STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: PETITION OF VERIZON-RHODE ISLAND FOR ARBITRATION OF AN AMENDMENT TO INTERCONNECTION AGREEMENTS WITH COMPETITIVE LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS IN RHODE ISLAND TO IMPLEMENT THE TRIENNIAL REVIEW ORDER AND TRIENNIAL REVIEW REMAND ORDER	:	DOCKET NO. 3588

ARBITRATION DECISION

On February 23, 2004, Verizon-Rhode Island ("VZ-RI") filed a petition for arbitration to amend interconnection agreements ("ICAs") between VZ-RI and competitive local exchange carriers ("CLECs") in Rhode Island. VZ-RI claimed that the proposed amendment would implement changes in VZ-RI's unbundling network obligations promulgated in the FCC's Triennial Review Order ("TRO"). Two procedural arbitration decisions were issued, which limited the scope of the issues as well as the number of parties in this arbitration.[1]

On August 20, 2004, the FCC issued its Interim Rules Order. VZ-RI and the CLECs engaged in further negotiation regarding the terms of an ICA Amendment. On September 15, 2004, VZ-RI, AT&T, and the Competitive Carrier Group ("CCG") represented by the law firm of Adler, Pollock & Sheehan filed new ICA Amendments.[2] On January 7, 2005, the parties filed a joint statement of issues to be arbitrated in this proceeding and on April 6, 2005, the parties agreed to two supplemental issues.[3]

[1] Order Nos. 17960(8/18/04) and 17802 (4/9/04).
[2] The CCG is composed of Choice One, Covad and IDT America.
[3] At a pre-hearing conference on January 18, 2005, the Arbitrator determined that two sub-issues for issue 17 addressing Performance Assurance Plan ("PAP") metrics for hot cuts and Section 271 facilities were excluded from the arbitration.

On February 4, 2005, the FCC issued its Triennial Review Remand Order ("TRRO"), which addressed issues as to VZ-RI's unbundling network obligations that had been reversed and/or remanded by the U.S. D.C. Circuit Court of Appeals.[4] On March 29, 2005, AT&T, MCI, and the CCG filed revised ICA Amendments to reflect the TRRO decision. On April 8, 2005, VZ-RI, AT&T, MCI and the CCG filed their initial briefs. On April 29, 2005, the same four parties filed reply briefs. On May 31, 2005, oral argument was conducted at which VZ-RI, AT&T and CCG were represented.[5]

ARBITRATOR'S FINDINGS

This arbitration has seemed to last an eternity. Thankfully, this eternity is more reminiscent of Dante's Purgatorio rather than his Inferno because the suffering will eventually come to an end. The Arbitrator will not unnecessarily prolong this agony by attempting to summarize in this decision approximately 443 pages of briefs filed by the parties. The parties are quite familiar with the respective arguments. However, the parties are not familiar with the Arbitrator's decision. Thus, without further ado, the Arbitrator will state and explain his findings.

I. The Law Governing ICAs (Issues 1, 23, and 32)

The first issue, which needs to be addressed in this arbitration, is what law governs ICAs. Essentially, the question is whether VZ-RI's wholesale obligation under an ICA, including any ICA Amendment, should be limited to Section 251 of the Telecommunications Act of 1996 ("Telco Act"), as well as the federal regulations

[4] United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).
[5] On June 3, 2005, at the request of the Arbitrator, VZ-RI filed comments addressing the appropriate definition for routine network definitions.

implementing these statutory provisions, or should it be based on the term "applicable law", which could mean state law, Section 271 of the Telco Act or merger related orders.

In relation to state law, the Commission has noted that the "FCC has preempted the states in a rather comprehensive manner as to VZ-RI's wholesale obligations."[6] Specifically, the FCC has made it rather clear that it would be "unlikely" that a state utility commission decision which contradicts the FCC's Rules "would fail to conflict" with federal law and thus, be preempted.[7] The FCC has already demonstrated that it does not make empty threats. The FCC has issued a declaratory ruling in which it found various state utility commissions' decisions which conflicted with the TRO were preempted.[8] Simply put, "the federal government has made itself, to a large extent, sovereign over local telecommunications competition".[9]

Federal supremacy is not at issue, but still at issue is whether there is any part of the field that has been left open for state law to apply. Sections 251(d)(3), 252(e)(3) and 261 of the Telco Act all recognize state authority to impose requirements in local telecommunications. Specifically Section 252(e)(3) would allow these state requirements to be incorporated into the ICA. However, Sections 251(d)(3) and 261 clearly declare that state requirements cannot be "inconsistent" with federal requirements and cannot "substantially prevent implementation" of federal requirements. Thus, in theory, there is only a place for state imposed wholesale obligations for any potential "gaps" in the FCC's Rules or where the field has not been occupied by federal regulation.[10] Nonetheless, there are essentially no current wholesale obligations imposed by Rhode

[6] Order No. 18310.
[7] Id. (citing TRO para. 195).
[8] FCC's Bell South Declaratory Ruling (3/25/05).
[9] Order No. 18281 (citing AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 378 n.6 (1999)).
[10] Order No. 18310.

Island, which have not been incorporated or preempted by the FCC. Therefore, there is no need to create "certain confusion and possibly unnecessary litigation" by requiring ICAs to use the phrase "applicable law".[11] If or when, in the future, the Commission imposes additional state wholesale obligations, state tariffs will be revised and ICAs can be modified through their changes of law provisions rather than having continued uncertainty in the ICA.[12]

Although it is clear that federal law reigns supreme over local telecommunications competition, there is an additional issue as to whether other aspects of federal law should be incorporated into the ICA. This Arbitrator has already determined that "the sun has set on VZ's obligations to provide UNEs under the Bell Atlantic/GTE Merger Order".[13] Thus, there is no need for these old merger conditions to be incorporated into the ICA.[14]

A more challenging inquiry is whether Section 271 obligations must be included in an ICA. Section 271(c)(1)(A) requires an ICA to be approved under the Section 252. However, the FCC has declared that, "it is reasonable to interpret sections 251 and 271 as operating independently".[15] For instance, the standards set forth in Section 252(c) for arbitration only discuss the requirements and regulations arising from Section 251 and the pricing for these Section 251 network elements, but make no mention of Section 271. Furthermore, pursuant to Section 252(e)(6) any appeal of an arbitration decision to federal court is based on whether the ICA meets the requirements of Sections 251 and

[11] Id.
[12] Id.
[13] Order No. 17802.
[14] If the FCC imposes merger conditions upon VZ, which affects VZ's Section 251(c) obligations, then those merger conditions could be incorporated into an ICA because those merger conditions would affect VZ-RI's Section 251(c) obligations even though the conditions were not necessarily incorporated into the FCC's Rules.
[15] TRO para. 655.

252, but make no mention of Section 271.[16] In addition, the arbitration process is triggered pursuant to Section 252(a)(1) when there is "a request for interconnection services, or network elements pursuant to Section 251". The phrase "network elements" is not derived from Section 271, but instead is found in Section 251(c)(3), which requires "access to network elements on an unbundled basis". Lastly, Section 271 recognizes a difference between unbundled network elements ("UNEs") required by Section 251(c)(3) and access to the facilities listed in the 14 point checklist of Section 271(c)(2)(B). For example, the second checklist item in Section 271 references "nondiscriminatory access to network elements in accordance with the requirements of Section 251(c)(3) and 252(d)(1)", which are UNEs. However, Section 271 separately requires in checklist items four through six that there be access to: loops, transport and switching. Therefore, UNEs, which are subject to Section 252 arbitration, are not necessarily Section 271 facilities, and therefore Section 271 facilities are not required to be arbitrated. Accordingly, Section 271 wholesale obligations are different and distinct from Section 251 obligations. Because the Section 252 arbitration process is for Section 251 UNE obligations, Section 271 obligations cannot be independently included in the ICA.

Section 271 obligations are not UNEs pursuant to Section 251. Although Section 271 imposes obligations, these are federal requirements for which the FCC has been given clear authority to enforce pursuant to section 271(d)(6). It is also quite apparent that these Section 271 obligations are of an undefined nature because the pricing for access to these Section 271 facilities, which are made pursuant to the just and reasonable standard of Sections 201 and 202, is still a matter of dispute. Since there is so much confusion surrounding these undefined federal obligations arising from Section 271, state

[16] Section 252 merely sets forth how to implement Section 251 obligations through arbitration and pricing.

utility commissions should not attempt to require Section 271 obligations to be included in ICAs because such a requirement will create unnecessary litigation. The Commission has repeatedly indicated that the CLECs should "petition the FCC immediately for relief if VZ-RI is not appropriately providing access to its facilities pursuant to Section 271" and then the FCC can "undertake a fact-specific inquiry as to whether a BOC's rates for Section 271 facilities are just and reasonable under Sections 201 and 202."[17]

The purpose of this arbitration is to define with as much clarity as possible the obligations of parties to one another. A lack of clarity creates an abundance of uncertainty which gives birth to harmful legal challenges rather than beneficial commercial exchanges. Utilizing the phrase "applicable law" does not end the dispute, but postpones it for another day. Telecommunications law is not a vague "omnipresence in the sky", but specific statutory and regulatory provisions.[18] The only law which governs an ICA at this time is Section 251 and the federal regulations implementing Section 251.

Now that it has been determined what law governs an ICA, the issue becomes how does the ICA Amendment to be adopted in this proceeding relates, as matter of law, to the current ICA and tariffs. Unquestionably, this ICA Amendment, which will implement the TRO and TRRO, supersedes any inconsistent provisions in the current ICA, but to the extent this ICA Amendment does not affect pre-existing rights or obligations in the ICA, those rights and obligations are still binding. However, tariffs are documents that are created and exist outside of the Section 252 arbitration process. In regards to ICAs, tariffs should be referenced in an ICA "only to supplement the ICA and

[17] Order No. 18310 (citing TRO para. 664).
[18] Southern Pacific Co. v. Jensen 244 U.S. 205 (1917) (Holmes, dissenting).

not supplant it".[19] Otherwise, parties could use tariffs to circumvent the ICA arbitration process of Section 252, which would contrary to the intent of federal law. The parties to this arbitration invested their time and resources into this ICA arbitration to insure their obligations and rights under the law were sufficiently clear and adequately protected. Vague references to other tariffs in order to protect VZ-RI's "right" to discontinue UNEs regardless of the provisions of the ICA Amendment will only lead to confusion and litigation and would also undermine the Section 252 arbitration process. Certainly, there is a place in an ICA to incorporate or refer to tariffs, but these references must be specific enough so that the tariffs "explain and supplement an ICA" such as when a tariff reference is included in order to reflect "a change of price" for a UNE.[20] However, these references must be specific or one is left with unresolved ambiguity. If "applicable law" is not sufficiently specific upon which to base VZ-RI's wholesale obligations, undoubtedly a reservation of rights arising from unspecified tariffs is also too ambiguous a basis to allow VZ-RI to discontinue UNEs. To summarize, the legal rights and obligations of this ICA Amendment are governed only by Section 251 of the Telco Act, and the federal regulations implementing Section 251. Furthermore, no tariff or other document not specified in the ICA can be relied upon by a party as a reservation of rights.

II. <u>Transition for Discontinued UNEs</u> (Issues 3, 4, 5, 11, 28, 31, Supplemental 1, and 2)

The next issue is how to implement the FCC's transition plan for discontinued UNEs. At the outset, it must be determined when the FCC's transition plan should go into effect for the discontinued UNEs of the TRRO. The FCC expressly mandated

[19] Order No. 17193.
[20] <u>Id</u>.

transition periods for discontinued UNEs in the TRRO such as mass market switching, and loops and transport in certain wire centers, which began on March 11, 2005.[21] Furthermore, the Commission has already determined that the transition plans for the discontinued UNEs in the TRRO had specific effective dates commencing on March 11, 2005.[22]

The second step is to determine what constitutes the CLECs' "embedded customer base", which would be eligible for transitional pricing. The Commission has already struggled to determine whether the FCC was referring to customers or UNE arrangements when the FCC used the term "embedded customer base". Taking the FCC's TRRO in its totality, the Commission held that "the phrase 'embedded customer base' equates to the embedded base of unbundled circuit switching or other such UNE arrangements".[23] Thus, "the transition plan is not for the CLECs' customers as of March 11, 2005 but for the specific UNE arrangements in place as of March 11, 2005, which serve the customers."[24] As noted by the Commission, "this interpretation is consistent with the overall objective of the TRRO, which is to transition away from UNE-P".[25]

The third step is to define which UNEs are discontinued. The FCC's Rules are quite clear in this regard. In fact, it would benefit everyone to specific language in the ICA Amendment as to which UNEs are available and which UNEs are discontinued and the appropriate transition plan. This may lengthen the ICA but will minimize potential acrimony. The one area where there is legitimate confusion regarding the FCC's Rules is whether the cap of 10 DS1 dedicated transports should apply to all routes where DS1 is

[21] TRRO paras 145, 198 and 227.
[22] Order No. 18281.
[23] Order No. 18310.
[24] Id.
[25] Id.

unbundled or only to those routes where DS1 transport is available but DS3 transport is no longer unbundled. Although acknowledging that the FCC's Rules are clear, but that the TRRO is silent as to application of the cap on all routes, the Commission has already adopted "the interpretation of the FCC's TRRO which imposes a cap of 10 DS1 transport circuits on all routes where DS1 is available to be unbundled".[26] As for requiring VZ-RI to provide packet switching functions to CLECs or having the UNE-P transition plan apply to enterprise switching customers, the TRO resolved these issues. The FCC's TRO clearly eliminated packet switching and enterprise switching as UNEs.[27] Since the TRRO did not specifically include enterprise switching in the definition of "embedded customer case" or revisit the issue of packet switching, there is no need to undo or attempt to undermine the FCC's objective of transitioning away from UNE-P. In fact, the Commission has already eliminated enterprise switching as a UNE from RIPUC Tariff No. 18.[28]

The fourth step is to determine when the transition period for the CLECs' embedded customer base ends. A stated earlier, the TRRO provides clear start dates for the transition period. Likewise, based on the language of the TRRO, there is clear end dates for the transition period for various discontinued UNEs. For instance, the FCC Rules repeatedly state that "for a 12-month period beginning on the effective date of the Triennial Review Remand Order", there is a transition period for mass market switching, DS1 and DS3 loops, as well as DS1 and DS3 dedicated transport.[29] Thus, depending on the UNE, the end of the transition period is 12 months or 18 months after the effective

[26] Id.
[27] TRO paras. 419 and 537.
[28] Order No. 18036.
[29] 47 C.F.R. Rules 51.319(a)(4)(iii), 51.319(a)(5)(iii), 51.319(d)(2)(iii), 51.319(e)(2)(ii)(C), 51.319(e)(2)(iii)(C).

date of the TRRO on March 11, 2005. However, VZ-RI has argued that transitional rates for these discontinued UNEs should end once a CLEC submits a conversion order for a particular UNE arrangement rather than allowing CLECs to receive the transitional rate until the conclusion of the FCC mandated transition period. This approach should not be adopted. Since the TRRO provides clear end dates for the transition period, the CLECs should receive the full economic benefit of these transitional rates for these discontinued UNEs. Also, VZ-RI's approach would be administratively inefficient and possibly lead to service disruption because a CLEC would be included to wait until the end of the transition period to submit conversion orders for its embedded base in order to garner the full benefit of the transition rate. Thus, CLECs should be permitted to place orders converting UNEs to alterative arrangements at any time during the transition period while still being charged the transitional rate until the end of the transition period.

The final step is to determine if the ICA Amendment should include a specific list of wire centers from where various UNEs are no longer available and the process by which to determine which wire centers are not eligible for certain UNEs. The Commission addressed this issue in Docket No. 3662 when it approved various revisions to RIPUC Tariff No. 18. Specifically, the Commission required VZ-RI to include a list of non-UNE eligible wire centers in its state wholesale tariff.[30] Furthermore, the Commission required VZ-RI to follow the tariff revision process of Title 39 which provides for notice, due process for the parties and oversight by the regulators when there are changes to be made to the wire center list.[31] As stated earlier, it can be appropriate to incorporate or refer to tariffs in an ICA as long as the tariff references are specific enough

[30] Order No. 18310.
[31] Id.

so as to "explain and supplement an ICA".[32] Therefore, the ICA Amendment should specifically refer to RIPUC Tariff No. 18 in regards to which wire centers are not eligible for various UNEs and state that any changes to this list will go through the tariff revision process of Title 39. The tariff revision process of Title 39 gives CLECs the opportunity for discovery and gives a role for the regulators to verify the accuracy of the wire centers list while giving VZ-RI flexibility to alter the list of eligible wire centers as needed.

III. <u>After the Transition</u> (Issues 6, 8, 24, 26, and 29)

Once the transition period is over, the issue becomes what happens to the services and prices of these discontinued UNEs, and to the CLEC customers who had benefited from these discontinued UNEs. In regards to what prices can be charged for a discontinued UNE, the simple answer is essentially whatever the FCC will allow VZ-RI to get away with. As discussed earlier, the Section 252 arbitration process is triggered pursuant to section 252(a)(1) when there is "a request for interconnection services, or network elements pursuant to Section 251". This "access to network elements on an unbundled basis" is set forth in Section 251(c)(3). Therefore, once the FCC determines that a facility is not required to be unbundled under Section 251(c)(3), access to that facility is essentially no longer subject to compulsory arbitration under Section 252. Whether or not the pricing of discontinued UNEs is subject to Section 271 or if the pricing for these discontinued UNEs violates Section 201 and 202, the issue is not appropriate for a Section 252 arbitration. Not only is pricing of discontinued UNEs not subject to Section 252 arbitration, but neither is any substitute service VZ-RI may offer to CLECs in lieu of these discontinued UNEs after the transition period. As stated earlier,

[32] Order No. 17193.

CLECs should "petition the FCC immediately for relief if VZ-RI is not appropriately providing access to its facilities pursuant to Section 271" so the FCC can "undertake a fact-specific inquiry as to whether a BOC's rates for Section 271 facilities are just and reasonable under Sections 201 and 202."[33]

Furthermore, if there is no requirement to reference the prices VZ-RI may charge CLECs for discontinued UNEs after the transition period ends, or what kind of substitute services VZ-RI must offer to CLECs after the end of the transition period, there is no need to reference any commercial agreement for such terms in the ICA. Since the commercial agreements, to be referenced, would discuss prices for services not subject to Section 251 even a reference to commercial agreements in an ICA could go beyond the scope of the Section 252 arbitration process.

Although prices and substitute services for discontinued UNEs after the transition period ends is not subject to the Section 252 arbitration process, as noted in Section II of this Decision, the ICA Amendment must set forth the specific transitional rates charged for the discontinued UNEs during the FCC mandated transition period. This is necessary to comply with the requirement of Section 252(a)(1) for a detailed schedule of charges for network elements to be included in the ICA, and it will also avoid any confusion. Furthermore, the FCC envisioned that a true-up of rates to the applicable transition rate would occur at the conclusion of the arbitration process when the ICA Amendment is approved by this Commission.[34] However, late fees or penalties are not part of the true-up charge as long a CLEC pays its true-up bill within the billing cycle in which the CLEC receives a true-up bill. In addition, although VZ-RI can charge whatever prices it

[33] Order No. 18310 (citing TRO para. 664).
[34] TRRO fns. 408, 524, and 630.

wants for discontinued UNEs, the charge for switching a service from a UNE to an alternative non-UNE arrangement is subject to Commission approval. Since VZ-RI has indicated that there is not a separate termination charge in Rhode Island because the termination charge is "already rolled in" to the initial non-recurring charge, there is no need to specifically allow in the ICA Amendment a termination charge for converting a UNE to an alternative arrangement.[35] As a general matter, as will be discussed in greater detail elsewhere in this arbitration, the FCC does not view favorably non-recurring charges associated with "termination charges".[36] If the Commission ever approves termination charges for such services, VZ-RI can go through a change of law process to amend its ICA.

As for the potential effect upon the CLECs' customers' services when a UNE is discontinued, this essentially depends on the CLEC's response to the discontinuation of the UNE by VZ-RI. Whether or not VZ-RI disconnects a CLEC customer is the CLEC's choice. VZ-RI has indicated it will give ninety days notice that it intends to discontinue providing the UNE at a TELRIC rate and then VZ-RI would reprice the arrangement unless the CLEC indicates that it wants the service to be terminated.[37] This is a rather simple and smooth process. Furthermore, the FCC has created clear transition plans of twelve to eighteen months for various discontinued UNEs. These transition plans give adequate time for CLECs to plan alternative arrangements, whether it is with VZ-RI through agreement, resale, or tariff, an agreement with another wholesale provider, or by self-provisioning. Lastly, if a CLEC decides to cease providing a service to its customers upon the discontinuance of a UNE, it is the responsibility of the CLEC, as the retail

[35] Tr. 5/31/05, pp. 32-35.
[36] TRO para. 587.
[37] VZ-RI's Brief, pp.110-111.

provider, to notify its customer and not the responsibility of VZ-RI, the wholesale provider.

IV. <u>Definitions and Loop Obligations</u> (Issues 9, 14, 16, and 18)

The next issue to be addressed is how to define the terms in the ICA Amendment, and how to define VZ-RI's new obligations in regards to certain specific loops. It appears that the CLECs disagree with approximately fifteen definitions proposed by VZ-RI in this arbitration while the CLECs have proposed approximately twenty-one new definitions in this arbitration with which VZ-RI disagrees.[38] Going through each of these definitions would be a labor of love only for someone like Noah Webster.

In order to simplify this analysis, some general principles must be to set forth. First, it must be recalled that the purpose of this arbitration is to implement the changes of law arising from FCC's TRO and TRRO. In the initial procedural arbitration decision in this docket, the subject of routine network modifications was excluded as an issue in this arbitration because the "FCC did not impose a new obligation on VZ-RI to undertake routine network modifications" and in fact, VZ-RI has an "an old pre-existing obligation" under its ICAs "to perform routine network modifications for CLECs at TELRIC rates".[39] Therefore, it is unnecessary to consider modifying the definition of terms already defined by the FCC which were not modified by either the TRO or TRRO. Second, since the purpose of this arbitration is to implement the changes of law arising from FCC's TRO and TRRO, it is reasonable to require all new definitions to mirror as closely as practicable to the definitions utilized by the FCC itself. This will not only simplify the

[38] VZ-RI's Brief, pp. 43-78.
[39] Order No. 17802. VZ-RI acknowledges it currently performs routine network modifications in Rhode Island. Tr. 5/31/05, pp. 47, 51.

process of amending the ICA, but also make the ICA Amendment more consistent with the FCC's TRO and TRRO. Third, in certain specific instances the terms not found in the FCC can be used in the ICA Amendment in order to simplify or clarify issues.

Regarding definitions for terms, which were not altered by the FCC's TRO and TRRO, there is not a clear need to amend the ICAs to include these terms. The Massachusetts DTE listed many of these terms in its recent Arbitration Order.[40] For instance, the FCC merely reaffirmed the ILEC's obligation to provide Network Interface Devices ("NIDs") as a UNE and the FCC specifically "declined to adopt more specific rules" for access to the NID.[41] Thus, there is no need have the NID discussed in the ICA Amendment. However, for the sake of clarification, if the parties wish to agree to include such terms and their definitions in the ICA Amendment, the definitions for these terms must mirror the FCC's definitions as close to verbatim as practicable.[42] One example of an area where the parties may agree to a clarification in the ICA Amendment is line conditioning. In the TRO, the FCC merely readopted its previous line conditioning rules as set forth in a previous FCC order.[43] Thus, there is no requirement that the ICA Amendment be modified to include line conditioning. However, if line conditioning is to be included in the ICA Amendment then the definition must mirror the FCC Rule 51.319(a)(1)(iii)(A) as verbatim as practicable, and it must be recognize not only VZ-RI's

[40] Mass DTE Arbitration Order (7/14/05), fn. 44.
[41] Id. paras. 356 and 358. The definition for the NID is located at 47 C.F.R. Rule 51.319(c).
[42] The definition for combination must be consistent with the language used in 47 C.F.R. Rule 51.315(c). The definition for commingling must mirror the definition used in 47 C.F.R. Rule 51.5, the terms and definitions section. The definition for dark fiber loop must be mirror the definitions used in 47 C.F.R. Rules 51.319(a)(1) and (a)(6)(i). The definition for DS1 and DS3 loops must mirror the definitions used in 47 C.F.R. Rules 51.319(a)(4) and (a)(5). The definition for enterprise switching must mirror the definition used in 47 C.F.R. Rule 51.319(d)(3). The definition for entrance facilities must mirror the definition used in Rule 51.319(e)(2). The definition for local switching must mirror the definition used in 47 C.F.R. Rule 51.319(d)(1). The definition for loops or loop distribution must mirror the definitions used in 47 C.F.R. Rule 51.319(a). The definition for mass market switching must mirror the definition used in 47 C.F.R. Rule 51.319(d)(2)(i).
[43] Id. para. 642.

obligation to perform line conditioning pursuant to 51.319(a)(1)(iii), but also VZ-RI's right to charge TELRIC based prices for line conditioning as permitted by 51.319(a)(1)(iii)(B).

There are certain colloquial telecom terms which may appear in the TRO and TRRO. These are not to be included in the ICA Amendment. Regarding UNE-P, the TRRO entirely eliminated UNE-P after the transition period.[44] Thus, there is no need to define UNE-P in the ICA Amendment. Furthermore, there is also no need to define circuit switch in the ICA Amendment because, as previously stated in footnote forty-two of this decision, there are numerous other terms relating to switching that can be included in the ICA Amendment.[45] As for the term hot cut, it need not be defined in the ICA Amendment because the term and its definition existed prior to TRO and TRRO. Furthermore, the new unbundling requirements in the TRRO do not require any discussion of hot cuts.[46]

There are some new definitions in the TRO and TRRO which need to be utilized. The terms dedicated transport and dark fiber transport have been used prior to the TRO and TRRO. However, in the TRRO it appears that the definition for these terms changed somewhat. The FCC defines the terms, dedicated and dark fiber transport, as including ILEC transmission facilities between ILEC wire centers or switches and switches owned by CLECs.[47] However, in the same rules, the FCC limits the ILEC's unbundling

[44] VZ-RI's Brief, p. 72.
[45] As for packet switching, the FCC determined that packet switching is not a UNE. TRO para. 537. Therefore, VZ-RI is not required to provide access to packet switching in the ICA Amendment. If it necessary, to indicate in the ICA Amendment that packet switching is not a UNE, the definition for it must mirror the definition used in 47 C.F.R. Rule 51.319(a)(2)(i).
[46] VZ-RI's Brief, pp. 65-67.
[47] 47 C.F.R. Rule 51.319(e)(1).

obligation to dedicated and dark fiber transport between ILEC wire centers or switches.[48] For the sake of consistency, the FCC's definition for dedicated and dark transport is to be utilized even though it creates some ambiguity.[49] However, to avoid any confusion, the ICA Amendment must be abundantly clear that entrance facilities are not UNEs. Another example is line splitting. Although the FCC reaffirmed its line splitting requirements, the FCC determined it would be "appropriate to adopt line splitting-specific rules".[50] Since it appears that new rules were adopted, the line splitting rules should be included in the ICA Amendment as close to verbatim as practicable.[51] The same is true for line sharing. In the TRO, the FCC adopted a detailed three year transition plan for new line sharing arrangements and for existing line sharing arrangements as of the effective date of the TRO.[52] Since the FCC created a transition plan for line sharing, the FCC Rules in this area should simply be included in the ICA Amendment.[53]

There are some new terms, definitions and obligations in the TRO relating to loops which must be included in the ICA Amendment. In regards to the term fiber-to-the-premises ("FTTP"), it is not found in the FCC's TRO or TRRO. It is a term invented by VZ-RI. Instead, the FCC uses the term fiber to the home ("FTTH"). As stated previously, the specific FCC terminology and definitions should be utilized in the ICA Amendment to fullest extent practicable. Accordingly, the definition of FTTH to be included in the ICA must mirror the language utilized by the FCC.[54] The FCC states that

[48] 47 C.F.R. Rule 51.319(e)(2).
[49] 47 C.F.R. Rules 51.319(e)(1) and (e)(2)(iv).
[50] TRO para. 251.
[51] 47 C.F.R. Rule 51.319(a)(1)(ii)(A)(B).
[52] TRO paras. 264-269.
[53] Order No. 18017 and 47 C.F.R. Rule 51.319(a)(1)(i).
[54] The term fiber to the curb ("FTTC") need not be specifically included as a separate term in the ICA Amendment because the FCC recently granted relief from its unbundling requirements for FTTC loops.

FTTH "is a local loop consisting entirely of fiber optic cable, whether dark or lit, and serving an end user's customer premises".[55] To be even clearer, the definition of FTTH refers to "customer premises" without any limitation as to the type of customer. In fact, in subsequent errata and reconsideration orders the FCC substituted previous references to "residential" as relates to FTTH with more generic phraseology such as "customer premises".[56] This demonstrated that FTTH is not limited to residential customers, but encompasses business customers as well. In fact, the FCC had originally indicated in the TRO that its "loop unbundling rules … do not vary based on the customer to be served".[57] Also, the FCC's Rules provide that an ILEC is not required to unbundle FTTH for new builds, which occur when the ILEC deploys a FTTH "loop to an end user's customer premises that previously has not been served by any loop facility".[58] Furthermore, the FCC's Rules stated that an ILEC is not required to unbundle a FTTH loop for overbuilds, which is when the ILEC deploys a FTTH "loop parallel to, or in replacement of, an existing copper loop", as long as the ILEC continues to provide access to the properly serviceable existing copper loop or a voice grade transmission path on the FTTH loop.[59] Thus, the ICA Amendment should simply utilize the language of the FCC's Rules on FTTH loops, including the definition itself and the provisions regarding new builds and overbuilds.

TRO Second Reconsideration Order (10/18/04). See Huber, Kellogg, Throne, and Leo, Federal Telecommunications Law, (2005 Cumulative Supplement) (2nd ed.)(2005), p.42.

[55] 47 C.F.R. Rule 51.319(a)(3).

[56] FCC's Errata Orders on 10/29/04 and 9/17/03. See Huber, Kellogg, Throne, and Leo, Federal Telecommunications Law, (2005 Cumulative Supplement) (2nd ed.)(2005), pp.40-41.

[57] TRO para. 210.

[58] 47 C.F.R. Rule 51.319(a)(3)(i).

[59] 47 C.F.R. Rule 51.319(a)(3)(ii).

Addressing the topic of the retiring copper loops, the FCC's Rules require VZ-RI to provide at least 90 days notice prior to the retirement of a copper loop.[60] The FCC does not impose a longer notice period or any pre-approval by a CLEC for a copper loop retirement. Any greater delay in the retirement of copper loops not only goes beyond federal law, but will delay investment in new technologies.

Regarding a hybrid loop, its definition is clearly set forth in the FCC UNE Rules, which state that it is "a local loop comprised of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant".[61] Furthermore, as in the case of FTTH, the FCC did not limit its hybrid loop unbundling rules to residential customers because the term "customer" as used in the FCC's Rules is a generic term.[62] Therefore, the FCC did not limit its hybrid loop unbundling rules to only residential customers. The FCC differentiates an ILEC's obligation regarding hybrid loops between broadband and narrowband services. For broadband services, the FCC did decline to unbundle "the next–generation network, packetized capabilities of their hyrbird loops".[63] However, the FCC did require VZ-RI to provide access "to the time division multiplexing ("TDM") features, functions and capabilities" of hybrid loops "that are not used to transmit packetized information".[64] For narrowband services, VZ-RI "may either" provide access to "to an entire hybrid loop capable of voice-grade service", which uses TDM technology or it can provide access "to a spare home-run copper loop".[65] Although VZ-RI is required to provide access to the TDM functions of the hybrid loop,

[60] 47 C.F.R. Rule 51.333(b)(iii). However, this notice provision does not apply to the retirement of copper feeder plant. TRO fn. 829.
[61] 47 C.F.R. Rule 51.319(a)(2).
[62] 47 C.F.R. Rule 51.319(a)(2)(ii)(iii).
[63] TRO para. 288.
[64] 47 C.F.R. Rule 51.319(a)(2)(ii).
[65] 47 C.F.R. Rule 51.319(a)(2)(iii).

VZ-RI is not required to provide access to the packet switch features of that loop.[66] In addition, although VZ-RI is required to provide access to TDM capability existing in the hybrid loop, it is not required to add TDM capability to a hybrid loop at the request of a CLEC.[67]

Some hybrid loops are served by an Integrated Digital Loop Carrier ("IDLC") system in which the IDLC "is integrated directly in to the switches of" the ILEC.[68] The FCC requires an ILEC to provide unbundled access to loops where the end user is served via Integrated Digital Loop Carrier ("IDLC").[69] The FCC noted "that in most cases" an ILEC can meet its obligation "either through a spare copper facility or through the availability of Universal DLC systems" ("UDLC").[70] However, "if neither of these options is available", the ILEC "must present requesting carriers a technically feasible method of unbundled access", which may entail "configuring existing equipment, adding new equipment, or both".[71] In other words, VZ-RI has the option of either providing a spare copper loop or access to a UDLC system. Once, VZ-RI has determined that it can not meet its obligation by providing a spare cooper loop or through a UDLC system, it is VZ-RI's option to determine what constitutes "a technically feasible method of unbundled access," and the CLEC must pay the costs for this additional work if it wants access. The TRO does not require the ILEC to utilize the approach chosen by the CLEC in order for the ILEC to comply with its unbundling obligation. The ILEC should determine how best to manage its own network in order to comply with FCC unbundling

[66] 47 C.F.R. Rule 51.319(a)(2)(i).
[67] TRO Second Reconsideration Order (10/18/04) para. 20.
[68] TRO para. 297.
[69] TRO paras. 296-297.
[70] Id.
[71] Id. para. 297 and fn. 855.

obligations. If the CLEC does not want to incur the costs associated with constructing new facilities, then it can choose not to have the facilities built.[72] Thus, the CLEC still retains the freedom not to incur what it deems exorbitant costs.

In regards to copper subloops, the ICA Amendment should reflect the FCC Rules in their entirety rather than portions of it.[73] In addition, the ICA Amendment should not only include the definition for a point of technically feasible access, but also utilize the examples of points of technically feasible access indicated in the FCC Rules. For instance, the FCC states that "such points include, but are not limited to, a pole or pedestal, the serving area interface, the network interface device, the minimum point of entry, any remote terminal, and the feeder/distribution interface."[74]

In regards to the term subloops for multiunit premises access, the simplest approach is to utilize the language in the FCC's Rules for the ICA Amendment. Therefore, the definition for subloops for multiunit premises access must be taken as close to verbatim as practicable from the FCC's Rules.[75] Since the definition of subloops for multiunit premises in the FCC Rules has no mention of FTTP, the term FTTP must be eliminated from the definition. As for access to the subloops for multiunit premises, the specific language used by the FCC in its Rules should be included in the ICA for the sake of simplicity and clarity. For instance, an ILEC shall provide a requesting CLEC "with nondiscriminatory access to the subloop for access to multiunit premises wiring on an

[72] Tr. 5/31/05, p.74.
[73] 47 C.F.R. Rule 51.319(b)(1).
[74] 47 C.F.R. Rules 51.319(b)(1)(i) and (b)(2)(i).
[75] 47 C.F.R. Rule 51.319(b)(2).

unbundled basis regardless of the capacity level or type of loop" that the requesting CLEC's "seek to provision for its customer."[76]

As for a Single Point of Interconnection ("SPOI") in copper subloops or subloops for multiunit premises access, the ILEC is obligated "to construct a SPOI to only those multiunit premises where the incumbent LEC has distribution facilities to that premises and either owns, controls or leases the inside wire at the multiunit premises, including the Inside Wire Subloop, if any, at such premises".[77] Furthermore, the ILEC's obligation "to build a SPOI for multiunit premises only arises when a requesting carrier indicates that it intends to place an order for access to an unbundled subloop network element via a SPOI."[78] In addition, this SPOI "obligation is in addition to the incumbent LEC's obligations … to provide nondiscriminatory access to a subloop for access to multiunit premises wiring, including any inside wire, at any technically feasible point".[79] The ICA Amendment should reflect the FCC's language as close to verbatim as practicable. However, the FCC was silent as to the exact rates, terms and conditions under which an ILEC will construct a SPOI but instead stated that "any issues in dispute regarding their obligation shall be resolved in state proceedings under section 252 of the Act."[80] Thus, it appears that only after a CLEC requests a SPOI at a multiunit premises is VZ-RI required to negotiate the specific rates, terms and conditions and then if their negotiations fail the Section 252 arbitration process can commence. Furthermore, it would simply be impracticable to try and create rates, terms and conditions to encompass all potential SPOI situations.

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[76] 47 C.F.R. Rule 51.319(b)(2).
[77] TRO fn.1058, and See 47 C.F.R. Rule 51.319(b)(2)(ii).
[78] Id.
[79] 47 C.F.R Rule 51.319(b)(2)(ii).
[80] Id.

One category of these subloops to multiunit premises is "inside wire" or "house and riser cable". VZ-RI acknowledges there really is no difference between the term "house and riser cable" and "inside wire" and that the FCC utilizes the term "inside wire".[81] Thus, the FCC term of "inside wire" is to be utilized in the ICA Amendment. Also, the definition for inside wire must be as close to verbatim as possible from the FCC's Rules.[82] For instance, there should be no reference to FTTP in the definition. Also, the definition is to use the phrase "owned or controlled", which is the term used in the rule itself. Furthermore, the definition is to state that inside wire is one category of subloops to multiunit premises.[83] As to granting access to CLECs' technicians to the inside wire loop, "VZ-RI has a right to maintain its network".[84] AT&T acknowledged that outside of collocation, CLECs are generally not allowed to make alterations to an ILEC's plant or facilities.[85] A compelling argument was not made to support a departure, in this one instance, from the common practice of not allowing CLEC technicians to alter an ILEC's facilities. As for requiring VZ-RI to reserve space on its inside wire for CLECs, the FCC does not mandate that ILECs engage in such a practice. Furthermore, requiring VZ-RI to reserve space on its inside wire does not further competition, but only hinders VZ-RI's ability to serve its customers.

As for the feeder portion of the subloop, it is clear that the FCC determined that ILECs should not be required to provide unbundled access to their fiber feeder loop plant except "to the extent their fiber feeder plant is necessary to provide a complete transmission path between the central office and the customer premises when incumbent

[81] Tr. 5/31/05, pp. 41-42.
[82] 47 C.F.R. Rule 51.319(b)(2).
[83] Id.
[84] Order No. 17193.
[85] Tr. 5/31/05, pp. 75-76.

LECs provide unbundled access to TDM-based capabilities of their hybrid loops."[86] There is nothing in the TRO, which indicates that this does not apply to all customers.

There are also new terms and definitions in order to implement the FCC mandated transition plan for loops and transport. These terms are to be included in the ICA Amendment in order to help clarify which wire centers are still eligible for certain UNEs as a result of the TRRO.[87] Specifically, the definition for the three tier wire center approach (set forth in the TRRO for determining which wire centers are eligible for which UNEs) shall utilize the definitions in FCC Rules.[88] As for the specific wire centers in Rhode Island, as discussed previously, a reference to RIPUC Tariff No. 18 is sufficient.[89]

There also appear to be new definitions for such terms as mobile wireless service and routine network modifications.[90] As previously noted, routine network modifications are not an issue in this arbitration, however, for the sake of clarity, the parties should agree to include a definition for routine network modifications. A definition of routine network modifications can include VZ-RI's obligation to perform routine network modifications as stated precisely in the FCC Rules.[91]

There are certain terms that should not be included in the ICA Amendment that also do not appear in the FCC's TRO or TRRO. As discussed earlier, the term

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[86] TRO para. 253.
[87] The definitions for business line, fiber based collocator, and wire center must mirror the definitions used in 47 C.F.R. Rule 51.5, the terms and definitions section. The definition for route must mirror the definition used in 47 C.F.R. Rule 51.319(e).
[88] For loops, the definition must mirror the definitions used in 47 C.F.R. Rules 51.319 (a)(4) and (a)(5) while for transport, the definition must mirror the definition used in 47 C.F.R. Rule 51.319(e)(3).
[89] Order No. 18310.
[90] For mobile wireless service, the definition must mirror the definition used in 47 C.F.R. Rule 51.5, the terms and definitions section. For routine network modifications, the definition must mirror the definitions used in 47 C.F.R. Rules 51.319(a)(8) and (e)(5).
[91] 47 C.F.R. Rules 51.319(a)(8)(i) and (e)(5)(i). A discussion of PAP metrics as it relates to routine network modifications will take place later on in this decision.

"applicable law" is simply too vague to be utilized to determine VZ-RI's wholesale obligations, and thus should not be included in the ICA Amendment. Also, the term, "Section 271 Network Elements" should not be utilized either. As stated previously, the Section 252 arbitration process is for Section 251 obligations and those state mandated obligations permissible under Section 251(d)(3), but not for Section 271 obligations. Also, "predicate conditions' and "zone conditions" are terms not applicable in this ICA Amendment because they apply specifically to New York, and not Rhode Island.[92]

There are terms that should be included in the ICA Amendment that may not specifically be defined by the FCC in either the TRO or TRRO. Specifically, it is appropriate to use the terms "Federal Unbundling Rules" and "discontinued facility". Since there are no Rhode Island imposed unbundling rules, the term "Federal Unbundling Rules" is accurate. If at some future date, the Commission were to impose an unbundling obligation not required by the FCC, then this term and its definition in the ICA can be altered through the changes of law process. Regarding the use of the term "discontinued facility", for the sake of clarity and to reduce the risk of unnecessary litigation, this term should be included in the ICA Amendment in order to distinguish current UNEs from UNEs discontinued in the TRO and TRRO. However, as will be discussed elsewhere, the definition for this term cannot allow for automatic implementation of UNEs discontinued in the future by the FCC.

[92] VZ-RI's Brief, p.69

V. Combinations, Commingling, Conversions, and Service Eligibility for EELs

(Issues 12, 13, 21 and 25)

The issue presented is how to implement VZ-RI's obligation to combine and commingle UNEs with wholesale services, convert wholesale services to UNEs, and how to implement the service eligibility criteria for Enhanced Extended Links ("EELs"). As a general matter, VZ-RI is required to provide CLECs with UNE combinations and is prohibited from separating UNE combinations that are ordinarily combined.[93] Furthermore, CLECs are permitted to commingle (connect) UNEs with non-UNE wholesale services such as special access.[94] Lastly, VZ-RI is required to convert non-UNE wholesale services such as special access to UNEs if they meet certain eligibility criteria.[95]

The first issue to be discussed is how to implement the service eligibility self-certification requirements for high capacity EELs. An EEL is a combination of a UNE high capacity loop and UNE dedicated transport, which many CLECs utilize to service business customers.[96] The FCC permitted CLECs to convert wholesale arrangements to TELRIC priced EELs as long as the non-UNE wholesale arrangement will provide local exchange service.[97] In the TRO, the FCC established service eligibility criteria to ensure that the special access arrangements, which are tariffed interstate wholesale services, will actually provide local telecommunication services.[98] The FCC adopted a "self-certification" requirement for CLECs to satisfy the service eligibility criteria, and

[93] TRO para. 573.
[94] Id. para. 579.
[95] Id. para. 586.
[96] 47.C.F.R. 51.5, and TRO para. 593.
[97] TRO paras. 590-594.
[98] Id.

indicated "a letter sent to the incumbent LEC" by the CLEC "is a practical method".[99] The "self-certification" letter is not an indirect means for the ILEC to perform an audit. The FCC repeated in the TRO that the ILEC "may not require a requesting carrier to submit to an audit prior to provisioning combinations of unbundled loop and transport network elements", which include EELs.[100] The FCC Rules indicate that an arrangement is eligible to be an EEL when a CLEC "certifies" various conditions such as "each circuit …will be assigned a local number", "… will have 911 or E911 capacity", "… will terminate in a collocation arrangement", "… will be served by an interconnection trunk", and "… will be served by a switch capable of switching local traffic".[101] The FCC Rule does not require CLECs to provide detailed information in its self-certification letter indicating for each circuit the local number assigned to each circuit, the specific date the circuit was established in the E911 database, the address where the collocation is located, or the identification numbers for the interconnection trunk and switch. This type of information goes beyond a self-certification letter and into the realm of what is required in an audit. Thus, VZ-RI's requirements for self-certification are unduly burdensome, and go beyond the FCC Rules.

However, in the self-certification letter, CLECs must certify on a "circuit by circuit basis, so each DS1 and EEL (or combination of DS1 loop with DS3 transport) must satisfy the service eligibility criteria".[102] The FCC required a circuit by circuit specific approach rather than a customer specific approach in order to prevent gaming.[103] Although, CLECs can certify multiple circuits in a single letter, CLECs can not simply

[99] Id. para. 624.
[100] Id. para. 621.
[101] 47 C.F.R. Rule 51.318.
[102] TRO para. 599.
[103] Id.

make batch certifications. Furthermore, since the TRO's service eligibility criteria for EELs "supersede the safe harbors that applied to EEL conversions in the past" and does not contain a grandfather clause for existing EEL arrangements, the TRO appears to require CLECs to re-certify existing EELs on a circuit by circuit basis as well.[104]

The next step after self–certification is a potential audit. It is clear that the FCC established "a limited right to audit" for ILECs whereby ILECs can retain an "independent auditor to audit, on an annual basis, compliance with qualifying service eligibility criteria."[105] Furthermore, if the independent auditor concludes that the CLEC "failed to comply in all material aspects with the service eligibility criteria" then the CLEC "must reimburse" the ILEC "for the cost of the independent auditor" and "must true-up any difference in payments, convert all noncompliant circuits to the appropriate service and make correct payments on a going-forward basis."[106] However, if the CLEC "complied in all material respects with the eligibility criteria", the ILEC "must reimburse the audited carrier for the costs associated with the audit".[107]

In regards to the meaning of an "annual" audit, the word "annual" does not necessarily equate to an actual calendar year but always equates to twelve months. For instance, fiscal years are annual but they do not necessarily correspond to the calendar year. Therefore, audits can only be conducted every twelve months. As for "compliance in all material aspects", the language of TRO is clear, but its application in all circumstances is not. The concept of "materiality" is familiar to auditors and is set forth

[104] Id. para. 589.
[105] Id. para. 626.
[106] Id. para. 627
[107] Id. para. 628.

in accounting standards.[108] If the auditor, utilizing the accounting concept of "materiality", determines that the CLEC has not achieved compliance in all material aspects then it pays for the audit, but if compliance in all material aspects is achieved by the CLEC, then the ILEC pays for the audit. However, the FCC does not address a scenario whereby a CLEC complies in some but not all material aspects. If it is possible for a CLEC to comply in some but not all material aspects, it is unclear if the CLEC should pay for the entire audit. Assuming this scenario is even possible, under the concept of materiality as applied by auditors, the CLEC should be required to pay for the audit in proportion to percentage of material aspects with which it failed to comply out of the total number of material aspects in the audit. The Arbitrator is aware that this is a rather vague approach in addressing a scenario, which may not even be plausible given how auditors apply the concept of materiality, but the parties were also unclear if such a situation could even occur.[109] Furthermore, in order to an audit to be performed at the request of the ILEC, the FCC expressed its expectation that CLECs "will maintain the appropriate documentation to support their certifications".[110] Accordingly, a requirement that CLECs maintain records of its EEL arrangements for at least a year after an arrangement is terminated, to allow for an ILEC to perform an audit every twelve months, appears reasonable.

The next issue is the effective date for the new pricing of conversions from wholesale services to UNEs. The issue of the effective date of the ICA Amendment, and the rights and obligations arising from it, is addressed in greater detail elsewhere in this arbitration decision. For the moment, it is sufficient to indicate that the TRO did not, in

[108] Id. fn. 1906.
[109] Tr. 5/31/05, pp. 58-65.
[110] TRO para. 629.

general, order automatic implementation of its rules as of a date certain, but instead required the parties to go through the arbitration process to implement its decision.[111] In the TRO, the only reference to the effective date for the pricing of conversions to UNEs is in Paragraph 589 of the TRO. In Paragraph 589, the FCC merely stated that it would "decline to require retroactive billing to any time before the effective date" of the TRO, and stated that for pending requests that had not been converted, the CLECs "are entitled to the appropriate pricing up to the effective date" of the TRO.[112] Paragraph 589 does not contain any clear FCC mandate that pricing for conversions begin on the effective date of the TRO, which was October 2, 2003. Accordingly, the pricing for these conversions does not take effect until the ICA amendment goes into effect.

The next issue becomes whether VZ-RI can impose non-recurring charges when wholesale services are being converted to UNEs. VZ-RI acknowledged that it has not received Commission approval for applying non-recurring charges to convert from wholesale services to UNEs.[113] The FCC Rules state that "except as agreed to by the parties", an ILEC "shall not impose any untariffed termination charges, or any disconnect fees, re-connect fees, or charges associated with establishing a service for the first time, in connection with any conversion between a wholesale service or group of wholesale services and an unbundled network element or combination of unbundled network elements".[114] Thus, VZ-RI can not impose any non-recurring charges at this time.

Thus, the issue becomes whether VZ-RI can impose non-recurring charges for these conversions after going through a TELRIC proceeding at some future date. At

[111] Id. para. 701.
[112] Id. para. 589.
[113] Tr. 5/31/05, pp. 88-89.
[114] 47 C.F.R. Rule 51.316(c).

present, there is no need to adopt an ICA amendment specifically allowing for charges that the Commission may or may not ever approve. More importantly, the FCC looks disapprovingly upon non-recurring charges associated with conversions from wholesale services to UNEs. In the TRO the FCC declared that once a CLEC "starts serving a customer, there exists a risk of wasteful and unnecessary charges such as termination charges, re-connect and disconnect fees or non-recurring charges associated with establishing a service for the first time", which "could deter legitimate conversions from wholesale services to UNEs".[115] Noting that because ILECs "are never required to perform a conversion in order to continue serving their own customers", the FCC concluded "that such charges are inconsistent with an" ILEC's "duty to provide nondiscriminatory access to UNEs and UNE combinations at just, reasonable, and nondiscriminatory rates, terms, and conditions".[116] Non-recurring charges for conversions, in particular, appear unnecessary because "converting between wholesale services and UNEs (or UNE combinations) is largely a billing function".[117] Thus, non-recurring charges for conversions should not be allowed in the ICA Amendment.

The final issue is how to perform a conversion. Conversions "should be a seamless process".[118] Since conversion is "largely a billing function", it should not be necessary for VZ-RI to make physical alterations to its facilities in order to complete a conversion. Furthermore, in most instances conversions should be completed within 30 days, and new rates should be in place once the conversion is completed. However, there can be exceptions to the general rule in which it may be necessary to make physical

[115] TRO para. 587.
[116] Id.
[117] Id. para. 588.
[118] Id. para. 586.

alterations to facilities to effectuate the conversion. As stated previously, "VZ-RI has a right to maintain its network".[119] Furthermore, the FCC does not contain any clear prohibition on an ILEC making physical changes to facilities to implement conversions. Since the conversion process involves VZ-RI's own network, VZ-RI should be allowed to manage its own network to implement the conversion as long as VZ-RI does not abuse its discretion in a manner which affects the CLEC "customer's perception of service quality".[120] If VZ-RI were to abuse its discretion, it is safe to assume the Commission would take appropriate remedial action. Regarding PAP metrics related to conversions or commingling, this topic will be discussed in greater detail elsewhere in this arbitration decision. It is sufficient to state that at this time it is unclear if the PAP metrics were designed to include conversions or commingling. Thus, commingling and conversions should be excluded from the PAP metrics at this time.

VI. <u>Extraneous Issues</u> (Issues 17, 19, 20, and 27)

This section addresses issues that should not be addressed in this arbitration. First, reverse collocation occurs when an ILEC places it local switching equipment in a CLEC's premises, and something for which the TRO specifically allows.[121] However, VZ-RI has indicated it does not reverse collocate in Rhode Island and does not plan to do so in the future.[122] Thus, there is no need to include this hypothetical situation in the ICA Amendment because this situation is not going to occur for the foreseeable future. However, if at some future date, VZ-RI decides to reverse collocate, a Section 252

[119] Order No. 17193.
[120] TRO para. 586.
[121] TRO fn. 1126.
[122] Tr. 5/31/05, p. 78.

process can begin in order to make changes to the ICAs. Second, the FCC indicated that its prior determinations concerning interconnection facilities were not altered by its finding of non-impairment for entrance facilities.[123] Since neither the TRO nor the TRRO changed the FCC's determinations as to interconnection facilities, there has not been a change of law which needs to be incorporated into the ICA Amendment. Third, the FCC stated in the TRO that it will "readopt the Commission rules requiring incumbent LECs to provide access to physical loop test access points on a nondiscriminatory basis for the purpose of loop testing, maintenance, and repair activities, and allowing incumbent LECs to maintain control over the loop and splitter equipment and functions in certain circumstances."[124] Since the FCC merely readopted existing rules, a change of law did not occur regarding the testing, maintenance and repairing of loops. Therefore, there is no need to amend the ICA in order to address this issue.

The major issue is whether PAP metrics should be created for this ICA Amendment or that the current PAP metrics should include the provisioning for various wholesale obligations clarified by the TRO. This arbitration is about implementing the TRO and TRRO; it is not to about incorporating, modifying or developing PAP metrics. As a general matter the Commission has stated it "will generally refrain from creating or adding metrics".[125] Instead, it is the Commission's policy to generally await for any changes in the PAP metrics to be ordered by the New York PSC prior to implementing the PAP metrics in Rhode Island.[126] Essentially, this is not the appropriate forum to

[123] TRO para. 366, and TRRO para. 140.
[124] TRO para. 252.
[125] Order No. 16809.
[126] See e.g. Order Nos.18311, 17343, and 17109.

address any changes to PAP metrics arising from the TRO. The appropriate forum is the New York Carrier Working Group. Once, the New York PSC adopts, or modifies any metrics for various wholesale obligations such as conversion to UNEs or routine network modifications, then the Commission will more than likely adopt these metrics.

Furthermore, since PAP metrics were developed over a number of years preceding the TRO, it is entirely unclear if the current PAP metrics do or should include such situations as routine network modifications, or conversions. Also, there are instances in PAP metrics, which allow for exclusions for orders that require non-standard provisioning.[127] Thus, the wholesale obligations clarified by the TRO, which may require non-standard provisioning, should be excluded from the PAP metrics at this time. Over time, the New York Carrier Working Group, and the New York PSC can determine if the current PAP metrics should specifically include these various wholesale obligations.

VII. <u>The Effective Date and Changes of Law</u> (Issues 2, 7, 10, 15, and 30)

The final issue is when this ICA Amendment takes effect. Certainly, VZ-RI has given adequate notice to the parties for changes of law arising from the TRO and TRRO to be implemented in this ICA Amendment. As for the changes of law arising from the TRO and TRRO, each order was clear that these changes of law would take effect upon completion of the Section 252 arbitration process.[128] In fact, the FCC specifically declined to override the Section 252 arbitration process to implement the TRO.[129] This

[127] VZ-RI Brief's, p.95.
[128] TRO paras. 700-702, and TRRO para. 233.
[129] TRO para. 701.

arbitration process will be completed once the Commission approves an ICA Amendment arising from this arbitration.

Once the ICA Amendment is approved, then the changes of law arising from the TRO and TRRO will take effect. This is fair approach since the changes of law arising from the TRO and TRRO expanded VZ-RI's wholesale obligations in some areas, but diminished them in other areas. The only exceptions to this approach, as discussed previously, are the expressly established FCC transition periods for discontinued UNEs in the TRRO such as mass market switching, loops and transport in certain wire centers, which began on March 11, 2005, and for line sharing, which began on October 2, 2003.[130] Furthermore, the Commission has already determined that the transition plans for the discontinued UNEs in the TRRO and line sharing in the TRO had specific effective dates.[131]

Now that it has been determined how the changes of law arising from the TRO and TRRO will be implemented, the question becomes how will other changes of law be implemented in the future. To simplify this issue, there is simply nothing in the TRO or TRRO which requires any modifications to current changes of law provisions in the ICAs. As stated previously, the purpose of this arbitration is to implement changes of law arising from the FCC's TRO and TRRO.[132] This arbitration is not a forum to attempt wholesale revisions to an ICA.

Although it might be more efficient for changes of law to be automatically implemented after sufficient notice, this change is not required by the FCC's TRO or TRRO. Furthermore, it is much more equitable to all parties if changes in law affecting

[130] TRO paras. 264-265, and TRRO paras 145, 198 and 227.
[131] Order Nos. 18281 and 18017.
[132] Order No. 17802.

VZ-RI's wholesale obligations, whether the change increases or diminishes these obligations, are implemented in a similar manner. There is a lack of fairness and symmetry in VZ-RI's proposal to allow for automatic implementation of changes of law, which reduce VZ-RI's wholesale obligations but to require a potential arbitration process for changes of law which expand VZ-RI's wholesale obligations. If the federal government or the state government, under its more limited authority, changes VZ-RI's wholesale obligations, then the current changes of law provisions in the ICAs should be followed barring some clear federal mandate for immediate implementation.[133] If VZ-RI wishes to change its changes of law provisions, it can negotiate and, if necessary, arbitrate this issue when each ICA expires.

CONCLUSION

In an endeavor of this magnitude, one can never be sure that every issue has been properly addressed and every decision had been clearly explained. Therefore, if the parties need further clarification, they need only to request it.

Ideally, it would be best if the Arbitrator could indicate summarily which party was successful on each individual issue. However, in many instances, each issue contains nuances and subparts in which differing parties were successful. With that said, here is the Arbitrator's summarization of how the parties fared on each issue: VZ-RI's position was adopted as to issues 1, 6, 11, 15, 16, 17, 19, 20, 24, 27, 28, 29, 31, 32, and supplemental issue 2; VZ-RI's position was adopted with some exceptions as to issues 3, 4, 5, 7, 9, 10, 14, 18, 30, and supplemental issue 1; VZ-RI's position was adopted in part and rejected in part for issues 12, 13, 21, and 25; and VZ-RI's position was rejected for issues 2, 8, 23, and 26.

[133] Order No. 18281.

In medieval times, patience was esteemed as a virtue.[134] In our fast paced modern epoch, as reflected by our near instantaneous communication system, this virtue has been largely forgotten. Certainly in this proceeding, the patience of the parties has been tested by the federal courts, the FCC, by one another, and even by this Arbitrator. Unfortunately, this decision can not reward all the parties equally for their patience. However, at least with this decision, the parties can be consoled with the knowledge that the conclusion of this arbitration is near, and the need for further patience in this arbitration will not be necessary.

Accordingly, it is

(18416) ORDERED:

1. Pursuant to the Commission's Rules Governing Arbitration of Interconnection Agreements, within fourteen days of the issuance of this Arbitration Decision, the parties may submit comments regarding this Arbitration Decision.
2. Pursuant to the Commission's rules Governing Arbitration of Interconnection Agreements, within twenty-one days of the issuance of this Arbitration Decision, the parties may reply submit comments regarding this Arbitration Decision.

DATED AND EFFECTIVE AT WARWICK, RHODE ISLAND ON NOVEMBER 10, 2005.

Steven Frias, Arbitrator

[134] St. Thomas Aquinas, The Summa Theologica, Second Part of the Second Part, Question 136, "Of Patience", and Geoffrey Chaucer, Canterbury Tales, "The Franklin's Tale", line 45.