Via Overnight Mail

March 2, 2005

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

Re: Proposed Revisions to Verizon PUC RI No. 18 – Docket 3662

Dear Ms. Massaro:

Conversent Communications of Rhode Island, LLC ("Conversent") submits the following comments concerning Verizon Rhode Island's ("Verizon's") February 18, 2005 proposed amendments to Verizon's PUC RI No. 18, which purport to effectuate the FCC's Triennial Review Remand Order, *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 (rel. Feb. 4, 2005) ("Remand Order" or "TRRO").

The Commission should reject (or at a minimum suspend and investigate) the proposed revisions to PUC RI No. 18. The proposed revisions fail in numerous respects to comport with the letter and spirit of the Remand Order and state law. Also, approving the tariff would divest the Commission of the ability under state law to require unbundling of high-capacity facilities in the absence of federal requirements, such as if the TRRO is invalidated — as Verizon has asked the D.C. Circuit to do. Finally, the Commission should disregard the fiber collocations of MCI and its affiliates in determining which wire centers satisfy the non-impairment triggers for high-capacity loops and dedicated transport.

1. The Proposed Revisions Fail to Comport with the Remand Order and State Law.

A. Verizon's Filing Circumvents the § 252 Process that the Remand Order Contemplates.

The Remand Order established "that incumbent LECs and competing carriers will implement the Commission's findings as directed by 47 U.S.C. § 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order." Remand Order, ¶ 233. Typically, under a Section 252 process, incumbents and CLECs would first negotiate the specific terms and conditions regarding access to UNEs in

accordance with the FCC's new unbundling rules (arbitrating disagreements if necessary), then implement these terms through interconnection agreement amendments. Verizon's tariff filing usurps this process by precluding negotiation of key issues under the Remand Order.

For example, Verizon's proposed revisions generally state that it will not provide the affected UNEs "to an extent beyond that required by [the applicable subsections of 47 C.F.R. § 51.319] as in effect on and after March 11, 2005." *E.g.,* Proposed Part B, § 2.1.1.B.1 (regarding DS1 Transport); Part B, § 2.1.1.C.1 (regarding DS3 Transport); Part B, § 5.3.1.B.1 (regarding DS1 Loops); Part B, § 2.1.1.C.1 (regarding DS3 Loops); Part B, § 2.1.1.B.1 (regarding DS1 Transport); Part B, § 10.1.1.B.1 (regarding Dark Fiber Loops); and Part B, § 10.1.1.C.1 (regarding Dark Fiber Dedicated Transport). To determine the particular limitations on Verizon's obligation to provide UNEs, Verizon's tariff would require "review of lists to be provided by [Verizon] on its wholesale web site of the central offices that meet specified criteria relating to the number of business lines that are served and the number of fiber-based collocators that are present." *E.g.,* Proposed Part B § 2.1.1.E (regarding DS1 or DS3 Transport); § 5.3.1.E (regarding DS1 or DS3 Loops); and Proposed Part B § 10.1.1.E (regarding Dark Fiber Transport).

The wire centers where high-capacity loops and dedicated transport will or will not be provided clearly is a critical issue that a CLEC would seek to negotiate with Verizon, and seek a ruling from the Commission if the parties were unable to agree. This is the method of implementation delineated by the FCC in its Remand Order, at ¶ 253. It is inconceivable that a CLEC would allow Verizon unilaterally to dictate — and, apparently, change at will — the list of wire centers where these various elements must be unbundled. The Commission, therefore, should reject Verizon's attempt to circumvent the § 252 process, by rejecting the tariff or suspending it to allow the negotiation process to occur.[1]

B. Verizon's Proposed Revisions Violate Rhode Island General Laws § 39-3-11 and Part Two, § 2.1 et seq. of the Commission's Rules of Practice and Procedure

In addition, Verizon's proposed tariff revisions violate state law. Rhode Island General Laws § 39-3-11 and Part Two, § 2.1 et seq. of the Commission's Rules of Practice and Procedure require that Verizon file tariffs that plainly state the rates, charges, terms, and conditions of the services it renders.

Verizon's proposed revisions are overtly vague and fail to satisfy the requirement that its tariffs specify plainly the rates, charges, terms, and conditions or service. First, Verizon fails to specify the various wire centers where a CLEC may obtain DS1 and DS3 loops and DS1, DS3, and dark fiber transport. Instead, Verizon's proposed tariff merely refers to undisclosed "lists" that Verizon has prepared, using methodology that it has not explained or justified. Thus, it is

[1] It is possible that particular interconnection agreements would require or permit implementing the TRRO solely through tariff amendments instead of negotiation and arbitration. Even in such cases, however, Verizon's tariff filing is flawed and should be rejected.

impossible to determine from the face of the tariff where a CLEC may obtain these UNEs — the information crucial to a CLEC's operations. A tariff that omits such critical information simply does not contain the terms and conditions of service.

Similarly, proposed tariff sections purport to allow Verizon to back-bill for the difference between the UNE rate and "the rate that would otherwise be charged for the use of that element," if Verizon can show that it was not required to provide the UNE in question in the particular wire center. *E.g.*, Proposed Part B § 2.1.1.E (regarding DS1 or DS3 Transport); § 5.3.1.E (regarding DS1 or DS3 Loops); and Proposed Part B § 10.1.1.E (regarding Dark Fiber Transport). The tariff does not specify the "rate that would otherwise be charged" or provide information on how to calculate it.

Verizon's proposed revisions also violate Rhode Island General Laws § 39-3-11 and Part Two, § 2.1 et seq. of the Commission's Rules of Practice and Procedure by allowing Verizon to change the list of wire centers, and thereby the rates, terms, and conditions of service, without prior notice to the Commission or anyone else. Since the tariff only vaguely refers to the list of wire centers "to be provided by [Verizon]" where various UNEs are available, merely by changing the list Verizon would be able to change the rate for the service from the Commission-established TELRIC rate to a "rate that would otherwise be charged." This is not permissible under Rhode Island state law.

C. Verizon's Proposed Revisions Lead to Inefficient and Inequitable Results.

Verizon's proposed tariff revisions anoint it, as a practical matter, as the sole judge of which wire centers satisfy the non-impairment criteria based on numbers of business lines and fiber-based collocators. Verizon's failure to include in the tariff the list of wire centers that Verizon claims satisfy the non-impairment criteria prevents the Commission and CLECs from assessing, and the Commission from determining, its accuracy prior to its implementation. The Commission will be relegated to arbitrating disputes between Verizon and individual CLECs in connection with particular UNE provisioning orders. This "onesie-twosie" approach is astoundingly inefficient.[2]

The list of wire centers satisfying the FCC's criteria is objectively verifiable; Verizon should submit it for Commission review and approval now. Verizon's attempt to hide the ball, through a tariff provision that merely seeks to implement a self-sponsored list, would cause unjustified uncertainty and lead to wasteful and duplicative proceedings to determine a final and objective list of wire centers that meet the FCC's standards. Competition will be chilled as a result, as Verizon unnecessarily drives up a CLECs costs. The Commission can foster a greater level of certainty and efficiency if the Commission and CLECs *1)* scrutinize that list, *2)*

[2] Verizon's failure to include the list of wire centers also may be an inappropriate way to shift the burden of proof regarding the tariff and its terms and conditions. Typically, Verizon has the burden of proof to justify its tariff proposal. It is not clear who has the burden in a dispute over provisioning of a single UNE.

investigate Verizon's methodology, and then *3)* implement whatever refinements are required to derive a final list of wire centers that meet the FCC's criteria – to be specified in compliance tariff filings, if necessary.

Just two days ago the Maine Commission addressed this very issue by requiring Verizon to file, in the Maine Commission's ongoing wholesale tariff proceeding, the back-up information showing how its list of wire centers was calculated. The Maine Commission recognized that it will be responsible for resolving disputes over wire center qualification under the new rules, and therefore took the initiative to review Verizon's methodology and data in advance. *See* Maine PUC Docket No. 2002-682, Procedural Order dated Feb. 28, 2005 (copy attached).

The same rationale used by the Maine Commission carries even more force here. In Maine, a wholesale tariff analogous to PUC RI No. 18 is not currently in effect. Here, there is an effective tariff and Verizon is seeking to amend it. The Commission can reduce confusion and the transaction costs of individual provisioning disputes by examining Verizon's categorization of wire centers in connection with review of the proposed tariff revisions.

D. Verizon's Tariff Proposal Places an Inappropriately High Burden on the CLEC.

Verizon's proposed requirement that a CLEC undertake a "diligent inquiry" is inappropriately restrictive. The Remand Order requires that a CLEC undertake a "*reasonably* diligent inquiry" before submitting its request for a UNE. *See* TRRO, ¶ 234. Verizon's formulation, therefore, places an inappropriately high burden of diligence on CLECs. This burden is compounded by Verizon's failure to provide any support or data that shows how Verizon calculates its list of wire centers.

E. The Proposed Tariff's Cap on DS1 Dedicated Transport Fails to Comply with the TRRO's Requirements.

Proposed Part B § 2.1.1.B.1 excessively restricts a CLEC's right to obtain dedicated DS1 transport circuits. That provision states that "a requesting [CLEC] may not obtain more than ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis."

Verizon's proposal is overly broad. Verizon's cap applies on every route where DS1 transport is available; but the TRRO's cap on DS1 circuits applies *only* on routes where Verizon is not required to unbundle DS3 dedicated transport. On this point the Remand Order is clear: "*On routes for which we determine that there is no unbundling requirement for DS3 transport,* we limit the number of DS1 transport circuits that each carrier may obtain *on that route* to 10 circuits." TRRO, ¶ 128 (emphasis added). The TRRO does not specify a cap on DS1 dedicated transport circuits on routes where DS3 unbundling also is required. The Commission should modify the tariff's DS1 cap to comport with paragraph 128 of the Remand Order.

2. Verizon's Tariff Would Inappropriately Strip the Commission of Its Authority to Fill the Gap in the Absence of Federal Unbundling Requirements.

Verizon's proposed tariffs explicitly disavow any obligation to unbundle UNEs such as DS1, DS3, and dark fiber dedicated transport and DS1 and DS3 loops "to an extent beyond that required by [specifically listed FCC regulations] as in effect on or after March 11, 2005." Proposed Part B, § 2.1.1.B.1 (regarding DS1 Transport); Part B, § 2.1.1.C.1 (regarding DS3 Transport); Part B, § 5.3.1.B.1 (regarding DS1 Loops); Part B, § 2.1.1.C.1 (regarding DS3 Loops); Part B, § 2.1.1.B.1 (regarding DS1 Transport); Part B, § 10.1.1.B.1 (regarding Dark Fiber Loops); and Part B, § 10.1.1.C.1 (regarding Dark Fiber Dedicated Transport). Thus, under the proposed tariff, in the absence of the specified federal requirements, Verizon's unbundling obligations would immediately cease.

This is hardly a speculative concern. On February 14, just ten days after the FCC released the TRRO, Verizon and the other BOCs filed a "supplemental petition for mandamus" seeking to invalidate the FCC's unbundling rules for high-capacity loops and transport. *United States Telecom Association v. FCC,* Nos. 00-1012 *et al.,* Supplemental Petition for a Writ of Mandamus to Enforce the Mandate of This Court (filed Feb. 14, 2005). On February 24, 2005 Verizon has also filed an appeal to the D.C. Circuit Court seeking review of the TRRO. As the Commission knows, Verizon has in the past successfully obtained a *vacatur* of the FCC's unbundling rules. They are actively seeking to do just that, again.

If the D.C. Circuit grants the relief Verizon seeks, the proposed tariff would permit Verizon to discontinue providing high-capacity facilities immediately, since the unbundling rules referenced in Verizon's tariff could be vacated. By approving the tariff, the Commission would give advance approval to such a disastrous Verizon action. The Commission, in effect, will have decided through a state-law tariff that Verizon's unbundling obligations go no further than the FCC's regulations.

This issue of the extent of the Commission's state-law authority to order unbundling of loops and transport in the absence of Section 251 derived federal law currently is under debate in various Commission proceedings. Nevertheless, this Commission has recognized that it has independent state law to order unbundling in the absence of federal law. See, e.g., Orders Nos. 18036, 16183 and 16012 (regarding UNE-P). However, by accepting Verizon's proposed tariff language, the Commission would concede Verizon's position that there is no state unbundling authority for loops and transport beyond express FCC requirements set forth in regulations adopted under only one source of federal authority – Section 251. The Commission should delete the tariff provisions that link the provision of DS1 and DS3 loops and DS1, DS3, and dark fiber dedicated transport *solely* to these Section 251 derived FCC regulations.

Deleting those tariff provisions does not require the Commission to decide that it does have authority to order unbundling independent of the FCC regulations. Deleting those provisions merely gives the Commission the option to make that determination at a later time. On the other hand, by adopting Verizon's provisions, the Commission would abdicate any

possibility of requiring unbundling in the absence of federal requirements. The Commission should keep its options open.

3. The Commission Should Disregard MCI and Its Affiliates in Determining the Number of Fiber-Based Collocators in a Given Wire Center.

The Commission should not count MCI and its affiliates, including but not limited to Brooks Fiber and MFS, as fiber-based collocators in a wire center for purposes of determining where Verizon must unbundle DS1 and DS3 high capacity loops and DS1, DS3, and dark fiber dedicated transport. According to the FCC's regulations, as amended by the TRRO, "[a] fiber-based collocator is any carrier, *unaffiliated with the incumbent LEC*, that maintains a collocation arrangement in an incumbent LEC wire center" satisfying certain conditions. 47 C.F.R. § 51.5, as amended by the TRRO (emphasis added).[3] In light of MCI's recent agreement to be acquired by Verizon, MCI no longer should be considered "unaffiliated."[4] The Commission should disregard its and its affiliates' fiber collocation arrangements in applying the unbundling standards.

The determination to include or exclude MCI could have an enormous effect on the amount of competition based on unbundled high-capacity loops and dedicated transport in the State. Brooks Fiber and MFS were early and extensive collocator in Rhode Island. Given that a single fiber collocator can be the difference in whether a wire center does or does not meet the non-impairment trigger for a particular loop or transport network element, counting MCI/Brooks/MFS collocation arrangements could result in unbundling of these elements at substantially fewer wire centers than if MCI/Brooks/MFS collocations were excluded.

Verizon no doubt will argue that unless and until the transaction closes, Verizon and MCI are separate corporations that should be treated as such in the unbundling analysis. Further, Verizon will probably point out that many obstacles must be overcome before the merger is consummated and claim that there is no guarantee that the deal will close. To treat Verizon and MCI as one, Verizon likely will argue, would require continued unbundling of high-capacity loops and dedicated transport in wire centers that facially satisfy the FCC's non-impairment triggers.

The flaw in Verizon's argument is that once removed from the list of wire centers where Verizon must unbundle high-capacity loops and/or dedicated transport, it is unclear if a wire center can be put back *on* the list after the merger closes. Even if it could, the harm to CLECs

[3] Under § 51.5, the term "affiliate" is defined by 47 U.S.C. § 153(1): "The term 'affiliate' means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent."

[4] Similarly, to the extent AT&T and SBC have fiber collocations in the same wire center, they together should be counted as only one fiber collocator. Under 47 C.F.R. § 51.5, "Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator."

from eliminating numerous wire centers from the "impaired" category and restoring them some time later would be far greater than the harm to Verizon from continued unbundling in anticipation of the merger. Simply put, eliminating a wire center from high-capacity loop or dedicated transport unbundling for a year or more while the merger works its way through the investment banking, shareholder approval, and regulatory processes could devastate competition in that geographic area. A CLEC's inability to obtain unbundled loops or transport could result in a loss of customers (and revenue) that will be impossible to recoup once the wire center is re-listed after merger closing. Such customer and revenue losses likely would be irreversible.

Having announced the merger, Verizon and MCI will go to great lengths and expend great resources to conclude it. The Commission should conservatively assume that they will succeed. The Commission should not count the fiber collocations of MCI and its affiliates toward the non-impairment triggers for high-capacity loops and dedicated transport.

4. Conclusion

The Commission should reject Verizon's proposed tariff revisions, or should suspend and investigate them in light of the issues raised above. Among other things, the Commission should suspend the application of the tariff until good faith negotiations are concluded, pursuant to the implementation plan established by the FCC in its Remand Order. At least, the Commission should suspend the Verizon proposed tariff and order Verizon to include the list of wire centers supposedly subject to the non-impairment triggers in the tariff filing, to allow CLECs and the Commission an opportunity to verify the accuracy of that list. Also, the Commission should exclude MCI and its affiliates when counting the fiber-based collocators in a given wire center.

Thank you for the opportunity to comment. If you or the Staff have any questions, please contact me at 401-834-3370 direct dial or at ashoer@conversent.com.

Respectfully Submitted,

Alan M. Shoer
Director, Regulatory Affairs and Counsel

CC: Alexander Moore, Assistant General Counsel – VZ/RI
Theresa O'Brien – Verizon/RI

Enclosure - (Maine Procedural Order)

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

VERIZON-MAINE
Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)

February 28, 2005

PROCEDURAL ORDER

On February 4, 2005, the Federal Communications Commission (FCC) issued its *Triennial Review Order Remand Order (TRO Remand)*. In its Order, the FCC eliminated certain unbundling requirements and established new business line count criteria for access to certain loop and transport UNEs. (*TRO Remand* at ¶ 5.) The FCC stated that CLECs may self-certify that a particular route or wire center does not meet the FCC's criteria when ordering the particular UNE. *TRO Remand* at ¶ 234. According to the FCC, the ILEC is obligated to fill the CLEC's order even if it disagrees with the CLEC's certification. *Id*. If the ILEC disagrees with the CLEC, it can dispute the matter with the state commission through the arbitration dispute process. *Id*.

On February 18, 2004, in response to a request by the FCC, the RBOCs filed letters with the FCC indicating which rate centers in their territories meet the FCC's criteria. On February 24, 2005, I requested that Verizon provide me with a copy of its letter to the FCC. (The request was made as a general matter, I had not determined at that point that inclusion in any particular docket was appropriate.) On that same day, counsel for Verizon forwarded to me a copy of the letter to the FCC via e-mail. (A copy of the e-mail and letter are attached.) In its letter, Verizon asserted that four wire centers in Maine (Augusta, Bangor, Lewiston, and Portland) meet the new criteria.

The FCC's new rules go into effect on March 11, 2005. Verizon has asserted via an Industry Letter dated February 10, 2005, that it will stop accepting orders for UNEs de-listed by the FCC on March 11th. Because we anticipate some confusion regarding implementation of the new rules and because we will be responsible for resolving any disputes regarding wire center qualification under the FCC's new rules, we find it necessary at this time to request that Verizon provide data to back-up the assertions made in the February 18, 2005 letter to the FCC. Specifically, we order Verizon to provide the work papers used to develop the Maine section of the February 18, 2005 letter by **March 4, 2005.** Verizon should include in its back-up information indicating how the lines were counted, whose lines were counted, the date of the line count, whether the data was derived from any publicly available data, how "wire centers" were

defined, and which particular switches and/or central offices were included in each wire center's totals. Verizon should also clarify whether it believes that its filing with the FCC preempts a CLEC from self-certifying in the four wire centers listed for Maine.

BY ORDER OF THE HEARING EXAMINER

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Trina M. Bragdon