ADLER POLLOCK & SHEEHAN P.C.

One Citizens Plaza, 8th floor
Providence, RI 02903-1345
Telephone 401·274·7200
Fax 401·751·0604 / 351·4607

175 Federal Street
Boston, MA 02110-2890
Telephone 617·482·0600
Fax 617·482·0604

www.apslaw.com

March 7, 2005

Via Hand Delivery and Electronic Mail

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

Re: Proposed Revisions to Rhode Island PUC Tariff No. 18

Dear Luly:

A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation, Covad Communications, Broadview Networks Inc. and Broadview NP Acquisition Corporation, and DSCI Corporation ("Joint Commentors"), through counsel, submit the following comments addressing Verizon Rhode Island's ("Verizon") February 18, 2005 proposed revisions to Rhode Island PUC Tariff No. 18. These revisions purport to implement the Federal Communications Commission's ("FCC") new rules applicable to Verizon's provision of unbundled network elements ("UNEs"), in the *Triennial Review Remand Order*.[1] The proposed revisions affect Verizon's tariffed terms for DS1 and DS3 and loops, dedicated DS1 and DS3 transport, and mass market local circuit switching and the Unbundled Network Element Platform ("UNE-P").

The revisions would prohibit competitive local exchange carriers ("CLECs") in Rhode Island from placing any orders as of March 11, 2005 for UNEs no longer subject to unbundling under section 251(c)(3) of the Telecommunications Act of 1996 ("1996 Act").[2] The proposed tariff changes also purport to implement the transition plans ordered in the *Triennial Review Remand Order* for those UNEs no longer subject to unbundling under section 251(c)(3) of the 1996 Act. Verizon's proposed tariff filing attempts to circumvent its obligations under section 252 of the 1996 Act and to unilaterally impose selective, self-serving interpretations of the *Triennial Review Remand Order* on its carrier customers. Further, the proposed revisions are substantively infirm. The proposed revisions attempt to alter Verizon's section 251(c)(3) UNE unbundling obligations in a manner that is inconsistent with the *Triennial Review Remand Order*

1 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (released February 4, 2005)(*"Triennial Review Remand Order"*).

2 *See* Letter to Luly E. Massaro, Commission Clerk, Rhode Island PUC, from Theresa L. O'Brien, Vice President, Verizon, filed February 18, 2005, page 3.

and its obligations under the 1996 Act. For those reasons, Verizon's tariff amendment must be rejected or, at a minimum, suspended and investigated.

The Commission should bear in mind that by definition the proposed revisions purport to implement changes in Verizon's unbundling obligations for high-capacity loops, dedicated transport and mass market unbundled local switching under section 251(c)(3) of the 1996 Act. They have not been proffered by Verizon to define its ongoing obligations with respect to these elements under section 271 of the 1996 Act, the Bell Atlantic/GTE merger order[3] and state law. The Joint Commentors have consistently maintained that such non-section 251 unbundling obligations should be enforced by the Commission through negotiated and/or arbitrated interconnection agreements. Nothing in these comments should be construed to suggest either that such federal and state law obligations do not exist, or otherwise, that such obligations may be effectuated through Verizon's tariff language.

I. VERIZON'S PROPOSED TARIFF REVISIONS VIOLATE ITS OBLIGATIONS UNDER SECTION 252 OF THE 1996 ACT, ITS INTERCONNECTION AGREEMENTS, AND THE FCC'S DIRECTIVE IN THE *TRIENNIAL REVIEW REMAND ORDER*

Procedurally, Verizon's tariff filing is premature. The modified unbundling obligations established in the *Triennial Review Remand Order* constitute a change in law affecting the rights of each of the Joint Commentors pursuant to section 251 of the 1996 Act. The 1996 Act, the terms of the parties' interconnection agreements, and the express directive of the FCC in the *Triennial Review Remand Order* all command that section 251 unbundling requirements arising under the *Triennial Review Remand Order* be implemented through interconnection agreement amendments, in the first instance through negotiations and, if necessary, by arbitrations before the Commission pursuant to section 252 of the 1996 Act. Verizon's tariff filing constitutes an unlawful attempt to bypass its section 252 obligations and therefore must be rejected.

The rights of CLECs to obtain access to UNEs pursuant to section 251 of the 1996 Act, and the obligations of incumbent local exchange carriers ("ILECs") to provision such elements, must be set forth in interconnection agreements negotiated and arbitrated pursuant to section 252 of the 1996 Act. Section 251(c) states that ILECs have "the duty to provide to any requesting telecommunications carrier for the provision of a telecommunications service, non-

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3 *In re GTE Corporation, Transferor and Bell Atlantic Corporation, Transferee For Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, FCC 00-221, 15 FCC Rcd 14032 (Jun. 16, 2000).

discriminatory access to network elements on an unbundled basis . . . *in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.*"[4] Put simply, the 1996 Act is built on rights and obligations set forth in interconnection agreements negotiated, arbitrated, and amended in accordance with section 252 of the Act. As Verizon itself often has noted, tariffs are not a substitute for the terms of an interconnection agreement.[5] By the same token, tariff amendments are not a substitute for amendments to interconnection agreements.

The FCC explicitly confirmed this principle in the *Triennial Review Remand Order*, stating that the means by which the *Triennial Review Remand Order* should be effectuated is pursuant to section 252 processes:

> We expect that incumbent LEC and competing carriers will implement the Commission's findings as directed by section 252 of the Act . . . We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes.[6]

Verizon's conduct with respect to these issues is in facial violation of the FCC's requirements. Verizon has not implemented the FCC's findings "as directed by section 252 of the Act," but rather, has failed to negotiate (or even offer to negotiate) *Triennial Review Remand Order* interconnection agreement amendments in good faith. Indeed, Verizon only has proposed to set "rates, terms and conditions necessary to implement [the FCC's] rule changes" through a unilateral process that bypasses all of its statutory, regulatory and contractual obligations. For this reason alone, Verizon's proposed tariff amendments must be summarily rejected.

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4 47 U.S.C. §252 (emphasis supplied).

5 *See e.g. Wisconsin Bell, Inc. v. Bie,* 340 F.3rd 441 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1051 (2004); *Verizon North, Inc. v. Strand*, 309 F.3rd 935 (6th Cir. 2002), *cert. denied*, 538 U.S. 946 (2003), cited in Verizon's Response to Order to Show Cause, Case 04-C-0861, New York Public Service Commission (filed November 24, 2004).

6 *Triennial Review Remand Order*, ¶ 253.

II. VERIZON'S PROPOSED TARIFF REVISIONS FAIL TO ACCURATELY INCORPORATE THE SUBSTANTIVE REQUIREMENTS OF THE *TRIENNIAL REVIEW REMAND ORDER*

DS1 and DS3 Loops and Transport

Verizon's failure to negotiate the content and language of its obligations under the *Triennial Review Remand Order* has substantive effects on the language it proposes in its tariff. None of the tariff revisions provide the detail necessary to establish an unambiguous set of rights and obligations on the parties. Verizon has merely referenced certain provisions of the FCC's rules; however, those rules are neither unambiguous nor self-effectuating. The lack of detail in Verizon's proposed revisions gives Verizon the complete discretion to interpret those rules in whatever way it sees fit. For example, Verizon does not define "fiber-based collocators" for purposes of applying the FCC's standard to determine when dedicated transport and/or high-capacity loops are no longer available as section 251(c)(3) UNEs.

Moreover, the proposed revisions leave a number of important issues unresolved. For example, the revisions are written almost entirely in the negative, while the FCC's order and rules are written in the positive. Thus, Verizon states at section 5.3.1.B.1 that: "[n]otwithstanding any other provision of this tariff . . . the Telephone Company will not provide unbundled access to DS1 loops . . ." In contrast, section 51.319 of the FCC's rules states: "an incumbent LEC shall provide a requesting telecommunications carrier with non-discriminatory access to a DS1 loop on an unbundled basis . . "[7] The FCC's rules are written in the affirmative for a reason: they define the rights of CLECs to continue to obtain access to unbundled loops and dedicated transport. Every one of Verizon's provisions is written in the negative and thereby leaves CLECs' affirmative entitlement to implication. This is unacceptable.

More specifically, Verizon's proposed self-certification processes for DS1 and DS3 loops, as well as for dedicated transport, are inconsistent with the FCC's rules and must be rejected. Paragraph 234 of the *Triennial Review Remand Order* states that:

> [a] requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self certify that, to the best of its knowledge, its request is consistent with the requirements discussed on Parts IV, V, and VI above, and that it is therefore entitled to unbundled access to the particular

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7 47 C.F.R. § 51.319 (emphasis supplied).

network elements sought pursuant to section 251(c)(3).[8]

Upon receipt of such self-certification, the FCC held "the incumbent LEC must immediately process the request."[9]

Verizon's proposed tariff language turns this process on its head and claims for Verizon the conclusive right to determine whether and when it will fulfill a CLEC order. Sections 2.1.1.E (transport) and 5.3.1.E (loops) give conclusive weight to the lists of wire centers that Verizon claims have met the FCC's criteria for "de-listing" under section 251(c)(3) and provides on its wholesale web site. This is beyond the reach of the FCC's rules and Verizon's authority. Regulators will determine in the first instance which wire centers meet the *Triennial Review Remand Order* standard; Verizon will not. Nor can Verizon unilaterally amend its lists of wire enters without demonstrating to the appropriate regulatory authorities that the facts justify the amendment. Nothing in the FCC's order allows Verizon to be the judge of its own facts. The *Triennial Review Remand Order* imposes on CLECs the obligation to conduct a "reasonably diligent inquiry" before submitting an order for a DS1 or DS3 loop or transport arrangement, while at the same time giving the CLECs the right to weigh all evidence, including evidence that contradicts Verizon's list of wire centers. If a CLEC certifies that it has made such an inquiry, Verizon "must immediately process the request."[10] Disputes over whether particular wire centers are closed to particular UNEs are to be resolved after the UNE is provisioned "through the dispute resolution procedures provided for in [ ] interconnection agreements."[11]

In addition, Verizon is not authorized to challenge a CLEC's self-certification in the manner it has proposed. Verizon states that "if it is determined that the CLEC was not entitled to unbundled access to such element or elements, then the CLEC will be backbilled to the date on which the element was first provisioned . . ."[12] The *Triennial Review Remand Order* does not provide for back-billing where a subsequent review shows that the CLEC is not entitled to the element under section 251(c)(3). The FCC order declines to adopt an auditing rule for CLEC self-certifications, "because, in contrast to EELs self-certifications, the requesting carrier seeking access to the UNE certified only to the best of its knowledge and is unlikely to have in its possession all information necessary to evaluate whether the network element meets the

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8 *Triennial Review Remand Order*, ¶ 234.

9 *Id.*

10 *Id.*

11 *Id.*

12 Proposed section 2.1.1.E. *See also* proposed section 5.3.1.E.

factual impairment criteria in our rules."[13] Nothing in this language authorizes back-billing when the CLEC, in good faith, has made a certification that ultimately proves to be incorrect.[14]

Verizon's proposed treatment of the FCC's transition plans for high-capacity loops and dedicated transport are similarly incorrect. There is no basis in the *Triennial Review Remand Order* for the "post-transition arrangement" burdens placed on CLECs by Verizon's proposed revisions. Proposed sections 2.1.1.D (transport) and 5.3.1.D (loops) state that orders for discontinuance or conversion "must be placed early enough, in light of applicable provisioning intervals, to ensure that orders can be fulfilled by the end of the transition period." The language should state that orders that are placed pursuant to existing intervals will be converted to the alternative arrangements prior to the end of the transition periods, and that if Verizon is unable to complete the conversions by that date, the existing arrangements shall continue unchanged until Verizon succeeds in effectuating the conversions. The logic of this is straightforward. The CLEC has the obligation to submit the order for discontinuance or conversion, but it cannot be penalized if, having submitted an order during the transition period, Verizon is unable to fulfill it before the end of the transition period. Verizon's proposed revisions place the burden on the CLEC with no burden on Verizon to perform its part of the work, and fail to acknowledge the FCC's directive that UNE rates continue to apply if Verizon is unable to process orders by the end of the transition period. Further, more realistically, these are issues that are better addressed in interconnection agreements. There, parties can negotiate grooming plans, establish performance standards, and develop efficient processes for (if necessary) mass conversions, without harm to consumers. Tariffs are not the vehicle for these kinds of issues.

Verizon's proposed tariff revisions also improperly restrict the availability of DS1 transport. The FCC was clear in the *Triennial Review Remand Order* that the 10 DS1transport circuit cap applies as a proxy for the point at which DS3 transport is economically viable. Hence, the rule limiting a CLEC to 10 DS1 transport circuits applies only where the FCC's rules find no impairment for DS3 transport ("[o]n routes for which we determine there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits."[15]) Obviously, for routes for which there *is* an unbundling obligation for DS3 transport,

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13 *Triennial Review Remand Order,* ¶ 234, n.659.

14 Moreover, in stating in n. 659 that its decision to decline to adopt an auditing requirement for high-capacity loops and dedicated transport in the *Triennial Review Remand Order* "do[es] not supercede any audit rights included in any interconnection agreements or other commercial agreements," the FCC once again acknowledges that the appropriate treatment of UNE obligations under the *Triennial Review Remand Order* is through interconnection agreements, not tariffs.

15 *Triennial Review Remand Order*, ¶128 (emphasis supplied).

the FCC did not limit the number of DS1 circuits. Verizon proposes, however, that CLECs are prohibited from obtaining "more than 10 unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis."[16] The Verizon tariff language is incorrect.

Mass Market Local Switching and UNE-P

As with high-capacity loops and dedicated transport, Verizon's failure to negotiate the content and language of its obligations under the *Triennial Review Remand Order* has substantive effects on the language it proposes in its tariff. None of the tariff revisions for mass market unbundled local switching provide the detail necessary to establish an unambiguous set of rights and obligations on the parties. Verizon has merely referenced certain provisions of the FCC's rules; however, those rules are neither unambiguous nor self-effectuating. The lack of detail in Verizon's proposed revisions gives Verizon the complete discretion to interpret those rules in whatever way it sees fit. For example, Verizon does not define what it considers to be a "timely order" for discontinuing or converting a DS0 local switching arrangement. Yet, Verizon's proposed language would permit it to discontinue an existing local switching arrangement at the end of the transition period if a "timely order" is not placed for its disconnection or conversion.

Moreover, the proposed revisions leave a number of important issues unresolved. For example, the revisions are written almost entirely in the negative, while the FCC's order and rules are written in the positive. Thus, Verizon states at section 6.1.1.A.1 that: "[n]otwithstanding any other provision of this tariff . . . the Telephone Company will not provide access to local circuit switching on an unbundled basis . . ."[17] In contrast, section 51.319(d) of the FCC's rules states: "An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to local circuit switching, including tandem switching, on an unbundled basis…". The FCC's rules are written in the affirmative for a reason: they define the rights of CLECs to continue to obtain access to unbundled local switching. Every one of Verizon's provisions written in the negative leaves CLECs' affirmative entitlement to implication. This is unacceptable.

Further, Verizon's proposed tariff revisions for mass market local switching incorrectly interpret and apply the FCC's ruling regarding the scope of the transition plan. The FCC determined that the 12-month transition plan should apply to a CLEC's "embedded

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16 Proposed section 2.1.1.B.1 (emphasis supplied).

17 *See also* proposed section 8.1.1.A.1 ("[n]otwithstanding any other provision of this tariff . . . the Telephone Company will not provide access to UNE-P Combinations on an unbundled basis . . .").

customer base."[18] While at some point CLECs are not permitted by the FCC's rules to add new customers under section 251(c)(3),[19] the order is clear that Verizon is obligated to continue to provision and service local switching arrangements for a CLEC to meet the needs of its existing customers as of March 11, 2005. Verizon's proposed revision, which defines "embedded base" to exclude the "placing of orders for new unbundled DS0 Local Circuit Switching arrangements, whether or not used to serve existing customers" and "'moves' that involve the disconnection of an existing DS0 Local Circuit Switching arrangement and the reestablishment of such arrangement at a different location"[20] is overbroad. The FCC's objective was to terminate the marketing of section 251(c)(3) local switching arrangements; clearly, permitting a CLEC to continue to serve its customers' needs during the 12-month transition plan if they relocate or need to add lines at their existing locations does not run afoul of that objective. Verizon's proposed revision must be rejected.

Finally, similar to high-capacity loops and dedicated transport, Verizon's treatment of the FCC's transition plan for mass market local switching is incorrect. There is no basis in the *Triennial Review Remand Order* for the transition plan burdens placed on CLECs by Verizon's proposed revision. Proposed section 6.1.1.A.3 states that orders for discontinuance or conversion "must be placed early enough, in light of applicable provisioning intervals, to ensure that the orders can be fulfilled by the end of the transition period." The proposed language goes on to state that "if the CLEC does not place timely orders to discontinue or convert any such DS0 Local Circuit Switching arrangements, the arrangements will be discontinued by the Telephone Company at the end of the transition period." The language should state that orders that are placed pursuant to existing intervals will be converted to the alternative arrangements prior to the end of the transition period, and that if Verizon is unable to complete the conversions by that date, the existing arrangements shall continue unchanged until Verizon succeeds in effectuating the conversions. The logic of this is straightforward. The CLEC has the obligation to submit the order for discontinuance or conversion, but it cannot be penalized if, having submitted an order during the transition period, Verizon is unable to fulfill it before the end of the transition period. Verizon's proposed revisions place the burden on the CLEC with no burden on Verizon to perform its part of the work, and fail to acknowledge the FCC's directive that UNE rates continue to apply if Verizon is unable to process orders by the end of the transition period.

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18 *Triennial Review Remand Order*, ¶ 227.

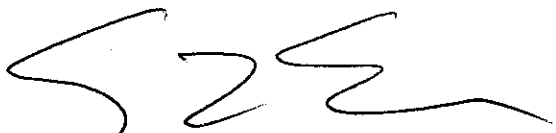
19 The date after which Verizon is permitted to refuse to provision new local switching arrangements for new customers under section 251(c)(3) is the effective date of a CLEC's interconnection agreement amendment implementing the *Triennial Review Remand Order*.

20 Proposed section 6.1.1.A.2.b.

III. CONCLUSION

In sum, Verizon's decision to implement the *Triennial Review Remand Order* pursuant to self-defined tariff revisions rather than through negotiation of amendments to interconnection agreements has led to numerous mistakes, all of which (not surprisingly) inure to the benefit of Verizon. The Commission must reject or, at a minimum, suspend Verizon's proposed revisions and direct the parties to negotiate. If, at the end of that process, the Commission believes that tariff revisions are necessary or desirable, then a full record will have been developed from which appropriate language can be derived. For these reasons, Verizon's tariff revisions must be rejected.

Sincerely,



Craig L. Eaton, #5515
Genevieve Morelli

Counsel for A.R.C. Networks, Inc. d/b/a InfoHighway Communications Corp., Broadview Networks Inc., Broadview NP Acquisition Corp., Covad Communications, and DSCI Corporation

CLE/bck

Enclosure

cc: John Spirito, Division Counsel (via hand delivery and electronic mail with attachment)