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VIA HAND DELIVERY

Ms. Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301

**Re: Dockets DT 05-083 – Wire Center Investigation and
DT 06-012 – Proposed Revisions to NHPUC Tariff No. 84**

Dear Ms. Howland:

Enclosed for filing in the above-referenced matter are an original and eight copies of Verizon New Hampshire's Comments.

Thank you for your attention to this matter.

Very truly yours,

Victor D. Del Vecchio
(Signature)

Victor D. Del Vecchio

NHPUC REG 7/05 4-11-06

cc: Service List

**BEFORE THE
STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

<u>Verizon New Hampshire's Proposed</u>)	
<u>Revisions to NH PUC Tariff No. 84</u>)	Docket No. DT 06-012
)	
)	
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<u>Wire Center Investigation</u>)	Docket No. DT 05-083

COMMENTS OF VERIZON NEW HAMPSHIRE

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COMMENTS OF VERIZON NEW HAMPSHIRE

Verizon New Hampshire ("Verizon NH") hereby comments on the issues raised in Staff's report to the parties dated January 31, 2006, in accordance with the Commission's Secretarial Letter of February 3, 2006. Verizon NH's comments correspond to the order and listing of issues set forth in Staff's memorandum.

I. WIRE CENTER IMPAIRMENT DETERMINATIONS

A. Effective Date

- 1. When is an impairment determination binding on all parties? (For example, should it be when Verizon notifies the CLECs that a wire center is no longer impaired, or when a CLEC determines through self-certification that it is no longer impaired in a particular wire center, or when the Commission makes a finding about a particular wire center?)**

In the *Triennial Review Remand Order* ("TRRO"),¹ the Federal Communications Commission ("FCC") determined that CLECs are not impaired without access to dark fiber and high-capacity interoffice transport or high-capacity loops on an unbundled basis

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

in incumbent LEC (“ILEC”) wire centers that meet certain criteria.² Accordingly, upon the effective date of the *TRRO* (*i.e.*, March 11, 2005), CLECs can no longer order as UNEs: (1) high-capacity (DS1-DS3) loops in ILEC wire centers that met the applicable FCC thresholds or (2) dark fiber and/or high-capacity transport between ILEC wire centers that met the FCC thresholds.³

In establishing its non-impairment criteria, the FCC relied upon fiber-based collocation information and ARMIS data provided by ILECs, including Verizon. *See TRRO* ¶ 66. For example, the FCC specifically cited Verizon’s collocation inspection data as one of the sources of information it relied on in assessing competitive deployment of fiber-based collocation and establishing its fiber-based collocation criteria. *See TRRO* ¶¶ 95 n.270, 97 n.275, 99, 100 n.288 & 102 n.93. The FCC recognized that available fiber-based collocation data is “one of the most objective competitive indicia of competitive deployment available to them.” *Id.* at ¶ 99.

The FCC also relied on ILEC-provided ARMIS data to establish its non-impairment criteria and as the basis for identifying wire centers that meet its non-impairment criteria in the future. Again, the FCC highlighted the objectivity of this data as a source for determining competitive business opportunities in a wire center for purposes of determining where impairment exists and where it does not. *Id.* at ¶ 105.

The FCC emphasized that it had selected these ILEC data sources – in its view “the most objective criteria possible” – “to avoid complex and lengthy proceedings that

² The FCC ruled separately in the *TRRO* that CLECs are not impaired without unbundled access to dark fiber loops in all wire centers. *See TRRO* ¶ 182; 47 C.F.R. § 51.319 (a)(6).

³ With respect to loop and transport UNEs, the FCC’s transitional rules do not allow any new UNE arrangements that do not meet the new criteria, without exception for elements ordered to serve existing customers. *See* 47 C.F.R. §§51.319(a)(4)(iii), (a)(5)(iii), (a)(6)(ii), (e)(2)(ii)(C), (e)(2)(iii)(C) and (e)(2)(iv)(B).

are administratively wasteful but add only marginal value to our unbundling analysis.[]” *Id.* at ¶ 99. Consistent with that view, the FCC did not provide for state commission review of ILEC wire center determinations, except where a CLEC specifically challenges an ILEC wire center classification in the context of a section 252 interconnection agreement dispute. *Id.* at ¶ 100 (FCC notes that “incumbent LEC counts of fiber-based collocations can be verified by competitive LECs, which will also be able to challenge the incumbent’s estimates in the context of section 252 interconnection agreement disputes”). Rather, disputes regarding the validity of any wire center classification promulgated by the ILEC were intended in the first instance to be addressed between ILECs and CLECs.

On February 13, 2005, in response to the FCC’s request that it do so, Verizon filed with the FCC its initial wire center list reflecting the non-impairment criteria established by the FCC in the *TRRO*. Shortly thereafter, on March 2, 2005, Verizon provided the same wire center information to CLECs in New Hampshire and elsewhere through direct mail and/or publication of an Industry Notice on its Wholesale Website, advising them that the wire center classifications identified by Verizon would take effect as of the mandatory effective date established by the FCC in the *TRRO*, March 11, 2005. This initial list identified the following New Hampshire wire centers as qualifying for relief from unbundling based on the application of the FCC’s non-impairment criteria: Dover, Keene, Manchester, Nashua and Portsmouth.⁴ Verizon also made the back-up

⁴ Verizon identified Keene, Manchester, Nashua and Portsmouth as having met the FCC’s “Tier 1” wire center classification for dedicated transport (the definition of which includes dark fiber transport (47 C.F.R. § 51.319(e)). Therefore, pursuant to the FCC rules, as of March 11, 2005, Verizon was no longer required to provide and CLECs were prohibited from obtaining unbundled DS1 or DS3 transport, or dark fiber transport facilities between those wire centers pursuant to section 251 of the 1996 Act. See *TRRO* ¶ 112 (defining “Tier 1” wire centers as “those with four or more fiber-based collocations or with 38,000 or more business lines.”); *TRRO* ¶¶ 112, 126 (“We find that requesting carriers are impaired without access to DS1-

information it used to apply the FCC's non-impairment criteria available to all requesting CLECs, as well as a description of the process Verizon used to classify the wire centers. Verizon has also provided this information to the Commission Staff.

As noted above, the FCC did not authorize state commissions to review wire center classifications in the absence of a specific CLEC complaint. However, where, as in this case, a state commission undertakes such a review any determinations it makes must be consistent with the *TRRO*. Therefore, the effective date of any Commission findings with respect to the above-described initial wire centers must be March 11, 2005.

In an Industry Notice to CLECs dated November 17, 2005 ("November 17th Notice"), Verizon identified two additional wire centers, Concord and Salem, as meeting the FCC's non-impairment criteria and "upgraded" the Dover wire center from Tier 2 to Tier 1. Verizon's notice indicated that these new/changed wire center determinations would take effect on February 15, 2006, 90 days from the date of the industry notification letter advising CLECs of the additional or upgraded non-impaired wire centers.⁵ On and

capacity transport on all routes except those connecting Tier 1 wire centers.... Thus incumbent LECs ... are not obligated to provide unbundled DS1 transport on routes connecting two Tier 1 wire centers."); 47 C.F.R. § 51.319(e)(2)(ii)(A); 51.319(e)(3)(i); 47 C.F.R. § 51.319(e)(2)(ii)(C) ("Where incumbent LECs are not required to provide unbundled DS1 transport ... requesting carriers may not obtain new DS1 transport as unbundled network elements."). Verizon identified Dover as having met the FCC's "Tier 2" wire center classification for dedicated transport. Therefore, pursuant to the FCC rules, as of March 11, 2005, Verizon was no longer required to provide and CLECs were prohibited from obtaining unbundled DS3 transport or dark fiber transport facilities between that wire center and any other Tier 1 or Tier 2 wire center pursuant to section 251 of the 1996 Act. See *TRRO* ¶ 118 (defining "Tier 2" wire centers as "those with three or more fiber-based collocations or with 24,000 or greater business lines."); *TRRO* ¶ 129-130 (FCC holds that CLECs are not impaired without unbundled access to DS3 transport on routes "connecting any combination of Tier 1 or Tier 2 wire centers."); 47 C.F.R. § 51.319(e)(2)(iii)(A); 47 C.F.R. § 51.319(e)(2)(iii)(C) ("Where incumbent LECs are not required to provide unbundled DS3 transport ... requesting carriers may not obtain new DS3 transport as unbundled network elements."). Verizon also identified Manchester as meeting the FCC's criteria for discontinuance of unbundled DS3 loops. *TRRO* ¶ 178; 47 C.F.R. § 51.319(a)(5) (FCC rules that CLECs are not impaired without unbundled access to DS3 loops in any building served by a wire center with at least 38,000 business lines and at least four fiber-based collocators); 47 C.F.R. § 51.319(a)(5)(iii) ("Where incumbent LECs are not required to provide unbundled DS3 loops ... requesting carriers may not obtain new DS3 loops as unbundled network elements.").

⁵ In the November 17th Notice, Verizon indicated, based on updated fiber-based collocation data, that the Dover and Salem wire centers now met the FCC's Tier 1 wire center criteria. Verizon also identified the

after that date, CLECs are not permitted to order new DS1, DS3 or dark fiber interoffice network elements connecting either the Dover or Salem wire centers to each other or to other Tier 1 and Tier 2 wire centers, or DS3 or dark fiber interoffice network elements connecting the Concord wire center to other identified Tier 2 wire centers. Additionally, CLECs will be required either to discontinue any “embedded” high-capacity loop or dedicated transport UNEs that are no longer available or to transition them to alternative arrangements, before March 11, 2006 (and before September 11, 2006 in the case of dark fiber transport).⁶ Transition rates for such embedded UNEs will apply during the transition period in accordance with the terms of the Tariff and the *TRRO*.

The 113-day transition period established for the newly delisted embedded UNEs is reasonable. It exceeds the transition periods provided for in most interconnection agreements; it exceeds the transition period the CLECs have agreed to in Massachusetts; it conforms to the termination date for high-capacity loop and dedicated transport UNEs that have already been delisted; and it reflects the fact that the *TRRO* has already been in

Concord wire center as meeting the FCC’s Tier 2 criteria based on the total number of business access lines in that wire center, as reflected in the most recent available ARMIS information. Verizon again stated that it would make the data supporting its wire center classifications available to requesting CLECs, subject to appropriate proprietary treatment. Verizon provided Staff with a copy of the back-up information for the supplemental wire center classifications on January 20, 2006. Letter from Lisa Thorne to Kathryn M. Bailey re: DT 05-083 – Supplemental Wire Center Information (January 20, 2006).

⁶ Thus, the transition period for embedded UNEs would be 113 days. The FCC established twelve- and eighteen-month transition periods in connection with the initial determinations of “delisted” high-capacity loops and transport UNEs. However, the FCC made it clear that these lengthy transition periods would not govern subsequent additions to the ILECs’ wire center lists, and that instead carriers were to negotiate appropriate transition arrangements in such cases pursuant to § 252. *TRRO* ¶¶ 196 n.519, 142 n.399. In Massachusetts, for example, the DTE required Verizon to provide a 30 days’ notice of a change in the status of a wire center. See Docket No. 04-33, Arbitration Order dated July 14, 2005, at 288. Verizon and a number of CLECs have nevertheless agreed on a 90-day transition period as part of their jointly proposed *TRO* Compliance Amendment in Massachusetts. In any event, it is unnecessary to negotiate transition arrangements where the parties’ interconnection agreements already incorporate tariff provisions related to UNEs, as many of the interconnection agreements do.

However, Verizon also has filed tariff language proposing to modify the post-transition arrangements for DS1 and DS3 facilities by allowing Verizon the option to convert and/or re-price the arrangements as an alternative to disconnection, discussed *infra*. This would allow a CLEC that has failed to submit disconnection or conversion orders, perhaps inadvertently, to avoid disconnection of its facilities.

effect for over eleven months. Thus, the CLECs have already had ample time to adjust to the new and more limited unbundling regime established by that order. The effective date of any Commission findings with respect to these supplemental findings should, therefore, be February 15, 2006.

Finally, the Commission should permit future changes to the wire center classifications to be effective no later than 90 days from the date of the industry notification letter advising CLECs of the additional or upgraded non-impaired wire centers.

B. Determination Process

1. If an individual CLEC makes a self-determination that it is no longer impaired in a particular wire center, is that CLEC's determination binding on other CLECs?

In paragraph 234 of the *TRRO*, the FCC imposed specific obligations on CLECs ordering dedicated transport and high-capacity loops to ensure that, to the extent practicable, CLECs would only order facilities as UNEs where, based on the FCC's rules, they would be impaired without such access. *See TRRO* ¶ 234. The FCC held 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 [applicable to these facilities in the *TRRO*] and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3)." *Id.* (emphasis added, footnote omitted). As discussed above, Verizon has identified the wire centers that meet the FCC non-impairment criteria, and made the back-up information available to CLECs upon request. Given the availability of this information, any reasonably diligent inquiry

by a CLEC will include a review of this information. If a CLEC concludes based on such an inquiry that Verizon has correctly classified the wire center as meeting the FCC's non-impairment criteria for loops and/or high-capacity transport facilities, then the CLEC is not entitled to order those facilities as UNEs out of that office. In other words, if the CLEC agrees with Verizon's exempt classification, there will be no "self-determination that it is no longer impaired in a particular wire center"; rather, the CLEC will simply not order UNEs out of that office. Where it can be established as fact that a particular CLEC has concluded that Verizon correctly classified a particular office as exempt from unbundling obligations for particular facilities (such as where a CLEC states that conclusion in responses to data requests), that fact should be considered persuasive evidence that no such impairment exists in the event another CLEC challenges a particular wire center's classification.

Of course, if the Commission verifies, either in this proceeding or in the context of a Verizon challenge to a CLEC's self-certification, that Verizon correctly classified particular wire centers as unimpaired, then no other CLECs would be permitted to order UNEs from that office in the future. Once impairment is established, it is established for good and for all CLECs (there are no CLEC-specific impairment determinations for wire centers, as the question seems to suggest). As the FCC has ruled, once an office meets the FCC's non-impairment criteria, it cannot be re-classified as subject to unbundling.⁷ *See, e.g., TRRO* ¶ 167 n.466 ("[O]nce a wire center satisfies the standard for no DS1 loop unbundling, the incumbent LEC shall not be required in the future to unbundle DS1 loops in that wire center. Likewise, once a wire center satisfies the standard for no DS3 loop

⁷ Of course, per the *TRRO*, Verizon is permitted to upgrade any such wire center in the future based on the presence of additional fiber-based collocators or higher business line counts.

unbundling, the incumbent LEC shall not be required in the future to unbundle DS3 loops in that wire center.”).

C. CLEC Mergers

1. **Should facilities owned or operated by two CLECs who merge to form one entity be counted only once in future wire center impairment determinations even if they have been counted as two in prior determinations concerning the same wire center?**

It is undisputed in this proceeding that, pursuant to the *TRRO's* non-impairment criteria, once a wire center has been properly classified through the application of the FCC's non-impairment criteria as a Tier 1 or Tier 2 wire center, it cannot subsequently be declassified (as a Tier 2 or Tier 3 wire center) based on subsequent data. However, where an ILEC seeks to upgrade the status of a wire center from Tier 3 to Tier 2 or 1, or from Tier 2 to Tier 1, the change in the wire center classification must be based the current available information and should accurately reflect affiliate relationships that exist in that wire center at the time the ILEC gives notice of the wire center classification to the CLECs. Therefore, if Verizon seeks to upgrade a wire center from Tier 3 to Tier 1 or 2, or from Tier 2 to Tier 1, and two of the carriers that were counted when the wire center was identified as a Tier 3 or Tier 2 wire center have now merged (*i.e.*, as of the publication date of any such Verizon Industry Notice), on a going-forward basis, the merged entity should be counted as a single entity for purposes of counting fiber-based collocation arrangements and determining whether there are a sufficient number of such arrangements to meet the FCC's Tier 1 or Tier 2 criteria.

The Commission, however, should clarify that affiliate relationships that existed at the time Verizon identified its initial wire center classifications are controlling for purposes of determining the count of fiber-based collocators underlying those

classifications. Staff appears to agree that this is appropriate. *See* Staff Memorandum to the Parties dated January 18, 2006 (“*Staff Memo.*”) at 6 (“Staff’s position is that for the initial five wire centers under consideration here, the relevant date for the merger of two CLECs is the date on which Verizon identified those wire centers.”). However, in paragraph 7 of the February 8, 2006 Affidavit of Kath Mullholand, Staff suggests that “... MCI’s collocations are not described in this document.” The Verizon/MCI merger had not taken place at the time Verizon identified its initial wire center list. Therefore, while it might be accurate for Staff to note that MCI’s collocations are not described in the Mullholand affidavit, that statement creates ambiguity, because the treatment of the Verizon-MCI merger is an issue in the case.

More specifically, as to paragraphs 24 and 35 of the Affidavit, Verizon, in fact, identified seven fiber-based collocators (including MCI) in the Manchester and Nashua wire centers, respectively. Verizon’s merger commitment to the FCC was to update the non-impaired wire center lists within 30 days of the merger closing to remove MCI fiber-based collocation arrangements *on a prospective basis*. Accordingly, removing MCI from the count of fiber-based collocators effective on and after February 3, 2006, does not change the prior (*i.e.*, pre-February 3, 2006) status of the initial five wire center classifications. Thus, MCI was properly counted as a fiber-based collocator during the period March 11, 2005 through February 2, 2006 with respect to the initial five wire centers.

II. FIBER-BASED COLLOCATION

A. Operation of Fiber

1. Pursuant to 47 CFR 51.5, the definition of a *fiber-based collocater* requires the carrier to “operate” a fiber-optic cable or comparable transmission facility. How should the term “operate” be interpreted?

The term “operate” should be interpreted consistent with the relevant dictionary definition of the term “to put or keep in operation.” *Merriam Webster’s Collegiate Dictionary*, Tenth Edition (1999). To operate a fiber-optic cable or comparable transmission facility in connection with a fiber-based collocation arrangement, means nothing more than that the CLEC “put or keep” that cable (whether it is dark or lit) in operation within its overall collocation arrangement.

B. IRU Contracts (Dark Fiber)

1. What elements must be included in a contract for it to be considered an IRU contract?

An IRU is an exclusive right to use a specified amount of dark fiber or dedicated transmission capacity for a specified time period. VZ Response to Staff 1-19 (Aug. 22, 2005). Newton’s Telecom dictionary defines an IRU as:

A term used in the underseas cable and fiber optic carrier business. Someone owning an IRU means he has a right to use the circuit for the time and bandwidth the IRU applies to. An IRU is to a submarine or fiber optic cable what a lease is to a building.

Newton’s Telecom Dictionary, (15th Ed.) at 426 (emphasis added).⁸ As in the case of a lease, the term of an IRU may be fairly short (*i.e.*, month to month) or cover multiple

⁸ Conversent Communications of New Hampshire, LLC (“Conversent”) adopted this definition in its response to Staff-CLEC data request #1 dated September 29, 2005.

years. The key element of an IRU contract is that it grants a carrier a right to use identified fiber transmission facilities owned or controlled by another carrier “for the time and bandwidth the IRU applies to.”

2. Does dark fiber obtained on an indefeasible right to use (IRU) basis meet the definition of a fiber-based collocator, hereinafter “the test” when a carrier obtains dark fiber from the ILEC?

Yes. The FCC’s definition of a “fiber-based collocator” for purposes of implementing the terms of the *Triennial Review Remand Order* provides that “[d]ark fiber obtained from an incumbent LEC on an *indefeasible right to use* basis shall be treated as non-incumbent LEC fiber-optic cable.” 47 C.F.R. § 51.5 (emphasis added).

3. Does dark fiber obtained on an IRU basis meet the test when a carrier obtains dark fiber from a CLEC?

Yes. Dark fiber obtained by one CLEC from another CLEC on an IRU basis is properly included when determining whether the obtaining CLEC maintains a fiber-based collocation arrangement as defined at 47 C.F.R. § 51.5. However, as discussed below, nothing in the *TRRO* rules requires that the fiber-optic cable or comparable transmission facilities operated by a CLEC as part of its fiber-based collocation, but obtained from another carrier, be subject to an IRU, except where the CLEC obtains dark fiber from an ILEC. *See id.* (“Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable.”).

4. Does obtaining dark fiber on a non-IRU basis meet the test when a carrier obtains dark fiber from a CLEC which is not affiliated with the ILEC?

Yes. Nowhere in the language of the *TRRO* definition of “fiber-based collocation” does the FCC purport to limit countable “fiber-optic cable or comparable transmission facilities” obtained from CLECs that are not affiliated with the ILEC to those that are subject to an IRU. Only where the dark fiber is obtained from an ILEC do the rules require it to be subject to an IRU.

C. Lit Fiber Products

1. Do lit fiber facilities acquired on a long term lease from a CLEC meet the test if the fiber used to supply those lit-fiber products terminates at the CLEC’s collocation and leaves the wire center premises?

The Commission should find that CLEC collocation facilities that include “lit” fiber facilities obtained from a CLEC not affiliated with the ILEC, and regardless of whether it is subject to a “long term lease,” should be counted as fiber-based collocation where those lit fiber products terminate at the CLEC’s collocation arrangement and leave the wire center premises. The FCC’s rules in no way restrict “fiber-optic cable or comparable transmission facilities” obtained from a non-ILEC affiliated carrier to unlit or dark fiber.

As Staff itself has acknowledged, the appropriate rule of decision when interpreting an FCC rule is to look first to the plain language of the actual rule to determine what it requires. In the absence of any ambiguity, the Commission must apply the rule as written. As noted above, the fiber-based collocation definition set forth at 47 C.F.R. § 51.5 does not exclude “lit” fiber from the transmission facilities to be counted in determining whether a CLEC has fiber-based collocation in a wire center for purposes of

applying the FCC's non-impairment criteria. Indeed, had the FCC intended to exclude lit fiber alternatives from the fiber transmission facilities to be counted, it could easily have done so.

Moreover, counting lit fiber used by a CLEC to compete with the ILEC is consistent with the FCC's stated objective in the *TRRO* to eliminate ILEC unbundling obligations where alternative wholesale transport facilities exist (*TRRO* ¶¶ 126 (“[W]here alternatives to the incumbent LEC’s network are available, or are likely to be available, we find that carriers are not impaired without access to the incumbent LEC’s transport”); 127 (“[W]here DS1 facilities are likely to be available from competitors on a wholesale basis, we find that competing carriers are not impaired without access to these facilities from the incumbent.”)). It cannot be disputed that lit fiber transmission facilities obtained by CLECs from non-ILEC wholesale providers constitute competitive alternatives to the ILEC’s network. Moreover, the fact that a CLEC has chosen to obtain and operate such facilities in its collocation arrangement by way of a contractual arrangement with a non-ILEC third party, rather than lighting the fiber itself, does not detract from the usefulness of those fiber transmission facilities as a means of competing with the ILEC to serve customers in that wire center. In fact, the diagrams accompanying the Staff Affidavit clearly show that the basic configuration of the CLECs’ collocation arrangements is the same, regardless of whether they are purchasing dark or lit fiber. Finally, the market opportunities available to CLECs from such collocation arrangements are essentially the same, regardless of whether they are purchasing dark or lit fiber. Thus, lit fiber should be included when determining the count of fiber-based collocators in a wire center.

D. CATT Collocation Arrangements

1. Do stand-alone CATT arrangements, without power, meet the test?

A competitive alternate transport terminal (“CATT”) is an interstate, tariffed arrangement that “provides a shared, alternate splice point within a Telephone Company central office at which a third party competitive fiber provider (CFP) can terminate its facilities” for interconnection within the central office. *See* Tariff FCC No. 11, Section 28.11.1(B). A CATT is designed for wholesale providers of high-capacity transport, and competitive fiber providers are responsible for supplying, installing and maintaining the cabling between the cable vault and CATT area in the central office. *Id.* at Section 28.11.3. Although the CATT arrangement itself may not have its own separate power supply, each of the fiber facilities connected to the CATT has an active power supply to light the fiber.

The FCC adopted explicit tests to determine non-impairment for transport and high-capacity loops in the *TRRO*. The tests were “designed to capture both actual and potential competition, based on indicia of significant revenue opportunities at wire centers.”⁹ The FCC recognized that “its determinations, based on these indicia, are not, nor are they required to be, error-proof.”¹⁰ Moreover, the FCC found, “the predictive nature of our tests permits us to ‘infer [] impairment (or its absence)’ based on ‘a sensible

⁹ *Id.* at ¶ 88.

¹⁰ *Id.*

definition of the markets in which deployment is counted”¹¹ and that it was “given significant latitude to infer the absence of impairment.”¹²

In establishing its rules, the FCC “weighed carefully a variety of actual competitive indicia for determining [transport and high-capacity loop] impairment and determine[d] that the best and most readily administered indicator of the potential for competitive deployment is the presence of fiber-based collocators in a wire center.”¹³ The FCC determined that “by abstracting the economic characteristics of individual incumbent LEC wire centers to identify routes where competitive deployment is economic (based on indicia of high potential revenues), we are able to treat all routes with similar sets of end-points in a similar fashion, making reasonable inferences about potential competition even where no such competition has developed to date.”¹⁴

Accordingly, the FCC defined fiber-based collocation as a competitive carrier collocation arrangement, with active power supply, that has a non-incumbent LEC fiber-optic cable that terminates at the collocation facility and leaves the wire center.¹⁵ The FCC specifically *included* in its qualifying test less traditional collocation arrangements such as Verizon’s CATT fiber termination arrangements, as well as fixed-wireless

¹¹ *Id.* quoting *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 574 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004) (“*USTA IP*”).

¹² *Id.*

¹³ *Id.* at ¶ 93. “[F]iber-based collocation in a wire center very clearly indicates the presence of competitive transport facilities in that wire center and signals that significant revenues are available from customers served by that wire center sufficient to justify the deployment of transport facilities.” *Id.* at ¶ 96.

¹⁴ *Id.* at ¶ 90.

¹⁵ *Id.* at ¶ 102.

carriers' arrangements – even though a fixed wireless carrier's arrangement may not be fiber-based at all.¹⁶

In its report to the parties, Staff acknowledged that the *TRRO* “states that collocation arrangements may be ‘pursuant to contract, tariff, or section 251(c)(6) of the Act, including less traditional collocation arrangements such as Verizon’s CATT fiber termination arrangement.’” *Staff Memo.* at 6. Staff further observed that the *Triennial Review Order*¹⁷ “indicates the FCC’s intent that a CATT be considered a collocation arrangement.” *Id.*¹⁸ But having correctly observed that the FCC found in the *TRRO* and *TRO* that CATT arrangements qualify, Staff then concluded that its “preliminary position” is that CATT collocation should “not be counted” because it is not powered. The PUC must defer to what the FCC expressly found – and not Staff’s preliminary position – and count competitors with CATT arrangements located in Verizon wire centers.¹⁹

The FCC included CATT arrangements in the text of its *TRRO* deliberately and not by accident. Nor did it inadvertently exclude CATTs from the scope of its rule by virtue of the “active electrical power” requirement, 47 C.F.R. § 51.5, as Staff suggests. A

¹⁶ The FCC explained that a competing carrier’s collocation arrangement shall count toward the qualification of a wire center “irrespective of the services that the competing carrier offers because the fiber-based collocation indicates an ability to deploy facilities and because it would exponentially complicate the process of counting such collocation arrangements.” *Id.*

¹⁷ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, (2003) (“*Triennial Review Order*” or “*TRO*”), corrected by Errata, 18 FCC Rcd 19020 (2003), *vacated and remanded in part, aff’d in part, USTA II, supra.*

¹⁸ Staff cited to *TRRO* ¶ 102 and *TRO* ¶ 406 and n.1257.

¹⁹ Of course, where a CLEC operates both a CATT arrangement and a more traditional collocation arrangement in the same Verizon central office, such CLEC is counted only once as a fiber-based collocater in this office.

close reading of the *TRRO*'s ¶ 102 – *in immediately adjacent sentences* – establishes that the FCC expressly provided for both to apply:

We define fiber-based collocation simply. For purposes of our analysis, we define fiber-based collocation as a competitive carrier collocation arrangement, *with active power supply*, that has a non-incumbent LEC fiber-optic cable that both terminates at the collocation facility and leaves the wire center. We find that the collocation arrangement may be obtained by the competing carrier either pursuant to contract, tariff or, where appropriate, section 251(c)(6) of the Act, *including less traditional collocation arrangements such as Verizon's CATT* fiber termination arrangements [emphasis added, footnotes omitted].

The FCC's reasoning is elementary: it intended that a collocation arrangement be “operationally ready” to qualify. While an active power supply is a necessary ingredient for traditional collocation arrangements, the condition has no application to a CATT that, as a form of cross-connect, simply does not require power. As the FCC explained in *TRO* ¶ 406, to which it cited approvingly in *TRRO* ¶ 102:

Each counted self-provisioned facility along a route must be *operationally ready* to provide transport into or out of an incumbent LEC central office. We find that the competitive transport facilities counted to satisfy this trigger must terminate in a collocation arrangement which may be arranged either pursuant to contract, tariff or, where appropriate, section 251(c)(6) of the Act. We find it beneficial to count for purposes of this test all types of collocation arrangements, *including those that may not qualify for collocation under section 251(c)(6)*. This provides an incentive to incumbent LECs to enable competitive LEC, including the “carrier-agnostic” wholesale transport providers, identified by incumbent LECs, to develop their transport networks by developing viable alternatives to unbundled transport²⁰ [emphasis added, certain footnotes omitted].²¹

²⁰ In two of the accompanying footnotes (nn.1256 and 1257), the FCC further explained:

This requirement is intended to preclude counting competitive facilities before the facility is capable of operation on that route. For example, the incumbent LEC must have fully provisioned the collocation arrangement (*e.g.*, provided space and power) before the route could be considered complete. In this same regard, states should not review the financial stability of alternative transport provisioners, except to the extent the carrier remains in operation. See *infra* para. 415 [n. 1256].

The inclusion of CATT arrangements also is consistent with the FCC's stated intention, noted above, to account for potential as well as actual deployment of fiber-based collocation facilities by multiple competitive LECs in its impairment determinations. *TRRO* ¶ 102, n.295 (where the FCC states "although we refer to our indicia as 'fiber-based collocation,' our test is actually agnostic as to the medium used to deploy an alternative transmission facility, because we find that a technologically neutral test better helps to capture the actual and *potential deployment* in the marketplace" (emphasis added)). Additionally, the FCC stated (*TRRO* ¶ 102) that "a competing carrier's collocation facilities shall count toward the qualification of a wire center for a particular tier irrespective of the services that the competing carrier offers because the fiber-based collocation *indicates an ability to deploy facilities* ..." (emphasis added).

The FCC included CATT splice points as instances of qualifying, non-traditional collocation arrangements because they facilitate interconnection with competitive fiber providers. To exclude such arrangements would be to ignore the FCC's specific findings on the matter – something that the PUC has stated an intention not to do when applying the 1996 Act. *See, e.g.*, Order No. 24,442 dated March 11, 2005, Docket No. DT 03-

Collocation may be in a more traditional collocation space or fiber can be terminated on a fiber distribution frame, or the like, to which any other competing carrier collocated in that central office **can obtain a cross-connect** under nondiscriminatory terms. *See* MFN Riordan Aff. at paras. 6-13 (describing Verizon's CATT arrangement for terminating transport fibers). Our impairment analysis recognizes alternatives outside the incumbent LEC's network regardless of the authority under which they came to exist [emphasis added, n.1257].

²¹ *See also* *TRO* ¶ 414 ("Additionally, the competitive transport providers must be operationally ready and willing to provide the particular capacity transport on a wholesale basis along the specific route. This safeguards against counting alternative fiber providers that may offer service, but do not yet have their facilities terminated or collocated in the incumbent LEC central office, or are otherwise unable immediately to provision service along the route" (footnotes omitted)).

201/04-176, at 48-49. CATT arrangements must be treated as a form of fiber-based collocation, as the FCC directed.

E. Verizon's DTS and DCS Products (Tariff 84, Section E.5.1 and 2)

- 1. Does a DTS dark fiber connection interconnecting two CLECs meet the test if the fiber both terminates at the CLEC's collocation and leaves the wire center premises?**
- 2. Does a DCS dark fiber connection between two unaffiliated CLECs meet the test if the fiber terminates at the CLEC's collocation and leaves the wire center premises?**

Dedicated Transit Service ("DTS")²² and Dedicated Cable Support ("DCS")²³ Service enable CLECs to use the fiber cable facilities of another CLEC as an alternative to self-provisioning their own fiber cables or relying solely on Verizon's transport facilities to connect their collocation arrangements to the rest of their networks. Under DTS, Verizon facilitates the physical interconnection of CLEC networks through a fiber cross-connection facility that Verizon installs between two CLEC collocation arrangements. With DCS, CLECs are permitted to run their own fiber cables within Verizon's central office to directly interconnect their collocation arrangements.

Verizon's DTS offering complies with the requirements of the FCC's *Collocation Remand Order*.²⁴ The FCC found in the *Collocation Remand Order* that "the provision of cross-connects by incumbent LECs to collocated competitive LECs is a common carrier service pursuant to section 201(a)" and that requiring ILECs to provide cross-

²² DTS service is offered pursuant to the terms and conditions set forth in Verizon's NH PUC No. 84 Tariff, Part E, Section 5.1 and F.C.C. No. 11, Section 27.1.

²³ DCS service is grandfathered and thus only furnished to CLECs with existing DCS arrangements. Terms and conditions for DCS are set forth in Part E, Section 5.1 of Verizon's NH PUC No. 84 Tariff.

²⁴ FCC 01-204, Fourth Report and Order, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 (rel. Aug. 8, 2001) ("*Collocation Remand Order*").

connects between collocated carriers also is “supported by section 251 of the Act.” *Id.* at ¶¶ 70, 79. While the FCC found that it “may not require an incumbent LEC to allow competitive LECs to provision cross-connects outside of their immediate physical collocation space at the incumbent’s premises” (*e.g.*, DCS service), it found “pursuant to section 201 that it would be unjust and unreasonable for an incumbent LEC to refuse to provision cross-connects between collocated competitive LECs” (*e.g.*, DTS service). *Id.* at ¶ 59. The FCC determined that “[i]ncumbent LEC-provisioned cross-connects are properly viewed as part of the terms and conditions of requesting carrier’s collocation in much the same way as the incumbent LEC provisions cables that provide electric power to collocators.” *Id.* at ¶ 79. The FCC found also that “the refusal to provision cross-connects would be discriminatory toward competitive LECs” and that “because incumbents provide cross-connects within their premises to those collocators that purchase the incumbents’ transport services, an incumbent LEC’s failure to provide cross-connects within its premises to collocators that wish to utilize a competitive transport provider also raises this nondiscrimination issue.” *Id.* at ¶¶ 82, 83.²⁵

Verizon’s DTS (and grandfathered DCS) services foster competition by enabling CLECs that collocate for purposes of competing against Verizon to select the transport provider of their choice. The FCC found that “cross-connects between collocators within an incumbent’s premises are essential to the development of a fully competitive transport market” and that “without the ability to cross-connect at the incumbent’s premises, a collocated competitive LEC that has its own transport facilities would be severely

²⁵ “[I]t would be discriminatory not to provide such cross connects because of the vast disparity in costs and efficiency associated with the two alternatives” and “a failure to provide cross connects would in effect force the competitive LEC to purchase incumbent LEC transport in order to access a competitive provider’s transport service,” according to the FCC. *Id.*

restricted in its ability to optimize the utilization of their transport facilities through the wholesale provision of transport services to other competitive LECs.” *Id.* at ¶¶ 65, 66. Verizon’s DTS service affords CLECs that desire to compete at the retail level an efficient, cost-effective means of obtaining access to dedicated lit or dark fiber facilities of other CLECs that also offer alternative transport facilities at the wholesale level.

Verizon should not be penalized – that is, barred from implementing the FCC’s non-impairment rules – merely because it makes available a DTS cross-connect offering that represents “the most direct and efficient way” for a CLEC to access another carrier’s transport facilities. *Id.* at ¶ 64. DTS enables a fully competitive transport market. The Commission should not find impairment simply because one or more fiber-based collocators chooses to access an alternative provider’s fiber transport facilities using a DTS offering that Verizon is required by law to provide, *i.e.*, an arrangement that enables cross-connects between each carrier’s network.

Nor is the fact that Verizon did not at first include fiber-based collocators that utilize Verizon’s DTS service an admission that such arrangements do not meet the *TRRO*’s collocation criteria. Rather, Verizon’s election not to initially identify fiber-based collocators that utilize DTS service was solely a function of prioritizing competing resources. The manual processes Verizon follows to physically inspect collocation arrangements in targeted central offices to confirm the presence of fiber-based collocators is time-consuming and labor-intensive. The process for confirming DTS fiber-based collocators necessarily adds yet additional reviews of provisioning and billing records and possibly further physical inspections.

Distinguishing between cross-connects being used to access Verizon fiber facilities (*e.g.*, network elements or special access) and cross-connects being used to cross-connect the facilities of two collocated CLECs is more difficult than physically identifying and tracing non-Verizon fiber optic cables running directly between a CLEC's collocation arrangement and the cable vault (or a CATT arrangement located in the vault). For these reasons, Verizon has not yet incorporated all qualifying fiber-based collocation possibilities (*e.g.*, DTS) into its analyses, nor has it even inspected all offices that potentially meet the *TRRO*'s non-impairment criteria. Until such time as Verizon has a reasonable opportunity to add or upgrade a wire center on Verizon's list, the universe of non-impaired centers will likely be understated.

III. SECTION 271

A. Is high-capacity transport a 271 element?

B. Are high-capacity loops a 271 element?

Section 271 of the Act allows Bell Operating Companies ("BOCs") like Verizon to enter the "long distance" business if the FCC finds that they have met certain market-opening conditions. 47 U.S.C. § 271(c). In general, under Section 271, the BOC must interconnect its network with the networks of CLECs, comply with the unbundling requirements of Section 251(c)(3), and provide specified other arrangements to CLECs. *Id.* § 271(c)(2)(B)(i) through (xiv). These provisions are referred to as the 14-point "competitive checklist."

Checklist item 2 (§ 271(c)(2)(B)(ii)) requires a petitioning BOC to provide unbundled access to all network elements required of an ILEC under Section 251(c)(3). Checklist item 2 is therefore entirely redundant of the unbundling obligations in Section

251(c)(3) and does not require the unbundling of any additional network elements. *See TRO ¶ 654.*

Items 4, 5, 6 and 10 of the checklist direct that the BOC provide “local loop transmission” (§ 271(c)(2)(B)(iv)), “local transport” (*id.* subsection (v)), “local switching” (*id.* subsection (vi)), and “databases and associated signaling necessary for call routing and completion” (*id.* subsection (x)), unbundled from one another and from other services. In its *Triennial Review Order*, FCC found that “[c]hecklist items 4 through 6 and 10 do not require [us] to impose unbundling pursuant to section 251(d)(2). Rather, the checklist independently imposes unbundling obligations, but simply with less rigid accompanying conditions.” *TRO ¶ 658.*²⁶

While the high-capacity loops and dedicated transport at issue in this investigation fall within the scope of § 271’s 14-point “competitive checklist,” that does not mean that the PUC can lawfully require the relevant delisted UNEs to be made available to competitors under state tariff or at rates, terms and conditions established by the PUC. As the Commission is aware, Verizon NH has contested the Commission’s assertion in its *271 Unbundling Orders*²⁷ that it has the authority to regulate Section 271 elements.²⁸

²⁶ The FCC’s finding in this regard was upheld in *USTA II*, which ruled that “Section 271 checklist items four, five, six and ten *do not incorporate* any of the specific requirements of § 251(c)(3)” (emphasis added) and held: “We agree with the [FCC] that none of the requirements of § 251(c)(3) applies to items four, five, six and ten on the § 271 competitive checklist.” *USTA II*, 359 F.3d at 590.

²⁷ *See* Order No. 24,442 dated March 11, 2005 in Docket Nos. DT 03-201 and DT 04-176; Secretarial Letter Order dated April 22, 2005 in No. DT 05-034; and Order of Notice dated April 22, 2005 in No. DT 05-083 (the “*271 Unbundling Orders*”).

²⁸ *See, e.g.*, Verizon’s Memorandum of Law in Support of Plaintiff’s Motion for Summary Judgment dated January 3, 2006, Civil No. 05-CV-94-PB (D.N.H.) (“*Verizon’s 1/3/06 Memorandum*”).

As set forth in detail in *Verizon's 1/3/06 Memorandum*, the text and structure of the Telecommunications Act of 1996 ("1996 Act")²⁹ provide that the obligation to offer access to network elements under Section 271 ("271 elements") is a *federal* obligation subject to *federal* regulation, and state commissions have no authority under federal law to regulate 271 elements or enforce compliance with Section 271's provisions. In addition, state commissions have no authority under state law to regulate 271 elements, and any purported sources of such authority are preempted.

The PUC's *271 Unbundling Orders* rely on Section 271 to override the FCC's non-impairment findings in the *Triennial Review Order*, the *Triennial Review Remand Order* and the D.C. Circuit's decision in *USTA II*. But as the FCC has rightly recognized, Section 271 cannot be used to effect an end-run around Section 251, and to "gratuitously reimpose" "a virtually unlimited standard [for] unbundling, based on little more than faith that more unbundling is better." *Triennial Review Order* ¶¶ 658-659. Instead, Section 271 reflects Congress's determination of the appropriate requirements to impose on BOCs as a condition for authorizing them to provide in-region, long-distance service. For the reasons explained in *Verizon's 1/3/06 Memorandum*, Congress then assigned to the FCC and the FCC alone, the task of ensuring that BOCs comply with those requirements.³⁰

²⁹ Telecommunications Act of 1996, Pub. L. No. 104-104,110 Stat 56, codified at 47 U.S.C. §§ 151 *et seq.* (the "Telecommunications Act" or "Act"). Citations to the Act will be to the United States Code. The Act amended the Communications Act of 1934 (the "1934 Act").

³⁰ Congress repeatedly and expressly authorized the FCC to implement Section 271, limited a state commission's role under Section 271 to non-binding consultation at the application stage, and expressly tied state commission arbitration and rate-setting authority under Section 252 to network elements that must be provided as UNEs under Section 251. For these reasons, state commissions have no authority under federal law to regulate 271 elements and any state law purporting to provide such authority is preempted as inconsistent with Congress's design. *See, e.g.,* See *Verizon's 1/3/06 Memorandum* at 21-34); *see also* Order No. 24,564 (December 15, 2005) at 13, Docket No. DT 05-041 (affirming lack of PUC jurisdiction over interconnection agreements under Section 271).

Among other things, state regulation of 271 elements would interfere with the establishment of market rates for 271 elements, such as through negotiation of “arms-length agreements” that the FCC has recognized are one method of establishing rates, terms and conditions for 271 elements. *TRO* ¶ 664.³¹ Indeed, state-by-state regulation of 271 elements would frustrate Congress’s goal of establishing a national framework to promote local competition while permitting BOCs to compete in the long-distance market.

Moreover, no need exists for the PUC to regulate Section 271 elements, even if it could lawfully do so. As explained at the pre-hearing conference of January 31, interstate special access services are available at “just and reasonable” rates under Section 201/202 of the 1934.³² These FCC-regulated services are available at the DS1 and DS3 loop and transport levels, like the delisted DS1/DS3 UNEs at issue in this investigation. *See* FCC Tariff No. 11, § 31.7.9, pp. 31-122 (DS1 loop), 31-129 (DS3 loop), 31-147 (DS1 transport) and 31-150 (DS3 transport); *see also* Section V, *infra*.

³¹ As the FCC repeatedly has found, “competition is the most effective means of ensuring that the charges, practices, classifications, and regulations ... are just and reasonable, and not unjust and unreasonably discriminatory.”³¹ And, in the specific context of network elements that need not be unbundled, the FCC has concluded that the “market price should prevail,” “as opposed to a regulated rate” of the sort that certain CLECs are proposing.³¹ Simply put, in this context, meaningful competitive alternatives necessarily exist. As a result, parties seeking to negotiate a commercial agreement to govern access to such elements and services should be able to do so without the overhang of state public service commission involvement.

³² State commissions have a delegated role under Section 252(d) to establish prices for Section 251 UNEs. The same does not apply to Section 271 elements, however, where the FCC has ruled that federal law, *viz.*, Sections 201 and 202 of the 1934 Act (47 U.S.C. §§ 201, 202) determines prices. *See TRO* ¶ 656, *aff’d*, *USTA II*, 359 F.3d at 588-90. Unlike Section 252(d), the FCC’s jurisdiction under Sections 201 and 202 of the 1934 Act is exclusive. *In re: Long Distance Telecomm. Lit.*, 831 F. 2d 627, 631 (6th Cir. 1987) (“[C]laims based on section 201(b) of the Communications Act are within the primary jurisdiction of the FCC” and are a matter “Congress has placed squarely in the hands of the [FCC]”) (brackets in original); *North Carolina Utils. Comm’n v. FCC*, 537 F.2d 787, 793-94 (4th Cir. 1976) (FCC’s “assertion of jurisdiction” proper over state regulation “that in effect encroaches substantially upon the [FCC’s] authority under sections 201 through 205”).

IV. TRANSITION

A. Should Verizon be enjoined from disconnecting circuits for a reasonable period of time following the Commission's order in this docket and, if so, for how long?

Verizon cannot be “enjoined” from disconnecting circuits for any period of time following the Commission’s order in this docket. As an initial matter, the Commission lacks the authority to impose an injunction. *See, e.g., Global Naps Inc. Petition for an Order Directing Verizon-NH to Comply With its Interconnection Agreement Obligation to Pay Reciprocal Compensation Order Granting Petition in Part*, 2003 N.H. PUC LEXIS 108 at 6-7 (N.H. PUC 2003)³³ In addition, even if the Commission had such authority it would be completely unnecessary. While Verizon’s currently effective tariff (*see* Tariff No. 84, Sections 2.1.1.E and 5.3.1.D) authorizes it to disconnect non-impaired facilities where a CLEC fails to transition those facilities to alternative arrangements, Verizon filed a proposed change to its tariff on January 11, 2006, that would allow Verizon to re-price those facilities to Verizon month-to-month special access, in lieu of disconnection. The Commission suspended that tariff for 30 days pursuant to R.S.A. 378:6, IV. *See Order of Notice*, DT 06-012 (January 23, 2006). As discussed below, the Commission’s prompt approval of Verizon’s proposed tariff revision would provide for the uninterrupted use by CLECs of existing DS1 and DS3 facilities beyond the FCC’s mandatory transition period at federally-tariffed rates for comparable services.

³³ The PUC stated that “the Commission is vested only with those powers granted to it by the Legislature. *Appeal of Public Service Company of New Hampshire*, 122 N.H. 1062, 1066 (1982). The Commission does not possess the type of equitable authority recognized in *Arcadia Mills*. *See, e.g., State v. New Hampshire Gas & Electric Co.*, 86 NH 16 (1932) (Commission's general supervisory authority over public utilities created by RSA 374:3 does not carry with it the authority to issue injunctive orders to correct illegal conduct.)” *Id.*

B. Going forward, how long should the transition period for newly identified wire centers be from the date of a Commission determination that the wire center is unimpaired?

The FCC established twelve- and eighteen-month transition periods in connection with the initial determinations of “delisted” high-capacity loops and transport UNEs. However, the FCC made it clear that these lengthy transition periods would not govern subsequent additions to the ILECs’ wire center lists, and that instead carriers were to negotiate appropriate transition arrangements in such cases pursuant to § 252. *TRRO* ¶¶ 196 n.519, 142 n. 399. In connection with its implementation of the original *Triennial Review Order*, this Commission also directed parties to negotiate subsequent transitions addressing the embedded base of discontinued UNEs. *See* Order No. 24,564 (N.H. PUC, Dec. 15, 2005) at 12 (“We remind the parties ... that they remain obligated to negotiate transition plans for the embedded base.”). Verizon has engaged in significant negotiations and has arbitrated embedded base transition issues in other states. In Massachusetts, for example, the DTE required Verizon to provide 30 days’ notice of a change in the status of a wire center. *See* Docket No. 04-33, Arbitration Order dated July 14, 2005, at 288. Verizon and a number of CLECs have nevertheless agreed on a 90-day transition period as part of their jointly proposed *TRRO* Compliance Amendment in Massachusetts. A 90-day transition period will afford CLECs sufficient time to transition discontinued UNEs and, as discussed above, is consistent with the time frames contained in currently-effective interconnection agreements. There is no need for the kind of lengthy transition periods the FCC ordered for the initial transitions. Unlike the first round of transitions – which involved substantial numbers of facilities and newly established replacement options – future delistings of a handful of facilities at a time, out

of one or two offices, and to well-established transition options, will require much less time and consideration.

To the extent the Commission includes a period for future transition in the tariff, it should be 90 days. Where CLECs have interconnection agreements that address transitions for discontinued UNEs, the transition period in those interconnection agreements would apply.

V. OTHER ISSUES NOT ADDRESSED ABOVE

A. **Should Verizon NH be permitted to convert delisted high-capacity circuits to special access arrangements pursuant to federally tariffed rates, terms and conditions?**

Yes. Tariff No. 84 provides for the disconnection by Verizon NH, at the end of a transition period, of delisted DS1 and DS3 high-capacity loop or dedicated transport UNEs for which a CLEC does not submit disconnection or conversion orders during the transition. *See, e.g.*, Section 2.1.1.E (DS1 and DS3 dedicated transport) and Section 5.3.1.D (DS1 and DS3 loops). Verizon NH's proposed revisions to Tariff No 84 would permit Verizon, as an alternative to disconnection, to convert those facilities by March 10, 2006, to analogous interstate special access arrangements pursuant to applicable interstate tariffed rates, terms and conditions.

Special access rates are regulated under the Communications Act's Sections 201/202 "just and reasonable" test – the standard that applies to interstate services, including Section 271 offerings. *See, e.g.*, *TRRO* ¶ 51 ("Special access prices are regulated pursuant to the Communications Act's 'just and reasonable' standard, which predates and bears no necessary relation to this cost-based standard, relying instead on historical costs."); ¶ 163 ("Thus, for example, in urban wire centers where high-capacity

loop unbundling is not required, competing carriers will be able to use their own facilities, or facilities deployed by other competitors, potentially complemented, as a gap-filler, by services using an incumbent LEC's tariffed alternatives for buildings where competitive facilities cannot economically be deployed. The availability of such incumbent LEC offerings therefore mitigates concerns, expressed by some competitive LECs, that a wire center approach is impermissibly 'under-inclusive' and overlooks the existence of end users in that wire center that cannot economically be served by competitive facilities." (footnote omitted)); *TRO* ¶ 664 ("Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6). We note, however, that for a given purchasing carrier, a BOC might satisfy this standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively, a BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.").

The CLECs' strategy in this proceeding and related investigations is readily apparent: they see in Section 271 another ticket to ride the gravy train of maximum unbundling at TELRIC rates for all narrowband and broadband facilities, regardless of whether they are impaired without such unbundling. Thus, consistent with claims before the PUC and other state commissions, some CLECs may claim that nothing prevents the

Commission from adopting forward-looking economic cost regimes, such as the TELRIC methodology, for network elements provided exclusively pursuant to Section 271. But the FCC has flatly rejected those claims, and the D.C. Circuit affirmed that result. The FCC held that, absent a finding of impairment, “it would be *counterproductive* to mandate that the incumbent offers the element at forward-looking prices,” *UNE Remand Order*³⁴ ¶ 473 (emphasis added), and that “TELRIC pricing for checklist network elements that have been removed from the list of section 251 UNEs” is “*no[t] necessary* to protect the public interest,” *Triennial Review Order* ¶ 656 (emphasis added).³⁵

In contrast to TELRIC pricing under Section 251, the FCC held that the statutory pricing standard for Section 271 obligations is the “just and reasonable” standard of Sections 201 and 202 of the 1934 Act, which applies to other Verizon services that are subject to common carriage regulation by the FCC. As noted, for Section 271 items, the FCC explained that “the market price should prevail.” *UNE Remand Order* ¶ 473; *see*

³⁴ Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) (“UNE Remand Order”), *petitions for review granted, United States Telecom Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (“*USTA I*”), *cert. denied*, 538 U.S. 940 (2003).

³⁵ The PUC has acknowledged that state commissions have no authority to take actions that conflict with the FCC’s rules. *See, e.g.*, Order No. 24,442 dated March 11, 2005, Docket No. DT 03-201/04-176, at 48-49 (“Having said that, however, we must make two important observations. First, we are sympathetic to Verizon’s arguments (and the FCC’s original position on this issue) that these facilities may not truly be the type that must be offered on an unbundled basis. It would not be appropriate for this Commission, however, to countermand the language of the FCC and the courts and simply declare dark fiber channel terminations are no longer required to be offered because we think it makes no sense, any more than it would be appropriate for Verizon to make such a unilateral determination. Until there is clearer guidance from the FCC or the courts on this issue, we find no basis to do other than to conclude that Verizon may not discontinue offering this element.”)

And the FCC has held, in turn, that when network elements must be provided as 271 elements, “the market price should prevail” as opposed to a regulated rate – with the test of reasonableness being assessed only against the *federal* standards set forth in Sections 201 and 202. *UNE Remand Order* ¶¶ 470, 473; *see Triennial Review Order* ¶¶ 656, 664. Any efforts by a state to establish rates, terms, and conditions for 271 elements would run directly counter to the FCC’s determination. The state-by-state regulation of 271 elements that the CLECs propose would thus frustrate the FCC’s expressed preference for commercial agreements with respect to 271 elements.

also TRO ¶ 664 (a BOC can demonstrate that the rate for a Section 271 element is reasonable “by showing that it has entered into arms-lengths agreements with other, similarly situated purchasing carriers to provide the element at that rate”). Alternatively, the FCC held that, for any Section 271 checklist item (not required to be unbundled under Section 251) that offers a network functionality similar to an existing ILEC service *that is already tariffed at a just and reasonable rate with the FCC*, the ILEC’s federal tariff rates are presumptively just and reasonable. *TRO ¶ 664.* Such is the case here.

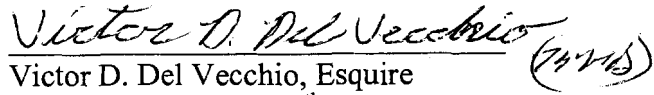
In its proposed Tariff No. 84 revisions, Verizon NH is reasonably seeking to avoid disconnecting non-responsive CLECs by converting delisted UNE facilities to special access services subject to FCC regulation. The approach is a fair alternative to disconnection, particularly where a CLEC has failed to negotiate a commercial substitute with Verizon. Actions barring conversion or disconnection, and purporting to require continued TELRIC rates for Section 271 elements, however, unnecessarily interfere with

federal policy and are preempted because they conflict with FCC rulings to the contrary.³⁶

Respectfully submitted,

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³⁶ See *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000) (states may not depart from “deliberately imposed” federal standards); *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 155 (1982) (federal regulation that “consciously has chosen not to mandate” particular action preempts state law that would deprive an industry “of the ‘flexibility’ given it by [federal law]”).

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