BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE STATE OF FLORIDA

Petition of Verizon Florida Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Florida Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	Case No. 040156-TP

RESPONSE OF EAGLE TELECOMMUNICATIONS INC. AND MYATEL CORPORATION TO THE PETITION FOR ARBITRATION OF VERIZON FLORIDA INC.

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AND MYATEL CORPORATION

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TO THE HONORABLE COMMISSION:

Pursuant to Section 252(b)(3) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (the "Act"),[1] Eagle Telecommunications Inc. ("Eagle") and Myatel Corporation ("Myatel"), by their undersigned counsel, respectfully submit this their Response to the Petition for Arbitration ("Verizon's Petition" or "Petition") and the Update to that Petition filed by Verizon Florida Inc. ("Verizon").

As explained below, the Public Service Commission of the State of Florida (the "Commission") should dismiss Verizon's Petition. In the alternative, the Commission should abate these proceedings, issue an order granting procedural flexibility, or, in the final alternative, reject the proposed contract language of Verizon, and, as stated herein, adopt the proposed contract language of Eagle and Myatel, or, at a minimum, substantially reform Verizon's proposed amendment in accordance with applicable law.

[1] As noted below, Eagle and Myatel do not concede that Section 252 requires or permits this arbitration.

I. RESERVATION OF RIGHTS

1. The Response to Verizon's Petition contained in this pleading is filed subject to the motions contained herein.

2. Eagle and Myatel expressly reserve the right to file an amended response to Vertizon's Update to its Petition, or to amend this response to deal more specifically with the language proposed by Verizon.

3. Further, Eagle and Myatel expressly reserve the right to participate in this proceeding only to the extent of agreeing to be bound by its outcome. The Commission should consider immediately issuing an order explicitly permitting this, as requested in the motion for procedural flexibility below,. Such a course would save the resources of both Verizon and smaller CLECs, and would minimize the Commission's expenditure of effort in this case.

II. BACKGROUND

4. Eagle and Myatel have both opted into the interconnection agreement approved by the Commission between WinStar Wireless of Florida and Verizon.

5. Verizon is correct that the FCC has released the *Triennial Review Order*,[2] and that this Order affects the unbundling obligations of ILECS. What may not be apparent from Verizon's petition are the following salient issues: (1) the reversal of the *Triennial Review Order* and the vacation and remand of many of its parts make it difficult or impossible to even consider arbitrating a contract amendment attempting to follow its provisions; (2) the statutory predicate for arbitration under 47 U.S.C. § 252(b)(1) - the receipt *by an incumbent local exchange carrier*

[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "TRO"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.*, 2004 WL 374262 (D.C. Cir. Mar. 2, 2004) ("*USTA II*").

of a request for negotiation under § 252 - has not occurred, and thus there is no legal basis under the Act for arbitration at this point; (3) despite Verizon's reliance on the *Triennial Review Order* as the sole governing authority on the issues it raises, there are important considerations of state law and policy which need to be taken into account; (4) all or most of the Verizon interconnection agreements at issue here contain change of law provisions whose language, not the *TRO*, governs the procedure to be followed in reaction to the *TRO* and similar matters; and (5) the decision in *USTA II*, upon which Verizon now rests its request for arbitration (*see* Verizon's Update to Petition), has not been discussed or negotiated between the parties – thus any arbitration is premature under the FTA and other applicable law.

6. At the time of Verizon's original filing, petitions for reconsideration of the *TRO* were pending before the FCC. While the petitions for reconsideration called into question the final and binding effect of the *TRO*, its appeal to the D.C. Circuit caused even more uncertainty. The situation has not improved. Since the original filing of Verizon's Petition, the D.C. Circuit Court has reversed the *TRO* in large part and (at the ILECs' request) vacated certain unbundling rules relied on by Verizon, and remanded others, in *USTA II*.[3] To complicate matters further, the mandate in *USTA II* has been stayed until May 3, 2004, or until the date the D.C. Circuit denies any petitions for rehearing, whichever is later.[4] Moreover, the majority of FCC commissioners who voted in favor of the *TRO* already have announced their intention to seek both a stay and Supreme Court review of the DC Circuit decision. The state of unbundling obligations is

[3] *United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.*, 2004 WL 374262 (D.C. Cir. Mar. 2, 2004) ("*USTA II*").

[4] *USTA II, supra*, slip op. at 61, 2004 WL 374262 at *40.

certainly in flux, and the implications, even in terms of which FCC rules are in effect and which are not, are unclear.[5]

7. Verizon now bases its request for arbitration upon the D.C. Circuit's decision in *USTA II*. No FTA negotiation proposals or procedures have occurred between the parties, and arbitration of new amendments based upon *USTA II* is premature and improper, and not provided for under the FTA.

8. Verizon states that it files its Petition under the *Triennial Review Order* ¶¶ 703 and 704 (purporting to establish an arbitration window), 47 U.S.C. § 252(b)(1) (providing the statutory basis for arbitration) and *USTA II*. The difficulty with this is that § 252(b)(1) predicates negotiation and arbitration on "the date on which *an incumbent local exchange carrier receives a request for negotiation* under this section." 47 U.S.C. § 252(b)(1) (emphasis added). Nothing of the sort has occurred here, and neither the FCC nor this Commission have the authority to predicate a § 252 arbitration on some other event.

9. It is, for these reasons, premature and inappropriate even for parties to negotiate, let alone for state commissions to arbitrate, ILEC unbundling obligations as modified by the *Triennial Review Order* and *USTA II* as Verizon proposes to do here. The Commission should dismiss Verizon's Petition, or, in the alternative, abate this proceeding and enter orders allowing procedural flexibility in order for this proceeding to go forward without causing undue hardship on the Commission and participants.

[5] The *USTA II* decision has not taken effect, and may be stayed. By its terms, the decision will not take effect until at least 60 days after issuance, and perhaps for much longer. The extent to which the D.C. Circuit's vacation of FCC decisions and rules will be impacted by appeals, thus leaving some vacated rules in effect (or not), and the extent to which vacated rules are now replaced by previous rules, are exercises in speculation which the undersigned will not now attempt.

10. Should the Commission decide not to dismiss or abate this proceeding, it should consider the imposition of unbundling obligations under state law and policy. Verizon's Petition assumes that the unbundling obligations established in the *TRO* and *USTA II* are its only unbundling obligations, and that these are the *only* requirements for ILEC unbundling. On the contrary, at least the First, Seventh, Ninth, and D.C. Circuit Courts, as well as the FCC, recognize that the Act leaves much room for autonomous state commission action under applicable state statutes and regulations. The Act's savings clauses expressly preserve state authority. It is clear that state requirements govern ILEC unbundling obligations, and should be considered in any proceeding regarding them.

11. As a result of the D.C. Circuit's review of the *Triennial Review Order*, significant parts of the Order, upon which Verizon relies, appear to no longer be operative. Should the Commission decide to consider Verizon's Petition, it should do so in light of the D.C. Circuit's decision and *USTA II*.[6]

III. MOTIONS TO DISMISS, OR, IN THE ALTERNATIVE, TO ABATE AND FOR PROCEDURAL FLEXIBILITY

12. As noted above, the *Triennial Review Order* is, at this point, hardly a firm reason to reconsider ILEC unbundling obligations, or to revise interconnection agreements concerning them. Give the current uncertainties under *TRO* and *USTA II*, arbitration of issues under rules which are not yet clear is premature and wastes the time of the Commission and the participants. More compellingly, there is no statutory predicate for this arbitration. The trigger required for an arbitration under the Act has not been pulled. In its absence, the Commission has no authority to

[6] At the same time, as noted above, arbitration based upon USTA II is clearly premature and improper. Abating this proceeding for the negotiation procedures of the FTS to be followed, possibly in an FTA mediation, would seem to be appropriate. An additional benefit of such a course is that it would allow the Commission and participants to come to some conclusion on other TRO-related proceedings in the meantime, which would significantly simplify this proceeding.

conduct an arbitration. In addition, the relationship between the parties and amendment of their interconnection agreement, is governed by the change of law provisions of their current agreement. What is more, arbitration based upon *USTA II* is premature and improper. Finally, Verizon's Petition is procedurally defective.

A. MOTION TO DISMISS

1. Arbitration to Determine UNE Unbundling Obligations is Premature and a Waste of Time

13. As noted above, the state of UNE unbundling obligations is in flux. No one knows what the rules are, and it is not likely that anyone can predict them. This Commission and others are in the midst of proceeding to aid in determining what they will be in the future. And certainty will not be present until the appeals of the TRO and *USTA II* are finally resolved, and the FCC has enacted rules which satisfy the mandates of the FTA and the courts. Until this happens, conducting a massive multi-party arbitration to determine unbundling obligations, during which the rules are almost certain to change radically, only increases uncertainty and is a waste of the time and assets of the Commission and the participants.

2. Verizon Must Follow the Change of Law Provisions of its Interconnection Agreements, and has not Done So

14. Verizon argues that it files its Petition pursuant to the arbitration window established by the *Triennial Review Order* ¶ 703 and 47 U.S.C. § 252(b)(1). The first obvious fatal problem with this is that ¶ 703 requires "incumbent and competitive LECs to use section 252(b) as a default timetable *for modification of interconnection agreements that are silent concerning change of law and/or transition timing*." (Emphasis added.) All, or at the least, most of the agreements Verizon here seeks to amend have change of law provisions which Verizon does not claim to have followed. It is those change of law provisions, not the *TRO*, which govern

the process of negotiating and arbitrating amendments to implement a change of law for Verizon's interconnection agreements.[7] Verizon is required to follow those change of law provisions, and since it neither alleges nor proves that it has, its Petition should be dismissed.

15. In fact, Verizon's allegations show conclusively that it has not followed either the change of law provisions of its interconnection agreements nor the FTA process for negotiation and arbitration. Verizon claims that its October 2, 2003 notice (Exhibit C to Verizon's Petition) initiated negotiations and proposed a draft amendment. In fact, this is not the case. The notice is titled "NOTICE OF DISCONTINUATION OF UNBUNDLED NETWORK ELEMENTS AND NOTICE OF AVAILABILITY OF CONTRACT AMENDMENT." The title is not an offer to negotiate. While the notice contains a sentence claiming that it is a "notice of changes in law, or notice of termination of service/facilities availability," it does not offer to negotiate or engage in any negotiation process. It merely indicates Verizon's unilateral decision (*without* amendment of its interconnection agreements) to discontinue provisioning certain UNEs and then provides that "[c]arriers seeking to amend their interconnection agreements should review the draft amendment and contact Verizon to proceed with completion of the contracting process." In other words, "if *you* want to amend, contact us."

16. In short, Verizon has not initiated either the change of law process specified in its interconnection agreements or the FTA negotiation and arbitration process. Its "notice" cannot be plausibly read to do so. The "notice" does not offer to negotiate or indicate any type of willingness on the part of Verizon to negotiate. It merely informs CLECs of Verizon's intention to unilaterally abrogate portions of its contracts and advises them that if *they* seek to amend their

[7] The general expectations expressed in ¶ 704 that parties will immediately begin change of law processes and that these processes can be completed in nine months are dicta and strengthen rather than alter this conclusion.

contracts with Verizon's amendment, they are free to "complete the contracting process." The notice does not supply the necessary predicate for arbitration under the interconnection agreements or the FTA.

3. The Trigger Event for Arbitration under 47 U.S.C. § 252(b)(1) has not Occurred

17. As noted above, the allegations of Verizon's Petition make it clear that the predicate for FTA arbitration – an offer or demand to negotiate – has not occurred. No one has sent a request for negotiation to anyone in this proceeding. Thus, an FTA arbitration is improper.

18. Even were there a request for negotiation, Verizon's arbitration claim under 47 U.S.C. § 252(b)(1) faces yet another obvious fatal problem. While Verizon alleges that *it* (the ILEC) sent a request for negotiations, it is undisputed that the trigger event for arbitration under 47 U.S.C. § 252(b)(1) - the receipt *by an incumbent local exchange carrier* of a request for negotiation under § 252 - has not occurred.

19. The FCC's apparent sanctioning of the § 252 timetable with regard to amendments based on the *TRO* is ineffective. In ¶ 703 of the *TRO*, the FCC purports to impose upon *non*-ILECs obligations which are imposed in § 252(b) only upon ILECs - *incumbent local exchange carriers*. The arbitration window in § 252(b)(1) is explicitly defined as being "[d]uring the period from the 135th to the 160th day (inclusive) after the date on which *an incumbent local exchange carrier receives a request for negotiation* under this section." 47 U.S.C. § 252(b)(1) (emphasis added). Nothing in § 252(b)(1) provides for measurement of an arbitration window from the date a *non*-ILEC receives a negotiation request, and nothing in the Act mandates or permits the FCC to establish an arbitration process other than that set out in the Act.

20. This is especially true in a proceeding to which most carriers (including the undersigned) were not parties, and in which the FCC does not even purport to modify its rules

relating to negotiation timing or arbitration triggers. Appendix B of the *TRO* includes no rule or modification to a rule imposing these requirements.[8] There is no manner in which the FCC may simply, by mere insertion in an order, impose *ad hoc* regulations or rules not mandated or permitted by the Act, and inconsistent with its terms, upon competitive local exchange carriers.

21. To the extent that ¶¶ 703 and 704 can be construed to impose negotiation and arbitration requirements beyong those contained in the FTA, they are not only pure dicta, they are ineffective. As noted above, nothing in the *TRO* or in Appendix B (modifying the FCC's rules) changes rules relating to negotiation timing or arbitration triggers. There was no previous notice of such a rulemaking, and without notice, rulemaking is impossible. And, as noted above, the imposition of new negotiation or arbitration requirements would be in conflict with the Act.

22. The same is true of the FCC's references in ¶¶ 703 and 704 to good faith negotiations and to its attempt in ¶ 704 to impose its preferred timeline by threatening to consider anything other than adherence to its schedule in implementing contractual change of law provisions as "a failure to negotiate in good faith and a violation of section 251(c)(1)." This is simply not legally possible, for at least three reasons. First, the duty imposed by § 251(c)(1) (to negotiate in good faith in accordance with § 252) applies only to incumbent local exchange carriers and "requesting carriers" – that is, non-ILEC carriers *requesting* negotiations, not those *receiving* negotiation requests. Second, § 251(b)(5) defines a failure to negotiate in good faith *during the negotiations and arbitrations triggered by the receipt by an incumbent local exchange carrier of a request to negotiate under § 252.* The definition is not in place during any other process. Third, the duties imposed upon "all local exchange carriers," (that is, on non-ILECs) are

[8] As noted below, the *TRO* amends a section of its rules dealing with negotiations - 47 C.F.R. § 51.301 ("Duty to Negotiate") - without mentioning any of the issues or timetables described in *TRO* ¶¶ 703 and 704. The rules with regard to negotiation timing and arbitration window triggers have not been modified.

contained in § 251(b), and do not include a duty to negotiate in good faith. The FCC can hardly change those definitions, add to them, or apply them to parties other than those to whom the Act applies them.

23. And the FCC has not done so. The reality is that the rules regarding negotiation and arbitration triggers have not been modified and do not require a different procedure in this case from the one laid out in the statute. In Appendix B to the *TRO*, the FCC amends a section of its rules dealing with negotiations - 47 C.F.R. § 51.301 ("Duty to Negotiate") - without mentioning any of the issues or timetables described in *TRO* ¶¶ 703 and 704. Given this, it is impossible to argue that the requirements have been changed by the FCC.

24. It should also be noted that the FCC's reasoning expressed in ¶ 703 for imposing its own arbitration timeline was to avoid "an adverse impact on investment and sustainable competition" and to synch up contract amendments with its new rules. Whatever one might say about the wisdom of such a rationale, it appears to have flown out the window with the D.C. Circuit's actions in *USTA II*. The adverse impact is inevitable as a result of the FCC's timing in releasing the *TRO* and the D.C. Circuit's actions, and the rules are in a state of disarray. Speeding up the arbitration timetable will increase, not decrease, adverse impacts on investment and sustainable competition.

4. Amendment Based Upon *USTA II* Is Premature

25. To complicate matters, Verizon now proposes to amend agreements based upon another change of law – the D.C. Circuit's action in *USTA II*. This took place *after* Verizon's initial filing. It is simply impossible that Verizon can claim to have followed any change of law provision with regard to *USTA II*, that it can claim to have had any negotiations with regard to

USTA II, or that it can claim that its Petition is not procedurally defective under § 252(b) of the Act with regard to its current request (see below).

5. Verizon's Petition is Procedurally Defective Under the FTA

26. Verizon's Petition is procedurally defective. Section 252(b) of the Act provides, in relevant part:

> (2) DUTY OF PETITIONER.--
>
> (A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--
>
> (i) the unresolved issues;
>
> (ii) the position of each of the parties with respect to those issues; and
>
> (iii) any other issue discussed and resolved by the parties.

27. Verizon has failed to comply with each of these provisions of the Act, and therefore its Petition is procedurally defective under the FTA. First, Verizon has not stated any of the issues discussed between the parties. It has not documented the unresolved issues. Second, Verizon has not identified the position of the parties with respect to unresolved issues, and simply states its own position. Third, Verizon has not documented which, if any issues have been discussed and resolved by the parties.

28. Admittedly, the issuance of *USTA II* some 8 days before the close of the arbitration window must have caused complications for Verizon. However, four things should be noted here. First, Verizon did have 8 days to alter its proposal. Second, harsh though the result may be, the FTA contains no "good cause" exception to its arbitration window, and none can plausibly be read into it. Third, Verizon is not without recourse. It can take advantage of the change of law provisions of its interconnection agreements. Such a course would be more likely to lead to productive results than leaping into arbitration at this unsettled point. Fourth, the issuance of *USTA II* in the midst of this proceeding, and the ensuing uncertainties, illustrate

amply the difficulties inherent in attempting to conduct an arbitration under the present unsettled conditions.

29. Finally, the Verizon petition is untimely filed. Verizon alleged that the trigger event for FTA arbitration occurred on October 2, 2003, when the TRO became effective and Verizon mailed its amendment demand to CLECs. The close of the arbitration window thus occurred on March 10, 2004. Verizon's *actual* (as opposed to tentative) arbitration proposal was not filed until March 19, 2004. Verizon was clearly aware of *USTA II*, and knew that its original proposals could not be its actual proposals, before the close of the arbitration window, yet failed to make a filing of its actual proposals within the FTA's arbitration window. The Verizon Petition is untimely and should be dismissed.

6. Conclusion

30. Two state commissions have already considered substantially identical versions of Verizon's Petition and effectively dismissed it – Maryland (dismissing without prejudice) as "premature," since "the status of the *TRO* is in flux" and since "the status of the law it seeks to use as the trigger for its change of law provision is unclear"[9] and North Carolina (continuing proceeding indefinitely) as "a waste of everybody's time," and because "it makes no sense to begin an arbitration where the underlying rules may be changed in midstream".[10] This Commission should follow their example.

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[9] *Verizon Maryland Petition for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Maryland Pursuant to Section 252 of the Communications Act, as Amended, and the Triennial Review Order*, State of Maryland Public Service Commission, Letter Ruling, March 19, 2004 ("Maryland Decision," attached hereto as Exhibit A).

[10] *In the Matter of Interconnection Agreements With Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Docket No. P-19 Sub 477, State of North Carolina Utilities Commission, Order Continuing Proceeding Indefinitely, March 3, 2004 ("North Carolina Decision," attached hereto as Exhibit B).

31. What is interesting about the actions of the Maryland and North Carolina Commissions is not what Verizon will likely argue – that two dozen or so other states have not yet dismissed its Petitions. It is that two states effectively dismissed Verizon's Petitions long before the response dates, while two dozen or so other commissions have not yet acted upon motions to dismiss which are likely only now being filed at or about the same time as this one. The message should be clear.

32. No request for negotiation has been made by Eagle or Myatel to Verizon, the incumbent local exchange carrier, concerning its proposed amendment. Thus, the arbitration window of 47 U.S.C. § 252(b)(1) has not opened. Thus, Verizon's Petition does not meet the requirements of 47 U.S.C. § 252(b)(1), and is not filed within the arbitration window established by that section. The Commission has no authority to conduct a § 252 arbitration outside of the terms of § 252. In addition, the relationship between the parties and amendment of their interconnection agreement, is governed by the change of law provisions of their current agreement. What is more, arbitration based upon *USTA II* is premature and improper. Finally, Verizon's Petition is procedurally defective. Verizon's Petition should be dismissed.

B. MOTION TO ABATE

33. Should the Commission conclude that it has authority to conduct this arbitration, it should abate these proceedings until it is more clear what requirements govern ILEC unbundling and provisions of interconnection agreements relating to UNEs supposedly affected by the *Triennial Review Order* and *USTA II*. As noted above, it simply is not yet clear what requirements exist. It will, likely, be no more clear 9 months from October 2, 2003 (or June 2, 2005) than it is now. If we cannot be certain when we will know what the rules are, if they change rapidly, as they appear to be likely to; and if the Commission is bound to apply current

FCC rules, and reviewing courts are bound to apply rules in effect at the time of their review;[11] the possibilities for a serious regulatory trainwreck, in the form of repetitive rewriting of the parties' agreement, increase. The Commission should, therefore, if it does not dismiss Verizon's Petition, abate this proceeding until it becomes more clear what the status of the *Triennial Review Order* and *USTA II* are and what obligations apply to ILEC unbundling.

34. In addition, once it becomes clear what change of law has actually occurred, further proceedings in this arbitration should be abated until the parties have had an opportunity to follow the change of law provisions in their interconnection agreements. The Commission should consider conducting FTA mediation during this period.

C. MOTION FOR PROCEDURAL FLEXIBILITY

35. The FTA does not appear to contemplate the multiple-party arbitrations that Verizon has requested. However, should the Commission proceed with this arbitration, multiple party arbitrations are workable as long as the procedures are fair, treat the parties equitably, and substantially comply with the FTA and the Commission's procedures. The Commission should issue two orders regarding procedural flexibility.

36. First, it seems likely that due to the fact that Verizon has apparently elected to attempt an arbitration with every conceivable operating and non-operating telecommunications provider in this state at the same time, that it will be impossible to meet the time frames prescribed in 47 U.S.C. 252. This is especially true because the Verizon filing requires parties to seek dismissal of certain of Verizon's requests for arbitration. Accordingly, if the Commission

[11] "Because the role of the federal courts is to determine whether the agreements comply with the Act ..., we conclude that we must ensure that the interconnection agreements comply with current FCC regulations, regardless of whether those regulations were in effect when the [state commission] approved the agreements." *Indiana Bell Tel. Co. v. McCarty*, No. 03-1123, 2004 WL 406737 at *13 (7th Cir. March 5, 2004), citing *USW Communications v. Jennings*, 304 F.3d 950, 956 (9th Cir.2002).

decides to hold a "generic" arbitration, it should seek assurances that Verizon will not seek redress from the Federal Communications Commission pursuant to 47 U.S.C. 252(e)(5) as long as the arbitration procedures continue in a timely fashion. At the same time, this Commission should strive to complete the arbitration as soon as possible.

37. Second, a number of CLECs, including those filing this Response, are being forced into an expensive and time-consuming arbitration over a "generic" issue – the effect of the TRO and USTA II. Like those filing this Response, these CLECs most likely are willing to accept the result of this arbitration, but do not wish to actively participate in it. They will, in all likelihood, not contribute a great deal of substance to the proceeding beyond that which can be expected from others in the CLEC community. The Commission should issue an order allowing CLECs to agree to simply accept the outcome of this proceeding, while being exempted from any requirements for further pleading, discovery, briefing, other filing, or any other form of active participation. Such an order would increase the speed of this proceeding, decrease its complexity, and conserve the resources of the Commission and the participants.

IV. ISSUES COVERED IN THE TRIENNIAL REVIEW ORDER ARE NOT BINDING ON THE COMMISSION'S STATE LAW AUTHORITY

38. Verizon's Petition implicitly assumes that the sole relevant governing authority on its unbundling obligations, and the only one to be considered in evaluating its proffered amendments is the *Triennial Review Order* and the rules promulgated by the FCC therein. This fundamentally misconstrues the FCC's own view of the binding effect of the *Triennial Review Order*, the D.C. Circuit's construction of the *Triennial Review Order*, the construction by other courts of the Act, and the Act's "explicit acknowledgment that there is room in the statutory scheme for autonomous state commission action." *Puerto Rico Tel. Co.* v. *Telecommunications Regulatory Bd. of P.R.*, 189 F.3d 1, 14 (1st Cir. 1999).

A. AS THE D.C. CIRCUIT HELD, THE TRIENNIAL REVIEW ORDER TERMS DO NOT PREEMPT STATES FROM ARBITRATING AND ESTABLISHING ADDITIONAL UNBUNDLING REQUIREMENTS.

39. The FCC plainly rejected the broad view implied by Verizon's Petition that only the FCC's rules affect unbundling requirements. The FCC stated that the *Triennial Review Order* rules pertaining to the unbundling of network elements did *not* expressly preempt state commissions from imposing supplemental requirements. *See Triennial Review Order* ¶¶ 191-92 (recognizing that "[m]any states have exercised their authority under state law to add network elements to the national list" and stating that "we do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law"); *see also Indiana Bell Tel. Co.* v. *McCarty*, No. 03-1123, 2004 WL 406737 (7th Cir. March 5, 2004) (agreeing with the FCC on this issue). Although the *Triennial Review Order* contains some language indicating that certain state law unbundling requirements might be preempted by the FCC in some future proceedings, that language, as the D.C. Circuit concluded, was merely a "general prediction," and not final agency action, and a complaint by state commissions of wrongful preemption by the FCC is not ripe. *USTA II*, slip op. at 61, 2004 WL 374262 at *39. In fact, the D.C. Circuit affirmed that the FCC "has not taken any view on any attempted state unbundling order." *Id.* In short, a wrongful preemption claims is not ripe *because preemption has not occurred.*

40. It is well established that states can adopt additional rules in this area under state law. *See, e.g., Southwestern Bell* v. *Waller Creek Comm.*, 221 F.3d 812, 820-21 (5th Cir. 2000) (upholding a state UNE combination requirement after the Eighth Circuit vacated the FCC's combination rule (and before the Supreme Court reinstated it) on the grounds that "[e]ven if the Eighth Circuit's decision on this issue is correct – which we do not decide today – it does not hold that such [state] arrangements are prohibited; rather, it holds only that they are not required

by [federal] law"); *MCI Telecomm. Corp.* v. *U S West Comm.*, 204 F.3d 1262, 65 (9th Cir. 2000) (upholding state UNE combination requirements, even though the 8th Circuit's decision vacating the FCC's combination rules "still stands," because "[a]ll this means for present purposes is that the Act does not currently mandate a provision requiring combination"). Significantly, the Seventh Circuit recently affirmed (*after* the *Triennial Review Order* and *USTA II* had been issued) that states can adopt additional unbundling requirements pursuant to state law. *See Indiana Bell Tel. Co.* v. *McCarty*, No. 03-1123, 2004 WL 406737 (7th Cir. March 5, 2004). In particular, the court found that "[b]ased on the plain language of the Act, it's clear that the [state commission] had independent authority preserved under the Act to impose" additional requirements on the ILEC "by way of the interconnection agreement." *Id.*, slip. op. at 23, 2004 WL 406737 at *11.

41. In the course of these proceedings, the Commission should take into account whether unbundling requirements already adopted by the Commission, or now adopted pursuant to state law, but purportedly replaced by Verizon's amendment, are proper and consistent with federal law and valid FCC rules. Such a course of action would be more consistent than Verizon's Petition with the *Triennial Review Order's* recognition that the Act "preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements," so long as those state law requirements do not conflict with federal law. *Triennial Review Order* ¶ 191.

B. State Commissions' Pro-Competitive Requirements Are Explicitly Safeguarded, Not Preempted, By Federal Law.

42. The Act is "an exercise in what has been termed cooperative federalism." *Puerto Rico Tel. Co., supra*, 189 F.3d at 8. Under it, state public utility commissions and the FCC work collaboratively to loosen the stranglehold of monopoly providers, such as Verizon, on the local

telephone market and provide consumers with the benefits of competition. Congress recognized the progress many states had made acting under their previously exclusive jurisdiction to regulate intrastate telephone service and, in the 1996 Act, took steps to build on those efforts and ensure that they would continue. To this end, Congress included *four* separate savings clauses in the 1996 Act to make it crystal clear that nothing in the statute would be read to impede the states' ongoing efforts to open their local markets to competition. An analysis of these provisions demonstrates that Congress did not intend to preempt states from imposing additional unbundling requirements under state law.

43. There are three instances in which courts will read federal law to preempt state law. This case fails to satisfy the conditions for any of them. First, Congress may include an "express provision for preemption" in a federal statute. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000). Second, state law may be implicitly preempted "to the extent of any conflict with a federal statute." *Id.* Such a conflict can occur "where it is impossible for a private party to comply with both state and federal law" or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 372-73. Third, "[w]hen Congress intends federal law to occupy the field," all "state law in that area is preempted." *Id.* at 372. None of these instances exists here.

1. The Act's Savings Clauses Demonstrate Clear Congressional Intent Not To Preempt State Unbundling Requirements Above The Federal Floor.

44. Preemption is always a question of congressional intent, the "ultimate touchstone" of preemption analysis. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978)). An analysis of the preemptive scope of a federal statute thus must "begin with the language employed by Congress and the assumption that the ordinary meaning of that

language accurately expresses the legislative purpose," *Morales v. TWA, Inc.*, 504 U.S. 374, 383 (1992) (internal quotation marks omitted), and recognizing that there is a "presumption against the pre-emption of state police power regulations," *Cipollone* v. *Liggett Group, Inc.*, *supra*, 505 U.S. at 518 (1992). Here, Congress affirmatively wrote a robust version of this presumption into the statute, specifying that the "Act shall not be construed to modify, impair, or supersede . . . State[] or local law unless expressly so provided." Act § 601(c)(1), 110 Stat. at 143. Congress included this provision, entitled "[n]o implied effect," in order to "prevent[] affected parties from asserting that the [Act] impliedly pre-empts other laws." H.R. Conf. Rep. No. 104-458, at 201, *reprinted in* 1996 U.S.C.C.A.N. at 215. As the Fifth Circuit has explained, § 601(c) squarely "precludes a broad reading of preemptive authority."[12]

45. The history, terms, structure, and purposes of the 1996 Act make it abundantly clear that § 251 and the FCC's implementing regulations are *minimum* requirements that establish a federal "floor" of regulation, and that states can impose additional unbundling obligations under state law. The 1996 Act was enacted against the background of the states' historic *exclusive* jurisdiction over intrastate telecommunications under § 152(b) of the Communications Act, 47 U.S.C. § 152(b). Many states had exercised this power by prohibiting competitive local services, but other states were increasingly using their jurisdiction to impose unbundling requirements analogous to those authorized by § 251. When federal law enters into an area previously subject to state police power regulation, there is a particularly strong presumption that Congress did not mean to oust state law. *See Cipollone v. Liggett Group, Inc.*, *supra*, 505 U.S. at 518.

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[12] *City of Dallas, Tex. v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999); *see also AT&T Communications of Ill., Inc. v. Illinois Bell Tel. Co.*, 349 F.3d 402, 410 (7th Cir. 2003) (§ 601(c) "precludes a reading that ousts the state legislature by implication.").

46. Rather than displace state authority generally, the 1996 Act expressly preempts only state law entry barriers (*see* 47 U.S.C. § 253(b)), while enacting four separate savings clauses that authorize states to enact or enforce additional procompetitive requirements under state law so long as they do not "lower" the federal floor. *See* 47 U.S.C. §§ 251(d)(2), 252(e)(3), 261(c); Act § 601(c)(1), 110 Stat. at 143; *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (savings clauses are "the best evidence of Congress' preemptive intent").

47. The 1996 Act is therefore analogous to numerous other federal statutes that place a floor under state regulation of the same subjects but not a ceiling above them. These decisions recognize the general principle that "a state or locality's imposition of additional requirements above a federal minimum is unlikely to create a direct and positive conflict with federal law." *Southern Blasting Servs., Inc. v. Wilkes County, N.C.*, 288 F.3d 584, 591 (4th Cir. 2002).

48. In addition to Act § 601(c)(1), 110 Stat. at 143, close textual readings of the other three savings clauses in the 1996 Act – 252(e)(3), 261(c), and 251(d)(3) - confirm that a preemption claim is foreclosed.

49. Section 252(e)(3) represents "an explicit acknowledgment that there is room in the statutory scheme for autonomous state commission action." *Puerto Rico Tel. Co.*, 189 F.3d at 14. It provides that, subject *only* to section 253's ban on state-law entry barriers, additional state unbundling requirements can be established or enforced *without limitation* in State commission proceedings that approve negotiated or arbitrated interconnection agreements. The Act thus bars State commissions considering interconnection agreements from adopting or enforcing measures that would preclude or substantially prevent the use of network elements to

provide competing services. It does *not* bar other state law requirements that would promote competition.[13]

50. Section 261(c) provides that "[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part." This provision authorizes a state to impose any state law "requirement[]" on a carrier that meets two conditions. First, the requirement must be "necessary to further competition in the provision of telephone exchange service or exchange access." 47 U.S.C. § 261(c). Second, the requirement must not be "inconsistent" with the 1996 Act's local competition provisions or relevant FCC regulations. *Id.*

51. The first condition is by definition met by a state public interest determination that additional unbundling requirements on a incumbent carrier are needed to promote competition. The second condition is satisfied so long as it is possible for a carrier to comply with both federal and state law, as it is when a state commission orders unbundling of an element not required to be unbundled under federal law. The word "inconsistent" (like the word "consistent" in § 251(d)(3)) is a term of art in preemption law, and Congress's deliberate decision to use it has to be given effect. *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). In particular, because the Supreme Court has held that state regulations are "consistent" with federal law so long as it is "possible to comply with the state law without triggering federal enforcement

[13] *See Southwestern Bell Tel. v. Public Util. Comm'n, supra*, 208 F.3d at 481 (§ 252(e)(3) "obviously allows a state [illegible] *Comm.* v. *BellSouth Telecomms., Inc.*, 238 F.3d 636, 642 (5th Cir. 2001) ("Subject to § 253, the state commission may also establish or enforce other requirements of state law in its review of an agreement."); *AT&T Comm. of NJ, Inc. v. Bell Atlantic-NJ, Inc.*, 2000 WL 33951473, at *14 (D.N.J. Jun. 6, 2000) ("§ 252(e)(3) gives states the authority to impose unbundling requirements beyond those mandated by FCC regulations.")

action," *Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977), § 261(c) bars only state measures that would require incumbents to violate the Act or would legally preclude competitors from obtaining elements and using them to provide competing services.

52. The final savings clause, section 251(d)(3), further undermines any preemption claim. That provision, titled "Preservation of State access regulations," specifies:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. § 251(d)(3).

53. Significantly, this provision is a limitation on FCC, not state, authority. It is triggered only when the FCC affirmatively and explicitly acts to "preclude the enforcement" of state law in the course of "prescribing and enforcing regulations." *Id.* Of course, as explained above, with respect to the elements discussed by Verizon, the FCC has not even purported to "preclude the enforcement" of any state "regulation, order, or policy," much less make the rigorous showing required by § 251(d)(3) to justify such a move.

54. In any event, even if the FCC were some day to attempt to satisfy the requirements of § 251(d)(3) and preempt a state unbundling decision, it could do so only on the basis that the state action conflicted with § 251 of the 1996 Act, *not* FCC regulations implementing it. Section 251(d)(3) expressly bars the FCC from adopting regulations that preempt a state access or interconnection requirement that is "consistent with the requirements of *this section*" and does not "substantially prevent implementation" of these requirements or "the purposes of this part," *i.e.*, §§ 251-61, *of the Act*. Because § 251(d)(3) limits the FCC's authority to adopt preemptive

regulations, the lawfulness of a state measure providing for additional unbundling is measured against the requirements and purposes of § 251 of the *Act,* not those of the *FCC's regulations*.

55. Taken together, the savings clauses cannot plausibly be read to prohibit states from imposing duties beyond those required by federal law. When Congress intends federal regulations to operate as both a floor and as a ceiling, it knows how to do so. In such cases, Congress adopts preemption provisions that – in sharp contrast to the terms of the 1996 Act – expressly preclude states from imposing requirements that "differ" from, are "in addition to," or are not "identical" to, federal obligations. The decisive factor here is that Congress did not use any of these time-honored formulations in the 1996 Act. Instead, Congress did exactly the opposite. Rather than bar states from enacting their own additional unbundling requirements or requiring them to be identical to the federal requirements, the 1996 Act expressly *permits* states to impose additional access obligations so long as they are not "inconsistent" with federal law, *see* 47 U.S.C. § 261(c), or create barriers to entry, *see id.* § 253.

2. State Unbundling Obligations Above the Federal Floor Are Not Preempted.

a) Additional State Unbundling Requirements Are Not Expressly or Impliedly Preempted.

56. As explained above, the Act contains *four* explicit savings clauses, each of which safeguards the functioning of state commission authority in different ways, depending on the situation. Congress was quite explicit that the courts should look to these clauses, and only these clauses, when deciding preemption questions. *See* Act § 601(c)(1), 110 Stat. at 143 (The "Act shall not be construed to modify, impair, or supersede . . . State[] or local law unless expressly so provided."). Through § 601(c) – entitled "[n]o implied effect" – and the other savings clauses, Congress made abundantly clear that it did not want the courts to embark on "implied"

preemption inquiries and invalidate state laws that, in the courts' opinion, might frustrate the "purpose" of the Act. As Congress explained, it inserted § 601(c) into the Act in order to "prevent[] affected parties from asserting that the [Act] impliedly pre-empts other laws." H.R. Conf. Rep. No. 104-458, at 201, *reprinted in* 1996 U.S.C.C.A.N. at 215.

b) A Preemption Claim Fails Even Under "Conflict" Preemption Analysis.

57. As the Supreme Court has said, "[t]he criterion for determining whether state and federal laws are so *inconsistent* that the state law must give way is firmly established in our decisions." *Jones v. Rath Packing Co.*, *supra*, 430 U.S. at 526 (emphasis added). Under basic principles of "conflict" preemption, state law is deemed to be inconsistent with federal law and thus preempted when "'compliance with both federal and state regulations is a physical impossibility,' or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (citations omitted).

58. The position that a state may not impose access requirements beyond those imposed by federal law is irreconcilable with the presumption in conflict preemption doctrine that federal law sets a floor and not a ceiling. As the Supreme Court has stated, "'[t]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem.'" *Id.* at 717 (quoting *New York Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 415 (1973)). Moreover, "merely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field." *Id.*; *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1543 (D.C. Cir. 1984) ("[F]ederal

legislation has traditionally occupied a limited role as the *floor* of safe conduct; before transforming such legislation into a *ceiling* on the ability of states to protect their citizens, and thereby radically adjusting the historic federal-state balance, courts should wait for a clear statement of congressional intent to work such an alteration." (internal citation omitted)). Courts will not find state legislative power to be "'superseded by the Federal Act unless that was the clear and manifest purpose of Congress,'" *Jones v. Rath Packing Co.*, *supra*, 430 U.S. at 525, and a party claiming preemption thus bears a heavy burden of showing that a "conflict between a particular local provision and the federal scheme[] that is strong enough to overcome the presumption" that state access regulation "can constitutionally coexist with federal regulation." *Hillsborough County*, *supra*, 471 U.S. at 716.

59. Additionally, it is clear that a state measure would frustrate the purposes of the 1996 Act only if it would erect an entry barrier or otherwise hinder local competition. As the Fifth Circuit has explained, the purpose of the 1996 Act was to "promote competition by encouraging and facilitating the entry of new telecommunications carriers into local service markets." *Southwestern Bell* v. *Waller Creek Comm*, *supra*, 221 F.3d at 814; see also *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 476 (2002) (The Act makes elimination of the local telephone monopolies "an end in itself."); *id.* at 489 (The Act authorizes whatever measures "give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property"). A state's independent decision to impose pro-competitive requirements beyond the federal minimum when "necessary to further competition in the provision of telephone exchange service," 47 U.S.C. § 261(c), is by definition consistent with this purpose.

V. ISSUES RAISED BY VERIZON UNDER THE TRIENNIAL REVIEW ORDER HAVE BEEN VACATED OR REMANDED BY THE D.C. CIRCUIT

60. As noted above, a number of issues raised by Verizon are predicated upon changes wrought in the *Triennial Review Order*. However, parts of that Order have been vacated and/or remanded by the D.C. Circuit.

61. The D.C. Circuit vacated:

(1) the FCC's subdelegation to state commissions of of decision-making authority over impairment determinations, that is, the subdelegation scheme established for mass market switching and certain dedicated transport elements (DS1, DS3, and dark fiber);

(2) the FCC's nationwide impairment determinations with respect to mass market switching and certain dedicated transport elements (DS1, DS3, and dark fiber);

(3) the FCC's decision not to take into account availability of tariffed special access services when conducting the impairment analysis;

(4) the FCC's decision that wireless carriers are impaired without unbundled access to ILEC dedicated transport; and

(5) the FCC's distinction between qualifying and non-qualifying services.

62. The D.C. Circuit remanded, but did not vacate:

(1) the FCC's decision that competing carriers are not entitled to unbundled EELs for provision of long distance exchange service; and

(2) the FCC's decision decision to exclude entrance facilities from the definition of "network element" for further development of the record to allow proper judicial review.

63. The effect of these decisions is to do serious violence to the rationale behind Verizon's proposals based on the *Triennial Review Order*, and to make it impossible to adopt Verizon's amendment as drafted. Worse, the status of the rules replaced by the vacated portions of the TRO is unclear. Are the old rules operative? Are there no rules? The Commission should

delete in total Verizon proposals predicated upon vacated portions of the *Triennial Review Order*, and reform others based on remanded portions.

VI. VERIZON PROPOSALS

64. As noted above, some Verizon proposals are based upon vacated portions of the *Triennial Review Order*, and others upon remanded portions. Those proposals should be modified accordingly. In addition, a number of Verizon proposals are overbroad and/or misconstrue portions of the *Triennial Review Order*, and should be modified accordingly. Finally, the Commission should exercise its authority under state law to require the unbundling of network elements in addition to those Verizon is willing to see unbundled.

65. Verizon's proposed amendment is some 26 pages long in relatively small type, thus it has not been possible to produce an exhaustive analysis in the time available. The discussion below addresses Verizon's proposal with regard to overall issues and some limited examples. Should the Commission decide to consider Verizon's Petition, The Commission should substitute for Verizon's amendment the language proposed in Exhibit C, or, at a minimum, Verizon's amendment should be extensively reformed.

A. AMENDMENT TERMS AND CONDITIONS

66. Verizon's amendment provides that existing interconnection agreements should be modified as set forth in its "TRO Attachment" and "Pricing Attachment." The amendment provides that, in the event that the FCC, the D.C. Circuit, or the Supreme Court stays any provisions of the *Triennial Review Order*, or the D.C. Circuit, or the Supreme Court stays any provisions of *USTA II*, any terms and conditions in the TRO Attachment or the Pricing Attachment that relate to the stayed provisions shall be suspended, and have no force or effect, until such stay is lifted. *See id.* § 6. Since the D.C. Circuit has, in fact, reversed a number of

provisions of the *Triennial Review Order*, this provision should be modified, and terms and conditions in the TRO Attachment or the Pricing Attachment that relate to the reversed provisions should be eliminated.

67. The amendment also includes a one-sided reservation of rights to Verizon to appeal and take other legal action. *See id.* This provision should be mutual.

68. The Amendment contains a statement that the Amendment is "joint work product" and shall not be construed against either party. *See id.* § 7. This statement is incorrect, as neither Eagle nor Myatel participated in drafting the Amendment. The provision should be replaced by one indicating which provisions were drafted by Verizon and therefore may be strictly construed against it.

B. GENERAL CONDITIONS (TRO ATTACHMENT § 1)

69. The amendment provides that Verizon will provide CLECs with access to UNEs, including UNEs commingled with wholesale services, *only* to the extent required by 47 U.S.C. § 251(c)(3) or 47 C.F.R. Part 51 (*see* TRO Attachment § 1.1), and only for those purposes contemplated by those sections, *see id.* § 1.2.[14] This provision should be replaced by one indicating that UNEs may also be provided to the extent required by the Commission under other applicable federal or state law.

70. The amendment provides that if Verizon is ever required to offer additional UNEs or commingling arrangements under federal law, the prices will be those established in Verizon's tariffs or those reached through negotiation with individual CLECs. *See id.* § 1.3. This provision should be amended to indicate that prices will be those established by the Commission.

[14] Not, in either case, the broader "by federal law," as Verizon suggests.

71. The amendment provides that Verizon also reserves the right to argue at some future date that a particular UNE mentioned in either the interconnection agreement or the amendment is no longer subject to unbundling at all. *See id.* § 1.4. This provision is not required by the *Triennial Review Order*, and should be struck. In the alternative, this provision is one-sided, and should include a similar reservation of rights to the signing CLEC to argue that UNEs not unbundled in the interconnection agreement or amendment should be unbundled.

C. GLOSSARY (TRO ATTACHMENT § 2)

72. Verizon's amendment contains a Glossary defining the terms used therein. Verizon represents that the Glossary reflects the FCC's definitions of terms in the *Triennial Review Order*. However, this appears not to be the case. As an example, Verizon gives its definition of "FTTH loop" and the FCC's. The two do not match, and Verizon's omits significant terms ("and the attached electronics") and substitutes non-identical phrases for the FCC's language ("between the main distribution frame (or its equivalent) in an end user's serving wire center and the demarcation point at the end user's customer premises" for "that connects a customer's premises with a wire center (*i.e.*, from the demarcation point at the customer's premises to the central office"). The definition does not match that stated in the new FCC rules in Appendix B the *Triennial Review Order*. All of the entries in the Glossary should be modified to conform to those in the *Triennial Review Order*, to the extent modified by *USTA II*.

D. REMAINDER OF AMENDMENT

73. The remainder of the agreement contains the same type of flaws, especially with regards to loops, network modifications, and line conditioning. These sections should be extensively revised and the prices associated with new items modified.

74. The amendment contains repetitive provisions that Verizon will provide CLECs with access to loops *only* to the extent required by 47 U.S.C. § 251(c)(3) or 47 C.F.R. Part 51, *see* TRO Attachment § 1.1. These provisions should be replaced by one indicating that UNEs may also be provided to the extent required by the Commission under other applicable federal or state law.

75. The amendment contains provisions related to portions of the *Triennial Review Order* which have been vacated and/or remanded. These provisions should be eliminated. In the alternative, these provisions should be replaced by provisions taking into account both federal and state law.

76. To the extent that provisions in this section purport to reflect the *Triennial Review Order*, they tend to vary from its language and should be modified to conform to the *Triennial Review Order*.

77. The amendment as a whole ignores the effect of state law and the ability of states to impose additional unbundling requirements above the federal floor. The Commission should consider both of these factors and modify the amendment accordingly.

VII. COUNTER PROPOSAL

78. Attached hereto as Exhibit C is alternative amendment language offered to Verizon in response to its proposals. The Commission should substitute this language for that proposed by Verizon.

VIII. CONCLUSION

79. The Commission should dismiss Verizon's proposed amendment. In the alternative, the Commission should abate this proceeding until it is clear what the fate of the *Triennial Review Order*, and the rules promulgated by it, are. The Commission should also grant

the foregoing motion for procedural flexibility. As a final alternative, the Commission should adopt the counter proposal attached hereto as Exhibit C in lieu of Verizon's proposed amendment, or substantially reform Verizon's proposed amendment to conform with applicable state and federal law.

Respectfully Submitted,

EAGLE TELECOMMUNICATIONS INC.
MYATEL CORPORATION

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ATTORNEYS FOR EAGLE TELECOMMUNICATIONS INC.
AND MYATEL CORPORATION

IX. CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the following, on this 12th day of April, 2004, by United States mail, postage paid and return receipt requested.

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EXHIBIT A

MARYLAND DECISION

STATE OF MARYLAND

PUBLIC SERVICE COMMISSION

March 15, 2004

David A. Hill, Esquire
Vice President & General Counsel
1 East Pratt Street, 8E/MS06
Baltimore, Maryland 21202

Re: ***Verizon Maryland Petition for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Maryland Pursuant to Section 252 of the Communications Act, as Amended, and the Triennial Review Order***

Dear Mr. Hill:

On February 20, 2004, Verizon Maryland Inc. ("Verizon") filed the above-referenced Petition requesting that the Commission initiate a consolidated arbitration proceeding to amend the interconnection agreements between Verizon and each of the Competitive Local Exchange Carrier ("CLECs") and applicable Commercial Mobile Radio Service ("CMRS") providers in Maryland, in light of the Federal Communications Commission's ("FCC's") changes to its network unbundling rules in its *Triennial Review Order ("TRO")*[1]. In accordance with the Telecommunications Act of 1996[2] ("the Act"), responses to Verizon's Petition are to be filed with the Commission by March 16, 2004. On March 11, 2004, Verizon requested that the Commission hold the Petition for Arbitration in abeyance until March 19, 2004.

Since Verizon's initial filing on February 20, 2004, the status of the *TRO* has been cast into a state of flux. On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit issued an Opinion[3] pertaining to the *Triennial Review Order*. In its Opinion, the Court vacated and/or remanded various portions of the *TRO*. As a result of the Court's action, the Commission believes that Verizon's Petition for Arbitration is premature, as the status of the law it seeks to use as a trigger for its change of law provision is unclear. Based upon this procedural uncertainty, the Commission hereby rejects Verizon's Petition, without prejudice.

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[1] *In the Matters of the Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advances Telecommunications Capability*, Report and Order on Remand and Further [illegible] ("*TRO*").

[2] 47 U.S.C. 251 et seq.

[3] *United States Telecom Association v. FCC*, No. 00-1012, 2004 U.S. App. LEXIS 3960 (D.C. Cir. Mar. 2, 2004)

Additionally, in light of the Commission's rejection of Verizon's Petition, it is unnecessary to grant the extension requested by Verizon on March 11, 2004.

By Direction of the Commission,

Felecia L. Greer
Executive Secretary

cc: Verizon Exhibit 1 - Service List

FLG:lvs

EXHIBIT B

NORTH CAROLINA DECISION

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-19, SUB 477

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Interconnection Agreements with Competitive	)	ORDER CONTINUING
Local Exchange Carriers and Commercial	)	PROCEEDING INDEFINITELY
Mobile Radio Service Providers	)	

BY THE COMMISSION: On February 20, 2004, Verizon South, Inc. filed for arbitration "of an Amendment to Interconnection Agreements with Competing Local Providers [CLPs] and Commercial Mobile Radio Service Providers [CMRS providers] in North Carolina" pursuant to Section 252 of the Telecommunications Act and the *Triennial Review Order* (TRO). As such, this consolidated arbitration petition involves nearly 70 CLPs and CMRS providers. Verizon is proposing an amendment to its interconnection agreements implementing changes in its network unbundling obligations pursuant to the TRO. More particularly, the petition was filed pursuant to the transition process that the FCC established in the TRO in Paragraphs 700 through 706. For the purposes herein, the term "CLPs" refers to both CLPs and CMRS providers.

Verizon explained that the FCC had provided that incumbent local exchange companies (ILECs) and CLPs must use the Section 252(b) "timetable for modification" of agreements; and, for the purposes of the negotiation and arbitration timetable, "negotiations [are] deemed to commence on the effective date" of the TRO, which was October 2, 2003. Verizon said the negotiations between itself and the CLPs in fact commenced on that date, because on October 2, 2003, Verizon sent a letter to each CLP initiating negotiations and proposing a draft amendment to implement the FCC's rules. This means that the window for requests for arbitration is from February 14, 2004, to March 11, 2004. A ruling would need to be made by the Commission on or about July 2, 2004.

Verizon reported that, since the October 2, 2003 notice, some CLPs have signed Verizon's draft amendment, without substantive changes; but, of the remaining CLPs in North Carolina, virtually none provided a timely response to Verizon. The majority of substantive responses have come in only lately. Some responses constitute a virtual wholesale rejection of the amendment.

Verizon, of course, noted the pendency of appeals before the D.C. Circuit and the other filings for reconsideration pending before the FCC. Verizon is filing this petition now, based on current federal law.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that good cause exists to continue this proceeding indefinitely pending further order and advise Verizon that it may avail itself of the provisions of Section 252(e)(5), wherein the arbitration may be referred to the FCC.

The reasons for these recommendations are several-fold:

First, the changes sought by Verizon appear to be of similar subject matter to those which are subject to the Commission's TRO proceeding. As such, this "consolidated arbitration" approximates a parallel TRO proceeding. This is a waste of everybody's time. It is especially so since Verizon informed this Commission on Halloween Day, 2003 that it would not actively participate in the TRO dockets, while reserving "its right to challenge these determinations at a later time." It also stated its belief that the FCC's TRO rules were "in direct conflict with the 1996 Telecommunications Act." This is strange considering that Verizon purports to desire the swift implementation of the FCC's rules in the context of its arbitration petition. The Commission does not have the resources or the inclination to conduct *two* TRO proceedings simultaneously.

Second, as alluded to by Verizon in its filing, the FCC rules are under challenge on many fronts. It makes no sense to begin an arbitration where the underlying rules may be changed in midstream.

Third, Verizon did not comply with the Commission's arbitration procedural rules. It did not include prefiled testimony or seek waiver of same. It included no matrix summary. The petition did not appear to be signed by North Carolina counsel as required by our rules.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 3rd day of March, 2004.

NORTH CAROLINA UTILITES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

dl030104.01

EXHIBIT C

RESPONDENTS' PROPOSED LANGUAGE

AMENDMENT TO INTERCONNECTION AGREEMENT TO IMPLEMENT FCC TRIENNIAL REVIEW ORDER

Section 1: Amended Definitions.

Commingling. Commingling means the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that CLEC has obtained at wholesale from Verizon, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services. Commingle means the act of commingling.

Enhanced extended link. An enhanced extended link or EEL consists of a combination of an unbundled loop and unbundled dedicated transport, together with any facilities, equipment, or functions necessary to combine those network elements.

Intermodal. The term intermodal refers to facilities or technologies other than those found in traditional telephone networks, but that are utilized to provide competing services. Intermodal facilities or technologies include, but are not limited to, traditional or new cable plant, wireless technologies, and power line technologies.

Non-qualifying service. A non-qualifying service is a service that is not a qualifying service.

Qualifying service. A qualifying service is a telecommunications service that competes with a telecommunications service that has been traditionally the exclusive or primary domain of incumbent LECs, including, but not limited to, local exchange service, such as plain old telephone service, and access services, such as digital subscriber line services and high-capacity circuits.

State commission. A state commission means the commission, board, or official (by whatever name designated) which under the laws of any state has regulatory jurisdiction with respect to intrastate operations of carriers. As referenced in this part, this term may include the FCC if it assumes responsibility for a proceeding or matter, pursuant to section 252(e)(5) of the Act or 47 C.F.R. § 51.320. This term shall also include any person or persons to whom the state commission has delegated its authority under sections 251 and 252 of the Act and 47 C.F.R. Part 51.

This Agreement. The underlying § 252 Interconnection Agreement between the Parties and any Amendments to that Agreement, including this Amendment.

Triennial Review Order. The Triennial Review Order means the Commission's Report and Order and Order on Remand and Further Notice of Proposed Rulemaking in CC Docket Nos. 01-338, 96-98, and 98-147.

Section 2: Interconnection.

(a) Verizon shall provide, for CLEC's facilities and equipment, interconnection with Verizon's network:

(1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;

(2) At any technically feasible point within Verizon's network including, at a minimum:

(i) The line-side of a local switch;

(ii) The trunk-side of a local switch;

(iii) The trunk interconnection points for a tandem switch;

(iv) Central office cross-connect points;

(v) Out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and

(vi) The points of access to unbundled network elements as described in 47 C.F.R. § 51.309;

(3) That is at a level of quality that is equal to that which Verizon provides itself, a subsidiary, an affiliate, or any other party. At a minimum, this requires Verizon to design interconnection facilities to meet the same technical criteria and service standards that are used within Verizon's network. This obligation is not limited to a consideration of service quality as perceived by end users, and includes, but is not limited to, service quality as perceived by CLEC; and

(4) That, if so requested by CLEC and to the extent technically feasible, is superior in quality to that provided by Verizon to itself or to any subsidiary, affiliate, or any other party to which Verizon provides interconnection. Nothing in this section prohibits Verizon from providing interconnection that is lesser in quality at the sole request of CLEC; and

(5) On terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the FCC's rules including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers, and offering such terms and conditions that are no less favorable than the terms and conditions upon which Verizon provides such interconnection to itself. This includes, but is not limited to, the time within which Verizon provides such interconnection.

(b) If CLEC requests interconnection solely for the purpose of originating or terminating its interexchange traffic on Verizon's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, CLEC is not entitled to receive interconnection pursuant to section 251(c)(2) of the Act.

(c) Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(d) Previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality.

(e) If Verizon denies a request for interconnection at a particular point it must prove to the state commission that interconnection at that point is not technically feasible.

(f) If technically feasible, Verizon shall provide two-way trunking upon request.

(g) Verizon shall provide to CLEC technical information about Verizon's network facilities sufficient to allow CLEC to achieve interconnection consistent with the requirements of this section.

Section 3: Use of unbundled network elements.

(a) Except as provided in 47 C.F.R. § 51.318, Verizon shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements for the service CLEC seeks to offer.

(b) CLEC may not access an unbundled network element for the sole purpose of providing non-qualifying services.

(c) When CLEC purchases access to an unbundled network facility it is entitled to exclusive use of that facility for a period of time. When purchasing access to a feature, function, or capability of a facility, CLEC is entitled to use of that feature, function, or capability for a period of time. CLEC's purchase of access to an unbundled network element does not relieve Verizon of the duty to maintain, repair, or replace the unbundled network element.

(d) When CLEC accesses and uses an unbundled network element to provide a qualifying service, CLEC may use the same unbundled network element to provide non-qualifying services.

(e) Except as provided in 47 C.F.R. § 51.318, Verizon shall permit CLEC to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from Verizon.
(f) Upon request, Verizon shall perform the functions necessary to commingle an unbundled network element or a combination of unbundled network elements with one or more facilities or services that CLEC has obtained at wholesale from Verizon.
(g) Verizon shall not deny access to an unbundled network element or a combination of unbundled network elements on the grounds that one or more of the elements:

(1) Is connected to, attached to, linked to, or combined with, a facility or service obtained from Verizon; or

(2) Shares part of Verizon's network with access services or inputs for non-qualifying services.

Section 4: Nondiscriminatory access to unbundled network elements.
(a) The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that Verizon provides to CLEC shall be the same for all telecommunications carriers requesting access to that network element.
(b) To the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that Verizon provides to CLEC shall be at least equal in quality to that which Verizon provides to itself. If Verizon fails to meet this requirement, Verizon must prove to the state commission that it is not technically feasible to provide the requested unbundled network element, or to provide access to the requested unbundled network element, at a level of quality that is equal to that which Verizon provides to itself.
(c) To the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that Verizon provides to CLEC shall, upon request, be superior in quality to that which Verizon provides to itself. If Verizon fails to meet this requirement, Verizon must prove to the state commission that it is not technically feasible to provide the requested unbundled network element or access to such unbundled network element at the requested level of quality that is superior to that which Verizon provides to itself. Nothing in this section prohibits Verizon from providing interconnection that is lesser in quality at the sole request of CLEC.
(d) Previous successful access to an unbundled element at a particular point in a network, using particular facilities, is substantial evidence that access is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.
(e) Previous successful provision of access to an unbundled element at a particular point in a network at a particular level of quality is substantial evidence that access is technically feasible at that point, or at substantially similar points, at that level of quality.

Section 5: Combination of unbundled network elements.
(a) Verizon shall provide unbundled network elements in a manner that allows CLEC to combine such network elements in order to provide a telecommunications service.
(b) Except upon request, Verizon shall not separate requested network elements that it currently combines.
(c) Upon request, Verizon shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in Verizon's network, provided that such combination:

(1) Is technically feasible; and

(2) Would not undermine the ability of other carriers to obtain access to unbundled network elements or to interconnect with Verizon's network.
(d) Upon request, Verizon shall perform the functions necessary to combine unbundled network elements with elements possessed by CLEC in any technically feasible manner.

(e) If Verizon denies a request to combine elements pursuant to paragraph (c)(1) or paragraph (d) of this section it must prove to the state commission that the requested combination is not technically feasible.
(f) If Verizon denies a request to combine unbundled network elements pursuant to paragraph (c)(2) of this section it must demonstrate to the state commission that the requested combination would undermine the ability of other carriers to obtain access to unbundled network elements or to interconnect with Verizon's network.

Section 6: Conversion of unbundled network elements and services.
(a) Upon request, Verizon shall convert a wholesale service, or group of wholesale services, to the equivalent unbundled network element, or combination of unbundled network elements, that is available to CLEC under this Agreement.
(b) Verizon shall perform any conversion from a wholesale service or group of wholesale services to an unbundled network element or combination of unbundled network elements without adversely affecting the service quality perceived by CLEC's end-user customer.
(c) Except as agreed to by the parties, Verizon shall not impose any untariffed termination charges, or any disconnect fees, re-connect fees, or charges associated with establishing a service for the first time, in connection with any conversion between a wholesale service or group of wholesale services and an unbundled network element or combination of unbundled network elements.

Section 7: Eligibility criteria for access to certain unbundled network elements.
(a) Except as provided in paragraph (b) of this section, Verizon shall provide access to unbundled network elements and combinations of unbundled network elements without regard to whether CLEC seeks access to the elements to establish a new circuit or to convert an existing circuit from a service to unbundled network elements.
(b) Verizon need not provide access to an unbundled DS1 loop in combination, or commingled, with a dedicated DS1 transport or dedicated DS3 transport facility or service, or to an unbundled DS3 loop in combination, or commingled, with a dedicated DS3 transport facility or service, unless CLEC certifies that all the following conditions are met:

(1) CLEC has received state certification to provide local voice service in the area being served or, in the absence of a state certification requirement, has complied with registration, tariffing, filing fee, or other regulatory requirements applicable to the provision of local voice service in that area.

(2) The following criteria are satisfied for each combined circuit, including each DS1 circuit, each DS1 enhanced extended link, and each DS1-equivalent circuit on a DS3 enhanced extended link:

(i) Each circuit to be provided to each customer will be assigned a local number prior to the provision of service over that circuit;

(ii) Each DS1-equivalent circuit on a DS3 enhanced extended link must have its own local number assignment, so that each DS3 must have at least 28 local voice numbers assigned to it;

(iii) Each circuit to be provided to each customer will have 911 or E911 capability prior to the provision of service over that circuit;

(iv) Each circuit to be provided to each customer will terminate in a collocation arrangement that meets the requirements of paragraph (c) of this section;

(v) Each circuit to be provided to each customer will be served by an interconnection trunk that meets the requirements of paragraph (d) of this section;

(vi) For each 24 DS1 enhanced extended links or other facilities having equivalent capacity, CLEC will have at least one active DS1 local service interconnection trunk that meets the requirements of paragraph (d) of this section; and

(vii) Each circuit to be provided to each customer will be served by a switch capable of switching local voice traffic.

(c) A collocation arrangement meets the requirements of this paragraph if it is:

(1) Established pursuant to section 251(c)(6) of the Act and located at Verizon's premises within the same LATA as the customer's premises, when Verizon is not the collocator; and

(2) Located at a third party's premises within the same LATA as the customer's premises, when Verizon is the collocator.

(d) An interconnection trunk meets the requirements of this paragraph if CLEC will transmit the calling party's number in connection with calls exchanged over the trunk.

Section 8: Specific unbundling requirements.

(a) Local loops. Verizon shall provide CLEC with nondiscriminatory access to the local loop on an unbundled basis, in accordance with section 251(c)(3) of the Act and 47 C.F.R. Part 51 and as set forth in 47 C.F.R. § 51.319 (a)(1) through (a)(9). The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in Verizon central office and the loop demarcation point at an end-user customer premises. This element includes all features, functions, and capabilities of such transmission facility, including the network interface device. It also includes all electronics, optronics, and intermediate devices (including repeaters and load coils) used to establish the transmission path to the end-user customer premises as well as any inside wire owned or controlled by the Verizon that is part of that transmission path.

(1) Copper loops. Verizon shall provide CLEC with nondiscriminatory access to the copper loop on an unbundled basis. A copper loop is a stand-alone local loop comprised entirely of copper wire or cable. Copper loops include two-wire and four-wire analog voice-grade copper loops, digital copper loops (e.g., DS0s and integrated services digital network lines), as well as two-wire and four-wire copper loops conditioned to transmit the digital signals needed to provide digital subscriber line services, regardless of whether the copper loops are in service or held as spares. The copper loop includes attached electronics using time division multiplexing technology, but does not include packet switching capabilities as defined in 47 C.F.R. § 51.319(a)(2)(i). The availability of DS1 and DS3 copper loops is subject to the requirements of 47 C.F.R. § 51.319(a)(4) and (a)(5).

(i) Line sharing. Beginning on October 2, 2003, the high frequency portion of a copper loop shall no longer be required to be provided as an unbundled network element, subject to the transitional line sharing conditions in paragraphs (a)(1)(i)(A) and (a)(1)(i)(B). Line sharing is the process by which CLEC provides digital subscriber line service over the same copper loop that Verizon uses to provide voice service, with Verizon using the low frequency portion of the loop and CLEC using the high frequency portion of the loop. The high frequency portion of the loop consists of the frequency range on the copper loop above the range that carries analog circuit-switched voice transmissions. This portion of the loop includes the features, functions, and capabilities of the loop that are used to establish a complete transmission path on the high frequency range between Verizon's distribution frame (or its equivalent) in its central office and the demarcation point at the end-user customer premises, and includes the high frequency portion of any inside wire owned or controlled by Verizon.

(A) Line sharing customers before the October 2, 2003. Verizon shall provide CLEC with the ability to engage in line sharing over a copper loop where, prior to October 2, 2003, CLEC began providing digital subscriber line service to a particular end-user customer and has not ceased providing digital subscriber line service to that customer. Until such end-user customer cancels or otherwise discontinues its subscription to the digital subscriber line service of CLEC, or its successor or assign, Verizon shall continue to provide access to the high frequency portion of the loop at the same rate that Verizon charged for such access prior to October 2, 2003.

(B) Line sharing customers on or after October 2, 2003. Verizon shall provide CLEC with the ability to engage in line sharing over a copper loop, between October 2, 2003 and three years after that date, where CLEC began providing digital subscriber line service to a particular end-user customer on or before October 2, 2004. Beginning October 2, 2006, Verizon is no longer required to provide CLEC with the ability to engage in line sharing for this end-user customer or any new end-user customer. Between

October 2, 2003 and October 2, 2006 Verizon shall provide CLEC with access to the high frequency portion of a copper loop in order to serve line sharing customers obtained between October 2, 2003 and October 2, 2004 in the following manner:

(1) During the first year following October 2, 2003, Verizon shall provide access to the high frequency portion of a copper loop at 25 percent of the state-approved monthly recurring rate, or 25 percent of the monthly recurring rate set forth in this Agreement, for access to a copper loop in effect on that date.

(2) Beginning October 3, 2004 and continuing until October 3, 2006, Verizon shall provide access to the high frequency portion of a copper loop at 50 percent of the state-approved monthly recurring rate, or 50 percent of the monthly recurring rate set forth in this Agreement, for access to a copper loop in effect on October 2, 2003.

(3) Beginning October 3, 2004 and continuing until October 3, 2006, Verizon shall provide access to the high frequency portion of a copper loop at 75 percent of the state-approved monthly recurring rate, or 75 percent of the monthly recurring rate set forth in this Agreement, for access to a copper loop in effect on October 2, 2003.

(ii) Line splitting. Verizon shall provide CLEC with the ability to engage in line splitting arrangements with another competitive LEC using a splitter collocated at the central office where the loop terminates into a distribution frame or its equivalent. Line splitting is the process in which one CLEC provides narrowband voice service over the low frequency portion of a copper loop and a second CLEC provides digital subscriber line service over the high frequency portion of that same loop.

(A) Verizon's obligation, under paragraph (a)(1)(ii) of this section, to provide CLEC with the ability to engage in line splitting applies regardless of whether the carrier providing voice service provides its own switching or obtains local circuit switching as an unbundled network element pursuant to paragraph (d) of this section.

(B) Verizon must make all necessary network modifications, including providing nondiscriminatory access to operations support systems necessary for pre-ordering, ordering, provisioning, maintenance and repair, and billing for loops used in line splitting arrangements.

(iii) Line conditioning. Verizon shall condition a copper loop at the request of CLEC when CLEC seeks access to a copper loop under paragraph (a)(1) of this section, the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not Verizon offers advanced services to the end-user customer on that copper loop or copper subloop. If Verizon seeks compensation from CLEC for line conditioning, CLEC has the option of refusing, in whole or in part, to have the line conditioned; and CLEC's refusal of some or all aspects of line conditioning will not diminish any right it may have, under paragraphs (a) and (b) of this section, to access the copper loop, the high frequency portion of the copper loop, or the copper subloop.

(A) Line conditioning is defined as the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders.

(B) Verizon shall recover the costs of line conditioning from CLEC in accordance with the FCC's forward-looking pricing principles promulgated pursuant to section 252(d)(1) of the Act and in compliance with rules governing nonrecurring costs in 47 C.F.R. § 51.507(e).

(C) Insofar as it is technically feasible, Verizon shall test and report troubles for all the features, functions, and capabilities of conditioned copper lines, and may not restrict its testing to voice transmission only.

(D) Where CLEC is seeking access to the high frequency portion of a copper loop or copper subloop pursuant to paragraphs (a) or (b) of this section and Verizon claims that conditioning

that loop or subloop will significantly degrade, as defined in 47 C.F.R. § 51.233, the voiceband services that Verizon is currently providing over that loop or subloop, Verizon must either:

(1) Locate another copper loop or copper subloop that has been or can be conditioned, migrate Verizon's voiceband service to that loop or subloop, and provide CLEC with access to the high frequency portion of that alternative loop or subloop; or

(2) Make a showing to the state commission that the original copper loop or copper subloop cannot be conditioned without significantly degrading voiceband services on that loop or subloop, as defined in 47 C.F.R. § 51.233, and that there is no adjacent or alternative copper loop or copper subloop available that can be conditioned or to which the end-user customer's voiceband service can be moved to enable line sharing.

(E) If, after evaluating Verizon's showing under paragraph (a)(1)(iii)(D)(2) of this section, the state commission concludes that a copper loop or copper subloop cannot be conditioned without significantly degrading the voiceband service, Verizon cannot then or subsequently condition that loop or subloop to provide advanced services to its own customers without first making available to any requesting telecommunications carrier the high frequency portion of the newly conditioned loop or subloop.

(iv) Maintenance, repair, and testing.

(A) Verizon shall provide, on a nondiscriminatory basis, physical loop test access points to CLEC at the splitter, through a cross-connection to CLEC's collocation space, or through a standardized interface, such as an intermediate distribution frame or a test access server, for the purpose of testing, maintaining, and repairing copper loops and copper subloops.

(B) If Verizon seeks to utilize an alternative physical access methodology it may request approval to do so from the state commission, but must show that the proposed alternative method is reasonable and nondiscriminatory, and will not disadvantage CLEC's ability to perform loop or service testing, maintenance, or repair.

(v) Control of the loop and splitter functionality. In situations where CLEC is obtaining access to the high frequency portion of a copper loop either through a linesharing or line splitting arrangement, Verizon may maintain control over the loop and splitter equipment and functions, and shall provide to CLEC loop and splitter functionality that is compatible with any transmission technology that CLEC seeks to deploy using the high frequency portion of the loop, as defined in paragraph (a)(1)(i) of this section, provided that such transmission technology is presumed to be deployable pursuant to 47 C.F.R. § 51.230.

(2) Hybrid loops. A hybrid loop is a local loop composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant.

(i) Packet switching facilities, features, functions, and capabilities. Verizon is not required to provide unbundled access to the packet switched features, functions and capabilities of its hybrid loops. Packet switching capability is the routing or forwarding of packets, frames, cells, or other data units based on address or other routing information contained in the packets, frames, cells or other data units, and the functions that are performed by the digital subscriber line access multiplexers, including but not limited to the ability to terminate an end-user customer's copper loop (which includes both a low-band voice channel and a high-band data channel, or solely a data channel); the ability to forward the voice channels, if present, to a circuit switch or multiple circuit switches; the ability to extract data units from the data channels on the loops; and the ability to combine data units from multiple loops onto one or more trunks connecting to a packet switch or packet switches.

(ii) Broadband services. When CLEC seeks access to a hybrid loop for the provision of broadband services, Verizon shall provide CLEC with nondiscriminatory access to the time division multiplexing features, functions, and capabilities of that hybrid loop, including DS1 or DS3 capacity (where impairment has been found to exist), on an unbundled basis to establish a complete transmission path between Verizon's central office and an end user's customer premises. This access shall include access to all features, functions, and capabilities of the hybrid loop that are not used to transmit packetized information.

(iii) Narrowband services. When CLEC seeks access to a hybrid loop for the provision of narrowband services, Verizon may either:

(A) Provide nondiscriminatory access, on an unbundled basis, to an entire hybrid loop capable of voice-grade service (i.e., equivalent to DS0 capacity), using time division multiplexing technology; or

(B) Provide nondiscriminatory access to a spare home-run copper loop serving that customer on an unbundled basis.

(3) Fiber-to-the-home loops. A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, and serving an end user's customer premises.

(i) New builds. Verizon is not required to provide nondiscriminatory access to a fiber-to-the-home loop on an unbundled basis when Verizon deploys such a loop to an end user's customer premises that previously has not been served by any loop facility.

(ii) Overbuilds. Verizon is not required to provide nondiscriminatory access to a fiber-to-the-home loop on an unbundled basis when Verizon has deployed such a loop parallel to, or in replacement of, an existing copper loop facility, except that:

(A) Verizon must maintain the existing copper loop connected to the particular customer premises after deploying the fiber-to-the-home loop and provide nondiscriminatory access to that copper loop on an unbundled basis unless Verizon retires the copper loop pursuant to paragraph (a)(3)(iii) of this section.

(B) If Verizon maintains the existing copper loop pursuant to paragraph (a)(3)(ii)(A) of this section it need not incur any expenses to ensure that the existing copper loop remains capable of transmitting signals prior to receiving a request for access pursuant to that paragraph, in which case Verizon shall restore the copper loop to serviceable condition upon request.

(C) When Verizon retires the copper loop pursuant to paragraph (a)(3)(iii) of this section it shall provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the fiber-to-the-home loop on an unbundled basis.

(iii) Retirement of copper loops or copper subloops. Prior to retiring any copper loop or copper subloop that has been replaced with a fiber-to-the-home loop, Verizon must comply with:

(A) The network disclosure requirements set forth in section 251(c)(5) of the Act and in 47 C.F.R. §§ 51.325 through 51.335; and

(B) Any applicable state requirements.

(4) DS1 loops. Verizon shall provide CLEC with nondiscriminatory access to a DS1 loop on an unbundled basis except where the state commission has found, through application of the competitive wholesale facilities trigger in 47 C.F.R. § 51.319(a)(4)(ii), that requesting telecommunications carriers are not impaired without access to a DS1 loop at a specific customer location. A DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services.

(5) DS3 loops. Subject to the cap in paragraph (a)(5)(iii), Verizon shall provide CLEC with nondiscriminatory access to a DS3 loop on an unbundled basis except where the state commission has found, through application of either 47 C.F.R. § 51.319(a)(5)(i) or the potential deployment analysis in 47 C.F.R. § 51.319(a)(5)(ii), that requesting telecommunications carriers are not impaired without access to a DS3 loop at a specific customer location. A DS3 loop is a digital local loop having a total digital signal speed of 44.736 megabytes per second.

(iii) Cap on unbundled DS3 circuits. CLEC may obtain a maximum of two unbundled DS3 loops for any single customer location where DS3 loops are available as unbundled loops.

(6) Dark fiber loops. Verizon shall provide CLEC with nondiscriminatory access to a dark fiber loop on an unbundled basis except where a state commission has found, through application of the self-provisioning trigger in 47 C.F.R. § 51.319(a)(6)(i) or the potential deployment analysis in 47 C.F.R. §

51.319(a)(6)(ii), that requesting telecommunications carriers are not impaired without access to a dark fiber loop at a specific customer location. Dark fiber is fiber within an existing fiber optic cable that has not yet been activated through optronics to render it capable of carrying communications services.

(7) Routine network modifications--(i) Verizon shall make all routine network modifications to unbundled loop facilities used by CLEC where the requested loop facility has already been constructed. Verizon shall perform these routine network modifications to unbundled loop facilities in a nondiscriminatory fashion, without regard to whether the loop facility being accessed was constructed on behalf, or in accordance with CLEC's specifications.

(ii) A routine network modification is an activity that Verizon regularly undertakes for its own customers. Routine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; and attaching electronic and other equipment that Verizon ordinarily attaches to a DS1 loop to activate such loop for its own customer. They also include activities needed to enable CLEC to obtain access to a dark fiber loop. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the construction of a new loop, or the installation of new aerial or buried cable for CLEC.

(8) Engineering policies, practices, and procedures. Verizon shall not engineer the transmission capabilities of its network in a manner, or engage in any policy, practice, or procedure, that disrupts or degrades access to a local loop or subloop, including the time division multiplexing-based features, functions, and capabilities of a hybrid loop, for which CLEC may obtain or has obtained access pursuant to paragraph (a) of this section.

(b) Subloops. Verizon shall provide CLEC with nondiscriminatory access to subloops on an unbundled basis in accordance with section 251(c)(3) of the Act and this part and as set forth in 47 C.F.R. § 51.319(b).

(1) Copper subloops. Verizon shall provide CLEC with nondiscriminatory access to a copper subloop on an unbundled basis. A copper subloop is a portion of a copper loop, or hybrid loop, comprised entirely of copper wire or copper cable that acts as a transmission facility between any point of technically feasible access in Verizon's outside plant, including inside wire owned or controlled by Verizon, and the end-user customer premises. A copper subloop includes all intermediate devices (including repeaters and load coils) used to establish a transmission path between a point of technically feasible access and the demarcation point at the end-user customer premises, and includes the features, functions, and capabilities of the copper loop. Copper subloops include two-wire and four-wire analog voice-grade subloops as well as two-wire and four-wire subloops conditioned to transmit the digital signals needed to provide digital subscriber line services, regardless of whether the subloops are in service or held as spares.

(i) Point of technically feasible access. A point of technically feasible access is any point in Verizon's outside plant where a technician can access the copper wire within a cable without removing a splice case. Such points include, but are not limited to, a pole or pedestal, the serving area interface, the network interface device, the minimum point of entry, any remote terminal, and the feeder/distribution interface. Verizon shall, upon a site-specific request, provide access to a copper subloop at a splice near a remote terminal. Verizon shall be compensated for providing this access in accordance with 47 C.F.R. §§ 51.501 through 51.515.

(ii) Rules for collocation. Access to the copper subloop is subject to the Commission's collocation rules at 47 C.F.R. §§ 51.321 and 51.323.

(2) Subloops for access to multiunit premises wiring. Verizon shall provide CLEC with nondiscriminatory access to the subloop for access to multiunit premises wiring on an unbundled basis regardless of the capacity level or type of loop that CLEC seeks to provision for its customer. The subloop for access to multiunit premises wiring is defined as any portion of the loop that it is technically feasible to access at a terminal in Verizon's outside plant at or near a multiunit premises. One category of this subloop is inside wire, which is defined for purposes of this section as all loop plant owned or controlled by Verizon

at a multiunit customer premises between the minimum point of entry as defined in 47 C.F.R. § 68.105 and the point of demarcation of Verizon's network as defined in 47 C.F.R. § 68.3.

(i) Point of technically feasible access. A point of technically feasible access is any point in Verizon's outside plant at or near a multiunit premises where a technician can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within to access the wiring in the multiunit premises. Such points include, but are not limited to, a pole or pedestal, the network interface device, the minimum point of entry, the single point of interconnection, and the feeder/distribution interface.

(ii) Single point of interconnection. Upon notification by CLEC that it requests interconnection at a multiunit premises where Verizon owns, controls, or leases wiring, Verizon shall provide a single point of interconnection that is suitable for use by multiple carriers. This obligation is in addition to Verizon's obligations, under paragraph (b)(2) of this section, to provide nondiscriminatory access to a subloop for access to multiunit premises wiring, including any inside wire, at any technically feasible point. If the parties are unable to negotiate rates, terms, and conditions under which Verizon will provide this single point of interconnection, then any issues in dispute regarding this obligation shall be resolved in state proceedings under the dispute resolution terms of this Agreement.

(3) Other subloop provisions.

(i) Technical feasibility. If the Parties are unable to reach agreement through voluntary negotiations as to whether it is technically feasible, or whether sufficient space is available, to unbundle a copper subloop or subloop for access to multiunit premises wiring at the point where a telecommunications carrier requests, Verizon shall have the burden of demonstrating to the state commission, in state proceedings under the dispute resolution terms of this Agreement, that there is not sufficient space available, or that it is not technically feasible to unbundle the subloop at the point requested.

(ii) Best practices. Once one state commission in any state has determined that it is technically feasible to unbundle subloops at a designated point, Verizon shall have the burden of demonstrating to the state commission, in state proceedings under the dispute resolution terms of this Agreement, that it is not technically feasible, or that sufficient space is not available, to unbundle its own loops at such a point.

(c) Network interface device. Apart from its obligation to provide the network interface device functionality as part of an unbundled loop or subloop, Verizon also shall provide nondiscriminatory access to the network interface device on an unbundled basis, in accordance with section 251(c)(3) of the Act and 47 C.F.R. Part 51. The network interface device element is a stand-alone network element and is defined as any means of interconnection of customer premises wiring to Verizon's distribution plant, such as a cross-connect device used for that purpose. Verizon shall permit CLEC to connect its own loop facilities to on-premises wiring through Verizon's network interface device, or at any other technically feasible point.

(d) Local circuit switching. Verizon shall provide CLEC with nondiscriminatory access to local circuit switching, including tandem switching, on an unbundled basis, in accordance with section 251(c)(3) of the Act and 47 C.F.R. Part 51 and as set forth in 47 C.F.R. § 51.319(d).

(1) Definition. Local circuit switching is defined as follows:

(i) Local circuit switching encompasses all line-side and trunk-side facilities, plus the features, functions, and capabilities of the switch. The features, functions, and capabilities of the switch shall include the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks.

(ii) Local circuit switching includes all vertical features that the switch is capable of providing, including custom calling, custom local area signaling services features, and Centrex, as well as any technically feasible customized routing functions.

(2) DS0 capacity (i.e., mass market) determinations. Verizon shall provide access to local circuit switching on an unbundled basis to CLEC for the purpose of serving end users using DS0 capacity loops except where the state commission has found, in accordance with the conditions set forth in 47 C.F.R. § 51.319(d)(2), that requesting telecommunications carriers are not impaired in a particular market, or where

the state commission has found that all such impairment would be cured by implementation of transitional unbundled local circuit switching in a given market and has implemented such transitional access as set forth in 47 C.F.R. § 51.319(d)(2)(iii)(C).

(i) Transitional use of unbundled switching. If the triggers described in 47 C.F.R. § 51.319(d)(2)(iii)(A) have not been satisfied with regard to a particular market and the analysis described in 47 C.F.R. § 51.319(d)(2)(iii)(B) has resulted in a finding that requesting telecommunications carriers are impaired without access to local circuit switching on an unbundled basis in that market, the state commission is required to consider whether any impairment would be cured by transitional ("rolling") access to local circuit switching on an unbundled basis for a period of 90 days or more. "Rolling" access means the use of unbundled local circuit switching for a limited period of time for each end-user customer to whom CLEC seeks to provide service. If the state commission determines that transitional access to unbundled local circuit switching would cure any impairment, Verizon will to make unbundled local circuit switching available to CLEC for 90 days or more, as specified by the state commission. The time limit shall apply to each request for access to unbundled local circuit switching by CLEC on a per customer basis.

(ii) DS0 capacity end-user transition. If the state commission finds that no impairment exists in a market or that any impairment could be cured by transitional access to unbundled local circuit switching, and CLEC provides service in that market, CLEC shall commit to an implementation plan with Verizon for the migration of the embedded unbundled switching mass market customer base within 2 months of the state commission determination. CLEC may no longer obtain access to unbundled local circuit switching 5 months after the state commission determination, except, where applicable, on a transitional basis as described in 47 C.F.R. § 51.319(d)(2)(iii)(C).

(iii) Transition timeline. CLEC shall submit the orders necessary to migrate its embedded base of end-user customers off of the unbundled local circuit switching element in accordance with the following timetable, measured from the day of the state commission determination. For purposes of calculating the number of customers who must be migrated, the embedded base of customers shall include all customers served using unbundled switching that are not customers being served with transitional unbundled switching pursuant to 47 C.F.R. § 51.319(d)(3)(iii)(C).

(A) Month 13: CLEC must submit orders for one-third of all its unbundled local circuit switching end-user customers;

(B) Month 20: CLEC must submit orders for half of its remaining unbundled local circuit switching end-user customers, as calculated pursuant to 47 C.F.R. § 51.319(d)(2)(iv)(A)(1); and

(C) Month 27: CLEC must submit orders for its remaining unbundled local circuit switching end-user customers.

(iv) Operational aspects of the migration. CLEC and Verizon shall jointly submit the details of their implementation plans for each market to the state commission within two months of the state commission's determination that requesting telecommunications carriers are not impaired without access to local circuit switching on an unbundled basis. CLEC shall also notify the state commission when it has submitted its orders for migration. Verizon shall notify the state commission when it has completed the migration.

(3) DS1 capacity and above (i.e., enterprise market) determinations. Verizon is not required to provide access to local circuit switching on an unbundled basis to CLEC for the purpose of serving end-user customers using DS1 capacity and above loops except where the state commission petitions the FCC for a waiver of this finding in accordance with the conditions set forth in 47 C.F.R. § 51.319(d)(3)(i) and the FCC grants such waiver.

(4) Transitional four-line carve-out. Until the [illegible] complete the [illegible] described in 47 C.F.R. § 51.319(b)(2)(iii)(B)(4), Verizon shall comply with the four-line "carve-out" for unbundled switching established in Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice

of Proposed Rulemaking, 15 FCC Rcd 3822-31, ¶¶ 276-98 (1999), reversed and remanded in part sub. nom. United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002).

(A) DS1 capacity and above end-user transition. CLEC shall transfer its end-user customers served using DS1 and above capacity loops and unbundled local circuit switching to an alternative arrangement within 90 days from the end of the 90-day state commission consideration period set forth in 47 C.F.R. § 51.319(d)(5)(i), unless a longer period is necessary to comply with a "change of law" provision this Agreement.

(4) Other elements to be unbundled. Elements relating to the local circuit switching element shall be made available on an unbundled basis as set forth in 47 C.F.R. § 51.319(d)(4)(i) and (d)(4)(ii).

(i) Verizon shall provide CLEC with nondiscriminatory access to signaling, call-related databases, and shared transport facilities on an unbundled basis, in accordance with section 251(c)(3) of the Act and 47 C.F.R. Part 51, to the extent that local circuit switching is required to be unbundled by the state commission. These elements are defined as follows:

(A) Signaling networks. Signaling networks include, but are not limited to, signaling links and signaling transfer points.

(B) Call-related databases. Call-related databases are defined as databases, other than operations support systems, that are used in signaling networks for billing and collection, or the transmission, routing, or other provision of a telecommunications service. Where CLEC purchases unbundled local circuit switching from Verizon, Verizon shall allow CLEC to use Verizon's service control point element in the same manner, and via the same signaling links, as Verizon itself.

(1) Call-related databases include, but are not limited to, the calling name database, 911 database, E911 database, line information database, toll free calling database, advanced intelligent network databases, and downstream number portability databases by means of physical access at the signaling transfer point linked to the unbundled databases.

(2) Service management systems are defined as computer databases or systems not part of the public switched network that interconnect to the service control point and send to the service control point information and call processing instructions needed for a network switch to process and complete a telephone call, and provide a telecommunications carrier with the capability of entering and storing data regarding the processing and completing of a telephone call. Where CLEC purchases unbundled local circuit switching from Verizon, Verizon shall allow CLEC to use Verizon's service management systems by providing CLEC with the information necessary to enter correctly, or format for entry, the information relevant for input into Verizon's service management system, including access to design, create, test, and deploy advanced intelligent network-based services at the service management system, through a service creation environment, that Verizon provides to itself.

(3) Verizon shall not be required to unbundle the services created in the advanced intelligent network platform and architecture that qualify for proprietary treatment.

(C) Shared transport. Shared transport is defined as the transmission facilities shared by more than one carrier, including Verizon, between end office switches, between end office switches and tandem switches, and between tandem switches, in Verizon network.

(ii) Verizon shall provide CLEC nondiscriminatory access to operator services and directory assistance on an unbundled basis, in accordance with section 251(c)(3) of the Act and 47 C.F.R. Part 51, to the extent that local circuit switching is required to be unbundled by a state commission, if Verizon does not provide CLEC with customized routing, or a compatible signaling protocol, necessary to use either a competing provider's operator services and directory assistance platform or CLEC's own platform. Operator services are any automatic or live assistance to a customer to arrange for billing or completion, or both, of a telephone call. Directory assistance is a service that allows subscribers to retrieve telephone numbers of other subscribers.

(e) Dedicated transport. Verizon shall provide CLEC with nondiscriminatory access to dedicated transport on an unbundled basis, in accordance with section 251(c)(3) of the Act and 47 C.F.R. Part 51 and as set forth in

47 C.F.R. § 51.319(e)(1) through (e)(5). As used in those paragraphs, a "route" is a transmission path between one of Verizon's wire centers or switches and another of Verizon's wire centers or switches. A route between two points (e.g., wire center or switch "A" and wire center or switch "Z") may pass through one or more intermediate wire centers or switches (e.g., wire center or switch "X"). Transmission paths between identical end points (e.g., wire center or switch "A" and wire center or switch "Z") are the same "route," irrespective of whether they pass through the same intermediate wire centers or switches, if any.

(1) Dedicated DS1 transport. (i) Verizon shall provide CLEC with nondiscriminatory access to dedicated DS1 transport on an unbundled basis except where the state commission has found, through application of the competitive wholesale facilities trigger in 47 C.F.R. § 51.319(e)(1)(ii), that requesting telecommunications carriers are not impaired without access to dedicated DS1 transport along a particular route. Dedicated DS1 transport consists of Verizon interoffice transmission facilities that have a total digital signal speed of 1.544 megabytes per second and are dedicated to a particular customer or carrier.

(2) Dedicated DS3 transport. Subject to the cap in 47 C.F.R. § 51.319(e)(2)(iii), Verizon shall provide CLEC with nondiscriminatory access to dedicated DS3 transport on an unbundled basis except where the state commission has found, through application of either 47 C.F.R. § 51.319(e)(2)(i) or the potential deployment analysis in 47 C.F.R. § 51.319(e)(2)(ii), that requesting telecommunications carriers are not impaired without access to dedicated DS3 transport along a particular route. Dedicated DS3 transport consists of Verizon interoffice transmission facilities that have a total digital signal speed of 44.736 megabytes per second and are dedicated to a particular customer or carrier.

(iii) Cap on unbundled DS3 circuits. CLEC may obtain a maximum of 12 unbundled dedicated DS3 circuits for any single route for which dedicated DS3 transport is available as unbundled transport.

(3) Dark fiber transport. Verizon shall provide CLEC with nondiscriminatory access to dark fiber transport on an unbundled basis except where the state commission has found, through application of either 47 C.F.R. § 51.319(e)(3)(i) or the potential deployment analysis in 47 C.F.R. § 51.319(e)(3)(ii) of this section, that requesting telecommunications carriers are not impaired without access to unbundled dark fiber transport along the particular route. Dark fiber transport consists of unactivated optical interoffice transmission facilities.

(4) Routine network modifications. (i) Verizon shall make all routine network modifications to unbundled dedicated transport facilities used by CLEC where the requested dedicated transport facilities have already been constructed. Verizon shall perform all routine network modifications to unbundled dedicated transport facilities in a nondiscriminatory fashion, without regard to whether the facility being accessed was constructed on behalf, or in accordance with the specifications, of CLEC.

(ii) A routine network modification is an activity that Verizon regularly undertakes for its own customers. Routine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; installing a repeater shelf; and deploying a new multiplexer or reconfiguring an existing multiplexer. They also include activities needed to enable CLEC to light a dark fiber transport facility. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the installation of new aerial or buried cable for CLEC.

(f) 911 and E911 databases. Verizon shall provide CLEC with nondiscriminatory access to 911 and E911 databases on an unbundled basis, in accordance with section 251(c)(3) of the Act and 47 C.F.R. Part 51.

(g) Operations support systems. Verizon shall provide CLEC with nondiscriminatory access to operations support systems on an unbundled basis, in accordance with section 251(c)(3) of the Act and 47 C.F.R. Part 51. Operations support system functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by Verizon's databases and information. Verizon, as part of its duty to provide access to the pre-ordering function, shall provide CLEC with nondiscriminatory access to the same detailed information about the loop that is available to Verizon.