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October 29, 2003

Luly E. Massaro
Commission Clerk
Rhode Island Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

Re: Verizon Rhode Island's Revisions to Tariff PUC RI No. 18

Dear Ms. Massaro:

Verizon Rhode Island ("Verizon RI") files this letter in response to the "complaint" filed yesterday by Covad Communications Company ("Covad") regarding Verizon RI's proposed revisions to Tariff No. 18 filed on October 2, 2003, to implement certain rulings of the Federal Communications Commission ("FCC") in its *Triennial Review Order*. As discussed below, Covad's claims are without merit and, therefore, there are no grounds for the Commission to suspend and investigate Verizon RI's October 2nd compliance filing. Accordingly, the Commission should approve Verizon RI's proposed revisions as filed.

In its comments, stylized as a "Complaint," Covad contends that Verizon RI's tariff revisions incorrectly implement the FCC's *Triennial Review Order* concerning line sharing. Covad Comments at 1. Covad's claims are unfounded.

In its *Triennial Review Order*, the FCC vacated its rules requiring line sharing and established a new federal regulatory framework for line sharing to which the Commission must adhere. *Triennial Review Order*, ¶ 257-58, 261. Under the FCC's new rules, the high frequency portion of a copper loop ("HFPL") is not an unbundled network element ("UNE") under Section 251 of the Telecommunications Act of 1996 (the "Act"), even on

a transitional basis.[1] Moreover, pursuant to Section 201(b) of the Act, the FCC imposed transitional rules on line sharing arrangements provided by incumbent local exchange carriers ("LEC") (*i.e.*, grandfathering provisions and a three-year transition for existing and new line sharing arrangements, respectively). *Triennial Review Order*, ¶¶ 179, 264-65, 267.

Verizon RI's October 2nd tariff filing fully complies with the FCC's directives to eliminate the unbundling requirement for the HFPL and grandfather existing line sharing arrangements.[2] Contrary to Covad's claims, Verizon RI's tariff revisions do not impose additional limitations on competitive local exchange carriers ("CLECs") with existing line sharing arrangements. Covad Comments at 1-2. Verizon RI's proposed tariff language clearly reflects the FCC's intent to minimize customer disruption by grandfathering line sharing arrangements that CLECs provided as of October 2, 2003, to end-user customers at *existing* rate levels.[3] *Triennial Review Order*, ¶ 267. Thus, no modification to Verizon RI's proposed tariff language is required, as Covad erroneously suggests.

Likewise, Covad incorrectly contends that Verizon RI should be required to incorporate in its tariff all rates, terms and conditions applicable to line sharing. Covad

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1 The FCC specifically stated that "[b]eginning on the effective date of the Commission's *Triennial Review Order*, the high frequency portion of the copper loop shall no longer be required to be provided as an unbundled network element, subject to the transitional line sharing conditions in paragraphs (a)(1)(i)(A) and (a)(1)(i)(B) of this section." *Triennial Review Order*, Appendix B, Final Rules at ¶ 10, 47 C.F.R. § 51.319(a)(1)(i).

2 Under the FCC's rules:

> [a]n incumbent LEC shall provide a requesting telecommunications carrier with the ability to engage in line sharing over a copper loop where, prior to the effective date of the Commission's *Triennial Review Order*, the requesting telecommunications carrier began providing digital subscriber line service to a particular end-user customer, and has not ceased providing digital subscriber line service to that customer. Until such end-user customer cancels, or otherwise discontinues its subscription to the digital subscriber line service of the requesting telecommunications carrier, or its successor or assign, the incumbent LEC shall continue to provide access to the high frequency portion of the loop at the same rate that the incumbent LEC charged for such access prior to the effective of the Commission's *Triennial Review Order*.

Triennial Review Order, Appendix B, Final Rules at ¶ 10, 47 C.F.R. § 51.319(a)(1)(i)(A). The FCC further directed incumbent LECs to charge the same rates as those charged prior to the effective date of the *Triennial Review Order*, until the next biennial review period commences in 2004. *Id*. at ¶ 264. The FCC stated that "[t]he interim grandfathering rule will help to alleviate the impact of such a significant change on end-user customers." *Id*.

3 This contradicts Covad's contention that line sharing must be priced at TELRIC based rates. Covad Comments, at 9-10.

Comments at 2, 4-5. This is inconsistent with the FCC's directives. In its *Triennial Review Order*, the FCC recognized that modifications to interconnection agreements would be required in response to that *Order*, and declared that individual carriers should be allowed the opportunity to negotiate to make the necessary contract changes. *Triennial Review Order*, ¶¶ 700-703. Accordingly, Covad's argument that Verizon RI must be required to tariff applicable line sharing rates, terms and conditions is erroneous and must be rejected by the Commission.

Finally, Covad argues that the Commission has the authority to reject the FCC's declaration to eliminate the unbundled requirement for HFPL. Covad Comments at 5-8. That argument is wrong.

The FCC clearly has authority, under Section 251(d)(3) and "long-standing federal preemption principles" to preclude states from adding to the list of network elements established by the FCC – which list does not include the HFPL.[4] *Triennial Review Order*, ¶ 192. And, in fact, the FCC has exercised that authority and preempted state attempts to override its decision to remove certain network elements from the national list of UNEs. *Id*. at ¶¶ 193-95. In its *Triennial Review Order*, the FCC delegated limited authority for state commissions to apply a more granular impairment analysis *only* for switching and certain types of loop facilities and dedicated transport – *not* for the HFPL, which is no longer a UNE on a national basis.[5] *Id*. at ¶ 193. Thus, because the Commission is not at liberty under the Supremacy Clause to frustrate or disregard that federal policy,[6] Covad's comments provide no basis for the Commission to suspend the proposed tariff.

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[4] As the U.S. Supreme Court has recognized, where Congress or a federal agency has made a specific "policy judgment" as to how "the law's congressionally mandated objectives" would "best be promoted," states are not at liberty to deviate from those "deliberately imposed" federal prerogatives. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000). In other words, where federal law sets forth a legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns. *See e.g., Fidelity Fed'l Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 155 (1982) (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]"). *See also Wisconsin Bell, Inc. v. Bie*, 2003 U.S. App. LEXIS 16514, *9 (7th Cir. August 12, 2003) ("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.").

[5] The FCC found that "setting a national policy for unbundling some network elements is necessary to send proper investment signals to market participants and to provide certainty to requesting carriers, including small entities." *Triennial Review Order*, ¶ 187. Contrary to Covad's claims, a separate declaratory ruling by the FCC is *not* a prerequisite to preemption under Section 251(d)(3). Covad Comments, at 16-17. Rather, the remedy of a declaratory ruling is meant to provide guidance in close cases. This is not a close case. Any attempt by the Commission to require the unbundling of HFPL would conflict with the FCC's *Triennial Review Order*.

[6] Covad erroneously relies on the Sixth Circuit Court of Appeals' opinion in *Michigan Bell v.*

For the foregoing reasons, there is nothing in the comments of Covad that provide a basis for the Commission to suspend Verizon RI's proposed tariff filing of October 2, 2003. The simple fact is that Covad is dissatisfied with findings that the FCC made in the *Triennial Review Order* and wants the Commission to investigate issues that the FCC resolved. The Commission should not take the bait but should approve Verizon RI's proposed tariff changes as filed.

Sincerely,

Alexander W. Moore

cc: Steven Frias, General Counsel
Anthony Hansel, Esq.

MCIMetro to support its contention that states may require access to additional UNEs as long as the regulations "would not interfere with the ability of new entrants to obtain services." Covad Comments, at 17-18. This is a grossly overbroad reading of the *Michigan Bell Order*. In that case, the "state regulation" at issue was a tariff provision that permitted CLECs to submit resale orders by facsimile. It was in that context, and that context *only*, that the Sixth Circuit determined that faxing orders did not "substantially prevent implementation" of the federal regime. *Michigan Bell v. MCIMetro*, 323 F.3d 348, 361 (6th Cir. 2003).

Nothing in the *Michigan Bell Order* stands for the proposition that a state may require access to "services" where the FCC has expressly determined on a national basis, that competitors are not impaired without unbundled access. *Triennial Review Order*, ¶ 258. To the contrary, the Sixth Circuit reiterated its prior holding in *Verizon N., Inc. v. Strand* 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.'" 309 F.3d 935, 940-41 (6th Cir. 2002), quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992). Therefore, nothing in the *Michigan Bell Order* supports Covad's argument that the Commission has the authority to require unbundled access to HFPL or otherwise disrupts the federal framework established in the FCC's *Triennial Review Order*.