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March 11, 2005

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

Re: Petition for Emergency Declaratory Relief

Dear Ms. Massaro:

Enclosed for filing in the above matter are the original and nine copies of the opposition of Verizon Rhode Island to Petition for Emergency Declaratory Relief filed on March 7, 2005, with an attachment.

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

Sincerely,

Alexander W. Moore

cc: Craig L. Eaton, Esq.

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

In Re: Petition for a Declaratory Ruling Under Commission Rule 1.10 Directing Verizon to Continue to Provision Certain UNEs and UNE Combinations	)

OPPOSITION OF VERIZON RHODE ISLAND TO
PETITION FOR EMERGENCY DECLARATORY RELIEF

Verizon Rhode Island ("Verizon RI") hereby opposes the Petition for Emergency Declaratory Relief filed by a number of competitive carriers ("the CLECs") on March 7, 2005, seeking a Commission order compelling Verizon to continue to accept new unbundled network element orders in direct violation of the Federal Communication Commission's *Triennial Review Remand Order ("TRRO").*[1]

INTRODUCTION

The FCC concluded in the *TRRO* that CLECs are not impaired without unbundled access to local circuit switching or, in some circumstances, high capacity loops and transport, and it set out a transition plan that halts new orders for these UNEs and phases out existing UNE arrangements over twelve months, or 18 months in the case of dark fiber. This mandatory transition plan "***does not permit*** competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching" on or after

[1] *Order On Remand, In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313; CC Docket No. 01-338, 2005 FCC LEXIS 912 (Rel. Feb.4, 2005) ("TRRO").

March 11, 2005.[2] This immediately effective bar on new orders also applies to enterprise loops and dedicated transport facilities for which no impairment exists under the criteria established in the *TRRO*.[3] The "no-new-adds" directives in the new rules could not be clearer. For example, 47 CFR §51.319(e)(2)(ii)(C) states that ILECs need not provide DS1 transport as a UNE in the specified circumstances and then 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."[4]

The FCC's prohibition on new orders for delisted elements should come as no surprise to the CLECs. The *TRRO* follows years of federal litigation over the lawful scope of unbundling, and memorializes the FCC's December 2004 decision to eliminate UNE-P. Indeed, the FCC recognized last summer that the D.C. Circuit's mandate in *USTA II*[5] eliminated these UNEs, absent the FCC's *Interim Rules*, which extended access only to March 11, 2005.[6]

The CLECs seek to forestall the implementation of federal law and the inevitable transition away from the discontinued UNEs by claiming that their interconnection agreements ("ICAs") allow them the unilateral discretion to ignore the FCC's binding directive to cease placing new UNE orders as of March 11, 2005, unless and until the

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2 *Id*. ¶ 227 (emphasis added).

3 Id. ¶¶ 142 (transport), 195 (loops).

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

5 *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied sub nom. NARUC v. United States Telecom. Ass'n*, Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004).

6 *Order and Notice of Proposed Rulemaking, Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783 (FCC rel. Aug. 20, 2004) ("*Interim Rules Order*").

CLECs see fit to agree to a contract amendment to memorialize the simple fact that the CLECs "***may not obtain"*** new UNEs discontinued by the new federal rules. The CLECs' Petition is based on the extraordinary – and clearly mistaken – proposition that their interconnection agreements with Verizon override the explicit and unconditional directives by the FCC that carriers take specific action on a specific date. The CLECs' suggestion is wrong both as a matter of law ***and*** as matter of the interconnection agreements themselves. Moreover, though the CLECs ask this Commission for the extraordinary relief of a preliminary injunction, they will face no risk of irreparable harm if the Commission denies the Petition and requires the CLECs to comply with federal law. *See* Argument, Part I.

The CLECs are wrong as a matter of law because the *TRRO*'s directive forbidding new orders for the discontinued UNEs is immediately effective and binding on the CLECs irrespective of the terms of their interconnection agreements ("ICAs"). As the Supreme Court has stated, "[c]ontractual arrangements remain subject to subsequent legislation by the presiding sovereign."[7] The existence of an interconnection agreement cannot deprive the FCC of jurisdiction to issue orders binding on carriers, especially where, as here, the order is part of mandatory transition regulations required to conform the FCC's rules to binding federal court decisions.[8] Even if the ICAs required some period of negotiation to effectuate an immediate change of law – which they clearly do not – such a term could not trump an immediately effective FCC directive. Indeed, the

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[7] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147-148 (1982) (citing Veix v. *Sixth Ward Building & Loan Assn. of Newark*, 310 U.S. 32 (1940); *Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398 (1934).)

[8] *See Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467, 482, 55 L.Ed. 297, 303, 31 S.Ct. 265, 270 (1911) (finding it "inconceivable" that the exercise of the commerce power by federal authorities

Indiana Utility Regulatory Commission on March 9, 2005, rejected the very argument offered by the CLECs here.[9] That Commission refused to order SBC to accept orders for new UNE-P customers after March 10, 2005, finding that:

> [W]e cannot reasonably conclude that the specific provision of the TRRO to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements.[10]

This Commission should follow suit and reject the CLECs entreaties. *See* Argument, Part II.

Second, despite the CLECs' rhetoric, Verizon is not "unilaterally" amending the ICAs or acting in violation of their terms. Indeed, though the CLECs base their entire petition on the allegation that the ICAs require Verizon to continue to provide the discontinued UNEs, they fail to cite to a single provision of those agreements in support of their claim. This is not surprising given that the terms of the ICAs directly contradict the CLECs' claim of anticipatory breach. In fact, two of the petitioners – Broadview Networks, Inc. and Broadview NP Acquisition Corp. – have no right to obtain the UNEs at issue here under their ICAs at all, even aside from the no-new-adds mandate. Therefore, two of the four petitioners lack standing to complain about implementation of

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could be hampered or restricted to any extent by contracts previously made between individuals or corporations).

9 *See Complaint of Indiana Bell Telephone Company for Expedited Review of a Dispute with Certain CLECs Regarding Adoption of an Amendment to Commission-Approved Interconnection Agreements*, Cause No. 42749, Order issued March 9, 2005 ("Indiana Order"). A copy of the Indiana Order is filed herewith.

10 *Id.*, at 7. The CLECs recently submitted the decisions of other state commissions on similar petitions which they allege support their argument here. Verizon suggests that this Commission should not make a determination on the Petition merely by counting the "votes" of other states but by carefully assessing the merits of the arguments before it.

the FCC's bar on new orders, and their claims of "immediate and irreparable injury" are necessarily false. *See* Argument, Part III.

Third, the Commission lacks authority to issue a stay of an FCC order and therefore cannot interpret the ICAs in a fashion that delays the *TRRO*'s explicit March 11 implementation date. Congress gave the FCC sole responsibility to make section 251 unbundling determinations. The FCC has exercised that jurisdiction in part by issuing its immediately effective no-new-orders directive. That directive can only be stayed by the FCC itself or by the D.C. Circuit, but the CLECs have not asked for a stay in either of those forums.[11] They may not collaterally challenge the FCC's Order before this Commission. *See* Argument, Part IV.

Fourth, the CLECs' appeal to section 271 as grounds to stay the FCC's order is unavailing. Verizon has never refused to make available the network elements required by section 271 but which will no longer be available as UNEs under the new FCC rules. In any event, determination and enforcement of Verizon's section 271 obligations is the sole province of the FCC. *See* Argument, Part V.

Because the CLECs are not entitled, under any theory, to ignore the clear directives of the FCC to desist from ordering new switching, loop or transport UNEs eliminated by the new rules, and because this Commission cannot provide the CLECs the relief they seek, the Commission must deny the Petition.

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[11] 28 U.S.C. § 2342 ("The court of appeals … has ***exclusive jurisdiction*** to enjoin, set aside, suspend (in whole or in part), or to determine the validity of -- (1) all final orders of the Federal Communications Commission….") (emphasis added).

REGULATORY BACKGROUND

In response to the remand ordered by the D.C. Circuit in *USTA II*, the FCC's *TRRO* found that competitors are ***not*** impaired and unbundling is ***not*** required for any local circuit switching or dark fiber loops, or for certain high-capacity loops or dedicated transport.[12] This determination by the FCC follows more than eight years of unlawful unbundling obligations imposed by rules repeatedly vacated by the Supreme Court and the D.C. Circuit. In deciding to eliminate these 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 sustainable competition." *TRRO*, at ¶ 2. The resulting, affirmative prohibition on new UNE arrangements for these services is unambiguous and unconditional:

- "Incumbent LECs have ***no obligation*** to provide competitive LECs with unbundled access to mass market local circuit switching." *TRRO ¶ 5.*
- The FCC's transition plan "***does not permit*** competitive LECs to add new switching UNEs." *Id.*
- "[T]he disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify ***a nationwide bar*** on such unbundling." *Id.* at ¶ 204.
- "[W]e find that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and we therefore determine ***not to unbundle*** that network element…" *Id*. at ¶ 210.
- "We conclude that requesting carriers are not impaired without access to unbundled DS3 transport on routes connecting wire centers where both if the wire centers are either Tier 1 or Tier 2 wire centers." *Id*. at ¶129
- "These transition plans … ***do not permit*** competitive LECs to add new dedicated transport UNEs pursuant to section 251(c)(3) where the Commission determines

[12] *TRRO* ¶¶ 5, 126, 129, 133, 174, 179, 182, 199, 204.

that no section 251(c) unbundling requirement exists." *Id*. at ¶ 142.

- "These transition plans … ***do not permit*** competitive LECs to add new high-capacity loop UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists." *Id*. at ¶195.

- "Competitive LECs are not impaired without access to dark fiber loops in any instance." *Id.* at ¶ 5 and 146.

- "With respect to dark fiber loops, we eliminate unbundling on a nationwide basis." *Id.* at ¶ 166.

And, as noted above, the rules themselves explicitly state that where an ILEC is not required to provide unbundled access to a given network element under the new rules, "requesting carriers ***may not obtain***" that element as a UNE.[13]

The *TRRO* also imposes specific transition periods for moving the embedded base of delisted elements to alternative arrangements. Specifically, the FCC granted CLECs twelve months to "submit orders to convert their UNE-P customers to alternative arrangements." *TRRO* ¶ 199. The FCC reasoned that "the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversion." *Id.* ¶ 227. The FCC likewise imposed a 12-month period to transition discontinued UNE loops and transport.[14] For purpose of negotiating those follow-on arrangements, the FCC gave the parties up to twelve months "to modify their interconnection agreements, including completing any change of law processes."[15]

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13 *See* Note 4, above.

14 *See e.g*. 47 C.F.R. §§ 51.319(a)(4)(iii), 51.319(d)(2)(iii) and 51.319(e)(2)(ii)(c). The rules also provide for an 18-month transition period for dark fiber. Id. ¶¶ 144, 197.

15 TRRO ¶¶ 143, 196, 227. The FCC also ruled that facilities no longer subject to unbundling would be subject to a true-up to the FCC's prescribed transitional rates, back to March 11, 2005, upon the amendment of the relevant interconnection agreements. *Id.* ¶¶ 145, 198 and 228.

The FCC made clear, however, that the transition periods apply *only* to the "embedded customer base," but as of March 11, 2005, **"do not permit** competitive LECs to add new … UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists."[16]

ARGUMENT

I. The CLECs Have Failed To Demonstrate Any Likelihood of Irreparable Harm In the Absence of Injunctive Relief.

Even if the Commission had authority to override the clear requirements of federal law – and it does not – the CLECs are not entitled to the extraordinary injunctive relief they seek. The Petition does not even bother to make a showing of irreparable harm, making only the naked assertion, without elaboration or supporting declaration or affidavit, that the CLECs will "sustain immediate and irreparable injury" in the absence of relief. Petition at 2. This assertion is demonstrably false.

Under the transition terms of the *TRRO* and the new rules, embedded base UNE arrangements will continue beyond March 11 and will not be disconnected on that date. As for new orders, the CLECs do not dispute that they will be able to continue to obtain new switching, loop and transport services from Verizon as of March 11, albeit at just and reasonable rates. In this regard, Verizon has offered to enter into commercial agreements for services to replace UNE-P, having posted such contract terms on its website and made them available to all CLECs as of February 25, 2005. More than 30 carriers – including MCI and Z-Tel – have entered into such agreements with Verizon. CLECs may also order switching services as resale. CLECs may obtain loop and transport services from Verizon as of March 11 in two ways. First, where the relevant

[16] TRRO ¶142, 195; *see also, id*. ¶227.

Verizon RI wire centers do not satisfy the FCC's new unbundling criteria, CLECs remain entitled to obtain a loop or transport UNE upon certifying to its availability after diligent inquiry, pursuant to TRRO ¶234. Where high-capacity loops or dedicated transport are no longer available as UNEs as of March 11, CLECs may order those network elements as special access services. Thus, there is no question that CLECs will remain able to serve current and any new customers as of March 11.

Consequently, the only "harm" the CLECs may suffer as a result of compliance with the new federal rules is that they may have to pay more for services they now receive at TELRIC rates, but money damages alone cannot constitute irreparable harm under Rhode Island law. *See, In re State Employees' Union*, 587 A.2nd 919, 926 (1991). The Commission must therefore deny the CLECs' Petition for injunctive relief.[17]

II. The Parties' Interconnection Agreements Cannot Supersede the FCC's Mandatory Transition Plan.

The CLECs cannot use the "change of law" provisions of the parties' ICAs to delay indefinitely the start of the FCC's "no-new-adds" period for the UNEs eliminated in the *TRRO*. The FCC has the authority to issue immediately effective directives that supersede any "change-of-law" process under interconnection agreements, and it clearly did not intend that the start of the no-new-adds period should be subject to a lengthy change-of-law process. Instead, the FCC directed that new orders for the discontinued UNEs must cease as of a date certain – March 11, 2005 – with no exceptions.

[17] Further, the FCC has conclusively determined that continued imposition of UNE obligations would harm the public interest. *See e.g.* TRRO ¶218, finding that propagation of UNE-P "would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition," contrary to the express goal of the Act. Thus, the public interest too requires denial of the Petition.

The FCC has the authority to issue immediately binding transition rules to remedy the situation created by its repeated promulgation of unlawful unbundling rules. For more than eight years the FCC has required incumbent LECs to provide access to unbundled network elements despite the repeated *vacatur* of its UNE rules by the Supreme Court and the D.C. Circuit because of its repeated failure to issue lawful impairment findings under section 251(d)(2).[18] Under such circumstances, the FCC has broad authority to correct the consequences of its vacated UNE rules.[19]

The FCC was explicit that its transition plan is necessary to the proper effectuation of the Act's goals and avoidance of market disruption.[20] Central to that transition plan is the FCC's requirement that the CLECs eliminate their current embedded base of UNE arrangements by converting them to other arrangements within twelve months, or in the case of dark fiber, 18 months. The FCC has special discretion in adopting transition rules intended to smooth implementation of its new permanent rules.[21] The immediate no-new-adds directive is part of that transition. It would have made no sense for the FCC to permit CLECs to continue to add new UNEs to the embedded base at the same time as carriers are supposed to be reducing the embedded base to zero.[22]

Thus, not only is the no-new-add directive ***not*** conditioned on renegotiation of interconnection agreements, but the CLECs are not free to ignore or avoid it. The FCC

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18 *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388, 391 (1999); *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 422-430 (D.C. Cir. 2002) ("*USTA I*");*USTA II*, 359 F.3d at 568.

19 *See United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992) (reading *Callery* to embody the "general principle of agency authority to implement judicial reversals).

20 *TRRO* ¶ 235-236.

21 *Bachow Communications, Inc. v. FCC*, 237 F.3d 683, 686 (D.C. Cir. 2001).

22 *Id*.

could not have been clearer when it held that its transition plan "does not permit" CLECs to order additional UNEs at the same time they are supposed to be converting UNEs away.[23]

Indeed, March 11, 2005, was carefully selected as the beginning of the transition period to avoid having a period where no rules are in place, and the FCC clearly did not intend the start of the transition period to be delayed by any negotiations. The FCC adopted the *TRRO* in response to the D.C. Circuit's *vacatur* of UNE rules adopted in the *Triennial Review Order*. Between the *vacatur* and the promulgation of these new UNE rules, however, the FCC issued its *Interim Rules Order,* in which it recognized that ILECs would be "permitted under the court's holding in *USTA II*" to immediately cease providing the UNEs at issue here, including the substantial embedded base.[24] To preclude the disruption that such a sudden elimination of UNEs would cause while the FCC was undertaking its remand proceeding, the FCC's *Interim Rules Order* included an immediately effective rule preventing the "withdrawal of access to UNEs" notwithstanding the terms of any interconnection agreements.[25] But the *Interim Rules Order's* temporary directive to continue providing UNEs despite the absence of a lawful impairment finding expires on March 11, 2005.[26] As a result, the FCC wrote the *TRRO's* new UNE rules and transition arrangements in a manner to avoid a hiatus in which no unbundling rules at all would be in place. *TRRO*, ¶¶ 235-236, 250.

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23 *TRRO* ¶142, 195; *see also, id*. ¶227.

24 *Interim Rules Order* ¶ 17.

25 *Id*. ¶ 26.

26 *Id*. ¶ 21.

To prevent such a hiatus, however, the *TRRO's* new transition rules must go into effect immediately upon expiration of the *Interim Rules Order* on March 11, 2005. Just as the obligations imposed on ILECs in the *Interim Rules Order* were immediately effective without a contract amendment, the *TRRO's* new transition rules, including the prohibition on adding new UNE-P arrangements, must also be immediately binding to avoid a situation in which no effective FCC rules apply. [27]

The CLECs' contention that the change-of-law provisions of the ICAs are implicated by the FCC's ban on new UNEs is thus beside the point. The ICAs cannot exempt carriers from complying with an explicit directive of federal law. The CLECs claim that "the only lawful way that Verizon RI modify its rights with respect to the provision of UNEs and UNE combinations is by amending its interconnection agreements," Petition at 5, and that Verizon would breach its ICAs by refusing to provision UNEs eliminated by the federal rules unless it first "compl[ies] with the change of law procedures established by the Agreements." Petition at 2. But the FCC understood that existing interconnection agreements often contain "change of law" provisions. It specifically contemplated, for example, that the embedded base transition would involve the change of law process – and it allowed twelve or eighteen months as a consequence. Had the FCC intended that the *entire* transition occur through such a lengthy process, however, it could have just made its new impairment findings and left it at that – much like it did in the *TRO*. Instead, the FCC explicitly directed that CLECs

[27] The CLECs are profoundly mistaken in their assumption that, if they successfully delay the application of the *TRRO*'s transitional rules, the parties will revert to a situation in which the CLECs may continue adding new UNEs to their embedded base. Instead, with the termination of the *Interim Rules Order*'s temporary preservation of UNEs after March 10, 2005, no FCC unbundling rules would apply and the parties would simply revert to the *USTA II* mandate, which would allow the immediate termination of all switching, loop and transport UNE arrangements, as the FCC itself recognized in the *Interim Rules Order*.

"***may not obtain***" new switching, loop or transport UNEs eliminated by the new rules as of a ***date certain***, March 11, 2005 – with no exceptions.[28]

The Indiana Commission rejected the very "change of law" argument offered by the CLECs here: "We do not find Joint CLECs position [arguing in favor of the change of law provisions of the contracts] to be the more reasonable interpretation of the TRRO. First, as stated earlier, the FCC is clear in its intent to eliminate UNE-P. … We also find the FCC's language of the TRRO and accompanying rules unambiguous as to the intent that access to UNE-P for new customers not be required after March 10, 2005."[29] In light of those rulings and the FCC's rules for the transition of the embedded base, the Indiana Commission held that:

> We interpret the TRRO to say that the establishment of a one-year transition period is solely for the purpose of allowing an orderly movement of a CLEC's embedded customer base off of UNE-P, and … CLECs are not permitted to add new UNE-P customers during the transition period. We find the more reasonable interpretation of the language of the TRRO is the intent to not allow the addition of new UNE-P customers after March 10, 2005.[30]

The Indiana Commission went on to note that, while it would "look to the parties' interconnection agreements in reviewing change of law issues," "we cannot ignore the requirements of the changed law itself."[31]

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[28] The TRRO is definitive in its ban on new UNE-Ps. Therefore, its statement that CLECs are "not permit[ted] … to add new UNE-P arrangements …except as otherwise specified in this Order" (TRRO, ¶ 227) refers to the option left to carriers to enter into voluntary commercial agreements that might continue the availability of UNE-P-like services.

[29] Indiana Order at 6.

[30] *Id.* at 7.

[31] *Id.* at 8.

The CLECs' position boils down to a simple refusal to follow that binding and pre-emptive directive – which is, of course, the result if the CLECs' delay their compliance past March 11, 2005. Their claim that negotiation, arbitration and amendment must precede compliance with the directive is *automatically* such a refusal because those processes obviously cannot be completed by March 11. It is in effect a claim that the effective date ordered by the FCC is subject to the CLECs' veto – which of course it is not.

No provision of the *TRRO* purports to make the section 252 contract amendment process a *precondition* to compliance with its mandates. For that incorrect proposition, the CLECs rely solely on *TRRO* ¶233, 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, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes.

That general direction to the parties to revise their contracts where necessary as a result of the new rules neither limits implementation of the *TRRO* to the section 252 amendment process nor negates the *TRRO's* specific directives, including the no-new-adds prohibition.[32]

First, and contrary to the CLECs' contention, not *everything* in the *TRRO* is subject to negotiation. Although the FCC contemplated in *TRRO* ¶233 that carriers

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[32] *See, e.g.*, ¶227. *See also*, Indiana Order at 7, quoting ¶234 of the TRRO but then holding that, "However, we cannot reasonably conclude that the specific provision of the TRRO to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using

would negotiate arrangements to implement the FCC's *permanent* unbundling rules (*e.g.*, to change the list of UNEs available under interconnection agreements, to work out operational details of the transition of the embedded base), no negotiation is required to implement the immediate no-new-add directive included in the transition rules.[33] The FCC held that its transition regime "does not permit" any additional unbundling of those elements subject to that regime "pursuant to section 251(c)(3)." *TRRO* ¶¶ 142, 195, 227. Unbundling "pursuant to section 251(c)(3)" *means* unbundling pursuant to existing 1996 Act interconnection agreements. *See* 47 U.S.C. § 251(c)(3) (describing incumbent LECs' obligation "to provide . . . access to network elements on an unbundled basis . . . in accordance with the terms and conditions of the [interconnection] agreement"); *id.* § 251(c)(1) (describing carriers' obligation to negotiate "terms and conditions of agreements to fulfill the duties described" in section 251(b) and (c)).[34] The FCC permitted carriers to negotiate alternative arrangements to supersede the surcharges and mandatory migration of the embedded base provided for under the transition rules, and it preserved "commercial arrangements carriers have reached" for continued provision of wholesale facilities. *TRRO* ¶¶ 145, 198, 228. But the FCC established no exceptions to the rule that mandatory unbundling of new UNE-P arrangements and high capacity

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UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements."

33 Similarly, at the end of the 12-month transition period, incumbent LECs have no further obligation to provide access to UNE-P or high-capacity facilities that are no longer subject to unbundling, even at the transitional rate. *See TRRO* ¶¶ 145, 198, 228 (noting that the "limited duration of the transition" protects incumbents).

34 Thus the CLECs' claim (Petition at 5) that "The 1996 Act is, put simply, built on rights and obligations set forth in interconnection agreements." has it exactly backwards. The parties' interconnection agreements are built on the rights and obligations set forth in the Act, as implemented by the FCC's rules.

facilities not subject to unbundling under section 251(c)(3) must cease as of March 11, 2005.

Moreover, in light of the FCC's findings that continued availability of UNE-P, for example, would "seriously undermine infrastructure investment and hinder the development of genuine facilities-based competition" (*Id.* ¶ 218), it makes no sense to suggest that those harms should be suffered for so long as the parties take to amend their agreements. Nor would it make sense for the FCC to have ruled that "requesting carriers may not obtain" new arrangements of the discontinued UNEs as of March 11, 2005, but then to have given carriers 12 months to complete an amendment before they would be bound by that prohibition, as the CLECs argue it did. Obviously, the FCC's bar on new orders as of March 11, 2005, would be meaningless if it could not be implemented until March 11, 2006.

III. The CLECs' Claims Are Contrary to the Plain Terms of Their Interconnection Agreements, Which Require Compliance With Federal Law.

Even if the CLECs had a plausible argument that their ICAs could somehow trump explicit FCC prohibitions – and they do not – the ICAs, in fact, do not support their position. Contrary to the CLECs' accusations, Verizon is neither violating nor "unilaterally" amending the agreements, but complying with both the terms of its contracts and the clear command of the FCC.

First, two of the petitioners here – Broadview Networks, Inc. and Broadview NP Acquisition Corp. – are parties to ICAs by way of adoption of an ICA between Verizon RI and another carrier. In both cases, the parties agreed to the respective adoptions upon the following condition:

> For avoidance of doubt, adoption of the Terms ***does not include adoption of any provision imposing an unbundling obligation on***

> ***Verizon that no longer applies to Verizon*** under the Report and Order and Order on Remand (FCC 03-36) released by the Federal Communications Commission ("FCC") on August 21, 2003 in CC Docket Nos. 01-338, 96-98, 98-147 ("Triennial Review Order"), the decision of the U.S. Court of Appeals for the D.C. Circuit in its Opinion and Order in United States Telecom Association v. Federal Communications Commission, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II"), or that is otherwise not required by both 47 U.S.C. Section 251(c)(3) and 47 C.F.R. Part 51.[35]

Of course, the obligations to provide the UNEs at issue here – mass market switching, high capacity loops and dedicated transport – are precisely those that the *USTA II* court vacated, and the FCC has found that these UNEs are not required by Section 251(c)(3) and Part 51 of the FCC's Rules. Accordingly, neither Broadview NP nor Broadview Networks has any contractual right to obtain any of these UNEs under the explicit terms of their existing ICAs.

Second, all four of the ICAs at issue here require both parties to *comply* with FCC directives. For example, all four agreements provide as follows:

> 4.2 Each Party shall remain in compliance with Applicable Law in the course of performing this Agreement.
>
> 4.3 Neither Party shall be liable for any delay or failure in performance by it that results from requirements of Applicable Law, or acts or failures to act of any governmental entity or official.
>
> 2.8 (Glossary) Applicable Law. All effective laws, government regulations and government orders, applicable to each Party's performance of its obligations under this Agreement.

As of March 11, the TRRO and the new federal unbundling regulations will obviously fall within the contracts' definition of Applicable Law, so under §4.2, the parties have

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[35] *See* Letter Agreement dated November 12, 2004, from John C. Peterson, Verizon New England Inc. d/b/a Verizon Rhode Island, to Eric G. Roden, Broadview NP Acquisition Corp., ¶1.B and Letter

agreed that they "shall remain in compliance" with the TRRO and the new rules.[36] In addition, §4.3 shields Verizon from any liability for any failure to perform resulting from its compliance with the new rules prohibiting CLECs from obtaining the discontinued UNEs as of March 11. Consequently, the CLECs have no viable claim that Verizon would breach its ICA by failing to provide the UNEs banned by the new FCC rules as of March 11.

Third, the parties' intent that Verizon RI's obligations to provide UNEs is co-extensive with applicable law is explicit in the ICAs, each of which provides, as a preface to the list of UNEs to be provided under the contract, that "in accordance with, ***but only to the extent required by, Applicable Law,*** Verizon shall provide [CLEC] access to the

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Agreement dated November 12, 2004, from John C. Peterson, Verizon New England Inc. d/b/a Verizon Rhode Island, to Eric G. Roden, Broadview Networks, Inc., ¶1.B. Emphasis added.

[36] The CLECs miss the point in asserting that "'Applicable law' includes, at the very least, Verizon's obligations under the Bell Atlantic-GTE merger conditions, under Section 271 of the 1996 Act, and under state law." Petition at 7. Whether these other sources of law are included in Applicable Law is immaterial, because the TRRO and the FCC's rules inarguably *are* included in Applicable Law, and therefore govern the interconnection agreements. In any event, the other sources of law cited by the CLECs do not fall within the ambit of the ICAs. As demonstrated in Part III, below, the Commission is preempted from creating UNEs under state law to replace those eliminated by the FCC based on its findings of no impairment and, in any event, the Commission has never conducted a proceeding in which it established an appropriate state-law standard for determining whether a network element should be made available on an unbundled basis, accepted and reviewed evidence as to whether a particular network element meets that standard or ordered Verizon RI to provide unbundled access to such a network element solely pursuant to state law. Second, with respect to the Bell Atlantic/GTE merger, the Arbitrator ruled long ago in Docket No. 3588 that, "The sun has set on VZ's obligation to provide UNEs under the Bell Atlantic/GTE Merger Order. A new more uncertain day has dawned for the CLECs." Procedural Arbitration Decision, Docket 3588, dated April 9, 2004. Finally, interconnection agreements implement legal obligations under section 251, not section 271, merger conditions, or state law. *Verizon Md., Inc. v. Global NAPs, Inc*., 377 F.3d 355, 364 (4th Cir. 2004) (quotations omitted); *see also BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc*., 317 F.3d 1270, 1278 (11th Cir. 2003) (en banc). Section 251(c)(1) of the Act limits the duty to negotiate to the duties described in § 251(b)(1)-(5) and § 251(c). As the Fifth Circuit has confirmed, an incumbent LEC cannot be forced to negotiate matters outside its obligations under section 251. *Coserv Ltd. Liab. Corp. v. Southwestern Bell Tel. Co*., 350 F.3d 482, 487 (5th Cir. 2003). In any event, the CLECs cite no language in their ICAs that would require Verizon to provision network elements required to be made available solely by section 271.

following [UNEs]"[37] As if that is not sufficiently clear, all of the ICAs also provide as follows:

> [N]otwithstanding any other provision of this Agreement, Verizon shall be obligated to provide unbundled Network Elements (UNEs) and Combinations to [CLEC] only to the extent required by Applicable Law and may decline to provide UNEs or Combinations to [CLEC] to the extent that provision of such UNEs or Combinations is not required by Applicable Law.[38]

Thus, the ICAs were never intended to require Verizon to provide UNEs not required by Applicable Law, and Verizon may "decline" to provide UNEs not required by law.

Finally, even the "change of law" provisions of the ICAs, so heavily relied on by the CLECs, contradict their claim. Each of the ICAs at issue here contains change of law provisions which specifically address changes that affect Verizon's obligation to provide any services to the CLEC. Section 4.7 of each agreement provides that:

> ***Notwithstanding anything in this Agreement to the contrary***, if, as a result of any legislative, judicial, regulatory or other governmental decision, order, determination or action, or any change in Applicable Law, Verizon is not required by Applicable Law to provide any Service, payment or benefit, otherwise required to be provided to [CLEC] hereunder, ***then Verizon may discontinue the provision of any such Service***, payment or benefit …. ***Verizon will provide thirty (30) days prior written notice to [CLEC] of any such discontinuance of a Service,*** unless a different notice period or different conditions are specified in this Agreement (including, but not limited to, in an applicable Tariff) or Applicable Law for termination of such Service in which event such specified period and/or conditions shall apply.[39]

Section 50.1 of each agreement is even more succinct:

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[37] *See* Agreements of DSCI, ARC, Broadview NP and Broadview Networks, Network Elements Attachment, §2.

[38] *Id*. §1.1.

[39] Emphasis added. *See also* Network Elements Attachment to each agreement, §1.5, stating in part that, "[I]f Verizon provides a UNE or Combination to [CLEC], and the Commission, the FCC, a court or other governmental body of appropriate jurisdiction determines or has determined that Verizon is not

> Notwithstanding anything contained in this Agreement, except as otherwise required by Applicable Law, Verizon may terminate its offering and/or provision of any Service under this Agreement upon thirty (30) days prior written notice to [CLEC].

The CLECs acknowledge in the Petition, at 3, that they had actual notice by February 10, 2005, of Verizon's intent not to accept orders for the UNEs discontinued by the new FCC rules as of March 11.[40] Thus Verizon will have provided the notice required by the ICAs and would not breach those agreements by rejecting new orders after March 11, even absent the FCC's mandate to implement the no-new-adds prohibition as of that date.

The ICAs are clear that the CLECs are not entitled to obtain the UNEs eliminated by the FCC's new rules as of March 11. These agreements cannot be read to allow the CLECs – or require Verizon – to ignore the FCC's ban on new UNE arrangements as of March 11, 2005.[41]

IV. The Commission May Not Stay an FCC Order.

Any decision by the Commission that stymied Verizon's efforts to comply with the clear directives of the FCC would be an attempt to stay the *TRRO*. It is absolutely clear that Commission has no authority to do so.

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required by Applicable Law to provide such UNE or Combination, Verizon may terminate its provision of such UNE or Combination to [CLEC].

40 Verizon posted the notice on its website on February 10, 2005, and mailed copies to CLECs that day.

41 The CLECs devote much space to complaining that the wire center lists that Verizon prepared in response to an FCC request and posted on Verizon's website are presented as "conclusive" proof of non-impairment in connection with the provisions of ¶234 of the *TRRO*. *See* Petition at 7-9. But, as Verizon RI explained in its recent Reply to Comments of CLECs Regarding Proposed Tariff Revisions dated March 3, 2005, at 10-11, those lists are not conclusive, even though the FCC intends that the lists, filed with the FCC and developed following the FCC's instructions, are presumptively correct. *See* TRRO ¶¶ 100, 105. In any event, any "reasonably diligent inquiry" (TRRO, ¶ 234) by a CLEC into its entitlement to order certain loop or transport facilities must take into account Verizon's wire center lists. Contrary to the CLECs' vague suggestions, Verizon's publication of its wire center lists does not exceed Verizon's "authority" under the new rules or violate any term of the parties' interconnection agreements.

The FCC's prohibitions on new UNEs are not subject to collateral challenge before the Commission. Congress' passage of the Act has "unquestionably" taken "regulation of local telecommunications competition away from the states" as to all "matters addressed by the 1996 Act." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999); *see also id.* at 397. In section 251(d)(2), Congress specifically "charged the [FCC] with identifying" which network elements are to be unbundled. *USTA I*, 290 F.3d at 422. States are not free to "impose any unbundling framework they deem proper under state law, without regard to the federal regime." *Triennial Review Order ("TRO")*, ¶ 192. In deciding to eliminate certain UNEs in the *TRRO*, 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 sustainable competition." *TRRO*, at ¶ 2. Any other balance struck by the Commission would necessarily conflict with the FCC's decision, would substantially impair implementation of the Act and would therefore be preempted.

Federal law is clear that any state commission action that is inconsistent with the FCC's unbundling rules is preempted. Under the Supremacy Clause of the U.S. Constitution, "[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."[42] In assessing whether such a conflict exists, the Supreme Court has emphasized that "[f]ederal regulations have no less preemptive effect than federal statutes."[43] Section 251(d)(3) of the Act embodies that same principle in that it permits

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42 *City of New York v. FCC*, 486 U.S. 57, 64 (1988); *see Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000) (states may not depart from "deliberately imposed" federal standards).

43 *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

preemption of any state law or regulatory requirement that undermines the FCC's implementing rules under Section 251. Given that *USTA II* ruled that the FCC could not delegate its unbundling analysis to the states, this Commission certainly cannot "seize the authority themselves" to re-impose unbundling obligations on Verizon in contravention of the *TRRO*.[44]

Moreover, a state cannot accomplish by contract (or interpretation of a contract by its adjudicatory bodies) what it is preempted by federal law from doing by affirmative regulation. Federal courts have consistently looked askance at a state's use of a "contract" to achieve regulatory goals in conflict with federal law. [45]

In any case, to the extent the CLECs wish to challenge the *TRRO*, they must do so before the FCC or the D.C. Circuit. Only the FCC itself or a federal court of appeals has jurisdiction to stay the action of the FCC. *See* 28 U.S.C. § 2349 ("Hobbs Act"); 47 U.S.C. § 405. More specifically, the FCC issued its prohibition of the discontinued UNEs on remand and in response to the D.C. Circuit's mandate in *USTA II*. Under the Hobbs Act, only a federal court of appeals "has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of…[the FCC's] final orders."

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[44] Opinion and Order Granting Plaintiff's Motion for Summary Judgment, *Michigan Bell Tel. Co., Inc. v. Mich. Pub. Serv. Comm'n and AT&T Comm. of Michigan, Inc. and MCImetro Access Transmission Services, LLC*, No. 04-60128 (E.D. Mich. Jan. 6, 2005) ("Michigan Bell"), slip. op. at 14.

[45] *See, e.g., South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984) (state contract regarding the sale of timber violated the Commerce Clause: "The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market") (emphasis added); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579-80 (1981) (enforcement of contracts by state courts was preempted to the extent such enforcement conflicted with Federal Power Commission jurisdiction to enforce filed rates because "[i]t would surely be inconsistent with this congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do."); *Norman v. Baltimore & Ohio Railroad*, 294 U.S. 240, 307-308 (1935) (upholding a joint resolution of Congress which prohibited contract clauses requiring payment in gold and stating that "[p]arties cannot remove their transactions from the reach of the dominant constitutional power by making contracts about them.")

28 U.S.C. § 2342. This Commission thus lacks the authority to interfere in any way with implementation of those rules.

V. Verizon's Obligations Under Section 271 of The Act Afford No Basis for Staying the FCC's New Unbundling Rules.

In a final effort to provide the Commission some excuse for extending the CLECs' access to the unlawful UNE arrangements barred by the FCC, the CLECs appeal to Verizon's obligation to make certain network elements available under section 271 of the Act. The CLECs' reliance on section 271 is misplaced. First, Verizon has in no way breached or stated an intention to breach its section 271 obligations. On the contrary, it has consistently stated its willingness to enter into individually-negotiated commercial agreements to provision network elements required by section 271 but no longer required to be unbundled under section 251. *See e.g.* Reply of Verizon Rhode Island to Comments of CLECs Regarding Proposed Tariff Revisions, n. 3, at 3. The CLECs even acknowledge that the proper standard for rates under such agreements is the FCC's "just and reasonable" standard, not TELRIC. Petition at 11. In the absence of a breach of Verizon's section 271 obligations, the CLECs have no cognizable claim here.

The CLECs ask the Commission to enforce the market-opening provisions of section 271, asserting that, "As a condition of continuing to provide in-region interLATA services in Rhode Island, Verizon must continue to offer CLECs unbundled high-capacity DS1 and DS3 loops, dedicated transport, and local switching and UNE-P and cannot be permitted to circumvent that obligation as it proposes." Petition at 12. But the interpretation and enforcement of section 271 is the exclusive province of the FCC. 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 (emphases added). Courts have likewise held that "Congress has clearly charged the FCC, and *not the State commissions*," with assessing Bell Operating Companies' compliance with section 271. *See, e.g., SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) (emphasis added); *see also AT&T Corp. v. FCC*, 220 F.3d 607, 624 (D.C. Cir. 2000). And the text of Section 271 is replete with references to the FCC's duties. 47 U.S.C. § 271(d)(3), (4), (6). 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. As the Massachusetts Department of Telecommunications and Energy has recently held, "we do not have the authority to determine whether Verizon is complying with its obligations under Section 271. 47 U.S.C. § 271(d)(6)."[46] This Commission should rule likewise, and decline to assert authority to enforce section 271 here.

[46] *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 56. *See also id*. at 71 ("[C]ompliance with Section 271 is for the FCC to decide").

CONCLUSION

For all of the foregoing reasons, the Commission should reject the CLECs' attempt to compel Verizon to provide new UNE arrangements in direct contravention of the new FCC rules on or after March 11, 2005.

Respectfully submitted,

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Dated: March 11, 2005

STATE OF INDIANA

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COMPLAINT OF INDIANA BELL TELEPHONE COMPANY, INCORPORATED D/B/A SBC INDIANA FOR EXPEDITED REVIEW OF A DISPUTE WITH CERTAIN CLECS REGARDING ADOPTION OF AN AMENDMENT TO COMMISSION APPROVED INTERCONNECTION AGREEMENTS

CAUSE NO. 42749

You are hereby notified that on this date the Presiding Officers in this Cause make the following Entry:

1. **Background**. On February 25, 2005, the following competitive local exchange carriers ("CLECs") and Respondents in this proceeding: Acme Communications, Inc., eGIX Network Services, Inc., Cinergy Communications Company, Midwest Telecom of America, Inc., MCImetro Access Transmission Services LLC, MCI WorldCom Communications, Inc, Intermedia Communications, Inc., Trinsic Communications, Inc., and Talk America Inc. (collectively "Joint CLECs") filed a *Joint Motion for Emergency Order Preserving Status Quo for UNE-P Orders* ("Motion") with the Indiana Utility Regulatory Commission ("Commission"). The Motion asserts that the Complainant in this Cause, Indiana Bell Telephone Company, Incorporated d/b/a/ SBC Indiana ("SBC Indiana"), which is an incumbent local exchange carrier ("ILEC"), has stated that it intends to take action on or before March 11, 2005, to reject Joint CLECs' unbundled network element platform[1] ("UNE-P") orders. Such action, according to the Joint CLECs, will cause them irreparable harm and will breach SBC Indiana's currently effective, Commission-approved interconnection agreements with the Joint CLECs. The Joint CLECs request that the Commission, on or before March 7, 2005, issue a directive requiring SBC Indiana to (1) continue accepting and processing the Joint CLECs' UNE-P orders, including moves, adds, and changes to the Joint CLECs' existing embedded customer base, under the rates, terms and conditions of their respective interconnection agreements and (2) comply with the change of law provisions of the interconnection agreements in implementing the Federal Communication Commission's ("FCC's") *Triennial Review Remand Order* ("TRRO").[2]

[1] The unbundled network element platform consists of a complete set of unbundled network elements (local circuit switching, loops and shared transport) that a CLEC can obtain from an ILEC in order to provide an end-to-end circuit.

[2] Order on Remand, *In re Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No.01-338, 2005 WL 289015 (FCC Feb. 4, 2005).

Based on Joint CLEC's allegation that an emergency situation exists, a Docket Entry was issued on March 1, 2005, that modified the times, as found in 170 IAC 1-1.1-12, for SBC Indiana to file a Response to the Motion and for Joint CLECs to file a Reply to a Response. A Response and a Reply were timely filed on March 2 and March 4, 2005, respectively.

The Motion is in response to a statement in recent SBC Indiana Accessible Letters to Joint CLECs that, beginning March 11, 2005, SBC Indiana will no longer accept UNE-P orders. According to SBC Indiana, its plan to no longer accept UNE-P orders beginning March 11, 2005, is in compliance with that part of the FCC's February 4, 2005 TRRO which states that, as of the effective date of the TRRO (March 11, 2005), CLECs are not permitted to add new UNE-P arrangements using unbundled access to local circuit switching. Joint CLECs argue that such action by SBC Indiana would be a unilateral action in violation of SBC Indiana's interconnection agreements with the Joint CLECs.

2. **Joint CLECs' Position**. Joint CLECs point to the provision in each interconnection agreement that requires SBC Indiana to provide UNE-P to the CLEC at specified rates. Joint CLECs further state that any modification to an interconnection agreement made necessary by a change in law requires adherence to each agreement's specified change of law process which typically includes notice, negotiation and, if necessary, dispute resolution. Therefore, according to the Joint CLECs, SBC Indiana is required to continue to provide UNE-P to the Joint CLECs until such time as each agreement's change of law process has been fulfilled with respect to the change of law directive in the TRRO.

Joint CLECs contend that adherence to change of law processes will be substantive undertakings with respect to the TRRO's ruling that ILECs are no longer required to provide unbundled switching, because SBC Indiana is under obligations independent of Sections 251/252 of the federal Telecommunications Act of 1996[3] ("Act") to provide UNE-P to the Joint CLECs. Joint CLECs posit that, notwithstanding the TRRO's finding that ILECs are no longer required to make UNE-P available to CLECs, State statute and prior Commission Orders, Section 271 of the Act, and the *SBC/Ameritech Merger Order*[4] require SBC Indiana to continue to make UNE-P available to the Joint CLECs. The Joint CLECs also argue that the TRRO itself requires carriers to implement the findings in the TRRO by implementing appropriate changes to their interconnection agreements.

Joint CLECs point not only to the terms of their interconnection agreements and language in the TRRO as requiring adherence to the requisite change of law provisions, but also to our January 21, 2005 Docket Entry in this Cause that, in denying certain Motions to Dismiss filed by certain CLEC Respondents, stated we would require factual

[3] The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

[4] *Applications of Ameritech Corp. and SBC Communications Inc. For Consent to Transfer Control*, 14 FCC Rcd 14712 (1999).

evidence relevant to each interconnection agreement's change of law provisions in order to determine if Commission intervention was an appropriate remedy. Joint CLECs conclude that it is appropriate for the Commission to preserve the status quo as to all of the issues raised in the applicable Accessible Letters by requiring SBC Indiana to engage in the relevant change of law processes that are mandated by the parties' interconnection agreements, by the FCC in the TRRO, and in our January 21, 2005 Docket Entry in this Cause.

3. **SBC Indiana's Position**. SBC Indiana contends that the language of the TRRO is unambiguous and even repetitive in its express forbiddance of new UNE-P orders as of March 11, 2005. SBC Indiana claims, therefore, that the provisions of the Accessible Letters that are the subject of Joint CLECs' Motion are merely SBC Indiana's plan to implement, and are in full compliance with, the TRRO. SBC Indiana further argues that implementation of the FCC's clear prohibition against new UNE-P as of March 11, 2005, does not require negotiations between carriers that have entered into interconnection agreements.

SBC Indiana also contends that the Commission lacks jurisdiction to stay an action of the FCC; that only the FCC itself or a federal court of appeals has such jurisdiction. As a result, according to SBC Indiana, any dispute with the FCC's bar on continued access to UNE-P as of March 11, 2005, must come as a challenge to the FCC order itself and not SBC Indiana's planned implementation of it.

4. **The TRRO**. In a further attempt to adopt rules implementing the Act's requirement that the FCC determine those unbundled network elements to which CLECs "at a minimum" need access in order to compete, the FCC issued its Triennial Review Order[5] ("TRO") on August 21, 2003. Among other things, the TRO found that CLECs were competitively impaired without unbundled access to ILECs' circuit switching for the mass market. The FCC determined that this impairment was primarily due to delays and other problems associated with ILECs' hot cut[6] processes. Accordingly, all state commissions, including this Commission, were directed to either determine that there was no such impairment in a particular market or develop a "batch" hot cut process that would efficiently provision multiple CLEC orders for circuit switching. As a result, this Commission initiated three Causes to address the directives of the TRO, including one proceeding devoted to developing a batch hot cut process.

Major parts of the TRO were almost immediately challenged in the Federal District Court of Appeals for the D.C. Circuit, which eventually vacated major portions of the TRO. In the end, appeals to the U.S. Supreme Court to reverse the D.C. Circuit were unsuccessful. Among other findings, the D.C. Circuit vacated the rules that allowed states to conduct impairment analyses and the FCC's national finding of impairment for

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[5] *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003).

[6] The physical process by which a customer is removed from the switch of one carrier and added to the switch of another carrier is referred to as a "hot cut."

mass market switching. The Court remanded those vacated parts of the TRO back to the FCC to make findings consistent with the Court's determinations. The result of that remand is the FCC's TRRO.

5. **The TRRO's Reasoning for Eliminating UNE-P**. In ruling to eliminate UNE-P, the FCC determined, based on the record developed during the TRO remand proceeding, that CLECs:

> . . . . not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets. Additionally, we find that the BOCs have made significant improvements in their hot cut processes that should better situate them to perform larger volumes of hot cuts ("batch hot cuts") to the extent necessary. We find that these factors substantially mitigate the *Triennial Review Order's* stated concerns about circuit switching impairment. Moreover, regardless of any limited potential impairment requesting carriers may still face, we find that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and therefore we conclude not to unbundled pursuant to section 251(d)(2)'s "at a minimum" authority.[7]

The FCC elaborated on its concern that unbundling of mass market circuit switching has created a disincentive for CLECs to invest in facilities-based competition, by stating:

> Five years ago, the Commission [FCC] expressed a preference for facilities-based competition. This preference has been validated by the D.C. Circuit as the correct reading of the statute. Since its inception, UNE-P was designed as a tool to enable a transition to facilities-based competition. It is now clear, as discussed below, that, in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment. Accordingly, consistent with the D.C. Circuit's directive, we bar unbundling to the extent there is any impairment where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition. . . . The record demonstrates the validity of concerns that unbundled mass market switching discourages competitive LEC investment in, and reliance on, competitive switches. . . . Competitive LECs have not rebutted the evidence of commenters showing that competitive LECs in many markets have recognized that facilities-based carriers could not compete with TELRIC-based UNE-P, and therefore have made UNE-P their long-term business strategy. Indeed, some proponents of UNE-P effectively concede that it discourages infrastructure investment, at least in some cases. Some

[7] *TRRO*, ¶ 199.

> competitive LECs have openly admitted that they have no interest in deploying facilities. Particularly in residential markets, facilities-based competitive LECs have been unable to compete against other competitors using incumbent LECs' facilities at TELRIC-based rates, and are thus discouraged from innovating and investing in new facilities.[8]

6. Discussion and Findings. As noted above, the Joint CLECs have argued not only that the TRRO's change of law with respect to unbundling mass market circuit switching must be effectuated through the change of law provisions found in the parties' interconnection agreements, but also that Indiana statute and prior Commission Orders, Section 271 of the Act, and the *SBC/Ameritech Merger Order* independently require unbundling. In its Response to the Motion, SBC Indiana devotes a lengthy discussion to its refutation of each of these independent authority arguments. However, the Joint CLECs make clear in their Reply that they are not asking the Commission to resolve the issue of the applicability of these independent authorities. Instead, the Joint CLECs state that they raise these other authorities to demonstrate the sort of issues that must first be negotiated between SBC Indiana and the Joint CLECs and, if necessary, brought to dispute resolution.

The main issue we face in ruling on the Motion is whether the requirement of the FCC's TRRO prohibiting new UNE-P orders as of March 11, 2005, must be effectuated through the provisions of the parties' interconnection agreements regarding change of law, negotiation and dispute resolution, resulting in the possible and likely availability of new UNE-P orders after March 10, 2005, or if the FCC's intent is an unqualified elimination of new UNE-P orders as of March 11, 2005.

The FCC is clear in its decision to eliminate UNE-P: "Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide."[9] This determination in the TRRO is then incorporated in the accompanying FCC rules: "An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops."[10]

The one qualification that the FCC makes with respect to this clear directive is to allow a one year transition period for existing UNE-P customers.

> Finally, we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order. This transition period shall apply only to the embedded customer base, and

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[8] *Id.* at ¶¶ 218, 220.

[9] *Id.* at ¶ 199.

[10] 47 C.F.R. § 51.319(d)(2)(i).

> does not permit competitive LECs to add new customers using unbundled access to local circuit switching. During the twelve-month transition period, which does not supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis, competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar until the incumbent LEC successfully migrates those UNE-P customers to the competitive LECs' switches or to alternative access arrangements negotiated by the carriers.[11]

Joint CLECs do not address the ramifications of the relief sought in their Motion vis-à-vis the stated transition directives of the TRRO. One reading of the TRRO is that the embedded base is a snapshot of those customers being served by UNE-P, and those customers for whom a request to be served by UNE-P has been made, as of March 10, 2005. If CLECs can continue adding new UNE-P customers after March 10, 2005, pending modification of their interconnection agreements pursuant to change of law provisions, how is the composition of the embedded base to be determined? We assume Joint CLECs would contend that new UNE-P customers added after March 10, 2005, would be added to the embedded base. If so, are these post-March 10th customers also subject to transitioning off of UNE-P by March 11, 2006? The Joint CLECs, however, might consider these questions premature in light of their primary assertion, as stated in the Motion: "Unless and until the Agreements are amended pursuant to the change of law process specified in the Agreements, SBC Indiana must continue to accept and provision the Joint CLECs' UNE-P orders at the specified rates."[12]

We do not find Joint CLECs' position to be the more reasonable interpretation of the TRRO. First, as stated earlier, the FCC is clear in its intent to eliminate UNE-P. It is also clear that the FCC intends to eliminate UNE-P from its existing requirement to be unbundled pursuant to section 251 of the Act. For some purposes, pursuant to sections 251/252 of the Act, interconnection agreements exist so parties can implement the unbundling requirements of the Act. If mass market circuit switching is no longer an element required to be unbundled pursuant to sections 251/252 of the Act, it can therefore no longer be required to be unbundled within the context of an interconnection agreement for the stated purposes of sections 251/252.

We also find the FCC's language of the TRRO and accompanying rules unambiguous as to the intent that access to UNE-P for new customers not be required after March 10, 2005. In its clear directive to eliminate future UNE-P, and eventually UNE-P that serves the embedded customer base, the FCC wants to ensure that existing UNE-P customers are not abruptly removed from the network. Therefore, the FCC creates a one-year transition period, the purpose of which is to allow CLECs to make alternative arrangements for these customers. We read the TRRO to say that as of March 11, 2005, ILECs are not required, pursuant to section 251 of the Act, to accept new UNE-P orders for new customers. In addition, as of March 11, 2006, all UNE-P customers in

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[11] *TRRO*, ¶ 199.

[12] Motion, p. 10.

existence and all customer orders pending for such service as of March 10, 2005, must be transitioned off of UNE-P. Of course, ILECs and CLECs are free to negotiate the continued provisioning of UNE-P-like service.

As noted above, the TRRO creates the transition period by stating: "Finally, we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order."[13] The effective date of the TRRO is March 11, 2005. The FCC then goes on to state: "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[14] We interpret the TRRO to say that the establishment of a one-year transition period is solely for the purpose of allowing an orderly movement of a CLEC's embedded customer base off of UNE-P, and even though UNE-P can continue to exist during this one-year transition period with respect to an embedded customer base, CLECs are not permitted to add new UNE-P customers during the transition period. We find the more reasonable interpretation of the language of the TRRO is the intent to not allow the addition of new UNE-P customers after March 10, 2005.

Clearly, too, the TRRO requires ILECs and CLECs to negotiate their interconnection agreements consistent with the findings in the TRRO:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.[15]

However, we cannot reasonably conclude that the specific provision of the TRRO to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements. To reach the conclusion proposed by the Joint CLECs would confound the FCC's clear direction provided in the TRRO, with no obvious way to

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[13] *TRRO*, ¶ 199.

[14] *Id.*

[15] *Id.* at ¶ 233.

return to the transition timetable established in the TRRO. Had the FCC remained silent on the timing and pricing for the transition of the CLEC embedded customer base, it is more plausible that the parties would need to negotiate, and this Commission possibly arbitrate, the continued availability of UNE-P for new customers. Instead, the FCC is clear that, barring mutual agreement by the parties, UNE-P will no longer be available to new customers after March 10, 2005. This clear FCC directive leaves little room for the interpretation advocated by the Joint CLECs. For these reasons, we find our conclusion herein to be consistent with our finding in the January 21, 2005 Entry in this Cause that we will look to the parties' interconnection agreements in reviewing change of law issues. The elaboration that this Entry provides is that we cannot ignore the requirements of the changed law itself. The TRRO sets forth a default arrangement for the elimination of UNE-P. Unless and until the parties mutually agree to adopt an alternative arrangement instead of the default provisions of the TRRO, we must look to the FCC's directives in the TRRO for the elimination of UNE-P for new customers.

In their Motion, Joint CLECs raised some practical concerns about the effects of their inability to obtain UNE-P after March 10, 2005. Therefore, we find it appropriate to use this Entry to provide guidance on some of the disagreements that may arise as a result of this Entry's ruling. Joint CLECs express the concern in their Motion that ". . . if a CLEC customer requests remote call forwarding to his or her vacation home on March 1, 2005, and then asks the CLEC on March 12, 2005 to remove the remote call forwarding so that calls revert to their usual location, the CLEC will be unable to remove the call forwarding feature from the customer's account because of SBC's rejection of the CLEC's change request."[16] We disagree. We think the TRRO is clear in its intent that a CLEC's embedded base (its UNE-P customers, and those customers for which UNE-P has been requested, as of March 10, 2005) not be disrupted. We would expect an embedded base customer to be able to acquire or remove any feature associated with circuit switching during the transition period.

Joint CLECs have also expressed concern that the agreement being offered by SBC Indiana for continued service after March 10, 2005, would require the immediate imposition of rates higher than the transition pricing established in the TRRO.[17] We do not find this to be an unreasonable position for SBC Indiana to take. Clearly, the intent of the one-year transition period, and its associated pricing, is to allow for a planned, orderly, and non-disruptive migration of existing UNE-P customers off of UNE-P to an alternative arrangement at an established price for the transition period. Our interpretation is that the transition period is not designed to be a period in which CLECs that negotiate an agreement to continue their service with SBC Indiana are then entitled

[16] *Motion*, p. 9.

[17] 47 C.F.R. § 51.319(d)(2)(iii) provides the following pricing requirements for UNE-P during the transition period: "The price for unbundled local circuit switching in combination with unbundled DS0 capacity loops and shared transport obtained pursuant to this paragraph shall be the higher of: (A) the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or (B) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that combination of network elements, plus one dollar. Requesting carriers may not obtain new local switching as an unbundled network element."

to continue with the same transition pricing. Once a CLEC agrees to continue its existing service arrangement, the issue of transitioning and the associated reasons for transition pricing cease.

It is our finding, therefore, that SBC Indiana, pursuant to the clear FCC directives in the TRRO, is not required to accept UNE-P orders for new customers after March 10, 2005. As to the Motion's request that we order SBC Indiana to comply with the change of law provisions of the interconnection agreements in implementing the TRRO, we do not make such an order, but nonetheless express our expectation that both SBC Indiana and all affected CLECs will make changes to their interconnection agreements consistent with the requirements of the TRRO. Accordingly, the Motion is denied.

IT IS SO ORDERED.

Judith G. Ripley, Commissioner

William G. Divine, Administrative Law Judge

3-9-05

Date