Via Electronic Mail and Overnight Mail

June 22, 2005

Luly E. Massaro
Commission Clerk
Rhode Island Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

Re: Verizon Rhode Island Proposed Revisions to PUC Tariff No. 18 (filed on February 18, 2005) – Docket 3662

Dear Ms. Massaro:

On April 1, 2005, in response to the Procedural Schedule in this proceeding, Conversent Communications of Rhode Island, LLC submitted a filing suggesting alternative Tariff language for consideration by the Commission in this matter.

On June 20, 2005 a Hearing Examiner released an Examiner's Report covering many of the same issues pending in this proceeding. *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21),* Docket No. 2002-682 (Examiner's Report, dated June 20, 2005). To assist the Commission in its review, Conversent files this Examiner's Report as further support to the alternative language and analysis provided in Conversent's April 1, 2005 Filing in this matter.

In particular, the Maine Examiner's Report attached provides further support to Conversent's position that Verizon-RI's Tariff Proposal improperly interprets and misapplies the FCC's recent TRRO in several important ways.

Please contact me if you have any questions regarding this filing.

Respectfully submitted,

Alan M. Shoer
Director – Regulatory Affairs
401-834-3370
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CC: Steve Frias, Esq., PUC Executive Counsel
Alexander Moore, Esq.

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

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

June 20, 2005

EXAMINER'S REPORT

NOTE: This Report contains the recommendation of the Hearing Examiner. Although it is in the form of a draft of a Commission Order, it does not constitute Commission action. Parties may file responses or exceptions to this Report on or before **noon on July 15, 2005**. It is expected that the Commission will consider this report at a special deliberative session on **July 25, 2005**.

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I. SUMMARY

In this Order, we determine the scope of unbundled network elements (UNEs) that must be included in Verizon's Wholesale Tariff for the State of Maine. We also order Verizon to file a revised tariff for our consideration within sixty days.

II. BACKGROUND

A. Previous Commission Orders

On September 3, 2004, we issued an Order in this proceeding requiring Verizon to include all of its wholesale offerings in its state wholesale tariff, including UNEs provided pursuant to both Sections 251 and 271 of the Telecommunications Act of 1996 (TelAct).[1] As we explained in that Order, at the time we conditioned our support of Verizon's 271 Application on Verizon filing a wholesale tariff, Verizon's unbundling obligations under Sections 251/252 of the TelAct were synonymous with its Section 271 unbundling obligations. Since that time, there have been two key decisions by both the D.C. Circuit Court of Appeals (*USTA I*[2] and *USTA II*[3]*)* and the Federal Communications Commission (FCC) (the *TRO*[4] and the *TRRO*[5]). These decisions collectively have lead

[1] Section 271 of the TelAct sets forth the requirements an incumbent local exchange carrier (ILEC) must meet before it will be allowed to enter the interLATA toll market. The so-called "competitive checklist" contains 14 measures which were intended to ensure that the ILEC had opened the local exchange market to competition.

[2] *U.S. Telecomm Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) *(USTA I).*

[3] *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II).*

[4] Report and Order and Order on Remand and Further Notice of Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 96-98 *et al*., FCC03-36, 18 FCC Rcd 16978 (rel. August 21, 2003)(*Triennial Review Order or TRO).*

[5] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-

to the current situation where an ILEC's Section 251/252 obligations are narrower than its Section 271 obligations.

Prior to our September 3rd Order, the competitive local exchange carriers (CLECs) contended that Verizon was required to include its Section 271 unbundling obligations in its state wholesale tariff. Verizon argued that the FCC had exclusive jurisdiction over matters relating to its 271 obligations and that this Commission had no authority to require Verizon to amend its wholesale tariff to include its 271 obligations. In our September 3rd Order, we found that we had authority under both federal and state law to interpret and enforce the commitment Verizon made in Docket No. 2000-849 to file a wholesale tariff. We specifically found that

> The FCC's statement regarding enforcement of state 271 commitments, and our significant experience with the issues associated with the wholesale tariff, provide us with legal authority and substantive expertise to enforce Verizon's wholesale tariff commitment. We will exercise this authority by requiring Verizon to honor the commitment it made to us in the 271 process to file a wholesale tariff which includes all of its unbundling requirements and then evaluating that tariff for compliance with state and federal standards. If a party believes the Commission has not applied the correct standard, the party may file an action with the FCC pursuant to 47 U.S.C. §271(d)(6) and the FCC will have the benefit of the detailed factual record developed by us. Nothing about our review of Verizon's wholesale tariff preempts or invalidates the FCC's authority under section 271(d)(6). If the FCC disagrees with the position we take here, it can explain itself in any order issued on appeal. In the meantime, our decision will provide a single litigation proceeding to resolve the myriad of issues resulting from the *TRO* and *USTA II.*[6]

313; CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) (*TRO Remand Order* or *TRRO*).

[6] Order at p. 13.

In addition, we further specified that Verizon must file prices for all offerings contained in the wholesale tariff for our review for compliance with federal pricing standards, i.e. TELRIC for Section 251 UNEs and "just and reasonable" rates pursuant to Sections 201 and 202 of the Communications Act of 1934 for Section 271 UNEs. Finally, we held that Verizon must continue to provision Section 271 UNEs at TELRIC prices pending approval of the wholesale tariff and/or new rates. We found this requirement necessary to ensure a timely transition to the new unbundling scheme. We that we "have no record basis to conclude that TELRIC rates do not qualify as "just and reasonable" rates; while we might ultimately approve higher rates, we cannot do so without the benefit of a record or the agreement of the parties."[7] Verizon did not seek reconsideration of the Order nor did it appeal the Order pursuant to 35-A M.R.S.A. § 1320.

On March 17, 2005, we issued another Order in this proceeding in response to certain motions by CLECs concerning Verizon's implementation of the *TRRO*. In addition to resolving the CLECs' motions, we responded to claims by Verizon that we could not enforce our September 4, 2004 Order requiring Verizon to continue to provision UNEs pursuant to Section 271 of the TelAct. We stated:

> We find Verizon's assertions both troubling and procedurally improper. Unless and until a Commission order is amended, vacated, or otherwise modified pursuant to the requirements of Title 35-A or other applicable law, the order retains the force of law and must be obeyed. Accordingly, our September 3, 2004 Order in this proceeding stands and Verizon must comply with it or risk being found in contempt

[7] We also note that the Supreme Court of the United States has upheld use of the TELRIC methodology as reasonable and specifically found that it was not undertaken with a confiscatory purpose. *Verizon v. FCC*, 535 U.S. 467 (2002).

> of a Commission order and subject to the fining provisions of 35-A M.R.S.A. § 1508-A.

We noted that there appeared to be significant disagreement between Verizon and the CLECs concerning which UNEs were required under Section 271 and that we expected to resolve those issues in the near future.

On April 1, 2005, Verizon filed a Complaint for Declaratory Judgment and Injunctive Relief in the Federal District Court of Maine seeking to overturn our September 3rd and March 17th Orders. Because that matter is not scheduled for trial until January 2006, we believe it is both important and prudent to move forward with this litigation.

B. Background on the UNE Matrix

On June 11, 2004, we issued an Order in Docket No. 2004 -135, Verizon-Maine's Request for Arbitration, which, among other things, consolidated this proceeding (Docket No. 2002-682) with the Verizon Arbitration proceeding. We also directed the parties to develop a consolidated list of issues that must be litigated and established a deadline of July 16, 2004, for filing of the list. After a number of extensions and further direction from the Hearing Examiner, the parties submitted a joint matrix on September 13, 2004. The matrix delineated the parties' positions on whether particular UNEs must be unbundled pursuant to Section 251 of the TelAct and/or Section 271 of the TelAct. The parties agreed as to the status of some UNEs and disagreed on many others.

On February 5, 2005, the FCC issued its *TRRO* which further modified the unbundling obligations of ILECs such as Verizon. Accordingly, on March 4, 2005, the Hearing Examiner issued a Procedural Order attaching a copy of the parties' UNE

matrix which has been modified by the Hearing Examiner to reflect her understanding of the current status of some UNEs as well as the areas of disagreement among the parties regarding other UNEs. The Hearing Examiner requested that parties submit legal briefs addressing the status of each of the contested UNEs contained in the matrix.

On April 8, 2005, Verizon, GWI, the CLEC Coalition (Mid-Maine Communications, Pine Tree Networks, Revolution Networks, and Oxford Networks), and Conversent filed briefs and/or comments on the UNE matrix. Also on April 8, 2005, segTel, Inc. (segTel) filed a request for late intervention in this proceeding as well as comments on the UNE matrix. SegTel's cover letter indicated that Verizon did not object to its intervention and we have not received objection from any other party. Accordingly, segTel's intervention request is granted, and its comments have been considered.

C. Background on GWI's Complaints

On August 12, 2004, Biddeford Internet Corporation d/b/a Great Works Internet (GWI) filed a complaint under the Commission's Rapid Response Process alleging that Verizon had rejected GWI's orders for OC-3 interoffice transport UNEs.[8] GWI argued that Verizon was obligated under the terms of its Interconnection Agreement with GWI to continue provisioning OC-3 UNEs pursuant to Section 271 of the TelAct. GWI also claimed that Verizon "is or should be" required to provide access to OC-3 UNEs pursuant to 35-A M.R.S.A. §§ 301 and 304. Verizon argued that the FCC had removed OC-3 transport from the list of UNEs that must be provided under

[8] *See* Section III(E)(3) *infra* for a description of OCn-level transport.

Section 251 of the TelAct in the *TRO* and that it had provided proper notice under GWI's Interconnection Agreement that Verizon would cease providing OC-3 UNEs. Finally, Verizon claimed that any arguments concerning its obligations under Section 271 of the TelAct or state law were premature.

On September 30, 2004, the Commission opened an investigation (Docket No. 2004-643) to resolve the legal issues presented by GWI's RRP complaint. The Commission invited GWI, Verizon, and all other interested parties to file legal briefs presenting their positions and to respond to specific questions posed in the Notice of Investigation. GWI, Verizon, AT&T of New England (AT&T), and Conversent Communications (Conversent) filed briefs. An Examiner's Report has not yet been issued in that matter.

On April 6, 2005, GWI filed a petition asking the Commission to initiate an enforcement action against Verizon for its refusal to comply with the Commission's September 3, 2004 and March 17, 2005 Orders in this proceeding. GWI claimed that on March 25, 2005, and March 31, 2005, Verizon rejected orders for OCn level interoffice transport, and that on March 29, 2005, Verizon rejected an order for a dark fiber entrance facility UNE. GWI contends that Verizon is obligated under Section 271 of the TelAct and the Commission's September 3rd and March 17th Orders to provision GWI's requests. Verizon claims that it has no obligation to fill GWI's orders because of changes in its obligations under Section 251 of the TelAct as discussed in the *TRO* and *TRRO.*

On April 12, 2005, the Hearing Examiner issued a Procedural Order establishing an April 29, 2005 deadline for Verizon to respond to GWI's enforcement

complaint. In addition, the Hearing Examiner noted that our March 17, 2005 Order stated that if Verizon refused to provision a Section 271 UNE based on a good faith disagreement concerning whether the UNE qualifies as a Section 271 UNE, the Commission would conduct a proceeding to determine whether the UNE qualifies. The Hearing Examiner noted that the FCC's decisions in the *TRRO* and the *Broadband 271 Forbearance Order*[9] provided Verizon with a good faith argument concerning the treatment of OCn level transport and dark fiber and thus the Commission should investigate before granting GWI's motion. The Hearing Examiner also noted that briefing on the UNE matrix covered the same topics as GWI's Petition. Accordingly, given that our action on the UNE matrix would resolve the disagreements associated with the treatment of all UNEs, including the treatment of interoffice transport and dark fiber, the Hearing Examiner stayed resolution of GWI's Rapid Response Complaint and its Petition for Enforcement pending our consideration of the UNE matrix in this Order.

III. DECISION

We will address the legal status of each of the UNEs appearing on the Hearing Examiner's UNE matrix as well as OCn level loops and transport. We find we have authority to make such determinations, absent an order from the FCC making specific contrary findings, under Sections 251, 252 and 271 of the TelAct and under the terms of

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[9] Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 C.F.R. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 C.F.R. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 C.F.R. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 C.F.R. § 160(c)*, WC Docket Nos., 01-338, 03-235, 03-260, 04-48, 19 FCC Rcd 21496 (2004) ("*Broadband 271 Forbearance Order*"). *See* Section III(A)((3) *infra* for a description of this Order.

Verizon's commitment to file a wholesale tariff in our 271 Proceeding. Specifically, as we stated in our September 3rd Order:

> Verizon's express agreement to file a wholesale tariff, in its letter confirming that it would abide by the Commission's conditions for recommending Section 271 approval, provide us with an independent basis for requiring Verizon to file such a tariff now. We assume Verizon did not lightly make its commitment, and that Verizon understood that the Commission, in accepting that commitment, would not condone or allow conduct inconsistent with the obligations thus undertaken. It follows, then, that Verizon by its acceptance of the condition (for which Verizon obtained Commission support for its Section 271 application) granted to the Commission the authority to ensure that Verizon fully complied with the wholesale tariff obligation defined by Section 271. This is not to suggest that the Commission has the independent authority to define the scope of those obligations where the FCC has clearly spoken; merely that, in light of Verizon's commitment, the Commission has an independent role in determining whether those obligations have been met.

Given that Verizon's obligations include both Section 251 and 271 obligations and that the Commission has authority under section 252 to arbitrate disputes between Verizon and the CLECs, we believe we act within our authority under both state and federal law when we interpret the requirements of Section 251 and Section 271 as set forth by the FCC in its Rules and Orders.

A. Loops

1. Copper Loops

All parties agree, and we concur, that Verizon must unbundle its copper loops under Section 251 of the TelAct as well as under Section 271, Checklist Item No. 4.[10] All parties also agree that TELRIC (Total Element Long Run Incremental

[10] *See* 47 C.F.R. § 51.319(a); *TRO* at ¶ ¶ 248 -250.

Cost) pricing pursuant to Section 251(d)(2) is the appropriate pricing standard for copper loops unbundled pursuant to Section 251.

2. UNE-P

No party filing comments on the matrix claimed that Verizon must continue to make UNE-P (UNE platforms - a combination of an unbundled loop, switching, and transport) available under Section 251, except as in accordance with the FCC's transition rules.[11] The parties also do not contest that UNE-Ps are not required under Section 271 because the FCC has found that Section 271 does not require combinations of UNEs.[12] Accordingly, pursuant to the FCC's rules, Verizon does not need to provide any new UNE-Ps after March 11, 2005, but must continue provisioning of existing arrangements until March 11, 2006. During the interim period, the price of existing UNE-Ps will be the price as of June 15, 2004, plus one dollar.

3. Line sharing

Line sharing allows a CLEC to use the high frequency part of a loop to provide xDSL service (broadband) while Verizon uses the low frequency portion of the loop to provide voice service to the same end user. The parties agree that, subject to a 3-year transition mechanism, the FCC eliminated line sharing as a UNE under Section 251. The parties vigorously disagree as to whether line sharing is required pursuant to Section 271, Checklist Item No. 4 – access to unbundled loops.

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[11] *See TRRO* at ¶ 199.

[12] *See TRO* at ¶ 655, fn 1990.

a. Verizon

Verizon contends that Section 271, Checklist Item No. 4, only requires access to a loop unbundled from switching and not to any portion or capacity of a loop. Verizon argues that unbundling line sharing requires unbundling beyond the "stand-alone local loop required by checklist item 4." Verizon points to what it characterizes as the "more expansive" language of Section 251(c)(3) which includes the "features, functions, and capabilities" of the network element and contrasts it with the language of Section 271 which requires only "local loop transmission from the central office to the customer's premises, unbundled from switching or other services." Verizon cites the FCC's orders approving Verizon's Section 271 applications for Massachusetts and Virginia as supporting its contention that line sharing is a checklist item only to the extent that it must be made available as a UNE under Section 251(c)(3). Finally, Verizon contends that even if line sharing is a Section 271 requirement, it has met its obligation by offering line sharing to CLECs under its VISTA agreements[13] which it characterizes as "arms-length agreements."

b. CLECs

The CLECs argue that line sharing clearly falls under Section 271's requirements. SegTel points to a recent decision by the New Hampshire Public Utilities Commission (NHPUC) which found that line sharing must continue to be provided pursuant to Section 271.[14] The NHPUC relied upon the statutory appendix to

[13] Verizon offers CLECs access to line sharing through commercial agreements it refers to as "VISTA agreements."

[14] Proposed Revisions to Tariff NHPUC No. 84 - (Statement of Generally Available Terms and Conditions) - Petition for Declaratory Order re Line Sharing - Order

the FCC's *New Hampshire 271 Order*.[15] In that appendix, the FCC specifically addressed how an ILEC could establish compliance with Checklist Item No. 4. The FCC stated that the ILEC "must provide access to any functionality of a loop requested by competing carrier unless it is not technically feasible to condition a loop facility to support the particular functionality requested."[16] The NHPUC found that the high frequency portion of the loop used to provide DSL service was “a functionality of the loop” and therefore must be provided pursuant to Section 271, Checklist Item No. 4.[17] SegTel points out that the FCC's *Maine 271 Order*[18] contained the same language about the necessity of providing access to the functionality local loop cited by the NH PUC.

Following Briefing, No. 24,442, DT 03-201 and DT-176 (March 11, 2005) (*NHPUC SGAT Revision Order*).

[15] *Application by Verizon New England Inc., and Verizon-Delaware, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the States of New Hampshire and Delaware,* CC Docket No. 02-157, Order, (September 25, 2002) (*NH 271 Order*).

[16] *NH 271 Order* at ¶ 49.

[17] *NHPUC SGAT Revision Order* at 46-47 citing *U.S. Telecomm. Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II).*

[18] *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine,* CC Docket No. 02-61, Order, 17 FCC Rcd 11676 (June 19, 2002) (*Maine 271 Order*).

c. Decision

We find, based upon our review of FCC orders, including the *Maine 271 Order, Massachusetts 271 Order*[19]*,* and the *Broadband 271 Forbearance Order*, that line sharing continues to be a Section 271 Checklist Item No. 4 requirement. First, as segTel points out, the Statutory Appendix to the *Maine 271 Order* contains the same language quoted by the NHPUC concerning the FCC's interpretation of Section 271 Checklist Item No. 4, i.e. that any functionality of the loop must be unbundled.[20] Second, we disagree with Verizon's interpretation and reliance upon paragraph 164 of the FCC's *Massachussetts 271 Order.* We find nothing in that paragraph which supports Verizon's position, i.e. that Checklist Item No. 4 is limited to full loops. However, in the paragraph directly above the one cited by Verizon, the FCC clearly states that line sharing must be provided pursuant to Section 271 under both Checklist Item No. 2 and Checklist Item No. 4.[21]

As we explained in our September 3, 2004 Order in this docket, Checklist Item No. 2 requires "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252 (d)(1)." Section

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[19] *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts,* Order, 16 FCC Rcd 8988 (April 16, 2001) (*Massachusetts 271 Order)*.

[20] *See* Appendix D to the *Maine 271 Order* at ¶ 49.

[21] *Massachusetts 271 Order* at ¶ 163 (**"**On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 and 4 of section 271").

251(c)(3) requires ILECs to provide access to their network, i.e. UNEs, while Section 252(d)(1) sets the pricing standard for those UNEs, i.e., TELRIC pricing. Section 251(c)(3) also requires compliance with section 251(d)(2) which limits access to UNEs at TELRIC pricing to only those which meet the "necessary and impair" standard. Thus, Checklist Item No. 2 requires an ILEC to meet all of the 251 and 252 unbundling and pricing standards set forth in the *TRO* and *TRRO.*

Checklist Items Nos. 4, 5, 6, and 10 require ILECs to provide unbundled access to loops, transport, switching and signaling. The FCC has explicitly found that, despite elimination of a number of UNEs under Section 251, ILECs must continue to provide access to those UNEs under Section 271.[22] However, because none of these other checklist items, unlike Checklist Item No. 2, cross reference sections 251(c)(3) and 252(d)(1), the UNEs unbundled under Checklist Items Nos. 4, 5, 6 and 9 must only meet the "just and reasonable" pricing standard of 47 U.S.C. §§ 201-202 and not the TELRIC standard required under section 251.[23]

Thus, the FCC's holding in the *Massachusetts 271 Order* that line sharing is required under both Checklist Item No. 2 and No. 4 is more significant now than it was at that time, when the ILEC's Checklist Item No. 2 requirements encompassed all of the other Checklist UNEs. Now that the ILEC's Checklist Item No. 2 requirements have been narrowed by the *TRO* and the *TRRO*, i.e. now that the FCC has found that Section 251 does not require the unbundling of certain UNEs such as line sharing, the fact that the FCC stated that the eliminated UNE also

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[22] *TRO* at ¶ 653.

[23] *TRO* at ¶ 656.

must be provided pursuant to Checklist Item No. 4 means that the ILEC has a continuing obligation to unbundle that UNE today.

The FCC's position on line sharing under Section 271 was confirmed in the aftermath of the FCC's *Broadband 271 Forbearance Order*, i.e. in the statements made by then Chairman Powell and then Commissioner, now Chairman, Martin accompanying the FCC 's *Broadband 271 Forbearance Order*. Chairman Powell stated that he did not believe the *Broadband 271 Forbearance Order* addressed line sharing or that the FCC was forbearing from application of Section 271 to line sharing.[24] Chairman Martin stated that he believed the *Broadband 271 Forbearance Order* did address line sharing and, that if it did not do so explicitly, it would do so by operation of law because both SBC and Quest had amended their forbearance petitions to include line sharing.[25]

Subsequently, the FCC issued its *Order Extending Deadline* explicitly stating that the earlier *Broadband 271 Forbearance Order* only covered Fiber to the Home (FTTH), Fiber to the Curb (FTTC), hybrid loops and packet switching and that the petitions of SBC and Quest remained pending as to any other UNEs not

[24] "By removing 271 unbundling obligations for fiber-based technologies - and not copper based technologies such as line sharing - today's decision holds great promise for consumers, the telecommunications sector and the American economy." *Broadband 271 Forbearance Order* at Chairman Powell's Separate Statement.

[25] "Regardless of whether it was affirmatively granted, because the Commission's decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute." *Broadband 271 Forbearance Order* at Chairman Martin's Separate Statement.

required under Section 251, e.g., line sharing.[26] The *Order Extending Deadline* further stated that unless the FCC took action within 90 days, the requests would be deemed granted by operation of law. On January 11, 2005, SBC withdrew its petition for forbearance and on January 13, 2005, Quest withdrew its petition, thereby foreclosing the FCC's consideration of the issue.

Clearly both former Chairman Powell and current Chairman Martin believe that line sharing continues to be a Section 271 requirement unless, and until, the FCC determines that it will forbear from enforcing the requirement. As described above, the FCC never reached that decision because SBC and Quest withdrew their petitions. We note that the FCC's recent *BellSouth Line Sharing Order,*[27] which addresses state commission authority to order line sharing pursuant to state law, is inapplicable to the question before us because we are finding that line sharing is required under federal law, not state law.

Accordingly, Verizon must continue to provision line sharing as a UNE and include it in its wholesale tariff. As stated earlier, the FCC has determined that the appropriate pricing standard for Section 271 UNEs is " just and reasonable" and we have determined that until Verizon files prices for our approval or submits FCC-approved rates, Verizon must continue to provision all Section 271 UNEs at TELRIC prices. Verizon alleges in its Brief that it meets the FCC's just and

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[26] *In the Matter of SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c) from Application of Section 271*, Order Extending Deadline, WC Docket No. 03-235 (Nov. 4, 2004).

[27] *Bellsouth Telecommunications, Inc. Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, WC 03-251, Memory and the Opinion and Order and Notice of Inquiry, FCC 05-78, rel. March 25, 2005 (*BellSouth Line Sharing Order*).

reasonable standard through its offering of line sharing under the VISTA agreements. We do not have sufficient information in front of us at this time to reach a final determination on Verizon's claim. Before we could reach such a determination, we would need a more detailed filing by Verizon comparing its line sharing pricing structure (all recurring and non-recurring costs associated with ordering wholesale line sharing) under TELRIC to the pricing structure under VISTA. **ALTERNATE NO. 1:** Thus, until Verizon submits such a filing and we make a final determination on Verizon's claim, Verizon must continue to offer line sharing at TELRIC rates. **ALTERNATE NO. 2:** Thus, until we are able to conduct a more in-depth investigation of Verizon's claim, and until we approve Verizon's wholesale tariff, we will make an interim finding that Verizon is meeting in its Section 271 line sharing requirements through its VISTA agreements.[28]

4. Hybrid Loops

The term hybrid loops describes loops which contain both a copper portion and a fiber portion. Previously, carriers served each customer with all copper wires running from the central office to the end user. More recently, ILECs have configured their network by using fiber feeder cables running from their central office to a remote terminal and then copper distribution wires running from the remote terminal to the end user's premises. This enables the ILEC to more efficiently carry the traffic between the remote terminal and the central office.

a. Section 251 Access

The parties generally agree, and we concur, that Verizon must unbundle hybrid loops pursuant to Section 251 in accordance with the limitations

[28] We invite comment on these two alternative conclusions in parties' Exceptions.

imposed by the FCC in paragraphs 285-297 of the *TRO*. Specifically, the FCC has held that ILECs must provide access to the TDM (time division multiplexing) features, functions, and capabilities of hybrid loops, including DS1s, DS3s, and voice-grade narrowband connections. The parties also agree that the appropriate pricing standard for such access pursuant to Section 251 is TELRIC pricing.

While the parties also agree, and we concur, that Verizon does not have to provide unbundled access to the packet switching features, functions, and capabilities of hybrid loops,[29] there is some disagreement concerning whether Verizon must provide unbundled access to broadband capabilities where the CLEC has installed its own packetized switching capabilities. GWI contends that the controlling authority for the availability of hybrid loops under Section 251 is the FCC's regulation, 47 C.F.R. §51.319(a)(2), and not the language of the *TRO* quoted in the matrix. GWI refers us to the Joint Brief of GWI, the OPA, the CLEC Coalition, and Cornerstone in Docket No. 2002-243, the Commission's Dark Fiber proceeding.[30] In that brief, they argued that the FCC's rules allow access to hybrid loops where the CLEC has installed its own packetized equipment and is not seeking access to the packet switch features of the hybrid loops.[31] Verizon contends that all CLECs are prohibited from using any broadband capabilities of hybrid loops because the FCC eliminated all CLEC access to fiber feeder subloops.[32]

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[29] *See TRO* at ¶ 288.

[30] *Initial Brief of The Public Advocate, The CLEC Coalition, Cornerstone and Great Works Internet,* Docket 2002-243 *(Consolidated Intervenors Dark Fiber Brief*).

[31] *Id*. at 20-21.

We find that the FCC intended to eliminate access to all of the fiber functionalities in fiber feeder. In the *TRO,* the FCC stated it was developing two sets of rules to govern access to hybrid loops; application of a particular set of rules would "vary depending upon whether a competitive LEC seeks access for the provision of broadband or narrowband services."[33] The FCC then plainly stated that unbundled access to hybrid loops for the provision of broadband services is no longer required.[34] Specifically, the FCC's stated that:

> We decline to require incumbent LECs to unbundle the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market … The rules we adopt herein do not require incumbent LECs to unbundle any transmission path over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is used to transmit packetized information.[35]

The FCC appears to have contemplated that CLECs would need to use TDM-based technologies, such as DS1s and DS3s, to provide broadband services.[36] Equally plain is the FCC's statements that ILEC next-generation networks and the next-generation network capabilities of fiber-based local loops are exempt from unbundling

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[32] *Verizon Reply Brief,* Docket No. 2002-243 (*Verizon's Dark Fiber Reply Brief)* at 3.

[33] TRO at ¶ 287.

[34] *TRO* at ¶ 200.

[35] *TRO* at ¶ 288

[36] *TRO* at ¶ 288. This requirement ensures that competitive LECs have additional means with which to provide broadband capabilities to end users because competitive LECs can obtain DS1 and DS3 loops, including channelized DS1 or DS3 loops and multiple DS1 or DS3 loops for each customer.

requirements.[37] The FCC anticipates that these unbundling exemptions will stimulate ILEC deployment of next-generation facilities and equipment wider and deeper into their networks.[38] The FCC also expects that CLECs will be stimulated by these exemptions to either deploy their own facilities or seek other "innovative access options" for providing mass market broadband services.[39]

We find that the FCC intended CLECs' access to fiber in hybrid loops to be limited solely to the TDM-based features *and* the circuit-switched TDM path of any fiber feeder portion of the loop. In paragraph 294 of the *TRO,* the FCC explains the application of its TDM limitation:

> We stress that the line drawing in which we engage does not eliminate the existing rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers. These TDM-based services – which are generally provided to enterprise customers rather than mass market customers – are non-packetized, high-capacity capabilities provided over the circuit switched networks of incumbent LECs. To provide these services, incumbent LECs typically use the features, functions, and capabilities of their networks as deployed to date – *i.e.*, a transmission path provided by means of the TDM form of multiplexing over their digital networks – or certain capabilities of multi-use integrated equipment (*e.g.*, integrated line cards deployed in DLC systems).

(citations omitted). In footnote 846, the FCC references submissions from several ILECs which described how they segregate traffic. Specifically, the FCC notes that,

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[37] *Id*. at ¶ 272.

[38] *Id*. *See also*, ¶ 290 and ¶ 295 ("For these reasons, we conclude that it is consistent with our section 706 mandate to promote investment in infrastructure by refraining from unbundling incumbent LECs' next-generation network facilities and equipment.")

[39] *Id*. at ¶ 290.

"they [ILECs] typically segregate transmissions over hybrid loops onto two paths, *i.e.*, a circuit-switched path using TDM technology and a packet-switched path (usually over an ATM network)."

It is unclear from the arguments made by the CLEC Coalition in the Dark Fiber proceeding and by GWI in this proceeding, whether their request for access to the non-packetized portion of fiber feeder subloops/hybrid loops would be met by access to the TDM pathway or whether it would require access to the packet-switched path. Thus, we do not reach a specific conclusion as to their request but specifically find that any CLEC access to hybrid loops is limited to the TDM pathway of both the fiber feeder portion and the copper distribution portion of the loop i.e., for the entire loop from the control office to the customer.[40]

b. Section 271 Unbundling

The parties also disagree as to whether Verizon must provide full access to hybrid loops pursuant to Section 271, Checklist Item No. 4. Since the time the parties submitted their matrix and their briefs in the Dark Fiber Proceeding, the FCC issued its *Broadband 271 Forbearance Order*, which explicitly stated that the FCC would forbear from enforcing any ILEC Section 271 obligations as to CLEC use of the packetized switching capabilities of hybrid loops.[41] Accordingly, Verizon's hybrid loop unbundling obligations are limited to its Section 251 unbundling obligations which are described above.

[40] We encourage the CLEC Coalition to further explain its position in Exceptions to this Examiner's Report.

[41] *See Broadband 271 Forbearance Order* at ¶ 37.

5. Fiber-to-the-Home

a. Section 251

The FCC has issued several orders addressing ILEC unbundling obligations associated with fiber loops which terminate at single home residences (Fiber-to-the-Home or FTTH). First, in the *TRO*, the FCC found that ILECs were not required to unbundle FTTH under Section 251.[42] The FCC was clear to limit the application of the new rules to mass market customers, i.e. residential customers.[43] The FCC limited ILEC unbundling obligations for FTTH to those situations where the ILEC has overbuilt its older copper network with fiber and retired the pre-existing copper. In such situations, the ILEC must only unbundle the narrowband (64 kilobit pathway) capabilities of the fiber.[44] In addition, the ILEC must abide by both state and FCC regulations concerning the retirement of copper plant.[45] In all other situations, including so-called "greenfield" situations where fiber loops are deployed in new construction areas, the ILEC does not have to provide access to its fiber loops pursuant to Section 251.

The FCC later reconsidered its FTTH holdings in the *MDU Reconsideration Order*,[46] where it explicitly expanded the unbundling limitations to

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[42] *TRO* at ¶ 273.

[43] *TRO* at ¶ 197, n. 624 and ¶ 200.

[44] *See TRO* at ¶ 273.

[45] *See TRO* at ¶ 283-284.

[46] Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338 (Aug. 9, 2004)(*MDU Reconsideration Order*) ("we reconsider certain of the Commission's determinations

include predominantly residential multi-dwelling units (MDUs). Finally, in the *FTTC Reconsideration Order*,[47] the FCC expanded its FTTH holdings to FTTC, which it defined as:

> A local loop consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises or, in the case of predominantly residential MDUs, not more than 500 feet from the MDU's MPOE. The fiber optic cable in a fiber-to-the-curb loop must connect to copper distribution plant at a serving area interface in which every other copper distribution subloop also is not more than 500 feet from the respective customer's premises.[48]

The FCC continued to emphasize the application of its ruling to mass market loops.[49]

Conversent raises concerns in its brief regarding Verizon's practice in other states of characterizing FTTH and FTTC loops as Fiber-to-the-Premises (FTTP) loops. Conversent contends that by doing so, Verizon is inappropriately attempting to expand the FCC's findings concerning FTTH and FTTC to apply to small and medium-sized businesses which Conversent argues the FCC specifically did not include in its definitions; Conversent argues the FCC limited unbundling relief to loops servicing mass-market, residential customers. Conversent proposes that we adopt alternate definitions for FTTH and FTTC which refer to

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with regard to multiple dwelling units (MDUs) and conclude that the fiber-to-the-home (FTTH) rules will apply to MDUs that are predominantly residential.").

[47] Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338 (Oct. 18, 2004)(*FTTC Reconsideration Order).*

[48] *Id*. at ¶ 2.

[49] *Id*. at ¶¶ 5-6.

"residential" premises and to "mass market loops to ensure that Verizon does not impermissibly expand the FCC's holding."

We acknowledge the basis of Conversent's concerns and specifically affirm our understanding that the FCC's rules regarding FTTH and FTTC apply to mass-market loops and not to small and medium-sized businesses served by DS1s and DS3s derived from fiber facilities. We also direct Verizon to reference the FCC's definitions of FTTH and FTTC in its tariff.[50] Thus, subject to these conditions, we find that Verizon does not have an obligation under Section 251 to unbundle FTTH or FTTC.

b. Section 271

The parties disagree as to whether Verizon must provide full access to FTTH loops pursuant to Section 271, Checklist Item No. 4. The FCC, however, resolved this issue in its *Broadband 271 Forbearance Order*. In its Order, the FCC specifically decided to forbear from enforcing the requirements of Section 271 with regard to certain so-called “broadband elements” that it had relieved ILECs from unbundling pursuant to Section 251. The broadband elements included FTTH, FTTC, the packetized functionality of hybrid loops, and packet switching. Accordingly, we find that Verizon is not required to unbundle FTTH or FTTC loops pursuant to Section 271.

6. DS1 Loops

DS1 loops (also known as T-1s) are dedicated loops providing 24 individual DS0 channels (DSO is a voice grade loop) and are capable of carrying data at

[50] Verizon is free to define its FTTP UNE as both FTTH and FTTC but not to change the definition in a way which would limit CLEC access beyond that contemplated by the FCC's rules.

1.544 mb/second. These loops are generally used to serve small businesses to provide both voice and data services. In the *TRO*, the FCC required ILECs to continue to unbundle DS1s subject to location-specific exceptions determined by state commissions pursuant to a delegation of power from the FCC.[51] Later, the D.C. Circuit overturned the FCC's delegation of authority to state commissions and remanded the decision back to the FCC for further consideration.[52] On remand, in the *TRRO*, the FCC found that ILECs must continue to unbundle DS1s except in wire centers with 60,000 or more business lines or 4 fiber collocators.[53] The FCC also limited each CLEC to 10 DS1s in any one building.

On February 18, 2005, in response to a request by the FCC, the ILECs filed letters with the FCC indicating which rate centers in their territories met the FCC's criteria. On February 24, 2005, the Hearing Examiner requested that Verizon provide the Commission with a copy of its letter to the FCC. On that same day, counsel for Verizon forwarded a copy of the letter to the FCC via e-mail. Verizon's letter indicated that no wire centers in Maine met the FCC's new criteria for DS1s and thus there were no limitations.[54]

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[51] *TRO* at ¶ 325.

[52] *USTA II* at 574.

[53] *TRRO* at ¶ 146

[54] On March 24, 2005, Verizon submitted a Letter of Correction indicating that it had incorrectly identified the Augusta wire center as meeting the FCC's Tier 2 (3 fiber collocators and 24,000 lines) criteria for transport UNEs. The correction had no impact on DS1 loops.

The parties do not disagree about the limitations placed on ILEC unbundling of DS1s under Section 251. Conversent, however, raises concerns about Verizon's unilateral determination of which wire centers meet the FCC's criteria. Conversent requests that we require Verizon to include the wire center list in the tariff so that we will have an opportunity to review and investigate Verizon's determinations. Conversent contends that allowing Verizon to be the sole "judge, jury and executioner" regarding which wire centers satisfy the FCC's criteria would lead to repeated disputes before the Commission and may deter CLECs from ordering facilities in certain wire centers. Conversent also points out that Verizon has already admitted to making errors in developing its list of wire centers. Finally, Conversent refers us to a recent decision by the New York Public Service Commission which requires Verizon to file the list of non-impaired wire centers as part of a tariff filing and provide supporting data for review and analysis.[55]

We agree with Conversent that Verizon should include the list of non-impaired wire centers in its tariff. In the *TRRO*, the FCC explicitly stated that disputes concerning which rate centers meet the FCC's criteria would be resolved, in the first instance, by the relevant state commission.[56] Rather than conduct inefficient piecemeal litigation, we will investigate Verizon's list all at once and make a determination as to its accuracy. To the extent that conditions change in the future,

[55] *In re Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand,* Case 05-C-0203, Order Implementing Tariff Changes, at 9-10 (Mar. 16, 2005).

[56] *TRRO* at ¶ 234.

Verizon may seek to amend its tariff to reflect additional rate centers upon a showing that they meet the FCC's criteria.

The parties also agree, and we concur, that DS1s must continue to be unbundled pursuant to Section 271, Checklist Item No. 4. As Conversent properly points out, the limitations applicable to DS1s unbundled pursuant to Section 251 do not apply to DS1s unbundled pursuant to Section 271. However, the pricing standard for DS1s unbundled pursuant to Section 271 is "just and reasonable" rather than TELRIC. Because DS1s continue to be available under Section 251, there is no need to set a Section 271 rate at this time.

7. DS3 Loops

DS3 loops (also known as T-3s) are dedicated loops providing the equivalent of 672 individual DS0 channels or 28 DS1 channels and are capable of carrying data at 44.7 mb/second. These loops are generally used to serve businesses and provide both voice and data services. In the *TRO*, similar to its treatment of DS1s, the FCC required ILECs to continue to unbundle DS3s subject to the location-specific exceptions determined by state commissions pursuant to a delegation of power from the FCC.[57] The *USTA II* decision, as it did with DS1s, overturned the FCC's delegation of authority to state commissions and remanded the decision back to the FCC for further consideration. On remand, in the *TRRO*, the FCC found that ILECs must continue to unbundle DS3s except in wire centers with 38,000 or more business lines or 4 fiber collocators.[58] The FCC also limited each CLEC to 1 DS3 in any one building.

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[57] *TRO* at ¶ 320.

[58] *TRRO* at ¶ 146

In the same February 18, 2005 letter sent to the FCC concerning DS1 criteria, Verizon identified which rate centers met the FCC's DS3 criteria. Verizon asserts that only the Portland wire center meets the DS3 criteria. Verizon's March 24, 2005 Letter of Correction made no changes to its DS3 findings.

The parties do not disagree about the limitations placed on ILEC unbundling of DS3s under Section 251. Conversent, however, raises the same concern about Verizon's unilateral determination of which wire centers meet the FCC's criteria as it raised relating to DS1s. Our decision to require Verizon to tariff its non-impaired wire center list applies to DS3 loops for the same reasons described above.

The parties also do not disagree that DS3s must continue to be unbundled pursuant to Section 271, Checklist Item No. 4. As with DS1s, the limitations applicable to DS3s unbundled pursuant to Section 251 do not apply to DS3s unbundled pursuant to Section 271. However, the pricing standard for DS3s unbundled pursuant to Section 271 is "just and reasonable" rather than TELRIC. Thus, for DS3s provisioned in the Portland wire center, Verizon must submit for approval rates which meet the FCC's just and reasonable standard or FCC-approved rates. Until such rates are submitted, Verizon should use the previously approved TELRIC rate.

8. OCn Loops

OCn is an optical interface designed to work with Synchronous Optical Network (SONET) systems. SONET is an optical interface standard for translating electronic communications signals into photonic signals for transmission across fiber optic facilities. SONET transmission systems are often laid out in a ring formation to provide redundancy. OCn transmission facilities are deployed as SONET

channels having a bandwidth of typically 155.52 Mbps (OC3 or the equivalent capacity of 3 DS3s) and higher, e.g., OC12 (622.08 Mbps); OC48 (2.488 Gbps).[59] The parties did not include OCn level loops in their original draft of the UNE matrix but they are addressed here in order to complete our analysis of UNE loops.

In the *TRO*, the FCC determined that CLECs are not impaired without access to unbundled 'lit' OCn loops because "the barriers relating to the deployment of OCn 'lit' loops can be overcome through self-deployment at the OC3 and above level, the use of unbundled dark fiber, or the use of 'lit' DS3s."[60] No party appealed the FCC's decision on OCn loops. Accordingly, ILECs are not required to unbundle OCn level loops under Section 251. However, ILECs must still unbundle them under Section 271, Checklist Item No. 4 (loops) because neither the *TRRO* nor the *Broadband 271 Forbearance Order* provided any further unbundling relief related to OCn level loops. The pricing standard for these loops is the FCC's "just and reasonable standard." However, until Verizon submits rates for our approval or files FCC-approved rates, it must provision OCn loops at the previously-approved TELRIC rates.

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[59] See *Newton's Telecom Dictionary* 527 (18th ed. 2002) for definitions of OC3, OC12, and OC48.

[60] *TRO* at ¶ 315.

9. Dark Fiber Loops[61]

a. Section 251

Dark fiber consists of unused fiber within an existing fiber optic cable that has not been activated through optronics to make it capable of carrying communications services. Users of unbundled dark fiber loops provide their own electronic equipment to activate the dark fiber strands to provide services. CLECs use dark fiber loops to serve business customers with both voice and data services.

In the *TRO,* the FCC found that CLECs were impaired at most customer locations without access to dark fiber loops and continued to require ILECs to unbundle dark fiber loops pursuant to Section 251.[62] The FCC did, however, also delegate authority to state commissions to make customer-specific determinations that CLECs were not impaired without access to dark fiber loops, i.e., to find that an ILEC did not have to unbundle a particular dark fiber loop pursuant to Section 251. *USTA II*, however, overturned the FCC's delegation to state commissions and remanded the dark fiber impairment findings back to the FCC for further determination.

In the *TRRO*, the FCC reversed its earlier impairment findings and instead found that CLECs are not impaired on a nationwide basis without access to unbundled dark fiber loops "because the barriers to entry relating to the deployment of dark fiber loops can be overcome through self-deployment of lit facilities

[61] In addition to documents filed in this proceeding, we have considered all filings made in Docket No. 2002-243, our *Investigation into Verizon's Dark Fiber Tariff*, when reaching determinations associated with dark fiber UNEs.

[62] *TRO* at ¶ 311.

at the OCn level."[63] The FCC did, however, provide an 18-month transition period during which the rate for the embedded base of dark fiber loops would be 115% of the rate as of June 4, 2004. Thus, subject to the transition rules, Verizon is no longer required to unbundled dark fiber loops in Maine pursuant to Section 251.

b. Section 271

While none of the parties dispute the lack of unbundling under Section 251, they vigorously dispute whether ILECs must unbundle dark fiber loops pursuant to section 271.

i. Verizon

Verizon contends that dark fiber is not included under Checklist Item No. 4's requirement to provide unbundled loops. Verizon argues that the FCC acknowledged in the *UNE Remand Order*[64] that dark fiber was incapable of carrying telecommunications services without the connection of electronics. According to Verizon, the FCC held that dark fiber fell within the statutory definition of loop network elements under Sections 153(29) and 251 because dark fiber was part of the "facilities, functions and capabilities" of the loop. Verizon further argues that Section 271's requirements speak only of "loop transmission...unbundled from local switching or other services." Thus, Verizon claims that the broader definition of loop under Section 251 which includes all of the "features, functions and capabilities" of the loop was not applied by Congress to Section 271 checklist obligations and that Section 271 loops do

[63] *TRRO* at ¶ 182.

[64] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket 96-98, Third Report and Order And Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, rel. November 5, 1999 (*UNE Remand Order*).

not include the Section 251 UNEs which are derived from the local loop such as line sharing, subloops, and dark fiber.

ii. CLECs

The CLECs contend that Section 271 Checklist Item No. 4‘s requirement for access to loops includes access to all types of loops. Conversent argues that Section 271 requires Verizon to provide "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services" and that dark fiber loops meet that definition. Conversent acknowledges, however, that the FCC's *Broadband 271 Forbearance Order* may have removed a small subset of dark fiber loops from Section 271, specifically any dark fiber loops associated with FTTH and FTTC loops. SegTel also acknowledges the FCC's holding in the *Broadband 271 Forbearance Order* but argues that it applies only in the limited circumstance of FTTH to FTTC loops of mass-market customers. SegTel also points to footnote 440 in the FCC's *Verizon Maine 271 Order* wherein the FCC states that dark fiber is among the features, functions and capabilities of the loop. Finally, SegTel directs our attention to the recent order by the New Hampshire Public Utilities Commission which found that dark fiber continues to be a Section 271, Checklist Item No. 4 requirement.

iii. Decision

We find that there is no Section 271 access to dark fiber loops which are part of FTTH or FTTC loops to mass-market customers. Specifically, when we consider the FCC's decision in the *Broadband 271 Forbearance Order* to forbear from enforcing any Section 271 obligations to unbundle FTTH or FTTC

in conjunction with the FCC's finding in the *TRRO* that CLECs are not impaired without access to dark fiber loops under Section 251, it is apparent that access to fiber that is part of a FTTH or FTTC loop, whether dark or lit, is now prohibited in all circumstances.

As to non-FTTH and non-FTTC dark fiber loops serving enterprise customers, we find that, dark fiber loops are included in the FCC's definition of loops pursuant to Checklist Item No. 4 in Section 271. In Appendix D to the FCC's *Maine 271 Order*, in a section entitled " Checklist Item 4 - Unbundled Loops" the FCC states:

> The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. This definition includes different types of loops, including 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.[65]

While the FCC does not explicitly mention dark fiber, footnote 440, which appears at the end of the second sentence quoted above, refers to the *UNE Remand Order* and states that it made "explicit that dark fiber and loop conditioning are among the features, functions and capabilities of the loop." Thus, contrary to Verizon's more narrow interpretation of Checklist Item No. 4 in Section 271, it appears to us that the FCC intended that the definition of loops under Section 271 be coterminous with its definition under Section 251. We note that our colleagues in New Hampshire reached a similar conclusion when interpreting the same language from the FCC's *New Hampshire 271 Order*. Accordingly, Verizon must continue to unbundle dark fiber loops to enterprise

[65] FCC's *Maine 271 Order* at ¶ 48.

customers available to CLECs in Maine pursuant to Section 271. Pricing for these dark fiber loops will be determined pursuant to the FCC's just and reasonable standard. As with other Section 271 UNEs, until Verizon submits rates for our approval, or provides us with FCC-approved rates, Verizon should continue to use the TELRIC rates for dark fiber previously approved by the Commission.

B. Subloops

1. Copper Distribution

Copper distribution subloops are the wires which run from a remote terminal to an end user's premises. All parties agree that ILECs must continue to provide access to copper distribution subloops UNEs pursuant to Section 251 of the TelAct at TELRIC pricing. While they also generally agree that copper distribution subloops must be made available pursuant to Section 271, the parties disagree as to which specific checklist item requires their provision. Verizon contends that only Checklist Item No. 2 applies, i.e. only the provision which requires ILECs to provide all Section 251 UNEs. CLECs contend that both Checklist Item No. 2 and Checklist Item No. 4, which separately requires ILECs to unbundle loops, require the unbundling of copper distribution subloops under Section 271. Resolution of this disagreement is not required for the purposes of copper distribution subloops but will be required for resolution of several disputed issues related to other types of subloops discussed below.

2. Copper Feeder

Copper feeder subloops are the wires which run from the central office to a remote terminal. As stated above, in the past ILECs configured their

networks by using copper wires between both the central office and the remote terminal and the remote terminal and the end user. While in recent years ILECs have begun to employ fiber between the remote terminal and the central office, legacy copper wires were usually left in place and used for various purposes. The FCC currently defines a subloop as:

> ... a portion of a copper loop, or hybrid loop, comprised entirely of copper wire or copper cable that acts as a transmission facility between any point of technically feasible access in an incumbent LEC's outside plant, including inside wire owned or controlled by the incumbent LEC, and the end-user customer premises.[66]

The FCC requires that the UNE terminate at the end user customer premises and thus, seemingly, limits the definition of subloops to distribution subloops and does not include feeder subloops which terminate at a remote terminal. As we stated in our April 20, 2004 Order in the *Skowhegan Online* proceeding (Docket No. 2002-704), the current FCC definition of a subloop is different from the previous version of 47 C.F.R. § 319 established in the *UNE Remand Order* which provided that:

> The subloop network element is defined as any portion of the loop that is technically feasible to access at terminals in the incumbent LEC's outside plant, including inside wire.

Under the old definition, a subloop could include both the feeder and distribution portion of the loop and did not have to terminate at an end user's premises. In our *Skowhegan Online Order,* we considered whether the FCC's language in its new rules regarding termination at a customer's premises was intended as a limit on subloops, i.e. only distribution subloops must be unbundled, or whether it was an outer limit and termination at earlier points in the plant are also acceptable, i.e. the

[66] 47 C.F.R. § 319(b)(1).

subloop could terminate at a pole as requested by SOI. We looked to paragraphs 253 and 254 of the *TRO,* which explain the FCC's rules on subloops and found:

> Unfortunately, paragraphs 253 and 254 contain conflicting statements concerning subloops. In paragraph 253, the FCC appears to focus on eliminating CLEC access to fiber feeder only – each time the term feeder is used it is accompanied by the word *fiber* and never mentions copper feeder. Thus, paragraph 253 could be read to support the CLECs' position that the FCC did not intend to eliminate copper feeder subloops. However, in paragraph 254, the FCC defines copper subloops as the distribution portion of the plant only, creating a question regarding whether the FCC simply overlooked the possibility of copper subloops because it was focused on the typical network layout (fiber feeder, copper distribution) or whether it intended to eliminate all feeder subloops.
>
> We find that, despite the ambiguity created in paragraphs 253 and 254 of the *TRO,* the definition of subloop contained in the FCC's Rules should control and that copper feeder subloops are not included under the FCC's definition of subloop. Thus, Verizon does not have an obligation, under the FCC's Rules, to unbundled copper feeder subloops.[67]

However, later in the same Order, we also found that

> while the FCC clearly included distribution subloops in its requirements and excluded fiber feeder, there is sufficient ambiguity with regard to copper feeder subloops generally, and with the SOI subloop specifically, that requiring unbundling would not rise to the level of conflict necessary to trigger preemption.[68]

Ultimately, in that case, we found that Verizon had an obligation under state law to unbundle the specific type of copper feeder subloop requested by SOI – one which went beyond the remote terminal and terminated on a pole at SOI's NID.

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[67] *Skowhegan Online Order* at 10-11.

[68] *Id.* at 19.

a. Section 251 Access

Verizon contends that we should uphold our previous finding that the FCC eliminated copper feeder subloops. While the matrix submitted jointly by the parties indicated there was disagreement as to whether copper feeder subloops are required under Section 251, none of the CLECs addressed subloop unbundling in their briefs. While we continue to believe that the FCC's holdings with regard to copper feeder subloops were somewhat ambiguous, we see no reason at this time to disturb our previous finding. Accordingly, Verizon is not required to provide unbundled copper feeder subloops pursuant to Section 251 of the TelAct.

b. Section 271 Access

The parties also disagree about Verizon's obligations to provide copper feeder subloops under Section 271. Verizon contends that subloops are not a separate unbundling requirement under Section 271; subloops are only required under Section 271 to the extent that they are required under Section 251 as required under Checklist Item No. 2. Verizon argues that the FCC has consistently treated subloops separately from loops and thus subloops should not be lumped to together with Verizon's loop obligations under Section 271, Checklist Item No. 4. Verizon states that the FCC defines subloops as an additional individual UNE beyond the unbundled loop and cites the *UNE Remand Order* as authority for that proposition. Verizon also argues that Checklist Item No. 4 of Section 271 refers to loop transmission from the central office to the customer's premises and therefore does not include the further obligation to provide access to subloops, which by definition do not reach all the way from the central office to the customer's premises. Finally, Verizon cites to the

Examiner's Report in the *Skowhegan Online* proceeding in which the Hearing Examiner proposed that the Commission conclude that Verizon did not have a continuing Section 271, Checklist Item No. 4 obligation to provide subloops.

While the CLECs did not address this issue directly in their most recent briefs, we note that in the *Skowhegan Online* proceeding GWI and Cornerstone argued that Verizon should be required to provide access to subloops under Section 271 because the Commission relied upon Verizon's assertions concerning its provision of subloops during the Commission's 271 proceeding, Docket No. 2000-849.

We find that that the rationale previously set forth in an Examiner's Report in the *Skowhegan Online* proceeding, but not adopted by us in that proceeding, supports our finding today that Verizon does not have a continuing Section 271, checklist item No. 4 obligation to provide access to copper feeder subloops.

In our Findings Report on Verizon's 271 Application, we found that Verizon met Checklist Item No. 4 and had provided access to its loops.[69] In reaching that conclusion, the Commission relied upon assertions made in Verizon's Section 271 filing concerning its provision of loops and subloops. Verizon included its discussion of subloop unbundling within the section of its Declaration that addressed loop unbundling issues.[70] The subloop portion of the Checklist Declaration cites to the FCC's *Massachusetts 271 Order*, which found that Verizon provided nondiscriminatory

[69] *Inquiry Regarding the Entry of Verizon-Maine into the InterLATA Telephone Market Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 2000-849, Findings Report at pp 33-47.

[70] *See* Verizon Maine 271 Application, Checklist Declaration at ¶ 166 -170.

access to subloops consistent with the requirements of Section 271 and the *UNE Remand Order.*[71] Footnote 482 of the FCC's *Massachusetts 271 Order* contains an important distinction regarding Verizon's provision of subloops. Specifically, the FCC pointed out that:

> Although nondiscriminatory access to subloops *technically falls under checklist item 2*, we treat subloops in this section [Checklist Item No. 4 – loops] because it is logically related to provision of unbundled loops.[72]

In addition, the *TRO,* which addresses unbundling requirements pursuant to Section 251, lists subloops not as a type of loop (like dark fiber or linesharing) but as a separate UNE (like switching or transport).[73]

All of this leads us to conclude that Verizon does not have a continuing Section 271, Checklist Item No. 4 (loops) obligation to provide subloops but instead has only a Section 271, Checklist Item No. 2 (access to UNEs) obligation to provide those subloops specifically required under Section 251, i.e. copper distribution subloops. Because the FCC has eliminated copper feeder subloops under Section 251, it no longer has an obligation to provide them under Section 271. Verizon continues to be obligated, however, under state law to provide access to the *Showhegan Online* subloop as described in our April 20, 2004 Order. We make no finding at this time as to whether it would be appropriate to extend Verizon's state-law subloop obligations to include additional types of subloops.

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[71] Declaration at ¶ 166 citing *Massachussetts 271Order* at ¶ 154.

[72] *Massachusetts 271 Order* at ¶ 154 n. 482 (emphasis added).

[73] *See* 47 C.F.R. § 51.319.

3. Fiber Feeder Subloops

Fiber feeder refers to the fiber-optic cable placed between the central office and a remote terminal. In paragraph 253 of the *TRO,* the FCC stated, "Consistent with our section 706 goal to spur deployment of advanced telecommunications capability, we do not require incumbent LECs to provide access to their fiber feeder loop plant on an unbundled basis as a subloop UNE." Thus, the parties agree that, subject to the hybrid loop access requirements discussed above, Verizon has no obligation to provide CLECs with access to fiber feeder subloops pursuant to Section 251. We reach the same conclusion here regarding the limits of the hybrid loop access requirements as we did in Section III (A)(4) above and thus will not repeat our discussion.

The parties disagree as to whether Verizon has a continuing Section 271 obligation to provide access to fiber feeder subloops. However, the decision we reached above that subloops are solely a Section 251 obligation and not a Section 271 obligation, limits the need to discuss this matter further. Accordingly, we find, for the reasons discussed above, Verizon does not have a Section 271 obligation to provide access to fiber feeder subloops.

4. Fiber Distribution Subloops

Fiber distribution subloops consist of fiber-optic cable running from the remote terminal to the end user. The FCC does not directly address fiber distribution subloops; it does not specifically state whether or not such subloops must be provisioned. Logic would suggest that each different type of fiber distribution subloop be treated similarly to the way a full fiber loop to the same end user would be

treated, assuming the feeder portion of loop is also fiber. Thus, to the extent that a fiber distribution subloop is used to connect to a mass market end user, it should be treated as a FTTH or FTTC loop as discussed in Section III (A)(5) above. If the fiber distribution subloop connects an enterprise end-user and is lit, it should be treated as in OCn loop, as discussed in Section III (A)(8) above. Finally, if it is unlit, it will be treated as a dark fiber subloop as discussed below.

5. Dark Fiber Subloops

Dark fiber subloops connect enterprise end-users to a remote terminal with fiber-optic cable which is not lit, i.e. fiber-optic cable that does not have electronics installed on each end. The parties did not include dark fiber subloops in the joint matrix nor did they address the issue in their briefs. The parties to the *Dark Fiber* proceeding did not directly address the issue either. We find, based upon the FCC's determination in the *TRRO* to eliminate Section 251 unbundling for dark fiber loops in general,[74] that unbundling of dark fiber subloops to connect end users is not required under Section 251. While the FCC does not directly address dark fiber subloops, we find it hard to believe that it would eliminate full dark fiber loops yet continue to require dark fiber subloop.

Regarding access under Section 271, the decisions we have reached above provide conflicting answers. First, in Section III (A)(9) above, we found that Verizon must continue to provide access to dark fiber loops under Section 271. However, in Section III (B)(3) also above, we found that Verizon does not have any obligation to provide access to subloops pursuant to Section 271. Given the FCC's

[74] *TRRO* at ¶¶ 182-185.

approach to subloops and the fact that access to subloops under Section 271 is limited to its Section 251 obligations, we find that Verizon is not obligated to provide access to unbundled dark fiber subloops under Section 271.

C. NIDs

A network interface devices (NID) interconnects an ILEC's loop distribution plant to wiring at a customer premises location. All parties agree that Verizon must provide access to NIDs under both Section 251 and Section 271, Checklist Item No. 2, and that TELRIC is the appropriate pricing standard for NID access.

D. Switching and Call-Related Databases

1. Switching

Switching refers to the process by which calls are directed to their point of termination. All parties appear to agree that there is no obligation under Section 251 to unbundle switching. We will not reiterate the long and tortured history of the FCC's decisions concerning switching but instead base our determinations squarely on the current FCC rule on switching, 47 C.F.R. § 51.319(d). We do note that the FCC's mass-market switching rule provides for a 12-month transition period during which unbundled mass-market switching will be available when combined with loop and transport as a UNE-P at the rate for UNE-P on June 15, 2004 plus one dollar.

The parties agree that switching, both mass-market and enterprise, remains a Section 271 obligation pursuant to Checklist Item No. 6 and must be priced under the FCC's just and reasonable standard. Until Verizon submits rates for our approval or provides us with FCC-approved rates, it shall use the previously-approved

TELRIC rates for switching except that, in accordance with our March 17, 2005 Order, mass-market switching associated with UNE-P will be priced at the FCC's transition rates.

2. Signaling and Call-Related Databases

Signaling and call-related databases provide important rating and routing information as well as enable certain underlying functionalities of the network. The parties previously agreed that access to signaling and call-related databases was required under Section 251. However, since the time the parties submitted the joint matrix, the FCC issued its *TRRO* decision which modified its rules relating to the availability of signaling and call-related databases. In 47 C.F.R. § 51.319 (d)(4), the FCC's states that signaling and call-related databases must only be made available pursuant to Section 251 to the extent that switching is required under 47 C.F.R. § 51.319 (d)(2)(iii), i.e. only during the 12-month UNE-P transition period. Thus, after the 12-month period, access to signaling and call-related databases will no longer be required under Section 251.

The parties agree that access to signaling and call-related databases remains a requirement under Section 271 pursuant to Checklist Item Nos. 7, 10, and 12, and priced pursuant to the FCC's just and reasonable standard. Until Verizon submits rates for our approval or provides us with FCC-approved rates, it shall use the previously-approved TELRIC rates for access to signaling and call-related databases.

E. Transport

Dedicated transport facilities move a particular customer's or carrier's traffic between ILEC central offices and tandem switches. CLECs use interoffice transport to aggregate end-user traffic by gathering the traffic from their end users' loops at the ILEC's central office and carrying the traffic through other central offices to a point of aggregation and ultimately to the CLEC's switch. Initially, in the *TRO*, the FCC made a national finding of impairment for DS1, DS3, and dark fiber transport, with delegated authority to state commissions to find no impairment on particular routes, and no impairment for OCn level transport.[75] The *USTA II* decision vacated the FCC's delegation of authority to state commissions and thus the FCC revisited its unbundling rules for dedicated transport in the *TRRO*.

1. DS1

DS1 level transport is the lowest standard capacity level of dedicated transport and is a two-point digital channel that provides for simultaneous two-way transmission of digital electrical signals at a transmission rate of 1.544 megabits per second (Mbps). The parties agree that, subject to certain per route limitations, dedicated DS1 transport must be provided pursuant to Section 251 for all routes except where both endpoints are wire centers containing 38,000 or more business lines or four or more fiber-based collocators.[76] There is some disagreement, however, regarding the FCC's limitation on the number of DS1s provisioned on a single route for a particular carrier. Conversent alleges that Verizon has submitted tariffs in

[75] *TRO* at ¶ 359.

[76] 47 C.F.R. § 51.319(e).

other states which limit the availability of DS1s on any particular route to 10 DS1s. Conversent claims that Verizon's stance is contrary to the language in paragraph 128 of the *TRRO* which states:

> *Limitation on DS1 Transport*. On routes for which we determine that 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. This is consistent with the pricing efficiencies of aggregating traffic. While a DS3 circuit is capable of carrying 28 uncompressed DS1 channels, the record reveals that it is efficient for a carrier to aggregate traffic at approximately 10 DS1s. When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply.

However, the FCC's rules appear to set a different standard:

> (A) General availability of DS1 transport. Incumbent LECs shall unbundle DS1 transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are Tier 1 wire centers. As such, an incumbent LEC must unbundle DS1 transport if a wire center at either end of a requested route is not a Tier 1 wire center, or if neither is a Tier 1 wire center.
>
> (B) Cap on unbundled DS1 transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.[77]

The FCC's rule does not make the same cross reference to availability of DS3 transport that the text of the *TRRO* itself does. Conversent points out that when the New York Public Service Commission (NYPSC) was faced with the same issue, it ruled that the *TRRO*'s 10-circuit limit for DS1 dedicated transport applied only

[77] 47 C.F.R. § 51.319(e)(2)(ii).

on routes where Verizon is relieved of its unbundling obligation for DS3 dedicated transport. Specifically, the NYPSC stated:

> The Joint CLECs and Conversent contend that Verizon's tariff unfairly restricts the number of DS1 circuits to 10 unbundled DS1 loops. They cite the TRRO provision that indicates that the 10 loops cap is only applicable where the FCC found non-impairment for DS3 transport. Verizon responds that the TRRO and its attached regulation are inconsistent. We read the TRRO as a whole as intending to apply to 10-loop cap only where the FCC found non-impairment for DS3 transport. That is the most logical and reasonable interpretation of the FCC's actions. Verizon is directed to modify its tariff accordingly.[78]

Once again we find ourselves faced with resolving an inconsistency contained in an FCC order. Clearly, the text of the *TRRO* and the text of the accompanying rules state two very different things. We will follow the lead of the NYPSC and require Verizon to implement the 10 DS1 per route limit to only those routes where it has been absolved of its obligation to unbundle DS3 dedicated transport.

According to Verizon's revised list of wire centers, only the Portland wire center has 38,000 or more business lines or four or more fiber-based collocators. Thus, there are no routes in Maine where both endpoints meet the FCC's criteria and, accordingly, all routes in Maine are considered impaired for the purposes of dedicated DS1 transport. As will be discussed more fully below, Verizon has been relieved of its DS3 transport unbundling obligations between three wire centers in Maine: Bangor,

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[78] Order Implementing TRRO Changes, *Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand,* Case 05-C-0203 (March 16, 2005) at 13. We note that the language quoted refers both to loops and transport. We believe this was an oversight on the part of the NYPSC and that it intended to reference transport and not loops.

Lewiston, and Portland. Accordingly, only those routes will be subject to the 10 DS1 per route limitation. We reiterate our commitment to closely scrutinize Verizon's wire center list for compliance with the FCC's criteria.

The parties agree that dedicated DS1 transport must be provided pursuant to Section 271, Checklist Item No. 5, and that it shall be priced pursuant to the FCC's just and reasonable pricing standard. Because all routes are impaired under Section 251, there is no need to set Section 271 rates at this time.

2. DS3

DS3 level dedicated transport consists of a two-point digital channel that provides for simultaneous two-way transmission of digital electrical signals at a transmission rate of 44.736 Mbps. The parties agree that dedicated DS3 transport must be provided pursuant to Section 251 for all routes where at least one of the endpoints is a wire center containing fewer than 24,000 business lines or fewer than three fiber-based collocators.[79] They also agree that the FCC has limited the number of DS3s provisioned on a single route to a particular carrier to 12 DS3s.

According to Verizon's revised list of wire centers which meet the FCC's criteria, the Portland, Bangor, and Lewiston wire centers all have 24,000 or more business lines or three or more fiber-based collocators.[80] Accordingly, DS3 dedicated transport will not be available between those three wire centers under Section 251. The price for dedicated DS3 transport on these non-impaired routes will be 115% of the rate on June 15, 2004, during the 12-month transition period established by the FCC.

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[79] 47 C.F.R. § 51.319(e).

[80] We reiterate our commitment to promptly investigate Verizon's list.

Thereafter, dedicated DS3 transport on non-impaired routes will be available pursuant to Section 271 as described below.

The parties agree that dedicated DS3 transport must be provided pursuant to Section 271, Checklist Item No. 5, and that it shall be priced pursuant to the FCC's just and reasonable pricing standard. Until Verizon submits rates for our approval or provides us with FCC-approved rates, it shall use the previously-approved TELRIC rates for access to dedicated DS3 transport unbundled pursuant to Section 271.

3. OCn Transport

OCn transport utilizes the SONET technology described above to provide very high-speed transport. A particular route's speed may be increased by changing the electronics attached to both ends of the pathway. OCn transport was not included in the joint matrix submitted by the parties but has been covered in both the recent briefs submitted on the matrix as well as in briefs submitted in Docket No. 2004-643, *Investigation into GWI's Rapid Response Complaint* relating to OCn level transport and GWI's Request for Enforcement filed in this docket relating to OCn transport and dark fiber entrance facilities. Accordingly, for the sake of completeness and for the purposes of resolving GWI's complaints, we address OCn transport in this Order.

a. Section 251

In the *TRO*, the FCC determined that, although it had previously unbundled all transport capacities up through OC192, it now found that CLECs are not impaired without lit transport beyond twelve DS3s on a route because it believed CLECs could self-provision transport facilities or self-provision optronic

equipment necessary to activate unbundled dark fiber.[81] The FCC specifically stated that it "need not unbundle OCn interface transmission facilities" and that CLECs could use dark fiber and multiple DS3 circuits to provide reasonable substitutes for OCn interface circuits.[82]

In the *TRRO,* the FCC revisited the unbundling rules relating to dedicated transport. While the FCC made certain changes to its impairment findings and limitations on the number of DS1s and DS3s as described above, it did not disturb the determination not to unbundle OCn facilities. *TRRO* at ¶¶ 128, 131. Accordingly, Verizon no longer must unbundle OCn level transport pursuant to Section 251 -- a point with which the parties do not appear to disagree.

b. Section 271

The parties disagree vehemently as to whether Verizon must continue to provide unbundled access to OCn transport pursuant to Section 271, Checklist Item No. 5.

i. GWI and the CLECs

GWI contends that Verizon remains obligated to provide it with access to OC-3 transportation pursuant to Section 271, Checklist Item No. 5, because the term "Applicable Law" in its Interconnection Agreement (Agreement) includes both Section 251 of the TelAct as well as Section 271 of the TelAct and Maine law. GWI cites to section 4.1 of the Agreement which states that the "construction, interpretation and performance" of the Agreement are governed by "(a) the laws of the

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[81] *TRO* at ¶ 389.

[82] *Id*.

United States of America and (b) the laws of the State of Maine." GWI also points to section 4 of the Pricing Attachment to the Agreement which states that if Verizon agrees to provide a service under the Agreement not required by Section 251 but required by Section 271, Verizon will have the right to establish charges that "differs from the manner in which under Applicable Law" the charges were set for the Section 251 services. GWI argues that Verizon's Petition for Arbitration, Docket No. 2005-135, reflected Verizon's understanding of the scope of the term "Applicable Law" because the proposed amendment specifically carved out everything but Section 251 UNEs from the Agreement.

GWI also contends[83] that the Commission's September 3, 2004 Order in this proceeding requires Verizon to continue offering CLECs access to OC-3s at TELRIC rates until the Commission approves new 271 rates, adopts FCC-approved rates, or the CLECs agree to different rates. GWI argues that 35-A M.R.S.A. §§ 301 and 1306 provide the Commission with the necessary authority to order Verizon to offer the OC-3 service under state law, even in the absence of a wholesale tariff or an obligation under Section 271. In its Reply Brief, GWI emphasized that nothing in its Agreement with Verizon limited the definition of the term "Applicable Law" to Section 251 of the TelAct. GWI also continued to contend that Verizon's proposed wholesale tariff had already taken effect.

[83] In addition to the arguments noted, GWI contends that Verizon's Wholesale Tariff (Docket No. 2002-682) had gone into effect by operation of law. Verizon later pointed out that it had, in fact, withdrawn the tariff so that the Commission could continue to investigate it. In its Reply Brief, GWI continued to press its argument that the Wholesale Tariff is in effect. The tariff is not in effect due to the earlier withdrawal.

AT&T initially took no position on GWI's claim but in reply comments noted its opposition to Verizon's contention that its special access rates constituted its Section 271 rates. AT&T argued that imposing "inflated special access" rates on loop and transport facilities will allow Verizon to impose "permanent and insurmountable" disadvantages on its competitors. AT&T believes that TELRIC-based pricing must be imposed for Section 271 rates in order to accomplish the competitive goals of Section 271.

ii. Verizon

Verizon contends that its interconnection agreement with GWI allows it to suspend provision of any de-listed UNEs, i.e. UNEs no longer required under Section 251. Verizon alleges that it sent GWI notice that it was discontinuing the provision of OC-3 transport in an October 2, 2003 letter and that it is no longer contractually bound to provide GWI with OC-3 transport. Finally, Verizon alleges that any obligation it might have under Section 271 or state law is not addressed by the parties' interconnection agreement. Verizon specifically contends that the Commission's October 3, 2004 order in this proceeding has no impact on its obligations to provide OC-3 transport because the Commission has yet to approve a tariff.

iii. Decision

First, we find, similar to our decision in Section III (A)(8) above, that Verizon must continue to provide unbundled access to OCn level transport pursuant to Section 271, Checklist Item No. 5, because neither the *TRO*, the *TRRO,* nor the *Broadband 271 Forbearance Order* explicitly relieved Verizon of its Section 271 transport obligations. Thus, Verizon must provide OCn level transport at

prices which meet the FCC's just and reasonable pricing standard. Until Verizon submits rates for our approval or provides us with FCC-approved rates, it shall use the previously-approved TELRI rates for OCn transport.

Verizon's arguments, however, raise another important issue which impacts the availability of each of the Section 271 UNEs which we have found must continue to be provided. If the wholesale tariff is not yet in effect, the parties' interconnection agreements govern their relationship, i.e. the provision of UNEs. Verizon contends that its agreements allow it to refrain from providing de-listed UNEs and that CLECs must enter into separate Section 271 commercial agreements in order to access Section 271 UNEs. (*See generally,* Verizon's arguments concerning its VISTA agreements.) Thus, we must examine the language used in GWI's Interconnection Agreement (and theoretically many, if not all, of the other CLECs' interconnection agreements) to determine whether the language permits Verizon to unilaterally eliminate de-listed UNEs or whether the "Applicable Law" language includes both Section 251 and Section 271.

Section 4.1 of GWI's Interconnection Agreement defines "Applicable Law" as follows:

> The construction, interpretation and performance of this Agreement shall be governed by (a) the laws of the United States of America and (b) the laws of the State of Maine, without regard to its conflicts of laws rules. All disputes relating to this Agreement shall be resolved through the application of such laws.

There is no reference in this section to Section 251 or Section 271 of the TelAct.

Section 1.1. of the Network Elements Attachment to GWI's Interconnection Agreement states as follows:

> Verizon shall provide to Great Works, in accordance with this Agreement (including, but not limited to, Verizon's applicable Tariffs) and the requirements of Applicable Law, access to Verizon's Network Elements on an unbundled basis and in combinations (Combinations); provided, however, that notwithstanding any other provision of this Agreement, Verizon shall be obligated to provide unbundled Network Elements (UNEs) and Combinations to Great Works only to the extent required by Applicable Law and may decline to provide UNEs or Combinations to Great Works to the extent that provision of such UNEs or Combinations is not required by Applicable Law.

Again, there is no mention of Section 251 or Section 271, only a reference to the term "Applicable Law." Section 1.5 of the Network Elements Attachments addresses the possibility of FCC or Commission action to modify Verizon's obligations. It states:

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

Once again there is no mention of Section 251 or Section 271.

Accordingly, we find, based upon the terms of GWI's Interconnection Agreement, that Verizon remains obligated to provision Section 271 UNEs unless and until, Verizon and GWI amend their Interconnection Agreement to

redefine the term "Applicable Law." With regard to other CLECs and their interconnection agreements, we place the burden on Verizon to come forward with proof that other interconnection agreements do not contain the same, or very similar, language concerning "Applicable Law." Until such time, Verizon remains obligated to provision Section 271 UNEs pursuant to its interconnection agreements until it obtains our approval of modified interconnection agreements.

4. Dark Fiber Transport

Dark fiber transport refers to unlit fiber facilities between two ILEC central offices.[84] In the *TRO,* the FCC made a national finding of impairment for dark fiber transport but delegated to the states the authority to find non-impairment on particular routes.[85] The *USTA II* decision overturned the FCC's delegation to states and remanded the matter back to the FCC.[86] In the *TRRO*, the FCC made a national finding of impairment for dark fiber transport but only on those routes where one end-point of the route is a wire center containing fewer than 24,000 business lines and fewer than three fiber-based collocators.[87] We apply Verizon's list of wire centers in Maine that meet the FCC's criteria and we find that only routes between the Bangor, Lewiston, and Portland wire centers are no longer subject to dark fiber transport unbundling pursuant to Section 251. These routes will be subject to the FCC's 18-month transition rules which require Verizon to continue to provision dark fiber transport on these routes for 18

[84] *TRO* at ¶¶ 365, 381

[85] *TRO* at ¶ the 381, 384.

[86] *USTA II* at 574.

[87] *TRRO* at ¶ 66.

months (from March 17, 2005) at prices equal to 115% of the TELRIC price on June 15, 2004. Otherwise, CLECs in Maine shall have access to unbundled dark fiber transport pursuant to Section 251 at TELRIC prices.

With regard to access to dark fiber transport under Section 271, the parties generally agree that to the extent Verizon still has obligations under Section 251 to unbundle dark fiber transport, it must continue to provide it under Section 271, Checklist Item No. 2, as well. For areas where there is no Section 251 obligation, the parties disagree as to whether dark fiber unbundling is required under Section 271, Checklist Item No. 5. Verizon contends that the FCC defined dark fiber in the *UNE Remand Order* for Section 251 purposes more broadly than transport is defined under Section 271. Verizon essentially makes the same arguments it made with regard to dark fiber loops and line sharing. The CLECs contend, as they did with respect to line sharing and dark fiber loops, that the FCC's *Maine 271 Order* and *Massachusetts 271 Order* both reflect an FCC definition of dark fiber transport that is broader than that espoused by Verizon and which is encompassed by Checklist Item No. 5.

The FCC made no specific mention of dark fiber transport in its *Maine 271 Order.* In paragraph 52, which addressed compliance with Checklist Item No. 5, the FCC referred to the declaration accompanying Verizon's federal 271 application. In the Declaration, Verizon describes its dark fiber offerings (both loop and transport) in a separate section under the general header "Compliance with Checklist Items 2, 4, 5 & 6" without specific reference to Checklist Item No. 5. The FCC's *Massachusetts 271 Order, New York 271 Order, Kansas/Oklahoma 271 Order, and Texas 271 Order,* all do not make specific reference to dark fiber transport and

compliance with Checklist Item No. 5. The *Pennsylvania 271 Order*, however, does make reference to Verizon's compliance with Checklist Item No. 5 by filing tariffs with the Pennsylvania PUC for its dark fiber offerings.[88] In addition, in the *Arkansas/Missouri 271 Order,* the FCC stated that it was relying upon Southwest Bell's affidavit stating that it provided non-discriminatory access to dark fiber as evidence that it provided access to dedicated transport.[89] Finally, in the *Rhode Island 271 Order*[90] and the *Vermont 271 Order*,[91] the FCC addressed arguments by a CLEC that Verizon's dark fiber offering did not meet the Checklist's requirements. While the FCC ultimately dismissed the CLECs' complaints in both cases, it did not deny or otherwise indicate that dark fiber was not considered a requirement of Checklist Item No. 5.

We find, based upon our review of FCC 271 orders, that dark fiber transport is a Checklist Item No. 5 requirement, i.e. that dark fiber transport is a specific

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[88] *In the Matter of Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, Order Approving Application, CC Docket No. 01-138 (Sept. 19, 2001) ¶ 109, n. 372.

[89] *In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996To Provide In-Region, InterLATA Services in Arkansas and Missouri*, Order Granting Application, CC Docket No. 01-194 (Nov. 16, 2001) at ¶ 116 n. 365.

[90] In the Matter of Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Rhode Island, Order Granting Application, CC Docket No. 01-324 (Feb. 22, 2002) at ¶ 92-93.

[91] *In the Matter of Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Vermont*, Order Granting Application, CC Docket No. 02-7 (April 17, 2002) at ¶¶ 56-57.

type of dedicated transport between two ILEC central offices and that Verizon must make it available pursuant to Section 271 at just and reasonable rates. Until Verizon files rates for our approval or submits FCC-approved rates, it must use the previously-approved TELRIC rates for dark fiber transport.

5. Dark Fiber Entrance Facilities

Entrance facilities refer to facilities which connect a CLEC's network to the ILEC's network. CLECs use these facilities to either backhaul traffic from the ILEC's network to the CLEC's network or to interconnect with the ILEC's network. Previously, entrance facilities were included in the FCC's definition of dedicated transport and thus were available as Section 251 UNEs. In the *TRO*, however, the FCC narrowed the definition of dedicated transport under Section 251 to include "only those transmission facilities within an incumbent LEC's transport network, that is, the transmission facilities between incumbent LEC switches."[92] Thus, entrance facilities, which run between a CLEC facility and an ILEC switch, were eliminated as Section 251 UNEs.[93]

The issue was appealed by the CLECs and heard by the *USTA II* court. The Court found that the record was not sufficient to reach a decision and thus remanded the matter back to the FCC for further consideration.[94] In the *TRRO*, the FCC reinstated its earlier definition of dedicated transport to include entrance facilities,

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[92] *TRO* at ¶ 366.

[93] *Id.* at fn 1116.

[94] *USTA II* at 586.

but then found that CLECs were not impaired without access to them, thereby eliminating their availability under Section 251.[95]

Several CLECs, including the Consolidated Intervenors in the Dark Fiber case, argue that there is a continuing Section 251 obligation to unbundle entrance facilities which are used for interconnection purposes pursuant to Section 251(c)(2), rather than backhauling traffic. Specifically, the CLECs argue that the FCC's statements in paragraph 365 of the *TRO* awknowledge the CLEC's continued right to use entrance facilities for interconnection purposes under Section 251(c)(2). However, the CLECs do not provide a detailed explanation of their position nor explain the distinction in how the facilities are used for each purpose.

Verizon argues that the CLECs' argument "confounds the distinction" in the TelAct and the FCC regulations between interconnection under Section 251(c)(2) and access to UNEs under Section 251(c)(3). According to Verizon, interconnection under paragraph 365 of the *TRO* and Section 251(c)(2) preserve a CLEC's right to mid-span interconnection arrangements for the purpose of exchanging traffic between networks. Verizon asserts that dark fiber, by definition unpowered and unlit, is not capable of transmitting traffic and so cannot possibly be considered a technically feasible point at which two carriers can exchange traffic for interconnection as defined under Section 251(c)(2) of the TelAct. Thus, Verizon concludes that the only interconnection arrangement available to CLECs under Section 251(c)(2) is that of a lit transmission facility, with the fiber and the electronics up to the meet-point owned by each carrier.

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[95] *TRRO* at ¶ 137.

In the *TRRO*, the FCC, in addition to making a non-impairment finding for entrance facilities, stated the following with regard to the use of entrance facilities for interconnection purposes:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.[96]

The FCC cited paragraph 366 of the *TRO* for support of the distinction between entrance facilities used for backhauling purposes and those used for interconnection. Paragraph 366 states that:

> In reaching this determination we note that, to the extent that requesting carriers need facilities in order to "interconnect" with the [incumbent LEC's] network," section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation.

Footnote 1117 to paragraph 366 states:

> Section 251(c)(2) requires access to "the facilities and equipment" used by competing carriers for "interconnection with the local exchange carrier's *network* . . . for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. § 251(c)(2) (emphasis added).

Clearly, the FCC sees a distinction between use of entrance facilities to backhaul traffic and use of the same facilities to interconnect. However, without a more detailed explanation of the distinction between the two types of activities, it is impossible for us to issue a decision which clearly delineates the line between backhauling and interconnection. **Parties are invited to address this matter further**

[96] *TRRO* at ¶ 140.

in their Exceptions. If the Commission is still unable to reach a decision, the matter will be investigated further at a later time.

With regard to the availability of entrance facilities under Section 271, we find that the FCC's re-inclusion of entrance facilities in its definition of dedicated transport means that entrance facilities are required under Section 271 as a type of transport. Thus, Verizon must continue to unbundle entrance facilities but must only meet the FCC's just and reasonable pricing standard. Until Verizon submits rates for our approval or files FCC-approved rates, it shall use the previously-approved TELRIC rates.

6. Shared Transport

The FCC defines shared transport as "the transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network."[97] In the *UNE Remand Order,* the FCC found that, without access to shared transport, requesting carriers are impaired in their ability to use unbundled local circuit switching. In the *TRO*, the FCC found that use of shared transport was tied exclusively to the use of unbundled switching, i.e. that only CLECs purchasing switching UNEs needed access to shared transport.[98] Accordingly, the FCC held that CLECs could access shared transport under Section 251 only in situations where they also had access to unbundled switching.

[97] 47 C.F.R. § 51.319(d)(4)(1)(C).

[98] *TRO* at ¶ 533.

In the *TRRO*, as described earlier, the FCC eliminated all CLEC access to switching under Section 251, subject only to a one-year transition period. Accordingly, shared transport will only be available as a Section 251 UNE until March 17, 2006. All parties agree, however, that shared transport must continue to be provided pursuant to Section 271, Checklist Item No. 5, *albeit* at prices which comply with the FCC's just and reasonable standard. Until Verizon submits rates for our approval or files FCC-approved rates, Verizon shall make shared transport available pursuant to Section 271 at the previously-approved TELRIC rate.

F. OSS

Operational Support Systems (OSS) refers to the manual, computerized, and automated systems used by ILECs for pre-ordering, ordering, provisioning, maintenance and repair, and billing functions for both wholesale and retail operations.[99] These functions are essential for both ILECs and CLECs to serve mass market and enterprise customers. The FCC concluded in the *TRO* that CLECs continue to be impaired without access to the ILEC's OSS as a UNE and required ILECs to provide nondiscriminatory access to all OSS functions. Thus, all parties agree that CLECs continue to have access to OSS as a UNE pursuant to Section 251 at TELRIC rates, as well as Section 271, Checklist Item No. 2.

[99] *TRO* at ¶ 561.

IV. CONCLUSION

For the reasons discussed above, Verizon shall file a wholesale tariff in accordance with the terms of this Order within 60 days.

Respectfully submitted,

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Trina M. Bragdon
Hearing Examiner