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March 7, 2005

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

Re: Docket No. 3662 – Verizon RI Proposed Revisions to PUC Tariff No. 18

Dear Ms. Massaro:

Enclosed for filing in the above matter are the original and nine copies of the Reply of Verizon Rhode Island to Comments of CLECs Regarding Proposed Tariff Revisions.

Please contact me if you have any questions. Thank you for your assistance in this matter.

Sincerely,

Alexander W. Moore

cc: Mr. Brian Kent
Alan M. Shoer, Esq.
Russell M. Blau, Esq.

BEFORE THE STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

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

REPLY OF VERIZON RHODE ISLAND TO COMMENTS
OF CLECS REGARDING PROPOSED TARIFF REVISIONS

In its *Triennial Review Remand Order*,[1] the FCC affirmatively found that CLECs are not impaired without access to certain unbundled network elements, and promulgated rules limiting access to those elements. The rules are unequivocal, stating not only that ILECs need no longer provide certain UNEs but *affirmatively prohibiting* CLECs from obtaining those UNEs. With respect to DS1 transport, for example, 47 CFR §51.319(e)(2)(ii)(C) states that, "Where incumbent LECs are not required to provide unbundled DS1 transport pursuant to [these rules], *requesting carriers may not obtain* new DS1 transport as unbundled network elements."[2] Moreover, the FCC expressly found good cause to expedite the effective date of its new rules and declared that they "shall take effect on March 11, 2005, rather than 30 days after the publication in the Federal Register." TRRO, ¶235.

The comments filed by the CLECs opposing Verizon Rhode Island's proposed revisions to PUC Tariff No. 18 ("the Tariff") all assert, in one way or another, that the Commission is free to ignore the new, preemptive federal law prohibiting CLECs from obtaining the affected

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1 *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC No. 04-313, CC Docket No. 01-338, *Order on Remand*, released February 4, 2005 ("TRRO").

2 Emphasis added. *See also*, 47 CFR §51.319(a)(4)(ii), (5)(iii) and (6)(ii) (regarding loops); 47 CFR §51.319(d)(2)(iii) (regarding local circuit switching) and 47 CFR §51.319(e)(2) (iii)(C) and (iv)(B) (regarding DS3 and dark fiber transport).

UNEs as of March 11 and may instead continue to allow CLECs access to those UNEs. As grounds for this theory, the CLECs argue that the TRRO prohibits Verizon RI from bringing its tariff into compliance with federal law until Verizon RI first amends its interconnection agreements with the CLECs. That argument is without merit and has no basis in the TRRO or any other FCC rule or state or federal law. Likewise without merit is the laundry list of substantive infirmities the CLECs allege plague the proposed tariff revisions. In fact, those revisions are necessary to bring the Tariff into compliance with the new federal rules. The Commission should reject the CLECs' groundless attempt to further delay the implementation of the new federal rules and should allow Verizon RI's proposed revisions to the Tariff to take effect on March 11. Verizon RI refutes the specific claims of the CLECs below.

I. The TRRO Does Not Require Verizon RI To Amend Its Interconnection Agreements In Lieu Of Revising The Tariff To Comply With The FCC's New Unbundling Rules. The Ongoing TRO Arbitration Affords No Grounds For Suspending The Tariff Revisions.

The CLECs' main argument in opposition to the tariff revisions proposed by Verizon RI is that the TRRO requires Verizon to implement the new federal rules solely and exclusively by amending its interconnection agreements, and that Verizon RI is thus prohibited from revising its tariff, at least until the ICAs have been amended.[3] For example, Conversent asserts that

[3] The Competitive Carriers ("CC") also argue that the Commission should not allow Verizon RI to withdraw its tariff provisions allowing access to UNEs until Verizon RI files a new tariff stating its obligations to provide network elements pursuant to section 271 of the Act. *See* CC Comments at 4. This argument is easily put to rest. The FCC has held that Congress granted "*sole authority* to the [FCC] to administer . . . section 271" and intended that the FCC exercise "*exclusive authority* . . . over the section 271 process." Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U S West Petitions to Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392, 14000-01, ¶¶ 17-18 (1999) (emphases added). A state commission's role is limited to "consultation" before Section 271 authority is given. 47 U.S.C. § 271. This is reiterated in the *Triennial Review Order*, in which the FCC stated that "[i]n the event that a BOC has already received Section 271 authorization, Section 271(d)(6) grants the Commission [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271." *Triennial Review Order*, ¶ 665. It would be truly anomalous if the Commission were to require Verizon RI to file a state tariff that could be enforced only by the FCC and not the Commission. The CLECs' suggestion, moreover, is inconsistent with Commission precedent, noted below, in which Verizon RI has been allowed to withdraw services from the Tariff that are no longer required by section 251, such as enterprise switching and OCn level transport, with no condition that Verizon RI file a new tariff for those services purportedly pursuant to section 271. The Commission may also find relevant that the Massachusetts

"Verizon's tariff filing usurps [the contract amendment process under section 252 of the Act] process by precluding negotiations of key issues under the [TRRO]."[4] This position finds no support in the TRRO, however, and rests on a fundamental misunderstanding of the different roles in implementing changes to the federal rules played by the Section 252 contract amendment process and the tariff revision process.

No provision of the TRRO purports to anoint the section 252 contract amendment process as the sole allowed or required method of implementing the new FCC rules, nor does the FCC attempt to prioritize the tasks that the parties must accomplish in order to fully implement those rules, such as amending contracts, tariffs and SGATs. In support of their contrary position, the CLECs read into the TRRO terms that simply are not there. Conversent and others rely chiefly on TRRO ¶233,[5] which states in part that:

> We expect that incumbent LEC and competing carriers will implement the Commission's findings as directed by section 252 of the Act…. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rules changes.

This paragraph states only an expectation that the parties may need to revise their contracts as a result of the new rules, but it says nothing about other actions parties may take to implement the rules. Certainly, it does not even suggest that an ILEC is prohibited from revising

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Department of Telecommunications and Energy has recently considered this issue and held that Verizon must file a state tariff covering services offered solely pursuant to its section 271 obligations only where it offers those services as common carriage. *See* Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17, entered in D.T.E. Nos. 03-60 and 04-73 on December 15, 2004, at 71; Order Denying Motion of Verizon Massachusetts for Partial Reconsideration, entered in D.T.E. 03-59-B on December 15, 2004, at 8. The Commission noted, however, that "Where the service is offered through individually negotiated contracts, and no uniform common carriage rate is made generally available, then no obligation to file a uniform tariff may arise." D.T.E. No. 03-59-B, at 9. Verizon RI does not intend to offer any services pursuant to section 271 as common carriage but will make them available solely through individually negotiated contracts. Thus, even under the Massachusetts decision, it would have no obligation to tariff those services.

[4] Conversent Comments at 2.

[5] *See e.g.*, Conversent Comments at 1-2; CCG Comments at 4.

its tariffs or taking other, non-section 252 steps in order to implement the new rules. Indeed, the section 252 process is plainly insufficient in and of itself to fully implement the new rules, because no amount of negotiation and arbitration of contract terms will ever effect changes in a tariff or SGAT.

That the TRRO does not make the section 252 contract amendment process the sole and exclusive means of implementing the new rules is not surprising. The Tariff and the parties' ICAs afford CLECs two different ways of purchasing UNEs, among other things. Section 252 provides the method of amending an ICA, nothing more. It is silent as to tariffs. Likewise, R.I.G.L. §39-3-11 addresses tariffs and changes to tariffs, but is silent as to contracts. Thus, the section 252 process and the tariff amendment process constitute two different tasks, with different purposes. Changes in the FCC's unbundling rules may require changes in Verizon RI's tariffs, in its ICAs, or both. Whether, when and how the parties' ICAs should be amended in response to the new federal unbundling rules is simply not relevant to this proceeding, which is a tariff proceeding in which the issue before the Commission is whether Verizon's proposed tariff changes properly reflect preemptive federal law.

In any event, the CLECs' claim that Verizon RI cannot revise its tariff but must implement changes in the federal unbundling rules solely by amending its ICAs is directly contrary to Commission precedent. In particular, the Commission recently allowed Verizon RI to revise the Tariff to withdraw enterprise switching as an unbundled network element even though the TRO Arbitration (Docket No. 3588) was obviously still pending. *See* Order No. 18036, entered in Docket 3614 on November 1, 2004. The Commission also allowed Verizon RI to revise the Tariff to remove line sharing, OCn-level dedicated transport and dark fiber channel termination facilities, again even though the TRO Arbitration was pending. *See* Order No.

18017 entered in Docket No. 3556 on October 12, 2004. Accordingly, the CLECs' position is contrary to Commission practice and should be rejected for that reason alone.

II. A Commission Decision Purporting to Delay Implementation of the Federal Rules While The Parties Arbitrate Amendments To Their ICAs Would Be Preempted.

It cannot reasonably be disputed that the Tariff must be revised in order to bring it into compliance with the new FCC rules. The new rules prohibit CLECs from obtaining new mass market switching, certain loops or certain dedicated transport as unbundled network elements on or after March 11. As currently written, however, the Tariff would allow CLECs to continue to purchase these UNEs from Verizon RI after March 11, in direct conflict with the FCC's rules. Any decision by the Commission allowing the Tariff to remain in conflict with the FCC's rules on or after March 11 would be inconsistent with the Act and federal policy and would be preempted.

The 1996 Telecom Act does not simply create federal rights and obligations that supplement state law requirements. To the contrary, as the United States Supreme Court has concluded, Congress' passage of the Act has "unquestionably" taken the regulation of local competition away from the states, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999); *see also id.* at 397, and states may take no action that is inconsistent with federal legislation and federal policy. The Act defines the conditions that must be satisfied before mandatory unbundling may be required and placed that determination squarely with the FCC.

State commissions are preempted from imposing additional unbundling requirements on incumbent LECs or otherwise disrupting the federal framework established in the FCC's unbundling rules. Citing "long-standing federal preemption principles," the FCC has rejected arguments by some carriers that "states may impose any unbundling framework they deem

proper under state law, without regard to the federal regime." TRO, at ¶ 192. The FCC found that the state authority preserved by the Act under the savings provision in Section 251(d)(3) is narrow and "is limited to state unbundling actions that are consistent with the requirements of section 251 and do not 'substantially prevent' the implementation of the federal regulatory regime." *Id*. at ¶193; *see also* 47 U.S.C. § 251(d)(3)(C) & § 261(c). Section 251(d)(3) also recognizes the FCC's power to prescribe and enforce "regulations to implement the requirements" of Section 251 and establish the standards to which the states must adhere. *See also* 47 U.S.C. § 252(c)(1).

When the FCC determines under Section 251(d)(2) of the Act that an element should *not* be unbundled, Section 251(d)(3) and familiar principles of conflict preemption preclude states from enforcing inconsistent rules that would override that determination. The FCC cautioned that any state attempt to require unbundling where the FCC has already made a national finding of no impairment or declined to require unbundling would be unlikely to survive scrutiny under a preemption analysis.[6] The FCC held that:

> [i]f a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and 'substantially prevent' implementation of the federal regime.

Id. at ¶ 195. This is true even if the state regulations share a "common goal" with federal law, but differ in the means chosen to further that goal.[7] *Id*. at ¶ 193.

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[6] Even *existing* state requirements that are inconsistent with the FCC's new framework are impermissible: "It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to [FCC] rules." *Id*. at ¶ 195.

[7] The U.S. Supreme Court has held that "even in the case of a shared goal, the state law is preempted 'if it interferes with the methods by which the federal statute was designed to reach its goal.'" *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992). *See also Crosby v. National Foreign Trade Council*, 530 U.S.

Under the Supremacy Clause, "[t]he statutorily authorized regulations of [a federal] agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988). That holding is supported by a long line of Supreme Court precedent. The federal government has the power to preempt any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

In assessing whether such a conflict exists, the Supreme Court has emphasized that "[f]ederal regulations have no less preemptive effect than federal statutes." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Moreover, the Court has held that a federal regulation that "consciously has chosen not to mandate" particular action preempts state law that would deprive an industry "of the 'flexibility' given it by [federal law]." *Id*. at 155. Indeed, unless Congress expressly states otherwise, a statutory "saving clause" that preserves some state authority does not diminish the preemptive force of federal regulations, and states may not depart from those "deliberately imposed" federal standards. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-74, 881 (2000). Section 251(d)(3) of the Act embodies that *same* principle in that it permits preemption of any state law or regulatory requirement that undermines the FCC's implementing rules under Section 251.

An FCC decision not to require unbundling – as in the case of the UNEs eliminated in the *TRRO* – constitutes "a ruling that no such regulation is appropriate or approved pursuant to the

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363, 379 (2000), in which the U.S. Supreme Court held that "[t]he fact of a common end hardly neutralizes the conflicting means." Similarly, the Seventh Circuit ruled that a tariff requirement imposed by the Wisconsin Public Service Commission was preempted by the Act, even though the tariff requirement "promotes the pro-competitive policy of the federal act." *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 445 (7th Cir. August 12, 2003). The Court found that "[a] conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's Supremacy Clause to resolve the conflict in favor of federal law." *Id*.; *see also Verizon North, Inc. v. Strand*, 309 F.3d 935, 940-41 (6th Cir. *2002*).

policy of the statute," and thus preempts inconsistent state regulation. *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); *United States v. Locke*, 529 U.S. 89, 110 (2000). Under the Supremacy Clause and Section 251(d)(3), the states are powerless to strike a different balance. A state requirement to reverse that FCC decision would substantially prevent implementation of the Act and federal policy, and thus conflicts with federal law, thereby warranting preemption.

In defending that position before the D.C. Circuit, the FCC was even more explicit, explaining that "a decision by the FCC not to require an ILEC to unbundle a particular element essentially reflects a 'balance' struck by the agency between the costs and benefits of unbundling that element" and that "[*a*]*ny state rule that struck a different balance would conflict with federal law, thereby warranting preemption*." Brief for the FCC at 93, *United States Telecom. Ass'n v. FCC* , No. 00-1012 (D.C. Cir. filed Jan. 16, 2004) (emphasis added; citation omitted).[8] And the Seventh Circuit, in discussing a state commission's authority to require unbundling of packet switching — another network element that the FCC has found that incumbents are not required to unbundle — "observe[d] that only in very limited circumstances, *which we cannot now imagine*, will a state be able to craft a packet switching unbundling requirement that will comply with the Act." *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004) (emphasis added).

Here, in deciding to eliminate certain UNEs, the FCC balanced the costs and benefits of unbundling to "provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and

[8] The D.C. Circuit dismissed on ripeness grounds a challenge by state commissions and their association, the National Association of Regulatory Utility Commissioners, to the FCC's conclusions regarding the preemptive force of a finding that incumbent LECs are not required to unbundle a particular network element. *See USTA II*, 359 F.3d at 594. However, the court noted that the state commissions did "acknowledge that Commission regulations will lawfully preempt in some circumstances." *Id.*

sustainable competition."[9] The resulting federal rules leave no doubt that ILECs need not provide, and CLECs cannot obtain, those UNEs as of March 11, 2005.[10] Any state decision that would strike a different balance – allowing the continued availability of the UNEs eliminated by the FCC – would conflict with federal law, substantially prevent implementation of the federal regulatory regime and would therefore be preempted.

Just last month, a federal district court confirmed that state commissions do not share unbundling authority with the FCC, holding that the decision in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") had definitively "rejected the argument that the 1996 Act does not give the FCC the exclusive authority to make unbundling determinations." *Michigan Bell Tel. Co., Inc. v. Lark, et al.*, No. 04-60128 (E.D. Mich. Jan. 6, 2005) ("*Michigan Bell*"), slip op. at 13. The Court observed that "state-imposed requirements are at odds with USTA II," and that it is "incongruous for the USTA II Court to find that Congress prohibited the FCC from passing unbundling decisions to the state[s]," but find that "the states could seize the authority themselves." *Id*. at 13-14.

Other state commissions have ruled that they cannot impose unbundling obligations that have been removed by federal law. For example, the Massachusetts D.T.E. has held that "[t]he language of the Section 251(d)(3) savings clause does not ...suggest a congressional intent to save state commission actions that conflict with Section 251 or with the FCC's regulations."[11] The Department also explicitly rejected a CLEC's "suggestion that Section 252(e)(3) preserves the ability of the States to require unbundling where the FCC finds that it is not required,"

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[9] TRRO, ¶ 2; see also TRRO ¶¶199 and 204.

[10] *See* note 2, above.

[11] *Proceeding by the Department on its Own Motion to Implement the Requirements of the FCC's Triennial Review Order Regarding Switching for Mass Market Customers*, MA D.T.E. 03-60, Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17, at 21 (Dec. 15, 2004).

because this reading of the Act "would discount improperly the preemptive effect of federal regulation under Section 251." *Id*. at 22.

Likewise, the Florida and Indiana Commissions have found that the impairment determinations necessary to require unbundling are "reserved for the FCC, not the states."[12] The Virginia Commission has also rejected petitions to retain unbundling obligations that the *USTA II* Court had vacated because:

> USTA II establishes that no unbundling can be ordered in the absence of a valid finding by the FCC of impairment under 47 U.S.C. § 251(d)(2). … This Commission will not mandate unbundling requirements that violate federal law. [13]

In short, the FCC has made an affirmative finding that CLECs are not impaired without access to the UNEs eliminated in the new FCC rules, and allowing CLECs to continue to obtain those UNEs would be contrary to the Act's pro-competitive goals. This Commission cannot, by failing to allow Verizon RI to revise its tariff, compel Verizon RI to continue providing the UNEs eliminated by the FCC.

III. The Tariff Revisions Proposed By Verizon RI Are Necessary To Bring The Tariff Into Compliance With The New FCC Unbundling Rules And Are Just And Reasonable.

The specific language offered by Verizon RI to revise the Tariff tracks the language of the new rules as far as practicable and is just and reasonable in accord with the requirements of R.I.G.L. §39-2-1. The CLECs offer a host of objections to particular terms of the revisions, but

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[12] *Implementation of Requirements Arising from FCC's Triennial UNE Review: Local Circuit Switching for Mass Market Customers, etc*., Order Closing Dockets, FL Order No. PSC-04-0989-FOF-TP, at 3 (Oct. 11, 2004). *See also Indiana Utility Regulatory Commission's Investigation of Matters Related to the Federal Communications Commission's Report and Order*, Cause Nos. 42500, 42500-S1 & 42500-S2, Order, at 7 (January 12, 2005).

[13] *Petition of the Competitive Carrier Coalition for an Expedited Order that Verizon Virginia Inc. and Verizon South Inc. Remain Required to Provision Unbundled Network Elements on Existing Rates and Terms Pending the Effective Date of Amendments to the Parties' Interconnection Agreements, etc*., Case Nos. PUC-2004-00073 & PUC-2004-00074, Order Dismissing Petitions, at 6 (July 19, 2004).

these are baseless quibbles and in no way justify suspension of the revisions. Generally, the CLECs complain that the Tariff revisions are not sufficiently detailed. Conversent, for example, alleges that the revisions are "overtly [sic] vague and fail to satisfy the requirement that its tariffs specify plainly the rates, charges, terms, and conditions of service," in violation of R.I.G.L. §39-3-11 and Part Two, Rule 2.1 *et seq*. of the Commission's Rules of Practice and Procedure.[14] But no tariff can be expected to anticipate all possible disputes that may arise under it in the future, and no tariff is required to meet the level of specificity sought by the CLECs. Of course, disputes may arise under the Tariff regarding details of the transition from UNEs to substitute services, but there is no dispute that the new federal rules provide that as of March 11: (1) CLECs may not obtain the subject network elements as new UNEs; (2) the rates for the UNE arrangements included in the embedded base will be as stated in the FCC's rules; and (3) those arrangements must be transitioned to alternative arrangements within 12 months (or within 18 months in the case of dark fiber). Verizon RI addresses the CLECs' specific objections as follows.

1. The CLECs object to the provisions of Tariff §§2.1.1.E and 5.3.1.E that state that the reasonably diligent inquiry a CLEC must conduct before ordering UNE loops or dedicated transport "shall include review of lists to be provided by the Telephone Company on its wholesale web site of the wire centers that meet" the non-impairment criteria stated in the federal rules. Conversent claims that this language somehow would "anoint [Verizon RI], as a practical matter, as the sole judge of which wire centers satisfy the non-impairment criteria…."[15] The

[14] Conversent Comments at 2. Of course, those authorities state no such standard. The statute requires only that the tariff revisions "plainly state the changes proposed," which Verizon RI's filing clearly does. The Commission's rules, by their own terms, apply "only to proceedings involving the investigation of changes in rates constituting a general rate increase in which the respondent utility's overall revenue requirements are at issue." Rule 2.2. This is not such a case.

[15] Conversent comments at 3; *see also* CC Comments at 4.

CLECs then posit a rash of objections to such a result, claiming that the TRRO does not give Verizon RI a unilateral right to categorize its wire centers and that Verizon RI should be required to provide support for the lists it publishes on its website.[16] The CLECs also cite to a recent order of the Maine PUC directing Verizon to file back-up information regarding the Maine wire centers appearing on Verizon's published lists, and ask the Commission to require Verizon RI to provide similar information here.

The CLECs completely misread the Tariff. It does not provide, in any terms, that Verizon RI's lists of wire centers are conclusive, even though the FCC clearly intends that those lists, filed at the FCC after they were developed following the FCC's instructions, are presumptively correct. *See* TRRO ¶¶ 100, 105. Nonetheless, the Tariff requires only that a CLEC take Verizon's published data into account in conducting the reasonably[17] diligent inquiry required of it by TRRO ¶234 and the Tariff before submitting an order for UNE loops or transport. No party has attacked this requirement on its own terms, and it is quite appropriate to require that any "diligent inquiry" into whether a high capacity loop or transport route is available as a §251 UNE will necessarily include a review of the data Verizon RI has developed and filed at the FCC, following the FCC's instructions on how to identify such offices.

Moreover, ¶234 of the TRRO provides that disputes between an ILEC and a CLEC over which wire centers satisfy the non-impairment criteria of the new rules will be determined on a case-by-case basis as they arise. Consequently, and because Verizon RI's published wire center lists are not conclusive on the issue, there is no reason for the Commission to determine at this time which offices satisfy the FCC's non-impairment criteria for transport or high-capacity

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16 *Id*.

17 Conversent objects that the Tariff refers only to a "diligent inquiry," and not a "reasonably diligent inquiry." Comments at 4. Verizon RI does not object to inclusion of that term, but it is not necessary given that

loops. It follows that the information showing how Verizon identified on its published list the RI wire centers that meet the FCC's criteria are not relevant to the matter now before the Commission, and the Commission has no need for that information at this time. It also follows that the Commission need not reach at this time Conversent's argument that MCI's collocations in Verizon RI's central offices should be disregarded in determining the number of collocators in a given wire center. *See* Conversent Comments at 6-7. The Commission should reject Conversent's argument in any event, because it asks the Commission to determine the tariff revisions now before it based on speculation as to an event that may or may not occur in the future.

2. Conversent offers the related criticism that the Tariff does not specify which wire centers fall into which tier. Conversent Comments at 3. Again, the tariff is not intended to provide all details to address all issues that may arise in the future. Given that any initial categorization of wire centers can change over time, as a result of the addition of business lines and/or collocators at a given office, it is reasonable not to freeze that categorization in place by including it in the tariff. This concept is very similar to past tariff practices where the tariff indicated that certain services were available where suitable facilities exist. Under those circumstances, the tariff did not attempt to list every location where such "suitable" facilities existed. Instead, such information was provided through other media and updated on a regular basis.

3. The CLECs also object to the provision of §§2.1.1.E and 5.3.1.E and 17.1.1.E of the Tariff memorializing that Verizon RI may back-bill a CLEC when Verizon RI has provisioned a loop or transport facility as a UNE but it is later determined that the network

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§§2.1.1.E and 5.3.1.E of the Tariff explicitly provide that the certification process stated therein is pursuant to the TRRO and the rules promulgated thereunder, thereby incorporating the reasonableness standard.

element at issue is not subject to unbundling. The CLECs assert that the TRRO does not explicitly provide for such true-up,[18] and that the Tariff fails to specify the rates that would apply.[19] Of course, the silence of the TRRO on the issue hardly offers a basis for precluding true-up, and the true-up provision is obviously just and reasonable. The fact that Verizon RI may provision a network element to a CLEC as a UNE based on the CLECs' incorrect certification that the element qualifies for UNE treatment affords no basis for denying Verizon RI the right to recover its normal charge for leasing that element once the inaccuracy of the CLECs' certification comes clear. Moreover, the Tariff specifies that the rate that would apply is "the rate that would otherwise be charged" for such element if provisioned as special access or, where no equivalent special access service is available, pursuant to market-based rates offered through commercial agreements.

4. The CLECs object to the terms of the Tariff that require them to submit orders to transition their embedded base UNEs to substitute arrangements in a timely fashion and provide that failure to submit timely orders will result in disconnection of the UNEs at the end of the transition period.[20] The Competitive Carriers assert that the tariff's definition of "timely" – orders "must be placed early enough, in light of the applicable provisioning intervals, to ensure that the orders can be fulfilled by the end of the transition period" – is not clear. CC Comments at 3. Verizon RI disagrees. The tariff language makes clear that an order is timely if it allows **at least** the applicable provisioning interval to be met before expiration of the transition period. Indeed, the CLECs who claim lack of clarity nevertheless also reached the correct conclusion, that "timely" means at least meeting the provisioning intervals. *See id.* The Competitive

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18 *See* CC Comments at 6.

19 *See* Conversent Comments at 3, CC Comments at 5-6.

20 *See* §§2.1.1.D, 5.3.1D, 6.3.1.D and 17.1.1.D.

Carriers also assert that where a CLEC has submitted a timely order, Verizon RI should be required to continue to provide the subject elements at transition rates until Verizon RI effectuates the transition, even if that does not occur until after the close of the 12-month transition period.[21] But such a rule would encourage CLECs to hold all of their conversion orders until the last possible moment in the hope that an unmanageable spike in order activity would prevent Verizon meeting the normal intervals and thereby give the CLECs extra weeks or months of UNE rates. That is inconsistent with the TRRO's clear instructions that the eliminated UNEs are in fact gone no later than the end of the transition period, and that the parties must negotiate reasonable operational arrangements to ensure that the conversion process is timely completed.[22] If a CLEC does not develop with Verizon RI a responsible transition plan that allows Verizon RI to convert the CLEC's embedded base of UNEs to substitute arrangements by the close of the 12-month period, then Verizon RI will at the close of the transition period, convert any remaining discontinued UNEs to comparable non-UNE services, such as resale for UNE-P and special access for high capacity loops and transport in discontinued locations. But this issue is just one of the many administrative issues that may or may not arise in the fullness of time, and there is no basis for requiring the Tariff to address these issues on the detailed level sought by the CLECs.

5. Conversent objects to the statement in §2.1.1.B.1 of the Tariff that "a requesting CLEC may not obtain more than 10 unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis." Conversent claims that this cap should apply only on routes for which the FCC's rules do not require Verizon RI to offer

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21 *See* CC Comments at 2.

22 *See* TRRO ¶¶143, 196 and 227.

unbundled DS3 dedicated transport, based on statements in ¶128 of the TRRO.[23] The tariff cap as proposed by Verizon RI, however, is a virtual quote of the applicable FCC rule, which includes no such limitation on the scope of the cap. 47 CFR §51.319(e)(2)(ii)(B) states, in its entirety, as follows: "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." There is no doubt that the proposed tariff provision accurately and fully states the federal rule, and it should be allowed to take effect.

6. The Competitive Carriers object to §6.1.1.A.2 of the Tariff on the grounds that it would not allow CLECs to order new unbundled DS0 local circuit switching to serve their existing customers on or after March 11.[24] But the applicable FCC rule is crystal clear: "Requesting carriers ***may not obtain*** new local switching as an unbundled network element."[25] That rule's requirement that an ILEC continue to provide unbundled switching during the transition period "for a requesting carrier to serve its embedded base of end-user customers" in no way implies that CLECs may continue to order new UNEs after March 11 if used to serve their existing customers. In the first place, such a reading would directly conflict with the last sentence of the rule, quoted above, that CLECs may not obtain new, unbundled local switching. Second, the very purpose of the transition period is to allow the parties time to transition current UNEs to alternative arrangements. As the FCC stated in ¶226 of the TRRO, "…we establish a transition plan to migrate *the embedded base of unbundled local circuit switching* used to serve mass market customers to an alternative service arrangement." (Emphasis added.) This purpose

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[23] Conversent Comments at 4.

[24] *See* CC Comments at 2-3.

[25] 47 CFR §51.319(d)(2)(iii) (emphasis added).

would be ill-served, to say the least, if CLECs were allowed to *increase* the number of UNE-P arrangements during the transition period. Further, as the italicized language in the above quote makes clear, the FCC's concept of embedded base is defined by the existing UNE arrangements themselves, not the group of customers currently served by those arrangements. Footnote 625 to ¶226 reinforces this conclusion, stating that "The transition period we adopt here thus applies to all unbundled local circuit switching arrangements used to serve customers at less than the DS1 capacity level *as of the effective date of this Order*." (Emphasis added.) The FCC thus made clear that the embedded base includes only those arrangements in service as of the date of the Order, and excludes any arrangements sought after that date, whether they are intended to serve current CLEC customers or new customers. Consequently, the Competitive Carriers' objection to the Tariff's exclusion of new UNEs to serve "moves" for existing customers fails. As stated in the Tariff, the moves that will no longer be supported with unbundled switching are those that involve the disconnection of an existing DS0 switching arrangement and the reestablishment of such an arrangement at a different location. Under the FCC's rules, CLECs may not obtain those new arrangements as a UNE as of March 11.

7. The Competitive Carriers object that the Tariff revisions "omit provisions that memorialize Verizon's obligation to offer 251(c)(2) interconnection facilities."[26] Interconnection facilities, however, are currently available to CLECs under rates approved by the Commission, and nothing in the TRRO or the new rules affects that availability. Consequently, there is no reason to change the Tariff at this time. In any event, the remedy for a CLEC that believes a tariff omits provisions regarding a network element is to petition the Commission for an appropriate order, not to block the revisions that are now before the Commission and are necessary to implement preemptive federal law.

8. Conversent objects to the phrasing of §2.1.1.B.1 and similar provisions of the Tariff on the grounds that they provide that Verizon RI will not provide unbundled access to the relevant network elements "beyond that required by [the applicable federal rule] as in effect on and after March 11, 2005." Conversent argues that in the event the rules are vacated on appeal, Verizon RI will no longer be obligated to provide any of these UNEs at all, since there will be no federal rule requiring it. Further, Conversent claims that by approving the proposed revisions to the Tariff, the Commission "would concede Verizon's position that there is no state unbundling authority beyond express FCC requirements."[27] Verizon RI does not see how Conversent's conclusion follows from the premise of its argument. Conversent claims that "this Commission has recognized that it has independent state law [authority] to order unbundling in the absence of federal law," citing prior Commission decisions. Comments at 5. Verizon RI disagrees with Conversent's interpretation of those decisions, but in any event they are entirely irrelevant here because *there is no "absence of federal law" here*. The FCC has clearly and unequivocally found in the TRRO that CLECs are not impaired in the absence of the UNEs eliminated by the new rules. At no time has this Commission ever ruled that it has state law authority to create a UNE in the face of an FCC finding of no impairment in the absence of that UNE. As demonstrated above, any such ruling would be preempted by the federal rule.

Further, Conversent is essentially asking the Commission to ignore current federal law in favor of anticipating potential future changes to that law. The Commission cannot and should not assume, in addressing changes to a tariff to comply with new federal rules, that those rules will be vacated. (In the telecommunications area, such an assumption would preclude the

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[26] CC Comments at 5.

[27] Conversent Comments at 5.

implementation of any unbundling rules, which have been the subject of ongoing litigation since their promulgation.)

Conclusion

For the above reasons, the Commission should allow the revisions Verizon RI has proposed to PUC Tariff No. 18 to go into effect as written, on March 11, 2005.

Respectfully submitted,

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