LEC and an incumbent LEC are characterized by

developments, and practical experience, particularly at the state level. Therefore, ongoing review of our rules is inevitable.”).

disparate bargaining power—the incumbent LEC has a tremendous incentive to deny requests for interconnection, to delay the establishment of agreements, and to deftly draft agreement clauses that obfuscate and obliterate a competitive LEC’s legal rights. Clear and precise UNE installation rules — rather than the always-shifting sands of “parity”— will provide a clear baseline of what a competitive LEC is entitled to receive from an incumbent LEC.

National UNE performance metrics and measurements will end the “battle of the data” in the 40+ remaining section 271 applications

As evidenced by the Commission’s decisions in all recent long distance proceedings, there is a great deal of uncertainty surrounding the issue of UNE provisioning performance by incumbent LECs for purposes of checklist compliance. Covad is forced to present a large volume of UNE data to the Commission in section 271 proceedings, which often results in the Commission being unable to resolve the data presented and noting that it was troubled by the lack of a definitive measure of UNE performance criteria.²³ Such difficulty is understandable, because in the absence of concrete rules, the Commission is left trying to determine if a loop that is three days late, or five days late, or a month late, is a violation of the incumbent LEC’s section 251(c)(3) obligations. UNE provisioning intervals codified as federal rules wipe that problem away. By establishing concrete intervals, and ensuring that the parameters of those intervals are defined concretely, the Commission will eliminate the “battle of the data” and resolve much more efficiently the question of UNE checklist compliance.

²² *Local Competition First Report and Order* at ¶ 56.

²³ “The need for unambiguous performance standards and measures has been reinforced by the disputes in the record regarding, for instance, what performance is being measured and whether it is properly captured by particular measures.” *Bell Atlantic New York Section 271 Order*, FCC 99-404, at ¶ 334.

As the Commission concluded in the *Local Competition First Report and Order*, concrete and specific national unbundling rules “help the states, the DOJ, and the FCC carry out their responsibilities under section 271, and assist BOCs in determining what steps must be taken to meet the requirements of [the] competitive checklist.”²⁴ This is of particular importance as more BOCs file section 271 applications, and the time and resources of the Commission are severely strained by the sheer volume of such applications. There is no question that the Commission will at some point in the very near future be virtually flooded with section 271 applications, and that UNE provisioning issues will be of paramount importance (as they have been in the applications received thus far). The Commission has already concluded that national rules establishing the concrete and specific standards of UNE unbundling pursuant to section 251(c)(3) of the Act provide the Commission “the standards to apply in adjudicating section 271 petitions in an extremely compressed time frame.”²⁵ The severely compressed time frame that the Commission predicted in 1996 will soon be a reality as multiple applications pour in. The Commission has before it today an opportunity to reduce the burden on the parties – both incumbents and competitors – as well as the state commissions, the DOJ, and the Commission itself, by ensuring that all parties to a section 271 proceeding are working from the same concrete and definite UNE provisioning rules. For example, a federal rule that states unambiguously that unbundled local loops must be provisioned in three business days – rather than the current amorphous “nondiscriminatory loop provisioning” – will streamline the section 271 process to the benefit of all parties concerned.

²⁴ *Local Competition First Report and Order* at ¶ 57.

²⁵ *Local Competition First Report and Order* at ¶ 57.

In order to end the “he said-she said” evidentiary battles in the dozens of section 271 applications still to come, the Commission need only adopt a benchmark for loop provisioning of three business days (and one business day for the line-sharing UNE) and bring an end to the retail analogue mess.²⁶ The Commission’s current system places the burden perversely on the competitive LEC to prove that the incumbent is not acting in an anticompetitive manner by providing data showing that the incumbent’s provisioning intervals are out of “parity” with the service the incumbent provides its own customers. Imposing such a burden on competitive LECs is a strange twist on the traditional placement of an evidentiary burden on the party that actually possesses all of the necessary information. Despite the fact that it is the incumbent, not the competitive LEC, who has all information related both to the competitive LEC UNE orders (when UNEs were ordered and when provisioned) and the incumbent’s own retail performance, the burdens of proof and persuasion are placed on the competitive LEC – the party without access to the information – to prove the incumbent’s noncompliance. This twisted system – contrary to long-standing common law principles – immunizes incumbent LECs from an effective section 271 checklist challenge and from effective enforcement action, because the incumbent need only claim that retail performance data is irrelevant, confidential, or unavailable to foreclose the competitive LEC from meeting its burden of proof.²⁷

The burden should not be on the competitive LEC, and the Commission must recognize how unworkable the section 271 and enforcement contexts have become in the

²⁶ See *infra* for a more detailed discussion of these proposed intervals.

²⁷ This system also has the perverse effect of giving incumbent LECs the incentive to maintain poor quality service to their own retail customers in order to reduce their burden of performance to their wholesale customers. The shorter the incumbent LEC’s retail interval, the shorter its wholesale interval must be.

absence of concrete UNE rules. All parties will benefit from the adoption of such rules. The Commission will benefit by facilitating the section 271 review process and enforcement proceedings. Incumbent LECs will benefit by having a clear and definite benchmark by which to provide UNEs and measure their own performance. Competitive LECs will benefit by gaining access to UNEs in a timely manner, having the section 271 checklist compliance burden of proof properly placed on the incumbents, and accessing an effective and workable enforcement mechanism to remedy anticompetitive incumbent LEC UNE practices. Finally, and most importantly, consumers will benefit from timely access to the widest possible variety of innovative advanced services.

There are no differences among states or incumbent LECs that would prevent the Commission from adopting national UNE metrics and measurements.

In their zeal to avoid the destruction of their favorite tool of discrimination, incumbent LECs will likely argue – as they do in opposition to every federal rule – that there are regional differences in UNEs that would make federal provisioning intervals unworkable. Covad submits that, in its experience ordering and utilizing loops from every single large incumbent LEC in the country (experience that no incumbent LEC can claim), there is not a single difference in loops over geographies and incumbents that could possibly interfere with the establishment of a national loop installation rule. As detailed below, Covad agrees that loop provisioning intervals should vary slightly when conditioning work is necessary, but the conditioning that must be performed on a loop with load coils and bridged taps is the same in Verizon's region as it is in BellSouth's. Incumbent LECs have an incentive to exaggerate the regional differences of loop

provisioning processes, because fighting implementation of a concrete and specific federal rule is the only means of preserving their favorite discriminatory tool.

Although it is certainly true that some state commissions have adopted UNE provisioning intervals, the fact remains that the overwhelming majority of state commissions have not done so, and those that have done so have put different standards in place. As a practical matter, the policies of the different states – ranging from very pro-competitive intervals to no intervals at all – make service offerings extremely difficult for national providers like Covad. As a result of the lack of federal rules, Covad's quality of service varies on a state-by-state, ILEC-by-ILEC basis to take account of the widely different provisioning intervals put in place across different states. For example, the vast majority of Covad's sales are through large, national ISPs that operate in multiple states, and Covad's sales are undertaken pursuant to national or regional contracts that cover those states. Because of the crazy-quilt lack of minimum national standards, Covad cannot, in its customer contracts, provide concrete expectations of uniform, national installation intervals or timeliness. This significantly impairs Covad's ability to sell its services and maintain a national, uniform expectation of service quality—which customers expect.

Establishment of minimum UNE installation intervals is fully consistent with the Commission's approach to its unbundling rules since the 1996 Act was passed. As the Commission noted in 1996 in the *First Local Competition Report and Order*, the adoption of uniform national unbundling rules is particularly pro-competitive, because it reduces "the likelihood of potentially inconsistent determinations by state commissions" and thus reduces "burdens on new entrants that seek to provide service on a regional or

national basis by limiting their need for separate network configurations and marketing strategies, and by increasing predictability.”²⁸ The Commission recognized that state commissions have an important role in adopting rules that “take into account local concerns,” but in the case of UNE provisioning intervals, there are no such concerns.²⁹ With regard to xDSL-capable loops in particular, it is indeed entirely within the Commission’s authority and responsibilities to ensure that *purchasers* of interstate telecommunications services and elements receive a certain minimum level of service quality from the incumbent LEC—because the incumbent LEC clearly has market power and degradation of service quality is one of the “classic” methods in which a firm with market power may seek to exercise that power.

Because the incumbent LEC has no incentive to provide quality service to its customers (the monopolist benefits in this regard from a lack of customer choice – the CLEC “consumer” simply cannot switch service providers), competitive LECs suffer from the Commission’s use of a “parity” standard to measure loop performance. Because incumbent LECs maintain their bottleneck monopoly control over loop plant, Covad and other competitive providers do not have another wholesale supplier of loops to switch to, and as a result, cannot differentiate their services from the incumbent LEC by providing better service quality and timeliness. The use of “parity” as the benchmark ensures that incumbent LECs are able to wed competitive LECs to exactly the same poor quality loop delivery as the incumbents provide their own retail customers. Surely this could not have been the intent of Congress.

²⁸ *Local Competition First Report and Order* at ¶ 47. Of course, even then the incumbent LECs fought hard against the implementation of ANY national rules. BellSouth, for example, “urge[d] the Commission merely to codify the language of the 1996 Act.” *Id.* at ¶ 50.

²⁹ *Local Competition First Report and Order* at ¶ 53.

In addition, one of the ostensible principles of the recent string of RBOC and ILEC mergers has been the “efficiencies” of running incumbent LEC networks across several states. In the context of both the SBC/Ameritech and Bell Atlantic/GTE mergers, those incumbents proposed multi-state service level commitments to this Commission. In addition, all providers of interstate telecommunications services³⁰ are currently subject to federal service quality rules and standards.³¹ In obtaining unbundled loops utilized for the provision of interstate services, competitive LECs should be accorded a certain minimum level of service quality.

Finally, the development of UNE intervals cannot be left to the negotiation process between incumbent and competitive LECs. As the Commission has recognized since 1996, “[n]egotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations . . . [t]he inequality of bargaining power between incumbents and new entrants militates in favor of rules that have the effect of equalizing bargaining power.” Incumbent LECs have demonstrated time and time again that they are fundamentally opposed to any notion of treating competitive LECs as “customers” rather than competitors, and that the fundamental economic motivation that drives their every interaction with competitive LECs is to discriminate in favor of their own retail service offerings. No negotiation can replace federal rules – without them, competitive LECs would never have been able to access xDSL capable loops, due to the consistent and recurring incumbent LEC refusal to provide such loops. In addition, a competitive LEC must enter into potentially hundreds of interconnection agreements with incumbent

³⁰ Which, according to the Commission in the *GTE ADSL Tariff* decision, includes the provision of DSL services for dedicated access to the Internet.

³¹ See, e.g., 47 C.F.R. §§ 63.60, *et seq.*, 63.100, 63.500-601, 64.401, 64.706, 64.1100-80, 64.1401-02, 64.1501, *et seq.*, 64.1600, *et seq.*, 64.1700, *et seq.*

LECs to provide national coverage—the likelihood of that iterative process resulting in anything remotely approaching a “national installation interval” is slim to none. If the Commission truly wishes to see competitive advanced services rolled out to “all Americans” with a certain minimum level of quality, minimum UNE installation intervals is required.

It is also important to note that the section 271 process, with its jumble of conflicting data, is ineffective as a replacement for federal loop delivery rules as to (1) non-BOC incumbent LECs, and (2) states in which long distance applications are not forthcoming. In the context of its review of Section 271 applications, the Commission has already determined that, where no retail analogue exists for a UNE, the incumbent must provide access in a manner that allows an equally efficient competitor a “meaningful opportunity to compete.”³² That standard, however, is only relevant to competition in a particular incumbent LEC territory if the incumbent is both a BOC *and* chooses to pursue a Section 271 application.³³

The Commission must adopt a minimum loop installation rule of 3 business days for loops that require no conditioning, and 5 business days for loops that require conditioning.

In the *Line Sharing Order*, the Commission cited with approval the provisioning interval adopted by the Texas PUC of 3 business days for standalone xDSL-capable

³² *Ameritech Michigan 271 Order* at ¶ 130.

³³ A substantial percentage of the United States is served by incumbent LECs that are not one of the four RBOCs. In addition, only 9 of 49 Section 271 applications have been approved by the Commission, for states representing a significant minority of the U.S. population. (In addition, to this date, Qwest has not filed a single 271 application before the Commission.) The Commission is charged with ensuring the development of competitive markets and deployment of advanced services *throughout* the United States. It would be a abdication of the Commission’s “public interest” authority to accord consumers in non-RBOC regions an inferior level of competitive entry, or to depend on the individualistic Section 271 timelines (in which entry in one state may be accelerated to the detriment of other states) for adequate enforcement.

loops.³⁴ This interval is more than sufficient time for incumbent LECs to provision a loop, especially if the incumbents cease delaying the implementation of electronic pre-order and order capabilities. When the loop requires conditioning and the competitive LEC requests such conditioning, the loop interval should be 5 business days so as to permit the incumbent to complete such conditioning activities as are necessary.

In the absence of a three business day loop interval, competitive LECs will continue to suffer egregious intervals that render effective competition with the incumbent all but impossible. For example, Verizon in Massachusetts offered consumers a "sign up to turn on" interval for their retail DSL service of only 6 days.³⁵ Covad generally wait significantly longer than 6 days simply to receive a loop from a Bell company. Because the loop provisioning process is largely computer-based, the incumbent has very little actual work to do in the field. Other than a truck roll to provision the loop to the customer's premises, and a central office cross connect of the loop to a competitor's point of interconnection, there is little other physical work for the incumbent LEC to do. Three business days is more than sufficient for loop provisioning, and it provides competitors a meaningful and fair opportunity to compete with incumbent LEC retail xDSL services.³⁶

It is of vital importance that the Commission put more teeth into its loop provisioning rules and provide competitive LECs a meaningful opportunity to compete with incumbents. The Commission's current "parity" standard measures the time period for loop delivery from incumbent LEC to competitive LEC and compares it with loop

³⁴ *Linesharing Order*, FCC 99-355 at ¶ 174.

³⁵ Bell Atlantic-Massachusetts 271 Proceeding, DTE 99-271, BA Response to in-hearing data request DTE-RR-81 (Nov. 19, 1999).

³⁶ Linesharing UNE intervals are discussed separately below.

delivery from incumbent LEC to incumbent LEC retail customer. This purported parity measure actually measures the time at which a competitive LEC can *begin* to provide service to its customer and compares it to the time that an incumbent LEC has *completed* providing service to its retail customer. After receipt of a functioning loop, a competitive begins the process of provisioning service to its broadband customer. The loop interval that the Commission has considered thus marks the beginning of the competitive carrier's provisioning process, which cannot commence until the loop is delivered. The incumbent LEC, on the other hand, *completes* its installation process with the installation of the loop. The "parity" that the Commission seeks to ensure is thus a false measure of the ability of competitive LECs to turn-up service to their customers. Only through an actual loop provisioning interval can the Commission ensure that competitive LECs can compete fairly and offer a true quality service to consumers – not the monopolist's version of quality.

In sum, the UNE provisioning process and the retail service activation are not the same thing. Incumbent LECs may take a week to activate retail service, but such activation includes the entire customer acquisition and setup process, from ISP provisioning to customer premises installation. It is not limited to the mere provisioning of the UNE itself. Incumbent LECs tack on days to the "provisioning process", the effect of which extends the actual parity measurement longer.³⁷ For example, provisioning of

³⁷ The time to coordinate the order with an ISP, or to arrange and perform a "truck roll" for customer installation or inside wiring will add days to the ILEC's "retail ADSL" installation interval. CLECs have to undertake those steps as well. For example, assume that for its retail ADSL service, the ILEC performs the central office cross-connect the first business day after it receives an ADSL order (this is generally all the work that is required to provide line-sharing to a CLEC). The ILEC may then take five business days to arrange a truck roll to perform inside wiring or other work at the customer premises. Under the "parity" standard argued for by ILECs, that additional week will be added to its "installation interval". As a result, the ILEC will be excused from providing line-shared loops to a CLEC within six business days—and the

the line-sharing UNE requires only cross-connect work in the central office – nothing more. Such an activity takes only a matter of minutes to perform. Covad’s proposal of a one-business-day interval, as described below, is more than sufficient for such work to be completed, and it ensures that competitive LECs will have a true meaningful opportunity to compete.

The interval established by the Commission must be measured concretely to avoid providing the incumbent LECs any opportunity to wiggle out of the otherwise procompetitive requirements. The interval must be measured from the time the competitive LEC submits the order to the incumbent LEC. Submission of the order is marked by the time that the competitive LEC delivers the order to the incumbent – not the transmission of a notice from the incumbent that the order has been received. In this way, the incumbent is not granted the ability to delay the interval by simply taking two or three days to transmit confirmation. The interval cannot be tolled by intervening “queries” from the incumbent – another favorite delay tactic. For example, incumbents may choose to send an order back to the competitive LEC because the order states “Street” instead of “Str” – not because the incumbent’s systems can’t process the order, but rather because the incumbent is seeking to delay the provisioning of the loop. Incumbent LECs must not be permitted to toll the interval by “querying” the order back to competitors. If an incumbent LEC needs clarification on an order, the incumbent must seek such information from its own databases, which contain all information on addresses and loop location, and the order must be corrected by the incumbent – using the vast information resources available to it – and not simply rejected back to the competitive

CLEC still has to coordinate installation and possibly a truck roll. In this sense, the “parity” standard advocated by ILECs would, in reality, *codify and permit overtly discriminatory provisioning.*

LEC. The loop order is “complete” when a functional loop is delivered to the competitive LEC’s point of interconnection, the requesting carrier is notified electronically that the loop has been delivered, and the requesting carrier accepts delivery of the loop.

The Commission should adopt a one business day provisioning interval for the linesharing UNE.

In order to further facilitate the deployment of competitive broadband services, the Commission should also take immediate steps to implement a linesharing UNE provisioning interval. As the Commission is well aware, the provisioning of line sharing requires only one simple installation step by the incumbent LEC: cross connecting between incumbent’s frame and the competitive LEC’s splitter. The loop is already in place, already functional, and fully ready for service. Simple cross connect work is all that is required – no field work, no truck roll, nothing other than cross connecting. This is part of the reason the Commission saw fit to adopt linesharing as a UNE in the first place – it severely cuts down on the time it takes for competitive LECs to secure unbundled access to the loop transmission functionality.

As a result, the Commission should ensure that linesharing UNEs are available in a timely manner. In the same way that incumbent LECs will never make short provisioning intervals for standalone loops available unless ordered to do so, incumbent LECs have no incentive to facilitate rapid access to linesharing capability. Indeed, incumbent LECs universally opposed the notion of even adopting linesharing as a UNE – recognizing the threat their monopolies would face if their solo grip on linesharing capability came to an end. The Commission must adopt a rule requiring the linesharing

UNE to be provisioned within one business day – utilizing the same interval parameters defined above – in order to preserve the ability of competitors to access linesharing in a timely manner. The interval for the linesharing UNE where conditioning is required should be three business days. These intervals provide more than sufficient time for incumbent LECs to do the cross connect work – for that is all the provisioning work that is required – necessary for the linesharing UNE. If the Commission is serious about ensuring that consumers benefit from linesharing, then it must be serious about imposing a provisioning requirement on incumbent LECs.

The one business day linesharing interval addresses the need of competitive carriers to provide consumers access to the service they ordered in a rapid manner. It also recognizes the simple provisioning work an incumbent LEC must undertake in order to provision linesharing – one simple cross connect in the central office. All other wiring is completed when the central office is activated for linesharing – in other words, long in advance of submission of the actual linesharing UNE order. This is why since December 7, 2000, the line sharing provisioning intervals in Illinois have been 1 business day for loops not requiring conditioning and 3 business days for line sharing loops requiring conditioning.³⁸ This “best practice” by the Illinois Commission was fully supported by the record before that agency. The Commission should adopt the same procompetitive interval as the Illinois Commission has done, and require linesharing UNEs to be provisioned in one business day.

³⁸ Covad Communications Company Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois and for an Expedited Arbitration Award on Certain Core Issues, Docket No. 00-312, 00-0313 (Consol.), August 17, 2000 Arbitration Decision at 25-27; Illinois Bell Telephone Company Proposed Implementation of High Frequency

The Commission's goal is to harmonize, not supersede, state performance metrics.

National UNE performance metrics and measurements will build on and facilitate the future development of state metrics and measurements.

The Commission seeks comment in the Notice regarding the proper interrelationship between new national performance metrics and measures and those already put in place by various states. It is important to note that the competitive LEC community is virtually unanimous in support of the efforts of numerous states to implement and enforce concrete and specific enforcement plans. Thus, Covad does not seek the implementation of a national performance metric plan that replaces equally or more stringent state plans.

In the *Notice*, the Commission seeks comment on the interrelationship between performance metrics and measures adopted at the national level and those adopted by the various states. Since 1996, state commissions have played a vital role in ensuring that competitive LECs can access UNEs in a timely manner. In particular, state performance metrics, measures, and performance assurance plans have served, in the absence of similar federal rules, as the only means for competitive carriers to secure reasonable nondiscriminatory access to UNEs. Those state commissions that have taken proactive steps to ensure UNEs are available in a procompetitive manner are to be commended for their dedication to competition. State commissions are at one of three stages in their efforts to address incumbent LEC UNE performance: (1) states that have already adopted measures and metrics, (2) states that are in the process of developing such measures and metrics, and (3) states that have not yet begun the process of development.

Portion of Loop (HFPL)/Line Sharing Service, Docket No. 00-0393, March 14, 2001 Order at 73 (requiring Ameritech Illinois to tariff in Illinois 24 hour interval for line sharing loops not requiring conditioning, and

Covad addresses the method the Commission should use to address these three different stages.

The Commission has already put concrete and specific UNE rules and delineated the relationship between state and federal unbundling rules. Specifically, the Commission made clear in the first *Local Competition Report and Order* that federal UNE rules are a floor, not a ceiling, and that they only preempt the ability of the states to require less stringent unbundling.³⁹ The Commission repeated this conclusion in the *UNE Remand Order*, concluding that “section 251(d)(3) grants state commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list, as long as they meet the requirements of section 251 and the national policy framework instituted in this Order.”⁴⁰ Thus, states are free to adopt additional unbundling rules, but may not reduce the unbundling obligations below the floor set by federal rules. The fact that states are free to develop and implement additional UNE requirements *ipso facto* means that the states must be left free to adopt additional performance metrics and standards as well. Were they not permitted to do so, states would left without the power to enforce the very rules that the 1996 Act and the Commission’s rules permit them to adopt independently.

Should the states that have already adopted metrics choose to modify those metrics to more closely align them with those adopted by the Commission, they should

3 days for loops requiring conditioning established in Covad/Rhythms line sharing arbitration).

³⁹ See *Local Competition First Report and Order*, 11 FCC Rcd 15499 at ¶ 244 (“[W]e adopt our tentative conclusion that states may impose additional unbundling requirements pursuant to section 252(e)(3), as long as such requirements are consistent with the 1996 Act and our regulations.”); see also *id.*, ¶ 283 (“We further conclude that, to the extent new entrants seek additional elements beyond those we identify herein, section 251(d)(2)(A) allows the Commission and the states to require unbundling of such elements . . .”).

⁴⁰ *UNE Remand Order*, 15 FCC Rcd 2696 at ¶ 154. Cf. *id.* at ¶ 157 (“ . . . state decisions to remove these network elements from the national unbundling obligations would “substantially prevent implementation of the requirements of section 251,” as prohibited by subsection 251(d)(3)(C).”).

be free to do so. Indeed, states may wish to streamline their rules to match the Commission's rules in order to reduce the burden on the states to evaluate incumbent LEC performance. If, however, the states determine that their more stringent measures (those that do not fall beneath the floor established by the Commission's rules, but actually exceed them) should remain in place, this promotes the procompetitive goals of the Act. Indeed, the more freedom the states are given to put in place more, not fewer, procompetitive rules, the closer the nation will be to enjoying true competition in the local telecommunications market. We certainly are not there yet.

The Commission asks in the Notice whether it is "consistent" with the deregulatory purpose of the 1996 Act to have different state and federal metrics in place across the country.⁴¹ The 1996 Act clearly anticipated shared jurisdiction between states and the Commission for implementation of the market-opening provisions of the statute. Indeed, the Commission and the various states share authority to adopt unbundling requirements. The question is not whether the Act foresaw that different requirements would be imposed by the states and the Commission – that is without question correct. Rather, the question is whether the purpose of the Act is met when the Commission and the states enact procompetitive rules that serve to increase the likelihood that incumbent LECs will comply with the market-opening provisions of the Act and permit the benefits of competition to reach all Americans. The answer is clearly yes. The Commission has long recognized that states and the federal government work in partnership to ensure local markets are open – witness the section 271 process, which could not function without the states and the FCC examining BOC compliance with the market-opening provisions of the Act. Often, the states and the FCC examine the same issues, and often

they end up reaching different conclusions. But that is exactly how Congress intended it, recognizing that regulation was the only way to ensure that the incumbent monopolists, who have no incentive to voluntarily cede market share to their competitors, complied with the Act.

Because the Commission's adoption of national performance metrics and penalties is undertaken pursuant to section 251(c)(3), the preemption process that applies to these metrics and penalties is exactly the same as applies to the underlying unbundling obligations. In the same way that a state cannot eliminate the obligation to unbundle linesharing, which has been adopted as a UNE pursuant to section 251(c)(3), it cannot eliminate the obligation, if adopted by the Commission, to provision the linesharing UNE in 1 business day. In the same way that a state could order additional UNEs, it could also order linesharing to be provisioned in 12 hours. Federal rules are a floor, not a ceiling, and any state performance metrics or remedies that are equal or more stringent than federal rules are not disturbed by those national rules. Similarly, to the extent an incumbent LEC is doubly punished, pursuant to a state and federal performance plan, the incumbent LEC would have the ability to file a petition with the FCC seeking permission to offset monies owed to competing carriers because of state plan liability.

In sum, the Commission cannot – and indeed, sound policy suggests that it should not – supersede the hard work of the state commissions that have adopted performance remedy plans. Indeed, for the last six years, those plans have been the only effective means of ensuring incumbent LEC compliance with the market-opening provisions of the 1996 Act. The Commission need not be concerned about overlapping plans causing

⁴¹ Notice at ¶ 18.

overlapping liability, because the incumbent LECs have the incentives and resources to ensure that such duplication does not occur.

Enforcement of the national performance metrics and measurements must be swift, self-executing, and effective.

To further facilitate the UNE provisioning process, the Commission must establish concrete penalties for incumbent LEC failure to provision loops in compliance with the Commission's rules. Covad have argued on numerous occasions before the Commission that an efficient means of enforcing loop provisioning rules – and providing adequate incentive for incumbent LEC compliance – is to impose strict and immediate financial penalties on the incumbent LECs. Those penalties must be self-executing, and they must be paid to the aggrieved carrier in order to compensate for the competitive harm suffered as a result of late loop delivery.

In the Notice, the Commission sought comment on “lawfulness and feasibility of adopting a self-effectuating liquidated damages rule similar to those that have been adopted by some states, where failure to comply with the standards would result in automatic payments to competitors.”⁴² The Commission should adopt exactly such a self-executing performance plan, modeled on similar state plans that have been put in place across the country. Such a plan would permit the Bell companies to utilize existing systems, processes, and personnel to implement, thus avoiding any additional burden on those carriers. In addition, by automating the remedy plan, the Commission will avoid the need for affirmative regulatory action to implement the plan, saving staff and resources for actual disputes that may arise based on the ILEC's reported performance.

⁴² Notice at ¶ 22.

If, as is the case before the states, the parties are satisfied with the reported performance and penalties paid, there is no work for the Commission to do.

The Commission has authority, pursuant to section 206 of the Act, to put in place the remedy provisions of its federal performance metrics rules proposed by Covad.

Specifically, section 206 provides:

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter of thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of the damages sustained in consequence of any such violation of the provisions of this Act⁴³

In determining the parameters of its performance remedy plan, the Commission must consider certain important factors. First, the Commission must consider the vital policy goal that it seeks to advance by adopting a full panoply of performance metrics and measures. The Commission has proposed not only the adoption of specific rules that define just what the obligation to provide UNEs in a “just, reasonable, and nondiscriminatory manner” means, As such, the Commission has recognized that rights without remedies are useless. Thus, the Commission’s adoption of a self-executing plan serves the important policy goals of regulatory certainty, minimization of burdens, and providing incentive for incumbent LEC compliance with the Act.

For loop delivery intervals, the Commission should establish associated penalties that relate to the recurring and nonrecurring charges for those loops. Thus, for example, should an incumbent LEC fail to deliver a loop within the three day provisioning interval, that incumbent LEC would be required to credit the requesting carrier and amount equal to the entire nonrecurring charge for that loop. Because that amount by itself is not a

sufficient financial deterrent, the Commission must also establish associated penalties based on the amount of delay. Using the example of a UNE loop, the Commission should require incumbent LECs to pay to the requesting carrier \$50 per loop for each day that loop is late. Thus, a UNE loop delivered 4 days late would result in a payment to the requesting carrier of an amount equal to the nonrecurring charges for that loop, plus \$200. For linesharing UNEs, the Commission should utilize the same penalty scheme. For a loop that is late, the incumbent LEC must refund the nonrecurring charges associated with that linesharing UNE, plus \$50 per day that the linesharing UNE is late.

To the extent an incumbent LEC believes that its performance metrics do not accurately account for exigent circumstances, there are several mechanisms available to the incumbent. First, because it would be making an allegation regarding the competitive LEC's compliance with the Commission's rules, the incumbent could simply file a complaint pursuant to section 208 of the Act and seek Commission adjudication of the dispute. Second, the incumbent could pursue action in federal court, pursuant to the choice of law provisions of section 207.

The Commission also asks "whether the Commission should adopt a standard creating a presumption of competitive harm in violation of section 271, or make a determination of competitive harm on a case-by-case basis, if the incumbent LEC's performance falls below a certain level for a particular measurement or standard."⁴⁴ The principal benefit to the Commission of the adoption of national performance standards is the avoidance of state-specific battles of data in each and every section 271 proceeding. National standards ensure that competitive LECs and incumbents both utilize the same

⁴³ 47 U.S.C. § 206. Section 206 also contains provisions related to the recovery of attorney's fees.

⁴⁴ Notice at ¶ 22.

objective measures of performance, established by the Commission, in evaluating whether the BOC has complied with its market-opening obligations in a particular state. Thus, a violation of national performance measures, demonstrated through the BOC's monthly data submissions and payments made to the competitive LECs, should be *prima facie* evidence of that BOC's failure to comply with its UNE checklist obligations.

Scope of the Commission's national performance rules

The Commission seeks comment in the notice as to the scope of national performance rules, and in specific whether such rules should apply to all incumbent LECs. In the first instance, there is no question that the full panoply of the Commission's rules must apply to the four Bell Operating Companies and all of their affiliates and subsidiaries. Second, it is equally clear that the rules should not apply to any incumbent LECs that are automatically exempt from the unbundling rules of section 251(c)(3). For those carriers that are not automatically exempt, but could petition the Commission or a state commission for such an exemption, such carriers should be considered subject to the Commission's national UNE performance rules until such time as the relevant regulatory authority fully exempts the carrier from unbundling obligations.⁴⁵ To the extent an incumbent carrier's section 251(c)(3) obligations are modified, rather than lifted entirely, that carrier should remain subject to the Commission's national performance rules until such time as the Commission rules on a petition from that carrier seeking a concomitant modification to its performance obligations.

The legal analysis underlying the applicability of national performance rules is simple: carriers subject to the unbundling obligations of section 251(c)(3) are also

⁴⁵ For example, section 251(f)(2) permits certain rural carriers to petition for an exemption from section 251(c)(3).

subject to the “just, reasonable and nondiscriminatory” performance obligations of that statutory provision. Because the Commission’s national performance rules are no more than an agency interpretation of the parameters of the “just, reasonable and nondiscriminatory” obligation, carrier subject to the statutory obligation are legally bound by the Commission’s interpretation of that obligation. Indeed, carriers are subject to it until such time as they are exempted. Thus, the Commission must clearly provide in its rules that any incumbent carrier subject to the unbundling requirements of section 251(c)(3) of the Act is subject to all of the Commission’s performance standards requirements, until a final, non-appealable decision by an appropriate regulatory authority determines that the carrier is no longer subject to section 251(c)(3) unbundling obligations.

In addition, the Commission recognized in the Notice that incumbent LECs have no inherent incentive to comply with the market-opening provisions of the 1996 Act. As such, national performance metrics serve to provide a concrete enforcement mechanism to provide incentive to the ILECs to comply with the law. Verizon seeks to extend the Commission’s performance reporting requirements and penalties to competitive LECs, in an effort to impose additional costs and burdens on competitive carriers.⁴⁶ Such a requirement would be a waste of the Commission’s time and resources, as well as the limited resources of competitive LECs, and would distract from the real purpose of this proceeding. What possible regulatory purpose could be served by requiring Covad and other competitive LECs to compile data for submission to the Commission on

⁴⁶ See Letter from Dee May, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98, at 2 (filed Oct. 16, 2001) (*Verizon Ex Parte*) (stating that national reporting requirements should be extended to all local telecommunications providers, including competitive LECs).

compliance with requirements in the Act to which competitive LECs are not subject?

Further, what purpose would be served by forcing Covad and other competitive LECs – which do not, unlike Verizon, have any mechanisms in place to capture and report such data – from doing so? Verizon seeks to distract from the real issue in this proceeding: bringing incumbent monopolists into compliance with the statutory obligations they have ignored for six years.

The Commission also seeks comment on the balance it should draw between burdens on parties obligated to compile performance data and the statutory requirement that the Commission adopt rules to “produce better overall performance by incumbents as the threat of sanctions for poor performance provides incentives to comply with the market-opening provisions of the Act.”⁴⁷ The balance the Commission should strike is clear. As set out above, the Commission’s performance reporting requirements build on plans put in place by states across the country. As a result, the national rules permit BOCs to utilize existing systems and procedures without additional burdens. The Commission’s statutory duty to ensure that incumbent LECs comply with the Act is paramount, and must be the primary consideration in the Commission’s deliberation on the proper rules to adopt.

Specific Metrics and Measures

The Commission has proposed adopting a core set of metrics that addresses four specific areas of UNE performance: “pre-ordering, ordering, provisioning, and ongoing maintenance and repair services.”⁴⁸ In order to assist the Commission in adopting concrete and enforceable measures that address those four vital areas of the UNE process,

⁴⁷ Notice at ¶ 26.

⁴⁸ NPRM at ¶ 25.

Covad has attached, as Appendix A to these comments, a set of 13 performance metrics. Those 13 metrics address the four key areas of section 251(c)(3) compliance identified by the Commission as most important to competitors. Covad believes that the adoption of the 13 metrics it proposes, which address UNE loops and linesharing, will provide an acceptable baseline minimum performance gauge. These proposed metrics must be associated with the self-executing performance plan discussed elsewhere in these comments.

The metrics set out in Appendix A to these comments are detailed in their purpose, their business rules, permissible exclusions, and manner of reporting. They are self-explanatory, in that they set out the purpose of the metric, the disaggregation required⁴⁹, the permissible exclusions, and the method of reporting. To briefly summarize those metrics:

- Percent FOC Received on Time. FCC-POI-1. Measures the success rate of the FOC delivery portion of the provisioning process. Used to identify issues that cause delays in the preorder provisioning process.
- Percent Service Order Reject on Time. FCC-POI-2. Measures the success rate of the reject delivery portion of the provisioning process. Used to identify issues that cause delays in the preorder provisioning process. This is an exception measure, used to monitor orders that do not flow through the normal provisioning process.
- Percent Slid FOCs. FCC-POQ-1. Tracks and measures the percentage of times an ILEC changes the Firm Order Commitment Date. Designed to

⁴⁹ For example, in order to accurately reflect performance, metrics must be disaggregated at the product level, the UNE type level, and at the geographic level (by state).

encourage the delivery of a valid FOC. Excludes Customer Requested Due Date changes.

- Percent FOC In Interval. FCC-POQ-2. Measures the percentage of FOCs offered whose intervals are less than or equal to the standard interval for the product. Used to ensure the delivery of a valid FOC.
- Average Delivery Interval. FCC-OPI-1. Measures the average amount of time in business days that elapses from service order placed to loop delivery. A loop is considered delivered when the ILEC has completed the work necessary to provide a DSL quality product to the CLEC AND the CLEC has accepted that delivery. This interval will be defined as the ILEC service delivery interval.
- Percent Joint Acceptance Test of UBL. FCC-OPQ-1. Measures the percentage of 2-wire unbundled loops delivered that go through the Joint Acceptance Test process. Higher levels of testing will improve the quality of loop delivered. An order will be considered acceptance tested when the parameters established for JAT (test documented, on-hold time exceeded, etc.) are met. Sub-metric will be % JAT Passed.
- Percent Commitment Met. FCC-OPQ-2. Measures the percentage of time the service delivery interval is within the promised delivery interval. A loop is considered delivered when the ILEC has completed the work necessary to provide a DSL quality product to the CLEC AND the CLEC has accepted that delivery.

- Percent Interval Met. FCC-OPQ-3. Measures the percent the standard service *delivery interval is met. A loop is considered delivered when the ILEC has completed the work necessary to provide a DSL quality product to the CLEC AND the CLEC has accepted that delivery.*
- Mean Time to Repair. FCC-MRI-1. Measures the interval for all repair tickets issued to the service provider.
- % Repair Complete in X. FCC-MRI-2. Track the percentage of repair tickets completed within specified intervals. This will identify repair time increases.
- Installation Quality. FCC-MRQ-1. Measures the quality of loop installation by identifying service failures within intervals close to *installation completion.*
- Repeat Trouble in 30 Days. FCC-MRQ-2. Measures the percentage of circuits with chronic trouble by measuring the number of trouble tickets issued in 30 days on a single service order.
- % Trouble Ticket Rate. FCC-MRQ-3. Measures the percentage of circuits with trouble by measuring the number of trouble tickets issued in the reporting month. Measurement reflects the overall network quality.

Covad strongly believes that the adoption of these 13 metrics pursuant to the Commission's Notice will go great lengths to satisfy the Commission's statutory obligation to ensure incumbent LEC compliance with section 251(c)(3) obligations. These metrics address the particular parameters of data reporting necessary to ensure nondiscriminatory provisioning of loop and linesharing UNEs.

Exclusions

The Commission has asked commenters to address “the exact definition and list of exclusions or exceptions that should apply to each measurement, and request that parties provide detailed responses regarding why particular exclusions should apply.”⁵⁰ Covad’s proposed metrics severely limit the ability of incumbent LECs to exclude broad categories of UNE orders from the reported metrics. The incumbent phone companies have demonstrated a pattern of deceptive submissions of performance data to the Commission and competitive carriers. This is not mere rhetoric: the Commission’s record of adjudication speaks for itself.⁵¹ In addition, the incumbent LECs have no incentive to accurately report their data. Thus, the Commission must severely limit the excuses that it provides the incumbents an opportunity to use to avoid reporting on their actual performance.

The Commission proposed in the Notice that it adopt “an exceptions process should be established to permit an incumbent LEC to explain or restate reported results to

⁵⁰ Notice ¶ 30.

⁵¹ For a sampling of such behavior, see, e.g. “FCC Enforcement Bureau and Verizon Enter into Consent Decree; Verizon to pay \$77,000 and Implement Remedial Actions to Help Ensure Compliance with Local Competition Rule,” News Release, Sept. 14, 2001, (Verizon fined for refusal to comply with FCC rule requiring Verizon to provide data to CLECs regarding which central offices are no longer available for collocation) *available at* http://www.fcc.gov/eb/News_Releases/veriz1.html ; “FCC Affirms \$88,000 Fine Against SBC For Failing To Comply With Merger Conditions,” News Release, May 29, 2001 (SBC used incorrect benchmarks and excluded key data from its performance reports for a period of up to 13 months), *available at* http://www.fcc.gov/eb/News_Releases/nrsbc052901.html ; “FCC Enforcement Bureau Imposes \$94,500 Fine Against SBC For Violations Of Local Competition Rule,” News Release, May 24, 2001, (SBC fined for failure to comply with FCC rule requiring provisioning of collocation data to CLECs), *available at* http://www.fcc.gov/eb/News_Releases/nrsbc052301.html ; “FCC Proposes To Fine SBC Communications, Inc. \$2.52 Million”, New Release, Oct. 16, 2001 (SBC's filing of inaccurate information in the Kansas/Oklahoma section 271 proceeding), *available at* http://www.fcc.gov/eb/News_Releases/nrsbc1016.html ; “FCC And BellSouth Enter Into A \$750,000 Consent Decree Improving Compliance With Local Competition Rules,” News Release, Nov. 12, 2000 (BellSouth failed to comply with Act and Commission rule requiring BellSouth to provide cost data to CLECs), *available at* http://www.fcc.gov/eb/News_Releases/nrbellsouth.html ; “Enforcement Bureau And Verizon Enter Into \$250,000 Consent Decree Regarding Long Distance Verification And Record Retention,” News Release, Oct. 17, 2000, (Verizon failed to comply with rules regarding data retention of customer records), *available at* http://www.fcc.gov/eb/News_Releases/nrverizon.html .

account for circumstances beyond its control.”⁵² It is vitally important to the success of the Commission’s performance rules that the “exceptions” process include a post facto appeals process, rather than a series of exceptions improperly places the burden on competitive LECs to seek recourse for violations of the Commission’s rules. If the Commission permits incumbent LECs to utilize a long list of exclusions from the performance reports, the Commission is giving the inmates the keys to the prison. Simply put, if an incumbent LEC is the arbiter of not only what performance it must report every month, but also whether it must report performance at all as to broad categories of service, it will be as if the Commission had never adopted any performance rules at all. Indeed, it will be worse: the Commission will be empowering the incumbent LECs to receive official regulatory blessing of the incumbent’s self-selected performance. The Commission has extensive experience with the unwillingness of the incumbent LECs to report their performance truthfully and fully. That pattern of behavior has emerged even in the absence of such exclusions.

Covad’s proposed benchmarks generally use 95% performance as the level of performance necessary to satisfy the metric. Thus, a 5% noncompliance rate is automatically built-in to provide the incumbent LEC a performance cushion to satisfy the need for exclusions. Should the incumbent LEC need to further to excuse its performance for various operational reasons that are not reflected in the business rules of the metrics, the mechanism to address those potential exclusions must be concrete and considerate of the incentives on the parties to the transaction. The incumbent LEC has only one incentive: fail to deliver the UNE, an essential input to its retail competitor, as

⁵² Notice at ¶ 32.

often as possible. Where it must eventually deliver the UNE, the incentive is to delay provisioning, or to degrade the performance of that provisioning, as much as possible.

Given that background, the Commission must deny incumbents the tools they need to avoid regulatory scrutiny of their UNE performance. A long list of metric exclusions does not serve that goal. Simply put, the burden must be on the incumbent LEC, not the requesting carrier, to justify failure to deliver a UNE in a timely manner. In other words, the Commission must start and end with the assumption that the incumbent LEC is required to provide a UNE. Although that sounds tautological, given the requirement that incumbent LECs provide UNEs to requesting carriers, it is vital that the Commission's rules recognize that principle. Metrics replete with exceptions do not serve this goal. Exceptions implement the statutory requirement thusly: incumbent LECs are required to provide UNEs, except where they don't believe they have a suitable loop, or except after 5pm, or except where the incumbent LEC technician marks a form that says the end user wasn't home, or except when the ILEC technician's load was too much to complete in one day, etc. The whole reason the Commission is adopting national performance metrics is to take the power to decide whether to comply with the law or not away from the incumbent LEC, which has no incentive to do comply. Rather, the Commission's rules must make clear that the default is that the incumbent must deliver the loop, not that the incumbent must scan the list of available exceptions to seek an excuse to back up its refusal to provide the loop.

Should the incumbent LEC need to seek exclusions from its reported performance, the Commission should put in place a simple reconsideration process that properly places the burden on the incumbent for avoiding the statutory unbundling

obligations of section 251(c)(3). Specifically, the Commission should not include exclusions in the metrics it adopts that permit incumbents to escape liability for failure to deliver a UNE based on factors within the incumbent LEC's control. Thus, facilities misses should not be an exclusion, because were it to be an exclusion the incumbent LEC would have no incentive to actually find facilities to fulfill the UNE order. In the event that facilities are truly not available, the incumbent LEC can always file a subsequent petition with the Commission seeking adjudication of those purported excuses. What the Commission cannot permit is a continuation of the status quo: incumbent LECs providing UNEs in a timely and quality manner in few circumstances, and utilizing the full panoply of excuses available to justify noncompliance with the Act.

The requirement that incumbent LECs file post facto requests for adjustments is exactly the process the incumbent carriers follow today with respect to state performance plans. For example, every month, Verizon files a petition with the New York PSC seeking various adjustments to the New York PAP for the prior three months of data, based on various exclusions that Verizon would like to make. The New York PSC then rules on those requests and permits Verizon to make adjustments as appropriate. The states have wisely constructed their performance plans in this manner, rather than give the incumbent LEC (the party with the ability to pay) the power to deny due compensation to the aggrieved carrier for months while the incumbent pursues appeals without merit. The Commission should adopt the same procedure. Incumbent LECs are in control of the information necessary to justify their failure to provide UNEs – competitive carriers are not. As such, the burden is properly on the incumbent LEC – the

party with the necessary information, and the incentive to avoid compliance with the law – to prove that it is entitled to a refund of amounts paid in damages to competing carriers.

The BOCs already have the systems and procedures in place to process and produce the necessary data, and would suffer no additional burden under national rules

The Commission asks in the Notice for parties to address with specificity “why their recommended outcomes do not increase carriers' overall regulatory burdens.”⁵³ As to the Bell Operating Companies, the answer is simple: these four companies already have the staff, the systems, and the means to implement the proposed metrics immediately. As set out in greater detail below, the four Bell Companies, whether they have received long distance approval or not, are required by state commissions to track their performance, on a monthly basis as to individual competitive LECs, and report that performance in a disaggregated form. The computer systems to calculate and track that data are in place at all four BOCs, the expert staff necessary to track that information is on hand, and the expertise on how to track the data and report it to regulatory authorities is firmly established. The additional regulatory burden that accompanies a requirement that the Bell Companies track monthly UNE performance data that they already compile across their footprints today is nil.

Each of the four Bell Operating Companies will argue that national performance metric reporting requirements impose an undue additional burden that serves no regulatory purpose. In order to counter those false claims, the Commission must first recognize the vital public interest in requiring the BOCs to report on UNE performance and pay self-executing penalties for failure to comply with the market-opening provisions of section 251. To address the burden claim, the Commission need only look at the

comprehensive performance plans at the state level, pursuant to which all four Bell companies already have the systems, processes, and personnel in place to compile and disseminate a much wider variety of performance data than will be required by the federal rules under consideration in this proceeding. The BOC plans already in place across the country are much more detailed and complex than the plan proposed by Covad, or indeed the plan contemplated by the Commission in its Notice. Indeed, each BOC is already responsible for monthly disaggregated performance reporting, by state, on hundreds of metrics as to dozens of products and wholesale customers. A brief examination of the complexity of these state plans should answer any concerns that the Commission's adoption of a few metrics, most of which are already in use across the country, will in any way burden the BOCs.

Verizon

In April 2000, Verizon completed its Performance Assurance Plan (PAP) for New York. The plan includes the adoption of carrier-to-carrier service measurements and standards, scoring mechanisms to determine whether CLECs are receiving non-discriminatory treatment (including statistical methodologies), bill credits for unsatisfactory performance, monthly reporting requirements, and provisions for annual reviews, updates and audits. Also included are provisions for a Quality Assurance Program for Verizon-NY's measures and an Exceptions Process that will allow VZ-NY to obtain, subject to state Commission approval, modifications to reported service results. Under this plan, VZ-NY issues bill credits to CLECs if it provides unsatisfactory performance.

³³ Notice at ¶ 34.

Measures and standards in the plan have generally been taken directly from the Guidelines for Carrier-to-Carrier Performance Standards and Reports developed in Case 97-C-0139 at the New York State Public Service Commission and cover the areas of Pre-order, Ordering, Provisioning, Maintenance and Repair, Billing and Network Performance. These measures and standards were developed after more than two years of collaborative meetings with CLECs. Primarily, two interrelated methods are used to monitor VZ-NY's wholesale performance to CLECs on the performance measurements. The first method is designed to measure VZ-NY's overall Section 271 performance in four categories that correspond to the methods or modes CLECs use to enter the local exchange market: Resale; Unbundled Network Elements; Interconnection (Trunks); and Collocation. This is referred to as the Mode of Entry (MOE) measurements method. These measurements provide a mechanism to measure the overall level of VZ-NY's service to the entire CLEC industry in the four areas.

A second method measures VZ-NY's performance in twelve critical areas, on both a CLEC-specific and a CLEC-aggregate basis. The critical measures are: (1) Response Time OSS Interface; (2) OSS Interface Availability (Prime Time); (3) % On Time LSR and Completion Notice Metrics; (4) % Missed Appointment – VZ – EEL; (4b) % Missed Appointments; (5) % Missed Appointments – VZ – No Dispatch – Platform; (6) % On Time Performance Hot Cut (adjusted for misses due to late FOCs); (7) % On Time Performance – UNE LNP; (8) % Repeat Reports within 30 days; (9) Mean Time to Repair; (10) % Final Trunk Groups Blocking; (11) Collocation; and (12) DSL Metrics. This is referred to as the Critical Measures method. The Critical Measures are a subset of the measures included in the MOE measurements. If VZ-NY's overall performance

score in the four categories falls below a minimum score in any given month, wholesale price reductions in the form of bill credits will be implemented and remain in effect for one month.

Verizon has exported the New York PAP to numerous of its other in-region states, and now reports (and pays) on a monthly basis on dozens of metrics, UNE categories, and carriers. In short, Verizon has systems already in place to handle the requirements of a federal performance metrics program. Verizon's systems can process not only the metrics data, by carrier, on a disaggregated basis, but they can also process the self-executing performance remedy aspect of national rules. Verizon's systems already utilize such a system on a state basis, and payments are automatically made to the aggrieved carrier by Verizon's systems. Thus, adoption of national metrics and self-executing penalties would impose no additional burden on Verizon.

SWBT Performance Remedy Plan

Southwestern Bell (SWBT) developed its Performance Remedy Plan (Plan) as part of its generic interconnection agreement for Texas. The interconnection agreement, as well as the Performance Remedy Plan, were developed in a collaborative process with the Texas Public Utility Commission and numerous CLECs. The plan provides that SWBT will provide a CLEC with a monthly report of performance for more than 100 performance measures. These measures include: (1) Resale POTS, Resale Specials and UNES; (2) Resale POTS and UNE Loop and Port Combination Combined by SWBT; (3) Resale Specials and UNE Loop and Port Combinations Combined by SWBT; (4) Unbundled Network Elements; (5) Interconnection Trunks; (6) Directory Assistance and Operator Services; (7) Local Number Portability; (8) 911; (9) Poles, Conduit and Rights

of Way; (10) Collocation; (11) Directory Assistance Database; (12) Coordinated Conversions; (13) NXX; and (14) Bona Fide/Special Request Process. SWBT collects, analyzes, and reports performance data for these measures in accordance with SWBT's Performance Measurement Business Rules, as approved by the Texas Commission.

SWBT uses a statistical test, a modified "Z-test," for evaluating the difference between two means (SWBT and CLEC) or percentages, or the difference in the two proportions. The modified Z-tests are applicable if the number of data points are greater than 30 for a given measurement. In cases where benchmarks are established, the determination of compliance is through the comparison of the measured performance delivered to the CLEC and the applicable benchmark.

Enforcement of the Plan is through liquidated damages and assessments. SWBT pays liquidated damages to a CLEC according to Tier-1 measurements identified as High, Medium, or Low on the list of performance measures. Assessments are applicable to Tier-2 measures identified as High, Medium, or Low on the list of performance measures, and are payable to the Texas State Treasury. SWBT is not liable for the payment of either Tier 1 damages or Tier 2 assessments until the Commission approved an Interconnection Agreement between a CLEC and SWBT containing the terms of the Performance Remedy Plan. Tier 2 assessments are paid on the aggregate performance for all CLECs that are operating in Texas, unless the CLEC has a payment plan that is not comparable to that in Tier 1 of the Performance Remedy Plan.

Like Verizon, SBC also has the experience, systems, procedures, and processes necessary to report its wholesale performance as to a limited number of metrics to the Commission and competing carriers. SBC also has systems in place to implement a self-

executing performance remedy plan, such as that proposed by the Commission, and to ensure that payments are properly made to carriers that have been subjected to discriminatory treatment.

Qwest Performance Assurance Plan

Qwest is currently engaged in a collaborative process with eleven of the fourteen state commissions in its territory to finalize its Post Entry Performance Plan (PEPP). The statistical methods and the payment structure of the Texas PAP served as the starting point for the PEPP. Qwest has already deployed systems and processes necessary to track all of the measures and metrics set out in the Texas plan throughout the Qwest region. Qwest is therefore just as prepared, and just as capable, as the other BOCs to implement a national performance metrics plan without additional burden.

BellSouth Service Quality Measurements

The Georgia Public Service Commission has required BellSouth to submit performance reports since May 1998, when it issued an order approving BellSouth's Service Quality Measurements (SQM). BellSouth's SQM covers 10 different functional categories including: Pre-ordering; ordering; provisioning; maintenance and repair; billing; operator services and directory assistance; E911; trunk group performance; and, collocation. Each of these categories corresponds to a function on which BellSouth's performance to CLECs is measured. Within each of these functional categories is a series of measurements. Each measurement is broken down into 10 categories including: The measurement itself; a definition of the measure; any exclusions to the measure; business rules; levels of disaggregation; a calculation of the measurement; report

structure; data retained relating to CLEC experience; data retained relating to BST experience; and, retail analog/benchmark.

BellSouth's Voluntary Self-Effectuating Enforcement Mechanism (VEESM) is based on key outcome-oriented measurements contained in the SQM as well as the corresponding analogs and benchmarks, and established a three-tiered schedule for penalties for non-performance. The three tiers are as follows:

- Tier-1 enforcement mechanisms are triggered when BellSouth fails on any one of the Tier-1 VSEEM measurements for a particular month and are paid directly to the individual CLECs;
- Tier-2 enforcement mechanisms are triggered when BellSouth fails at the CLEC aggregate level on any one of the Tier-2 VSEEM measurements in a calendar quarter. These payments would be made directly to the State;
- Tier-3 enforcement mechanisms are triggered when BellSouth consistently fails at the CLEC aggregate level on any 5 of the 12 Tier-3 VSEEM measurements for 3 consecutive months in a calendar quarter. Under Tier-3, BellSouth will voluntarily discontinue marketing long distance service in Georgia until such time as BellSouth's performance improves.

The object of the self-executing remedies plan is to ensure that carriers need not petition the Georgia Commission to resolve disputes about poor performance and to remove the delays and expense of pursuing litigation. The plan has an absolute cap of 44% of BellSouth's net revenues, which equals approximately \$340 million.

As with its BOC brethren, BellSouth has the systems and procedures in place to report on a wide variety of performance metrics. In addition, like the other three BOCs,

BellSouth has the systems in place to implement a self-executing performance plan and to ensure that payments are properly made to the aggrieved carrier.

Given the experience that the BOCs already have with measuring performance on a state-by-state basis, the Commission should require incumbent LECs to report on performance to the Commission and competitive LECs by state.⁵⁴ Similarly, the Commission's remedy plan should require performance penalty payments to competitive LECs be made on a state by state basis.

Data Reporting and Auditing

The Commission seeks specific comment on the most effective means of ensuring that the data submitted by incumbent LECs is accurate and verifiable. As the Commission well knows from its prior section 271 applications and from merger proceedings, incumbent LEC submission of data to the Commission is subject to misstatements, restatements, and outright refusals to comply with the Commission's rules. As discussed above, incumbent LECs have no incentive to submit accurate data unless they are subject to check, and unless completion of that check they are subject to concrete penalties for failure to comply with the data reporting requirements.

The Commission should adopt specific audit requirements, overseen by the Commission (not the incumbent LEC) and conducted by the Commission staff with assistance from independent auditors if necessary.⁵⁵ The incumbent LECs will be more inclined to submit accurate and complete data to the Commission, and to accurately pay damages due to competing carriers, if they are subject to audit. Thus, the audit procedures would "ensure that both regulators and interested parties may trust the

⁵⁴ Notice at ¶ 83 (seeking comment on level of geographic disaggregation for performance measures).

⁵⁵ Notice at ¶ 74.

accuracy and validity of the incumbent LEC-generated and reported data and whether such procedures can be instituted without increasing carriers' overall regulatory burdens.⁵⁶ In addition to the audit requirements, incumbent LECs must make available, on a website in carrier-specific and UNE product-disaggregated manner, the raw data that underlies the performance metric calculations undertaken by the incumbents. The availability of such raw data will impose no additional burden on the incumbent LECs, as they are (obviously) required to compile such data as part of the data calculation process. Absent such audits, as the Bell companies have shown too many times, neither regulators nor competitive carriers can have any faith in the validity of the incumbents' data.

The Commission also seeks comment on whether regular collaborative meetings of all carriers should be made a part of the national performance rules.⁵⁷ The purpose of such collaborative sessions, as with collaboratives that take place at the state level, would be to address the "development and refinement" of national performance rules.⁵⁸ Covad participates actively in such collaboratives in all four BOC regions, and would welcome participation in such sessions at the federal level to address the specifics of the federal rules. It is of vital importance to the success of those rules, however, that the Commission leave none of the initial implementation of those rules to such a collaborative, and that those rules be effective as of the release of the Commission's order, and not as of the commencement of collaboratives. In Covad's experience, the BOCs use collaboratives to delay implementation of needed metrics and requirements.

The Commission must assign staff from both its policy making and enforcement arms to the collaborative sessions, and Commission staff must be in charge of the

⁵⁶ Notice at ¶ 74.

⁵⁷ Notice at ¶ 75.

collaboratives, including setting the agenda and determining deadlines for deliverables. Meetings should be convened monthly at the Commission, and the Commission should solicit input from interested parties as to the agenda for each meeting. In no event should the Commission tie any of the metrics or measures it adopts in this proceeding to implementation of the collaborative process – the rules must go into effect as soon as possible, and any subsequent need for modification can be addressed in the collaborative as industry gains experience with the Commission’s rules.

The Commission must also delegate authority to the Common Carrier Bureau to implement metric business rule changes as necessary to address the concerns of all parties. Although the Bureau would not be empowered to make such changes without soliciting comment from interested parties, the Bureau’s delegated authority in this arena would ensure more timely addressing of carrier concerns. Finally, the Commission should not set any concrete sunset rule for the performance metrics it adopts. Because such metrics are put in place in order to ensure incumbent LEC compliance with the obligations of section 251(c)(3), so long as those obligations remain in place, the metrics that ensure compliance must remain in place as well.

The Commission must take affirmative steps to ensure the immediate and timely implementation of its rules.

The Commission should ensure that its procompetitive performance rules are immediately available to competitors. Possible points of delay include the time period between order adoption and rule effective date; commencing of negotiations for interconnection agreement modifications; arbitration of those modifications; implementation of the arbitration awards – all of these delays, which add up to months if

⁵⁸ *Id.*

not years of delay, can be avoided. The Commission must set out a concrete and definite timetable for implementation of its rules. In the *Linesharing Order*, the Commission adopted a six-month timetable for negotiation and implementation of interim interconnection agreements to ensure the rapid deployment of the linesharing UNE. In the context of the performance rules, there is nothing for an incumbent LEC to “implement,” so the time period should be significantly shorter. An incumbent LEC, in order to submit itself to the Commission’s three business day loop interval, must simply provide the loop – pursuant to longstanding methods and procedures already in place – in a shorter time period than it has traditionally been willing to do so.⁵⁹ The Commission must make clear that the rules it adopts become automatically effective, and do not require inclusion in an interconnection agreement or any action by the competitive LEC to implement the rules.

The Bell company separate affiliates – which are on their last legs – provide no replacement for concrete loop provisioning intervals

Certain incumbent LECs have suggested that their separate affiliates, or the separation-type treatment they afford their integrated retail arms, offer sufficient protection against discrimination to obviate the need for national performance rules. The level of integration between the incumbent LEC and its affiliates renders the affiliate an ineffective protection against UNE provisioning practices. The affiliate is not a true “wholesale” customer of incumbent loops, because the affiliate relies on the sales, maintenance, and operational services of the incumbent and the incumbent’s ISP as well. As a result, the loop “interval” that the affiliate (or, indeed, the integrated incumbent LEC

⁵⁹ Indeed, the Commission already has a rule in place providing that it is a violation of the incumbent LEC’s statutory duty to negotiate in good faith to refuse to permit an interconnection agreement “to be amended in

retail arm) receives is inexorably linked to all other operational aspects of the service delivery process. Thus, if the incumbent affiliate “receives” its loop in seven days, and the entire service provisioning process undertaken by the incumbent on behalf on its affiliate (ISP service provisioning, OSS updates, truck roll to customer premises, etc.) is complete, the affiliate can turn up service as soon as that loop is delivered. The competitive LEC, on the other hand, can only *begin* the customer provisioning process when its gets its loop on day seven. Thus, the affiliate serves to cloud the true nature of the loop (or linesharing UNE) provisioning process, insulating the incumbent LEC from providing a meaningful opportunity for competitive LECs to compete with the affiliate, all in the name of “parity.” Given this reality, and the fact that both Verizon and SBC have sought the immediate termination of the separate affiliates, the Commission cannot rely on such affiliates as a replacement for UNE provisioning intervals.

Conclusion

The Commission has worked hard for six years to bring the benefits of competition to all consumers in this country. In particular, the Commission has actively fostered competition in the advanced services arena, in furtherance of both the market-opening provisions of the Act and the congressional mandate of section 706 of the Act. As the Commission has repeatedly recognized, the loop unbundling and OSS obligations of section 251(c)(3) are at the very core of those market-opening provisions. It is now time for the Commission to look at six years of competitive experience and take immediate action to close the gaps in its procompetitive rules. These gaps – the lack of specific UNE intervals, performance metrics, and self-executing measures – are denying more and more consumers competitive broadband services every day. By adopting

the future to take into account changes in Commission or state rules.” 47 CFR § 51.301(c)(3).

meaningful UNE provisioning intervals and associated penalties, the Commission will take a great step towards ensuring the further growth and development of the competitive broadband industry, an industry dedicated to meeting the demands of consumers for low-cost, high-speed, innovative broadband services.

Respectfully submitted,

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APPENDIX A – PERFORMANCE METRICS

Covad Communications Company

CC Docket No. 01-318

Percent FOC Received on Time

FCC-POI-1

Purpose:

Measures the success rate of the FOC delivery portion of the provisioning process. Used to identify issues that cause delays in the preorder provisioning process.

Description:

FCC-POI-1A: Measures the successful delivery of the FOC for UNE-P orders. Includes all service orders designated for POTS service.

FCC-POI-1B: Measures the successful delivery of the FOC for Line Share DSL orders. Includes all service orders designated as Line Share products.

FCC-POI-1C: Measures the successful delivery of the FOC for all unloaded 2-wire unbundled loops. Includes all service orders designated as 2W-UBL, and all IDSL service orders.

FCC-POI-1D: Measures the successful delivery of the FOC for all loaded 2-wire unbundled loops. Includes all service orders that require conditioning prior to provisioning.

Exclusions / Exceptions:

- ❖ Includes business days only in the interval calculation
- ❖ A "day" is defined as a true 24-hour day, from 12 midnight to 12 midnight

Reporting Period: One Month	Unit of Measure: Percent
Product Reporting: As identified above.	Target: 98% Success

<p>Fields Required for Calculation:</p> <ol style="list-style-type: none"> 1. Service Order Placed Date 2. FOC Delivered Date 3. FOC Interval 4. Standard Interval per Product 5. Supplement Date 6. Success Flag 7. FOC Delivered Count 8. Product Type <p>Amplifying Data:</p> <ol style="list-style-type: none"> 1. PON 2. Service Order Number 3. FOC Date 	<p>Calculations:</p> <p>FOC Interval = (FOC Delivered Date – Service Order Placed Date) <i>IN BUSINESS DAYS</i></p> <p style="text-align: center;">OR</p> <p>FOC Interval = (FOC Delivered Date – Last Supplemental Service Order Placed Date) <i>IN BUSINESS DAYS</i></p> <p>Success Flag = IF ((FOC Interval ≤ Standard Interval for Product) Then 1) Else 0</p> <p>% FOC Received on Time = Σ (Success Flag) / Σ (FOCs Delivered)</p>
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Product Delivery Standards:

FCC-POI-1A: 24 Hours	FCC-POI-1B: 24 Hours
FCC-POI-1C: 48 Hours	FCC-POI-1D: 48 Hours

Percent Service Order Reject on Time

FCC-POI-2

Purpose:

Measures the success rate of the reject delivery portion of the provisioning process. Used to identify issues that cause delays in the preorder provisioning process. This is an exception measure, used to monitor orders that do not flow through the normal provisioning process.

Description:

FCC-POI-2A: Measures the successful delivery of the reject notice for UNE-P orders. Includes all service orders designated for POTS service.

FCC-POI-2B: Measures the successful delivery of the reject notice for Line Share DSL orders. Includes all service orders designated as Line Share products.

FCC-POI-2C: Measures the successful delivery of the reject notice for all unloaded 2-wire-unbundled loops. Includes all service orders designated as 2W-UBL, and all IDSL service orders.

FCC-POI-2D: Measures the successful delivery of the reject notice for all loaded 2-wire unbundled loops. Includes all service orders that require conditioning prior to provisioning.

Exclusions / Exceptions:

- ❖ Includes business days only in the interval calculation
- ❖ A "day" is defined as a true 24-hour day, from 12 midnight to 12 midnight

Reporting Period: One Month	Unit of Measure: Percent
Product Reporting: As identified above.	Target: 98% Success

<p>Fields Required for Calculation:</p> <ol style="list-style-type: none"> 1. Service Order Placed Date 2. Reject Delivered Date 3. Reject Interval 4. Standard Interval per Product 5. Supplement Date 6. Success Flag 7. Reject Delivered Count 8. Product Type <p>Amplifying Data:</p> <ol style="list-style-type: none"> 1. PON 2. Service Order Number 	<p>Calculations:</p> <p>Reject Interval = (Reject Delivered Date – Service Order Placed Date) <i>IN BUSINESS DAYS</i></p> <p style="text-align: center;">OR</p> <p>Reject Interval = (Reject Delivered Date – Last Supplemental Service Order Placed Date) <i>IN BUSINESS DAYS</i></p> <p>Success Flag = IF (Reject Interval ≤ Standard Interval for Product) Then 1) Else 0</p> <p>% Reject Received on Time = Σ (Success Flag) / Σ (Rejects Delivered)</p>
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Product Delivery Standards:

FCC-POI-2A: 12 Hours	FCC-POI-2B: 12 Hours
FCC-POI-2C: 24 Hours	FCC-POI-2D: 24 Hours

Percent Slid FOCs

FCC-POQ-1

Purpose:

Track and measure the percentage of times an ILEC changes the Firm Order Commitment Date. Designed to encourage the delivery of a valid FOC. Excludes Customer Requested Due Date changes.

Description:

FCC-POQ-1A: Measures the percentage of UNE-P orders with more than one FOC. Includes all service orders designated for POTS service.

FCC-POQ-1B: Measures the percentage of Line Share DSL orders with more than one FOC. Includes all service orders designated as Line Share products.

FCC-POQ-1C: Measures the percentage of unloaded 2W-UBL service orders with more than one FOC. Includes all service orders designated as 2W-UBL, and all IDSL service orders.

FCC-POQ-1D: Measures the percentage of loaded 2-wire unbundled service orders with more than one FOC. Includes all service orders that require conditioning prior to provisioning.

Exclusions / Exceptions:

❖ Customer requested due date change.

Reporting Period: One Month	Unit of Measure: Percent
Product Reporting: As identified above.	Target: ≤ 3% Slid FOC

<p>Fields Required for Calculation:</p> <ol style="list-style-type: none"> 1. # Orders with FOC 2. # Orders with >1 FOC 3. Orders with FOC Count 4. Slid Flag 5. FOC Received Date 6. Product Type <p>Amplifying Data:</p> <ol style="list-style-type: none"> 1. PON 2. Service Order Number 3. Supplement Date 4. First FOC Date 5. Last FOC Date 	<p>Calculations:</p> <p>Slid Flag = IF ((FOC > 1) Then 1) Else 0</p> <p>% Slid FOC = $\Sigma (\text{Slid Flag}) / \Sigma (\text{Orders with FOC})$</p>
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Percent FOC In Interval

FCC-POQ-2

Purpose:

Measure the percentage of FOCs offered whose intervals are less than or equal to the standard interval for the product. Used to ensure the delivery of a valid FOC.

Description:

FCC-POQ-2A: Measures the percentage of FOCs for UNE-P orders with an offered interval less than or equal to the standard POTS interval. Includes all service orders designated for POTS service.

FCC-POQ-2B: Measures the percentage of FOCs for Line Share DSL orders with an offered interval less than or equal to the standard Line Share interval. Includes all service orders designated as Line Share products.

FCC-POQ-2C: Measures the percentage of FOCs for unloaded 2W-UBL service orders with an offered interval less than or equal to the standard unloaded 2W-UBL interval. Includes all service orders designated as unloaded 2W-UBL, and all IDSL service orders.

FCC-POQ-2D: Measures the percentage of FOCs for loaded 2-wire unbundled service orders with an offered interval less than or equal to the standard loaded 2W-UBL interval. Includes all service orders that require conditioning prior to provisioning.

Exclusions / Exceptions:

- ❖ Customer requested due date outside interval
- ❖ Includes business days only in the interval calculation
- ❖ A "day" is defined as a true 24-hour day, from 12 midnight to 12 midnight

Reporting Period: One Month	Unit of Measure: Percent
Product Reporting: As identified above.	Target: 95% FOCs in Interval

<p>Fields Required for Calculation:</p> <ol style="list-style-type: none"> 1. Product Type 2. Standard Interval for Product 3. Conditioning Status 4. Actual Interval Offered 5. Customer SUP Date 6. Last FOC 7. Valid Interval Flag 8. Service Order Placed Date 9. Orders with FOC Count <p>Amplifying Data:</p> <ol style="list-style-type: none"> 1. PON 2. Service Order Number 	<p>Calculations:</p> <p>Actual Interval Offered = (Last FOC) – (Service Order Placed Date)</p> <p>Valid Interval Flag = IF ((Actual Interval Offered ≤ Standard Interval for Product) Then 1) Else 0</p> <p>% FOC in Interval = $\frac{\sum (\text{Valid Interval Flag})}{\sum (\text{Orders with FOC})}$</p>
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Product Delivery Standards:

FCC-POI-2A: 1 Business Days	FCC-POI-2B: 1 Business Days
FCC-POI-2C: 3 Business Days	FCC-POI-2D: 5 Business Days

Average Delivery Interval

FCC-OPI-1

Purpose:

Measure the average amount of time in business days that elapses from service order placed to loop delivery. A loop is considered delivered when the ILEC has completed the work necessary to provide a DSL quality product to the CLEC AND the CLEC has accepted that delivery. This interval will be defined as the ILEC service delivery interval.

Description:

FCC-OPI-1A: Measures the average service delivery interval for UNE-P orders. Includes all service orders designated for POTS service.
FCC-OPI-1B: Measures the average service delivery interval for Line Share DSL orders. Includes all service orders designated as Line Share products.
FCC-OPI-1C: Measures the average service delivery interval for unloaded 2W-UBL service orders. Includes all service orders designated as unloaded 2W-UBL, and all IDSL service orders.
FCC-OPI-1D: Measures the average service delivery interval for loaded 2-wire unbundled service orders. Includes all service orders that require conditioning prior to provisioning.

Exclusions / Exceptions:

- ❖ Customer requested due date outside interval
- ❖ Includes business days only in the interval calculation
- ❖ A "day" is defined as a true 24-hour day, from 12 midnight to 12 midnight
- ❖ Cancelled orders EXCEPT those that are cancelled after due date.

Reporting Period: One Month	Unit of Measure: Average
Product Reporting: As identified above.	Target: Average interval on or below product delivery standards

<p>Fields Required for Calculation:</p> <ol style="list-style-type: none"> 1. Product Type 2. Standard Interval for Product 3. Conditioning Status 4. Service Order Complete Date 5. Customer SUP Date 6. Service Order Placed Date 7. Average Service Order Interval 8. Service Order Complete Flag <p>Amplifying Data:</p> <ol style="list-style-type: none"> 1. PON 2. Service Order Number 	<p>Calculations:</p> <p>Average Service Order Interval = $\frac{\Sigma \text{ Business Days (Service Order Complete Date)} - (\text{Service Order Placed Date})}{\Sigma(\text{Service Orders Completed})}$</p>
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Product Delivery Standards:

FCC-OPI-1A: 1 Business Days	FCC-OPI-1B: 1 Business Days
FCC-OPI-1C: 3 Business Day	FCC-OPI-1D: 5 Business Days

Percent Joint Acceptance Test of UBL

FCC-OPQ-1

Purpose:

Measure the percentage of 2-wire unbundled loops delivered that go through the Joint Acceptance Test process. Higher levels of testing will improve the quality of loop delivered. An order will be considered acceptance tested when the parameters established for JAT (test documented, on-hold time exceeded, etc.) are met. Sub-metric will be % JAT Passed.

Description:

FCC-OPQ-1A: Not applicable to this metric

FCC-OPQ-1B: Not applicable to this metric

FCC-OPQ-1C: Measures the percentage of unloaded 2W-UBL service orders joint acceptance tested. Includes all service orders designated as unloaded 2W-UBL, and all IDSL service orders.

FCC-OPQ-1D: Measures the percentage of loaded 2-wire unbundled service orders joint acceptance tested. Includes all service orders that require conditioning prior to provisioning.

Exclusions / Exceptions: None

Reporting Period: One Month

Unit of Measure: Percentage

Product Reporting: As identified above.

Target: 95%

Fields Required for Calculation:

1. Product Type
2. Conditioning Status
3. Service Order Complete Date
4. Service Order Placed Date
5. Service Order Complete Flag
6. JAT Flag
7. JAT Date

Amplifying Data:

1. PON
2. Service Order Number
3. JAT Pass Flag

Calculations:

% UBL Joint Acceptance Tested =
 $\Sigma(\text{JAT Flag}) / \Sigma(\text{2-Wire UBL Service Orders Completed})$

% JAT Passed = $\Sigma(\text{JAT Pass Flag}) / \Sigma(\text{JAT Flag})$

JAT Flag = IF(JAT Test) OR (Meet Terms of JAT) THEN 1, ELSE 0

Percent Commitment Met

FCC-OPQ-2

Purpose:

Measure the percentage of time the service delivery interval is within the promised delivery interval. A loop is considered delivered when the ILEC has completed the work necessary to provide a DSL quality product to the CLEC AND the CLEC has accepted that delivery.

Description:

FCC-OPQ-2A: Measures the percentage commitment met for UNE-P orders. Includes all service orders designated for POTS service.

FCC-OPQ-2B: Measures the percentage commitment met for Line Share DSL orders. Includes all service orders designated as Line Share products.

FCC-OPQ-2C: Measures the percentage commitment met for unloaded 2W-UBL service orders. Includes all service orders designated as unloaded 2W-UBL, and all IDSL service orders.

FCC-OPQ-2D: Measures the percentage commitment met for loaded 2-wire unbundled service orders. Includes all service orders that require conditioning prior to provisioning.

Exclusions / Exceptions: None

Reporting Period: One Month

Unit of Measure: Percentage

Product Reporting: As identified above.

Target: 95%

Fields Required for Calculation:

1. Product Type
2. Promised Delivery Interval
3. Conditioning Status
4. Service Order Complete Date
5. Customer SUP Date
6. Service Order Placed Date
7. Service Order Interval
8. Service Order Complete Flag
9. FOC Date
10. Delivery Within Interval Flag

Amplifying Data:

1. PON
2. Service Order Number

Calculations:

Promised Delivery Interval =
(FOC Date) – (Service Order Placed Date)

Service Order Interval = (Service Order Complete Date) – (Service Order Placed Date)

Delivery Within Interval Flag = IF
(Service Order Interval) ≤ (Promised Delivery Interval) THEN 1, ELSE 0

% Commitment Met = $\Sigma(\text{Delivery Within Interval Flag}) / \Sigma(\text{Service Order Complete Flag})$

Percent Interval Met

FCC-OPQ-3

Purpose:

Measure the percent the standard service delivery interval is met. A loop is considered delivered when the ILEC has completed the work necessary to provide a DSL quality product to the CLEC AND the CLEC has accepted that delivery.

Description:

FCC-OPI-1A: Measures the percent the standard service delivery interval is met for UNE-P orders. Includes all service orders designated for POTS service.

FCC-OPI-1B: Measures the percent the standard service delivery interval is met for Line Share DSL orders. Includes all service orders designated as Line Share products.

FCC-OPI-1C: Measures the percent the standard service delivery interval is met for unloaded 2W-UBL service orders. Includes all service orders designated as unloaded 2W-UBL, and all IDSL service orders.

FCC-OPI-1D: Measures the percent the standard service delivery interval is met for loaded 2-wire unbundled service orders. Includes all service orders that require conditioning prior to provisioning.

Exclusions / Exceptions:

- ❖ Customer requested due date outside interval
- ❖ Includes business days only in the interval calculation
- ❖ A "day" is defined as a true 24-hour day, from 12 midnight to 12 midnight

Reporting Period: One Month	Unit of Measure: Percentage
Product Reporting: As identified above.	Target: 95%

<p>Fields Required for Calculation:</p> <ol style="list-style-type: none"> 1. Product Type 2. Standard Interval for Product 3. Conditioning Status 4. Service Order Complete Date 5. Customer SUP Date 6. Service Order Placed Date 7. Service Order Interval 8. Service Order Complete Flag 9. Interval Success Flag <p>Amplifying Data:</p> <ol style="list-style-type: none"> 1. PON 2. Service Order Number 	<p>Calculations:</p> <p>Service Order Interval = $\Sigma(\text{Business Days (Service Order Complete Date) - (Service Order Placed Date)}) / \Sigma(\text{Service Orders Completed})$</p> <p>Interval Success Flag = IF (Service Order Interval \leq Standard Interval for Product) THEN 1, ELSE 0</p> <p>% Interval Met = $\Sigma(\text{Interval Success Flag}) / \Sigma(\text{Service Order Complete Flag})$</p>
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Product Delivery Standards:

FCC-OPQ-3A: 1 Business Days	FCC-OPQ-3B: 1 Business Days
FCC-OPQ-3C: 3 Business Day	FCC-OPQ-3D: 5 Business Days

Mean Time to Repair

FCC-MRI-1

Purpose:

Measure the interval for all repair tickets issued to the service provider.

Description:

FCC-MRI-1A: Measures the repair interval for UNE-P orders. Includes all service orders designated for POTS service.

FCC-MRI-1B: Measures the repair interval for Line Share DSL orders. Includes all service orders designated as Line Share products.

FCC-MRI-1C: Measures the repair interval for unloaded 2W-UBL service orders. Includes all service orders designated as unloaded 2W-UBL, and all IDSL service orders.

FCC-MRI-1D: Measures the repair interval for loaded 2-wire unbundled service orders. Includes all service orders that require conditioning prior to provisioning.

Exclusions / Exceptions:

❖ No Trouble Found

Reporting Period: One Month	Unit of Measure: Average
Product Reporting: As identified above.	Target: Average within standard defined for product

<p>Fields Required for Calculation:</p> <ol style="list-style-type: none"> 1. Product Type 2. Conditioning Status 3. Service Order Complete Date 4. Service Order Placed Date 5. Service Order Complete Flag 6. Trouble Ticket Count 7. Trouble Ticket Issued Date(s) 8. Trouble Ticket Closed Date(s) 9. Repair Interval <p>Amplifying Data:</p> <ol style="list-style-type: none"> 1. PON 2. Trouble Ticket Number(s) 	<p>Calculations:</p> <p>Repair Interval = (Trouble Ticket Closed Date – Trouble Ticket Issued Date)</p> <p>Mean Time to Repair = $\Sigma(\text{Repair Interval}) / \text{Trouble Ticket Count}$</p>
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Product Delivery Standards:

FCC-MRI-1A: 4 Hours	FCC-MRI-1B: 4 Hours
FCC-MRI-1C: 24 Hours	FCC-MRI-1D: 24 Hours

% Repair Complete in X

FCC-MRI-2

Purpose:

Track the percentage of repair tickets completed within specified intervals. This will identify repair time increases.

Description:

FCC-MRI-2A: Measures the percentage of repair tickets completed within specified intervals for UNE-P orders. Includes all service orders designated for POTS service.

FCC-MRI-2B: Measures the percentage of repair tickets completed within specified intervals for Line Share DSL orders. Includes all service orders designated as Line Share products.

FCC-MRI-2C: Measures the percentage of repair tickets completed within specified intervals for unloaded 2W-UBL service orders. Includes all service orders designated as unloaded 2W-UBL, and all IDSL service orders.

FCC-MRI-2D: Measures the percentage of repair tickets completed within specified intervals for loaded 2-wire unbundled service orders. Includes all service orders that require conditioning prior to provisioning.

Exclusions / Exceptions: None

Reporting Period: One Month	Unit of Measure: Percentage
Product Reporting: As identified above.	Target: Tracking metric

<p>Fields Required for Calculation:</p> <ol style="list-style-type: none"> 1. Product Type 2. Conditioning Status 3. Standard Repair Intervals 4. Service Order Placed Date 5. Service Order Complete Flag 6. Trouble Ticket Count 7. Trouble Ticket Issued Date(s) 8. Trouble Ticket Closed Date(s) 9. Repair Interval 10. Repair Within Standard Interval Flag <p>Amplifying Data:</p> <ol style="list-style-type: none"> 1. PON 2. Trouble Ticket Number(s) 	<p>Calculations:</p> <p>Repair Interval = (Trouble Ticket Closed Date – Trouble Ticket Issued Date)</p> <p>Repair Within Standard Interval Flag</p> <p>= IF(Repair Interval ≤ Standard Repair Interval (X)) THEN 1, ELSE 0</p> <p>% Repair Complete in X = $\Sigma(\text{Repair Within Standard Interval Flag}) / \Sigma(\text{Trouble Ticket Count})$</p>
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Standard Repair Intervals:

NOTE: These values would be substituted for X in the “Repair Within Standard Interval Flag” calculation.

≤ 4 Hours, ≤ 24 Hours, > 24 Hours

Installation Quality

FCC-MRQ-1

Purpose:

Measure the quality of loop installation by identifying service failures within intervals close to installation completion.

Description:

FCC-MRQ-1A: Measures the loop quality for UNE-P orders. Includes all service orders designated for POTS service.

FCC-MRQ-1B: Measures the loop quality for Line Share DSL orders. Includes all service orders designated as Line Share products.

FCC-MRQ-1C: Measures the loop quality for unloaded 2W-UBL service orders. Includes all service orders designated as unloaded 2W-UBL, and all IDSL service orders.

FCC-MRQ-1D: Measures the loop quality for loaded 2-wire unbundled service orders. Includes all service orders that require conditioning prior to provisioning.

Exclusions / Exceptions:

❖ NTF Tickets that include no additional TT within interval

Reporting Period: One Month

Unit of Measure: Percentage

Product Reporting: As identified above.

Target: 2%

Fields Required for Calculation:

1. Product Type
2. Conditioning Status
3. Service Order Complete Flag
4. Service Order Complete Date
5. Trouble Ticket Count
6. Trouble Ticket Issued Date(s)
7. Trouble Ticket Closed Date(s)
8. Trouble Interval
9. I-7 Flag
10. I-30 Flag

Amplifying Data:

1. PON
2. Trouble Ticket Number(s)

Calculations:

Trouble Interval = (Trouble Ticket Issued Date) – (Service Order Complete Date)

I-7 Flag = IF(Trouble Interval ≤ 7) THEN 1, ELSE 0

I-30 Flag = IF(Trouble Interval ≤ 30) THEN 1, ELSE 0

I-7 = $\Sigma(\text{I-7 Flag}) / \Sigma(\text{Service Order Complete Flag})$

I-30 = $\Sigma(\text{I-30 Flag}) / \Sigma(\text{Service Order Complete Flag})$

Repeat Trouble in 30 Days

FCC-MRQ-2

Purpose:

Measure the percentage of circuits with chronic trouble by measuring the number of trouble tickets issued in 30 days on a single service order.

Description:

FCC-MRQ-2A: Measures the percentage of UNE-P orders with chronic trouble. Includes all service orders designated for POTS service.

FCC-MRQ-2B: Measures the percentage of Line Share DSL orders with chronic trouble. Includes all service orders designated as Line Share products.

FCC-MRQ-2C: Measures the percentage of unloaded 2W-UBL service orders with chronic trouble. Includes all service orders designated as unloaded 2W-UBL, and all IDSL service orders.

FCC-MRQ-2D: Measures the percentage of loaded 2-wire unbundled service orders with chronic trouble. Includes all service orders that require conditioning prior to provisioning.

Exclusions / Exceptions:

- ❖ NTF Tickets within the month (Calendar)

Reporting Period: One Month	Unit of Measure: Percentage
Product Reporting: As identified above.	Target: 3%

<p>Fields Required for Calculation:</p> <ol style="list-style-type: none"> 1. Product Type 2. Conditioning Status 3. Repaired Service Orders 4. Service Order Complete Date 5. Trouble Ticket Count 6. Trouble Ticket Issued Date(s) 7. Trouble Ticket Closed Date(s) 8. Failure Interval 9. T-30 Flag <p>Amplifying Data:</p> <ol style="list-style-type: none"> 1. PON 2. Trouble Ticket Number(s) 	<p>Calculations:</p> <p>Failure Interval = TT2(Trouble Ticket Issued Date) – TT1(Trouble Ticket Issued Date)*</p> <p>T – 30 Flag = IF(Failure Interval ≤30)THEN 1, ELSE 0</p> <p>T – 30 = $\Sigma(T-30 \text{ Flag}) / \Sigma(\text{Repaired Service Orders})$</p> <p>* TT2 and TT1 refer to trouble tickets. These are trouble tickets on orders that have multiple trouble tickets, where the date of the older ticket is subtracted from the next ticket on the service order.</p>
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% Trouble Ticket Rate

FCC-MRQ-3

Purpose:

Measure the percentage of circuits with trouble by measuring the number of trouble tickets issued in the reporting month. Measurement reflects the overall network quality.

Description:

FCC-MRQ-3A: Measures the percentage of UNE-P orders with trouble. Includes all service orders designated for POTS service.

FCC-MRQ-3B: Measures the percentage of Line Share DSL orders with trouble. Includes all service orders designated as Line Share products.

FCC-MRQ-3C: Measures the percentage of unloaded 2W-UBL service orders with trouble. Includes all service orders designated as unloaded 2W-UBL, and all IDSL service orders.

FCC-MRQ-3D: Measures the percentage of loaded 2-wire unbundled service orders with trouble. Includes all service orders that require conditioning prior to provisioning.

Exclusions / Exceptions:

- ❖ NTF Tickets

Reporting Period: One Month	Unit of Measure: Percentage
Product Reporting: As identified above.	Target: 2%

<p>Fields Required for Calculation:</p> <ol style="list-style-type: none"> 1. Product Type 2. Conditioning Status 3. Repaired Service Orders 4. Trouble Ticket Issued Date(s) 5. Order Status 6. LIS Flag <p>Amplifying Data:</p> <ol style="list-style-type: none"> 1. PON 2. Trouble Ticket Number(s) 	<p>Calculations:</p> <p>LIS Flag = IF(Order Status = Connected) THEN 1, ELSE 0</p> <p>% Trouble Ticket Rate = $\Sigma(\text{Repaired Service Orders}) / \Sigma(\text{LIS Flag})$</p>
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Application by Verizon Virginia Inc., *et al.*) CC Docket No. 02-214
for Authorization to Provide In-Region,)
InterLATA Services in Virginia)

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Introduction

Covad Communications Company (Covad), by its attorneys, hereby respectfully submits its comments in opposition to the long distance application submitted by Verizon in the above-referenced docket. Verizon prematurely seeks authorization from the FCC to offer in-region, interLATA services in Virginia while substantial, competitively significant defects persist in several aspects of its application, including in the areas of access to loop qualification information, interconnection, unbundled loops, dark fiber, billing OSS, and UNE rates.

Covad is the leading nationwide provider of broadband connectivity using digital subscriber line (DSL) technology. Covad's nationwide facilities-based broadband network reaches nearly 45% of the nation's homes and businesses. Covad offers residential and business users a wide variety of innovative and competitively priced broadband services, and currently provides broadband connectivity to over a third of a million customers. Covad competes directly with the retail broadband offerings of Verizon and other Bell Operating Companies, providing vital innovation and price pressure on the Bells that has sparked widespread DSL deployment in the five years since Covad launched the first commercial DSL offering in the nation.

As a facilities-based provider, Covad relies on Verizon to provide unbundled transmission facilities (loops and interoffice transport) and the operations support systems (OSS) necessary to facilitate ordering and provisioning of such facilities. Covad is collocated in 63 central offices throughout Virginia, and from those central offices, Covad provides business and residential consumers innovative xDSL offerings, including the nation's lowest priced residential DSL offering, Telesurfer Link, which provides

broadband connectivity at or below the price of dial-up services. Covad also offers consumers and small and medium-sized businesses a competitively priced alternative to Verizon's high-priced T-1 services. In the face of these intense competitive pressures, Verizon has both the incentive and the ability to handicap Covad's pro-competitive offerings by denying, delaying, and degrading the UNEs that Verizon is required to provide. Given the current crisis in the telecommunications sector, consumers and competitive carriers need the Commission's honest and diligent evaluation of Verizon's compliance with its market-opening obligations now more than ever.

Covad's objections to Verizon's long distance application center on checklist items one, two, four and five. Verizon has failed to make available to competitors non-discriminatory access to the information needed for competitors to interconnect with Verizon's PARTS network facilities. Verizon's application fails to make the requisite *prima facie* case that Verizon provides competitors with non-discriminatory access to its OSS for loop make-up information. Moreover, as Covad's comments demonstrate, Verizon's OSS for providing loop makeup information to competitors is highly unreliable, and does not even contain all the loop makeup information available to Verizon's personnel. Verizon's policies for the provisioning of high capacity loop and line sharing UNEs arbitrarily discriminate against competitors, in violation of the Commission's UNE rules. Furthermore, Verizon's stated "no facilities" policy places wholesale customers on a different footing than its retail customers, rejecting competitors' orders for lack of facilities while Verizon's retail customers are allowed to obtain service. Verizon also fails to provide non-discriminatory access to its OSS for dark fiber. Verizon's billing OSS results in pervasive billing errors for competitors.

Moreover, Verizon fails to take adequate steps to correct these billing errors in a timely fashion. Finally, Verizon has not made the requisite showing that the rates it seeks to charge in Virginia comply with the Commission's TELRIC pricing rules.

The Commission must not allow Verizon to ignore the requirements of the competitive checklist in Section 271. Unless and until Verizon remedies the specific defects in its application discussed herein, the Commission must not grant Verizon's bid for Section 271 authorization.¹

Non-Discriminatory Access to Information about PARTS rollout – Checklist Item 1

On August 9, 2002, Verizon filed a tariff with the Commission purporting to offer as an interstate telecommunications service access to its PARTS next-generation digital loop carrier systems for competitive LECs.² Covad is separately opposing Verizon's PARTS tariff filing as being in violation of sections 201 and 202 of the Communications Act.³ Covad also submits that, because of Verizon's actions to date with respect to its PARTS rollout, Verizon has failed to meet its burden of showing that it provides

¹ On May 24, 2002, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *USTA v. FCC*, 290 F.3d 415. In *USTA*, the court remanded to the Commission its *UNE Remand* and *Line Sharing* decisions, concluding that the Commission had not adequately explored certain factors in its implementation of section 251(c)(3) of the Act. The court's mandate must issue prior to the decision in *USTA* taking effect. As of the date of this filing (August 21, 2002), that mandate has not yet issued. Indeed, the parties to the *USTA* case, including the Commission itself, have sought further judicial review of the *USTA* decision, which most likely will further delay the issuance of the court's mandate. In short, although the Commission will continue its review of its current UNE rules in the Triennial Review proceeding, those UNE rules (including loops, linesharing, and OSS) remain in full legal force at this time, and were in force at the time the instant application was filed. As such, notwithstanding the *USTA* decision, Verizon must prove to the Commission that it is in full compliance with all of the Commission's UNE rules in order to satisfy its burden of proof pursuant to the competitive checklist of section 271 of the Act.

² See Verizon Tariff Transmittal No. 232, filed Aug. 9, 2002 (PARTS tariff). Verizon's tariff transmittal includes the addition of PARTS service provisions to its FCC-1 tariff, which covers Verizon's offering of interstate access services in Virginia.

³ See Covad Petition to Reject or, Alternatively, Suspend and Investigate, Verizon Transmittal No. 232, filed August 16, 2002.

competitors with non-discriminatory access to interconnection under the section 271 checklist.⁴ Verizon has failed to provide adequate notice to competitors of the unprecedented and substantial network change entailed by its PARTS rollout, a change which certainly impacts competitors' networks and ability to offer services. Verizon's present 271 application consequently fails to comply with the Act and Commission's implementing rules.⁵

In fact, in testimony to the Massachusetts DTE in November 2001, Verizon indicated that a PARTS roll-out was far off in the future, and would not be complete until some distant, unspecified point.⁶ Then, starting in February of this year, Verizon issued several notices to competitive LECs informing them that it was deploying PARTS-capable NGDLC throughout its footprint. Previously, Verizon had repeatedly denied that it was deploying this architecture. Verizon's notices provided no details about the manner in which competitors could make use of and provide services using Verizon's next-generation network facilities. Instead, Verizon's notice to competitors consisted merely of change management log entries describing Verizon-initiated changes to its loop qualification and ordering OSS.⁷ Apart from such brief notices, competitors received little word regarding Verizon's PARTS rollout until Verizon's tariff filing at the Commission in Transmittal No. 232. Covad believes that Verizon's tariff, in its current

⁴ 47 U.S.C. § 271(c)(2)(B)(i); 47 U.S.C. § 251(c)(2).

⁵ 47 U.S.C. §§ 251(c)(2), 251(c)(5); 47 C.F.R. §§ 51.325 *et seq.*

⁶ See *Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided-Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts*, DTE 98-57, Hearing Transcript, November 16, 2001 at 896-98.

⁷ See Appendix A.

form, still fails to provide sufficient information to competitors and potential customers about the manner in which they may make use of Verizon's PARTS architecture.

In sum, Verizon has failed to provide sufficient information for Covad to make operationally ready its own OSS, provisioning processes, retail processes and marketing for services employing this new network architecture. Verizon has failed to provide competitors with detailed information about pre-ordering, ordering, provisioning, billing, or any other information pertinent to competitors being able to provision services using PARTS. Verizon, meanwhile, has been developing its back office systems and processes in conjunction with its rollout of the PARTS network architecture.

The network notice requirements of the Act, and the Commission's implementing rules, were created precisely to avoid giving incumbents the kind of head-start Verizon has given itself with its PARTS rollout. As the Commission has stated, "the primary concern reflected in section 251(c)(5) is continued interconnection and interoperability."⁸ Verizon's last minute, unannounced tariff filing accomplishes exactly the anti-competitive goal that the Commission's rules seek to prevent: Verizon now has a significant head start over its competitors in utilizing upgraded loops in its network, and competitors are left to scramble in an effort to catch up. Because Verizon's tariff constitutes the first notice of any kind about the manner in which Verizon will allow competitors to access PARTS, the Commission must bar Verizon from entering the interLATA market in Virginia until it provides competitors with sufficient information about its PARTS facilities rollout to enable them to interconnect with these facilities in a non-discriminatory manner. Verizon should not be allowed, in any event, to enter the

⁸ See Local Competition Second Report and Order, 11 F.C.C.R. 19,392, para. 224 (1996).

interLATA services market in Virginia for at least the next 12 months.⁹

Loop Qualification Information – Checklist Item 2

DSL requires the loop to have certain characteristics in order to work. Verizon asserts that its mechanized pre-qualification database, LiveWire, tells CLECs whether a loop is qualified for DSL prior to submission of an order. LiveWire identifies the presence or absence of load coils or bridge taps, the length of cable, whether a binder group contains spectrally incompatible services, or a determination of whether the loop is on copper or fiber. In Covad's experience, LiveWire falsely reports certain loops as non-qualifiers. As a result, Covad can either turn away a customer because of the incorrect report or incur manual loop qualification charges to show that the loops are actually compatible with DSL service. Covad has experienced numerous instances where it must turn away a customer because LiveWire incorrectly reports that the customer is served by a long loop (a "false negative"). In response, the customer will inform Covad that a neighbor has DSL, so its loop cannot be too long. Covad is then compelled to submit an extended loop makeup query, a time consuming manual process, which Verizon states only includes information for approximately 10 percent of its loops.

More disturbing, Covad is currently receiving responses from LiveWire indicating that the loop has a length of 99,000 feet or zero feet and is non-qualified. Clearly, there are no 99 kilofeet loops and no zero foot loops and so we are compelled to conduct a manual workaround that increases delay and the costs associated with provisioning these loops. These manual workarounds often reveal that the loops actually are compatible

⁹ See 47 C.F.R. § 51.331.

with DSL service. In fact, the fact that Verizon's manual workaround process provides the actual loop length indicates that Verizon has at its disposal the means to obtain more accurate information than it provides to competitors. Verizon has been informed about this problem, but to date has refused to take any action to correct the inaccurate entries in its loop qualification database. Until this problem is fixed, Covad will continue to incur additional costs to the business and unreasonable provisioning delays for every LiveWire response that erroneously reports a loop to be 99 kilofeet or zero feet long.

Incorrect information in the LiveWire database regarding spectrum compatibility issues have also prevented Covad from submitting valid DSL loop orders. Several months ago, Verizon articulated to Covad its firm policy of rejecting any Covad line sharing order submitted, where the loop may be located in the same binder group as a loop over which Verizon currently serves one of its retail customers with AMI T-1 service. Pursuant to an FCC mediation session, a sample of rejected line sharing orders submitted during February 2002 were jointly reviewed by Covad and Verizon. The test sample revealed that of approximately 240 line sharing orders that Covad submitted having received a "loop not qualified" response due to spectrum compatibility concerns, only one of those orders actually had a T-1 in the binder group. In other words, LiveWire was wrong approximately 99% of the time in the case of our sample. To date, this matter has already prevented Covad from provisioning DSL to well over a thousand customers that requested service with Covad.

Furthermore, the presence of DLC on a line limits Covad's ability to provide DSL services. To address this situation, Verizon, for a fee, will provide CLECs with line station transfers where it will move a customer with a DLC line to a full copper loop, if

one is available. Verizon's pre-qualification tool often indicates that only DLC is available in a binder group, thereby preventing Covad from requesting a line station transfer to a full copper loop. Based on its own data, Covad believes that upwards of 30% of the pre-qualification responses of "loop not qualified" due to DLC are incorrect because copper is available in a binder group and, accordingly, the loop could be served by available copper.

The scope of KPMG's pre-order testing did not test the accuracy of Verizon's pre-qualification database. If an order from KPMG's pseudo-CLEC came back non-qualified for whatever reason, KPMG incorrectly assumed the result was accurate and complete. KPMG never attempted to provision any of its own pseudo-DSL facilities that were not qualified based on pre-qualification test results. As a result, KPMG did not develop any correlation between the pre-qualification database and the ability to provision the loops.

CLECs should not have to pay for loop qualification because of Verizon's failures and inaccuracies. The Commission should require Verizon to correct these clear discrepancies in its database prior to 271 approval. Updating and maintaining Verizon's database on its loop inventory is the responsibility of Verizon. It is a function of doing business, a surrogate to direct access to an existing OSS, and the cost to perform that function is a cost of doing business, that is recovered through recurring charges to CLECs. CLECs rely upon this information to make business decisions. Had Verizon followed its own guidelines related to its database over the past 20 years, more of the pertinent information would have been included, given the frequency of plant additions and rearrangements. As long as Verizon can continue to pass on to competitors the cost

of whatever manual processes it employs, the company will have every incentive to not accurately maintain its mechanized database. Thus, the Commission should not permit Verizon to assess a manual loop qualification charge or an engineering work order charge for competitors to obtain information that should be available electronically through LiveWire before recommending Verizon's 271 application to the FCC. CLECs are already charged a monthly recurring charge for electronic access to LiveWire.

To the extent that information needed for loop qualification resides only in Verizon's "plats" (which are paper plant records), rather than in electronic databases, it reflects Verizon's failure to populate its databases as it should have given the upgrades that Virginia ratepayers have been funding for years. It is Verizon's responsibility to follow its own practices for fully and accurately populating its databases, and maintaining those databases in such a way that they contain accurate information. The costs for populating and maintaining OSS databases have traditionally been passed on to consumers as part of recurring costs. In a competitive environment, the incumbent should pay for error correction, should it be found that existing practices are either not being followed, or are not being done accurately. If loop qualification information that should have been in LiveWire is missing, then Verizon should obtain the appropriate information, correct its own database(s), and provide the information to the requesting carrier, in an expeditious manner, without new charges being imposed on the competitor. If anything, Verizon should be compensating the competitor for harmful delay associated with waiting for the information to be obtained manually, rather than via a real-time mechanized interface, for which competitors are already being charged.

1. Verizon Provides Mechanized Loop Qualification Information that is Tailored to the Needs of its Affiliate

Verizon states that CLECs and Verizon VA alike utilize the LiveWire database to determine if loops are qualified for DSL services. Verizon has based the design of its mechanized loop qualification database specifically on the needs of its retail DSL operations. This database is less useful to competitors and is more expensive than read-only access to Verizon's underlying databases. Verizon's current mechanized loop qualification process provides a summary "yes/no" indicator that reports whether the loop in question meets the technical requirements of Verizon's retail ADSL offering, "Infospeed DSL." Such an indicator, specific to the equipment of Verizon's vendor and the deployment decisions that Verizon has made for its own (or its affiliate's) retail service offering, is clearly not relevant to a competitor's service offerings. The information provided is designed in such a manner that Verizon retail would not need additional information. Furthermore, Verizon's process masks the underlying loop makeup data that Verizon's own engineers must evaluate to determine the suitability of particular loops for Verizon's retail ADSL service. Verizon apparently envisions that this more detailed loop makeup information would only be available to competitors at a heavy premium through the manual loop qualification or engineering query process.

2. Verizon Does Not Provide Nondiscriminatory Access to Loop Qualification Information

What Verizon has done is set up its loop qualification process in such a manner that fully and efficiently meets the needs of its affiliate and in a manner that provides it an opportunity to claim it is providing nondiscriminatory access to CLECs, while at the same time masking discriminatory treatment. For instance, Verizon states that it provides nondiscriminatory access to three processes for loop qualification – mechanized loop

qualification, manual loop qualification, and engineering query.¹⁰ As noted above, Verizon designed this database for its own retail needs. When CLECs use this system, more often than not, they will need additional information, which they will have to obtain through the much higher prices for manual loop qualification or an engineering query. This results in discrimination. Verizon has essentially set up two loop qualification processes – a seamless, relatively inexpensive one for its retail arm and a cumbersome and expensive, manual process for CLECs.

3. Verizon's Databases Provide Incomplete Information

Verizon contends that it also provides CLECs with electronic access to Loop Makeup ("LMU") that might be contained in the LFACS database where it exists. Providing such additional detail is not equivalent to providing competitors with equal access to the underlying data that Verizon can access to develop its own qualification processes. For instance, as Verizon noted, the LMU information provided is limited. Verizon noted:

This is because the inventory of loops contained in LFACS are primarily expected to meet voice grade requirements, while loop make-ups were prepared only for those loops that were designed as special circuits, which are only a small portion of the base.¹¹

Thus, the loop makeup information that Verizon currently provides is selective and does not provide the full spectrum of information that CLECs need to determine if the loop is qualified to provide the services the CLEC seeks to offer.

This situation is compounded by the fact that Verizon failed to populate the

¹⁰ Verizon VA OSS Declaration, Attachment 305.

¹¹ Verizon VA Checklist Declaration at ¶ 150.

information in the LFACS database adequately. The New York Public Service Commission recently found that CLECs had credibly shown that "compliance with Verizon's own guidelines related to its databases would have resulted over the past 20 years, in more of the pertinent information being included, given the frequency of plant additions and rearrangements."¹² If the LFACS database had been adequately populated in the first place, and CLECs had been provided direct, read-only access to such a fully populated database, then CLECs would have had true non-discriminatory access. Unfortunately, Verizon has not included all pertinent information in the LFACS database, as it should have. CLECs should have direct read-only access not only to the LFACS databases, but also to other databases where relevant loop information is stored. As the Maryland Commission held:

By its own admission, this LFACS has been around for "a long time" and it adds loop makeup information to the LFACS as loops are upgraded or replaced but, in all that time Verizon has supposedly only upgraded or replaced 16% of its loops. The Commission finds that the LFACS, TIRKS and other related databases are a form of OSS. The CLECs should be permitted read-only access via an *electronic interface* and should be able to access that information which would be available in a forward-looking environment, i.e., total loop length (including bridged taps), presence and location of load coils, presence and location of Digital Loop Carrier, cable gauge, and qualifications for ADSL/HDSL. Because this information would be available in a forward-looking

¹² NY PSC Case No. 98-C-1357, Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements, Order on Unbundled Network Element Rates at 131 (Jan. 28, 2002) ("NY PSC UNE Decision").

network, the Commission rejects the findings of the Arbitrator with respect to this issue and, instead, finds that there are no charges with respect to manual loop qualification or engineering query.¹³

It is significant that the information a CLEC would need to qualify a loop such as (1) the composition of the loop; (2) existence, location and type of any electronic or other equipment on the loop; (3) loop length, including the length and location of each type of transmission media; (4) the wire gauge(s) of the loop; (5) the electrical parameters of the loop; and (6) engineering work in progress on the cables housing the loop are only provided as a result of the engineering query process.¹⁴ Thus, according to Verizon's declaration on UNE rates, a CLEC currently has to pay a nonrecurring charge (in Covad's case, about \$34) and endure the arduous and lengthy engineering query process to get information that should have been in Verizon's OSS and accessible by CLECs to begin with. Meanwhile, Verizon's retail arm need not incur these costs because Verizon's loop qualification system is crafted to its needs.

In the *UNE Remand Order*, the FCC required incumbent LECs to provide nondiscriminatory access to loop information.¹⁵ The purpose of this requirement is to require incumbents to produce the information that will allow CLECs to determine *for themselves* whether a loop satisfies the prerequisites for the service the CLEC intends to

¹³ In the Matter of Arbitration of Rhythms Links, Inc. and Covad Communications Company vs. Bell Atlantic Maryland, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, MD PSC Case 8842, Phase II, Order 76852 at 31 (April 3, 2001).

¹⁴ Verizon VA OSS Declaration, Attachment 305, at 5.

¹⁵ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket 96-98 at ¶ 427-428 (1999); 47 C.F.R. §51.5.

provide.¹⁶

Verizon contends that it is providing nondiscriminatory access to loop qualification information through the processes it describes. That is clearly not the case, as Verizon's affiliate is able to get all the information it needs in one seamless, electronic inquiry, while CLECs have to go through numerous steps some of which will involve manual processes at excessive prices. Thus, the Commission should not permit Verizon to assess a manual loop qualification charge or an engineering work order charge for competitors to obtain information that should be available electronically through LiveWire.

Billing OSS – Checklist Item 2

Verizon's billing system and performance continue to be fraught with problems. Contrary to Verizon's claims, KPMG's Virginia test falls short of addressing all stages of a CLEC's relationship with Verizon, particularly in the billing domain. KPMG admitted that its testing did not create and test for key aspects of a CLEC's interaction with Verizon, including, among other things, billing disputes or queries or any instances of backbilling. More telling, KPMG did not examine or audit any Verizon-generated bills for CLECs in Virginia that actually had real customers, nor did KPMG interview any CLECs regarding their actual billing experiences with Verizon. In short, KPMG's limited evaluation of Verizon's billing procedures and bills does not accurately reflect an

¹⁶ This purpose is implicit in the FCC's finding that "under its existing rules, the relevant inquiry is *not* whether the retail arm of the incumbent has access to the underlying loop qualification information, but, instead, whether such information exists anywhere within the incumbent's back office and can be accessed by any of the incumbent LEC's personnel. *UNE Remand Order* at ¶ 430. Requiring such "back office" information to be made available to the CLEC necessarily excludes "front office" activities engaged on the part of the incumbent to interpret that information.

actual CLEC's experiences with Verizon's various billing processes.

Verizon's real life billing practices fall short of meeting the FCC's pro-competitive truth-in-billing principles and guidelines. In particular, Verizon has not provided Covad with adequate descriptions and clear identification of charges on bills that would allow Covad to understand and compare the charges on the bill to the products and services it had ordered. Covad has persistently asked Verizon since October 2001 for a mapping of the "ordering" codes to the "billing" codes. Specifically, Covad has asked Verizon to provide (1) a description of each element that we order from Verizon; (2) the Universal Service Order Code(s) ("USOC(s)") that correlate to the particular UNE description; and (3) the Network Channel and Channel Interface ("NC/NCI") Codes, secondary codes and specification codes that are associated with the correlated UNE description and USOC(s). While Verizon has acknowledged Covad's need for such information in order to validate billing, to date, over 8 months after our initial request, Verizon has not adequately addressed Covad's concerns.

This problem is made worse by Verizon's appalling billing practices, including, but not limited to, backbilling, inaccuracies and manual processes. As noted above, KPMG observed no instances of backbilling. In reality, Verizon has backbilled Covad for charges that are two to three years old. Covad received a bill from Verizon amounting to approximately \$1.1 million for various unidentified backbilled charges dating back to July 1, 2000. Disturbingly, Verizon did not even set apart the charge as a "new" charge under current charges. Rather, the charges deviously showed up for the first time under "Balance Due Information." More appalling is the fact that these charges (i) were for line sharing charges, but billed on a High Capacity Bill and (ii) were assessed

to a New York bill, however, the charges extended across numerous jurisdictions, including Virginia.

The extent of the detail regarding the \$1.1 million was limited to "Adjustment of local switching charges loop/line sharing 7/1/00-6/30/01." There was no identification of the circuits being billed. After expending significant resources to identify what the \$1.1 million in charges were for, Covad determined, and Verizon agreed, that over \$336,000 were invalid charges. Verizon's bill was at least 30% inaccurate and Covad continues to work diligently to validate the remaining balance.

Verizon may claim that it adjusted those charges after it received a claim and subsequently met with Covad to explain the charges on the bill and the adjustment. What Verizon fails to mention is that it took 9 months to resolve this matter. Covad also notes that during this process, Verizon erroneously billed the \$1.1 million *again*. Covad filed another claim for the *second application of the \$1.1 million*, while the original claim for the \$1.1 million remained open. Verizon may state that it provided spreadsheets with supporting data. However, Verizon was unable to produce adequate supporting documentation until Covad issued repeated requests and the issue was escalated to VP level.

Very often, the resolution of disputes extends well beyond the target 30 day window and requires numerous phone calls and e-mails in order to resolve basic claims. Indeed, as of August 19, 2002, Covad has 9 disputed billing claims open with Verizon open for an average of 204 days. These disputed charges total to more than \$58,000, yet Verizon continues to drag its feet in resolving them.¹⁷ Covad has even escalated these

¹⁷ See Appendix B.

billing disputes to the VP of billing within Verizon, and Covad received assurances that these disputes would be resolved by August 15. Nonetheless, Verizon allowed the August 15 date to pass by without taking any action on Covad's disputed charges, and continues to take no action to resolve these claims.

Moreover, Verizon continues to refuse to resolve Covad's outstanding billing disputes over charges for the loops Covad purchases to provide IDSL services. Under the Bell Atlantic-GTE merger commitments, Verizon is required to provide 25% discounts on the loops Covad purchases to provide advanced services. Verizon, however, refuses to provide these discounts to Covad, arguing that ISDN loops do not qualify as loops used to provide advanced services. For reasons that Covad has already provided to Verizon on numerous occasions, Verizon's reading of its obligations under the merger commitments is simply wrong. Regardless of whether these loops could be used to provide non-packetized services, when Covad uses them to provide IDSL services, they are loops used to provide advanced services. Accordingly, Verizon is required to provide the discounts required under the Bell Atlantic-GTE merger conditions. But, despite Covad's repeated attempts, Verizon has refused to resolve this billing dispute. Instead, this billing dispute, like Covad's many others, continues to languish without any action by Verizon.

The Commission has recognized that billing errors can be disabling to CLECs by denying them a meaningful opportunity to compete in many ways. For example, in its Pennsylvania 271 Order, the Commission noted that if CLECs receive bills that are not readable, auditable, and accurate, CLECs must spend additional monetary and personnel resources reconciling each bill and pursuing bill corrections. Covad is forced to more

closely monitor its bills and pursue expensive and time consuming billing disputes, claims and queries.

Due to the limited scope of KPMG's testing, these were not issues that were reviewed in its analysis. KMPG did not create and test for billing disputes, claims or queries. As has been shown, Verizon's billing methods are often antiquated and far from accurate. Covad's experiences on the billing resolution front have been painful, to say the least.

What makes this interaction more burdensome is Verizon's manual processes. Verizon manually places charges on Covad's bills and then provides a spreadsheet as support for the charges. This method is excessively troublesome for CLECs and prolongs an already lengthy and unreasonable claims and dispute process. Verizon is not adequately updating its billing system to support new products. When Verizon provides a new product, it does not create billing codes for elements that will allow it to bill on a mechanized basis. As a result, Verizon is manually processing invoices and spreadsheets, increasing human error and greatly increasing the chance for incorrect billing. Further, once the billing is mechanized, this is not effectively communicated through the Verizon organization and the CLEC sometimes is doubled billed, on a manual and mechanized basis.

The Commission should not approve Verizon's instant application for interLATA authorization until Verizon meets the four following conditions, aimed at forcing Verizon to address the persistent deficiencies inherent in its billing systems. First, Covad should not be required to pay unverifiable charges until Verizon has provided a reliable and accurate source of information for purposes of ordering and billing review. Verizon

states that as of January 2002, it has ceased manually billing for the remaining rate elements that have not been mechanized. Verizon has not indicated, however, when it will implement mechanized billing for future elements. For instance, Verizon took over 2 years to mechanize the billing for line sharing elements. Second, Verizon should be required to mechanize the billing process for new products and elements within 60 days of the product or element's introduction. Third, CLECs should not be required to pay invoices until Verizon has provided them on a mechanized basis.

Fourth, and finally, the Commission should limit Verizon's ability to backbill CLECs to a 6-month period. According to Verizon, backbilling occurs when a CLEC receives service, but has paid a charge that is less than the correct charge specified in the agreement with Verizon or Verizon's tariffs. The mere fact that backbilling occurs at all is more evidence that Verizon is not billing CLECs properly and highlights the inaccuracies in Verizon's billing process and the difficulties that Covad, and other CLECs, will face when trying to verify, reconcile, and compare charges on the bill to the products and services it has ordered.

UNE Rates – Checklist Item 2

Verizon's inaccurate billing practices are especially troubling in light of Verizon's practice of unilaterally imposing new charges on competitors without an agreement or an order from the Commission, based on a CLECs' payment of a bill, either BDT or Paper. For example, Verizon recently sent a letter to CLECs dated March 22, 2002, unilaterally imposing new rates for Virginia UNEs. In this letter, Verizon stated that "payment of your first invoice in which Verizon has incorporated the new UNE rates will signify your acceptance of these rates and will result in them being incorporated into your

interconnection agreement on a going forward basis.” First, it is troubling that Verizon would attempt to unilaterally impose new rates on competitors without an agreement or the Commission’s direct approval.

Second, contrary to Verizon’s declaration that in no case would the new UNE rates be higher than the rates CLECs are currently being billed, several of Verizon’s charges did turn out to be significantly higher than the charges currently in Covad’s interconnection agreement with Verizon in the Commonwealth of Virginia. For instance, Verizon attempted to unilaterally raise the xDSL loop qualification and conditioning rates previously agreed to in its line sharing amendment with Covad. In the line sharing amendment, the Manual Loop Qualification charge is \$53.72, while in Verizon’s letter and 271 filing the rate almost doubled to \$93.70. In the line sharing amendment, the Engineering Query charge is \$34.19, while in Verizon’s letter and 271 filing it almost quadrupled to \$121.37. Additionally, the Engineering Work Order charge was raised from \$193.15 to \$500.90. Further, Verizon attempted to impose a cooperative testing charge where none existed before. Due to Covad’s efforts to hold Verizon to its word, Verizon subsequently retreated from its new UNE rates, stating that it would continue to charge Covad the rates specified in its interconnection agreements. Yet the fact that Verizon would even attempt to unilaterally change the UNE rates it charges competitors, without direct approval from the relevant commission, should cause this Commission grave concern about Verizon’s application.

Furthermore, Verizon indicates that, for the non-recurring costs Verizon incurs in Virginia to perform loop qualification and loop conditioning for competitors like Covad, it has unilaterally imposed rates that were the lower of rates in a negotiated

*interconnection agreement or rates set by the New York Public Service Commission. As an initial matter, the Commission can easily reject the notion that negotiated rates in an interconnection agreement are an appropriate substitute for the Commission's TELRIC cost rules. As the Commission's TELRIC rules make abundantly clear, TELRIC requires the setting of rates based on a forward-looking cost methodology, using a fully-developed TELRIC cost study. Negotiated rates in an interconnection agreement, standing alone, cannot meet this threshold.*¹⁸

Verizon appears to be operating under the assumption that New York rates applying to the same network and back office operations as the old New York Telephone Company are appropriate surrogates for the Virginia network of the old Chesapeake and Potomac Telephone Company. What Verizon fails to mention is that New York's rates for these functions are among the highest in the Verizon territory. Furthermore, Verizon fails to mention that these specific New York rates have never been examined for TELRIC compliance by this Commission. Indeed, Verizon appears to have picked New York out of a hat as the appropriate state to use in determining the non-recurring charge rates in Virginia, without sufficient explanation for why New York's rates are the appropriate substitute for Virginia rates. Given that relative cost differences for loop qualification and loop conditioning are not even captured by the Commission's benchmarking analysis employing USF costs, Covad and the Commission are left without any means of checking Verizon's assumption that New York rates are the correct substitute for Virginia rates.

Verizon considers loops over 18 kilofeet as Digital Designed loops that require

¹⁸ Covad further notes that in some cases, it does agree to negotiated rates set above what a TELRIC methodology would produce, as an interim means of market entry.

conditioning at significant costs to CLECs. Covad is not now providing DSL service to customers who are served by long copper loops over 18 kilofeet. The conditioning charges that Verizon imposes on CLECs make it uneconomical for Covad to offer service to these customers. In this way, Verizon has succeeded, by imposing excessive costs on us, in limiting Covad's DSL service.

Indeed, state regulators in other Verizon states have concluded that, in a forward-looking network environment, the rates for loop qualification and loop conditioning functions should be set at zero.¹⁹ Such was the determination of the state commission in Maryland, a state adjacent to Virginia whose local telephone network comes from the same network and corporate lineage as the network in Virginia.²⁰ Nonetheless, Verizon chose to import non-recurring loop qualification and conditioning charges from New York. Furthermore, Verizon does not even commit to performing a true-up of these non-recurring charges to the rates ultimately established by the FCC in the cost phase of its pending arbitration proceeding for Virginia. Verizon seems to believe that, in the absence of rates developed in a TELRIC cost proceeding, it can simply pick any other state as it sees fit and import rates from that state as it sees fit, to come into TELRIC compliance. The Commission should reject Verizon's wholly arbitrary position. In order to demonstrate that its rates are TELRIC-compliant, Verizon must treat any of its non-

¹⁹ See, e.g., *Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided-Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts, D.T.E 01-20 (July 11, 2002) ("Massachusetts DTE UNE Order")* at 102; *Investigation re: Verizon Pennsylvania's Unbundled Network Element Rates*, Pennsylvania PUC Docket No. R-00016683, Recommended Decision (May 3, 2002) at 89.

²⁰ Specifically, the Maryland PSC found that, in a forward-looking network environment, the charges for loop conditioning, manual loop qualification, and engineering queries should be set at zero. See

recurring charges for loop qualification and loop condition as interim rates, subject to true-up against the rates ultimately established by the Commission in its Virginia cost proceeding. Furthermore, any interim rates used cannot be from a state arbitrarily chosen at Verizon's discretion. Instead, the interim rates applied in Virginia must be from the one state adjacent to Virginia which has developed non-recurring rates for loop qualification and loop conditioning in a fully litigated TELRIC cost proceeding, and whose network is the same network from the same corporate lineage as the network in Virginia, namely the state of Maryland.

Access to UNE DS1 Loops – Checklist Item 4

Verizon refuses, in circumstances determined by Verizon, to provide to Covad loops capable of carrying DS-1 circuits. Verizon states that it is under no obligation to attach electronics to existing loop facilities to render them capable of carrying DS-1 circuits. Verizon states that, when it receives a CLEC order for a DS-1 loop, its practice is to check to see whether the required common equipment is installed in the central office and has available ports or slots on it. Verizon states that it rejects CLEC orders unless these conditions are met. Furthermore, Verizon states that it does not procure any central office equipment to provision the loop. Thus, Verizon has articulated to Covad its firm policy of rejecting any Covad UNE DS-1 loop order submitted, where it must attach central office our outside plant equipment to the UNE loop.

Covad met with Verizon to explore the reasons for Verizon's rejection of several Covad UNE DS-1 loop orders. In the course of those meetings, Covad discovered

several circumstances in which Verizon's practice was to refuse to provision loops to Covad. Specifically, Covad discovered that Verizon was rejecting Covad's orders where provisioning the loop would require the addition of doubler cases, central office shelf space, repeaters, riser cable, or other equipment to the loop.²¹ During the hearing on this issue in Virginia, Verizon even admitted that it would deny a competitor's order for a DS-1 loop due to "no facilities" when all it would have to do is open a cable sheath to splice existing pairs into an existing apparatus case.²² Verizon's policy has caused and continues to cause Verizon to reject Covad's UNE DS-1 loop orders unlawfully. Covad has reason to believe that, as of July 15, 2002, approximately 46% of its UNE DS-1 orders were rejected unlawfully because of Verizon's determination that there were "no facilities."²³

In support of its policy, Verizon states that the 1996 Act only requires incumbent carriers to unbundle their existing network, not to construct new facilities. Verizon also argues that the definition of the loop network element includes only electronics already attached to the loop. Furthermore, according to Verizon, its obligation to provision loops that pass a DS-1 signal rate includes only the obligation to remove devices from the loop, and does not include the attachment of devices to the loop that are not already in place.²⁴

Verizon forces competitors to obtain high capacity loop UNEs by purchasing the

²¹ See Appendix C.

²² See *In the Matter of Verizon Virginia, Inc.*, Report of Alexander F. Skirpan, Jr., Hearing Examiner, Case No. PUC-2002-00046 (July 12, 2002), at 114 (Hearing Examiner's Report).

²³ See Appendix D.

²⁴ Subsequent to its correspondence to Covad, Verizon issued a general statement of its policy on unbundling DS-1 and DS-3 UNE loops. See "DS1 and DS3 Unbundled Network Elements Policy," July 24, 2001 (Appended to this letter as Appendix E).

facilities as special access lines, and then converting them to UNEs after a specified three month time frame. Verizon's policy is based on an erroneous reading of the Commission's rules and orders, and continues to cause Covad to suffer severe harm.

Verizon's position, brought before the Commission and the courts time and time again, is that it has no obligation to provide competitors with access to an "unbuilt superior network." But Covad does not seek an unbuilt network; rather, Covad seeks Verizon to provision unbundled loops using Verizon's existing loop facilities, in a manner that allows Covad to use the full features, functions and capabilities of those loops. The fact is that only Verizon has access to the loop plant to render it DS-1 capable. Verizon's suggestion that Covad seeks access to an unbuilt network is belied by Verizon's willingness to provide loops supporting DS-1 data rates as part of a retail service. What Verizon seeks is to be the only player in town able to provide DS-1 level services for its own customers, while competitors are permanently relegated to the status of second-class provider. The Commission cannot accept such a position.

Sadly, the Commission has previously found that Verizon's current policy of rejecting competitor DS1 orders for "no facilities" does not warrant a finding of checklist non-compliance.²⁵ The Commission must immediately reverse its previous findings, and recognize the discrimination inherent in Verizon's policy. Verizon's policy does not result in the rejection of competitor orders solely when there are truly no facilities available. Rather, Verizon's policy results in rejection of competitor orders even when spare copper facilities are available to serve the end user, but when Verizon decides not to perform the necessary, technically feasible, work to provision a DS-1 capable loop.

²⁵ See Verizon Pennsylvania 271 Order, paras. 91-92; New Jersey 271 Order, para. 151.

As the hearing examiner in Virginia found, “Verizon Virginia’s policy has a significant and adverse effect on competition in Virginia, is inconsistently applied across UNEs, is at odds with industry accounting rules, and is inconsistent with TELRIC-pricing principles.”²⁶ For example, as the hearing examiner found, Verizon will “make cable pairs available through line and station transfers, but following its “no construction” policy, Verizon Virginia will not splice any of those available pairs into existing repeater cases.”²⁷ The hearing examiner further explained how Verizon’s policy was at odds with the Commission’s accounting rules, treating the provisioning activities covered by its “no facilities” policy, such as rearranging its existing plant, as new construction rather than expense items, and at odds with the Commission’s TELRIC pricing rules, by adopting the short-run assumption that no new plant will be constructed to meet reasonably anticipated competitor demand.²⁸ These inconsistencies only serve to further illustrate the underlying inconsistency of Verizon’s no facilities policy with the Commission’s UNE rules.

Verizon is in violation of the Commission’s requirement that it provide unbundled access to DS-1 loops to the extent technically feasible.²⁹ Because Verizon does not claim that it is not technically feasible to provision the loops Covad has requested for DS-1 capability, Verizon must provide the loops that Covad requests. Covad has and continues to suffer serious harm because of Verizon’s refusal to provide UNE loops as required by

²⁶ Hearing Examiner’s Report at 116.

²⁷ *Id.*

²⁸ *Id.* at 117.

²⁹ See 47 C.F.R. § 51.319(a) (requiring unbundling of local loops, including DS-1 loops); 51.321 (requiring ILECs to provide any technically feasible method of access to UNEs).

law. Verizon has a strong incentive to deny Covad the ability to offer its competing T1 services. By enacting its policy of rejecting UNE DS-1 loop orders, Verizon is raising the bar for competitive T1 offerings higher than for its own T1 offerings. The Commission should not allow Verizon to enter the interLATA market in Virginia until it reverses this discriminatory policy.³⁰

Line Sharing over Resold Voice – Checklist Item 4

Verizon discriminates against competitors by refusing to provision UNE line shared loops for customers served by resale voice providers. When Covad submits orders for UNE line shared loops for customers served by resellers of Verizon's voice service, Verizon refuses to provision the loop, returning a rejection notice indicating "third party voice." Verizon does this notwithstanding the fact that Verizon continues to function as the voice provider for the customer, and notwithstanding the Commission's rule clearly requiring Verizon to unbundle the high frequency portion of the loop where Verizon is providing the customer's voice service.

The Commission's rules provide that:

An incumbent LEC shall only provide a requesting carrier with access to the high frequency portion of the loop if the incumbent LEC is providing, and continues to provide, analog circuit-switched voiceband services on the particular loop for

³⁰ Covad has separately sought enforcement action against Verizon for its discriminatory policy of rejecting competitors' DS1 UNE orders. See Letter of Praveen Goyal, Covad Communications, to Alexander Starr, FCC Enforcement Bureau, dated July 23, 2002. Because Verizon's actions constitute a present violation of the Commission's rules and the Act warranting immediate enforcement action, the Commission should recognize that Verizon's no facilities policy is also non-compliant with the terms of the section 271 checklist.

which the requesting carrier seeks access.³¹

There is no question that Verizon continues to provide “analog circuit-switched voiceband services” when it sells its voice service to a reseller. Verizon retains control of the loop facility, and continues to provide the narrow-band transmission of circuit-switched voice services over the loop. The fact that Verizon continues to serve as the facilities-based provider of voice services is further belied by the pricing standard applied to Verizon’s resold voice services. Instead of being priced at TELRIC, as unbundled network facilities are, Verizon’s resold voice services are priced at an avoided-cost standard, to reflect the reseller’s addition of its own billing and other administrative costs to Verizon’s own costs of providing facilities-based voice service. Verizon clearly remains the provider of voice services over the loop, and clearly retains the obligation to unbundle the high-frequency portion of the loop, when it resells its voice services.

Any other reading of the Commission’s line sharing rules would vitiate the Commission’s actual intent in enacting the above-referenced provision of the line sharing rules. Specifically, in its *Line Sharing Order*, the Commission stated that it would not require incumbents to unbundle access to the data portion of an otherwise unoccupied loop (or a “dry” loop).³² Accordingly, the Commission concluded that incumbents would not have to unbundle the high-frequency portion of the loop where the incumbent was not also providing the customer’s voice service – ie., a dry loop on which no voice service was being provided. Similarly, the Commission also specifically exempted incumbents from unbundling loops to requesting carriers purchasing UNE-P. As the Commission later explained in its *Line Sharing Reconsideration Order*, the Commission’s line-sharing

³¹ 47 C.F.R. § 51.319(h)(3).

rules allows customers of service providers employing UNE-P to obtain competitive alternatives for xDSL service through line-splitting arrangements.³³ In no circumstance, however, did the Commission permit incumbents to deny competitors access to the high-frequency portion of the loop where incumbent-provided voice service was resold. Indeed, apart from Verizon's need to draw arbitrary lines for when competitors can and can't obtain the line sharing UNE, there exists little policy basis for denying competitors access to the line sharing UNE when Verizon's voice services are provided through a reseller. Indeed, to allow Verizon to refrain from providing line shared loop UNEs for customers of voice resellers would leave such customers without any competitive alternative to Verizon's retail xDSL services.

Verizon must immediately reverse its discriminatory policy of denying competitors access to line shared loop UNEs over loops to customers obtaining resold voice services. Verizon must immediately remove the third-party voice designation from loops over which resold voice services are provided, because this is what causes Verizon to reject Covad's line sharing orders for such loops. Unless and until Verizon reverses this discriminatory policy, the Commission must not allow Verizon to obtain authorization to provide interLATA services in Virginia.

Dark Fiber/Dark Fiber OSS – Checklist Items 2 and 5

Verizon provides an inadequate process regarding information about the availability of dark fiber in its network. Verizon's process is a virtual guessing game to determine if dark fiber is available between Verizon's central offices. Verizon has made

³² See *Line Sharing Order*, 14 FCC Rcd. 20912, 20947 at para. 72.

³³ See *Line Sharing Reconsideration Order*, 16 FCC Rcd 2101, 2110-14, paras. 17-26.

it as difficult as possible for Covad to plan its dark fiber routes through its route-specific dark fiber inquiry process. The Commission should require Verizon to provide requesting carriers direct access to the same plant records that are available to an ILEC for evaluating the availability of dark fiber, including access to detailed inter-office dark fiber maps and other procedures designated to facilitate CLEC access to dark fiber information. At the 271 hearings before the Virginia SCC, Verizon offered to provide maps to any requesting CLEC of dark fiber available in its network. Verizon subsequently admitted that dark fiber maps are available, but refused to provide them arguing that they are proprietary.

Typically, Verizon will only inform a competitor whether dark fiber is available between two locations if the competitor specifically inquires about the particular route. If Verizon responds that there is no dark fiber available for the route requested, there is no way for the competitor to question or confirm Verizon's determination. Moreover, Verizon may deny that dark fiber exists between two locations based on the competitor's route request, even though there is an alternative route that Verizon did not disclose. Obtaining dark fiber, consequently, remains a matter of guesswork for competitors like Covad. Verizon's piecemeal disclosure of the location and availability of dark fiber also leaves competitors without any effective information source to include dark fiber in any of its long term network planning. Covad needs to know where dark fiber is in Verizon's network in order to have any meaningful opportunity to use it.

This is exactly the process that this Commission found not to comply with the Commission's rules and orders in its recent arbitration of an interconnection agreement

between Verizon and AT&T.³⁴ Specifically, the Commission affirmed the CLEC right to purchase a dark fiber route, even if it traverses multiple COs, by obtaining information about available fiber routes, including maps and field surveys in Verizon's possession, and placing a single order for an available, desired route.³⁵ As the Commission stated, "[T]he Commission's rules requiring nondiscriminatory access to UNEs, and specifically to OSS, preclude any requirement by Verizon that AT&T submit multiple inquiries to discover whether fiber is available along each leg of a desired route."³⁶

The Commission must not credit any Verizon arguments that the arbitration order's rulings are prospective, and that non-compliance with the terms of the order do not warrant a finding of checklist non-compliance. Rather, because the Bureau's decision was delivered on delegated authority, its findings should be regarded as findings of what the Act and the Commission's implementing UNE rules presently require, and have required all along. Verizon must not be allowed to enter the interLATA service market in Virginia until it demonstrates that it complies with the terms of the FCC's order. Specifically, Verizon must provide to competitors the same detailed underlying information regarding the composition and qualifications of the loop that the incumbent itself possesses, including access to maps.³⁷ Furthermore, Verizon must be required to provide information about all available fiber routes between specified points, so that

³⁴ See *In the Matter of Petitions of Cox Virginia Telcom, Inc., WorldCom, Inc., and AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration*, Memorandum Opinion and Order, DA 02-1731, paras. 445-474 (rel. Jul. 17 2002).

³⁵ See *id.* at paras. 455-57, 469-74.

³⁶ See *id.* at para. 473.

³⁷ See *id.*

competitors can effectively make use of the dark fiber available in Verizon's network without engaging in the guessing game entailed by Verizon's current piecemeal disclosure of dark fiber availability.

Conclusion

For the reasons stated herein, the Commission should reject the application of Verizon for authority to provide in-region, interLATA services in Virginia.

Respectfully submitted,

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21 August 2002

Appendix A

Verizon West Change Management Log

Release	GR# DPSR# Type 4 Rating	Description of Change Request	GR Type	Data Added
Unassigned	<p>C01-0042</p> <p>PMCD1318</p> <p>Rating =</p> <p>AT&T =</p> <p>WorldCom =</p> <p>Sprint =</p> <p>VADI =</p> <p>SBCT =</p> <p>Allegiance =</p>	<p>Title: PARTS – Packet from the Remote Terminal Service</p> <p>Description: The product requires new fields being added to the LSR which will require changes to SIGS and flow through to NOCV. Packet Transport from the Remote Terminal (PART) is a data transport service to be sold to certified local exchange carriers (CLECs). PART provides a data transport service between a rate demarcation point at the end user's premises and a customer/carrier specified DSX or FTF termination at the CLEC's collocation POT Bay in the end user's serving wire center. Only end users that are served by specially equipped DSL capable remote terminals will be reachable by PART service.</p> <p>Business Narrative:</p> <p>Reason: Process Improvement</p> <p>Documentation Impact:</p>	4	<p>05/07/01</p> <p>05/18/01</p> <p>06/08/01</p>

Verizon East Change Management Log (Page 6 of 47 Change Control Items by Release July meeting)

Release	CR # Initiative # Type 4 Rating	Description of Change Request	CR Type	Data Added
June 15, 2002 Completed	1924 366421	<p>Title: Add RT indicator for xDSL Loop Qual to identify addresses served by a Remote Terminal</p> <p>Description: The goal of this initiative is to introduce Packet Transport from the Remote Terminal (PART) as an offering to the Wholesale market.</p> <p>Business Narrative : This change request adds a new field to the xDSL Loop Qualification response to indicate the presence of a remote terminal that is xDSL capable. With this enhancement, the CLECs will have an additional option for a location that is qualified for xDSL service.</p> <p>LSR rules for Remote Terminal: REQTYP = "AB" 2nd character of TOS= "R" or "2" SLI = "C" or "V" ACT = "N", "C" or "D"</p> <p>The following fields will be added to the Local Response: Related Exchange Company ID – RECCKT Virtual Path Indicator - VPID1, VPID2 Virtual Path Identifier - VPI1, VPI2 Virtual Circuit Identifier - VCI1, VCI2</p> <p>For the DSL Extract, a new value will be returned in the SVCAVAIL field to indicate presence of remote terminal that is xDSL capable.</p> <p>Reason: UNE Remand</p> <p>Jurisdiction: North & South; System: LSI, EDI, CORBA; Primary Area: UNE; LSOG Version: 4 & 5</p>	2	3/5/02

Appendix B

Appendix C

Examples of Rejected Covad UNE DS-1 Orders

Parent Carrier Name	Rgn Name	Order Status	Order Rec'd Date	No Facilities Reason	Date Rejected	PON Number
Verizon (BA North)	Boston, MA	Rejected	04/17/02 12:20 PM	NO APPARATUS/DOUBLER CASE	4/23/2002	1580207
Verizon (BA North)	Boston, MA	Rejected	03/28/02 04:31 PM	EU NEEDS A DOUBLER	4/3/2002	1551281
Verizon (BA North)	Boston, MA	Rejected	03/01/02 11:06 AM	NEED TO PLACE FIBER AND OR MUX	4/11/2002	1515616
Verizon (BA North)	Boston, MA	Rejected	03/11/02 08:13 AM	NO APPARATUS/DOUBLER CASE	3/29/2002	1526726
Verizon (BA South)	Philadelphia, PA	Cancelled	03/14/02 07:02 AM	no available un-bundled facilities	3/21/2002	1531799
Verizon (BA South)	Washington, DC	Rejected	04/01/02 08:57 AM	A DOUBLER WOULD BE NEEDED	4/25/2002	1554667
Verizon (BA South)	Washington, DC	Rejected	04/01/02 05:31 AM	NO ILEC Facilities- End User Premise	4/25/2002	1554192
Verizon (BA South)	Washington, DC	Rejected	04/01/02 07:00 AM	no fiber/mux at location	4/17/02	1554318
Verizon (BA South)	Washington, DC	Rejected	04/10/02 09:03 AM	nospare pairs in the encapsulated buried splice	4/18/2002	1567754
Verizon (BA South)	Philadelphia, PA	Rejected	04/05/02 09:21 AM	no doubler case	4/22/2002	1561660
Verizon (BA South)	Philadelphia, PA	Rejected	03/21/02 01:47 PM	NO ILEC Facilities- End User Premise	3/28/2002	1542035
Verizon (BA South)	Baltimore, MD	Rejected	04/16/02 03:01 PM	needing a doubler	4/25/2002	1578776
Verizon (BA South)	Washington, DC	Rejected	03/11/02 02:01 PM	needs MUX	4/10/2002	1527591
Verizon (BA South)	Philadelphia, PA	Rejected	01/14/02 05:01 PM	no facilities available of the F1	1/22/2002	1455909A
Verizon (BA South)	Baltimore, MD	Rejected	03/20/02 03:20 PM	requires 1 or possibly 2 doublers	3/27/2002	1540598
Verizon (BA South)	Washington, DC	Rejected	04/11/02 06:00 PM	NO ILEC Facilities- End User Premise	4/19/2002	1573569
Verizon (BA South)	Philadelphia, PA	Rejected	03/19/02 06:00 AM	no facilities	4/3/2002	1537686
Verizon (BA South)	Washington, DC	Rejected	04/01/02 06:03 AM	no facilities until June 21	4/16/2002	1554228
Verizon (BA South)	Washington, DC	Rejected	04/05/02 05:40 AM	needing fiber or mux	4/25/2002	1561425

Appendix D

Parent Carrier Name	Client Install Order Status	Last Loop Install Order Orig Foc Date	Client Order Cancel Date	Client Order Cancel Reason	Loop Point	Client State
Verizon (BA North)	Rejected		05/30/02 09:58 AM	No ILEC Facilities- Central Office	1607010	MA
Verizon (BA North)	Rejected		06/24/02 05:22 AM	NO ILEC Facilities- End User Premise	1638626	MA
Verizon (BA North)	Rejected		05/02/02 10:19 AM	No ILEC Facilities- Central Office	1580207	MA
Verizon (BA North)	Rejected			No ILEC Facilities- Central Office	1666898	MA
Verizon (BA North)	Rejected		04/12/02 06:13 AM	No ILEC Facilities- Central Office	1551281	MA
Verizon (BA North)	Rejected		05/03/02 06:07 AM	No ILEC Facilities- Central Office	1577678	MA
Verizon (BA North)	Rejected		04/12/02 06:43 AM	No ILEC Facilities- Central Office	1515616	MA
Verizon (BA North)	Rejected		05/03/02 06:06 AM	No ILEC Facilities- Central Office	1587117	MA
Verizon (BA North)	Rejected		06/13/02 12:59 PM	NO ILEC Facilities- End User Premise	1624909	MA
Verizon (BA North)	Rejected		04/12/02 06:41 AM	No ILEC Facilities- Central Office	1526726	MA
Verizon (BA North)	Rejected		04/17/02 06:02 AM	No ILEC Facilities- Central Office	1573286	MA
Verizon (BA North)	Rejected		06/19/02 12:51 PM	NO ILEC Facilities- End User Premise	1627827	MA
Verizon (BA North)	Rejected			NO ILEC Facilities- End User Premise	1664494	MA
Verizon (BA South)	Rejected			No ILEC Facilities- Central Office	1650998	MD
Verizon (BA South)	Rejected		04/25/02 11:04 AM	NO ILEC Facilities- End User Premise	1578776	MD
Verizon (BA South)	Rejected		07/10/02 07:04 AM	NO ILEC Facilities- End User Premise	1672548	MD
Verizon (BA South)	Rejected		06/21/02 11:05 AM	No ILEC Facilities- Central Office	1649779	MD
Verizon (BA South)	Rejected		04/17/02 06:04 AM	NO ILEC Facilities- End User Premise	1540598	MD
Verizon (BA South)	Rejected		04/25/02 11:02 AM	NO ILEC Facilities- End User Premise	1554192	MD
Verizon (BA South)	Rejected		05/22/02 12:39 PM	NO ILEC Facilities- End User Premise	1561425	MD
Verizon (BA South)	Rejected		05/22/02 05:25 AM	NO ILEC Facilities- End User Premise	1597438	MD
Verizon (BA South)	Rejected		06/19/02 01:05 PM	NO ILEC Facilities- End User Premise	1615492	MD
Verizon (BA South)	Rejected		07/05/02 07:01 AM	No ILEC Facilities- Central Office	1652672	MD
Verizon (BA South)	Rejected		06/26/02 02:02 PM	No ILEC Facilities- Central Office	1653083	MD
Verizon (BA South)	Rejected		07/05/02 07:01 AM	No ILEC Facilities- Central Office	1653783	MD
Verizon (BA South)	Rejected		07/15/02 07:01 AM	NO ILEC Facilities- End User Premise	1661573	MD
Verizon (BA South)	Rejected	03/29/02 12:00 AM	04/18/02 11:02 AM	NO ILEC Facilities- End User Premise	1527591	MD
Verizon (BA South)	Rejected		07/08/02 08:05 AM	NO ILEC Facilities- End User Premise	1667185	NJ
Verizon (BA South)	Rejected			NO ILEC Facilities- End User Premise	1667191	NJ
Verizon (BA South)	Rejected	06/05/02 12:00 AM	06/20/02 06:35 AM	NO ILEC Facilities- End User Premise	1564115	NJ
Verizon (BA South)	Rejected		06/19/02 05:39 AM	NO ILEC Facilities- End User Premise	1646225	NJ
Verizon (BA South)	Rejected		07/01/02 02:03 PM	NO ILEC Facilities- End User Premise	1653973	NJ
Verizon (BA South)	Rejected		07/01/02 07:07 AM	NO ILEC Facilities- End User Premise	1658718	NJ
Verizon (BA North)	Rejected		04/12/02 06:39 AM	No ILEC Facilities- Central Office	1552849	NY
Verizon (BA North)	Rejected		05/02/02 10:34 AM	No ILEC Facilities- Central Office	1578125	NY

Verizon (BA North)	Rejected		05/13/02 11:05 AM	NO ILEC Facilities- End User Premise	1601353	NY
Verizon (BA North)	Rejected		05/30/02 09:54 AM	NO ILEC Facilities- End User Premise	1597551	NY
Verizon (BA North)	Rejected		07/08/02 01:22 PM	No ILEC Facilities- Central Office	1639851	NY
Verizon (BA North)	Rejected		07/08/02 01:19 PM	No ILEC Facilities- Central Office	1608049	NY
Verizon (BA North)	Rejected			No ILEC Facilities- Central Office	1632108	NY
Verizon (BA North)	Rejected		06/24/02 05:19 AM	NO ILEC Facilities- End User Premise	1632908	NY
Verizon (BA North)	Rejected			No ILEC Facilities- Central Office	1667360	NY
Verizon (BA North)	Rejected		06/24/02 05:52 AM	NO ILEC Facilities- End User Premise	1600926	NY
Verizon (BA South)	Rejected		06/06/02 10:54 AM	NO ILEC Facilities- End User Premise	1633697	PA
Verizon (BA South)	Rejected		01/25/02 12:49 PM	No ILEC Facilities- Central Office	1445909	PA
Verizon (BA South)	Rejected		04/22/02 11:04 AM	NO ILEC Facilities- End User Premise	1561660	PA
Verizon (BA South)	Rejected		04/12/02 10:19 AM	NO ILEC Facilities- End User Premise	1537686	PA
Verizon (BA South)	Rejected		04/18/02 02:02 PM	NO ILEC Facilities- End User Premise	1542035	PA
Verizon (BA South)	Rejected		04/16/02 11:03 AM	NO ILEC Facilities- End User Premise	1554228	VA
Verizon (BA South)	Rejected	05/07/02 12:00 AM	05/14/02 08:08 AM	NO ILEC Facilities- End User Premise	1554667	VA
Verizon (BA South)	Rejected	04/04/02 12:00 AM	05/21/02 09:58 AM	NO ILEC Facilities- End User Premise	1530440	VA
Verizon (BA South)	Rejected		07/15/02 01:40 PM	NO ILEC Facilities- End User Premise	1611451	VA
Verizon (BA South)	Rejected		04/18/02 11:03 AM	NO ILEC Facilities- End User Premise	1554318	VA
Verizon (BA South)	Rejected			No ILEC Facilities- Central Office	1649529	VA
Verizon (BA South)	Rejected		04/19/02 11:03 AM	NO ILEC Facilities- End User Premise	1573569	VA
Verizon (BA South)	Rejected		06/20/02 12:59 PM	NO ILEC Facilities- End User Premise	1639096	VA
Verizon (BA South)	Rejected		04/18/02 11:04 AM	NO ILEC Facilities- End User Premise	1567754	VA
TOTAL	57					

Verizon (BA South)	Closed	05/13/02 12:00 AM			1554321	DC
Verizon (BA South)	Closed	05/17/02 12:00 AM			1580744	DC
Verizon (BA South)	Closed	05/02/02 12:00 AM			1573565	DC
Verizon (BA South)	Closed	06/20/02 12:00 AM			1623761	DC
Verizon (BA North)	Closed	06/28/02 12:00 AM			1607190	MA
Verizon (BA North)	Closed	06/14/02 12:00 AM			1610934	MA
Verizon (BA North)	Closed	04/26/02 12:00 AM			1547014	MA
Verizon (BA North)	Closed	07/01/02 12:00 AM			1650967	MA
Verizon (BA North)	Closed	04/29/02 12:00 AM			1547003	MA
Verizon (BA North)	Closed	06/13/02 12:00 AM			1617036	MA
Verizon (BA North)	Closed	06/10/02 12:00 AM			1576431	MA
Verizon (BA South)	Closed	02/11/02 12:00 AM			1445906	MD
Verizon (BA South)	Closed	06/19/02 12:00 AM			1580732	MD

Verizon (BA South)	Closed	04/16/02 12:00 AM	1526749	MD
Verizon (BA South)	Closed	06/25/02 12:00 AM	1603782	MD
Verizon (BA South)	Closed	06/26/02 12:00 AM	1613965	MD
Verizon (BA South)	Closed	05/01/02 12:00 AM	1556573	MD
Verizon (BA South)	Closed	04/18/02 12:00 AM	1536145	MD
Verizon (BA South)	Closed	05/21/02 12:00 AM	1590560	MD
Verizon (BA South)	Closed	07/05/02 12:00 AM	1623247	MD
Verizon (BA South)	Closed	06/25/02 12:00 AM	1633689	MD
Verizon (BA South)	Closed	06/26/02 12:00 AM	1590793	MD
Verizon (BA South)	Closed	07/10/02 12:00 AM	1646124	NJ
Verizon (BA South)	Closed	05/21/02 12:00 AM	1574985	NJ
Verizon (BA South)	Closed	02/14/02 12:00 AM	1449763	NJ
Verizon (BA South)	Closed	06/11/02 12:00 AM	1616294	NJ
Verizon (BA South)	Closed	03/28/02 12:00 AM	1541354	NJ
Verizon (BA South)	Closed	03/28/02 12:00 AM	1519367	NJ
Verizon (BA South)	Closed	04/25/02 12:00 AM	1547249	NJ
Verizon (BA South)	Closed	07/03/02 12:00 AM	1624831	NJ
Verizon (BA South)	Closed	07/08/02 12:00 AM	1647653	NJ
Verizon (BA South)	Closed	05/01/02 12:00 AM	1555093	NJ
Verizon (BA North)	Closed	05/13/02 12:00 AM	1560262	NY
Verizon (BA North)	Closed	05/28/02 12:00 AM	1595918	NY
Verizon (BA North)	Closed	06/27/02 12:00 AM	1646830	NY
Verizon (BA North)	Closed	07/02/02 12:00 AM	1654252	NY
Verizon (BA North)	Closed	05/20/02 12:00 AM	1601509	NY
Verizon (BA North)	Closed	05/10/02 12:00 AM	1556818	NY
Verizon (BA North)	Closed	05/01/02 12:00 AM	1555022	NY
Verizon (BA North)	Closed	04/26/02 12:00 AM	1526993	NY
Verizon (BA North)	Closed	06/25/02 12:00 AM	1646829	NY
Verizon (BA North)	Closed	04/17/02 12:00 AM	1542054	NY
Verizon (BA North)	Closed	04/29/02 12:00 AM	1574765	NY
Verizon (BA North)	Closed	05/08/02 12:00 AM	1579388	NY
Verizon (BA North)	Closed	06/11/02 12:00 AM	1628485	NY
Verizon (BA North)	Closed	06/10/02 12:00 AM	1573971	NY
Verizon (BA North)	Closed	05/20/02 12:00 AM	1604020	NY
Verizon (BA South)	Closed	04/25/02 12:00 AM	1547322	PA
Verizon (BA South)	Closed	05/02/02 12:00 AM	1573571	PA
Verizon (BA South)	Closed	06/18/02 12:00 AM	1628848	PA

Verizon (BA South)	Closed	04/01/02 12:00 AM	1521067	PA
Verizon (BA South)	Closed	06/11/02 12:00 AM	1613377	PA
Verizon (BA North)	Closed	03/11/02 12:00 AM	1479152	RI
Verizon (BA South)	Closed	05/21/02 12:00 AM	1574867	VA
Verizon (BA South)	Closed	04/22/02 12:00 AM	1542750	VA
Verizon (BA South)	Closed	05/02/02 12:00 AM	1554474	VA
Verizon (BA South)	Closed	07/05/02 12:00 AM	1596922	VA
Verizon (BA South)	Closed	07/05/02 12:00 AM	1626981	VA
Verizon (BA South)	Closed	07/10/02 12:00 AM	1650984	VA
Verizon (BA South)	Closed	05/08/02 12:00 AM	1579490	VA
Verizon (BA South)	Closed	04/22/02 12:00 AM	1555988	VA
Verizon (BA South)	Closed	04/12/02 12:00 AM	1545680	VA
Verizon (BA South)	Closed	06/06/02 12:00 AM	1591268	VA
Verizon (BA South)	Closed	05/31/02 12:00 AM	1608335	VA
Verizon (BA South)	Closed	07/11/02 12:00 AM	1603336	VA
Verizon (BA South)	Closed	07/09/02 12:00 AM	1644537	VA
Verizon (BA South)	Closed	04/25/02 12:00 AM	1554718	VA
TOTAL	67			

**% Rejected
for No Facilities 46%**

Appendix E

July 24, 2001

DS1 and DS3 Unbundled Network Elements Policy

A number of carriers have recently expressed concern that Verizon is changing its policies with respect to the construction of new DS1 and DS3 Unbundled Network Elements. This is not the case. To ensure that there is no misunderstanding on this point this letter restates Verizon's policies and practices with respect to the provisioning of unbundled DS1 and DS3 network elements. In compliance with its obligations under applicable law, Verizon will provide unbundled DS1 and DS3 facilities (loops or IOF) to requesting CLECs where existing facilities are currently available. Conversely, Verizon is not obligated to construct new Unbundled Network Elements where such network facilities have not already been deployed for Verizon's use in providing service to its wholesale and retail customers. This policy, which is entirely consistent with Verizon's obligations under applicable law, is clearly stated in Verizon's relevant state tariffs and the CLEC Handbook, and is reflected in the language of Verizon's various interconnection agreements.

This does not mean that CLECs have no other options for obtaining requested facilities from Verizon.

In areas where Verizon has construction underway to meet anticipated future demand, Verizon's field engineers will provide a due date on CLEC orders for unbundled DS1 and DS3 network elements based on the estimated completion date of that pending job, even though no facilities are immediately available. Rigid adherence to existing policies could dictate that the field engineers reject these orders due to the lack of available facilities; but in an effort to provide a superior level of service, Verizon has chosen not to do so. In such cases, the result is that the order is filled, but the provisioning interval is longer than normal. At the same time, Verizon's wholesale customers should not confuse these discretionary efforts to provide a superior level of service with a perceived *obligation to construct new facilities*.

Moreover, although Verizon has no legal obligation to add DS1/DS3 electronics to available wire or fiber facilities to fill a CLEC order for an unbundled DS1/DS3 network element, Verizon's practice is to fill CLEC orders for unbundled DS1/DS3 network elements as long as the central office common equipment and equipment at end user's location necessary to create a DS1/DS3 facility can be accessed. However, Verizon will reject an order for an unbundled DS1/DS3 network element where (i) it does not have the common equipment in the central office, at the end user's location, or outside plant facility needed to provide a DS1/DS3 network element, or (ii) there is no available wire or fiber facility between the central office and the end user.

Specifically, when Verizon receives an order for an unbundled DS1/DS3 network element, Verizon's Engineering or facility assignment personnel will check to see if existing common equipment in the central office and at the end user's location has spare ports or slots. If there is capacity on this common equipment, operations personnel will perform the cross connection work between the common equipment and the wire or fiber facility running to the end user and

install the appropriate DS1/DS3 cards in the existing multiplexers. They will also correct conditions on an existing copper facility that could impact transmission characteristics. Although they will place a doubler into an existing apparatus case, they will not attach new apparatus cases to copper plant in order to condition the line for DS1 service. At the end user's end of the wire or fiber facility, Verizon will terminate the DS1/DS3 loop in the appropriate Network Interface Device (Smart Jack or Digital Cross Connect (DSX) Panel).

In addition, if Verizon responds to a CLEC request for an unbundled DS1/DS3 network element with a Firm Order Completion date (FOC), indicating that Verizon has spare facilities to complete the service request, and if Verizon subsequently finds that the proposed spare facilities are defective, Verizon will perform the work necessary to clear the defect. In the event that the defect *cannot be corrected, resulting in no spare facilities, or if Verizon has indicated that there are spare facilities and Verizon subsequently finds that there are no spare facilities*, Verizon will not build new facilities to complete the service request.

Finally, wholesale customers of Verizon, like its retail customers, may request Verizon to provide DS1 and DS3 services pursuant to the applicable state or federal tariffs. While these tariffs also state that Verizon is not obligated to provide service where facilities are not available, Verizon generally will undertake to construct the facilities required to provide service at tariffed rates (including any applicable special construction rates) if the required work is consistent with Verizon's current design practices and construction program. Even in these cases, of course, Verizon must retain the right to manage its construction program on a dynamic basis as necessary to meet both its service obligations and its obligation to manage the business in a fiscally prudent manner.

In summary, although Verizon's policies regarding the construction of new DS1 and DS3 Unbundled Network Elements remain unchanged, Verizon continues to strive to meet the requirements of its wholesale customers for unbundled DS1 and DS3 facilities in a manner that is consistent with the sound management of its business.

If you have any questions regarding Verizon's unbundled DS1/DS3 building practice, you may contact your Account Manager.