18.2.3.2, 18.2.4. Verizon's proposal clearly and reasonably defines the parties' responsibilities and is identical to the language in the existing *Virginia AT&T Agreement*.

Cavalier's proposal, by contrast, leaves the parties' responsibilities vague and ill-defined, and prescribes stiff penalties for failure to satisfy Cavalier's subjective standard for professional conduct. For example, Cavalier's Proposed Section 18.2.4 requires each party to "provide mutually agreed referrals" to the other company's "prospective" customers when they mistakenly contact the other company. *Id.* at 18.2.4. In providing referrals, each company is not to "disparage or discriminate against the other party or its products or services" or "provide information about its own products or services." *Id.* But Cavalier's proposal does not define "mutually agreed referrals" or provide any detail as to what would constitute "discrimination" against the other party. And because any Virginia resident is a "prospective customer" of Cavalier, Cavalier's proposal would effectively prevent Verizon from discussing its services with anyone who calls. *Smith Direct* at 17:6-8. Obviously, Cavalier has no right to prohibit Verizon from engaging in legitimate marketing activities.

Cavalier's proposed Section 18.2.5, likewise, seeks to impose penalties on a party whose employee fails to engage in "appropriate professional conduct," which Cavalier vaguely defines as "conduct that is in accordance with sections 18.2" of the agreement "as well as all applicable industry standards." *Id.* at 18.2.5. In other words, given the broad scope of Section 18.2 and "industry standards," inappropriate professional conduct could be anything Cavalier says it is. As Verizon witness Smith testified, none of Verizon's 3600 interconnection agreements contain penalty language like Cavalier's, and Cavalier provided no evidence of any such language in any agreement. *See Smith Direct* at 18:13-18; *Verizon's Request for Production* C17-1 and *Cavalier's Responses*, attached as Exhibit 4.

For example, under Cavalier's contract language, offering discounted Yellow Pages advertising to win back a customer would not be "appropriate professional conduct" even though this is entirely lawful, legitimate competitive behavior. Cavalier's Proposed Section 18.2.5. As Verizon witness Smith explained, Yellow Pages advertising is a competitive, unregulated business that cannot be regulated through interconnection agreement provisions. *Smith Rebuttal* at 10:20-25. Nonetheless, Cavalier proposes that such advertising discounts and other violations of Cavalier's subjective "appropriate professional conduct" standard would carry penalties of increasing amounts beginning with $1,000.00 per occurrence, payable to the "non-offending party" up to payments as high as $50,000.00 per month in the event of repeated violations. *Id.* at Sections 18.2.5, 18.2.6. Under Cavalier's proposal, then, Cavalier would be able to extract steep fines from Verizon for behavior that does not violate any statute, rule, or order, but that is merely objectionable to Cavalier. Cavalier's proposal is nothing more than an attempt to curb legitimate competitive activity.

Cavalier's proposal is unworkable, as well as anticompetitive. For example, every time either party feels that there may have been a breach of the "appropriate professional conduct" standard, Cavalier's proposal would require the other party to conduct a formal investigation and submit a written report to the other party, describing in detail factual findings and disciplinary action taken. *Smith Direct* at 17: 16-18. These investigations would be involved and time-consuming. Certainly, the parties' resources would be much better spent serving their customers than conducting investigations and drafting reports concerning alleged unprofessional contacts. *See Smith Direct* at 17: 18-21, *Hearing Tr.* 215: 4-17 (Smith) (noting expense and burden of proposed investigations).

Even if Cavalier's proposal were workable, it is unnecessary and unwarranted. Verizon has proposed language in Section 25.5 that would except claims for defamation from the limitation of liability provision. Furthermore, Cavalier produced no evidence of any systemic customer contact problems. It raised only a handful of situations dating back several years and having little to do with its proposed contract language. See *Smith Rebuttal* 10:15 – 11:5. Verizon already requires its employees to follow strict controls and guidelines with respect to the activities of other carriers and contacts with their customers. *Smith Rebuttal* at 10:7-10; *Hearing Tr.* at 205:5 – 206:11 (Smith). When another carrier believes that a Verizon employee has violated these controls or guidelines, Verizon takes corrective measures including an investigation and, if necessary, appropriate disciplinary action. *Hearing Tr.* at 205:18-22; 206:8-11 (Smith).

In any event, Cavalier's proposal is not appropriate for consideration in this arbitration, which is intended to determine the terms and conditions under which the parties will satisfy their interconnection and other network access obligations under section 251 of the Act. Neither section 251 nor anything else in the Act contemplates that state commissions will dictate the way in which companies supervise their employees or provide information to prospective customers.

The Bureau should reject Cavalier's extreme, unnecessary and anticompetitive proposal and instead approve Verizon's language – the same language the Bureau already approved for the *Virginia AT&T Agreement*.

XII. VERIZON'S PROPOSED CONTRACT LANGUAGE ON DIRECTORY LISTINGS IS FAIR TO BOTH CAVALIER AND VERIZON AND WOULD REASONABLY COMPENSATE CAVALIER FOR ANY ERRORS OR OMISSIONS IN ITS CUSTOMERS' LISTINGS (ISSUE C18)

Under the Act, Verizon is obligated to provide Cavalier and other CLECs "nondiscriminatory access" to its directory listings services. The Commission has already concluded that Verizon provides this nondiscriminatory access. *Virginia 271 Order* ¶ 153. Notwithstanding the legal standard, Cavalier's proposed language on directory listings would impose duties on Verizon that far exceed what the Act requires. Cavalier proposes several contract sections that impose on Verizon an impossibly high standard of liability, and which, not coincidentally, would also permit Cavalier to collect financial penalties whenever Verizon fails to meet this unrealistic standard. And, its new, last-minute language on credits for directory listing errors or omissions is vague and unclear and, since Cavalier offered no evidence or testimony to explain how Cavalier would interpret it, should not be included in the proposed interconnection agreement. The Bureau should adopt Verizon's proposed language on directory listings and reject Cavalier's.

A. The Bureau Should Reject Cavalier's Unnecessary And Unduly Burdensome Proposal To Require Verizon To Certify The Accuracy Of Each Directory Listing.

Cavalier's Proposed Section 19.1.5 would require Verizon to certify in writing that it has checked each and every Cavalier customer listing against the information Cavalier submitted. This proposal would be virtually impossible for Verizon to implement. *Toothman-Spencer Rebuttal* at 4:20 – 6:5; *Hearing Transcript* at 485:6 – 487:1 (Toothman). Verizon cannot simply compare Listing Verification Reports (which Verizon makes available to CLECs in electronic form to verify their customers' listings) to the Local Service Requests that Cavalier submits to create the listings, as Cavalier's language would require. While Verizon's database saves the customer's listing information, it does not always save the identification number of the Local Service Request that created that listing and, as a result, Verizon cannot readily identify which Local Service Request created a particular listing. *Toothman-Spencer Rebuttal* at 5:1-7; *Hearing Transcript* at 486:1-15; 490:21-22 (Toothman) ("I can't compare the LSR to the LVR. I don't have that information."). In addition, although Listing Verification Reports correlate listings with a specific directory, Verizon's database generally does not. Thus, in order to compare a customer listing to a Listing Verification Report, Verizon would have to create special logic for its database that would determine in which directory the listing would eventually appear. *Toothman-Spencer Rebuttal* at 5:7-12.

Cavalier's proposed language on this issue also ignores the complexity involved in the directory listings process. Cavalier implies that the directory listing process is relatively simple and that the process involves nothing more than Cavalier submitting a Local Service Request for a listing and Verizon processing it. But the process is not nearly as simple as Cavalier suggests. In many cases, Cavalier, as well as other CLECs, submit *multiple* Local Service Requests that change or modify a particular listing, right up until the time directory closes. Thus, in order to "compare" Cavalier's listings against the Listing Verification Report, Verizon would not only have to determine which Local Service Request created the listing, it may need to sort through a series of them to figure out which Local Service Request was the last and final request. *Toothman-Spencer Rebuttal* at 5:13-15.

And, although Cavalier's proposed language in 19.1.5 would, in effect, hold Verizon strictly liable for any errors in its customers' listings, it would at the same time absolve Cavalier of any need to cooperate in the directory listings process. Cavalier repeatedly implies in its testimony that it no longer intends to use the electronic Listing Verification Reports that Verizon makes available to Cavalier and other CLECs to verify their customers' listings. *Hilder Rebuttal Testimony* at 2:4-5; 7:21-22. The Commission recognized in the Virginia 271 proceeding that the Listing Verification Report is a reasonable process for ensuring the quality of listings. In the Virginia 271 proceeding, the Commission specifically approved of the use of the Listing

Verification Report and found that "the availability of the [Listing Verification Report] affords a competitor the opportunity to review its listings before publication, and further improves the accuracy of directory listings." *Virginia § 271 Order* at 168. Requiring Cavalier to review the Listing Verification Report is also consistent with Cavalier's agreement in Section 19.1.5 to language that would require both parties "to use commercially reasonable efforts to ensure the accurate listing of Cavalier Customer listings."

Furthermore, Cavalier's decision to dispense with using the Listing Verification Report will do a disservice to its customers. The goal of both parties should be to work cooperatively so that listings are as accurate as possible. Cavalier has direct contact with the customer and is in position to know exactly how its customers want their listings to appear. Its active involvement in the directory listings process is important and it should not be permitted to shift all of the responsibility for directory listings accuracy (as well as the blame) to Verizon.

In any event, Cavalier's Proposed Section 19.1.5 is unnecessary, as Verizon witness Toothman described in detail at the hearing. Verizon already has multiple layers of quality control at different stages of the directory listings process. *Hearing Transcript* at 493:18 – 496:19 (Toothman). There is no need to add Cavalier's extremely difficult and cumbersome verification procedure on top of the controls Verizon already has in place.

B. Verizon's Proposed Language On Credits For Directory Errors Or Omissions Is More Reasonable Than Cavalier's Language And Is Consistent With Manner In Which Verizon Provides Credits To Its Own Customers.

Both Cavalier and Verizon have proposed language in Section 19.1.6 that would credit Cavalier for errors or omissions in its customers' listings.

Verizon's Proposed Section 19.1.6 would fairly and reasonably compensate Cavalier by making Verizon's liability to Cavalier "comparable to" Verizon's liability to its own customers."[8] Cavalier's credits would be based on the same formula Verizon uses to calculate credits for its customers – one-half of the fixed monthly charges that the customer pays for local exchange services. Verizon's retail tariff states that Verizon's liability "[s]hall be limited to the amount of actual impairment to the customer's service and in no event shall exceed ***one-half the amount of the fixed monthly charges applicable to Local Exchange Services*** ... affected during the period covered by directory in which the error or omission occurs." Verizon Virginia Tariff No. 201, Section 1.E.3 (emphasis added).[9] In the wholesale context, this formula translates into a credit of 50% on the UNE loop rate where Cavalier serves a customer with a loop or entirely over its own facilities, and a credit of 50% on the resale charges for dial tone line and fixed usage services where Cavalier serves a customer with Verizon's resold services.[10]

On October 24, Cavalier submitted new proposed language for credits for errors or omissions in directory listings. Faced with overwhelming and undisputed evidence by Verizon witnesses that its previous proposal was based on a flawed methodology that misinterpreted Verizon's retail tariff and would credit Cavalier far in excess of credits most Verizon customers receive, Cavalier discarded its previous language and proposed a new section 19.1.6 that would based Cavalier's credits on what a "respective" Cavalier customer pays in "fixed monthly charges for local exchange services." These rates would be based on the fixed monthly charges in effect for Cavalier's Richmond exchanges.

Cavalier's new last-minute proposal should also be rejected. For one, Cavalier's new

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[8] Again, as discussed above, Verizon has proposed this language despite the fact that neither the Act nor the Commission's rules require Verizon to pay a CLEC for omissions or errors in directory listings. *Virginia § 271 Order* ¶ 171 (recognizing that the Commission's "rules do not address the assignment of liability and responsibility for restitution in these circumstances").

[9] At Staff's request, the relevant pages of Verizon Virginia's retail tariff 201 are attached as Exhibit 5.

[10] Although Cavalier does not pay Verizon for a customer's line when it serves that customer using its own facilities, Verizon's proposal nonetheless allows Cavalier to receive a credit for an error or omission under these circumstances.

language contains some of the same flaws as its previous language. Cavalier still bases its credits on rates paid by only a select group of customers (those in the Richmond area). These customers, not coincidentally, generally pay some of the highest "fixed monthly charges applicable to local exchange service" under Cavalier's *retail tariff.* Moreover, Cavalier's new language would still entitle it to a credit for any and all listing errors, no matter how minor or immaterial. As Verizon witness Spencer testified at the hearing, Verizon customers often receive *no* compensation for an error in a directory listing, but even in the cases where Verizon provides a credit, it may be less than the maximum amount allowed under the tariff. *Hearing Transcript* at 515:7 – 516:13 (Spencer); *Toothman-Spencer Direct Testimony* at 7:6-14; *Toothman-Spencer Rebuttal Testimony* at 9:6-10. This would again place Cavalier and its customers in a much better position than Verizon customers who experience an identical directory error.

Moreover, Cavalier's new language is vague and broadly defined. Cavalier now bases its proposed credits on what *Cavalier* customers pay for local exchange services rather than what Verizon customers receive as credits. But since Cavalier presented no testimony or evidence on what this language means, it is impossible for Verizon or the Bureau to know exactly how Cavalier would interpret this language and how these credits would be calculated. For example, Cavalier's customers may have very different packages from Verizon's customers, some of which could be very expensive. Verizon should not be required to pay Cavalier based on rates it charges it customers, rates over which Verizon has no control. Cavalier also proposes that these amounts "shall not exceed Verizon's charges for the same or comparable service," but it is equally unclear what this language would entail. Verizon's proposal is much more clear and reasonable and makes far more sense in a wholesale context. The Bureau should adopt

Verizon's credit proposal and reject Cavalier's new proposed language.

C. Cavalier's Remaining Proposals Concerning Directory Listing Should Also Be Rejected

Cavalier also proposes several miscellaneous contract provisions that are equally objectionable. For example, Cavalier's Proposed Section 19.1.3 would require Verizon to supply Cavalier with ALI codes as well as "other information" required to process directory listings orders. This language is unnecessary. Verizon already provides ALI codes to Cavalier (along with other CLECs), including weekly ALI code reports for all types of listings. *Toothman-Spencer Direct Testimony* at 11:7-14. But Cavalier's language is objectionable not only because it would require Verizon to turn over something it already provides, but because it would hold Verizon strictly liable for any and all errors if this unspecified "other information" is not provided to Cavalier's liking. The agreement should not include language that ties Verizon's liability for errors to such a vaguely defined condition. *Hearing Transcript* at 506:16-507:17 (Toothman).

In Section 19.1.6(c), Cavalier seeks to include language that would require Verizon, in the event of an error in a Yellow Pages listing, to notify Cavalier of any contact that Verizon or Verizon Information Services may have had with that customer and take "appropriate remedial action to correct any such error and compensate Cavalier as may be appropriate under the circumstances." Cavalier failed to submit any evidence in support of this proposed language, so it is difficult to understand exactly what this language would require. To the extent Cavalier's proposed language refers to errors in free yellow page listings (listings provided as part of basic service), Verizon's proposed language already offers Cavalier a remedy for any errors or omissions. *Toothman-Spencer Direct Testimony* at 12:5-19. To the extent Cavalier is referring to errors in *paid* yellow page advertising (paid listings are advertising), its language is inappropriate. Cavalier has no right to restrict the ability of Verizon Information Services to contact its own advertising customers that it serves through an unregulated service. Nor can the Bureau adopt such language, since it would be a direct infringement on Verizon Information Services' lawful commercial speech.

Finally, in Section 19.1.8, Cavalier proposes language that would require the parties to negotiate towards an arrangement where Cavalier has direct, unmediated access to Verizon's directory services databases. This language is superfluous and unnecessary. Verizon's legal obligation is to provide nondiscriminatory access to its directory listing services, not to a fictional directory database UNE. Moreover, even for those databases Verizon is required to unbundle as network elements, the *Triennial Review Order* makes clear that Verizon is not required to provide unmediated access to them. *Triennial Review Order* ¶ 567. In any event, if Cavalier wants to request such a change to Verizon's Operations Support Systems, it should raise this issue through Verizon's OSS Change Management process or the Ordering and Billing Forum. *Toothman-Spencer Direct Testimony* at 12: 5-19.

The Act does not require that Verizon be strictly liable for errors in directory listings. There is no legal basis for any of Cavalier's proposed contract sections and the Bureau should reject them.

XIII. VERIZON'S PROPOSED CONTRACT LANGUAGE ON ASSURANCE OF PAYMENT IS REASONABLE AND SUPPORTED BY THIS COMMISSION'S STATEMENTS OF POLICY (ISSUE C21)

Verizon's assurance of payment language in Section 20.6 of its proposed agreement permits Verizon to obtain adequate assurances of payment in the event Cavalier becomes financially unstable or unable to timely make its payments. *Verizon Response, Exhibit A* at 51-52; *Smith Direct* at 19:9-11. Verizon's proposed language is nearly identical – except for a few changes supported by the Commission's statements of policy discussed below – to the language that resulted from the Bureau's *Virginia Arbitration Order. Verizon Response, Exhibit A* at 51; *Virginia Arbitration Order* ¶ 972.

Verizon's only changes to the language adopted in the *Virginia Arbitration Order* are additional provisions that clarify when Verizon can exercise its remedies and what those remedies will be. Verizon has modified these provisions to more effectively respond to the increased risk that CLECs may suddenly become insolvent and no longer worthy of credit. The recent wave of CLEC bankruptcies in general,[11] and the suddenness of WorldCom's bankruptcy in particular, have demonstrated the need for assurance of payment provisions that can take effect as soon as a CLEC begins to demonstrate an inability to pay its bills. These provisions are necessary to protect Verizon from the risk that CLECs may suddenly be unable to pay for the services Verizon is providing. Risk of non-payment is particularly pronounced in this case given Cavalier's previous failures to timely pay its bills. *See Hearing Tr.* at 313:4-18 (Smith) ("For a period of time, [Cavalier] refused to pay [its] bills in total."); *Smith Direct* at 25:18-24 (citing the observation of federal court district judge about Cavalier's tendency to litigate rather than pay its bills). Additionally, Verizon has crafted its proposed language to be consistent with the protection measures suggested by the Commission in its December 23, 2002 Policy Statement.

Cavalier may trigger these assurance of payment provisions only when it fails to pay its bills on time or shows other signs of insolvency or lack of creditworthiness and if and only if Cavalier has no bona fide dispute as to the substance of the bills, and when the unpaid amounts are substantial. *Smith Rebuttal* at 12:8-18; *Hearing Tr.* at 310:10-12 (Smith) ("[Failure to timely pay a bill occurs] when a customer does not pay the bill by the pay-by date [and] does not submit a dispute for charges that they disagree with."). Verizon's proposed language permits Verizon to

[11] A list of recent CLEC bankruptcies is attached at Exhibit 6.

request from Cavalier a letter of credit equal to two months' anticipated charges, but only permits Verizon to draw upon the letter of credit to satisfy bills that are more than 30 days in arrears. Verizon's Proposed Section 20.6; *Smith Rebuttal* at 12:8-18.

Cavalier has proposed to delete *all* of Verizon's assurance of payment language, including the language previously adopted by the Bureau in the Virginia arbitration. This would leave *no* assurance of payment provision in the contract at all. Cavalier's language would force Verizon to extend Cavalier an unlimited line of credit – a particularly unreasonable position given the wave of CLEC bankruptcies in recent years. *See Smith Rebuttal* at 14:5-6 ("The industry has become much more volatile since the current agreement was signed in 1997. Many carriers have gone bankrupt, including large carriers."); *Hearing Tr.* at 316:17-317:5 (Smith) ("At this moment Cavalier is paying their bills on time, but we do believe that with the volatility in the industry, that at any moment, things could change. We've seen that happen repeatedly, with 145 bankruptcies or more over the past few years. So you know, at the moment, I don't know that they are, but I couldn't guarantee that they aren't. So I think Verizon is just looking for protection for services – or payment for services that we have already provided."). There is no reason under the Act, the Commission's rules, or sound public policy to require Verizon to assume the financial risks of a CLEC's business plans. *Smith Rebuttal* at 14:14-17 ("Cavalier is trying to shift a considerable portion of the financial risks associated with its business model to Verizon, by forcing Verizon to assume the risk of non-payment in the event that Cavalier becomes uncreditworthy. There is no reason why Verizon should have to assume this risk.... Verizon's proposed Section 20.6 places this risk precisely where it belongs – with Cavalier and its investors."). Indeed, as discussed above, the Bureau has rejected the notion that Verizon is not entitled to any assurance of payment protection. *Virginia Arbitration Order* ¶ 727

("Verizon has a legitimate business interest in receiving assurances of payment ... from its [CLEC] customers.").

Verizon's proposed changes to the language in the *Virginia AT&T Agreement* were intended to be consistent with the December 23, 2002 Policy Statement, in which the Commission suggested four potential "additional protections against nonpayment" for the incumbent LECs' consideration:

1. Proven History of Late Payment – a trigger requiring a deposit should the carrier fail to pay undisputed, non-*de minimis* bills in any two of the most recent twelve months. Policy Statement, *Verizon Petition for Emergency Declaratory and Other Relief*, WC Docket No. 02-202, FCC 02-337, ¶ 6 (rel. Dec. 23, 2002).

2. Reduced Notice Periods – where allowed by law, incumbent LECs could reduce the notice period for refusal or discontinuance of service. *Id.*

3. Accelerated Billing Cycles -- incumbent LECs could require CLECs to pay bills more frequently than every thirty days, thus reducing exposure to pre-bankruptcy petition debt. *Id.*

4. Billing in Advance – for usage-based services, incumbent LECs could bill delinquent CLECs in advance, basing the amount of the bill on estimated average usage over a prior sample period. *Id.*

Verizon's proposal tracks the Commission's first and fourth recommendations. In particular, subsections (x) and (y) of Verizon's Proposed Section 20.6 state that Verizon is entitled to "additional assurance of payment, consisting of monthly advanced payments of estimated charges," should Cavalier fail to timely pay two or more bills in a sixty-day period or three or more bills in a 180-day period. Verizon's Proposed Section 20.6 contains specific protections for Cavalier to ensure that Verizon cannot invoke the assurance of payment provisions without good cause. For example, Verizon's proposal explicitly exempts from the trigger any bills that are the subject of bona fide disputes, and further requires that the bill amounts reach a threshold level (more than five percent of the total amount billed in the relevant period) to trigger the advance billing measure. Verizon does not invoke the assurance of payment provision if Cavalier does not pay a bill that it does not receive. As Verizon witness Smith testified at the Hearing:

> [A]ctually the contract I believe has language in it that says either the payment is due 30 days from the bill date or 20 days from the receipt of the bill, whichever is later.

Hearing Tr. at 311:15-19 (Smith). *See also* Verizon's Proposed Section 28.9.1.

Thus, under Verizon's proposal, the "proven history of late payment" trigger works in conjunction with the "billing in advance" measure. This is consistent with the Bureau's recommendation that "the incumbent LEC tariffs specify that advance billing is triggered only by concrete, objective standards that are narrowly tailored to target only those customers that pose a genuine risk of nonpayment, in order to prevent any unreasonable discrimination among customers." *Policy Statement* at ¶ 27. A proven history of late payment is just such a nondiscriminatory, narrowly-tailored trigger.

Cavalier may argue that it is financially stable and thus the assurance of payment provisions are not necessary in Cavalier's case. However, should this Commission strike Verizon's assurance of payment provisions, other carriers could opt into Cavalier's agreement in Virginia, which would lack adequate assurance of payment provisions. 47 U.S.C. § 252(i). Any of these carriers could become insolvent, and Verizon would be left with no mechanism for recovering payment for the services it has provided these CLECs.

Given that Verizon's proposed contract language is consistent with the measures suggested by the Commission in its December 23, 2002 Policy Statement, the Bureau has previously acknowledged Verizon's right to include assurance of payment language in its interconnection agreements, and Cavalier has not suggested any alternative language (but rather argues for its complete deletion), the Bureau should adopt Verizon's proposed language in its entirety.

XIV. THE BUREAU SHOULD ADOPT VERIZON'S PROPOSED CONTRACT LANGUAGE ON DISCONTINUANCE OF SERVICE BECAUSE IT COMPLIES WITH STATE LAW AND IS IDENTICAL TO LANGUAGE IN THE AT&T AGREEMENT RESULTING FROM THE VIRGINIA ARBITRATION (ISSUE C24)

The Bureau should reject Cavalier's claim that Verizon be required to obtain an order from the Virginia SCC or the Commission before terminating service to Cavalier for nonpayment. Even Cavalier concedes that Verizon's termination for nonpayment process, sometimes called the "embargo" process, contains no such requirement and nevertheless works well. *Hearing Tr.* at 327:18-20 (Whitt) ("[W]e feel like the embargo process works.") Nor has Cavalier been able to point to a single situation where it needed the contract terms that it advocates here; to the contrary, Cavalier concedes that, under the current system, disputes are resolved. *Hearing Tr.* at 328:1-5 (Whitt). Finally, Cavalier concedes that it is unaware of any other interconnection agreement that contains language similar to what Cavalier proposes here. *Hearing Tr.* at 324:13-17 (Whitt).

Verizon's Proposed Section 22.4 allows Verizon to terminate services to Cavalier if and only if Cavalier defaults on payments that are not subject to a bona fide dispute, and Cavalier fails to cure that default within sixty days. This proposed language is identical to language in the AT&T agreement resulting from the *Virginia Arbitration Order*. And, as Verizon also explained in testimony and at the hearing, this language complies with Virginia law governing termination of service. *Verizon Response, Exhibit A* at 53-54; *Smith Direct* at 22:11-26:19; *Smith Rebuttal* at 15:18-17:12; *Hearing Tr.* at 329:15-330:3, 330:11-331:1 (Smith).

Cavalier's proposed requirement that Verizon obtain prior Virginia SCC or Commission approval before terminating service to Cavalier, on the other hand, goes far beyond what is required by law. This in effect would require Verizon to invoke a quasi-evidentiary proceeding to terminate service for a CLEC that does not pay its bills, a significant burden not only on

Verizon but on the Virginia SCC and/or the Commission as well. *Smith Direct* at 24:5-10. Moreover, Cavalier's language would require Verizon to continue providing service to Cavalier long after Cavalier has stopped paying for it. *Smith Direct* at 25:5-9. This is not a hypothetical concern; Cavalier has a history of not paying its bills from Verizon. *Hearing Tr.* at 313:4-18 (Smith); *Smith Direct* at 25:18-26:10.

Under Verizon's proposed contract language as well as Virginia SCC rules, Verizon could not terminate services to Cavalier – even where Cavalier has defaulted on its obligation to pay Verizon for these services – without fulfilling each of the following requirements:

- Verizon must provide Cavalier with 60 days written notice of the default and Verizon's intention to terminate services if the default is not cured (Agreement § 22.4);
- Verizon must notify the Virginia State Corporation Commission's Division of Communications within three business days of notifying Cavalier of its proposed suspension or disconnection of service (Va. Admin. Code § 5-423-80(E) (2003));
- Verizon must provide Cavalier and the appropriate federal and/or state regulatory authorities with written notice of its intention to terminate services at least twenty-five days prior to the proposed service termination date (Agreement § 22.4);
- only after the 60 day notice period has elapsed, and Cavalier has still not cured its default, Verizon is permitted under the Agreement to terminate services.

Under these terms, Verizon would provide Cavalier and the Virginia SCC sixty days notice of its intention to terminate services. The Virginia SCC has issued rules that squarely address incumbent LECs' disconnection of services to CLECs for nonpayment of charges, and these rules require incumbent LECs to give both the Virginia SCC and the CLEC notice sixty days prior to the proposed date of termination. *See* Va. Admin. Code § 5-423-80(B) (resale CLECs), § 5-423-80(C) (facilities- and UNE-based CLECs).

Cavalier's main complaint about Verizon's language is that it would prompt Cavalier to give notice to its customers in the event of an embargo. But the notice requirement Cavalier complains of is required by Virginia law, not by any provision of Verizon's proposed language. The Virginia SCC requires CLECs to notify their customers 30 days in advance of the date on which they plan to discontinue service offerings. Va. Admin. Code § 5-423-20(B) (for CLECs intending to cease all operations in Virginia), § 5-423-30(B) (for partial discontinuances), § 5-423-40(B) (for withdrawals of tariffed service offerings), § 5-423-50(B) (for CLECs intending to terminate obsolete tariffed services). As discussed above, under Verizon's proposal, Cavalier has a full thirty days from the date it receives Verizon's notice of default in which to cure its default or, if Cavalier believes Verizon wrongly issued its notice of default, pursue the Agreement's bona fide dispute resolution mechanisms before Cavalier is required to notify its customers of an impending service disruption.

Those dispute resolution provisions are contained in Verizon's Proposed Agreement Section 28.9. If Cavalier believes it has a bona fide dispute regarding a Verizon bill, it may invoke these procedures at any time, including when it first receives the allegedly erroneous Verizon bill and certainly before Cavalier receives any default notice from Verizon. Both parties' proposed language for Section 22.4 specifically except unpaid amounts that are "subject to a bona fide dispute pursuant to Section 28.9" of the Agreement. *Revised Joint Decision Point List*, Issue C24, filed October 21, 2003. Thus, Verizon could not issue a default-termination notice pursuant to Section 22.4 based on a valid dispute.

Verizon treats every dispute from Cavalier as "bona fide" until after it has conducted a full investigation and determined whether or not to reject the dispute, either in whole or in part. Upon rejection of its dispute, Cavalier has the opportunity to escalate Verizon's rejection and subject the dispute to further review under Section 28.9 of the Agreement. *See Hearing Tr.* at 313:21-315:6 (Smith) ("We accept all disputes from the customer when they come in as a bona fide dispute. We then go through our process to review the disputes and then we provide back to the customer a resolution letter, telling them that their dispute is either granted or denied or granted in part and denied in part, and then if the customer disagrees with our finding, they can go ahead and escalate that, so they can turn around and respond to us through the escalation process on the billing side that they disagree with our assessment of that, and ask to have it … reviewed again…. [Escalation] takes it out of the collection activity and puts it back into the dispute category."). At no point during this process may Verizon issue default notices for any of the amounts in dispute.

At the Hearing, Staff asked the parties to discuss the effect of the Commission's discontinuation rules (47 CFR § 63.71) on this issue. *Hearing Tr.* at 333:14-19 (Adams). Part 63 of the Commission's Rules applies only to interstate services. 47 CFR § 63.01(a) ("Any party that would be a domestic *interstate* communications common carrier is authorized to provide domestic, *interstate* services to any domestic point and to construct or operate any domestic transmission line ….) (emphasis added). Therefore, the discontinuation provisions contained in the Agreement are unaffected by the federal requirements.

Moreover, even if 47 CFR § 63.71 did apply in these circumstances, Verizon's proposed contract provisions give Cavalier enough time to comply with applicable federal rules. 47 CFR § 63.71 requires a local exchange carrier to state in its notification to customers of a planned discontinuation of service that they have fifteen days to file comments regarding the carrier's discontinuation plan. 47 CFR § 63.71(a)(5)(i) (for non-dominant carriers). The regulation also states that the carrier's plan automatically becomes effective on the 31st day following its filing with the Commission, absent Commission action to the contrary. 47 CFR § 63.71(c). Cavalier need not file its application to discontinue service with the Commission or inform its customers of such a plan until a full thirty days after initially being notified of default by Verizon. Even then, Cavalier could initiate a proceeding to block any service embargo imposed by Verizon. *Smith Rebuttal* at 16:7-9; *Whitt Direct* at 14:20-21 ("Like Verizon's affiliate in Delaware did when Cavalier's affiliate there threatened a service embargo, Cavalier could initiate an emergency proceeding.").

This Commission has stated that its policy in promulgating Rule 63.71 was to streamline barriers to entry and exit into the telecommunications industry by providing an efficient way for carriers to gain approval for discontinuing their services where commercially necessary, while at the same time maintaining the authority to police abusive practices against consumers. *See* Final Rule, *Section 214 Deregulated Entry Requirements and Streamlined Exit Requirements for Domestic Telecommunications Common Carriers*, CC Docket No. 97-11, FCC 99-104, 64 FR 39939 (1999). The Commission did not intend for Rule 63.71 to serve as a shield for CLECs to invoke when they wish to avoid having their service terminated by the incumbent LEC for nonpayment.

The net effect of Cavalier's proposed language is to require a Commission or Virginia SCC order before Verizon could terminate service to Cavalier, even when Cavalier refuses to pay undisputed amounts. This would allow Cavalier to continue to receive services from Verizon, and even to order new services, for months on end. This would be a wasteful, unnecessary, and unlawful result. *See Hearing Tr.* at 329:16-330:1 (Smith) ("I believe [Cavalier's] language is actually requiring the Commission to issue an order, in order for us to proceed with an embargo or termination … we have no control over whether or not the Virginia SCC would or would not issue an order. So they have … potentially precluded us from pursuing … a remedy here.").

Verizon's Proposed Section 22.4 is a standard commercial arrangement. The Bureau should approve it.

XV. THE BUREAU SHOULD REJECT CAVALIER'S PROPOSED NEW SECTION 25.5.7 BECAUSE IT IS UNREASONABLE, UNNECESSARY, AND WOULD EVISCERATE THE AGREEMENT'S LIMITATION OF LIABILITY PROVISION (ISSUE C25)

The parties have agreed that the Agreement should contain a reasonable limitation of liability provision. Proposed Agreement Section 25. That language is identical to the language that the Bureau approved in the *Virginia Arbitration Order*. The parties further agreed in Section 25.2 that each party's liability to the other and its customers for claims resulting from a service failure will not exceed an amount equal to the pro rata applicable monthly charge for the service.

Cavalier now proposes adding new language to Section 25.5, which outlines an exception to the limitations of liability and which would eviscerate the agreed-upon liability limits established in Section 25.2. Cavalier's proposed exception would allow Cavalier to bring a claim against Verizon for virtually any alleged "violation of the laws governing communications." The Bureau should reject Cavalier's proposal because it would render the Agreement's liability limits meaningless. Cavalier's proposal is unprecedented, commercially unreasonable, unnecessary, and not authorized by the Act. Cavalier's proposed language would effectively require Verizon to guarantee perfect service to Cavalier. *Romano Direct* at 4:1-4. Cavalier's proposed language therefore should not be adopted.

In contrast, Verizon's proposed compromise language in Section 25.5 adequately addresses Cavalier's concerns regarding defamation, false advertising, and antitrust liability (the three areas that Cavalier specifically identified as concerns with Verizon's proposed language) without undermining the rest of the Agreement's limitation of liability provision. The Bureau should adopt Verizon's proposed additions to Section 25.5 and reject Cavalier's proposed Section 25.5.7.

Cavalier proposes an exclusion from the Agreement's liability limits "a claim of violation of the laws governing communications," including 47 U.S.C. §§ 151 et. seq., Virginia state law governing communications, and "any unstayed regulations or decisions of a regulatory body." Cavalier's Proposed Section 25.5.10. This exception is so broad that it virtually eliminates the limitations of liability in Section 25. Any breach of this contract is arguably a violation of 47 U.S.C. §§ 151 et. seq., and comparable Virginia state law. Cavalier's proposed exclusion might, therefore, allow Cavalier to seek unlimited damages for virtually any service failure. Under Cavalier's proposal, Cavalier could argue that Verizon was financially responsible for lost profits and consequential damages without limitation any time Verizon failed to provide perfect service. Such a provision is commercially unreasonable. *Romano Direct* at 1:18-22; 3:3-4:6.

It is well settled that communications common carriers may reasonably limit their liability, and the Commission has recognized that limitation of liability provisions strike "a balance between the rights of the aggrieved customers and the public interest in the provision of telephone service at the lowest possible cost." *In the Matter of AT&T*, 82 F.C.C. 2d 370, 372 (1980). Indeed, the parties already agreed to limit Verizon's liability for service failures. *See* Proposed Agreement Section 25.2. Cavalier should not be allowed to functionally refuse to limit liability by agreeing, first, to limit liability, but then, second, insisting on a vast exception to agreed-upon liability limits.

Moreover, Cavalier's sweeping liability exclusion is not necessary to ensure that Verizon provides services, facilities, and arrangements in accordance with the performance standards required by law. Section 26.1 of the Agreement specifically incorporates Verizon's responsibilities under the Virginia Performance Assurance Plan ("PAP") approved by the Virginia SCC and the Commission in the Virginia Section 271 Order. *Virginia § 271 Order* ¶ 198; Order, *Establishment of a Performance Assurance Plan for Verizon Virginia Inc.*, PUC010226 (Va. SCC, Filed Nov. 1, 2001). The PAP contains a comprehensive set of performance measurements for timeliness, reliability, and quality of service. It includes self-executing remedies that put up to $205 million at risk annually if Verizon's performance falls below proscribed standards. Contrary to Cavalier's contentions, the PAP provides sufficient incentive for Verizon to provide equitable service. *See Whitt Direct* at 15:11-13; *Romano Rebuttal* at 1:19-23. A broad exclusion to the liability limits in Section 25.5 for service failures is therefore unnecessary. Cavalier need not be permitted to seek unlimited damages for service failures to ensure service parity.

Cavalier's proposal is an attempt to circumvent the PAP, and receive individualized performance standards in this agreement. The Bureau should reject Cavalier's attempt to guarantee itself perfect service. The Act requires only parity. *Romano Direct* at 4:7-14. The Bureau has already rejected a similar request from WorldCom in the *Virginia Arbitration*. In rejecting WorldCom's proposal, the Bureau found that "Verizon has no duty to provide perfect service to its own customers; therefore it is unreasonable to place that duty to provide perfect service to WorldCom." *Virginia Arbitration Order* ¶ 709. The logic of the Bureau's decision translates to Cavalier's proposed exclusion in Section 25.5.7. If Cavalier could sue Verizon, without limitation, for any violation of state or federal telecommunications law, then the agreed-upon limitation of liability provision would be eviscerated, and Cavalier could seek unlimited damages from Verizon for anything short of perfect service. The Bureau must therefore reject Cavalier's proposal.

XVI. THE PARTIES' AGREEMENT SHOULD NOT INCLUDE CAVALIER'S PROPOSED CHARGES FOR WINBACKS AND TRUCK ROLLS (ISSUE C27)

Cavalier's Proposed Exhibit A(2) and Section 11.17 would assess a variety of unwarranted "UNE-related" charges on Verizon, primarily associated with "truck rolls" and winbacks. The Bureau should reject Cavalier's proposed language because, as the Bureau recognized in the *Virginia Arbitration* Order, it lacks jurisdiction in a Section 251 arbitration to determine the rates that a CLEC proposes to charge an incumbent carrier. Moreover, even if the Bureau had jurisdiction to consider these charges, it should reject them because they are unnecessary, unsubstantiated, and unfair.

A. The Bureau Does Not Have Jurisdiction To Set The "UNE-Related" Rates That Cavalier Proposes To Charge Verizon.

The Bureau has already acknowledged that it lacks jurisdiction over intrastate rates charged by competitive local exchange carriers to incumbents. *Virginia Arbitration Order* ¶ 588. An interconnection agreement may include rates on which the parties have agreed or which the Commission's Rules prescribe. In all other cases, however, including the UNE-related charges that Cavalier seeks to impose here, Cavalier must seek authorization from the Virginia SCC for the rates it proposes to charge. *Virginia Arbitration Order* ¶ 589.

Cavalier offers a copy of a January 27, 2003 letter from Senior Communications Specialist Garland Hines of the Virginia SCC Staff rejecting a Cavalier tariff as authority as support for its request to include "UNE-related" rates charged by Cavalier to Verizon in the interconnection agreement. *Clift Direct*, Exhibit MC-11. But this letter is far from a definitive ruling by the Virginia SCC on this subject: Mr. Hines' letter makes clear that he considered Cavalier's tariff too vague to understand, and that, in any event, it had not been filed on time. *Albert Panel Rebuttal* at 21:5-14. This does not prove that the Virginia SCC would conclude that these charges should not be contained in a tariff, just as other rates Cavalier would normally charge Verizon.

But even if the letter said what Cavalier wants it to say, that letter cannot trump the Bureau's jurisdictional holding in the *Virginia Arbitration Order*:

> [T]he Bureau, acting as the Virginia Commission for purposes of this proceeding, is authorized by section 252 to determine just and reasonable rates to be charged by Verizon, not petitioners. As Cox points out, the Commission has ruled that it would be *inconsistent with the Act* for a state commission to impose section 251(c) obligations on competitive LECs.

Virginia Arbitration Order ¶ 589 (emphasis added; footnotes omitted). The Bureau made it clear that its decision was required by the terms of Sections 251 and 252 of the Act, and the letter Cavalier offers from the Virginia SCC – regardless of how it is read – cannot undermine that ruling.

At the Hearing, Cavalier witness Clift pointed to a section of the parties' proposed agreement as supposed proof that the agreement could contain rates Cavalier charges Verizon. Although the record is not clear, it appears that Mr. Clift was referring to a section of the agreement entitled "Cavalier Services, Facilities, and Arrangements." *Hearing Tr.* at 627:7 – 630:9 (Clift). This section contains rates for reciprocal compensation and also contains Cavalier's tariffed rates for access and collocation, as well as a catch-all section for "All Other Cavalier Services Available to Verizon for Purposes of Effectuating Local Exchange Competition." Verizon's Proposed Exhibit A(2) at 152.

This contract provision is consistent with the Bureau holding discussed above. The Bureau stated that an interconnection agreement may contain rates which the Commission's Rules prescribe (which would include reciprocal compensation rates) and rates on which the parties have agreed, or for which the Virginia SCC has approved a tariff (which would cover the balance of the rates in the section to which Mr. Clift apparently referred). *Virginia Arbitration*

Order ¶ 589. The charges that Cavalier seeks to impose here are not prescribed by Commission Rules, Verizon has not agreed to them, and they have not been tariffed in Virginia. Therefore, they cannot be included in the parties' interconnection agreement.

B. Cavalier's Proposed Truck Roll Charge Is Inappropriate.

Cavalier says that Verizon's mistakes in installing loops force Cavalier to dispatch its own trucks, and that Verizon should pay for these truck rolls. Cavalier, however, has not submitted any cost studies to support these rates. Moreover, the evidence shows that the truck rolls for which Cavalier seeks payment often occur for reasons beyond Verizon's control, and that, even if Verizon makes a mistake in installing a loop, Cavalier can reduce truck rolls by taking a few reasonable steps.

Cavalier witness Webb stated that, upon completion of the installation of a new loop, Cavalier checks to see whether the loop is working by making a test call to the customer. If Cavalier is unable to reach the customer to verify that service has been established, Cavalier dispatches a technician. *Webb Direct* at 5:10-12; *Hearing Tr.* at 633:19-21 (Webb). Cavalier wants to be paid for each of these truck rolls. *Clift Direct* at 22:18-20. However, there are a number of reasons, through no fault of Verizon, why Cavalier may be unable to reach a customer immediately after a loop is installed. The customer may not be home when Cavalier calls; the customer may not yet have purchased a telephone; or the customer may simply have decided not to pick up the call.

Cavalier could also reduce its truck rolls by participating in Verizon's Cooperative Testing program for digital (or xDSL-capable) loops, which cost the same as analog loops. Verizon's Proposed Exhibit A(VI). Under this program, in which most CLECs participate, when Verizon completes a service installation, a Verizon technician calls Cavalier at a number

Cavalier provides on the order form. The Verizon technician then works with Cavalier in real time to confirm that the service is working. If the service is not working, Verizon will not charge Cavalier to resolve the problem. *Albert Panel Rebuttal* at 21:23 – 22:3.

Cavalier also claims that its proposed truck roll charge will encourage Verizon to commit fewer errors in installing loops for Cavalier. Verizon, however, is already subject to performance standards in Virginia that carry substantial monetary penalties for nonperformance. Section 26.1 of the parties' interconnection agreement specifically incorporates Verizon's responsibilities under the Virginia PAP, approved by both Virginia SCC and by the Commission. *Virginia PAP Proceeding*; *Virginia § 271 Order* ¶ 198. The PAP contains a comprehensive set of performance measurements for timeliness, reliability, and quality of service, as well as self-executing remedies that put up to $205 million at risk annually if performance falls below these standards. *Romano Direct* at 5:2-5.

The Commission examined the PAP during Verizon's section 271 application in Virginia and ruled that the Virginia PAP was effective in ensuring non-discriminatory treatment of CLECs:

> [W]e find that the Virginia Plan is reasonable to ensure an open local market in Virginia. We conclude that the Virginia Plan, in concert with the Virginia State Corporation Commission's active participation in implementing modifications to promote the oversight of Verizon's performance, provides sufficient assurance that Verizon will have a *compelling incentive* to maintain post-entry checklist compliance. We also note that *no party challenged the effectiveness of the plan.*

Virginia § 271 Order ¶ 198 (emphasis added; citations omitted).

Cavalier complains that the PAP does not cover missed appointments and loops that were not properly delivered, (*Clift Surrebuttal* at 1-3), but in fact, the Virginia PAP covers all of these situations. *Agro Rebuttal* at 6:4-5. Cavalier also argues that the PAP's performance measures inappropriately mix performance on UNE-loops (which Cavalier uses) with performance on

UNE-platform (which Cavalier does not use), but the Virginia PAP also includes performance measures that are specific to the installation of UNE Loops. In fact, PR-4-04-3113 (Percent of Missed Appt. – Verizon – Dispatch - Loop New) measures provisioning performance for new loops. The quality of new loop installation is also measured by PR-6-01-3112 (Percent Installation Troubles Reported Within 30 Days - POTS Loop – UNE), which captures troubles reported on newly installed loops that Cavalier reports as not working. *Agro Surrebuttal* at 1:4-13. Metrics for missed repair appointments, average delay days, lines out of service for more than 24 hours, and repeat reports within 30 days are also measured separately for UNE-loop and UNE-platform providers. *Agro Surrebuttal* at 1:22 – 2:25.

Cavalier is concerned that the Virginia PAP does not measure Verizon's performance "vis-à-vis Cavalier." *Clift Direct* at 22:5-7. Cavalier's concern here is also misplaced. In addition to assuring satisfactory performance to CLECs in the aggregate, the PAP was designed to assure satisfactory performance for individual carriers. If Verizon does not meet a critical measure at the industry aggregate level in a given month, Verizon must make penalty payments to every CLEC that received substandard service. If Verizon meets a critical measure at the industry aggregate level for two consecutive months, but nonetheless misses the measure in both months "vis-à-vis Cavalier," Verizon must pay penalties to Cavalier. Therefore, the carrier-specific remedies contained in the Virginia PAP are sufficient to address Cavalier's concerns, and there is no need for the additional layer of carrier-specific remedies Cavalier proposes. *Agro Rebuttal* at 7:6-16.

Cavalier relies on the fact that Cavalier has not received payments pursuant to the PAP as evidence of the fact that the PAP does not provide Cavalier with adequate protection from receiving substandard service. *Clift Surrebuttal* at 3. But the reason that Cavalier has not