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

REPLY OF VERIZON RHODE ISLAND TO PROPOSALS TO REVISE PUC TARIFF NO. 18, AS APPROVED ON MARCH 8, 2005

At Open Meeting on March 8, 2005, the Commission approved on an interim basis Verizon Rhode Island's proposed revisions to its UNE tariff, PUC Tariff No. 18 ("the Tariff") implementing the FCC's new unbundling rules adopted in the *Triennial Review Order on Remand* ("TRRO").[1] The Commission called for additional briefing solely to determine whether the specific wording of Verizon RI's revisions accurately translates the *TRRO* and the new rules into tariff terms.

The only parties to file comments – the Division and Conversent – propose a number of changes to Verizon RI's language. The Division asserts that the Commission should adopt three changes ordered by the New York Public Service Commission ("NY PSC") when it approved Verizon New York's proposed revisions to its UNE tariff, similar to the revisions at issue here.[2] With all due respect to the NY PSC, however, those changes are inappropriate, and the Commission should not follow New York's lead.

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

2 *See*, Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand, Case 05-C-0203, *Order Implementing TRRO Changes*, dated March 16, 2005 ("New York Order").

Conversent too asks the Commission to revise the Tariff in the manner directed by the NY PSC. Conversent goes much further, however, and seeks to avoid the *TRRO*'s limitations on unbundling by proposing tariff terms that would perpetuate unbundled access, at TELRIC rates, to network elements that Conversent has no legal right to obtain. Conversent argues that the Commission may enforce unbundling obligations that supposedly exist under Section 271, and that the Commission should preserve its right to impose unbundling obligations under state law where the FCC has not issued a rule. Verizon RI, however, has demonstrated time and again – and the Commission has recently acknowledged – that the FCC has exclusive authority to enforce Section 271, and that federal law preempts the Commission from re-imposing under state law the unbundling obligations eliminated by the FCC's new rules. Moreover, Conversent's proposals to inject state law and Section 271 into the Tariff fall outside the scope of this proceeding, which is limited to implementing the *TRRO* and the new rules. Conversent's proposals are improper for the additional reason that the Tariff is intended solely is to effectuate obligations imposed on Verizon RI by Section 251, not by state law or Section 271.

The Commission should, accordingly, reject the changes proposed by the Division and Conversent and approve Verizon RI's proposed language without change on a permanent basis.

I. THE DIVISION'S PROPOSED CHANGES.

A. Conversion of loop and transport services.

The Division recommends that the Commission amend §§2.1.1.D, 5.3.1.D and 10.1.1.D of the Tariff, consistent with the decision of the NY PSC, to allow for "conversion of DS1 and DS3 loop and transport services to analogous services at the applicable resale rate in the event an order for conversion is placed before the end of the FCC mandated transition period, even if the order cannot be completed within the transition period." Division Comments at 1. Such a rule,

however, would only encourage CLECs to hold their conversion orders until the final day of the transition period, resulting in a flood of last-minute orders and making an orderly and timely transition impossible.

Moreover, the NY PSC's ruling is poorly drafted and as a result is impossible to implement. For example, while resale is an appropriate alternative to UNE switching when provisioned as part of a UNE-P arrangement, special access services (not resale) are the alternative services most comparable to UNE loops and transport. Thus, the Tariff should not attempt to define the "default" arrangements that would apply should a CLEC fail to fulfill its obligations to transition its UNEs to alternative services during the transition period. In addition, the Division would apply its proposed default language to §10.1.1.D of the Tariff, governing dark fiber, even though the NY PSC specifically limited its tariff modification to "DS1 and DS3 loop and transport services." *See* New York Order at 13, 26. The Division has offered no basis for expanding the New York Order, and, given the FCC's long, 18-month transition period for dark fiber, no "default" is appropriate with respect to dark fiber loops. The Division's misapplication of the New York Order points out the perils of inserting too much detail in the Tariff in anticipation of future disputes.

B. The Tariff need not list the wire centers that satisfy the FCC's non-impairment criteria for loops and transport.

The Division and Conversent rely on the New York Order for the proposition that the Tariff should include a list of wire centers that satisfy the FCC's non-impairment criteria regarding unbundled access to high-capacity loops and transport.[3] As noted above, however, the Tariff is not intended to address all issues that may arise in the future. Given that any such list of

[3] Conversent presumes that Verizon RI "should have little, if any, objection" to Conversent's wire center language, because that language "is similar to what Verizon filed in its compliance filing in its New York tariff." Conversent Proposal, at 5. Contrary to Conversent's implication, however, Verizon did not propose the change but made it only to comply with an order from the NY PSC.

wire centers can change over time as a result of the addition of business lines and/or collocators at a given office, it is not reasonable to freeze that list in place by including it in the Tariff. This concept is very similar to past tariff practices where the tariff indicated that certain services were available where suitable facilities exist. Under those circumstances, the tariff did not attempt to list every location where such "suitable" facilities existed. Instead, such information was provided through other media and updated on a regular basis.

Moreover, the reasoning of the New York Order is faulty. The NY PSC stated that it would require Verizon to tariff such a list of wire centers "[t]o ensure adequate notice and process…." The PSC also felt that tariffing would create "bright line effective dates" showing when a given wire center had been added to the list or upgraded to a new classification, thus resulting in more efficient "true-ups" of Verizon's bills for the affected services. *See* New York Order at 9. The NY PSC's concerns are unwarranted, because the FCC has already established in the *TRRO* a complete system for ordering loops and transport and resolving any resulting disputes.

In ¶ 234 of the *TRRO*, the FCC provides that a CLEC may order and obtain access to high-capacity loops and transport consistent with the new unbundling rules, so long as it can, based upon a "reasonably diligent inquiry," certify in good faith that the facility is subject to unbundling:

> We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in parts IV, V, and VI above and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3). Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that

> issue through the dispute resolution procedures provided for in its interconnection agreements. In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority.

(Footnotes omitted.) Thus, the FCC established a complete system by which CLECs may order and obtain access to UNE loops and transport. The NY PSC's concern that CLECs must be afforded adequate "process" are fully addressed by the FCC's express reference to the parties' ability to bring any relevant dispute to a "state commission or other appropriate authority." Moreover, because Verizon must immediately process a CLEC-certified order for such a UNE, the existence of a dispute between Verizon and the requesting carrier over the availability of the UNE will not prevent the CLEC from obtaining the facility at UNE rates while the parties resolve their dispute.

As for the NY PSC's concern over adequate notice, Verizon has already publicly filed with the FCC a list of its central offices in Rhode Island that satisfy the *TRRO*'s non-impairment criteria for high-capacity loops and transport[4] and posted the list along with a CLEC Industry Notice on its wholesale website[5]. When additional offices meet the FCC's non-impairment criteria, Verizon will notify CLECs promptly. Verizon has also provided back-up documentation supporting its list and will make it available to requesting CLECs pursuant to an appropriate non-disclosure agreement. In any event, under the FCC's system requiring Verizon RI to provision CLEC-certified UNE orders pending outcome of any dispute on the issue, no CLEC will suffer harm through lack of notice that a wire center has been determined to satisfy the FCC's non-impairment criteria. In any event, Verizon RI has every incentive to make all CLECs fully aware

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4 *See Verizon Ex Parte*, from Susanne G. Geyer to Marlene H. Dortch, *Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (Feb. 18, 2005). That list shows that no Rhode Island wire centers qualify for relief from DS1 loop unbundling, and only one wire center qualifies for DS3 loop unbundling relief. Only seven wire centers qualify as either Tier 1 or Tier 2 offices under the FCC's non-impairment criteria.

5 *See* http://www22.verizon.com/wholesale/library/local/industryletters/1,,east-wholesale-resources-2005_industry_letters-clecs-03_02,00.html

of any such determination, because it will factor into whether the CLEC performed the reasonably diligent inquiry the FCC requires before the CLEC submits an order.

Finally, the ability of Verizon RI to accurately and fairly "true-up" its bills for a facility found to be unavailable as a UNE does not depend on the "bright line effective date" on which a wire center first satisfied the FCC's non-impairment criteria. Verizon RI has reasonably proposed that it will true-up any such charges by billing the CLEC the difference between the UNE rate and the rate that would otherwise apply, back to the date when the facility was first provisioned. *See* Verizon RI's Proposed Tariff §§2.1.1.E and 5.3.1.E and 17.1.1.E. That exercise does not depend on the date on which the relevant wire center was found to satisfy the FCC's non-impairment criteria.[6]

In light of the ordering and dispute resolution procedures established by the FCC in the *TRRO*, there is no need for the more cumbersome and resource-intensive proposal to include in the Tariff (and presumably litigate) a list of wire centers that satisfy the FCC's non-impairment criteria.[7]

C. The Tariff as written properly applies the FCC's Cap on DS1 Transport UNEs.

Verizon RI's proposed §2.1.1.B.1 of the Tariff states that "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." The Division and Conversent would revise this provision to limit the application of the FCC's cap on DS1 transport circuits to routes

[6] To the extent that the NY PSC was concerned not with the true-up of bills, as it stated, but with the avoidance of disputes over whether a CLEC was aware that a wire center satisfied the non-impairment criteria, and thus should not have certified the availability of a UNE from that wire center, such disputes should be rare in Rhode Island, where (as noted above) only a few wire centers satisfy any of the FCC's criteria.

[7] The Division's and Conversent's proposal to tariff the list of wire centers that satisfy the FCC's non-impairment criteria would be particularly pointless if, as Conversent proposes at 3, a CLEC need only "review" that list before submitting an order for a UNE loop or transport. Should the Commission require the tariffing of such a list, it must also include a provision stating that a CLEC shall not submit any order for a UNE loop or transport that is inconsistent with the tariffed list.

on which Verizon RI is not required to unbundle DS3 dedicated transport. *See* Division Comments at 2; Conversent Proposal at 6-8. Verizon's proposed language, however, is a virtual quote of the applicable FCC rule, which includes no such limitation. The rule states, in its entirety, as follows:

> Cap on unbundled DS1 Transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

47 C.F.R. §51.319(e)(2)(ii)(B).

In support of its proposed change, Conversent relies on ¶ 128 of the *TRRO* and the NY PSC's statement that, "We read the TRRO as a whole as intending to apply the 10-loop cap only where the FCC found non-impairment for DS3 transport." New York Order at 13. The NY PSC, however, fails to explain how it could read "the TRRO as a whole" to add a provision into the rule that simply isn't there. *TRRO* ¶ 128 is simply inconsistent with the rule. Neither the NY PSC nor this Commission may re-write the FCC's rule based upon speculation as to what the FCC intended. Until and unless the FCC itself revises the rule, it must be applied as written.

II. THE COMMISSION SHOULD REJECT CONVERSENT'S PROPOSALS TO ADD TERMS TO THE TARIFF CONCERNING STATE LAW AND SECTION 271.

Conversent devotes much of its Comments to proposals designed to evade, rather than implement, the *TRRO*. Specifically, Conversent suggests new terms that would require Verizon RI to continue to provision UNEs pursuant to the Tariff (and at TELRIC rates) pursuant to state law and/or Section 271 of the Act. For example, a number of existing Tariff terms provide that Verizon RI "will not provide unbundled access to [the relevant network element] to an extent beyond that required by" the relevant FCC unbundling rule. To each of these provisions,

Conversent proposes to add the phrase, "unless continued access to Verizon's network is required by applicable law," by which Conversent means state law and Section 271. *See* Conversent Proposal at 8-9. Conversent also seeks to add terms to the Tariff usurping the FCC's exclusive power to enforce and set rates under Section 271 and give those powers to the Commission. *See id*., at 21-28. The Commission should reject Conversent's proposals. Not only do they fall outside the scope of this proceeding and are inappropriate for a tariff that is limited in scope to Section 251 obligations, but they are clearly contrary to law.

A. Conversent's attempt to inject state law and Section 271 into the Tariff falls outside the scope of this proceeding.

Conversent blithely ignores that the Commission has already approved Verizon RI's revisions to the Tariff, and that this proceeding is limited solely to the issue of whether Verizon RI's language accurately implements the *TRRO* and the FCC's new unbundling rules. In support of its proposals, Conversent makes no argument that Verizon RI's Tariff revisions do not fairly reflect the terms of the *TRRO* or the FCC's new rules. Instead, Conversent makes very plain that it wishes to *avoid* implementing the *TRRO* by imposing unbundling requirements on Verizon RI based on authorities *other than* Section 251. Conversent's heading #3, at 8, says it all. It argues that in considering Verizon RI's Tariff revisions, the Commission 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.

Conversent's argument is entirely irrelevant to this proceeding, which was initiated solely to implement the changes to Verizon RI's Section 251 obligations resulting from the *TRRO* and the FCC's new, Section 251 unbundling rules, *not* as a vehicle to consider application of Section 271 or alleged state law. The Commission should refuse to consider Conversent's proposals for this reason alone.

B. Conversent's proposed references to state law and to Section 271 are inappropriate in the Tariff, which is Verizon RI's Section 251 UNE tariff.

Verizon's Tariff is intended to effectuate its obligations under Section 251 of the Act. As such, Conversent's attempt to inject other sources of law into the Tariff is improper and should be rejected. If Conversent actually believes its arguments regarding state law and Section 271, it can file a petition to seek new tariffs. This Section 251 tariff proceeding is not the place to consider proposed terms that even Conversent admits have nothing to do with Section 251 unbundling obligations.

Moreover, Conversent's changes would result in a confusing, ambiguous and unlawful tariff. In an attempt to prolong its access to dark fiber UNEs that the FCC has abolished, Conversent would require Verizon RI to continue to provision network elements pursuant to the Tariff where "continued access to Verizon's network is required by applicable law," which Conversent defines to include state law and Section 271. But, the Tariff requires Verizon RI to make network elements available *as UNEs at TELRIC prices* under Section 251. Thus, under Conversent's proposal, the Section 271 requirement that RBOCs make loops available, for example, would trigger an obligation on Verizon RI to provision DS1 and DS3 loops as UNEs and at TELRIC rates, as provided in the Tariff. But Section 271 elements are indisputably subject to "just and reasonable" pricing, not TELRIC, so Conversent's proposal is unlawful. *See, e.g.*, TRO, ¶663

Conversent argues that unless the Tariff requires Verizon RI to provide access to network elements pursuant to state law and Section 271, the Tariff would "foreclose" and "preclude" the Commission from requiring Verizon RI to provide CLECs with access to its network under such law. Conversent Proposal at 9. Conversent counsels the Commission to "keep its options open" in the event that the FCC's unbundling rules are vacated in the future, *id*. at 19, and argues that

the Tariff must "recognize" that despite the FCC's de-listing of many UNEs, CLECs' "access to Verizon's network must still be allowed under other applicable laws." *Id*. at 20.

Of course, as discussed below, the FCC's unbundling rules preempt the Commission from imposing new UNEs under state law, and the Commission has no authority to enforce Section 271. Moreover, even with Verizon RI's revisions, the Tariff is silent as to state law or Section 271. It does not purport to excuse Verizon RI from complying with any Section 271 obligations, nor does it purport to "foreclose" or "preclude" the Commission's authority (whatever it might be) to consider issues that may come before it in the future. Indeed, no tariff could accomplish that. Accordingly, Conversent's proposed revisions to the Section 251 Tariff cannot be justified on the supposed need to "recognize" other law or to protect the Commission's decision-making authority.

C. The Commission cannot re-impose unbundling obligations under State law that the FCC has eliminated under federal law, and the Commission has no authority to enforce Section 271.

Conversent asserts that both state law and Section 271 constitute "sources of unbundling authority" that the Commission may and should exploit. *See* Conversent Proposal at 9. Conversent also argues that the Commission "should independently establish a just and reasonable rate" for those network elements Verizon RI makes available solely pursuant to Section 271. *Id*. at 22-28. Conversent's arguments are contrary to law, and the Commission must reject its proposed additions to the Tariff.

1. State law.

As Verizon RI demonstrated in its initial Reply to Comments of CLECs, filed in this docket on March 7, 2005 (at 5-10), the Commission is preempted from re-imposing on Verizon RI any UNE obligation that the FCC has eliminated in the *TRRO*, or elsewhere. This Commission has already held as much. At Open Meeting on March 24, 2005, the Commission

denied a Petition for Emergency Declaratory Relief in Docket 3668 and refused to order Verizon RI to accept orders for UNEs discontinued by the *TRRO*, based in part on the fact that granting the motion would require Verizon RI to provide services no longer required by federal law. Rather than repeating here the extensive legal arguments supporting the preemptive effect of the FCC's unbundling rules and confirming the propriety of the Commission's decision, Verizon RI has attached as Appendix A hereto a portion of its Initial Brief in Docket 3588 that discusses the matter.[8]

Conversent concedes that the Act forbids this Commission from imposing unbundling requirements that are inconsistent with the FCC's rules. (Conversent Comments, at 10-11.) But it argues that "[i]f 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." *Id*.. at 11. Conversent contends that "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." (*Id*. at 19 (emphasis in original).)

Even if Conversent were right that this Commission could impose its own unbundling obligations where the FCC has left a "gap" in its requirements (and it is wrong, for the reasons stated in Appendix A), that "gap" theory would not apply here, because the FCC has made *affirmative findings* that CLECs are *not impaired* without unbundled access to the network elements that Verizon RI seeks to withdraw from the Tariff,[9] and the FCC has promulgated rules

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[8] See also Opposition of Verizon Rhode Island to Petition for Emergency Declaratory Relief, filed in Docket 3668 on March 11, 2005, ("Opposition to Emergency Motion") at 20-23.

[9] *See TRRO* ¶¶ 5 (re mass market switching and dark fiber loops), 126 (DS1 transport), 129 (DS3 transport), 133 (dark fiber transport) and 146 (DS1, DS3 and dark fiber loops).

effectuating those findings.[10] A state Commission order re-imposing unbundling obligations for items the FCC has de-listed is *per se* inconsistent with the FCC's rules and preempted.[11]

Even Conversent realizes that it cannot claim that the FCC remained silent on the issue of unbundling for enterprise loops and dedicated transport, so it launches into a convoluted example of an area where the FCC has purportedly not acted and where this Commission could step in and require unbundling. Conversent contends that the FCC's rules providing that Verizon need not unbundle fiber-to-the-premises ("FTTP") loops apply only to loops serving mass market, residential customers, leaving the Commission free to order unbundling of FTTP loops serving enterprise customers. *See* Conversent Proposal at 11. Conversent is wrong,[12] but it is not necessary for the Commission to consider the merits of its argument, because it has nothing to do with the Tariff at issue. The Tariff does not now provide for the unbundling of FTTP loops, and Verizon RI has not proposed any changes to the Tariff concerning FTTP loops.

Conversent also speculates that the FCC's rules that require unbundling under Section 251 might be vacated on appeal of the *TRRO*, in which case Verizon RI's revisions to the Tariff "would permit Verizon to discontinue providing high-capacity facilities immediately…." In order to avoid "such a disastrous Verizon action," Conversent urges the Commission to insert references to "applicable law" in the Tariff to preserve its alleged authority to create UNEs under state law in the absence of effective federal rules. *See* Conversent Proposal at 10. The Commission should ignore Conversent's scare tactics.

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[10] *See*, 47 CFR §51.319(a)(4)(iii), (5)(iii) and (6)(ii) (re loops); 47 CFR §51.319(d)(2)(iii) (re switching) and 47 CFR §51.319(e)(2) (ii)(C), (iii)(C) and (iv)(B) (transport).

[11] Conversent's claim that the Commission has previously ruled that it may require unbundling under state law "in areas that are not preempted by operation of federal law," Conversent Proposal at 10, is likewise inapposite. The FCC's rules prohibiting or restricting unbundled access to the network elements at issue here would preempt any contrary state commission action. The Commission has never ruled that it has state law authority to create a UNE in the face of an FCC finding of no impairment.

[12] *See* Verizon Rhode Island's Initial Brief in Docket 3588, filed on April 8, 2005, at 52-55, demonstrating that the FCC has freed ILECs from any obligation to provide unbundled access to FTTP loops serving either mass market *or* enterprise customers.

Tariffs are intended solely to state the rates, terms and conditions upon which a carrier makes specified services available. A tariff cannot and should not attempt to anticipate changes of law that may or may not take place in the future. Thus, the Commission cannot assume, in addressing changes to the Tariff to comply with the current federal rules, that those rules will be vacated. Indeed, by Conversent's reasoning, Verizon RI should be entitled to withdraw all Section 251 unbundling obligations from the Tariff, on the ground that the courts or the FCC may eliminate them in the future.

In any event, as noted above, nothing in Verizon RI's revisions to the Tariff precludes the Commission from taking any action that would otherwise be available to it in the event that the FCC's unbundling rules are vacated on appeal.

Finally, Conversent's "Chicken Little" scenario is extremely unlikely to unfold. Just last year, the D.C. Circuit vacated the FCC's unbundling rules for mass-market switching and high-capacity loops and transport in *USTA II*,[13] but the sky did not fall. Instead, the FCC – the sole agency with the authority and responsibility to do so – established interim rules to prevent disruption of the market, as and to the extent that it deemed advisable. This Commission cannot seize unbundling authority from the FCC for any reason, but certainly not based on the unrealistic fear of "disastrous" consequences if an FCC unbundling obligation is struck down.

2. Section 271.

As noted above, Conversent argues that the Commission may enforce Section 271 of the Act and establish rates for those services Verizon RI makes available solely pursuant to that section. *See e.g.* Conversent Proposal at 22. Conversent would require the Tariff to state that

[13] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied sub nom. National Ass'n of Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004) ("*NARUC*").

where Verizon RI is not required to provide unbundled access to a given network element, a CLEC may nevertheless obtain access to such element "at just, reasonable and nondiscriminatory rates, terms and conditions approved by the Commission." *Id*. at 21-22; *see also id*. at 24. Conversent's arguments are easily put to rest.

Simply put, the Commission has no authority to enforce obligations imposed on Verizon RI by Section 271, and may not set rates under that section. As Verizon RI noted in its Reply to Comments of CLECs, at 2 nt. 3, the FCC has held that Congress granted "*sole authority* to the [FCC] to administer . . . section 271" and intended that the FCC exercise "*exclusive authority* . . . over the section 271 process."[14] A state commission's role is limited to "consultation" before Section 271 authority is given. 47 U.S.C. § 271. This is reiterated in the *Triennial Review Order*, in which the FCC stated that "[i]n the event that a BOC has already received Section 271 authorization, Section 271(d)(6) grants the Commission [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271." *Triennial Review Order*, ¶ 665.

With respect to state commissions' authority to set rates, Section 252(d)(1) is "quite specific" and "*only* applies for the purposes of implementation of section 251(c)(3)." *Triennial Review Order* ¶ 657 (emphasis added). The FCC's conclusion is compelled by the text of Section 252, which authorizes state commissions, in arbitrating interconnection agreements, to establish rates only for "network elements according to [section 252(d)]," which in turn authorizes "[d]eterminations by a State commission" of the "rate for network elements *for purposes of* [*section 251(c)(3)*]." 47 U.S.C. § 252(c)(2), (d)(1) (emphasis added). Congress made no comparable delegation of rate-setting authority to state commissions with respect to 271

[14] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U S West Petitions to Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392, 14000-01, ¶¶ 17-18 (1999) (emphases added).

elements, and there is "*no serious argument*" that the UNE pricing regime "appl[ies] to unbundling pursuant to § 271." *USTA II*, 359 F.3d at 589 (emphasis added). And because Congress gave the FCC — and the FCC alone — authority to determine whether a BOC complies with Section 271, that authority rests exclusively with the FCC. *See id.* at 565. For a more extensive argument demonstrating the FCC's exclusive authority over Section 271 matters, Verizon RI has attached as Appendix B hereto the portion of its Initial Brief in Docket 3588 that discusses the issue.[15]

Indeed, within the past week, a federal district court determined this very point when it enjoined a state commission from ordering access to unbundled network elements that the FCC has determined should not be unbundled.[16] Consistent with the *TRRO* and amended FCC rules, the United State District Court for the Southern District of Mississippi issued a preliminary injunction barring the Mississippi commission from enforcing its order requiring BellSouth to continue to provide new UNE-P arrangements after the FCC's March 11, 2005 cutoff. The court held "…in keeping with its plenary authority under the 1996 Act, it follows that the FCC's conclusion prevails over the PSC's contrary conclusion"[17] and that "… even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth had failed to comply, § 271 explicitly places enforcement authority with the FCC …."[18]

Conversent's position, moreover, is inconsistent with Commission precedent. In particular, the Commission recently allowed Verizon RI to revise the Tariff to withdraw enterprise switching as an unbundled network element. *See* Order No. 18036, entered in Docket 3614 on November 1, 2004. The Commission also allowed Verizon RI to revise the Tariff to

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15 *See also*, Opposition to Emergency Motion, at 23-24.

16 *BellSouth Telecommunications Inc. v. Mississippi Public Service Commission, et al.*, Civil Action No. 3:05CV173LN (S.D. Miss., April 13, 2005).

17 *Id*. at 16.

18 *Id*. at 16-17.

remove line sharing, OCn-level dedicated transport and dark fiber channel termination facilities. *See* Order No. 18017 entered in Docket No. 3556 on October 12, 2004. In neither of these cases did the Commission condition its approval on Verizon RI adding new language to the Tariff authorizing the Commission to enforce or establish rates under Section 271, to the extent those elements fell within that section.

Conversent has no response to the law cited above. Rather, Conversent essentially asks the Commission to forego its own analysis of Section 271 and instead rely on the fact that other state commissions have "instituted proceedings designed to examine alternative prices required in Verizon's wholesale tariffs under Section 271." Conversent Proposal at 25. Verizon RI does not dispute, as Conversent notes, that the New Hampshire and Maine commissions have obligated Verizon to continue to provide network elements under Section 271 at TELRIC prices, pending approval of a wholesale tariff or new rates, *id*. at 26. Based on the law and reasoning cited above, however, those commissions acted in error, and Verizon is vigorously prosecuting appeals of those decisions in federal court and, in the meantime, is complying with federal law.

Conversent claims that the Massachusetts D.T.E. "is also exploring its authority and responsibilities under Section 271" and that the NY PSC has opened a case to establish prices under Section 271. *See id*. at 26 and 25 respectively. Conversent fails to note, however, that the D.T.E. has already approved revisions to Verizon MA's Section 251 UNE tariff that are virtually identical to those at issue here. The NY PSC also approved Verizon's revisions to its Section 251 tariff in light of the *TRRO* without inserting any of the terms proposed by Conversent under the banner of state law or Section 271. *See* New York Order, attached to the Division's Comments. Thus, the fact that these agencies may be considering the scope of their authority

under Section 271 is immaterial to the issues before the Commission in this case, and offers no grounds for amending the Tariff as Conversent proposes.[19]

Conclusion

For the above reasons, the Commission should approve, without modification and on a permanent basis, the revisions to PUC Tariff No. 18 which the Commission allowed to go into effect on March 11, 2005.

Respectfully submitted,

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[19] Conversent also entreats the Commission to open a new proceeding to establish prices for Section 271-only elements. *See* Conversent Proposal at 26, 27. Conversent's request is entirely inappropriate in this tariff proceeding and should be ignored. In any event, the Commission has no authority to set such rates, as demonstrated above.

APPENDIX A

Issue 1: Should the Amendment include rates, terms, and conditions that do not arise from federal unbundling regulations pursuant to 47 U.S.C. sections 251 and 252, including issues asserted to arise under state law?

Verizon proposed its Amendments and filed its Petition to bring its interconnection agreements into compliance with sections 251 and 252, as interpreted by the FCC. As discussed below, no other source of law can override the FCC's delineation of unbundling obligations. Furthermore, the 1996 Act makes clear that state commission authority under the 1996 Act is limited to implementation of the unbundling obligations under section 251(c)(3) and the FCC's implementing regulations. Thus, the amendments to the ICAs must include only rates, terms, and conditions that arise from federal unbundling regulations adopted by the FCC pursuant to sections 251 and 252.

A. Federal Law, Not State Law, Governs Verizon's Unbundling Obligations

Although the 1996 Act affords states a role in implementing the Act, it vests the authority to make unbundling determinations, including the determination as to whether competitive local exchange carriers would be "impaired" without access to incumbent-provided network elements on an unbundled basis pursuant to § 251(c)(3), exclusively with the FCC. 47 U.S.C. § 252(e)(2); *see USTA II*, 359 F.3d at 565-68. Indeed, the *USTA II* court made clear that the 1996 Act establishes as an affirmative requirement of federal law that there be a valid finding of impairment *by the FCC* before an incumbent can be required to provide any network element as a UNE at TELRIC prices. Where no such valid federal finding exists — either because the FCC has not found impairment or because a court has vacated an FCC impairment finding —

imposition of any unbundling requirement is inconsistent with federal law and is not permitted. Verizon's unbundling obligations exist, if at all, by virtue of federal law.

The Massachusetts D.T.E. has also recognized that a state commission cannot lawfully impose an unbundling obligation that the FCC had already rejected:

> State mandated unbundling of packet switching under Massachusetts law would not be "merely" inconsistent with the federal rules in their current form, but would be contrary to them. . . . Therefore, . . . we conclude that the FCC's *Triennial Review Order* precludes further Department review of Verizon's PARTs unbundled packet switching offering.

D.T.E. Phase III-D Order at 15, 16-17 (2004).[20] More recently, the D.T.E. explicitly rejected a CLEC's "suggestion that Section 252(e)(3) preserves the ability of the States to require unbundling where the FCC finds that it is not required," because this reading of the Act "would discount improperly the preemptive effect of federal regulation under Section 251."[21] Instead, it held that,

> Where the FCC has found affirmatively that CLECs are 'not impaired' and that ILECs are therefore not obligated to provide the network elements as UNEs under Section 251, a contrary finding of impairment would conflict with federal regulation.[22]

Other state commissions have, likewise, concluded that they have no authority to override the FCC's unbundling decisions. For example, the Virginia commission held that "*USTA II* establishes that no unbundling can be ordered in the absence of a valid finding by the FCC of impairment under 47 U.S.C. § 251(d)(2)" and that any state-commission imposed UNE

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[20] Order Dismissing Remaining Issues, *Investigation by the Commission on its own motion as to the propriety of the rates and charges set forth in M.D.T.E. No. 17, filed with the Commission by Verizon New England, Inc. d/b/a Verizon Massachusetts on May 5 and June 14, 2000, to become effective October 2, 2000*, D.T.E. 98-57 Phase III-D (D.T.E. Jan. 30, 2004) ("*D.T.E. Phase III-D Order*").

[21] *See, Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17*, entered in D.T.E. Nos. 03-60 and 04-73 on December 15, 2004, at 48 (the "Consolidated Order"), at 22.

[22] *Id*. at 23, n. 17.

obligations would therefore "violate federal law."[23] The Florida and Indiana Commissions have, likewise, found that the impairment determinations necessary to require unbundling are "reserved for the FCC, not the states."[24]

Consistent with these observations, the Commission must reject CLEC proposals to define unbundling obligations by reference to "Applicable Law," state law, merger conditions, or anything other than section 251(c)(3) and the FCC's unbundling rules. *See, e.g.*, AT&T Amendment §§ 1.1, 2.0.

The CLECs' basic position – that the limitations on unbundling established in federal law do not bind state commissions – is all-the-more untenable after the FCC's decision in *BellSouth Telecommunications, Inc. Request for Declaratory Ruling*, WC Docket No. 03-251, FCC 05-78 (rel. Mar. 25, 2005) ("*BellSouth Preemption Declaratory Ruling*"). In that case, the FCC granted BellSouth's request for a declaratory ruling that decisions by state commissions in Florida, Georgia, Kentucky, and Louisiana – which had purported to require BellSouth to provide DSL service to customers that purchase voice telephone service from CLECs using unbundled loops leased from BellSouth – are contrary to the FCC's determinations in the *Triennial Review Order* and therefore preempted. *See* Mem. Op. ¶¶ 17, 25, 26. In so ruling, the FCC squarely ruled that section 251(d)(3) – notwithstanding any of the "savings clauses" in the 1996 Act – bars state commissions from ordering unbundling in circumstances where the FCC has determined that no unbundling should be required.

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[23] Order Dismissing Petitions, *Petitions of the Competitive Carrier Coalition and AT&T Communications of Virginia, LLC*, Case Nos. PUC-2004-00073 & PUC 2004-00074, at 6 (Va. SCC July 19, 2004).

[24] Order Closing Dockets, *Implementation of Requirements Arising from FCC's Triennial UNE Review: Local Circuit Switching for Mass Market Customers*, Docket Nos. 030851-TP & 030852-TP, at 3 (Fla. PSC Oct. 11, 2004). *See also Indiana Utility Regulatory Commission's Investigation of Matters Related to the Federal Communications Commission's Report and Order*, Cause Nos. 42500, 42500-S1 & 42500-S2, 2005 Ind. PUC LEXIS 31, at *14 (I.U.R.C. Jan. 12, 2005) ("*Indiana Order*").

The FCC determined that "state decisions that require BellSouth to provide DSL service over the [high frequency portion of the loop ("HPFL")] while a competitive LEC provides voice service over the low frequency portion of a UNE loop facility effectively require unbundling of the [low frequency portion of the loop ("LFPL")]. *Id.* ¶ 25. The FCC held that such decisions "violated [47 U.S.C. §] 251(d)(3)(B) because such decisions directly conflict and are inconsistent with the [FCC's] rules and policies implementing section 251." *Id.* ¶ 26. Such requirements "impose on BellSouth a requirement to . . . do exactly what the Commission expressly determined was not required by the Act and thus exceed the reservation of authority under section 251(d)(3)(B)." *Id.* ¶ 27. Such decisions are "therefore inconsistent with federal law." *Id.*

The FCC's analysis squarely applies to the question whether a state commission may require an incumbent to unbundle any de-listed network element. The FCC reiterated that "a state decision, pursuant to state law, to unbundle an element for which the [FCC] has either found no impairment or otherwise declined to require unbundling on a national basis, would likely conflict with and 'substantially prevent' implementation of the federal regime, in contravention of the Act's specific and limited reservation of state authority." *Id.* ¶ 7 (citing *Triennial Review Order*). The FCC held that "[t]he Act establishes – and courts have confirmed – the primacy of federal authority with regard to several of the local competition provisions of the 1996 Act . . . . including, of course, unbundling and other issues addressed by Section 251." *Id.* ¶ 22.[25] "[E]xcept in limited cases, the [FCC's] prerogatives with regard to local competition supersede state jurisdiction over these matters." *Id.*

[25] The FCC noted that "'[t]he statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof.'" *Id.* ¶ 19 n.57 (quoting *City of New York v. FCC*, 486 U.S. 57, 64 (1988)).

"Accordingly, the reach of the states' authority with regard to local competition is governed principally by federal law" – in particular, section 251(d)(3). *Id.* ¶ 22. The FCC noted that a state requirement is not protected from preemption "when the state regulation is inconsistent with the requirements of section 251 *or* when the state regulation substantially prevents implementation of the requirements of section 251 or the purposes of sections 251 through 261 of the Act." *Id.* The FCC noted that, in reaching its unbundling determinations, it must "weigh … the benefits of unbundling against the costs of unbundling, including the potential of depressing competitive incentives to deploy facilities." *Id.* ¶ 29. A state requirement imposing the very unbundling obligation that the FCC had decided should not be imposed would "undermine the effectiveness of incentives for deployment" and "therefore do not pass muster under section 251(d)(3)(C) of the Act." *Id.* ¶ 30.

Notably, the FCC specifically rejected the argument, pursued by many of the same CLECs who have filed here, that any of the other provisions of the Act – including section 252(e)(3), section 261, or section 601(c) of the 1996 Act – can override the clear limitations imposed by section 251(d)(3). *See BellSouth Preemption Declaratory Ruling* ¶ 23 nn. 74, 75. Where the FCC has made a deliberate determination to limit unbundling obligations – consistent with the pro-competitive goals of the 1996 Act – no state commission can order further unbundling without "substantially prevent[ing] [the FCC's] implementation" of the Act.

APPENDIX B

Issue 32: Should the Amendment address Verizon's Section 271 obligations to provide network elements that Verizon no longer is required to make available under section 251 of the Act? If so, how?

A. Section 271 is Enforced by the FCC, Not by State Commission Arbitration Under Section 252

Various CLECs wish to insert provisions into the ICAs addressing section 271 obligations. As Verizon has explained, there is no lawful basis to include section 271 obligations in the section 252 Amendment under arbitration.

As noted in the Introduction, above, the FCC has held that Congress granted "*sole authority* to the [FCC] to administer . . . section 271" and intended that the FCC exercise "*exclusive authority* . . . over the section 271 process." *InterLATA Boundary Order*,[26] 14 FCC Rcd at 14400-01, ¶¶ 17-18 (emphases added). Courts have likewise held that "Congress has clearly charged the FCC, and *not the State commissions*," with assessing a BOC's compliance with section 271. *See, e.g.*, *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) (emphasis added). And the text of Section 271 is replete with references to the FCC's duties. *See* 47 U.S.C. § 271(d)(3), (4), (6).

By contrast, the only role Congress identified for state commissions in section 271 is with respect to an "application" for long-distance approval, and there Congress provided that "the *[FCC] shall consult* with the State commission of [that] State" so that the FCC (not the state commission) can "verify the compliance of the Bell operating company with the requirements of []section [271](c)." *Id.* § 271(d)(2)(B) (emphasis added). Congress gave state commissions no role *after* approval of such an application, and the FCC has never held that it has the obligation to consult with a state commission before ruling on a complaint under section 271(d)(6). State commissions therefore have no authority to "parlay [their] limited role in issuing a recommendation under section 271 . . . into an opportunity to issue an order" — whether under

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[26] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions To Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392 (1999) ("*InterLATA Boundary Order*").

federal law or "ostensibly under state law" — "dictating conditions on the provision" of 271 elements. *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004). Such efforts are preempted because they "bump[] up against" the procedures that are "spelled out in some detail in sections 251 and 252" and "interfere[] with the method the Act sets out" in Section 271. *Id.* As the Massachusetts D.T.E. has ruled:

> [Section 271-only elements] should be priced, not according to TELRIC, but rather according to the "just and reasonable" rate standard of Section 201 and 202 of the Act…. [T]he FCC has the authority to determine what constitutes a "just and reasonable" rate under Section 271, and ***the FCC is the proper forum for enforcing Verizon's Section 271 unbundling obligations. … We do not have authority to determine whether Verizon is complying with its obligations under Section 271***.[27]

The detailed procedures in § 251 and § 252, moreover, confirm that state commissions have no authority to regulate 271 elements. To the extent those sections impose obligations on incumbents or grant authority to state commissions, they are expressly tied to network elements that must be provided as UNEs under § 251. State commission authority over interconnection agreements is triggered only by "a request . . . *pursuant to section 251*," and where "negotiation[s] *under this section*" are unsuccessful either party "may petition a State commission to arbitrate any open issues." 47 U.S.C. § 252(a)(1), (b)(1) (emphases added); *see also id.* § 252(c)(1) (state commission must resolve open issues consistent with "the requirements of section 251"); *id.* § 252(e)(2)(B) (state commission may reject arbitrated agreement that "does not meet the requirements of section 251"). Furthermore, § 251(c)(1) obligates incumbents to negotiate — and, if necessary, arbitrate pursuant to § 252 — only "terms and conditions of agreements to fulfill the duties described in [section 251(b) and (c)]." *Id.*

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[27] Consolidated Order at 55-56 (Citations omitted.) Thus, the CCG's proposal to require Verizon to provide at TELRIC rates network elements required solely by section 271 (CCG Amendment, §4.2) is unlawful regardless of the scope of the ICAs or the Commission's authority to enforce section 271. The CCG's attempt to require Verizon to "combine and/or commingle" section 271-only elements (Amendment §4.3) must also be rejected, because section 271 does not require Verizon to combine network elements, as does section 251.

§ 251(c)(1). Based on these provisions, the FCC has held that "*only* those agreements that contain an ongoing obligation *relating to section 251(b) or (c)*" are "interconnection agreement[s]" covered by § 252. *Qwest Declaratory Ruling*, 17 FCC Rcd at 19341, ¶ 8 & n.26 (emphases added).

With respect to state commissions' authority to set rates, § 252(d)(1) is similarly "quite specific" and "*only* applies for the purposes of implementation of section 251(c)(3)." *Triennial Review Order* ¶ 657 (emphasis added). The FCC's conclusion is compelled by the text of § 252, which authorizes state commissions, in arbitrating interconnection agreements, to establish rates only for "network elements according to [section 252(d)]," which in turn authorizes "[d]eterminations by a State commission" of the "rate for network elements *for purposes of* [*section 251(c)(3)*]." 47 U.S.C. § 252(c)(2), (d)(1) (emphasis added). Congress made no comparable delegation of rate-setting authority to state commissions with respect to 271 elements, and there is "*no serious argument*" that the UNE pricing regime "appl[ies] to unbundling pursuant to § 271." *USTA II*, 359 F.3d at 589 (emphasis added). And because Congress gave the FCC — and the FCC alone — authority to determine whether a BOC complies with section 271, that authority rests exclusively with the FCC. *See id.* at 565.

Indeed, state law regulation of 271 elements (even if it were permitted, and it is not) would be contrary to the FCC's expressed preference for commercial agreements with respect to those elements. *See UNE Remand Order*, 15 FCC Rcd at 3906, ¶ 473; *Triennial Review Order* ¶ 664.[28] The possibility of state commission review and potential modification of voluntary commercial agreements encourages parties to attempt to use the regulatory process to improve further on the terms of a negotiated deal, thus diminishing their ability to resolve issues with any

[28] *See also, e.g.*, Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein on Triennial Review Next Steps (Mar. 31, 2004) ("The Communications Act emphasizes the role of commercial negotiations as a tool in shaping a competitive communications marketplace.").

certainty at the bargaining table. The FCC recognized this in the *Qwest Declaratory Ruling*, explaining that subjecting commercial agreements to the same procedural requirements that Congress specifically applied only to agreements implementing § 251(b) and (c) would raise "unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs." *Qwest Declaratory Ruling*, 17 FCC Rcd at 19341, ¶ 8. In addition, most competitors operate in multiple states and typically seek to negotiate multi-state agreements with incumbents. If the rates, terms, and conditions for provision of 271 elements in such agreements were subject to diverging and potentially conflicting regulation by each state commission, the ability of carriers to reach commercial agreements would also be severely undermined. In this regard, it is noteworthy that numerous competitors in multiple states have obtained access to directory assistance and operator services as 271 elements from Verizon under a standard multi-state contract offer, without any regulation by state commissions. As the FCC recognized, there has been "no adverse effect" on competitors — let alone any "perverse policy impact" — from BOCs' provision of these 271 elements without state regulation. *Triennial Review Order* ¶ 661.