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February 25, 2005

VIA UPS

Honorable Jaclyn A. Brilling
Secretary
New York Public Service Commission
Three Empire State Plaza
Albany, New York 12223

05-C-0203

Re: Case 04-C-0420 – In the Matter of Telecommunications Competition n New York Post USTA II Including Commitments Made in Case 97-C-0271; In re: Petition to Reject or Suspend and Investigate Verizon's Proposed Tariff Amendments Restricting the Availability of UNEs

Dear Secretary Brilling:

Allegiance of New York, A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation, BridgeCom International, Inc., Broadview Network, Inc., Trinsic Communications, Inc. and XO New York, Inc., by their attorneys, respectfully submit an original and five (5) copies of their Petition to Reject or Suspend and Investigate Verizon's Proposed Tariff Amendments Restricting the Availability of UNEs.

Also enclosed are a duplicate of this filing and a self-addressed, postage prepaid envelope. Please date-stamp the duplicate and return in the envelope provided. If you have any questions regarding this filing, please contact Harry Davidow at (212) 808-7769

ack

VA01/EDMOA/57483.1

Respectfully submitted,

Andrea P. Edmonds

Andrea P. Edmonds

APE:APE

cc: Peter McGowan (By U.S. Mail)
Mr. Robert H. Mayer (By U.S. Mail)
Joseph A. Post (By U.S. Mail)

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of Telecommunications Competition in New York Post USTA II Including Commitments Made in Case 97-C-0271	)	Case 04-C-0420
In re: Petition to Reject or Suspend and Investigate Verizon's Proposed Tariff Amendments Restricting the Availability of UNEs	)	

PETITION TO REJECT OR SUSPEND AND INVESTIGATE VERIZON'S PROPOSED TARIFF AMENDMENTS TO MODIFY ITS OBLIGATIONS TO PROVISION UNBUNDLED NETWORK ELEMENTS

February 25, 2005

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PETITION TO REJECT OR SUSPEND AND INVESTIGATE VERIZON'S PROPOSED TARIFF AMENDMENTS TO MODIFY ITS OBLIGATIONS TO PROVISION UNBUNDLED NETWORK ELEMENTS

Pursuant to Public Service Law § 90, *et seq.*, and Section 3.6 of the Commission's Rules, Allegiance of New York, A.R.C. Communications Networks, Inc. d/b/a InfoHighway Corporation, BridgeCom International, Inc., Broadview Networks, Inc., Trinsic Communications, Inc., and XO New York, Inc. ("Petitioners") submit this Petition To Reject or Suspend and Investigate Verizon's Proposed Tariff Amendments Restricting the Availability of UNEs.

I. INTRODUCTION

Verizon has filed proposed amendments to its tariff PSC NY No. 10 purporting to implement selected components of the Federal Communications Commission's ("FCC") Triennial Review Order on Remand[1] ("TRO II"). Petitioners hereby seek an order of the Commission rejecting that tariff proposal or, in the alternative, suspending and investigating it.

[1] In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338 (released February 4, 2005) ("TRO II").

As we will show below, Verizon's filing is both procedurally inappropriate and substantively incorrect. Procedurally, Verizon's tariff filing is premature at the very least. The modified unbundling obligations established in the TRO II constitute a change of law affecting the rights of the parties pursuant to Section 251 of the Telecommunications Act of 1996 (the "Telecom Act" or the "Act"). The Act, the terms of the parties' interconnection agreements and the express directive of the FCC in the TRO II all command that the TRO II requirements be implemented through interconnection agreement amendments, in the first instance by negotiations and, if necessary, by arbitrations before the New York Public Service Commission ("NY PSC" or "Commission") pursuant to Section 252 of the Act. Verizon's tariff filing attempts to bypass its Section 252 obligations and to impose selective, self-interpretive applications of the TRO II on its customers.

Further, Verizon's tariff proposals are substantively infirm. Verizon's proposed tariff amendments attempting to alter its obligations with respect to the Unbundled Network Element Platform ("UNE-P") incorrectly implement both the TRO II and the terms of the Pre-Filing Statement of Bell Atlantic-New York, filed in Case 97-C-0271 (April 6, 1998) (the "PFS"). Verizon's tariff provisions regarding the appropriate rules for loops and transport are vague, one-sided and incorrect.

II. VERIZON'S TARIFF PROPOSAL VIOLATES ITS OBLIGATIONS UNDER SECTION 252 OF THE TELECOM ACT, ITS INTERCONNECTION AGREEMENTS AND THE FCC'S DIRECTIVE IN THE TRO II

The rights of competitive local exchange carriers ("CLECs") to obtain access to unbundled network elements ("UNEs") pursuant to section 251 of the Telecom Act, and the obligations of incumbent local exchange carriers ("ILECs") to provision such elements, must be set forth in and governed by interconnection agreements negotiated and arbitrated pursuant to section 252 of the Act. Section 251(c) states that incumbent local exchange carriers have "the

duty to provide to any requesting telecommunications carrier for the provision of a telecommunication service, non-discriminatory access to network elements on an unbundled basis . . . in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."[2]

The Telecom Act is, put simply, built on rights and obligations set forth in interconnection agreements negotiated and amended pursuant to section 252 of the Act. As Verizon itself has often noted, tariffs are not a substitute for terms of an interconnection agreement. *Wisconsin Bell, Inc. v. Bie* 340 F.3rd 441 (7th Cir 2003), *cert. denied*, 124 S. Ct. 1051 (2004) and *Verizon North, Inc. v. Strand*, 309 F3d 935 (6th Cir. 2002), *cert. denied*, 538 U.S. 946 (2003).[3] By the same token, tariff amendments are not a substitute for amendments to interconnection agreements. The FCC itself was unusually blunt on this topic, stating that the proper means by which the TRO II should be effectuated is pursuant to section 252 negotiations:

> We expect that incumbent LEC and competing carriers will implement the Commission's findings as directed by section 252 of the Act. . . . We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes.[4]

Verizon's conduct with respect to these issues is in facial violation of this requirement. It has not implemented the Commission's findings "as directed by section 252 of the Act." It has not negotiated or offered to negotiate in good faith. And it has instead proposed to set "rates, terms and conditions necessary to implement [FCC] rule changes," through a process that

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2 45 U.S.C. § 252 (emphasis supplied).

3 Cited by Verizon in Response to Order to Show Cause, Case 04-C-0861.

4 TRO II, ¶253.

bypasses all of its statutory, regulatory and contractual obligations. For this reason alone, its proposed tariff amendments should be summarily dismissed.

Verizon has also entered into binding interconnection agreements with each of the Petitioners that contain similar requirements. Thus, by way of example, the interconnection agreement entered into between Verizon New York and AT&T, which governs the relationship between Verizon and Broadview states at Section 27.4:

> In the event that any legislative, regulatory, judicial or other legal action materially affects any material term of this agreement where the rights or obligations of either [CLEC] or Verizon hereunder, or the ability of [CLEC] or Verizon to perform any material provision hereof, the Parties shall renegotiate in good faith such affected provisions with a view toward agreeing to acceptable new terms as may be required or permitted as a result of such a legislative, regulatory, judicial or other legal action. Either Party may request such renegotiation by written notice to the other Party. The Parties shall thereafter renegotiate in good faith such mutually acceptable new or revised terms as may be required. Unless otherwise agreed to by the Parties. If, within thirty (30) days of the receipt of the request for renegotiation, the Parties have not agreed on mutually acceptable new or revised terms, or if at any time during such 30-day period the Parties shall have ceased to negotiate such new or revised terms for a continuous period of fifteen (15) days, either Party may pursue any remedies available to it under this Agreement at law, in equity, or otherwise, including, but not limited to, instituting an appropriate proceeding before the Commission, the FCC, or a court of competent jurisdiction."

Verizon has not complied with any aspect of this provision. Instead, it seeks unilaterally to alter its rights under the interconnection agreements by altering its tariff. In the process, it bypasses its obligations to the CLECs to negotiate in good faith regarding both its substantive rights and the language that most accurately reflects those rights. It also bypasses and ignores the CLEC's right to have disputed issues resolved by arbitration before the Commission and, should it be necessary, ultimately by the courts.

III. VERIZON'S TARIFF PROVISIONS DO NOT ACCURATELY REFLECT ITS PRE-FILING STATEMENT OBLIGATIONS

The Verizon tariff pages recognize, as they must, that Verizon has obligations to provision UNE-P in New York that are independent of and in addition to its obligations under sections 251 and 252 of the Telecom Act. These arise out of the Pre-Filing Statement. Verizon's tariff language purports to take the Pre-Filing Statement into account. However, it has failed to do so accurately.

A. The Structure of the Pre-Filing Statement

The Pre-Filing Statement derives from a period when, like today, the right of CLECs to purchase UNE-P pursuant to section 251 of the Act was in doubt. At that time, the Eighth Circuit had ruled that ILECs were not obligated under the terms of the Telecom Act to combine elements for the benefit of CLECs or even to leave those elements combined when a customer elected to change from the ILEC to a CLEC carrier.[5] The Eighth Circuit recognized, however, that CLECs were allowed to lease the individual UNEs, and were allowed to combine those elements for themselves. Subsequently, the Supreme Court would reverse this finding,[6] but at the time the Pre-Filing Statement was being negotiated, the law was uncertain. The NY PSC, however, was aware that, if its authority to compel Bell Atlantic-New York (now Verizon) to combine elements pursuant to sections 251 and 252 of the Act was in doubt, it was not so limited with respect to section 271. The Commission therefore conditioned its support for a Verizon section 271 application to enter the interLATA market in New York on evidence that Verizon could enable CLECs to combine such elements for themselves. The problem, however, was that there was no such known method and Verizon could not meet the condition. Hence, CLECs

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5 *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997).

6 *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 394 (1999).

were barred from entering the local market using UNE combinations while Verizon was barred from entering the long distance market because of its inability to demonstrate that it could enable CLECs to combine UNEs for themselves in a usable way.

The PFS was a compromise designed to break that logjam. In the PFS, Verizon made a series of commitments pursuant to section 271 of the Act.[7] The PFS states that, if Bell Atlantic's application to provide interLATA service pursuant to section 271 is granted, "the Company will keep the commitments set out herein, unless they are found to violate law by any court of competent jurisdiction."[8] Of course, Verizon did receive the NY PSC's support and ultimately the FCC's approval of its section 271 application.

In the PFS, Verizon committed that, notwithstanding any obligations it might or might not have under Section 251, it would:

1. Provide UNE-P for four years in Zone 1 (New York City and major cities) and six years in Zone 2 (the rest of the state). These are referred to in the PFS as the "Duration Periods." The start date for these Duration Periods was December 22, 1999. The end dates are, therefore, December 22, 2003 and 2005 respectively.

2. During the Duration Period, Verizon would develop methods that would "enable CLECs to assemble underlying elements for themselves or to migrate customers in an

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7 *See* PFS, at 1:

> This 'Pre-Filing statement' sets forth additional commitments that New York Telephone Company, doing business as Bell Atlantic-New York (Bell Atlantic-NY or the Company) will make to the Federal Communications Commission (FCC) in connection with an application for long distance relief pursuant to Section 271 of the Telecommunications Act of 1996.

8 *Id.*, at 2.

efficient manner to their own switches."[9] These two requirements are sometimes described as the "predicate conditions."[10]

3. If Verizon satisfied the predicate conditions by successfully enabling CLECs to perform these two functions by the end of the Duration Period, Verizon was entitled to begin a two-year transition period -- until December 22, 2005 in Zone 1 and December 22, 2007 in Zone 2 -- during which time Verizon could raise the price of the unbundled network element platform "to substantially the cost of similar resold lines."[11]

4. If Verizon did not satisfy the two predicate conditions by the end of the Duration Period, however, Verizon could not begin to increase the price of UNE-P. The PFS states: "In any event, Bell Atlantic-New York would not pursue raising the platform price unless and until it had successfully implemented access arrangements that enabled CLECs to combine the elements themselves and implemented a reasonable process to enable CLECs to migrate their links to their switches in a timely manner."[12]

5. As a consequence of 4, above, the two year transition periods during which rates for UNE-P would rise "to substantially the cost of similar resold lines" do not start

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9 PFS, at 9.

10 Verizon has sometime referred to them as "Preconditions." *See* Case 04-C-0420, Verizon Reply Comments at 28.

11 *Id. See also* Case 04-C-0420, In the Matter of Telecommunications Competition in New York Post USTA II Including Commitments Made in Case 97-C-0271 – Notice Requesting Comments (issued March 29 2004) (Henceforth "0420 Notice").

Bell Atlantic (now Verizon . . . committed to provide UNE-P for four years in Zone 1 (New York City and major cities) and six years in Zone 2 (the rest of the state). At the end of the duration period Verizon committed to continue the availability of the platform for an additional two years, albeit at a price that would increase to substantially the cost of similar resold lines. 0420 Notice at 2.

12 *Id.*, 9-10 (emphasis supplied).

until Verizon has satisfied the two predicate conditions. Verizon may not "begin to assess an increasing additional recurring charge" until the conditions are satisfied.[13]

6. Finally, the PFS specifies that the surcharges placed on the price of the UNE platform during the transition periods would only apply to carriers electing to continue to have Verizon provision UNE-P on their behalf. Verizon is permitted to raise the price of UNE-P to CLECs only "if CLECs do not choose to assemble the platform for themselves."[14]

These are the unambiguous and undisputed provisions of the PFS. Many of these terms and conditions are fixed. Several of them, however, are conditional and their applicability depends upon findings of fact or rulings that this Commission must make.

Verizon's tariff filing fails to effectuate these PFS requirements in three critical ways. First, it fails to accurately implement the fixed conditions of the PFS – those conditions that are unconditional and do not turn on disputed issues or issues that the Commission has yet to resolve. Second, the tariff filing is defective because it purports to implement the transitional rate increases provided for in the PFS before the Commission has found that Verizon has satisfied the predicate conditions. The Commission has made no such findings and, as we will demonstrate below, cannot do so on the record currently available to it. Until the Commission finds that these conditions are satisfied, Verizon may not implement transitional rate increases under the terms of the PFS. Finally, Verizon's tariff provisions are inappropriate because they do not set, and are not authorized to set, a rate. Only the Commission can determine when Verizon is entitled to begin "over the course of two years, [to] raise the price of the unbundled

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13 *Id.* (emphasis supplied).

14 *Id.*

platform to the CLEC to substantially the cost of similar resold lines."[15] And only the Commission can determine how those transitional rates are to be set once begun. The Commission has not made either determination. Hence, Verizon's tariff amendments can neither terminate the availability of UNE-P under the terms of the PFS nor increase the rate for it at this time. Verizon is proposing to file a tariff without a rate and without authorization to charge any rate other than its currently tariffed rates, thereby violating the most fundamental rules of tariffed ratemaking.

B. Verizon's Tariff Provisions Fail To Satisfy Even the Undisputed Provisions of the PFS

While Verizon's tariff amendments purport take the PFS into account, Verizon's application of the PFS is incomplete, self-serving and, in several cases, simply wrong. As the Commission is fully aware, while certain of the provisions and requirements of the PFS are apparently not in dispute, others are highly disputed but unresolved. Verizon's filing fails to properly implement even the fixed and presumably undisputed requirements of the PFS.

There is, for example, no dispute that Verizon must continue to provision UNE-P in New York at current rates until December 22, 2003 in Zone 1 and December 22, 2005 in Zone 2. These are the basic "Duration Periods." Further, as the Commission's 0420 Notice reports, Verizon committed to "continue the availability of UNE-P" at some rate at least until the end of 2005 in Zone 1 and 2007 in Zone 2."[16] These are the "Transition Periods."

The rate that Verizon can charge for provisioning UNE-P in Zone 1, at a minimum, until December 22 of this calendar year is in dispute and will not be resolved until the Commission decides whether Verizon has satisfied the predicate conditions, and then sets the appropriate start

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15 *Id.*

16 0420 Notice, at 2.

date for a transition[17] and the appropriate transitional rate. At a minimum (assuming *arguendo* that Verizon has satisfied the predicate conditions during the Duration Period), Verizon's obligation to provision new orders in Zone 1 until December 22, 2005, at some rate set by the Commission and less than "substantially the cost of resold lines," is not subject to dispute. Indeed, the Commission's 0420 Notice states it explicitly: "At the end of the duration period **Verizon committed to continue the availability of the platform for an additional two years**, albeit at a price that would increase to substantially the cost of similar resold lines.[18]

Verizon's tariff proposal, however, ignores this commitment by prohibiting CLECs from submitting orders for new UNE-P lines in Zone 1 after March 11, 2005.[19] But the PFS Transition Periods, unlike TRO II transition rule, does not have any limitation on adding new customers: it only contemplates progressive rate increases. Thus, the PFS, in contradiction of this proposed tariff provision, expressly allows new UNE-P arrangements until at a minimum, the end of 2005, at rates to be set by the Commission. If the Commission finds that Verizon has not satisfied the predicate conditions, then Verizon is obligated to continue to provision new UNE-P orders in Zone 1 at current rates until the Commission finds that it has satisfied those conditions. Thereafter, Verizon may "begin to assess an increasing additional recurring charge," as permitted by the Commission.

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17 Verizon, for example, could not be found to have satisfied its obligation to enable CLECs "to migrate their existing links to their respective switches through reasonable methods and in a reasonable timeframe," PFS at 9, until at least August 25, 2004, the date of issuance of the Commission Order Setting Permanent Hot Cut Rates ("Hot Cut Order"). The Hot Cut Order represented the first time the Commission determined that Verizon's hot cut processes were scalable. Thus, assuming that the Commission found that Verizon had satisfied its other predicate obligation – which the facts cannot support – the start date for the two year transition in Zone 1 would be the effective date of the Hot Cut Order.

18 Notice, at 2 (emphasis supplied).

19 *See* proposed Tariff, §5.1.1.1(C)(5)(c).

Second, Verizon has also misapplied the PFS conditions to Zone 2. The Duration Period for Zone 2 is six, not four years, and extends until December 22 of this year. Hence, pursuant to the express and uncontroverted terms of the PFS, Verizon must provide UNE-P at current rates through December 22, 2005. This applies both to new customers and to the carriers' embedded base. Verizon's tariff language proposes to make UNE-P available in Zone 2, but only at rates set by the FCC, which includes a $1 per line surcharge. The PFS is a one-way ratchet, and where its terms are superior to the CLECs' rights under section 251, the PFS terms apply.[20] Further, Verizon's tariff provisions appear to prohibit CLECs from provisioning "new PFS UNE-P Arrangements" in Zone 2 after December 21, 2005. However, as already discussed, the PFS also provides (at a minimum, if the predicate conditions are satisfied) for an additional two year period during which CLECs can add new UNE-P lines at rates that transition over the two year interval until, at the end of the interval they are "substantially the equivalent to similar resold lines." Verizon's attempt to ignore the obligation to provision new UNE-P arrangements in Zone 2 under the PFS is, again, flatly inconsistent with its unambiguous PFS obligations.

C. Verizon Has Yet To Demonstrate That It Has Satisfied the PFS's Predicate Conditions

Beyond its failure to implement even the undisputed portions of the PFS, Verizon has filed tariff language that presumes that all of the unresolved and highly disputed issues arising out of the PFS must immediately be resolved in its favor. It has, as it so often does, acted in its tariff filings as the judge of its own litigation.

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20 Case 97-C-0271. Minutes of Oral Argument, at 4339 (dated August 31, 1999).

As noted, above, the PFS is unambiguous in holding that two conditions are predicate to any right that Verizon may have either to cease to provision UNE-P lines or to increase the rate for those lines. The PFS states that, at the end of the Duration Period, Verizon:

> ...would not pursue raising the platform price unless and until it had successfully implemented access arrangements that [1] enabled CLECs to combine the elements themselves and [2] implemented a reasonable process to enable CLECS to migrate their links to their switches in a timely manner.[21]

Verizon has acknowledged to the Commission that these obligations are mandatory "preconditions" to instituting the price transition provisions of the PFS, asserting: "The PFS Preconditions to a Price Transition Have Been Satisfied."[22] While Verizon's admission that the predicate conditions (or "Preconditions") must be satisfied before it may implement the PFS's price transition rules is important, it's assertion that it has already satisfied those conditions is not. Verizon is not the decision maker on those disputed issues of fact; the Commission is. The Commission has not yet found that Verizon has satisfied either condition, much less both of them. "Unless and until" the Commission finds that Verizon has satisfied those predicate conditions, tariff changes that purport to implement transitional rate increases are legally premature.

Moreover, the burden is clearly on Verizon to demonstrate that it has met these preconditions. Verizon must "enable CLECs to assemble the underlying elements of the platforms themselves through reasonable methods..." [23] Verizon must show that it has

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21 *Id.*, 9-10 (emphasis supplied).

22 Reply Comments of Verizon, Case 04-C-0420, at 28.

23 PFS, at 9.

"successfully implemented access arrangements that enabled CLECs to combine the elements themselves. . ."[24] The verbs refer to Verizon and they are transitive verbs.

In addition to requiring Verizon to enable CLECs to assemble the underlying elements of the UNE platform themselves through reasonable means, the PFS also requires Verizon to enable CLECs "to migrate their existing links to their respective switches through reasonable methods and in a reasonable timeframe ..."[25] In short, it requires Verizon to demonstrate a commercially viable hot cut process.

Petitioners believe that Verizon has failed to offer a hot cut process that satisfies these conditions. But Petitioners do not contend that the Commission has not made a finding on this subject, nor that the finding is not supported by record evidence. To the contrary, it is highly instructive to compare the record evidence available to the Commission with respect to Verizon's hot cut processes with the evidence available to the Commission with respect to Verizon's ability to enable CLECs to combine unbundled network elements themselves.

The Commission's efforts to ensure that Verizon developed a commercially reasonable hot cut process were extensive and are fully documented in its recent Hot Cut Order.[26] The Hot Cut Order recites the Commission's efforts to create a viable hot cut process, to evaluate the efficacy of what it had created and to set appropriate rates. As the Commission notes, the proceeding was initiated by order dated November 22, 2002.[27] During the spring and summer of that year, Commission staff met with Verizon and many CLECs to "discuss ways to alleviate

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24 *Id.*

25 *Id.*

26 Case 02-C-1425, Proceeding on Motion of The Commission to Examine the Process and Related Costs of Performing Loop Migrations on a More Streamlined, (*e.g.*, Bulk) Basis, Issued and Effective (August 25, 2004).

27 Case 00-C-1945 and Case 98-C-1357, Order Instituting Verizon Incentive Plan (February 27, 2002).

bottlenecks in the hot cut process."[28] The Commission assigned Administrative Law Judge Joel Linsider to supervise exchanges of information and proposals for improving processes. Technical workshops were held throughout the spring of 2003. Disputes over the scope of the proceeding were briefed and resolved by Judge Linsider. When Judge Linsider found that the technical conferences had been inadequate to fully resolve issues over the appropriate process, the matters were submitted to litigation. Formal testimony was filed under oath by a variety of parties in October 2003. Evidentiary hearings were held before administrative law Judge Liebschutz in January 2004. Witnesses were cross-examined: 1,602 pages of testimony and 87 exhibits were compiled. The case was fully briefed and the Hot Cut Order constitutes the Commission's decision. While Petitioners may reasonably disagree with the Commission's ultimate determination on the efficacy of the Verizon processes or the reasonableness of the rates, no one can dispute that the Commission conducted a full and thorough investigation into the relevant facts and based its decision on record evidence that had been subject to thorough testing through the litigation process.

Now compare the Hot Cut record with the available record evidence purporting to show the efficacy of Verizon's method to enable CLECs to combine network elements for themselves. Put simply, there is no such evidence. Nothing at all. Verizon has never offered so much as a single written page of description of what such a process would look like.

As noted above, Verizon has always acknowledged – as it must – that the PFS "preconditions" exists, are binding on it, and must be satisfied before the transitional pricing rules go into effect. Verizon sole legal justification for beginning to impose transitional rates

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28 Hot Cut Order, at 7.

under the PFS is its claim that "the PFS preconditions to a price transition have been satisfied."[29] Having acknowledged that the predicate conditions are "preconditions to a price transition" under the PFS, Verizon can blame no one but itself for its failure to prove what it has claimed; *i.e.* that it has satisfied these conditions.

The Commission gave Verizon every opportunity to make such a case in the 04-C-0420 docket. However, Verizon declined to do so. A review of the record in that case demonstrates that Verizon offered *no evidence whatsoever* that it has satisfied this requirement. Instead, Verizon relied on its attorneys to make legal arguments asserting that Verizon had successfully established methods for CLECs "to assemble the underlying elements of the platforms themselves" as early as 1998 and that the Commission had already so ruled. Citing to the Commission's decision in Opinion 98-18, Verizon's counsel stated:

> With respect to the first requirement, the Commission has already concluded that Verizon offers a series of options that, in conjunction with the availability of UNE-P pursuant to the terms of the PFS, enables CLECs to collocate and to combine elements themselves.[30]

Verizon's reliance on this (circular) assertion in the 0420 Docket was nearly absolute.[31] As a result, Verizon offered no evidence at all that it could enable a CLEC to provision -- or ever had enabled a CLEC to provision -- even one loop-port combination by itself. Verizon did not offer sworn testimony in the proceeding, or even the unsworn statement of a subject matter expert. It offered no description of the particular process that it wished to champion, no data on

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29 Case 04-0420, Verizon Reply Comments at 28.

30 Tr. 109.

31 It is circular because a finding that Verizon's offerings "in conjunction with the availability of UNE-P pursuant to the terms of the PFS" enables CLECs to combine elements themselves is not a finding that Verizon's offerings without the availability of UNE-P pursuant to the terms of the PFS enables CLECs to combine elements themselves.

the performance standards it could achieve. It provided no evidence of how many CLEC combinations it had facilitated to date, with which CLECs, under what conditions, and with what performance results and success rates. All that Verizon offered was the unsworn and unsubstantiated statement of its attorney that:

> There is no doubt that we can deliver both the loop and the switch through collocation. After that, its up to the CLECs to combine. Our obligations in that respect go no further than that, and we have already met them. [32]

While this is rhetorically flamboyant, it is not evidence and, even if true[33] would not satisfy the PFS requirement.[34]

Moreover, the Opinion on which Verizon relies in lieu of evidence simply does not support Verizon's position that it has already been let off the predicate condition hook. Indeed, the contrary is the case. The 98-18 decision states unequivocally that Verizon did *not* have *any* methods that would satisfy its obligations to enable CLECs to combine elements for themselves except its PFS commitment to offer UNE-P, which is why it was required to agree to make UNE-P available pursuant to the PFS even if federal law did not require it.

The Commission ruled in Opinion No. 98-18 that Verizon would satisfy its section 271 network element combination requirements if it offered both a menu of collocation options and ***also*** offered UNE-P "pursuant to the terms of the PFS." One of the terms of the PFS, cited above and at issue here, is that, at the end of the Duration Period, Verizon would either "enable

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32 Tr. 108.

33 And, in fact, the statement is not true. If the Commission wishes to investigate, some of the petitioners here are prepared to submit sworn affidavits that they approached Verizon asking to be shown this product and were informed by Verizon that no such method for combining loops and ports exists.

34 A collocation-based hot cut process does not meet the standards in the PFS that Verizon offer "reasonable methods" on the conclusion of the Commission that such a process be "seamless and ubiquitous."

CLECs to assemble the underlying elements of the platforms themselves through reasonable means" or continue to offer UNE-P at TELRIC rates. Verizon was prohibited by the PFS from raising the platform price "unless and until" it had met this predicate. In short, the Order did not state that Verizon had designed and implemented some functional replacement for UNE-P which was approved by the Commission in 1998, it stated that Verizon was obligated under the PFS to continue to offer UNE-P until there *was* such a replacement.

The detailed language of the Commission's 98-18 Order reiterates this point repeatedly. As noted above, the Commission, in its 98-11 Order, accepted collocation methodologies as adequate to permit CLECs to combine Verizon loops with CLEC switches *in conjunction with UNE-P* pursuant to the terms of the PFS, but it explicitly rejected the argument that such a methodology would suffice as a method by which CLECs could combine Verizon loops with Verizon switches *in the absence of* UNE-P or an electronic or otherwise seamless and ubiquitous alternative for it. The conclusion of the 98-11 Order is explicit: collocation options alone, without UNE-P or an electronic surrogate "or otherwise seamless and ubiquitous method" for it, are "insufficient."

> In her [ALJ Stein] view, this record indicated that Bell Atlantic-New York's **collocation-based options alone, absent provision of the platform (or another electronic or otherwise seamless and ubiquitous method), were insufficient** to support combination of elements to serve residential and business customers on any scale that could be considered mass market. [35]

Indeed, the Commission noted that Verizon filed a formal exception:

> to the recommendation **that it be required to provide the unbundled element platform until a comparably ubiquitous method is available to serve the mass market.** [36]

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35 Opinion No. 98-11, at 9-10 (emphasis added).

36 Order, at 9-10 (emphasis added).

The exception was denied. Given this record finding, the Commission supported Verizon's section 271 application in reliance on the Pre-Filing Statement requirement that UNE-P would continue until an "electronic or otherwise seamless and ubiquitous" surrogate for it was created.

Verizon also briefly argued in the 0420 Docket that the Chairman's decision in September 1999 to recommend section 271 relief to the FCC proves that Verizon had "demonstrated the efficacy of **these offerings** in the marketplace."[37] But the Chairman's reference to "these offerings" referred to collocation and UNE-P, not collocation and a UNE-P replacement in a world where UNE-P was unavailable. Verizon never demonstrated as part of its section 271 filings *any* offering that would allow CLECs to combine Verizon loops with Verizon ports in the absence of UNE-P. And the Commission, with no evidence of an alternate method for combining loops and ports in the section 271 record, never said it had.

In sum, the Commission has no record evidence at all that Verizon has working processes in place that "enable CLECs to assemble the underlying elements of the platforms themselves." It has no such proof because Verizon deliberately declined to offer such proof in the Post USTA II 04-C-0420 Docket and because Verizon, in fact, has no such process.[38] Absent that proof, Verizon has not satisfied the predicate conditions that would permit it to "pursue raising the platform price."

Finally, perhaps in recognition that the collocation theory is not persuasive, Verizon asserted in the Post USTA II 0420 Docket that it can satisfy its predicate obligation to allow CLECs to combine the elements of the platform themselves by continuing to offer UNE-P at the increased transitional rates. Verizon's counsel has stated:

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37 Tr. 108 (emphasis supplied).

38 *See supra* note 33.

> There will be a Verizon network option, a platform that will be offered that will avoid the necessity of CLECs combining elements on their own. That's precisely where we are now and, of course, during the transitional period, it won't be priced at TELRIC or at current TELRIC rates, but on the other hand you cannot interpret Opinion 98-18 or any other aspect of the 271 process as promising any particular rate level.[39]

This argument, as applied to the PFS, suffers from both legal and pragmatic problems. Legally, it is circular and ignores the express language of the PFS. The PFS states that Verizon may not "pursue a rate increase unless and **until**" it has offered CLECs a method for combining elements, including the elements of the platform, by themselves.[40] And even when it has developed such a method for combining elements, it may only "**begin** to assess an increasing additional recurring charge."[41] And it may only assess the charge "if CLECs do not choose to assemble the platform for themselves."[42] Verizon's solution here is that it meets its predicate obligations entitling it to impose a rate increase by imposing the rate increase. That is a perfect circle.

The pragmatic point of view may be even more important. Verizon's counsel states that it should be found to have satisfied this precondition because "there **will be** a Verizon network option, a platform that **will be offered** that **will avoid** the necessity of CLECs combining elements themselves."[43] The rates for this, Verizon's counsel assured Judge Lee, will not be priced at TELRIC, but "you cannot interpret Opinion 98-18 or any other aspect of the 2271 process as promising any particular rate level."

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39 Tr. 109.

40 PFS at 9. (emphasis supplied).

41 *Id.* (emphasis supplied).

42 *Id.* (emphasis supplied).

43 Tr. 109 (emphasis supplied).

This is a most intriguing argument and the one that potentially offers some hope for resolving this dispute. We commend it to the Commission's careful attention. However, while speaking broadly about future events, Verizon did not describe any particular offer to Judge Lee in the 0420 Docket. Verizon's counsel says that Verizon can satisfy the predicate conditions by offering an alternative UNE-P arrangement. Perhaps, but what offer? Verizon has not presented any such offer to the Commission in any proceeding, formal or informal, to prove that the offer even exists, much less that it is an offer that the Commission should find satisfies Verizon's section 271 PFS obligations.[44] It is the ultimate pig in a poke.

In fact, Verizon has been violently opposed to allowing the Commission either to know the terms of its offers for commercial agreements or to play any role in evaluating their reasonableness -- under the PFS test itself, under Section 92 of the Public Service Law or under section 271 of the Telecom Act. Are the rates, terms and conditions being offered just and reasonable? How would the Commission know? Such proposals as Petitioners have been offered by Verizon -- presumably the ones Verizon's counsel relies upon in this statement -- have been subject to such stringent non-disclosure requirements that we are prevented here even from commenting on Verizon's implicit assertion that these proposals are fair, reasonable and pro-competitive. We might suggest to the Commission, however, two things. First, the Commission cannot rule that Verizon has satisfied the predicate conditions based on offers that may exist but which Verizon will not reveal to the Commission or let others reveal. Second, if

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[44] Since Verizon's PFS obligations derive from its section 271 obligations, the Commission cannot find that a "commercial arrangement" satisfies Verizon's predicate condition obligations under the PFS unless it finds that (1) Verizon has satisfied both the particular terms of the PFS (*e.g.*, enable CLECs to combine elements themselves through an electronic or otherwise seamless and ubiquitous process), and (2) that its offer also satisfies the broader obligations under section 271 that its rates terms and conditions are just, reasonable and non-discriminatory.

Verizon seriously thought that the commercial offers it was making could be defended under Section 92 of the New York law and section 271 of the Telecom Act, it would probably disclose them.

As the Supreme Court has already noted, it is illogical and inefficient for an ILEC to "sabotage network elements" by disconnecting previously connected elements over the objection of the requesting carrier "not [ ] for any productive reason but just to impose wasteful reconnection costs on new entrants."[45] Yet that illogic was, for a time, mandated by the 8th Circuit.[46] While the approach is illogical, however, it is not, given modern technology, unachievable.

In 1998, when Verizon was demanding that it to be allowed into the long distance market while simultaneously refusing to allow CLECs to compete in the local market using UNE combinations, CLECs argued that Verizon had a legal obligation to develop a method that would allow CLECs to perform this illogical exercise for themselves on a commercially reasonable basis. Because Verizon could not devise a method that would quickly accomplish this objective, it agreed in the PFS that it would do what was logical: it would offer UNE-P for a term of years and would get to the CLEC combination rights later. In exchange, Verizon got section 271 relief more quickly than it would have if it had to pursue the development of such a CLEC-operated system for assembling elements.

The Commission and the parties drafting the PFS, however, were reasonably prescient. They did not know whether, at the end of the Duration Periods CLECs would have the right to

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45 *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. at 366, 394.

46 *Iowa Utils. Bd. v. FCC,* 120 F.3d 753.

the UNE-P combination under section 251.[47] Hence, they built into the PFS the same choice for Verizon at the end of the Duration Period that it faced at the beginning. Verizon could either continue to offer the UNE Platform at current rates or it could take the time available during the multi-year Duration Period to develop a method that would enable CLECs "seamlessly and ubiquitously" to combine the elements for themselves. But, unequivocally, Verizon would be "required to provide the unbundled element platform until a comparably ubiquitous method is available to serve the mass market."[48]

It is also important to reiterate here what Verizon and other RBOCs would prefer to ignore but that even the FCC recognizes. CLECs remain entitled to lease unbundled local switching and high capacity loops pursuant to section 271 of the Act, even if the FCC's section 251 non-impairment findings for those elements survive appeal.[49] All that CLECs have lost in the TRO II is the right to have access to such UNEs at TELRIC rates. Verizon counsel's statement regarding a UNE-P-like offer that would satisfy section 271 moves in the direction of the law. But such an offer must actually satisfy section 271, and someone other than Verizon must find that this is true.[50] Under section 271, CLECS are entitled to access these UNEs at rates and pursuant to terms and conditions that are just, reasonable and not unreasonably

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47 This is no longer a theoretical question. As the rights of CLECs to lease local circuit switching under section 251 end, CLECs need such a method to combine elements. Hence, there is a real, practical need for a method that will allow CLECs to assemble the Platform using Section 271 UNEs unless Verizon extends its commitment to UNE-P.

48 Opinion at 9-10.

49 *Triennial Review Order*, ¶¶ 654-655.

50 Some of these Petitioners have also filed today Comments on Verizon's Response to the Commission's Order to Show Cause why it should not be required to tariff its proposed UNE-P surcharge for enterprise and Four Line Carve-Out UNE-P order. That Response shows that Verizon is obligated to offer such arrangements under section 271 and that the Commission is obligated, under the New York Public Service Law to have Verizon tariff those services and to ensure that the rates terms and conditions satisfy the state's "just and reasonable" standard.

discriminatory. This Commission obtained from Verizon a commitment in the PFS that, in order to satisfy its section 271 obligations, it would offer access to UNEs pursuant to Section 271 and enable CLECs to combine those elements themselves "through reasonable methods."[51] It may still be more rational and efficient for Verizon to offer and for CLECs to buy a platform-like product than to develop such a method. But if Verizon is not obligated at the end of the Duration Period to offer UNE-P under section 251 and if it elects not to pursue the economically rational approach of supporting rates that its customers can agree to on consent or under Commission rule, then the Commission made clear in the PFS that the predicate conditions for Verizon's right to walk away from the PFS obligation to provision UNE-P was that it: (1) develop a method by which CLECs could combine the elements themselves and (2) that CLECs that elect to perform the combining function would not be subject to the transitional rate increase.

In sum, Verizon's attempt to prove that it has satisfied or can satisfy the PFS's predicate condition for instituting a transitional rate increase are vacuous. Verizon may not pursue such a rate increase at this time, through tariff changes or otherwise.

Finally, there are a few particular points of disagreement with Verizon's tariff treatment of unbundled switching that require brief attention.

Section 5.1.1.1(C)(4)(b)(i) and (ii): Transition Plan: Verizon's transition plan tariff language states absolutely that carriers shall migrate their embedded bases to other arrangements by March 10 2006. This absolute statement conflicts with Verizon's other tariff provisions – especially those relating to the PFS – and is thus incorrect even within Verizon's own intent. For the reasons shown above, CLECs are not obligated to migrate their embedded base except as the

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51 PFS, at 9.

Commission determines is so required under the terms of the PFS. The provision should be deleted.

Subsection (ii) also suffers from incorrect limitations on adding new customers as may be permitted by the PFS. Further, however, should there be a point where CLECs are not permitted to add new UNE-P customers,[52] the language does not specify, as it should, that CLECs can add and delete features, services new lines to customer's existing service arrangements.

Section 5.1.1.1(C)(4)(a): Four-line carve out": Verizon states in this section that nothing in Section 5.1.1.1 shall apply to DS0 service arrangements which "the Telephone Company was not required to provide on an unbundled basis prior to March 11, 2005, pursuant to the four-line "carve-outs" provided for by §§ 5.12.3(B)(3() and (B)(4)." However, as shown in the Response to the Commission's Order to Show Cause, filed today in Case 04-C-0861, Verizon has never, in fact, withdrawn UNE-P service for Enterprise and Four Line Carve-Out customers. Instead, in an ill-advised and unlawful maneuver, Verizon tried unilaterally to impose an untariffed surcharge on that service. The functional effect of this action was to leave the CLEC embedded bases for these customers in place as of the December 15 date of the TRO II. That Order specifies that "the transition period we adopt here thus applies to all unbundled local circuit switching arrangements used to serve customers at less than the DS1 capacity level as of the effective date this Order."[53] Those, customers, therefore, by the effect of that order, fall under

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52 TRO II makes clear that CLECs can continue to serve their "embedded base" while not being allowed to add new service arrangements during the TRO II transition period. However, new service arrangements refers more properly to new customers than new lines for existing customers since the objective is to terminate the marketing of services based on this provisioning arrangement. Therefore, CLECs should be able to continue to serve existing customers if they relocate or need to add lines at their existing locations.

53 TRO II, ¶ 226, n. 625.

the TRO II transition plan. They must continue to be served until March 10, 2006 at current TELRIC rates plus $1.

IV. THE COMMISSION SHOULD REJECT VERIZON'S TARIFF PROVISIONS WITH RESPECT TO DS1 AND DS3 LOOPS AND TRANSPORT

In the first instance, the Commission should reject or suspend and investigate Verizon's provisions with regard to DS1 and DS3 loops and transport for the same reason it should reject Verizon provisions with respect to local switching -- because they fail to comply with Verizon's obligations to implement the changes of law resulting from the TRO II pursuant to negotiations and amendments to interconnection agreements. Verizon's failure to negotiate over both content and language has substantive effects on the language it proposes in its tariff. Most obviously, none of the tariff provisions provides the detail necessary to provide an unambiguous set of rights and obligations. It is bad tariff writing.

Verizon has simply referenced certain provisions of the FCC rules. But those rules are neither unambiguous nor self-effectuating. Moreover, they leave a variety of issues unresolved. For example, Verizon's tariff provisions are written almost entirely in the negative, while the FCC's orders and rules are written in the positive. Thus, for example, Verizon states at Section 5.1.1(C)(2)(a)(i) that: "notwithstanding any other provision of this tariff . . . the telephone company will not provide unbundled access to DS1 loops . . ." In contrast, Section 51.319 of the FCC's rules states: "an incumbent LEC shall provide a requesting telecommunications carrier with non-discriminatory access to a DS1 loop on an unbundled basis. . ." The FCC rules are written in the affirmative for a reason; they define the rights of the CLEC that continue to obtain access to loops and transport. Every one of Verizon's assertions written in the negative leaves the CLEC's affirmative entitlement to implication and this is unacceptable. It is the kind of drafting that is done by a party that is not required to negotiate over language.

Other problems with individual sections abound.

Self-certification: Paragraph 234 of the TRO II adopts a CLEC self-certification process for the submission of DS1 and DS3 loop and transport orders. Specifically, the FCC stated:

> We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in Parts IV, V and VI above, and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3).[54]

Upon receipt of such self-certification, the FCC held, "the incumbent LEC must immediately process the request."[55]

Verizon's tariff language turns this process on its head and claims for Verizon the conclusive right to determine whether and when it will fulfill a CLEC order. Section (C)(1)(d) of Verizon's proposed tariff amendments requires CLECs in effect to give conclusive weight to lists of central offices provided by Verizon. That is beyond the reach of the FCC's rules and Verizon's authority. The Commission (and/or the FCC) will determine which central offices fall into Tiers 1, 2 and 3: Verizon will not. Nor can Verizon unilaterally amend its lists without demonstrating to the relevant regulatory authorities that the facts so require. Nothing in the FCC's order and nothing in the telecommunications law allows Verizon to be the judge of its own facts. Until the FCC or this Commission makes such findings, the TRO II clearly gives CLECs the obligation to conduct a "reasonably diligent inquiry" before submitting an order, while at the same time giving the CLECs the right to weigh all the evidence at its disposal, including evidence that contradicts Verizon's lists of central offices. If a CLEC certifies that it

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54 TRO II, ¶ 234.

55 *Id.*

has made such an inquiry, Verizon "*must* immediately process the request." Disputes over whether particular Verizon central offices are closed to particular UNEs must be resolved "through the dispute resolution procedures provided for in [ ] interconnection agreements."[56]

More generally, Verizon is not entitled to challenge a CLEC's self-certification in the manner it has proposed. Verizon has proposed a standard that the FCC has not authorized, in stating it will back-bill CLECs where "the TC was not entitled to unbundled access to such element or elements..." The TRO II does not provide this formulation, nor does it provide for back-billing where a subsequent review shows that the CLEC was not so entitled. All that the FCC has required is that: "a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in parts IV, V and VI above."[57] The FCC's decision goes on to state: "we do not adopt auditing rules for the self-certifications relating to our impairment rules for dedicated transport and high-capacity loops. We decline to adopt an auditing requirement because, in contrast to EELs self-certifications, the requesting carrier seeking access to the UNE certifies only to the best of its knowledge and is unlikely to have in its possession all information necessary to evaluate whether the network element meets the factual impairment criteria in our rules."[58] Nothing in this language authorizes backbilling when the CLEC, in good faith, has made a certification that ultimately proves to be incorrect. Finally, the FCC concludes that the question of the appropriate treatment of disputes is not one for tariff at all. Rather, "these rules do not supercede any audit rights included in any interconnection agreements or other commercial arrangements..."

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56 *Id.*

57 TRO II, ¶234.

58 *Id.*, n. 659.

In short, the Verizon tariff provisions attempting to create audit and back-billing rights and imposing different burdens of proof are incorrect and inconsistent with the TRO II. They are also precisely the kinds of issues that the FCC intended be negotiated between the parties and reflected in interconnection agreements, not unilaterally imposed on parties in tariffs. The entire section should be deleted because it does not belong in a tariff. It belongs in a contract.

Post-transition arrangements: (C)(2)(d) and (C)(3)(e). There is no basis for the post-transition arrangement burdens placed upon CLECs in this provision. The provision says that orders for such discontinuance or conversion must be placed early enough, in light of the applicable provisioning intervals, to insure that the orders can be fulfilled by the end of the transition period. More appropriate language should state that orders that are placed pursuant to existing intervals will be converted to the alternative arrangements prior to the end of the transition periods, and that if Verizon is unable to complete the conversions by that date, they shall continue unchanged until Verizon succeeds in effectuating the conversion. The logic of this is straightforward. The CLEC has an obligation to submit its order for discontinuance or conversion pursuant to applicable rules, but cannot be penalized if, having submitted an order during the transition period, Verizon is unable to fill it before the end of the transition period. Verizon's tariff, unsurprisingly, places the burden on the CLEC with no burden on Verizon to perform its side of the work and fails to acknowledge the FCC's directive in the TRO II that TELRIC rates continue to apply if Verizon is unable to fully process the order by the end of the transition period. And, more realistically, these are issues which are better addressed in interconnection agreements. There, the parties might negotiate grooming plans before the termination date and establish performance standards or even efficient processes for mass

conversions, if necessary, to effectuate the conversions without harm to consumers. Tariffs are hardly the vehicle for this kind of agreement.

Dark fiber loops: (C)(2)(c)(i). While the TRO II eliminates the availability of dark fiber loops, it does nothing to remove Verizon's obligation to perform routine network modifications in order to provision lit DS1 or DS3 loops. This routine network modification obligation includes the obligation to activate dark fiber strands if and where Verizon does so in order to provide service to its own customers. Given Verizon's history of willful intransigence with respect to routine network modifications, the tariff should expressly obligate Verizon to activate dark fiber in order to provide lit DS1 or DS3 loops. This adjustment to the language should be made in the tariff and incorporated in interconnection agreements.

DS1 transport caps (C)(3)(b)(i). Verizon's tariff provision improperly restricts the availability of DS1 circuits to 10 unbundled DS1 loops. The FCC was clear the 10 unbundled loop cap applies as a proxy for the point at which DS3 transport is economically viable. Hence, the rule limiting the CLEC to 10 DS1s applies only where the FCC rules finds non-impairment for DS3 transport. In paragraph 128 of TRO II, the Commission made this abundantly clear:

> "on routes for which we determine there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits."[59]

Obviously, on routes for which there *is* an unbundling obligation for DS3 transport, the FCC did not limit the number of DS1 transport circuits. The Verizon tariff language is incorrect.

In sum, Verizon's decision to implement its TRO II rights pursuant to self-defined tariff language rather than negotiation of amendments to interconnection agreements has led to

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59 TRO II, ¶128.

numerous mistakes, all of which inure to the benefit of Verizon. The proper method is to suspend and/or reject the tariff and direct the parties to negotiate. If, at the end of that process, the Commission believes that tariff provisions are necessary and/or desirable, then a full record will have been developed from which appropriate language can be derived.

For these reasons, the Verizon tariff provisions relating to DS1 and DS3 loops and transport should be rejected or suspended and investigated.

V. CONCLUSION

Verizon's proposed tariff amendments are inappropriate and premature. The proper method for redefining CLEC and Verizon obligations in light of the TRO II is, as the FCC has explicitly found, negotiations and arbitrations under section 252 of the Act. Moreover, the Verizon tariff provisions, inevitably in the absence of negotiations between the parties, represent a one-sided and inaccurate representation of Verizon's obligations and CLEC rights under the Telecom Act and the Pre-Filing Statement.

The Commission must find that Verizon has not satisfied its obligations under the PFS to enable CLECs to combine elements for themselves. There is no other possible conclusion given the absence of record evidence to the contrary. The Commission is free to propose a process to solve this problem, and Joint Petitioners will gladly participate. But until the predicate conditions are satisfied, Verizon should not be permitted to change either the rates or the terms and conditions of its current tariff offerings for UNE-P.

Verizon's tariff provisions affecting the availability of loops and transport are also poorly crafted, inaccurate and one-sided. The Commission should direct Verizon to negotiate with the CLECs to reach agreement on terms and conditions that will implement the TRO II. Issues that the parties cannot resolve should be subject to arbitration by the Commission pursuant to section 252 of the Act.

Respectfully submitted,

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