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January 17, 2006

VIA HAND DELIVERY

Hon. Ron Jones, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Joint Petition for Arbitration of NewSouth Communications Corp., et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*
Docket No. 04-00046

Dear Chairman Jones:

Enclosed please find a copy of a December 15, 2005 decision of the District of Columbia Public Service Commission. BellSouth provides this decision as supplemental authority for its positions. In relevant part, the District of Columbia Commission held that there is no requirement that section 271 network elements be addressed in interconnection agreements negotiated and arbitrated pursuant to section 252 and a state commission's authority does ***not*** extend to requiring inclusion of section 271 network elements in interconnection agreements (pp. 28-29, n. 173).

A copy of this letter has been provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2006, a copy of the foregoing document was served on the following, via the method indicated:

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9 of 100 DOCUMENTS

PETITION OF VERIZON WASHINGTON DC, INC FOR ARBITRATION PURSUANT TO SECTION 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996

TAC 19, Order No 13836

District of Columbia Public Service Commission

2005 D C PUC LEXIS 257

December 15, 2005

OPINION: [*1]

ORDER

I. INTRODUCTION

1 By this Order, the Public Service Commission of the District of Columbia ("Commission") adopts in part and declines to adopt in part the Arbitrator's Recommended Decision ("Recommended Decision") in this proceeding n1 The parties shall file interconnection agreement amendments that conform to this Order with the Commission within 30 days of the date of this Order

n1 *TAC 19 -- Petition of Verizon Washington DC, Inc for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Recommended Decision, filed September 7, 2005

II. BACKGROUND

2 On August 21, 2003, the Federal Communications Commission ("FCC") issued the text of its *Triennial Review Order ("TRO")*, which redefined the standards used to classify portions of the incumbent local exchange carrier's ("ILEC") network as unbundled network elements ("UNEs") n2 As part of that Order, the FCC required telecommunications service providers to update their interconnection agreements to comply **[*2]** with the new UNE list If telecommunications service providers were unable to agree on new interconnection agreements, they were required to use the arbitration procedures set forth in section 252(b) of the federal Telecommunications Act of 1996 ("Act") n3

n2 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No 98-147, 18 FCC 16978*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking ("*TRO*") (2003)
n3 *TRO at 18 FCC Rcd 17409, P 704*

3 In response to the *TRO*, Verizon DC filed its Petition for Arbitration ("Petition") with the Commission pursuant to section 252(b) of the Act Based on Verizon's submission, the Commission opened the **[*3]** instant proceeding Verizon DC filed an Amended Petition on March 19, 2004 ("March 2004 Amended Petition") n4 Several parties filed responses to the Petition and the March 2004 Amended Petition n5

n4 *TAC 19*, Update to Petition for Arbitration of Verizon Washington DC, Inc. ('Verizon DC Amended Petition"), filed March 19, 2004
n5 *TAC 19*, Response of Sprint Communications Company, L P ("Sprint") to the Petition for Arbitration and Motion to Dismiss ("Sprint Response"), filed March 12, 2004: Letter to Sanford M Speight, Acting Commission Secretary, from Craig D Dingwall, Director, State Regulatory, Sprint Communications Company, L. P., ("Sprint Amended Response"), filed March 16, 2004; Response of AT&T Communications of Washington D.C , LLC and Teleport Communications-Washington DC, Inc. to the Petition for Arbitration of Verizon Washington DC, Inc ("AT&T Response"), filed March 16, 2004, Response of Cavalier Telephone Mid-Atlantic, LLC To Verizon Washington DC, Inc 's Petition for Arbitration ("Cavalier Response"), filed March 16, 2004; Response of MCImetro Access Transmission Services, LLC, MCI Worldcom Communications, Inc., Intermedia Communications, Inc , and Worldcom-ICC, Inc. (collectively, "MCI") to Verizon Washington DC, Inc.'s Petition for Arbitration ("MCI Response"), filed March 16, 2004, OpenBand of DC, LLC's Revised Response to Petition for Arbitration of Verizon Washington DC, Inc ("OpenBand Response"), filed March 16, 2004, Letter to Sanford M Speight, Acting Commission Secretary, from Roderic L. Woodson and David A. O'Connor, Counsel for SBC Telecom, Inc , ("SBC Response"), filed March 16, 2004, Answer of A R C Networks Inc d/b/a Infohighway Communications Corporation, Broadview Networks Inc , Business Telecom Inc , Comcast Business Solutions Inc., DIECA Communications Inc d/b/a Covad Communications Company, Global Crossing Local Services Incorporated, IDT America Corp , KMC Telecom V Inc , NOW Communications Inc., Spectrotel Inc , Talk.com Holding Inc , Winstar Communications LLC, XO Communications, Inc., XO D C Inc , Xspedius Management Co of DC L L C , and Xspedius Management Co. of D.C., L L C "Competitive Carrier Coalition") ("Kelley Competitive Carrier Coalition Response"), filed March 16. 2004, Competitive Carrier Coalition's Motion to Dismiss and Response to Petition for Arbitration of Verizon Washington DC, Inc ("Swidler Competitive Carrier Coalition Motion and Response"), filed March 16, 2004; Letter to Sanford M Speight, Acting Commission Secretary, from Charon H Phillips, Regulatory Counsel. Verizon Wireless ('Verizon Wireless Response"), filed March 16, 2004

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4. On March 2, 2004, the Court of Appeals for the District of Columbia Circuit ("D C. Circuit") vacated several portions of the *TRO* in the *United States Telecommunications Association v FCC ("USTA II")*. n6 On August 20, 2004, the FCC released its *Interim Unbundling Order* that, *inter alia*, froze the rates, terms, and conditions under which incumbent local exchange carriers ("ILECs") offer access to certain unbundled network elements n7 This order also set a six-month schedule for the FCC's consideration and establishment of permanent unbundling rules n8

n6 *U S Telecom Ass'n v F C C , 359 F 3d 554* (D C Cir., 2004)
n7 Order and Notice of Proposed Rulemaking, *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, 19 FCC Rcd 16783 (2004)* ("*Interim Unbundling Order*")
n8 *Interim Unbundling Order*

5 Verizon **[*5]** DC submitted two revised amendments to its Petition on August 20, 2004 ("August 2004 Amended Petition") n9 On September 17, 2004, Verizon DC submitted revisions to the August 2004 Amended Petition to reflect the FCC's *Interim Unbundling Order* ("September 2004 Amended Petition") n10 ACN, AT&T, the KCCC, MCI, and US LEC responded to the August 2004 Amended Petition on September 10, 2004, n11 and to the September 2004 Amended Petition on October 12, 2004 n12

n9 *TAC 19*, Amendments and Issues List of Verizon Washington DC, Inc ('Verizon DC August 2004 Amendment"), filed August 20, 2004
n10 *TAC 19*, Verizon Washington DC, Inc 's Revised Amendment 1 and Request to Hold Amendment 2 in Abeyance ("Verizon DC September 2004 Amendment"), filed September 17, 2004.
n11 *TAC 19*, ACN Communications Services, Inc 's Response to Verizon's Proposed Amendments ("ACN Response to August 2004 Amended Petition"), filed September 10, 2004. Response and Arbitration Issues List of AT&T Communications of Washington D.C , LLC, Teleport Communications-Washington, D C , Inc , and ACC National Telecom Corp ("AT&T Response to August 2004 Amended Petition"), filed September 10, 2004, Letter to Sanford M. Speight, Acting Commission Secretary, from Genevieve Morelli and Andrea Pruitt Edmonds, Counsel to the Competitive Carrier Coalition ("KCCC Response to August 2004 Amended Petition"), filed September 10, 2004; Response of MCI to Verizon's Amendments and Issues List ("MCI Response to August 2004 Amended Petition"), filed September 10, 2004, Response of US LEC of Virginia L L C to Amendments of Verizon Washington DC, Inc. and Issues List of US LEC of Virginia L.L C ("US LEC Response to August 2004 Amended Petition"), filed September 10, 2004

[*6]

n12 *TAC 19*, Letter to Sanford M. Speight, Acting Commission Secretary, from Russell M Blau, Robin F Cohn, and Paul B Hudson, Counsel for ACN Communications Services, Inc ("ACN Response to September 2004 Amended Petition"), filed October 12, 2004, Comments of AT&T Communications of Washington D C , LLC, Teleport Communications-Washington, D C., Inc , and ACC National Telecom Corp ("AT&T Response to September 2004 Amended Petition"), filed October 12, 2004, Competitive Carrier Coalition's Response to Verizon's Updated Arbitration Filing ("KCCC Response to September 2004 Amended Petition"), filed October 12, 2004, Comments of MCI in Response to Verizon's Revised Amendment land Request to Hold Amendment 2 in Abeyance ("MCI Response to September 2004 Amended Petition"), filed October 12, 2004, Comments of US LEC of Virginia L L C in Response to Verizon Washington DC, Inc 's Revised Amendment 1 and Request to Hold Amendment 2 in Abeyance ("US LEC Response to September 2004 Amended Petition"), filed October 12, 2004

6. On February 4, 2005, the FCC released the text of its *Order on Remand* **[*7]** from the *USTA II* decision ("*Triennial Review Remand Order*" or "*TRRO*") which, *inter alia*, clarified and modified the impairment standard adopted in the *TRO* n13 The *Triennial Review Remand Order* also refined the rules and established transition or phase-out periods for certain types of dedicated interoffice transport, high-capacity loops, and mass market switching. n14 The FCC encouraged state commissions to monitor parties' compliance with the implementation of the conclusions adopted in the order Finally, the FCC mandated that the requirements of the *TRRO* would become effective on March 11, 2005, rather than 30 days after publication in the *Federal Register* n15

n13 *In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No 04-313 and CC Docket No 01-338, Order on Remand *("TRRO") 20 FCC Rcd at 2533, 2537-8 (2005)*
n14 *TRRO* at 2537-8
n15 *TRRO* at 2667

[*8]

7. On March 10, 2005, the Commission notified the parties that it had selected John Antonuk to serve as the Arbitrator in this proceeding The Arbitrator set the procedural schedule, including briefing dates After discussion, the parties agreed to a revised issues list and indicated that hearings were not necessary to resolve the issues on the revised list On July 8, 2005, AT&T, the CCC, n16 the CCG, n17 Sprint, US LEC, and Verizon DC filed briefs. n18 AT&T, the CCC, the CCG, US LEC, and Verizon DC filed reply briefs on August 5, 2005 n19

n16 As of this filing, the CCC consisted of ATX, CTC, and Starpower
n17 As of this filing, the CCG consists of Covad, XO, and Xspedius.
n18 *TAC 19*, Initial Brief of AT&T Communications of Washington DC, LLC and Teleport Communications-Washington, D C , Inc ("AT&T Brief"), filed July 8, 2005, Initial Brief of the Competitive Carrier Coalition ("CCC Brief"), filed July 8, 2005, Initial Brief of the Competitive Carrier Group ("CCG Brief"), filed July 8, 2005, Initial Brief of Sprint Communications Company, L P ("Sprint Brief"), filed July 8, 2005, Initial Brief of US LEC of Virginia L.L C ("US LEC Brief"), filed July 8, 2005, Verizon Washington DC, Inc 's Initial Brief ("Verizon DC Initial Brief"), filed July 8, 2005

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n19 *TAC 19*, Reply Brief of AT&T Communications of Washington DC, LLC and Teleport Communications-Washington, D C., Inc ('AT&T Reply Brief"), filed August 5, 2005; Reply Brief of the Competitive Carrier Coalition ('CCC Reply Brief"), filed August 5, 2005; Reply Brief of the Competitive Carrier Group ("CCG Reply Brief"), filed August 5, 2005, Reply Brief of US LEC of Virginia L L C ("US LEC Reply Brief"), filed August 5, 2005, Verizon Washington DC, Inc 's Reply Brief ("Verizon DC Reply Brief"), filed August 5, 2005

8 The Arbitrator filed his Recommended Decision on September 7, 2005 The CCC, Covad, Verizon DC, and XO filed partial appeals of the Recommended Decision to the Commission on September 16, 2005 n20 Verizon DC filed a motion to file a response and its response to the CLEC appeals on September 26, 2005. n21 On November 14, 2005, the CCC filed a motion to supplement the record n22 On November 16, 2005, Verizon DC also filed a motion to supplement the record. n23 Verizon DC filed a motion to withdraw some of its exceptions on November 22, 2005 n24

n20 *TAC 19*, Partial Appeal of Arbitration Decision of ATX Licensing, Inc. and CTC Communications Corp ("CCC Appeal"), filed September 16, 2005, Covad Communications Company's Petition for Reconsideration of Recommended Decision ("Covad Appeal"), filed September 16, 2005, XO Communications Services, Inc 's Petition for Reconsideration of Recommended Decision ("XO Appeal"), filed September 16, 2005, Verizon Washington DC, Inc 's Exceptions to Recommended Decision ("Verizon DC Appeal"), filed September 16, 2005

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n21 *TAC 19*, Verizon Washington DC, Inc 's Motion to File its Response to CLEC Exceptions to Recommended Decision ("Verizon DC Response Motion"), filed September 26, 2005; Verizon Washington DC, Inc 's Response to CLEC Exceptions to Recommended Decision ("Verizon DC Response"), filed September 26, 2005
n22 *TAC 19*, CCC Motion for Leave to File Supplemental Authority in Support of Partial Appeal of Arbitration Decision ("CCC Supplemental Authority Motion"), filed November 14, 2005.
n23 *TAC 19*, Verizon Washington DC, Inc 's Motion for Leave to File Notice of Supplemental Authorities Supporting its Exceptions to the Arbitrator's Recommended Decision ("Verizon DC Supplemental Authority Motion"), filed November 16, 2005; Verizon Washington DC, Inc 's Notice of Supplemental Authorities Supporting its Exceptions to the Arbitrator's Recommended Decision ("Verizon DC Supplemental Authority Notice"), filed November 16, 2005
n24 *TAC 19*, Verizon Washington DC, Inc.'s Motion to Withdraw its Exceptions to the Arbitrator's Recommended Decision on Issues 4, 5, and 9 ("Verizon DC Withdrawal Motion"), filed November 22, 2005

[*11]

III. PROCEDURAL ISSUES

A. Verizon DC Response Motion

9 In its motion to file its response to the CLECs' appeals, Verizon DC argues that Commission acceptance of its response will give the Commission a more complete record upon which to base its findings The Commission agrees, granting Verizon DC's motion and considering the Response in this Order

B. CCC Supplemental Authority Motion

10 In its Motion, the CCC requests the Commission to consider additional decisions from other state commissions that support its issues on appeal. The CCC avers that this information will provide a more complete record upon which to base a decision n25 The Commission agrees, grants the CCC's Supplemental Authority Motion, and adds the state commission decisions into the record

n25 CCC Supplemental Authority Motion at 1-2

C. Verizon DC Supplemental Authority Motion

11 In its Motion, Verizon DC requests the Commission to review additional state commission arbitration decisions in this proceeding. Verizon DC avers **[*12]** that these decisions will assist the Commission in deciding the issues raised by the parties' appeals n26 The Commission agrees, grants Verizon DC's Supplemental Authority Motion, and adds the state commission decisions into the record

n26 Verizon DC Supplemental Authority Motion at 1.

D. Verizon DC Withdrawal Motion

12 Part of the Recommended Decision on Issues 4, 5, and 9 requires Verizon DC to submit a list of unimpaired wire centers that includes MCI facilities as facilities owned by a Verizon DC affiliate Verizon DC objected to this decision in its Appeal. However, in its Withdrawal Motion, Verizon DC now seeks to withdraw these objections Verizon DC argues that these objections are moot now that Verizon has agreed to count MCI facilities as its affiliated facilities as part of the Verizon-MCI merger To Verizon DC, these objections are now moot n27 The Commission accepts Verizon DC's Withdrawal Motion and discusses its substance in paragraph 29

n27 Verizon DC Withdrawal Motion at 1-2

[*13]

IV. DISCUSSION

13 The Recommended Decision resolved 27 contentious issues. The parties appealing the Recommended Decision did so only in part, focusing on Issues 3, 4, 5, 10, 12, 13, 14, 16, 20, and 27. Additionally, the CCC alleges that the Arbitrator did not reach decisions on other issues For those issues that were not appealed by the parties, the Commission accepts the Recommended Decision's disposition of those issues n28 We address each of the objections to the Recommended Decision below

n28 For those uncontested issues, the Commission directs the parties to incorporate into their amended interconnection agreements provisions that correspond to the determinations made in the Recommended Decision

A. Issue 3 -- Local Circuit Switching

1. Recommended Decision

14 Issue 3 stated·

> What obligations, if any, with respect to unbundled access to local circuit switching, including mass market and enterprise switching (including Four-Line Carve-Out switching), and tandem switching, should be included [*14] in the Amendment to the parties' interconnection agreements?

15 The *TRRO* eliminated circuit switching from the national UNE list and created rules and a timeframe for transitioning from local circuit switching to other arrangements The Arbitrator determined that the *TRRO's* transition rules should be included in the amended interconnection agreements. The Arbitrator also found that the *TRRO* prohibited CLECs from obtaining new unbundled network element -- platform ("UNE-P") arrangements, even for existing customers during the transition period, although CLECs could still change and add features to existing UNE-P lines during that period n29

n29 Recommended Decision at 12, P 46-48

16. The Arbitrator also decided to allow conversion orders to occur throughout the transitional period He determined that UNE pricing as modified in the *TRRO* ("modified UNE pricing") should end and new pricing should begin on the last day of the *TRRO* transition period (March 11, 2006), regardless of the date of the [*15] conversion The Arbitrator disagreed with the contention that Verizon DC should provide local circuit switching after the end of the transition period for conversions that are not completed by March 11, 2006, and determined that Verizon DC could charge prices similar to those for equivalent services after March 11, 2006, until the conversion is complete The Arbitrator determined that Verizon DC could not convert circuit switches to packet switches during the transition period in order to escape the time-limited obligation to provide the circuit switching functionality n30

n30 Recommended Decision at 13, P 49-51

2. Exceptions

17 Verizon DC objects to the Recommended Decision's disposition of Issue 3 on two points First, Verizon DC objects to the Arbitrator's decision to require Verizon DC to continue providing circuit switching when Verizon DC replaces circuit switches with packet switches, arguing that the *TRRO* ends Verizon DC's unbundling obligation immediately upon this replacement Verizon DC argues [*16] that the FCC's switching rules apply not only to the packet switching functionality, but also to the packet switches themselves, so Verizon DC's unbundling obligation ends when the packet switch replaces the circuit switch. n31 Verizon DC urges the Commission to follow decisions in Massachusetts ("MA DTE"), Pennsylvania ("PA PUC"), and Washington ("WA UTC") and deny access to packet switches, not just packet switching functionality, during the *TRRO-created* transition period. n32

n31 Verizon DC Appeal at 21
n32 Verizon DC Appeal at 22

18 Second, Verizon DC objects to the Arbitrator's decision that modified UNE pricing will remain in effect throughout the transition period, regardless of the date on which UNE arrangements are converted to other arrangements Verizon DC contends that the *TRRO* permits modified UNE pricing only until Verizon DC completes the transi-

tion. n33 Verizon DC also claims that this decision would impose an administrative burden on Verizon DC because Verizon DC's billing systems **[*17]** would need to be altered n34

n33 Verizon DC Appeal at 22
n34 Verizon DC Appeal at 23

3. Decision

a. Obligation to Provide Circuit Switching Over Packet Switches

19. In the *TRO*, the FCC defined "local circuit switching" as encompassing line-side and trunk-side facilities, as well as the features, functionalities, and capabilities of the switch n35 The FCC's definition of packet switching, reiterated in the *TRO*, is "routing or forwarding packets, frames, cells or other data units based on address or other routing information contained in the packets, frames, cells or other data units" and the functions performed by DSLAMs n36 The *TRO* excludes packet switching from the UNE list, with no exceptions n37 The FCC did not amend this decision in the *TRRO* Thus, packet switching was never a UNE, while mass market circuit switching remained on the national UNE list until the *TRRO*

n35 *TRO at 18 FCC Rcd 17246, P 433*

[*18]

n36 *TRO at 18 FCC Rcd 17321, P 535*
n37 *TRO at 18 FCC Rcd 17324, P 535-541*

20 While the CLECs argue and the Arbitrator determined that this Commission can order local circuit switching to be provided over packet switches when Verizon DC replaces a circuit switch with a packet switch during the transition period, it appears that the language of the *TRO* extends not only to packet switching functionality, but also to the packet switches themselves. The *TRO* specifically states that "[the FCC does] not require packet switches to be unbundled " n38 Thus, the Commission cannot require unbundling of packet switches to be used to provide local circuit switching, even during the transition period Based on this language, the Commission reverses the Recommended Decision on this issue.

n38 *TRO at 18 FCC Rcd 17062, P 448*

21 Notwithstanding **[*19]** this determination, the Commission chooses to require Verizon DC to provide local circuit switching functionality by some means during the transition period if it chooses to replace a circuit switch with a packet switch. This requirement will ensure that CLECs have access to circuit switching, which they are permitted to have on a limited basis until the end of the transition period The Commission chooses to follow the example of the MA DTE, which declined to require Verizon to provide local circuit switching functionalities over packet switches, but required Verizon DC to provide these functionalities through some other arrangement n39 With the transition date approaching rapidly, the Commission finds that this issue will soon become moot, so there should be no hardship to Verizon DC to accommodate these situations

n39 Mass Arb Order at 183

b. Duration of UNE Pricing

22 In the *TRRO*, the FCC determined that the CLECs will "continue to have access to UNE-P priced [sic] at TELRIC plus one dollar until **[*20]** the incumbent LEC successfully migrates those UNE-P customers to competitive LECs' switches or to alternative access arrangements negotiated by the carriers." n40 This language clearly indicates that the modified UNE pricing lasts only until the conversion to alternative arrangements, not during the transition period after conversion The Arbitrator does not provide any support for his decision to extend modified UNE pricing For the reasons aforementioned, the Commission reverses the portion of the Recommended Decision that requires Verizon DC to price circuit switching at transitional rates even after a conversion is complete

n40 *TRRO at 20 FCC Rcd 2641, P 199 See also, 20 FCC Rcd 2651, P 216,* "However, during that twelve-month period, incumbent LECs must continue providing access to mass market unbundled local circuit switching at a rate of TELRIC plus one dollar for the competitive LEC to serve those customers until the incumbent LECs successfully convert those customers to the new arrangements."

[*21]

B. Issue 4 -- High-capacity Loops

1. Recommended Decision

23. Issue 4 reads.

What obligations, if any, with respect to unbundled access to DS1 loops, DS3 loops, and dark fiber loops should be included in the Amendment to the parties' interconnection agreements?

24. The Arbitrator determined that language mirroring all of the FCC's high-capacity loop rules should be included in the amended interconnection agreements The amended interconnection agreements must also include the criteria and processes for designating the wire centers at which high-capacity loops may not be ordered ('qualified wire centers") The Arbitrator directed Verizon DC to post a list of wire centers in which high capacity loops are not available about 45 days before the estimated effective date of the amended interconnection agreements If a CLEC wishes to challenge a wire center on Verizon DC's list, then it needs to do so within 10 days of the posting by requesting the underlying data supporting the inclusion The Arbitrator also created a dispute resolution process if the CLEC is not satisfied with Verizon DC's documentation The Arbitrator determined that same process could be used if Verizon **[*22]** DC adds wire centers to its list in the future. n41

n41 Recommended Decision at 15-16, P 58-64

25 The Arbitrator further determined that as of the effective date of the *TRRO*, CLECs could not add any high capacity loops in the qualifying wire centers n42 Regarding pricing, the Arbitrator ruled that conversion orders would be allowed during the transition period Changed pricing would become effective on the last day of the transition period n43

n42 Recommended Decision at 17, P 65
n43 Recommended Decision at 17, P 65

26 The Arbitrator addressed the Verizon-MCI merger by noting that the number of qualified wire centers could change once MCI becomes an affiliate of Verizon DC. The Arbitrator ruled that Verizon DC's first posting of disqualified wire centers must indicate whether the status of the wire center would change if MCI were **[*23]** to become a Verizon DC affiliate n44

n44 Recommended Decision at 17, P 66

2. Exceptions

27 Verizon DC argues that the Recommended Decision should not have required Verizon DC to submit a new list of qualified wire centers that would treat MCI as an affiliate after the completion of the Verizon-MCI merger. Verizon DC argues that once a wire center is exempt from unbundling requirements, it remains exempt, even if circumstances change so that the wire center fails to meet the thresholds at a later date Verizon DC contends that the purpose of the threshold requirements is to capture both existing and potential competition, so that if the wire center falls beneath the threshold for actual competition, it would still meet the threshold for potential competition because it once had sufficient actual competition n45 Verizon DC argues that the fact that MCI was able to collocate at a particular wire center is evidence that other facilities-based providers may also do so This ability to collocate does not change even **[*24]** if MCI becomes an affiliate of Verizon DC n46

n45 Verizon DC Appeal at 15
n46 Verizon DC Appeal at 15

3. Decision

28 In the *TRRO*, the FCC eliminated unbundling requirements for high capacity loops at certain wire centers To eliminate unbundling for DS3 loops, the FCC requires that the qualified wire center have at least 38,000 business lines and at least four fiber-based collocators. n47 For DS1 loops, the wire center threshold is at least 60,000 business lines and at least four fiber-based collocators n48 To qualify for relief from unbundling, Verizon DC does not have to demonstrate that these collocators have actually deployed DS1 or DS3 loops, potential deployment is sufficient to end the unbundling obligation n49 Additionally, the FCC determined that once a wire center is deemed to have met the standard for no loop unbundling at either the DS1 or the DS3 level, the unbundling requirements at that wire center cease for that particular level. n50 There is no exception to this rule

n47 *47 C F R § 51 319(a)(5)*
[*25]

n48 *47 C F.R § 51 319(a)(4)*
n49 *TRRO at 20 FCC Rcd 2633, P 178*
n50 *TRRO at 20 FCC Rcd 2627, P 167, n 466*

29 Based on this guidance, the Commission would find that the Arbitrator's decision to require Verizon DC to revise its list of qualified wire centers upon completion of the Verizon-MCI merger is erroneous But as Verizon DC points out in its Withdrawal Motion, one of the conditions imposed on Verizon by the FCC's merger approval is a requirement to reevaluate all wire centers, excluding MCI as a collocator n51 Because the FCC merger approval accomplishes the same result as the Arbitrator's decision, Verizon DC's objections to this decision are moot Based on the FCC's action, the Commission requires Verizon DC to post a list of qualifying wire centers, excluding MCI from its

calculations, within 45 days of the effective date of the amended interconnection agreements Additionally, the Commission requires Verizon DC to submit a list of such wire centers to the Commission n52 **[*26]**

n51 *In the Matter of Verizon Communications Inc and MCI, Inc Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order at 28-29, P 51, Appendix G, UNE Condition 2, FCC 05-184, rel November 17, 2005

n52 This determination applies to Verizon DC's non-impairment lists for both high capacity loops and dedicated transport, as the Arbitrator's decision regarding Verizon DC's non-impairment lists appears to apply to both lists

C. Issue 5 -- Dedicated Transport

1. Recommended Decision

30 Issue 5 states

> What obligations, if any, with respect to unbundled access to dedicated transport, including dark fiber transport, should be included in the Amendment to the parties' interconnection agreements?

31 The Arbitrator made many of the same rulings for dedicated transport as for high capacity loops He determined that the language in the FCC rules regarding dedicated transport should be included in the amended interconnection agreements When wire centers are **[*27]** added to the non-impairment list, the *TRRO* transition rules then apply to the new wire center. CLECs cannot order new dedicated transport between non-impairment wire centers as UNEs during the transition period The Arbitrator also adopted the same procedures regarding listing qualifying wire centers, CLEC self-certification, the timing of migration orders, and modified pricing for transport as he did for high capacity loops n53

n53 Recommended Decision at 18, P 71

32 Verizon DC and the CLECs disagree about the number of DS1 transport circuits that CLECs could order along a given route if the DS3 transport circuit along that route is not required to be unbundled The Arbitrator determined that if a CLEC wished to purchase more than 10 DS1s along a route, it can purchase a DS3 circuit only as a UNE, even if that circuit is otherwise not required to be unbundled n54

n54 Recommended Decision at 18-19, P 72-73.

[*28]

2. Exceptions

33 The CCC and XO object to the Arbitrator's cap on the number of DS1 circuits along any given route, arguing that this finding contradicts the *TRRO* XO contends that the *TRRO's* cap on DS1 circuits applies only on routes where Verizon DC is no longer required to provide DS3 transport n55 The CCC and XO contend that while the FCC's rules do not contain this limitation, the language of the *TRRO* clearly does. The CCC and XO argue that the Commission must look beyond the language of the rule to the *TRRO* to determine the full meaning of the rule. n56 The CCC argues that the DS1 cap was intended to prevent CLECs from evading a non-impairment determination on DS3 transport for a given route Given that rationale, the CCC argues that there is no reason to apply the cap when DS3 transport is still a UNE on a particular route n57 XO asks the Commission to reverse the Recommended Decision and accept the CCG language limiting the DS1 cap n58

n55 CCC Appeal at 3, XO Appeal at 2
n56 CCC Appeal at 3, XO Appeal at 3
n57 CCC Appeal at 4
n58 XO Appeal at 3

[*29]

34 In response, Verizon DC maintains that the Arbitrator was correct in his decision regarding the applicability of the DS1 cap Verizon DC argues that *47 C F R § 51 319(e)(2)(ii)(B)* clearly establishes a cap on DS1 transport circuits for any route. There are no exceptions in the rule. n59 Verizon DC indicates that this rule is analogous to the DS1 loop rule, which also applies regardless of whether DS3 loops exist in the wire center Verizon DC argues that the FCC indicated that it imposed "similar" rules for DS1 transport and loops n60 Verizon DC also argues that rulemaking principles state that a statement in the underlying FCC order cannot be used to alter the plain meaning of a rule Because the FCC's DS1 transport rules are unambiguous, Verizon DC avers, there is no need to look to the *TRRO* to provide additional interpretation. n61 Verizon DC also contends that the Commission has no authority to determine independently whether any unbundling arrangement satisfies section 251 of the Act or the FCC's rules n62 Verizon DC contends that the appropriate forum for the CLECs' complaint against the rule is the FCC, not this Commission. **[*30]** n63 Verizon DC indicates that the commissions in Massachusetts, Rhode Island, Florida, Michigan, and Texas have reached the same conclusion n64

n59 Verizon DC Response at 2
n60 Verizon DC Response at 3
n61 Verizon DC Response at 4
n62 Verizon DC Response at 5
n63 Verizon DC Response at 6
n64 Verizon DC Response at 2-3.

3. Decision

35. The parties contend that the FCC's rules on dedicated transport and the dedicated transport provisions in the *TRRO* conflict, so that a cap on DS1 transport circuits is in the rules, while the *TRRO* contains an exception to this general rule In looking at the FCC's dedicated transport rules, *47 C F R § 51 319(e)(2)(ii)(B)* is the only rule relating to the cap on DS1 transport The language of *47 C F R § 51 319(e)(2)(ii)(B)* reads:

> Cap on Unbundled DS1 transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated **[*31]** transport circuits on each route where DS1 dedicated transport is available on an unbundled basis

There is no exception to this cap in any other rule. In paragraph 128 of the *TRRO*, the FCC states.

> *Limitation on DS1 Transport* On routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier must obtain on that route to 10 circuits. This is consistent with the pricing efficiencies of aggregating traffic While a DS3 circuit is capable of carrying 28 uncompressed DS1 channels, the record reveals that it is efficient for a carrier to aggregate traffic at approximately 10 DS1s When a carrier aggregates sufficient traffic on DS1 facilities such that it could efficiently use a DS3 facility, we find that our DS3 impairment conclusions should apply n65

The first sentence of this paragraph appears to create an exception to the DS1 cap However, the rest of the paragraph states that if a CLEC has sufficient capacity to use more than 10 DS1 transport circuits, then it can efficiently use a DS3 facility and should do so This conclusion **[*32]** is bolstered by comments in a later portion of the *TRRO* that set a cap of 10 DS1 loops In footnote 489, the FCC notes

> we impose a similar cap on the number of DS1 transport circuits that can be purchased by a given competitive LEC on a single route n66

Taking all of these statements and the rule together, the Commission finds that there is no conflict between *47 C F R § 51 319(e)(2)(ii)(B)* and the language of the *TRRO* The Commission upholds the Recommended Decision on this issue

> n65 *TRRO* at 20 Rcd 2606-2607, P 128
> n66 *TRRO* at 20 Rcd 2634, P 181, n 489

D. Issue 10 -- Change of Law Provisions

1. Recommended Decision

36 Issue 10 reads:

> Should Verizon be required to follow the change of law and/or dispute resolution provisions in existing interconnection agreements if it seeks to discontinue the provisioning of UNEs under federal law?

37 The parties disagreed about the timing of the implementation of the *TRO* and *TRRO* changes **[*33]** Verizon DC contended that the termination of unbundling obligations in the *TRO* and *TRRO* were self-effectuating, so that they could occur before interconnection agreement amendments were negotiated and approved The CLECs disagreed, arguing that they could have access to UNEs delisted by the *TRO* and *TRRO* until the parties had signed interconnection agreement amendments incorporating these changes The Arbitrator found that the *TRO* and *TRRO* delistings did not preempt the interconnection agreement amendment process He determined that the *TRRO* did not create a firm beginning date that terminated access to new UNEs automatically. Instead, the *TRRO* created only a firm end date for requiring conversions from delisted UNEs to alternative arrangements March 11, 2006 n67 The Arbitrator determined that the beginning date for terminating access to any new delisted UNEs is the date that the Commission issues an order regarding the Recommended Decision n68

> n67 Recommended Decision at 33-34, P 138
> n68 Recommended Decision at 34, P 140

[*34]

2. Exceptions

38 Verizon DC objects to the Arbitrator's decision concerning the date upon which new orders for *TRRO* delisted UNEs would end Verizon DC argues that as of March 11, 2005, CLECs could not place any new orders for *TRRO* delisted UNEs. Verizon DC argues that the March 11, 2005 cutoff date applies to orders for switching, DS1 loops, DS3 loops, dark fiber loops, dedicated DS1 transport, dedicated DS3 transport, and dark fiber transport n69 Verizon DC argues that no interconnection agreement amendments are necessary to effectuate these *TRRO* changes n70 Thus, the Recommended Decision errs when it refers to March 11, 2005 as the effective date for changes in law instead of for

barring new orders for delisted UNEs n71 Verizon DC argues that nearly every state commission and reviewing tribunal has rejected the Arbitrator's approach on this issue n72

n69 Verizon DC Appeal at 4-6
n70 Verizon DC Appeal at 6
n71 Verizon DC Appeal at 7.
n72 Verizon DC Appeal at 8-10 In its Supplemental Authority Notice, Verizon DC adds two states to its list of states that have rejected the Recommended Decision's analysis of this issue Verizon DC Supplemental Authority Notice at 1-2

[*35]

3. Decision

39 The Commission disagrees with the Arbitrator's determination that the *TRRO* failed to set a start date for ending access to delisted UNEs The FCC's rules adopted in the *TRRO* clearly specify that CLECs may not have access to newly delisted UNEs n73 Additionally, the *TRRO* prohibits new orders for delisted UNEs n74 The FCC also clearly stated that the transition period for converting delisted UNEs to alternative arrangements began on the *TRRO's* effective date, March 11, 2005 n75 The FCC did require carriers to amend their interconnection agreements to comply with the *TRRO* within the transition period but did not delay the implementation of the decisions in the *TRRO* until interconnection agreements are amended n76 Taking into account the FCC's prohibition on new orders of delisted UNEs, it appears that the FCC's guidance regarding the amendment of interconnection agreements was intended to direct the parties to include detailed transition plans in their interconnection agreement amendments The FCC's language was not meant to permit new orders of delisted UNEs until amendments are completed n77 Because of the plain language in the *TRRO* **[*36]** , the Commission declines to adopt the Arbitrator's decision on this issue and determines that the effective date of the *TRRO* delisting was March 11, 2005 Thus, CLECs are not entitled to order new delisted UNEs as of that date

n73 *47 C F R. § 51 319(a)(4)(iii)*, 51 319(a)(5)(iii), 51.319(d)(2(iii); 51 319(e)(2)(ii)(C); 51 319(e)(2)(iii)(C), 51 319(2)(iv)(B)
n74 *TRRO at 20 FCC Rcd 2613-2614, P 142* (barring new orders for delisted dedicated transport UNEs); *TRRO at 20 FCC Rcd 2641, P 195* (barring new orders for delisted loop UNEs), *TRRO at 20 FCC Rcd 2661, P 227* (for circuit switching).
n75 *TRRO at 20 FCC Rcd 2614, P 143* (for dedicated transport); *TRRO* at 20 RCC Rcd 2641, P 196 (for delisted loops); *TRRO at 20 FCC Rcd 2661-2662, P 227* (for circuit switching)
n76 *TRRO at 20 FCC Rcd 2614, P 143* (for dedicated transport), *TRRO at 20 FCC Rcd 2641, P 196* (for delisted loops). *TRRO at 20 FCC Rcd 2661-2662, P 227* (for circuit switching)

[*37]

n77 The Commission notes that most other state commissions have determined that the ban on new delisted UNE orders supersedes UNE provisions in interconnection agreements *See, e g* , MA DTE Order at 71-75 Additionally, the courts have overruled the state commissions that determined that the *TRRO* did not override the UNE provisions in interconnection agreements *BellSouth Telecomms , Inc v MCIMetro Access Transmission Servs* , LLC, No. 05-1180 (11th Cir. Sept 15, 2005).

E. Issue 12 -- Commingling

1. Recommended Decision

40 Issue 12 reads.

How should the interconnection agreements be amended to address changes arising from the *TRO* with respect to commingling of UNEs or Combinations with wholesale services, EELs, and other combinations?

41. Two of the most important disputes in this proceeding concern commingling and conversions The term "commingling" refers to the types of services that may permissibly be provided over a UNE. The process of converting a UNE to and from another type of arrangement is termed a "conversion." The *TRO's* commingling and conversion **[*38]** rules differ significantly from previous rules The parties had two major disputes regarding the *TRO's* rules first, whether these rules were new rules, or merely amendments of existing rules, and second, which types of services could be commingled As a threshold matter, the Arbitrator determined that the *TRO's* commingling and conversion requirements were new requirements, not merely modifications of existing rules. Therefore, CLECs could not obtain the benefits of these new rules until the interconnection agreements are amended and executed n78

n78 Recommended Decision at 38, P 154

42 The Arbitrator then turned to the types of services that could be commingled. The Arbitrator apparently accepted most of Verizon DC's proposed language, including the definitions of the terms "Qualifying Wholesale Service" and "Qualifying UNE" because they were different from the FCC's invalidated definition of "qualifying service " However, because the Arbitrator found that Verizon DC's definition of "Qualifying Wholesale **[*39]** Service" did not include all of the services permitted to be commingled under the *TRO*, he required this language to be broadened n79 The Arbitrator also required Verizon DC to remove language that would permit Verizon DC to replace non-compliant extended enhanced links ("EELs") with any arrangement selected by Verizon DC The Arbitrator agreed with Sprint's language, which limits Verizon DC to converting a non-compliant EEL to a special access arrangement n80

n79 Recommended Decision at 38, P 157
n80 Recommended Decision at 38, P 158

43 To obtain high-capacity EELs, the Arbitrator found that CLECs must self-certify their eligibility for new and existing EELs on a circuit-by-circuit basis. The Arbitrator also determined that this self-certification could be done in bulk As part of the self-certification, the Arbitrator required that CLECs affirm that they have the data to justify their self-certification but not actually provide the documentation with the self-certification In audits of this underlying **[*40]** data, the Arbitrator found that CLECs would be required to pay any costs of the audit only if they were materially non-compliant with the FCC's rules The Arbitrator determined that Verizon DC would pay its own costs for the audit in any circumstance, and pay the CLECs' costs if the CLECs were found to be compliant with the FCC's rules n81

n81 Recommended Decision at 38, P 156

2. Exceptions

44 The parties have several objections to the Recommended Decision on this issue First, XO argues that the FCC rules permit more commingling than the Arbitrator permits in the Recommended Decision Because the *TRO* permits general commingling, XO argues that the term "Qualifying UNEs" is too limiting and should not be included in the amended interconnection agreements XO argues that the interconnection agreements should clarify that UNEs and UNE combinations can be combined with Verizon DC resold and wholesale services and facilities n82

n82 XO Appeal at 4

[*41]

45. Verizon DC responds by arguing that its definition of "Qualifying UNE" correctly reflects the FCC's commingling rules n83 Verizon DC contends that the *TRO* did not permit unlimited commingling, only commingling of UNEs and UNE combinations with certain services Verizon DC avers that its language does not prevent permitted commingling of newly delisted UNEs during the transition period. n84 Verizon DC contends that its language also permits the conversion of delisted UNEs to special access circuits n85 Verizon DC argues that the MA DTE has accepted Verizon DC's position n86

n83 Verizon DC Response at 6
n84 Verizon DC Response at 7
n85 Verizon DC Response at 7-8
n86 Verizon DC Response at 6-7

46. XO alleges that the Recommended Decision fails to set an effective date for Verizon DC to meet its commingling, conversion, and routine network modification obligations. XO argues that this date should be the date that the Commission issues an order adopting the Recommended Decision, not the **[*42]** date on which the amended interconnection agreements are executed. XO contends that this date is appropriate since these obligations predate the *TRO* n87

n87 XO Appeal at 5

47. Verizon DC objects to XO's proposed effective date, arguing that the effective date should be the date of execution of the amended interconnection agreements Verizon DC argues that the effective date should not be set any earlier because the routine network modification and commingling rules are new rules, not merely clarifications of existing rules. To Verizon DC, interconnection agreement amendments arising from new rules should become effective only upon execution of the amended agreement, not before n88 Verizon DC contends that the FCC and the MA DTE, PA PUC, and WA UTC have all agreed with Verizon DC's position on these issues n89

n88 Verizon DC Response at 8
n89 Verizon DC Response at 8-9

[*43]

3. Decision

a. Definition of "Qualifying UNE"

48 The *TRO* greatly expanded CLECs' ability to commingle UNEs and UNE combinations with non-UNE facilities and services. These facilities and services include wholesale services, such as switched and special access services offered pursuant to tariff, as well as resold services n90 The *TRO's* commingling rules did have one limitation. UNEs could be commingled only if they were being used to provide "qualifying services," a term defined in the *TRO*. n91 The *USTA II* court invalidated the FCC's definition of "qualifying services." n92 On remand, the FCC affirmed its commingling rules but determined that CLECs could not obtain access to UNEs if they were to be used solely for the provision of wireless or long distance services. n93

n90 *TRO at 18 FCC Rcd 17343, 13748, PP 579, 584*
n91 *TRO at 18 FCC Rcd 17068, P 132-153 and 17352, 17354, PP 591, 595* The FCC defined a "qualifying service" as telecommunications services that either are similar to or substitutes for telecommunications services that were traditionally offered ILECs Examples of these services included local exchange service and access services *TRO at 18 FCC Rcd 17068, P 135*

[*44]

n92 *USTA II* at 592.
n93 *TRRO at 20 FCC Rcd 2552-2553, P34*

49. Verizon DC's proposed definition of "Qualifying UNE" is acceptable, because it does not track the definition of the invalidated term "qualifying services " However, Verizon DC's proposed definition of "Qualifying Wholesale Services" is problematic. As the Arbitrator points out, the term does not adequately capture the extent of the services that can be commingled In particular, the definition excludes resold services, which are expressly included by the FCC The Commission agrees with the Arbitrator that Verizon DC's definition of "Qualifying Wholesale Services" must be broadened to include resold services and changed to include all of the services that can be commingled according to paragraphs 579 and 584 of the *TRO* Thus, the Commission affirms the Recommended Decision on this issue.

b. Effective Date of Commingling Requirements

50 The *TRO* makes it clear that the commingling and conversion rules are new rules, not merely clarifications of existing rules. n94 Additionally, the **[*45]** *TRO* states that these rule changes are not self-executing, they require amendment of interconnection agreements to be effective n95 Because these rules must be implemented in interconnection agreement amendments, they cannot become effective until the date that the amendments are executed The Commission upholds the Arbitrator's Recommended Decision on this issue

n94 *TRO at 18 FCC Rcd 17343, P 579* There, the FCC stated that it "modified [its] rules to affirmatively permit carrier to commingle UNEs and combinations of UNEs with services " The word "modify" signals that these are new rules, not clarifications of earlier rules
n95 *TRO at 18 FCC Rcd 17405, P701*

F. Issue 13 -- Miscellaneous UNEs and Other Requirements

1. Recommended Decision

51. The parties had different opinions on the scope of Issue 13 Verizon DC's Issue 13 states·

Should the [interconnection agreements] be amended to address changes or clarifications, if any, arising **[*46]** from the *TRO* with respect to. (a) fiber loops, hybrid loops and packet switching; (b) line splitting, line sharing, and line conditioning; (c) retirement of copper loops; or (d) network interface devices?

The CCC's version of Issue 13 is as follows

Issue 13(A) Should the unbundling limitations for FTTH, FTTC and Hybrid loops be applied to customer premises other than "mass market" customer premises, of, for MDUs, other than "predominantly residential" MDUs? If so, how should the agreement define "mass market" and "predominantly residential" MDUs?
Issue 13(B) Should the voice-grade channel provided pursuant to the FTTH and Hybrid Loop sections of the Amendment be subject to the same rates and terms as a DSO UNE loop?

Issue 13(C) What terms should apply if and when Verizon proposes to retire copper loops that are in use by a CLEC?

52 As a threshold matter, the Arbitrator decided that the amended interconnection agreements should contain the FCC's definitions for fiber-to-the-home ("FTTH") and fiber-to-the-curb ("FTTC"), but not Verizon DC's definition of fiber-to-the-premises ("FTTP") n96 The Arbitrator determined that the interconnection agreement amendments should **[*47]** indicate that unbundling is not required for new FTTH and FTTC loops n97 For overbuilt FTTH and FTTC loops, the Arbitrator ruled that the interconnection agreement amendments should track the FCC's rules n98

n96 Recommended Decision at 28, P 115
n97 Recommended Decision at 40, P 163
n98 Recommended Decision at 40, 44, PP 165-166, 183

53 Regarding the time division multiplexing ("TDM") features, functionalities, and capabilities of hybrid loops, the Arbitrator determined that Verizon DC is not required to provide TDM capability where it does not already exist n99 The Arbitrator also ruled that Verizon DC, not the CLEC, chooses whether to provide a hybrid or copper loop to a CLEC for narrowband services n100

n99 Recommended Decision at 41, P 169
n100 Recommended Decision at 42, P 174

2. Exceptions

54 The exceptions focus **[*48]** on two issues relating to Verizon DC's provision of TDM capabilities and the scope of the FCC's FTTH and FTTC rules Regarding TDM capabilities, XO contends that the Recommended Decision does not effectuate the FCC's intent for Verizon DC to supply TDM features and capabilities on a nondiscriminatory basis XO contends that the Commission should require Verizon DC to provide TDM to CLECs wherever these features and capabilities exist n101 In response, Verizon DC argues that XO errs by contending that Verizon DC is required to build TDM capabilities where they do not exist. Building such new capabilities would be contrary to the FCC's *FTTC Order*, Verizon DC claims. Verizon DC also contends that the MA DTE agreed with Verizon DC on this issue n102

n101 XO Appeal at 7
n102 Verizon DC Response at 13

55. The CCC objects to the Arbitrator's finding that the restrictions on FTTH and FTTC unbundling apply to all customers, not just residential customers The CCC argues that even though the rules are silent on **[*49]** the scope of customers affected by the FTTH and FTTC restrictions, the *TRO* notes over 20 times that the FTTH and hybrid loop rules were intended to apply only to the mass market, not to the enterprise market. n103 The CCC contends that because the FCC has determined that its orders and rules have equal interpretative weight, the Commission should rely on the language of the *TRO* to limit the scope of the unbundling restriction to residential customers The CCC also alleges that the Arbitrator's interpretation renders the FCC's decisions to list dark fiber loops as a UNE and to apply unbundling relief to primarily residential multi-dwelling unit buildings ("MDUs") meaningless n104 In further support of its position, the CCC argues that the *TRRO's* extensive explanation of its DS1 and DS3 loop rules did not indicate that these rules apply to hybrid loops n105 In its Supplemental Authority Motion, the CCC avers that the Illinois Commerce Commission and the Maine Public Utility Commission have agreed that the FCC's FTTH and FTTC rules only apply to the residential market n106

n103 CCC Appeal at 6
[*50]

n104 CCC Appeal at 7-8
n105 CCC Appeal at 8
n106 CCC Supplemental Authority Motion at 1-2

56. Alternatively, the CCC urges the Commission to clarify that DS1 and DS3 loops are not included in the definitions of FTTC, FTTH, and hybrid loops Otherwise, the CCC contends, the hybrid loop rules could be used as a way to eliminate DS1 and DS3 unbundling obligations preserved by the *TRRO* n107

n107 CCC Appeal at 8-9

57. Verizon DC responds by arguing that the FCC has clarified through *Errata* that its FTTH and FTTC rules apply to all customers, not merely residential customers n108 Since the FCC's rules clearly eliminate the distinction between residential and enterprise customers, Verizon DC argues that any other language in the FCC orders should be disregarded. n109 Verizon DC indicates that the MA DTE has found that the FCC's FTTH and FTTC rules apply to all customers

n108 Verizon DC Response at 10-11
[*51]

n109 Verizon DC Response at 12-13.

3. Decision

a. Obligation to Unbundle TDM Capabilities

58 TDM capabilities are non-packetized, high-capacity capabilities provided over circuit switched networks These capabilities are typically associated with enterprise, not mass market customers. But in the context of providing hybrid loops110 that CLECs can use to offer broadband service to mass market customers, the FCC ruled that ILECs must continue to provide TDM capabilities on these loops The *TRO* also prohibited ILECs from modifying their networks to prevent access to TDM capabilities by CLECs 111 However, the FCC ruled in its *FTTC Order* that ILECs are not required to build TDM capabilities into new packet-based networks or existing packet-based networks that do not currently have TDM capability n112 The Arbitrator's decision followed these two FCC decisions Thus, the Commission upholds the Arbitrator's decision to follow the language of *47 C F R 51 319(a)(2)(ii)*, adding a provision clarifying that Verizon DC does not have to build TDM capability [*52] where it does not currently exist

n110 *47 C F R 51 319(a)(2)(ii)* defines hybrid loops as local loops consisting of fiber and copper cable The fiber cable is usually in the feeder plant, while the copper cable is usually in the distribution plant
n111 *TRO, 18 FCC Rcd at 17153, P 294* This decision was included in the network modification rules, which were upheld in *USTA II See, USTA II, 359 F 3d at 577-578*

n112 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Development of Wireline Services Offering Advanced Telecommunications Capability, CC Dockets No 01-338, 96-98, 98-147,19 FCC Rcd 20293,* Order on Reconsideration ("*FTTC Order*") and *FTTC Errata*, (October 18 and 29, 2004)

b. Applicability of the FTTH and FTTC Rules [*53] to Enterprise Customers

59 The FCC's rules defining FTTH and FTTC are as follows

(A) Fiber-to-the-home loops A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, serving an end user's customer premises or, in the case of predominantly residential multiple dwelling units, (MDUs), a fiber optic cable, whether dark or lit, that extends to the multiunit premises minimum point of entry (MPOE)

(B) Fiber-to-the-curb loops. A fiber-to-the-curb loop is a local loop consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises, or in the case of predominantly residential MDUs, not more than 500 feet from the MDU's MPOE The fiber optic cable in a fiber-to-the-curb loop must connect to a copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premises n113

Both of these definitions and the rules relating to new builds and overbuilds n114 refer to a "customer premises," without limiting the type of customer to be included in the definition. **[*54]** Because "end user customer" or "customer" is not defined in the regulation, these definitions are unclear, requiring further analysis to determine their meaning n115 The terms "end user customer" and "customer" were not in the original version of the rule These original versions, later corrected by the *TRO* and *FTTC Errata*, referred to "residential" units and premises. n116 These references were either deleted or changed to refer to "end user," which can signify either a residential or enterprise customer This change appears to broaden the scope of the rule from merely residential customers to any type of customer. This conclusion is buttressed by the FCC's determination that its unbundling obligations do not depend on the type of customer n117 Thus, the FCC's FTTH and FTTC rules do not apply solely to residential customers but may also apply to enterprise customers The Commission accepts the Arbitrator's decision not to limit the scope of the FTTH and FTTC rules to residential customers

n113 *47 C F R § 51.319(a)(3)(i)(A)* and (B)
n114 *47 C F R § 51 319(a)(3)(ii)* and (iii)

[*55]

n115 *See, In re Sealed Case, 237 F 3d 657, 669 (D.C. Cir 2001), Meeks v West, 216 F 3d 1363, 1366 (Fed Cir 2000)*
n116 *See, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Development of Wireline Services Offering Advanced Telecommunications Capability*, CC Dockets No 01-338, 96-98, 98-147, Errata *("TRO Errata"), 18 FCC Rcd 19020, P 37-38 (2003), FTTC Errata*, P 11
n117 *TRO at 18 FCC Rcd 17111, P 210*

G. Issue 14 -- Effective Date of Interconnection Agreements Amendments

1. Recommended Decision

60 Issue 14 reads

What should be the Effective Date of an Amendment to the parties' agreements?

61 The Arbitrator determined that the effective date of the interconnection agreement amendments should be the date of their execution by all parties, with a few exceptions One such exception is for conversion |*56| requests pending when the *TRO* was issued, which the Arbitrator ruled qualify for retroactive UNE pricing from the *TRO* effective date to the date that Verizon DC completes the conversion For conversion orders that occurred after the *TRO* effective date, the effective date of UNE pricing is the date on which the Commission approves the Recommended Decision n118

n118 Recommended Decision at 45, P 189

2. Exceptions

62. Verizon DC disagrees with the Arbitrator's two decisions regarding the timing of retroactive pricing. Verizon DC argues that CLECs may take advantage of the *TRO's* new EEL eligibility rules only after they have signed new interconnection agreements incorporating the new rules. Verizon DC contends that the *TRO* eliminated restrictions on commingling EELs and special access facilities and modified EEL eligibility requirements Verizon DC contends that because both of these provisions change the EEL rules, not merely clarify existing law, the change of law provisions in the interconnection |*57| agreements apply to these provisions Verizon DC further contends that the *TRO* does not require these provisions to become effective immediately, only upon amendment of the underlying interconnection agreements n119 Thus, pricing for conversions should switch to UNE pricing after the amended interconnection agreement is signed, not when this Order is issued n120 Verizon DC argues that the Florida and Rhode Island commissions have determined that there is no retroactive pricing for EELs ordered prior to the execution date of the amended interconnection agreements. n121

n119 Verizon DC Appeal at 16, 18
n120 Verizon DC Appeal at 17
n121 Verizon DC Supplemental Authority Notice at 2-3

63 Verizon DC also questions the Arbitrator's decision of the effective date of pricing for EEL requests pending before the *TRO's* effective date Verizon DC argues that the *TRO* made it clear that for requests for EELs pending on the effective date of the *TRO*, these EELs would be converted and retroactively |*58| priced at UNE rates until the effective date of the *TRO* Verizon DC claims that the FCC based its decision on the fact that there were different eligibility criteria for EELs before the *TRO*, so those old EELs should be converted and priced at UNE rates for the time that they were still permitted, which is the time period before the effective date of the *TRO*. Verizon DC claims that a *pre-TRO* conversion request for an EEL that now satisfies the new eligibility criteria cannot qualify for retroactive pricing n122

n122 Verizon DC Appeal at 18.

3. Decision

64 Verizon DC has two problems with the Arbitrator's decisions on this issue: the decision that EEL requests placed before the *TRO* effective date should qualify for retroactive pricing from the effective date of the *TRO* until the conversion completion date and the decision that conversion requests submitted after the effective date of the *TRO* should be priced at UNE prices as of the date of this Order As the Arbitrator correctly notes, |*59| the *TRO* only addresses the pricing of conversion requests that were pending as of the effective date of the *TRO* For those requests, the

FCC stated that CLECs were entitled to retroactive UNE pricing up to the effective date of the *TRO*, not beyond that date n123 Thus, the Arbitrator was incorrect when he determined that retroactive pricing should occur between the *TRO* effective date and the conversion completion date

n123 *TRO at 18 FCC Rcd 17351, P 589*

65. Additionally, because the *TRO* does not expressly permit retroactive pricing for any other conversions, the Commission cannot imply that such a right to retroactive pricing for post-TRO conversion orders exists This conclusion is buttressed by the FCC's determination that *TRO* changes were not self-executing but must be implemented through amendments to interconnection agreements Because there is no retroactive pricing mechanism in the *TRO* for *post-TRO* conversion orders that comply with the new eligibility **[*60]** criteria, the Arbitrator's decision to permit retroactive pricing for *post-TRO* conversion orders from the date that this Order is released is erroneous The Commission declines to adopt the Recommended Decision on these two issues

H. Issue 16 -- Standard Provisioning Intervals, Performance Metrics, and Remedies

1. Recommended Decision

66 Issue 16 states

> Should Verizon be subject to standard provisioning intervals or performance measurements and potential remedy payments, if any, in the underlying Agreement or elsewhere, in connection with its provision of a) unbundled loops in response to CLEC requests for access to IDLC-serviced hybrid loops, b) commingled arrangements, c) conversion of access circuits to UNEs, d) loops or transport (including dark fiber transport and loops) for which routine network modifications are required, e) batch hot cuts, large job hot cut and individual hot cut process, and f) network elements made available under § 271 of the Act or under state law?

67. The Arbitrator determined that the interconnection agreement amendments should recognize the existence of Verizon DC performance standards contained in the District of Columbia Performance **[*61]** Assurance Plan ("DC PAP"). He found that the interconnection agreements should neither impose any additional performance standards nor ignore the existence of any performance standards n124

n124 Recommended Decision at 47-48, P 196

2. Exceptions

68. Verizon DC seeks clarification of one phrase of the Recommended Decision, which states that the interconnection agreements "should specifically allow for any retroactive changes that take into account of the any [sic] changes in intervals, metrics, or payments recommended generated [sic] as a result of the work of that group " Verizon DC is concerned that this phrase can be interpreted to mean that any changes to the District of Columbia Carrier-to-Carrier Guidelines ("DC Guidelines") and DC PAP should be applied retroactively Verizon DC asserts that retroactive application of performance standards and incentive payments would be erroneous and possibly unconstitutional Verizon DC alleges that the Recommended Decision does not justify any retroactive imposition **[*62]** of incentive payments Verizon DC urges the Commission to delete this phrase from the Recommended Decision n125 Alternatively, Verizon DC requests the Commission to clarify that changes to the DC Guidelines and DC PAP are to apply only prospectively n126 Verizon DC urges the Commission to follow the example of Rhode Island, which declined to address PAP metrics in the arbitration. n127

n125 Verizon DC Appeal at 20.
n126 Verizon DC Appeal at 21
n127 Verizon DC Supplemental Authority Notice at 3

3. Decision

69. The Commission upholds the Arbitrator's decision to the extent that it requires Verizon DC to comply with existing standards in the DC Guidelines and the DC PAP. However, the Commission also agrees that the sentence identified by Verizon DC needs clarification because changes to the DC Guidelines and DC PAP should not be applied retroactively to interconnection agreements The Commission amends this sentence to read "The ICA should not anticipate the results of the work of that group, but should **[*63]** recognize its operation and should specifically allow for any changes in intervals, metrics, or payments generated as a result of the work of that group " This change ensures that amendments to the DC Guidelines and the DC PAP do not apply retroactively

I. Issue 20 -- Combinations and Conversions

1. Recommended Decision

70. Issue 20 reads

> What obligations, if any, with respect to the conversions of wholesale services (e g special access circuits) to UNEs or UNE combinations (e g EELs), or vice versa ("Conversions"), should be included in the Amendment to the parties' interconnection agreements?
>
> > A What information should a CLEC be required to provide to Verizon (and in what form) as certification to satisfy the FCC's service eligibility criteria to (1) convert existing circuits /services to EELs or (2) order new EELs?
> > B Conversion of existing circuits/services
> >
> > 1 Should the contract provide that Verizon may not physically disconnect, separate, change, or alter the existing facilities under any circumstances when performing conversions?
> > 2 What type of changes, if any, and under what conditions, if any, can Verizon impose for Conversions?
> > 3 Should EELs ordered **[*64]** by a CLEC prior to October 2, 2003, be required to meet the FCC's service eligibility criteria?
> > 4. For conversion requests submitted by a CLEC prior to the effective date of the amendment, should CLECs be entitled to EELs/UNE pricing effective as of the date the CLEC submitted the request?
> > 5 When should a Conversion be deemed completed for purposes of billing?
>
> C How should the Amendment address audits of CLEC compliance with the FCC's service eligibility criteria?

71 To convert facilities into high capacity EELs, the *TRO* established specific eligibility criteria The FCC also created certification and auditing requirements to ensure that these EELs were being used at least in part for local exchange service The Arbitrator found that the same certification process and payment structure that applies to EELs should apply to combinations and conversions Thus, a CLEC must certify that it has the documentation to support its EEL request but does not have to produce such documentation unless audited n128 The Arbitrator specified that Verizon DC could require recertification of EELs ordered pursuant to the old eligibility criteria (called the "safe harbor provisions") ("pre-existing **[*65]** EELs"), but only through a simpler process than was proposed by Verizon DC The Arbi-

trator agreed with AT&T that CLECs could certify or recertify their EEL requests in batches as long as each circuit is identified n129

n128 Recommended Decision at 53, P 219
n129 Recommended Decision at 55, P 226

72. The Arbitrator directed that conversions be completed in a "reasonable" timeframe He did not set a specific timeframe, indicating that there was a lack of evidence on the record n130

n130 Recommended Decision at 55, P 227

2. Exceptions

73 The CCC, XO, and Verizon DC object to different parts of the Recommended Decision on this issue. The CCC and XO object to the recertification requirements imposed by the Arbitrator They allege that because the *TRO* does not mention the treatment of EELs obtained under the safe harbor provisions, n131 **[*66]** recertification of pre-existing EELs is not required They contend that the new eligibility criteria apply prospectively only to the following situations: a conversion of a special access circuit to a high-capacity EEL, an order for a new high-capacity EEL, and UNE pricing for the UNE part of a commingled high-capacity EEL n132 Because the eligibility criteria differ from those of the safe harbor provisions, existing EELs could be eliminated by a recertification requirement. XO contends that the FCC did not intend to eliminate existing EELs in creating the new eligibility criteria n133 The CCC urges the Commission to follow the Vermont Arbitration Decision, which held that CLECs should not be required to recertify preexisting EELs n134

n131 CCC Appeal at 10, XO Appeal at 6
n132 CCC Appeal at 10
n133 XO Appeal at 6
n134 CCC Appeal at 11

74 In response, Verizon DC argues that CLECs must recertify their preexisting EELs because the FCC rules contain no provision to "grandfather" these EELs **[*67]** n135 Although the FCC listed three categories of EELs that require certification, Verizon DC argues that this list is not exhaustive, so other types of EELs would also require certification Verizon DC argues that the *TRO's* new criteria apply to every EEL and supersede the old EEL rules, so that CLECs cannot rely on now obsolete rules to justify their EELs. n136 Verizon DC notes that the commissions in Massachusetts, Pennsylvania, Florida, and Washington have all agreed with Verizon DC's position n137

n135 Verizon DC Response at 15
n136 Verizon DC Response at 16
n137 Verizon DC Response at 15, 15 n. 17.

75 XO also objects to the Arbitrator's conversion completion decision, arguing that the Arbitrator should have set a specific timeline for completing conversions n138 Instead of requiring completion within a "reasonable" time period, XO contends that the Arbitrator should have required completion by the next billing cycle after the conversion request

is made Such a decision would effectuate the **[*68]** FCC's decision that conversions can be completed expeditiously, as they are primarily billing modifications n139

n138 XO Appeal at 7
n139 XO Appeal at 8

76 In response, Verizon DC argues that the Recommended Decision already protects CLECs against any Verizon DC delay in completing conversions by ruling that billing must be converted on the date that the work can reasonably be completed Verizon DC argues that completing billing changes by the next billing cycle would not be feasible in all cases, especially when the changes come at the end of a billing cycle. Verizon DC contends that the FCC rejected a CLEC request to set a firm billing conversion date of 10 days Verizon DC proposes a 30-day conversion window (unless the order exceeds a certain number of circuits), which would permit Verizon DC to complete the conversion request without undue delay Verizon DC asserts that the MA DTE has accepted the 30-day conversion window n140

n140 Verizon DC Response at 15

[*69]

77 Verizon DC objects to the portion of the Recommended Decision that permits CLECs to certify that they meet the EEL eligibility criteria by letter Verizon DC maintains that a letter certification is insufficient to comply with the FCC's rules, which mandate certification that the CLEC has met the FCC's requirements Verizon DC has indicated that it has already drafted language that complies with the FCC's rules. n141 Verizon DC argues that it would not be burdensome for CLECs to use this draft language, since they must have the information to justify their requests n142

n141 Verizon DC Appeal at 23.
n142 Verizon DC Appeal at 24

3. Decision

a. Applicability of the Eligibility Criteria to Pre-existing EELs

78 In the *TRO*, the FCC reaffirmed its rules on UNE combinations, continuing to require ILECs to provide UNE combinations upon request and not to separate UNE combinations that are usually combined, except upon request. n143 The *TRO* created new eligibility criteria specifically for high-capacity **[*70]** EELs, n144 a popular form of combination, to ensure that EELs are being used to provide local exchange service, at least in part The FCC stated that its eligibility criteria apply to three situations. the conversion of a special access circuit to a high-capacity EEL; the acquisition of a new high-capacity EEL, and the receipt of UNE pricing for part of the high-capacity loop-transport combination. n145 The FCC stated that the *TRO* eligibility criteria superseded previous "safe harbor" EEL rules But the FCC did not address whether EELs that had qualified under the old "safe harbor" rules would be "grandfathered" and deemed to be qualified under the new eligibility criteria

n143 *TRO at 18 FCC Rcd 17340, P 573.*
n144 EELs are defined as a combination of unbundled loop, dedicated transport, and sometimes additional electronics *TRO at 18 FCC Rcd 17339, P 571*
n145 *TRO at 18 FCC Rcd 17347, P 583.*

79 The *TRO* [*71] language can be interpreted to support both the CLECs and Verizon DC's positions. The *TRO* stated that "on a going-forward basis, a requesting carrier may obtain a high-capacity EEL any time the underlying network elements are available pursuant to our impairment analysis and the carrier meets the eligibility criteria " n146 The phrase "on a going-forward basis" appears to indicate that the eligibility criteria is to apply to new EEL orders or conversions, not pre-existing EELs. But the FCC also indicated that "each EEL must satisfy the service eligibility criteria." n147 Additionally, *47 C F R § 51 318(b)* indicates that an ILEC is not required to provide access to high-capacity EELs unless "all of the [] conditions are met " n148 The use of the present tense "are," coupled with the lack of a grandfathering provision for existing EELs, appears to indicate that all current EELs must comply with the eligibility criteria Thus, the Commission upholds the Arbitrator's decision to require CLECs to recertify their pre-existing EELs under the new eligibility criteria

n146 *TRO at 18 FCC Rcd 17342, P 577*

[*72]

n147 *TRO at 18 FCC Rcd 17356, P 599*
n148 *47 C F R § 51 318(b)*

b. Timing of Conversions

80 The FCC required conversions to occur "expeditiously" but did not mandate a specific time period for conversion completion Instead, the FCC determined that setting timeframes was better left to the parties in interconnection agreement amendment negotiations The FCC assumed that it would be possible to correct billing records by the next billing cycle after the conversion but did not require this timeframe n149 The Arbitrator determined that he had insufficient evidence upon which to make such a decision

n149 *TRO at 18 FCC Rcd 17350, P 588*

81 However, in its Response, Verizon DC proposes a 30-day conversion timeframe This proposal is based on a Massachusetts tariff permitting 30 days for conversions No party has objected [*73] to Verizon DC's proposal or proffered one of its own Inasmuch as Verizon has conceded that it can complete the conversion within 30 days, and in the absence of some evidence that the conversion can be done sooner, we conclude that the 30-day period proposed by Verizon is reasonable. Moreover, a definitive time period for conversion provides certainty for the parties and avoids needless litigation over this point in the future Thus, the Commission adopts this proposal and requires the parties to include it in their amended interconnection agreements

c. Certification Requirements

82 Verizon DC objects to the Arbitrator's decision to permit CLECs to obtain high-capacity EELs by certifying that they meet the eligibility criteria without providing the documentation supporting their certification The *TRO* requires CLECs to certify that they meet the eligibility criteria to obtain high-capacity EELs but does not require CLECs to use a specific form of certification One certification method approved in the *TRO* is certification by letter, but this format is not required. n150 Thus, a letter certification is permissible

n150 *TRO at 18 FCC Rcd 17369, P 624*

[*74]

83 Additionally, when discussing audits, the FCC stated that it expected CLECs to "maintain the appropriate documentation to support their certifications."151 This language indicates that the FCC did not envision this documentation to be supplied with the certification; it needs to be available only if the CLEC's certification is audited Thus, the Arbitrator was correct in minimizing the requirements of the certification notice The Commission affirms the Arbitrator's decision limiting the type of information that needs to be included in the certification.

n151 *TRO at 18 FCC Rcd 17371, P 629*

J. Issue 27 -- Section 271 Obligations

1. Recommended Decision

84. Issue 27 reads

> Should the Amendment address Verizon's § 271 obligations to provide network elements that Verizon no longer is required to make available under § 251 of the Act? If so, how?

85. The Arbitrator determined that any Verizon DC obligations arising from section 271 should not be addressed in interconnection **[*75]** agreements. He found that the Commission's only role in implementing section 271 is to advise the FCC on compliance with the section 271 checklist Because of this lack of jurisdiction, the Arbitrator determined that the interconnection agreement process cannot be used to address alleged Verizon DC failures to adhere to section 271 n152

n152 Recommended Decision at 65-66, P 265-269

2. Exceptions

86. The CCC, Covad, and XO argue that the Commission retains the authority to make decisions regarding network elements required to be unbundled pursuant to section 271 ("section 271 network elements") Covad argues that the Commission's authority to review section 271 network elements stems from the fact that Verizon DC used interconnection agreements to support its case for section 271 approval n153 The CCC and XO argue that the Commission has broad authority to determine the rates, terms, and conditions of all network elements provided by Verizon DC, whether under section 251 or 271 n154 XO contends that pursuant **[*76]** to that authority, the Commission must accomplish four tasks: interpret and enforce unbundling obligations pursuant to federal law; approve commercial agreements regarding section 271 network elements, reject any modification to Verizon DC's wholesale tariffs that would alter its obligations in conflict with federal law, and set rates for section 271 network elements n155 The CCC argues that the Commission retains authority to resolve issues regarding section 271 network elements because section 252 requires both section 251 and 271 network elements to be included in interconnection agreements To the CCC, because the *TRO* and *TRRO* included discussions of both section 251 and section 271 network elements and stated that issues resolving these issues are to be decided in section 252 arbitration proceedings, the Commission retains control over section 271 network elements The CCC argues that many states have recognized their authority to conduct arbitrations regarding section 271 network elements n156

n153 Covad Appeal at 1
n154 CCC Appeal at 12, XO Appeal at 9-10
n155 XO Appeal at 9-10

[*77]

n156 CCC Appeal at 12-13

87. The CCC and XO argue that the Commission's section 271 role is not merely limited to providing the consultative report at the beginning of the section 271 process, but continues, in order to ensure compliance with the section 271 checklist after section 271 approval. The CCC and XO contend that the FCC indicated that states could investigate complaints of noncompliance with commitments made during the section 271 process. n157 XO avers that the FCC cited the Commission's role as preventing backsliding behavior as a factor in granting Verizon DC section 271 approval. n158

n157 CCC Appeal at 13; XO Appeal at 10
n158 XO Appeal at 10-11

88. Covad also contends that the Commission has the authority to review issues voluntarily included in interconnection agreements due to its authority to review the interconnection agreement itself Thus, according to Covad, because Verizon DC has voluntarily included **[*78]** provisions regarding section 271 network elements (and other issues) in its interconnection agreements, the Commission retains the right to review these provisions of the interconnection agreements Covad claims that neither the *TRO* nor the *TRRO* require the deletion of issues voluntarily included in interconnection agreements from amended interconnection agreements n159 In its Supplemental Authority Motion, the CCC notes that the Tennessee Regulatory Authority has determined that section 271 issues can be arbitrated in the context of section 252 interconnection agreements n160

n159 Covad Appeal at 2
n160 CCC Supplemental Authority Motion at 1

89 In response, Verizon DC argues that section 271 issues should not be included in the interconnection agreements. Verizon DC alleges that the FCC, federal courts, and other state commissions have all determined that the enforcement of section 271 UNEs is a matter for the FCC, not state commissions Verizon DC argues that the only role for state commissions **[*79]** in section 271 is to consult with the FCC after a section 271 application is filed, the states have no ongoing role in implementing section 271 n161 Verizon DC asserts that the FCC's regulations do not include any provisions regarding section 271 network elements in its section 251 regulations The Telecommunications Act does not include any language linking section 271 network elements to sections 251 and 252. Verizon DC argues that while it is true that section 252 interconnection agreement provisions were used to show compliance with the requirements of section 271, it is not true that issues relating to section 271 network elements must be included in section 252 interconnection agreements in order to meet the requirements of section 251 Responding to the CLECs' contentions that the FCC has granted some section 271 authority to state commissions, Verizon DC argues that this authority was limited to reviewing performance assurance plans adopted to prevent backsliding under section 271. Verizon DC avers that the FCC has never granted state commissions authority to determine unbundling obligations under section 271 n162

n161 Verizon DC Response at 16-17
[*80]

n162 Verizon DC Response at 20

3. Decision

90 Section 252 of the Act establishes the processes for negotiating and arbitrating interconnection agreements This section also outlines the role that states are to play in mediating, arbitrating, and reviewing interconnection agreements. States have the authority to arbitrate "any open issues," n163 but section 252 does not define the term "open " Courts have interpreted this language to mean that parties may include non-section 251 issues in their interconnection agreement negotiations, but only those non-section 251 issues voluntarily negotiated may be arbitrated by the parties The only issues that must be included in an arbitration proceeding are those unresolved issues that an ILEC must negotiate n164 The question then becomes whether Verizon DC is required to negotiate section 271 issues

n163 *47 U S C § 252*(b)(1) (2000).
n164 *Coserv LLC v Southwestern Bell Tel Co , 350 F 3d 482, 487-488 (2003)*

[*81]

91 Section 252 cross references section 251 several times n165 The interconnection negotiation process begins when a CLEC requests "interconnection, services, or network elements pursuant to section 251." n166 In resolving arbitration disputes, state commissions must "ensure that such resolution and conditions meet the requirements of section 251." n167 Section 252 does not cross reference section 271 Section 271 does cross reference section 252 several times, mostly discussing how section 252 interconnection agreements can be used as proof of competition in the local exchange market n168 Additionally, meeting the requirements of section 251 and 252 are the first two elements of the 14-point checklist for obtaining section 271 approval n169 The section 271 network elements are separately listed in the 14-point checklist, and these sections do not cross reference section 252 n170

n165 *See, 47 U S C § 252*(a) ""upon receiving a request for interconnection, services, or network elements pursuant to section 251", *47 U S C § 252*(c) (requiring that arbitrated interconnection agreements must meet the requirements of section 251, set rates for section 251 UNEs, provide reciprocal compensation rates pursuant to section 251(b)(5), and set wholesale rates pursuant to section 251 (c)(4))

[*82]

n166 *47 U S C § 252*(a)(1) (2000)
n167 *47 U S C § 252*(c)(1) (2000)
n168 *See 47 U S C § 271*(c)(1)(A) and § 271(c)(2)(B)(i) (requiring proof of the existence of facilities-based competitors through section 252 interconnection agreements).
n169 *47 U S C § 271*(c)(2)(B)(i) and (ii) (2000)
n170 *47 U S C § 271*(c)(2)(B)(iv), (v), (vi), and (x) (2000).

92. The FCC has not addressed this issue explicitly. However, throughout the *TRO*, the FCC limits its discussion of the section 252 interconnection agreement process to apply to implementing section 251. n171 The FCC has also determined that the section 271 unbundling obligations are independent of the unbundling obligations of section 251 n172 Thus, there is no requirement that section 271 network elements be addressed in interconnection agreements negotiated and arbitrated pursuant to section 252 If the parties voluntarily agree to address **[*83]** section 271 network elements in their agreements, that appears to be permissible, and the Commission will review any section 271 network elements included in interconnection agreements. However, there is no requirement for the inclusion of section 271 network elements in interconnection agreements. The Commission upholds the Arbitrator's decision that section 271 network elements do not have to be addressed in interconnection agreements. n173

n171 *See, TRO at 18 FCC Rcd 17404, P 700*
n172 *TRO at 18 FCC Rcd 17385, P 654*

n173 The Commission does not agree with the Arbitrator's determination that the Commission's only role in implementing section 271 is in preparing the report to the FCC regarding whether the BOC meets the section 271 statutory requirements The FCC gave the Commission a role in protecting against backsliding after section 271 approval *See, In the Matter of Application by Verizon Maryland, Inc Verizon Washington DC, Inc , Verizon West Virginia, Inc , Bell Atlantic Communications, Inc (d/b/a Verizon Long Distance) NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc and Verizon Select Services Inc for Authorization to Provide In-Region, InterLATA Services in Maryland, Washington, D C , and West Virginia, WC Docket No 02-384, Memorandum Opinion and Order at 18 FCC Rcd 2512, 2314-2315, P 176* But this authority does not extend to requiring inclusion of section 271 network elements in interconnection agreements

[*84]

K. Other Issues

1. Exceptions

93 The CCC argues that the Arbitrator did not address all of the issues raised by the parties The CCC contends that the Recommended Decision fails to resolve the following five issues

> Issue 1. Should the Amendment include rates, terms, and condition that do not arise from federal unbundling regulations pursuant to *47 U S C sections 251* and 252, including issues assert to arise under state law?
> Issue 5(c). Should UNE loops used to serve residential customers be counted as "business lines" for purposes of the non-impairment determinations for high-capacity loops and transport?
> Issue 5(g) Should the limit of 10 DS1 dedicated transport circuits per route apply so as to limit CLECs to 10 DS1 EELs per central office?
> Issue 13(b) Should the voice-grade channel provided pursuant to the FTTH and Hybrid Loop sections of the Amendment be subject to the same rates and terms as a DS0 UNE Loop?
> Issue 20(c)(B)(1) Should the contract provide that Verizon may not physically disconnect, separate, change, or alter the existing facilities under any circumstances when performing conversions?

The CCC asks the Commission **[*85]** to resolve these issues n174

n174 CCC Appeal at 15

94. Verizon DC disputes the CCC's claim. Verizon DC alleges that the parties agreed to remove all of the issues involved in Issue 1 from the arbitration, so that the Arbitrator had none of these issues to decide n175 Verizon DC argues that the Arbitrator resolved Issue 5(c) under Issue 9, by rejecting the CLECs' definition of "business lines" in favor of the FCC's definition. n176 To Verizon DC, the Arbitrator resolved Issue 5(g) by deciding that the DS1 cap applies to the transport portion of EELs n177 Verizon DC asserts that the Recommended Decision resolves Issue 13(b) by adopting the FCC's hybrid and FTTH rules, which do not treat hybrid and FTTH loops as equivalent to DS0 loops. n178 Finally, Verizon DC argues that the Arbitrator implicitly ruled against the CCC on Issue 20(c)(B)(i) when he declined to limit Verizon DC's conversion processes n179

n175 Verizon DC Response at 21

[*86]

n176 Verizon DC Response at 21-22
n177 Verizon DC Response at 22

n178 Verizon DC Response at 22-23
n179 Verizon DC Response at 23

2. Decision

95. Issue 1 deals with the scope of the issues that could be included in interconnection agreements. After reviewing the record, the Commission determines that the parties agreed to remove Issue 1 from consideration in this proceeding n180 Because the Arbitrator was not required to render any decision on any of the issues in Issue 1, he did not err by failing to address Issue 1

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n180 Recommended Decision at 7, P 25

96. Issue 5(c) inquires whether loops used to serve residential customers' lines should be counted as business lines for the non-impairment determinations. Because Verizon DC argues that the Arbitrator's decision in his discussion of Issue 9 requiring the addition of the FCC's definition of "business line" resolves this issue, the Commission looks to **[*87]** this discussion The Arbitrator required the addition of a definition for "business line" that would match the FCC's definition n181 The FCC's definition of business line reads

> Business line. A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line For example, a DS1 line corresponds to 24 64kbps-equivalents, and therefore to 24 "business lines " n182

While the first sentence of this definition appears to limit the lines to business lines, **[*88]** the second sentence of this definition includes all UNE loops in the wire center, without restricting the loops to business loops. Because the definition of business line includes all UNE loops attached to a wire center, it appears that residential lines would be included in the definition of "business line " Verizon DC is correct that the acceptance of the full definition of "business line" resolves Issue 5(c).

n181 Recommended Decision at 23, P 94
n182 *47 C F R § 51 5*

97 Issue 5(g) involves whether the limit of 10 DS1 transport circuits per route would limit CLECs to 10 DS1 EELs per central office This issue requires deciding whether the DS1 transport or DS1 loop rules would apply to EELs, which are a combination of transport and loop The Arbitrator did address this issue, in requiring the application of the 10 DS1 transport circuit limitation per route even when the transport circuit is used as part of an EEL n183

n183 Recommended Decision at 18-19, P 72-73

[*89]

98. Issue 13(b) addresses whether the voice grade channel of FITH and hybrid loops should be subject to the same rates and terms as a DSO loop The Arbitrator required the parties to include the language of *47 C F R § 51 319(a)(2)(iii)* in their agreements n184 This rule states that Verizon DC must provide equivalent, but not the same, voice grade service over hybrid loops as is provided over DS0 loops n185 In requiring this rule to be included in the interconnection agreements, the Arbitrator determined that FTTP and hybrid loops should not be subject to the same rates and terms as a DS0 loop

n184 Recommended Decision at 42, P 171
n185 *47 C F R § 51 319(a)(2)(iii).*

99 Issue 20(c)(B)(1) inquires whether Verizon DC may change existing facilities when performing conversions Verizon DC claims that the Arbitrator implicitly decided this issue when he did not reject Verizon DC's proposed conversion processes. The Arbitrator did not **[*90]** address this issue explicitly Instead, he rejected language in Verizon DC's proposed amendment stating that conversions would be processed according to Verizon DC's internal guidelines His reasoning was not that the guidelines were incorrect, but that internal Verizon documents should not be included in interconnection agreements because only Verizon can change those documents The Arbitrator determined that the provisions contained in the conversion guidelines could be incorporated into the amended interconnection agreements if the parties agree. Thus, the Arbitrator did address this issue

V. CONCLUSION

100 The Commission adopts in part and declines to adopt in part the Recommended Decision The Commission reverses the Recommended Decision's determinations on the following issues that Verizon DC must provide unbundled access to circuit switching provided through packet switches if it replaces circuit switches with packet switches during the transition period (Issue 3), that CLECs may pay modified UNE prices for circuit switching arrangements after they are converted to alternative arrangements (Issue 3); and that new orders for delisted UNEs may continue until the Commission **[*91]** approves the Recommended Decision (Issue 10) The Commission also declines to adopt the Arbitrator's pricing decisions in Issue 14 The Commission clarifies that any changes to the DC Guidelines or the DC PAP do not apply retroactively to interconnection agreements (Issue 16) The Commission also accepts Verizon DC's proposal on the timing of conversions (Issue 20). The Commission upholds the other challenged determinations in the Recommended Decision The parties shall file interconnection agreement amendments that conform to this Order with the Commission within 30 days of the date of this Order

THEREFORE, IT IS ORDERED THAT:

101. Verizon Washington DC, Inc 's Motion to File its Response to CLEC Exceptions to Recommended Decision is **GRANTED,**

102 The Competitive Carrier Coalition's Motion for Leave to File Supplemental Authority in Support of Partial Appeal of Arbitration Decision is **GRANTED,**

103. Verizon Washington DC, Inc 's Motion for Leave to File Notice of Supplemental Authorities Supporting its Exceptions to the Arbitrator's Recommended Decision is **GRANTED,**

104. Verizon Washington DC, Inc.'s Motion to Withdraw its Exceptions to the Arbitrator's Recommended **[*92]** Decision on Issues 4, 5, and 9 is **GRANTED,**

105 The Recommended Decision is ADOPTED in part consistent with the contents of this Order.

106. The Partial Appeal of Arbitration Decision of ATX Licensing, Inc and CTC Communications Corp. is **DENIED,**

107 The Covad Communications Company's Petition for Reconsideration of Recommended Decision is **DENIED,**

108 The XO Communications Services, Inc 's Petition for Reconsideration of Recommended Decision is **DENIED,**

109 The Verizon Washington DC, Inc 's Exceptions to Recommended Decision is **GRANTED** in part and **DENIED** in part,

110 Verizon Washington DC, Inc shall post a list of qualified wire centers complying with the requirements of paragraph 27 of this Order within 45 days of the effective date of amended interconnection agreements,

111 Verizon Washington DC, Inc shall submit a list of qualified wire centers complying with the requirements of paragraph 27 of this Order to the Commission within 45 days of the effective date of amended interconnection agreements, and

112 The parties shall file interconnection agreement amendments that conform to this Order with the Commission within 30 days of the date of this Order **[*93]**

BY DIRECTION OF THE COMMISSION