BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for arbitration of open issues resulting from interconnection negotiations with Verizon Florida Inc. by DIECA Communications, Inc. d/b/a Covad Communications Company.	DOCKET NO. 020960-TP ORDER NO. PSC-03-0569-PHO-TP ISSUED: May 5, 2003

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on April 21, 2003, in Tallahassee, Florida, before Commissioner J. Terry Deason, as Prehearing Officer.

APPEARANCES:

ANTHONY HANSEL, Esquire, Covad Communications Company, 600 14th Street, NE, Suite 750, Washington DC 20005; CHARLES E. WATKINS, Esquire and WILLIAM H. WEBER, Esquire, Covad Communications, Company, 1230 Peachtree Street, NE, 19th Floor, Atlanta, Geogia 30309; and VICKI GORDON KAUFMAN, Esquire, McWhirter Reeves McGlothlin Davidson Decker Kaufman & Arnold, P.A., 117 South Gadsden Street, Tallahassee, Florida 32301
On behalf of DIECA Communications, Inc. d/b/a Covad Communications Company ("COVAD").

AARON M. PANNER, Esquire and SCOTT H. ANGSTREICH, Esquire, Kellog, Huber, Hansen, Todd & Evans, P.L.L.C., 1615 M Street, NW, Suite 400, Washington DC 20036
On behalf of Verizon Florida Inc. ("VERIZON").

C. LEE FORDHAM, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission.

PREHEARING ORDER

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

II. CASE BACKGROUND

On September 6, 2002, DIECA Communications, Inc. d/b/a Covad Communications Company (Covad) petitioned the Commission to arbitrate certain unresolved terms and conditions of an interconnection agreement with Verizon Florida Inc. (Verizon). Verizon filed a response and the matter has been set for hearing.

III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 364.183, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

1. Any party intending to utilize confidential documents at hearing for which no ruling has been made, must be prepared to present their justifications at hearing, so that a ruling can be made at hearing.

2. In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

a) Any party wishing to use any proprietary confidential business information, as that term is

defined in Section 364.183, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.

b) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.

c) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.

d) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.

e) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of the Commission Clerk and Administrative Services's confidential files.

IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 80 pages, and shall be filed at the same time.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to five minutes. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes

the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

Witness	Proffered By	Issues #
Direct		
Valerie Evans and Michael Clancy (Panel)	COVAD	2, 3, 4, 5, 8, 9, 13, 19, 22, 23, 24, 25, 27, 29, 30, 31, 32, 34, 36, 37, 38, 41, 42, 43, 44, 45, 46, 47, 48, 52
Ronald J. Hansen	Verizon	2, 4, 5, 9
David J. Kelly and John White (Panel)	Verizon	19, 22
Rosemarie Clayton	Verizon	23, 27
Faye H. Raynor	Verizon	4, 13, 22, 37
John White	Verizon	12, 30, 31, 32, 33
Don Albert and Alice B. Shocket (Panel)	Verizon	41, 42, 43, 44, 45, 46, 47, 48, 49
Rebuttal		
Valerie Evans and Michael Clancy (Panel)	COVAD	2, 3, 4, 5, 9, 13, 19, 22, 23, 24, 25, 27, 30, 31, 32, 34, 37, 43, 45, 46

VII. BASIC POSITIONS

COVAD: In addressing and resolving the issues in this arbitration, the Florida Public Service Commission ("Commission") must keep certain fundamental legal principles in mind. First, in Section 252 of Telecommunications Act of 1996 (the "Act"), Congress provided ALECs the right to negotiate rates, terms and

conditions for interconnection, services or network elements pursuant to Section 251 of the Act. The Act fully contemplates customized and negotiated interconnection agreements and explicitly rejects the notion that an ILEC can meet its section 251 and 252 obligations through a "one size fits all" service offering. Therefore, it is inappropriate to defer an issue to a tariff provision if it does not meet or address the needs of the Parties. In this arbitration, there are many instances where this is the case and the Commission must establish contract language that addresses the specific needs of the parties and governs their on-going business relationship.

Second, the Commission must recognize the backdrop of this arbitration. With few exceptions, the terms being established define the rights of an ALEC to buy services and goods (UNEs) that the ALEC will use in direct competition with its ILEC supplier -- who is hostile to the ALEC's interests. Verizon only offers interconnection agreements with ALECs because it is compelled by law to do so. Moreover, it should not be assumed Verizon will feel constrained to assume duties that are not expressly spelled out in the Agreement. Rather, to the extent the obligations articulated in the Agreement are vague, Verizon's position will virtually always be contrary to the ALEC's interests and engender disputes. Given this, it is vital that the Agreement expressly and properly set out the rights and duties of the Parties.

The Commission cannot presume that Verizon's obligations to enter into this Agreement in good faith will inspire its good faith performance. It will not. As the evidence in this proceeding will show, the history of Covad's commercial relations with Verizon over the past several years has been one of repeated unilateral decisions made by Verizon not to act in a manner that would have benefited Covad and increased competition. Verizon's actions or inactions, in many of these cases, have been based on unreasonable readings and interpretation of contract or, more commonly, tariff

language. Yet Verizon maintained tenuous positions in a blatant effort to impede and frustrate Covad's ability to compete in the marketplace.

To help minimize potential future disagreements under this Agreement that are caused by Verizon's conduct in this regard and any other associated abuse of its role as the reluctant monopoly provider, the Commission should establish just and reasonable terms and conditions that comply with applicable law and are clear, express, and comprehensive. In selecting the contract language, it is vital that the Commission ensure that language in the Agreement is, among other things, (a) clear, (b) coherent, (c) creates stability between the parties, and (d) includes the necessary specificity regarding important procedures that the Parties must follow. Covad has proposed contract language regarding the disputed issues that adhere to these important principles.

Finally, Covad and Verizon continue to work diligently to resolve, or at least narrow, the issues in dispute in this arbitration. To date, the Parties have successfully resolved nearly one-third of the original issues. The positions of the Parties on many more issues are narrowing toward resolution. It is Covad's intention to make every effort to resolve the remaining issues in this arbitration through business-to-business negotiation at as early a date as possible.

VERIZON: The issues in this proceeding should be resolved in Verizon favor, consistent with federal law and this Commission precedent. The issues that Covad has raised generally focus on two areas. First, Covad raises issues related to the parties business relationship ordering, billing, and other logistics. Second, Covad seeks unprecedented access to Verizon network and to impose unprecedented burdens on Verizon to accommodate Covad preferences without regard to the public interest. Covad positions are without merit. First, the accommodations that Covad seeks are unauthorized by the federal Telecommunications Act of 1996 (996 Act or ct and contrary to this Commission policies. Second, many

issues that Covad seeks to litigate in this bilateral proceeding have already been resolved or are being resolved through *multilateral* processes. Relitigating such issues in this bilateral arbitration would lead to endless and needless proceedings and would undermine the 1996 Act strong policy in favor of uniform treatment for all industry participants.

STAFF: Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS

ISSUE 1: If a change of law, subject to appeal, eliminates one or more of Verizon's obligations to provide unbundled network elements or other services required under the Act and the Agreement resulting from this proceeding, when should that change of law provision be triggered?

POSITIONS

COVAD: Such a change of law should only be triggered when there is a final and non-appealable change in law relieving Verizon of the obligation to provide UNEs or other services under this Agreement. During any renegotiation or dispute resolution, the Parties should continue to perform their obligations in accordance with the terms and conditions of the Agreement, unless the Commission, the FCC, or a court of competent jurisdiction determines that modifications to the Agreement are required to bring it into compliance with the Act, in which case the Parties should perform their obligations in accordance with such determination or ruling. As the Commission knows well, the telecommunications industry has been subject to numerous changes in law that later were reversed (e.g., the various 8th Circuit decisions on TELRIC). The Commission should not permit Verizon to disrupt Covad's business operations and the service it

provides to end users in Florida, unless and until there is a final and non-appealable change in law

VERIZON: This issue involves the extent to which the parties agreement can obligate Verizon to continue providing Covad with access to any UNE or other service, payment, or benefit once applicable law no longer requires Verizon to provide such access. Verizon has proposed language stating that, once there is an effective order eliminating a prior obligation, Verizon ay discontinue immediately the provision of any arrangement pursuant to that obligation, except that Verizon will maintain existing arrangements for 45 days, or for the period specified in the order or another source of applicable law (including, among other things, the agreement, a Verizon tariff, or state law). Verizon Response Attach. C at 1, 8, 24 (Agreement 4.7; UNE Attachment 1.5; Collocation Attachment 1). This language strikes a reasonable balance between Verizon right to have its obligations under the agreement remain consistent with the terms of applicable law and the interest, shared by Verizon and Covad, in ensuring a smooth transition to the new legal regime.

Covad, on the other hand, has proposed language that would require Verizon to wait until the entry of a final and non-appealable order before it is permitted to take advantage of a change in law. An order that is subject to appeal, however, is still legally binding. Indeed, in this arbitration, the Commission is required to apply federal law as set forth in the effective orders of the FCC and decisions of the federal law, even if those orders and decisions are subject to appeal. *See* 47 U.S.C. 252(c). There is no reason to adopt language that would allow Covad to avoid the effect of such an order or decision merely because it is issued after the parties agreement has been approved. Indeed, on this reasoning, state commissions in California,[1] Delaware,[2]

[1] *See* Final Arbitrator's Report, *Global NAPs, Inc. (U-6449-C) Petition for Arbitration of an Interconnection Agreement with Verizon California Inc. f/k/a GTE California Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Application

Massachusetts,[3] New York,[4] Rhode Island,[5] and Vermont[6] have all rejected proposed language virtually identical to Covad's.[7]

STAFF: Staff has no position at this time.

01-12-026, at 73 (Cal. PUC May 15, 2002), *aff'd*, Order Adopting Final Arbitrator's Report with Modification, Decision 02-06-076 (Cal. PUC June 27, 2002).

[2] *See* Arbitration Award, *Petition by Global Naps, Inc., for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Verizon Delaware Inc.*, PSC Docket No. 02-235, at 41 (Del. PSC Dec. 18, 2002), *aff'd*, Order, PSC Docket No. 02-235 (Del. PSC Mar. 17, 2003).

[3] *See* Order, *Petition of Global NAPs, Inc., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration to establish an interconnection agreement with Verizon New England, Inc. d/b/a Verizon Massachusetts f/k/a New England Telephone & Telegraph Co. d/b/a Bell Atlantic-Massachusetts*, D.T.E. 02-45, at 79 (Mass. DTE Dec. 12, 2002).

[4] *See* Order Resolving Arbitration Issues, *Petition of Global NAPs, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York Inc.*, Case 02-C-0006, at 21 (N.Y. PSC May 22, 2002).

[5] *See* Arbitration Decision, *Arbitration of the Interconnection Agreement Between Global NAPs and Verizon-Rhode Island*, Docket No. 3437, at 40-41 (R.I. PUC Oct. 16, 2002), *aff'd*, Final Order on Arbitration, Docket No. 3437 (R.I. PUC Jan. 24, 2003).

[6] *See* Order, *Petition of Global NAPs, Inc., for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England Inc., d/b/a Verizon Vermont*, Docket No. 6742, at 33-34, 47 (Vt. PSB Dec. 26, 2002).

[7] An arbitrator in New Jersey recently reached the same result. *See* Arbitrator's Recommended Decision, *Petition of Global NAPs, Inc. For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New Jersey, Inc., f/k/a Bell Atlantic-New Jersey*, Docket No. T02060320, at 19 (N.J. BPU Mar. 7, 2003).

ISSUE 2: What time limit should apply to the Parties' rights to assess previously unbilled charges for services rendered?

POSITIONS

COVAD: Neither party to the Agreement should bill the other party for previously unbilled charges that are for services rendered more than one year prior to the current billing date. Backbilling should be limited to services rendered within one year of the current billing date in order to provide some measure of certainty in the billing relationship between the Parties.

VERIZON: The parties' right to assess previously unbilled charges (*i.e.*, to "backbill"), in the absence of a voluntary agreement to the contrary, should be governed by the five-year statute of limitations in Fla. Stat. § 95.11(2)(b). This statute of limitations applies to billing under contractual relationships between businesses generally, and appropriately protects the parties' interest in collecting the established price for services they provide under the agreement. If this statute of limitations were deemed not to apply, a party would potentially be able to provide service and collect fees from its customers while avoiding the appropriate payments for the inputs it purchases from the other party.

Covad's proposal is not only inconsistent with the statute of limitations, but also one-sided and therefore unreasonable. The parties' right to backbill to recoup any undercharges should be symmetrical with the right to contest any previously billed overcharges. Despite its claims that a time limit on the right to backbill is necessary to provide "certainty in the billing relationship," Covad has proposed no similar limitation on the right to dispute past overcharges, which would remain governed by the five-year statute of limitations. But, just as a party's right to dispute overcharges should not be arbitrarily limited, a party's right to collect undercharges also should not be so limited.

Consistent with Verizon's position, the anti-waiver provision of the agreement should not be altered.

STAFF: Staff has no position at this time.

ISSUE 3: RESOLVED

ISSUE 4: When the Billing Party disputes a claim filed by the Billed Party, how much time should the Billing Party have to provide a position and explanation thereof to the Billed Party?

POSITIONS

COVAD: The Billing Party should acknowledge receipt of disputed bill notices within 2 business days. In responding to notices of disputed bills, the Billing Party should provide an explanation for its position within 30 days of receiving the notice of the dispute

VERIZON: Any performance standards governing when Verizon must respond to a billing dispute should be set on an industry-wide basis, as this Commission recently did in Docket No. 000121C-TP. Otherwise, the process for responding to such disputes would soon become unworkable, as different standards may be established for different ALECs. To the extent Covad believes it is important for the Commission to adopt billing dispute resolution performance measurements, it should propose them in Docket No. 000121C-TP.

In any event, Covad proposed standard is unreasonable. Under Covad proposal, there is no requirement that Covad notice of the dispute contain sufficient information for Verizon to investigate the matter; nor is there any requirement that the billing dispute be sufficiently current to ensure that Verizon will have access to the data necessary to investigate Covad claim within 30 days. Billing dispute resolution performance measurements established in other Verizon states include both requirements (as well as others), and the same

should be true of any such industry-wide measurements adopted in Florida.

STAFF: Staff has no position at this time.

ISSUE 5: When Verizon calculates the late payment charges due on disputed bills (where it ultimately prevails on the dispute), should it be permitted to assess the late payment charges for the amount of time exceeding thirty days that it took to provide Covad a substantive response to the dispute?

POSITIONS

COVAD: No. Late charges should not be imposed for any time that Verizon takes beyond thirty days to address a dispute. This will prevent Verizon from profiting from its own failure to comply with the requirement that it address the dispute in a timely manner. In addition, it will increase Verizon's incentive to provide a response within thirty days. Otherwise Verizon will have no incentive to do so. Similarly, Verizon should not be allowed to assess a late payment charge on unpaid previously billed late payment charges when the underlying charges are in dispute. Late payment charges should only apply to the initial outstanding balance and Verizon should not have the right to apply late penalties upon late penalties when a dispute remains regarding the original charges.

VERIZON: Yes. This Commission has previously rejected Covad's attempts to avoid paying late-payment charges when billing disputes are resolved in the ILEC's favor, *see* Final Order on Arbitration, Order No. PSC-01-2017-FOF-TP, Docket No. 001797-TP, at 118 (Fla. PSC Oct. 9, 2001), and should do so again here. Covad is not required to pay disputed amounts during the pendency of a dispute. As a result, if late-payment fees do not accrue after 30 days from Verizon's receiving notice of a dispute, Covad would have the incentive to submit frivolous claims to earn interest on the "disputed" amounts. Moreover, as explained above, depending upon the degree of detail Covad provides when it submits its dispute and whether

the dispute pertains to recent bills, 30 days may not be a commercially reasonable period in which to resolve a billing dispute.

Covad also proposes language that would prohibit a party from assessing late-payment charges in the event that the other party fails to pay previously assessed late-payment charges. It is commercially reasonable for late-payment charges to apply to any failure to pay amounts due under the agreement, whether those amounts are charges for services or late-payment charges. Non-payment of charges amounts to a forced, interest-free loan from Verizon to its competitor.

STAFF: Staff has no position at this time.

ISSUE 6: RESOLVED

ISSUE 7: For service-affecting disputes, should the Parties be required to employ arbitration under the rules of the American Arbitration Association, and if so, should the normal period of negotiations that must occur before invoking dispute resolution be shortened?

POSITIONS

COVAD: Yes and yes. Unlike situations subject to the standard dispute resolution provisions of the Agreement, in which the dispute involves only the relationship between Verizon and Covad, a service-affecting dispute harms either Covad's or Verizon's end users. The services that both Parties provide to their customers must be protected to the greatest extent possible, and a dispute that affects those services should be resolved faster than other disputes. Accordingly, either party should be able to submit such a dispute to binding arbitration under the expedited procedures described in the Commercial Arbitration Rules of the American Arbitration Association (rules 53 through 57) in any circumstance where negotiations have failed to resolve the dispute within five (5) business days.

VERIZON: As Covad recognizes, under the 1996 Act, all open issues must be resolved in accordance with the requirements of federal law. Although federal law protects parties' right to *choose* to resolve their disputes through binding arbitration, no provision of federal law authorizes this Commission to *require* Verizon to give up its right to seek resolution of any dispute before an appropriate forum. Instead, arbitration is "a matter of consent, not coercion," *Volt Info. Scis., Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989), and "arbitrators derive their authority to resolve disputes *only because the parties have agreed* in advance to submit such grievances to arbitration," *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986) (emphasis added).

STAFF: Staff has no position at this time.

ISSUE 8: Should Verizon be permitted to terminate this Agreement as to any exchanges or territory that it sells to another party?

POSITIONS

COVAD: No. Verizon should not be permitted to terminate the Agreement unilaterally for exchanges or other territory that it sells. Otherwise, Verizon will have no incentive to avoid disrupting Covad's provision of services to end users. Covad's proposed contract language for this provision allows Verizon to assign the Agreement to purchasers.

VERIZON: Yes. Verizon cannot be required to condition any sale of its operations on the purchaser agreeing to an assignment of this agreement. Once Verizon sells an exchange or territory, it is no longer the ILEC for that service area and has no obligations under the interconnection provisions of the 1996 Act. *See* 47 U.S.C. § 252(a) (obligating ILECs to enter into interconnection agreements); *id.* §§ 251(h), 252(j) (defining "ILEC" for purposes of § 252). Nor can the purchaser be forced to accept Verizon's obligations under this agreement. Not only does federal law provide no basis for such

obligations, but also any such obligations would likely reduce the price that Verizon could receive for a sale, and could impose on any would-be purchaser obligations under the agreement greater than those that apply to it under federal law. *See, e.g., id.* § 251(f) (exempting rural carriers from certain requirements under the 1996 Act). In any event, if Verizon were to sell an exchange or territory in Florida, Covad can protect its rights and interests without the inclusion of the language it seeks to add, by participating in the Commission's proceeding regarding the sale.

STAFF: Staff has no position at this time.

ISSUE 9: Should the anti-waiver provisions of the Agreement be altered in light of the resolution of Issue 2?

POSITIONS

COVAD: Yes. As described under Issue 2, backbilling between the Parties should be limited to billing for services rendered within one year prior of the current billing date to provide a measure of certainty in the billing relationship between the Parties. If Covad's position on this issue is accepted, the waiver provisions of the Agreement should be modified to take this backbilling limit into account.

VERIZON: The parties' right to assess previously unbilled charges (*i.e.*, to "backbill"), in the absence of a voluntary agreement to the contrary, should be governed by the five-year statute of limitations in Fla. Stat. § 95.11(2)(b). This statute of limitations applies to billing under contractual relationships between businesses generally, and appropriately protects the parties' interest in collecting the established price for services they provide under the agreement. If this statute of limitations were deemed not to apply, a party would potentially be able to provide service and collect fees from its customers while avoiding the appropriate payments for the inputs it purchases from the other party.

Covad's proposal is not only inconsistent with the statute of limitations, but also one-sided and therefore unreasonable. The parties' right to backbill to recoup any undercharges should be symmetrical with the right to contest any previously billed overcharges. Despite its claims that a time limit on the right to backbill is necessary to provide "certainty in the billing relationship," Covad has proposed no similar limitation on the right to dispute past overcharges, which would remain governed by the five-year statute of limitations. But, just as a party's right to dispute overcharges should not be arbitrarily limited, a party's right to collect undercharges also should not be so limited.

Consistent with Verizon's position, the anti-waiver provision of the agreement should not be altered.

STAFF: Staff has no position at this time.

ISSUE 10: Should the Agreement include language addressing whether Covad can bring a future action against Verizon for violation of Section 251 of the Act?

POSITIONS

COVAD: No. Covad should be permitted to seek damages and other relief from Verizon based upon Sections 206 and 207 of the Act, which provide a cause of action in federal district court or at the FCC and a right to damages for violations of any other provision of the Act, including Section 251. Covad's proposed language is intended to address *Trinko v. Bell Atlantic Corp.*, 294 F.3d 307 (2d Cir. 2002), in which the court held that because Section 252 of the Act allows the parties to negotiate interconnection agreements "without regard to the standards set forth in subsections (b) and (c) of section 251," 47 U.S.C. § 252(a)(1), the act of entering an interconnection agreement can extinguish an ALEC's right to damages for violations of Section 251. The court held that such ALECs have the right to sue for only common law damages for breach of contract. Covad and Verizon, however, did not negotiate the instant Agreement "without

regard to the standards set forth in subsections (b) and (c) of section 251." Indeed, the Parties negotiated this Agreement with regard to Section 251, as many of the provisions thereof are based either explicitly or implicitly upon that section of the Act. Accordingly, Covad should be able to explicitly preserve causes of action that arise from Sections 206 and 207 of the Act because the Parties are incapable of enumerating in the Agreement all potential causes of action that exist now or may exist in the future.

VERIZON: Covad seeks to insert language that it hopes would impede Verizon's ability to defend against a future lawsuit claiming violations of § 251 of the Act. Whether the execution of an interconnection agreement affects any other remedies the parties might have is a question that is not presented here and that the Commission should not attempt to pre-judge in this proceeding. In particular, the question whether Covad, once it has signed an interconnection agreement with Verizon, could bring an action against Verizon based on an alleged violation of subsections (b) and (c) of § 251 is not presented in this proceeding, and the Commission should not include any language in the parties' agreement purporting to address that issue. Instead, that question should be addressed by the FCC or a court of competent jurisdiction if and when the question arises. In any event, uniform federal court authority, including authority from the federal district courts in Florida, holds that no action may be brought pursuant to §§ 206 and 207 of the Act for such alleged violations of § 251. *See, e.g., Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002), *cert. granted on other grounds*, No. 02-682 (U.S. Mar. 10, 2003); *Supra Telecomms. & Info. Sys., Inc. v. BellSouth Telecomms., Inc.*, No. 99-1706-CIV, 2001 U.S. Dist. LEXIS 23816 (S.D. Fla. June 8, 2001); *Intermedia Communications, Inc. v. BellSouth Telecomms., Inc.*, 173 F. Supp. 2d 1282 (M.D. Fla. 2000).

STAFF: Staff has no position at this time.

ISSUE 11: RESOLVED

ISSUE 12: What language should be included in the Agreement to describe Verizon's obligation to provide Covad with nondiscriminatory access to the same information about Verizon's loops that Verizon makes available to itself, its affiliates and third parties?

POSITIONS

COVAD: The following language should be included in the Agreement:

"Verizon will provide such information about the loop to Covad in the same manner that it provides the information to any third party and in a functionally equivalent manner to the way that it provides such information to itself.

Verizon, as part of its duty to provide access to the pre-ordering function, must provide Covad with nondiscriminatory access to the same detailed information about the loop at the same time and manner that is available to Verizon and/or its affiliate."

Although Covad does not have to be granted access to the same systems that Verizon uses for pre-ordering and ordering OSS functions for its own customers, Verizon must ensure that Covad has access to the same information that Verizon accesses with those systems. Verizon also must make certain that this access is available in the same manner as Verizon makes the information available to third parties and in a functionally equivalent manner to the way it makes the information available to itself and its affiliates. The FCC has consistently found that such nondiscriminatory access to OSS is a prerequisite to the development of meaningful local competition. *See, e.g., Bell Atlantic New York Order*, at 3990, ¶ 83; *BellSouth South Carolina Order*, 547-48, 585; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20653; *see also Telecommunications Act of 1996*, § 271(c)(2)(B)(ii). Without such access, the FCC has determined that a competing carrier "will be severely disadvantaged, if not precluded altogether, from fairly competing." *Bell*

Atlantic New York Order at 3990, ¶ 83. In order to meet the standards set by the FCC, Verizon must provide nondiscriminatory access to the systems, information, documentation, and personnel that support its OSS. *Bell Atlantic New York Order,* 15 FCC Rcd at 3990, ¶ 84. For OSS functions that are analogous to those that Verizon provides to itself, its customers or its affiliates, the nondiscrimination standard requires that it offer requesting carriers access that is ***equivalent in terms of quality, accuracy, and timeliness.*** *Id.* at 3991, ¶ 85 (emphasis added). Covad's proposed language accomplishes that.

VERIZON: The dispute here is not about whether Verizon must provide Covad with nondiscriminatory access to loop qualification information. The agreement already provides that "[t]he pre-ordering function includes providing Covad nondiscriminatory access to the same detailed information about the loop that is available to Verizon and its affiliates." Verizon Response Attach. A at 48 (Additional Services Attachment § 8.1.1). The agreement also provides that Verizon "shall provide to Covad, pursuant to Section 251(c)(3) of the Act, 47 U.S.C. § 251(c)(3), Verizon OSS Services." *Id.* at 49 (Additional Services Attachment § 8.2.1); *see also id.* at 65 (UNE Attachment § 3.13.3) ("Verizon shall provide access to loop qualification information in accordance with, but only to the extent required by, Applicable Law"). Accordingly, the agreed-upon provisions of the agreement already require Verizon to provide Covad with loop qualification information as required by federal law. Covad has shown no need for its additional language.

Furthermore, Covad's proposed language is inconsistent with the requirements of federal law insofar as it purports to regulate the manner in which Verizon provides loop qualification information. *See, e.g., id.* Attach. C at 5 (Additional Services Attachment § 8.1.4) ("Verizon will provide such information about the loop to Covad in the *same manner* that it provides the information to any third party and in *a functionally equivalent manner* to

the way that it provides such information to itself.") (emphases added). The language Covad has proposed has no basis in the 1996 Act or in any FCC rule or order implementing the Act.

STAFF: Staff has no position at this time.

ISSUE 13: In what interval should Verizon be required to return Local Service Confirmations to Covad for pre-qualified Local Service Requests submitted mechanically and for Local Service Requests submitted manually?

POSITIONS

COVAD: Verizon should be required to return 95% of Firm Order Commitments to Covad for pre-qualified and fully mechanized Local Service Requests within three (3) hours. Verizon should be required to return 90% of Firm Order Commitments to Covad for pre-qualified and partially mechanized Local Service Requests within seven (7) hours. Verizon should be required to return 95% of Firm Order Commitments to Covad for pre-qualified and non-mechanized Local Service Requests within twenty-four (24) hours. These benchmarks are identical to benchmarks applied to other ILECs in Florida.

VERIZON: Intervals for returning Local Service Request Confirmations ("LSRCs") – formerly referred to as Firm Order Confirmations ("FOCs") – should not be established on an interconnection-agreement-by-interconnection-agreement basis. Instead, any such intervals should be established on an industry-wide basis, as this Commission recently did in Docket No. 000121C-TP. Covad's proposed language would change both the intervals and the performance standards contained in the measurements this Commission adopted and should be rejected for that reason. Furthermore, including these intervals in interconnection agreements would mean that amendments to those agreements would be required to modify the intervals, when necessary.

STAFF: Staff has no position at this time.

ISSUE 14: RESOLVED.

ISSUE 15: RESOLVED.

ISSUE 16: RESOLVED.

ISSUE 17: RESOLVED.

ISSUE 18: RESOLVED.

ISSUE 19: Do Verizon's obligations under Applicable Law to provide Covad with nondiscriminatory access to UNEs and UNE combinations require Verizon to build facilities in order to provision Covad's UNE and UNE combination orders?

POSITIONS

COVAD: Yes. Verizon should provide Covad UNEs and UNE combinations in instances when Verizon would provide such UNE or UNE combinations to itself. Pursuant to Section 251(c)(3) of the Act, and applicable FCC rules, Verizon is obligated to provide Covad access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory terms. As the FCC itself has found, Section 251(c)(3)'s requirement that incumbents provide ALECs "nondiscriminatory access" to UNEs requires that incumbents provide ALECs access to UNEs that is "equal-in-quality" to that which the incumbent provides itself. *Local Competition Order*, ¶ 312; 47 C.F.R. § 51.311(b). Indeed, the United States Supreme Court has affirmed the fact that Section 251(c)(3) obligates incumbents to provide requesting carriers combinations that it provides to itself. *Verizon Communications v. F.C.C.*, 535 U.S. 467, 538, 122 S.Ct. 1646, 1687 (2002) ("otherwise, an entrant would not enjoy true 'nondiscriminatory access'" pursuant to Section 251(c)(3)). As the FCC has found, the same reasoning requires that incumbents provide requesting carriers UNEs in situations where the incumbent would provide the UNE to a requesting retail customer as part of a retail service offering. Verizon's proposed language would unduly restrict Covad's access to

network elements and combinations that Verizon ordinarily provides to itself when offering retail services.

VERIZON: This issue pertains to Covad's attempt to expand Verizon's unbundling obligations under federal law by requiring Verizon to build facilities in order to provision Covad's UNE orders. Incumbent LECs are not legally obligated to construct or deploy new facilities or equipment in order to provide access to their networks on an unbundled basis. As the Eighth Circuit has held, under the UNE provisions of the 1996 Act, ALECs are granted "access only to an incumbent LEC's *existing* network – not to a yet unbuilt superior one." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). Consistent with that holding, the FCC expressly affirmed that it "did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed [such] facilities for its own use." *UNE Remand Order*[8] ¶ 324; *see also Triennial Review NPRM*[9] ¶ 65 (under FCC's current rules, "incumbent LECs are not required to build new facilities in order to fulfill competitors' requests for network elements"). Reviewing this clear body of law, the FCC's Wireline Competition Bureau stated, in the context of an interconnection agreement arbitration, that "Verizon is . . . correct that the Act does not require it to construct network elements . . . for the sole purpose of unbundling those elements for . . . other carriers." *Virginia Arbitration Order*[10] ¶ 468. The Sixth Circuit has also recently made

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[8] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *petitions for review granted, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

[9] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, 16 FCC Rcd 22781 (2001) ("*Triennial Review NPRM*").

[10] *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the*

clear that an ILEC is not required to construct facilities to provide an ALEC with unbundled access to its network, even if it would perform such construction for its retail customers. *See, e.g., Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 593 (6th Cir. 2002) ("[t]he Act does not forbid [an ILEC] from discriminating between [an ALEC] requesting unbundled network elements and [the ILEC's] own retail customers"). Finally, the FCC has also reviewed Verizon's specific practices with respect to providing unbundled elements on numerous occasions and, in each case, has found that Verizon's practices satisfy the requirements of the Act and the FCC's regulations. *See Pennsylvania 271 Order*[11] ¶ 92; *Virginia 271 Order*[12] ¶¶ 141, 144; *New Hampshire/Delaware 271 Order*[13] ¶¶ 112-114; *New Jersey 271 Order*[14] ¶ 151.

In the FCC's recently adopted, but as yet unreleased, *Triennial Review Order*, the FCC adopted further rules regarding this issue. *See* FCC News Release, *FCC Adopts*

Virginia State Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, Memorandum Opinion and Order, 17 FCC Rcd 27039 (Wireline Comp. Bur. 2002) ("*Virginia Arbitration Order*").

[11] *Application of Verizon Pennsylvania Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, 16 FCC Rcd 17419 (2001) ("*Pennsylvania 271 Order*"), *appeal pending, Z-Tel Communications, Inc. v. FCC*, No. 01-1461 (D.C. Cir.).

[12] *Application by Verizon Virginia Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Virginia*, Memorandum Opinion and Order, 17 FCC Rcd 21880 (2002).

[13] *Application by Verizon New England Inc., et al., for Authorization To Provide In-Region, InterLATA Services in New Hampshire and Delaware*, Memorandum Opinion and Order, 17 FCC Rcd 18660 (2002).

[14] *Application by Verizon New Jersey Inc., et al., for Authorization To Provide In-Region, InterLATA Services in New Jersey*, Memorandum Opinion and Order, 17 FCC Rcd 12275 (2002) ("*New Jersey 271 Order*").

New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers, Attach. at 3-4 (Feb. 20, 2003) ("*Triennial Review* News Release"). Although the content of those rules is not yet known, unless stayed or vacated by a court of competent jurisdiction, they will form the basis for any language in the parties' agreement on this issue. In the event the FCC has changed its prior rules, Verizon reserves the right to propose new language in light of those rules and will address this issue further at the hearing in this proceeding and in its post-hearing brief.

STAFF: Staff has no position at this time.

ISSUE 20: RESOLVED

ISSUE 21: RESOLVED

ISSUE 22: What appointment window should apply to Verizon's installation of loops? What penalty, if any, should apply if Verizon misses the appointment window, and under what circumstances?

POSITIONS

COVAD: This issue has narrowed to the charge for failure to meet the appointment window. Covad proposes the following language to resolve the remaining narrow issue:

"If a dispatch does not occur (other than if the Covad end user was not available or upon the request of Covad), Covad may request a new appointment window outside of the normal provisioning interval by contacting Verizon's provisioning center directly and Covad shall not be required to pay the non-recurring dispatch charge for such appointment. Moreover, each additional instance in which the Verizon technician fails to meet the same customer during future scheduled windows, Verizon will pay to Covad the missed appointment fee that will be equivalent to the nonrecurring dispatch charge that Verizon would have assessed to Covad had the Verizon technician not missed the appointment."

Like any provider of a service that requires installation in the end-user's home or business, Verizon should be obligated to provide its customer (Covad) a commercially reasonable appointment window when it will deliver the product (the loop). And when it fails to meet this committed timeframe, Verizon should waive the nonrecurring dispatch charges. Similarly, when Verizon misses additional appointment windows for that same end-user, Verizon should pay Covad a missed appointment fee equivalent to the Verizon non-recurring dispatch charge.

VERIZON: Verizon offers ALECs and its retail customers the opportunity to request an appointment window: a.m., p.m., or first or last appointment. Verizon makes good-faith efforts to meet those windows, but does not guarantee the appointment window for either retail customers or ALECs. Through this process, Verizon provides ALECs with parity service, as required by the 1996 Act. Verizon believes that the parties are in agreement that access to appointment windows on these terms satisfies Verizon's obligations under the 1996 Act. However, the parties continue to disagree about Covad's proposed penalty provisions, which would prevent Verizon from charging for dispatches in certain circumstances and require it to pay penalties in other circumstances. A two-party arbitration is not the appropriate forum to address the issue of performance measurement penalties. In any event, Covad's penalty proposals are unreasonable. First, the penalties proposed would apply even where it is Covad's fault (or its end-user customers' fault) that an appointment date was missed. Second, because the applicable legal standard is parity – and thus Verizon is required to meet substantially the same percentage of provisioning appointments for comparable retail and wholesale orders – a penalty provision that could apply even when Verizon's performance for Covad is better than Verizon's performance for its own customers is inconsistent with federal law.

STAFF: Staff has no position at this time.

ISSUE 23: What technical references should be included in the Agreement for the definition of the ISDN and HDSL loops?

POSITIONS

COVAD: The Agreement should refer to industry ANSI standards and not to Verizon's internal (and unilaterally changeable) technical references. Covad has requested that Verizon utilize only industry ANSI standards in the Agreement rather than Verizon Technical Reference 72575 (TR 72575) for ISDN, ADSL and HDSL loops. In an industry where it is routine for carriers to operate in multiple-states and in a variety of ILEC territories, use of national industry standards is the best means of defining technical terms for purposes of an interconnection agreement.

VERIZON: Verizon and Covad agree that the sections of the agreement at issue should make reference to industry standards, which contain technical references for the technology and electronics used to provide ISDN and HDSL. The parties disagree, however, about whether those sections should also refer to the Verizon technical documents, which apply those technical references to specify the particular types of loops in Verizon's network that can be used to provision ISDN and HDSL. Although Verizon revises its technical documents from time to time to remain current with industry standards, it is ultimately Verizon's documents – and not the industry standards – that define the loops that Verizon provides when Covad places an order for an ISDN or an HDSL loop. Because Covad is entitled to obtain unbundled access only to Verizon's existing network, the agreement should reference the Verizon technical documents as well as industry standards.

STAFF: Staff has no position at this time.

ISSUE 24: SUBSUMED WITHIN ISSUE 19.

ISSUE 25: SUBSUMED WITHIN ISSUE 19.

ISSUE 26: RESOLVED

ISSUE 27: What are Covad's obligations under Applicable Law, if any, to notify Verizon of services it is deploying on UNE loops?

POSITIONS

COVAD: This issue has narrowed to a disagreement over Covad's inclusion of the language underlined in the paragraph below:

"If Covad seeks to deploy over Verizon's network a new loop technology that is not among the loop technologies described in the loop types set forth above (or in the cross-referenced sections of Verizon's tariff), then Covad shall submit to Verizon a written request, citing this sub section 3.6, setting forth the basis for its claim that the new technology complies with the industry standards for one or more of those loop types. Within 45 calendar days of receiving this request, Verizon shall either (a) identify for Covad the loop type that Covad should order when it seeks to deploy that loop technology, or (b) indicate that it does not agree with Covad's claim that the new technology complies with industry standards. With respect to option (b), if Covad does not agree with Verizon's position, Covad may immediately institute an appropriate proceeding before the Commission, the FCC, or a court of competent jurisdiction to resolve the dispute, without first pursuing dispute resolution in accordance with Section 14 of the General Terms and Conditions of this Agreement. With respect to option (a), if Verizon subsequently creates a new loop type specifically for the new loop technology, Covad agrees to convert previously-ordered loops to the new loop type, without any interruption of service and at no cost, and to use the new loop type on a going-forward basis. Verizon will employ good faith efforts to ensure that any such conversions are completed without any interruption of service."

With this language, Verizon will allow Covad to deploy new loop technology over its network, so long as the technology complies with industry standards, even though Verizon has not "officially" developed or released a product that utilizes similar technology. Otherwise said, Verizon will not prevent Covad from deploying a new technology that complies with industry standards on the grounds that Verizon has yet to deploy its own "product." By agreeing to this language, Verizon acknowledges that it cannot refuse a request made by Covad to deploy a certain technology over a loop if it complies with industry standards. Verizon wants, however, to penalize Covad's speed to market in deploying this new technology prior to Verizon by requiring that Covad pay for converting the loops upon which Covad's new technology is deployed to loop types that Verizon officially creates and designates subsequently to handle the new technology. Verizon's desire to foist such costs on Covad is highly inappropriate.

The disputed language underlined above is designed to protect the speed with which Covad can introduce new technologies from delaying tactics available under the dispute resolution provisions of the Agreement.

VERIZON: Verizon's proposed language states that "Covad and Verizon will follow Applicable Law governing spectrum management." Verizon Response Attach. C at 12 (UNE Attachment § 3.11). Covad, in contrast, has proposed changes to that language that do *not* follow current applicable law. Covad's proposed language would give it the right to deploy advanced services on loops that it obtains from Verizon without informing Verizon of the particular type of advanced service Covad is deploying on the loop. Under the FCC's rules, however, Covad is obligated to provide this information to Verizon. *See*

Line Sharing Order[15] ¶ 204. Verizon also uses this information to ensure that the various services provided over loops in a binder group do not interfere with each other. This information also may be relevant in trouble-shooting and repairs, for which Verizon is held to performance standards. Verizon's possession of this information better enables end users to receive the services that they order and, therefore, is in the public interest.

STAFF: Staff has no position at this time.

ISSUE 28: RESOLVED

ISSUE 29: RESOLVED

ISSUE 30: Should Verizon be obligated by this Agreement to provide cooperative testing of loops it provides to Covad, or should such testing be established on an industry-wide basis only? If Verizon is to be required by this Agreement to provide such testing, what terms and conditions should apply?

POSITIONS

COVAD: Yes. The Agreement should provide specific terms and conditions reflecting how the Parties currently conduct cooperative testing and should continue to do so under the Agreement. Cooperative acceptance testing, or joint acceptance testing, assists in timely and efficient provisioning of newly requested stand alone UNE loops over which DSL and other advanced services will be provided. Additionally, cooperative testing can assure complete maintenance processes on such loops.

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[15] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*"), *vacated and remanded, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

Covad, unlike other ALECs, primarily offers advanced services over UNE loops and, as a result, cooperative testing is absolutely critical to its business and ensuring that the loops serving its customers are properly provisioned. Covad therefore seeks to protect its business interests by including language in the Agreement that details what is involved in the cooperative testing process, rather than leaving it to the imagination of the parties.

Covad has proposed new language that does not detail the specific process that Verizon must follow when cooperative testing is performed. Instead, Covad proposes language that takes a more functional and less granular approach with regard to specifying the time when cooperative testing must take place and what should accomplished when it is performed. Specifically, Covad proposes general language about when cooperative testing will be performed, the types of tests that will be performed, when Verizon has to repeat the tests, the standard by which the loops should perform, and for what activities Verizon should use Covad's Interactive Voice Response ("IVR") system. In addition, Covad proposes language that allows for future improvement of cooperative testing, *i.e.*, additional testing, procedures and/or standards, upon agreement of the parties.

The specific tests referenced in Covad's proposed language, *i.e.*, (1) Loop Length Testing; (2) DC Continuity Testing; (3) Foreign Battery/Conductor Continuity Testing; (4) AC Continuity Testing; and (5) Noise Testing, are tests that Verizon performs today with Covad during the cooperative testing process. Rather than specify how these tests will be performed in the Agreement, Covad seeks language that simply provides that a Verizon technician and a Covad technician will jointly perform them.

VERIZON: Covad proposes to add language to the agreement that specifies, in great detail, a manual cooperative testing process that Verizon's technicians must follow when they provision an xDSL-capable loop. The process described in

Covad's language was developed in the former Bell Atlantic region of Verizon's territory through a DSL collaborative proceeding that commenced in New York in August 1999. This procedure, however, is not employed in Verizon's former GTE jurisdictions, such as Florida. In any event, because the cooperative testing of loops is an operational matter that is subject to change over time, detailed processes for such testing should not be specified in interconnection agreements. Finally, Verizon opposes Covad's position because it would require Verizon to conduct inefficient and burdensome manual testing, even when mechanized testing of the loop is available.

STAFF: Staff has no position at this time.

ISSUE 31: RESOLVED

ISSUE 32: Should the Agreement establish terms, conditions and intervals to apply to a manual loop qualification process?

POSITIONS

COVAD: Yes. In instances when Verizon rejects a Covad mechanized loop qualification query, Covad should be allowed to submit an "extended query" to Verizon at no additional charge. Such a query could avoid the need for, and costs of, manual loop qualification. Covad should be able to submit either an extended query or a manual loop qualification request in instances when the Verizon customer listing is defective, not just in cases where the Verizon database does not contain a listing. Finally, Verizon should complete Covad's manual loop qualification requests within one business day.

VERIZON: Even as revised in the Evans/Clancy Joint Rebuttal Testimony, Covad's proposals are generally inapplicable to the procedures Verizon provides for retail and ALEC loop qualification requests in Florida. The single electronic loop qualification transaction Verizon offers to itself and to ALECs in Florida provides not only all

the information provided by the various electronic transactions offered in Verizon's former Bell Atlantic Service Areas, but also information that is usually only available on a manual basis in those areas. For this reason, Verizon does not offer a manual loop qualification process in Florida. Nonetheless, as an exceptions process, Verizon will manually investigate loop qualification information on particular loops for both its retail DSL service and for ALECs, and will provide to both any information found in substantially the same time and manner.

In addition, Covad's proposal is contrary to law. The FCC recently has reaffirmed that an ILEC's obligation is to provide ALECs with nondiscriminatory access to the loop qualification information the ILEC has. The FCC "has never required incumbent LECs to ensure the accuracy of their loop qualification databases." *BellSouth Five-State 271 Order*[16] ¶ 142. Accordingly, there is no basis to Covad's asserted right to be able to obtain loop qualification information at no cost in cases where the information Verizon returns through the mechanized transaction is "defective."

STAFF: Staff has no position at this time.

ISSUE 33: Should the Agreement allow Covad to contest the prequalification requirement for an order or set of orders?

POSITIONS

COVAD: Yes. For certain order types, Verizon has agreed to accept Covad service orders without regard to whether they have been prequalified. However, Covad seeks language that would preserve its right to contest the prequalification "requirement" for an order or set of

[16] *Joint Application by BellSouth Corp., et al. for Provision of In-Region, InterLATA Services In Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, Memorandum Opinion and Order, 17 FCC Rcd 17595 (2002) ("*BellSouth Five-State 271 Order*").

orders. Covad seeks this right because Verizon's prequalification tool has proven to be unreliable on certain orders types. In the event Covad uncovers significant and pervasive problems with Verizon's prequalification tool for an order or sets of order, Covad seeks to reserve its right to contest any requirement that such orders must pass prequalification.

VERIZON: No. It is essential that orders for advanced services be provisioned on loops that possess the appropriate technical capabilities. Accordingly, Verizon expects that ALECs have prequalified their xDSL orders before submitting them. If Covad seeks to dispute Verizon determination that a particular loop or set of loops does not meet the necessary technical specifications to handle the advanced services Covad seeks to provide, then Covad may challenge those findings. But Covad should not be permitted to eliminate entirely the prequalification requirement for a particular class of loops. If Covad were not required to prequalify its xDSL-capable loop orders, then Verizon could be required to attempt to provision Covad's xDSL-capable loop orders where no xDSL-capable loop is available.

STAFF: Staff has no position at this time.

ISSUE 34: Should the Agreement specify an interval for provisioning loops other than either the interval that Verizon provides to itself (for products with retail analogs) or the interval that this Commission establishes for all ALECs (for products with no retail analog)?

POSITIONS

COVAD: Yes. Verizon should provision loops within the shortest of either: (1) the interval that Verizon provides to itself, or (2) the Commission-adopted interval, or (3) ten business days for loops needing conditioning, five business days for stand-alone loops not needing conditioning, and two business days for line shared loops not needing conditioning. These intervals are reasonable and ensure that Covad receives reasonable and

nondiscriminatory access to UNE loops.

VERIZON: No. There is no basis in federal law for Covad to obtain an interval that is shorter than the interval Verizon provides to itself or the interval this Commission establishes for all ALECs. Instead, Covad should obtain the same nondiscriminatory intervals available to all other ALECs.

Covad has also proposed the deletion of language stating that the applicable interval for provisioning a loop does not include any time necessary for engineering and conditioning. Although Verizon will perform such engineering and conditioning work to enable a loop to handle the service Covad has ordered, that work is not part of the normal provisioning process, and Verizon should have additional time in which to complete that work.

STAFF: Staff has no position at this time.

ISSUE 35: Under what terms and conditions should Verizon conduct line and station transfers ("LSTs") to provision Covad loops?

POSITIONS

COVAD: Consistent with the nondiscrimination provisions of the Act, when provisioning T1s or xDSL loops, after obtaining Covad's approval, Verizon should perform LSTs at no additional charge if Verizon does not charge its own customers for performing such work. Covad also believes that, except in line sharing situations, the standard provisioning interval should not change based on Verizon's need to conduct LSTs. Such work is routinely done by Verizon to provision loops and should already be captured by the standard interval. In fact, Verizon's retail provisioning intervals do not vary depending on whether it must conduct an LST for its retail end users.

VERIZON: Through negotiations in the DSL collaborative in New York, Verizon and interested ALECs including Covad

reached agreement on a process for line and station transfers (STs . Verizon will conduct an LST if the loop currently serving an end user cannot handle the service Covad has ordered and there is a spare loop that meets the necessary technical specifications for that service. The LST enables Verizon to complete Covad order by rearranging the loops. Pursuant to the agreement, Verizon performs LSTs as a matter of course when provisioning ALECs orders because ALECs, including Covad, requested that Verizon take the steps necessary to provision their orders successfully. Although Verizon is developing a uniform process by which ALECs would indicate, on an order-by-order basis, whether they wish to have an LST performed, Covad should remain bound to the terms of the existing industry agreement until the new uniform process is in place. Further, Covad and other ALECs should be required to pay for any LSTs performed, as such activity constitutes additional work that Verizon is not required to perform in order to provide unbundled access to its network. Finally, because performing an LST can add time to the provisioning process, Verizon should have additional time to perform an LST when it is required to provision an ALEC order. Indeed, the agreement reached in the DSL collaborative expressly recognized that LSTs will require an additional charge and involve additional installation work.

STAFF: Staff has no position at this time.

ISSUE 36: Is Verizon obligated to provide line sharing where an end-user customer receives voice services from a reseller?

POSITIONS

COVAD: Yes. Verizon should be obligated to offer a form of line sharing, called Line Partitioning, where end users receive voice services from a reseller of Verizon local services. There is no reason to deny competitive DSL service to end users who choose to purchase local voice services from a reseller, rather than Verizon.

VERIZON: No. Federal law on this point is clear. Verizon has no obligation to provide access to the high-frequency portion of the loop where an ALEC provides voice service on a loop as a reseller. *See Virginia 271 Order* 151; *Line Sharing Order* 72; *Texas 271 Order*[17] ¶ 330. There is thus no reason for the Commission to revisit this issue, especially in light of the FCC's recent conclusion that "[t]he high-frequency portion of the loop (HFPL) is not an unbundled network element" in any circumstance. *Triennial Review* News Release, Attach. at 2. Pursuant to Verizon's federal tariff, ALECs may resell Verizon's retail DSL service over resold lines, so end users that purchase their voice service from a reseller are able to obtain DSL services on a competitive basis.

STAFF: Staff has no position at this time.

ISSUE 37: What should the interval be for Covad's line sharing Local Service Requests?

POSITIONS

COVAD: If a loop is mechanically prequalified by Covad, Verizon should return an LSR confirmation within two business hours for all Covad LSRs. This interval is reasonable and would ensure that Covad is provided reasonable and nondiscriminatory access to Verizon's OSS.

VERIZON: See Verizon's position on Issue 13.

STAFF: Staff has no position at this time.

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[17] *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354 (2000).

ISSUE 38: What interval should apply to collocation augmentations where a new splitter is to be installed?

POSITIONS

COVAD: Verizon should provision such augmentation in 45 days. This interval is reasonable and would ensure that Covad is provided reasonable and nondiscriminatory access to UNEs.

VERIZON: The intervals in Verizon effective collocation tariff in Florida (19) should apply to collocation augments that Covad orders, including when Covad seeks to have Verizon install a new splitter. All the collocation-related terms and conditions that apply to Covad should be the same as those in the tariff on file with this Commission, which comports with the Commission decision in its generic collocation docket. *See* Final Order on Collocation Guidelines, Order No. PSC-00-0941-FOF-TP, Docket Nos. 981834-TP, 990321-TP (Fla. PSC May 11, 2000). Contrary to Covad claim, only then would it be provided reasonable and nondiscriminatory access to UNEs. Indeed, by suggesting that the terms and conditions under which Verizon is required to provide collocation should be set on an interconnection-agreement-by-interconnection-agreement basis, Covad is suggesting that it is entitled to preferential treatment.

STAFF: Staff has no position at this time.

ISSUE 39: On what terms should Covad be permitted to access loops for testing purposes?

COVAD: Consistent with 47 C.F.R. Section 51.319(h)(7)(i), Covad should be allowed to supply its own test head for line shared loops, as it has a right to access its loops for testing purposes. In particular, Covad is entitled to test the entire frequency range of the loop facility, both the high frequency portion and the low frequency portion (including DC). Covad should have access to its loops for testing purposes and should be able to test them in the manner it sees fit to assure that its

customers are provided reliable service.

VERIZON: As an initial matter, this dispute pertains only to line shared loops, not to all loops as the title of this issue suggests. As noted above, the FCC has recently concluded that he high-frequency portion of the loop (HFPL) is not an unbundled network element and has adopted new rules limiting ILECs obligations to provide line sharing. See Triennial Review News Release, Attach. at 2

Furthermore, 4.8.1 of the UNE Attachment which is not subject to dispute here already permits Covad to use its own test head for line shared loops in Verizon end offices where Verizon employs a POT Bay for interconnection of a Covad collocation arrangement with Verizon network. Under 4.8.2, Covad may not use its own test head where Verizon has not employed a POT Bay for interconnection of a Covad collocation arrangement with Verizon network. However, Verizon will make available to Covad an on-line, electronic test system for those lines.

Covad has proposed to specify in 4.8.2 that the inability to use its own test head pertains only to line-shared loops. This is already clear from the context of the provision, in that 4 is captioned ine Sharing and addresses only line-shared loops, but Verizon does not object to the inclusion of Covad first proposed addition to Verizon language, which does not change the meaning of the provision. Covad has further proposed to add language stating that it may use Verizon on-line test system at no charge. Verizon opposes this provision, which Covad does not defend, and for which there is no basis. Finally, Covad proposes to add language stating that the inclusion of 4.8.2 in the agreement does not constitute Covad acknowledgement that Verizon has satisfied its obligations under 47 C.F.R. 51.319(h)(7)(i). But Verizon clearly has done so. That section requires ILECs to provide est access points . . . at the splitter . . . or through a standardized interface, such as . . . a test access server. 47 C.F.R. 51.319(h)(7)(i) (emphasis added). Accordingly, there is

no basis for Covad proposed language.

STAFF: Staff has no position at this time.

ISSUE 40: RESOLVED

ISSUE 41: Should Verizon provide Covad access to unterminated, unlit fiber as a UNE? Should the dark fiber UNE include unlit fiber optic cable that has not yet been terminated on a fiber patch panel at a pre-existing Verizon Accessible Terminal?

POSITIONS

COVAD: Yes. The Agreement should clarify that Verizon's obligation to provide UNE dark fiber applies regardless of whether any or all fiber(s) on the route(s) requested by Covad are terminated. The FCC's definition of dark fiber includes both terminated and unterminated dark fiber. Fiber facilities still constitute an uninterrupted pathway between locations in Verizon's network whether or not the ends of that pathway are attached to a fiber distribution interface ("FDI"), light guided cross connect ("LGX") panel, or other facility at those locations. In addition, the termination of fiber is an inherently simple and speedy task.

Verizon's termination requirement would allow it unilaterally to protect every strand of spare fiber in its network from use by a competitor by simply leaving the fiber unterminated until Verizon wants to use the facility.

Covad requests that the Commission clarify that the definition of unbundled loop, subloop, and transport dark fiber includes fiber that is deployed in the network but not yet terminated. Further, Verizon should be required to terminate unterminated dark fiber for requesting ALECs.

Verizon's current dark fiber inventory practices are unreasonable and discriminatory and violate section

251(c)(3) of the Act and FCC rule 51.319. For example, Verizon has argued that dark fiber that is not terminated at both ends does not meet the FCC's definition of unbundled dark fiber and need not be made available to ALECs as a UNE. Verizon considers fiber that is not terminated at both ends and completely spliced to be under construction and not part of the dark fiber inventory available to ALECs. Verizon's refusal to consider these unterminated fibers as part of its inventory results in Verizon grossly understating the amount of dark fiber that should be characterized by Verizon as "available" to requesting ALECs as UNEs. Such fiber may readily be made usable by Verizon, and should be considered usable by ALECs. Unless Verizon is required to terminate dark fiber for ALECs, it can deliberately leave dark fiber that has been pulled or lies just outside a central office or building unterminated in order to reduce the dark fiber inventory that is available to ALECs. The District of Columbia Public Service Commission ("DC PSC") recently rejected Verizon's policies regarding unterminated and unspliced dark fiber and concluded that unlit fiber that is not attached at both ends is within the scope of the dark fiber UNE and should be included in Verizon's dark fiber UNE inventory that is made available to CLECs.

VERIZON: The *UNE Remand Order* defines dark fiber as nused loop capacity that *is physically connected to facilities* that the incumbent LEC currently uses to provide service; was installed to handle increased capacity and can be used by competitive LECs *without installation by the incumbent.* *UNE Remand Order* 174 n.323 (emphases added). Moreover, as described above, the law is clear that Verizon is not required to construct new UNEs for an ALEC. *See, e.g., Virginia Arbitration Order* 468 (Verizon is also correct that the Act does not require it to construct network elements, including dark fiber, for the sole purpose of unbundling those elements for . . . other carriers. .

Fiber that has not been installed between two accessible terminals (for example, between two end offices or between an end office and a customer premises) does not

meet the FCC definition because it is *not* physically connected to facilities used to provide service and *cannot* be used *by anyone* without installation by Verizon. The FCC expressly held that dark fiber must connect[] two points within the incumbent LEC network to be fully installed and available as a UNE. *UNE Remand Order* 325. Fiber that does not extend from one accessible terminal to another does not *connect* any point in the network to any other point in the network. Such fiber, therefore, does not fall within the FCC definition: it is not n uninterrupted pathway between locations in Verizon network, as Covad claims. In fact, the FCC stated that ark fiber is a network element within the meaning of 153(29) of the Act *only* if it is both physically connected to the incumbent network and is *easily called into service*. *Id.* 328 (emphasis added). If additional construction is required to complete an end-to-end route and make fiber ready for use, that fiber is not a network element under the FCC definition.

Covad claims that terminating fiber at an accessible terminal is n inherently simple and speedy task and that Verizon supposedly would protect every strand of spare fiber in its network from use by a competitor by simply leaving the fiber unterminated until Verizon wants to use the facility. Covad claim, however, does not reflect the manner in which Verizon actually constructs fiber facilities in its network. Verizon does not construct new fiber optic facilities to the point where the *only* remaining work item required to make them available and attached end-to-end to Verizon network is to terminate the fibers onto fiber distributing frame connections at the customer premises.

STAFF: Staff has no position at this time.

ISSUE 42: Under Applicable Law, is Covad permitted to access dark fiber in technically feasible configurations that do not fall within the definition of a Dark Fiber Loop, Dark Fiber Sub-Loop, or Dark Fiber IOF, as specified in the Agreement? Should the definition of Dark Fiber Loop include dark fiber that extends between a terminal located somewhere other than a central office and the customer premises?

POSITIONS

COVAD: Yes. Covad should be able to access dark fiber at any technically feasible point, which is the only criterion that Congress adopted for determining where carriers may access the incumbent's network. Verizon's attempt to limit access to dark fiber at central offices and via three defined products would diminish Covad's rights to dark fiber under Applicable Law.

Covad's proposed language, which permits it to have access to dark fiber in technically-feasible configurations consistent with Applicable Law, is simple, reasonable, and comports with the Act and FCC rules. Section 251(c)(3) of the Act and FCC Rule 51.307(c) specifically provide that ILECs shall provide to a requesting telecommunications carrier for the provision of a telecommunications service, "nondiscriminatory access to network elements on an unbundled basis at *any technically feasible* point" on terms and conditions that just, reasonable, and nondiscriminatory." Under the FCC definition of "technically feasible," access to unbundled network elements at a point in the network "shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier…for such access, or methods."

Furthermore, Covad's proposed language, which specifies that that "[t]he description of Dark Fiber Loop, Dark Fiber Sub-loop, and Dark Fiber IOF products, does not limit Covad's right to access dark fiber in other technically feasible configurations consistent with

Applicable Law," comports with FCC's findings in the *Virginia Arbitration Award*.

VERIZON: Dark fiber is not a separate, stand-alone UNE under the FCC rules. To the contrary, dark fiber is available to an ALEC *only* to the extent that it falls within the definition of specifically designated UNEs set forth in 47 C.F.R. 51.319(a) and (d) in particular, the loop network element, subloop network element, or interoffice facilities (OF . Verizon proposed contract language allows Covad to obtain access to dark fiber loops, subloops, and IOF, as those network elements are specifically defined by the FCC. That is all that applicable law requires. Covad proposed 8.1.5, which purports to expand Covad right to dark fiber beyond the loop, subloop, or IOF network elements, is inconsistent with the FCC rules implementing 251(c)(3) of the Act.

In addition, Covad proposed modification to the definition of dark fiber loops in 8.1.1 of the UNE Attachment is inaccurate and confusing. Section 51.319(a)(1) of the FCC rules defines the loop network element as transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises, including inside wire owned by the incumbent LEC. 47 C.F.R. 51.319(a)(1). Verizon proposed contract language in 8.1.1 follows this definition, describing a dark fiber loop as unlit fiber optic strands between Verizon Accessible Terminal, such as the fiber distribution frame, or its functional equivalent, located within a Verizon Wire Center [*i.e.*, a central office , and Verizon main termination point at a Customer premise, such as the fiber patch panel located within a Customer premise. Verizon Response Attach. C at 19 (UNE Attachment 8.1.1). Covad, however, expands this definition to include unlit fiber optic strands at a Verizon Wire Center or other Verizon premises in which Dark Fiber Loops terminate. *Id.* In other words, Covad would define a dark fiber loop as any dark fiber that extends between a terminal located somewhere other than the central office (*i.e.*, a remote terminal and the

customer premises. What Covad is describing, however, is not a loop at all, but a subloop, which is already covered under 8.1.2 of the UNE Attachment. In particular, 8.1.2(b) defines a dark fiber subloop to include dark fiber strands between Verizon Accessible Terminal at a Verizon remote terminal equipment enclosure and Verizon main termination point located within a Customer premise. *Id.* at 20 (UNE Attachment 8.1.2). Therefore, Covad proposed modification to Verizon proposed contract language is unnecessary to provide Covad with access to dark fiber at accessible terminals outside a Verizon central office.

STAFF: Staff has no position at this time.

ISSUE 43: Should Verizon make available dark fiber that would require a cross connection between two strands of dark fiber in the same Verizon central office or splicing in order to provide a continuous dark fiber strand on a requested route? Should Covad be permitted to access dark fiber through intermediate central offices?

POSITIONS

COVAD: The Agreement should clarify that Verizon's obligation to provide UNE dark fiber includes the duty to provide any and all of the fibers on any route requested by Covad regardless of whether individual segments of fiber must be spliced or cross connected to provide continuity end to end. This provision is consistent with the FCC's rules governing nondiscriminatory access to UNEs. Verizon should be required to splice because Verizon splices fiber for itself when provisioning service for its own customers and affiliates. In addition, according to usual engineering practices for carriers, two dark fiber strands in a central office can be completed by cross-connecting two dark fiber strands with a jumper. The FCC, acting as the arbitrator for the state of Virginia, has determined that Verizon may not decline to cross connect fiber to complete a route. It is Covad's position, and the FCC agreed, that Verizon's refusal to route dark fiber transport through intermediate central

offices places an unreasonable restriction on the use of fiber, and thus conflicts with FCC rules 51.307 and 51.311.

The Commission should require Verizon to route dark fiber transport through two or more intermediate central offices for Covad without requiring collocation at the intermediate central offices. Further, the Commission should require Verizon to provide any needed cross connects or splices between such fibers in order to facilitate routing of dark fiber through intermediate central offices

VERIZON: As explained above with respect to Issue 41, the law is clear that Verizon is not required to splice new fiber routes for an ALEC. If fiber optic strands must be spliced together end-to-end to create a continuous, uninterrupted transmission path, that fiber route is not yet fully constructed, and does not meet the definition of dark fiber. *See Virginia Arbitration Order* ¶¶ 451-453.

Verizon will cross-connect fibers at intermediate central offices for Covad and has proposed new contract language that would allow Covad to order dark fiber on an indirect basis, without having to collocate at intermediate central offices. Reasonable limitations on Verizon's offering, however, are necessary due to limitations of Verizon's network design and/or prevailing industry practices for optical transmission applications.

STAFF: Staff has no position at this time.

ISSUE 44: Should Verizon be obligated to offer Dark Fiber Loops that terminate in buildings other than central offices?

POSITIONS

COVAD: Yes. Covad should be able to access Dark Fiber Loops without regard to whether they terminate in central offices or other buildings (that effectively perform the functions of a central office for the Dark Fiber Loop).

Covad's proposed language on this issue is innocuous, unambiguous, comports with federal law, and protects Covad's legal rights to access Dark Fiber Loops. In particular, Section 51.319(a)(1) of the FCC's rules defines the loop network element as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC *central office* and the loop demarcation point at an end-user customer premises, including inside wire owned by the incumbent LEC." Verizon's proposed contract language, however, does not follow this definition because it limits the availability of dark fiber loops to "Wire Center" locations rather making dark fiber loops available in all Central Offices or Verizon locations that are de facto Central Offices.

VERIZON: Verizon proposed 8.1.1 of the UNE Attachment provides that Covad may access dark fiber loops at an accessible terminal in a Verizon Wire Center. ire Center is defined as a] building or portion thereof which serves as a Routing Point for Switched Exchange Access Service. The Wire Center serves as the premises for one or more Central Offices. Verizon Response Attach. A at 43 (Glossary Attachment 2.115). Furthermore, the definition of central Office states that sometimes this term is used to refer to a telephone company building in which switching systems and telephone equipment are installed. *See id.* at 31 (Glossary Attachment 2.20). Thus, the definition of a Verizon Wire Center includes any Verizon premises that houses a switch and thus acts as a central Office. More importantly, however, Verizon definition of ark Fiber Loops in 8.1.1 is fully consistent with 51.319(a)(1) of the FCC rules, which defines the loop network element as transmission facility between a distribution frame (or its equivalent) *in an incumbent LEC central office* and the loop demarcation point at an end-user customer premises, including inside wire owned by the incumbent LEC. 47 C.F.R. 51.319(a)(1) (emphasis added).

Covad proposed modification to the definition of ark Fiber Loops in 8.1.1 is inaccurate and confusing, for the reasons explained above in Verizon response to Issue

42. What Covad is seeking at other Verizon premises where the fiber is terminated is not a oop at all, but a subloop, which is already covered under 8.1.2 of the UNE Attachment. In particular, 8.1.2(b) defines ark Fiber Subloops to include dark fiber strands between Verizon Accessible Terminal at a Verizon remote terminal equipment enclosure and Verizon main termination point located within a Customer premise. Verizon Response Attach. C at 20 (UNE Attachment 8.1.2). Covad should not be permitted to conflate the definitions of Dark Fiber Loops and Dark Fiber Subloops in this manner.

STAFF: Staff has no position at this time.

ISSUE 45: Should Covad be permitted to request that Verizon indicate the availability of dark fiber between any two points in a LATA without any regard to the number of dark fiber arrangements that must be spliced or cross connected together for Covad's desired route?

POSITIONS

COVAD: Yes. It is Covad's position, and the FCC found, that requiring a requesting carrier to submit separate requests for each leg of a fiber route places unreasonable burden on carriers that is not comparable to Verizon's own information about and access to its fiber, and is therefore discriminatory. As mandated by the *Virginia Arbitration Order*, Verizon has agreed to route dark fiber transport through intermediate offices for ALECs without requiring collocation at the intermediate central offices (an indirect route). Verizon has also agreed that where a direct route is not available, Verizon will provide in its response to a Dark Fiber Inquiry information regarding alternative indirect routes. Verizon seeks to unreasonably limit its unbundling obligations, however, by imposing a restriction on its obligation to provide access to dark fiber UNEs and information regarding dark fiber UNEs that is inconsistent with FCC rules and the *Virginia Arbitration Order*. By limiting the number of intermediate offices that dark fiber may traverse, Verizon seeks to

impose a limitation on the usage of UNE dark fiber that violates FCC rule 51.309(a).

VERIZON: As described in response to Issue 43, Verizon has proposed new language for § 8.2.5 that would use intermediate office routing in response to dark fiber inquiries and in provisioning dark fiber orders. As a result, Covad would not need to collocate at intermediate central offices in order to obtain dark fiber on these routes. Pursuant to this language, Verizon would provide fiber optic cross-connects to join the terminated dark fiber IOF strands at the intermediate central offices.

Reasonable limitations on this offering, however, are necessary. As set forth above in Verizon's proposed new language, Verizon reserves the right to limit the number of intermediate central offices on an indirect route consistent with limitations in Verizon's network design and/or prevailing industry practices for optical transmission applications. Verizon will discuss with Covad any limitations on the number of intermediate offices along an indirect route to permit Covad to make any necessary collocation decisions.

STAFF: Staff has no position at this time.

ISSUE 46: To what extent must Verizon provide Covad detailed dark fiber inventory information?

POSITIONS

COVAD: In order to meaningfully utilize dark fiber, Covad must be able to know where and how much dark fiber exists in the network in order to develop its business and network plans, evaluate competitive customer opportunities, and otherwise truly utilize dark fiber as a component of a network build out strategy. Verizon must provide Covad detailed dark fiber inventory information, including, but not limited to, field surveys and access to maps of routes that contain available dark fiber by LATA and availability of dark fiber between any two points in a LATA without regard to the number of dark fiber

arrangements that must be spliced or cross connected together for Covad's desired route. Verizon performs field surveys for itself to determine the quality, sufficiency, and transmission characteristics of dark fiber. The FCC has made plain that Verizon must provide to Covad the same detailed underlying information regarding the composition and qualifications of the loop that Verizon itself possesses.

Verizon is required to provide access to requesting ALECs to the information available in any of its OSS, not merely the limited maps and other information it is convenient for Verizon to provide. Accordingly, Verizon cannot lawfully withhold detailed dark fiber transport maps, TIRKS data regarding availability of dark fiber, baseline fiber test data from engineering records or inventory management, and other data from ALECs as has been its standard practice.

Consistent with the FCC's decisions, Covad does not seek information that does not reside anywhere in Verizon's databases, fiber maps, paper records or elsewhere within Verizon's records, databases and other sources as alleged by Verizon in its Response. Rather, Covad seeks parity access to the same up-to-date pre-ordering and ordering information regarding dark fiber UNEs that is available anywhere in Verizon's backoffice systems, databases and other internal records, including but not limited to data from the TIRKS database, fiber transport maps, baseline fiber test data from engineering records or inventory management, and field surveys.

VERIZON: Verizon's obligation to provide information regarding its dark fiber inventory does not compel Verizon to provide to ALECs information that Verizon itself does not possess. In its proposed language, Covad demands that Verizon provide "maps of routes that contain available Dark Fiber IOF by LATA for the cost of reproduction." Verizon Response Attach. C at 23 (UNE Attachment § 8.2.5.1). Verizon, however, does not have such "maps" available for its own use that show what dark fiber is available along each route in Verizon's network. The

availability of dark fiber at specific locations changes on a day-to-day basis based on the needs of Verizon, ALECs, IXCs, and other customers for lit fiber services, as well as ongoing construction and maintenance and repair activities. If Verizon were to provide a snapshot picture of all available dark fiber in Florida at any given instant in time – which it cannot do – Covad could not assume that such dark fiber would be available when and if Covad later decides to place an order. In fact, because Verizon must review its records manually on a route-by-route basis to determine the availability of dark fiber, by the time Verizon finished a review of the entire state, the results would *already* be outdated. Therefore, requiring Verizon to provide Covad information identifying all available dark fiber in Florida not only would be unduly burdensome and costly for Verizon, but the information would be useless to Covad as soon as it was received.

In addition, for the reasons set forth in Verizon's response to Issues 43 and 45, Covad's proposed modifications to § 8.2.5 of the UNE Attachment are unnecessary (and, insofar as they purport to require Verizon to splice fiber for Covad, are inconsistent with applicable law). Verizon will propose language such that, if no direct route is available between the A to Z points requested by Covad, Verizon will search for reasonable indirect routes without requiring Covad to submit additional dark fiber inquiries.

STAFF: Staff has no position at this time.

ISSUE 47: What information must Verizon provide in response to a field survey request? How detailed should any provisions of the Agreement be that address Verizon's responses to field survey requests?

POSITIONS

COVAD: Verizon should be required to provide certain critical information about dark fiber via a response to a field survey request that allows Covad a meaningful opportunity

to use dark fiber. Covad pays Verizon a nonrecurring charge to perform field surveys and should receive critical fiber specifications, including whether fiber is dual window construction; the numerical aperture of the fiber; and the maximum attenuation of the fiber. Verizon has an obligation to provide Covad parity access to dark fiber information under the FCC's rules. Based on Covad's experience, unless specific types of data are explicitly listed and described in an agreement or commission order, Verizon will simply deny access to that data.

VERIZON: The type of detailed technical information requested by Covad in its proposed § 8.2.8.1 to the UNE Attachment is not the type of detail that should be defined on an interconnection-agreement-by-interconnection-agreement basis. Indeed, at this time, Verizon does not know whether it has the capability to provide the type of information requested by Covad. "Parity" access to dark fiber information does not include access to information that Verizon does not track for itself.

The information Verizon provides in response to field surveys is the same for all ALECs, and is the result of various industry collaboratives, interconnection agreement arbitrations and § 271 proceedings in other states. As part of the field survey, Verizon will provide the ALEC with the total measured dB optical insertion loss for the specific fibers assigned to the ALEC's order. The ALEC can then factor this loss into the design of its fiber optic electronics, just as Verizon engineers do when they design Verizon's own lit fiber optic systems.

Covad's language, to the extent it can be read as a demand for a specific level of transmission quality (*i.e.*, 0.35dB/km loss at 1310 nanometers and 0.25dB/km loss at 1550 nanometers), is a technical requirement/specification for the transmission characteristics of Verizon's fibers. Verizon, however, is obligated only to provide dark fiber to ALECs "as is," and the transmission capabilities of the fiber are not guaranteed. *See, e.g., Virginia Arbitration Order* ¶ 468

(ruling that ALECs "may not hold Verizon's dark fiber to a given standard of transmission capacity").

STAFF: Staff has no position at this time.

ISSUE 48: RESOLVED

ISSUE 49: RESOLVED

ISSUE 50: RESOLVED

ISSUE 51: If a UNE rate contained in the proposed Agreement is not found in a currently effective FCC or FPSC order or state or federal tariff, is Covad entitled to retroactive application of the effective FCC or FPSC rate either back to the date of this Agreement in the event that Covad discovers an inaccuracy in Appendix A to the Pricing Attachment (if such rates currently exist) or back to the date when such a rate becomes effective (if no such rate currently exists)? Will a subsequently filed tariff or tariff amendment, when effective, supersede the UNE rates in Appendix A to the Pricing Attachment?

POSITIONS

COVAD: Yes. The charges for a service should be the Commission or FCC approved charges and should be accurately represented and warranted in Appendix A to the Agreement to the extent such rates are available. To the extent certain charges for a service have not yet been approved by the Commission or the FCC, when such rates are approved Verizon should be required to apply them retroactively starting on the effective date of the Agreement. Verizon should provide a refund to Covad of over-charged rates if necessary.

Verizon should not be able, by the mere filing of a tariff, to negate the established and effective rates contained in the Interconnection Agreement. Covad must be able to rely on the rates established by this Commission and contained in the Agreement. Otherwise, the Commission's rates and the rates in the Agreement are

little more than placeholders, until Verizon determines to impose a different rate. Second, Verizon's position would require Covad and other ALECs to become "tariff police" who must scour every tariff filing Verizon makes with the Commission to find any page or paragraph which may impact Covad's interests.

VERIZON: Where there is a generally applicable rate for a service, effective under the laws of Florida or federal law, and subject to the regulatory review and challenge provided for under state and federal law, that rate should govern. Covad effort to portray this provision as giving Verizon the ability to modify rates contained in the agreement unilaterally is incorrect. *See* Covad Petition Attach. B at 20. Under Verizon proposal, where a rate is contained in an applicable tariff that this Commission or the FCC has allowed to go into effect, any rate contained in the agreement does not apply. *See* Verizon Response Attach. C at 24-25 (Pricing Attachment 1.3-1.5). Covad proposal would permit Covad to game the system by seeking to maintain rates that are more favorable than those available to all other ALECs in Florida based simply on an accident of timing.

Finally, to the extent that rates are set forth in Appendix A to the Pricing Attachment, rather than in a generally applicable tariff, Covad has not raised a dispute with respect to any of those rates. Accordingly, these are agreed-upon rates and, therefore, are binding upon the approval of this agreement by this Commission. These rates will be superseded by any new rates that are required by any order of the Commission or the FCC, approved by the Commission or the FCC, or otherwise allowed to go into effect by the Commission or the FCC. There is no basis, however, to suggest that either party is entitled to retroactive application of those rates.

STAFF: Staff has no position at this time.

ISSUE 52: Should Verizon be required to provide Covad individualized notice of tariff revisions and rate changes?

POSITIONS

COVAD: This issue has evolved to the more narrow issue of whether Verizon must provide Covad advanced written notice of any non-tariff revisions that serve to establish new rates or change existing rates in Appendix A. Verizon should have this obligation and Covad specifically proposes the following language for section 1.9 of the Pricing Attachment:

> Notwithstanding anything to the contrary in Sections 1.1 to 1.7 above, Verizon shall provide advance actual written notice to CLEC of any non-tariffed revisions that: (1) establish new Charges; or (2) seek to change the Charges provided in Appendix A. Whenever such rate(s) becomes effective, Verizon shall, within 30 days, provide Covad with an updated Appendix A showing all such new or changed rates for informational purposes only.

This language is needed in the Agreement because Section 1.8 of the Pricing Attachment, which has been agreed upon, provides "In the absence of Charges for a Service established pursuant to Sections 1.3 through 1.7, the Charges for the Service shall be mutually agreed to by the parties in writing." Section 1.8 primarily addresses circumstances in which there is no tariffed rate, no rate in the Appendix A, or Commission-approved rate for a service. As Section 1.8 requires, the parties must *mutually agree in writing* what will be charged for such services.

Covad requests this language because Verizon has a track record of not notifying Covad regarding a new charge that will be assessed that is non-tariffed and not allowing

Covad to agree to the charge. Instead, Verizon begins billing or, to make matters worse, backbills Covad for such charges and thereby places the burden on Covad to "rifle through the thousands of pages" of bills and find the newly assessed charge buried in it. After a charge is uncovered, an extremely prolonged and burdensome billing dispute with Verizon ensues that can be a nightmare for Covad to resolve with Verizon.

VERIZON: Verizon already provides public notice to its customers, including wholesale customers, of its tariff filings. Verizon should not also be required to provide individualized notice to each of the ALECs operating in Florida. When a tariff takes effect, Covad is just as able as Verizon to make informational updates to the parties Pricing Appendix. Verizon should not be required to perform such administrative tasks on Covad behalf.

STAFF: Staff has no position at this time.

ISSUE 53: RESOLVED

ISSUE 54: RESOLVED

ISSUE 55: RESOLVED

IX. EXHIBIT LIST

The exhibits will be those attached to and made a part of the prefiled testimony of the witnesses in this proceeding. Admissibility of that testimony has been stipulated.

Parties and Staff reserve the right to identify additional exhibits at the hearing in this matter.

X. PROPOSED STIPULATIONS

The following issues have been resolved: 3, 6, 11, 14, 15, 16, 17, 18, 20, 21, 26, 28, 29, 31, 40, 48, 49, 50, 53, 54 and 55. In addition, Issues 24 and 25 have been subsumed in other issues.

The parties have stipulated that all filed testimony may be inserted into the record with cross examination of the witnesses waived. In addition, the parties have stipulated into the record the official transcripts of hearings on the same issues held in New York and Pennsylvania.

XI. PENDING MOTIONS

There are no motions pending at this time.

XII. PENDING CONFIDENTIALITY MATTERS

There are no confidentiality matters pending at this time.

XIII. DECISIONS THAT MAY IMPACT COMMISSION'S RESOLUTION OF ISSUES

Parties have stated in their prehearing statements that the following decisions have a potential impact on our decision in this proceeding:

COVAD: The Triennial Review Order may impact some of the issues in this case; however, that Order has not been issued yet and will have to be evaluated when it becomes available.

- *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999)
- *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999)
- *Brooten v. AT&T*, Memorandum Opinion and Order, File No. E-96-32, 11 FCC Rcd 13343, (1997)
- *Illinois Commerce Commission On Its Own Motion v. Illinois Bell Telephone Company*, Docket No. 99-053, Order at 18, 21 (Aug. 15, 2000)
- *Iowa Utilities Board v. FCC*, 120 F.3d 753, 812-13 (8th Cir. July 18, 1997)
- *Iowa Utilities Board v. FCC*, 219 F.3d 744, 758 (8th Cir. July 18, 2000)

- *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997)
- *MCI Telecommunications Corp. v. US West Communications, Inc.*, 1998 WL 34004509 *4 (W.D.Wash 1998)
- *MCI WorldCom v. New York Telephone Company*, Case No. 99-C-0975, Declaratory Ruling Regarding Interconnection Agreement, 2000 WL 749232, *9 (2001)
- *Michigan Bell Tel Co. v. Strand*, 2002 WL 31155092 *10 (6th Cir. Sept. 30, 2002)
- *Michigan Bell Telephone v. WorldCom Tech., Inc.*, 2002 WL 99739 (Mich App. 2002)
- *The People's Network, Inc. v. AT&T Corp.*, Memorandum and Order, File No. E-92-99, 11 FCC Rcd 21081 (1997) ("TPN")
- *U.S. West Communications, Inc. v. Jennings*, 46 F.Supp.2d 1004, 1025 (D. Ariz. 1999)
- *US West Communications, Inc. v, Minnesota Public Utilities Commission*, 55 F.Supp.2d 968, 983 (D.Minn. Mar. 30, 1999)
- *US WEST Communications, Inc. v. THOMS*, 1999 WL 33456553 *8 (S.D. Iowa Jan. 25, 1999)
- *US West Communications, Inc. v. AT&T Communications of the Pacific Northwest*, Inc, 31 F.Supp.2d 839, 856 (D. Or. 1998)
- *US West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc.*, 1998 WL 1806670 *4 (W.D. Wash. 1998)
- *Verizon Communications v. FCC*, 122 S.Ct. 1646, 1169 (2002)
- *WorldCom Technologies Inc. v. Ameritech Michigan*, Case No. U-12072, Opinion and Order, 2000 WL 363350 at *3 (Mich. P.S.C. Mar. 3, 2000)

- 47 C.F.R. § 51.230
- 47 C.F.R. § 51.230 *et seq.*
- 47 C.F.R. § 51.230(a)
- 47 C.F.R. § 51.230(b)
- 47 C.F.R. § 51.232(a)
- 47 C.F.R. § 51.233
- 47 C.F.R. § 51.309(a)
- 47 C.F.R. § 51.311(a)&(b)
- 47 C.F.R. § 51.311(b)
- 47 C.F.R. § 51.313(b)
- 47 C.F.R. § 51.319(a)
- 47 C.F.R. § 51.319(a)(1)
- 47 C.F.R. § 51.319(a)(3)
- 47 C.F.R. § 51.5
- 47 C.F.R. §§ 51.311(a)&(b)
- 47 C.F.R. §§ 51.603 & 51.613
- 47 CFR §§ 51.311(a)
- 47 U.S.C. § 251(c)(3)
- 47 U.S.C. § 251(c)(4)(A)&(B)
- 47 U.S.C. § 251(d)(3)
- 47 U.S.C. § 415

- 47 U.S.C. §§ 251(b)(4)

VERIZON:

- *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff in part, rev in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

- *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999), *vacated and remanded, United States Telecom Ass v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

- *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999), *petitions for review granted, United States Telecom Ass v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

- *Applications of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000).

- *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354 (2000).

- *Application of Verizon New England Inc., et al., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, 16 FCC Rcd 8988 (2001), *aff in pertinent part, remanded in part, WorldCom, Inc. v. FCC*, 308 F.3d 1 (D.C. Cir. 2002).

- *Application by Verizon New England Inc., et al., for Authorization To Provide In-Region, InterLATA Services in*

New Hampshire and Delaware, Memorandum Opinion and Order, 17 FCC Rcd 18660 (2002).

- *Application of Verizon Pennsylvania Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, 16 FCC Rcd 17419 (2001), *appeal pending, Z-Tel Communications, Inc. v. FCC*, No. 01-1461 (D.C. Cir.).

- *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, 16 FCC Rcd 22781 (2001).

- *Application by Verizon New Jersey Inc., et al., for Authorization To Provide In-Region, InterLATA Services in New Jersey*, Memorandum Opinion and Order, 17 FCC Rcd 12275 (2002).

- *Application by Verizon Virginia Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Virginia*, Memorandum Opinion and Order, 17 FCC Rcd 21880 (2002).

- *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, 17 FCC Rcd 27039 (Wireline Comp. Bur. 2002).

- *Joint Application by BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, Memorandum Opinion and Order, 17 FCC Rcd 17595 (2002).

- *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580 (6th Cir. 2002).

- *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order, CC Docket No. 01-338, FCC 03-___ (FCC adopted Feb. 20, 2003).

- Law Offices of Curtis v. Trinko, LLP v. Bell Atlantic Corp. 305 F.3d 89 (2d Cir. 2002), *cert. granted on other grounds*, No. 02-682 (U.S. Mar. 10, 2003).

- *Supra Telecomms. & Info. Sys., Inc. v. BellSouth Telecomms., Inc.*, No. 99-1706-CIV, 2001 U.S. Dist. LEXIS 23816 (S.D. Fla. June 8, 2001).

- *Intermedia Communications, Inc. v. BellSouth Telecomms., Inc.*, 173 F. Supp. 2d 1282 (M.D. Fla. 2000).

It is therefore,

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner J. Terry Deason as Prehearing Officer, this 5th Day of May, 2003.

J. TERRY DEASON
Commissioner and Prehearing Officer

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any

administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.