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July 3, 2003

VIA HAND DELIVERY
James J. McNulty, Secretary
Pennsylvania Public Utility Commission
400 North Street
Commonwealth Keystone Building
Harrisburg, Pennsylvania 17120

DOCUMENT

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: DIECA Communications, Inc. t/a Covad Communications Company

Petition For Arbitration Of Interconnection Rates, Terms and Conditions And Related Arrangements with Verizon Pennsylvania Inc. and Verizon North Inc. Pursuant to Section 252(b) of the Communications Act of 1934
Docket Nos. A-310696F7000, A-310696F7001

Dear Secretary McNulty:

Enclosed for filing with the Commission in the above-captioned proceeding are originals and nine (9) copies each of the Reply Brief of Covad Communications Company. Copies of this Reply Brief are being served upon the parties of record as shown on the attached Certificate of Service.

Very truly yours,

John F. Povilaitis

Counsel for
Covad Communications Company

JFP/cc
Enclosures

Certificate of Service
The Honorable Marlane R. Chestnut

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BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

DIECA Communications, Inc. t/a Covad Communications Company

Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Verizon Pennsylvania Inc. and Verizon North Inc. Pursuant to Section 252(b) of the Communications Act of 1934

Docket Nos.
A-310696F7000
A-310606F7001

POST-TECHNICAL CONFERENCE REPLY BRIEF OF COVAD COMMUNICATIONS COMPANY

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Dated: July 3, 2003

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BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

DIECA Communications, Inc. t/a Covad Communications Company

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Docket Nos.
A-310696F7000
A-310606F7001

POST-TECHNICAL CONFERENCE REPLY BRIEF OF COVAD COMMUNICATIONS COMPANY

Pursuant to the direction of the Administrative Law Judge ("ALJ"), Covad Communications Company ("Covad") respectfully submits its Post-Technical Conference Reply Brief.

I. ARGUMENT

Issue 1: **Should Verizon continue to provide unbundled network elements and other services required under the Act and the Agreement until there is a final and non-appealable change in law eliminating any such requirements?**

Summary: Covad's proposed language merely seeks reciprocal language that precludes Verizon from discontinuing provisioning services *if a question of law exists* as to whether it has been relieved of future legal obligations. Verizon should not be allowed to discontinue service before the legal parameters of Verizon's duty to provide such UNEs or services have been resolved.

Covad disagrees with Verizon's assertion that Verizon's proposed language "strikes a reasonable balance" between the parties' disputed positions regarding this issue.[1] Despite Verizon's claim that Covad seeks to require Verizon to continue providing Covad with access to

[1] Verizon's Brief on the Merits, at 5.

a UNE or other service indefinitely, even if Verizon's legal obligations are modified,[2] Covad merely seeks reciprocal language that precludes Verizon from discontinuing provisioning services *if a question of law exists* as to whether it has been relieved of future legal obligations. Adoption of Verizon's proposed language would improperly vest Verizon with authority to curtail Covad's access to particular UNEs or services prematurely, before the legal parameters of Verizon's duty to provide such UNEs or services have been resolved. Such a result would be highly disruptive and prejudicial to Covad's business for the reasons stated in Covad's Initial Brief, and the Commission should reject Verizon's efforts to retain the unilateral power to "pull the plug" on Covad's operations while legal questions remain as to Verizon's right to do so.[3]

As Covad explained in its Initial Brief, its position is consistent with the *AT&T NY Arbitration Award* and the FCC's *Virginia Arbitration Award*.[4] In addition, Covad's position was adopted on June 26, 2003, in the New York arbitration between Covad and Verizon involving substantially the same issues that are before the Commission in this case. Finding that "the sort of protection Covad seeks is not unreasonable," the New York Commission ruled that Covad's proposed language regarding this issue should be adopted.[5] The Commission should similarly accept Covad's proposed language in this case, and reject Verizon's inappropriate position.

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2 Verizon's Brief on the Merits, at 5.

3 Covad's Post-Technical Conference Initial Brief, at 7-8.

4 Covad's Post-Technical Conference Initial Brief, at 5-6, 10.

5 Petition of Covad Communications Company, Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York, Inc., Case 02-C-1175, *Arbitration Order* (NY PSC June 26, 2003) ("*New York Arbitration Order*") at 7.

Verizon's contention that the impending FCC *Triennial Review Order* should cause the Commission to adopt Verizon's position on this issue is not persuasive.[6] Although Verizon claims that the appeals and subsequent related proceedings that will follow from release of the *Triennial Review Order* may result in its being required to provide Covad with access to UNEs or other services that will no longer be necessary after all of the issues associated with the *Triennial Review Order* are resolved, Covad notes that the law is constantly in a state of flux. This is all the more reason to require parties to adhere to their existing legal obligations while renegotiation or dispute resolution regarding specific issues is ongoing. Otherwise, as Covad explained in its Initial Brief, Verizon would improperly be given the discretion to discontinue providing services to Covad even where the scope of its legal obligation has not been resolved.[7] For these reasons and for the reasons set forth in Covad's Initial Brief, the Commission should adopt Covad's proposed language and reject the language proposed by Verizon.[8]

Issue 2: **Should the Parties have the unlimited right to assess previously unbilled charges for services rendered?**

Issue 9: **Should the anti-waiver provisions of the Agreement be implemented subject to the restriction that the Parties may not bill one another for services**

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6 Verizon's Brief on the Merits, at 8.

7 Covad's Post-Technical Conference Initial Brief, at 9.

8 If, for some reason the Commission seeks to deviate from the approach of the New York Commission and Covad's proposed language, then the Commission should adopt Covad's initial proposal that Verizon may discontinue the provision of new services, and discontinue the provision of existing services after a reasonable transition period, only upon the issuance of a final and non-appealable legislative, judicial, regulatory or other governmental decision, order, determination or action, or any change in Applicable Law, that Verizon is not required by Applicable Law to provide any Service, payment or benefit, otherwise required to be provided to Covad. Verizon cannot dispute the reasonableness of this approach as it acceded to such a provision as a condition of the FCC's approval of the Bell Atlantic/GTE merger. *See Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee,* CC Docket No. 98-184, Memorandum Opinion and Order, FCC 00-221, Conditions for Merger, No. XIII, Offering of UNEs (2000). Implicit in its agreement to such a condition is the fact that such a provision promotes the public interest by precluding instantaneous and potentially unwarranted discontinuing of service.

rendered more than one year prior to the current billing date?

Summary: Verizon's reliance solely on statutory limitation periods or collaborative efforts should be rejected. The Commission has authority to set what it deems is a reasonable period for backbilling, and Covad has demonstrated that a one year limitation is reasonable.

Covad believes that Verizon's ability to assess previously unbilled charges for services rendered (*i.e.*, its ability to backbill) should be limited to services rendered within one year of the current billing date. Verizon continues to operate under the mistaken belief that the a general four-year Pennsylvania statute of limitations should be the only restriction applicable to backbilling. Covad rebutted this proposition in its Initial Brief[9] and will not belabor the issue here. For instance, the New York Public Service Commission noted that it was not necessarily bound by the generic statute of limitations period, and could impose a shorter period for backbilling.[10] Contrary to Verizon's contentions, Covad has demonstrated the need for limitations on backbilling.[11] Moreover, even assuming *arguendo* that Verizon generally bills in a timely manner, this is no reason to stretch the allowable period in which it may backbill up to four years. As Covad has demonstrated, however, in the context of backbilling, a one year limitation is more appropriate and is the one best supported by.Commission and FCC precedent and regulations.[12]

Verizon does not dispute the FCC precedent limiting a carrier's ability to backbill, but tries to distinguish the cases by stating that the cases deal with end user customers, not other carriers. However, in *The People's Network, Inc.*, the Complainant was a long distance carrier

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9 Covad's Post-Technical Conference Initial Brief, at 12-13.

10 *NY Arbitration Order* at 9, n. 9. The NY PSC did ultimately decide to use its state statute of limitations period.

11 Covad's Post-Technical Conference Initial Brief, at 16-17.

12 Covad's Post-Technical Conference Initial Brief, at 13-16.

reselling AT&T's services, and, thus, in a comparable position to Verizon's wholesale customers, such as Covad.[13] In *AmNet*, the case in which the FCC found the federal two year statute of limitations inapplicable to backbilling, the Petitioner was a carrier purchasing access services from AT&T.[14] Thus, there is no basis for Verizon's suggestion that backbilling poses a different scenario if the customer is a carrier, as opposed to an end user. In fact, as Covad noted, since it still has to bill its customer after it receives the charges from Verizon, thereby adding more delay to the time frame in which the end user is billed, it is even more important that Verizon bill its wholesale customers in a timely manner.[15]

Verizon contends that Covad has not demonstrated that backbilling will impact its SEC filings, and that in the situation involving backbilling for line sharing charges, Covad had specified in its 10-K that while it was provisioning line sharing orders, permanent rates had not been set.[16] Thus, Verizon is suggesting that the possibility of backbilling had been reflected in Covad's 10-K. What Verizon fails to mention is that in 2000, Covad and Verizon had entered into an interconnection agreement that specified interim line sharing rates. Thus, while Covad recognized that its expenses might ultimately be affected by the setting of permanent rates, it expected that Verizon would bill in a timely manner the interim rates in the interconnection agreement, which Verizon failed to do. If Verizon were permitted to extend this potential to

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13 *The People's Network, Inc. v. AT&T Corp.*, Memorandum and Order, File No. E-92-99, 11 FCC Rcd 21081 (1997) (*"TPN"*). As the FCC noted, "AT&T has failed to make a persuasive showing that the billing delays experienced by TPN's customers -- in some cases more than 10 months -- should be viewed as reasonable under Section 201(b), especially in light of the particular requirements of TPN as a resale carrier and its dual status as a customer and competitor of AT&T." *Id.*

14 *American Network, Inc., Petition for Declaratory Ruling Concerning Backbilling of Access Charges*, Memorandum Opinion and Order, 4 FCC Rcd 550 (1989) *recon. denied*, 4 FCC Rcd 8797 (1989).

15 Covad's Post-Technical Conference Initial Brief, at 16-17.

16 Verizon's Brief on the Merits, at 13.

backbill over four years, it is easy to see how this backbilling would wreak havoc with Covad's SEC filings.

It is important that the Commission incorporate into interconnection agreements protections for carriers and their end user customers. Even if Verizon had a stellar history of timely billing, which it clearly does not, there is no basis in law or policy to allow it to backbill for periods of up to four years.

Issue 4: **When the Billing Party disputes a claim filed by the Billed Party, how much time should the Billing Party have to provide a position and explanation thereof to the Billed Party?**

Issue 5: **When Verizon calculates the late payment charges due on disputed bills (where it ultimately prevails on the dispute), should it be permitted to assess the late payment charges for the amount of time exceeding thirty days that it took to provide Covad a substantive response to the dispute? Should Verizon be permitted to assess late fees on unpaid late fees?**

Summary: Covad's request for prompt response to billing disputes is in accord with applicable performance metrics and is appropriate and necessary for inclusion in an interconnection agreement. Verizon should be limited in its attempt to exacerbate late payment charges through dilatory responses to disputes.

Issues 4 and 5 are two closely related issues that arise from Verizon's dilatory responses to billing disputes raised by Covad. The Commission should require Verizon to provide Covad a response to billing disputes within thirty days, and limit Verizon's assessment of late payment charges on disputed charges.

Verizon contends that Covad is seeking unique treatment in regard to response to billing disputes. Covad has demonstrated, however, that the thirty day period is very much in accord with applicable performance metrics.[17] Even if Covad were seeking an assurance of somewhat better performance, Covad's experiences in regard to Verizon's dilatory responses would support

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[17] Covad's Post-Technical Conference Initial Brief, at 18-19.

such a request.[18] In addition, this would not deny other CLECs the right to similar performance as they have the right to adopt Covad's interconnection agreement.

Verizon also suggests that the FCC has made a finding that it is "unreasonable" to require a thirty day response for billing disputes pertaining to bills that are more than sixty days old. Far from making such a finding, the FCC merely approved a Section 271 application in Rhode Island in which Verizon had a business rule that excludes from applicable metrics billing disputes on charges that are over 60 days old. The FCC never ruled on the propriety of this business rule. [19] As Verizon concedes, the current New York measurements do not contain this exclusion.[20] Thus, in New York, Verizon has been required to respond to claims within 30 days even if the charges are over 60 days old. As Verizon itself notes, this Commission will base its performance standards on those issued by the New York Commission.[21]

Verizon also challenges the propriety of including performance measurements in interconnection agreements.[22] Covad has every right to seek contractual protections to ensure timely resolution of billing disputes. In the Covad/Verizon New York Arbitration, the Commission held that parties are free to include performance metrics that deviate from the general performance standards in their interconnection agreements.[23] Where the parties do not agree on the applicable standard, the general performance standards would apply.[24] Thus, at the

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18 Covad's Post-Technical Conference Initial Brief, at 19.

19 *In the Matter of Application by Verizon New England, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Rhode Island*, CC Docket No. 01-324, Memorandum Opinion and Order, FCC 02-63, ¶ 71 (2002).

20 Verizon's 1/17/03 Opening Brief at 11.

21 Verizon's Brief on the Merits, at 15.

22 *See* Covad's Post-Technical Conference Initial Brief, at 38.

23 *New York Arbitration Order* at 12.

24 *New York Arbitration Order* at 12, 23.

very least, the current performance standards on resolution of billing disputes should be included in the interconnection agreement.

Verizon admits that its other concern about inclusion of performance metrics, *i.e.*, modification of the agreement to reflect new or changed metrics, is something that can be addressed via change of law provisions.[25] Since the Commission revises metrics only at predetermined times and pursuant to its own Orders, modifying the agreement to reflect these changes should create no problem. Verizon seeks instantaneous modification, but has demonstrated no reason why the agreement's change of law process would not be sufficient. The New York Commission noted that prospective changes to metrics should be handled through an interconnection agreement's change-of-law provisions.[26]

Verizon also concedes that the relevant billing dispute metrics do not capture data in regard to special access circuits that have been converted to UNEs.[27] Thus, there will be no way to remedy any dilatory responses by Verizon to disputes concerning these particular UNEs. Verizon's solution is for Covad to raise this issue in the Change Management Process, which Verizon itself has previously conceded could take months to resolve the issue.[28] In the interim, Covad would be left with no protection in regard to these vital facilities. Verizon also contends that Covad has not demonstrated any problem in regard to these circuits, but overlooks the fact that Covad demonstrated that Verizon's longest response time to billing disputes pertained to high capacity access/transport facilities.[29] Verizon further asserts that its personnel make no

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25 Verizon's Brief on the Merits, at 15.

26 *NY Arbitration Order* at 12.

27 Verizon's Brief on the Merits, at 16.

28 Covad's Post-Technical Conference Initial Brief, at 20-21.

29 Covad's Post-Technical Conference Initial Brief, at 19. It takes on average 221 days for

distinction in their processing of claims for special access circuits as opposed to UNE circuits.[30] Of course, Verizon can conveniently make this argument because it knows that since these circuits are not captured in the applicable performance metrics, as a result of which there is no way either to corroborate or to disprove Verizon's assertion.

In regard to late payment charges (Issue 5), Verizon contends that in one instance where a major, and protracted, billing dispute was resolved, all was eventually made right by Verizon not requiring Covad to pay late-payment charges. Of course, Verizon fails to mention the numerous claims Covad had to file in regard to those late-payment charges.[31] If it is indeed Verizon's practice ultimately not to assess these late payment charges, the language of the interconnection agreement should reflect this practice, rather than requiring Covad to rely upon Verizon to waive late fees voluntarily.

Verizon also suggests that Covad may be at fault for Verizon's delays in responding by failing to provide sufficient information or disputing charges months after the fact.[32] Verizon provides no substantiation for this proposition, but even assuming *arguendo*, that there is such a problem, Verizon can alleviate these problems. If it receives insufficient information from Covad to support a dispute, Verizon should notify Covad in a timely manner of the need for more information, so that Covad can provide such information. Also, if Verizon bills in a timely manner, Covad can dispute charges in a timely manner. Verizon, as master of the billing

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Verizon to resolve such claims.

30 Verizon's Brief on the Merits, at 16.

31 Covad's Post-Technical Conference Initial Brief, at 23. Contrary to Verizon's assertions, Covad is forced not only to dispute the actual charges in question but also the late payment charges assessed on a cumulative basis. Covad's Post-Technical Conference Initial Brief, at 22-23.

32 Verizon's Brief on the Merits, at 18-19.

process, is the party that can ultimately make the process more seamless and less difficult for all concerned. As the New York Commission noted:

> Covad is correct in noting that Verizon has greater control than Covad over the pace of billing dispute resolutions, and that where Verizon takes unduly long to resolve a dispute, late payment charges should not continue to accumulate and compound. At the same time, Covad should have a disincentive to filing billing disputes that lack merit. A fair resolution of the conflicting interests here is to adopt Covad's wording but to toll the accumulation of late payment charges after 60 days rather than after only 30; in that way, Covad will have protection against the truly egregious cases it claims to be concerned about.[33]

This Commission should also limit Verizon's ability to accumulate and compound late payment charges.

Issue 7: **For service-affecting disputes, should the Parties employ arbitration under the rules of the American Arbitration Association, and if so, should the normal period of negotiations that must occur before invoking dispute resolution be shortened**

Summary: Verizon's sole argument in regard to Issue 7, *i.e.*, that Commissions cannot mandate private arbitration has been unequivocally rejected by other state commissions and should be rejected by this Commission.

Unlike situations subject to the standard dispute resolution provisions of the agreement in which the dispute involves only the relationship between Verizon and Covad, a service-affecting dispute harms end users. The services that both Parties provide to end users must be protected to the greatest extent possible, and a dispute that affects those services should be resolved more rapidly than other disputes. Accordingly, either party should be able to submit such a dispute to binding arbitration under the expedited procedures described in the Commercial Arbitration Rules (CAADR) of the American Arbitration Association (rules 53 through 57) in any circumstance in which negotiations have failed to resolve the dispute within five (5) business days.

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33 *NY Arbitration Order* at 14.

Verizon's central argument in regard to Issue 7, *i.e.*, that a state commission does not have the authority to require parties to submit to binding arbitration, was rejected by the New York Commission in its *AT&T Arbitration Award* and its recent *NY Arbitration Order*.[34] In fact, in that Order, the New York Commission noted that that such procedures are a typical feature in the interconnection agreements the Commission has approved in the past. [35] Verizon raised, to no avail in the *AT&T Arbitration*, the argument that it should not be forced to accede to the CAADR provisions and that it has a right to invoke this state's substantive and procedural laws.[36] The New York Commission reiterated in the recent Covad/Verizon New York arbitration that:

> We rejected Verizon's arguments against imposing a dispute resolution process in an interconnection arbitration not only in the most recent AT&T case but also in its predecessor. Verizon has shown no reason to depart here from well-established precedent, and Covad's wording should be adopted.[37]

The New York Commission noted that a state commission has ample authority to adopt a dispute resolution process for an interconnection agreement.[38] This Commission similarly has ample authority to require a dispute resolution process in an interconnection agreement. Covad demonstrated in its Initial Brief that binding arbitration provisions are very much within the mandate of the 1996 Act and that other state commissions have similarly required use of such

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34 Verizon's Brief on the Merits, at 20.

35 *NY Arbitration Order* at 15; *Joint Petition of AT&T Communications of New York, Inc., TCG New York Inc. and ACC Telecom Corp. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York, Inc.*, Case No. 01-C-0095, Order Resolving Arbitration Issues at 10 (2001) ("*AT&T Arbitration Award*").

36 *AT&T Arbitration Award* at 8-9.

37 *NY Arbitration Order* at 15.

38 *NY Arbitration Order* at 15.

provisions in interconnection agreements.[39] The interests of both Covad and Verizon, as well as the interests of Covad's customers, would be well served by such a dispute resolution process.

Issue 8: **Should Verizon be permitted unilaterally to terminate this Agreement for any exchanges or territory that it sells to another party?**

Summary: Verizon's proposed language contravenes basic contract principles, is economically infeasible, and undercuts principles of contract stability that are central to interconnection agreements.

Refusing to recognize basic contract principles, Verizon argues both that it is not required to condition any sale of its operations on the purchaser agreeing to an assignment of the parties' agreement under federal law, and that once it sells an exchange or territory, it is no longer the ILEC for the service area and has no obligations under the Act.[40] However, as explained in Covad's Initial Brief, the assignment of assets to a buyer, as a matter of hornbook assignment law, does not extinguish the obligor's obligation to the obligee, in this instance Verizon's obligations to Covad.[41] Therefore, for the reasons explained in Covad's Initial Brief, Verizon's position is incorrect and it should be promptly rejected.[42]

Verizon's argument that Covad's proposed language is "mere surplusage" because Section 43.2 of the agreement already authorizes Verizon to assign the agreement[43] should not cause the Commission to improperly curtail Covad's rights by accepting Verizon's proposal. Section 43.2 is easily distinguished from the disputed issue of whether Verizon should be permitted to unilaterally terminate the agreement, as that provision conditions any assignment on the consent of the other party, "which consent shall not be unreasonably withheld, conditioned,

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39 Covad's Post-Technical Conference Initial Brief, at 26-28.

40 Verizon Initial Brief at 21.

41 Covad Initial Brief at 29.

42 *See* Covad Initial Brief at 28-31.

43 Verizon Initial Brief at 21-22.

or delayed." In marked contrast, Verizon seeks to retain the unilateral authority to terminate the agreement after only a truncated notice period, and without Covad's consent.

With regard to Verizon's claim that Covad could protect its rights by participating in any Commission proceeding regarding Verizon's sale of an exchange or territory,[44] Covad notes that such participation is both economically infeasible and contrary to the principles of contractual stability that are central to Covad's objectives in entering into an interconnection agreement with Verizon. Verizon's position ignores the considerable burden—both in terms of financial cost and with regard to the distraction of management personnel—that is placed on competitive entrants who must dispute issues with ILECs in regulatory proceedings. The entire process undermines the purpose of having a binding interconnection agreement that provides relative certainty to the parties in the first instance. Therefore, Verizon should not be permitted to terminate the agreement upon assignment, and its proposed language should be rejected.

Issue 10: **Should the Agreement preclude Covad from asserting future causes of action against Verizon for violation of Section 251 of the Act?**

Summary: Covad is not seeking to establish any federal cause of action that does not already exist. Covad is simply seeking to memorialize the uncontroverted fact that the parties are negotiating and arbitrating this agreement within the ambit of the standards of Section 251 of the Act.

Verizon's Brief on the Merits does not raise anything that was not addressed in Covad's Post-Technical Conference Initial Brief.[45] As Covad explained, questions of whether the agreement was entered into "with regard to section 251" can easily be addressed now rather than by another legal authority that was not part of this arbitration in distant future.[46] Contrary to Verizon's claims, Covad is not attempting to address a legal issue that should be addressed by a

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44 Verizon Initial Brief at 22.

45 Covad's Post-Technical Conference Initial Brief, at 31-34.

46 Covad's Post-Technical Conference Initial Brief, at 33-34.

such a court or authority but rather is clarifying a factual point, *i.e.*, that the agreement was entered into with regard to the standards set forth in subsections (b) and (c) of section 251, which is obvious at this time and Verizon should not be allowed to argue otherwise at some later date. Covad's proposed language addresses these just and reasonable concerns; therefore the Commission should adopt this language.

Contrary to the New York Commission's finding, Covad is not attempting to create a federal cause of action that does not exist through use of this language.[47] Covad is just seeking to memorialize the fact that Covad and Verizon negotiated and are in fact arbitrating this Agreement with regard to Section 251(b) and (c), as many of the provisions thereof are based either explicitly or implicitly upon that section of the Act. The parties *did not* negotiate the Agreement "without regard" to these standards, and *Verizon fully recognizes this fact and has not demonstrated otherwise.*

As Covad noted in its Post-Technical Conference Initial Brief, agreements or provisions that have been "negotiated" represent nothing more than a good faith attempt to comply with the requirements of the 1996 Act.[48] As the court explained in *AT&T of Southern States,*

> if a particular provision is mandated by the 1996 Act, the FCC rules or regulations, or some application thereof, then a party might agree to that provision without resort to arbitration. Such an agreement, which would occur without arbitration, is not necessarily "without regard" to the 1996 Act and law thereunder. In other words, some provisions may be negotiated and agreed upon "with regard" to the 1996 Act and law thereunder, and provisions so negotiated and agreed upon may be reformed if the controlling law changes. *Indeed, were it otherwise, parties would have an incentive to submit each issue to arbitration, so*

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47 *NY Arbitration Order* at 19.

48 Covad's Post-Technical Conference Initial Brief, at 33, *citing, AT&T of the Southern States, Inc. v. BellSouth Telecommunications, Inc.*, 229 F.3d 457, 465 (4th Cir 2000) ("*AT&T of Southern States*"); *see also Trinko v. Bell Atlantic Corp.*, 309 F.3d 71, 75-76 (4th Cir 2000) (Sack dissenting) (disagreeing with the majority's conclusion that the presence of a partially negotiated interconnection agreement here renders the duties of the defendant enumerated in § 251 "superfluous.").

that if there were a change in controlling law, the provision would be so reformed. We decline to so encourage arbitration at the expense of negotiation.[49]

With this reasoning, the court in *AT&T of Southern States* had to determine, based on its consideration of certain factors, whether or not a specific provision of an agreement was negotiated with regard to the standards set forth in section 251(b) and (c). *Id.* In this case, Covad seeks to avoid having a court make this determination at some later date when it is abundantly clear, at this point in time, that section 251 of the Act and related FCC and Commission rules and decisions have served or are serving as the framework by which Covad and Verizon have negotiated and are arbitrating various provisions in this Agreement. Verizon cannot deny this fact because it specifies that its fundamental obligations to provide Covad access to network elements, pursuant to section 251(c)(3) - which is Covad's sole purpose of entering into negotiations with Verizon - must track this applicable law and related FCC and Commission rules and decisions.[50] Thus, it is clear that the parties are operating within the ambit of the requirements and standards set forth in Section 251. For the foregoing reasons, the Commission should adopt Covad's proposed language.

Issue 12: **Should Verizon provide Covad with nondiscriminatory access to the same information about Verizon's loops that Verizon makes available to itself, its affiliates and third parties?**

Summary: Contract language unambiguously specifying that Verizon must provide loop information in the same manner it provides such information to third parties and in a manner that is functionally equivalent to the manner in which it provides information to itself should be adopted.

Incredibly, Verizon argues that Covad's language that specifies that nondiscriminatory access to information includes providing the information in the same time and manner "has no basis in the Act or any FCC rule or regulation" and that the FCC has not adopted rules regarding

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[49] *AT&T of S.States,* at 465 (emphasis added).

the manner in which it is provided.[51] These claims are incorrect, as Covad's Initial Brief demonstrates, and Covad's proposed language for Issue 12 should be adopted instead of Verizon's proposed language.

To be abundantly clear regarding Verizon's legal obligations in this regard, § 251(c)(3) of the Act imposes an unmistakable duty on Verizon to provide CLECs access to network elements on an unbundled basis ... on rates, terms and conditions that are just, reasonable, and nondiscriminatory." FCC Rule 51.319(g) specifically requires that an ILEC offer OSS as a UNE on a nondiscriminatory basis and that an ILEC must provide a CLEC with nondiscriminatory access to the same detailed information about the loop that is available to the ILEC.[52] Significantly, the nondiscrimination standard requires that Verizon offer requesting carriers access that is *equivalent in terms of quality, accuracy, and timeliness.*[53] In particular, Verizon must provide access that permits competing carriers to perform these functions in "substantially the same time and manner" as Verizon.[54] FCC Rule 51.311 further codifies Verizon's duty to offer all requesting carriers equal access to UNEs and in a manner that is no less favorable than how Verizon provides such access to itself.[55]

Pursuant to FCC Rule 51.319(g), OSS consists of "pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and

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50 *See, e.g.,* Covad's Arbitration Petition, Attachment C, UNE Attachment § 1.1.

51 Verizon's Brief on the Merits, at 25.

52 47 C.F.R. § 51.319(g).

53 *See, e.g., In the Matter of Application by Bell Atlantic New York, et al., for Authorization Under Section 271 of the Communications Act to Provide In-region, InterLATA Service in the State of New York,* FCC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404, ¶ 85 (1999). (emphasis added).

54 *Id.*

55 47 C.F.R. § 51.311(b).

information."[56] In defining the OSS UNE, the FCC chose to broadly classify OSS as anything that involves one or more of these five functions. For instance, in the *UNE Remand Order*, the FCC clarified that "OSS includes the manual, computerized, and automated systems, together with associated business processes and the up-to-date data maintained in those systems."[57] With respect to electronic gateways that access ILEC backend systems, the FCC has held that CLECs should be able to use available gateways to access these systems.[58] The network information and access to which Covad is entitled are inseparably related to OSS pre-ordering and ordering functions because they constitute network information retrieved through manual, computerized, and automated systems and thus, by definition are a function of Verizon's OSS.

In short, OSS information and the means by which it is provided, whether via electronic gateways or otherwise, fall within the purview of the nondiscriminatory access principles set forth under §251(c)(3). Such access is the only way for Covad to access Verizon's "back office" records and databases that contain loop qualification information at parity with the access Verizon and its employees currently enjoy.

Furthermore, the *UNE Remand Order* expressly obligates Verizon to provide nondiscriminatory access to the information Covad requests. The FCC made clear in the *UNE Remand Order* that an incumbent LEC must:

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56 *See* 47 C.F.R. § 51.319(g).

57 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-68, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, ¶ 425 (1999), *subsequent history omitted* ("*UNE Remand Order*").; *see alsoIn the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket. No. 96-98, CC Docket No. 95-185, 11 FCC Record 15499, ¶ 523-525 (1996), subsequent history omitted ("*Local Competition Order*")..

58 *Local Competition Order*, ¶ 527.

(1) Provide the requesting carrier access to the "same detailed information" about the loop that is available to the incumbent LEC in any of its databases or other internal records, either via an electronic interface (to the extent that a LECs employees have access to the information in electronic format) or manually (if a LEC has not compiled such information for itself);

(2) Allow requesting carriers to obtain information about the underlying capabilities of the loop plant in the same manner (*i.e.*, electronically or manually) as is available to the incumbent LEC's personnel – that access is not defined merely by whether a LEC's retail employees have access to the information but rather if any of the LEC's personnel can access such information; and

(3) Provide such information to the requesting carriers *within the same time frame* that an ILEC's personnel are able to obtain the information, as it would be unreasonable for the requesting carrier to wait several days in a situation where the LEC's personnel can obtain such information in several hours and "to the extent [the ILECs] employees have access to the information in an electronic format, that same format should be made available to new entrants via an electronic interface."[59]

Moreover, the FCC explained that an ILEC "may not filter or digest such information to provide only that information that is useful" for the provisioning of a particular type of service the incumbent chooses to offer.[60] Instead, the *UNE Remand Order* established that the ILEC "must provide access to the underlying loop qualification information contained in its engineering records, plant records, and other back office systems so that requesting carriers can make their own judgments about whether those loops are suitable for the services the requesting carriers seek to offer."[61] The following FCC statement is equally applicable here: "To permit an incumbent LEC to preclude requesting carriers from obtaining information about the underlying capabilities of the loop plant in the same manner as the incumbent LEC's personnel would be contrary to the goals of the Act to promote innovation and deployment of new technologies by multiple parties."[62]

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59 *UNE Remand Order*, ¶¶ 427, 429-431.

60 *UNE Remand Order*, ¶ 428.

61 *Id.* ¶ 428.

62 *Id.* ¶ 430.

Although the *UNE Remand Order* clarified the extent of access required for loop qualification information, it *never limited* an ILECs' obligation to provide nondiscriminatory access to other network information, such as the information Covad currently seeks, in the same time and manner, i.e. electronic or manual, pursuant to which Verizon accesses that information. In fact, the FCC has indicated that general nondiscriminatory access requirements apply equally.[63] Therefore, the clarifying language proposed by Covad not only serves to assist the Commission in understanding the breadth and scope of Verizon's obligation to provide nondiscriminatory access to OSS, but also illustrates how broadly these obligations extend to all network information that the ILEC utilizes in provisioning network elements, including the network information Covad seeks to access.

Verizon's claim that its position should be adopted because Covad has not complained of any problems obtaining loop qualification information available from Verizon North[64] is a red herring. Whether or not Covad has lodged any such complaints is wholly irrelevant to the issue of what language should be employed in the parties' interconnection agreement, and Verizon's position does not merit any serious consideration by the Commission.

Covad's position was recently adopted in the *New York Arbitration Order*, in which the New York Commission ruled that Covad's proposed language should be effectuated.[65] Its proposed language should likewise be adopted in this case, as it properly reflects Verizon's obligations under 251(c)(3). Moreover, for purposes of the Commission's review under § 252(e)(2)(B), the Commission must recognize that a provision in the interconnection agreement

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63 *UNE Remand Order*, ¶ 426.

64 Verizon's Brief on the Merits, at 26.

65 *New York Arbitration Order* at 21.

does not "meet the requirements" of § 251 if it fails to provide the minimum nondiscrimination requirements contemplated by the FCC that Covad seeks to reflect here.

Issue 13: **In what interval should Verizon be required to return Firm Order Commitments to Covad for pre-qualified Local Service Requests submitted mechanically and for Local Service Requests submitted manually?**

Issue 32: **What terms, conditions and intervals should apply to Verizon's manual loop qualification process?**

Issue 34: **In what interval should Verizon provision loops?**

Issue 38: **What should the interval be for Covad's line sharing Local Service Requests ("LSRs")? (Verizon North only**

Summary: The incorporation of performance standards into agreements better ensures quality ordering and provisioning is not only appropriate, but much needed. Verizon also should be required to complete manual loop qualifications in one day and provision line-shared loops within two days as both these intervals are not only feasible, but vital to the prompt deployment of advanced services.

Issues 13, 32, 34 and 38 pertain to performance standards to ensure timely ordering and provisioning for Covad's orders. In Issues 13 and 38, Covad seeks to incorporate current Verizon performance standards in regard to firm order commitments into the agreement. In Issue 34, Covad likewise seeks to apply a performance standard, this time in regard to provisioning of line-shared loops, but in this case, Covad seeks a shorter interval. In regard to these three issues, there is an underlying issue of the propriety of incorporating performance standards into interconnection agreements. Covad believes that the incorporation of performance standards in regard to products and services of vital import to its operations is the best way to assure quality ordering and provisioning. Verizon takes the position that it is not necessary to incorporate performance standards into interconnection agreements, because Verizon is already under an obligation to meet these standards. It has been said that a CLEC cannot avail itself of

statutory rights under §§ 251-52 unless those rights are incorporated into its ICA.[66] By analogy, the performance standards would not give Covad a right to sue for breach of contract unless they were incorporated into the ICA.

Issue 13 and 38: LSRs

Verizon raises two general challenges in regard to Issue 13. Verizon contends that performance metrics should not be included in interconnection agreements. As Covad demonstrated in its initial brief, the New York Commission, the author of the PAP on which Pennsylvania's PAP is based, has unequivocally rejected this proposition and has allowed for use of performance metrics in interconnection agreements.[67] Verizon also challenges the fact that Covad's proposed intervals do not include the definitions and exclusions that accompany the C2C performance metrics.[68] Covad is not to blame for this, however. Covad would be perfectly willing to negotiate language as to appropriate definitions and exclusions for performance standards included in the agreement. Verizon, however, has taken the intransigent position that no performance metrics should be included in the agreement at all, and therefore has made it unproductive for Covad to broach the topic of what appropriate definitions would be for the standards. Covad remains willing to negotiate on this issue, but it should not be penalized for Verizon's unreasonable bargaining positions. Indeed, as the New York Commission held:

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

66 *See, generally, Law Offices of Curtis Trinko v. Bell Atlantic Corp.*, 305 F.3d 89 (2nd Cir. 2002) (cert. granted on other issues, ___ U.S. ___).

67 Covad's Post-Technical Conference Initial Brief, at 39.

68 Verizon's Brief on the Merits, at 27-29.

> wording should be modified to track the carrier-to-carrier guidelines precisely and, as so modified, should be included in the agreement.[69]

Verizon has maintained a similar intransigent refusal to negotiate on metrics issues in this proceeding, and the Commission should likewise refuse to reward Verizon for its stance.

Issue 32: Manual Loop Qualification

In some instances, Verizon rejects a Covad mechanized loop qualification query because Verizon's mechanized database or the listing is defective. In these instances, when Verizon rejects a Covad mechanized loop qualification query, Covad should be permitted to submit an "extended query" at no additional charge so that the need for, and costs, of a manual loop qualification could be avoided. Verizon contends that, under federal law, Covad has no right to use these manual processes at no charge and cites to Section 252(d) of the Telecommunications Act of 1996 to support its proposition.[70] Section 252(d)(1)(A)(i) requires that the rate of a network element be based on the cost of providing a network element, and the FCC has required that the cost of a network element be forward-looking.[71] Significantly, this Commission rejected all loop qualification charges that Verizon proposed in the UNE cost proceeding for that very reason.[72] Specifically, the Commission held that,

> Because a forward-looking network would not contain inherent obstacles to the provision of DSL services, there would be no need for loop qualification. Accordingly, we adopt the recommendation of the ALJ to disallow the charge.[73]

Thus, Verizon's charge is not forward-looking and Verizon has no right to recover the charge.

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69 *NY Arbitration Order* at 23.

70 Verizon's Brief on the Merits, at 32.

71 47 U.S.C. 252(d)(1)(A)(i); 47 C.F.R. § 51.505(b)(1).

72 *See Generic Investigation Re Verizon Pennsylvania, Inc.'s Unbundled Network Element Rates*, R-00016683, Tentative Order, at 202 (Penn. P.U.C. Oct. 24, 2002) (rejecting Verizon's changes for Mechanized Loop Qualification, (2) Manual Loop Qualification; and (3) Engineering Query.)

In addition, Verizon should complete Covad's manual loop qualification requests within one business day because there is no reason why Verizon cannot do so. The fact that Verizon consistently meets its performance standard in this regard strongly indicates that Verizon has far too much time to complete manual loop qualification requests. The public interest demands that services be provided as timely and expeditiously as possible. Therefore, the interval should be revisited and at a minimum be shortened as Covad proposes.

Significantly, performance measurements adopted by this Commission for Verizon that suggest a two-business day standard for responding to a manual loop qualification request submitted as a pre-order query are irrelevant to the issue of whether such an interval is reasonable. The performance measurements are an evolving set of standards that do not *per se* dictate what is an appropriate interval for an interconnection agreement.[74]

Issue 34: Loop Provisioning Intervals

Verizon's position in regard to Issue 34 is puzzling. In one breath, it argues that the existing Commission standard goes beyond parity by requiring that at least 95% of CLEC-line sharing orders are provisioned within three days, even if this is better performance that what Verizon provides to its retail broadband group. In the next breath, Verizon argues that the Commission should reject Covad's two day interval because this would provide Covad with performance that is superior to what Verizon provides its retail broadband group.[75] If the Commission is already mandating that Verizon provide performance that goes beyond parity, there is no reason why it should not continue to do so. At any rate, Covad is not asking for

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73 *Id.*

74 *See Re Performance Measures Remedies*, Docket No. M-00011468 (PMO II), Order entered December 10, 2002 (Pa Verizon/Staff/CLEC working group established to address ongoing guideline, metric and remedies issues) p. 87.

75 Verizon's Brief on the Merits, at 48-49.

superior performance as there is no reason that Verizon should not be able to provide a two day interval for its retail broadband group or other CLECs.

Verizon also asserts that any change to the interval should come through a generic proceeding in which all interested parties could participate. Covad already attempted this by raising the issue in the Change Management Process, in which other CLECs similarly placed a high priority on reducing the interval. Verizon asked Covad to withdraw the request for no valid purpose other than Verizon's refusal to consider reducing the interval. Covad refused to withdraw the request and the request was subsequently voted as a high priority by the Change Management forum. Despite this, Verizon classified the request as denied, which demonstrates Verizon's ability to circumvent its change control process. Verizon continues to refuse to even consider implementing the shorter interval.

Next, Verizon posits that a two day interval would impact its ability to provide new voice service in a timely manner. This assertion is belied by the fact that BellSouth is able to provision line-shared loops in two days.[76] Clearly there appears to be no such concern on the part of BellSouth that such an interval would imperil its voice service.[77] Since provisioning a line shared loop requires relatively simple cross-connection work in a central office, there is no reason why Verizon should not be able to coordinate its workforce to perform this work when they are also provisioning voice service in that particular central office. Moreover, the fact that Verizon has a two day interval for hot cuts which requires similar cross-connection activity to provisioning a

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[76] Covad's Post-Technical Conference Initial Brief, at 42.

[77] Verizon's Brief on the Merits at 50, n. 49. Verizon concedes that BellSouth has a two day interval and that this interval applies to BellSouth's retail orders as well. Verizon posits factors that it claims may support a longer interval for Verizon but provides no support for this proposition. For instance, one of the factors it proffers is "geography" but it is unclear how geography should impact tasks that are primarily conducted within a central office, or what about the geography of Pennsylvania warrants a longer interval than is required in all nine of BellSouth's states.

line-shared loop, and actually requires more workforce work in regard to coordination with the CLEC, there should be no reason why the two day interval should not be achieved for line-shared loops.[78]

Finally, Verizon contends that it needs the ability to manage its workforce to "react effectively" to spikes in demand.[79] Verizon already has an effective tool in this regard, *i.e.*, demand forecasts rendered by CLECs. As Covad has stated, and Verizon has conceded, Covad is a carrier that generally adheres to its forecasts.[80]

A two day interval is feasible, and is long overdue. Implementing such an interval will further facilitate the rapid deployment of advanced services.

Issue 19: **Should Verizon be obligated to provide Covad nondiscriminatory access to UNEs and UNE combinations consistent with Applicable Law?**

Issue 24: **Should Verizon relieve loop capacity constraints for Covad to the same extent as it does so for its own customers?**

Issue 25: **Should Verizon provision Covad DS-1 loops with associated electronics needed for such loops to work, if it does so for its own end users?**

Summary: Verizon contends Covad misconstrues federal law, but it is Verizon that is distorting the law in an attempt to evade its duty to offer UNEs at parity.

Verizon contends that Covad's proposals are based on a misunderstanding of federal law and the fact that Verizon does additional construction on facilities to provision service to its retail customers does not mean that it is required to do so for CLECs in regard to unbundled facilities. An ILEC's duty to offer UNEs at parity does not stop at new construction when it is a routine, customary, or necessary activity. As Covad submitted on pages 62-69 of its Initial Brief,

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78 *See* Covad's Post-Technical Conference Initial Brief, at 42.

79 Verizon's Brief on the Merits, at 50.

80 Covad's Post-Technical Conference Initial Brief, at 43.

the crucial limitation established in the *Iowa I*[81] and *Iowa II*[82] decisions requires that an ILEC (in treating CLECs at parity and in a nondiscriminatory manner[83]) make those modifications to its facilities that are necessary to accommodate interconnection or access to network elements, but do not require the ILEC "to provide superior interconnection or access by substantially altering its network."[84] As the Court in *US West* found, the proper interpretation of this limitation requires that the term "necessary" be given a meaning consistent with FCC precedent.[85] Significantly, the FCC deems equipment is "necessary" for interconnection or access to unbundled network elements within the meaning of 251(c)(6) "if an inability to deploy that equipment would, as a practical, economic, or operational matter, preclude the requesting carrier from obtaining interconnection or access to unbundled network elements."[86] Thus, applying this FCC definition of the word "necessary" within the context of the *Iowa I* and *Iowa II* limitation

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81 *Iowa Utilities Board v. FCC*, 120 F.3d 753, 812-13 (8th Cir. July 18, 1997) ("*Iowa I*").

82 *Iowa Utilities Board v. FCC*, 219 F.3d 744, 758 (8th Cir. July 18, 2000) ("*Iowa II*").

83 *See* 47 C.F.R. § 51.311(a)&(b) and 51.313(a)&(b); *see also, e.g., U.S. West Communications, Inc. v. Jennings*, 46 F. Supp.2d at 1025 (D. Ariz. 1999); *US West Communications, Inc. v. AT&T Communications of the Pacific Northwest*, Inc., 31 F. Supp.2d at 856.

84 *See US WEST Communications, Inc. v. THOMS*, 1999 WL 33456553 *8 (S.D. Iowa Jan. 25, 1999) ("*US West*").

85 *See also US WEST* at *8 (concluding that the state commission's interpretation of the word "necessary" as it applied to the *Iowa I* limitation was appropriate because it tracked the FCC's definition of necessary in the context of 251(c)(6)) (citing *Local Competition Order*, Docket No. 96-98, 11 FCC Rcd 15499, at ¶ 579 ("*Local Competition Order*"). Subsequent to this court's decision, the FCC modified its definition of the term necessary in the *Fourth Report and Order* as discussed herein. *See Fourth Report and Order* ¶ 21.

86 *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capacity*, FCC Docket No. 98-147, Fourth Report and Order, FCC 01-204, 16 FCC Rcd 15435, ¶ 21 (rel. Aug. 8, 2001) ("*Fourth Report and Order*").

means that modifications or expansions to equipment is *necessary* because a CLEC cannot obtain interconnection or access to UNEs without them.

This is the precise situation that Covad faces with respect to Issues 19, 24, and 25, and the limitation on *Iowa I* and *Iowa II* directly applies because Covad cannot access the associated DS1 and DS3 UNEs if Verizon does not make the same basic network modifications and expansions for CLECs that Verizon performs for its retail customers. Because these modifications are basic and routinely offered to Verizon's retail customers, such modifications do not involve substantial alteration to Verizon's network and may not be rejected on the grounds that the request involves providing superior interconnection or access. Indeed, Covad is not requesting that Verizon construct network facilities that are superior in quality to that which Verizon provides to itself or construct a new, superior network; Verizon is already and routinely offering the same services to its retail customers. In short, these facilities are necessary to provide Covad with an *equivalent*, not a "superior," quality of interconnection or access to network elements.

Verizon contends that Covad has produced no evidence specific to Verizon North or Verizon Pennsylvania that Covad is losing customers in this region because of Verizon's facility construction policies. As Covad has noted repeatedly throughout this proceeding, Covad's request for its contract language is based on the fact that Verizon has rejected a large number of Covad orders for high capacity UNEs, claiming that no facilities are available because the capacity of those facilities is allegedly exhausted.[87] Verizon has not suggested that its "no facilities" policies are inapplicable to Verizon North and Verizon Pennsylvania. The FCC

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[87] *See* NY 2/4/03 Technical Conference, Tr. at 76; Covad's 1/17/03 Initial Brief at 56-59 & Exhibit 1 at Issues 19 & 24.

clearly saw Verizon's "no facilities" policy as sufficient threat to its unbundling requirements that it announced in a February 20, 2003 press release regarding its Triennial Review of network unbundling obligations under the Telecommunications Act of 1996 that ILECs are required to make "routine network modifications" to existing loop facilities and "undertaking the other activities that incumbent LECs make for their own retail customers." There is no basis for Verizon to continue imposing its discriminatory policies.

Issue 22: **Should Verizon commit to an appointment window for installing loops and pay a penalty when it misses the window?**

Summary: In circumstances when Verizon misses appointments, Covad should be able to request a new appointment outside the normal provisioning interval, the non-recurring dispatch charge should not be applied and where there are additional instances of missed appointments, Verizon should pay Covad the equivalent of the nonrecurring dispatch charge. This will provide Verizon with proper incentives to avoid damaging Covad's relationship with customers by missing appointments.

Covad's concerns on Issue 22 center on the issue of what is the effect of Verizon's failure to meet an initial appointment window or a subsequent appointment for the installation of service. If a dispatch does not occur (other than because the Covad end user was not available or upon the request of Covad), Covad should be able to request a new appointment window outside of the normal provisioning interval by contacting Verizon's provisioning center directly and Covad should not be required to pay the non-recurring dispatch charge for such appointment. Moreover, each additional instance in which the Verizon technician fails to meet the same customer during future scheduled appointment day, Verizon should pay to Covad a missed appointment fee equal to the nonrecurring dispatch charge that Verizon would have assessed to Covad had the Verizon technician not missed the appointment.

Verizon correctly notes that the parties have reached agreement regarding language pertaining to Verizon's general scheduling of appointment windows. As Verizon notes, there is

disagreement as to what the consequences will be for Verizon's failure to meet an appointment. Verizon incorrectly contends that Covad's language on this issue is "ambiguous." Verizon is needlessly complicating the issue. For instance, while Verizon suggests it is not clear what would transpire if an appointment is missed, Covad's language clearly sets out a well-defined and reasonable process. Covad's position is that if Verizon does not meet the initial appointment, and the missed appointment is not the result of any action on the part of Covad or its customer, Covad should be able to contact Verizon's provisioning center directly and obtain a new appointment window without having to submit another LSR or pay another nonrecurring dispatch charge. Covad understands that one of Verizon's principal concerns in regard to guaranteeing appointment windows is that it finds it hard to balance providing appointment windows with meeting the six day provisioning interval for basic loops.[88] After a missed appointment, Covad is willing to go outside the standard interval as long as it has some assurance that the appointment will be kept the next time. By being given the flexibility to go outside the interval, Verizon should be able to ensure that the appointment will be met. In addition, Covad wants to ensure that it does not have to repay a nonrecurring dispatch charge when an appointment was missed because a dispatch was not made during the day. Covad should not be penalized for Verizon's failure to meet the appointment or, moreover, when Verizon fails to dispatch a technician at all that day to meet the end user.

Covad also wants to minimize the risk that subsequent appointments will be missed. The best way to do this is to provide a disincentive for Verizon to miss subsequent appointment days, and that is to require it to pay the equivalent of the nonrecurring dispatch charge each time a subsequent appointment is missed because Verizon did not dispatch a technician that day. While Verizon may not guarantee to its retail customers an initial appointment window, it will surely

88 NY 2/4/03 Technical Conference, Tr. at 108: 1-5.

strive to ensure that a subsequent appointment is not missed. Covad's customers should have this same assurance. For instance, the New York Commission has required that utilities pay rebates or issue credits for missed appointments.[89] Verizon argues that the penalties it faces under the Performance Assurance Plan are sufficient to ensure it meets appointments, but as the New York Commission has consistently held, PAP remedies are not intended to displace remedies in interconnection agreements.[90] Covad has a right to seek additional assurance that appointments will be met.

Finally, Verizon contends Covad is seeking performance that goes beyond parity. It is doubtful, however, that Verizon, or its customers, would countenance one missed appointment, much less a series of missed appointments, in regard to provisioning of Verizon's retail services. Parity dictates that Covad, and its customers, experience this same timely installation.

The New York Commission agreed that "consequences should attach to a missed appointment" and that "interconnection agreements may contain penalty provisions that complement those of the PAP."[91] Thus, the New York Commission required that:

> One-half of the nonrecurring charge should be waived with respect to an appointment that, having been rescheduled after having been missed through no fault of Covad or the end use customer, is missed again through no fault of Covad or the end use customer and rescheduled a second time. The Agreement should state as well that to request rescheduling after an appointment has been missed, Covad may contact Verizon's provisioning center directly, without submitting a new LSR, and that it retains the option of requesting either the standard provisioning interval or an appointment window outside the standard interval.[92]

This Commission should likewise provide incentive for Verizon to meet its appointments for its wholesale customers because it is the end user that ultimately benefits and is spared much

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89 Covad's Post-Technical Conference Initial Brief, at 54-55

90 Covad's Post-Technical Conference Initial Brief, at 52-54.

91 *NY Arbitration Order* at 29.

92 *NY Arbitration Order* at 29-30.

frustration.

Issue 23: **What technical reference should be used for the definition of the ISDN, ADSL and HDSL loops?**

Summary: The FCC has made clear that ANSI technical standards serve as the best means of defining technical terms, given the operation of carriers in multiple-states. Verizon, by seeking inclusion of its in-house technical standards, is undermining the primacy of industry standards.

Covad has requested that Verizon utilize only industry ANSI standards in the agreement rather than Verizon Technical Reference 72575 (TR 72575) for ISDN, ADSL and HDSL loops. Verizon seeks to include references both to industry standards and to its own standards.

The FCC recognizes that industry standards bodies are appropriate bodies to help foster the deployment of advanced services consistent with section 706 of the Act and has mandated that ILECs abide by them rather than imposing their own rules.[93] The FCC rendered this decision because it did not want ILECs to dictate unilaterally what standards applied. Instead, it wanted "competitively neutral spectrum compatibility standards and spectrum management rules and practices."[94] The FCC concluded that the "ATIS [Alliance for Telecommunications Industry Solutions] standards setting processes, which may culminate ultimately in the ANSI [American National Standards Institute] standards approval process, are facially neutral, open to all interested parties, and contain safeguards against domination by any one particular interest."[95] The FCC therefore presumes, in accordance with this decision and FCC rule 51.230(a) that was promulgated as a result of it, that advanced service loops are acceptable so long as industry

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93 *Deployment of Wireline Service Offering Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunication Act of 1996, Third Report and Order in CC Docket No. 98-147,* Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912, ¶¶ 179-180 (1999) (*"Line Sharing Order") vacated on other grounds sub nom. USTA v FCC*, 290 F.3d 415 (D.C. Cir. May 24, 2002).

94 *Line Sharing Order* ¶ 180.

standards are met. In effectuating this decision in an arbitration context, the FCC, in the *Virginia Arbitration Award*, required Verizon to "comply with all applicable national and international industry standards (e.g., ANSI and ITU) for the provision of advanced services."[96]

Allowing Verizon to reference its own standards would undercut the competitively neutral standards regime the FCC is attempting to implement. It is clear that by requesting inclusion of its own standards, Verizon is attempting to undermine the primacy the FCC placed on industry standards. For instance, Verizon suggests that its documents, and not industry standards, "defines the loops Verizon provides" and define how the industry standards "would apply to the loop."[97] Verizon's suggestion that its own standards may trump industry standards contravenes the FCC's requirements.

Issue 27: **Should the Agreement make clear that Covad has the right, under Applicable Law, to deploy services that either (1) fall under any of the loop type categories enumerated in the Agreement (albeit not the one ordered) or (2) do not fall under any of loop type categories?**

Summary: Verizon should not be allowed to penalize Covad for offering services over loop types that Verizon may not offer by imposing charges for converting loops to loop types that Verizon subsequently creates based on new loop technologies. Such an approach would inappropriately undermine Covad's business plan and hinder its expedited deployment of new technologies.

Verizon objects to Covad's language on the grounds that the processing of orders to convert Covad loops from one type to another imposes costs on Verizon and, therefore, Verizon

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95 *Line Sharing Order* ¶ 183.

96 *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218 & 00-249, Memorandum Opinion and Order, DA 02-1731, ¶ 480 (Chief, Wireline Competition Bureau rel. July 17, 2002) ("*Virginia Arbitration Order*")..

97 Verizon's Brief on the Merits, at 39.

should be able to recover such costs from Covad.[98] Again, Verizon is wrong. Covad is not the cost causer. Verizon only incurs a cost *if it decides* to re-categorize its loop facilities in its inventory system, and Covad should not be required to bear financial responsibility for this decision.

As Covad showed in its Initial Brief,[99] because the conversion is necessitated both by (1) Verizon's inability to offer the new technology on a timely basis as Covad provides it; and (2) the manner in which Verizon prefers to designate its UNE loop products, Verizon's insistence that Covad pay the costs associated with converting its UNE loops to Verizon's newly designated UNE loop type is unreasonable when Covad gains nothing from the conversion.[100] Moreover, as Covad demonstrated in its Initial Brief, Verizon benefits from learning from Covad's UNE order that such new loop technology is in demand.[101] Furthermore, charging Covad for such conversions is tantamount to penalizing Covad for being the first to the market, and there is no justification for imposing such costs upon Covad. Permitting Verizon to assess a conversion cost could result in duplicative charges for provisioning of the same loop, as the conversion charge could be imposed after the loop is initially provisioned.

Apart from the above, because Verizon is only permitted to recover TELRIC-based costs and because a forward-looking network under TELRIC would already be designed to accommodate the forward-looking loop technology Covad seeks to offer, Verizon is not legally permitted to charge Covad for such conversions. The Commission should therefore adopt Covad's language, which precludes Verizon from charging Covad for converting loops.

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98 Verizon's Brief on the Merits, at 41.

99 Covad's Post-Technical Conference Initial Brief, at 57-59.

100 *See* Verizon's Brief on the Merits, at 41.

101 Covad's Post-Technical Conference Initial Brief, at 59.

Issue 30: **Should Verizon be obligated to cooperatively test loops it provides to Covad and what terms and conditions should apply to such testing?**

Summary: Covad proposes reasonable compromise language regarding cooperative testing that appropriately covers when testing will be performed, types of tests, repeat tests, standards and use of Covad's IVR system. In contrast, Verizon proposes language that is vague and inappropriately gives Verizon the unilateral right to decide if it will test on an automated or manual basis.

Verizon avers that there is no reason for performing manual cooperative testing when the IVR is available.[102] As Covad explained in its Initial Brief, however, Covad needs cooperative testing so that it can verify that the Verizon technician is at the correct demarcation point when he or she calls into Covad's center.[103] The communication between the Verizon Technician and Covad's technician provides information that would not be otherwise transmitted to Covad and that supports final provisioning of the Covad service to the end user. Cooperative testing also ensures that the Verizon technician is testing the overall end-to-end loop and not at some intermittent point.[104] Even though Verizon has been doing cooperative testing for over four years, Covad still encounters many instances where the Verizon technician is not at the correct location for testing and has not terminated the circuit at the correct demarcation point.[105] Covad's automated IVR process would not identify this problem and Verizon and Covad would be required to re-test the loop via cooperative testing.[106] If Verizon's language were adopted, and Verizon unilaterally elected to perform cooperative testing on an automated basis before Covad agreed to allow Verizon to replace joint testing that is done with a Covad technician,

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102 Verizon's Brief on the Merits, at 44.

103 Covad's Post-Technical Conference Initial Brief, at 63.

104 Covad's Post-Technical Conference Initial Brief, at 63.

105 Covad's Post-Technical Conference Initial Brief, at 63.

106 Covad's Post-Technical Conference Initial Brief, at 63.

these problems would remain and Verizon would not correctly provision Covad's loops.[107]

With respect to future changes in the testing process, Verizon argues that Covad's proposal is unacceptable because it applies only to agreements with respect to "additional testing...not covered by this Agreement," implying that Verizon will be required to follow the manual cooperative testing process throughout the life of the agreement.[108] This language was not meant, however, to imply this at all. Covad is willing to change the term "additional" to "revised" to address Verizon's concern in this regard so that it is understood the testing process can evolve during the life of the agreement upon mutual agreement. Verizon also argues that Covad's proposal is inefficient because it requires an amendment if parties agree on new testing procedures.[109] However, nowhere does Covad's proposal state that an "amendment" to the agreement is required. Indeed, to protect its business interests, Covad seeks to have the agreed upon "revised" process in writing, but that does not necessitate an amendment to the agreement as Verizon suggests. Covad merely wishes to avoid having potential terms of a revised process that are confirmed only by a hallway handshake.

Finally, Verizon asserts that Covad's proposed language should be rejected because the cooperative testing procedure that Covad seeks was not previously employed in Verizon North's

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107 Covad's Post-Technical Conference Initial Brief, at 63-64. Verizon also argues that Covad's proposed language that would require Verizon to perform cooperative testing on any loop upon which Covad has opened a maintenance ticket to close out any loop troubles is not properly before the Commission. Verizon's Brief on the Merits, at 43, n. 44. Again, Verizon is mistaken. First, this proposed language codifies the testing that Verizon currently performs in closing out loop troubles. Second, such testing plainly falls within the cooperative testing process that is at issue here. Third, Verizon agreed to the manner upon which this proceeding has been conducted. Rather than having the issues remain static, they have been fluid so that they can evolve as a result of the parties' efforts to settle issues. Verizon cannot now object to Covad's good faith effort to do just that.

108 Verizon's Brief on the Merits, at 43-44.

109 Verizon's Brief on the Merits, at 43-44.

Pennsylvania territory.[110] As is the case with Verizon's attempt to sidestep its obligations regarding loop qualification information in Verizon North's Pennsylvania territory,[111] this issue is not relevant to consideration of the appropriate language for inclusion in the parties' interconnection agreement. Covad's request for additional specificity is justified based on Verizon's existing legal obligations, and Covad is not required to demonstrate that the safeguards it seeks are warranted for one area of Verizon's territory and not the other.

For these reasons and for the reasons previously expressed,[112] the Commission should adopt Covad's proposed language.

Issue 33: **Should the Agreement allow Covad to contest the prequalification requirement for an order or set of orders?**

Summary: Covad seeks language preserving its right to contest the prequalification requirement on orders because, among other reasons. Verizon's prequalification tool, LiveWire, is tailored to its own retail services and thus does not reflect if a loop is "qualified" for DSL under other service criteria.

Covad should have the right to contest Verizon's prequalification requirement. Prequalification pertains to the pre-order access that Verizon provides for a carrier to determine if a loop is qualified to provide xDSL service based upon Verizon's service descriptions that are based upon Verizon's retail service offering.. Verizon requires that Covad prequalify its orders prior to submitting them. Verizon accepts Covad service orders without regard to whether they have been prequalified, as long as Covad notes on the Local Service Request that the loop is not qualified. Covad seeks language that would preserve its right to make Loop Service Requests of Verizon on loops that are not qualified according to Verizon's criteria, but may be qualified under Verizon's service criteria.

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110 Verizon's Brief on the Merits, at 42.

111 *See* discussion of Issue 12, *infra.*

Verizon contends that Covad has "agreed" to use one of Verizon's loop prequalification as if Covad is somehow irrevocably bound to Verizon's loop qualification process.[113] While Covad will generally use Verizon's loop qualification process, it reserves the right to contest any requirement that such orders must be pre-qualified where there are significant and pervasive problems with loop qualification process, or where Verizon's qualification criteria would inhibit Covad product or market expansion. Verizon argues on one hand that Covad has not substantiated that Verizon's loop qualification is unreliable, and then on the other hand concedes that its loop qualification information may contain "inaccuracies."[114] Covad documented the many "imperfections" of Verizon's loop qualification systems in its Initial Brief.[115] There is no reason that Covad be required to pay loop qualification charges for particular orders when it knows the information would be inaccurate. Verizon recognizes the validity of this principle by allowing Covad to bypass loop prequalification for certain types of orders,[116] or by simply indicating the loop is not qualified. When such an indication is presented, Verizon's practice is to engage in its own manual loop qualification which causes additional cost to Covad. Verizon should provide a mechanism whereby a CLEC can request loops that are not qualified under Verizon's criteria but may be qualified on a competing network.

Verizon's provision of a bypass of loop prequalification for certain orders also undercuts its assertion that loop qualification is required. The FCC, far from mandating loop prequalification, has recognized the right of a CLEC to use raw data pertaining to loops to create

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112 *See* Covad's Post-Technical Conference Initial Brief, at 59-65.

113 Verizon's Brief on the Merits, at 45.

114 Verizon's Brief on the Merits, at 45.

115 Covad's Post-Technical Conference Initial Brief, at 65-67.

116 Covad's Post-Technical Conference Initial Brief, at 68.

its own prequalification tool.[117] It should be noted, however, that Covad cannot create its own tool because Verizon does not provide nondiscriminatory access to the required raw data. Thus, there is clearly no "requirement" that Covad partake of Verizon's loop prequalification process.

Issue 35: **Under what terms and conditions should Verizon conduct line and station transfers ("LSTs") to provision Covad loops?**

Summary: Contrary to Verizon's assertions, the agreement in the New York DSL Collaborative does not support the language Verizon seeks. The New York Commission has determined that Verizon must obtain Covad's approval prior to conducting an LST, and must follow standard provisioning intervals.

A Line and Station transfer ("LST") done in conjunction with a line sharing arrangement involves the reassignment and relocation of an existing Verizon end user voice service from a Digital Loop Carrier ("DLC") facility to a spare or freed-up qualified non-loaded copper facility. Consistent with the nondiscrimination provisions of the Act, when provisioning T1s or xDSL loops, after obtaining Covad's approval, Verizon should perform LSTs *at no additional charge* if Verizon does not charge its own customers for performing such work. Covad also believes that, except in line sharing situations, the standard provisioning interval should not change based on Verizon's need to conduct a LST.

Verizon argues that in the New York Digital Subscriber Line ("DSL") collaborative, CLECs, including Covad, "reached agreement" with Verizon on a process for line and station transfers.[118] Covad does not dispute the existence of the agreement, but does dispute that this agreement precludes the language Covad is seeking.

First, Verizon challenges Covad's position that a LST should only be performed "upon the request of Covad" or "after obtaining Covad's approval." Verizon represents that the

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117 Covad's Post-Technical Conference Initial Brief, at 67.

118 Verizon's Brief on the Merits, at 51.

agreement in the DSL collaborative specified that Verizon would perform LSTs in "all cases." The full language of the agreement's provision states that "[t]his new process will be applied to all cases where Verizon encounters the customer on DLC and where Verizon can automatically reassign the customer to a spare copper facility." [119] This language does not, however, address the issue of what should be the appropriate predicate action to Verizon performing the LST. The language is more focused on ensuring that Verizon does not attempt to evade the performance of LSTs as opposed to requiring a LST even if the CLEC does not want one. This interpretation is more reasonable given the fact that it makes no sense to perform a LST if the CLEC does not want one. Performing a LST when the CLEC does not want one would impose undesired charges on the CLEC and waste the workforce resources of Verizon. Verizon recognizes this fact by noting that it is developing a process by which CLECs may indicate on an order-by-order basis whether they want a LST performed.[120] It makes sense then in the interim, to ask the CLEC if it wants the LST performed rather than automatically providing one. Verizon has proffered no reason why it would not be able to obtain the CLEC's consent prior to performing a LST. A CLEC should not be forced to pay for something it does not want. The New York Commission agreed, noting that a CLEC should not be "required to accept an LST willy-nilly; particularly given that a charge will be applicable."[121]

Verizon next attempts to challenge Covad's position that Verizon should be able to perform a LST for a line-shared loop or stand-alone xDSL loop within the standard interval for a stand-alone xDSL loop. Once again, Verizon cites to the New York DSL collaborative

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119 *Re Provision of Digital Subscriber Line Services*, New York Public Service Commission Case No. 00-C-0127, Opinion and Order Concerning Verizon's Wholesale Provision of DSL Capabilities, Opinion No. 00-12, 2000 WL 33158570, *12 (2000) ("*NY DSL Order*").

120 Verizon's Brief on the Merits, at 52.

121 *NY Arbitration Order* at 37.

agreement, in which it was specified that a LST "involves additional installation work."[122] Verizon's retail provisioning intervals do not, however, vary based upon whether a LST needs to be performed; wholesale provisioning intervals should not vary either.[123] As LSTs become more prevalent with increased fiber deployment by Verizon and diminished unbundling obligations in regard to the fiber, allowing Verizon to extend unnecessarily provisioning intervals for loops requiring LST will create a significant disparity for CLECs. Verizon will be able to deploy broadband service promptly to its customers, while CLECs will face a longer interval. The New York Commission agreed, noting that "parity precludes a longer provisioning interval where LSTs are required."[124] The time to obtain service will clearly influence the choice of the customer in regard to which carrier it chooses.

Finally, Verizon asserts that Covad agreed that a LST "would require an additional charge." Covad has demonstrated that performing LSTs at no charge is more appropriate given the fact that Verizon does not charge its retail customers for LSTs.[125] Covad also demonstrated that a zero charge for LSTs is in accord with forward-looking network assumptions, a conclusion that this Commission also reached.[126] This Commission also recognized the discriminatory impact of imposing on CLECs an additional cost of customer migration.[127] It is damaging enough that CLECs must have their customers migrated to another loop, with the attendant risk

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122 *NY DSL Order*, *12.

123 Covad's Post-Technical Conference Initial Brief, at 71.

124 *NY Arbitration Order* at 37/

125 Covad's Post-Technical Conference Initial Brief, at 70.

126 Covad's Post-Technical Conference Initial Brief, at 70-71.

127 *Re Verizon Pennsylvania, Inc.*, PA PUC Rulemaking Proceeding 00016683, Tentative Order, 2002 WL 31664693, *89 (Nov. 4, 2002).

of service interruption, when Verizon deploys DLC, but requiring the CLEC to pay for this migration places the CLEC at a further competitive disadvantage.

Issue 37: **Should Verizon be obligated to provide "Line Partitioning" (i.e., Line Sharing where the customer receives voice services from a reseller of Verizon's services)?**

Summary: The Commission should end Verizon's anti-competitive, discriminatory policy that prohibits the resale of Verizon's voice service in Line Partitioning when Covad provisions DSL over the high frequency portion of the loop.

Beyond Verizon's main arguments regarding this issue, which Covad has already refuted, Verizon argues that the Commission should not address this issue because of the FCC's recent conclusion in the Triennial Review (in an order that has not yet been released) that line sharing will at some time in the future no longer be available as a UNE. The Commission's resolution of this issue should not, however, be based on that decision.[128] Line sharing is currently available and will be available for some time to come and possibly more if the decision is overturned. As indicated in Covad's Post-Technical Conference Initial Brief, the Commission must require Verizon to offer Line Partitioning because resellers are being discriminated against by UNE-P providers and Verizon by not being able to resell Verizon's voice services when another CLEC, such as Covad, provisions DSL over the high frequency portion of the loop.

Verizon argues that Covad's discrimination claim is legally incorrect because the FCC defined the high-frequency portion of loop UNE to exist only where Verizon is the voice provider or a CLEC has obtained access to the entire loop as a UNE. Again, Verizon fails to acknowledge *its overarching legal obligations under the Section 251(c)(4) of the Telecommunications Act that requires Verizon to make available for resale any retail*

[128] Indeed, if Verizon's argument had validity, it would require that line sharing be deleted entirely from this agreement. Even Verizon does not seek such a result, recognizing that line sharing will not be eliminated immediately, but will at most be phased out over time.

telecommunications service, which of course includes voice services. Section 251(c)(4) mandates that ILECs have "the duty –

> (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers;
> (B) not to prohibit and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service...[129]

The FCC enacted similar rules, 47 C.F.R. §§ 51.603 & 51.613, and has also made it clear that ILECs such as Verizon are prohibited from imposing discriminatory conditions on the resale of retail services, finding that "resale restrictions are presumptively unreasonable."[130]

Verizon further argues that the FCC rejected Covad's claim that Verizon discriminates because Verizon permits the resale of its DSL service over resold voice lines so that customers purchasing resold voice are able to obtain DSL services from a provider other than Verizon. This argument is inapposite and fails to address resellers' federal right to resell voice services that Verizon provides when a CLEC utilizes the high frequency portion of the loop.[131] In addition, Verizon's DSL Over Resold Lines tariff, FCC Tariff No. 20, Part III, Section 5.2, which Verizon references, is also irrelevant because it provides resold DSL services, which Covad is not seeking. Significantly, the tariff does not cure the discrimination that is occurring on the voice side because Verizon does not allow resellers to resell voice services that Verizon provides when another CLEC is utilizing the high frequency portion of the loop. Apart from this, resellers should not have to convert their resold lines to UNE-platform to access basic voice

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129 47 U.S.C. § 251(c)(4)(A)&(B).

130 *See Local Competition Order* , ¶ 939.

131 Verizon contends that Covad does not have standing to complain on behalf of the resellers. The New York Commission found no merit to this claim noting that Verizon's argument "loses sight of the fact that Covad sees the alleged discrimination as redounding to its own detriment." *NY Arbitration Order* at 39.

services that they are legally entitled to resell.

For the foregoing reasons and for the reasons Covad previously submitted,[132] the Commission should accordingly order Verizon to make its voice services available for resale, as requested, and adopt Covad's contract language. The New York Commission recently agreed with Covad, noting that "we see no current legal impediment to line partitioning, and we are inclined in principle to direct that it be offered as a mechanism to enhance the choices available to customers."[133] Recognizing that its ruling may have effects on market participants not involved in the arbitration, the New York Commission stated it will issue a notice inviting comment before going forward on its proposed course of action.[134] The New York Commission, to ensure that line partitioning is made available as soon as possible after any decision to require it and to ensure that its implementation is not delayed by the need to negotiate terms, ordered that Covad's proposed wording on line partitioning be included in the Agreement with the proviso that the line partitioning will only take effect after it is required by law.

Issue 39: **What interval should apply to collocation augmentations where a new splitter is to be installed?**

Summary: Consistent with this Commission's decision in a prior arbitration order, the Agreements should reflect a thirty business day interval for collocation augmentations where new splitters are installed and Verizon's interval should be firmly rejected.

Covad seeks inclusion of language referencing a thirty (30) business day interval for collocation augmentations where new splitters are to be installed. Verizon seeks to extend the collocation augment interval to seventy six (76) business days in direct violation of the

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132 Covad's Post-Technical Conference Initial Brief at 71-73; Covad's 1/17/03 Brief at 109-113.

133 *NY Arbitration Order* at 39.

134 *Id.*

Commission's November 15, 2000 Ruling in the Arbitration of Covad and Rhythms.[135] In the *Arbitration Order*, this Commission adopted a thirty (30) business day interval for augmenting collocation arrangements.[136] Covad is not seeking to change this Commission's prior ruling in this proceeding. Verizon, on the other hand is seeking to more than double the Commission ordered interval.

In its *Arbitration Order*, the Commission has already dealt with the augment interval that Verizon proposes. Verizon should not be allowed to use this Arbitration for another bite at the apple on the collocation augment interval. Despite this Commission's ruling, Verizon delayed filing a tariff revision implementing this Commission's thirty (30) day augment interval for almost three (3) years and, instead, has only recently filed a forty-five (45) interval contrary to the Commission's findings. Under Verizon's proposed language, a seventy-six (76) day interval would have applied through this three (3) year period, rather than the Commission approved thirty (30) day interval. Covad has also submitted a Complaint in response to the April 11, 2003 filing by Verizon of revisions to its Tariff Pa. P.U.C. – No. 218 - CLEC Collocated Interconnection Service ("Tariff 218") ("April 11 Tariff Filing"). As mentioned above, the April 11 Tariff Filing also attempts to change the collocation augment interval to forty-five (45) business days in direct violation of the *Arbitration Order*. The Commission has suspended this tariff filing and set it for investigation finding that the filing was in "direct contravention" of its

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135 *Petition of Covad Communications Company for Arbitration Award against Bell Atlantic Pennsylvania, Inc., Implementing the Line Sharing/Unbundling Network Element*, Docket No. A-310696F0002; *Petition of Rhythms Links, Inc. for an Expedited Arbitration Award Implementing Line Sharing*, Docket No. A-310698F0002, Commission Opinion and Order entered November 15, 2000, ("*Arbitration Order*").

136 *Arbitration Order* at 17.

November 15, 2000 Ruling and that the filing may be "unlawful, unjust, unreasonable, and contrary to the public interest."[137]

Verizon does not dispute that Covad's proposed language contains the interval currently prescribed by Pennsylvania law.[138] This should end the discussion on this issue. Until Verizon convinces this Commission that a different collocation augment interval should apply, the thirty day interval is the law and should be the interval referenced in the interconnection agreement. If Verizon subsequently succeeds in obtaining a longer interval then it may utilize the change of law provisions to address the issue. [139]

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137 *Pennsylvania Public Utility Commission and Covad Communications Company v. Verizon Pennsylvania, Inc.*, Docket Nos. R-00038348 and R-00038348C0001, Order at p. 3 (May 22, 2003).

138 Verizon Brief on the Merits, at 56.

139 Verizon also notes that Covad has changed its position in these arbitrations. Verizon is aware that it has been negotiating resolution of collocation intervals with a number of CLECs across the entire Verizon footprint. For some time, these negotiations had ceased and resulted in no agreement. Accordingly, Covad is seeking the current interval allowed under Pennsylvania Law. These negotiations have recently been revived. However, until a settlement is reached, there is no basis for Verizon's proposed language.

Issue 42: **Should Verizon Provide Covad access to unterminated dark fiber as a UNE? Should the dark fiber UNE include unlit fiber optic cable that has not yet been terminated on a fiber patch panel at a pre-existing Verizon Accessible Terminal?**

Summary: Consistent with this Commission's prior decisions and those of other state commissions, the Agreement should require Verizon to make unterminated dark fiber available to Covad and include it in Verizon's UNE dark fiber inventory.

Verizon repeats its tired argument that providing access to unterminated dark fiber constitutes "construction" and that dark fiber that is not terminated at both ends need not be made available to CLECs as a UNE. Verizon's position is not consistent with this Commission's prior decisions. Further, most of the state commissions that have addressed the issue have rejected this argument as inconsistent with Verizon's obligations under Section 251(c) of the Act and FCC Rule 51.319. Consistent with its prior decisions, this Commission should adopt their reasoning and reject Verizon's position in the present proceeding.

First, Verizon's refusal in this proceeding to make unterminated dark fiber available to Covad as a UNE is inconsistent with Verizon's own position in the Yipes arbitration and this Commission's decision in that proceeding. In the Yipes arbitration Verizon reached the following agreement with Yipes, which was adopted by the Commission:

> *It is Verizon's standard practice that* when a fiber optic cable is run into a building or remote terminal, *all fibers in that cable will be terminated* on a Verizon accessible terminal in the building or remote terminal. Should a situation occur in which a fiber optic cable that is run into a building or a remote terminal is found to not have all of its fibers terminated, then Verizon agrees to complete the termination of all fibers in conformance with its standard practices and to do so expeditiously at the request of Yipes.[140]

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[140] *Petition of Yipes Transmission, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish and Interconnection Agreement with Verizon Pennsylvania, Inc.*, Docket No. A-310964, Opinion and Order, at 8-9, 11-14 (Order adopted October 12, 2001) (emphasis added). In the final implementing contract language, the

In fact, Verizon testimony in the Yipes arbitration admitted that under Verizon's standard practices "*every* outside fiber cable has a connectorized cable attached to it and has a patch panel installed with connectors plugged into the patch panel, so there is a complete path ending at the termination point at the fiber patch panel."[141] Judge Weismandel accordingly determined that in serving CLECs, Verizon should not be permitted to deviate from its standard practices and that as a general rule, consistent with its alleged standard practices, Verizon was required to terminate all fibers in a building or at a remote terminal at an accessible terminal.[142] Thus, Verizon has asserted before this Commission that its standard practice is to terminate all fibers. Covad only requests that Verizon do for Covad what it does for itself – make available and terminate dark fiber.

Verizon complains that Covad's proposed language, which mirrors its Yipes agreement, does not include a requirement that fiber strands be "continuous."[143] However, in the *Virginia Arbitration Order* the FCC directed Verizon to "strike the word continuous" because Verizon's refusal to route dark fiber through intermediate central offices "places an unreasonable restriction on the use of the fiber, and thus conflicts with [FCC] rules 51.307 and 51.311."[144] Of course, Covad will not agree to this restriction, which the FCC has determined to be inconsistent with its rules.

Commission replaced the word "expeditiously" with "in a timely manner in conformance with Verizon's standard practices" at Verizon's urging. *Id.*, at 14; Verizon's Brief on the Merits, at 62-63.

141 *Id.*, at 11.

142 *Id.*, at 11, 13-14.

143 Verizon's Brief on the Merits, at 62-63.

144 *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e) of the Communications Act for Preemption of the Virginia Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, CC Docket

Most importantly, Verizon's proposed language is also inconsistent with this Commission's decision regarding access to dark fiber at existing and new splice points.[145] In that order, the Commission determined that "upon a CLEC's request, Verizon PA should be required to establish an accessible terminal adjacent to the splice point in order to connect the CLEC's dark fiber with Verizon PA's dark fiber via fiber optic connectors located at the newly created accessible terminal."[146] Thus, the Commission's Splice Order contemplates that Verizon will create accessible terminals upon a CLEC's request and thereby terminate the fiber. Verizon's proposed contract language undermines the Commission's holding in the Splice Order by providing that dark fiber loops, transport and subloops must "already terminate" at a pre-existing terminal before the dark fiber is available to a CLEC.[147] Verizon's proposed language also would frustrate the Commission's holding in the Splice Order by providing that "[u]nused fibers located in a cable vault or a controlled environmental vault, manhole or other location outside the Verizon wire center, and *not terminated* to a fiber patch, *are not available* to Covad."[148] Contrary to Verizon's language, the Splice Order does not restrict access to fiber in manholes and other locations outside the wire center and contemplates that Verizon will terminate such fiber for CLECs.

No. 00-218, DA 02-1731, at ¶ 457 (2002) ("*Virginia Arbitration Order*").

145 *Report to the Pennsylvania Public Utility Commission, regarding the technical workshop on access to dark fiber at existing and new splice points*, Docket No. R-00005261, R-00005261 C0001, at 3 (entered June 3, 2002) ("Splice Order").

146 Splice Order, at 3.

147 Verizon's Brief on the Merits, at 61; Verizon's proposal prior to its Brief more obviously conflicted with the Commission's Splice Order by stating that dark fiber would be provided only at "pre-existing" accessible terminals. Revised Proposed Language Matrix – Verizon PA, at 19 (UNE Attachment, § 8.2.2). Its not clear, however, Verizon appears to have abandoned this language.

148 *Id.*

Most of the state commissions that have considered the issue have rejected the position, presented here by Verizon, that requiring an ILEC to terminate dark fiber constitutes "construction." In Texas, for example, SBC made the same argument that Verizon makes here: that providing access to unterminated dark fiber constitutes constructing new facilities and does not meet the FCC's definition of unbundled dark fiber because it is not easily called into service and does not connect two points in the network.[149] The Texas Public Utilities Commission ("Texas PUC") rejected SBC's arguments and held that "dark fiber which is deployed but not yet terminated can easily be called into service" and falls within the Commission's definition of the dark fiber UNE.[150] Further, the Texas PUC concluded that "terminating dark fiber does not constitute constructing new" facilities.[151] Accordingly, the Texas PUC ruled that "unterminated and unspliced fibers should be made available to [the CLEC] for use as UNE dark fiber," and that "[SBC] has an obligation to provide that unspliced UNE dark fiber to [the CLEC] and splice it upon request."[152]

Consistent with the Texas PUC decision, the District of Columbia Public Service Commission ("DC PSC") rejected Verizon's policy regarding unterminated dark fiber and concluded that unlit fiber that is not attached at both ends is within the scope of the dark fiber UNE and should be included in Verizon's dark fiber UNE inventory that is made available to CLECs. More specifically, the DC PSC rejected Verizon's argument that such unattached dark fiber is under construction and therefore should not be part of Verizon's dark fiber UNE

149 *Petition of CoServ, Inc. et al for Interconnection Agreement with SWBT*, Docket 23396, Arbitration Award at 109, 113 TX PUC, April 17, 2001 ("*COSERV Arbitration*").

150 *COSERV Arbitration*, at 113.

151 *COSERV Arbitration*, at 114.

152 *Petition of El Paso Networks, LLC For Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Co.*, PUC Docket No. 25188, Revised Arbitration Award, at 139

inventory.[153] The DC PSC concluded that "it is clear that unattached dark fiber is already installed in the network before it is attached to termination equipment, and *easily called into service by the attachment of termination equipment*."[154] The D.C. PSC concluded that:

> The *UNE Remand Order* includes unattached dark fiber in its definition of dark fiber, since it is deployed in Verizon's network and is easily called into service. It is also analogous to 'dead count' or 'vacant' copper, which the FCC required to be unbundled. The Commission chooses to follow the Indiana Commission's decision in permitting [CLECs] to have access to unattached dark fiber. Approval of [the CLEC's] position *does not require Verizon to create a superior quality network, since it merely permits [the CLEC] to have the same access to dark fiber that Verizon provides to itself.*[155]

The California Public Utilities Commission ("California PUC") also rejected these ILEC arguments regarding access to unterminated dark fiber, noting that it "is an attempt to define away its legal obligations"[156] and that the California PUC did "not want to set a rule in place that would allow [SBC] to evade its obligations to unbundle dark fiber for CLECs, as mandated by the FCC."[157]

In sum, by attempting to exclude unterminated dark fiber from the inventory of dark fiber that is available to CLECs, Verizon hopes to evade its obligation to provide unbundled dark fiber. Verizon's refusal to consider these unterminated fibers as part of its inventory results in

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(Texas PUC 2002) ("Texas Revised Arbitration Award").

153 *TAC 12 – Petition of Yipes Transmission, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon Washington, DC, Inc.*, Order No. 12286, Order on Reconsideration, at ¶¶ 26, 33 (DC PSC Jan. 4, 2002) ("*D.C. Dark Fiber Order*").

154 *DC Dark Fiber Order*, at ¶ 26 (emphasis added).

155 *DC Dark Fiber Order*, at ¶ 33 (emphasis added).

156 *Application by Pacific Bell Telephone Company (U 1001 C) for Arbitration of an Interconnection Agreement with MCImetro Access Transmission Services, L.L.C. (U 5253 C) Pursuant to Section 252(b) of the Telecommunications Act of 1996*, A.01-01-010, Final Arbitrator's Report Cal. PUC, July 16, 2001 at 139.

157 *Id.*

Verizon grossly understating the amount of dark fiber that should be characterized by Verizon as "available" to requesting CLECs as UNEs. Such fiber may readily be made usable by Verizon, and should be considered usable by CLECs. The Commission should preclude this unlawful conduct by adopting the position of other state commissions that have addressed the issue and is reflected in Covad's proposed language.

Issue 43: **Should Covad be permitted to access dark fiber in any technically feasible configuration consistent with Applicable Law?**

Summary: Covad's request for access to dark fiber in any technically feasible configuration is reasonable and consistent with the Commission's orders.

As Covad submitted on pages 120-122 of its 1/17/03 Initial Brief, Covad's proposed language, which permits it to have access to dark fiber in technically-feasible configurations consistent with Applicable Law, is simple, reasonable, and comports with the Act and FCC rules. Section 251(c)(3) of the Act and FCC Rule 51.307(c) specifically provide that ILECs shall provide to a requesting telecommunications carrier for the provision of a telecommunications service, "nondiscriminatory access to network elements on an unbundled basis at *any technically feasible* point" on terms and conditions that just, reasonable, and nondiscriminatory."[158]

Furthermore, Covad's proposed language, which specifies that that "[t]he description of Dark Fiber Loop, Dark Fiber Sub-loop, and Dark Fiber IOF products, does not limit Covad's right to access dark fiber in other technically feasible configurations consistent with Applicable Law," comports with FCC's findings in the *Virginia Arbitration Award.* In its Order, the FCC

158 47 U.S.C. § 251 (c)(3).

noted numerous times that contract language that references access to UNEs or interconnection at any technical feasible point is lawful.[159]

Issue 44: **Should Verizon make available dark fiber that would require a cross connection between two strands of fiber in the same Verizon central office or splicing in order to provide a continuous dark fiber strand on a requested *route*? *Should Covad be permitted to access dark fiber through intermediate* central offices?**

Summary: Consistent with the FCC's *Virginia Arbitration Order*, Verizon should be required to route dark fiber transport between two or more intermediate central offices without requiring collocation at the intermediate offices. Verizon should be required to provide cross connects or splices to facilitate fiber routing.

In the *Virginia Arbitration Order*, the FCC agreed with the CLECs that "Verizon's refusal to route dark fiber transport through intermediate central offices places an unreasonable restriction on the use of the fiber, and thus conflicts with Commission rules 51.307 and 51.311."[160] In light of the *Virginia Arbitration Order*, Verizon apparently concedes in its Brief that Verizon is required to connect dark fiber strands at intermediate central offices to permit CLEC access to dark fiber without requiring collocation at the intermediate central offices.[161] Verizon's language, however, would unduly restrict Covad's access to combinations in

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159 *See, e.g., In the Matter of Petition of WorldCom, Inc., Pursuant to Section 252(e) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, FCC Dockets No. 00-218, 00-249, 00-251, DA 02-1731, ("*Virginia Arbitration Award*") at ¶ 57 & n.141 (emphasizing that "[t]echnical feasible interconnection is the right of every carrier."), ¶ 231 (adopting WorldCom's proposed language and finding that is consistent with Commission precedent that "any requesting carrier may choose any method of technically feasible interconnection ...at a particular point"), ¶ 338 (noting that "Verizon has contractual obligation to provide AT&T with nondiscriminatory access to UNEs, including combinations of UNEs, at any technically feasible point and including all other UNE's features, functions and capabilities."), ¶ 353 (rejecting Verizon's requirement that CLEC be collocated to access UNEs because such a provision is not consistent with Verizon's statutory obligation to provide access to UNEs "at any technically feasible point.").

160 *Virginia Arbitration Order*, at ¶ 457.

161 Verizon's Brief on the Merits, at 68.

accordance with Applicable Law by requiring Covad to access dark fiber loops and IOF via a collocation arrangement in that Verizon premise where that loop of IOF terminates.

Consistent with *the Virginia Arbitration Award* and Verizon's most recent proposed contract language, the Commission should require Verizon to route dark fiber transport through two or more intermediate central offices for Covad without requiring collocation at the intermediate central offices. Further, the Commission should require Verizon to provide any needed cross connects or splices between such fibers in order to facilitate routing of dark fiber through intermediate central offices and to allow UNE combinations.

Verizon contends that Covad is attempting to shoehorn a new issue of "acceptance testing" into this arbitration.[162] This contention is incredibly ironic given the fact that it was Verizon that provided entirely new language on dark fiber in the middle of this arbitration. Obviously what is good for the goose is not good for the gander. Covad's addition of new language to a pre-existing section pales in comparison to Verizon's wholesale inclusion of new sections. Covad, in a spirit of good-faith negotiation, agreed to some of the new language despite its reservations. Only after Covad agreed to the new language did Verizon claim it would oppose Covad's new language because Covad did not raise it initially.

In regard to splicing, as discussed in detail in Issue 42, Verizon's proposed language is inconsistent with this Commission's decision in the Splice Order. Specifically, Verizon's proposed language in Sections 8.2.2 of the UNE Attachment limits CLEC access to fiber that is "already terminated" at a pre-existing accessible terminal whereas the Splice Order requires Verizon to "create newly accessible terminals adjacent to the existing splice points" that facilitate the termination of the fiber.[163] Verizon's proposed Section 8.2.2 also denies CLECs

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162 Verizon's Brief on the Merits, at 58.

163 Splice Order, at 3.

access to dark fiber in "a cable vault, manhole or other location outside the Verizon Wire Center" that is "not terminated to a fiber patch."[164] This language is inconsistent with the Splice Order, which requires Verizon to "*establish an accessible terminal* adjacent to the splice point in order *to connect* the CLEC's dark fiber with Verizon's dark fiber via fiber optic connectors located at the newly created accessible terminal."[165] Thus, the Splice Order contemplates CLEC access to dark fiber at all existing splice points, albeit via adjacent accessible terminals, and does not preclude CLEC access to dark fiber in manholes, controlled environmental vaults and other locations as does Verizon's language. Verizon's proposed Section 8.2.2 also directly precludes CLEC access to dark fiber at "a splice point." In its Brief, however, Verizon appears to back away from this clearly unlawful position.[166]

Verizon admits in its Brief that it is required under Pennsylvania law to "open existing splice points to create adjacent terminals" for requesting CLECs to facilitate access to dark fiber at those existing splice points.[167] In implementing the Commission's Splice Order, Verizon would have the Parties rely on a vague statement that Verizon will "provide Covad access to Dark Fiber in accordance with, but only to the extent required by, Applicable Law."[168] This vague language would likely lead to further litigation, especially in light of the fact that Verizon's more specific proposed language at section 8.2.2 is inconsistent with the Commission's Splice Order. Covad proposes instead that the agreement include language that directly implements the Commission's Splice Order, including the restrictions the Commission

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164 *Id.*

165 *Id.*

166 Verizon's Brief on the Merits, at 61.

167 Verizon's Brief on the Merits, at 65.

168 Verizon's Brief on the Merits, at 67.

imposed on CLECs. Specifically, Covad proposes the following to ensure the Agreement is consistent with Pennsylvania law:

> Consistent with the Pennsylvania Commission's decision in Docket No. R-00005261, Verizon shall provide access to dark fiber at existing splice points by the creation of an accessible terminal adjacent to splice case in order to connect the CLEC's dark fiber with Verizon's dark fiber via fiber optic connectors located at the newly created accessible terminal. Covad must commit to a three year minimum lease of the dark fiber as a condition to Verizon creating a new accessible terminal adjacent to a splice point. Further, Verizon's technicians shall perform the work to create the new accessible terminal. Covad agrees to compensate Verizon for creation of the accessible terminal at a tariffed time and materials rate. If Covad orders ribbon fiber, the Covad must order the fibers in ribbons of at least 12 strands.

Covad's proposed language directly captures the Commission's ruling in the PA Splice Order rather than relying on a vague reference to "Applicable Law" that would only lead to further litigation in light of the Parties' present disagreements.

Further, the Commission should consider relaxing the restrictions it imposed on access to dark fiber in the Splice Order. The Commission imposed these restrictions in response to red herring arguments by Verizon that splicing dark fiber for requesting CLECs would lead to reliability problems. The experience of other state commissions demonstrates that direct fusion splicing of dark fiber and the "stub-out" method of splicing that were considered by the Commission in the Technical Workshop do not lead to reliability problems when performed by the ILEC on behalf of CLECs. The Texas PUC, for example, has long required the ILEC to splice dark fiber for CLECs and has not encountered any reliability issues. Because the splicing process is routine and is performed by legions of ILEC trained full-time splicing specialists, unspliced fiber is easily called into service. The most obvious evidence that unspliced fibers can be easily called into service is the fact that ILECs perform thousands of fiber splices for their own use. Indeed, the work is so routine, SBC currently charges El Paso Networks, LLC ("EPN") only $434 per dark fiber splice location, regardless of how many splices it performs for EPN.

Further, SBC has performed approximately 300 fiber splices for EPN alone, apparently without experiencing any difficulty.[169]

In light of these facts, the Commission should adopt the best practices regarding splicing and termination of dark fiber developed by state commissions around the country and incorporate their findings into its rules. As discussed above in Issue 42, the Texas PUC recently ruled that "unterminated and unspliced fibers should be made available to [the CLEC] for use as UNE dark fiber," and that "[SBC] has an obligation to provide that unspliced UNE dark fiber to [the CLEC] and splice it upon request."[170] Several other state commissions, including those in the District of Columbia,[171] Indiana,[172] Massachusetts, New Hampshire[173] and Rhode Island[174] have examined the issue and have ordered ILECs to splice dark fiber for requesting CLECs.[175] For example, the Massachusetts Department of Telecommunications and Energy ("MA DTE") dismissed the arguments raised by Verizon regarding the technical feasibility of splicing dark fiber and concluded "that it is *technically feasible* and *consistent with industry practice* to lease

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169 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* FCC CC Dockets No. 01-338, 96-98, 98-147, Reply Comments of El Paso Networks, at 53-55, 62-66 (July 17, 2002) ("EPN Reply Comments").

170 *Petition of El Paso Networks, LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone*, Docket No. 25188, at 139 (Texas PUC 2002).

171 *D.C. Dark Fiber Order*, at ¶ 62, 87.

172 *Re: AT&T Communications of Indiana, Inc.*, Cause No. 40571-INT-03, Slip Opinion, at 79, 129-130 (Nov. 20, 2000) ("Indiana Order").

173 *Re: Deliberations in DT 01-206 Regarding Rates, Terms and Conditions for the UNE Remand Unbundled Network Elements*, Policy Letter, at 2 (N.H. PUC, March 1, 2002).

174 *In re: Verizon-Rhode Island's TELRIC Studies - UNE Remand,* Docket No. 2681, Report and Order, at 19, 22-23 (Rhode Island PUC, Dec. 3, 2001) *("RI Dark Fiber Order")* ("Verizon is required to splice dark fiber at any technically feasible point on a time and materials basis, so as to provision continuous dark fiber through one or more intermediate central offices without requiring the CLEC to be collocated at any such offices.").

175 EPN Reply Comments, at 48-66.

dark fiber at splice points."[176] In fact, the MA DTE concluded that Verizon itself resplices "from time to time" and that those "splice points are designated for [Verizon], itself, to use as junction points in its network."[177] Accordingly, the MA DTE saw "little distinction between a splice performed on behalf of [Verizon] and that performed for another carrier" and ordered Verizon to provide access to dark fiber at any technically feasible point including existing splice points as well as hard termination points.[178] The MA DTE required Verizon to perform splicing at the CLEC's request in order to make a fiber strand "continuous by joining fibers at existing splice points within the same sheath."[179] In sum, the Commission should follow the lead of these state commissions and require Verizon to allow access to dark fiber at splice points through fusion splicing and other methods, in addition to requiring Verizon to create new accessible terminals to access dark fiber at existing splice points.

Issue 47: **Should Verizon provide Covad detailed dark fiber inventory information?**

Summary: Consistent with federal law, Covad should be provided parity access with Verizon to the same up-to-date pre-ordering information regarding dark fiber UNEs available in Verizon's backoffice systems, data bases and other internal records, including data from the TIRKS database, fiber transport maps and other information, similar to the requirements in Maine and New Hampshire.

The FCC has concluded that the provision of access to Operations Support Systems ("OSS") and the "functions and the information they contain is integral to the ability of

176 *New England Telephone and Telegraph Company d/b/a Bell Atlantic Massachusetts,* Decision D.P.U./D.T.E. 96-83, 96-94-Phase 4-N, at 33 (Mass. DTE Dec. 13, 1999) ("We impose no collocation requirement ... it is technically feasible and consistent with industry practice to lease dark fiber at splice points.") ("Mass. DTE Phase 4N Order") (emphasis added); *New England Telephone and Telegraph Company d/b/a NYNEX, et al.*, Decision D.P.U. 96/73-74, 96/80-81, 96-84-Phase 4-R Order at 4-5 (Mass. DTE Aug. 17, 2000).

177 *New England Telephone and Telegraph Company d/b/a NYNEX,* Decision D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 3, at 48-49 (Mass. DTE Dec. 4, 1996) *("Mass. DTE Phase 3 Order").*

178 *Mass. DTE Phase 3 Order*, at 48.

competing carriers to enter the local exchange market."[180] In addition, in its *UNE Remand Order*, the Commission clarified that "OSS includes the manual, computerized, and automated systems, together with associated business processes and the up-to-date data maintained in those systems."[181] In light of these requirements, several state commissions have required Verizon to provide parity access to information regarding dark fiber. The Maine Public Utilities Commission, for example, has determined that if Verizon believes that dark fiber is unavailable, Verizon must provide the CLEC with "written documentation and a fiber map."[182] The written documentation must include, at a minimum, the following:

- a map (hand-drawn, if necessary) showing the spans along the most direct route and two alternative routes (where available), and indicating which spans have spare fiber, no available fiber, and construction jobs planned for the next year or currently in progress with estimated completion dates;
- the total number of fiber sheaths and strands in between points on the requested routes;
- the number of strands currently in use or assigned to a pending service order;
- the number of strands in use by other carriers;
- the number of strands assigned to maintenance;
- the number of spare strands; and
- the number of defective strands.

In addition, as set forth in detail in Covad's initial Brief, the New Hampshire commission requires that Verizon provide information to CLECs regarding dark fiber that is nearly identical to that required in Maine:[183] Verizon dismisses this information as "demanding information that

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179 *Mass. DTE Phase 4N Order*, at 33; *D.C. Dark Fiber Order*, at ¶ 62, 87.

180 *UNE Remand Order*, at ¶ 421; *Implementation of the Local Competition Provisions of the Telecommunications Act of* 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, at ¶ 518 (1996) ("*First Local Competition Order*"); EPN Reply Comments, at 67-68.

181 *UNE Remand Order*, at ¶ 425; EPN Reply Comments, at 67-68.

182 *Inquiry Regarding the Entry of Verizon-Maine into the InterLATA Telephone Market Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 2000-849, Letter of Dennis L. Keshl (March 1, 2002).

183 *Order Finding Dark Fiber Subject to the Unbundling Requirement of Section 251 of the Telecommunications Act of 1996*, Order No. 22,942, DE 97-229, at 8-9 (May 19, 1998); Verizon

Verizon does not have and that Covad does not need."[184] Contrary to Verizon's assertions, the information required by the New Hampshire and Maine commissions does exist and has been provided to CLECs by in other states.[185] In sum, Covad seeks parity access to information regarding dark fiber, not non-existent information as alleged by Verizon.

Issue 52: **Should the Agreement provide that Covad will pay only those UNE rates that are approved by the Commission (as opposed to rates that merely appear in a Verizon tariff)?**

Issue 53: **Should Verizon provide notice of tariff revisions and rate changes to Covad?**

Summary: Verizon's proposed language would require Covad to "police" Verizon's tariff filings and allow Verizon to impose upon Covad unilateral changes in rates not finally approved by regulatory authorities; language should be adopted making it clear Verizon can charge Covad only Commission or FCC approved charges, set forth in tariffs.

Verizon raises a number of misplaced objections to Covad's proposed language regarding Issues 52 and 53. Verizon refuses to recognize that Covad has the legitimate reason for proposing its language: to ensure that the billing problems that Covad previously encountered with Verizon, such as Verizon's bill to Covad of over $19,000 in charges that were associated with rates that were neither specifically approved by the Commission (i.e., line station transfer charges), nor agreed to by the Parties, do not recur.[186]

Preventing such future occurrences boils down to these two points: (1) Verizon should not assess or bill such charges if they are not set forth in a Commission approved tariff or are

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Maine Tariff filing, Miscellaneous, § 17.1.3 (Nov. 1, 2002).

184 Verizon's Brief on the Merits, at 72.

185 *CTC Communications Corp. Request for Fast-Track Arbitration of Verizon NH's Denial of Dark Fiber Request*, Docket No. DT 02-028, Order No. 23,969 (NH PUC May 10, 2002) (the Arbitrator recommended that the PUC overrule Verizon's denial of the CLEC's dark fiber request based on an analysis of such information).

186 *Covad Communications Company Petition for Arbitration of Interconnection Rates, Terms and Conditions with New York Telephone d/b/a Verizon New York, Inc.*, Case No. 02-C-1175, Covad's Post-Technical Conference Initial Brief at 70-76; Covad's 12/12/02 Initial Brief

otherwise not Commission or FCC approved (otherwise said, the Pricing Attachment should only capture and Covad should only be billed Commission or FCC approved rates and nothing else); and (2) if Verizon wishes to assess or bill a rate *that is not in a Commission approved tariff, or has otherwise not been approved by the Commission or the FCC*, then Verizon needs to notify Covad and agree to a rate with Covad before Verizon bills Covad that rate. This notification would take the form of a revised Appendix A and then Verizon could only bill the charges if Covad agreed in writing to the new non-approved rate set forth in the Appendix.

Covad's request and the associated language proposed is fully justified and entirely reasonable. Contrary to Verizon's claims, Covad is neither attempting to game the system, seeking preferential treatment, nor seeking something to which it is not legally entitled. Rather, as emphasized above, Covad wants to prevent a second billing problem from recurring. Covad's proposed language does just that, and should be adopted.

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at 104-109; Covad's 12/20/02 Reply Brief at 26.

II. CONCLUSION

Covad respectfully requests that the Commission grant Covad's requested contract language on the aforementioned issues.

Respectfully submitted,

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Dated: July 3, 2003

SUPPLEMENTAL NON-PENNSYLVANIA ADMINISTRATIVE DECISIONS

APPENDIX TO COVAD COMMMUNICATIONS REPLY BRIEF

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

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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

ARBITRATION ORDER

Issued and Effective: June 26, 2003

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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

COMMISSIONERS PRESENT:

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

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

ARBITRATION ORDER

(Issued and Effective June 26, 2003)

BY THE COMMISSION:

INTRODUCTION

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

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

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

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

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

OVERVIEW OF PARTIES' POSITIONS

Covad

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

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

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

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

Verizon

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

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

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

Discussion

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

CHANGE OF LAW--ISSUE 1

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

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

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

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

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

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

[4] Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, CC Docket Nos. 00-218 & 00-249, Memorandum Opinion and Order, DA 02-1731, §717 (Chief, Wireline Competition Bureau, rel. July 17, 2002)("Virginia Arbitration Award").

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

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

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

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

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

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

BILLING ISSUES

Back-Billing (Issues 2 and 9)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Timing of Responses to Billing Claims (Issue 4)

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

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

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

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

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

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

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

[12] Tr. 217.

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

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

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

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

Late Payment Charges on Disputed Bills (Issue 5)

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

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

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

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

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

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

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

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

DISPUTE RESOLUTION

Submission to Arbitration (Issue 7)

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

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

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

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

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

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

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

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

[17] Cases 96-C-0723, et al., New York Telephone Company/AT&T Interconnection, Opinion No. 96-31 (issued November 29, 1996), pp. 61-63. AT&T there argued, persuasively, that we have ample authority under the 1996 Act to adopt a dispute resolution process for an interconnection agreement. It is the intention of the 1996 Act, AT&T maintained, that interconnection agreements achieved under its auspices be effectively implemented (citing 47 U.S.C. §§252(b)(4)(C) and 252(c)(2)), and, AT&T observed, the 1996 Act provides that "subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement" (47 U.S.C. §252(e)(3)).

Termination (Issue 8)

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

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

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

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

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

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

Future Causes of Action (Issue 10)

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

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

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

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

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

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

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

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

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

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

OPERATIONS SUPPORT SYSTEMS

Access to Information About Loops (Issue 12)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

UNBUNDLED NETWORK ELEMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[27] Tr. 79.

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

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

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

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

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

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

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

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

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

Installation Appointment Windows (Issue 22)

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

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

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

[31] Tr. 113.

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

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

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

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

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

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

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

Loop Categories (Issue 24)

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

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

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

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

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

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

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

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

Cooperative Loop Testing (Issue 27)

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

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

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

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

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

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

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

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

Contesting the Loop Prequalification Requirement (Issue 28)

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

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

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

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

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

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

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

Line and Station Transfers (Issue 29)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Line Partitioning (Issue 31)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Interval for Provisioning Line-Shared Loops (Issue 32)

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

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

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

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

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

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

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

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

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

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

PRICING (ISSUES 37 AND 38)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Commission orders:

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

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

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

3. This proceeding is continued.

By the Commission,

(SIGNED) JANET HAND DEIXLER
Secretary

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISISON

DIECA Communications, Inc.	:	
t/a Covad Communications Company	:	
	:	
Petition For Arbitration of Interconnection	:	
Rates, Terms and Conditions And Related	:	Docket Nos.
Arrangements with Verizon Pennsylvania Inc.	:	A-310696F7000
and Verizon North Inc. Pursuant to Section 252(b)	:	A-310696F7001
of the Communications Act of 1934	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing document in accordance with the requirements of 52 Pa. Code § 1.54 et seq. (relating to service by a participant).

VIA UPS OVERNIGHT MAIL

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