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Timolyn Henry

From: terry.scobie@verizon.com
Sent: Thursday, March 17, 2005 3:32 PM
To: Filings@psc.state.fl.us
Cc: Richard Chapkis; David Christian; demetria.c.watts@verizon.com
Subject: Docket No. 050172-TP - Verizon Florida Inc.'s Opposition to Emergency Petition of American Dial Tone, Inc.

Attachments: 050172 VZ FL Opposition to Emergency Petition.pdf

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)position to Eme

The attached filing is submitted in Docket No. 050172-TP on behalf of Verizon Florida Inc. by

Richard A. Chapkis
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The attached .pdf document contains 31 pages - transmittal letter (1 page), certificate of service (1 page), and Opposition to Emergency Petition (29 pages).

(See attached file: 050172 VZ FL Opposition to Emergency Petition.pdf)

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March 17, 2005 – VIA ELECTRONIC MAIL

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 050172-TP
Emergency petition of Ganoco, Inc. d/b/a American Dial Tone, Inc. for Commission order directing Verizon Florida Inc. to continue to accept new unbundled network element orders pending completion of negotiations required by "change of law" provisions of interconnection agreement in order to address the FCC's recent Triennial Review Remand Order (TRRO)

Dear Ms. Bayó:

Enclosed is Verizon Florida Inc.'s Opposition to Emergency Petition of American Dial Tone, Inc. for filing in the above matter. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please contact me at 813-483-1256.

Sincerely,

/s/ Richard A. Chapkis

Richard A. Chapkis

RAC:tas

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Verizon Florida Inc.'s Opposition to Emergency Petition of American Dial Tone, Inc. in Docket No. 050172-TP were sent via U. S. mail on March 17, 2005 to:

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/s/ Richard A. Chapkis

Richard A. Chapkis

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Emergency Petition of Ganoco, Inc. d/b/a American Dial Tone, Inc. for a Commission Order Directing Verizon Florida Inc. To Continue To Accept New Unbundled Network Element Orders	Docket No. 050172-TP Filed: March 17, 2005

VERIZON FLORIDA INC.'S OPPOSITION TO EMERGENCY PETITION OF AMERICAN DIAL TONE, INC.

Verizon Florida Inc. ("Verizon") opposes the Emergency Petition of Ganoco, Inc. d/b/a American Dial Tone, Inc. ("Petitioner") seeking an order from this Commission compelling Verizon to continue accepting new unbundled network element orders from Petitioner, in direct violation of the Federal Communications Commission's *Triennial Review Remand Order ("TRRO")*.[1]

I. INTRODUCTION

The Federal Communications Commission ("FCC") concluded in the *TRRO* that CLECs are not impaired without unbundled access to local circuit switching or, in some circumstances, high capacity loops and transport, and it set out a transition plan that halts new orders for these UNEs and phases out existing UNE arrangements over twelve months, or eighteen months in the case of dark fiber. This mandatory transition plan "***does not permit*** competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching" on or after March 11, 2005.[2] This immediately effective bar on new orders also applies to high capacity enterprise loops

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

[2] *Id.* ¶ 227 (emphasis added).

and dedicated transport facilities for which no impairment exists under the criteria established in the *TRRO*.[3]

The "no-new-adds" directives in the new rules could not be clearer. For example, 47 CFR §51.319(e) (2)(ii)(C) states that ILECs need not provide DS1 transport as a UNE in the specified circumstances and then states that, "[w]here incumbent LECs are not required to provide unbundled DS1 transport pursuant to [these rules], *requesting carriers may not obtain* new DS1 transport as unbundled network elements."[4]

The FCC's prohibition on new orders for delisted elements should come as no surprise to Petitioner. The *TRRO* follows years of federal litigation over the lawful scope of unbundling, and memorializes the FCC's December 2004 decision to eliminate UNE-P. Indeed, the FCC recognized last summer that the D.C. Circuit's mandate in *United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") eliminated these UNEs, absent the FCC's *Interim Rules*, which extended access only to March 11, 2005.[5]

The Petitioner seeks to forestall the implementation of federal law and the inevitable transition away from the discontinued UNEs by claiming that its interconnection agreement ("ICA") gives it the unilateral right to ignore the FCC's binding directive to cease placing new UNE orders as of March 11, 2005, unless and until Petitioner sees fit to agree to a contract amendment to memorialize the simple fact that it may not obtain new UNEs discontinued by the new federal rules. The Petition is

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[3] *Id.* ¶¶ 142 (transport), 195 (loops).

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

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

based on the extraordinary – and clearly mistaken – proposition that Petitioner's interconnection agreement with Verizon overrides the explicit and unconditional directives by the FCC that carriers take specific action on a specific date. Petitioner's suggestion is flatly wrong as a matter of law.

First, Petitioner's "emergency" petition is, in fact, a request for a preliminary injunction against Verizon. This request for injunctive relief must be denied for two reasons: (1) the Legislature has authorized the courts, not the Commission, to issue an injunction, and thus the Commission lacks the power to grant injunctive relief; and (2) the Petition fails to provide any justification for such extraordinary relief.

Second, Petitioner's interpretation of the *TRRO* makes no sense. Petitioner claims that the FCC ordered parties to negotiate every aspect of the *TRRO* over the 12-month transition period (or 18 months for dark fiber facilities) it prescribed, even though the FCC repeatedly emphasized that this transition period "***applies only to the embedded customer base***, and does not permit competitive LECs to add new switching UNEs" (*TRRO*, ¶ 5, 199) (emphasis added) or delisted loops or transport facilities (TRRO, ¶¶ 5, 142, 195). Petitioner simply ignores the FCC's distinction between the treatment of new orders and the embedded base, and argues that the transition period applies to both. Under this reading, carriers may take up to a year (or 18 months for dark fiber) to implement, through their contracts, the bar on new orders for delisted UNEs that the FCC unequivocally stated was to take effect on March 11, 2005. Obviously, the FCC's explicit direction that the no-new-adds rules take effect on March 11, 2005 would be meaningless if carriers could wait a year (or 18 months) to implement them—which is just what the Indiana Commission recently held:

> [W]e cannot reasonably conclude that the specific provision of the TRRO to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements. To reach [such a] conclusion [] would confound the FCC's clear direction provided in the TRRO, with no obvious return to the transition timetable established in the TRRO.[6]

As discussed in detail below, a number of other state regulatory commissions have similarly rejected any attempt to compel Verizon to provide new UNE arrangements in direct contravention of the new FCC rules on or after March 11, 2005.

Third, Petitioner's conclusion that the FCC's new rules cannot override its ICA is wrong. As the Supreme Court has stated, "[c]ontractual arrangements remain subject to subsequent legislation by the presiding sovereign."[7] The existence of an interconnection agreement cannot deprive the FCC of jurisdiction to issue orders binding on carriers, especially where, as here, the order is part of mandatory transition regulations required to conform the FCC's rules to binding federal court decisions.[8]

Fourth, the Commission lacks authority to stay an FCC order and therefore cannot interpret an ICA in a fashion that delays the explicit March 11 implementation date. Congress gave the FCC sole responsibility to make section 251 unbundling determinations. The FCC has exercised that jurisdiction in part by issuing its

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[6] *Complaint of Indiana Bell Telephone Co., Inc. d/b/a SBC Indiana for Expedited Review of a Dispute with Certain CLECs Regarding Adoption of an Amendment to Commission Approved Interconnection Agreements*, Cause No. 42749, Entry dated March 9, 2005, at 7-8 ("Indiana Order").

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

[8] *See Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467, 482, 55 L.Ed. 297, 303, 31 S.Ct. 265, 270 (1911) (finding it "inconceivable" that the exercise of the commerce power by federal authorities could be hampered or restricted to any extent by contracts previously made between individuals or corporations).

immediately effective no-new-orders directive. That directive can only be stayed by the FCC itself or by the D.C. Circuit, but Petitioner has not asked for a stay in either of those forums.[9] Petitioner may not collaterally challenge the FCC's Order before this Commission.[10]

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

II. REGULATORY BACKGROUND

In response to the remand ordered by the D.C. Circuit in *USTA II,* the FCC's *TRRO* found that competitors are ***not*** impaired and unbundling is ***not*** required for any local circuit switching or dark fiber loops, or for certain high-capacity loops or dedicated transport.[11] This determination by the FCC follows more than eight years of unlawful unbundling obligations imposed by rules repeatedly vacated by the Supreme Court and the D.C. Circuit. In deciding to eliminate these UNEs, the FCC balanced the costs and

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[9] 28 U.S.C. § 2342 ("The court of appeals ... has ***exclusive jurisdiction*** to enjoin, set aside, suspend (in whole or in part), or to determine the validity of -- (1) all final orders of the Federal Communications Commission....") (emphasis added).

[10] Even if Petitioner had a plausible argument that its ICA could somehow trump explicit FCC prohibitions – and Petitioner does not – its ICA, in fact, does not support its position that a contract amendment is necessary to implement the FCC's no-new-adds mandate. Under § 1.5 of the Network Elements Attachment, Verizon may terminate provision of any UNE or combination where, as here, the FCC has determined Verizon is not required to provide that element ("Without limiting Verizon's rights pursuant to Applicable Law or any other section of the Agreement, this Combinations Attachment and the Pricing Appendix to the Combinations Attachment to terminate its provision of a Combination, if Verizon provides a Combination to Ganoco, and the Commission, the FCC, a court or other governmental body of appropriate jurisdiction determines or has determined that Verizon is not required by Applicable Law to provide such Combination, Verizon may terminate its provision of such Combination to Ganoco.")

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

benefits of unbundling, to "provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition." *TRRO*, at ¶ 2. The resulting, affirmative prohibition on new UNE arrangements for these services is unambiguous and unconditional (emphasis added):

- "Incumbent LECs have ***no obligation*** to provide competitive LECs with unbundled access to mass market local circuit switching." *TRRO ¶ 5.*

- The FCC's transition plan "***does not permit*** competitive LECs to add new switching UNEs." *Id.*

- "[T]he disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify ***a nationwide bar*** on such unbundling." *Id.* at ¶ 204.

- "[W]e find that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and we therefore determine ***not to unbundle*** that network element..." *Id.* at ¶ 210.

- "We conclude that requesting carriers are ***not impaired*** without access to unbundled DS3 transport on routes connecting wire centers where both if the wire centers are either Tier 1 or Tier 2 wire centers." *Id.* at ¶129.

- "These transition plans ... ***do not permit*** competitive LECs to add new dedicated transport UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists." *Id.* at ¶ 142.

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

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

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

And, as noted above, the rules themselves explicitly state that where an ILEC is not

required to provide unbundled access to a given network element under the new rules, "requesting carriers may not obtain" that element as a UNE.[12]

The *TRRO* also imposes specific transition periods for moving the embedded base of delisted elements to alternative arrangements. Specifically, the FCC granted CLECs twelve months to "submit orders to convert their UNE-P customers to alternative arrangements." *TRRO* ¶ 199. The FCC reasoned that "the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversion." *Id.* ¶ 227. The FCC likewise imposed a twelve-month period to transition discontinued UNE loops and transport.[13] For purpose of negotiating those follow-on arrangements, the FCC gave the parties up to twelve months "to modify their interconnection agreements, including completing any change of law processes."[14]

The FCC made clear, however, that the transition periods apply ***only*** to the "embedded customer base," but as of March 11, 2005, ***"do not permit*** competitive LECs to add new ... UNEs pursuant to section 251(c)(3) where the [FCC] determines that no section 251(c) unbundling requirement exists."[15]

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[12] *See* Note 3, above.

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

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

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

III. ARGUMENT

A. The Commission Must Reject Petitioner's Request for a Preliminary Injunction.

The "emergency" relief Petitioner seeks is really a preliminary injunction forcing Verizon to continue to satisfy new orders for delisted UNEs. The Commission cannot grant Petitioner the injunctive relief it seeks for two independent reasons. First, only the courts – not the Commission – can grant injunctive relief. Second, Petitioner cannot meet the criteria that would entitle it to such extraordinary relief

1. The Commission Cannot Grant Preliminary Injunctive Relief.

The Commission is not empowered to grant preliminary injunctive relief. The Commission is created by statute and has only those powers granted by the Legislature. *Florida Tel. Corp. v. Carter*, 70 So. 2d 508 (Fla. 1954). The Commission derives no power from the Constitution, and it has no inherent or common law powers. *State v. Mayo*, 354 So. 2d 359 (Fla. 1977); *City of Cape Coral v. GAC Utility*, 281 So. 2d 493 (Fla. 1973). The Legislature has authorized the courts,[16] not the Commission, to issue injunctions, and thus the Commission lacks the power to grant injunctive relief. *See* Trawick *v. Fla. Power & Light Co.*, 1997 Fla. PUC LEXIS 1444, *2–*3 (1997) (acknowledging that the Commission is not authorized to issue an injunction). Consequently, the Commission cannot grant Petitioner the relief it seeks here.

[16] Article V. Section 20(3), Florida Constitution, and Section 26.012, Florida Statutes, authorize the courts to issue an injunction.

2. Petitioner Is Not Entitled to Preliminary Injunctive Relief.

Even if the Commission were empowered to grant such relief, which it is not, Petitioner has not met the burden of showing that it is entitled to the extraordinary remedy of preliminary injunctive relief. To obtain such relief before a court, Petitioner would have to establish that: (1) irreparable injury will result if the injunction is not granted; (2) the party has a clear legal right to the requested relief; (3) the public interest will be served by the temporary injunction; and (4) there is no adequate remedy at law. *See Liberty Fin. Mortg. Corp. v. Clampitt,* 667 So. 2d 880, 881 (Fla. 2d DCA 1996); *see also Weinstein v. Aisenberg,* 758 So. 2d 705, 706 (Fla. 4th DCA), *review dismissed* 767 So. 2d 453 (Fla. 2000). As discussed below, Petitioner cannot meet any – let alone all – of the foregoing criteria.

a. There Is No Irreparable Injury.

Petitioner has not even tried to demonstrate that it will suffer "irreparable injury" in the absence of injunctive relief, because any claimed injury is entirely of its own making.

Three weeks ago, Verizon offered CLECs an interim commercial agreement ("Interim Agreement") that would enable them to continue to order UNE-like services while they are either negotiating a permanent commercial agreement covering these orders or otherwise completing the FCC's transition away from the delisted UNEs. This Interim Agreement, effective March 11, 2005, permits CLECs to continue to place new

orders for platform service using existing ordering interfaces, subject to an additional per-line surcharge, while the parties negotiate long-term commercial alternatives.[17]

The framework for those long-term commercial agreements, called Wholesale Advantage, has been available since last April and remains available to Petitioner today. Wholesale Advantage offers customized, three-year agreements, restructured pricing and a number of high-value services, such as voice mail, inside wire maintenance and high-speed digital subscriber line (DSL) service, that have not been available under government-mandated interconnection contracts. Not only have carriers nationwide signed Wholesale Advantage agreements, carriers have also signed interim agreements. A number of additional agreements are pending execution. Altogether, these commercial agreements cover approximately 2.5 million lines in Verizon's national footprint, leaving no doubt about the viability of commercial agreements for UNE-P replacement services.

Given the options available to Petitioner to prevent any lapse in its ability to place new orders, it cannot claim any injury, let alone irreparable injury, caused by Verizon's implementation of the FCC's no-new-adds mandate on March 11. Petitioner has tried to manufacture an emergency by declining to avail itself of immediately available remedies that many other carriers have already adopted. Even if the Commission could grant an injunction (and it cannot), it would be improper here where Petitioner has in its own hands the power to avoid any such injury.

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[17] These documents can also be found on Verizon's wholesale website at http://www22.verizon.com/wholesale/library/local/industryletters/1,,east-wholesale-resources-2005_industry_letters-clecs-02_25,00.html.

Moreover, in the case of dedicated transport and high-capacity loops, even in the absence of Verizon's offers, Petitioner would have no basis on which to claim irreparable harm from on-time implementation of the *TRRO*'s ban on new orders in non-impaired areas as of its effective date – March 11, 2005. First, the FCC's *TRRO* rules reflect the FCC's attempt to apply the 1996 Act's[18] "impairment standard" in a more targeted way and to eliminate unbundling only where CLECs do not face impairment without such access. In applying this standard to dedicated transport and high-capacity loops, the FCC found that, where its non-impairment criteria were satisfied — and thus where CLECs are not entitled to obtain these UNEs — that CLECs have adequate replacement options, including "self-provided facilities, alternative facilities offered by other carriers, commercial agreements, or *special access services offered by the ILEC.*"[19] Petitioner has failed to reconcile its dubious claim of "irreparable harm" with the clear determination of the FCC – the expert agency charged with making such findings - that CLECs are not even impaired in those situations.

In any case, because options have been available to the Petitioner since well before the *TRRO* was issued, and will continue to be available to the Petitioner after March 11, 2005, Petitioner has no reason to claim it will be irreparably harmed in the absence of an injunction from this Commission.

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[18] Telecommunications Act of 1996, 47 U.S.C §§ 101, *et seq.* (1996) (the "1996 Act").

[19] *See TRRO* ¶¶ 142 (emphasis added). *See also id.* at ¶¶ 166, & 180.

b. Petitioner Has No Legal Right to the Requested Relief.

Petitioner has not shown, nor can it show, that it has any legal right to the relief requested. To the contrary, as discussed in detail herein, the *TRRO* and the FCC's implementing regulations bar Petitioner from ordering new discontinued UNEs as of March 11, 2005, irrespective of the terms of existing section 252 interconnection agreements.

c. Granting Injunctive Relief Would Be Contrary to the Public Interest.

The imposition of an injunction in this case would conflict with the public interest (as well as federal law). The *TRRO* represents the FCC's *national* policy determinations regarding the extent to which UNEs should be made available to CLECs. The FCC's determinations on this issue were made following consideration of both the public interest in actual facilities-based competition and "substantial costs inherent in unbundling" (*TRRO* ¶ 45). For example, the FCC not only determined that CLECs may not obtain new orders for UNE-P as of March 11, 2005, but this decision was, in part, based on the FCC's finding that such unbundling "would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition." *TRRO* ¶ 218. More generally, the *TRRO* reflects the FCC's view that unbundling should not be available in areas where CLECs are not impaired without such access. The FCC not only provides a specific implementation date (after which CLECs may not order new discontinued UNEs), but also a transition plan to facilitate the transition of the CLEC's embedded base of discontinued UNEs to alternative

arrangements. The public interest will not be served by the entry of an injunction in this case, which would delay the implementation of the FCC's clear directives with respect to these issues and thwart the federal policies which the *TRRO* is designed to implement.

d. Petitioner Has An Adequate Remedy At Law.

Petitioner cannot demonstrate that it lacks an adequate remedy at law. This showing would be impossible to make, because, as stated above, Verizon has offered all CLECs commercial agreements for services to replace the UNEs discontinued by the FCC – and many CLECs have entered into such agreements. Petitioner therefore has the ability to continue placing orders for new switching, loop and transport services. Thus, the only "harm" that Petitioner may claim as a result of compliance with the new federal rules is that it may have to pay more for services they now receive at TELRIC rates. As a result, Petitioner has an adequate remedy at law in the form of monetary damages.

* * * *

In sum, the Commission must reject Petitioner's request for a preliminary injunction because the courts, not the Commission, are the appropriate bodies to hear such a request, and, in any event, Petitioner cannot show that it is entitled to such relief.

B. Petitioner's Interconnection Agreement Cannot Supersede the FCC's Mandatory Transition Plan.

Petitioner cannot use its purported "change of law" provision to delay indefinitely the start of the FCC's "no-new-adds" period for UNEs eliminated in the *TRRO*. The

FCC has the authority to issue immediately effective directives that supersede any "change-of-law" process under interconnection agreements, and it clearly did not intend that the start of the no-new-adds period should be subject to a lengthy change-of-law process. Instead, the FCC directed that new orders for the discontinued UNEs must cease as of a date certain – March 11, 2005 – with no exceptions.

The FCC has the authority to issue immediately binding transition rules to remedy the situation created by its repeated promulgation of unlawful unbundling rules. For more than eight years the FCC has required incumbent LECs to provide access to unbundled network elements despite the repeated *vacatur* of its UNE rules by the Supreme Court and the D.C. Circuit because of its repeated failure to issue lawful impairment findings under section 251(d)(2).[20] Under such circumstances, the FCC has broad authority to correct the consequences of its vacated UNE rules.[21]

The FCC was explicit that its transition plan is necessary to the proper effectuation of the Act's goals and avoidance of market disruption.[22] Central to that transition plan is the FCC's requirement that the CLECs eliminate their current embedded base of UNE arrangements by converting them to other arrangements within twelve months, or in the case of dark fiber, eighteen months. The FCC has special discretion in adopting transition rules intended to smooth implementation of its new

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

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

[22] *TRRO* ¶¶ 235-236.

permanent rules.[23] The immediate no-new-adds directive is part of that transition. As the Indiana Commission found, it would have made no sense for the FCC to permit CLECs to continue to add new UNEs to the embedded base at the same time as carriers are supposed to be reducing the embedded base to zero.[24]

Thus, not only is the no-new-add directive ***not*** conditioned on renegotiation of interconnection agreements, but CLECs also are not free to ignore or avoid it. The FCC could not have been clearer when it held that its transition plan "does not permit" CLECs to order additional UNEs at the same time they are supposed to be converting UNEs away.[25]

Indeed, March 11, 2005 was carefully selected as the beginning of the transition period to avoid having a period where no rules are in place, and the FCC clearly did not intend the start of the transition period to be delayed by any negotiations. The FCC adopted the *TRRO* in response to the D.C. Circuit's *vacatur* of UNE rules adopted in the *Triennial Review Order.* Between the *vacatur* and the promulgation of these new UNE rules, however, the FCC issued its *Interim Rules Order,* in which it recognized that ILECs would be "permitted under the court's holding in *USTA II*" to immediately cease providing the UNEs at issue here, including the substantial embedded base.[26] To preclude the disruption that such a sudden elimination of UNEs would cause while the FCC was undertaking its remand proceeding, the FCC's *Interim Rules Order* included an immediately effective rule preventing the "withdrawal of access to UNEs"

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

[24] *Id.*

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

[26] *Interim Rules Order* ¶ 17.

notwithstanding the terms of any interconnection agreements.[27] But the *Interim Rules Order's* temporary directive to continue providing UNEs despite the absence of a lawful impairment finding expires on March 11, 2005.[28] As a result, the FCC wrote the *TRRO's* new UNE rules and transition arrangements in a manner to avoid a hiatus in which no unbundling rules at all would be in place. *TRRO* ¶¶ 235-236 & 250.

To prevent such a hiatus, however, the *TRRO's* new transition rules must go into effect immediately upon expiration of the *Interim Rules Order* on March 11, 2005. Just as the obligations imposed on ILECs in the *Interim Rules Order* were immediately effective without a contract amendment, the *TRRO's* new transition rules, including the prohibition on adding new UNE-P arrangements, must also be immediately binding to avoid a situation in which no effective FCC rules apply.[29]

Petitioner's contention that the change-of-law provision of its ICA is implicated by the FCC's ban on new UNEs is thus beside the point. The ICA cannot exempt Petitioner from complying with an explicit directive of federal law. Petitioner claims that the only lawful way that Verizon may modify its rights with respect to the provision of UNEs and UNE combinations is by amending its interconnection agreements, and that Verizon would breach its ICA by refusing to provision UNEs eliminated by the federal rules unless it first complies with the change of law procedures established by the

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[27] *Id.* ¶ 26.

[28] *Id.* ¶ 21.

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

Agreements. But the FCC understood that existing interconnection agreements often contain "change of law" provisions. It specifically contemplated, for example, that the embedded base transition would involve the change of law process – and it allowed twelve or eighteen months as a consequence. Had the FCC intended that the *entire* transition occur through such a lengthy process, however, it could have just made its new impairment findings and left it at that – much like it did in the *TRO*. Instead, the FCC explicitly directed that CLECs "***may not obtain***" new switching, loop or transport UNEs eliminated by the new rules as of a ***date certain***, March 11, 2005 – with no exceptions.[30]

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

No provision of the *TRRO* purports to make the section 252 contract amendment process a *precondition* to compliance with its mandates. For that incorrect proposition, Petitioner relies on *TRRO* ¶ 233, which states in part that:

> We expect that incumbent LEC and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their

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

> interconnection agreements consistent with our conclusions in this Order. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes.

That general direction to the parties to revise their contracts where necessary as a result of the new rules neither limits implementation of the *TRRO* to the section 252 amendment process nor negates the *TRRO's* specific directives, including the no-new-adds prohibition. *See, e.g.*, ¶ 227.

First, and contrary to Petitioner's contention, not *everything* in the *TRRO* is subject to negotiation. Although the FCC contemplated in *TRRO* ¶ 233 that carriers would negotiate arrangements to implement the FCC's *permanent* unbundling rules (*e.g.*, to change the list of UNEs available under interconnection agreements and to work out operational details of the transition of the embedded base), no negotiation is required to implement the immediate no-new-add directive included in the transition rules.[31] The FCC held that its transition regime "does not permit" any additional unbundling of those elements subject to that regime "pursuant to section 251(c)(3)." *TRRO* ¶¶ 142, 195, 227. Unbundling "pursuant to section 251(c)(3)" *means* unbundling pursuant to existing 1996 Act interconnection agreements. *See* 47 U.S.C. § 251(c)(3) (describing incumbent LECs' obligation "to provide ... access to network elements on an unbundled basis ... in accordance with the terms and conditions of the [interconnection] agreement"); *id.* § 251(c)(1) (describing carriers' obligation to negotiate "terms and conditions of agreements to fulfill the duties described" in section 251(b) and (c)). The

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

FCC permitted carriers to negotiate alternative arrangements to supersede the surcharges and mandatory migration of the embedded base provided for under the transition rules, and it preserved "commercial arrangements carriers have reached" for continued provision of wholesale facilities. *TRRO* ¶¶ 145, 198 & 228. But the FCC established no exceptions to the rule that mandatory unbundling of new UNE-P arrangements and high capacity facilities not subject to unbundling under section 251(c)(3) must cease as of March 11, 2005.

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

> Clearly, the intent of the one-year transition period, and its associated pricing, is to allow for a planned, orderly, and non-disruptive migration of existing UNE-P customers off of UNE-P to an alternative arrangement at an established price for the transition period.[32]

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[32] *Indiana Order*, at 8.

It would be impossible to carry out a "planned, orderly, and non-disruptive migration" of the embedded base to UNE replacement arrangements if CLECs were permitted to keep adding customers at the same time they were supposed to be transitioning them off of delisted UNEs. The Indiana Commission's observation that the "CLECs do not address the ramifications of the relief sought in their Motion via-a-vis the stated transition directives of the TRRO"[33] applies here, as well. Petitioner cannot, and does not even try, to explain how its interpretation can be squared with the FCC's plain distinction between new customers and embedded base, or with the stated purpose of the transition process.[34]

C. The Commission May Not Stay an FCC Order.

Any Commission decision allowing Petitioner to disregard the FCC's clear directives would effectively stay the *TRRO*, something the Commission has no authority to do.

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

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[33] *Indiana Order*, at 6. ("If CLECs can continue adding new UNE-P customers after March 10, 2005, pending modification of their interconnection agreements pursuant to change of law provisions, how is the composition of the embedded base to be determined?")

[34] Petitioner also relies on paragraph 228 in support of the erroneous argument that the *TRRO* purports to make the section 252 contract amendment process a *precondition* to compliance with its mandates. Petitioner's reliance on this paragraph is misplaced. Paragraph 228 leaves carriers free to negotiate alternative arrangements superseding the transition period, but makes clear that the transition mechanism is the default process if one or both of the parties chooses not to negotiate alternative arrangements.

that must be satisfied before mandatory unbundling may be required and places that determination squarely with the FCC.

State commissions are preempted from imposing additional unbundling requirements on incumbent LECs or otherwise disrupting the federal framework established in the FCC's unbundling rules. Citing "long-standing federal preemption principles," the FCC has rejected arguments by some carriers that "states may impose any unbundling framework they deem proper under state law, without regard to the federal regime." *TRO* at ¶ 192. The FCC found that the state authority preserved by the Act under the savings provision in section 251(d)(3) is narrow and "is limited to state unbundling actions that are consistent with the requirements of section 251 and do not 'substantially prevent' the implementation of the federal regulatory regime." *Id.* at ¶193; *see also* 47 U.S.C. § 251(d)(3)(C) & § 261(c). Section 251(d)(3) also recognizes the FCC's power to prescribe and enforce "regulations to implement the requirements" of section 251 and establish the standards to which the states must adhere. *See also* 47 U.S.C. § 252(c)(1).

When the FCC determines under section 251(d)(2) of the Act that an element should *not* be unbundled, section 251(d)(3) and familiar principles of conflict preemption preclude states from enforcing inconsistent rules that would override that determination. The FCC cautioned that any state attempt to require unbundling where the FCC has already made a national finding of no impairment or declined to require unbundling would be unlikely to survive scrutiny under a preemption analysis.[35] The FCC held that:

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

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

Id. at ¶ 195. This is true even if the state regulations share a "common goal" with federal law, but differ in the means chosen to further that goal.[36] *Id.* at ¶ 193.

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

In assessing whether such a conflict exists, the Supreme Court has emphasized that "[f]ederal regulations have no less preemptive effect than federal statutes." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153 (1982). Moreover,

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[36] The United States Supreme Court has held that "even in the case of a shared goal, the state law is preempted 'if it interferes with the methods by which the federal statute was designed to reach its goal.'" *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992). *See also Crosby v. National Foreign Trade Council*, 530 U.S. 363, 379 (2000), in which the United States Supreme Court held that "[t]he fact of a common end hardly neutralizes the conflicting means." Similarly, the Seventh Circuit ruled that a tariff requirement imposed by the Wisconsin Public Service Commission was preempted by the Act, even though the tariff requirement "promotes the pro-competitive policy of the federal act." *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 445 (7th Cir. August 12, 2003). The Court found that "[a] conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's Supremacy Clause to resolve the conflict in favor of federal law." *Id.*; *see also Verizon North, Inc. v. Strand*, 309 F.3d 935, 940-41 (6th Cir. *2002*).

the Court has held that a federal regulation that "consciously has chosen not to mandate" particular action preempts state law that would deprive an industry "of the 'flexibility' given it by [federal law]." *Id.* at 155. Indeed, unless Congress expressly states otherwise, a statutory "saving clause" that preserves some state authority does not diminish the preemptive force of federal regulations, and states may not depart from those "deliberately imposed" federal standards. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-74, 881 (2000). Section 251(d)(3) of the Act embodies that *same* principle in that it permits preemption of any state law or regulatory requirement that undermines the FCC's implementing rules under Section 251.

An FCC decision not to require unbundling – as in the case of the UNEs eliminated in the *TRRO* – constitutes "a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," and thus preempts inconsistent state regulation. *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); *United States v. Locke*, 529 U.S. 89, 110 (2000). Under the Supremacy Clause and section 251(d)(3), the states are powerless to strike a different balance. A state requirement to reverse that FCC decision would substantially prevent implementation of the Act and federal policy, and would thus conflict with federal law, thereby warranting preemption.

In defending that position before the D.C. Circuit, the FCC was even more explicit, explaining that "a decision by the FCC not to require an ILEC to unbundle a particular element essentially reflects a 'balance' struck by the agency between the costs and benefits of unbundling that element" and that "[a]*ny state rule that struck a different balance would conflict with federal law, thereby warranting preemption.*" Brief

for the FCC at 93, *United States Telecom. Ass'n v. FCC* , No. 00-1012 (D.C. Cir. filed Jan. 16, 2004) (emphasis added; citation omitted). And the Seventh Circuit, in discussing a state commission's authority to require unbundling of packet switching — another network element that the FCC has found that incumbents are not required to unbundle — "observe[d] that only in very limited circumstances, *which we cannot now imagine*, will a state be able to craft a packet switching unbundling requirement that will comply with the Act." *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004) (emphasis added).

In deciding to eliminate certain UNEs, the FCC balanced the costs and benefits of unbundling to "provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition."[37] The resulting federal rules leave no doubt that ILECs need not provide, and CLECs cannot obtain, those UNEs as of March 11, 2005.[38] Any state decision that would strike a different balance – allowing the continued availability of the UNEs eliminated by the FCC – would conflict with federal law, substantially prevent implementation of the federal regulatory regime and would therefore be preempted.

Earlier this year, a federal district court confirmed that state commissions do not share unbundling authority with the FCC, holding that the decision in *USTA II* had definitively "rejected the argument that the 1996 Act does not give the FCC the exclusive authority to make unbundling determinations." *Michigan Bell Tel. Co., Inc. v. Lark, et al.*, No. 04-60128 (E.D. Mich. Jan. 6, 2005) ("*Michigan Bell*"), slip op. at 13. The

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[37] **TRRO, ¶ 2; see also** TRRO, ¶¶199 & 204.

[38] *See* note 2, above.

Court observed that "state-imposed requirements are at odds with *USTA II*," and that it is "incongruous for the *USTA II* Court to find that Congress prohibited the FCC from passing unbundling decisions to the state[s]," but find that "the states could seize the authority themselves." *Id.* at 13-14.

This Commission and the Indiana commission have found that the impairment determinations necessary to require unbundling are "reserved for the FCC, not the states."[39] The Virginia commission has also rejected petitions to retain unbundling obligations that the *USTA II* Court had vacated because:

> USTA II establishes that no unbundling can be ordered in the absence of a valid finding by the FCC of impairment under 47 U.S.C. § 251(d)(2). ... This commission will not mandate unbundling requirements that violate federal law. [40]

Other state commissions have correctly ruled that they cannot impose unbundling obligations that have been removed by federal law. For example, the Massachusetts D.T.E. has held that "[t]he language of the Section 251(d)(3) savings clause does not ... suggest a congressional intent to save state commission actions that conflict with Section 251 or with the FCC's regulations."[41] The Department also

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

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

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

explicitly rejected a CLEC's "suggestion that Section 252(e)(3) preserves the ability of the States to require unbundling where the FCC finds that it is not required," because this reading of the Act "would discount improperly the preemptive effect of federal regulation under Section 251." *Id.* at 22.

In short, the FCC has made an affirmative finding that CLECs are not impaired without access to the UNEs eliminated in the new FCC rules, and allowing CLECs to continue to order new, delisted UNEs—for any length of time beyond March 11, 2005—would be contrary to the Act's pro-competitive goals. The Commission cannot, therefore, compel Verizon to continue providing the UNEs eliminated by the FCC. In particular, the TRRO's mandatory transition plan, including its "no-new-adds" directive for UNE-P as of March 11, 2005, applies regardless of any existing contract terms.

In any case, to the extent that Petitioner wishes to challenge the *TRRO*, it must do so before the FCC or the D.C. Circuit. Only the FCC itself or a federal court of appeals has jurisdiction to stay the action of the FCC. *See* 28 U.S.C. § 2349 ("Hobbs Act"); 47 U.S.C. § 405. More specifically, the FCC issued its prohibition of the discontinued UNEs on remand and in response to the D.C. Circuit's mandate in *USTA II.* Under the Hobbs Act, only a federal court of appeals "has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of...[the FCC's] final orders." 28 U.S.C. § 2342. The Commission thus lacks the authority to interfere in any way with implementation of those rules.

Consistent with the *TRRO's* explicit ban on new UNE-Ps, a number of state regulatory commissions have rejected CLECs' attempts to seek sanction to continue to order UNE-Ps. For example, on March 16, 2005, the New York Public Service

Commission ("NYPSC") approved Verizon's tariff implementing the *TRRO*, including the UNE-P ban, finding that "[t]he changes Verizon has made to its tariff implement the FCC's designated transition periods and price structures for dedicated transport, high capacity loops, and local circuit switching."[42] Finding Verizon's tariff revisions "reasonable", the NYPSC rejected the notion that the change of law provisions of interconnection agreements could override "the express directive in *TRRO* ¶ 227 that no new UNE-P customers be added."[43]

Other commissions are also in accord. On March 9, 2005, the Indiana Utility Regulatory Commission refused to order SBC to accept orders for new UNE-P customers after March 10, 2005.[44] On March 11, 2005, the New Jersey commission unanimously denied the petition of various CLECS to require Verizon to continue accepting UNE-P orders.[45] That same day, the Maine commission unanimously concluded that CLECs are not entitled to order new UNEs discontinued under Section 251, and found that the FCC clearly intended no contract amendment would be required to give the March 11, 2005 deadline legal effect.[46]

Also on March 11, 2005, the Massachusetts commission unanimously approved Verizon's new tariff implementing the *TRRO's* UNE-P ban. Similarly, on March 8, 2005,

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[42] Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC'S Triennial Review Order on Remand, Case No. 05-C-0203, Order Implementing TRRO Changes (N.Y. PSC March 16, 2005) at 13.

[43] *Id.* at 13, 26.

[44] *Complaint of Indiana Bell Telephone Company, Incorporated d/b/a SBC Indiana for Expedited Review of a Dispute with Certain CLECs Regarding Adoption of an Amendment to Commission-Approved Interconnection Agreements*, Cause No. 42749, Order (Ind. URC Mar. 9, 2005) at 7.

[45] Open Hearing, *In the Matter of the Implementation of the FCC's Triennial Review Order,* Docket No. TO03090705 (N.J. BPU March 11, 2005).

[46] Open Hearing, *Request for Commission Investigation for Resold Services (PUC#21) and Unbundled Network Elements (PUC#20)*, Docket No. 2002-682, Consideration of Motions for Emergency Relief (Maine PUC March 11, 2005).

the Rhode Island Public Utilities Commission unanimously adopted on an interim basis Verizon's tariff revision implementing the *TRRO*'s "no new UNE-P" directive, rejecting CLEC requests to ignore that FCC mandate.[47]

In California[48], Ohio[49], Texas,[50] and Kansas[51], the state commissions also declined to require SBC to accept UNE-P orders for new customers. As the Kansas commission noted, "the FCC is clear in that as of March 11, 2005, the mass market local circuit switching...[is] no longer available to CLECs on an unbundled basis for new customers" and therefore, "the sooner the FCC's new rules can be implemented, the sooner rules held to be illegal can be abrogated."[52] And the state commissions in

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[47] Open Meeting, *Verizon RI Tariff filing to implement the FCC's new unbundled (UNE) rules regarding as set forth in the TRO Remand Order issued February 4, 2005*, Docket 3662 (Mar. 8, 2005) (http://www.ripuc.org/eventsactions/docket/3662page.html).

[48] *Petition of Verizon California Inc. (U 1002 C) for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in California Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order*, App. No. 04-03-014, Assigned Commissioner's Ruling Granting In Part Motion for Emergency Order Granting Status Quo for UNE-P Orders (Ca. PUC March 11, 2005).

[49] *See In the Matter of the Emergency Petition of LDMI Telecommunications, Inc., MCImetro Access Transmission Services, LLC, and CoreComm Newco, Inc. for a Declaratory Ruling Prohibiting SBC Ohio from Breaching its Existing Interconnection Agreements and Preserving the Status Quo with Respect to Unbundled Network Element Orders,* Case No. 05-298-TP-UNC, *et al.* Entry (Ohio PUC Mar. 9, 2005) at 3.

[50] *See Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement,* Docket No. 28821, Proposed Order on Clarification, Approved as Written (Tex. PUC Mar. 9, 2005) at 1.

[51] *See In re General Investigation to Establish a Successor Standard Agreement to the Kansas 271 Interconnection Agreement,* Docket No. 04-SWBT-763-GIT, Order Granting in Part and Denying in Part Formal Complaint and Motion for an Expedited Order (Kan. SSC March 10, 2005).

[52] *Id.* at 4-5.

Maryland[53] and Massachusetts[54] have rejected CLEC attempts to transform implementation of the *TRRO* into an emergency requiring intervention from state commissions.

IV. CONCLUSION

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

Respectfully submitted on March 17, 2005.

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[53] *See In re Emergency Petition from MCI for a Commission Order Directing Verizon to Continue to Accept New Unbundled Network Element Platform Orders*, ML# 96341, Letter (Md. PSC Mar. 10, 2005) (emphasizing that CLECs should file "individualized petitions based upon their particular interconnection agreements and specific provisions of the *Triennial Review Remand Order*" and reminding parties that "the rights of all parties shall be determined by the parties' interconnection agreements and the FCC's applicable rules").

[54] *See Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers Pursuant to Section 252 of the Communications Act, as amended, and the Triennial Review Order*, D.T.E. 04-33, Briefing Questions to Additional Parties (Mass. DTE Mar. 10, 2005) (declining to take emergency action to block implementation of *TRRO*'s ban on new UNE-P orders on March 11, 2005).