STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

Verizon RI — Tariff Filing To Amend RI PUC Tariff No. 18	: : : :	Docket No. 3556

BRIEF OF COVAD COMMUNICATIONS COMPANY FOR SUSPENSION, INVESTIGATION AND MODIFICATION OF CERTAIN PROVISIONS OF THE OCTOBER 2, 2003 PROPOSED REVISIONS TO VERIZON RHODE ISLAND TARIFF PUC RI NO. 18

Covad Communications Company ("Covad") respectfully submits this brief to the Rhode Island and Providence Plantations Public Utilities Commission ("Commission") in opposition to New England Telephone and Telegraph Company's ("Verizon Rhode Island" or "Verizon") revisions to its Tariff PUC RI No. 18 ("Tariff 18") ("October 2 Tariff Filing"). Verizon has submitted these revisions, purporting to comply with the Federal Communications Commission's ("FCC") *Triennial Review Order*[1]; however, as demonstrated below, the proposed revisions actually misinterpret the *Triennial Review Order*, fail to adequately tariff Verizon's line sharing obligations, and generally serve to disadvantage CLECs unjustly in Rhode Island with consequential injury to Rhode Island consumers.

Covad is a competitive carrier, certificated by this Commission to provide services to Rhode Island customers. Covad serves numerous DSL customers in Rhode Island via line sharing. Covad's competitive interests and the interests of its customers

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[1] *In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Service Offering Advanced Telecommunications Capacity*, CC Docket No. 98-147 (FCC 03-06), rel. August 21, 2003.

will be immeasurably harmed if Verizon's tariff revisions, as proposed, are permitted to become effective or otherwise approved. On October 28, 2003, Covad filed its complaint with this Commission regarding the October 2 Tariff Filing. Pursuant to the Commission's scheduling memorandum in this proceeding, Covad respectfully submits the following comments.

I. The Commission Should Either Reject or Suspend and Investigate Verizon's October 2 Tariff Filing as an Incorrect Implementation of the *Triennial Review Order* and a Violation of Both Federal and State Telecommunications Laws.

Regardless of its alleged intent, Verizon's October 2 Tariff Filing does not correctly implement the *Triennial Review Order.* First, Verizon incorrectly interprets the FCC's grandfathering rule regarding existing line sharing arrangements and, moreover, unilaterally imposes additional limitations on CLECs. Second, the revisions would create an untenable situation regarding new line sharing arrangements. Verizon's standard Interconnection Agreement — that it makes available to all CLECs in Rhode Island — only provides line sharing to CLECs in accordance with, and subject to, the rates, terms and conditions set forth in Verizon's Tariff 18. Yet the effect of the proposed revisions would be to eliminate those same rates, terms and conditions for new line sharing arrangements from Tariff 18. Instead, Verizon proposes to provision new line sharing arrangements on a transitional basis pursuant to terms offered in a separate agreement subject to its own interpretation of FCC-prescribed pricing rules. Verizon's proposal effectively will eliminate the availability of line sharing services *except insofar and only to the extent that Verizon chooses to make them available.* This is inconsistent with the *Triennial Review Order* and, as discussed below, flagrantly violative of the Telecommunications Act of 1996 (the "Act"). Notwithstanding any section 251

determinations contained within the *Triennial Review Order*, Verizon remains subject to its section 271 obligations. Verizon cannot simply stop offering line sharing pursuant to its tariff. Moreover, this Commission retains authority under both the Act and state law to require Verizon to tariff line sharing on an unbundled basis. The Commission's independent state law authority is preserved by the Act and cannot be preempted by the FCC's recent *Triennial Review Order*. Finally, there are compelling state-specific reasons for this Commission to continue such requirements.

It is essential that the Commission require Verizon to tariff, in detail, all of its line sharing obligations in Rhode Island. These must include (1) its obligations under the *Triennial Review Order's* Section 251 transitional plan; ***and*** (2) unbundled access to line sharing under Section 271 of the Telecommunications Act of 1996 ("Act"). This Commission should also require Verizon to tariff unbundled access to line sharing pursuant to Rhode Island state law.

Finally, this Commission must clarify that Verizon may not take steps to impose its interpretation of the *Triennial Review Order* until the Commission has reviewed, modified and made effective Verizon's tariff modifications to Tariff 18. The FCC stated clearly (in its pleadings before the Court of Appeals for the District of Columbia) that line sharing remains available to CLECs under existing terms and conditions, which are not affected in the short term by its new rules, until such new rules are incorporated into the interconnection agreement terms and conditions (i.e., the effective date of modifications to Tariff 18).[2] Although the FCC's language refers to the contractual change of law provisions that provide a mechanism for incorporation of the new line

sharing rules, this interpretation applies equally to new line sharing rules incorporated into interconnection agreements via tariff changes. Under no circumstances should Verizon be allowed to effectuate its position regarding the *Triennial Review Order* until the Commission has reviewed and ruled upon Verizon's proposed revisions to this tariff. Covad remains concerned that Verizon will attempt unilaterally to impose its skewed interpretation of the *Triennial Review Order* upon competitive carriers prior to full consideration by this Commission. In a similar tariff filing, the Pennsylvania Public Utility Commission did not agree with Verizon's contention that its filing was administrative in nature and ruled that Verizon's UNE tariff consists of service offerings that cannot be added, modified or withdrawn without further action by the Pennsylvania Commission.[3]

II. Verizon's October 2 Tariff Filing Attempts to Implement an Incorrect Interpretation of the *Triennial Review Order* and Violates Both Federal and State Telecommunications Laws.

Verizon's October 2 Tariff Filing proposes to effectuate a number of key changes to its Tariff 18, allegedly to reflect the FCC's *Triennial Review Order*. As discussed below, however, Verizon has misconstrued the FCC's decisions in that proceeding. Moreover, Verizon's proposed changes to its Tariff 18 would eviscerate enforcement of its continuing obligation to provide unbundled line sharing on a tariffed basis. Finally, the distinctive requirements which Verizon imposes for essentially similar line-splitting processes imposes an entirely unwarranted discriminatory burden upon UNE-L CLECs.

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[2] Opposition of the Federal Communications Commission to Covad's Motion for Stay Pending Review at fn 3, *United States Telecom Ass'n v. FCC and United States of America,* No. 03-1310 (D.C. Cir. Filed Oct. 9, 2003).

[3] *Pennsylvania Public Utility Commission v. Verizon Pennsylvania Inc.*, Docket R-00038871, (Dec. 4, 2003).

A. The October 2 Tariff Filing Incorrectly Implements the *Triennial Review Order's* Rules for Grandfathering Existing Line Sharing Arrangements

The FCC's line sharing rules grandfathered "all existing line sharing arrangements unless the respective competitive LEC, or its successor or assign, discontinues providing xDSL service to that particular end-user customer." [4] Verizon takes the FCC's language and unilaterally imposes additional limitations on CLECs. Specifically, Verizon's proposed tariff language states that an existing line sharing arrangement will be grandfathered:

> provided the TC *began providing xDSL service to its end user customer* using Line Sharing over that Loop or Subloop *prior to October 2, 2003*, and only so long as the TC has not ceased providing xDSL service to that end user customer *over that Loop or Subloop at that location*. (emphasis added)

Verizon's interpretation is wrong for several reasons.

First, the FCC never intended that a CLEC must have begun providing xDSL service to an end user before a line sharing arrangement would become eligible for grandfathering. Rather, the only reasonable point in time to determine whether a line sharing arrangement is eligible for grandfathering is the moment at which a CLEC submits an order to Verizon to provision service to an end user. The alternative — using a later point once the line sharing loop has been provisioned and the customer is actually receiving DSL service — misstates the FCC's position and, not insignificantly, wreaks unwarranted harm upon a considerable volume of line sharing arrangements which are awaiting provisioning. Among other considerations, Verizon should be prevented from

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[4] *See Triennial Review Order*, ¶ 264.

using its own poor performance and ordering, processing, provisioning and repair delays in order to frustrate the grandfathering of eligible line sharing arrangements.

Next, the *Triennial Review Order* makes clear that a line sharing arrangement is grandfathered *until a particular end user customer cancels or otherwise discontinues the service of the CLEC.* Verizon's conspicuous misinterpretation limits grandfathering not only to a particular end user customer, but also to the specific copper loop or subloop serving the end user and the specific customer location. Under this scenario, if a copper loop serving an existing line sharing arrangement is not properly maintained by Verizon, is retired, gets cut, or for some reason no longer works, rather than repairing the loop or moving the end user to a working loop through a line and station transfer as it routinely does for its own retail customers, Verizon's proposed tariff arguably would allow Verizon to terminate the grandfathering of that end user's service arrangement even if the end user wishes to continue receiving the CLEC's DSL service. Similarly, if an end user moves locations and wishes to continue receiving a CLEC's DSL service, Verizon's proposed tariff arguably would allow it to end grandfathering of that arrangement, rather than transferring the grandfathered line sharing arrangement to the end user's new location as it routinely does for its own retail customers.

B. The October 2 Tariff Filing Unjustly Circumscribes Verizon's Obligation Under Both Federal and State Laws to Provide New Line Sharing Arrangements.

Currently, Verizon's standard Interconnection Agreement — that it makes available to all CLECs in Rhode Island — provides line sharing in accordance with, and subject to, the rates, terms and conditions set forth in Verizon's PUC RI No. 18 Tariff. For this reason (among others), Verizon must continue offering line sharing pursuant to

its tariff. Further, in order to ensure transparent availability of line sharing to Rhode Island CLECs, it is essential that the Commission require Verizon to tariff, in detail, all of its line sharing obligations in Rhode Island. In contrast to this clear obligation, Verizon's proposal to provision new line sharing arrangements on a transitional basis pursuant to terms offered in a separate agreement subject to its view of FCC-prescribed pricing rules is completely unacceptable. It is conceivable that CLECs may be forced to accept Verizon's unreasonable position regarding basic line sharing terms and conditions and pricing, even as this decision exposes them to numerous business risks. If, pursuant to Section 252, a CLEC chooses to negotiate, and eventually arbitrate, rates, terms and conditions for line sharing, the only backstop for CLECs may be Verizon's one sided terms. This is particularly invidious as Verizon's position will virtually always be contrary to the CLEC's interests. Given these factors, Verizon must be required to tariff, in detail, (1) its obligations under the *Triennial Review Order's* Section 251 transitional plan; ***and*** (2) unbundled access to line sharing under Section 271 of the Act.

C. Verizon's Tariff 18 Line Splitting Provisions Discriminate Against CLECs.

The FCC has made it eminently clear that Verizon is to provide nondiscriminatory access to OSS necessary for, among other things, the pre-ordering, ordering and provisioning of line splitting arrangements. In formal comments filed elsewhere, Verizon has acknowledged the FCC's determination that Verizon must facilitate the ability of CLECs to engage in line splitting arrangements on a nondiscriminatory basis.[5] Notwithstanding the clarity of this requirement, however, Verizon's Tariff 18 permits line splitting only with a UNE-P provider, thereby discriminating against UNE-L (UNE

Loop) providers. Verizon must be required to modify Tariff No. 18 to permit line splitting with both UNE-P and UNE-L providers under the same terms and conditions, including the use of an LSR ordering process.

Verizon's line splitting processes and OSS for line splitting with a UNE-L provider are different than those applied to a UNE-P provider. Verizon's processes for UNE-L providers are not scaleable. In order to accomplish line splitting, a UNE-P provider and a collocated telecommunications carrier must interconnect with each other within the same Verizon premises via a jumper connection between a Connecting Facility Assignment ("CFA") and the Office Equipment that is the Unbundled Switch port. Verizon requires the disassembly of UNE-P into its component elements, the Switch Port and the UNE Loop to provide Line Splitting. In the case involving UNE-L and data providers, Verizon does not follow the same process for CLEC-to-CLEC cross connects. Verizon requires CLECs to interconnect with each other using Verizon's Dedicated Transit Service ("DTS") out of its respective FCC Special Access tariffs. DTS does not use the processes and OSS that Verizon has built to manage UNE orders and Line Splitting orders in UNE-P scenarios. With DTS, Verizon requires CLECs to submit an ASR, rather than an LSR. The ASR process forces CLECs, such as Covad, to build new systems to manage what is the same provisioning process used with UNE-P providers. The need for these extra (parallel) systems and the resulting additional costs to CLECs arises entirely because of Verizon's insistence that UNE-L CLECs use ASRs instead of LSRs. In addition, the ASR process directs the demand for these services to a center within Verizon that is not designed to handle the provisioning of UNE loops. Instead,

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[5] Covad Communications Co. v. Verizon Pennsylvania, Docket No. R-00038871C0001, Motion to Dismiss.

Verizon's ASR process typically manages high capacity services, such as DS3 and OCn services. Consequently, the agents in these centers are neither trained for nor familiar with the particularized challenges providers typically encounter while provisioning shared loop services.

Verizon's discriminatory actions not only impair a UNE-L CLEC's ability to place orders for Main Distribution Frame ("MDF") cross connections, as they do now, but by forcing this demand into centers that typically handle high capacity services, Verizon will increase the costs for itself and for CLECs, will reduce its production capability for CLEC high capacity services, and will prove unable to manage commercial volumes of orders to line split on UNE-L orders by interconnecting Voice providers with Data providers. This is absolutely contrary to the Commission's (and FCC's) goal of promoting facility deployment and facilities-based interconnection.

Verizon's decision to use different processes and OSS for UNE-P and UNE-L providers is meant only to impede the availability of line splitting. Verizon can easily modify its OSS to support the interconnection of two CFAs. Verizon currently inventories CFAs in order to provision voice services ordered by the facilities-based voice CLECs on UNE loops. Additionally, Verizon inventories the data provider's splitter assignments as CFAs in its OSS. In fact, Verizon performs this function today in order to self-provision line sharing where Verizon's dial tone equipment is connected to a competitive data CLEC's CFA. In other words, the nondiscriminatory solution is both clear and technically feasible. Unfortunately, Verizon simply refuses to perform the same functions for a facilities-based voice CLEC that it does for its own retail voice service today.

III. This Commission has Adequate Authority to Enforce Verizon's Section 271 Line Sharing Obligations.

Notwithstanding the *Triennial Review Order*, Verizon's operations in Rhode Island remain subject to its compliance with the section 271 checklist. This Commission is authorized both by federal and state laws to enforce Verizon's compliance obligations.

A. Section 271 of the Act Requires Verizon to Continue Provision of Unbundled Access to Line Sharing.

As discussed above, Verizon must tariff line sharing pursuant to its unbundling obligations under Section 271 of the Act, which obligation it was not relieved of in the *Triennial Review Order*. The FCC made clear in the *Triennial Review Order* that section 271 creates independent access obligations for the Regional Bell Operating Companies:

> [W]e continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.[6]
>
> Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.[7]

Thus, there is no question that, regardless of the FCC's analysis of competitor impairment and corresponding unbundling obligations under section 251 for *incumbent LECs*, as a Bell Operating Company, Verizon retains an independent statutory obligation under section 271 of the Act to provide competitors with unbundled access to the network elements listed in the section 271 checklist.[8] Similarly, there is no question that

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[6] *See Triennial Review Order*, ¶ 653.

[7] *See Triennial Review Order*, ¶ 655.

[8] *See* 47 U.S.C. § 271(c)(2)(B).

Verizon's network access obligations include the provision of unbundled access to loops under checklist item #4.[9]

Although the FCC concluded in its *Triennial Review Order* that competitors are not impaired without unbundled access to line sharing pursuant to section 251(c)(3) of the Act, the FCC also acknowledged that section 271 creates separate, statutory line sharing unbundling obligations for the Bells, wholly separate and apart from the statutory unbundling obligations in section 251. Verizon cannot deny that section 271 checklist item 4 requires the Bells to provide access to the high frequency portion of the loop ("HFPL"). By its plain language, checklist item 4 requires the Bells to provide access to "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[10] The HFPL is clearly a form of loop transmission—a loop transmission that Verizon itself routinely uses to provide xDSL services separately from narrowband voice services.[11] In light of this clear statutory language, there is no question that Verizon remains under a statutory obligation to offer unbundled HFPL loop transmission to competitors, notwithstanding the FCC's finding of no impairment pursuant to section 251.

Each time the FCC has reviewed a 271 application since the advent of line sharing, the FCC has insisted that the BOC long distance applicant offer non-

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[9] *See Triennial Review Order*, ¶ 654 ("Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling, without mentioning section 251.")

[10] *See* 47 U.S.C. § 271(c)(2)(B)(iv).

[11] In other words, Verizon customers typically purchase narrowband voice services without also purchasing xDSL, and pay a separate monthly fee in order to add xDSL services to their local loop.

discriminatory access to the HFPL in order to comply with checklist item #4.[12] To this day, even after its decision to eliminate HFPL access in the *Triennial Review Order*, the FCC continues to look at the non-discriminatory availability of line sharing as an integral component of its checklist item #4 analysis in section 271 proceedings.[13] The significance of this point cannot be overstated. The FCC required SBC, the BOC long distance applicant, to provide non-discriminatory access to the HFPL as a precondition to gaining long distance authority pursuant to checklist item #4 of section 271 after the *Triennial Review Order* eliminated line sharing (the HFPL) as a UNE.[14] There is simply no question that the Act, and the FCC, require Verizon to provide non-discriminatory access to the HFPL if Verizon desires to provide long distance services.

B. The Commission Has Authority Pursuant to Section 271 of the Act to Require Verizon to Provide Unbundled Access to Line Sharing.

It is well-established that this Commission has authority to enforce post-entry section 271 checklist compliance. In its order approving SBC's application for section 271 authority in Arkansas and Missouri, the FCC commented that it "has strongly encouraged state commissions to conduct performance monitoring and post-entry enforcement" explaining in an associated footnote that "[t]hese mechanisms are generally administered by state commissions and derive from authority the states have under state

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[12] *See, e.g., Joint Application by SBC Communications, Inc., et al., for Provision of In-Region InterLATA Services in Kansas and Oklahoma,* Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, ¶¶. 214-219 (2001).

[13] See *Application by SBC Communications, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio and Wisconsin*, Memorandum Opinion and Order, WC Docket No. 03-167, FCC 03-243, ¶¶ 142-145; *Application by Qwest Communications International, Inc., for Authorization to Provide In-Region, InterLATA Services in Minnesota*, Memorandum Opinion and Order, WC Docket No. 03-90, FCC 03-142, ¶ 53, and App. C, ¶¶ 50-51; *Application by SBC Communications, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, WC Docket No. 03-138, FCC 03-228, ¶¶ 133-143.

[14] *See id.* at ¶ 1.

law **or under the federal Act**."[15] In its order approving Qwest's application for section 271 authority to provide services in Minnesota, the FCC remarked that "[w]e are also confident that the Minnesota Commission, as it addresses allegation of past violations of the statute by Qwest and considers any future problems that may develop, will continue to ensure that Qwest meets its statutory obligations."[16] In the same order, within a list of potential consequences should Qwest falter in its service obligations, the FCC included "enforcement provisions in interconnection agreements," which would be addressed at the state level.[17] Finally, in its closing paragraphs, the FCC referred expressly to "cooperative state and federal oversight and enforcement" as an effective means to prevent possible post-entry backsliding by Qwest.[18] Similar statements are made within each of the FCC's section 271 approval orders, evidencing the central and established place which this concept of shared enforcement responsibility occupies. Moreover, in several section 271 approval orders, the FCC discusses the importance of various Performance Assurance Plans instituted in the course of the state commission section 271 reviews. These discussions express a hope that the simple presence of the compliance plans will suffice to motivate appropriate competitive behavior following entry into the intrastate long distance markets; however that sentiment is anchored to a more pragmatic expectation that the state commission's "active oversight" and "provisions for

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[15] *Joint Application by SBC Communications, Inc et al., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri,* 16 FCC Rcd 20719, CC Docket No. 01-194, Memorandum Opinion and Order (rel. Nov. 16, 2001) at ¶ 127, fn. 404 (emphasis added).

[16] *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in Minnesota,* 18 FCC Rcd 13323, WC Docket No. 03-90, Memorandum Opinion and Order (rel. June 26, 2003) at ¶ 3.

[17] *Id.*, at ¶ 72.

[18] *Id.*, at ¶96.

comprehensive review" will reinforce prospects for continuing open local markets in that state. What is clear from these comments is the FCC's expectation that state commissions will play a front-line role in the enforcement of section 271 obligations following an incumbent's entry into their long distance markets.

In addition to its shared responsibility under section 271, this Commission has independent state authority to enforce these section 271 BOC obligations. The Rhode Island PUC has broad authority to regulate utilities and prohibit discrimination or unfair competitive practice. As stated in the General Laws of Rhode Island:

> "it is hereby declared to be the policy of the state to provide fair regulation of public utilities and carriers in the interest of the public, to promote availability of adequate, efficient and economical energy, communication, and transportation services and water supplies to the inhabitants of the state, to provide just and reasonable rates and charges for such services and supplies, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices, and to co-operate with other states and agencies of the federal government in promoting and coordinating efforts to achieve realization of this policy."[19]

This authority more than encompasses that necessary to ensure that Verizon fulfills its statutory duties under section 271. Furthermore, this independent state authority co-exists amicably with federal authority over section 271 issues. (Even Verizon would not dare to argue that the Commission's enforcement of Verizon's section 271 checklist obligations would "substantially prevent the implementation" of any provision of the federal Telecommunications Act.) In fact, where state enforcement activities do not impair federal regulatory interests, concurrent state enforcement activity is clearly

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[19] R.I GEN. LAWS § 31-1-1.

authorized.[20] Indeed, the Act expressly preserves a state role in the review of a BOC's compliance with its section 271 checklist obligations, and requires the FCC to consult with state commissions in reviewing a BOC's section 271 compliance.[21] Thus, the Commission clearly has the authority to enforce Verizon's obligations to provide unbundled access to loops under Section 271 checklist item #4.

C. The Commission Has Authority Pursuant to Section 271 of the Act to Require Verizon to Price Line Sharing at TELRIC or a TELRIC-Equivalent.

Pricing standards for section 271 checklist items are distinct from those applied to UNEs; however, these standards are compatible with TELRIC pricing. Although the FCC ultimately rules upon the overall compliance of a section 271 applicant's pricing with approved price methodologies, it is the state utility commissions which actually investigate carrier costs and approve rates. This Commission's pricing determinations with respect to unbundled line sharing, relying upon a TELRIC analysis, meet the Act's standards for section 271 checklist items

(a) Provision of Line Sharing Required as a Section 271 Checklist Item Must be Priced Consistent with Sections 201 and 202 of the Act; However, This Standard is Entirely Consistent with TELRIC and TELRIC-Equivalents.

The FCC determined in the *Triennial Review Order* that a different pricing standard applies to network elements required to be unbundled under section 271 as opposed to network elements unbundled under section 251 of the Communications Act.

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[20] *See Florida Avocado Growers v. Paul,* 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). Courts have long held that federal regulation of a particular field is not presumed to preempt state enforcement activity "in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *See De Canas v. Bica,* 424 U.S. 351, 356, 96 S.Ct. 933, 936, 47 L.Ed.2d 43 (1976) (quoting *Florida Avocado Growers,* 373 U.S. at 142, 83 S.Ct. at 1217).

[21] *See* 47 U.S.C. § 271(d)(2)(B) (requiring the FCC to consult with state commissions in reviewing BOC compliance with the 271 checklist).

Specifically, the FCC stated that "the appropriate inquiry for network elements required only under section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202."[22] In other words, according to the FCC, the appropriate *legal standard* under which the pricing for section 271 checklist items should be determined is a different *legal standard* than that under which the pricing of section 251 UNEs is required to be determined. The FCC concluded that "section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not require TELRIC pricing."[23]

Notably, however, nowhere in the *Triennial Review Order* does the FCC forbid the application of a forward-looking, long-run incremental cost standard to the pricing of network elements required to be unbundled under section 271. Rather, the FCC merely states that unbundled access to section 271 checklist items is not *required* to be priced pursuant to the particular forward-looking cost methodology specified in the FCC's rules implementing section 252(d)(1) of the Communications Act – namely, TELRIC. The FCC indicates that the appropriate legal standard to determine the correct price of section 271 checklist items is found in sections 201 and 202. Nowhere, however, does the FCC conclude — or even suggest — that these two different legal standards may not result in the same rate-setting methodology. In fact, the FCC itself has allowed the use of forward-looking economic costs to establish the rates for tariffed interstate telecommunications services regulated under sections 201 and 202 of the

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[22] *See Triennial Review Order*, para. 656.

[23] *See Triennial Review Order*, para. 659.

Communications Act – services which are not subject to the pricing standards in section 252(d)(1) of the Communications Act.[24]

Similarly, nowhere in the *Triennial Review Order* does the FCC preclude the use of forward-looking, long-run incremental cost methodologies *other than TELRIC* to establish the prices for access to section 271 checklist items. As the FCC made clear when it adopted the TELRIC pricing methodology in its *Local Competition Order*, there are various methodologies for the determination of forward-looking, long-run incremental cost.[25] TELRIC describes only one variant, established by the FCC for setting UNE prices under section 252(d)(1), derived from a family of cost methodologies consistent with forward-looking, long-run incremental cost principles.[26] Consequently, the FCC's *Triennial Review Order* does not preclude the use either of TELRIC or of a forward-looking, long-run incremental cost standard *other than TELRIC* in establishing prices consistent with sections 201 and 202 of the Act.[27]

(b) Ultimately, Establishment of Specific Approved Pricing for Section 271 Checklist Items Rests With the Individual States.

Primary responsibility for setting intrastate rates belongs to each state's utility commission. Section 2 of the Communications Act of 1934 (the "1934 Act") clearly stated that, with certain key exceptions, "nothing in this Act shall be construed to apply

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[24] *See, e.g., Access Charge Reform,* CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962, 12984, para. 57 (2000).

[25] *See Local Competition Order,* FCC 96-325, at para. 631.

[26] *See Local Competition Order,* FCC 96-325, at paras. 683-685 (defining "three general approaches" to setting forward-looking costs).

[27] For example, where the 271 checklist item for which rates are being established is not legacy loop plant but next-generation loop plant, incumbents might argue for the use of a forward-looking, long-run incremental cost methodology based on their *current network technologies* – in other words, a non-TELRIC but nonetheless forward-looking, long-run incremental cost methodology. *See, e.g., Local Competition Order,* FCC 96-325, at para. 684.

or to give the [FCC] jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . "[28] The authority vested in the FCC to approve a section 271 applicant's pricing does not significantly undermine this allocation of responsibilities. As manifest within each successive FCC order approving a section 271 application, the FCC's evaluation of pricing relies upon the extensive work and submitted representations of the relevant state commission.[29] The FCC reaches a general determination that the state commission's pricing analysis is not so wholly unreasonable as to violate the broad mandates of the Act[30]; however, it is the state commission which undertakes lengthy investigations of each carrier's operations, cost studies, pricing proposals, market comparables, economic analyses and so forth, eventually resulting in the approved pricing.[31] This allocation of pricing responsibilities to the state commissions is further evidenced in section 252 of the Act which directs incumbent local exchange carriers to submit proposed interconnection agreements as well as requests for

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[28] Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*

[29] See, e.g., *Application by Verizon New England, Inc. et al., for Authorization to Provide In-Region, InterLATA Services in Vermont*, 17 FCC Rcd 7625, CC Docket 02-7, Memorandum Opinion and Order (rel Apr. 17, 2002) ("The Commission has previously held that it will not conduct a de novo review of a state's pricing determinations. [] We will not reject an application 'because isolated factual findings by a commission might be different from what we might have found if we were arbitrating the matter. . . .' [] We will, however, reject an application if 'basic TELRIC principles are so violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce." (footnotes omitted)(citing also to similar statements in the FCC's approvals of SWBT's application for section 271 authority in Kansas and Oklahoma as well as Verizon's application for section 271 authority in Pennsylvania).

[30] *Id.*

[31] It is the FCC, however, which evaluates and approves general pricing methodologies for interconnection and unbundled access. See, e.g., *Verizon Communications, Inc. v. F.C.C.*, 122 S.Ct. 1646 (2002).

mediation and arbitration to the relevant state commission. In the course of arbitrations, the state commission shall "establish any rates for interconnection, services or network elements."[32] Section 252 (d) prescribes the standards for rate determination by the state commissions.[33] Section 252(e) vests state commissions with broad authority to approve or reject proposed interconnection agreements and their negotiated pricing, including incompatibility with the public interest, convenience and necessity.[34]

The FCC does not dispute this allocation of responsibilities. On the contrary, the FCC recognizes that state commissions can address pricing issues with a close-to-the-issues granularity which would be impossible to achieve on a national basis. In a recent *Notice of Proposed Rulemaking*, the FCC described the section 271 review process as follows:

> As part of that review, the Commission considers whether a BOC offers access to UNEs at prices that comply with section 252(d)(1). [] In reviewing state pricing decisions in the section 271 context, the Commission does not conduct a de novo review. Rather, given that the purpose of our section 271 review is to determine whether a BOC has opened its local market to competitors, the Commission determines whether the state has established rates that are within the range that a reasonable application of TELRIC principles would produce.[35]

In its order approving Verizon's application for section 271 authority in Rhode Island, the FCC commented that "[w]e rely heavily in our examination of this application on the work completed by the Rhode Island Commission," noting the Commission's

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32 Section 252 (c)(2).

33 Section 252 (d).

34 Section 252 (e)(2)

35 *In the Matter of the Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, 18 FCC Rcd. 18945, WC Docket No. 03-173, (rel. Sept. 15, 2003)(footnotes omitted).

four-and-one-half year series of proceedings to set rates for unbundled network elements(UNEs)."[36]

(c) This Commission's Determinations Regarding Pricing for the HPFL Meet the Requirements of Sections 201 and 202 and Generally Further the Purposes of the Act.

The pricing already established by the Commission for the HFPL is entirely consistent with the pricing standard under sections 201 and 202 of the Act. Specifically, the standards of sections 201 and 202 are that the prices for section 271 checklist items be *just, reasonable and non-discriminatory*. The principle of non-discriminatory pricing is exactly what has been applied to date in Rhode Island. The recurring rate for the HFPL is set at the same amount of loop cost allocated by Verizon to its own tariffed xDSL services — zero. Moreover, while these rates may be consistent with TELRIC, they are also consistent with the sections 201 and 202 statutory requirements of non-discriminatory pricing.[37] Accordingly, the currently effective recurring rate of zero for unbundled access to the HFPL comports perfectly with the statutory pricing standard specified by the FCC for section 271 checklist items.

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[36] *Application by Verizon New England, Inc. et al., for Authorization to Provide In-Region, InterLATA Services in Rhode Island*, 17 FCC Rcd 3300, CC Docket No. 01-324, Memorandum Opinion and Order, (rel. Feb. 22, 2002).

[37] *See* 47 U.S.C. § 202(a) (forbidding "unjust or unreasonable discrimination" in "charges, practices...[or] facilities").

IV. The Commission Retains Independent State Law Authority to Require Verizon to Provide Unbundled Access to Line Sharing

This Commission should also require Verizon to tariff unbundled access to line sharing pursuant to Rhode Island state law.

A. The Commission Has Independent State Law Authority to Unbundle the HFPL.

This Commission has independent authority under Rhode Island law to require Verizon to provide competitors with unbundled access to the HFPL. The FCC's *Triennial Review Order* did not affect that authority. As described above, the Rhode Island PUC has broad authority to regulate utilities and prohibit discrimination or unfair competitive practice. The General Laws of Rhode Island declare the broad policy of the state to encompass "fair regulation of public utilities and carriers in the interest of the public . . "[38] Fulfillment of this mandate requires determination of "just and reasonable rates and charges for such services and supplies, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices," as well as "co-operat[ion] with other states and agencies of the federal government in promoting and coordinating efforts to achieve realization of this policy."[39] There can be no serious doubt that this Commission has been proceeding, and has the authority to continue to proceed, entirely consistent with and pursuant to state law.

Accordingly, this Commission can, should, and indeed must order the unbundling of the HFPL under its own independent state law authority. Furthermore, in order to ensure full compliance and the transparent availability of this service to CLECs, the

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[38] R.I GEN. LAWS § 31-1-1.

[39] *Id.*

Commission also should require that Verizon fully tariff line sharing in accordance with its obligations under state law.

B. The Commission's Independent State Law Authority is Preserved Explicitly by the Act.

It is beyond dispute that this Commission's independent state law authority is not preempted by the federal Telecommunications Act. Section 252(e)(3) of the Act, entitled "Preservation of authority" explicitly states that:

> [N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.[40]

Similarly, Section 251(d)(3) of the Act, entitled "Preservation of State access regulations" states:

> In prescribing and enforcing regulations to implement the requirements of this section, the [Federal Communications] 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.[41]

Accordingly, the Act preserves Rhode Island's independent authority to implement state regulatory policies.

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[40] 47 U.S.C. § 252(e)(3).

[41] 47 U.S.C. § 251(d)(3).

C. The Commission's Independent State Law Authority Was Not Preempted by the FCC in its *Triennial Review Order.*

It is also beyond dispute that the authority granted to this Commission under independent state law has not been preempted by the FCC's *Triennial Review Order*. Nor could it be. While the FCC has the authority to interpret the Act, it does not have the authority to re-write it.[42] Notwithstanding any statements in the *Triennial Review Order*, the Act defines this Commission's authority, and, as set forth above, the Act does not evince any general Congressional intent to preempt state law unbundling orders. Rather, the Act expressly preserves such state law authority.

Should this Commission choose to acknowledge the FCC's interpretation of the Act in its *Triennial Review Order*, it is worth noting that even the FCC recognized that the aforementioned provisions of the Act expressly indicate Congress' intent <u>not</u> to preempt state regulation, and forbid the FCC from engaging in such preemption:

> Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. Many states have exercised their authority under state law to add network elements to the national list.[43]

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[42] Indeed, any deference previously accorded to the FCC's interpretation of the Act under the *Chevron* doctrine has long since been forfeited because the FCC's interpretation of the Act has been repeatedly reversed by the D.C. Circuit. *See* MCI v. AT&T, 512 U.S. 218,229 (1994) (holding that an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear).

[43] *See Triennial Review Order*, at ¶ 191.

The FCC further acknowledged in the *Triennial Review Order* that Congress expressly declined to preempt states in the field of telecommunications regulation:

> We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.[44]

Accordingly, the FCC has acknowledged explicitly that, except for certain identified circumstances, this Commission retains its independent unbundling authority.

(a) The FCC Held that State Law Authority is Preserved Unless the Exercise of That Authority Would "Substantially Prevent Implementation" of Section 251.

In its *Triennial Review Order* the FCC claimed to identify a narrow set of circumstances under which federal law would act to preempt state laws unbundling orders:

> Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) 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...
>
> [W]e find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation.[45]

Based upon the Eight Circuit's *Iowa Utilities Board I* decision the FCC specifically recognized that state law unbundling orders that are inconsistent with the FCC's unbundling orders are <u>not</u> *ipso facto* preempted:

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[44] *See Triennial Review Order*, at ¶ 192.

[45] *See Triennial Review Order*, at ¶¶ 192, 194.

> That portion of the Eighth Circuit's opinion reinforces the language of [section 251(d)(3)], i.e., that state interconnection and access regulations must "substantially prevent" the implementation of the federal regime to be precluded and that "merely an inconsistency" between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3).[46]

In sum, the FCC's *Triennial Review Order* confirmed that "merely an inconsistency" between state rules providing for competitor access and federal unbundling rules is ***insufficient*** to create such a conflict. Rather, the FCC recognized that state laws would not be subject to preemption unless they were found to "substantially prevent implementation" of section 251.

(b) The FCC Did Not Conclude That Any Existing State Commission Orders Unbundling the HFPL or Hybrid Loops Would "Substantially Prevent Implementation" of the Act or the FCC's Rules.

In its *Triennial Review Order*, the FCC did not preempt ***any existing*** state law unbundling requirements, nor did it act to preclude the adoption of ***any future*** state law unbundling requirements. This is particularly significant because several states, including California and Minnesota, have exercised their independent state law authority to unbundle the HFPL.[47] Similarly, several states, including Illinois, Wisconsin, Indiana, and Kansas, have exercised their independent authority to unbundle hybrid loops.[48] The

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[46] *See Triennial Review Order*, ¶ 192 n. 611 (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 806).

[47] **California:** CPUC Docket No. R.93-04-003/I.93-04-002; Open Access and Network Architecture Development, Permanent Line Sharing Phase, D. 03-01-077(Jan. 30, 2003); **Minnesota:** MPUC Docket No. P-999/CI-99-678; *In the Matter of a Commission Initiated Investigation into the Practices of Incumbent Local Exchange Companies Regarding Shared Line Access* (Oct. 8, 1999).

[48] **Illinois:** ICC Docket No. 00-0393; P*roposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service* (March 14, 2001); **Wisconsin:** WPSC Docket No. 6720-TI-161; Investigation into Ameritech Wisconsin's Unbundled Network Elements (March 22, 2002); **Indiana:** *IURC Cause Number 40611-S1, Phase II; In the Matter of the Commission Investigation and Generic Proceeding on Ameritech Indiana's Rate's for Interconnection, Service, Unbundled Termination Under the Telecommunications Act of 1996 and Related Indiana Statutes* (Feb. 17, 2001); **Kansas:** KCC Docket No.

FCC declined to preempt any of these unbundling orders, stating only that "in *at least some circumstances* existing state requirements will not be consistent with our new framework and may frustrate its implementation."[49] Accordingly, the FCC effectively acknowledged that in many circumstances state law unbundling of the HFPL and hybrid loops will be consistent with the FCC's framework and will not frustrate its implementation.[50]

Recognizing that its ability to preempt state unbundling orders is limited (if existent at all), the FCC declined to issue a blanket determination that all state orders unbundling the HFPL or hybrid loops were preempted. Instead, the FCC invited parties to seek declaratory rulings from the FCC regarding whether individual state unbundling orders "substantially prevent implementation" of Section 251.[51] The FCC's refusal to preempt state unbundling orders outright, as well as its proposed mechanism for challenges to such orders, testified clearly to the FCC's belief that certain state

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01-GIMT-032-GIT; *In the Matter of the General Investigation to Determine Conditions, Terms, and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning, and Line Sharing* (Jan. 13, 2003).

[49] *See Triennial Review Order*, ¶ 195.

[50] Notably, the FCC's statements indicating when it is 'likely' to find preemption for particular state rules appear to conflict with a recent Sixth Circuit holding. The Sixth Circuit has stated that "as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted." The court further noted that a state commission is permitted to "enforce state law regulations, even where those regulations differ from the terms of the Act or an interconnection agreement" entered into pursuant to section 252 of the Act, "as long as the regulations do not interfere with the ability of new entrants to obtain services." *See Michigan Bell v. MCIMetro*, 2003 WL 909978, at 9 (6th Cir. 2003).

[51] In a conspicuous deviation from this standard, the FCC observed that it was "*unlikely*" that it would refrain from preempting a state law or Order that required the "unbundling of network elements for which the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national basis." *Triennial Review Order* at ¶ 195. While the FCC's preemption analysis (or more accurately, its unsupported supposition) is flawed, it is important to note that even pursuant to this faulty analysis the FCC expressly refused to conclude that an order unbundling the HFPL or hybrid loops would be preempted as a matter of law, thereby signaling to state commissions that the HFPL could be unbundled under particular circumstances.

unbundling orders would not be deemed appropriate for preemption. Arguably more striking than its refusal to preempt all state unbundling orders (which it could have proposed as a sort of decks-clearing exercise) was the FCC's refusal to preempt any state unbundling orders whatsoever.

(c) The FCC Acknowledged That Unbundling Will Be Required Under Certain Circumstances.

Although the FCC noted that it was "unlikely" to refrain from preempting a state law requiring unbundling, the *Triennial Review Order* affirmatively and broadly identified circumstances that would lead the FCC to decline to preempt a state commission order unbundling a network element that the FCC has declined to unbundle nationally. Specifically, in its discussion of state law authority to unbundle network elements, the FCC stated that "the availability of certain network elements may vary between geographic regions."[52] Indeed, according to the FCC, such a granular "approach is required under *USTA*."[53] Thus, if the requisite state-specific circumstances exist in a particular state, state rules unbundling network elements that are not required to be unbundled nationally are permissible in that state, and would not substantially prevent the implementation of section 251.

V. The Commission Has the Authority to Require Verizon to Provide Access to the HFPL Consistent with Federal Law Based Upon Rhode Island-Specific Facts.

Although the *Triennial Review Order* concluded that competitors are not impaired on a national basis without access to the HFPL, the FCC also made clear that state-

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[52] *See Triennial Review Order*, ¶196.

[53] *See Triennial Review Order*, para. 196 (citing *USTA*, 290 F.3d at 427).

specific facts could warrant different unbundling requirements in a particular state. Such state-specific circumstances warrant the unbundling of the HFPL in Rhode Island. In short, the facts relied upon by the FCC to reach a national finding of non-impairment without access to the HFPL do not exist in Rhode Island. Because of these Rhode Island-specific circumstances, an obligation imposed by Rhode Island law to provide unbundled access to the HFPL would be entirely warranted. Particularly as such an obligation would not substantially prevent implementation of section 251, and the FCC's federal unbundling regime, the FCC would be unlikely to preempt such a finding.

The primary and deciding factor relied upon by the FCC to make a national finding of non-impairment with respect to the HFPL is the supposed ability of competitors to obtain revenues from all of the services the loop is capable of offering, including voice and data bundles using line splitting. In the state of Rhode Island, however, Verizon has not made line splitting operationally available in the same manner as its own retail voice and data bundles. Indeed, there are significant financial and operational obstacles to CLEC's providing line splitting in Rhode Island. There are limitations on timing of line splitting orders, with adverse effects upon customers. There are discriminatory versioning policies for submission of line splitting orders. Only recently, Verizon unilaterally and arbitrarily determined that it would refuse to act on a change request to implement line splitting migrations – even though every requesting CLEC gave this change request a rating of 5 (reflecting the highest level of importance); and to this day, Verizon continues to refuse to provision line splitting with resold voice

service. These few examples illustrate all too well the operational barriers confronting CLECs in Rhode Island. Because of the operational and cost disadvantages that competitive data providers continue to face in providing line split voice and data bundles in Rhode Island, such providers face severe competitive disadvantages in obtaining "all potential revenues derived from using the full functionality of the loop."[54] In the end, it is consumers that pay the price by losing their opportunity to choose their data provider. In other words, the core assumptions underlying the FCC's conclusion that on a national basis competitors generally are not impaired without access to the HFPL do not comport with the facts as they exist specifically in Rhode Island. This is precisely the type of requisite state-specific circumstances which justify the continued application of state unbundling laws. In no way will these laws "substantially prevent" the implementation of section 251 of the Act or of the FCC's Rules. On the contrary, these laws will further the central aims of the Act, the FCC's Rules and of the *Triennial Review Order* by bringing the telecommunications market in Rhode Island closer to the state of effective competition envisioned in these documents.

VI. Conclusion

Covad respectfully submits that it has demonstrated compellingly that Verizon's October 2 Tariff Filing is unlawful and should not be approved in its current form. The Commission should either reject or suspend and investigate the limitations and requirements proposed in Tariff 18. Moreover, as discussed within these comments, the Commission should require Verizon to tariff unbundled access to line sharing both under

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[54] *See Triennial Review Order*, ¶ 258.

Section 271 of the Act and as a UNE under Rhode Island state law. This Commission must also ensure that Verizon accurately tariff line splitting in a nondiscriminatory manner, treating line splitting arrangements with UNE-L providers the same as it does UNE-P providers and itself.

Respectfully Submitted:

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