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ORIGINAL

July 9, 2003

VIA OVERNIGHT MAIL

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

Re: Docket Nos. A-310696F7000 and A-310696F7001
Petition for Arbitration of DIECA Communications, Inc. d/b/a Covad Communications Company with Verizon Pennsylvania Inc. and Verizon North Inc. Pursuant to Section 252(b) of the Communications Act of 1934

Dear Mr. McNulty:

Please find enclosed for filing an original and nine copies of the Post-hearing Reply Brief on the Merits of Verizon Pennsylvania Inc. and Verizon North Inc. in the above matter. Service of the brief has been made as indicated on the Certificate of Service. We are also supplementing the material filed in our prior appendices with an additional appendix.

Also enclosed is one extra copy of the brief. Please date stamp and return the extra copy in the enclosed, self-addressed stamped envelope.

If there are any questions regarding this matter, please contact me at (202) 326-7959.

Sincerely,

Scott H. Angstreich

Enclosures

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ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DIECA Communications, Inc. d/b/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	Case Nos. A-310696F7000, A-310696F7001

REPLY BRIEF ON THE MERITS OF VERIZON PENNSYLVANIA INC. AND VERIZON NORTH INC.

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July 9, 2003

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REPLY BRIEF ON THE MERITS OF VERIZON PENNSYLVANIA INC. AND VERIZON NORTH INC.

Verizon Pennsylvania Inc. ("Verizon PA") and Verizon North Inc. ("Verizon North"), collectively "Verizon," by counsel and pursuant to the direction of the Administrative Law Judge ("ALJ"), submit this Reply Brief.

I. INTRODUCTION AND SUMMARY

Covad's positions with respect to the contested issues in this proceeding are legally and factually without foundation. Because Covad's positions are inconsistent with federal law, they must be rejected for that reason alone. Indeed, with respect to many issues, Covad advances here the same legal arguments that the FCC has rejected in other proceedings and that the New York Public Service Commission ("PSC") rejected in its June 26, 2003 order in Covad's arbitration with Verizon New York.[1] Most of the issues that Covad raises here were presented to the New York PSC in that arbitration,[2] and on approximately two-thirds of those issues the New York

[1] Arbitration Order, *Petition of Covad Communications Co., 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 (N.Y. PSC June 26, 2003) ("*Covad New York Order*").

[2] All of the issues on which the New York PSC ruled are also presented in these arbitrations, although the issue numbers are not always identical; Verizon notes such differences

PSC rejected Covad's position — which was the same as its position here — and adopted Verizon New York's proposed language in full or in large measure. In fact, in its briefs here, Covad presents many of the exact same arguments regarding *New York* law — which, in any event, have little, if any, relevance in an arbitration in *Pennsylvania* — that the New York PSC rejected in adopting Verizon's position.[3] As to those issues, this Commission should reach the same result here.

Furthermore, the record here contains no evidence to support Covad's accusations of poor performance by either Verizon PA or Verizon North. Instead of detailed information to which Verizon could offer responses, Covad has offered only broad generalizations and anecdotes with respect to Verizon PA and nothing at all with respect to Verizon North. The FCC has repeatedly rejected claims based on such conclusory and anecdotal "evidence." *See, e.g.*, *Maryland/DC/West Virginia 271 Order*[4] ¶¶ 34, 36, 171; *New Jersey 271 Order*[5] ¶¶ 184-185; *New York 271 Order*[6] ¶ 295. This Commission should do the same.

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below. The following issues raised here were not part of the New York arbitration: Issue 23 (technical references), Issue 32 (manual loop qualification intervals), Issue 34 (with respect to intervals for non-line-shared loops only), Issue 38/39 (collocation augment intervals), Issues 42-44 and 47 (dark fiber).

[3] The New York PSC's order was released one week before Covad filed its reply brief in this proceeding, providing it with a full opportunity to respond to the New York PSC's rulings in favor of Verizon.

[4] Memorandum Opinion and Order, *Application by Verizon Maryland Inc., Verizon Washington, D.C. Inc., Verizon West Virginia Inc., et al., for Authorization To Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia*, 18 FCC Rcd 5212 (2003) ("*Maryland/DC/West Virginia 271 Order*").

[5] Memorandum Opinion and Order, *Application by Verizon New Jersey Inc., et al., for Authorization To Provide In-Region, InterLATA Services in New Jersey*, 17 FCC Rcd 12275 (2002) ("*New Jersey 271 Order*").

[6] Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 (1999) ("*New York 271 Order*"), *aff'd*, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

Covad's failure to present evidence in support of its claims is especially relevant with respect to the many issues where it asserts that it should not be bound by the same terms that apply to all other CLECs in Pennsylvania. As an initial matter, Verizon *has* — contrary to Covad's claims — customized its negotiating template to meet Covad's requests; indeed, Verizon has made multiple changes to well over 100 subsections of Verizon's template. But, despite its repeated assertions that its needs are unique, Covad fails to identify (let alone document) any extraordinary circumstances that support its claimed right to special treatment. Covad thus provides no basis for this Commission to revisit, in a *bilateral* arbitration, determinations that have been reached through industry-wide, collaborative proceedings in which Covad was a participant. Resolving such issues on an industry-wide basis where possible furthers the goal of nondiscrimination contained in federal Telecommunications Act of 1996 ("1996 Act") and state law, eliminates unnecessary and duplicative effort for the Commission and carriers in arbitrations, and allows Verizon PA and Verizon North, as entities that do business with all of the CLECs, to standardize their processes to a large extent, thereby promoting efficiency.

II. ISSUE-BY-ISSUE ARGUMENT

A. Change of Law

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?

Consistent with the nondiscrimination principles of the 1996 Act, change-of-law provisions should enable a rapid and smooth transition when a legal obligation imposed on Verizon has been eliminated; in no circumstance should the change-of-law language permit the eliminated obligation to remain in effect indefinitely.

Consistent with the nondiscrimination principles of the 1996 Act, change-of-law provisions should enable a rapid and smooth transition when a legal obligation imposed on

Verizon has been eliminated. Verizon's proposed language satisfies these criteria, while Covad's proposed language includes no fixed point at which Verizon will be able to benefit from the elimination of a legal obligation. Instead, under Covad's language, Verizon would continue to be subject to that superseded obligation as long as Covad could continue litigating the terms of an amendment to the interconnection agreement reflecting the elimination of that obligation, with the necessary consequence that Verizon could remain subject to that obligation indefinitely. Covad would thus gain a competitive advantage over CLECs already subject to the new legal regime, either through the change-of-law provisions in their interconnection agreements or because they entered into new interconnection agreements after the elimination of the legal obligation.

Covad offers a number of justifications for its current proposed language, none of which has merit. First, Covad places primary reliance on the New York PSC's resolution of this issue in two prior arbitrations. *See* Covad Post-Conf. Br. at 5-7, 9-10. In Covad's arbitration with Verizon New York, the New York PSC applied the rulings it had reached in those prior arbitrations and adopted Covad's position. *See Covad New York Order* at 6-7. This Commission, however, has not followed the New York PSC in this regard. Instead, in a recent order resolving an interconnection arbitration with another CLEC, this Commission approved an Administrative Law Judge's conclusion that, "if a change in law is effective, the Parties' Agreement should recognize it."[7] Under Covad's proposed language, however, the parties' agreement would *not* recognize an effective change in law as long as Covad could raise *any*

[7] Opinion and Order, *Petition of Global NAPs South, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms and Conditions with Verizon Pennsylvania Inc.*, Docket No. A-310771F7000, at 66 (Pa. PUC entered Apr. 21, 2003) ("*GNAPs Pennsylvania Order*"), *aff'g in pertinent part*, Recommended Decision, *Petition of Global NAPs South, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms and Conditions with Verizon Pennsylvania Inc.*, Docket No. A-310771F7000, at 30 (Pa. PUC filed Oct. 10, 2002).

dispute about the precise meaning of that change in law. Indeed, as a practical matter, there is little difference between the language that Covad currently proposes and its original proposal, which this Commission (and numerous others) previously rejected, that a change in law would take effect only once it was final and non-appealable. *See GNAPs Pennsylvania Order* at 66; Verizon Merits Br. at 6 n.7. Both have the effect of delaying Verizon's ability to take advantage of a change in law until well beyond the effective date of the order announcing such a change. *See* Verizon Merits Br. at 5-6.

The New York PSC did not consider these arguments in its recent decision to adopt Covad's proposed language or in its earlier decisions on this issue. *See AT&T New York Order*[8] at 7-8; *Covad New York Order* at 6-7. Although the New York PSC noted "the resourcefulness and persistence of parties to . . . disputes" over whether "an order terminates [such] an obligation," it offered no reason why Covad should be given the incentive to engage in such legal maneuvering even when there is no ambiguity whatsoever about the effect of an order. *Covad New York Order* at 7. Indeed, it is telling that Covad has never identified a single instance in which it was unclear whether an order eliminated a pre-existing legal obligation.[9] For these reasons, this Commission should adhere to its precedent and should reject Covad's proposed language.

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[8] Order Resolving Arbitration Issues, *Joint Petition of AT&T Communications of New York, Inc., et al., Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York Inc.*, Case 01-C-0095 (N.Y. PSC July 30, 2001) ("*AT&T New York Order*").

[9] Even if there were any such ambiguity, the proper course of action is not to hold Verizon to the pre-existing obligation until a separate decision-maker issues an order, but instead for Covad to petition the court or commission that issued the decision for a ruling clarifying or staying the effective date of the order.

Second, Covad points to the FCC's Wireline Competition Bureau's *Virginia Arbitration Order*.[10] *See* Covad Post-Conf. Br. at 5-6. This Commission has previously found that this order — which Covad incorrectly describes as an order of the FCC itself — "is not conclusive upon this Commission." *US LEC Arbitration Order*[11] at 17. Indeed, in a recent court filing, the FCC itself described the Bureau's order as an "interlocutory staff ruling" that is not binding on the FCC, and noted that the FCC "has not yet ruled on . . . whether the *Virginia Arbitration Order* reflects agency policy."[12] Therefore, this Commission is under no obligation to follow the Bureau's order rather than its decision in the *GNAPs Pennsylvania Order*. And, as Verizon has explained, even the Bureau recognized that FCC orders "terminat[ing] existing obligations" "routinely specify effective dates" and never suggested — as would be the case under Covad's proposed language — that CLECs could gain access to a UNE or other service after the effective date. *Virginia Arbitration Order* ¶ 717.

Finally, Covad characterizes Verizon's language as leaving Covad subject to "Verizon's unilateral interpretation of [a] decision" terminating an obligation, and portrays its own language as a neutral proposal that does not favor either party's interpretation of such a decision. Covad Post-Conf. Br. at 7. Covad is wrong. The language Covad has proposed is not neutral, but instead provides Covad with the incentive to adopt unreasonable interpretations of an order

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[10] Memorandum Opinion and Order, *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*, 17 FCC Rcd 27039 (Wireline Comp. Bur. 2002) ("*Virginia Arbitration Order*").

[11] Opinion and Order, *Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. A-310814F7000 (Pa. PUC entered Apr. 18, 2003) ("*US LEC Arbitration Order*").

[12] Brief of Federal Communications Commission and United States of America at 30-32, *Mountain Communications, Inc. v. FCC*, No. 02-1255 (D.C. Cir. filed June 19, 2003).

eliminating a legal obligation solely to prolong its access to the UNE or service at issue. Indeed, it is *Covad* that would have the unilateral ability — and strong incentive — to assert that questions of law exist about the meaning of such an order merely to prolong its access to a service. The indefinite delay that Covad's language makes possible goes well beyond anything necessary to ensure a smooth transition between legal regimes and, instead, serves only to afford Covad opportunities for competitive advantages that are not available to other CLECs. This is of particular importance now, with the imminent release of the FCC's *Triennial Review Order*. Covad should not be permitted to preserve any legal obligations afforded under that order if they are struck down by a reviewing court after the parties' agreement takes effect. *See* Verizon Merits Br. at 8.[13]

B. Billing Issues

With respect to each of these issues, Covad has proposed language that differs from the rule that applies to all other CLECs. Covad's requests for special treatment should be rejected.

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

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

The four-year statute of limitations in 42 Pa. Cons. Stat. § 5525(a)(8) (2002) governs the parties' right to assess previously unbilled charges for services rendered; no modification to the anti-waiver provisions of the agreement is necessary.

[13] Although Covad argues that the opening sentence in § 1.5 of the UNE Attachment is redundant and raises ambiguities, *see* Covad Post-Conf. Br. at 10, that language, in fact, removes any ambiguity about whether the procedures set forth in § 4.7 (which refers generally to a "Service, payment or benefit") also apply to orders eliminating the obligation to provide a UNE or UNE combination. *See* Revised Proposed Language Matrix – Verizon PA at 1 (Agreement § 4.7), 6-7 (UNE Attach. § 1.5).

Consistent with applicable law, as interpreted by this Commission, the four-year statute of limitations in 42 Pa. Cons. Stat. § 5525(a)(8) applies to any claim for charges properly assessed under an interconnection agreement. *See* Verizon Merits Br. at 9. In arguing for the creation of a special rule for its interconnection agreement, Covad has presented here the exact same factual case that it presented in New York — a single, two-year-old incident of backbilling — that the New York PSC recently held "provides no basis for requiring a specific departure from [New York's] six-year statute [of limitations]." *Covad New York Order* at 9. The New York PSC, therefore, rejected Covad's proposal to impose a one-year limitation on backbilling. *See id.* The New York PSC's ruling thoroughly undermines Covad's reliance on various *New York* administrative and judicial decisions and New York regulations, *see* Covad Post-Conf. Br. at 13-15, which are beside the point in any event as they are contrary to this Commission's determinations applying *Pennsylvania* laws and regulations.

Covad acknowledges that, under this Commission's regulations, as under the general statute of limitations, a utility has four years in which to bill residential customers for services rendered. *See* Covad Post-Conf. Br. at 14; 52 Pa. Code §§ 56.35, 56.83(7). A four-year period likewise applies, pursuant to 42 Pa. Cons. Stat. § 5525(a)(8), to Covad's contractual relationships with its other suppliers. Covad thus has up to four years in which to bill *its* customers, yet it seeks a one-year limit on Verizon's ability to bill Covad for the services that Covad purchases from Verizon. Covad offers no reason why it should have the benefit of a *shorter* backbilling period than the period that applies to its customers. Because four years is, as this Commission has found, an appropriate limit for backbilling to end users, it should be an equally appropriate limit for backbilling to carriers, including Covad.

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?

The standards that Covad proposes are unreasonable and are contrary to the performance measurements that this Commission has adopted for Verizon PA.

The Carrier-to-Carrier Guidelines that this Commission has adopted contain two interim performance measurements that establish the time frames in which Verizon PA must respond to CLECs' billing disputes. *See* Verizon Merits Br. at 13-14. Covad, however, continues to assert that it is entitled to performance that goes "beyond what the metrics require." Covad Post-Conf. Br. at 18. But Covad still has provided no evidence specific to Verizon PA's handling of Covad's billing disputes — and no evidence at all with respect to Verizon North — that could justify the creation of a performance standard to apply to Covad's claims alone. Instead, Covad continues to repeat vague claims about billing disputes "with Verizon East" — that is, all fourteen of the former Bell Atlantic jurisdictions. *See* Covad Post-Conf. Br. at 18.[14] Considering these exact same claims, the New York PSC rejected Covad's proposed language. *See Covad New York Order* at 12. This Commission should do so as well.[15]

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[14] The question here is not whether Covad has the right to *seek* such provisions in its interconnection agreement; instead, it is whether Covad has demonstrated any *need* for them — and Covad has not.

[15] The New York PSC, however, stated that "changes in those metrics should be handled through the Agreement's change-of-law provisions," *Covad New York Order* at 12, which could be read to imply that a photocopy of the existing interim measurements should be included in the parties' agreement in New York. Such a result is contrary to this Commission's "preference for a collaborative approach to refinements" and its conclusion that measurements should be easily modified "to reflect accurately the experiences by the industry in the marketplace," and should not be followed here. Final Opinion and Order on Performance Measures and Remedies for Wholesale Performance for Verizon Pennsylvania Inc. (PMO II), *Performance Measures Remedies*, Docket No. M-00011468, at 11, 85 (Pa. PUC entered Dec. 10, 2002) ("*PMO II Order*"); *see also* Verizon Merits Br. at 15 (explaining why performance measurements should not be included in interconnection agreements).

The New York PSC also rejected Covad's claim that it is "important to insert contract language to address" billing disputes with respect to circuits that Covad initially purchased through Verizon's special access tariff, but later converted to UNEs. Covad Post-Conf. Br. at 20; *see also* Verizon Merits Br. at 16-17 (describing this issue). That commission found that "Verizon is right to favor [this issue] being treated through the Carrier Working Group, which provides an ongoing opportunity for all participants in the market to address [the] issue[]." *Covad New York Order* at 12. Although the New York PSC stated that a different result might apply if Covad could show "extraordinary circumstances" and a "unique interest" with respect to this issue, *id.*, the record here contains no such evidence. Indeed, Covad has never asserted that it has submitted a single billing dispute with respect to converted circuits in Pennsylvania or any other state, let alone that it has a unique interest in such disputes. *See* Verizon Merits Br. at 16-17.[16]

If this Commission does follow the New York PSC's decision, however, Verizon PA should be required only to include in the agreement a cross-reference to the terms of the billing dispute resolution measurements in the Carrier-to-Carrier Guidelines, so that they will update automatically whenever this Commission issues an order approving changes to the terms of those measurements. There is no reason for obsolete measurements to persist in the parties' agreement while the parties follow the change-of-law process, especially if this Commission adopts Covad's proposed language, under which that process could drag on indefinitely. Because this Commission determines the precise text of changes to performance measurements (normally as the result of consensus proposals by Verizon PA and the CLECs) and their effective date, there is nothing for the parties to negotiate and no possible ambiguity to be resolved through the change-of-law process.

[16] Covad suggests that the billing dispute resolution measurements this Commission has adopted for Verizon PA do not cover disputes related to billing for collocation and transport, citing its own witness's statement at the New York Technical Conference. *See* Covad Post-Conf. Br. at 20. Covad is mistaken. As Verizon explained, those measurements include all disputes related to UNEs, including collocation and transport; they do not, however, include disputes related to services purchased from Verizon's access tariffs, which also include collocation and transport, because the terms for such disputes are governed by Verizon's tariffs. *See* Abesamis/Raynor Decl. ¶ 15 & Attach. 1. In any event, even if Covad were correct — and it is not — the New York PSC determined that the proper forum for modifying the measurements is

Finally, Covad has offered no justification for the inclusion of its proposed language in its agreement with Verizon North. Indeed, on this issue, Covad's Post-Conference Brief — like its prior filings on this issue (and nearly all of the other issues in this arbitration) — contains no mention of Verizon North *at all*. Therefore, this Commission should reject Covad's proposed language, which in any event is unreasonable because it contains no performance standard, no exclusion for disputes of older bills, and none of the specification inherent in a fully developed performance measurement of the type developed through industry-wide proceedings. *See* Verizon Merits Br. at 17.

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?

Consistent with this Commission's rules, when a Covad billing dispute is resolved in Verizon's favor, Covad should be required to pay late fees on its entire unpaid balance, for the duration that the balance is unpaid.

When Covad disputes charges on a Verizon bill, Covad can withhold payment of those charges until the dispute is fully resolved, either by agreement between the parties or pursuant to a decision of this Commission, the FCC, or a court of competent jurisdiction. *See* Geller Decl. ¶ 12. Even after Verizon rejects a Covad dispute as unfounded, Covad can escalate the dispute and continue to withhold payment. Because Verizon does not get paid until a dispute is fully resolved in its favor, it unquestionably has an incentive to respond promptly to Covad's billing disputes. However, if late payment fees did not apply to disputed amounts for the entire duration of the dispute, Covad would have an incentive to raise meritless claims in order to obtain, in effect, an interest-free loan from Verizon.

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the Carrier Working Group, not an interconnection agreement arbitration. *See Covad New York Order* at 12.

Verizon's proposal is entirely consistent with this Commission's regulations, which provide that a utility may charge late fees of up to 1.5% per month "on the full unpaid and overdue balance of the bill," which includes any unpaid, past-due late-payment charges. 52 Pa. Code § 56.22(a). Covad never addresses this Commission's rules, instead arguing that Verizon's proposal is contrary to the *New York PSC's* rules. *See* Covad Post-Conf. Br. at 21-22. This would be irrelevant to this Commission's resolution of the issue even if it were true — and it is not, as demonstrated by the New York PSC's conclusion that late payment charges on disputed amounts may "continue to accumulate and compound." *Covad New York Order* at 13.

The New York PSC, however, adopted a modified version of Covad's language with respect to another aspect of this issue, finding that late payment charges should be tolled if, 60 days after Covad submits a dispute (rather than the 30 days Covad proposed), Verizon has not responded to that dispute, until Verizon provides such a response. *See id.* at 13-14.[17] This Commission should not follow the New York PSC in this regard. The record contains no evidence of any need for the New York PSC's compromise proposal — Covad has identified no instance in which Verizon North has failed to respond to a Covad billing dispute in a timely fashion and only one, two-year-old instance in which Verizon PA did so. *See* Verizon Merits Br. at 18.

C. Dispute Resolution

With respect to each of these issues, Covad's proposals exceed its rights under federal and state law, and should be rejected. Specifically, Covad seeks to require Verizon to participate

[17] This tolling would have effect only when a dispute is resolved in whole or in part in Verizon's favor; when a dispute is resolved in Covad's favor, Covad will be credited both the amount in dispute and *all* late payment charges assessed with respect to that amount. *See* Geller Decl. ¶ 12; New York Transcript at 230:9-15, 235:16-18.

in binding arbitration, to limit Verizon's ability to sell an exchange in New York, and to reserve a non-existent right to file suit against Verizon for purported violations of 47 U.S.C. § 251.

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?**

Under federal and state law, Verizon cannot be required to submit a dispute to be resolved through binding arbitration.

Under federal and state law, arbitration is "a matter of consent, not coercion." *Volt Info. Scis., Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989); *see* Verizon Merits Br. at 19-20. Accordingly, under the Federal Arbitration Act, *see* 9 U.S.C. § 1 *et seq.*, and Pennsylvania law, arbitration cannot be forced on a party, and Covad's language must be rejected.

Covad relies primarily on the New York PSC's resolution of this issue in two arbitration decisions involving AT&T and Verizon, which the New York PSC recently applied in Covad's arbitration with Verizon New York. *See* Covad Post-Conf. Br. at 24-27; *Covad New York Order* at 14-15. The New York PSC pointed to three provisions of the 1996 Act that it claimed provide state commissions with the authority to require a party to submit to binding arbitration of disputes that arise under an interconnection agreement. *See Covad New York Order* at 15 n.17 (citing 47 U.S.C. § 252(b)(4)(C), (c)(2), (e)(3)). None of the three provides the necessary authority; in fact, the only one that is relevant to the question at issue here supports *Verizon's* position, not Covad's.

The first provision provides that, in resolving open issues, a state commission may "impos[e] appropriate conditions as required to implement [§ 251(c)]." 47 U.S.C. § 252(b)(4)(C). The reference to "appropriate" conditions cannot be construed to authorize mandatory arbitration in light of the savings provision in the 1996 Act, which states that nothing in the Act shall be "construed to modify, impair, or supersede Federal, State, or local law unless

expressly so provided." 1996 Act § 601(c)(1), *reprinted at* 47 U.S.C. § 152 note. Because § 252(b)(4)(C) does not create an express obligation for ILECs to arbitrate disputes that arise under an approved interconnection agreement — in contrast to 47 U.S.C. § 252(b)(1), which expressly mandates arbitration over the terms of the agreement itself — that section cannot be construed to have done so implicitly, when the Federal Arbitration Act expressly limits binding arbitration to instances in which both parties consent.

The second provision requires state commissions, in resolving open issues in an interconnection agreement arbitration, to "establish any rates for interconnection, services, or network elements." 47 U.S.C. § 252(c)(2). Even aside from the savings clause, the reference to "establish[ing] . . . rates" could not, consistent with any plausible definition, be read to authorize binding arbitration with respect to "service-affecting disputes," which is what Covad seeks here. Verizon Proposed Language Matrix – Verizon PA at 3 (Agreement § 14.3). The appropriate *rate* to be *established* for a service at the time an interconnection agreement is adopted has nothing to do with the proper manner for resolving disputes with respect to the *functioning* of that service while that agreement is in force.

The third of the provisions permits a state commission to "establish[] or enforc[e] other requirements of State law in its review of an agreement." 47 U.S.C. § 252(e)(3). State law, however, is of no help to Covad, because Pennsylvania law is identical to federal law with respect to binding arbitration. Indeed, under Pennsylvania law — which Covad never addresses — forcing parties to submit to binding arbitration of a dispute is "violative of common law and statutory principles prevailing in this Commonwealth." *Brown v. D. & P. Willow Inc.*, 454 Pa. Super. 539, 546, 686 A.2d 14, 18 (1996).

Because Covad has identified no provision of federal or state law that supports its proposed language — and because that language is contrary to federal and Pennsylvania arbitration law — this Commission should not follow the New York PSC's resolution of this issue and should reject Covad's proposed language.

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

Under federal law, Verizon cannot be required to condition any sale of its operations on the purchaser consenting to an assignment of the parties' agreement.

Covad has identified no provision of federal law — because there is none — that supports its claim that Verizon should not be permitted to sell an exchange or territory unless the prospective purchaser agrees to assume Verizon's duties under the agreement. The obligation to enter into interconnection agreements applies only to ILECs, *see* 47 U.S.C. § 252(a); after Verizon sells an exchange, it is not the ILEC for that area and, thus, the obligation under § 252(a) no longer applies, *see id.* §§ 251(h), 252(j) (defining ILEC for purposes of § 252). Moreover, no provision of the 1996 Act obligates the new purchaser — that is, the new ILEC — to assume the agreement Verizon entered into with Covad.[18] In the event that Verizon PA or Verizon North were to sell an exchange or territory in Pennsylvania, Covad could protect any rights and interests by participating in the Commission's proceeding regarding the sale. *See* 66 Pa. Cons. Stat. § 1103 (2002). This is precisely what the New York PSC held in rejecting

[18] Contrary to Covad's claim, Verizon never asserted that it is an exempt rural carrier. *See* Covad Post-Conf. Br. at 29. Instead, Verizon pointed to § 251(f) as one possible reason why the *purchaser* of a Verizon exchange would have no obligation to assume the duties under the Verizon-Covad interconnection agreement. *See* Verizon Merits Br. at 21; Verizon Opening Br. at 14.

Covad's proposed language. *See Covad New York Order* at 17.[19] This Commission should reach the same determination here.

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

Whether Covad can bring a future action against Verizon for violation of § 251 of the Act is not within this Commission's jurisdiction, and the agreement should not contain language addressing this issue.

The question whether Covad has the right to bring a suit against Verizon under §§ 206 or 207 based on claimed violations of § 251 is outside of this Commission's jurisdiction. Instead, it is for the federal courts to decide whether such claims may be brought. Accordingly, the agreement should be silent on this question, especially where the only potential consequence of Covad's proposed language could be to impede Verizon's ability to defend against such a cause of action should Covad ever assert one. *See* Verizon Merits Br. at 22-23.

The New York PSC reached this conclusion and rejected Covad's proposed language. *See Covad New York Order* at 19. The New York PSC explained that it "does not appear appropriate" to adopt language that, "in effect, would have us create a federal cause of action where one might not otherwise exist," particularly where it "is unclear . . . that the wording proposed by Covad is accurate or that it would achieve its stated goal" of overruling the Second Circuit's decision in *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 305 F.3d 89 (2d

[19] The New York PSC adopted Verizon's proposed language with one modification. Where Verizon proposed to provide Covad with 150 days' notice of termination following sale, if possible, and a minimum of 90 days' notice, *see* Revised Proposed Language Matrix – Verizon PA at 4 (Agreement § 43.2), the New York PSC required Verizon to provide a minimum of 150 days' notice, *see Covad New York Order* at 17. Although Verizon will strive to provide Covad with 150 days' notice, it would be commercially unreasonable to expect every prospective purchaser to wait a minimum of five months after completing its purchase of an exchange before beginning to operate the network in that exchange and to receive any revenues.

Cir. 2002), *cert. granted on other grounds sub nom. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 123 S. Ct. 1480 (2003) (No. 02-682). *Covad New York Order* at 19.

This Commission should follow the New York PSC's resolution of this issue. Indeed, the arguments Covad raises here are the same ones that the New York PSC rejected, because they have no basis in fact or law. First, Covad's proposed language, as it concedes, is factually inaccurate. Covad has proposed that the agreement should state that "[*n*]*o portion* of . . . the parties' Agreement was entered into 'without regard'" to the requirements of federal law. Revised Proposed Language Matrix – Verizon PA at 4 (Agreement § 48) (emphasis added). Yet, in its brief, Covad claims only that "*many* of the provisions" of the parties' agreement — not all of them — "are based either explicitly or implicitly upon [§ 251(b) and (c)]." Covad Post-Conf. Br. at 31 (emphasis added). Thus, as Covad itself recognizes, a number of provisions of the agreement reflect Verizon's willingness to assume duties that go beyond the requirements of federal law. To take just one example, the interconnection agreement contains provisions related to the billing of calls to Voice Information Service providers (*e.g.*, 976 numbers), even though such provisions are not mandated under 47 U.S.C. § 251(b) and (c). *See* Verizon Response Attach. E at 46-47 (Additional Services Attach. § 5).

Second, Covad's language is based on a misreading of the Second Circuit's decision in *Trinko*. Contrary to Covad's claim, the Second Circuit's holding on this point, which is consistent with uniform federal court precedent, does not turn on whether provisions of an agreement were arbitrated or were negotiated with or without regard to the requirements of federal law. *See* Covad Post-Conf. Br. at 31. Instead, that court recognized that agreements could contain both negotiated and arbitrated provisions, but held that any disputes related to either type of provision must be brought pursuant to the interconnection agreement, not §§ 206

or 207. *See Trinko*, 305 F.3d at 102. For this reason, refusing to adopt Covad's proposed language will not, as Covad claims, give CLECs an incentive to arbitrate every provision of their interconnection agreements. *See* Covad Post-Conf. Br. at 33-34.

D. Operations Support Systems

These issues pertain to three aspects of Verizon's obligations with respect to its operations support systems: loop qualification information, order confirmation notices, and manual processes for obtaining loop qualification information. As to the first, Verizon's proposed language tracks the FCC's descriptions of Verizon's requirements precisely, while Covad's does not. As to the second, Covad's proposed language would materially alter the uniform performance standards that currently apply to Verizon PA and Verizon North. As to the third, Covad's proposal is contrary to federal law because it would provide Covad with better performance than Verizon provides to itself.

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?

The Commission should adopt Verizon's proposed language, which tracks verbatim the FCC's rules governing an ILEC's provision of loop qualification information.

The language currently in the agreement and that Verizon proposes to add to the agreement — language that Covad ignores in its Post-Conference Brief — fully implements Verizon's obligation, as set forth by the FCC in numerous orders, to provide Covad with nondiscriminatory access to loop qualification information. *See* Verizon Merits Br. at 24-26; *see also, e.g., Maryland/DC/West Virginia 271 Order* App. F ¶ 35 ("incumbent carriers [must] provide competitors with access to all of the same detailed information about the loop that is available to the incumbents," "within the same time intervals it is provided to the [incumbent's] retail operations"). Covad's proposed language is inconsistent with the FCC's repeated

descriptions of the requirements of federal law with respect to loop qualification information by purporting also to regulate the *manner* in which Verizon provides that information. *See* Verizon Merits Br. at 25.

In adopting Covad's proposed language in large part for this issue, the New York PSC relied on an FCC order that Covad identified for the first time in its reply brief — and, therefore, without affording Verizon an opportunity to respond — that used the word "manner" when discussing an incumbent LEC's obligation to provide loop qualification information. *See Covad New York Order* at 21 & n.23 (citing *UNE Remand Order*[20] ¶ 430).[21]

In that order, the FCC used the word "manner" to refer to the incumbent LEC's obligation to provide CLECs with the same information available to the incumbent, not, as Covad claims (Post-Conf. Br. at 34), to provide that information through either the same or a functionally equivalent method. *See UNE Remand Order* ¶ 430.[22] In any event, the FCC's passing reference to "manner" does not reflect the requirements of federal law. Indeed, the word "manner" does *not* appear: (1) in the FCC's summary in the *UNE Remand Order* of an

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[20] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *vacated*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

[21] The New York PSC modified Covad's proposed language for § 8.2.3 of the Interconnection Attachment, to state that "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.'" *Covad New York Order* at 21.

[22] In that paragraph, the FCC states that an incumbent LEC must provide CLECs with access to loop qualification information that "exists anywhere within the incumbent's back office and can be accessed by any of the incumbent LEC's personnel," regardless of "whether the retail arm of the incumbent has access to [that] information." *UNE Remand Order* ¶ 430. The FCC goes on to state that "[t]o 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." *Id.* (emphasis added).

incumbent LEC's obligation to provide loop qualification information, *see UNE Remand Order* ¶ 431; (2) in the regulations the FCC promulgated in that order, *see* 47 C.F.R. 51.319(g)[23]; or (3) in the statutory requirement appendix to numerous § 271 orders, where the FCC describes in detail an incumbent LEC's various requirements under the 1996 Act, *see, e.g.*, *Maryland/DC/West Virginia 271 Order* App. F ¶ 35.

For these reasons, this Commission should not follow the New York PSC's resolution of this issue, and should adopt Verizon's proposed language and reject Covad's.

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?

38. What should the interval be for Covad's line sharing Local Service Requests ("LSRs")? [Verizon North petition only]

> Covad's proposals should be rejected because they are inconsistent with the intervals under which Verizon is currently required to return order confirmation notices and, in any event, because such requirements should not be established on an interconnection-agreement-by-interconnection-agreement basis.

Despite Covad's claims, the intervals and performance standards related to local service request confirmations ("LSRCs") that it has proposed are *not* identical to those set forth in either this Commission's Carrier-to-Carrier Guidelines or the FCC's Merger Guidelines. *See* Covad Post-Conf. Br. at 37-38; Verizon Merits Br. at 26-27.[24] The New York PSC agreed with

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[23] That regulation states that "[a]n incumbent LEC . . . must provide the requesting carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent LEC." 47 C.F.R. 51.319(g). Covad claims (Post-Conf. Br. at 35) that this regulation supports its proposed language, but the absence of the word "manner" makes clear that it is *Verizon's* language, not Covad's, that conforms to federal law.

[24] In New York, Covad attempted to blame Verizon for its failure to propose language that is identical to the performance measurements applicable to Verizon's return of LSRCs in New York. *See Covad New York Order* at 23. Those performance measurements, in New York as in Pennsylvania, are publicly available documents and Verizon repeatedly informed Covad that its proposed language would substantively change the standards set forth in those

Verizon, and rejected Covad's proposed language. *See Covad New York Order* at 23 (Issue 13).[25]

Although Covad claims to have "demonstrated that [LSRCs] are critical" to Covad, the record contains no support for this claim — indeed, Covad cites nothing to support this claim. Covad Post-Conf. Br. at 38. Notably, despite its numerous unsubstantiated claims of poor performance by Verizon, Covad has never claimed that either Verizon PA's or Verizon North's performance in returning LSRCs in a timely manner is deficient. Moreover, Covad has never even attempted to explain why the timely return of LSRCs is *more important to Covad* than to other CLECs, all of which receive LSRCs from Verizon for the orders they submit. Finally, although Covad once again makes reference to Verizon being required to report its performance under any standards established in the agreement, there is no language in the agreement, nor has Covad proposed any, that would impose performance reporting requirements on Verizon regardless of whether Covad's proposed language for this issue is adopted. *See id.* at 39; Verizon Reply Br. at 11-12. In any event, Verizon PA and Verizon North already report their performance in returning LSRCs for Covad's orders, pursuant to the terms of the Carrier-to-

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measurements, *see, e.g.*, New York Transcript at 168:22-169:22; Covad never made an effort to conform its proposed language to those measurements. In any event, there is no need to negotiate definitions and exclusions for performance standards to be included in an interconnection agreement. The definitions and exclusions in the Carrier-to-Carrier and Merger Guidelines were established through collaborative proceedings and reflect the consensus of the industry and the rulings of state commissions; Verizon should not be required to re-negotiate those terms on an individual CLEC basis in every interconnection agreement arbitration.

[25] The New York PSC, however, required the parties to include the actual LSRC interval measurements in the parties' agreement. *See Covad New York Order* at 23. For the reasons set forth above, this Commission should not follow the New York PSC's conclusion in this regard, because it is contrary to this Commission's determinations in the *PMO II Order*; if this Commission does follow the New York PSC's conclusion, it should make clear that the agreement should simply cross-reference the performance measurements and need not include a copy of the measurements. *See supra* note 15. This is consistent with Covad's representation at the New York technical conference that its proposed language for this issue would automatically adapt to any Commission-approved changes. *See* New York Transcript at 172:9-15.

Carrier Guidelines and the Merger Guidelines, respectively. *See* Carrier-to-Carrier Guidelines[26] at 28; Merger Guidelines[27] at 5.

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

> Verizon PA's and Verizon North's proposed language, which provide Covad with access to loop qualification on a manual basis in the time intervals that this Commission has established for Verizon PA and that Verizon North provides to itself, and at the same rates that apply to all CLECs, complies with federal law, should be adopted.

The parties' proposed language with respect to the manual processes that Verizon PA and Verizon North offer for providing loop qualification information differs in two material respects.

First, Covad seeks to obtain such information within one business day. *See* Revised Proposed Language Matrix – Verizon PA at 11-12 (UNE Attach. § 3.13.5). But this Commission has established, in the Carrier-to-Carrier Guidelines, the interval in which Verizon PA must respond to a manual loop qualification request — 95% within 48 hours (excluding weekend and holiday hours). *See* Abesamis/Raynor Decl. ¶ 27. Although there is no corresponding measurement in the Merger Guidelines, Verizon North provides the same manual process to itself and to CLECs. Therefore, the appropriate legal standard under the 1996 Act is parity, which means that Covad and other CLECs are entitled to receive information from this manual process in the same roughly five-business-day interval that Verizon provides to itself. *See* Verizon Merits Br. at 31.

Covad simply asserts that "there is no reason why Verizon cannot" meet a faster interval, but that is not the relevant question here. Covad Post-Conf. Br. at 40. With respect to Verizon

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[26] *See* http://www.verizon.com/wholesale/clecsupport/east/performance_assurance/attachments/PA_C2C_Guidelines_0603_compliance.doc.

[27] *See* http://www.verizon.com/wholesale/clecsupport/perf_meas_ug/FCC_West_052902_Blackline.doc.

PA, this Commission has established multilateral procedures for changing the intervals this Commission set in the Carrier-to-Carrier Guidelines, *see PMO II Order* at 86-88, and Covad provides no reason why this Commission should depart from those procedures here. The New York PSC, in resolving similar issues in Verizon's favor, also rejected Covad's attempt to alter the measurements in the Carrier-to-Carrier Guidelines through a bilateral arbitration. *See, e.g.*, *Covad New York Order* at 12. With respect to Verizon North, the federal requirement of parity service obligates Verizon to provide Covad with information "within the *same* time intervals it is provided to [Verizon's] retail operations" — whether Verizon could provide such information faster is not part of the legal standard. *See Maryland/DC/West Virginia 271 Order* App. F ¶ 35 (emphasis added). In any event, Covad has pointed to no evidence — and there is none in the record here — to support its assertion that either Verizon PA or Verizon North could complete the different manual processes that they offer in one business day.

Second, Covad has proposed that, whenever Verizon PA's or Verizon North's electronic databases do not contain information on a loop or the information that is contained is "defective," then the agreement should specify that Covad may use Verizon's manual process at no charge. *See* Revised Proposed Language Matrix – Verizon PA at 11-12 (UNE Attach. § 3.13.5). But, as the FCC has held, and the New York PSC recently found in rejecting Covad's proposed language on another issue in this arbitration, with respect to loop qualification information "perfection is not the standard; parity is." *Covad New York Order* at 35; *Virginia*

271 Order[28] ¶ 34. Therefore, Covad has no right to use Verizon PA's or Verizon North's manual processes for free whenever the electronic databases are not 100% accurate.[29]

E. Unbundled Network Elements

All of the issues addressed here pertain to Verizon's provision of unbundled network elements. In each case, Covad has sought access to Verizon's network that exceeds its rights under applicable law. Indeed, in many instances, the same arguments that Covad raises here have been considered and rejected by this Commission and the FCC in other proceedings.

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

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

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?

Under federal law, Verizon is not required to build facilities in order to provision Covad's UNE orders, and Verizon's bona fide request process satisfies its obligations to permit CLECs to order new UNE combinations.

As Verizon has explained, these issues raise two distinct questions about the scope of Verizon's obligation to provide unbundled access to its network. The first is whether Verizon is

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[28] Memorandum Opinion and Order, *Application by Verizon Virginia Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Virginia*, 17 FCC Rcd 21880 (2002) ("*Virginia 271 Order*").

[29] Consistent with this Commission's Verizon PA UNE order, neither Verizon PA nor Verizon North currently charges for obtaining loop qualification information through the manual processes that they offer. *See* Tentative Order, *Generic Investigation Re: Verizon Pennsylvania's Unbundled Network Element Rates*, Docket No. R-00016683, at 202 (Pa. PUC entered Nov. 4, 2002). That decision was not, as Covad claims (Post-Conf. Br. at 40) based on any supposed inaccuracies with Verizon PA's loop qualification information, but instead because of this Commission's conclusion that loop qualification would not be necessary in a forward-looking network. *See id.* If this Commission were to modify its conclusion in this regard and authorize Verizon PA or Verizon North to establish a generally applicable rate for these manual processes, Covad should be required to pay this rate, which would apply to all other CLECs in Pennsylvania, and should not be permitted to rely on its interconnection agreement to avoid payment of that rate.

required to build facilities in order to provision Covad's UNE orders when the necessary facilities are not available. The second pertains to the terms on which Verizon provides Covad with access to new UNE combinations, and is not related to the "facility build" issue. With respect to each issue, the New York PSC sided with Verizon and rejected Covad's proposed language. *See Covad New York Order* at 26-27 (Issues 19 and 23).

As to the first question, Covad recognizes that, in the *Triennial Review Order*, the FCC recently adopted further rules regarding this issue. *See* Covad Post-Conf. Br. at 47; Verizon Merits Br. at 35. In light of the imminent issuance of those rules, there is no reason for this Commission to resolve this issue in a bilateral arbitration; whatever rules the FCC issues, unless stayed or vacated by a court of competent jurisdiction, will form the basis for any language contained in the parties' agreement with respect to this issue. The New York PSC, confronted with the same arguments that Covad presents here, concluded that "Verizon is . . . correct that the no-facilities issue is being handled generically" and found that the agreement should not include Covad's language, but instead "should include a provision incorporating the generic resolution of the no-facilities issue when it is reached." *Covad New York Order* at 27.[30]

In addition, Covad has demonstrated no need for its proposed language. Indeed, Covad has presented no evidence that Verizon's UNE provisioning policies have affected Covad's operations in Pennsylvania. Nonetheless, Covad continues to assert that Verizon "has rejected a

[30] Verizon has previously explained why Covad's language is contrary to the state of the law prior to the FCC's adoption of the *Triennial Review Order*. *See* Verizon Opening Br. at 22-24; Verizon Reply Br. at 14; Verizon Merits Br. at 33-35. Contrary to Covad's claim (Post-Conf. Br. at 46 n.145), the Sixth Circuit's conclusion in *Michigan Bell Telephone Co. v. Strand*, 305 F.3d 580 (6th Cir. 2002), that "[t]he Act does not forbid [an ILEC] from discriminating between a CLEC requesting unbundled network elements and [the ILEC's] own retail customers," *id.* at 593, cannot be limited to UNEs that have no retail analog. Instead, that court rejected a CLEC's claim — identical to the claim Covad is raising here — that an ILEC's obligation to perform work in order to provide a UNE to a CLEC depends on whether the ILEC performs that work in provisioning its retail customers' orders. *See id.* at 591-93.

large number of Covad orders for high capacity UNEs" in unspecified states, "claiming that no facilities are available." Covad Post-Conf. Br. at 43. Covad made the same claim in arbitrating these issues with Verizon Florida; when the Florida commission staff inquired on this point, Covad admitted that Verizon had *never* rejected an order that Covad placed for a high capacity UNE in Florida. *See* Late Filed Exhibit No. 11, *Petition for Arbitration of Open Issues Resulting from Interconnection Negotiations with Verizon Florida Inc. by DIECA Communications, Inc. d/b/a Covad Communications Co.*, Docket No. 020960-TP, at 7 (Fla. PSC filed May 19, 2003) (response to staff interrogatory 53(c)).

The second question raised here has to do with Verizon's provision of UNE combinations and, as the New York PSC found in adopting Verizon's language, has nothing to do with the facilities build issue discussed above. *See Covad New York Order* at 27. In 2002, the Supreme Court reinstated the FCC's rules requiring ILECs, subject to certain limitations, to combine UNEs for CLECs in any technically feasible manner, which the Eighth Circuit had twice vacated. *See Verizon Communications Inc. v. FCC*, 535 U.S. 467, 534-38 (2002); *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 758-59 (8th Cir. 2000) (subsequent history omitted). In response to the Supreme Court's decision and to comply with the reinstated rules, Verizon informed CLECs that, to the extent they sought access to a technically feasible combination of UNEs that was not specifically available under a tariff or an interconnection agreement, they should make a request through the bona fide request ("BFR") process. *See* Bragg/Kelly Decl. ¶ 7 & Attach. 2. In approving Verizon's § 271 application for Virginia, the FCC reviewed and approved Verizon's use of the BFR process to provide new combinations, rejecting a CLEC's claim that this process

is "extended and burdensome . . . [and] violates section 51.315(e) of the Commission's rules." *Virginia 271 Order* ¶ 60.[31]

As the above discussion makes clear, the new combinations issue is distinct from the question whether Verizon must build facilities to provision a UNE. Covad, however, confuses the two issues, claiming that the BFR process "was not designed for facilities that would normally be provided pursuant to Applicable Law but for Verizon's no facilities policy." Covad Post-Conf. Br. at 49. Verizon has never claimed that a CLEC should submit a BFR when the facilities necessary to provision a UNE order are unavailable. Instead, a CLEC should submit a BFR when it seeks to order a combination of UNEs that has not been specifically provided for in Verizon's tariff or in the CLEC's interconnection agreement. Because Covad's proposed language appears to be intended to provide it with a basis to claim that it can order new UNE combinations without submitting a BFR, as is required of all other CLECs in Pennsylvania, that language should be rejected. Indeed, as the New York PSC found, "there is no need to afford Covad a method of [ordering new UNE combinations] that differs from the process used by other CLECs." *Covad New York Order* at 27.

[31] Covad's claim (Post-Conf. Br. at 49 n.155) that the *Virginia 271 Order* "did not find that the BFR process was not burdensome" is thus clearly contradicted by the text of that order. The New York PSC also rejected Covad's claim, finding that "it appears that the BFR process is adequate for its intended purpose of requesting new UNE combinations." *Covad New York Order* at 27.

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

Covad's proposed language, which could require Verizon to perform dispatches for Covad for free and could require Verizon to pay penalties to Covad even when Verizon provides Covad with superior service, should be rejected, because it is vague and contrary to federal law.

The parties' remaining disputes with respect to this issue center around a new paragraph that Covad has proposed. *See* Revised Proposed Language Matrix – Verizon PA at 7 (UNE Attach. § 1.9); Covad Post-Conf. Br. at 50; Verizon Merits Br. at 35-37. As Verizon explained, the Commission should reject this additional paragraph because the three changes it proposes are ambiguous and contrary to federal law. The New York PSC generally agreed with Verizon on these points, for the most part rejecting Covad's position and its proposed language. *See Covad New York Order* at 29-30. This Commission should reject Covad's proposed language in full, especially because Covad has offered no Pennsylvania-specific arguments in favor of its language, instead repeating the same arguments with respect to *New York* law that the New York PSC found largely unpersuasive and that are irrelevant here. *See* Covad Post-Conf. Br. at 51-54.

The first change that Covad proposes, which would give Covad the right to "request a new appointment window outside of the normal provisioning interval by contacting Verizon's provisioning center directly," Revised Proposed Language Matrix – Verizon PA at 7-8 (UNE Attach. § 1.9), should be rejected because it is vague and because it appears designed to require Verizon to provide Covad with guaranteed appointment windows despite the fact that Verizon does not offer such guarantees to its retail customers or to any other CLEC, *see* Verizon Merits Br. at 36-37 & n.38. The New York PSC agreed that Covad's proposed language "comes too close to a guarantee [of an appointment window], which Verizon reasonably declines to offer." *Covad New York Order* at 29.

Although the New York PSC found that the agreement should state that, in rescheduling an appointment date after Verizon misses an appointment, "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," *id.* at 29-30, the New York PSC appears to have misunderstood the manner in which Covad (and all other CLECs) currently reschedule appointments. First, CLECs are not required to submit a new LSR to reschedule an appointment; instead, they submit a supplement (or "SUPP") to an existing LSR. Second, Covad already can submit such supplements manually, by telephoning Verizon's provisioning center (*i.e.*, its National Marketing Center), but most CLECs prefer to submit such supplements using Verizon's electronic interfaces, in light of the possibility of error that is inherent in manual processes. Third, CLECs are never required to accept the appointment date that results from application of the standard provisioning interval; they may always request a longer-than-standard provisioning interval. For these reasons, there is no need for adoption of the language that the New York PSC developed. Apparently recognizing that its proposal might not reflect an accurate understanding of Verizon's provisioning processes, the New York PSC permitted the "parties [to] agree on some other terms." *Covad New York Order* at 29.

The other two changes that Covad has proposed would require Verizon to perform a dispatch for free and to pay a penalty if it misses subsequent appointment windows.[32] The New York PSC rejected Covad's proposal in large part. Instead of adopting Covad's proposed

[32] Contrary to Covad's claim (Post-Conf. Br. at 51-52), Verizon's proposed language expressly states that Covad need not pay for a dispatch when it is Verizon's fault that an initial appointment date was missed. *See* Revised Proposed Language Matrix – Verizon PA at 7 (UNE Attach. § 1.9) ("Covad shall not be required to pay the non-recurring dispatch charge for dispatches that do not occur."). The dispute between the parties is whether this initial miss means that Covad is not required to pay the generally applicable rate for a subsequent dispatch.

language, the New York PSC held that, if, through no fault of Covad or its end user customer, Verizon missed *two* appointment *dates* (not *one* appointment *window*, as Covad proposed), then *one-half* (not *all*, as Covad proposed) of the generally applicable dispatch charge would be waived when Verizon provisioned the order. *See Covad New York Order* at 29. Again, however, the New York PSC permitted the "parties [to] agree on some other terms." *Id.*

This Commission should follow the New York PSC's rejection of Covad's proposal, but should not follow that Commission's recommendation that part of the dispatch charge be waived. There is no evidence in the record that supports the need for such a term. Indeed, Covad provides no evidence about Verizon's performance in Pennsylvania at all. *See* Verizon Merits Br. at 38. Nor does Covad even allege that Verizon's performance in Pennsylvania in meeting provisioning appointments is worse for CLECs than it is for its retail customers. Because the applicable legal standard is parity — and that standard applies in the aggregate, not on individual orders — if Verizon's performance for Covad, overall, is as good as (or better than) Verizon's performance for itself, then Verizon is meeting the requirements of federal law and Covad is not entitled to any remedy, whether a reduction in the price or a penalty payment. *See, e.g.*, *Massachusetts 271 Order*[33] ¶ 137. For these reasons, Covad's proposed language should be rejected in its entirety.

[33] Memorandum Opinion and Order, *Application of Verizon New England Inc., et al., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988 (2001) ("*Massachusetts 271 Order*"), *aff'd in part, dismissed in part, and remanded in part, WorldCom, Inc. v. FCC*, 308 F.3d 1 (D.C. Cir. 2002).

23. What technical references should be used for the definition of the ISDN, ADSL and HDSL loops?

The agreement should reference both industry standards and Verizon's technical documents, as Verizon's technical documents define the characteristics of the loops in Verizon's network, which are the loops available to both CLEC and retail end-user customers.

The dispute between the parties is whether the definition of certain loop types in the agreement should refer only to industry standards (as Covad proposes), or also to the Verizon technical documents that define loop characteristics specific to Verizon's network (as Verizon proposes). *See* Verizon Merits Br. at 38-39. Covad's sole basis for objecting to the inclusion of references to Verizon's technical documents is its claim that Verizon seeks "to dictate unilaterally what standards apply with respect to advanced services." Covad Post-Conf. Br. at 55. But the evidence in the record here demonstrates that Verizon's technical documents are *consistent with* the industry standards. *See* Pennsylvania Transcript at 164:17-165:6; *see also id.* at 167:12-168:22, 171:24-172:6; Verizon Merits Br. at 39. Verizon, therefore, is not dictating standards — indeed, Covad has still failed to identify *any* instance in which Verizon's technical documents would have prevented Covad from deploying a technology that was consistent with industry standards. Because Verizon's technical documents "go the next step," and define "how those [industry] standards would apply to the loop[s]" that Covad orders from Verizon, Pennsylvania Transcript at 164:17-165:6, the interconnection agreement should reference those documents, and the Commission should adopt Verizon's proposed language.

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 the loop type categories?

Because Covad benefits in multiple ways from the creation of a new loop type when it deploys a new loop technology, the Commission should reject Covad's proposed language, which would require Verizon to process the orders to convert Covad's loops from one loop type to another without any compensation.

As both parties agree, this issue has been almost entirely resolved.[34] The only remaining issue is whether, when Verizon develops a new loop type in response to Covad's request to deploy a new loop technology, Covad must pay the costs associated with converting prior orders to the new loop type. *See* Verizon Merits Br. at 39-41; Covad Post-Conf. Br. at 55-57. The New York PSC agreed with Verizon that "a provision exempting Covad from all cost responsibility here would be inappropriate" and rejected Covad's language for this issue, which is the same language that Covad proposes here. *Covad New York Order* at 31 (Issue 24). The New York PSC deferred a decision on "the precise level of cost to be borne by" Covad and other CLECs until such time as Verizon sought to establish a charge for the development of the new loop type and for the orders to convert existing loops to the new loop type. *See id.*

This Commission should also reject Covad's proposed language. As Verizon explained, because Covad is the cost-causer in with respect to new loop types — and benefits from their development — it should pay the Commission-established rates for the conversion orders as well

[34] Verizon, however, disputes Covad's characterization of the parties' agreement, insofar as Covad's claim that "Verizon acknowledges that it cannot refuse a request made by Covad to deploy a certain technology over a loop if it complies with industry standards," Covad Post-Conf. Br. at 56, can be read to suggest that Verizon agrees that Covad is permitted, for example, to run an SDSL technology over a loop that it ordered using the ADSL loop type. Under federal law, Covad is obligated to inform Verizon of the advanced services that it deploys over the loops that it orders from Verizon; the loop type is the means by which Verizon tracks those services. *See* Verizon Opening Br. at 36-37; New York Transcript at 17:3-5, 43:4-7. The parties have agreed to language that requires each to follow applicable law in this regard.

as the charges related to the development of the new loop type. *See* Verizon Merits Br. at 41 & n.42.

Covad's arguments for why it should be permitted to avoid paying these costs have no merit, as the New York PSC recognized. First, Covad claims that it should not have to pay because the need for the conversion orders is supposedly the result of "Verizon's inability to offer the new technology on a timely basis." Covad Post-Conf. Br. at 58. But, as Verizon has explained, Verizon does not develop new loop types on its own; instead, the necessary codes are developed by national, industry-wide bodies. *See* Verizon Merits Br. at 40. Covad's claim that Verizon is seeking to impose a penalty on Covad for being first to market, *see* Covad Post-Conf. Br. at 56, 58, is equally baseless. Because loop types are developed by the industry, whether a loop type exists for a new loop technology is independent of whether Verizon is already marketing that technology. *See* Verizon Merits Br. at 40-41.

Second, Covad claims that it "gains nothing from the conversion" to the new loop type. Covad Post-Conf. Br. at 58-59. But the record demonstrates that this is not the case and that Covad benefits in multiple ways from the creation of a new loop type. *See* Verizon Merits Br. at 41.

Finally, Covad claims that it should not be required to pay for such conversions because the costs are unknown. *See* Covad Post-Conf. Br. at 58-59. Covad raised this same argument before the New York PSC, which was unpersuaded and, as noted above, deferred its decision on the precise costs Covad must pay until such time as Verizon seeks to establish rates. *See Covad New York Order* at 31. Verizon's position is that there is no need to develop a new rate, because the existing service order charges for converting from one xDSL loop type to another, which are set forth in Appendix A to the Pricing Attachments to each agreement and are not subject to

dispute here, should govern any conversion orders submitted under this section. *See* Verizon Merits Br. at 40 & n.41.

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

With respect to Verizon North, Covad's proposals should be rejected because they are inapplicable to Verizon North's operations in Pennsylvania; Covad's proposals should also be rejected because they are overly detailed and would require Verizon PA and Verizon North to use an inefficient manual process where an automated process is available.

Both Verizon PA and Covad have proposed language pursuant to which Verizon is required to perform a cooperative test before it completes provisioning of xDSL loops. *See* Revised Proposed Language Matrix – Verizon PA at 13-15 (UNE Attach. § 3.13.5). The main difference between the two proposals is that Covad's language would require Verizon to conduct *manual* cooperative tests during the life of the agreement, while Verizon's proposed language would permit Verizon to conduct the tests using Covad's *automated* Interactive Voice Response ("IVR") unit. *See* Verizon Merits Br. at 44-45. The record in this proceeding, however, demonstrates that the IVR offers the exact same testing capabilities as the manual test, but is considerably more efficient than the manual process. *See* New York Transcript at 119:17-24, 121:12-18, 131:19-20; Verizon Merits Br. at 44-45. Covad does not dispute either of these points.[35] The New York PSC, reviewing the same arguments Covad raised here, rejected

[35] Covad's claim (Post-Conf. Br. at 62) that Verizon's language does not sufficiently specify what tests will be performed during cooperative testing is specious. The record demonstrates that, regardless of whether the test is performed manually or through the IVR, it is *Covad*, not Verizon, that conducts the testing and, therefore, has control over what will be tested. *See* New York Transcript at 121:12-16, 125:13-14, 126:20-21, 127:7-8.

Covad's position and adopted Verizon's proposed language. *See Covad New York Order* at 33 (Issue 27).[36]

This Commission should also reject Covad's proposed language with respect to Verizon PA, which "preclud[es] the use of technological advances that could make the [cooperative testing] process more efficient." *Covad New York Order* at 33. Covad, however, claims that Verizon should be required to use the less efficient, manual cooperative testing process "so that it can verify that the Verizon Technician is at the correct demarcation point." Covad Post-Conf. Br. at 62. Although Covad asserts that there are "many instances" where Verizon's technician is not at the correct location, *id.* at 63, the record contains no data supporting this assertion. The declarations submitted with Covad's Initial and Reply Briefs do not even make this claim, let alone substantiate it. *See* Evans/Clancy Joint Decl. ¶¶ 46-51; Evans/Clancy Joint Reply Decl. ¶¶ 35-40. Nor was this claim made by Covad's witnesses during the technical conference in either Pennsylvania or New York. *See* Pennsylvania Transcript at 214:18-222:17; New York Transcript at 117:13-138:16. Thus, Covad has provided no justification for requiring Verizon PA to continue to use the older, less efficient, manual process for cooperative testing.[37]

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[36] The New York PSC adopted Verizon's proposed wording "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.'" *Covad New York Order* at 33. Because Covad's IVR does not currently provide Verizon with a "serial number," which indicates that Covad has accepted the loop's status, the person-to-person exchange that the New York PSC contemplated provides a means for Verizon to receive this information. *See* New York Transcript at 130:24-131:11, 137:2-15.

[37] Although Covad states that it "envisions transitioning" to the IVR for cooperative testing, it plans to do so only when it, unilaterally, "determines that Verizon's performance is acceptable." Covad Post-Conf. Br. at 63. Verizon PA's ability to utilize newer, more efficient testing technology should not be held hostage to Covad's view of what constitutes acceptable performance, which is at odds with the performance obligations established in the 1996 Act and the FCC's rules and orders. *See, e.g.*, Comments of Covad Communications Co. at 14, 19, *Performance Measurements and Standards for Unbundled Network Elements and*

Covad's proposed language should be rejected with respect to Verizon North as well. As Verizon has explained, the cooperative testing procedure addressed in Covad's proposed language is not employed in Verizon's former GTE jurisdictions, such as Verizon North's territory in Pennsylvania. *See* Verizon Merits Br. at 42. Covad has offered no evidence supporting the need for the institution of such a process in Verizon North's territory in Pennsylvania. Nor does Verizon North have a legal obligation to implement a cooperative testing process for xDSL loops, which was voluntarily implemented in the former Bell Atlantic jurisdictions. *See, e.g., New York 271 Order* ¶ 319. For these reasons, Verizon North's proposed language for this issue should be adopted.

Finally, Verizon PA's and Verizon North's performance in provisioning loops that are subject to cooperative testing is measured in multiple respects under the Carrier-to-Carrier Guidelines and the Merger Guidelines, respectively, which means that any problems that might arise with the xDSL loops that Verizon provisions for Covad will be easily documented by Covad and this Commission. For this reason, and because repairing defective loops is expensive for Verizon, Verizon has every bit as strong a motivation as Covad to ensure that it provisions working loops to Covad.[38]

Interconnection, CC Docket Nos. 01-318, *et al.* (FCC filed Jan. 22, 2002) (claiming that CLECs are entitled to better-than-parity service from ILECs).

[38] Covad's proposed language would also require Verizon to perform cooperative testing as part of its maintenance and repair activities. *See* Revised Proposed Language Matrix – Verizon PA at 14 (UNE Attach. § 3.13.13); Verizon Merits Br. at 43 n.44. As Verizon explained, because Covad did not raise this issue in its petition for arbitration, this issue is not properly before the Commission. *See* 47 U.S.C. § 252(b)(4)(A) ("The State commission shall limit its consideration of any [arbitration] petition . . . to the issues set forth in the petition and in the response."); Verizon Merits Br. at 43 n.44. The fact that parties have modified their proposed language with respect to open issues, in a largely successful attempt to settle those issues, does not authorize Covad to open a new issue, which was not raised in its Petition. Covad may regret that it did not initially seek to arbitrate this issue, but expanding the reach of its proposed language from provisioning to the distinct operations support system function of

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

Although Covad may dispute Verizon's determination that particular loops do not have the necessary technical specifications to handle one or more xDSL services, Covad should not be permitted to eliminate the agreed-upon requirement that it prequalify its orders for xDSL-capable loop types.

As Verizon has explained, the parties have agreed that Covad will use Verizon PA's and Verizon North's respective loop qualification information to "prequalify" its orders for xDSL loop types. *See* Revised Proposed Language Matrix – Verizon PA at 12 (UNE Attach. § 3.13.7); Verizon Merits Br. at 45.[39] Although Verizon has proposed language providing that Covad may dispute Verizon's qualification *information* with respect to a particular loop or group of loops, Covad seeks the broader right to challenge the prequalification *requirement* itself. The New York PSC rejected Covad's proposed language. *See Covad New York Order* at 35 (Issue 28).

As the New York PSC found, reviewing the same arguments that Covad presents here, Covad has "not shown a need" for the right it seeks here. *Id.* Although Covad claims that there are "significant problems" with the database Verizon PA uses for mechanized loop prequalification, the only support it offers for those allegations are its eleven-month-old comments opposing Verizon's § 271 application *in Virginia*, which Covad simply asserts apply in Pennsylvania as well. *See* Covad Post-Conf. Br. at 64-66 & nn.190-92. Covad, however,

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maintenance and repair in an attempt to correct that mistake cannot be described as an attempt to settle this issue.

In any event, Covad devotes only one sentence in its Post-Conference Briefs to the substance of its request. *See* Covad's Post-Conf. Br. at 60 ("Additionally, cooperative testing can assure complete maintenance processes on such loops."). Covad's failure to demonstrate any need for its requested language provides an independent ground for rejecting that language.

[39] Because Covad has agreed to prequalify its xDSL loop orders, this Commission need not consider Covad's argument that Verizon cannot require Covad to prequalify those orders. *See* Covad Post-Conf. Br. at 66-67.

neglects to mention that the FCC, in approving Verizon's application, rejected each of Covad's claims. *See Virginia 271 Order* ¶¶ 32, 34, 36. Covad makes no such assertions with respect to the different database that Verizon North uses for mechanized loop prequalification — indeed, it has provided no evidence at all with respect to that database. For these reasons, Covad's proposed language should be rejected and Verizon's language should be adopted.

34. In what interval should Verizon provision loops?

> Covad's proposed language should be rejected because it is contrary to federal law, which requires Verizon to provision loops in the interval that it provides to itself or in the Commission-established interval; Covad is not entitled to a shorter interval.

In this issue, Covad had proposed the establishment of three separate loop provisioning intervals: no more than ten business days for loop orders where Covad requests conditioning or loop extensions; no more than five business days for stand-alone loops where Covad does not request such work; and two business days for Covad's orders for line-shared loops. *See* Verizon Merits Br. at 47-48. As Verizon explained, Covad's proposed intervals are contrary to federal law and this Commission's decisions, because they would provide Covad with intervals that are shorter than those Verizon provides to itself or than those this Commission has established. *See id.* at 46-47. Furthermore, with respect to Verizon North, Covad's ten- and five-business-day proposals would dramatically change the manner in which Verizon North currently sets provisioning intervals for such loops, at substantial cost to Verizon North and without any justification in the record for such a change. *See id.* at 47-48.

In its Post-Conference Brief, Covad does not even mention, let alone defend, its first two proposals. Verizon presumes Covad has abandoned those proposals; in any event, as a result of Covad's failure to address those proposals in its brief, they are waived. *See* 52 Pa. Code § 51.501(3). Instead, Covad discusses only its proposal to reduce Verizon PA's and Verizon

North's existing three-business-day provisioning interval for line-shared loops to two business days. *See* Covad Post-Conf. Br. at 40-43. The New York PSC rejected Covad's proposal, finding that Covad "has not made a case for departure here from the generic standard" of three business days. *Covad New York Order* at 42 (Issue 32).[40]

This Commission should also reject Covad's proposed language. The record in this proceeding, as in New York, demonstrates that the existing, three-day interval — which is the same interval that Verizon provides to its retail customers — is necessary for Verizon PA and Verizon North to ensure that they can provision on time all of the work, not simply line-sharing orders, that must be done in each of their central offices on a given day. *See* Verizon Merits Br. at 49-50.[41] Although Covad suggests that the forecasts it provides are sufficient to alleviate this concern, its own witness testified that those forecasts are provided "every six months." Covad Post-Conf. Br. at 42-43; New York Transcript at 164:11-12. Such forecasts cannot provide Verizon with notice of spikes in demand that occur on a specific day or week. *See* New York Transcript at 162:8-11. Covad also asserts that Verizon does not dispute Covad's claim that certain preparatory work for hot cuts, which Verizon can complete in two days, is no more complicated than provisioning a line-shared loop, which Covad claims Verizon also should be able to complete in two days. *See* Covad Post-Conf. Br. at 41.[42] But Verizon's witnesses

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[40] In New York, Covad sought to change Verizon New York's line-shared loop provisioning interval only; it did not seek to change Verizon New York's provisioning intervals for other types of loops.

[41] As Verizon's witness explained, it is not, as Covad implies, merely that certain of Verizon's central offices are unmanned. *See* New York Transcript at 162:18-163:3; Covad Post-Conf. Br. at 42. Instead, the three-day interval ensures that Verizon can handle "the cumulative impact of all the work that is being done in the [central offices] that day." New York Transcript at 163:2-3.

[42] Covad also points (Post-Conf. Br. at 41-42) to BellSouth's offer of a two-day provisioning interval for line-shared loops to support its request here, but, as Verizon has explained, there are numerous potential differences between Verizon's and BellSouth's networks

disputed that claim the very first time Covad raised it, explaining that line-sharing orders are "more complicated" than hot cut orders and that Verizon must run "more wires . . . for line sharing than . . . for hot cuts." New York Transcript at 157:11-22; *see* Verizon Merits Br. at 50 n.50.

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

LSTs should be conducted pursuant to the process developed in New York and to which Covad agreed; because Covad's proposed language is inconsistent with that agreed-upon process and should be rejected.

Verizon's proposed language states that it will "perform[] line and station transfers in accordance with the procedures developed in the DSL Collaborative in the State of New York, NY PSC Case 00-C-0127." Revised Proposed Language Matrix – Verizon PA at 13 (UNE Attach. § 3.13.12); Verizon Merits Br. at 50-51. Covad, however, has proposed language that is inconsistent with the LST process established through the DSL collaborative and adopted by the New York PSC in three respects: Covad seeks (1) to obtain LSTs at no cost, (2) to determine when Verizon will perform an LST, and (3) to provide Verizon no additional time to provision a stand-alone xDSL loop that requires an LST. *See* Verizon Merits Br. at 51-52. Because Covad was a party to the settlement with respect to LSTs that emerged from the DSL collaborative, and has been applied throughout Verizon's footprint (that is, in both the former Bell Atlantic and former GTE territories), it should be bound to that agreement and its language should be rejected.

The New York PSC agreed with Verizon on the first issue and rejected Covad's attempt to obtain LSTs at no charge. As the New York PSC explained, "[i]t is difficult to read the

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that could account for BellSouth's shorter provisioning interval, which BellSouth also offers to its retail customers, *see* Verizon Merits Br. at 50 n.49; New York Transcript at 155:3-23.

agreement in the DSL collaborative other than as contemplating a charge for LSTs, and Covad's effort to avoid that charge is unpersuasive." *Covad New York Order* at 37 (Issue 29).

Moreover, Covad's claim that Verizon should not be permitted to charge for LSTs is based on its mistaken belief that Verizon does not charge its own customers for LSTs. *See* Covad Post-Conf. Br. at 69. When Verizon performs an LST to provision an xDSL order placed on behalf of Verizon Online (Verizon's affiliated Internet service provider) by its retail broadband group, Verizon will assess the same charge for that LST that would apply if the xDSL order were submitted by Covad or any other CLEC. The fact that Verizon Online does not pass those LST charges on to individual retail customers is irrelevant; Covad is equally able to charge all of its customers the same rate, regardless of whether some customers' orders required an LST.[43]

The New York PSC agreed with Covad on the other two issues, *see Covad New York Order* at 37, but did not explain why it found that Covad's positions on those issues were compatible with the agreement reached in the New York DSL collaborative. That agreement states explicitly that that an LST "will be applied *to all cases* where Verizon encounters" the need to perform that process to provision a CLEC's order. *New York DSL Order*[44] Attach. 2 (emphasis added). Although Verizon is currently developing a process that would permit a CLEC to indicate, on an order-by-order basis, whether it wants Verizon to perform an LST, that

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[43] Covad also cites this Commission's "Tentative Order" to disallow an LST charge. *See* Covad Post-Conf. Br. at 69-70 & n.200. If this Commission concludes in that proceeding, or in the future, that Verizon *can* impose such a charge on CLECs — particularly in light of the fact that Covad and other CLECs *agreed* to pay it — then nothing in Covad's interconnection agreement should insulate it from paying that charge.

[44] Opinion and Order Concerning Verizon's Wholesale Provision of DSL Capabilities, *Proceeding on Motion of the Commission to Examine Issues Concerning the Provision of Digital Subscriber Line Services*, Case 00-C-0127, Opinion No. 00-12 (N.Y. PSC Oct. 31, 2000) ("*New York DSL Order*").

process, when it is complete, will *change* the agreement reached in the New York DSL collaborative. *See* Verizon Merits Br. at 52. The agreement reached in the New York DSL collaborative should apply until that new process is fully developed and implemented.[45]

That agreement also explicitly recognizes that performing an LST "involves *additional* work," *New York DSL Order* Attach. 2 (emphasis added); as Verizon explained, Verizon may be required to rearrange facilities currently used to provide service to other customers so that a copper facility may be made available for use by Covad, *see* Verizon Merits Br. at 52 & n.52. Although Covad concedes that Verizon may take additional time when an LST is necessary to provision a line-shared loop, the agreement does not distinguish between line-shared loops and other xDSL loops — all "involve[] additional installation work." *New York DSL Order* Attach. 2; Verizon Merits Br. at 52.

In both instances, Covad's requests are contrary to the plain language of the agreement it and other CLECs reached with Verizon. Neither Covad nor the New York PSC explained why Covad should be permitted to depart from the terms of that agreement.

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[45] Verizon is under no legal obligation to perform an LST; instead, Verizon performs an LST when no facilities are available to provision the CLEC's order — as explained above, Verizon is entitled under federal law to reject an order under those circumstances. Nonetheless, Verizon agreed in the DSL Collaborative to go beyond the requirements of federal law and perform LSTs for CLECs. However, because Verizon might not determine that an LST is required until its technician has been dispatched to provision a CLEC's xDSL order — because, for example, the technician finds that the copper facility that Verizon planned to use is defective — the agreement reached in the DSL Collaborative, at the insistence *of the CLECs*, was that Verizon would perform LSTs as a matter of course to prevent the disruptions to the provisioning process that would occur if Verizon were required at that point to ask the CLEC if it wanted Verizon to perform the LST.

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)?

> Under federal law, Verizon has no obligation to provide Covad with so-called "line partitioning" — *i.e.*, unbundled access to the high-frequency portion of the loop when a reseller provides voice service on that loop.

The FCC has squarely held that Verizon has no obligation to provide so-called line partitioning, and the FCC has recently held that the high frequency portion of the loop is not a UNE at all. *See* Verizon Merits Br. at 53. As the FCC explained:

> *We disagree with Covad* that Verizon is obligated to provide access to the high frequency portion of the loop when the customer's voice service is being provided by a reseller, and not by Verizon. Our rules *do not require* incumbent LECs to provide access to the high frequency portion of the loop when the incumbent LEC is not providing voice service over that loop. . . . *We agree*, therefore, *with Verizon* that it *is not required* to provide access to the high frequency portion of the loop under these circumstances.

Virginia 271 Order ¶ 151 (emphases added; footnote omitted). Although the New York PSC, reviewing this issue, concluded that there is "no current legal impediment to line partitioning," *Covad New York Order* at 39 (Issue 31), that conclusion is impossible to square with the FCC's unambiguous holding — rejecting the same arguments that Covad raises here[46] — that federal law does not entitle Covad to obtain access to the high frequency portion of the loop when a reseller is providing voice service on that loop.[47]

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[46] *See* Comments of Covad Communications Co. at 29, *Application by Verizon Virginia Inc., et al., for Authorization To Provide In-Region, InterLATA Services in Virginia*, WC Docket No. 02-214 (FCC filed Aug. 21, 2002) ("In no circumstance, however, did the [FCC] permit incumbents to deny competitors access to the high-frequency portion of the loop where incumbent-provided voice service was resold. . . . Indeed, to allow Verizon to refrain from providing line shared loop UNEs for customers of voice resellers would leave such customers without any competitive alternative to Verizon's retail xDSL services.").

[47] The New York PSC recognized that its "decision here may be affected by the FCC's Triennial Review order" — which the FCC has indicated will rule that the high frequency portion of the loop is not a UNE — and stated that it "will take account of that order, once it is issued, as may be warranted." *Covad New York Order* at 40 n.38. Covad's suggestion in New

Even though the New York PSC incorrectly found that there is no legal impediment to requiring line partitioning, that commission, in any event, declined to impose a requirement on Verizon to provide line partitioning before completing a further, industry-wide proceeding, during which it would "decid[e] whether to go forward." *Covad New York Order* at 40. As the New York PSC recognized, line partitioning "may have effects on market players beyond those represented in this bilateral proceeding." *Id.* Indeed, the evidence in the record demonstrates that, because line partitioning involves a third party (the reseller), Covad would need to have a contractual relationship with the reseller before line partitioning could occur, and detailed rules would need to be developed setting forth Verizon's responsibilities toward each of the CLECs, as their interests may conflict. *See* New York Transcript at 180:19-182:12, 185:15-24. Hearing this evidence, the New York ALJ concluded that providing line partitioning "would involve a fairly large array of issues related to how the reseller fits into the picture." *Id.* at 187:8-10.

If this Commission decides to follow the New York PSC — and to ignore the clear holdings of the FCC — on this issue, it similarly should not require Verizon to provide line partitioning before working out all of the implementation issues on an industry-wide basis.

York that the New York PSC's resolution of this issue should not be based on the *Triennial Review Order* is meritless. *See id.* at 39. This Commission is required to resolve open issues in this arbitration in accordance with federal law, which includes the *Triennial Review Order*.

F. Collocation

38/39. What interval should apply to collocation augmentations where a new splitter is to be installed?

The collocation augment interval is set forth in Verizon's tariff, and Covad should not be permitted, in its interconnection agreement, to modify that generally applicable interval or to insulate itself from future changes to that tariff that would apply to all other CLECs.

Under Verizon's proposed language for this issue, Verizon will provision collocation augments pursuant to the interval set forth in Verizon's Collocation Tariffs. *See* Revised Proposed Language Matrix – Verizon PA at 17 (UNE Attach. § 4.3); Revised Proposed Language Matrix – Verizon North at 18 (UNE Attach. § 4.7.2); Verizon Pennsylvania Inc., Pa. PUC Tariff No. 218, § 2(B)(2)(d); Verizon North Inc., Pa. PUC Tariff No. 9, § 19.4.1. That tariffed interval — whatever it is, today or in the future — should apply to Covad's requests for collocation augments, just as it applies to requests from all other CLECs in Pennsylvania. The question of what interval should be contained in Verizon's tariff is currently pending before this Commission in a tariff proceeding open to all CLECs,[48] where Covad has raised the same arguments that it raises here. That generic proceeding, not this bilateral one, provides the appropriate forum in which to resolve this dispute, particularly because Verizon's proposed language states that the outcome of the tariff proceeding will control here. There is no reason for this Commission to adjudicate this issue twice, or to pre-judge its ruling in the tariff proceeding, which applies to all CLECs and not just to Covad.[49]

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[48] *Pennsylvania PUC & Covad Communications Co. v. Verizon Pennsylvania Inc.*, Docket Nos. R-00038348 & R-00038348C0001. The tariff proceeding has been assigned to the same presiding officer as this arbitration, and the parties are currently engaged in settlement negotiations.

[49] Covad claims that it is entitled to the inclusion of a 30-day interval in its agreement based on an arbitration order from 2000 involving Verizon PA and Covad. *See* Covad Post-Conf. Br. at 73. The Commission's subsequent conclusion, in a generic proceeding in 2001, that

Covad does not respond to any of this in its briefs. Instead, it contends that "Verizon[] seeks to change the collocation augment interval to seventy-six (76) business days." Covad Post-Conf. Br. at 73. Verizon's proposed language says nothing of the sort. Verizon PA's proposed language contains no mention of a 76-day interval and states simply that "Verizon will provision Line Sharing collocation augments in accordance with the terms of Verizon's PUC PA No. 218 Tariff, as amended from time to time." Revised Proposed Language Matrix – Verizon PA at 17 (UNE Attach. § 4.3). Verizon North's proposed language states that "an interval of seventy-six (76) business days shall apply," "*unless a different interval* is stated in Verizon's applicable Tariff" — and Verizon North's tariff contains a 45-day interval, which is the interval Covad initially requested in this arbitration and which numerous state commissions have approved. Revised Proposed Language Matrix – Verizon North at 18 (UNE Attach. § 4.7.2) (emphasis added); *see* Verizon Merits Br. at 55.[50]

For these reasons, Covad's proposed language should be rejected and the parties' interconnection agreements should incorporate by reference the interval set forth in Verizon PA's and Verizon North's Collocation Tariffs.

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it was "not prepared to rule on the cable-only augment provisioning issue at this time" pending further collaborative proceedings on that issue, eliminates the ability of Covad to rely on the earlier order here as binding Commission precedent. *See* Opinion and Order, *Pennsylvania PUC v. Verizon Pennsylvania Inc.; Rhythms Links, Inc. v. Verizon Pennsylvania Inc.*, Docket Nos. R-00994697 & R-00994697C0001, at 48 (Pa. PUC adopted May 24, 2001); *see* Verizon Merits Br. at 57. In any event, that arbitration decision could not bind Verizon North, which was not a party to that arbitration.

[50] Although the 76-day interval would not apply in Verizon North's territory in Pennsylvania, because of the condition in the *Bell Atlantic/GTE Merger Order* that Verizon make interconnection agreements in one Verizon jurisdiction available for adoption in another jurisdiction, *see* Verizon Merits Br. at 42 n.43 (citing Memorandum Opinion and Order, *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control*, 15 FCC Rcd 14032, ¶¶ 300-305 (2000)), Verizon North proposed including a provision that would apply in the event that the agreement was adopted in a state where Verizon had no collocation tariff.

G. Dark Fiber

Verizon and Covad have been able to resolve six of the ten original dark fiber issues in Covad's Petition. As indicated in Verizon's Brief on the Merits, however, in addition to the four remaining issues in the Petition, Covad seeks to arbitrate a new issue concerning "acceptance testing" of dark fiber. *See* Verizon Merits Br. at 58-60. In particular, in the Revised Proposed Language Matrix, Covad has proposed changes to § 8.2.19 of the UNE Attachment concerning the terms under which Verizon will test dark fiber after provisioning of the dark fiber circuit is completed. Verizon's proposed language with respect to § 8.2.19 has not changed since the time Covad filed its Petition, however, and Covad did not raise any dispute with respect to that language at that time, representing to Verizon and to the Commission that it agreed with those terms. It is too late in the proceeding for Covad to insert this new issue into the arbitration, especially after the factual record is closed.

It is irrelevant that Verizon itself proposed new contract language to Covad during the course of the arbitration. Under the 1996 Act, parties are expected and encouraged to attempt to resolve *open* issues in an arbitration through continued negotiations, including by proposing new contract language. Indeed, as a result of the new contract language that Verizon proposed, Verizon and Covad were able to resolve a substantial number of the open dark fiber issues. Here, however, Covad is attempting to open a *closed* issue by proposing changes to language to which it had already *agreed* prior to filing its Petition.[51]

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[51] Covad's attempt to shove the square peg issue of "acceptance testing" into the round hole of Issue 44 highlights this fact. Issue 44 — as described by Covad in the Petition — addresses intermediate office routing, and whether Verizon should be required to provide intermediate office routing through splicing as well as fiber optic cross-connects (which Verizon has agreed to do). "Acceptance testing," which determines the transmission characteristics of a fiber, has nothing to do with intermediate office routing or splicing, which govern Verizon's obligations to provide dark fiber to Covad.

In any event, the Commission should reject Covad's proposed revisions to § 8.2.19. *See* Verizon Merits Br. at 59-60. In essence, Covad is demanding a guarantee from Verizon that the dark fiber it orders will meet certain transmission characteristics — that is, whether the fiber is "suitable," as defined by Covad. Covad Post-Conf. Br. at 78. Verizon's legal obligation, however, is only to provide dark fiber on an "as is" basis; although Verizon tests the fiber to ensure that it passes light, Verizon is not obligated to (and does not) guarantee the transmission quality of the fiber. *Virginia Arbitration Order* ¶ 468 (CLECs "may not hold Verizon's dark fiber to a given standard of transmission capacity"). For this reason, Verizon's proposed language for § 8.2.19 should be adopted.

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?

> Under federal law, Verizon's obligation to provide dark fiber is limited to fiber that is fully constructed, is physically connected to its facilities, and is easily called into service; Verizon is not required to construct new network elements for CLECs.

Covad claims that the language it proposes for § 8.2.1 of the UNE Attachment "mirrors" language adopted by the Commission in the Yipes arbitration. *See, e.g.*, Covad Post-Conf. Br. at 74. This is demonstrably false. Covad's proposed language is substantially *different* from the Yipes language, omitting critical provisions adopted by the Commission in that proceeding. To illustrate, the following shows Covad's proposed language, redlined against the language *actually* adopted by the Commission in the Yipes arbitration:

> It is Verizon's standard practice that when a fiber optic cable is run into a building or remote terminal that 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 ~~in a timely manner in conformance with Verizon's standard practices~~ as soon as

reasonably practicable at the request of ~~Yipes~~ Covad. ~~Nothing contained herein shall require Verizon to terminate a fiber optic cable that runs through a remote terminal in that remote terminal where the fiber optic cable is engineered and constructed to run through the remote terminal en route to termination in another remote terminal or the central office; and nothing contained herein shall require Verizon to terminate a fiber optic cable that runs through a building in that building in the rare instance where the fiber optic cable is engineered and constructed to run through the building en route to another termination point, but if Verizon terminates any fiber optic strands from the fiber optic cable running through a building in that building, the fiber optic strands shall be terminated in accordance with Verizon's standard practice as stated herein. Upon request by Yipes, Verizon shall produce documentation demonstrating that the fiber optic cable(s) referred to in the previous sentence was (were) originally engineered and constructed to run through the remote terminal and/or building, as the case may be. Verizon will not, at Yipes' request, perform or accelerate the performance of any fiber construction but Verizon shall adhere at all times to its standard practices, including, but not limited to, placing fiber facilities and equipment in buildings or remote terminals, splicing fiber cables, and installing accessible terminals.~~ [52]

Clearly, Covad's proposed language in no way "mirrors" the language adopted by the Commission in the Yipes arbitration, as Covad misleadingly claims.

Furthermore, the language in the Commission's order was the result of a larger compromise between Verizon and Yipes. As part of the compromise, Yipes made no demand that Verizon splice new cable routes or otherwise perform construction on demand for Yipes; nor did it demand that Verizon accelerate its own construction schedule for new fiber facilities. In fact, as part of the compromise, Yipes accepted language that limited dark fiber UNEs to "continuous" dark fiber strands, and agreed that Verizon would not be obligated to splice fiber

[52] *Compare* Revised Proposed Language Matrix – Verizon PA at 18 (UNE Attach. § 8.2.1) *with* Opinion and Order, *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 Pennsylvania, Inc.*, Case No. A-310964, at 10-11, 13-14 (Pa. PUC entered Oct. 12, 2001) ("*Yipes Arbitration Order*"), *recon. denied*, Opinion and Order, *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 Pennsylvania, Inc.*, Case No. A-310964 (Pa. PUC entered June 18, 2002) ("*Yipes Order on Reconsideration*").

end-to-end in the field to make a fiber route "continuous" for Yipes.[53] Most importantly, the language that the Commission ultimately adopted to implement the parties' compromise "expressly relieves Verizon of a duty to accelerate construction at Yipes[']s request"[54] — the polar *opposite* of what Covad is demanding in this arbitration.[55] Covad has no right to demand, for its agreement with Verizon, only *portions* of compromise language between Verizon and Yipes.

Nor is there any inconsistency between Verizon's testimony in the Yipes arbitration and the evidence in this arbitration, as Covad implies. As set forth in the Shocket/White Declaration, Verizon does not construct new fiber optic facilities to the point where the *only* remaining work item required to make them available and attached end-to-end to Verizon's network is to

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[53] It makes no difference that the Wireline Competition Bureau directed Verizon to strike the word "continuous" from the definition of dark fiber in the *Virginia Arbitration Order* to allow for intermediate office routing of dark fiber IOF. *First*, the Bureau's order is irrelevant to language that Yipes *voluntarily* accepted as part of its compromise with Verizon. *See* 47 U.S.C. § 252(a)(1) (parties may voluntarily agree to terms in interconnection agreements "without regard to" requirements of federal law). *Second*, intermediate office routing — the issue where the Bureau objected to the word "continuous" — has nothing to do with the issue of so-called "unterminated" fiber, or whether Verizon should be required to splice dark fiber end-to-end to create new routes for Covad. In fact, Verizon has proposed — and Covad has accepted — language that permits intermediate office routing using fiber optic cross-connects, consistent with the *Virginia Arbitration Order*. *Third*, the *Virginia Arbitration Order* supports *Verizon's* position, not Covad's, on the question of splicing — the Bureau expressly found that Verizon is *not* required "to splice new [dark fiber] routes in the field" for a CLEC. *Virginia Arbitration Order* ¶ 457.

[54] *Yipes Arbitration Order* at 14. The language ultimately adopted by the Commission stated, *inter alia*, that "Verizon will not, at Yipes[']s request, perform or accelerate the performance of any fiber construction." *Id.* at 13.

[55] As the Revised Proposed Language Matrix shows, Covad is insisting on several provisions that would require Verizon to perform splicing to create new fiber routes for Covad. *See* Revised Proposed Language Matrix – Verizon PA at 17 (UNE Attach. § 8.1.4) (demanding that Verizon "splice strands of Dark Fiber IOF together wherever necessary, including in the outside plant network, to create a continuous Dark Fiber IOF strand between two Accessible Terminals"); *id.* at 19 (UNE Attach. § 8.2.3) ("Verizon will perform splicing or permit Covad to contract a Verizon approved vendor to perform splicing (*e.g.*, introduce additional splice points or open existing splice points or cases) to accommodate Covad's request.").

terminate the fibers onto fiber distributing frame connections at a Verizon central office or at the customer premises. *See* Shocket/White Decl. ¶ 19. This is fully consistent with the statement of Verizon's standard practices in the Yipes arbitration, which addresses the circumstances in which a fiber optic cable has already been pulled into a building (such as a central office, customer premises, or remote terminal). However, as Verizon's witnesses explained, if fiber strands have not been terminated on *both* ends, they are not yet fully constructed in the network and thus do not "go anywhere." In other words, one or both ends of the fiber have not been pulled into a building for termination. *See id.* ¶¶ 15-19.[56] Additional construction work, including pulling new lengths of fiber cable and splicing fiber end-to-end, would be required to complete the fiber route and terminate the fibers at both ends at accessible terminals. It is *not* simply a matter of terminating fibers at the accessible terminal using connectorized fiber, as Covad claims. *See id.* ¶ 19.[57] Therefore, the Commission should reject Covad's proposed addition to § 8.2.1.

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[56] In fact, Verizon's witnesses stated that "[i]t is Verizon's standard practice in Pennsylvania that when Verizon runs a fiber optic cable to terminate in a building or remote terminal, all fibers in that cable will be terminated on a Verizon accessible terminal in the building or remote terminal. If fibers are not terminated to an accessible terminal, then the entire cable is still under construction." Shocket/White Decl. ¶ 20.

[57] Covad cites to portions of the Yipes transcript to claim that Verizon's witness testified that "'*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.'" Covad Post-Conf. Br. at 78 (quoting *Yipes Arbitration Order* at 11). This statement, however, is taken out of context. The discussion between ALJ Weismandel and Verizon's witness was expressly limited to fiber optic cable that had *already been installed* within a building. *See* Yipes Transcript at 107 (limiting discussion to "the entry point of the fiber optic cable coming into the building"). It is only at that point that a "connectorized" cable would be attached to the outside plant cable. *Id.* at 108-09. Verizon's witness *did not* state that *every* fiber optic cable in the outside plant network — in particular, "unterminated" cable that has not been spliced through from one location to another (*see* Shocket/White Decl. ¶ 19) — has a connectorized cable attached. *See* Yipes Transcript at 107-12.

Finally, in its Post-Conference Reply Brief, Covad confuses the difference between splicing new, end-to-end fiber routes for a CLEC and gaining access to dark fiber at splice points, and claims that Verizon's position with respect to "unterminated" fiber is inconsistent with the Commission's decision in the *Splice Point Order*.[58] *See* Covad Post-Conf. Br. at 78 (citing Covad Pre-Hearing Brief at 123-29). Covad is wrong.

First, as Verizon has explained, the *Splice Point Order* adopted the Commission Staff's recommendations in a Report following a collaborative Technical Workshop in Docket Nos. R-00005261 and R-00005261C0001. *See* Verizon Merits Br. at 64-65. In that Report, the Staff did not consider the issue of whether Verizon is required to create new continuous fiber optic routes for a CLEC by splicing its own fiber end-to-end in the field. Thus, the *Splice Point Order* was limited to the narrow issue of whether and how a CLEC may access dark fiber at a splice point, *Splice Point Order* at 1-4, *not* whether Verizon can be compelled to splice new end-to-end fiber routes for a CLEC.

Second, in its *Splice Point Order*, the Commission directed Verizon to amend its Tariff No. 216 to include terms and conditions for creating accessible terminals adjacent to existing splice points — at the CLEC's expense, on a time and materials basis — so that the CLEC may access dark fiber at the accessible terminal (not at the splice point itself). *Splice Point Order* at 4. Verizon amended its tariff accordingly, and the Commission approved that amendment. As Verizon has explained, under Verizon's proposed contract language, Covad may order dark fiber out of the tariff, and obtain the same terms and conditions as other CLECs, including access to dark fiber at newly created accessible terminals. *See* Verizon Merits Br. at 65. Covad's

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[58] Order, *Report to the Pennsylvania Public Utility Commission Regarding the Technical Workshop on Access to Dark Fiber at Existing and New Splice Points*, Docket Nos. R-00005261 & R-00005261C0001 (Pa. PUC entered June 3, 2002) ("*Splice Point Order*").

language, on the other hand, is inconsistent with the *Splice Point Order*, because it would require Verizon to provide access to dark fiber *directly* at splice points, and would require Verizon to create *new* splice points at Covad's request — something that this Commission determined that Verizon is *not* required to do. *See Yipes Order on Reconsideration* at 3. For these reasons, Covad's proposed changes to §§ 8.2.1 and 8.2.2 should be rejected, and Verizon's proposed language should be adopted.

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

Covad's proposed language should be rejected because it attempts to expand Covad's right to dark fiber network elements beyond those required under Applicable Law.

Covad offers no new arguments in its Post-Conference Brief on Issue 43. Verizon stands by the arguments it has set forth in this proceeding. *See* Verizon Merits Br. at 66-67.

44. Should Verizon make available dark fiber that would require a cross connection between two strands of dark 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?

Under federal law, Verizon is not required to splice fiber strands at a CLEC's request; however, the parties have agreed to terms for cross-connecting two terminated dark fiber IOF strands at intermediate central offices, and Verizon has agreed to provide combinations of network elements in accordance with Applicable Law.

Covad's arguments with respect to Issue 44 are internally inconsistent. With one breath, Covad relies on paragraph 457 of the Wireline Competition Bureau's decision in the *Virginia Arbitration Order* to claim that Verizon should be required to route dark fiber through intermediate offices. *See* Covad Post-Conf. Br. at 77. As explained in Verizon's Merits Brief (at 68), however, Verizon has already proposed — and Covad has accepted — language to permit such routing using fiber optic cross-connects, consistent with the Bureau's ruling. With the next

breath, however, Covad *ignores* paragraph 457 of the *Virginia Arbitration Order* — and asks this Commission to do the same — by seeking to require Verizon to *splice* dark fiber to provide new end-to-end fiber routes — something that the Bureau expressly held that Verizon is *not* required to do. *See Virginia Arbitration Order* ¶ 457 ("[w]e do not require Verizon to splice new routes in the field"). Covad cannot have it both ways.[59]

Covad further claims — with no explanation — that Verizon's proposed language would "unduly restrict Covad's access to combinations in 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 o[r] IOF terminates." Covad Post-Conf. Br. at 78. This is simply not the case. As Verizon has explained, the parties have already agreed to language that permits Covad to request that Verizon combine two or more network elements, which includes the dark fiber network elements, "[t]o the extent . . . required by Applicable Law." Revised Proposed Language Matrix – Verizon PA at 21 (UNE Attach. § 16); *see* Verizon Merits Br. at 69-70 & n.73. Verizon's proposed language thus makes clear that Covad may request combinations of dark fiber network elements to the extent that it is entitled to do so under applicable law, which includes, among other things, local use restrictions and other limitations on Verizon's obligation to combine elements for a CLEC. *See* Verizon Merits Br. at 69 & n.72. Thus, Verizon's proposed language is coextensive with the requirements of applicable law, and neither expands nor contracts either party's legal rights. Contrary to Covad's claim (Post-Conf. Br. at 78), nothing in Verizon's proposed contract language would require Covad to access dark fiber loops

[59] To be clear, Verizon does not splice dark fiber in intermediate offices to provide fiber continuity between two locations for itself. As Mr. White testified at the Technical Conference, "Technically that is not how we do it. We bring the inter-office cables in and we terminate them on a fiber panel. And then we have the patch cords. Think of the old switchboards. We actually plug them in and that is how we cross-connect them. . . . It's not splicing." Pennsylvania Transcript at 136:19-25.

and IOF via a collocation arrangement where Covad requests — and is legally entitled to — a UNE combination that would avoid the need for collocation.[60]

Finally, Covad asks that the Commission revisit its rulings in the *Splice Point Order*. In doing so, Covad argues that the Commission should adopt "the best practices" of other state commissions, including the Massachusetts DTE, to require Verizon to provide direct access to dark fiber at splice points. *See* Covad Post-Conf. Br. at 78 (citing Covad Pre-Hearing Brief at 123-29). This Commission, however, fully considered the findings of the Massachusetts DTE and other state commissions in determining whether to allow access to dark fiber at splice points, *see Yipes Order on Reconsideration* at 7, but determined that, as a result of the Technical Workshop, access to dark fiber directly at splice points is *not* technically feasible, *see Splice Point Order* at 3 (adopting the recommendations of the Staff Report). Covad had a full and fair opportunity to participate in that industry workshop, but chose not to. It should not now be permitted to attack the results of that industry collaborative in a bilateral arbitration proceeding.

In any event, after the *Splice Point Order* was issued, the FCC's Wireline Competition Bureau held that there is, in fact, "no 'best practices' presumption of feasibility for splice point access" to dark fiber, and agreed with this Commission's prior ruling that access to dark fiber UNEs directly at splice points is not technically feasible. *Virginia Arbitration Order* ¶ 452.[61]

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[60] In addition to arguments concerning intermediate office routing and UNE combinations, Covad has proposed, for the first time in its Post-Conference Reply Brief, language that would expressly permit access to dark fiber at newly created accessible terminals adjacent to splice points. Covad Post-Conf. Reply Br. at 55. Covad's last-minute language proposal should be rejected. In any event, there is no need for Covad's proposed language, because Verizon's Commission-approved tariff, which is incorporated by reference in the parties' agreement in § 1 of the UNE Attachment, already expressly sets forth Verizon's obligations with respect to Accessible Terminals as set forth by this Commission.

[61] The Bureau did not expressly consider whether Verizon Virginia would be required to create new accessible terminals at existing splice points. The Bureau did, however, hold that

Thus, the Commission should decline Covad's invitation to revisit its ruling in the *Splice Point Order*, and adopt Verizon's proposed language limiting Covad's access to dark fiber at accessible terminals.

47. Should Verizon provide Covad detailed dark fiber inventory information?

> Under federal law, Verizon is required to, and does, provide Covad with only that dark fiber information it actually possesses; the language Covad has proposed requests information that Verizon does not (and, likely, cannot) possess.

Although Covad repeats its demand that Verizon provide "parity access" to "information regarding dark fiber," Covad Post-Conf. Br. at 79, for the reasons Verizon has set forth, Verizon *already* provides parity access to dark fiber information. *See* Verizon Merits Br. at 70-71. The three types of information that Verizon provides – wire center fiber maps (which show street-level information on Verizon's loop fiber routes within a wire center), dark fiber inquiries (which show specific dark fiber availability between particular points, known as "A" and "Z" points, on the maps at a given point in time), and field surveys (which test the transmission characteristics of the fiber and physically verify the availability of specific fiber pairs) — when used in combination, mirror the process that Verizon uses to determine fiber availability for its own lit fiber services. *See id.* Indeed, Verizon uses the same back office information to process dark fiber inquiries and field surveys that Verizon uses to assign fibers to Verizon's own lit fiber optic systems. *See* Shocket/White Decl. ¶ 32. Moreover, the FCC has expressly held that the three types of dark fiber information described above satisfy Verizon's requirements under the 1996 Act.[62]

Verizon Virginia was not required to perform *any* splicing of dark fiber on behalf of CLECs. *See Virginia Arbitration Order* ¶ 457.

[62] *See, e.g., Maryland/DC/West Virginia 271 Order* ¶ 125 (holding that "Verizon's provision of information allows competitors to construct dark fiber networks in a

Since 2001 — the last time that Covad requested dark fiber information from Verizon *anywhere* in the Verizon footprint — Verizon has implemented substantial changes to its dark fiber inquiry and provisioning processes, which have been found by the FCC and other state commissions to comply with the requirements of the 1996 Act. The fact that some state commissions imposed additional obligations *prior* to the implementation of those changes should not affect the Commission's analysis. Moreover, Covad has provided no evidence whatsoever that the information Verizon currently provides to CLECs in Pennsylvania — which is the same as in other states — is insufficient to permit Covad to determine the location and availability of dark fiber in Verizon's network, let alone to impose substantial *additional* obligations on Verizon to provide new information in the form requested by Covad.

H. Pricing

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)?

> Because Covad has not objected to any rates in Appendix A, those rates are binding on the parties — except that, to ensure nondiscriminatory treatment of CLECs, tariff amendments should supersede both the rates in Appendix A — and Covad is not entitled to retroactive application of different rates.

This issue addresses the source of the rates for the unbundled network elements that Covad obtains from Verizon and the methods for modifying those rates. *See* Verizon Merits Br. at 74-75. The New York PSC adopted Verizon's proposed language for this issue in full and rejected Covad's position. *See Covad New York Order* at 46. The New York PSC also expressly rejected the sole claim that Covad raises in its briefs here — that tariffed rates that take effect

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nondiscriminatory fashion" and that "the three types of information that Verizon makes available allow [CLECs] to do long range planning, check the availability of dark fiber and perform detailed engineering"); *Virginia 271 Order* ¶ 147.

after the adoption of the parties' agreement should not supersede rates in the agreement. *See* Covad Post-Conf. Br. at 79-80.[63] As the New York PSC explained, "[p]roposed tariff amendments are subjected to scrutiny and are allowed to go into effect only if they pass that scrutiny. . . . Covad's apparent concern that a tariff 'allowed to go into effect' receives no review, or only cursory [re]view, is unwarranted, and its wording on this issue is rejected." *Covad New York Order* at 46 (Issue 37).

As it did in New York, Covad claims here that "Verizon's language would allow mere tariff filings to supercede currently effective rates prior to the tariff even going into effect," but does not identify the specific language that purportedly would yield this result. Covad Post-Conf. Br. at 81. In fact, there is no such language. Instead, under Verizon's proposed language, only tariff filings that have been "allowed to go into effect" or that are "approved by the Commission or the FCC" can supersede existing rates. Revised Proposed Language Matrix – Verizon PA at 22 (Pricing Attach. § 1.5).

Finally, Verizon has explained why this Commission's recent order in the Verizon PA-US LEC arbitration — in which it held that "the non-tariffed rates negotiated in [that] Agreement must remain in effect throughout the term of the Agreement and thus cannot be unilaterally changed through the filing of tariff revisions by Verizon," *US LEC Arbitration Order* at 74 — is distinguishable and should not be applied here. *See* Verizon Merits Br. at 76-77. Specifically, because Covad has not sought to negotiate unique rates in either of the agreements at issue here — but instead has accepted the rates that Verizon PA and Verizon North uniformly offer to all CLECs in Pennsylvania — this Commission's conclusion that adopting Verizon's proposed

[63] Covad offers no response to Verizon's argument that the specific rates contained in Appendix A to the parties' agreement are binding upon the parties, as a result of Covad's failure to object to any of those rates, and therefore that Covad has no right to retroactive application of a different rate. *See* Verizon Merits Br. at 75-76.

language would "limit[] US LEC's right to negotiate a fixed rate" is inapplicable here. *US LEC Arbitration Order* at 75. Covad has not sought to rely on the *US LEC Arbitration Order* here; nor did it dispute Verizon's arguments with respect to that order. Therefore, this Commission's earlier decision should not prevent the Commission from following the New York PSC and adopting Verizon's proposed language for this issue.

53. Should Verizon provide notice of tariff revisions and rate changes to Covad?

> Covad's proposal to require Verizon to provide individualized notice of non-tariffed rate changes after they take effect should be rejected because Covad has submitted no evidence demonstrating a need for such notice, which would be superfluous and unduly burdensome for Verizon to provide.

As Verizon demonstrated, Covad's current proposed language is superfluous. *See* Verizon Merits Br. at 77-78. All of the methods that the agreement provides for changing the established rates ensure that Covad will receive advance notice of any such changes. Although the New York PSC found that Covad is entitled to "advance actual written notice" of non-tariffed rate changes, it did not dispute Verizon's demonstration that the agreement already provides Covad with such notice. *Covad New York Order* at 46 (Issue 38). Furthermore, the New York PSC found that Verizon need not notify Covad again, after rate changes take effect, finding that there is "no reason for Verizon . . . to do Covad's housekeeping work on its behalf," because "given the information it is to receive, Covad can prepare the updated Appendix [A to the Pricing Attachment] itself." *Id.*

Covad, however, continues to assert that "Verizon has a track record of not notifying Covad regarding a new charge . . . that is non-tariffed." Covad Post-Conf. Br. at 82. In its Post-Conference brief, however, Covad discusses only a single instance, involving a nominal charge, where Verizon supposedly did not provide advance notice of a non-tariffed rate change. *See id.* at 83-84. This one instance, which occurred 17 months ago, is not evidence of any kind of

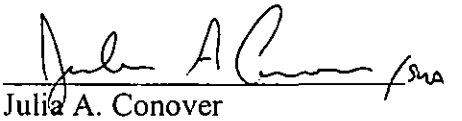
systematic problem that would justify the adoption of Covad's language. Indeed, as Verizon has explained, and Covad does not dispute, the FCC has repeatedly rejected CLECs' claims that such "isolated problems are sufficient to demonstrate that [an ILEC] fails to meet the statutory requirements." *Second Louisiana 271 Order*[64] ¶ 78; *see also, e.g., Maryland/DC/West Virginia 271 Order* ¶ 30 ("we find that such isolated incidents are not reflective of a systemic problem that would warrant a finding of checklist noncompliance"); *Virginia 271 Order* ¶ 57 ("we do not find that this isolated incident . . . rebuts Verizon's demonstration of checklist compliance"). Instead, the FCC "look[s] for patterns of systemic performance disparities that have resulted in competitive harm or that have otherwise denied new entrants a meaningful opportunity to compete." *New Jersey 271 Order* ¶ 137. This Commission should do the same.

[64] Memorandum Opinion and Order, *Application of BellSouth Corp., et al., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599 (1998) ("*Second Louisiana 271 Order*").

III. CONCLUSION

For the foregoing reasons, Verizon's proposed language on the disputed issues in this arbitration should be adopted and Covad's proposed language should be rejected.

Respectfully submitted,



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July 9, 2003

CERTIFICATE OF SERVICE

I, Scott Angstreich, hereby certify that I have this day served a true copy of the Post-hearing Reply Brief on the Merits of Verizon Pennsylvania Inc. and Verizon North Inc., upon the participants listed on the attached Service List, as indicated, in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Washington, D.C., this 9th day of July, 2003.

VIA FIRST CLASS MAIL AND UPS OVERNIGHT DELIVERY

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ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DIECA Communications, Inc. d/b/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	)	Case Nos. A-310696F7000, A-310696F7001

REPLY BRIEF ON THE MERITS OF VERIZON PENNSYLVANIA INC. AND VERIZON NORTH INC.

SUPPLEMENTAL APPENDIX

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ARBITRATION ORDER

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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

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[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.

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[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

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[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

ORIGINAL

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May 19, 2003

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: Docket No.: 020960-TP

Dear Ms. Bayo:

On behalf of DIECA Communications, Inc. d/b/a Covad Communications Company (Covad), enclosed for filing and distribution are the original and 16 copies of the following:

- DIECA Communications, Inc. d/b/a Covad Communications Company's Late-filed Exhibit No. 11.

Please acknowledge receipt of the above on the extra copy and return the stamped copy to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

VGK/bae
Enclosures

cc: Lee Fordham (w/ encls.)
Aaron Panner (w/ encls.)

AUS
CAF
CMP
COM 3
CTR
ECR
GCL
OPC
MMS
SEC 1
OTH

LATE-FILED EXHIBIT NO. 11 .

DOCKET NO.: 020960-TP

WITNESS: COVAD-STIP

PARTY: COVAD

DESCRIPTION:

1. DIECA Communications, Inc. d/b/a Covad Communications Company's Responses to Staff's Third Set of Interrogatories (No. 48 – 58)

2. DIECA Communications, Inc. d/b/a Covad Communications Company's Responses to Staff's First Request for Production of Documents (Nos. 1 - 11)

PROFFERING PARTY: STAFF

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for arbitration of open issues resulting from interconnection negotiations with Verizon Florida Inc. by DIECA Communications, Inc. d/b/a Covad Communications Company.	Docket No. 020960-TP

DIECA COMMUNICATIONS, INC.
D/B/A COVAD COMMUNICATIONS COMPANY'S
RESPONSES TO STAFF'S THIRD SET OF INTERROGATORIES (NOS. 48 - 58)

DIECA Communications Inc. d/b/a Covad Communications Company (Covad), by and through its undersigned counsel, hereby responds to the Staff' Third Set of Interrogatories (Nos. 48 - 58). In providing these responses, Covad does not waive any of its objections filed on April 25, 2003, to Staff's Third Set of Interrogatories.

INTERROGATORIES

48. On Page 20, lines 3 – 6 of Evans/Clancy Direct Testimony an incumbent's responsibility for provisioning UNEs is discussed. Please identify specifically where FCC has made incumbents provide requesting carriers UNEs in situations where the incumbent would provide the UNE to a requesting retail customer as part of a retail offering.

RESPONSE: Section 251(c)(3) of the Telecommunications Act of 1996 imposes a duty upon ILECs to provide CLECs "nondiscriminatory access to network elements on an unbundled basis...on rates, terms and conditions that are just, reasonable, and nondiscriminatory." Sections 51.307, 51.311 and 51.313 of the FCC's rules similarly require ILECs to offer all requesting carriers nondiscriminatory access to UNEs. Specifically, Section 51.311(b) of the FCC's rules requires that "the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that

which the incumbent LEC provides to itself."[1] Furthermore, Section 51.313(b) of the FCC's rules requires that "the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself."[2]

The parity requirement of these rules includes the tasks involved in performing routine network expansions and modifications to electronics and other facilities that ILECs normally perform for their retail customers.[3] Thus, if an ILEC "upgrades its own network (or would do so upon receiving a request from a [retail] customer), it may be required to make comparable improvements to the facilities that it provides to its competitors to ensure that they continue to receive at least the same quality of service that the [ILEC] provides to its own customers."[4] The parity requirements of Section 51.311(b) and 51.313(c) already mandate that network modifications be made so that CLECs can access

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1 47 C.F.R. § 51.311(b); *see also In 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, ¶¶ 312-13 (1996) ("*Local Competition Order*") (subsequent history omitted); *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Record 3696, ¶¶ 490-491 (1999) ("*UNE Remand Order*") (subsequent history omitted).

2 47 C.F.R. § 51.313(b); *see also Local Competition Order* ¶¶ 315-16.

3 *See, e.g., US West Communications, Inc. v. AT&T Communications of the Pacific Northwest*, Inc, 31 F.Supp.2d 839, 856 (D. Or. 1998) *rev'd and vacated in part on other grounds sub nom. US West Communications, Inc. v Hamilton*, 224 F.3d 1049 (9th Cir. 2000); *U.S. West Communications, Inc. v. Jennings*, 46 F.Supp.2d 1004, 1025 (D. Ariz. 1999).

4 31 F.Supp.2d at 856; *see also* 46 F.Supp.2d at 1025.

underlying network elements or interconnect at the same level of quality or pursuant to the same terms and conditions that an ILEC provides to itself.

49. (a) On page 21, lines 6 – 17 of Evans/Clancy Direct Testimony, Verizon's loop provisioning policy is discussed. Please identify the number of Covad UNE DS-1 orders in Florida during the past 12 months that have been rejected due to "no facilities."

(b) Is it Covad's claim that Verizon Florida rejects Covad's orders where provisioning ". . . the loop would require the addition of doubler cases, central office shelf space, repeaters, or other equipment to the loop. . ."?

(c) If the response to (a) is affirmative, please identify all documents in Covad's possession that substantiate this assertion.

(d) Referring to lines 14 – 17, please identify all documents in Covad's possession that support this assertion.

RESPONSE: (a) None to date.

(b) Yes.

(c) Verizon's policy is set out in the responsive documents attached to Covad's Response to Staff's First Request for Production of Documents (Nos. 1 – 11), including, but not limited to,: slides 36 to 51 of the Verizon Hi-Cap Operations Presentation; March 30, 2001, April 2, 2001, and April 5, 2001, Correspondence between Mr. Oxman and Mr. Hartman; July 24, 2001, "Dear CLEC customer" DS1 and DS3 Unbundled Network Elements Policy; CLEC Guide – Unbundled Network Elements, p. 7.

(d) Id.

50. On page 33, lines 21 – 22 and 34, lines 1 – 10 of Evans/Clancy Direct Testimony, Verizon's policy for provisioning DSL to its retail customers is discussed.

(a) Does Covad possess any documentation that supports its claim that Verizon Florida provides resold DSL over resold voice lines to its resale customers?

(b) If the response to (a) is affirmative, please identify all documents in Covad's possession that substantiate this claim.

RESPONSE: (a) Yes.

(b) Responsive documents are attached to Covad's Response to Staff's First Request for Production of Documents (Nos. 1 – 11), including, but not limited to, November 21, 2001, VADI Communication.

51. (a) On page 14, lines 6 – 9 of Evans/Clancy Rebuttal Testimony Verizon's responsibility to condition existing loop facilities is discussed. Please identify specifically where in the Act, FCC rules, or FCC orders there is a requirement for ". . . Verizon to take affirmative steps to condition existing loop facilities to enable competing carriers to, provide services not currently provided over the facilities."

(b) Please define "condition existing loop facilities" as it used herein.

RESPONSE: (a) The Federal Communications Commission imposed an obligation on Verizon (specifically, its predecessor incumbent LEC companies) on August 8, 1996, to unbundle local loops for requesting carriers. That obligation, found in the *Local Competition First Report and Order*, and codified in Part 47 of the C.F.R., arises from the unbundling provisions of section 251(c)(3) of the Act. In that 1996 Order, the Commission described a DS-1 capable loop:

> We further conclude that the local loop element should be defined as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises. This definition includes, for example, two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level signals.[5]

The FCC then addressed the requirement for incumbent LECs, such as Verizon, to take affirmative steps to condition loops to carry digital signals:

> Our definition of loops will in some instances require the incumbent LEC to take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities. For example, if a competitor seeks to provide a digital loop functionality, such as

[5] *Local Competition First Report and Order* at ¶ 380.

> ADSL, and the loop is not currently conditioned to carry digital signals, but it is technically feasible to condition the facility, the incumbent LEC must condition the loop to permit the transmission of digital signals. Thus, we reject BellSouth's position that requesting carriers "take the LEC networks as they find them" with respect to unbundled network elements. As discussed above, some modification of incumbent LEC facilities, such as loop conditioning, is encompassed within the duty imposed by section 251(c)(3).[6]

Subsequently, in the *First Advanced Services Order*, the FCC again addressed this very issue. The FCC stated for a second time that incumbent LECs must take affirmative steps to condition loops for requesting carriers. Paragraph 53 of that Order states, in pertinent part,:

> In the *Local Competition Order*, the Commission identified the local loop as the network elements that incumbent LECs must unbundle "at any technically feasible point." It defined the local loop to include "two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL and DS-1-level signals." To the extent technically feasible, incumbent LECs must "take affirmative action to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities." For example, if a carrier requests an unbundled loop for the provision of ADSL service, and specifies that it requires a loop free of loading coils, bridged taps, and other electronic impediments, the incumbent must condition the loop to those specifications, subject only to considerations of technical feasibility. The incumbent may not deny such a request on the ground that it does not itself offer advanced services over the loop, or that other advanced services that the competitive LEC does not intend to offer could be provided over the loop.[7]

The FCC repeated the obligation yet again in the *UNE Remand Order*:

> In order to secure access to the loop's full functions and capabilities, we require incumbent LECs to condition loops. This broad approach accords with section 3(29) of the Act, which defines network elements to include their "features, functions and capabilities."[8]

And indeed, the FCC was forced to once again reject GTE (now Verizon's) argument that it need not only provide a loop as it exists in its network:

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[6] *Local Competition First Report and Order* at ¶ 382.
[7] *First Advanced and Order* at ¶ 53 (internal citations omitted).
[8] *UNE Remand Order* at ¶ 167.

> GTE contends that the Eighth Circuit, in the *Iowa Utils. Bd. v. FCC* decision, overturned the rules established in the *Local Competition First Report and Order* that required incumbents to provide competing carriers with conditioned loops capable of supporting advanced services even where the incumbent is not itself providing advanced services to those customers. We disagree.[9]

(b) For DS-1 loops, "condition existing loop facilities" includes not only the removal of bridge taps and load coils, but the addition of doubler cases, central office shelf space, repeaters, or other equipment to the loop. These modifications are performed by Verizon for its retail customers and are, therefore, "technically feasible affirmative acts to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities."

52. (a) On page 14, lines 15 – 20 of Evans/Clancy Rebuttal Testimony Verizon's policy for provisioning a Verizon customer DS1 loop request is discussed. Please identify all documents in Covad's possession that support the claim that Verizon Florida will perform the steps for its retail customers identified at lines 15 - 18.

(b) Please identify all documents in Covad's possession that support the claim that Verizon Florida will not perform the steps for UNE customers identified at lines 18 – 20.

RESPONSE: (a) Responsive documents are attached to Covad's Response to Staff's First Request for Production of Documents (Nos. 1 – 11), including, but not limited to,: slides 36 to 51 of the Verizon Hi-Cap Operations Presentation; March 30, 2001, April 2, 2001, and April 5, 2001, Correspondence between Mr. Oxman and Mr. Hartman; July 24, 2001, "Dear CLEC customer" DS1 and DS3 Unbundled Network Elements Policy; CLEC Guide – Unbundled Network Elements, p. 7.

(b) Id.

[9] *UNE Remand Order* at ¶ 173.

53. (a) On page 15, lines 3 – 14 of Evans/Clancy Rebuttal Testimony, Verizon's policies for provisioning service to its competitors is discussed. Please identify all documents in Covad's possession that support the claim with respect to Verizon Florida ". . . in instances where a shelf is added to provision a line for a competitor, the competitor bears the brunt of costs for the shelf and all the lines that will get installed on that shelf, including Verizon's lines."

(b) Please identify all documents in Covad's possession that support the claim that Verizon Florida has a 3-month minimum service period.

(c) Please identify all documents in Covad's possession that support the claim that Verizon Florida ". . . has rejected a number of Covad orders for high capacity UNEs claiming that no facilities are available on the basis that the capacity of its facilities is exhausted."

RESPONSE: (a) Responsive documents are attached to Covad's Response to Staff's First Request for Production of Documents (Nos. 1 – 11), including, but not limited to,: slides 36 to 51 of the Verizon Hi-Cap Operations Presentation; March 30, 2001, April 2, 2001, and April 5, 2001, Correspondence between Mr. Oxman and Mr. Hartman; July 24, 2001, "Dear CLEC customer" DS1 and DS3 Unbundled Network Elements Policy; *CLEC Guide – Unbundled Network Elements, p. 7.*

When Covad pays the special access rate, Covad bears additional costs over the UNE rate for installing the shelf. Any customer who orders a UNE DS-1 thereafter (until the shelf is full) does not bear that cost. If the incremental cost were included in the UNE rate, then Verizon should have no basis to refuse to install the shelf in order to provision a UNE DS1, which as previously stated, Verizon refuses to do.

(b) Id. The time commitment varies according to the Verizon entity involved.

(c) To date, Verizon has not rejected an order on this basis in Florida.

54. (a) On page 16, lines 9 – 13 of Evans/Clancy Rebuttal Testimony, the "distinction between constructing a new facility and modifying an existing one to improve its capacity" is discussed. Please identify specifically where the FCC has made a "distinction between constructing a new facility and modifying an existing one to improve its capacity."

(b) Please identify specifically where the Eight Circuit has made a "distinction between constructing a new facility and modifying an existing one to improve its capacity."

RESPONSE: (a) See Response to Interrogatory No. 51 (a).

(b) The 8th Circuit decisions in *Iowa I*[10] and *Iowa II*,[11] addresses an ILEC's unbundling obligation as it relates to modifying its network. The *Iowa* Court, and other courts, recognized the ILECs' obligation to modify or expand their networks at existing quality levels and that the construction of new facilities does not necessarily mean providing a superior network.[12] Indeed, "new facilities could be necessary just to create equivalent interconnection and access."[13]

To elaborate, although *Iowa I* and *Iowa II* vacated the FCC's superior quality rules, these decisions did not absolve ILECs from their obligation to treat CLECs in a nondiscriminatory manner and at parity, as the Act[14] and FCC rules require,[15] with respect to routine network modifications and expansions that are needed so that CLECs can interconnect and access UNEs on an equivalent basis. Although *Iowa I* stated that the Act only requires unbundled access to an ILEC's existing network, "not to yet unbuilt superior one," [16] this statement does not, as

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

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

12 *See Iowa I* at 813 n.33; *see also US West Communications, Inc. v, Minnesota Public Utilities Commission*, 55 F.Supp.2d 968, 983 (D.Minn. Mar. 30, 1999); 46 F.Supp.2d at 1025; 31 F.Supp.2d at 856; *US West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc.*, 1998 WL 1806670 *4 (W.D. Wash. 1998); *MCI Telecommunications Corp. v. US West Communications, Inc.*, 1998 WL 34004509 *4 (W.D.Wash 1998).

13 55 F.Supp.2d at 983.

14 47 U.S.C. § 251(c)(3).

15 47 C.F.R. §§ 51.311(a)&(b) and 51.313(a)&(b); *see also Local Competition Order* ¶¶ 312 (stating that Act's requirement that ILECs "'provide nondiscriminatory access to network elements on an unbundled basis' refers to the physical or logical connection to the element and the element itself.") & 313 (finding that ILECs must provide access and UNEs that are at least equal-in-quality to what the ILECs provide themselves unless it is technically infeasible to do so which the ILEC must demonstrate); see also UNE Remand Order ¶¶ 490-491.

16 *Iowa I*, 120 F.3d at 812-13.

Verizon would have the Commission believe, stand for the proposition that an ILEC may refuse to perform routine network modifications and expansions in order to make an existing network element available as it does for itself and its retail customers.[17]

In fact, the decision does not suggest this at all. *Iowa I* holds that ILECs cannot be required to *substantially* alter their networks in order to provide superior quality interconnection or superior quality access to network elements.[18] Furthermore, the *Iowa I* court limited this holding and explained that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include *modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements.*"[19] When the court revisited this decision in *Iowa II*, it simply reaffirmed its opinion. In doing so, the *Iowa II* court noted that its ruling was limited in its applicability because "*the Act prevents an ILEC from discriminating between itself and a requesting competitor with respect to the quality of interconnection provided.*"[20]

Hence, the crucial limitation established in the *Iowa I* and *Iowa II* decisions requires that an ILEC (in treating CLECs at parity and in a nondiscriminatory manner[21]) make those modifications to its facilities that are

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17 *See, e.g.*, 31 F.Supp.2d at 856; 46 F.Supp.2d at 1025.

18 *See US WEST Communications, Inc. v. THOMS*, 1999 WL 33456553 *8 (S.D. Iowa Jan. 25, 1999) ("*US West*") (citing *Iowa I*, 120 F.3d at 813 n.33).

19 *See Iowa I*, 120 F.3d at 813 n.33 (emphasis added) (citing *Local Competition Order*, ¶ 198); *see also US West*, at *8 (noting that the Eight Circuit endorsed the FCC's statement that the obligations imposed by section 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities "to the extent necessary to accommodate interconnection or access to network elements"); 55 F.Supp.2d at 983 (same); 31 F.Supp.2d at 856 (same); 1998 WL 1806670 *4 (same); 1998 WL 34004509 *4 (same).

20 *See Iowa II*, 219 F.3d at 758 (emphasis added).

21 *See* 47 C.F.R. § 51.311(a)&(b) and 51.313(a)&(b); *see also, e.g.*, 46 F.Supp.2d at 1025; 31 F.Supp.2d at 856.

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."[22]

55. Define Covad's Interactive Voice Response (IVR) System raised in Issue 30 and state when it should be used by Verizon. Does use of this system eliminate any of the manual testing?

RESPONSE: Covad developed the Interactive Voice Response (IVR) System for its Field Service Technicians (FSTs) to use for fault isolation in maintenance and repair operations. Due to the woeful performance of Verizon in delivering stand alone UNE loops to Covad, Covad negotiated with Verizon Operating Management and expanded the use of the IVR for fault isolation in provisioning operations by Verizon Technicians. This was to reduce the number of inbound calls to Covad Service Centers. Verizon Technicians would call the toll free number given for Joint Acceptance Testing to fault isolate loops that they were in the process of provisioning rather than calling once they had completed the provisioning process. The Verizon technicians were causing increased costs to Covad.

Verizon's use of Covad's IVR system was applied on an experimental basis in Massachusetts and the results were positive. Inbound call rates to the Covad center dropped and the provisioning success rate was about the same. The use of the IVR was expanded to New York and the results were similar. Eventually all of Verizon East was using the IVR on a high percentage of installs and the inbound call rate dropped to a more manageable level. Covad still takes inbound calls to perform a final, joint acceptance test, where the Covad Service Agent works with a Verizon field technician to verify the circuit, and so that Verizon's field technician can provide essential demarcation information to

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22 *See US West* at *8.

Covad. This process assures the technician is at the end user's premise based upon interactive scripts that have been jointly developed and agreed to by Verizon and Covad.

For Verizon, since it is Verizon's obligation to deliver a product that is operational when they state it is complete, the work that was being skirted by Verizon technicians calling directly to Covad call centers, is they did not need to perform a manual test with Central Office technicians in their own offices to verify that the loops functioned properly. Verizon did not install test equipment to remotely perform these tests, so the tests had to be performed manually by two Verizon technicians, one in the field and one in the central office. The offer to expand the use of the IVR caused some additional capital investment by Covad to increase the capacity of the IVR, but avoided the costs foisted on Covad by Verizon for Verizon to complete its obligation to Covad. Verizon avoided the manual testing costs. The IVR is not capable, however, of recording the demarcation information nor is it capable of asking the questions of the Verizon technician required to verify the circuit and gain the important demarcation information.

56. Please explain why Covad should not be subject to the collaborative agreement reached by Verizon and interested ALECs (including Covad) in New York concerning the process for line and station transfers (LST), as mentioned in Issue 35 on page 22 in Verizon's prehearing statement filed on March 21, 2003.

RESPONSE: To clarify, the "agreement" reached in the NY DSL Collaborative was that Verizon would provide LSTs in lieu of upgrading their DLC equipment so those loops could provide DSL service. Since the DLC was technically capable, with an upgrade, to provide DSL service, yet Verizon had not deployed the capability, Verizon, at the time of the collaborative, agreed to perform LST to move the requested service to a copper loop so the DSL service could be provisioned.

Verizon initially agreed to do this at no cost.

Subsequently, Verizon made a motion to reconsider the order that was written, and the NY Commission rendered an order that stated the costs for LST would be developed in UNE cost proceedings. Those costs were never developed for NY and Verizon applied costs for two different existing rate elements. In some states these were addressed in cost proceedings where the cost remains zero dollars.

57. Referring to Covad's position on Issue 38 reflected in its prehearing statement, please explain why Covad believes that Verizon should provision a new splitter in 45 days rather than the interval that is contained in Verizon's collocation tariff.

RESPONSE: As a result of line sharing arbitrations in New York State, the NY State PSC ordered the Carrier Working Group to negotiate an interval for augmenting collocation arrangements. During the arbitration, this issue expanded beyond simple splitter augments based upon the examples presented by CLECs involved in the proceeding. The result of the negotiation was that Verizon filed a tariff in NY that defined a particular set of augments that would have a 45 business day augment interval, and reaffirmed the existing 76 business day interval for full collocation. Some terms and conditions were also negotiated and those language changes were made in the tariff filing.

This was subsequently addressed in MA DTE case 98-57 Phase III and Massachusetts adopted the settlement from NY.

This left Verizon with a conundrum. In PA, the arbitrator ruled that splitter augments would be completed in 30 calendar days, and all other collocation work would be completed in 60 calendar days. Verizon offered to make standard augment intervals across its entire footprint of 45 business days and full collocation intervals of 76 business days. A number of CLECs joined this negotiation and consideration was made by Verizon in expanding the scope

of augments considered eligible for 45 business day treatment, further changing tariff language especially regarding forecasts, smoothing demand, and unexpected spikes in demand. This is the agreement that was referenced in our arbitration petition in Florida. It was negotiated among a consortia of CLECs with Verizon. The terms and conditions would apply to all parties.

Verizon recently backed away from this agreement. As a consequence, Covad intends to move in each state to make the standard interval what it is in Pennsylvania: 30 calendar days for augments and 60 calendar days for full collocation.

58. Does Covad consider Issue 39 to be a "resolved" or "unresolved" issue for purposes of this docket? Please explain your answer.

RESPONSE: Covad considers Issue 39 to be unresolved. Covad's position on Issue 39 is that consistent with 47 C.F.R. Section 51.319(h)(7)(i), Covad should be allowed to supply its own test head for line shared loops, as it has a right to access its loops for testing purposes. In particular, Covad is entitled to test the entire frequency range of the loop facility, both the high frequency portion and the low frequency portion (including DC). Covad should have access to its loops for testing purposes and should be able to test them in the manner it sees fit to assure that its customer's are provided reliable service.

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(850) 222-2525 Telephone
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Attorneys for Covad Communications
Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing DIECA Communications, Inc. d/b/a Covad Communications Company's Responses to Staff's Third Set of Interrogatories (Nos. 48 - 58) has been provided by (*) hand delivery, (**) electronic mail, or (***) U.S. Mail this 19th day of May 2003 to the following:

(*) (**) Lee Fordham
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

(**) David Christian
Verizon Florida, Inc.
106 East College Avenue, Suite 810
Tallahassee, Florida 32301

(**) (***) Kimberly Caswell
Vice President and General Counsel
Verizon Communications
201 North Franklin Street
Tampa, Florida 33601-0100

(**) (***) Steven H. Hartmann
Verizon Communications, Inc.
1320 House Road, 8th Floor
Arlington, Virginia 22201

(**) (***) Kellogg Huber Law Firm
Aaron Panner/Scott Angstreich
1615 M. Street, Suite 400
Washington, DC 20036

Vicki Gordon Kaufman

VERIFICATION

STATE OF NEW YORK

COUNTY OF NASSAU

BEFORE ME, the undersigned authority, personally appeared **Michael Clancy**, who deposed and stated that the answers to the Third Set of Interrogatories (Nos 48-58) served on Covad Communications Company by Staff in Docket No. 020960-TP were prepared at his request and he is informed that the responses contained therein are true and correct to the best of his information and belief.

DATED this 19th day of May, 2003.

Michael Clancy

Sworn to and subscribed before me this 19th day of May, 2003.

Notary Public
State of New York

JON STEINHAUSER
NOTARY PUBLIC, State of New York
No. 01ST6072753
Qualified in Nassau County
Commission Expires April 15,2006

No. 01ST6072753
Name Typed or Printed Commission No.

My Commission Expires:
4-15-2006

VERIFICATION

DISTRICT OF COLUMBIA

BEFORE ME, the undersigned authority, personally appeared **Valerie Evans,** who deposed and stated that the answers to the Third Set of Interrogatories (Nos 48-58) served on Covad Communications Company by Staff in Docket No. 020960-TP were prepared at her request and she is informed that the responses contained therein are true and correct to the best of her information and belief.

DATED this 16 day of May, 2003.

Valerie Evans

Sworn to and subscribed before me this 16th day of May, 2003.

Notary Public
District of Columbia

Jessie M. Keels
Name Typed or Printed Commission No.

My Commission Expires: My Commission Expires April 30, 2004

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for arbitration of open issues resulting from interconnection negotiations with Verizon Florida Inc. by DIECA Communications, Inc. d/b/a Covad Communications Company.	Docket No. 020960-TP

DIECA COMMUNICATIONS, INC.
D/B/A COVAD COMMUNICATIONS COMPANY'S
RESPONSES TO STAFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS
(NOS. 1 - 11)

DIECA Communications Inc. d/b/a Covad Communications Company (Covad), pursuant to *Rules 1.280(b) and 1.350, Florida Rules of Civil Procedure, and Rule 28-106.206, Florida* Administrative Code, hereby provides the following Responses to Staff's First Request for Production of Documents (Nos. 1 – 11). In providing these responses, Covad does not waive any of its objections filed on April 25, 2003, to Staff's First Request for Production of Documents.

DOCUMENT REQUEST

1. Please provide all documents identified in response to Interrogatory 49(a).

RESPONSE: No documents were identified in response to Interrogatory 49(a). However, the spreadsheet entitled "Covad T1 Order *History for* Verizon Florida", provides the basis for Covad' response to Interrogatory 49(a). It is being filed with a Notice of Intent to Request Confidential Calssification

2. Please provide all documents identified in response to Interrogatory 49(c).

RESPONSE: Slides 36 to 51 of the Verizon Hi-Cap Operations Presentation; March 30, 2001, April 2, 2001, and April 5, 2001, Correspondence between Mr. Oxman and Mr.

Hartman; July 24, 2001, "Dear CLEC customer" DS1 and DS3 Unbundled Network Elements Policy; and CLEC Guide – Unbundled Network Elements, p. 7 are enclosed herewith.

3. Please provide all documents identified in response to Interrogatory 49(d).

RESPONSE: See Response to Request for Production No. 2.

4. Please provide all identified documents in Covad's possession that respond to Interrogatory 50(b).

RESPONSE: Verizon correspondence, dated November 21, 2001, entitled "VADI Communication" is enclosed herewith.

5. Please provide all identified documents in Covad's possession that respond to Interrogatory 52(a).

RESPONSE: See Response to Request for Production No. 2.

6. Please provide all identified documents in Covad's possession that respond to Interrogatory 52(b).

RESPONSE: See Response to Request for Production No. 2.

7. Please provide all identified documents in Covad's possession that respond to Interrogatory 53(a).

RESPONSE: See Response to Request for Production No. 2.

8. Please provide all identified documents in Covad's possession that respond to Interrogatory 53(b).

RESPONSE: See Response to Request for Production No. 2 and December 19, 2002 email from David F. Russell to Valerie Evans with attachments.

9. Please provide all identified documents in Covad's possession that respond to Interrogatory 53(c).

RESPONSE: No such documents exist as to Florida rejects.

10. Please provide all identified documents in Covad's possession that respond to Interrogatory 54(a).

RESPONSE: The FCC citations provided in response to Interrogatory 54(a) are available publicly..

11. Please provide all identified documents in Covad's possession that respond to Interrogatory 54(b).

RESPONSE: The 8th Circuit Court of Appeals citations provided in response to Interrogatory 54(b) are available publicly.

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Attorneys for Covad Communications Company

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I HEREBY CERTIFY that a true and correct copy of the foregoing DIECA Communications, Inc. d/b/a Covad Communications Company's Responses to Staff's First Request for Production of Documents (Nos. 1 - 11) has been provided by (*) hand delivery, (**) electronic mail, or (***) U.S. Mail this 19th day of May 2003 to the following:

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Washington, DC 20036

Vicki Gordon Kaufman


verizon

UNE Hi-Cap Operations Meeting November 15, 2001

Agenda

- 9:00 - 9:15 Welcome & Opening Comments
- 9:15 - 9:45 Organizational Overview
- 9:45 - 10:15 UNE Hi-Cap Resources
- 10:15 - 11:00 ASR Process Flow
- 11:00 - 11:15 Break

Agenda (continued)

- 11:15 - 11:45 Facility Build Policy
- 11:45 - 12:45 Provisioning Flow
- 12:45 - 1:00 Wrap-up/Q&A

CLEC Operations

- ***The Goal Of This Meeting Is:***
  - Meet Operations Personnel from across the industry in an effort to:
    - ✓ Improve communications
    - ✓ Develop better business relationships

CLEC Operations

Topics For This Meeting:

- Topics should be limited to:
  - ✓UNE Hi-Cap Facility Ordering & Provisioning
  - ✓Facility Build Policy for UNE Hi-Caps

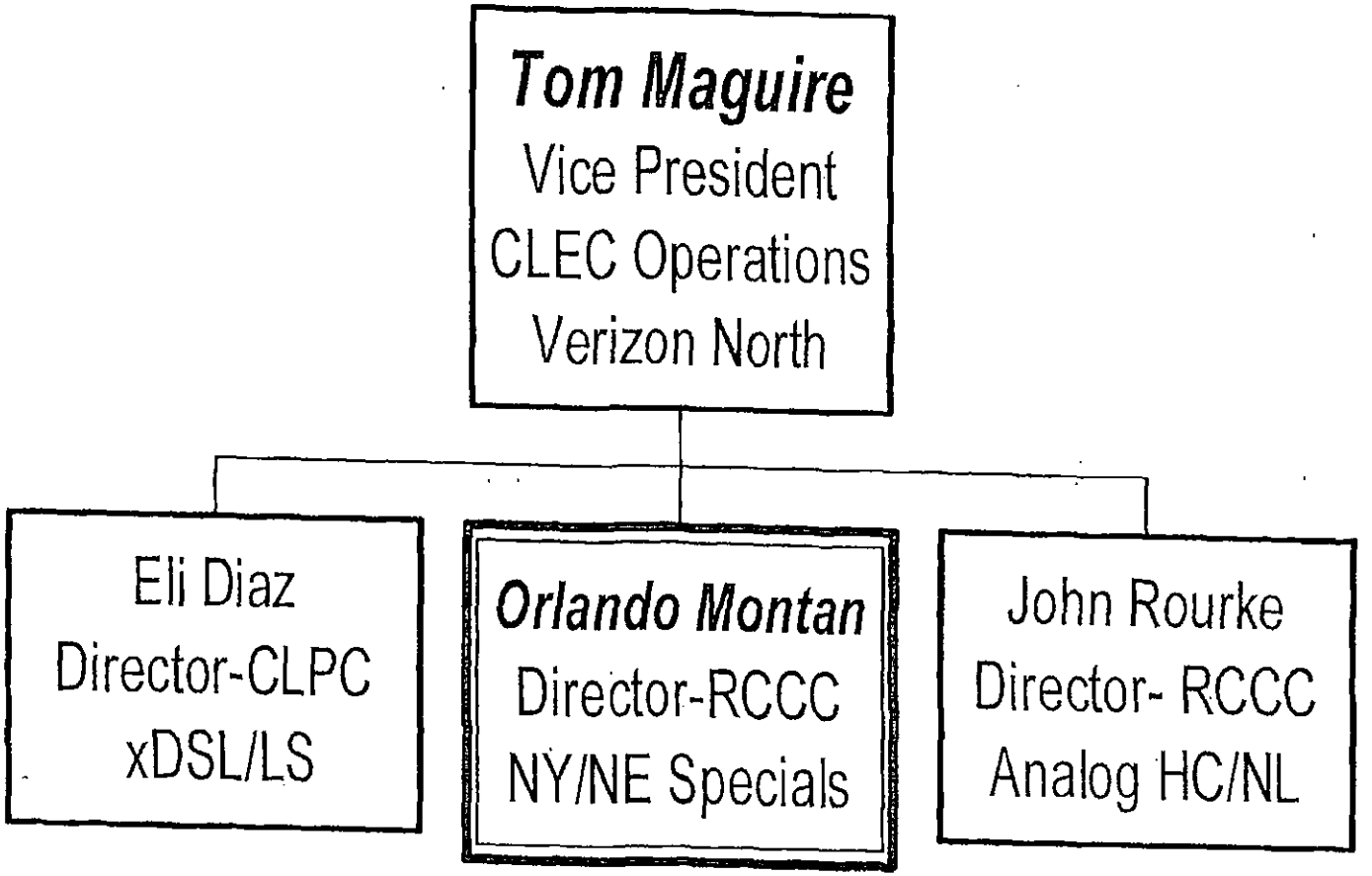
- Time will be allocated for all questions

CLEC Operations

- ***This Meeting is Not:***
  - A forum to discuss:
    - ✓ **Metrics**
    - ✓ **Regulatory matters**
  - A venue to allow clients to address individual complaints or challenges other than items that are high level (i.e., industry wide) in nature

Organizational Overview

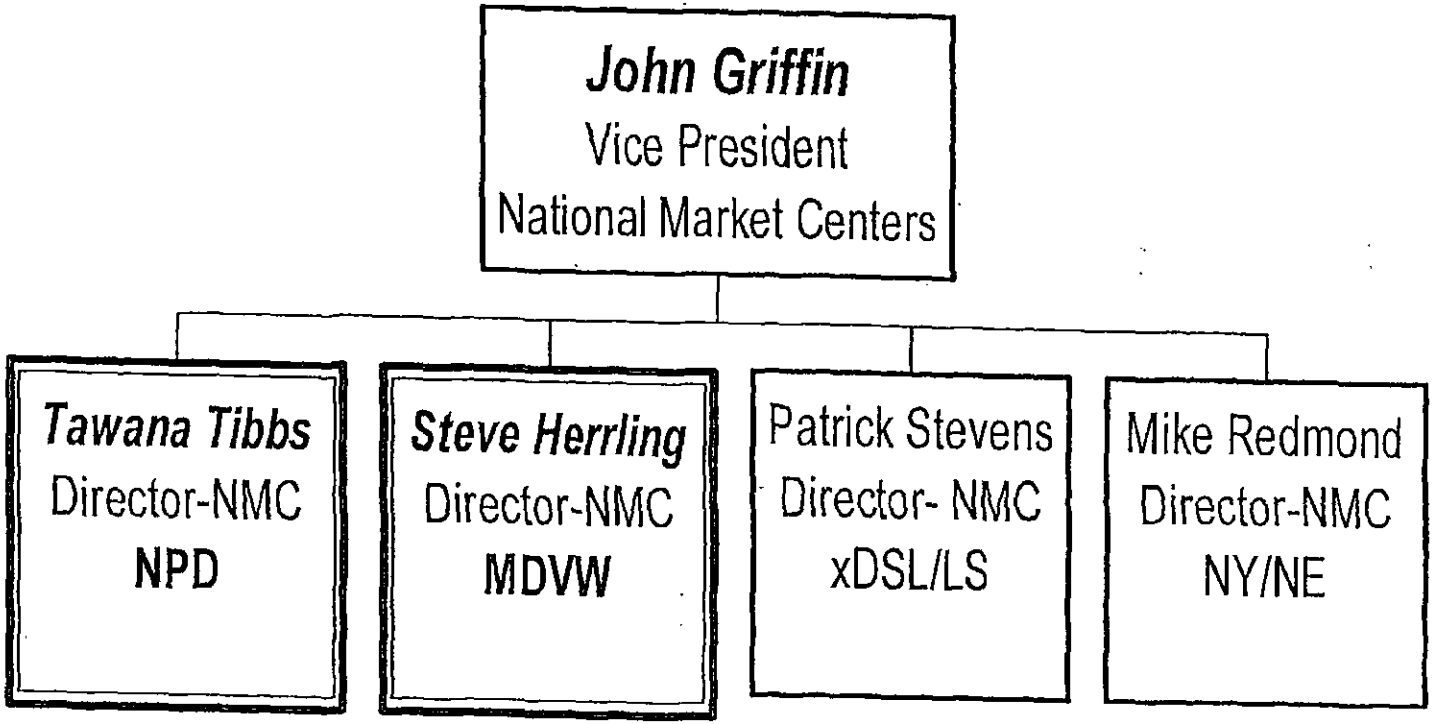
CLEC Operations - North



CLEC Operations - North

- UNE Hi-Cap - ASR Processing & Provisioning
  - Orlando Montan - Director
    - ✓Boston CATC (NY/NE)
      - Jim DeNapoli, Manager
    - ✓NY RCCC (NY/NE)
      - Jim Martin & Marva Morris, Managers

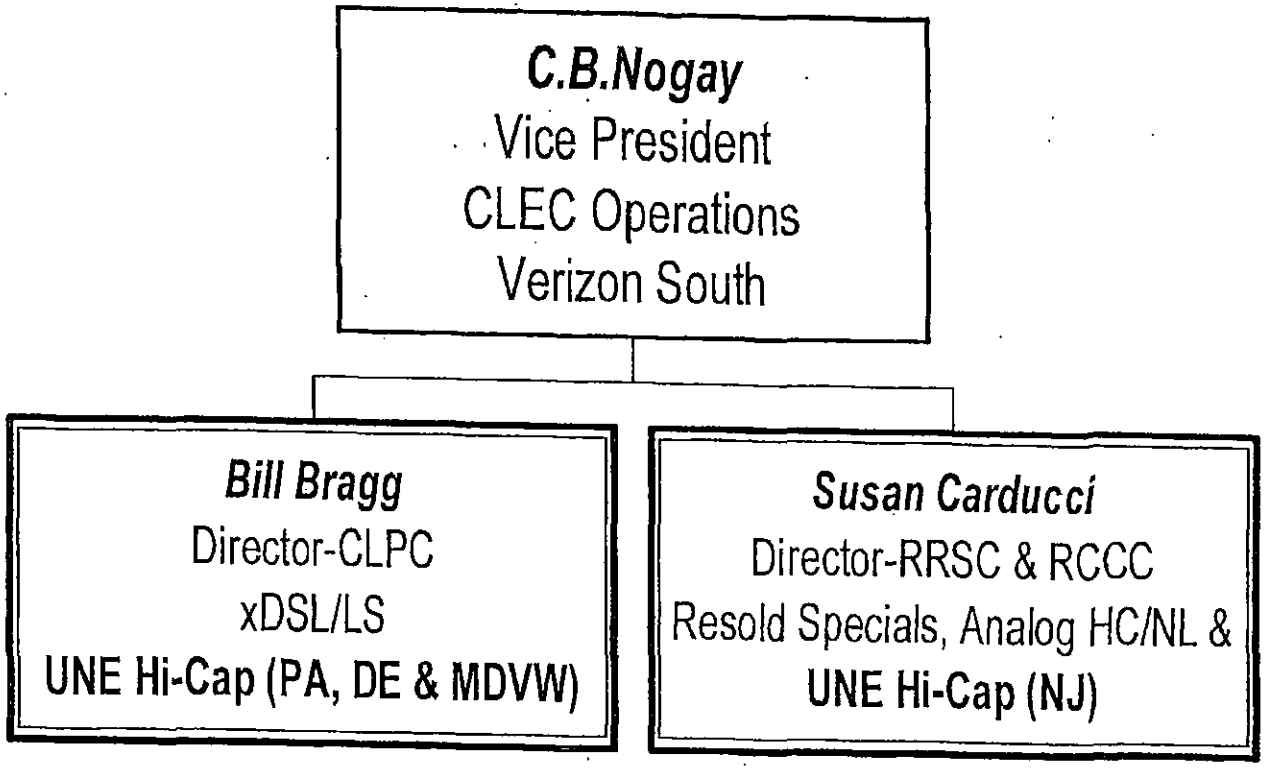
National Market Centers



National Market Centers

- UNE Hi-Cap - ASR Processing
  - Tawana Tibbs - Director NMC
    - ✓Pittsburgh NMC (NJ, PA & DE)
      - – Charlene Sanders, Manager
  - Steve Herrling - Director NMC
    - ✓Silver Spring NMC (MDVW)
      - – Al Townsend, Manager

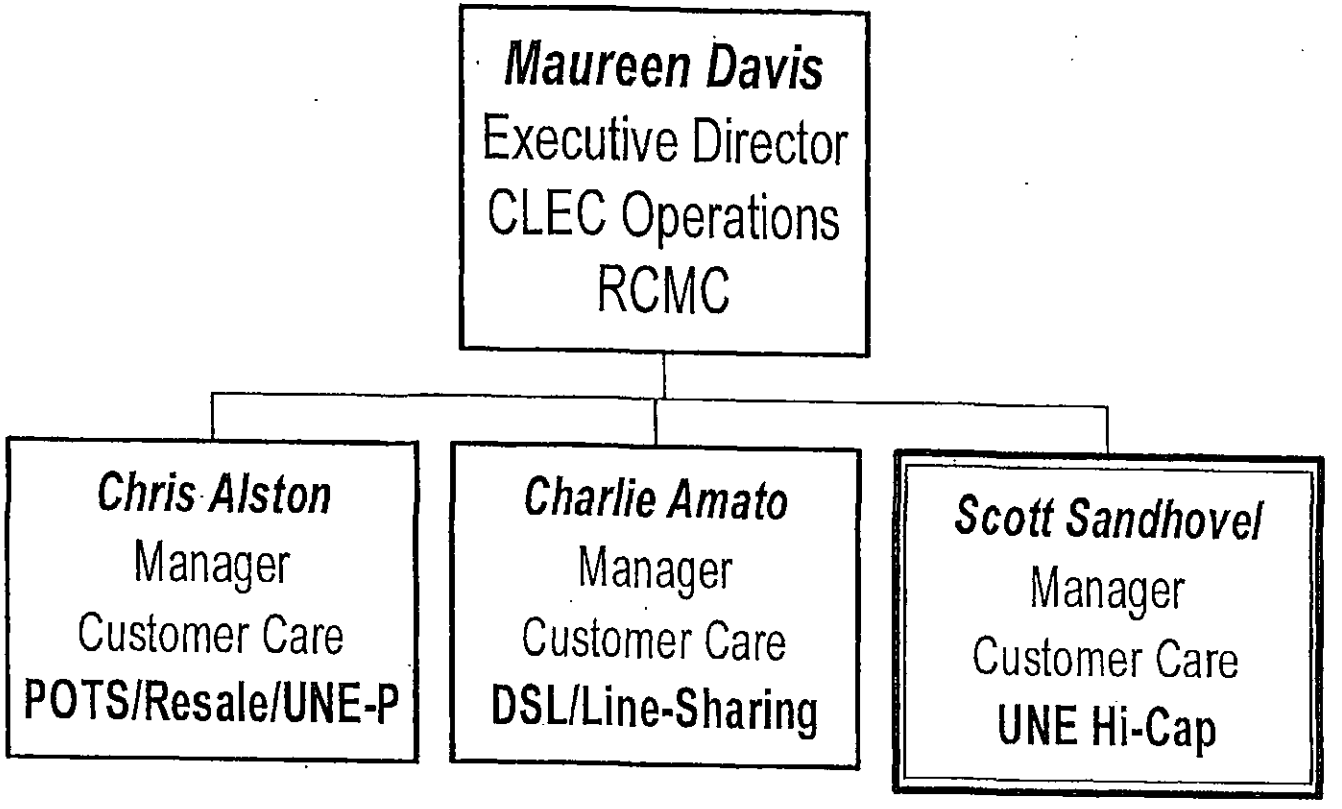
CLEC Operations - South



CLEC Operations - South

- UNE Hi-Cap - Provisioning
  - Bill Bragg - Director CLPC
    - ✓Hunt Valley CLPC (PA, DE & MDW)
      - Linda Brooks, Manager
  - Susan Carducci - Director RCCC/RRSC
    - ✓RRSC (NJ)
      - Bob Borik, Manager

CLEC Operations - Maintenance

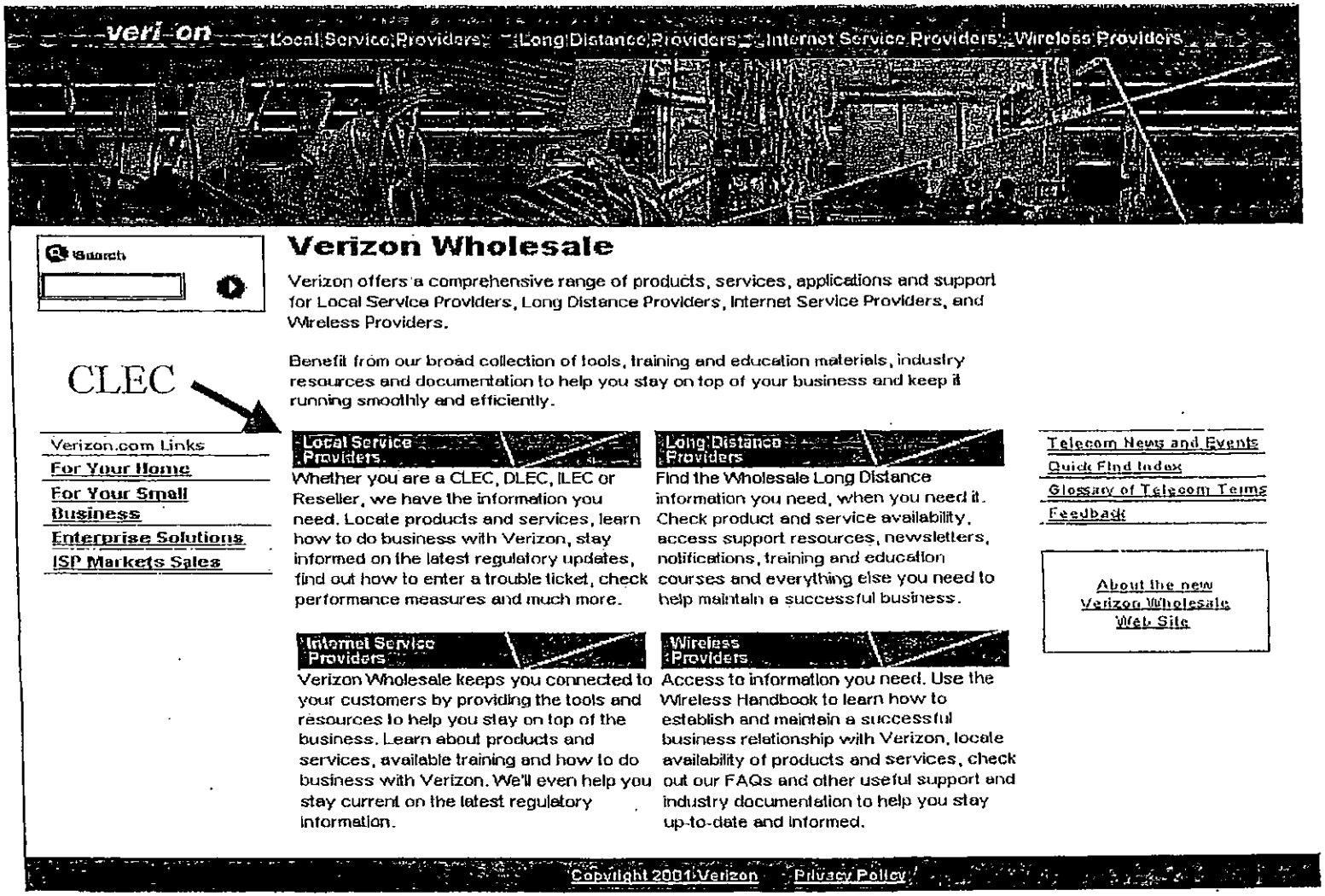



verizon

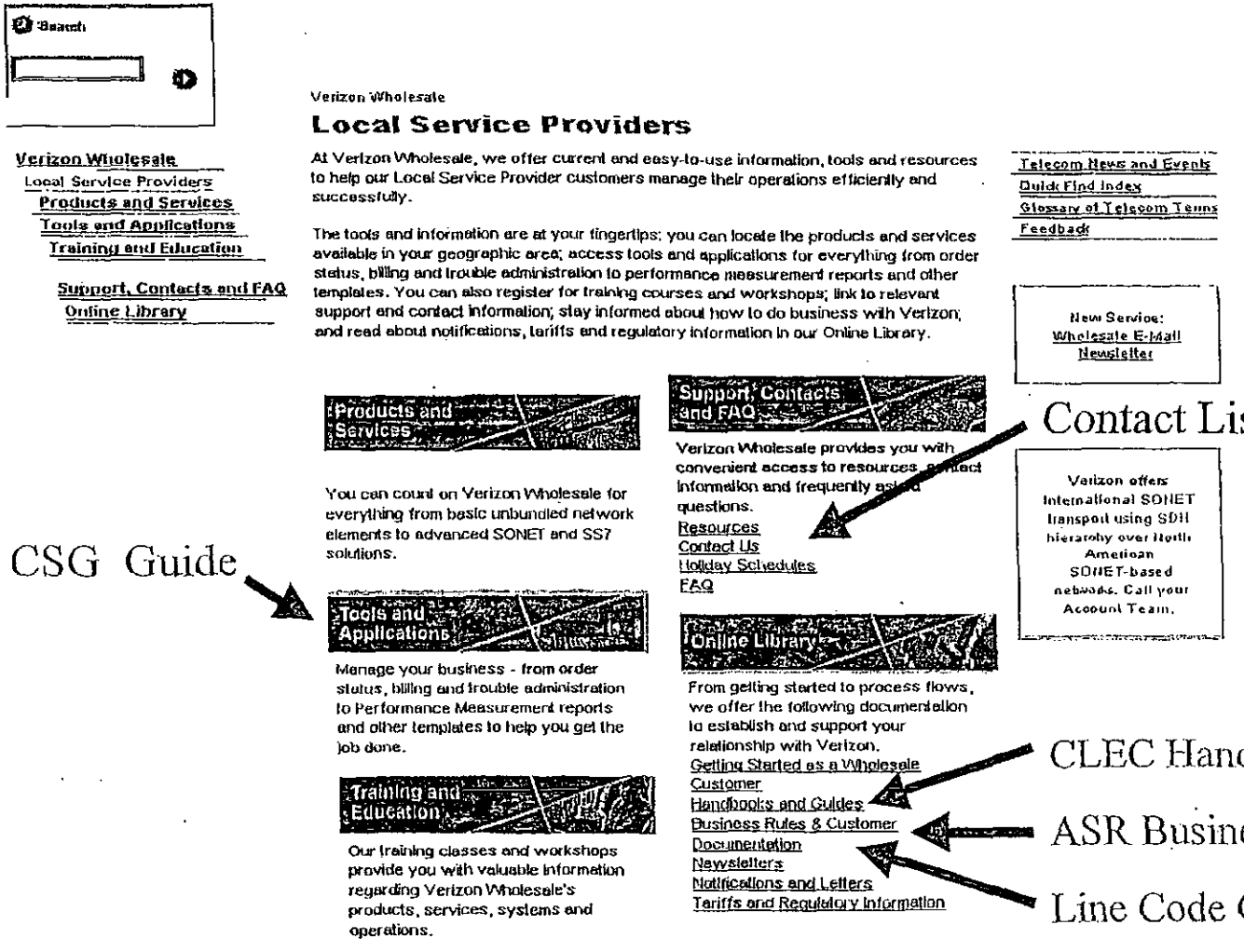
UNE Hi-Cap Resources

Steve Degeorgis
Service Manager
RCCC

http://www22.verizon.com/wholesale



Local Service Providers



Tools & Applications: CSG - DD/PTD Status

Due Date/Plant Test Date Status Display

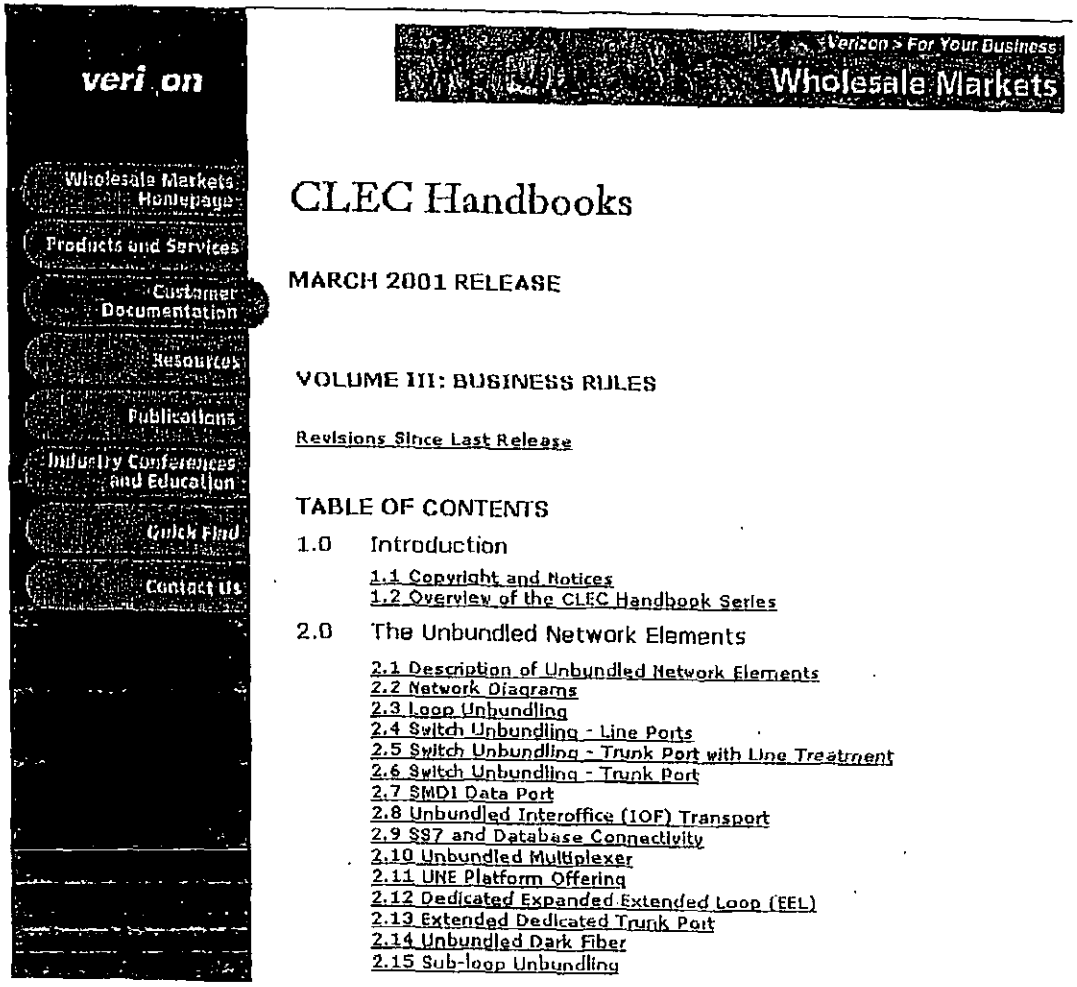
Search Criteria
CCNA: AAA
PON: 1212121212

Status Information

Circuit ID	Act	Status	PTD	PTD JEP	DD	DD JEP
32/HCFU/123456/NY	A	PENDING	mm/dd/yyyy	-	mm/dd/yyyy	A

JEOPARDY CODE DESCRIPTION TABLE	
	DESCRIPTION
A	
B	Service Order Problem
C	Engineering Document Problem
D	Loop Make-Up Problem
E	Facilities Assignment Issue
F	Plug-In Issue
G	Software/Provisioning Issue
H	Trunk-Side Switch Termination Problem
I	Scheduling Issue
J	Exception (weather, disaster or work-stoppage)

On-Line Library: CLEC Handbook Series



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Wholesale Markets Homepage
Products and Services
Customer Documentation
Resources
Publications
Industry Conferences and Education
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Contact Us

Verizon's For Your Business
Wholesale Markets

CLEC Handbooks

MARCH 2001 RELEASE

VOLUME III: BUSINESS RULES

Revisions Since Last Release

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2.4 Switch Unbundling - Line Ports
2.5 Switch Unbundling - Trunk Port with Line Treatment
2.6 Switch Unbundling - Trunk Port
2.7 SMDI Data Port
2.8 Unbundled Interoffice (IOF) Transport
2.9 SS7 and Database Connectivity
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2.14 Unbundled Dark Fiber
2.15 Sub-loop Unbundling

- Product & Technical Descriptions
- Ordering Requirements
- USOC
- Ordering Intervals

On-Line Library

- ASR Business Rules
  - ASR (Access Service Request) form
  - Transport form
  - SALI (Service Address Location Identifier)
    - ✓ **Facility terminates @ End-user location**
- NC/NCI/SECNCI Guide for UNE Hi-Cap
  - UNE IOF, Dark Fiber
  - UNE Loops (DS1/DS3)
  - EEL Loops, EEL Backbone & M-Loops

ASR Business Rules

3.2 ASR - Access Service Request Form

Required form for all requests using ASR forms.

ASR Form - Specific Data

8.	UNB	Unbundled Network Elements	1	A	Conditional	Y = Ordering unbundled elements	Identifies that this request is ordering unbundled network elements for local service. Optional when the CC field is populated and the first position of the REQTYP field is "M", "S" or "L", otherwise prohibited *Required when ordering UNEs. See REQTYP field notes for UNEs.*
70.	SPEC	Service and Product Enhancement Code	5-7	A/N	*Conditional*	Positions 1-7 = any alpha character except "I" or any numeric character except "0" *When ordering UNEs:* *"UNBALL"* *"UNB1OT"* *"UNB1DP"* *"UNB1D2"* *see Notes*	Identifies a specific product or service offering. *Required when UNE field = "Y" and first position of the REQTYP field entry is "L", "M" or "S".* *UNE SPECs and configurations are:* *UNBALL = UNE DS1 & DS3 Loop (non-EEL), UNE IOF, UNE Dark Fiber, UNE Mux, Cage to cage and DTS* *UNB1OT = All Expanded Extended Loop (EEL)* Products (EEL Backbone, EEL Loops (DS1 and DS3) and EEL M-Loops (Voice Grade, DS0, and DS1)* *UNB1DP = Extended Dedicated Trunk Port (EDTP) Type 1** *UNB1D2 = Extended Dedicated Trunk Port (EDTP) Type 2** **where available*

3.6 SALI - Service Address Location Information

17.	LDI	Location Designator #1	4	A	Conditional		Identifies additional specific information related to the service address (e.g., building, floor, room). *Required when the ACT field on the ASR Form is "N" or "T" and the SASN field is populated, otherwise prohibited.*
18.	LVI	Location Value #1	10	A/N	Conditional		Identifies the value associated with the first location designator of the service address. *Required when the LDI field is populated, otherwise prohibited.*

NC/NCI/SECNCI Guide for UNE Hi-Cap Facilities

UNE IOF TRANSPORT – DS3

(SPEC FIELD = UNBALL)

Termination Type* DS3	Line Coding & Framing	NC Code	NCI Code	SECNCI Code
CLEC CO to CLEC CO	M32 Framing	HF--	04DS6.44	04DS6.44
Colloc to Colloc	M32 Framing	HF--	04QB6.33A	04QB6.33A
Colloc to CLEC CO	M32 Framing	HF--	04QB6.33A	04DS6.44
CLEC CO to Colloc	M32 Framing	HF--	04DS6.44	04QB6.33A
CLEC CO to CLEC CO	C-Bit Parity (Channelized)	HFC-	04DS6.44I	04DS6.44I
Colloc to Colloc	C-Bit Parity (Channelized)	HFC-	04QB6.33C	04QB6.33C
Colloc to CLEC CO	C-Bit Parity (Channelized)	HFC-	04QB6.33C	04DS6.44I
CLEC CO to Colloc	C-Bit Parity (Channelized)	HFC-	04DS6.44I	04QB6.33C
CLEC CO to CLEC CO	C-Bit Parity (Unchannelized)	HFC-	04DS6.44A	04DS6.44A
Colloc to Colloc	C-Bit Parity (Unchannelized)	HFC-	04QB6.33B	04QB6.33B
Colloc to CLEC CO	C-Bit Parity (Unchannelized)	HFC-	04QB6.33B	04DS6.44A
CLEC CO to Colloc	C-Bit Parity (Unchannelized)	HFC-	04DS6.44A	04QB6.33B

* Termination type refers to entries in ACTL field (A-End) and SECLOC field (Z-End) as populated on ASR.

UNE DARK FIBER (IOF & LOOP)

(SPEC FIELD = UNBALL)

Termination Type* DF	Line Code & Framing	NC Code	NCI Code	SECNCI Code
Colloc to Colloc (DF-IOF)	[redacted]	LX--	02QBF.LLX	02QBF.LLX
Colloc to CLEC CO (DF-IOF)		LX--	02QBF.LLX	02FCF.X
Colloc to End-user (DF-LOOP)		LX--	02QBF.LLX	02FCF.X

* Termination type refers to entries in ACTL field (A-End) and SECLOC field (Z-End) as populated on ASR.

NC/NCI/SECNCI Guide for UNE Hi-Cap Facilities

UNE LOOPS – DS3

(SPEC FIELD = UNBALL)

Termination Type* – DS3	Line Coding & Framing	NC Code	NCI Code	SECNCI Code
Colloc to End-user	M32 Framing	HF--	04QB6.33A	04DS6.44
Colloc to End-user	C-Bit Parity (Channelized)	HFC-	04QB6.33C	04DS6.44I
Colloc to End-user	C-Bit Parity (Unchannelized)	HFC-	04QB6.33B	04DS6.44A
Colloc to End-user	Non-CBIT or M23 **	HF--	04QB6.33	04DS6.44

* Termination type refers to entries in ACTL field (A-End) and SECLOC field (Z-End) as populated on ASR.
** The non-CBIT or M23 option will not be valid for "new" activity on or after January 7, 2002.

UNE LOOPS – DS1

(SPEC FIELD = UNBALL)

Termination Type* – DS1	Line Code & Framing	NC Code	NCI Code	SECNCI Code
Colloc to End-user	AMI, SF	HC--	04QB9.11	04DU9.BN
Colloc to End-user	AMI, ESF	HCD-	04QB9.11	04DU9.1KN
Colloc to End-user	B8ZS, ESF	HCE-	04QB9.11	04DU9.1SN
Colloc to End-user	B8ZS, SF	HCZ-	04QB9.11	04DU9.DN

* Termination type refers to entries in ACTL field (A-End) and SECLOC field (Z-End) as populated on ASR.

NC/NCI/SECNCI Guide for UNE Hi-Cap Facilities

EEL LOOPS – DS1

(SPEC FIELD = UNB1OT)

Termination Type – DS1*	Line Code & Framing	NC Code	NCI Code*	SECNCI Code*
Colloc to End-user	AMI, SF	HC--	04QB9.11	04DU9.BN
CLEC CO to End-user	AMI, SF	HC--	04DS9.15	04DU9.BN
Colloc to End-user	AMI, ESF	HCD-	04QB9.11	04DU9.1KN
CLEC CO to End-user	AMI, ESF	HCD-	04DS9.1K	04DU9.1KN
Colloc to End-user	B8ZS, ESF	HCE-	04QB9.11	04DU9.1SN
CLEC CO to End-user	B8ZS, ESF	HCE-	04DS9.1S	04DU9.1SN
Colloc to End-user	B8ZS, SF	HCZ-	04QB9.11	04DU9.DN
CLEC CO to End-user	B8ZS, SF	HCZ-	04DS9.15B	04DU9.DN

* Termination type refers to entries in ACTL field (A-End) and SECLOC field (Z-End) as populated on ASR.

EEL DS1 M-LOOPS

(SPEC FIELD = UNB1OT)

SR Flavor/Termination Type* – DS1	Line Code & Framing	NC Code	NCI Code*	SECNCI Code*
Colloc to End-user	AMI, SF	HC--	04QB6.33	04DU9.BN
CLEC CO to End-user	AMI, SF	HC--	04DS6.44	04DU9.BN
Colloc to End-user	AMI, ESF	HCD-	04QB6.33	04DU9.1KN
CLEC CO to End-user	AMI, ESF	HCD-	04DS6.44	04DU9.1KN
Colloc to End-user	B8ZS, ESF	HCE-	04QB6.33	04DU9.1SN
CLEC CO to End-user	B8ZS, ESF	HCE-	04DS6.44	04DU9.1SN
Colloc to End-user	B8ZS, SF	HCZ-	04QB6.33	04DU9.DN
CLEC CO to End-user	B8ZS, SF	HCZ-	04DS6.44	04DU9.DN

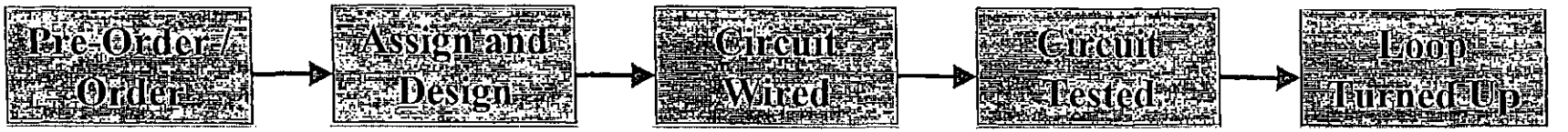
* Termination type refers to entries in ACTL field (A-End) and SECLOC field (Z-End) as populated on ASR.


verizon

ASR Process Flow

Jim DeNapoli
Manager
CATC

ASR Process Flow



- CLEC issues ASR indicating type of UNE Hi-Cap loop requested
- CATC/NMC either queries or accepts and inputs into RequestNet
- RequestNet confirms facilities through Engineering. If not available, query CLEC to issue SUP1
- FOC sent within 72 hours either way

- CPC designs circuit and issues on RID
- DLR sent to CLEC
- WORD DOC flows to RCCC/CLPC via WFA/C
- Work steps created in WFA/DI and TEMS for Central Office wiring activity
- If required, order flows to WFA/DO for field dispatch

- TEMS automatically places electronic cross connects
- CO tech wires frame
- If required, field techs complete outside work

- RCCC/CLPC tests the loop on Frame Continuity Date, contacts appropriate party if something wrong. (In / Out)

- If required, field dispatches tech to premises. Field tech contacts RCCC/CLPC for testing
- RCCC/CLPC tech does turn up testing with CLEC
- CLEC accepts circuit or requests that test loop be left up until they are ready

Pre-RID ⟷ **Post-RID**

Open Query - Issues

- Numerous ASRs in Query status, some quite old
- Miscommunication w/ "Voice Message" Query notification process
- Pre-order tools not utilized fully (Service Address, CFA Validation)
- ASR Business Rules not always adhered to

Open Query - Impact

- Creates backlog
- End-user expectations may not be met
- Extra work/negotiations may be required for CLEC & VZ
- Increase in expedites/escalations
- May impact pipeline orders
- 10-day auto-cancellation, eff. 11/26/01

Project Policy

- All project intervals are negotiated with Project Managers:
  - NY/NE - Mary Farrell, 617-743-1587
    - mary.farrell@verizon.com
  - NJ/PA/DE - Diane Sherry, 617-342-0992
    - diane.f.sherry@verizon.com
  - MDVW - R. Terry Charlton, 301-989-4229
    - richard.t.charlton@verizon.com

Project Policy - New Connects

- UNE-IOF: Either ACTL or SECLOC must be the same location
  - UNE IOF - 8 or more DS1, DS3 or OC3/OC12
- UNE-Loop: Same ACTL & SECLOC
  - UNE-Loop - 10 or more DS1/DS3 (North)
  - UNE-Loop - 11 or more DS1/DS3 (South)

Project Policy - Coordinated Conversion

- When one CLEC assumes another CLECs circuits due to bankruptcy, takeovers and mergers
- Losing CLEC sometimes not able to issue a disconnect ASR
- Assuming CLEC responsible for issuing new connect ASR with disconnect circuit & BAN in Remarks


verizon

Facility Build Policy

Sharon Rose
Manager
Engineering

Facility Build Policy

- Verizon will provide UNE DS1 & DS3 facilities (loops or IOF) to requesting CLECs where existing facilities are currently available.
- Verizon is not obligated to construct new UNE(s) where such network facilities have not already been deployed for Verizon's use in providing service to its wholesale and retail customers.

Facility Build Policy

- In areas where Verizon has construction underway to meet anticipated future demand, Verizon's field engineers will provide a due date on CLEC orders for UNE DS1 and DS3 facilities (Loops/IOF) based on the estimated completion date of that pending job, even though no facilities are immediately available.
- ECCD plus product interval.

Facility Build Policy

- Verizon will reject an order for a UNE DS1/DS3 where (i) it does not have the common equipment in the central office, at the end user's location, or outside plant facility needed to provide a DS1/DS3 network element, or (ii) there is no available wire or fiber facility between the central office and the end user.

PROPRIETARY INFORMATION

Docket Number A-310696F7000

Name of Document Pages 40-47

Date Document Received 7-9-2003

DOCUMENT CONTAINS

PROPRIETARY INFORMATION

Facility Build Policy

- Verizon's Engineering or facility assignment personnel will check existing common equipment in C.O. and at the End-user's location for spare ports or slots. If there is capacity on this common equipment, operations personnel will perform the cross connection work between the common equipment and the wire or fiber facility running to the end user and install the appropriate DS1/DS3 cards in the existing multiplexers.

Facility Build Policy

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

Facility Build Policy

- On FOC'd orders, where Verizon subsequently finds proposed spare facilities are defective, Verizon will perform work necessary to clear defect. In the event the defect cannot be corrected, resulting in no spare facilities, or if Verizon has indicated there are spare facilities and Verizon subsequently finds there are no spare facilities, Verizon will not build new facilities to complete the service request.

Facility Build Policy

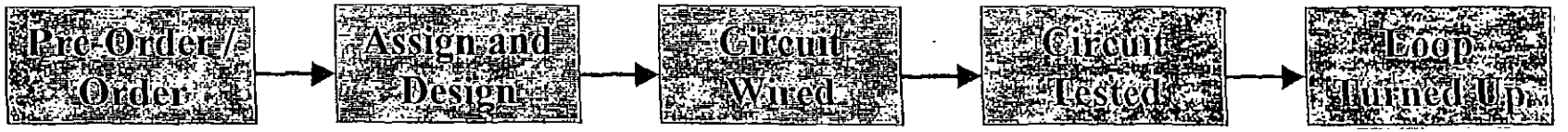
- CLEC may request Verizon to provide DS1 and DS3 services pursuant to the applicable state or federal tariffs. While these tariffs also state that Verizon is not obligated to provide service where facilities are not available, Verizon generally will undertake to construct the facilities required to provide service at tariffed rates (including any applicable special construction rates) if the required work is consistent with Verizon's current design practices and construction program.


verizon

Provisioning Flow

Marva Morris
Manager
RCCC

Provisioning Flow



- CLEC issues ASR indicating type of UNE Hi-Cap loop requested
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- RequestNet confirms facilities through Engineering. If not available, query CLEC to issue SUP1
- FOC sent within 72 hours either way

- CPC designs circuit and issues on RID
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- If required, field dispatches tech to premises. Field tech contacts RCCC/CLPC for testing
- RCCC/CLPC tech does turn up testing with CLEC
- CLEC accepts circuit or requests that test loop be left up until they are ready

Pre-RID ⟷ **Post-RID**

CNR (Customer Not Ready) - Issues

- End-user not aware/not ready
- CLEC equipment not ready (both ends)
- CLEC not ready/available to test on DD
- Incorrect Service Address
- Incorrect Line-Coding/Framing (NC/NCI/SECNCI)

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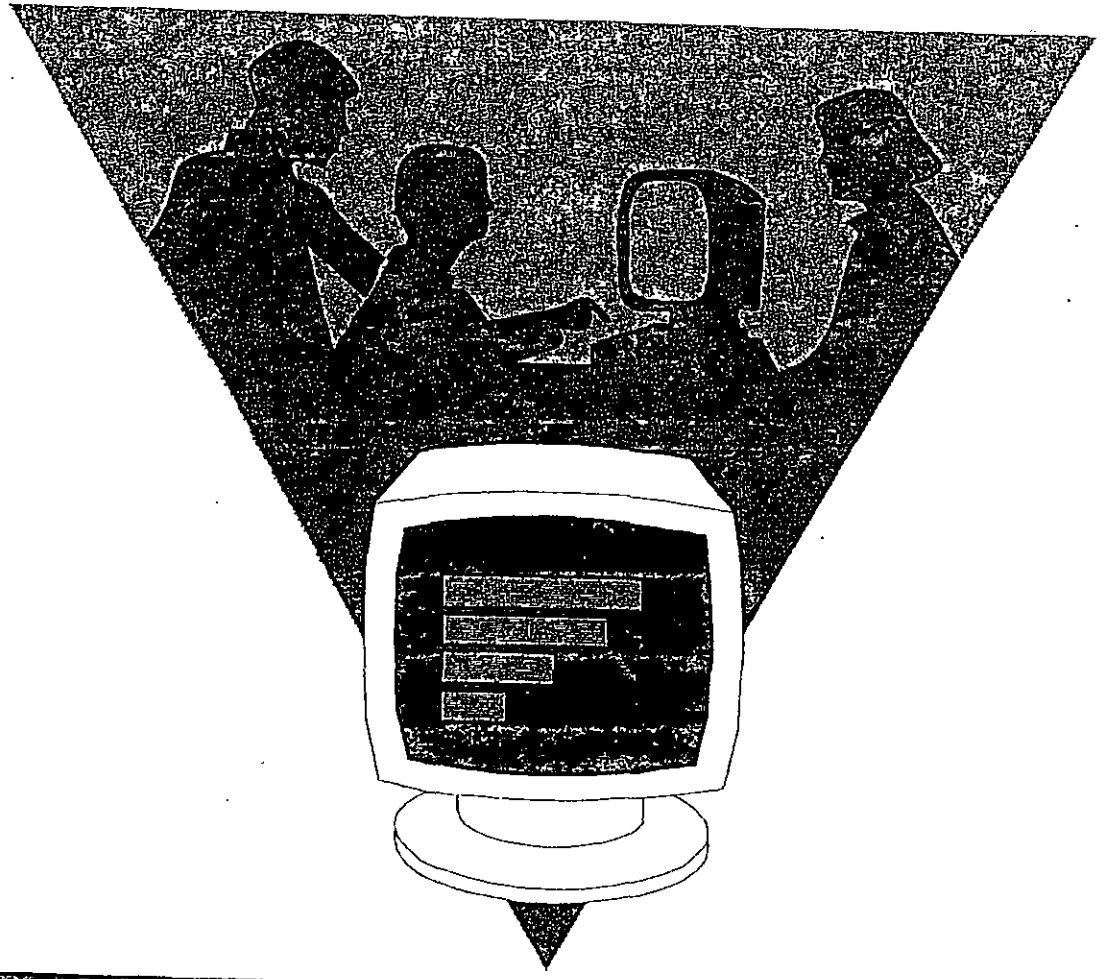
CNR (Customer Not Ready) - Impact

- Creates backlog
- SUP may be required to reschedule
- May require cancel & reissue of ASR
- Extra work/negotiations may be required for CLEC & VZ
- Increase in expedites/escalations
- May impact pipeline orders

Q & A



Steven H. Hartmann
Senior Counsel
Carrier Relations

1320 North Court House Road
8th Floor
Arlington, Virginia 22201

Phone: 703-974-3940
Fax: 703-974-0665
Email: Steven.H.Hartmann@verizon.com

March 30, 2001

VIA E-MAIL AND FIRST CLASS MAIL

Jason Oxman, Esq.
Covad Communications Company
600 14th St., N.W.
Suite 750
Washington, DC 20005

Dear Jason:

Scott Randolph asked me to respond to your e-mail dated March 28 regarding Verizon West's alleged failure to provide Covad with unbundled DS-1s in compliance with Verizon West's obligations. I have a couple of related responses. First, I'm puzzled by your contention that Verizon West "refuse[s] to provision an unbundled DS-1 loop unless a retail DSL customer is served over that loop already." Verizon West's obligation to provision DS-1 loops at UNE rates depends on whether or not such loops are currently available in Verizon West's network at the time of the request. This obligation has nothing to do with whether or not a retail customer or a DSL customer is served over the loop. If you can provide examples of the instances you refer to, we will investigate them.

Second, if I understand the central point of your complaint correctly, it is that Covad believes Verizon must provide Covad with DS-1 loops (meaning copper loops conditioned to handle DS-1 signals, plus the related electronics at each end) at UNE rates regardless of whether or not the conditioned copper loops and related electronics are available in Verizon West's network at the time of Covad's request. We disagree. I am aware of neither legal obligations under sections 251 and 252 of the Act nor contractual obligations that require Verizon West to build out DS-1 loops for Covad and provide them at UNE rates.

Regarding Verizon West's legal responsibilities, I would ask that you provide the basis for your assertion that sections 251, 252, and the FCC's rules compel us to install DS-1 loops and provide them on an unbundled basis.

Regarding Verizon West's contractual responsibilities, I would ask that you similarly describe the basis for your position, particularly as I believe the interconnection agreements support Verizon's position, not Covad's. The Texas interconnection agreement between Covad and GTE is illustrative. Article VII, Section 2.3 (captioned "Connection to Unbundled Elements") provides:

> Covad may connect to the UNEs listed in Article VII, Section 2.1 that Covad chooses. The UNEs must be Currently Available and connection to them must be technically viable.

The term "Currently Available" is defined in Article II, Section 1.22 as:

> [E]xisting as part of GTE's network at the time of the requested order or service and does not include any service, feature, function, or capability that GTE either does not provide to itself or to its own end users, or does not have the capability to provide.

Read together, these two provisions make clear that Verizon West, f/k/a GTE, is not required to build new facilities to satisfy a Covad request for unbundled network elements, including DS-1 loops.

Given our fundamental disagreement over the extent of Verizon West's legal obligations, Verizon West is not willing to agree to your demands that it (i) immediate convert existing DS-1 special access circuits to UNE DS-1 circuits, or (ii) certify to Covad that it will make DS-1 loops available at UNE rates where such loops are not available in Verizon West's network. Of course, if you can explain how the law and the contracts support your position, Verizon stands willing to reconsider its positions.

Sincerely,

Steven H. Hartmann

cc: Scott Randolph

COVAD

Hamilton Square 500 14th Street NW Suite 750 Washington DC 20005
T> 202-220-0400 F > 202-220-0401

2 April 2001

Steven H. Hartmann, Esq.
Senior Counsel
Carrier Relations
Verizon
1320 North Court House Road
Arlington, VA 22201

Re: Verizon refusal to provide UNE DS-1 capable loops

Dear Steve:

In your March 30, 2001, letter to me, you made the following request: "Regarding Verizon West's legal responsibilities, I would ask that you provide the basis for your assertion that sections 251, 252, and the FCC's rules compel us to install DS-1 loops and provide them on an unbundled basis."[1] I am happy to do so, in the hope that you will reconsider your position on this matter.

As you may recall, the Federal Communications Commission imposed an obligation on Verizon (specifically, its predecessor incumbent LEC companies) on August 8, 1996, to unbundle local loops for requesting carriers. That obligation, found in the *Local Competition First Report and Order*, and codified in Part 47 of the C.F.R., arises from the unbundling provisions of section 251(c)(3) of the Act. In that 1996 Order, the Commission described the exact type of loop that we are asking you to provide us: a DS-1 capable loop. To quote the Commission:

> We further conclude that the local loop element should be defined as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises. This definition includes, for example, two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level signals.[2]

The Commission then addressed the requirement for incumbent LECs, such as Verizon, to take affirmative steps to condition loops to carry digital signals:

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[1] Hartmann Letter at 1.
[2] *Local Competition First Report and Order* at para. 380.

> Our definition of loops will in some instances require the incumbent LEC to take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities. For example, if a competitor seeks to provide a digital loop functionality, such as ADSL, and the loop is not currently conditioned to carry digital signals, but it is technically feasible to condition the facility, the incumbent LEC must condition the loop to permit the transmission of digital signals. Thus, we reject BellSouth's position that requesting carriers "take the LEC networks as they find them" with respect to unbundled network elements. As discussed above, some modification of incumbent LEC facilities, such as loop conditioning, is encompassed within the duty imposed by section 251(c)(3).[3]

Subsequently, in the *First Advanced Services Order*, the Commission again addressed the very issue that leads us to this exchange of correspondence. The Commission stated for a second time that incumbent LECs must take affirmative steps to condition loops for requesting carriers. I would point you to paragraph 53 of that Order, which states, in pertinent part:

> In the *Local Competition Order*, the Commission identified the local loop as the network elements that incumbent LECs must unbundle "at any technically feasible point." It defined the local loop to include "two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL and DS-1-level signals." To the extent technically feasible, incumbent LECs must "take affirmative action to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities." For example, if a carrier requests an unbundled loop for the provision of ADSL service, and specifies that it requires a loop free of loading coils, bridged taps, and other electronic impediments, the incumbent must condition the loop to those specifications, subject only to considerations of technical feasibility. The incumbent may not deny such a request on the ground that it does not itself offer advanced services over the loop, or that other advanced services that the competitive LEC does not intend to offer could be provided over the loop.[4]

The Commission repeated the obligation yet again in the *UNE Remand Order*:

> In order to secure access to the loop's full functions and capabilities, we require incumbent LECs to condition loops. This broad approach accords with section 3(29) of the Act, which defines network elements to include their "features, functions and capabilities."[5]

And indeed, the Commission was forced to once again reject GTE (now Verizon's) argument that it need not only provide a loop as it exists in its network:

---

[3] *Local Competition First Report and Order* at para. 382.
[4] *First Advanced and Order* at para. 53 (internal citations omitted).
[5] *UNE Remand Order* at para. 167.

> GTE contends that the Eighth Circuit, in the Iowa Utils. Bd. v. FCC decision, overturned the rules established in the *Local Competition First Report and Order* that required incumbents to provide competing carriers with conditioned loops capable of supporting advanced services even where the incumbent is not itself providing advanced services to those customers. We disagree.[6]

You now continue to maintain the same position that the FCC has rejected on three occasions. You claim that Verizon has no obligation to provide an unbundled DS-1 capable loop if an DS-1 capable loop is not already in place to an end user premises. You claim to be "aware of neither legal obligations under sections 251 and 252 of the Act nor contractual obligations that require Verizon West to build out DS-1 loops for Covad and provide them at UNE rates."[7] To clarify what you mean by "build out DS-1 loops for Covad," you succinctly state Verizon's policy as follows: "Verizon West's obligation to provision DS-1 loops at UNE rates depends on whether or not such loops are currently available in Verizon West's network at the time of the request."[8] That is not true. The only question Verizon is entitled to ask itself when Covad requests a DS-1 capable loop is this: is it technically feasible to condition a loop to provide DS-1 capablities to the address requested by Covad? If the answer is yes, then Verizon must provision a DS-1 capable loop.

Fortunately, you have already answered that simple question for us. By providing a retail DS-1 access service instead of the UNE DS-1 loop that Covad ordered, Verizon necessarily concedes that it is technically feasible to condition a loop to support DS-1 digital signals to the address requested by Covad. Verizon simply prefers to condition that loop on Covad's behalf only via Verizon's retail arm, not its wholesale arm. Therefore, Verizon is not only denying Covad access to the UNEs to which it is entitled by law, it is also engaging in a discriminatory practice of conditioning loops for its retail arm while refusing to do so for requesting carriers.

You also cite our interconnection agreement with you as further evidence to support your claim that Verizon need not provide DS-1 capable loops. In particular, you cite certain provisions of Article VII, Section 2.3 of the Covad/Verizon Texas Interconnection agreement, which provides:

> Covad may connect to the UNEs listed in Article VII, Section 2.1 that Covad chooses. The UNEs must be Currently Available and connection to them must be technically viable.

You then note that the term "Currently Available" is defined in Article II, Section 1.22 as:

---

[6] *UNE Remand Order* at para. 173.
[7] Hartmann Letter at 1.
[8] Hartmann Letter at 1.

> [E]xisting as part of GTE's network at the time of the requested order or service and does not include any service, feature, function, or capability that GTE either does not provide to itself or to its own end users, or does not have the capability to provide.

Unfortunately, you left out the most important provision of that agreement; namely, the part where Covad is entitled to order an unbundled DS-1 loop:

> 4.2.5 "DS-1 loop - will support a digital transmission rate of 1.544 Mbps. The DS-1 loop will have no bridge taps or load coils and will employ special line treatment. DS-1 loops will include midspan line repeaters where required, office terminating repeaters, and DSX cross connects."

You clearly do not dispute that the copper loop is available at the time Covad orders a DS-1 capable loop; indeed, a retail access service is offered to Covad in lieu of the UNE loop. As I understand your argument, to the extent the "midspan line repeaters where required, office terminating repeaters, and DSX cross connects" are not already in place over a loop for DS-1 capability, you believe Verizon has no obligation to provide the requested UNE. Having contractually bound itself to provide DS-1 loops, including necessary conditioning work, and having failed repeatedly in its efforts to convince the FCC that it need not unbundle loops where the finished loop product is not already in place, Verizon cannot maintain its current position. I cannot imagine that the FCC would appreciate being forced to tell Verizon of its obligations a fourth time.

Now, as much as I enjoy sharing my favorite passages from Commission Orders with you, I must now ask you to comply with the rules I have cited. Verizon is in violation of the Commission's requirement that it take affirmative steps to condition loops to the extent technically feasible. Because you do not claim that it is not technically feasible to condition the loops Covad has requested for DS-1 capability, you must condition the loops that Covad requests. As I mentioned to Scott in my email dated March 28, 2001, Covad has and continues to suffer serious harm because of Verizon's refusal to provide UNE loops as required by law. As you know, Verizon now has a pending application for long distance authority in Massachusetts. One of the issues in that proceeding is Verizon's compliance with checklist items two and four of section 271 of the Act, which require Verizon to provide nondiscriminatory access to unbundled loops. By setting and maintaining this policy, Verizon is in violation of those checklist provisions. Please take this opportunity to reconsider your March 30, 2001, letter to me

as soon as possible. Because you volunteered to reconsider that position, I now offer you until close of business on Tuesday, April 3, 2001 to contact me for further discussion of this matter, or with your determination that your original position stands. In the latter event, please be advised that this matter will be referred immediately to the Commission via various mechanisms that are available to aggrieved carriers.

Sincerely,

Jason D. Oxman
Senior Counsel

Steven H. Hartmann
Senior Counsel
Carrier Relations

verizon

1320 North Court House Road
8th Floor
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Phone: 703-974-3940
Fax: 703-974-0665
Email: Steven.H.Hartmann@verizon.com

April 5, 2001

VIA E-MAIL AND FIRST CLASS MAIL

Jason Oxman, Esq.
Covad Communications Company
600 14th St., N.W.
Suite 750
Washington, DC 20005

Dear Jason:

I write in response to your letter dated Monday, April 2. Before getting into the substance of my response, I note that in your letter you requested that I respond by close of business on Tuesday, April 3, failing which Covad would immediately refer this matter to the FCC. Similarly, in your initial e-mail on this subject, which you sent to Scott Randolph and me after business hours on Wednesday, March 28, you demanded a written response no later than Friday, March 30, which I provided. While I know you've indicated that this is an important issue to Covad, the deadlines you've included for Verizon's response have not been reasonable. I'm willing try to resolve this matter as quickly as possible, but I would ask that Covad allow us reasonable time to respond to its communications.

In my letter of March 30, I asked that you provide examples of instances in which Covad believes Verizon West improperly rejected orders for unbundled DS1 loops, and that you explain Covad's contention that sections 251, 252 and the FCC's rules compel Verizon to build DS1 loops and provide them on an unbundled basis. Although you've now provided an explanation of Covad's legal assertions, you haven't provided the examples I requested. It's unfortunate that we don't have this information yet, as it would allow Verizon to figure out why the orders Covad is complaining about were rejected, assist the parties to clarify the issues in dispute, and hopefully allow the parties to start to quantify the number of DS1 orders regarding which we are in disagreement. Accordingly, I urge you have your company send us a partial or complete list of the unbundled DS1 loop orders at issue.

Because we don't know anything about orders Covad is complaining about, it's not possible for me to address the legal issues in a way that relates to what actually

occurred. However, I can at least respond to your general assertions regarding Verizon's legal obligations.

Concerning Verizon West's contractual obligations, I fail to see how the provision you cite from the Texas contract, Section 4.2.5, which is a description of the DS1 loop product, advances Covad's argument. Regardless of how DS1 loops are described in the Interconnection Agreement, the point is that Covad may only purchase these loops where they're "Currently Available," as that term is defined in the Agreement.

Regarding Verizon's obligations under the 1996 Act and related regulations, although I concur entirely with your assertions that (i) the local loop network element includes DS1 loops and (ii) Verizon is obligated to "condition" local loops at the request of Covad or other requesting carriers (at the requesting carrier's expense), neither of these requirements support what I understand to be Covad's principal assertion: that, pursuant to its obligation to condition loops, Verizon West must, when presented with a Covad order for an unbundled DS1 local loop, do whatever's necessary to provide Covad an unbundled DS1 loop, including construction of new facilities.

Contrary to your assertions, neither Verizon West's obligation to unbundle loops nor its obligation to condition loops requires it to attach DS1 electronics to the wire or fiber facilities that serve the end user. The FCC's definition of the local loop network element supports the position that ILECs are not required to add electronics to existing copper or fiber loop facilities. Under 47 C.F.R. § 51.319(a), ILECs must provide requesting carriers access to the local loop and subloop. Subsection 51.319(a)(1) of the FCC's regulation provides that

> [t]he local loop network element is defined as "a transmission facility between a distribution frame . . . and the loop demarcation point at an end-user customer premises, including inside wire owned by the incumbent LEC. The local loop network element includes all features, functions and capabilities of such transmission facility. Those features, functions and capabilities include, but are not limited to, dark fiber, attached electronics (except those electronics used for the provision of advanced services, such as [DSLAMs]), and line conditioning. (emphasis added)

As this provision indicates, the "features, functions and capabilities" that Covad may avail itself of include attached electronics, meaning electronics already connected to the wire or fiber, in contrast to unattached electronics, which is what Covad demands here.

The fact that Verizon West must condition wire facilities, including conditioning them so that they can pass signals at a DS1 rate, similarly does not help Covad's argument. Under Subsection 51.319(a)(3)(i) of the FCC's regulations,

> Line conditioning is defined as the removal from the loop of any devices that may diminish the capability of the loop to deliver high speed switched wireline telecommunications capability, including xDSL service. Such devices include, but are not limited to, bridge taps, low pass filters, and range extenders. (emphasis added)

Nothing in this definition, or in the FCC's related discussion in the *UNE Remand Order*, suggests that an ILEC must, as part of its line conditioning obligations, add or attach electronics to a copper or fiber facility.

More broadly, the 1996 Act only requires incumbent carriers to unbundle their existing network, not to construct network elements simply to make them available on an unbundled basis to competing carriers. As the Eighth Circuit explained, "subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network - not to a yet unbuilt superior one." *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), appealed on other grounds, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 737 (1999). Here, Covad demands that Verizon West agree that it will build out its network wherever Covad demands an unbundled DS1 loop, which exceeds the scope of Verizon West's obligations under section 251.

Notwithstanding the fact that Verizon West has no legal obligation to add DS1 electronics to available wire or fiber facilities to fill a CLEC order for an unbundled DS1 loop, Verizon West's practice is to fill such CLEC orders as long as the central office common equipment necessary to create a DS1 loop can be accessed. When Verizon West receives an order for an unbundled DS1 loop, it checks to see if the required common equipment is installed in the central office and has available ports or slots on it. If there's capacity on this common equipment, Verizon West does the cross connection work between the common equipment and the wire or fiber facility running to the end user. At the end user's end of the wire or fiber facility, Verizon West terminates the DS1 loop in the appropriate NID.

Thus, Verizon West's existing practice goes significantly beyond its legal obligations, in that we effectively will create an unbundled DS1 loop, even where the necessary electronics are not already attached to the wire or fiber facility, as long as we can do so without having to procure additional common equipment in the central office.

In sum, under Verizon West's current practice it rejects an order for an unbundled DS1 loop only where (i) it does not have the common equipment in the central office needed to provide a DS1 loop, or (ii) there is no available wire or fiber facility between the central office and the end user. If you believe that Verizon West has rejected orders for unbundled DS1 in a manner that may have been inconsistent with this practice, please provide the order information, so that we can investigate these and address them as necessary.

Please contact me if you would like to discuss this issue further.

Sincerely,

Steven H. Hartmann

cc: Scott Randolph

Verizon
HQE02M51
Wholesale Services
600 Hidden Ridge
Irving, TX 75038-3897

July 24, 2001

Dear CLEC Customer:

A number of carriers have recently expressed concern that Verizon is changing its policies with respect to the construction of new DS1 and DS3 Unbundled Network Elements. This is not the case. To ensure that there is no misunderstanding on this point this letter restates Verizon's policies and practices with respect to the provisioning of unbundled DS1 and DS3 network elements.

In compliance with its obligations under applicable law, Verizon will provide unbundled DS1 and DS3 facilities (loops or IOF) to requesting CLECs where existing facilities are currently available. Conversely, Verizon is not obligated to construct new Unbundled Network Elements where such network facilities have not already been deployed for Verizon's use in providing service to its wholesale and retail customers. This policy, which is entirely consistent with Verizon's obligations under applicable law, is clearly stated in Verizon's relevant state tariffs and the CLEC Handbook, and is reflected in the language of Verizon's various interconnection agreements.

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

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

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

Specifically, when Verizon receives an order for an unbundled DS1/DS3 network element, Verizon's Engineering or facility assignment personnel will check to see if existing common equipment in the central office and at the end user's location has spare ports or slots. If there is capacity on this common equipment, operations personnel will perform the cross connection work between the common equipment and the wire or fiber facility running to the end user and install the appropriate DS1/DS3 cards in the existing multiplexers. They will also correct conditions on an existing copper facility that could impact transmission characteristics. Although they will place a doubler into an existing apparatus case, they will not attach new apparatus cases to copper plant in order to condition the line for DS1 service. At the end user's end of the wire or fiber facility, Verizon will terminate the DS1/DS3 loop in the appropriate Network Interface Device (Smart Jack or Digital Cross Connect (DSX) Panel).

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

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

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

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

CLEC Guide - Unbundled Network Elements

Loop

TOP

Overview

Engineered and non-engineered loops are designed to appropriate technical specifications. Circuit turn-up shall include the following:

- Test continuity to end user s Network Protector
- Validate that loop meets bearer service

requirements

- Establish meet coordination with other CLECs as required (charges will apply)
- Complete order as appropriate

Provisioning testing of the loop will be from the Network Interface Device (NID) to the Main Distribution Frame (MDF).

Verizon West offers a national turn-up testing center for designed loop and private line service. The national number is (800) 967-7027. This number WILL NOT provide status of service orders, repair reporting, etc. It is ONLY for turn-up testing of CLEC designed/engineered service orders. It WILL NOT provide for status or repair type testing after completion of the service order.

TOP

Loop Provisioning

Loop Certification

When providing unbundled loops, Verizon West has the right and responsibility to ensure that no company s use of Verizon West facilities will jeopardize or interfere with other services also using the same or adjacent facilities. This responsibility is balanced by the CLEC s right to use unbundled network element for whatever purpose they choose, without use restriction.

TOP

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xDSL UNE Loop Qualifications

This statement outlines Verizon's technical specifications governing the method for cable pair qualification and spectral compatibility conformance for Competitive Local Exchange Carriers (CLECs). These rules provide guidelines for ordering unbundled digital loops from Verizon West capable of supporting Digital Subscriber Line (xDSL) technology. Verizon West makes no guarantee and assumes no liability for any UNE loop that does not conform to Verizon West standards.

As a specific example, a 2-wire digital loop may be configured to support Enhanced Copper Technologies (ECTs), such as ADSL. However, any

application of CLEC technology that does not conform with the limits of Verizon's technical standards will negate Verizon's obligation to support the requested technology. Support includes provisioning, testing and repair of the UNE loop.

Subject to applicable Interconnection agreements and/or tariffs, any required Unbundled Loops will be provisioned and maintained by Verizon West consistent with Telcordia Technologies (formerly BellCore) standard NC/NCI codes. Where a CLEC chooses to use an Unbundled Loop in a manner different than that defined by the NC/NCI code, Verizon West cannot guarantee that the facility will accommodate the CLEC's intended use.

Effective May 16, 1999, Verizon West will only accept the NC/NCI codes associated with Unbundled Loops as listed below. Any and all other NC/NCI codes used for ordering unbundled loops will be rejected after that time.

To the extent any of the Unbundled Loops listed below are required, the listings below define all unbundled loops available for lease from Verizon West. Should a CLEC require a loop with electrical characteristics not defined below, they should contact their Verizon West Account Manager and issue a Verizon West Bonafide Request. The request will be reviewed and the CLEC will be notified as to cost and time frame for implementation.

NCI/NCI Codes

2-Wire Analog - A 2-wire voice frequency transmission facility that is suitable for the transport of analog voice signals between approximately 300 - 3000 Hz, with loss not to exceed 8.5 db. A 2-wire analog loop may include load coils, bridge taps, etc. Also, this facility may include carrier derived facility components (i.e. pair gain applications, loop concentrator/multiplexes).

NC NCI

LX--02QB2.0

The following NC/NCI codes are to be used in conjunction with 2-Wire Analog UNE loops:

Loop Start LX--02QC2.OOC

Ground Start LX--02QC2.OOB

2-Wire Analog Loop Non-Designed (Loop Start-Closed End) LX--02QC2.OOD

2-Wire Analog Loop Non-Designed (Loop Start-Open End) LX--02QC2.OOE

4-Wire Analog - A 4-wire voice frequency transmission facility that is suitable for the transport of analog voice signals between approximately 300 Hz to 3000 Hz with loss not to exceed 8.5 dB. A 4-wire analog loop may include load coils, bridge taps, etc. Also, this facility may include carrier derived facility components (i.e. pair gain applications, loop concentrator/multiplexes).

NC NCI

LX--04QB2.0

2-Wire Digital A 2-wire transmission facility capable of transmitting digital signals up to 160 KPBS, with no greater loss than 38db end-to-end, measured at 40kHz without loop repeaters. Dependent upon loop make-up and length, midspan repeaters may be required, in which case loss will be no greater that 76 dB. at 40kHz.

NC NCI

LX-N 02QB2.0

In addition, a 2-wire Digital Loop, dependent on loop make up, may be configured to support Enhanced Copper Technologies (ECTs), such as ADSL. When utilizing ADSL technology, the CLEC is responsible for limiting the Power Spectral Density (PSD) of the signal to the levels specified in Clause 6.13 of ANSI T1.413 ADSL Standard.

NC NCI

LX-N 02QB9.00A

2-Wire Digital ADSL Capable Loop (Over 12,000 ft) - Remove Bridge Taps & Load Coils

NC NCI

LXCN 02QB9.00A

2-Wire Digital ADSL Capable Loop (Over 12,000 ft) - Remove Load Coils Only

NC NCI

LXC- 02QB9.00A

2-Wire Digital ADSL Capable Loop (Over 12,000 ft)

- Remove Bridge Taps Only

NC NCI

LX-N 02QB9.00C

2-Wire Digital ADSL Capable Loop (Under 12,000 ft) - Remove Load Coils Only

NC NCI

LXR- 02QB9.00A

2-Wire Digital ADSL Capable Loop (Under 12,000 ft) - Remove Bridge Taps Only

NC NCI

LX-N 02QB9.00C

4-Wire Digital - A 4-wire copper facility that is suitable for the transport of digital signaling. This loop type will contain no load coils and minimum allowable bridge tap. A 4-wire Digital Loop may be used by a CLEC to provision services such as ISDN- PRI or HDSL. The 4-wire digital UNE is not available where Verizon West has provisioned its local network utilizing Digital Line Concentrators (DLCs). Verizon West does not supply the electronics associated with these service types.

NC NCI

LX-N 04QB2.0

4-Wire Digital Loop Designed (Over 12,000 ft) - Remove Bridge Taps and Load Coils

NC NCI

LXCN 04QC5.

4-Wire Digital Loop Designed (Over 12,000 ft) - Remove Load Coils Only

NC NCI

LXC- 04QC5.

4-Wire Digital Loop Designed (Over 12,000 ft) - Remove Bridge Taps Only

NC NCI

LX-N 04QC5.

4-Wire Digital Loop Designed (Under 12,000 ft) - Remove Bridge Taps and Load Coils

NC NCI

LXRN 04QC5.

4-Wire Digital Loop Designed (Under 12,000 ft) - Remove Load Coils Only

NC NCI

LXR- 04QC5.

4-Wire Digital Loop Designed (Under 12,000 ft) - Remove Bridge Taps Only

NC NCI

LX-N 04QB9.11

4-Wire Digital Loop/ISDN-PRI - Remove Bridge Taps & Load Coils

NC NCI

LXCN 04QB9.11

4-Wire Digital Loop/ISDN-PRI - Remove Load Coils Only

NC NCI

LXC- 04QB9.11

4-Wire Digital Loop/ISDN-PRI - Remove Bridge Taps Only

NC NCI

LX-N 04QB9.11

4-Wire Digital HDSL Capable Loop (Over 12,000 ft) - Remove Bridge Taps and Load Coils

NC NCI

LXCN 04QB5.00H

4-Wire Digital HDSL Capable Loop (Over 12,000 ft) - *Remove Load Coils Only*

NC NCI

LXC- 04QB5.00H

4-Wire Digital HDSL Capable Loop (Over 12,000 ft) - Remove Bridge Taps Only

NC NCI

LX-N 04QB5.00H

4-Wire Digital HDSL Capable Loop (Under 12,000 ft) - Remove Bridge Taps and Load Coils

NC NCI

LXRN 04QB5.00H

4-Wire Digital HDSL Capable Loop (Under 12,000 ft) - Remove Load Coils Only

NC NCI

LXR- 4QB5.00H

4-Wire Digital HDSL Capable Loop (Under 12,000 ft) - Remove Bridge Taps Only

NC NCI

LX-N 04QB5.00H

DS1 - A transmission facility that provides connectivity from the serving central office termination point to the network interface device located at the end users premise. A DS1 unbundled loop will support a digital transmission rate of 1.544 Mbps and contains no load coils and minimum allowable bridge taps. A DS1 unbundled loop includes the necessary electronics to provide the DS1 transmission rate. DS1 unbundled loops will be provided only when the necessary equipment to provide the DS1 Loop is currently available.

NOTE: The costs for Clear Channel Capability (B8ZS) may be above and beyond those detailed within the Customer's Interconnection Agreement.

NC NCI	Description
HC-- 04QB9.11	SuperFrame & AMI
HCZ- 04QB9.11	SuperFrame & B8ZS
HCD- 04QB9.11	Extended SuperFrame & AMI
HCE- 04QB9.11	Extended SuperFrame & B8ZS

DS3 – A transmission facility that provides connectivity from the serving central office DS3 termination point (typically a DS3 patch panel) to the *network interface device located at the end users* premises. A DS3 will provide for 45 MBPS digital transmission channels. A DS3 unbundled loop *offers a CLEC the ability to provision the equivalent* of 28 DS1s or 672 DS0s (basic 64 KBPS digital channels). A DS3 unbundled loop includes the necessary electronics to provide the DS3 transmission rate. DS3 unbundled loops will be provided only when the electronics necessary to provide the DS3 functionality are currently available for the specific loop being requested. Verizon West will not install new electronics.

NC NCI

LX-N 04QB6.33

4-Wire Digital 56KPBS Capable Loop - Remove Bridge Taps & Load Coils

NC NCI

LXCN 04QC5.OOP

4-Wire Digital 56KPBS Capable Loop - Remove *Load Coils Only*

NC NCI

LXC- 04QC5.OOP

4-Wire Digital 56KPBS Capable Loop - Remove Bridge Taps Only

NC NCI

LX-N 04QC5.OOP

When providing unbundled loops, Verizon West has the right and responsibility to ensure that no company's use of Verizon West facilities will *jeopardize or interfere with other services also using* the same or adjacent facilities. This responsibility is balanced by the CLEC's right to use unbundled *network element for whatever purpose they choose,* without use restriction.

Other xDSL Technologies -- As the industry accepts additional Power Spectral Density (PSD) mask's, i.e. T1 418-200, Verizon (formerly GTE) will offer additional types of unbundled loops capable of supporting such xDSL technologies. The following NC/NCI code(s) may be used to order unbundled loops for such xDSL technologies without

renegotiations, contract amendments, or the use of the BFR process.

NC NCI

LX-N 02QB5.00E

TOP

To order a UNE Loop for xDSL from Verizon West

If the remarks section for a UNE Loop for xDSL are not properly populated as noted below, Verizon West will reject these orders.

In order to insure that Verizon West is able to process a CLEC's unbundled loop order for xDSL *technology without additional provisioning delays*, it will be necessary to place the following language in the remarks section of the

Loop Service form based upon one of the three following scenarios.

Scenario 1: IF REQUEST IS FOR xDSL ONLY

Use of appropriate NC NCI Codes placed in Local Service Request Fields 33 and 34

REMARKS field should include:

"(CLEC) will accept an xDSL loop at a maximum length of ____ kft "

- Where (CLEC) is the name or OCN of the ordering CLEC.
- xDSL the x should be populated with the applicable DSL technology.
- ____kft should be replaced with the actual length desired.

Example: "XYZ Telecommunications will accept an ADSL loop at a maximum length of 20.4 kft"

Verizon West will reject order if remark not provided.

Request will be disqualified and placed in jeopardy if maximum loop length is exceeded.

Scenario 2: IF REQUEST IS FOR ISDN ONLY

Use of appropriate NC NCI Codes placed in Local

Service Request Fields 33 and 34

REMARKS field should include:

"Certify for ISDN-BRI without Line Loop Extenders."

OR

"Certify for ISDN-BRI, add Line Loop Extenders if required."

Verizon West will reject order if remark not provided.

Request will be disqualified and placed in jeopardy *if repeater required and order is ISDN without* repeaters.

CLEC may choose to accept loop without repeater.

Scenario 3: IF REQUEST IS TO QUALIFY FOR BOTH xDSL AND ISDN

Use of appropriate NC NCI Codes placed in Local Service Request Fields 33 and 34

REMARKS field should include:

"(CLEC) will accept an xDSL loop at a maximum length of ____ kft. If NOT xDSL qualified (CLEC) will accept ISDN without repeaters"

OR

"(CLEC) will accept an xDSL loop at a maximum length of ____ kft. If NOT xDSL qualified (CLEC) will accept ISDN with repeaters if required"

- Where (CLEC) is the name or OCN of the ordering CLEC.
- xDSL the x should be populated with the applicable DSL technology.
- ____kft should be replaced with the actual length desired.

Example: "XYZ Telecommunications will accept an ADSL loop at a maximum length of 20.4 kft with repeaters if required"

Verizon West will reject order if remark not provided.

Request will be disqualified and placed in jeopardy if repeater required and order is ISDN without repeaters.

CLEC may choose to accept loop without repeater.

When standard procedure/policy in place, Verizon West will reject order if remark not provided. If preferred service (i.e. ADSL) identified by NC NCI Code is unavailable, order will be placed in jeopardy for CLEC response and/or supplemental order with appropriate NC NCI Codes.

Verizon West will only provision unbundled loops in parity with the technical standards that Verizon West uses to provision xDSL services for it's own end users. If a CLEC provisions a loop longer than what Verizon West uses as a standard for its own xDSL type service, the CLEC will assume all associated risks.

Currently Verizon's technical standard used to provision ADSL service for our end user customers is 16.2kft. This distance is subject to change without notice being posted on this WEBsite, but is available in our retail tariff filings.

TOP

Cable Pair Qualification and Spectral Compatibility

The following describes Verizon Communication s rules governing the method for cable pair qualification and spectral compatibility conformance.

Cable Pair Qualification

The loops will be qualified based on the following guidelines:

- Not behind a pair gain device or remote switching unit.
- Non loaded, metallic loops (no loop electronics).
- No interferers (using cable records)

Verizon West will provide the CLEC with the following information. Items 2 through 5 will only be provided if the order for the UNE loop is placed in a jeopardy condition.

1. Electrical Loop Length
2. The presence of spectral influence in bundle if applicable.
3. The presence of spectral influence in adjacent bundles if applicable.
4. "Copper facility not available."
5. "Working behind a digital loop carrier (DLC)."

TOP

Facility Requirements

Bridge taps will not exceed a total of 2,500 feet.

xDSL will not be provisioned behind a DLC.

The electrical loop length is determined by measurements based on capacitance tests, which may include bridge taps under 2,500 feet in length.

TOP

Spectral Influence

The 25 pair bundle that includes the identified, or selected, circuit will be checked (cable records check) to determine the presence and quantity of the following:

- T1- Pulse Code Modulated (PCM) circuits (AMI signaling).
- HDSL2 or HDSL LITE (one-pair)
- Analog Carrier
- Primary rate ISDN (PRI)

The adjacent four (4) bundles to the identified or selected circuit will be checked to determine the presence and quantity of the following:

- T1- Pulse Code Modulated (PCM) circuits (AMI signaling).
- Analog Carrier
- Primary rate ISDN (PRI)

This check includes the 100 pair (4 binder groups) around the specific pair being qualified (typically 50 pair on either side).

NOTE: Verizon West follows industry standards as close as possible; however, Verizon West reserves the right to enhance the specified standards in order to further protect embedded or newly added services, and to amend these rules without consent of any or all customers.

Verizon West reserves the right to routinely monitor random xDSL circuits to determine compliance to the specified spectral mask. Random circuit monitoring will be performed at the physical layer only.

TOP

Violation of Compliance

Verizon West reserves the right to disconnect any and all services and/or circuits that do NOT comply with all rules specified in this document. Violation may be determined either through testing by Verizon West or indication of violation, i.e. circuit outages and or trouble reports. Verizon West will attempt to notify the violating CLEC at least three hours before disconnecting the circuit and/or circuits in violation of any specified rule. Verizon West will allow the CLEC three hours to correct the problem. Upon correction, Verizon West reserves the right to test and/or monitor the circuit to determine if the problem is corrected. If the problem is not corrected, Verizon West will proceed to disconnect the offending circuit. If a CLEC cannot be contacted through normal methods, the circuit will be disconnected without notification.

TOP

Line Loop Extender

Unbundled Digital Loop Extension is an offering used in conjunction with Unbundled 2-Wire Digital Loops. CLEC's may lease an Unbundled 2-Wire Digital Loop and use them to provide various types of digital services (e.g. ISDN-BRI). As provisioned, such loops may require treatment in order to support services up to the maximum service limits of the terminal equipment without extension. The Unbundled Digital Loop Extension product is an ancillary piece of equipment that may be utilized to exceed the terminal equipment service limits.

The costs associated with the Unbundled Digital Loop Extension equipment are separate and incremental to those for the unbundled loop element itself and must be negotiated as such and included within the requesting CLEC contract. This must be done prior to Verizon West installing the necessary equipment. Otherwise, Verizon West will limit the loop length to the distance of the basic service distance as defined by Verizon West standards for the NC/NCI code as documented on the requesting CLEC's LSR. In addition, CLEC's are required to provide acceptance of the incremental charges associated with Unbundled Digital Loop Extension equipment on a per LSR basis. The following phrase should be added to the remarks section of the LSR in order to both approve the installation of the equipment and to accept the associated

incremental charges:

Certify for ISDN-BRI - add line extension equipment (repeaters).

NOTE: Repeaters in used generically in this application. Verizon West uses various types of equipment to extend ISDN-BRI capable loops. The type of equipment used varies by area and is Verizon's discretion as to the type of equipment used. The equipment used will be in parity with the equipment Verizon West uses for the companies retail/wholesale customers within the same given area.

TOP

Provisioning UNE Loops for Analog Subscriber Carrier

Verizon West will not provision a UNE loop over an Analog Subscriber Carrier. In cases where non-typical carrier is in use, and no spare wire pairs to an end user premise are available, Verizon West will require the CLEC to either cancel the order or have the order remain on the DSR list until facilities can be constructed. The CLEC may be responsible for construction costs.

TOP

UNE Loops Served from a Verizon West Pair Gain Location (Remote)

Verizon West will use the following process for provisioning of UNE Loops.

- Verizon West will first use all available, spare physical facilities to provision any CLEC request for a UNE loop.
- If no facilities are available, Verizon West will notify CLEC of the lack of facilities, using the Jeopardy Report. If Verizon West has planned an installation of facilities to augment the exhausted facilities, that date will be provided to the CLEC on the Jeopardy report from the NMC. Upon installation of Verizon West facilities, those facilities will be made available to the CLEC on a first come, first served basis.
- If Verizon West notifies the CLEC of a lack of

facilities, the CLEC may choose to cancel the pending order, cancel and reissue at a latter date, or for RESALE CLEC accounts ONLY be placed on a DOR (Delayed Order Request) list, waiting for Verizon West to install facilities under planned expansion to complete the provisioning of the UNE loop. Other options may be available pursuant to individual interconnection agreements. When the available dedicated CLEC pair gain facilities are exhausted, and no Verizon West facilities exist, Verizon West will follow the above described procedure to notify the CLEC.

VADI Customer Care/Service Support

Verizon Advanced Data, Inc.

VADI Communication

To: CLECs

Subject: Verizon DSL Over Resold Lines in VADI-West

Date: November 21, 2001

Communication Number: 2001.150

Description: The purpose of this communication is to advise CLECs in the following states:

- Alabama
- California
- Florida
- Hawaii
- Idaho
- Illinois
- Indiana
- Kentucky
- Michigan
- Missouri
- North Carolina
- Ohio
- Oregon
- Pennsylvania
- South Carolina
- Texas
- Virginia
- Washington
- Wisconsin

that Verizon has filed a tariff with an effective date of November 21, 2001 to offer resold DSL over resold voice lines in the areas mentioned above where it offers DSL. The service is known as Verizon DSL Over Resold Lines or Verizon DRL.

Verizon DRL will be provided by Verizon Advanced Data Inc. (VADI) as follows:

- The resold voice service must already be in place.
- The CLEC or its ISP must have, or establish, a connection to Verizon's DSL network.
- The CLEC ordering DRL must be the same entity providing the end-users' voice services.
- The CLEC is responsible for providing all associated equipment, premise services and support for ISP services to the end-user. This includes but is not limited to – any required splitters, filters, modems, users software, end-users' technical support, etc. The equipment must meet VADI's specifications.
- The CLEC will receive a separate bill from VADI for the DRL service.
- Service orders must pass a service qualification process employing VADI business rules (e.g., loop length, class of service, central office availability, etc.).

Pricing

For more information, including rates and charges, please refer to the **Verizon Advanced Data, Inc.** Communications Services Tariff F.C.C. No. 1, Section 5.2, Part 3 which can be viewed at www.banetworkdata.com.

For more information on Verizon DRL, please call your Verizon Wholesale Account Manager.

From: david.f.russell@verizon.com [mailto:david.f.russell@verizon.com]
Sent: Thursday, December 19, 2002 10:15 AM
To: Evans, Valerie
Cc: elaine.l.lapointe@verizon.com
Subject: Minimum Service Periods

Valerie,

The VZ Special Access Minimum Service periods are as follows.

In the former BA South (reference section 7.4.4 of the FCC 1 Tariff):
DS1 2 months
DS3 1 year

In the former BA North (reference section 7.4.4 of the FCC 11 Tariff):
DS1 3 months
DS3 3 months

In the former GTE (reference section 3.2.4 (DS1) and 5.6.11 (DS3) of the FCC
14 Tariff):
DS1 1 month
DS3 There are a series of minimum periods which you might recognize more as term plans than minimum period. Effectively you sign up for a term commitment that is stated as a minimum period and the penalties look more like early termination penalties than those in the east tariffs.
To understand all of the terms, I recommend you take a look at FCC 14, Section 5.6.11 and if there are any questions, let me know.

Dave

-----Original Message-----
From: Waldron, David
Sent: Tuesday, June 25, 2002 4:28 PM
To: Berard, John; Evans, Valerie
Cc: Clancy, Mike; BOS-Legal-BellAtlantic
Subject: RE: VERIZON NORTH FACILITY ISSUES FOR SPECIAL ACCESS MODEL

There is also the matter of making the conversion from Special Access pricing to UNE/T1 pricing. I have attached what our Verizon Account Manager stated would be the most likely 'informal' process going forward.

See Attached. Hope this helps.

VERIZON
ONSE TO THE QUE

VERIZON RESPONSE TO THE QUESTION OF SPECIAL ACCESS CONVERSIONS

This document contains excerpts from two email communications between myself and the Verizon Account Manager Betsy Lamond on the topic of converting a Special Access DS1 to a UNE DS1 after the three month Liability period has been exhausted.

NOTE: [Verizon responses in RED] // [Covad questions in BLUE]

Dave,

Actually, you don't have to send an ASR in to convert to UNE after a Special Access circuit has been installed for 3 months. You follow the EEL process which means you send me a spreadsheet with the circuit IDs and Verizon will do a billing adjustment to UNE rates.

As far as the ASR entries for Special Access DS1s, I believe the following fields are changed:

SPEC - This field needs to be blank. For UNE's you would have UNBALL in this field. For SA, nothing goes in there.

PIU - This field will be 100, indicating 100% interstate traffic. For UNEs, it's 0

VTA - If you want a discount plan, you input the amount of months of the plan. If you want month to month, leave it blank

NC - It's HC- - for a Special Access DS1

NCI - It's 04DS9.15

SECNCI - 04DU9.56

I believe those are all the fields that need to changed. If there are more, the CATC will query the ASR.

In a separate email I asked Betsy to provide some additional logistical details on the Special Access Conversion process. Below are her responses to my questions.

Q #1) What are the intervals on the Special Access Provisioning? The Business Rules quote a 60 day interval for "New Construction" and a 30 Day interval for "Extending Facilities". What can Covad use as a quotable interval in these situations - typical scenario? Or, will a timeframe be quoted on each request?

A #1) The 30 and 60 day intervals are worst case scenario for builds. I really can't say what a "typical scenario" would be because it depends on how extensive the job is. Covad will receive an "ECCD" (estimated construction Completion date) on each order which requires a build.

Q #2) Are there a different set of 'NRC's' when Engineering is "Extending Facilities" to accommodate our order versus the "New Construction". How will this be delineated in the price quotations?

A #2) No NRCs are applicable when new construction is needed for a Special Access order. If Covad requests Verizon extend the demarc, a Time and Material charge will apply. These rates are in the FCC 1 & 11 tariffs. If Verizon has to extend facilities in order to accommodate a Special Access order, no NRCs apply.

NOTE: This may be a terminology issue because in the financial model sent two weeks ago there were one time "POP & LSO" Circuit Charges to cover for the initial build. These two charges are tantamount to a Non Recurring Charge.

Q #3) On the DS1 to UNE Conversion Process, since a new ASR is not being generated then the PON nor CFA will not change; however, will the Circuit ID change? We need to confirm for both billing and maintenance purposes. Are special references required should we encounter a down circuit?

A #3) No, the circuit ID will not change. Verizon will apply an adjustment to the existing circuit in CABS to reflect the UNE rate. No order activity is necessary by either company.

Q #4 & 5) On the DS1 to UNE Conversion Process, when can Covad expect to see the invoice reduction? This is necessary to convey to our customers and internal billing department. On the DS1 to UNE Conversion Process, what interval can we expect for the process to take place in all Verizon's systems? So, we can confirm with our customer that the change has taken place.

A #4 & 5) These two questions are similar so I'll put them together. UNE billing can start as soon as the 90 day period for maintaining the circuit is satisfied if VZ receives the spreadsheet with the circuits which need to be converted. For example, if a circuit went in today (May 6), the UNE billing could start August 3rd. You would send me the spreadsheet on or about August 3rd, and the billing adjustment would occur from August 3rd. If the billing date fell on the 15th, for example, VZ would pro-rate for the rest of the month and UNE billing would continue for every month thereafter.

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 02-1255

MOUNTAIN COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties:

All parties, intervenors, and amici appearing below and in this Court are listed in the Brief of Petitioner.

B. Rulings Under Review:

Mountain Communications, Inc. v. Qwest Communications International, Inc., 17 FCC Rcd 2091 (Enf. Bur. 2002) ("Staff Order") (J.A.), 17 FCC Rcd 15135 ("Order") (J.A.).

C. Related Cases:

This case has not previously been before this court or any other court. Counsel are not aware of any related cases currently pending before this or any other Court.

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TABLE OF AUTHORITIES

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Cases

Administrative Decisions

Statutes and Regulations

** Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

APA	Administrative Procedure Act
CLEC(s)	competitive local exchange carrier(s)
CMRS	Commercial Mobile Radio Service
CPNP	Calling Party Network Pays
DID	direct inward dialing
IXC(s)	interexchange carrier(s)
LATA	local access and transport area
LEC(s)	local exchange carrier(s)
Mountain	Mountain Communications, Inc.
MTA(s)	major trading area(s)
POC	point of connection
Qwest	Qwest Communications International

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

The Federal Communications Commission in the complaint proceeding on review upheld certain charges that Qwest Communications International ("Qwest"), an incumbent local exchange carrier ("LEC"), had assessed upon Mountain Communications, Inc. ("Mountain"), a paging company. Mountain Communications, Inc. v. Qwest Communications International, Inc., 17 FCC Rcd 2091 (Enf. Bur. 2002) ("Staff Order") (J.A.), 17 FCC Rcd 15135 ("Order") (J.A.). The issues on review are as follows:

1. Whether the Commission reasonably determined that Qwest lawfully had charged Mountain for certain dedicated toll facilities used to deliver traffic to Mountain because those facilities were part of a wide area calling arrangement?

2. Whether the Commission reasonably determined that Qwest lawfully had charged Mountain for transporting to Mountain traffic that originates on the networks of third carriers?

STATUTES AND REGULATIONS

The pertinent statutes and regulations are reproduced in an appendix to this brief.

COUNTERSTATEMENT OF THE CASE

I. Background

"Historically, paging has been a one-way wireless radio-transmission using coded radio signals to activate a device that provides an audio, visual, or tactile indicator."[1] One-way paging services – the kind of services offered by Mountain Communications, Inc. – involve the conveyance of a message to a small portable wireless receiver, or pager, that the paging service provider furnishes to its subscriber. The subscriber carries the pocket-sized pager that is designed to alert him that someone is trying to contact him. See Pocket Phone Broadcast Service v. FCC, 538 F.2d 447, 449 (D.C. Cir. 1976).

One-way paging services can involve either local or interexchange communications. Local paging calls generally originate on the facilities of a local exchange carrier ("LEC") and are conveyed to the paging carrier for termination on the pager belonging to the paging carrier's customer. An interexchange paging call also generally originates on the facilities of a LEC, which sends the message to the facilities of an interexchange carrier ("IXC") for transmission to

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[1] Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, 14 FCC Rcd 10145, 10180 (1999).

the LEC in the local serving area of the called party; that LEC in turn hands the call off to the paging carrier for termination.

At least three different "area" concepts apply to the providers of the services involved in this case. First, the Local Access and Transport Area ("LATA") is the area within which a LEC is authorized to provide local exchange telephone service or exchange access services. A LATA may be an entire state, or it may be a more limited area within a state that includes one or more local exchanges. A LEC providing service within a LATA may offer interexchange toll service within the LATA as well as flat-rated local exchange service.[2]

Second, the local service area of a LEC is the area within which the LEC provides local service without toll charges.[3] This area often is defined by a state regulatory body, and the state's definition of the local service area generally determines indirectly which calls are subject to toll charges. A LEC also may extend toll-free service to include service within several local service areas in an arrangement known as wide area service.

Third, a Major Trading Area ("MTA") is the local service area of a wireless telephone carrier, known generally as a Commercial Mobile Radio Service ('CMRS") carrier.[4] MTAs often are larger than the local service areas that apply to wireline LECs. See Staff Order, 17

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[2] See Bell Atlantic Telephone Companies v. FCC, 131 F.3d 1044, 1046 (D.C. Cir. 1997). See also 47 U.S.C. § 153(25).

[3] See AT&T Corp. v. Iowa Utilities Board, 525 U.S. 360, 370 (1999) ("AT&T Corp.").

[4] CMRS are mobile telecommunications services that are provided for profit and make interconnected service available to the public (or to such classes of eligible users as to be effectively available to a substantial portion of the public). 47 C.F.R. § 20.3(a). See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, 10 FCC Rcd 8844, 8844-45 (¶ 1) (1995). Paging carriers are CMRS providers.

FCC Rcd at 2092-93 n.11 (J.A.). CMRS carriers are not regulated by state commissions and are free to set their own rates without regard to MTA boundaries.

Mountain offers one-way paging services to customers in a MTA that encompasses the Colorado communities of Colorado Springs, Pueblo, and Walsenburg. Qwest, the incumbent LEC that offers local telephone service in the relevant Colorado communities, is the interconnecting LEC for Mountain's paging services and transports calls from its telephone network to Mountain's network.[5] Mountain in turn transports the calls to its subscribers' pagers.

Although Colorado Springs, Pueblo, and Walsenburg are located in the same LATA and the same MTA, they are in different LEC local service areas. Thus, any telephone call between these communities (e.g., a Colorado Springs-to-Pueblo call or a Walsenburg-to-Colorado Springs call) is a toll call under Qwest's intrastate telephone tariff.

Mountain has a single point of connection ("POC") with Qwest in the relevant MTA, which is located in Pueblo. For purposes of serving its own customers, however, Mountain assigns them direct inward dialing ("DID") numbers that are associated with Qwest switches in each of Qwest's Pueblo, Walsenburg and Colorado Springs central offices.[6] Mountain then obtains from Qwest dedicated toll facilities connecting all of these DID numbers to Mountain's single POC in Pueblo.[7] This arrangement enables Mountain to offer its subscribers in each of the communities paging numbers that can be called by LEC subscribers in that local service area

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[5] Staff Order, 17 FCC Rcd at 2091 (¶ 2) (J.A.).

[6] Mountain's subscribers in Pueblo thus have numbers that are associated with Qwest's Pueblo local service area, Mountain's Walsenburg customers have Walsenburg numbers, and its Colorado Springs customers have Colorado Springs numbers. For a definition of DID, see Staff Order, 17 FCC Rcd at 2098 n.14 (J.A.).

[7] Qwest Corporation's Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 4 (¶ 8) (Jan. 19, 2001) (J.A.).

without toll charges. For example, under the arrangement it obtains from Qwest, Mountain can provide a subscriber in Walsenburg with a paging number from the Walsenburg central office, even though Mountain does not have a POC in Walsenburg. As a result, calls from a LEC subscriber in Walsenburg to the Mountain subscriber (who may or may not be in Walsenburg at the time of a particular call) appear to be local calls, and the party calling the pager incurs no toll charges, even though Qwest delivers the call to Mountain outside the Walsenburg service area. In the absence of the dedicated toll facilities connecting the three communities to make up a wide-area service arrangement, persons in Walsenburg calling the Mountain pager ordinarily would be charged for a toll call because Mountain has no POC in Walsenburg and the call would have to be transported from one LEC service area (Walsenburg) to another (Pueblo).[8] Qwest bills the paging carrier a flat monthly rate for the dedicated facilities across its toll network.[9]

A. Statutory and Regulatory Background

The Communications Act of 1934 ("1934 Act") gives the Commission responsibility to adjudicate private disputes concerning the lawfulness of a common carrier's actions. 47 U.S.C. §§ 206-209. Section 208(a) allows any person "complaining of anything done or omitted to be done by any common carrier subject to this [1934 Act], in contravention of the provisions thereof," to file a complaint with the Commission. 47 U.S.C. § 208(a). The Commission has a duty to rule upon the issues raised by the complainant, American Telephone & Telegraph Co. v. FCC, 978 F.2d 727, 732 (D.C. Cir. 1992), cert. denied, 509 U.S. 913 (1993), but it has discretion to investigate the complaint "in such manner and by such means as it shall deem proper," 47

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[8] See Answer, Exh. 1 (Declaration of Vicki Boone) at 4 (J.A.).

[9] Qwest Corporation's Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 4 (¶ 7) (J.A.).

U.S.C. § 208(a). The complainant bears the burden of proving that the carrier violated the Act or regulations implementing the Act.[10] The Commission has authority to award monetary damages to the complainant. 47 U.S.C. § 209.

Section 332 – a provision of the Act specifically pertaining to mobile services – directs the Commission, upon receipt of a reasonable request from a CMRS provider, to order a common carrier to establish physical connection with that CMRS provider pursuant to section 201(a). 47 U.S.C. § 332(c)(1)(B). Section 201(a) authorizes the Commission to require a common carrier "to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes." 47 U.S.C. § 201(a). The Commission's authority with respect to mobile services under section 332 applies to both interstate and intrastate interconnections.[11]

Section 251(b)(5), added to the Communications Act as part of the Telecommunications Act of 1996, [12] requires LECs to "establish reciprocal compensation arrangements for the

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[10] E.g., High-Tech Furnace Systems v. FCC, 224 F.3d 781, 787 (2000); American Message Centers v. FCC, 50 F.3d 35, 41 (D.C. Cir. 1995).

[11] Although section 2(b) of the 1934 Act generally denied the Commission jurisdiction over intrastate communications, see Louisiana PSC v. FCC, 426 U.S. 355 (1986), Congress made an exception to that jurisdictional limitation for matters regulated under section 332. See 47 U.S.C. § 152(b). See also AT&T Corp. v. Iowa Utilities Bd., 525 U.S. at n.8 (1996 amendments to 1934 Act extended FCC authority over local competition and thus lessened the practical effect of section 2(b) as a limitation on FCC jurisdiction).

[12] Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

transport and termination of telecommunications."[13] 47 U.S.C. § 251(b)(5).[14] In the rulemaking proceeding that implemented this statute, the Commission determined that section 251(b)(5) applied to interconnections between LECs and CMRS providers, "including one-way paging providers, for the transport and termination of traffic on each other's networks."[15] The Commission held further that section 251(b)(5) applies only to local telecommunications traffic, i.e., traffic that originates and terminates within the MTA, and not to long-distance or toll interstate traffic.[16] The Commission in that proceeding also adopted section 51.703(b), a regulation that states that a "LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network." 47 C.F.R. § 51.703(b). This regulation addressed a common practice under which LECs had charged paging carriers for the privilege of terminating calls that originated with LEC subscribers.

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[13] The term "telecommunications" as defined in the 1996 Act is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[14] Under reciprocal compensation arrangements, "when a customer of LEC A calls a customer of LEC B, LEC A must pay LEC B for completing the call." Bell Atlantic Telephone Companies, 206 F.3d 1, 4 (D.C. Cir. 2000). See also Global Naps, Inc. v. FCC, 247 F.3d 252, 254 (D.C. Cir. 2001).

[15] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15997 (¶ 1008) (1996) ("Local Competition Order"), vacated in part, affirmed in part, Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), rev'd in part, affirmed in part, AT&T Corp., 525 U.S. 360.

[16] Local Competition Order, 11 FCC Rcd at 16013 (¶ 1034). See also Global Naps, Inc. v. FCC, 247 F.3d at 254; Bell Atlantic Telephone Companies v. FCC, 206 F.3d at 2. The Commission determined that "traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5)." Local Competition Order, 11 FCC Rcd at 16016 (¶ 1043). The Commission changed its definition of what is covered by section 251(b)(5) in its ISP Remand Order, 16 Rcd 9151 (2001), but made clear in that order the change had no impact on CMRS traffic, id., 16 FCC Rcd at 9173 (¶ 47). This Court set aside the ISP Remand Order on review. Worldcom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2002).

B. TSR Wireless Order

In TSR Wireless, LLC v. U S West Communications, Inc., 15 FCC Rcd 11166 (2000) ("TSR Wireless"), aff'd, Qwest Corp. v. FCC, 252 F.3d 462 (D.C. Cir. 2001) ("Qwest Corp."), the Commission granted in part and denied in part the complaints of five paging carriers alleging inter alia that certain LECs had charged them for facilities that were used in the delivery of LEC-originated traffic to paging carriers, in violation of section 51.703(b). The Commission in that order reaffirmed the applicability of the reciprocal compensation requirements of section 251(b)(5) to local calls that are delivered to one-way paging carriers. 15 FCC Rcd at 11176-78 (¶¶ 18-21). Because reciprocal compensation governed the payment obligation for such calls, LECs could not charge paging carriers for the local traffic the LECs handed off to them. The Commission also held that LECs could not circumvent the requirement in section 51.703(b) by "redesignating . . . 'traffic' charges as 'facilities' charges." 15 FCC Rcd at 11181 (¶ 25).

The Commission made clear in that order, however, that section 51.703(b) does not bar LECs in all circumstances from imposing charges on a paging carrier in connection with traffic that terminates on a paging carrier's network. See Qwest Corp. v. FCC, 252 F.3d at 468 (paging carrier must pay for facilities in some circumstances). First, the Commission stated that LECs lawfully could charge paging carriers for transiting traffic, i.e., "traffic that originates from a carrier other than the interconnecting LEC but nonetheless is carried over the LEC network to

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