IV. UNBUNDLED NETWORK ELEMENTS

Issues III-6 and III-7 (Combinations)

The Commission should adopt WorldCom's proposal with respect to Issue III-6 – Combinations – because it is consistent with governing law, and because it represents the choice that best effectuates both the plain language and purpose of the 1996 Act.

It is undisputed that incumbent local exchange carriers must provide access to unbundled network elements, and that new entrants may use such elements, alone or in combination, to provide telecommunications services. See 47 U.S.C. § 251(c)(3); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999). It is similarly undisputed that incumbent carriers may not "uncombine" elements that are already combined in their network. See AT&T Corp. v. Iowa Utils Bd., 525 U.S. 366 (199) (reinstating 47 C.F.R. § 315(b). Finally, it is undisputed that the Eighth Circuit's most recent decision struck down requirements that would otherwise allow a new entrant to ask the incumbent to combine elements that are not ordinarily combined in the incumbents' network.

The only remaining dispute, therefore, is under what circumstances Verizon must combine elements that it ordinarily combines within in its own network, but that do not happen to be combined at the moment the competitive carrier orders the elements. This dispute, too, appears to have been narrowed. First, in both its written testimony and at the hearing in this matter, Verizon indicated it would provide UNE platform combinations, see Verizon Exh. 1, Direct Testimony of UNE Panel at 4; Tr. 10/3/2001 at

58 (N. Gilligan, Verizon).[55] Verizon also indicated it would provide any combinations necessary to provide service to a new home, or to provide second lines. See id. at 62.[56]

Verizon should not, however, be able to limit the circumstances in which it provides combinations to competitors that it ordinarily provides to itself. If its attempt to do so were sanctioned, competitors would be placed at a serious competitive disadvantage. As the Commission has recognized, "in practice it would be impossible for new entrants that lack facilities and information about the incumbent's network to combine unbundled elements from the incumbents' network without the assistance of the incumbent." Local Competition Order ¶ 293. Thus, if Verizon were allowed to refuse to provide elements that are ordinarily combined in combined form, competitive carriers would be "seriously and unfairly inhibited in their ability to use unbundled elements to enter local markets." Id.; accord WorldCom Exh. 5, Direct Testimony of C. Goldfarb, A. Buzacott, R. Lathrop at 6-7 (explaining why WorldCom needs access to combinations of Verizon network elements in order to provide service in Virginia).

Verizon's only argument in support of its proposal that it be allowed to limit its duty to provide those combinations ordinarily combined in its network is an assertion that

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[55] It is unclear, however, whether Verizon would provide UNE Platform in combination in all circumstances. It purports to limit the circumstances under which it will do so to those in which "facilities are available and currently combined," Verizon Exh. 1, Direct Testimony of UNE Panel at 4, without explaining precisely what that means.

[56] Verizon has never introduced language into the record that reflects these concessions. WorldCom notes that, in the DPL filed in November, Verizon included a new section 16 that purported to be a "Combinations" section. That proposal is not part of the record, see note 1, supra. In any event, it is no real offer, because it offers to provide UNE-platform combinations, for example, only "to the extent provisions of such Combination is required by Applicable Law." Because Verizon's position is that such combinations are not required by existing law, Verizon's newest language does not appear to constitute an enforceable requirement.

the Eighth Circuit's decision mandates that result. That assertion is wrong. The FCC imposed three sets of relevant requirements in its regulations implementing the 1996 Act. First, in Rule 315(a), the FCC required incumbents to provide elements ordinarily combined in their network. Second, in Rule 315(b), the Commission prohibited incumbents from taking apart elements that are already combined in the network Finally, Rules 315(c) – (f) collectively required incumbents to provide novel combinations – those combinations not typically found in the incumbents' networks. Thus, as the Commission explained in the Local Competition Order:

> Incumbent LECs are required to perform the functions necessary to combine those elements that are ordinarily combined within their network in the same manner in which they are typically combined. Incumbent LECs also are required to perform the functions necessary to combine elements, even if they are not ordinarily combined in that manner, or are not ordinarily combined in the incumbent's network, provided that such combination is technically feasible, or such combination would not undermine the ability of other carriers to access unbundled network elements or interconnect with the incumbent LEC's network.

Local Competition Order ¶ 296.

The language in Rules 315(c) - (f) – which are the only rules vacated by the Eighth Circuit – tracks the language in the second requirement discussed by the Commission in paragraph 296. Those rules address issues of technical feasibility and the impact on the ability of other carriers to access unbundled network elements or interconnect with the ILEC's network. In contrast, the language in the first requirement discussed in paragraph 296 is codified in Rule 315(a). Unsurprisingly, technical feasibility and related issues are not contained in that discussion; requesting elements in the manner that they are ordinarily combined raises no such concerns. Because only Rules 315(c) - (f) were vacated by the Eighth Circuit, the requirement that incumbents

combine elements "ordinarily combined" in their network remains intact. Indeed, Verizon concedes as much in its direct testimony, describing Rules 315(c)-(f) as the "rules that had required Verizon VA to combine UNEs that are not ordinarily combined in Verizon's network. ... " Verizon Exh. 24, Rebuttal Testimony of UNE Panel at 4 (emphasis added).

Verizon nonetheless attempts to avoid this result by asserting that some of the language used by the Eighth Circuit indicates that even ordinary combinations are prohibited by the Act. There is no dispute, however, that the Eighth Circuit did not strike down Rule 315(a). Nor can Rules 315(c)-(f) be rewritten to incorporate the requirement contained in Rule 315(a). Indeed, to do so would be nonsensical, rendering Rule 315(a) utterly superfluous in violation of core tenets of statutory construction. See, e.g., United States v. Morton, 467 U.S. 822, 828, (1984); see also 2A C. Sands, Sutherland on Statutory Construction § 46.06, p. 104 (rev. 4th ed. 1984 ("A statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant") (footnotes omitted).[57]

Such a result would also run afoul of the Act's anti-discrimination provisions. The Act requires that Verizon provide "nondiscriminatory access to network elements. . . ." 47 U.S.C. § 251(c)(3). The FCC's implementing regulations mandate that "the quality of the access to [an] unbundled network element[] that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself." 47 C.F.R. § 51.311(b). But Verizon proposes a result

[57] Although Verizon asserts that WorldCom's reading would render 315(c)-(f) superfluous, see Verizon Exh. 24, Rebuttal Testimony of UNE Panel at 8, that is plainly not the case. Rules 315(c)-(f) expressly deal with "novel" combinations, not the "ordinary" combinations covered by Rule 315(a).

that would result in competitors obtaining access to elements that is not equal in quality to that which Verizon provides itself. Instead, Verizon's preferred result would allow it to withhold from new entrants those combinations that it "ordinarily" provides itself and, by extension, its own customers.

Such a situation would be untenable. Because, as the Commission has recognized, new entrants are not, as a practical matter, able to combine elements in Verizon's network, if Verizon refuses to provide those elements it ordinarily combines for itself new entrants would be unable to provide even ordinary combinations to their own customers. Because new entrants in general, and WorldCom in particular, do not have ubiquitous facilities in place, see WorldCom Exh. 5, Direct Testimony of C. Goldfarb, A. Buzacott, R. Lathrop at 6, WorldCom relies on comginations of elements to provide service to Virginia customers. Verizon's proposal would prohibit WorldCom from providing such service. Nothing in the Act allows, much less mandates, such an anticompetitive result.

The problems with Verizon's proposal are compounded by section 1.2 of Verizon's proposed agreement. [10/] For example, it provides that Verizon shall have no obligation to construct or deploy new facilities or equipment to offer any UNE. This is inconsistent with the non-discriminatory provision of UNEs required by the Act because

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[58]/ Section 1.2(c) of Verizon's proposed interconnection agreement states: "Verizon shall not be obligated to combine UNEs that are not already combined in Verizon's network. **CLEC shall not directly or through a third party (e.g., **CLEC's Customer) order Telecommunications Services from Verizon in order to impose on Verizon an obligation to provide a UNE or a Combination that Verizon would not otherwise have an obligation to provide. For example, **CLEC shall not order Telecommunications Services or advise its Customer to order Telecommunications Services where existing UNEs or Combination desired by **CLEC are not available in order to permit **CLEC to subsequently convert the Telecommunications Services to the UNEs or Combinations desired by **CLEC."

Verizon will construct or deploy new facilities and equipment to serve a retail customer taking service from Verizon.[59] See WorldCom Exh. 14, Direct Test. of C. Goldfarb, A. Buzacott, and R. Lathrop at 25. The limitation proposed by Verizon is overbroad, and improperly permits Verizon to refuse provisioning of a loop to a WorldCom customer's premise because facilities do not exist and then to deploy the loop facility so that Verizon's retail arm can serve the customer. See Verizon's Proposed ICA, UNE Attachment, §1.2(b).

Verizon then compounds that discriminatory and anti-competitive provision by proposing further contract language that prohibits a potential WorldCom customer from ordering service from Verizon (which requires deployment of facilities) and then migrating his/her service to WorldCom. See id. These two provisions, taken together, lock the customer into Verizon service. See WorldCom Exh. 14, Direct Test. of C. Goldfarb, A. Buzacott, and R. Lathrop at 25. The first provision prohibits the customer from receiving service from WorldCom in the first instance and forces the customer to take service from Verizon. The second provision then prevents the customer from migrating service to WorldCom once he or she has established service from Verizon.

Although Verizon has euphemistically called the latter provision an "anti-gaming" provision, it is more appropriately thought of as a "lock up the customer for all time" provision. Thus, wherever Verizon does not currently have facilities deployed to provide a retail customer an additional trunk, for example, neither WorldCom nor the retail customer could purchase the service from Verizon and then migrate to WorldCom

[59] WorldCom does not suggest that Verizon has an unlimited obligation to construct UNEs for a CLEC. Rather, the non-discriminatory access to UNEs required by Section 251(c)(3) means that Verizon must deploy facilities to a specific location for a CLEC if it would do so for its own retail operation.

service provided over UNEs or UNE combinations. End-users would thus have to continue to receive service from Verizon, even if they preferred to migrate to WorldCom.[60] This result is flatly antithetical to the Act's goal of introducing competition to local markets "as quickly as possible." H.R. Rep. No. 104-204 at 89 (1995) ("H. Rep.").

[60] WorldCom also introduced evidence that it will be impaired in the Commonwealth of Virginia if it does not have access to the "EELs" combination. See WorldCom Exh. 12, Direct Testimony of C. Goldfarb, A. Buzacott, R. Lathrop at 14-17. Thus, no matter which party's language the Commission adopts with respect to combinations, the Commission should order Verizon to provide EELs.

Issue III-8 (Connection at Technically Feasible Points)

The Commission should adopt the language proposed by WorldCom with respect to Issue III-8, because it is the only proposal consistent with the Act and the FCC's requirements. WorldCom proposes, simply, that a contract provision making clear that "For each Network Element including, but not limited to, Combinations, Verizon shall provide connectivity at any Technically Feasible point without requiring MCIm to collocate." Att. III, Sec. 2.5. This straightforward provision tracks Rule 51.307(a), which states that incumbent LECs "shall provide . . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point." 47 C.F.R. § 51.307(a).

In contrast, Verizon has proposed a provision that requires WorldCom to access network elements via collocation. See Sec. 1.7 ("Except as otherwise expressly stated in this Agreement, **CLEC shall access Verizon's UNEs specifically identified in this Agreement via Collocation in accordance with the Collocatin Attachment at the Verizon Wire Center where those elements exist. . . ."). This is squarely in conflict with this Commission's conclusion that incumbents LECs cannot limit a competitive carrier's access to network elements to collocation. LA. II 271 Order ¶ 164.

Presumably recognizing that its proposal is in conflict with existing law, Verizon retreats from its proposed language in its testimony, asserting that notwithstanding the clear language it proposes, competitors may access elements via other means as well. Verizon Exh. 23, Unbundled Network Elements Additional Direct Testimony on Mediation Issues at 9-10. During cross examination, however, Verizon's witness conceded that this list does not contain all technically feasible methods for accessing network elements. Tr. 10/03/01 at 113-114 (S. Fox, Verizon) ("Q. . . . [I]t's not your

position that you have identified every single technically feasible means of accessing UNEs and UNE combinations in those sections to which you pointed. Ms. Fox: I would say that's true. Q. That's correct? Ms. Fox: Yes.").

Thus, even Verizon has conceded that its proposed language is inconsistent with the Act and this Commission's requirements. The Commission should thus adopt WorldCom's proposed language.

Issue III-9 (Local Switching –Exceptions)

WorldCom's proposed language concerning the circumstances under which ILECs must voluntarily offer loop-transport combinations ("enhanced extended links," or "EELs") if they decline to provide unbundled local switching faithfully incorporates both the spirit and the letter of the Commission's switching exception laid out in the UNE Remand Order. Verizon's proposal does not.

WorldCom's proposed contract language in Attachment III is as follows:

> 7.1 Verizon shall provide MCIm unbundled, Non-Discriminatory access to Local Switching (including traditional and ISDN switching functionalities, and in particular including the ability to route to MCIm's transport facilities, dedicated facilities, and systems) at TELRIC-based rates; provided, however, that Verizon may charge the market-based rates set forth in Attachment 1 for Local Switching for MCIm's provision of local service to customers who have four or more voice grade (DS0) or equivalent lines at one location in the density zone 1 of the Washington, D.C. and Norfolk-Virginia Beach-Newport News Metropolitan Statistical Areas (as defined as of January 1, 1999 under Section 69.123 of the FCC's rules), if Verizon also provides to MCIm throughout the relevant density zone 1 Non-Discriminatory access at TELRIC prices to Loop/Transport Combinations (including multiplexing/concentration equipment).

Verizon's language differs from WorldCom's in two critical respects: first, Verizon would apply the exception whenever there is a customer with a single line in Density Zone 1 who has three or more other locations somewhere within the same LATA., Tr. 10/3/01 at 163, while WorldCom would have the exception apply when there are four or more lines going to a single customer location. Second, Verizon limits its "voluntary" offering of EELs to those situations in which it is required to provide EELs

under the Clarification Order. Neither of Verizon's restrictions is faithful to the language or purpose of the switching exception, and both should be rejected out of hand.

1. **The Four Line Limitation.** The FCC's rationale for adopting the switching exception was made explicit in the UNE Remand Order, and Verizon's proposal does violence to that rationale. As this Commission said, "as a general matter," CLECs are impaired without access to unbundled local switching because access to ILEC-supplied switching "materially raises entry costs, [and] delays broad-based entry." UNE Remand Order ¶ 253. Because of economies of scale, switching costs more on a per-customer basis when a switch cannot be fully utilized, id. ¶ 260, and transport and in particular collocation costs typically make it prohibitively expensive for CLECs to transport sufficient volumes of traffic to a switch to overcome these scale economy advantages. Id. ¶¶ 261, 263.

But the Commission also recognized that in a small number of cases these scale economies could be overcome, making it possible for a CLEC to offer service using its own switches without being impaired. For one thing, an ILEC's voluntary EELs offering was a necessary component of the switching exception identified by the Commission because it concluded that "the EEL allows requesting carriers to aggregate loops at fewer collocation locations and increase their efficiencies by transporting aggregated loops over efficient-high capacity facilities ... Thus, the cost of collocation can be diminished." Id. ¶ 288.

Critically, the Commission also limited the exception to situations in which the retail customer has four or more lines. The FCC used line counts as a criteria because line counts signified a high volume of traffic, see id. ¶ 293, and traffic volume was, of

course, one of the critical factors that made it cost-effective for competitors to use their own switches. Specifically, the Commission reasoned that "if the EEL is available and a requesting carrier seeks to serve a high volume business, the incumbent LEC can provision the high capacity loop and connect directly to a requesting carrier's collocation cage." Id. ¶ 298; see also id. ¶ 274 (requiring unbundled switching "in areas where traffic volumes and customer densities make it difficult initially to justify deploying a switch").

Obviously, if the four or more lines were scattered throughout the LATA, as would be permitted in the Verizon proposal, it would not be possible to interconnect with them, as the Commission's Order specifies, at a single "requesting carrier's collocation cage." Id. ¶ 298. Instead interconnection would require four or more collocation cages. At the same time, CLECs would not benefit from any scale economies as a result of the high volume of traffic moving over the EEL, the very efficiencies the FCC pointed to in adopting the four line exception. In other words, when the Commission referred to "end users with four or more lines," Id. ¶ 253, it could not possibly have meant lines at different locations.

Verizon fails to provide any rationale at all for its strained contrary interpretation. It is absurd to interpret the FCC's rules to deny CLEC access to switching, for example, to serve a small bakery company because that company has four locations in a LATA, each with one telephone line. While in theory there may be efficiencies in billing when dealing with one customer in multiple locations as opposed to different customers in those locations, those efficiencies were never discussed in the UNE Remand Order, nor

do those efficiencies relate in any way to the efficiencies that were discussed in that Order concerning the use of collocation and transport facilities.

Although the conclusions and findings of the UNE Remand Order are controlling and cannot be challenged in this proceeding, the testimony here fully corroborated the fact-findings that led the Commission to adopt the four-line limitation in that earlier Order. Thus, when AT&T witness Pfau was asked by staff "how do the costs vary between serving a customer that has four lines in one location and four lines at four separate locations?" he responded that "the costs are going to vary dramatically[.] . . . When a CLEC is going to serve a customer using its own switch, it's going to have to deal with at least two major factors, maybe three: getting collocation, digitizing the loop, and dealing with the hot cut. Now all of these things happen on a customer-by-customer basis." Tr. 10/3/01 at 165, ll. 14-22 (Pfau, AT&T). Verizon's witness agreed that "there is certainly a truth to the fact that serving customers of different sizes have different costs." id. at 169, l. 16 (Gansert, Verizon). And while he then went on to assert that some of the costs do not greatly differ, he did not dispute that collocation costs vary greatly depending on whether the CLEC has to construct one or four different collocations to bring traffic to its switch. Of course, these collocation costs were the principal reason the FCC found that CLECs were generally impaired when they lacked access to ILEC switching. Thus Verizon's witness never disputed the central factual assertion that establishes the irrationality of Verizon's proposal: "obviously, if [the customer locations] are, for example, in two different central offices, you have to have two different collocations to get them back to your switch. So the economies are going to

be dependent on that customer and your particular location." Tr. 10/3/01 at 180, l. 21-181, l. 4 (Pfau, AT&T).

WorldCom's proposal also is consistent with a recent finding of the Pennsylvania Public Utilities Commission ("PA PUC"), which adopted a "per location" definition in restricting UNE-P and EEL offerings.[61] The PA PUC required Verizon to make UNE-P and EEL offerings available to any CLEC residential customer as well as business customers with total billed revenue ("TBR") from local and intraLATA toll services at or below $80,000 annually. In response to Verizon's proposal that the TBR threshold limit imposed by the PA PUC be applied to "customers" defined as an account, regardless of the number of locations served by that account (as Verizon proposes to do here), the PA PUC stated:

> ...Verizon is, apparently, attempting once again to restrict the availability of UNE-P. Verizon's reliance on its interpretation of the $80,000 TBR as requiring a per customer definition is misplaced. As the ALJ noted, the goal of this provision was to encourage competition. Indeed, adoption of Verizon's proposal to combine all of the branches, locations and subsidiaries of a business entity for purposes of identifying eligibility under the $80,000 threshold would stifle competition. Absent a locational distinction, as the ALJ noted, we exclude the kinds of customers, i.e., the small business customer, we intended to benefit by setting the $80,000 threshold. We have frowned on the previous attempts of Verizon to treat the CLEC's small business customers differently than Verizon treat its small business customer. (footnote omitted) Thus, we agree with the ALJ and the CLECs that business customers should be restricted to a locational definition.[62]

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[61] Interim Opinion and Order in the Further Pricing of Verizon Pennsylvania Inc.'s Unbundled Network Elements, case R-00005261 (PA. PUC June 8, 2001.

[62] Id. at 78.

In sum, the Commission should adopt WorldCom's proposed language on the four-line requirement as the only language consistent with binding Commission regulations.

2. **The Supplemental Order's Safe Harbor Provisions.** Verizon's second "switching exception" limitation is every bit as unlawful and irrational as its first. Verizon would limit its "voluntary" provision of EELs to only those EELs it is legally required to provide pursuant to the FCC's Clarification Order. In that order, the FCC addressed ILEC concerns that IXCs would convert their base of access circuits to loop-transport combinations. Because the FCC had not yet addressed renewed questions about the use of UNEs for access services, and because of ILEC concerns that these conversions of existing circuits "could 'cause a significant reduction of the incumbent LECs' special access revenues prior to full implementation of access charge and universal service reform,'" Supplemental Order ¶ 3 (quoting UNE Remand Order), the FCC ultimately decided that such conversions "solely to provide exchange access service," would be limited pending consideration of these questions. The FCC made clear that "this constraint does not apply if an IXC uses combinations of unbundled network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer." Id. ¶ 9. In a subsequent Order, the Commission set out three "safe harbor" provisions that, if satisfied, would prove that the IXC was providing a significant amount of local exchange service." Clarification Order ¶ 21.

These legal requirements, and the concerns that led to their enactment, have nothing whatsoever to do with the Commission's earlier decision that ILECs who

voluntarily provide unqualified access to EELs may in certain circumstances decline to provide access to unbundled local switching. To begin, both the Supplemental Order and the Clarification Order were modifications of the UNE Remand Order, but neither made any reference to the UNE Remand Order's switching exception, or to the Commission's decision that a voluntary decision to provide EELs on an unqualified basis was a necessary part of a showing that CLECs were not impaired absent switching. To the contrary, the later orders explicitly amended only paragraphs 486, 489, and 494-96 of the UNE Remand Order, provisions dealing with use of UNEs for access services, and whether or not to make EELs an element in their own right. See Supplemental Order ¶ 9. The Supplemental Order did not amend any part of the Commission's discussion of unbundled local switching.

Additionally, the switching exception was based on a detailed impairment analysis. UNE Remand Order ¶¶ 253-299. A critical part of that impairment analysis was the FCC's understanding that ILECs might choose voluntarily to make EELs available to requesting CLECs. Obviously, the Commission did not factor into that impairment analysis the possibility that ILECs would limit their voluntary offering of EELs to correspond to the various safe harbor provisions the FCC later adopted for a different purpose in the Clarification Order. Had the Commission considered such a limitation, it might have reached a different conclusion on impairment, and might not have adopted the switching exception at all. Thus it would be entirely improper for Verizon to deny access to unbundled local switching while limiting access to EELs in a manner never considered by the Commission when it adopted the switching exception.

Nor is there any relationship between the FCC's decision that ILECs who voluntarily choose to provide EELs on an unconditional basis in certain circumstances do not need to provide unbundled switching, and its later decision concerning the extent to which ILECs must provide EELs as a legal matter in light of concerns that this requirement could be misused by IXC's to lower their access costs. The two concerns are obviously wholly unrelated.

Indeed, precisely because the two rulings are so unrelated, by artificially limiting its voluntary agreement to provide EELs in the manner set out in the Clarification Order, Verizon's proposal would completely undermine the operation of the switching exception. Thus, two of the three safe harbor provisions require CLECs to establish collocations, while, as discussed above, the very point of the voluntary provision of EELs in the context of the switching exception was that CLECs would be able to interconnect with ILECs without having to construct collocation cages. Application of the third safe harbor would equally undermine the switching exception, for it would not apply (according to Verizon, at least, Tr. 10/3/01 at 137, l. 9-12 (Schneider, Jenner & Block on behalf of WorldCom) whenever the CLEC could not "certify" that at least 50% of the traffic is voice as opposed to Internet or fax traffic, and at least 33% of the calls are local, rather than long-distance, calls. Clarification Order ¶ 22(3). These requirements protect against a risk that is not present when a CLEC needs an EEL to connect its local customer to its own switch. Indeed, the only effect of the imposition of such rules here will be to assure that CLECs will be left entirely out in the cold – they will not be able to lease unbundled local switching, and will not be able to lease facilities that would enable them to use their own switches. While Verizon professes no "current" plans to invoke

the switching exception, those plans obviously would promptly change were the Commission ever to adopt Verizon's distorted view of the switching exception, since, if it ever became the law, the result would be that CLECs would be left without the ability to serve local customers.

Issue III-11 (Subloops)

The contract terms that WorldCom has proposed regarding access to the sub-loop element are reasonable and should be adopted by the Commission. As explained below, WorldCom's proposed language, section 4.3 of Attachment III, merely paraphrases the FCC's rules. See WorldCom Exh. 5, Direct Test. of C. Goldfarb, A. Buzacott and R. Lathrop at 28. There is no legitimate reason to exclude terms that are indisputably consistent with the Commission's regulations, and WorldCom's proposed language provides necessary clarity. Verizon acknowledges that the contract terms proposed by WorldCom are almost identical to the Commission's regulations governing sub-loop access, see Tr. 10/4/01 at 358, but nonetheless opposes these contract terms.[63] Verizon's objections to WorldCom's language are meritless.[64]

WorldCom's proposed language paraphrases the FCC's rules regarding access to the subloop unbundled network element. Specifically, Section 4.3.1 paraphrases the FCC's subloop definition language, which appears at 47 C.F.R. § 51.319(a)(2). Section 4.3.2 explicitly identifies five subloop components of a loop. Section 4.3.3 paraphrases the inside wire language that appears at 47 C.F.R. § 51.319(a)(2). Section 4.3.4 paraphrases the technical feasibility and best practices language that appears at 47 C.F.R. §§ 51.319(a)(2)(B) and (C). And Section 4.3.5 paraphrases the single point of

[63] Verizon objects to including a restatement of the Commission's rules in the contract because the law might change. This objection is baseless because the contract will contain a change of law provision requiring the parties to negotiate new contract terms if the law changes.

[64] Although Verizon initially objected to WorldCom's inside wire language, the parties have resolved that portion of this issue. See Verizon Exh. 23 at 3.

interconnection language that appears at 47 C.F.R. § 51.319(a)(2)(E). Because WorldCom's language implements this Commission's binding regulations, its inclusion should not be controversial.

Nonetheless, Verizon would prefer to exclude this full recitation of WorldCom's rights, and instead include a vague reference to "applicable law." See Tr. 10/4/01 at 358. That proposal should be rejected, because a reference to "applicable law" is relatively ambiguous.[65] Indeed Verizon Witness Antoniou was unable to provide a precise explanation of what Verizon means by the phrase "applicable law." See id. Thus if Verizon's proposed reference were included, the contract would contain insufficient detail and clarity.

There is an additional reason WorldCom's rights with respect to sub-loop must be spelled out in the contract in detail, and that the contract should set forth some of the Commission's regulations: Despite its assurances that it will comply with "applicable law," Verizon has proposed contract terms which flatly contradict the Commission's regulations. Specifically, Section 5.3 of Verizon's proposed UNE attachment provides that WorldCom can access subloop only at a Fiber Distribution Interface ("FDI"), and only through an intermediate device known as a COPIC. This proposal is contrary to the Commission's regulations, which list a number of points (not just an FDI) where sub-

[65] For a fuller discussion of the "applicable law" issue, see Part I supra.

loop may be accessed.[66] See 47 C.F.R. § 51.319(a)(2). Moreover, the Commission's regulations do not require a CLEC to access sub-loop via an intermediate device such as a COPIC. Verizon's imposition of this COPIC requirement is inconsistent with the regulations and a serious hindrance to a CLEC's ability to actually use the subloop element. See Tr. 10/4/01 at 365-366 (Rousey, Verizon) (acknowledging that the Commission's regulations do not require that access to subloop be accomplished through an intermediate device).

Verizon's proposal that a CLEC be required to construct a COPIC in order to access subloop is not only inconsistent with the Commission's regulations, it is also unreasonable. The proposed requirement adds significant unnecessary costs to the CLEC and creates administrative problems that would not occur with direct access to the FDI. The cost of constructing a pad, building the COPIC, and obtaining a right of way and zoning approvals are all avoidable if the CLEC can directly access the FDI. Moreover, the ability of a CLEC to receive rights of way in proximity to the Verizon FDI is uncertain, and if the CLEC cannot receive the right of way for a COPIC, it cannot access subloop at all under Verizon's proposed contract language.

Verizon's objection to WorldCom's proposal that the Agreement provide for direct access to the subloop element is also meritless. The regulations do not require

[66] Verizon Witness Rousey asserted that Verizon intends to allow access at all the points allowed by the regulation and that this is accomplished by use of the phrase "applicable law." The difficulty with this rationalization of Verizon's language is that Verizon's language expressly provides that a "CLEC may obtain access to a Sub-Loop only at an FDI and only from a CLEC outside plant interconnection cabinet (a COPIC)." Verizon's proposed section 5.3 is in conflict with WorldCom's rights and with applicable law. A vague reference to "complying with applicable law" will not cure the conflict or remove the ambiguity about WorldCom's rights caused by Verizon's contract language.

CLECs to construct an intermediate device in order to access subloop. See 47 C.F.R. § 51.319(a)(2). Indeed, the regulations require Verizon to provide access using the method WorldCom requests (direct access without intermediate devices) unless the requested method is not technically feasible. 47 C.F.R. §§ 51.311(b), 51.321(a). The UNE Remand Order identified the FDI as a technically feasible access point. UNE Remand Order ¶ 206. Verizon bears the burden of proving that access using the requested method is not technically feasible, 47 C.F.R. §§ 51.311(b), 51.321(d), but has failed to do so.

In sum, the Commission should adopt the subloop contract language proposed by WorldCom because it is virtually identical to provisions of several Commission Orders and Rules, and because Verizon's language imposes requirements on CLECs (such as the requirement to construct an unnecessary intermediate device) that have no basis in the Rules.

Issue III-12 (Dark Fiber)

The Commission should adopt the detailed language that WorldCom has proposed regarding Verizon's obligation to provide unbundled dark fiber, which appears at Sections 5.1 and 5.2 of Attachment III of WorldCom's proposed contract. As an alternative, because Verizon has opposed those terms, WorldCom would accept the dark fiber contract terms to which WorldCom and BellSouth have mutually agreed. See WorldCom Exh. 5, Direct Test. of C. Goldfarb, A. Buzacott, and R. Lathrop at 30; WorldCom Exh. 13, Rebuttal Test. of C. Goldfarb, A. Buzacott, and R. Lathrop at 15. As set forth below, the language proposed by WorldCom, and the WorldCom-Bell South language implement the Commission's intention to make dark fiber available to CLECs. Verizon's proposed terms, in contrast, are so full of restrictions and limitations they effectively deny WorldCom the right to the meaningful access to dark fiber that this Commission's rules promise. Indeed, during the hearing, Verizon conceded that it has fiber in the ground that will otherwise be "wasted" WorldCom seeks to purchase that fiber---allowing Verizon to recover an investment it could not otherwise recover. In a typical commercial situation, a firm would jump at such an offer. Here, however, Verizon seeks to deny its competitors access to such an element. That discriminatory position should be rejected.

The principle differences between the parties' proposals concern the methods by which dark fiber may be accessed. Specifically, the parties disagree about whether dark fiber can be accessed via splicing, whether dark fiber can be accessed in a manhole or vault, and whether collocation is required to access dark fiber. In both WorldCom's initial proposal and the WorldCom/BellSouth contract language, Verizon is required to

identify appropriate connection points including light guide interconnection or splice points to enable WorldCom to connect or splice its equipment to the dark fiber. See WorldCom Exh. 5, Direct Test. of C. Goldfarb, A. Buzacott, and R. Lathrop at 33; WorldCom Exh. 13, Direct Test. of C. Goldfarb, A. Buzacott, and R. Lathrop at 17. Verizon, on the other hand, limits the availability of dark fiber to hard termination points and prohibits splicing altogether as a means of accessing dark fiber. Verizon also requires collocation in order to access dark fiber, and prohibits WorldCom from accessing dark fiber in manholes or vaults. See WorldCom Exh. 5, Direct Test. of C. Goldfarb, A. Buzacott, and R. Lathrop at 34. Instead of making dark fiber available as a UNE, Verizon's proposed terms provide a list of restrictions which make it virtually impossible for a CLEC to access dark fiber. For the reasons discussed below, the interconnection agreement should identify points where fiber can be accessed, including for example, splice points for unterminated dark fiber located in a manhole or vault, and should also permit WorldCom to access dark fiber at these points by splicing. The interconnection agreement with BellSouth affords WorldCom exactly this option, Tr. 10/4/01 at 453-455, and the interconnection agreement with Verizon should also.

A. The Interconnection Agreement Should Allow Dark Fiber To Be Accessed By Splicing.

Section 319(a)(2)(B) of the Commission's rules places the burden of proof on Verizon to demonstrate that it is not technically feasible to access dark fiber at the points requested by WorldCom. 47 C.F.R. § 51.319(a)(2)(b). Verizon has failed to meet this burden. At the outset, the fact that BellSouth has agreed to the language that Verizon opposes demonstrates that it is technically feasible for an ILEC to provide access to dark

fiber via a splice and thereby provide access at any technically feasible point. Indeed, splicing is a convenient, efficient, and technically feasible means of accessing dark fiber.[67]

Further, the Commission's regulations do not specify or constrain the methods that can be used to access dark fiber, other than to provide that subloop may be accessed at any point where technicians can access the fiber without removing a splice case to reach the fiber. 47 C.F.R. § 51.319(a)(2). The Commission's Rules governing access to dark fiber do not require collocation, and do not prohibit a CLEC from accessing dark fiber in a manhole or vault. Rule 51.319(a)(2) does not prohibit splicing as a means of accessing dark fiber, and merely prohibits removing a splice case to reach the fiber. Establishing a new splice to access dark fiber, at a point where the splice can be done without removing a pre-existing splice case, is not prohibited.[68] Verizon should not be permitted to impose restrictions on the availability of dark fiber that go well beyond the Commission's rules.

Moreover, it is clear from the record of this proceeding that Verizon routinely performs splices of fiber in its own network. Tr. 10/4/01 at 371-373, 375 (Detch, Verizon). There are hundreds of splices in any real fiber cable. Id. at 377 (Detch,

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[67] Verizon has raised a number of operational objections to splicing but these objections do not call into question the technical feasibility of splicing as a means of accessing dark fiber. Indeed, the BellSouth/WorldCom contract terms proposed herein demonstrate that the operational questions associated with access to dark fiber can be resolved. See WorldCom Exh. 13, Rebuttal Test. of C. Goldfarb, A. Buzacott, and R. Lathrop at 19. In order to address Verizon's concerns regarding network security, WorldCom is willing to specify that any splices of WorldCom fiber to Verizon dark fiber must be performed by Verizon personnel.

[68] In fact, Verizon frequently accesses unused fiber for its own purposes in exactly this way.

Verizon). Splicing is a typical method of creating a fiber route which should not be denied to CLECs, particularly if CLECs are to have non-discriminatory access to dark fiber. A typical scenario in which a CLEC might want dark fiber occurs where Verizon has dark fiber running between two points, and a CLEC would like to access the dark fiber in the middle of the run, such as in a manhole, via a splice. Indeed, Verizon's own witness admitted that if Verizon had fiber between Arlington and Dulles, Verizon would splice it together to create a route between these points and would also splice some of the fiber at an intermediate point in order to create a route to Tysons Corner. Tr. 10/4/01 at 379 (Gansert, Verizon). WorldCom should be allowed to access dark fiber in the same fashion to create dark fiber routes that are useful to it.

In sum, Verizon's assertion that the definition of dark fiber excludes splicing is baseless,[69] and the Commission should allow WorldCom to use splicing to create fiber routes.

B. The Commission Should Reject The Remainder Of Verizon's Language Because It Improperly Restricts CLEC Access To Dark Fiber.

Section 7.2.2 provides another example of the manner in which Verizon's contract terms restrict and limit the availability of dark fiber and make it difficult for a CLEC to actually take advantage of this UNE. Section 7.2.2 provides in part that "[u]nused fibers located in a cable vault or a controlled environmental vault, manhole or other location outside the Verizon wire center and not terminated to a fiber patch, are not

[69] For example, Verizon has asserted that "[i]f you're looking at different pieces of fiber and splicing it all together, now we are talking about Verizon constructing a route that's not readily available today, not easily called into service, and doesn't fall into the definition of unbundled dark fiber." Tr. 10/4/01 at 373 (Detch, Verizon); see also e.g., Tr. 10/4/01 at 375, lines 6-8 (same).

available to CLEC." That is, Verizon refuses to allow CLECs to use unused fibers simply because they are located in a manhole or vault and can be accessed via a splice. Despite Verizon Witness Detch's assertion that such fibers are not available to a CLEC because they do not meet the definition of dark fiber, see Tr. 10/4/01 at 386, the Commission's definition of dark fiber does not exclude fiber located in a vault or manhole. These strands of unused fiber are dark fiber which should be made available to a CLEC. [70]

Section 7.2.2 also limits any meaningful access to dark fiber by including this provision: "CLEC may access a dark fiber loop only at a pre-existing hard termination point of such Dark Fiber Loop and CLEC may not access a Dark Fiber Loop at any other point including but not limited to, a splice point. Verizon will not introduce new splice points or open existing splice points to accommodate a CLEC's request." This provision also has no basis in the Commission's rules. Moreover it is discriminatory and unreasonable because Verizon introduces new splice points for its own uses without disturbing preexisting splice cases. For example, Verizon stubs the cable in some situations so that excess fiber can be accessed in the future via splicing without disturbing

[70] There are several reasons such unused fiber might be found in a vault. For example, the cable might be wasted or additional fiber that was not needed and was therefore left in the vault unterminated. Tr. 10/4/01 at 386-387 (Gansert, Verizon). Network construction sometimes results in fibers that are left as spares, and/or left hanging unused. Id. at 391 (Gansert, Verizon). Also, because fiber comes in discrete sizes, such as 96 pairs, which may exceed current needs, there are sometimes pieces that Verizon does not intend to use, pieces that are permanently lost. Id. at 406 (Gansert, Verizon).

the existing splice. Tr. 10/4/01 at 405, 457 (Gansert, Verizon).[71] Where Verizon expects in the future to use currently unused fiber, it positions the splice so that it can use the fiber without disturbing the existing splice. Id. at 406-407 (Gansert, Verizon). A CLEC can make use of that excess fiber just as Verizon does by splicing, or if Verizon prefers, by having Verizon do the actual splicing. However, Verizon's position is that CLECs can never access dark fiber by creating a new splice, even if the fiber can be accessed without breaking into an existing splice case. Id. at 399-400 (Gansert, Verizon). Because the record makes clear that Verizon performs new splices for itself without disturbing existing splices, id. at 405-407 (Gansert, Verizon), its refusal to allow CLECs identical access is plainly discriminatory.

The Commission should also reject Verizon's proposed Sections 7.2.1 and 7.3, which require WorldCom to establish a collocation in order to access the dark fiber, including requiring collocation at a remote terminal. Tr. 10/4/01 at 397 (Detch, Verizon), 494 (Lathrop, WorldCom). Collocation, whether virtual or physical, is not required by the Commission's Rules. Nor is it required by WorldCom's interconnection agreement with BellSouth. Moreover, a collocation requirement is unnecessary because a strand of dark fiber can be accessed in the outside plant via a splice without collocation in a central office or remote terminal. Tr. 10/4/01 at 495.

Section 7.2.2.10 of the Verizon contract also imposes significant risks of network disruptions upon CLECs that request dark fiber. Specifically, that section permits

[71] Stubbing occurs when Verizon splices the through-ribbons together in a manhole in the main splice and then rolls up excess fiber and leaves a smaller piece of the fiber in place ready to be spliced later. This piece, called the stub, can be accessed later for future splicing and the main splice is never touched again. Tr. 10/4/01 at 458-459 (Gansert, Verizon).

Verizon to take back fiber previously provided to a CLEC, after proving to the Commission it has a need for the fiber. If Verizon exercises its right to take back fiber, a CLEC's network could be dismantled and service to customers could be interrupted. The possibility that a CLEC can be required to return fiber that it has already incorporated into its network will act as a powerful disincentive to CLECs to seek dark fiber from Verizon. Once dark fiber has been accessed by a CLEC the CLEC must have the assurance that it can rely on that fiber as a part of its network.

In sum, the terms proposed by Verizon are so full of restrictions and limitations that they appear to be designed to prevent CLECs from obtaining access to unbundled dark fiber. Accordingly, that language is contrary to the Commission's rules. In contrast, the language proposed by WorldCom, and the WorldCom-BellSouth language, implement the Commission's intention to make dark fiber actually available to CLECs, and should therefore be adopted by this Commission.