Via Electronic Mail and Overnight Mail

April 1, 2005

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

Re: Verizon Rhode Island Proposed Revisions to PUC Tariff No. 18 (filed on February 18, 2005).

Dear Ms. Massaro:

On behalf of Conversent Communications of Rhode Island, LLC, please find enclosed an original and nine (9) copies of Conversent's alternative language proposal regarding Verizon's tariff implementing the FCC's Triennial Review Remand Order.

Please contact me if you have any questions regarding this filing.

Respectfully submitted,

Alan M. Shoer
Director – Regulatory Affairs
401-834-3370
ashoer@conversent.com

CC: Alexander Moore, Esq.

BEFORE THE STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

In Re: Verizon Rhode Island Proposed Revisions to PUC Tariff No. 18 filed On February 18, 2005	)	Docket No. 3662

CONVERSENT COMMUNICATIONS OF RHODE ISLAND, LLC'S ALTERNATIVE LANGUAGE PROPOSAL REGARDING VERIZON'S TARIFF IMPLEMENTING THE FCC'S TRIENNIAL REVIEW REMAND ORDER

In accordance with the procedural schedule set in this matter, Conversent Communications of Rhode Island, LLC ("Conversent") submits the following necessary revisions to the language contained in Verizon Rhode Island's ("Verizon's") February 18, 2005 amendments to Verizon's PUC RI No. 18. The Commission has allowed Verizon's TRRO tariff changes to go into effect on an interim basis, subject to further investigation to determine whether the wording of the proposed tariff needs to be revised, in order to properly reflect 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"). Conversent provides the following recommended changes, in order to properly implement the FCC's TRRO.

1. **Verizon's TRRO Tariff Should List The Wire Centers Subject to Unbundling Relief and Not Merely Refer The CLEC to a Verizon Web Page or Other List Not Approved By The Commission.**

Verizon Proposed Language:

[Unbundled IOF Transport] – Pursuant to the Order on Remand issued by the Federal Communications Commission on February 4, 2005, in WC Docket No. 04-313 and CC

Docket No. 01-338 (the "Triennial Review Remand Order"), and the regulations promulgated by the FCC pursuant to that order, a CLEC's submission to the Telephone Company of an order for unbundled DS-1 or Ds-3 dedicated transport shall constitute a certification that, to the best of the CLEC's knowledge based on diligent inquiry, the order is consistent with the restrictions set forth in Part B, Sections 2.1.1.B.1 and 2.1.1.C.1, above, and that the CLEC is entitled to unbundled access to the network element or elements ordered. Such diligent inquiry shall include review of lists to be provided by the Telephone Company on its wholesale web site of the wire centers that meet specified criteria relating to the number of business lines that are served and the number of fiber-based collocators that are present . . . . Part B; Section 2.1.1.E.

[High Capacity Loops] – Pursuant to the Order on Remand issued by the Federal Communications Commission on February 4, 2005, in WC Docket No. 04-313 and CC Docket No. 01-338 (the "Triennial Review Remand Order"), and the regulations promulgated by the FCC pursuant to that order, a CLEC's submission to the Telephone Company of an order for unbundled DS-1 or Ds-3 loop shall constitute a certification that, to the best of the CLEC's knowledge based on diligent inquiry, the order is consistent with the restrictions set forth in Part B, Sections 5.3.1.B.1 and 5.3.1.C.1, above, and that the CLEC is entitled to unbundled access to the network element or elements ordered. Such diligent inquiry shall include review of lists to be provided by the Telephone Company on its wholesale web site of the wire centers that meet specified criteria relating to the number of business lines that are served and the number of fiber-based collocators that are present. . . . . Part B; Section 5.3.1.E.

[Dark Fiber Transport] – Pursuant to the Order on Remand issued by the Federal Communications Commission on February 4, 2005, in WC Docket No. 04-313 and CC Docket No. 01-338 (the "Triennial Review Remand Order"), and the regulations promulgated by the FCC pursuant to that order, a CLEC's submission to the Telephone Company of an order for unbundled dark fiber dedicated transport shall constitute a certification that, to the best of the CLEC's knowledge based on diligent inquiry, the order is consistent with the restrictions set forth in Part B, Sections 10.1.1.C.1, above, and that the CLEC is entitled to unbundled access to the network element or elements ordered. Such diligent inquiry shall include review of lists to be provided by the Telephone Company on its wholesale web site of the wire centers that meet specified criteria relating to the number of business lines that are served and the number of fiber-based collocators that are present. . . . . Part B; Section 10.1.1.E.

Conversent Alternative Language:[1]

[Unbundled IOF Transport] – Pursuant to the Order on Remand issued by the Federal Communications Commission on February 4, 2005, in WC Docket No. 04-313 and CC Docket No. 01-338 (the "Triennial Review Remand Order"), and the regulations promulgated by the FCC pursuant to that order, a CLEC's submission to the Telephone

[1] Conversent's alternative language is highlighted in these Comments ***through bold and italicized type face.***

Company of an order for unbundled DS-1 or Ds-3 dedicated transport shall constitute a certification that, to the best of the CLEC's knowledge based on a ***reasonably*** diligent inquiry, the order is consistent with the restrictions set forth in Part B, Sections 2.1.1.B.1 and 2.1.1.C.1, above, and that the CLEC is entitled to unbundled access to the network element or elements ordered. ***Such diligent inquiry shall include review of Appendix ___ to this tariff, which identifies the wire centers that are in the Telephone Company's service area in Rhode Island that meet the non-impairment tests for DS1 or DS-3 dedicated transport under the standards set forth in the Triennial Review Remand Order. . . .*** Part B; Section 2.1.1.E.

[High Capacity Loops] – Pursuant to the Order on Remand issued by the Federal Communications Commission on February 4, 2005, in WC Docket No. 04-313 and CC Docket No. 01-338 (the "Triennial Review Remand Order"), and the regulations promulgated by the FCC pursuant to that order, a CLEC's submission to the Telephone Company of an order for unbundled DS-1 or Ds-3 loop shall constitute a certification that, to the best of the CLEC's knowledge based on a ***reasonably*** diligent inquiry, the order is consistent with the restrictions set forth in Part B, Sections 5.3.1.B.1 and 5.3.1.C.1, above, and that the CLEC is entitled to unbundled access to the network element or elements ordered. ***Such diligent inquiry shall include review of Appendix ___ to this tariff, which identifies the wire centers that are in the Telephone Company's service area in Rhode Island that meet the non-impairment tests for DS1 or DS-3 Loops under the standards set forth in the Triennial Review Remand Order. . . .***.Part B; Section 5.3.1.E.

[Dark Fiber Transport] – Pursuant to the Order on Remand issued by the Federal Communications Commission on February 4, 2005, in WC Docket No. 04-313 and CC Docket No. 01-338 (the "Triennial Review Remand Order"), and the regulations promulgated by the FCC pursuant to that order, a CLEC's submission to the Telephone Company of an order for unbundled dark fiber dedicated transport shall constitute a certification that, to the best of the CLEC's knowledge based on a ***reasonably*** diligent inquiry, the order is consistent with the restrictions set forth in Part B, Sections 10.1.1.C.1, above, and that the CLEC is entitled to unbundled access to the network element or elements ordered. ***Such diligent inquiry shall include review of Appendix ___ to this tariff, which identifies the wire centers that meet the non-impairment tests for dark fiber dedicated transport under the standards set forth in the Triennial Review Remand Order. . . .*** . Part B; Section 10.1.1.E.

DISCUSSION: According to the TRRO, CLECs are supposed to independently determine whether they can still place orders for certain loop and transport UNEs at TELRIC based prices. TRRO at § 234. Verizon has sent out notices that, like its proposed tariff, merely point a CLEC to Verizon prepared "lists" posted on its web page. 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).

Under our interconnection agreement, any dispute over the listing of a particular wire center would be submitted to this Commission for resolution; however, the TRRO makes clear that if Verizon challenges a CLEC UNE request, Verizon "must provision the UNE and subsequently bring any dispute regarding access to the UNE before a state commission or other appropriate authority." TRRO at ¶ 234. Still, the date that Verizon uses for defining a relevant wire center is important, since the billing changes that may result will be set on that date.

Also, since Verizon may make changes to the list of wire centers, and wire centers can be added to the list or upgraded to a different classification, there is a need for the applicable wire centers to be part of an official record, with sufficient notice and approved dates.[2] Verizon must not be authorized to be the arbiter and keeper of the official list of wire centers outside of its official tariffs as this would allow Verizon to effectively change the applicable rate by changing the lists without official notice and approval by the Commission through a tariff change.

---

[2] For example, Conversent has been notified by Verizon that Verizon made an error in originally listing the Augusta, Maine wire center on its list, and Verizon is seeking to remove that wire center. This shows that Verizon cannot be trusted with the sole authority to declare which wire centers meet the applicable impairment standards. Errors will be made, and therefore an official record, through this tariff, must established in order to derive a final list of wire centers and effective dates that can be objectively relied upon.

For example, just recently, the New York Commission recognized this flaw in Verizon's similar proposed tariff in New York:

> Without the official records provided through tariffing, effective dates could be questioned. If the affected wire centers are included in the tariff, then there will be specific effective dates that can be used in order to resolve disputes that are allowed under the TRRO. These could result in true-ups that can be done more efficiently with 'bright line' effective dates.

Ordinary Tariff Filing of Verizon New York, Inc. to Comply with FCC's Triennial Review Order on Remand, Case No. 05-C-0203 (Order Implementing TRRO Changes, dated March 16, 2005), at pp. 8-9.

As a result of the New York Commission's Order, Verizon filed amended tariff language in New York on March 18, 2005. Conversent's alternative language is similar to what Verizon filed in this amended New York TRRO tariff. *See Verizon New York PSC No. 10, Section 5.1.1.1.C.1.d and Appendix E* (Issued March 18, 2005 for effective date of March 28,2005). Accordingly, Verizon should have little, if any, objection since this language is similar to what Verizon filed in its compliance filing in its New York tariff. Conversent's alternative language would require the applicable wire centers to be listed, as approved by the Commission, in this tariff. This would ensure adequate notice and process and would eliminate unnecessary argument over the effective date applicable to a particular wire center.

Finally, as with the New York and Maine Commissions, Verizon should also be required to file its supporting documentation with the Commission and its Staff for review and analysis. This will assist in the event of a conflict or dispute. Any subsequent changes should also be provided to the Commission by way of a supplemental tariff filing, with supporting documents provided to the Commission.

2. Verizon's TRRO Tariff Should Provide A Ten DS-1 Cap To A CLEC's Ability To Order DS1 Dedicated Transport Only On Routes Where Verizon Is No Longer Is Required To Provide DS-3 Unbundled Transport.

Verizon Proposed Language:

[For DS1 Dedicated Transport] -- Limitations on Unbundling Obligation - ……. Moreover, pursuant to 47 C.F.R. 51.319(e)(2)(ii)(B) as in effect on an after such date, a requesting CLEC may not obtain more than 10 unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

Conversent Proposed Language: :

[For DS1 Dedicated Transport] -- Limitations on Unbundling Obligation - ……. Moreover, pursuant to 47 C.F.R. 51.319(e)(2)(ii)(B) as in effect on and after such date, a requesting CLEC may not obtain more than 10 unbundled DS1 dedicated transport circuits on each route ***where there is no DS3 unbundling obligation imposed on the Telephone Company by the Triennial Review Remand Order.***

DISCUSSION: Proposed Part B § 2.1.1.B.1 of Verizon's proposed tariff excessively restricts a CLEC's right to obtain dedicated DS1 transport circuits. Verizon's proposed tariff would place a ten unbundled DS1 dedicated transport circuits limit *on each and every route* where DS1 dedicated transport is available on an unbundled basis. However, the FCC established that the TRRO cap on DS1 circuits should apply *only on routes where Verizon is not required to unbundle DS3 dedicated transport*. This is not the same as on each and every route where DS1 dedicated transport must be provided as a Section 251 UNE. 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* to10 circuits.

TRRO, ¶ 128 (emphasis added). Therefore, the Commission should modify the tariff's DS1 cap to comport with paragraph 128 of the Remand Order.

Verizon has made this same error in other state tariff filings, including New York. There, in support of its more expansive tariff provision, Verizon argued that the FCC's TRRO and its implementing rules are ambiguous or inconsistent. Verizon argued there (and may argue here) that the FCC's implementing rules, found at 51.319(e)(2)(ii)(B), do not specify that application of the cap *only* to DS-3 transport routes, and that this presents a conflict with the contrary determination limiting the cap just to the DS3 routes, as described in the text of the Order itself, at ¶ 128. When confronted with just this situation, the New York Commission noted that the Commission must review the TRRO as a whole to determine what the FCC intended when it imposed a 10 DS1 circuit cap.

> We read the TRRO as a whole as intending to apply [the DS-1 cap] only where the FCC found non-impairment for DS3 transport. That is the most logical and reasonable interpretation of the FCC's actions. Verizon is directed to modify its tariff accordingly.

Ordinary Tariff Filing of Verizon New York, Inc. to Comply with FCC's Triennial Review Order on Remand, Case No. 05-C-0203 (Order Implementing TRRO Changes, dated March 16, 2005), at pp. 13-14.

The New York Commission was correct to look to the text of the Order for guidance, as this represents the FCC's interpretation of its rules. In such case, courts have held that a reviewing entity 'must defer to an agency's reading of its own regulations unless that reading is plainly erroneous or inconsistent with the regulations." *Ranger Cellular v. FCC*, 348 F.3d 1044, 1052 (D.C. Cir. 2003)(citations and internal quotations omitted); See also *Andre Laus et al. v. CRMC*, R.I. Sup. Ct. Decision, dated May 30, 1989 (citing *Citizens Savings Bank v. Bell*, 605 F.Supp. 1033, 1041 (D.R.I.

1985) (agency interpretations of its own guidelines is given controlling weight unless determined to be clearly erroneous or inconsistent with law).

The FCC's and the New York Commission's interpretation of the FCC rules is in no way inconsistent with the actual rules, but applies the rule in the manner intended by the FCC's TRRO, and as explained by the FCC itself in its own orders. The New York Commission was correct that Verizon's proposed tariff did not fully implement the intent of the FCC in its application of the 10 DS1 cap. As a result of the New York Commission's ruling against Verizon's proposed tariff Verizon filed a compliance tariff in New York on March 18, 2005. Verizon's compliance tariff filing there corrected its earlier error and clarified that the 10 DS1 cap should apply *only on routes where Verizon is not required to unbundle DS3 dedicated transport. See Verizon New York PSC No. 10, Section 5.1.1.1.C.3.b.i* (Issued March 18, 2005 for effective date of March 28,2005). Since Verizon corrected its error in its New York tariff it should have no reason to object to a similar correction in its Rhode Island wholesale tariff. Therefore, this Commission should also require Verizon to amend this provision to limit the 10 DS1 circuit cap to just those routes where the FCC found non-impairment for DS3 transport.

3. **Verizon's TRRO Tariff Should Preserve Unbundling Obligations That Exist Under Other Applicable Laws Beyond Section 251 UNEs, Such As Continued Access to Loops and Transport Under Section 271, Or As Available Under Independent State Law.**

Verizon Language Proposal:

Verizon's proposed revisions 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).

Conversent Alternative Language Proposal:

[Verizon] will not provide the affected UNEs "to an extent beyond that required by ***47 U.S.C. Section 251 and [47 C.F.R. 51.319] unless continued access to Verizon's network is required by applicable law***." 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).

DISCUSSION: Verizon's proposed tariff provisions for all these loop and transport UNEs assume that there is one – and only one – source of unbundling authority available to CLECs, as set forth in the relevant subsections of 47 C.F.R. § 51.319. This is not the case. As discussed below, there are additional sources authority requiring Verizon to provide unbundled access to parts of its network, and these additional sources of authority should not be foreclosed by these tariff provisions, nor should this tariff preclude the Commission from evaluating where and under what circumstances continued access to Verizon's network by competitors is warranted.

The addition of the requirement to require access where "by applicable law" is important for several reasons. Under Verizon's proposed tariff, the Commission needs to be concerned about what happens if Verizon's appeal of the FCC's new rules [regarding high capacity loops] in the TRRO (contained at 47 C.F.R. 51.319) are, as Verizon requests, vacated by the D.C. Circuit Court or another court.[3] If that should happen – and it has happened once after the TRO just last year -- there would be no federal rules in place, and, according to Verizon's proposed tariff language, *Verizon's unbundling obligations under any other conceivable authority would immediately cease*.

[3] On February 24, 2005 Verizon filed an appeal to the D.C. Circuit Court seeking review of the TRRO. Verizon seeks to have a court, again, vacate the FCC's unbundling rules as applied to high capacity loops and transport. Conversent understands that just recently the matter was in fact assigned to the D.C. Circuit Court for appeal.

This must not be authorized by the Commission. If an appeals court 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 just one of the FCC's regulations.

Moreover, there exist unbundling obligations imposed on Verizon beyond the rules set forth under Section 251 (as found in 47 C.F.R. 51.319), such as under state law and other federal statutory provisions, such as Section 271. For example, while Conversent takes no position regarding the continued availability of UNE-P in Rhode Island, Conversent notes that the Commission has ruled that it has independent state law authority to require unbundling in areas that are not preempted by operation of federal law. See, e.g., Orders Nos. 18036, 16183 and 16012 (regarding UNE-P).

Such independent state action is fully supported by law. As the Supreme Court has said, the statute was "designed to give aspiring competitors every possible incentive to enter local retail telephone markets." *Verizon Communications Inc. v. FCC,* 535 U.S. 467, 489 (2002). The Act "grant[s] . . . 'most promiscuous rights' . . . to competing carriers vis-à-vis the incumbents." *AT&T,* 525 U.S. at 397. State efforts to require unbundling where necessary and not in conflict with federal laws does not *prevent* implementation the Telecommunications Act; such efforts would *promote* it. Indeed, Congress explicitly authorized this Commission's authority to require unbundling pursuant to the 1996 Act's saving clause:

> In prescribing and enforcing regulations to implement the requirements of this section, the 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.

47 U.S.C. § 251(d)(3). If the Commission were to order Verizon to unbundle loop and transport network elements in the absence of federal requirements, such state unbundling rules would, therefore, not impose "inconsistent" requirements.[4]

A highly relevant example is in the continued ability of Conversent to obtain access to Verizon's wholesale network in order to serve business customers (not mass market customers) in areas where there are no federal unbundling rules in place. For example, the FCC's FTTH rules clearly intended that the rules providing Verizon relief from unbundling FTTH and FTTC loops *was limited to such loops servicing mass market, residential customers.* The Commission must not allow Verizon to manipulate its TRRO tariff to prevent continued access to parts of Verizon's network where the FCC left the matter open for further unbundling relief by states, through continued unbundled access to Verizon fiber loops serving business (not "mass market") customers.

A closer examination of just this one point proves the danger in allowing Verizon's TRRO tariff to exclude any further unbundling that this Commission may deem appropriate. First, the very name of the network element — fiber to the *home* — shows that the FCC meant that to be exempt from the unbundling requirement, FTTH

[4] "Inconsistent" is defined as "not compatible with another fact or claim." *Merriam-Webster Online Dictionary,* www.m-w.com. State unbundling rules cannot be "not compatible" with federal rules if federal rules do not exist.

loops must serve residential end-users. In addition, the FCC's orders repeatedly demonstrate the FCC's intent to limit unbundling relief to fiber loops serving mass-market, residential customers.

The issue of fiber-to-the-home loops first arose in the Triennial Review Order. There, the FCC found that incumbent LECs were not required to unbundle FTTH loops. *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, ¶ 273 (Aug. 21, 2003) ("TRO"). In so doing, the FCC repeatedly referred to mass market, residential customers, and based its unbundling analysis on the costs and revenue potential of serving residential mass-market customers. For example, the FCC explained that the policy underlying its decision to grant FTTH unbundling relief was that "removing incumbent LEC unbundling obligations on FTTH loops will promote their deployment of the network infrastructure necessary to provide broadband service to the mass market." *Id.,* ¶ 278.

In addition, explaining why FTTH loops in new build ("greenfield") situations were to be governed by different rules than FTTH loops in overbuild situations, the FCC made clear that FTTH unbundling relief applied only in residential situations:

> With respect to new FTTH deployments (*i.e.*, so-called "greenfield" construction projects), we note that the entry barriers appear to be largely the same for both incumbent and competitive LECs – that is, both incumbent and competitive carriers must negotiate rights-of-way, respond to bid requests *for new housing developments*, obtain fiber optic cabling and other materials, develop deployment plans, and implement construction programs.
>
> . . .
>
> The record indicates that deployment of overbuild FTTH loops could act as an additional obstacle to competitive LECs seeking to provide certain

> services to the *mass market.* By its nature, an overbuild FTTH deployment enables an incumbent LEC to replace and ultimately deny access to the already-existing copper loops that competitive LECs were using to serve *mass market* customers.

Id., ¶¶ 275, 277 (emphasis added). FCC Commissioner Adelstein was explicit: "I supported unbundling relief [in the TRO] for the deployment of fiber loops *to single family homes* in greenfield developments . . . ." *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket 01-338, Order on Reconsideration, FCC 04-191, Statement of Commissioner Jonathan S. Adelstein Concurring in Part, Dissenting in Part (Aug. 9, 2004) ("MDU Reconsideration Order") (emphasis added).

By contrast, the FCC established that ILECs were not to use their relief from unbundling fiber and hybrid loops to deny competitors access to loops serving business customers, DS1 or other high capacity loops:

> DS1 loops will be available to requesting carriers, without limitation, regardless of the technology used to provide such loops. . . . The unbundling obligation associated with DS1 loops is in no way limited by the rules we adopt today with respect to hybrid loops typically used to serve mass-market customers.

Id., ¶ 325 n. 956. Subsequently, the FCC expanded the FTTH exemption to loops serving primarily residential multiple dwelling units (MDUs), holding that "to the extent fiber loops serve MDUs that are primarily residential in nature, those loops should be governed by the FTTH rules." *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket 01-338, Order on Reconsideration, FCC 04-191, ¶ 4 (Aug. 9, 2004) ("TRO Reconsideration Order"). In so doing, the FCC explained:

> [W]e conclude that the record here demonstrates that the same unbundling relief as provided for FTTH loops is warranted for such MDUs. In arriving at this conclusion, we are persuaded that making such a change in our rules is necessary to ensure that regulatory disincentives for broadband deployment are removed for carriers seeking to serve those customers – *residential customers* – that pose the greatest investment risk.

Id. ¶ 5 (emphasis added).

The FCC's intent to confine the FTTH exemption to mass market, residential customers is obvious in its ruling that the exemption applies to "multiple *dwelling* units" that are "primarily *residential* in nature."[5] Later, when the FCC expanded the exemption still further to FTTC loops, it said:

> In the *Triennial Review Order*, the Commission limited the unbundling obligations imposed on mass-market FTTH deployments to remove disincentives to the deployment of advanced telecommunications facilities in the mass market. We find here that those policy considerations are furthered by extending the same regulatory treatment to incumbent LECs' mass-market FTTC deployments. Similarly, just as we found no impairment with respect to mass market FTTH loops in the *Triennial Review Order*, we also find that the level playing field for incumbents and competitors seeking to deploy FTTC loops, and increased revenue opportunities associated with those deployments, demonstrates that requesting carriers are not impaired without access to mass market FTTC loops.

In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket 01-338, Order on Reconsideration, FCC 04-248, ¶ 2 (Oct. 18, 2004) (footnotes omitted) ("FTTC Reconsideration Order"). Further describing it's holding in the TRO, the FCC again repeatedly described its earlier grant of unbundling relief as applying to mass-market loops.

> In implementing the statutory unbundling requirements for mass-market local loops, we engage in a balancing test. . . . The Commission granted

[5] It is true that the unbundling relief granted to fiber loops serving primarily residential MDUs will also exempt some loops used to serve small businesses in those primarily residential MDUs. *See* MDU Reconsideration Order, ¶ 6 ("For example, a multi-level apartment building that houses retail stores such as a drycleaner and/or a mini-mart on the ground floor is predominantly residential, while an office building that contains a floor of residential suites is not."). This is an unfortunate side effect of the "overbroad and ill-conceived expansion of the Commission's exemption for fiber facility unbundling in the *Triennial Review*." MDU Reconsideration Order, Dissenting Statement of Commissioner Michael J. Copps.

> the greatest unbundling relief for dark or lit fiber loops serving mass market customers that extend to the customer's premises (known as fiber-to-the-home or FTTH loops) in new build or "greenfield" situations. For those loops, the Commission determined that no unbundling is required. However, where a FTTH loop is deployed in overbuild, or "brownfield," situations, the Commission determined that incumbent LECs must either provide unbundled access to a 64 kbps transmission path over the fiber loop or unbundled access to a spare copper loop. We noted that this "is a very limited requirement intended only to ensure continued access to a local loop suitable for providing narrowband services to the mass market in situations where an incumbent LEC has deployed overbuild FTTH and elected to retire the pre-existing copper loops."

Id., ¶¶ 5-6 (footnotes omitted). Finally, in the TRRO, the FCC said, "Further, in other orders, we have substantially limited unbundled access to fiber-to-the-home, fiber-to-the-curb, and hybrid loops used to serve the mass market." TRRO, ¶ 49.

Accordingly, the Commission needs to keep its options open as to whether to exercise independent authority to establish rules for continued access to Verizon's fiber network by competitors, such as Conversent, that seek to serve non-mass market business customers. The Commission must not countenance Verizon's attempt to limit its unbundling obligations to just 47 C.F.R. 51.319. To do so will greatly harm the market for telecommunications services serving small businesses. As FCC Commissioner Copps recently said:

> Small business is the engine that drives America's economy. We know that small businesses generate between two-thirds and three-quarters of all new jobs in this country. They represent way over 90 percent of all employers, and they produce over half of the nation's private sector output. . . . The Small Business Administration tells us that in metropolitan areas where most multi-tenant buildings are located, competitive carriers serve 29 percent of small businesses. Small business likes competition. It has voted with its pocketbook for competition. That is because small business has been a chief beneficiary of the enhanced services and lower prices that competition brings to market.

MDU Reconsideration Order, Dissenting Statement of Commissioner Michael J. Copps. Construing the exemptions narrowly will prevent further erosion of the small business telecommunications market.

Furthermore, preserving access to Verizon's network where authorized by "applicable law" would recognize the existence of Verizon's obligations to allow unbundled access to loops and transport pursuant to Section 271 of the 1996 Act. Under Section 271, Verizon remains obligated to provide continued unbundled access to local loops and local transport, including dark fiber transport. For example, there can be no serious question that dark fiber transport is included within checklist item 5 where the FCC has defined interoffice unbundled transport to include dark fiber.[6] Therefore, in order to comply with checklist item 5, Verizon must continue to provide the transport facilities that fall within the FCC's definition of interoffice transport, referred to as "interoffice transmission facilities" in the FCC's rules.

Verizon's obligation under checklist item 5 to provide the facilities within the definition of interoffice transmission facilities does not end where Section 251(c)(3) unbundling at TELRIC rates is no longer required under the TRRO. At that time, Verizon must continue to provide all of the same interoffice transmission facilities, including dark fiber, on just and reasonable rates, terms and conditions.[7] See 47 U.S.C. §

---

[6] *UNE Remand Order* ¶ 330 *reversed on other grounds United States Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) (the obligation to unbundle dedicated interoffice transport includes dark fiber); *TRO* ¶ 359 *reversed on other grounds United States Telecom Ass'n v. FCC*, Dkt No. 00-10012 and cons. cases (D.C. Cir. Mar. 2, 2004) ("We find on a national level that requesting carriers are impaired without access to unbundled dark fiber transport facilities."); n.1097 ("Dark fiber transport facilities… are transport facilities without any activated electronics."); 47 C.F.R. § 51.319(d)((1)(ii) (defining the "interoffice transmission facility network elements" to include "Dark fiber transport").

[7] *UNE Remand Order* ¶ 470 ("If a checklist network element does not satisfy the unbundling standard in section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a)").

271(c)(2)(B). There is no provision in the TRRO that seeks to remove Verizon's independent Section 271 unbundling obligations. ILECs, including Verizon and notwithstanding certain unbundling relief afforded by the FCC in the TRRO, remain "subject to a host of duties intended to facilitate market entry." *AT&T Corp.v. Iowa Utilities Board,* 525 U.S. 366, 371 (1999).[8]

The Commission should be guided by the fact that several state commission have required Verizon to preserve its Section 271 unbundling obligations in state wholesale unbundling tariffs. For instance, the New Hampshire Commission just recently agreed that the FCC clarified in the *TRO* that the removal of a UNE from the list of section 251 obligations because of a lack of impairment did not automatically resolve the question of whether an RBOC must still make that UNE available under section 271. *Verizon New Hampshire/Segtel, Inc., Proposed Revisions to Tariff NHPUC No. 84*, Order No. 24,442, Dated March 11, 2005 (citing *TRO* at ¶¶ 652-655).[9]

The New Hampshire Order reminds the Commission that in the TRO, the FCC stated that "the BOCs have an independent obligation under section 271 (c)(2)(B) to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at reasonable rates." *Id.* The New Hampshire Commission also pointed out that the FCC further concluded that RBOC obligations pursuant to section 271 are "not necessarily relieved based on any determination [by the FCC] under the section 251 unbundling analysis." *Id*. at ¶ 655. The FCC's conclusions in the TRO were

---

[8] Notably, Conversent's proposed contractual language does not necessarily require the Commission to rule that Verizon should unbundle any particular network elements under state law, or to identify what other network elements must be unbundled under Section 271 or state law. Conversent's provision merely preserves for the Commission the option to make that determination at a later date, while Verizon's proposed tariff language eliminates this option.

[9] Conversent is aware that Verizon has appealed the New Hampshire Order to the federal district court in New Hampshire.

reaffirmed in *USTA II.* *See USTA II,* 359 F.3d at 589-90. As the New Hampshire Commission ruled, determining whether UNEs provided under Section 271 remain as Verizon obligations under section 271 requires a case-by-case analysis.

The Maine Commission has reached similar conclusions, and has an open docket investigating Verizon's wholesale tariff and Section 271 unbundling responsibilities. See *Verizon-Maine Proposed Schedules Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21),* Docket No. 2002-682 (Orders Dated September 4, 2004, March 17, 2005 and Procedural Order Dated March 3, 2005) Verizon's language, on the other hand, completely ignores this independent source of unbundling authority.

Verizon has argued elsewhere that the FCC has afforded broad preemption rights to Verizon and thereby foreclosed independent state unbundling. Verizon is expected to rehash these arguments here, possibly citing the FCC's recent BellSouth declaratory ruling. *In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers,* WC Docket No. 03-251, Memorandum Opinion and Order and Notice of Inquiry, FCC 05-78 (Mar. 25, 2005) ("BellSouth Declaratory Order"). The Commission must not be fooled into believing Verizon's overbroad preemption approach. Nothing in the FCC's recent *BellSouth* declaratory ruling prohibits the Commission from leaving this option open. In that case, the FCC merely held that a state commission requirement that *directly contradicted* a determination made in the *Triennial Review Order* (specifically, a state requirement in essence that the ILEC unbundle the low-

frequency portion of the loop by requiring the ILEC to provide DSL over CLEC UNE loops) was preempted by federal law.

Accordingly, the FCC's *BellSouth* ruling does not support the notion that the Commission is prohibited from requiring unbundling under state law *where there has not been an express FCC ruling* on the issue, when the FCC has been silent, when a court has overturned or stayed FCC rules, or when there otherwise is a gap in FCC requirements. Indeed, it is hard to see how the FCC could take such a position in light of its explicit statement in its motion to stay the *USTA II* mandate that states have unbundling authority in the absence of FCC requirements. In its brief in support of its motion for further stay of the D.C. Circuit mandate in *USTA II,* here is what the FCC had to say about continued state unbundling authority:

> In the absence of binding federal rules, state commissions will be required to determine not only the effect of this Court's ruling on the terms of existing agreements *but also the extent to which mass market switching and dedicated transport should remain available under state law.*

United States Telecom Association v. FCC, Motion of the Federal Communications Commission to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari, May 24, 2004, at 9.

Thus, by accepting Verizon's proposed tariff language, the Commission would concede Verizon's position that there is no state or other federal unbundling authority beyond Rule 51.319. Simply put, the Commission should keep its options open, as other commissions are doing, as regards continued access to loop and transport arrangements, at just and reasonable prices established under either Section 271 or independent state laws. The Commission should reject Verizon's attempt to narrow the scope of its unbundling obligations unnecessarily through tariff language that invites mischief.

Conversent's proposal would give the Commission the flexibility to exercise state-law or § 271 authority to require unbundling of high-capacity loops and dedicated transport, if appropriate.[10]

By contrast, Verizon's proposed amendment would limit its unbundling obligations only to the extent affirmatively required by one explicit federal regulation.[11] Conversent's proposed language, with the insertion of "other applicable laws" as a potential source and recognition of other unbundling obligations, properly preserves Verizon's currently existing obligation to provide access to its wholesale network at just, reasonable and nondiscriminatory rates in accordance with all applicable laws, including other state and federal laws that are not implemented pursuant to Section 251 of the Telecommunications Act.

4. The Tariff Provisions Related To "Transition" Must Also Recognize That, Notwithstanding the Discontinuance of Certain Section 251 UNEs, Access to Verizon's Network Must Still Be Allowed Under Other Applicable Laws.

Verizon language proposal:

[For DS1 Transport] – "Transition Plan -- . . . Where the Telephone Company is not required to provide unbundled DS1 transport pursuant to Part B Section 2.1.1.B.1, above, requesting CLECs may not obtain new DS1 transport as unbundled network elements on or after March 11, 2005." Part B; Section 2.1.1.B.2.

[For DS3 Transport] - "Transition Plan -- . . . Where the Telephone Company is not required to provide unbundled DS3 transport pursuant to Part B Section 2.1.1.C.1, above, requesting CLECs may not obtain new DS3 transport as unbundled network elements on or after March 11, 2005." Part B; Section 2.1.1.C.2.

---

[10] This would include, for example, the right to order unbundling when there is an absence of federal rules and the right to set prices at just and reasonable rates for unbundled access to loops and transport that are no longer subject to unbundling under § 251.

[11] Again, Conversent takes no position regarding whether the Commission should require access to Local Switching, or any UNE Combination involving Local Switching, under §§ 251 or 271 of the Act or under state law.

[For DS1 Loops] - "Transition Plan -- . . . Where the Telephone Company is not required to provide unbundled DS1 Loops pursuant to Part B, Section 5.3.1. B.1, above, requesting TCs may not obtain new DS1 Loops as unbundled network elements on or after March 11, 2005." Part B; Section 5.3.1.B.2.

[For DS3 Loops] - "Transition Plan -- . . . Where the Telephone Company is not required to provide unbundled DS3 Loops pursuant to Part B, Section 5.3.1. C.1, above, requesting TCs may not obtain new DS3 Loops as unbundled network elements on or after March 11, 2005." Part B; Section 5.3.1.C.2.

[For Dark Fiber Loops] - "Transition Plan -- . . . Requesting TCs may not obtain new DS1 Loops as unbundled network elements on or after March 11, 2005." Part B; Section 10.1.1.B.2.

[For Dark Fiber Dedicated Transport] - "Transition Plan -- . . . Where the Telephone Company is not required to provide unbundled dark fiber dedicated transport pursuant to Part B, Section 10.1.1.C.1, above, requesting TCs may not obtain new dark fiber transport as unbundled network elements on or after March 11, 2005." Part B; Section 10.1.1.C.2.

Conversent Alternative Language Proposals:

[For DS1 Transport] – "Transition Plan -- . . . Where the Telephone Company is not required to provide unbundled DS1 transport pursuant to Part B Section 2.1.1.B.1, above, requesting CLECs ***may*** obtain new DS1 transport as on or after March 11, 2005, ***at just, reasonable and nondiscriminatory rates, terms and conditions approved by the Commission.***" Part B; Section 2.1.1.B.2.

[For DS3 Transport] - "Transition Plan -- . . . Where the Telephone Company is not required to provide unbundled DS3 transport pursuant to Part B Section 2.1.1.C.1, above, requesting CLECs ***may*** obtain new DS3 transport on or after March 11, 2005, ***at just, reasonable and nondiscriminatory rates, terms and conditions approved by the Commission.***." Part B; Section 2.1.1.C.2.

[For DS1 Loops] - "Transition Plan -- . . . Where the Telephone Company is not required to provide unbundled DS1 Loops pursuant to Part B, Section 5.3.1. B.1, above, requesting TCs may not obtain new DS1 Loops on or after March 11, 2005, ***at just, reasonable and nondiscriminatory rates, terms and conditions approved by the Commission.***" Part B; Section 5.3.1.B.2.

[For DS3 Loops] - "Transition Plan -- . . . Where the Telephone Company is not required to provide unbundled DS3 Loops pursuant to Part B, Section 5.3.1. C.1, above, requesting TCs ***may*** obtain new DS3 Loops as unbundled network elements on or after March 11, 2005, ***at just, reasonable, and nondiscriminatory rates, terms and conditions approved by the Commission.***" Part B; Section 5.3.1.C.2.

[For Dark Fiber Loops] - "Transition Plan -- . . . Requesting TCs ***may*** obtain new Dark Fiber Loops on or after March 11, 2005, ***at just reasonable and nondiscriminatory rates, terms and conditions approved by the Commission.***" Part B; Section 10.1.1.B.2.

[For Dark Fiber Dedicated Transport] - "Transition Plan -- . . . Where the Telephone Company is not required to provide unbundled dark fiber dedicated transport pursuant to Part B, Section 10.1.1.C.1, above, requesting TCs ***may*** obtain new dark fiber transport on or after March 11, 2005, ***at just, reasonable and nondiscriminatory rates, terms and conditions approved by the Commission.***" Part B; Section 10.1.1.C.2.

DISCUSSION: Conversent refers the Commission to the discussion points raised above in Item 3 above that cover the same points of objection to the Verizon proposed tariff that impermissibly seek to limit Verizon's unbundling obligations to unbundling according to just one federal rule implemented under authority found at 47 U.S.C. Section 251.

5. For Parts of Verizon's Network That Verizon Must Continue To Provide Under Applicable Laws After March 11, 2005, Verizon's TRRO Tariff Should Provide That Verizon Will Provide These Wholesale Services At Just and Reasonable Rates.

A. Where There Exists No Analagous Tariffed Service Offering, Such As For Wholesale Access To Verizon Dark Fiber Transport, The Commission Should Independently Establish A Just and Reasonable Rate.

[For The "Transition Plan" Portion of The TRRO Tariff, see above for Verizon proposed language and Conversent Alternative Proposed Language]

[For "Post Transition Arrangements" Described in the Verizon's TRRO Tariff]

Verizon Proposal:

[For Dedicated DS1 and DS3 Transport] -- CLECs that have unbundled UNE dedicated transport arrangements in place at the end of the transition periods described in Part B, Sections 2.1.1.B.2 and 2.1.1.C.2, above, must discontinue such arrangements or convert them to alternative serving arrangements, where such alternative arrangements are available from the Telephone Company. Orders for such discontinuance or conversion must be placed early enough, in light of the applicable provisioning intervals, to ensure that the orders can be fulfilled by the end of the transition period. If the TC does not place timely orders to discontinue or convert any such unbundled dedicated transport

arrangements, the arrangements will be disconnected at the end of the transition period. Part B, Section 2.1.1.D.

[For High Capacity Loops] -- TCs that have unbundled DS1 or DS3 loop arrangements in place at the end of the transition periods described in Part B, Sections 5.3.1.B.2 and 5.3.1.C.2, above, must discontinue such arrangements or convert them to alternative serving arrangements, where such alternative arrangements are available from the Telephone Company. Orders for such discontinuance or conversion must be placed early enough, in light of the applicable provisioning intervals, to ensure that the orders can be fulfilled by the end of the transition period. If the TC does not place timely orders to discontinue or convert any such unbundled dedicated transport arrangements, the arrangements will be disconnected at the end of the transition period. Part B, Section 5.3.1.D.

[For Dark Fiber Loops and Dark Fiber Transport] -- TCs that have unbundled dark fiber loops or unbundled dark fiber dedicated transport arrangements in place at the end of the transition periods described in Part B, Sections 10.1.1.B.2 and 10.1.1.C.2, above, must discontinue such arrangements or convert them to alternative serving arrangements, where such alternative arrangements are available from the Telephone Company. Orders for such discontinuance or conversion must be placed early enough, in light of the applicable provisioning intervals, to ensure that the orders can be fulfilled by the end of the transition period. If the TC does not place timely orders to discontinue or convert any such unbundled dedicated transport arrangements, the arrangements will be disconnected at the end of the transition period. Part B, Section 10.1.1.D.

Conversent Alternative Proposal:

[For Dedicated DS1 and DS3 Transport] -- CLECs that have unbundled UNE dedicated transport arrangements in place at the end of the transition periods described in Part B, Sections 2.1.1.B.2 and 2.1.1.C.2, above, must discontinue such arrangements or convert them to alternative serving arrangements, where such alternative arrangements are available from the Telephone Company ***or where such alternative arrangements are required under applicable law***. All such alternative arrangements will be provided ***upon rates, terms and conditions approved by the Commission***. Orders for such discontinuance or conversion must be placed early enough, in light of the applicable provisioning intervals, to ensure that the orders can be fulfilled by the end of the transition period. ***If an Order for conversion is placed prior to the end of the applicable transition period, but not within the applicable provisioning interval, the Telephone Company will continue to provide the service at just and reasonable rates, terms and conditions approved by this Commission***. Part B, Section 2.1.1.D.

[For High Capacity Loops] -- TCs that have unbundled DS1 or DS3 loop arrangements in place at the end of the transition periods described in Part B, Sections 5.3.1.B.2 and 5.3.1.C.2, above, must discontinue such arrangements or convert them to alternative serving arrangements, where such alternative arrangements are available from the

Telephone Company ***or where such alternative arrangements are required under applicable law***. All such alternative arrangements will be provided ***upon rates, terms and conditions approved by the Commission***. Orders for such discontinuance or conversion must be placed early enough, in light of the applicable provisioning intervals, to ensure that the orders can be fulfilled by the end of the transition period. ***If an Order for conversion is placed prior to the end of the applicable transition period, but not within the applicable provisioning interval, the Telephone Company will continue to provide the service at just and reasonable rates, terms and conditions approved by this Commission***. Part B, Section 5.3.1.D.

[For Dark Fiber Loops and Dark Fiber Transport] -- TCs that have unbundled dark fiber loops or unbundled dark fiber dedicated transport arrangements in place at the end of the transition periods described in Part B, Sections 10.1.1.B.2 and 10.1.1.C.2, above, must discontinue such arrangements or convert them to alternative serving arrangements, where such alternative arrangements are available from the Telephone Company ***or where such alternative arrangements are required under applicable law***. All such alternative arrangements will be provided ***upon rates, terms and conditions approved by the Commission***. Orders for such discontinuance or conversion must be placed early enough, in light of the applicable provisioning intervals, to ensure that the orders can be fulfilled by the end of the transition period. ***If an Order for conversion is placed prior to the end of the applicable transition period, but not within the applicable provisioning interval, the Telephone Company will continue to provide the service at just and reasonable rates, terms and conditions approved by this Commission***. Part B, Section 10.1.1.D.

DISCUSSION: In order to allow for the orderly transition off of certain UNEs that Verizon no longer is required to unbundle pursuant to The TRRO's rules implementing Section 251, the FCC established specific transition time-frames and transition pricing arrangements for the existing embedded customers of the CLEC. TRRO ¶¶ 142-145; 195-198 and Rule 51.319. As pointed out above, while the FCC granted Verizon significant unbundling relief as for Section 251 UNEs, Verizon remains obligated to unbundle its network where required by other applicable laws, such as Section 271 or state law. The question remains, however, at what price?

Verizon's tariff proposal is not only silent about its remaining unbundling obligations, but also is silent on what prices would be charged for orders that are "converted" to alternative and analogous services, where required. Where Verizon must

allow for continued unbundling of certain parts of its network under other applicable laws after March 11, 2005, the Commission must insist that the price Verizon charges for these wholesale products and services, or converted during the transition period to analogous services, are set at just and reasonable prices clearly described in Verizon's tariff.

In fact, several regional state commissions have begun proceedings designed to establish the alterative price to be applied in Verizon's applicable wholesale tariff for UNEs that are no longer to be provided under Section 251 and 252. This Commission needs to undertake a similar proceeding, where appropriate, so that alternative "just and reasonable" rates can be put in place to prevent unnecessary and time-consuming disputes.

For example, the New York PSC has initiated a proceeding designed to establish alternative just and reasonable prices for continued access to Verizon's dedicated transport network. See *In the Matter of Telecommunications Competition in New York Post USTA II Including Commitments Made in Case No. 97-C-0271*, Notice Requesting Comments, dated March 29, 2004. There, the New York PSC tentatively concluded that Verizon's special access tariffed rates could serve as the upper limit to alternative prices for similar services:

> With regard to transport, the obligation of Verizon to provide transport at TELRIC pursuant to 47 U.S.C. §§ 251 and 252 may end on May 2, absent a stay of the D.C. Circuit Ruling. However, Verizon is required to provide local transport under federal law (§ 271) and such obligation could be required under state law. The only question is at what price. Federal law does not preclude the Commission from establishing a price provided the state rate is not inconsistent with the federal rate. Consequently, comment is sought on the appropriate rate for transport. It is tentatively concluded that a reasonable transition from TELRIC pricing to wholesale pricing would be appropriate to ensure an orderly transition similar to the transition envisioned in the Pre-Filing Statement. The price of transport could increase to 'substantially the cost' of similar services. In this instance, special access rates might serve as the ceiling and the existing

> transport rate would increase over time. Comment is sought on the appropriate wholesale rate and a reasonable timeframe for the price change and when that change should take place.

In the Matter of Telecommunications Competition in New York Post USTA II Including Commitments Made in Case No. 97-C-0271, Notice Requesting Comments, dated March 29, 2004 at pp. 3-4.

As noted above, both the Maine and the New Hampshire Commissions have also instituted proceedings designed to examine alternative prices required in Verizon's wholesale tariffs under Section 271 and/or state law. Indeed, both New Hampshire and Maine have obligated Verizon to continue to provide network access under Section 271 (such as loop and transport UNEs) at TELRIC prices, pending approval of the wholesale tariff and/or new rates. *Verizon-Maine Proposed Schedules Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21),* Docket No. 2002-682, Order Dated March 17, 2005 and Procedural Order Dated March 3, 2005; *Verizon New Hampshire/Segtel, Inc., Proposed Revisions to Tariff NHPUC No. 84*, Order No. 24,442, Dated March 11, 2005.[12] The Massachusetts DTE is also exploring its authority and responsibilities under Section 271 in a briefing process in Docket No. 03-60, 04-74, 03-59.

The Rhode Island PUC also needs to initiate proceedings designed to establish the replacement prices that Verizon will be allowed to charge competitors for continued access to those parts of Verizon's network that must still be provided under either Section 271 and/or state law. Conversent's alternative proposed language would put a placeholder in the tariff for just this purpose. Notably, Conversent's alternative proposed

[12] Conversent is aware that Verizon has appealed the New Hampshire Order to the federal district court in New Hampshire.

language would not require that the alternative rates be set at this time, but would allow the Commission (like these other Commission proceedings) to consider further these important considerations. Verizon's tariff proposal would strip the Commission of this authority.

As noted, Conversent orders dark fiber dedicated transport services from Verizon. However, unlike for lit DS-1 or DS-3 dedicated transport there is no Verizon special access tariff on file either at the FCC or in Rhode Island that establishes what a replacement just and reasonable price would be for either new dark fiber transport orders, or for conversions of existing dark fiber dedicated transport to analogous Verizon services. With no equivalent special access dark fiber tariffed rate in place in Rhode Island (or at the FCC), the Commission should institute a proceeding to provide a replacement just and reasonable rate for dark fiber dedicated transport that is required under other applicable laws, such as Section 271 or independent state law.

Finally, Verizon's post-transition language is flawed for its draconian approach. According to Verizon's proposal, if the CLEC does not place timely orders to discontinue or convert any such unbundled loop or transport arrangement, Verizon will unilaterally disconnect the services, and shut off services to the customers. See Part B, Section 2.1.1.D; Part B, Section 5.3.1.D; Part B, Section 10.1.1.D. Verizon should not be authorized to unilaterally shut off customer services where an order for conversion is placed, but not in the time-lines expected by Verizon.

The FCC's transition time-frames coupled with Verizon's standard intervals, provide the applicable transition plan. However, as the New York Commission recently ruled, "if an order were placed for conversion for the service prior to the end of the

transition period, but not within the applicable provisioning interval, requiring Verizon to provide the service at resale rates would seem a reasonable alternative to disconnection." *Ordinary Tariff Filing of Verizon New York, Inc. to Comply with FCC's Triennial Review Order on Remand*, Case No. 05-C-0203 (Order Implementing TRRO Changes, dated March 16, 2005), at page 12.

For this reason the New York Commission ordered Verizon to amend the tariff to allow for "conversion to analogous service at the applicable resale rate" where a request for conversion is made that cannot be completed within the applicable transition period. Id. Disconnection of service, on the other hand, is a drastic remedy that will only harm customers and cause unnecessary disruptions to all concerned. This cannot be in the public interest. Conversent's alternative proposed language would prevent such harms, while providing the necessary incentive for the CLEC to act responsibly.

6. In Order to Prevent Unnecessary Back-Billing Disputes, Verizon's Tariff Should Specify The Wire Centers And Provide For Clearer Terms on How Disputes Will Be Resolved.

.

Verizon Proposed Language:

[Unbundled IOF Transport] – Pursuant to the Order on Remand issued by the Federal Communications Commission on February 4, 2005, in WC Docket No. 04-313 and CC Docket No. 01-338 (the "Triennial Review Remand Order") . . . . If the Telephone Company challenges such certification, and if it is determined, after completion of the applicable dispute resolution process, that the CLEC was not entitled to unbundled access to such element or elements, then the CLEC will be back-billed to the date on which the element was first provisioned, in the amount of the difference between the rate applicable to unbundled access to the network element in question and the rate that would be otherwise charged for the use of that element. Part B; Section 2.1.1.E.

[High Capacity Loops] – Pursuant to the Order on Remand issued by the Federal Communications Commission on February 4, 2005, in WC Docket No. 04-313 and CC Docket No. 01-338 (the "Triennial Review Remand Order"), . . . If the Telephone Company challenges such certification, and if it is determined, after completion of the applicable dispute resolution process, 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, in the amount of the difference between the rate applicable to unbundled access to the network element in question and the rate that would be otherwise charged for the use of that element. Part B; Section 5.3.1.E.

[Dark Fiber Transport] – Pursuant to the Order on Remand issued by the Federal Communications Commission on February 4, 2005, in WC Docket No. 04-313 and CC Docket No. 01-338 (the "Triennial Review Remand Order"), . . . If the Telephone Company challenges such certification, and if it is determined, after completion of the applicable dispute resolution process, that the CLEC was not entitled to unbundled access to such element or elements, then the CLEC will be back-billed to the date on which the element was first provisioned, in the amount of the difference between the rate applicable to unbundled access to the network element in question and the rate that would be otherwise charged for the use of that element. Part B; Section 10.1.1.E.

Conversent Alternative Language:

[Unbundled IOF Transport] – Pursuant to the Order on Remand issued by the Federal Communications Commission on February 4, 2005, in WC Docket No. 04-313 and CC Docket No. 01-338 (the "Triennial Review Remand Order") . . . . If the Telephone Company challenges such certification, and if it is determined, after completion of the applicable dispute resolution process, that the CLEC was not entitled to unbundled access to such element or elements, then the CLEC will be back-billed ***to the effective date of the tariff that lists the affected wire center on which the element was provisioned***, in the amount of the difference between the rate applicable to unbundled access to the network element in question and ***the applicable alternative just and reasonable rate approved by the Commission for the use of that element***. Part B; Section 2.1.1.E.

[High Capacity Loops] – Pursuant to the Order on Remand issued by the Federal Communications Commission on February 4, 2005, in WC Docket No. 04-313 and CC Docket No. 01-338 (the "Triennial Review Remand Order"), . . . If the Telephone Company challenges such certification, and if it is determined, after completion of the applicable dispute resolution process, that the CLEC was not entitled to unbundled access to such element or elements, then the CLEC will be back-billed ***to the effective date of the tariff that lists the affected wire center on which the element was provisioned***, in the amount of the difference between the rate applicable to unbundled access to the network element in question and ***the applicable alternative just and reasonable rate approved by the Commission for the use of that element*** Part B; Section 5.3.1.E.

[Dark Fiber Transport] – Pursuant to the Order on Remand issued by the Federal Communications Commission on February 4, 2005, in WC Docket No. 04-313 and CC Docket No. 01-338 (the "Triennial Review Remand Order"), . . . If the Telephone Company challenges such certification, and if it is determined, after completion of the applicable dispute resolution process, that the CLEC was not entitled to unbundled access to such element or elements, then the CLEC will be back-billed ***to the effective date of the tariff that lists the affected wire center on which the element was provisioned***, in the amount of the difference between the rate applicable to unbundled access to the network

element in question and ***the applicable alternative just and reasonable rate approved by the Commission for the use of that element***. Part B; Section 10.1.1.E.

DISCUSSION: Verizon's tariff proposes to provide a right to back-bill CLECs for the provisioning of UNEs at TELRIC rates that should not have been so provisioned according to the FCC's revised unbundling rules in the TRRO. This possibility exists in the event that, after the conclusion of the applicable dispute resolution process, it is determined that a CLEC was not entitled to a UNE at a specific location or route at TELRIC rates.

Putting aside the fact that there is no provision in the TRRO or its implementing rules for such a back-bill allowing Verizon to recover the charges it has lost due to a CLEC's mistaken certification of eligibility for a UNE, if the Commission is going to allow Verizon to back-bill it should insist that the list of wire centers and effective dates be part of this tariff. The Commission should also insist that the applicable alternative rate that should be used for calculating the back-bill amount is also tariffed, as discussed above. These corrections in alternative language will avoid unnecessary disputes on exactly what the trigger dates should be, and what the applicable alternative rate is. Conversent's proposed alternative language provides this clarity and avoids the ambiguity that is left by Verizon's proposed language.

****

Respectfully Submitted,

Conversent Communications of Rhode Island, LLC

By: _____

Alan M. Shoer
Director – Regulatory Affairs and Counsel
24 Albion Road, Suite 230
Lincoln, Rhode Island 02865
Tel: 401-834-3370
Fax: 401-834-3350
ashoer@conversent.com

Dated: April 1, 2005