

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the petition of TelNet Worldwide, Inc. for arbitration of interconnection rates, terms, and conditions and related arrangements with Verizon North Incorporated and Contel of the South, Inc., d/b/a Verizon Systems	Case No. U-13931
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DECISION OF THE ARBITRATION PANEL

HISTORY OF PROCEEDINGS

On October 24, 2003, TelNet Worldwide, Inc. ("TelNet"), pursuant to Section 252(b) of the Federal Telecommunications Act of 1996 ("Federal Act" or "Act"), 47 USC § 151 et seq., and arbitration procedures adopted by the Michigan Public Service Commission ("MPSC" or the "Commission") in its order dated July 16, 1996 in Case No. U-11134, filed a Petition for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements ("Petition") with Verizon North, Incorporated and Contel of the South, Inc., d/b/a Verizon Systems ("Verizon MI"). TelNet's Petition included: (1) the Affidavit of Mark Iannuzzi, President of TelNet; (2) a Statement Regarding the Case; (3) a series of Matrixes, showing both Parties' proposed language on the disputed issues and reasons for adopting TelNet's language; (4) TelNet's Proposed Interconnection Agreement; and (5) certain Exhibits. The Petition contained approximately 140 issues, some of which are related.

After the Petition was filed, the Parties continued their settlement negotiations and stipulated that Telnet's Petition for Arbitration shall be deemed to have been filed with the

Commission and served on Verizon MI on June 4, 2004,¹ which the Parties further deem as Day 135 of the negotiations. The Parties further stipulated that Verizon MI's response ("Verizon MI's Answer") to TelNet's Petition is deemed to have been filed on June 28, 2004.

On June 3, 2004, TelNet filed an Amendment to Petition ("Amendment"). This Amendment consisted of three documents including: (1) an issues matrix related to Verizon MI's proposed Triennial Review Order ("TRO") Amendment; (2) a status matrix setting forth each of the issues raised in the Petition;² and (3) a stipulation evidencing the consent of Verizon MI to the filing of the Amendment. The Amendment eliminated the issues settled since TelNet submitted the original Petition and adds 18 issues in the Triennial Review Order Amendment ("TRO Amendment"). On June 9, 2004, Verizon MI filed the Supplemental Answer to the Amended Petition for Arbitration of TelNet Worldwide, Inc., Regarding Issues Related to the FCC's Triennial Review Order, ("Verizon MI's Supplemental Answer").

Some of the issues contained in the Amendment pertain to Verizon MI's originally proposed TRO Amendment which was developed after the D.C. Circuit released its opinion in *USTA II*³, but before the court issued its mandate.⁴ After the D.C. Circuit issued its mandate in *USTA II* on June 16, 2004, Verizon MI revised its proposed TRO Amendment ("Revised TRO Amendment") to eliminate provisions rendered moot by the D.C. Circuit's decision. The Parties agreed to use the Revised TRO Amendment in place of the original TRO Amendment for purposes of this arbitration. On July 14, 2004, Verizon MI sent TelNet the Revised TRO

¹ The procedural schedule has been revised by agreement of the Parties. As a result, the dates for filing the Petition and Answer do not track with the other dates.

² The Panel notes that the Parties do not agree on how the disputed issues should be framed. As a result, the PDAPs filed in this proceeding contain different statements on the disputed issues. In most instances, the Panel chose TelNet's description of the disputed issues based on the fact that TelNet filed the Petition.

³ *United States Telecom Assoc. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*")

⁴ The *USTA II* decision stayed the effect of its decision for 60 days. *USTA II*, 359 F.3d at 595. On April 13, 2004, the D.C. Circuit granted the FCC's motion to extend the stay of the mandate in *USTA II* through June 15, 2004. On June 9, 2004, the Supreme Court denied petitions to stay the mandate further, thereby allowing the mandate in *USTA II* to become effective on June 16, 2004.

Amendment, along with a document summarizing Verizon MI's understanding of the impact of the Revised TRO Amendment on the issues that TelNet had raised with respect to the original TRO Amendment. At TelNet's request, Verizon MI provided TelNet a redline version of the Revised TRO Amendment identifying the differences between the two amendments on July 16, 2004.

The Parties agreed to retain John Kern of Kern & Associates ("the Panel") to review the record and develop a proposed arbitration decision. The Parties stipulated that the Commission should conclude the resolution of any unresolved issues in this Arbitration by October 11, 2004, pursuant to Section 252(4)(c) of the Federal Act.

The Parties exchanged email notices and held conference calls with the Panel for the purpose of addressing procedural matters. As a result, the Parties agreed that TelNet would file a Proposed Decision of the Arbitration Panel ("PDAP") on July 23, 2004. Per agreement of the Parties, TelNet filed a Supplemental Proposed Decision of the Arbitrator ("Supplemental PDAP") on issues related to the *Triennial Review Order*⁵ on July 30, 2004. On August 3, 2004, TelNet filed a Second Supplement to its PDAP which addressed issues that were inadvertently omitted from TelNet's July 23, 2004 PDAP. Verizon MI filed its Proposed Decision of the Arbitrator (Verizon MI's PDAP") on August 18, 2004 on all issues except those addressed in TelNet's August 3, 2004 filing. Verizon MI filed its PDAP addressing those issues on August 25, 2004.

⁵ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978 (2003), ("Triennial Review Order"), vacated in part *sub nom. United States Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

At the request of the Panel, oral presentations were held on August 19, 2004 and a conference call was held on September 1, 2004.

In accordance with the requirements of the Commission's Orders in Case Nos. U-13774 and U-11134, the Panel's decision in this proceeding is limited to the positions raised by TelNet in its various Petitions and PDAPs, Verizon MI's responses and PDAPs, and information obtained during the course of this arbitration. The Panel is limited to selecting the position of either Telnet or Verizon MI, unless the result would be clearly unreasonable or contrary to the public interest. For these purposes, a result is unreasonable or contrary to the public interest if, without regard to the opposing party's position, it is inconsistent with the 1996 Act or if it is otherwise contrary to law, arbitrary, or capricious.

The Panel has considered the disputed issues raised in the Petitions and Responses in accordance with the standards stated above, and sets forth its findings below.

PROPOSED FINDINGS AND CONCLUSIONS

Issues 2 and 3: Verizon MI ICA, General Terms and Conditions §§ 2.1 and 2.3; TelNet ICA, General Terms and Conditions §§ 2.1 and 2.3

Issue 2: Should the term of the Agreement be two years or three years?

Issue 3: Should the Agreement address what terms should apply if a gap develops between this agreement and its successor?

TelNet's Position

Issue 2: A three-year term is common in interconnection agreements. It is absolutely essential that TelNet be able to make future business plans. In order to do that, TelNet must be able to operate in an environment that provides as much economic stability as possible. A two-

year agreement is too short and does not provide a long enough horizon to permit TelNet to make long-term business plans.

Issue 3: This Agreement should continue in effect until the effective date of its successor agreement. The possibility of a gap between this Agreement and its successor would put CLECs' business operation into limbo. TelNet's prior agreement with Verizon MI expired on March 3, 2002. No successor Agreement has been reached despite the fact that the parties have been conducting good-faith negotiations.

Verizon MI's Position

Issues 2 and 3: Verizon MI proposes an initial, two-year contract term, and that the Agreement continue indefinitely if neither Party provides notice of termination.⁶ If Verizon MI or TelNet gives notice of termination in anticipation of the end of the two-year term,⁷ either Party may request negotiations.⁸ The Agreement would remain in place while negotiations continue, for up to a year beyond the initial two-year term.⁹

Verizon MI contends that its proposal balances the Parties' need for stability with the need to allow their relationship to evolve along with changes in the telecommunications market. Particularly in light of recent regulatory changes, TelNet has offered no persuasive evidence that it needs a contractual term longer than two years.

Verizon MI further argues that its proposal to impose a definite limit on the life of the Agreement is the only way to provide appropriate incentives for the Parties to negotiate a successor agreement within a reasonable time frame. In contrast, TelNet's proposed "evergreen"

⁶ Verizon MI ICA, GTC § 2.1.

⁷ *Id.* § 2.3.

⁸ *Id.*

⁹ Including the 90-day notice of termination period, the Parties would have up to 15 months to negotiate a new contract. *Id.*

provision would allow the contract to continue indefinitely,¹⁰ removing any incentives to renegotiate. TelNet's proposed language also effectively would eviscerate the termination provisions of the Agreement, allowing the Agreement to continue indefinitely even after one Party has provided notice of termination to the other.

Finally, Verizon MI contends that acceptance of its proposal would not risk creating a gap between the Agreement and its successor.¹¹ The Parties know the dates by which they must act in order to avoid any gap between this Agreement and its successor, and it will be within TelNet's control to avoid any gap.

Panel's Decision

Issue 2: Should the term of the Agreement be two years or three years?

The Panel concludes that the position and contract language proposed by TelNet be adopted for Issue 2. Under Verizon MI's suggested two-year term, TelNet would only have a year and part of a second year to operate under the instant Agreement before TelNet would have to begin negotiations for the next agreement, if Verizon MI exercised its first opportunity to terminate the instant Agreement. The Panel agrees that the negotiation of an extensive interconnection agreement can be an extremely costly undertaking for a small CLEC such as TelNet, both in terms of financial resources and in terms of the time it distracts the CLEC's management from devoting time to business operations.

The Panel believes that the length of the Agreement is more crucial to TelNet than it is to Verizon MI. Verizon MI does not depend on the Agreement for Verizon MI to be able to serve customers; TelNet does. Verizon MI states that it is crucial that the Parties be able to negotiate new agreements within a reasonable amount of time given the ever-quickenning pace of

¹⁰ TelNet ICA, GTC §§ 2.1, 2.3.

¹¹ TelNet Petition, GTC at 3; TelNet PDAP at 8.

technological, market, and regulatory changes in the telecommunications market. However, nothing prevents the Parties from voluntarily negotiating an amendment or a new contract prior to the expiration of this Agreement if the Parties were in agreement that circumstances required a new arrangement. Verizon MI states that “many” agreements have two-year terms and cites four interconnection agreements as examples. However, it appears that none of the examples that Verizon MI provided were arbitrated agreements and none of them appear to be recent agreements.¹² In fact, one of Verizon MI’s examples was not even from Michigan. The Panel finds that recently arbitrated agreements before the Commission are likely to contain a term of three years.¹³

Issue 3: Should the Agreement address what terms should apply if a gap develops between this Agreement and its successor?

The Panel concludes that the position and contract language proposed by TelNet be adopted for Issue 3. Verizon MI proposes to limit the period for negotiating a successor agreement to one year following either Party’s notice of termination. Verizon MI argues that the one-year limitation will give the Parties an incentive to promptly negotiate a new agreement. The Panel believes that Verizon MI’s proposal fails to provide a remedy if, despite the best efforts of both Parties, a gap should develop between the instant Agreement and a successor Agreement. Under Verizon MI’s proposal, if a gap develops, the Parties are left in limbo during

¹² Verizon MI Answer at 4.

¹³See *i.e.*, Interconnection Agreement under Section 251 and 252 of the Telecommunications Act of 1996 between Ameritech Information Industry Services and AT&T Communications of Michigan, Inc. (“SBC/AT&T ICA”), Section 21.1.2, approved by the Commission on November 20, 2000 in Case No. U-12465; Interconnection Agreement under Section 251 and 252 of the Telecommunications Act of 1996 between Michigan Bell Telephone Company, d/b/a Ameritech Michigan and Baraga Telephone Company (“SBC/Baraga ICA”), General Terms and Conditions, Section 5.2, approved by the Commission on November 7, 2002 in Case No. U-13383; Interconnection Agreement under Section 251 and 252 of the Telecommunications Act of 1934, as Amended, between Michigan Bell Company and MCImetro Access Transmission Service LLC (“SBC/MCI ICA”), General Terms and Conditions, Section 7.1, approved by the Commission on December 18, 2003 in Case No. U-13758.

the gap with no direction on how to proceed. The Panel believes that such a gap is good for neither Party and has the affect of harming customers. The gap would create uncertainty and increase the chances of unnecessary disputes. Such limbo would not significantly affect Verizon MI's business operation, but could significantly disrupt TelNet's ability to operate.

The Panel does not agree with Verizon MI that it is "within TelNet's control to avoid any gap."¹⁴ When mutual agreement is required to reach a contract, neither Party has exclusive control to achieve resolution within any specified time period because both essentially have veto power. The Panel notes that the Parties in this very proceeding have been negotiating for substantially more than one year. Verizon MI has not shown that it was within TelNet's exclusive control to have obtained a Commission-approved arbitration agreement. The Panel notes that after TelNet filed its petition on October 24, 2003, it was almost seven months before Verizon MI filed its Answer. Moreover, Verizon MI withdrew the version of the baseline agreement (Version 2.6) that the Parties had been using for negotiation for several months, and replaced it with a new version (Version 2.7) on January 3, 2003. Then several months later, Verizon MI proposed a TRO Amendment that contained substantial changes to the UNE attachment in Version 2.7. This was followed by the Revised TRO Amendment. While there were intervening judicial rulings that affected these provisions and therefore required the documents to be modified, these events demonstrate that it was not exclusively within TelNet's control to obtain a Commission approved Agreement within 12 months. Furthermore, the Panel notes that in the recent arbitration between SBC and MCI, the parties took several years to negotiate a successor agreement.¹⁵

¹⁴ Verizon MI PDAP at 8.

¹⁵Opinion and Order, *In the Matter of the Petition of Michigan Bell Telephone Company, d/b/a SBC Michigan, for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with MCIMetro Access*

The Panel also disagrees with Verizon MI’s contention that TelNet’s evergreen provision would allow the contract to continue indefinitely. The Panel notes that the Commission found such a provision to be reasonable in *SBC/McLeod Arbitration Order* and agrees with the Commission’s rationale that the “evergreen” provision will “give the parties advance notice of the rates that will be in effect, is more consistent with the arbitration rules, and yields certainty about the rates during the gap periods.”¹⁶

Issues 5, 18A, and 23: Verizon MI ICA, General Terms and Conditions §§ 4.6, 4.7, and 50; Glossary § 2.8; TelNet ICA, General Terms and Conditions §§ 4.6 and 4.7; Glossary § 2.8

Issue 5: If a change in the law materially affects a Party’s obligations under the Agreement, should the Parties be required to renegotiate and amend the relevant portions of the Agreement to conform the Agreement to the changed law? (General Terms and Conditions § 4.6)

Issue 18A: Should the Agreement permit Verizon MI, on 30 days’ notice, to discontinue providing TelNet a service that Verizon MI is not legally obligated to provide? (General Terms and Conditions §§ 4.7, 50.1)

Issue 23: How should the Agreement define the “Applicable Law” that governs the Parties’ obligations under the Agreement? (Glossary § 2.8)

Transmission Services LLC, pursuant to Section 252(b) of the Telecommunications Act, Case No. U-13758 (Nov. 25, 2003), (“*SBC/MCI Arbitration Order*”), p. 3.

¹⁶ Opinion and Order, *In the matter of the petition of McLeod USA Telecommunications Services, Inc., for arbitration of interconnection rates, terms, and conditions and related arrangements with Michigan Bell Telephone Company, d/b/a Ameritech Michigan*, pursuant to Section 252(b) of the Telecommunications Act of 1996, Case No. U-13124 (Jan. 22, 2002) (“*SBC/McLeod Arbitration Order*”), p. 7.

TelNet's Position

Issue 5: No. The Parties should only be required to renegotiate the Agreement in mid-term only if the changes in law are mandated to be implemented immediately. TelNet wants changes in law to be implemented mid-term in the Agreement where such changes meet two criteria: 1) where the change in law is binding in Michigan; and 2) where a court or tribunal indicates that the change in law should take immediate effect and supersede the terms of the current contract before the contract's expiration. TelNet argues that the essence of a contract is to bind the Parties during the term of the contract. TelNet also argues if Verizon MI is permitted to implement changes in law that a court or tribunal does not require supersede the contract, there will be much uncertainty and instability in the parties' relationship.

Issue 18A: No. The Parties' agreement should not authorize Verizon MI to cease providing service to TelNet on 30 days notice.

Issue 23: The definition of Applicable Law in Verizon MI's proposed contract controls the instances when a change of law would or would not override the provisions in the contract. Therefore, Applicable Law should be defined to mean that a change in law becomes "applicable" in instances where two criteria are satisfied: 1) where the change in law is binding in Michigan, and 2) where a court or tribunal indicates that the change in law should take immediate effect and supersede the terms of the current contract before the contract's expiration.

Verizon MI's Position

Issues 5 and 23: Verizon MI's proposed section 4.6 requires the Parties to renegotiate portions of the Agreement that are materially affected by a change in Applicable Law (but if the change in law eliminates Verizon MI's obligation to provide a service, then section 4.7,

discussed below, applies).¹⁷ Verizon MI defines “Applicable Law” simply as “[a]ll effective laws, government regulations and government orders, applicable to each Party’s performance of its obligations under this Agreement.”¹⁸ Under Verizon MI’s proposal, if renegotiation efforts fail within 30 days after the change in law, the Parties may pursue other remedies available to them at law, under the Agreement, or otherwise.¹⁹

Verizon MI’s proposals provide reasonable procedures and timelines for negotiating amendments to conform the Agreement to a change of law.²⁰ TelNet, on the other hand, proposes unreasonable conditions on a Party’s right to invoke the Agreement’s change of law provisions.

Issue 18A: Yes. Where Verizon MI no longer has any legal obligation to provide a service, the Agreement should permit it to discontinue that service on 30 days’ notice.²¹ Because the purpose of the Agreement is to reflect Verizon MI’s obligations under federal law, Verizon MI should be permitted to withdraw services that the law no longer requires it to provide.²² TelNet’s proposals, on the other hand, could require Verizon MI to continue to provide a service to Verizon MI long after its legal obligation to do so has ended.²³

Panel’s Decision

Issue 5 and 23: These two issues are related and the Panel will decide them together. The gist of these issues is whether the Parties should be required to implement changes in law

¹⁷ Verizon MI ICA, GTC § 4.6.

¹⁸ *Id.*, Glossary § 2.8. As to UNEs in particular, section 1.1 and other sections of the TRO Amendment specify that the applicable law is section 251(c)(3) and the FCC’s implementing rules.

¹⁹ *Id.*, GTC § 4.6.

²⁰ Verizon MI Answer at 8.

²¹ As discussed in Issue 152, section 3.2.5 of Verizon MI’s Revised TRO Amendment provides for a 90-day notice period before Verizon MI may discontinue the provision of any UNEs affected by *USTA II* (i.e. mass-market switching and high capacity loops and transport).

²² Verizon MI Answer at 13-14.

²³ *Id.* at 14.

which occur mid-term in the Parties' Agreement. The Panel concludes that the position and contract language proposed by Verizon MI be adopted for Issues 5 and 23.

TelNet argues that Verizon MI should not be permitted to discontinue service in mid-term of the Agreement simply because there is some prospective, non-final, non-mandatory ruling by some tribunal. TelNet further argues that the change in law must be "mandatory and final" before the parties renegotiate the Agreement; that the word "material" be deleted, and; that the Agreement state that the Parties "may," rather than "shall," renegotiate changes to the Agreement to reflect a change in the law.²⁴

The Panel disagrees with TelNet's arguments. First, a change in law goes into effect according to its terms, unless it is stayed, so it is, in fact, mandatory and final. According to TelNet, a decision by a California Court should not necessarily affect its Agreement with Verizon in Michigan. Without a specific example, it is hard to ascertain if this example is accurate. As Verizon MI correctly noted, "a change in law would need to be binding upon the Parties, who operate in Michigan, before the Parties may invoke it under their Agreement."²⁵ Second, the Panel believes that the Agreement must reflect existing law, and not wait until all appeals are final. The Panel believes that companies cannot avoid compliance with a change in law until all appeals are exhausted, a process that could take years.

The Panel agrees with Verizon MI that the Agreement is not a freely negotiated commercial contract but rather a regulatory document, intended to embody the Parties' rights and duties under the Act, the FCC's rules and other state rules and regulations. To the extent there is a change in law affecting these rights and duties, the Parties must negotiate an amendment to the Agreement to reflect these changes. This does not mean that the change of law takes effect

²⁴ Petition, Tab 5 at 5-6.

²⁵ Verizon MI PDAP at 16

immediately. If a particular ruling does not take effect immediately, this should be considered by the Parties when negotiating the change. As TelNet discusses, the FCC specifically rejected the ILECs' request to unilaterally change all interconnection agreements in order to avoid delay in renegotiating contract provisions, finding that voluntary negotiation for interconnection agreement is "the very essence of section 251 and section 252."²⁶ However, simply because a change of law may be suspended and later reinstated or remanded does not give the Parties license to ignore rulings that may be binding and effective. If one Party disagrees with another Party's interpretation of a change in law, that Party may invoke the dispute resolution provision of the Agreement.

The Panel also notes the apparent inconsistency in TelNet's position. Based on TelNet's position regarding Issue 53, TelNet would amend the Agreement immediately if the change of law benefits TelNet.

The Panel also agrees with Verizon MI that the term "material" should not be struck. This term is a well-understood contractual term and excluding it could require the Parties to renegotiate changes with respect to every minor change even remotely affecting the Agreement.

The Panel further rejects TelNet's additional proposal in section 4.6, which provides that the Parties "may" rather than "shall" negotiate an amendment, because this language would allow a Party to obstruct negotiations or refuse to negotiate changes in law altogether. In contrast, Verizon MI's proposal for section 4.6 would *require* the Parties to renegotiate portions of the Agreement affected by material changes in applicable law. By mandating renegotiation, this provision ensures that a Party cannot avoid its obligation to comply with governing law. As the FCC explained in the *Triennial Review Order*, a party that refuses to negotiate or delays the

²⁶*Triennial Review Order* ¶ 701.

resolution of issues after the new unbundling rules go into effect may be in violation of the Act's good-faith negotiation requirement.²⁷

Therefore, the Panel concludes that Verizon MI's proposed language for these sections be adopted, including the words "material" and "shall."

Issue 18A: Should Verizon MI be permitted to withdraw services it provides to TelNet upon 30 days' notice?

The Panel concludes that the position and language proposed by TelNet be adopted for Issue 18A. Verizon MI argues that 30 days gives TelNet "adequate time to transition to new arrangements and to prevent service disruptions to its customers."²⁸ The Panel agrees with TelNet that Verizon MI's discontinuance of service to TelNet upon 30 days notice may not provide for sufficient time to enable TelNet to obtain the same service from alternative arrangements, either with Verizon MI or with third parties. Furthermore, even if TelNet would accept any available arrangements from Verizon MI or any third parties, the change of service arrangements may involve technical changes that may require installation and/or testing, which could be time-consuming.²⁹

The Panel also agrees with TelNet that Section 50.2 does not provide sufficient protection to TelNet. Section 50.2 of the General Terms and Conditions is limited to resolving "substitute

²⁷ *Id.* ¶ 706; 47 U.S.C. § 251(c)(1). Further the Panel believes that ¶¶700 and 706 of the *Triennial Review Order* undermine TelNet's assertion that "major FCC decisions recognize that the terms of the Parties' ICA should be respected for the life of the contract." TelNet PDAP at 14.

²⁸ Verizon MI Answer at 16.

²⁹ Verizon MI recently sought a permanent waiver of the Commission's Service Quality Rules and asserted that "factors such as a lack of facilities, winter construction difficulties, load restrictions on certain roads, and a need to place new poles, could prove to be insurmountable obstacles." Order Denying Waiver Request, *In the Matter of the Application of Verizon MI North Inc. and Contel of the South, Inc., d/a/a Verizon MI North Systems, for a Limited Permanent Waiver of the Telecommunications Service Quality Rules Adopted in Case No. U-13013, Case No. U-13837* (Mar. 16, 2004).

provisions for compensation” and not the broader issue of withdrawing services.³⁰ It is foreseeable that other changes of law may also involve complicated transitional schemes. The Panel believes that Verizon MI should not be permitted to terminate services or payments before the Parties have completed negotiations to implement the revisions and before the Commission has had the opportunity to address any disputed issues that may arise.

As discussed in Issues 5 and 23, the Parties must negotiate an amendment if there is a change in law that modifies Verizon MI’s obligations. If a change in law results in the disconnection of services, customers could be directly affected. To the extent that the Parties agree that service should be terminated, the Parties will need time to minimize the effects on end user customers. Therefore, any disconnection of service must be done only after the Parties have negotiated an amendment and if necessary, use the dispute resolution process in the Agreement.

For these reasons, the Panel cannot accept Verizon MI’s proposal to terminate service on 30-days notice.³¹

Issue 8: Verizon MI ICA, General Terms and Conditions § 9.5; TelNet ICA, General Terms and Conditions §9.5

Should the Parties be required to submit billing statements within 12 months of the date the charges are incurred?

TelNet’s Position

The Parties should submit billing statements within 12 months of the date the charges are incurred in order to achieve certainty.

³⁰ The Panel notes that the Commission rejected SBC’s similar request to implement the *ISP Remand Order* on 20 days’ notice. See, Decision of the Arbitration Panel, *Michigan Bell Telephone Company d/b/a SBC Michigan’s Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with MCI Metro Access Transmission Services, LLC Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. U-13578, at 37 (MI P.S.C. June 26, 2003) (“DAP, SBC/MCI Arbitration”).

³¹The Panel agrees with Verizon MI that TelNet’s page 24 of its GTC Matrix contained a typographical error. In setting forth Verizon MI’s proposed language for Section 50.1, TelNet indicated that Verizon MI was proposing 60 days notice. Verizon MI correctly points out that its proposal is for 30 days notice.

Verizon MI's Position

Verizon MI's proposed section 9.5 of the General Terms and Conditions allows each Party to present bills to the other at any time, except as may be limited by applicable law.³² According to Verizon MI, this proposal recognizes the Parties' legal right to be paid for services rendered. Verizon MI argues that TelNet's proposal to limit the billing period to 12 months after a charge is incurred, on the other hand, would constitute an improper, forced waiver of a Party's right to payment.³³ Verizon MI further asserts that TelNet has failed to provide real-world examples to support the adoption of its arbitrary 12-month limitation on billing or to demonstrate that any harm will flow from applying the law as Verizon MI proposes.³⁴

Panel's Decision

The Panel concludes that the position and language proposed by TelNet be adopted for Issue 8. It must be recognized that financial certainty is an important consideration of relatively small CLECs. Contrary to Verizon MI's claim, limiting the billing date to 12 months does not override state or federal statutes. The statutes cited by Verizon MI are not on point. First the Michigan statutes cited by Verizon MI involve damages for breaches of contract, specific performance, fiduciary bonds, deeds, mortgages, surety bonds, appeal bonds and public obligations while the federal statutes address Limitations of Action. TelNet's proposed language does not address damages for breach of contract or limitations of action but rather the submission of bills within a 12 month period. The Panel is mindful that the Parties here are arbitrating an Agreement that will result in a stable business relationship that will promote competition. A small CLEC like TelNet could face potentially great financial peril if it suddenly received a back bill from Verizon MI for months of service not previously billed. Twelve months should be

³² Verizon MI ICA, GTC § 9.5.

³³ Verizon MI Answer at 20 (citing MICH. COMP. LAWS ANN. § 600.5807; 47 U.S.C. § 415).

³⁴ *Id.* at 21.

more than enough time for Verizon MI to accurately determine what amounts are properly owing to it by TelNet. Moreover, the Panel notes that the 12-month limit applies to both TelNet and Verizon MI. If TelNet is willing to commit to accurately bill Verizon MI for services within 12 months or suffer the consequences, Verizon MI, given its much greater resources, should be able to make an equal commitment.

Issue 11: TelNet ICA, General Terms and Conditions § 20.5

Should Verizon MI indemnify or reimburse TelNet for fines or other costs imposed upon TelNet if Verizon MI's actions or inactions cause TelNet to be in violation of the Commission's *Quality of Service Rules*?³⁵

TelNet's Position

Verizon MI should indemnify or reimburse TelNet for fines or other costs imposed upon TelNet if Verizon MI's actions or inactions cause TelNet to be in violation of the Commission's *Quality of Service Rules*.

Verizon MI's Position

No. There is no legal basis for TelNet's extraordinary proposal that Verizon MI should indemnify and reimburse TelNet for fines or unspecified "other costs" when TelNet claims that Verizon MI violated the Commission's *Quality of Service Rules*.³⁶ TelNet's proposal would impermissibly expand the scope of the Commission's *Quality of Service Rules*. Further, TelNet's proposed language is vague and ambiguous, unworkable from a practical standpoint, and inconsistent with the agreed-upon indemnification and limitation of liability provisions in the Agreement. TelNet's proposal also conflicts squarely with the well-established rule that a carrier

³⁵Opinion and Order, *In the Matter, on the Commission's Own Motion, to Promulgate Rules Governing the Quality of Telecommunication Services*, Case No. U-13013 (Aug. 20, 2002) ("Aug. 2002 Quality of Service Order"). The *Quality of Service Rules* were finally adopted in the Commission's Order Adopting Rules on Telecommunications Services, Case No. U-13013, March 31, 2003 ("*March 2003 Qualify of Service Order*").

³⁶ TelNet ICA, GTC § 20.5.

may limit its liability for consequential or other damages arising out of lapses in service, and fails to recognize that there are remedies available to TelNet if Verizon MI fails to meet the standards in the Parties' Agreement: TelNet may invoke the dispute resolution provision in the Agreement and/or may petition for a waiver under the Commission's *Quality of Service Rules*. In addition, TelNet's proposal would encourage litigation between the Parties over who is to blame for any violation.

Panel's Decision

The Panel concludes that the position and language proposed by TelNet, as modified by the Panel, be adopted for Issue 11. Verizon MI argues that the indemnification clause impermissibly expands the scope of the Commission's *Quality of Service Rules* and Verizon MI's obligations under the Agreement. Verizon MI also asserts that the *Quality of Service Rules* are limited to carrier's relationships with their retail customers and do not apply to contractual arrangements between carriers.³⁷ In its *Quality of Service Rules* Order, the Commission discussed the fact that CLECs frequently purchase services from ILECs on a wholesale basis in order to provide service to the CLECs' customers. The Commission recognized that if the ILEC provided poor quality of service to the CLECs that did not meet the Commission's quality requirements, the CLEC could be held in violation of the *Quality of Service Rules* and could incur fines and other costs.³⁸ In that proceeding, Verizon MI repeatedly took the opposite position that the federal law governing agreements required this issue be resolved by negotiation and arbitration.³⁹ On rehearing, the Commission deleted a recourse provision from an earlier version of the *Quality of Service Rules* and concluded that CLECs should address the matter of

³⁷ Verizon MI's PDAP at 30.

³⁸ Aug. 2002 *Quality of Service Order* at 31.

³⁹ *Id.* p. 32; Opinion and Order, *In the Matter, on the Commission's Own Motion, to Promulgate Rules Governing the Quality of Telecommunication Services*, Case No. U-13013, (Jan. 21, 2003) ("Jan. 2003 *Quality of Service Order*") at 7.

recourse against ILECs in their interconnection agreements. Specifically, the Commission stated: “In light of the recent decision of the federal Court of Appeals in *Verizon MI North Inc v Strand*, 2002 FED App. 0388P (6th Cir.), the Commission concludes that it should delete the recourse rule and that providers should address the matter in their interconnection agreements.”⁴⁰ Therefore, the Commission expects parties negotiating agreements to address this issue.

The Panel believes that TelNet’s proposed language, as modified by the Panel is reasonable. TelNet recommends it be reimbursed for fines and costs that are actually imposed upon TelNet “in proportion to Verizon MI’s contributory actions or omissions.”⁴¹ The Panel agrees with Verizon MI that TelNet did not define “fines and costs.” Therefore the Panel adopts the language originally proposed by the Commission in Rule 81.⁴² This recommendation addresses Verizon MI’s concern that “costs” are not defined in TelNet’s proposal.

Verizon MI asserts that TelNet can petition the Commission for a “permanent or temporary waiver or exception” from the Rules if it cannot meet a particular quality of service Rule.⁴³ The Panel disagrees. Several CLECs have petitioned the Commission for a waiver of the *Quality of Service Rules* because their compliance with the Rules was sometimes contingent upon the ILECs’ services.⁴⁴ The Commission denied their petitions, reasoning that the CLECs

⁴⁰ Jan. 2003 *Quality of Service Order* at 8.

⁴¹ TelNet PDAP at 27.

⁴² Aug. 2002 *Quality of Service Order*, Rule 81 at 18.

⁴³ Verizon MI Answer at 26-27.

⁴⁴ Opinion and Order, *In the Matter of the Application of LDMI Telecommunications, Inc., for a Limited Permanent Waiver of the Telecommunications Service Quality Rules adopted in Case No. U-13013*, Case No. U-13848 (Mar. 16, 2004) (“LDMI Waiver Order”); Opinion and Order, *In the Matter of the Application of McLeodUSA Telecommunications Services, Inc., for a Limited Permanent Waiver of the Telecommunications Service Quality Rules adopted in Case No. U-13013*, Case No. U-13866 (Mar. 16, 2004) (“McLeod USA Waiver Order”); Opinion and Order, *In the Matter of the Application of Sage Telecom, Inc., for a Limited Permanent Waiver of the Telecommunications Service Quality Rules adopted in Case No. U-13013*, Case No. U-13883 (Mar. 6, 2004) (“Sage Waiver Order”); Opinion and Order, *In the Matter of the Application of TDS Metrocom, LLC, for a Limited Permanent Waiver of the Telecommunications Service Quality Rules adopted in Case No. U-13013*, Case No. U-13822 (Mar. 16, 2004) (“TDS Waiver Order”); Opinion and Order, *In the Matter of the Application of XO Michigan, Inc., for a Limited Permanent Waiver of the Telecommunications Service Quality Rules adopted in Case No. U-13013*, Case No. U-13842 (Mar. 16, 2004) (“XO Waiver Order”).

should seek an interconnection agreement amendment that would limit its financial exposure for noncompliance. For example, in the *Sage Waiver Order*, the Commission found that “because Sage has the option of seeking an interconnection agreement amendment that limits its financial exposure for noncompliance with the timeframes for completing repairs under Rule 55, it is not necessary to approve the waivers requested for Rules 55 and 61(1)(b).”⁴⁵

In any event, the Panel does not believe that it is logical to presume that the Commission would grant waivers to CLECs relieving them from complying with the *Quality of Service Rules* for the reason that certain types of compliance are within the control of the ILECs, from whom the CLECs are purchasing wholesale services. If the Commission waived compliance in such situations, many CLECs’ customers would not have the protection that the *Quality of Service Rules* affords to the public.

The Panel also rejects Verizon MI’s argument that the indemnification clause is inconsistent with the Commission’s *Quality of Service Rules* and the other provisions of the Agreement. Since Verizon MI does not have a remedy plan similar to SBC Michigan’s Compromise Remedy Plan, the Parties need to incorporate the allocation of financial risks for noncompliance in the instant Agreement. TelNet’s proposed language closely tracks the Commission’s *Quality of Service Rules* orders and the Panel finds that TelNet’s proposal presents a more reasonable solution.

Issue 12: Verizon MI ICA, General Terms and Conditions §§ 21.1-21.7; TelNet ICA, General Terms and Conditions §§ 21.1-21.7

A. Should the requirement for insurance coverage be mutual for each Party?

⁴⁵*Sage Waiver Order*, p. 5.

B. Should TelNet be required to comply with Verizon MI's standard insurance requirements?

TelNet's Position

B. Verizon MI's insurance requirement is onerous and unnecessary. TelNet is ultimately responsible for its contractors, so its contractors need not be required to have the same level of insurance coverage. It is also burdensome for TelNet to name Verizon MI's innumerable affiliates as named insureds.

Verizon MI's Position

B. Yes. Verizon MI argues that TelNet should be required to meet Verizon MI's standard insurance requirements. Specifically, Verizon MI argues that TelNet should be required to maintain at least \$2 million in commercial general liability, commercial motor vehicle liability, and employer's liability insurance; excess liability (umbrella) insurance of at least \$10 million; and workers' compensation insurance as required by law.⁴⁶ Verizon MI's remaining insurance requirements are set forth in sections 21.1.5-21.7 of Verizon MI's proposed Agreement.⁴⁷

According to Verizon MI, these insurance requirements are justified because Verizon MI faces considerable risks to its network, facilities, equipment, and personnel arising out of its dealings with TelNet under the Agreement.⁴⁸ Thus, to protect itself, as well as TelNet and the general public, from such risks, Verizon MI requires CLECs with which it interconnects to maintain adequate insurance coverage.⁴⁹ Verizon MI further argues that its insurance coverage

⁴⁶ Verizon MI ICA, GTC §§ 21.1.1-21.1.4.

⁴⁷ *Id.*, GTC §§ 21.1.5-21.7.

⁴⁸ Verizon MI Answer at 30-31.

⁴⁹ *Id.*

requirements are commercially reasonable and consistent with industry standards, and routinely have been approved by both the FCC and state commissions.⁵⁰

Verizon MI claims that TelNet has offered no reasons for many of its proposed deletions of Verizon MI's insurance requirements.⁵¹ It further contends that TelNet's proposal to replace Verizon MI's insurance requirements with those in other agreements is unreasonable because those agreements were negotiated between the other parties, and, as the FCC has recognized, insurance requirements are unique to each carrier's individual risks and circumstances.⁵²

Verizon MI also argues that TelNet's objection to the requirement that its contractors maintain insurance coverage to cover the potential risks of their activities misses the point.⁵³ Without such coverage, Verizon MI may end up being forced to pay for damage that a TelNet contractor causes.⁵⁴

Finally, Verizon MI states that its proposed requirements are necessary to enforce TelNet's agreed-upon indemnification obligation in section 20.1 of the General Terms and Conditions.⁵⁵

Panel's Decision

The Panel has been informed that TelNet has withdrawn that portion of its proposal that would require Verizon MI to maintain the same level of insurance coverage that Verizon MI is requesting TelNet to maintain. Therefore, the Panel concludes that the position and language proposed by Verizon MI be adopted for this portion of Issue 12A.

⁵⁰ *Id.* at 31-34.

⁵¹ *Id.* at 34.

⁵² *Id.* at 34-35.

⁵³ *Id.* at 36.

⁵⁴ *Id.*

⁵⁵ *Id.*

The Panel concludes that the position and language proposed by TelNet be adopted for Issue 12B. The Panel notes that in the GTE/BRE interconnection agreement (which TelNet adopted and is now operating under), Verizon MI's predecessor required a much lower insurance level of \$500,000 per person and \$1,000,000 per occurrence of general liability if TelNet attached to a Verizon MI pole or occupied a Verizon MI conduit. In response to TelNet's argument that the old agreement had lower insurance requirements, Verizon MI states that the purpose of negotiating a new Agreement is to take into account changes in circumstances since the time of the old contract.⁵⁶ However, Verizon MI has not provided any evidence that a change in circumstances has occurred that warrant a requirement for TelNet to provide 12 times more insurance now than TelNet was previously required to provide to Verizon MI.

The Panel believes that TelNet has reasonably offered to increase its insurance coverage 5 times in an attempt to reach a compromise with Verizon MI. Furthermore, TelNet submitted an exhibit, attached to its Petition, which showed that in a commercial, arms-length environment, TelNet and Level 3 negotiated a collocation agreement in which Level 3 required TelNet to have \$1 million of general liability insurance.

Verizon MI asserts that its insurance requirements are consistent with the coverages Verizon MI itself maintains and requires of other carriers in its tariffs.⁵⁷ The Panel believes this assertion is irrelevant. The issue before the Panel is what insurance requirements are appropriate for this Agreement, not what Verizon MI requires of itself or other carriers that chose to obtain service from Verizon MI's tariffs.

The Panel also agrees with TelNet that TelNet will ultimately be responsible to Verizon MI for all work performed by its agents and subcontractors and that TelNet's agents and

⁵⁶ Verizon MI's PDAP at 43, n 138.

⁵⁷ *Id.* at 38.

subcontractors should not be required to individually and separately maintain the same high level of insurance that is required of TelNet. Such a requirement could severely limit the pool of contractors that TelNet is able to hire and unduly increase its costs of construction.

The Parties also disagree on whether TelNet should be required to list Verizon MI's numerous affiliates as named insureds. In its Answer, Verizon MI explains that TelNet could simply list Verizon MI's affiliates generically and would not have to name them individually. The Panel has been informed that, with this clarification, TelNet withdraws its previous objection to naming Verizon MI's affiliates as named insureds.

Issue 19: TelNet ICA, General Terms and Conditions § TBD

Should the Agreement include a pick-and-choose provision similar to the one in the SBC/Coast Agreement?

Panel's Decision

TelNet has advised the Panel that in light of the FCC's recent *All-or-Nothing Order*⁵⁸ that it will not pursue this issue. The Panel notes that the recent order was adopted after TelNet filed the original Petition and the Amendment to Petition. The Panel accepts TelNet's withdrawal of its proposed language.

Pricing Agreement and Tariff Rates

Issues 20, 84, 127 and 128: Verizon MI ICA, Pricing Attachment §§ 1.3.1-1.7; TelNet ICA, Collocation Attachment § TBD, Pricing Attachment §§ 1.3-1.4

Issue 20: Should TelNet be permitted to purchase the same service from either the Agreement or Verizon MI's tariff?

⁵⁸ Second Report and Order, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-164 (rel. July 13, 2004) ("*All-or-Nothing Order*").

Issues 84, 127(A) and 128: Should the Pricing Attachment in the Agreement govern Verizon MI's rates for services under the Agreement?

Issue 127(B): Should the rates in the Agreement be updated by Verizon MI's upcoming cost study?

TelNet's Position

Issue 20: Yes. TelNet should be permitted to purchase the same service from either the Agreement or approved tariff.

Issues 84, 127(A) and 128: Yes. The Pricing Attachment should govern the rates for services under the Agreement so that TelNet can plan service pricing to its customers and will not be subject to unilateral rate changes by Verizon MI.

Issue 127(B): Yes. Verizon MI's rates in the Pricing Attachment are excessive and should be updated with a new Verizon MI cost study.

Verizon MI's Position

Verizon MI proposes that rates for services under the Agreement should be governed by a party's tariffs, in the first instance. If there is no relevant tariff for a particular service, Verizon MI proposes that the price stated in the Agreement's Pricing Attachment (Appendix A) should govern. Under Verizon MI's proposal, any charges stated in the Pricing Attachment would be automatically superseded by applicable tariff charges, as well as by relevant orders of this Commission or the FCC. According to Verizon MI, this pricing hierarchy, which looks to tariffs as the primary source of prices, ensures nondiscriminatory pricing for all CLECs, in accordance with the Act and Michigan law. Verizon MI asserts that its proposal also protects against the unfair and anticompetitive rate arbitrage opportunities that TelNet proposes to secure for itself. Verizon MI emphasizes that its proposal does not undermine the tariff process, as does TelNet's

by allowing TelNet to both participate in Verizon MI's tariff filings and, if unhappy with the outcome, avoid the Commission-approved tariffs by claiming the continued benefit of the rates in the Agreement. Also, Verizon MI argues that its proposal, unlike TelNet's, does not attempt to unlawfully override mandates of the Commission or the FCC. As a result, Verizon MI asserts, its proposal is more efficient than TelNet's, which would require the relitigation of issues already decided in Commission-approved tariffs or other Commission or FCC actions.

Panel's Decision

In its Answer, Verizon MI groups Issues 20, 84, 127, and 128. All these issues deal with how pricing should be determined under the Agreement. Issues 20 and 127(B) are addressed separately below. Issue 127(A) is discussed with both Issues 84 and 128. Issue 127B.

Issue 20: Should TelNet be permitted to purchase the same service from either the Agreement or Verizon MI's tariff?

The Panel concludes that the position and contract language proposed by TelNet be adopted for Issue 20. TelNet is correct that the Commission has considered this issue on at least two other occasions and concluded that CLECs are permitted to purchase the same service from either the Agreement or approved tariff.⁵⁹ The Panel notes however that the Commission limited this ability and prohibited the CLEC from mixing and matching terms from the contract and the tariff for a particular order. As a result, if TelNet orders a service out of the Agreement, it must do so according to all the appropriate contract terms. If TelNet orders a service out of the tariff, all of the related tariff terms and conditions apply.⁶⁰

Issues 84, 127(A) and 128: Should Verizon MI be able to revise the Pricing Attachment by revising its tariff?

⁵⁹ TelNet PDAP at 39.

⁶⁰ *SBC/MCI Arbitration Order* at 6.

In Issue 84, the issue is whether Verizon MI should be required to establish contract pricing for the collocation services that it offers. In Issue 127A, the issue is whether contract pricing should control over tariff pricing or whether tariff pricing should control over contract pricing. Verizon MI wants tariff pricing to control. TelNet does not want Verizon MI to be able to increase the contract pricing by simply filing a tariff modification. Issue 128 is the same as Issue 127A. Combined with the right that TelNet seeks in Issue 20, above, TelNet would have the option of choosing the lower of the contract price or the tariff price.

The Panel concludes that the position and language proposed by TelNet be adopted for Issues 84, 127(A) and 128. The Panel believes that Verizon MI's position conflicts with the *SBC/MCI Arbitration Order* where the Commission concluded that the rates for collocation should be incorporated into the agreement from the ILEC's tariff as of a date certain and should not be subject to revision by the ILEC via tariff changes.⁶¹ The Panel believes that Verizon MI's proposal would place TelNet in the position of accepting contractual changes (via the tariff process) to which TelNet has not agreed. Therefore, any changes to the rates contained in the Pricing Attachment must be incorporated into the Agreement by way of an amendment agreed to by both parties after the execution of the Agreement.

The Panel also notes that Verizon MI's position conflicts with the position that Verizon MI argued in Federal Court. In *Verizon North I*, Verizon MI argued that if it were required to tariff its UNE rates, the arbitration and negotiation procedures of Section 252 of the Federal Act would be defeated. The Court agreed with Verizon MI and overrode the Commission's directive requiring Verizon MI to tariff its UNE rates.⁶² Ironically, as indicated above, Verizon MI is taking the position in this case that it can rely on its collocation tariff rates and does not have to

⁶¹ DAP, *SBC/MCI Arbitration* at 22.

⁶² *Verizon North, Inc. v. Strand*, 309 F.3d 935, 944 (6th Cir. 2002) ("*Verizon North I*").

subject them to the arbitration and negotiation procedures of Section 252 and argues that it does not have to incorporate such rates into the Agreement. As Verizon MI argued in Federal Court, relying exclusively on tariffed rates would deprive TelNet of the arbitration and negotiation procedures to which it is entitled under Section 252.⁶³ Verizon MI's proposed language would render the Pricing Attachment essentially meaningless since the pricing in the Agreement could change at any time.

The FCC also rejected a similar proposal by Verizon MI in the *Virginia Arbitration Order*.⁶⁴ There, Verizon made similar arguments that its proposal would (1) ensure that prices were consistent, fair, and non-discriminatory throughout the service area covered by the agreement; (2) avoid litigation by relying on the Virginia Commission's authority over rates; and (3) keep the agreement up-to-date without the need for further amendment if a tariff rate is revised during the term of the agreement.⁶⁵ The FCC rejected those arguments. The FCC further disagreed with the argument that a tariff was the necessary vehicle to ensure non-discriminatory rates throughout its service territories, stating that, "Consistent with the statute's recognition of parties' right to negotiate interconnection agreements, the parties are certainly free to agree that services will be provided pursuant to tariffs filed with the appropriate commission . . . [w]here the parties fail to agree, however, and ask a state commission to set rates or resolve other issues relating to the interconnection agreement, a carrier cannot use tariffs to circumvent the Commission's determinations under section 252."⁶⁶

⁶³*Verizon North, I*, 309 F.3d at 941.

⁶⁴*Memorandum Opinion and Order, Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd 27039 ¶ 590 (2002) ("*Virginia Arbitration Order*").

⁶⁵*Id.* ¶ 594.

⁶⁶*Id.* ¶ 602.

The Panel is especially concerned that to allow Verizon MI to supersede the rates in the Agreement with its tariffs will thwart TelNet’s statutory right to ensure that rates in the Agreement comply with the requirements of Sections 251 and 252.⁶⁷ Under Section 252(e)(6), “[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.” Under Verizon MI’s proposal, the new tariffed rates would not be subject to determination under section 252.

The Panel is aware that Verizon MI believes such an arrangement is unfair. However, the Commission, by giving CLECs the option to purchase either from the tariff or from the Agreement, and the Sixth Circuit in *Michigan Bell Telephone Company v. MCI Metro Access Transmission Services, Inc.*,⁶⁸ as shown above, have found it essential to competition to permit CLECs to have both price certainty and, at the same time, have the option to purchase from the tariff if rates decline. The Sixth Circuit concluded that “[t]hough MCI did not include in the interconnection agreement an express provision allowing it to opt into a tariff, allowing MCI to purchase under terms of Ameritech’s Michigan tariffs will ensure that competitors are able to buy on the most favorable terms available in a given local market. Michigan’s tariffs and the agreements negotiated pursuant to the Act work toward the common purpose of giving new entrants a means of competing with incumbent local exchange carriers.”⁶⁹ The Panel declines to override these policy decisions.

Issue 127(B): Should the rates in the Agreement be updated by Verizon MI’s cost study?

⁶⁷*Id.* ¶ 601.

⁶⁸ *Michigan Bell Telephone Company v. MCI Metro Access Transmission Services, Inc.*, 323 F.3d 348 (6th Cir. 2003)

⁶⁹*Id.* at 359.

The Panel concludes that the position and language proposed by TelNet be adopted for Issue 127(B). On Issue 127(B), the parties agree in principle that the rates may be updated by Verizon MI's new cost studies.⁷⁰ However, because of their differing positions on whether contract rates or tariff rates should have preeminence, the parties disagree on whether the new cost study rates should update the contract rates or update the tariff rates. Verizon MI takes the position that the tariff rates should be updated. TelNet takes the position that the contract rates should be updated. TelNet admits on page 1 of its Pricing Matrix that its position that the contract rates should be updated and amended is an exception to TelNet's general position of trying to achieve stable contract rates. However, TelNet points out one very crucial fact: as indicated above, Verizon MI does not tariff its UNE rates in Michigan. If Verizon MI did tariff its UNE rates, there would be no need for TelNet's proposal because under Issue 20 TelNet would have the option of purchasing UNE service off the tariff if UNE rates declined. Because Verizon MI does not tariff its UNE rates, TelNet would be deprived of the option of choosing lower rates if the new cost study results in lower rates.

TelNet asserts on page 1 of its Pricing Matrix that "Verizon MI's current cost study pricing is so excessive that TelNet believes a subsequent study will result in lower pricing, particularly given the fact that telecommunications is a declining cost industry." The Panel believes that the Commission's established policy of letting CLECs have the option of choosing declining rates should not be defeated simply because Verizon MI does not tariff certain rates,

⁷⁰ See Opinion and Order, *Application of MCIMetro Access Transmission Services LLC, MCI Telecommunications Corp., and Brooks Fiber Communications of Michigan for a Commission Investigation to Update the Total Element Long-Run Incremental Cost, Total Service Long-Run Incremental Cost, and Resale Cost Studies of Verizon North Inc. and Contel of the South, Inc. d/b/a Verizon North Systems*, Case No. U-13944, U-14013, 2004 Mich. PSC LEXIS 20 (MI P.S.C. Jan. 22, 2004) ("Verizon MI Cost Proceeding").

particularly UNE rates. If such rates decline in the next cost study, it is important that they be incorporated in the instant Agreement.

Successor Agreement

Issue 21: TelNet ICA, General Terms and Conditions § TBD, page 28.

Should the instant Agreement be the baseline agreement used to negotiate the Parties' successor Agreement?

TelNet's Position

To secure this Agreement as the baseline agreement in negotiating the Parties' successor Agreement would create much needed efficiency for the next negotiation. TelNet also recommends that the Party proposing the change bears the burden of proving that the change is "reasonable and in the public interest."

Verizon MI's Position

Verizon MI argues that because no one can predict the regulatory or other changes that may occur in the years until this Agreement expires, it makes no sense to require the Parties to use the Agreement as the basis for their future, successor agreement. Verizon MI further argues that TelNet's proposal is beyond the scope of this proceeding and would unlawfully override the Act's standards for approval of arbitrated agreements.

Panel's Decision

The Panel concludes that the language proposed by TelNet, as modified by the Panel, be adopted for Issue 21. The Panel believes that it would be far more efficient for the Parties to begin negotiations using the instant Agreement. The Panel does not agree with Verizon MI's assertion that changes that may occur during the three-year term of the instant Agreement are likely to be so dramatic that the parties would be better off starting from scratch. Nor does the

Panel agree that TelNet's proposal would waste the Parties' time and resources by eliminating the flexibility to easily tailor the next Agreement. In fact, the Panel believes that beginning with the instant Agreement will promote efficiency since both parties will have operated under the Agreement for some time and have an understanding regarding its terms and conditions. TelNet is reasonably concerned that, unless this provision is adopted, TelNet will again be forced to renegotiate from scratch as occurred in the instant negotiation. TelNet should not be forced to negotiate from a completely different baseline agreement every three years and potentially be required to redesign its network or re-plan its business strategy every three years. Such a consequence will inhibit a CLEC's ability to compete with the ILECs that already have strongholds in the market.

Verizon MI asserts that TelNet's recommendation is outside the scope of this proceeding. According to Verizon MI, "the Act permits state commissions to establish terms and conditions only for the agreement currently pending before them," and TelNet's proposal asks the Commission to prejudge the terms of a *future* agreement between the parties.⁷¹ The Panel disagrees. The fact that Verizon MI proposes to use an entirely new agreement undermines Verizon MI's claim that this issue is outside the scope of this proceeding.

While the Panel generally agrees with TelNet on this issue, the Panel does not agree with TelNet's proposal that the Party proposing the change bears the burden of proving that the change is "reasonable and in the public interest." The Panel notes that TelNet did not provide any citation to any statute or rule to support its proposed standard for changes to the baseline Agreement and the Panel notes that TelNet's proposal may in fact be unlawful.⁷² In addition, the Panel agrees with Verizon MI that TelNet's language would "straitjacket future negotiations"

⁷¹ Verizon MI PDAP at 59.

⁷² Verizon Answer at 23.

which is contrary to the Act's preference for negotiations.⁷³ The Panel finds that either Party may propose changes to the successor Agreement without having to demonstrate that the proposed change is reasonable and in the public interest.

Definition of Customer

Issue 28: Verizon MI ICA, Glossary § 2.28; TelNet ICA, Glossary § 2.28).

May another telecommunications carrier be a customer?

TelNet's Position

The definition of customer should be broad enough to include another telecommunications provider.

Verizon MI's Position

No. TelNet may use UNEs to provide services to other telecommunications carriers only in accordance with 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51. TelNet's proposal could be interpreted to allow TelNet to provide UNEs to other carriers in ways that are inconsistent with applicable law.

Panel's Decision

The Panel concludes that the position and language proposed by TelNet be adopted for Issue 28. The Panel notes that this very issue was presented to the Commission in the *SBC/MCI Arbitration Order* where the panel concluded that, "SBC Michigan's proposed language seeks to impermissibly limit the use of UNEs to provide telecommunications services...[and] is impermissibly restrictive and should not be included in the arbitration agreement."⁷⁴ Verizon MI has not presented any new information or evidence that would warrant a different conclusion. Verizon MI speculates that this definition would require Verizon MI to pay reciprocal

⁷³ *Id.*

⁷⁴ *DAP, SBC/MCI Arbitration* at 6.

compensation for calls from a Verizon MI customer to a customer of a third-party carrier. However, the Panel notes that Verizon MI's obligation for reciprocal compensation is determined by relevant provisions and applicable laws and will not change whether TelNet's proposed language is added or not.

Virtual NXX Traffic

Issues 32, 33, 40, 41 and 47: Verizon MI ICA, Interconnection Attachment §§ 6.5. 7.2.1, 7.2.9, Glossary §§ 2.46, 2.60, 2.99, 2.100; TelNet ICA, Interconnection Attachment §§ 6.5, 7.2.1, 7.2.9, Glossary § 2.46, 2.60, 2.99, 2.100

Should the Commission reverse its previous rulings that the NXX code determines whether a call is a local or long distance call and instead look to the geographic location of the end user?

TelNet's Position

The NXX code determines whether a call is a local call or a long distance call. Virtual NXX traffic is subject to reciprocal compensation as the Commission has ruled in several previous cases. The Commission should affirm its previous decisions.

Verizon MI's Position

A. **Reciprocal compensation.** Verizon MI argues that, under federal law, interexchange traffic, including VNXX traffic, is not subject to section 251(b)(5) reciprocal compensation.⁷⁵ Such traffic is "exchange services for . . . access," which is exempt from reciprocal compensation under section 251(g) of the Act and FCC Rule 51.701(b)(1). Because VNXX calls indisputably begin and end in different local calling areas, they are instead subject to access charges, a compensation regime that is preserved by section 251(g) of the Act. The FCC has expressly stated that it does not require payment of reciprocal compensation for VNXX

⁷⁵ See generally Verizon MI Answer at 59-73.

traffic. Likewise, twenty-one states — the overwhelming majority of states that have addressed this issue — have concluded that VNXX traffic is not subject to reciprocal compensation. The Commission’s rulings to the contrary — most of which predate the relevant federal precedent and were based on a different evidentiary record — put Michigan in a distinct minority, and provide no useful guidance in this case.

B. **Transitional Compensation.** Verizon MI argues that VNXX calls bound for Internet service providers (“ISPs”) are ineligible for transitional compensation, pursuant to the FCC’s *ISP Remand Order*.⁷⁶ The *ISP Remand Order* expressly states that such transitional compensation applies only to calls from an end user to an ISP’s equipment located *in the same local calling area*. Because VNXX ISP-bound calls indisputably are delivered to an ISP server located in a *different* local calling area than the end user, they are not eligible for such compensation.

Panel’s Decision

The Panel concludes that the position and language proposed by TelNet be adopted for Issue 32. Since the Parties have agreed that the resolution of this issue controls the outcome of Issues 33, 40, 41 and 47, the Panel concludes that the position and language proposed by TelNet be adopted for these issues as well.⁷⁷ The Panel notes that the Commission has addressed this issue many times, with the most recent being in the *SBC/MCI Arbitration Order*.⁷⁸ The Panel is not persuaded that it should reverse the Commission’s long established precedent that local calls include virtual NXX traffic calls.

⁷⁶ See *id.* at 69-70 and *ISP Remand Order*.

⁷⁷ Petition, Interconnection Attachment at Issue 32 and Verizon MI PDAP at 68, fn 195.

⁷⁸ *SBC/MCI Arbitration Order* at 41. See also *Opinion and Order, In the matter of the petition for arbitration to establish an interconnection agreement between TDS Metrocom, Inc., and Ameritech Michigan*, Case No. U-12952 (Sept. 7, 2001) at 24-25 (“*SBC/TDS Arbitration Order*”).

Verizon MI asserts that the record in this arbitration is different than other arbitrations in that the Commission did not address the specific legal argument as to whether VNXX traffic constitutes “exchange services for ... access” within the meaning of FCC Rule 51.701(b)(1).⁷⁹ Verizon also asserts that the scope of the Act’s reciprocal compensation obligations have been clarified since the Commission last reviewed this issue.⁸⁰

The Panel does not have the complete record of these past arbitrations. Therefore, the Panel recommends that the Commission review the record developed in this case, including Verizon MI’s assertions and TelNet’s response⁸¹ and determine if new circumstances warrant a change in Commission policy on these issues.

Issues 37 and 51: Verizon MI ICA, Interconnection Attachment 7.2, Glossary 2.80; TelNet ICA, Interconnection Attachment 7.2, 2.1.5; Glossary 2.80.

Should the Agreement specify types of traffic to which reciprocal compensation does not apply when the FCC or the Commission has concluded that some of the enumerated traffic is in fact subject to reciprocal compensation?

TelNet’s Position

No. Verizon MI is attempting to restrict its obligation to pay reciprocal compensation by explicitly stating that certain types of traffic are not subject to reciprocal compensation when in fact certain of the enumerated types of traffic are subject to the payment of reciprocal

⁷⁹ Verizon MI PDAP at 79.

⁸⁰ Verizon MI Answer at 67. Contrary to Verizon MI’s assertion, it appears that the FCC has yet to address the legal question of whether ILECs have an affirmative obligation under the Act to provide reciprocal compensation for virtual NXX traffic. See FCC 03-278, n. 63 (citing Memorandum Opinion and Order, *Application by Verizon Maryland Inc., et al. to Provide In-Region, InterLATA Services in Maryland, Washington, D.C. and West Virginia*, 18 FCC Rcd 5212, 5314, n. 603 (2003)).

⁸¹ See TelNet PDAP at 50-58.

compensation.⁸² TelNet’s proposed language would obligate the parties to pay reciprocal compensation for traffic as is required by applicable law.

Verizon MI’s Position

Verizon MI contends that the FCC’s rules state that traffic is not subject to reciprocal compensation if it is “exchange access, information access, or exchange services for such access.”⁸³ Verizon MI argues that it is important for the Agreement to clearly define what types of traffic fall within these three exempt categories and to carve such traffic out of the Parties’ intercarrier compensation obligations in order to avoid — or at least minimize — future disagreements relating to intercarrier compensation that would likely bring the Parties before the Commission again. Verizon MI states that its proposed language, described below, is designed to accomplish this goal, and does so by tracking applicable law, and in some instances, quoting it *verbatim* [emphasis in original].⁸⁴

Specifically, Verizon MI’s proposed contract language enumerates certain types of traffic that fall within these three categories and are thus exempt from reciprocal compensation.⁸⁵ They include: 1) Exchange Access, Information Access, or Exchange Services for Exchange Access or Information Access; 2) Internet Traffic; 3) Toll Traffic; 4) Optional Extended Local Calling Area Traffic; 5) special access, private line, or any other traffic that is not switched by the terminating party; 6) Tandem Transit Traffic; 7) Voice Information Service Traffic; 8) traffic that is not subject to reciprocal compensation under Section 251(b)(5) of the Act; 9) Virtual Foreign Exchange (“VNXX”) Traffic; and 10) traffic that does not originate and terminate in the same Verizon Local Calling Area.

⁸² TelNet PDAP at 66.

⁸³ 47 C.F.R. § 51.701(b)(1).

⁸⁴ See Verizon MI Answer at 88.

⁸⁵ Verizon MI ICA, Glossary § 2.80; *id.*, Interconnection Attach. § 7.2.

Panel's Decision

Issue 37 concerns the Agreement's definition of "reciprocal compensation traffic" in section 2.80 of the Glossary. Issue 51 concerns the substantive provisions in section 7.2 describing the types of traffic that are not subject to reciprocal compensation. Because of this overlap, the Parties have agreed that the resolution of Issue 51 will control the resolution of Issue 37. The Panel concludes that the position and contract language proposed by TelNet be adopted for Issues 37 and 51. The Panel has two concerns with the language proposed by Verizon MI. First, as explained in greater detail below, Verizon MI's language conflicts with existing Commission policy regarding reciprocal compensation for information services traffic. Second, it would appear that Verizon MI's language could have the potential to exclude new types of traffic (*e.g.*, Voice over IP ("VoIP")) from reciprocal compensation obligations before any state or federal determination was made as to whether reciprocal compensation applies to VoIP. The Panel does not believe that such an outcome would advance Verizon MI's goal of avoiding future disputes. The Panel believes the more prudent policy is to wait for a decision by either the Commission or the FCC as to the applicability of reciprocal compensation to VoIP traffic and then determine what changes, if any, need to be made to the Agreement.

The Panel also believes that TelNet's language is precise enough to avoid future litigation because it restricts the applicability of reciprocal compensation as "required by applicable law."

The Parties will not be able to argue that a certain type of traffic is entitled to reciprocal compensation unless the FCC, the Commission or other applicable law requires. As discussed below, in some cases the FCC and/or the Commission has explicitly found that some of the categories of traffic in Verizon MI's proposed language are subject to reciprocal compensation:

- (1) Information Services Traffic

Verizon MI's proposed language conflicts with the Commission's *SBC/MCI Arbitration Order*, where the Commission rejected arguments that all information services traffic be exempted from reciprocal compensation. The Commission's decision was influenced by the FCC's *Virginia Arbitration Order* concerning the scope of reciprocal compensation:

We disagree with Verizon's assertion that every form of traffic listed in section 251(g) should be excluded from section 251(b) reciprocal compensation. In remanding the ISP Intercarrier Compensation Order to the Commission [FCC], the D.C. Circuit recently rejected the Commission's earlier conclusion that section 251(g) supports the exclusion of ISP-bound traffic from section 251(b)(5) reciprocal compensation obligations. Accordingly, we decline to adopt Verizon contract proposals that appear to build on logic that the court has now rejected.⁸⁶

(2) Voice Information Service Traffic

The Commission in the *SBC/MCI Arbitration Order* rejected SBC's argument that traffic listed in Section 251(g) should be excluded from reciprocal compensation.⁸⁷ Verizon MI does not offer any other independent argument here. If the Act or the FCC does not require reciprocal compensation for voice information service traffic, TelNet's language would not be interpreted in any way to allow such reciprocal compensation. The Panel notes that Verizon MI has not cited any authority other than the same argument based on Section 251(g) to support its claim that voice information is not subject to reciprocal compensation.

(3) Traffic that is not subject to reciprocal compensation under Section 251(b)(5) of the Act: The Panel notes that this proposed language is similar to TelNet's proposed language that reciprocal compensation does not apply to any type of traffic for which a party is not required to pay reciprocal compensation under applicable law.

⁸⁶*SBC/MCI Arbitration Order* at 42 (quoting from the *Virginia Arbitration Order* ¶ 261).

⁸⁷ *Id.*

(4) Virtual foreign exchange (VNXX) traffic: As explained with respect to Issue 47, it is the law in Michigan that virtual foreign exchange traffic is local traffic and thus subject to reciprocal compensation.

(5) Traffic that does not originate and terminate in the same Verizon MI local calling area: Verizon MI's proposed language is inconsistent with prior Commission's rulings that for purpose of intercarrier compensation, local calling is not defined by the physical location for the end-user customer.⁸⁸ Contrary to Verizon MI's argument, the law is clear in Michigan that the geographic location of the calling and called parties is not the determinative factor for assessing whether traffic is local or inter-exchange traffic for the purpose of reciprocal compensation.

The Panel believes that Verizon MI's criticism of TelNet's reliance on the *Virginia Arbitration Order* to support its position is misplaced. Even if the *Virginia Arbitration Order* is not a binding precedent, the Panel's decision is based on this Commission's previous rulings. Nevertheless, the *Virginia Arbitration Order* provides a good guide in resolving the similar issues in this arbitration.

Verizon MI also makes a self-contradictory argument that "in light of the fluctuating state of the law in this area, it is essential that the Agreement state as precisely as possible the boundaries of the parties' reciprocal compensation obligations."⁸⁹ But Verizon MI's proposed language attempts to exclude some traffic that is clearly or may be subject to reciprocal compensation. Under TelNet's proposed language, the parties would only pay reciprocal compensation for the traffic that is required by applicable law. TelNet's language is thus not vague and ambiguous because it calls for affirmative obligations under applicable law. Whereas

⁸⁸*Id.*

⁸⁹Verizon MI Answer at 95.

Verizon MI's clear-cut language would permit Verizon MI to avoid certain of its obligations in violation of either federal or state applicable law.

Voice Information Services Traffic

Issue 43: Verizon MI ICA, Additional Services Attachment 5.1; TelNet ICA, Additional Services Attachment 5.1

Should voice information service traffic be subject to reciprocal compensation?

TelNet's Position

Yes. There is no basis for excluding voice information service such as horoscope and weather services from reciprocal compensation obligations. These types of calls can not even be identified or distinguished from other traffic. In Issue 105, in the *SBC/MCI Arbitration Order*, the Commission ruled that information service is subject to reciprocal compensation.

Verizon MI's Position

No. Verizon MI contends that voice information services traffic represents "information access," which the FCC ruled in its *ISP Remand Order* is exempt from reciprocal compensation.⁹⁰ As explained earlier, FCC Rule 51.701(b)(1), which embodies that exemption, remains good law. The definition of "information access" under the FCC's rules is very broad, encompassing "all access traffic that [is] routed by a LEC 'to or from' providers of information services."⁹¹ The definition of "information services" is also broad, and encompasses the voice-based information services that are at issue here. Accordingly, this traffic is not subject to reciprocal compensation under the Act and the FCC's rules.

Verizon MI notes that a contrary result, aside from being inconsistent with the law, would create opportunities for regulatory arbitrage: subjecting one-directional traffic such as voice

⁹⁰ Verizon MI Answer at 99.

⁹¹ *ISP Remand Order* ¶ 44.

information services traffic to reciprocal compensation would encourage carriers to target providers of such services as customers in order to receive compensation without ever having to “reciprocate.”⁹² The FCC has actively sought to eliminate such incentives, finding that they lead to serious market distortions. Finally, as other state commissions have found, voice information services traffic can be easily identified so that it may be subject to the proper intercarrier compensation rules.

Panel’s Decision

The Panel concludes that the position and contract language proposed by TelNet be adopted for Issue 43.

“Voice information services” consist of recorded voice announcement information (for example, weather forecasts) and vocal discussion programs open to the public (such as 976 chat services). There does not appear to be any dispute between the Parties on this definition.⁹³ Their dispute instead concerns whether a carrier can collect reciprocal compensation for terminating such traffic.

Consistent with the Panel’s conclusion for Issues 37 and 51, this issue was been decided by the Commission in the *SBC/MCI Arbitration Order*. In that proceeding, the Commission concluded that all information services traffic be subject to reciprocal compensation. In this proceeding, Verizon MI contends that voice information services traffic represents information access. The Panel does not have the complete record developed in the SBC/MCI arbitration and therefore is unable to determine if the specific subset of voice information services was specifically analyzed by the Commission. However, based on Verizon MI’s arguments that the

⁹² Verizon MI Answer at 105-106.

⁹³ See Verizon MI ICA, Additional Services Attach. § 5.1 (“Voice Information Service means a service that provides [i] recorded voice announcement information or [ii] a vocal discussion program open to the public”); TelNet ICA, Additional Services Attach. § 5.1 (same).

FCC’s definition of information access includes all access traffic (including voice information services) to and from providers of information services,⁹⁴ the Panel must conclude that the Commission’s existing policy to include all information services in the reciprocal compensation regime must also include voice information services.

The Panel notes Verizon MI’s assertion that the *SBC/MCI Arbitration Order* does not provide guidance in this case. Verizon MI contends that SBC did not make the same arguments as Verizon MI makes in this arbitration. Verizon MI also contends that the FCC’s *ISP Remand Order* is still valid law and therefore should be considered by the Commission. Finally, Verizon MI contends that the Commission’s reliance on the *Virginia Arbitration Order* overlooked the true nature of the discussion. According to Verizon MI, the Bureau staff did not decide the specific question as to whether reciprocal compensation applies to voice information services traffic.⁹⁵

As discussed under Issues 32, 33, 40, 41, and 47, Verizon MI should bring these issues to the Commission and the Commission can decide if there are new circumstances to warrant a change in policy. As TelNet correctly states, “[t]his issue is a matter that Verizon MI needs to raise with the MPSC.”⁹⁶

Issues 34 and 45(A): Verizon MI ICA, Interconnection Attachment 1, Glossary 2.71; TelNet ICA, Interconnection Attachment 2.1.1, 2.1.5; Glossary 2.71.

Should TelNet be responsible for both delivering its traffic to Verizon MI and picking up Verizon MI’s traffic from Verizon MI?

Issues 45(B) and 48: Verizon MI ICA, Interconnection Attachment 1, 2.1, 7.1; TelNet ICA, Interconnection Attachment 2.1.1., 2.1.2, 2.1.5, 2.1.6, 7.1.

⁹⁴ Verizon PDAP at 105.

⁹⁵ *Id.* at 112-114.

⁹⁶ TelNet PDAP at 73.

Should the reciprocal compensation be mutual and reciprocal so that TelNet be permitted to recover the cost for transporting Verizon MI's originating traffic to TelNet's network?

TelNet's Position

Issues 34 and 45(A): Absolutely not. Verizon MI must accept the cost responsibility for delivering its traffic to TelNet just like TelNet accepts the full cost responsibility for delivering its traffic to Verizon MI. Verizon MI's proposal that TelNet be required to pick up Verizon MI's traffic from Verizon MI's network means that TelNet would be responsible for both delivering traffic to Verizon MI and picking up Verizon MI's traffic from Verizon MI. TelNet agrees to deliver its traffic to a POI on Verizon MI's network, but Verizon MI is responsible for delivering its traffic to TelNet.

Issues 45(B) and 48: Yes. TelNet and Verizon MI should have the mutual and reciprocal right to recover the costs for transporting the other party's originating traffic to be terminated on its network.

Verizon MI's Position

Issues 34 and 45(A): Yes. As an initial matter, TelNet's PDAP attempts to confuse the issues raised in Issues 34 and 45(a), which are limited to a single question: should Verizon MI dedicated facilities built out to TelNet, at TelNet's request, be considered "on Verizon's network" for purposes of establishing the POI for TelNet's traffic?⁹⁷ Verizon MI notes that TelNet has failed to even address this limited question, and instead argues that *Verizon MI*

⁹⁷ Specifically, Verizon proposes the following language: "Each Party shall provide to the other Party . . . interconnection at (i) any technically feasible Point(s) of Interconnection on Verizon's network in a LATA and/or (ii) a fiber meet point to which the Parties mutually agree under the terms of this Agreement for the transmission and routing of Telephone Exchange Service and Exchange Access." Verizon MI ICA, Interconnection Attach. § 2.1.1. Under Verizon MI's definition of the POI, a TelNet switch could not serve as a POI because it is not on Verizon MI's network. Verizon MI ICA, Glossary § 2.71 ("[A] technically feasible Point of Interconnection on Verizon's network . . . would not include a TelNet Wire Center, TelNet switch or any portion of a transport facility provided by Verizon to TelNet or another party between (x) a Verizon Wire Center or switch and (y) the Wire Center or switch of TelNet or another party.").

should be required to drop *its* traffic off to TelNet at a TelNet switch location. However, the issue of where Verizon MI must drop off its traffic to TelNet is addressed in Issue 45(b). Thus, because TelNet has failed to justify its refusal to accept Verizon MI's proposed contract language, which makes it clear that TelNet may not drop its traffic off to Verizon MI at a TelNet switch, the Panel should adopt Verizon MI's proposal.⁹⁸

Verizon MI further argues that its proposals in Issues 34 and 45(a) are consistent with the text and logic of multiple FCC rules and orders that establish that Verizon MI's network, for purposes of designating a POI, does *not* include Verizon MI dedicated facilities built out to TelNet's network. Permitting a CLEC to define these facilities, which are built to serve the CLEC and not the public at large, as part of Verizon MI's network invites regulatory arbitrage. For example, a CLEC could order an access facility to its switch, requiring Verizon MI to build dedicated facilities to the CLEC's premises. The CLEC could then cancel access service while claiming the right to designate its switch as an acceptable POI because it was now connected to Verizon MI's "network." Verizon MI argues that nothing in the Act contemplates such an unreasonable practice.

Issues 45(B) and 48: Verizon MI argues that, as in Issues 34 and 45(a), TelNet's PDAP utterly confuses the Parties' dispute with respect to the two narrow questions at the heart of Issues 45(b) and 48. The first issue, according to Verizon MI, is whether Verizon MI may use the *same* POI chosen by TelNet. And the second issue involves the appropriate reciprocal compensation charges each Party may charge the other for terminating traffic on its side of the POI.

⁹⁸ TelNet agrees "that the FCC's rules state that Verizon must allow TelNet to interconnect with Verizon at any technically feasible point within Verizon's network," but does not agree to Verizon MI's proposed contract language that TelNet's switch locations are *not* within Verizon MI's network.

With respect to the first issue, Verizon MI maintains that POIs are for the *mutual* exchange of traffic, and that TelNet may not therefore pick one POI for handing off traffic to Verizon MI, but designate another POI for Verizon MI to hand off traffic to TelNet. Moreover, as discussed in Issue 45(a), a TelNet switch is not on Verizon MI's network and thus cannot constitute a POI.

With respect to the second issue, Verizon MI argues that the Commission has already determined that the compensation for carrying another carrier's traffic from the POI to the terminating switch should consist of the end office or tandem office reciprocal compensation rates. TelNet's proposal to charge Verizon MI both the reciprocal compensation rates approved by the Commission and *an additional* transport charge when Verizon MI delivers its traffic to the same POI TelNet uses to deliver its traffic is therefore contrary to law.

Panel's Decision

After reviewing the issues and the presentations by the Parties, the Panel has consolidated Issues 34, 45(A), 45(B) and 48 and concludes that the language proposed by Verizon MI be adopted. These issues relate to where the POI will be located, whether it will be used for the mutual exchange of traffic, and the compensation that follows from this arrangement.

1. Location of the POI and whether it will be used for the mutual exchange of traffic: While TelNet agrees to deliver its originating traffic to a POI on Verizon MI's network the parties disagree as to whether Verizon MI has an obligation to deliver its originating traffic to a POI on TelNet's network. TelNet has proposed to delete Verizon MI's language that lists examples of permissible locations on Verizon MI's network for POIs,⁹⁹ and instead states that

⁹⁹ Verizon MI ICA, Glossary § 2.71 (“[A] technically feasible Point of Interconnection on Verizon's network in a LATA would include an applicable Verizon Tandem Wire Center or Verizon End Office Wire Center[.]”).

the default POI for *Verizon MI*'s traffic will be "at each respective *TelNet Switch* serving the terminating TelNet end user."¹⁰⁰

The Panel agrees with Verizon MI and concludes that the Agreement should make clear that a TelNet switch location is not "on Verizon's network" and therefore cannot constitute a POI.¹⁰¹ The Panel agrees with Verizon MI that under the Act and the FCC's rules, Verizon MI must allow TelNet to interconnect its network "at any technically feasible point within" Verizon MI's network.

An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network . . . [a]t any technically feasible point *within the incumbent LEC's network*[.]¹⁰²

TelNet may therefore designate a POI, but that POI must be "technically feasible" and "within [Verizon MI's] network." The FCC's still-effective rule on permissible locations for a POI provides that the locations "within the incumbent LEC's network" could include "the line-side of a local switch," "the trunk-side of a local switch," "the trunk interconnection points for a tandem switch," and "[c]entral office cross-connect points."¹⁰³ Such locations are all at Verizon MI's own switches.

TelNet insists, however, that Verizon MI hand off *its* traffic at *TelNet's switch* if the Parties do not mutually agree that Verizon MI can hand off its traffic at the same POI TelNet has selected to hand off its traffic to Verizon MI. TelNet asserts that Verizon MI's proposal misinterprets the FCC's rules.¹⁰⁴ According to TelNet, while the Act imposes on ILECs the duty

¹⁰⁰ TelNet ICA, Interconnection Attach. § 2.1.1 (emphasis added); *see also id.*, Glossary § 2.71 (deleting examples of locations on Verizon MI's network from the definition of the "POI").

¹⁰¹ Under Verizon MI's proposed language, therefore, an appropriate POI "would not include a TelNet Wire Center, TelNet switch or any portion of a transport facility provided by Verizon to TelNet or another party[.]" Verizon MI ICA, Glossary § 2.71.

¹⁰² 47 C.F.R. § 51.305(a) (emphasis added); *see also* 47 U.S.C. § 251(c)(2)(B).

¹⁰³ 47 C.F.R. § 51.305(a)(2).

¹⁰⁴ TelNet PDAP at 59.

to permit interconnection with its network, the term interconnection does not include transport and termination of traffic.¹⁰⁵ TelNet states that Verizon MI's proposal would shift costs to TelNet by requiring TelNet to bear the cost of transporting Verizon MI's originating traffic from the POI back to TelNet's network. Therefore, TelNet concludes that this concept violates the FCC rules regarding reciprocal compensation because TelNet would be paying to transport traffic that originated on Verizon MI's network.¹⁰⁶

In support of its position, TelNet cites the *Virginia Arbitration Order* which states that, "competitive LECs may request interconnection at any technically feasible point ... to the extent an incumbent LEC delivers to the point of interconnection its own originating traffic that is subject to reciprocal compensation, the incumbent LEC is required to bear financial responsibility for that traffic."¹⁰⁷

The Panel agrees with Verizon MI that TelNet's position violates the FCC's rules in two ways. First, TelNet may not pick its switches as POI locations. Second, POIs are for the *mutual* exchange of traffic and thus TelNet may not select one POI for Verizon MI's traffic and another for its own. Verizon MI's position is supported by the plain language of 47 C.F.R. § 51.5, which provides that interconnection is the "linking of two networks for the *mutual exchange of traffic*."¹⁰⁸ Thus, while TelNet has the right to select the location of the POI or POIs on Verizon MI's network, Verizon MI must be permitted to hand off its traffic to TelNet at the *same* POI location on Verizon MI's network chosen by TelNet; otherwise, a POI would not be a point of *mutual* traffic exchange.¹⁰⁹

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 60.

¹⁰⁷ *Id.* at 62, (citing *Virginia Arbitration Order* ¶ 52).

¹⁰⁸ 47 C.F.R. § 51.5 (emphasis added).

¹⁰⁹ Likewise, if TelNet chooses *several* POIs on Verizon MI's network for handing off its traffic to Verizon MI, as permitted by the FCC, the Panel finds that Verizon MI should be permitted to decide which one (or more) of those POIs on Verizon MI's network to use to hand off its traffic to TelNet because each POI is for the mutual exchange

As Verizon MI correctly notes, TelNet’s proposal is also inconsistent with the *Virginia Arbitration Order*, which recognized that, “under the petitioners’ proposals, each party would bear the cost of delivering its originating traffic to *the point of interconnection designated by the competitive LEC*.”¹¹⁰ The Bureau held further:

The “single point of interconnection” rule benefits the competitive LEC by permitting it to interconnect for delivery of *its* traffic to the incumbent LEC network at a single point. It does not preclude the Parties from agreeing that the incumbent may deliver its traffic to a different point or additional points *that are more convenient for it*.¹¹¹

Thus, the “single point of interconnection rule” entitles Verizon MI to deliver its traffic to the POI “designated by the competitive LEC” on Verizon MI’s network, unless Verizon MI agrees to deliver its traffic to other, alternative locations. In other words, it is Verizon MI’s choice, not TelNet’s, to request a different POI arrangement for delivering Verizon MI traffic to TelNet because logically, only Verizon MI, not TelNet, would be able to determine what interconnection arrangement is most efficient for Verizon MI.

For its part, TelNet argues that it is not “responsible for establishing a part of the network to pick up Verizon’s traffic from Verizon,” and so TelNet should not be required to use the facilities it builds out to Verizon MI’s network to carry Verizon MI’s traffic from the POI back to the TelNet switch.¹¹² According to TelNet, Verizon MI is attempting to burden TelNet with the obligation of building the facilities required to deliver Verizon MI’s traffic to TelNet.¹¹³

TelNet argues further that “Verizon wants no network or cost responsibility to transport its own

of traffic. *Id.* § 51.305(a)(2); Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 ¶ 112 (2001).

¹¹⁰ *Virginia Arbitration Order* ¶ 53 (emphasis added).

¹¹¹ *Id.* ¶ 71 (emphases added).

¹¹² TelNet Petition, Interconnection Attach. at 10 (emphasis); *see also id.*, Glossary at 13 (“Verizon is attempting to force TelNet to bear the cost of both delivering its traffic to Verizon and picking up Verizon’s traffic from Verizon”).

¹¹³ TelNet Petition, Interconnection Attach. at 10-11.

traffic from its own network to TelNet’s network.”¹¹⁴ The Panel rejects this argument.

TelNet’s argument ignores the FCC’s interconnection rules. The POI is the location where Verizon MI’s network and TelNet’s network meet, and the Parties agree that they each are responsible for bringing their own traffic to the POI. But as discussed above, the FCC’s rules plainly state that the POI must be located *on Verizon MI’s network*, and FCC rules make clear that Verizon MI must be permitted to hand off its traffic at the *same POI* TelNet has selected to hand off its traffic. Therefore, TelNet has the responsibility to both deliver its originating traffic to the POI on Verizon MI’s network that it selects — presumably with an eye towards minimizing costs¹¹⁵ — and to pick up Verizon MI’s originating traffic at that same location. Verizon MI has a reciprocal obligation to deliver and receive traffic from points on its network within a given LATA to the POI chosen by TelNet.¹¹⁶

TelNet also attempts to support its argument by claiming that requiring TelNet to carry its traffic to a POI on Verizon MI’s network somehow constitutes a “charge” assessed by Verizon MI in violation of 47 C.F.R. § 51.703.¹¹⁷ The Panel disagrees and concludes that the fact that TelNet has chosen to do business in Michigan and must, consistent with the FCC’s rules, build facilities to Verizon MI’s network for the purposes of exchanging traffic does not constitute a charge “imposed by Verizon MI.” The Panel finds equally unpersuasive TelNet’s attempts to buttress its argument with precedent from the Fourth and Fifth Circuits and the Wireline

¹¹⁴ *Id.* at 12.

¹¹⁵ See Verizon MI PDAP at 118-119 (As Verizon MI explains, it is responsible for transporting traffic from points throughout its LATA-wide network to the POI chosen by TelNet (on Verizon MI’s network), and thus bears significant transport expense. Moreover, TelNet chooses the POI and may therefore choose, for example, the Verizon MI switch that is closest to TelNet’s hub. In short, TelNet’s claim that Verizon MI’s proposal allows Verizon MI to control which Party bears the most transport costs is not correct. Because TelNet chooses the POI, it has considerably more control over the Parties’ relative transport costs than does Verizon MI).

¹¹⁶ Memorandum Opinion and Order, *TSR Wireless, LLC v. U.S. West*, 15 FCC Rcd 11166 (2000), cited by TelNet in its PDAP at 74, is not to the contrary. That case involved an ILEC’s attempt to assess charges to interconnecting CLECs for dedicated and shared transmission facilities used to deliver ILEC-originated traffic *to the POI*. No similar charges are at issue in this case.

¹¹⁷ TelNet PDAP at 61.

Competition Bureau.¹¹⁸ In *MCImetro*¹¹⁹ and *Southwestern Bell*,¹²⁰ the ILECs sought to charge the CLECs for carrying *ILEC-originated traffic to a POI*. But as discussed above, Verizon MI's proposed Agreement recognizes that Verizon MI is responsible for carrying its traffic to the POI, and that it must pay TelNet the appropriate reciprocal compensation rate for taking Verizon MI's traffic at the POI and terminating it on TelNet's network. Neither opinion addressed the question at hand: whether the POI is for the mutual exchange of traffic. Thus, FCC Rule 51.703 only precludes a LEC from assessing charges on other carriers for transporting the LEC's traffic *to the POI*.

Similarly, the Panel finds no merit in TelNet's claim that Verizon MI's proposal is similar to the GRIP ("geographically relevant interconnection points") and VGRIP ("virtually geographically relevant interconnection points") proposals made by Verizon in the Virginia arbitration. As Verizon MI explains, Verizon's GRIPs/VGRIPs proposal would have required CLECs, in some cases, to bear some of the costs of transporting Verizon-originated traffic on Verizon's side of the POI as well as some of the costs in transporting TelNet-originated traffic on Verizon's side of the POI.¹²¹ In this proceeding, by contrast, Verizon MI has agreed to bear *all of the cost* of transporting both Parties' traffic on Verizon MI's side of the POI within Verizon MI's service territory within a LATA. Because Verizon MI's proposal here is not the same as —

¹¹⁸ TelNet PDAP at 62-64.

¹¹⁹ *MCImetro Access Transmission Services, Inc. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872 (4th Cir. 2003).

¹²⁰ *Southwestern Bell Telephone Co. v. Public Utils. Comm'n of Texas*, 348 F.3d 482 (5th Cir. 2003).

¹²¹ Specifically, Verizon MI explains that its VGRIP proposal required the CLEC at a minimum to establish "IPs" at each Verizon tandem in a LATA where Verizon would drop off its originating traffic and the CLEC was given the option to either deliver its originating traffic to the Tandem switch that is subtended by an end office switch serving Verizon's customer or providing transport to the serving end office switch. Verizon's "GRIPs" proposal required the CLEC to give Verizon an "IP" in every local calling area where Verizon could drop off its originating traffic and the CLEC was given the option to either deliver its originating traffic to the Tandem switch that is subtended by the end office switch that serves a Verizon customer or providing transport to the serving end office switch. Verizon MI explains, however, that its current proposal, by contrast, requires Verizon to bear all the costs of transporting traffic (both traffic that it originates and traffic that it terminates) to a single POI (which may be at a Verizon end office or tandem switch) as selected by the CLEC.

and, in fact, is significantly different from — its GRIPs/VGRIPs proposal, the Panel finds that the Bureau’s previous GRIPs/VGRIPs rulings are irrelevant to the current proceeding. Indeed, TelNet has provided absolutely no evidence that Verizon MI’s proposal here is similar to the proposal made in the Virginia arbitration, and in fact, has not even explained what Verizon’s GRIP/VGRIP proposal contained.

The Panel notes that TelNet does not seriously contest that the FCC’s rules provide for the mutual exchange of traffic at the POI. Indeed, TelNet admits that interconnection is for the “mutual exchange of traffic,” but notes that the term “interconnection” does not include “transport and termination of traffic.”¹²² The Panel believes that TelNet misses the point. Rule 51.5 addresses two *separate* activities: first, the Parties interconnect their traffic at the POI, and second, each Party transports and terminates the traffic of the other Party on its side of the POI. Thus, TelNet’s observation does not undermine Verizon MI’s position that, physically, it may hand its traffic off to TelNet at the same POI TelNet has chosen for handing its traffic off to Verizon MI.

Finally, the Panel rejects TelNet’s claim that allowing Verizon MI to drop off its traffic at the same POI chosen by TelNet for dropping off its traffic to Verizon MI violates Section 252(d)(2), which provides for the “mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier.” As Verizon MI correctly notes, TelNet’s claim is irrelevant to this issue of where, physically, Verizon MI may drop off its traffic to TelNet. In any event, the Panel addresses TelNet’s claim about transport and termination rules next.

¹²² TelNet PDAP at 75 (“Interconnection under section 251(c)(2) is defined in the Code of Federal Regulations as ‘the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.’”) (quoting 47 C.F.R. § 51.5).

Compensation: This section addresses how each Party is to be compensated for carrying the other Party's traffic *from the POI* to its network.

The Panel adopts Verizon MI's proposal that each Party would bear the costs of carrying its originating traffic *to the POI*, chosen by TelNet, and then would charge the other Party the Commission-approved reciprocal compensation rates for taking the other Party's traffic *from the POI* and terminating it on its side of the POI.

Under the Act and FCC rules, local exchange carriers are required to establish "reciprocal compensation" arrangements to compensate each other for terminating calls on their respective networks. The FCC has specified that the reciprocal compensation rates a CLEC charges an ILEC must be "equal to those that the incumbent LEC assesses upon the other carrier for the same services."¹²³ Thus, the reciprocal compensation rates that TelNet charges Verizon MI must be the same as the reciprocal compensation rates that the Commission has directed Verizon MI to charge TelNet.

The question is, therefore, what costs should be *included* in the reciprocal compensation rates. The FCC's rules are clear that reciprocal compensation charges are the only charges that may be assessed by one carrier for terminating the traffic of another carrier.¹²⁴ As Verizon MI correctly notes, the Commission has already decided this issue, finding that reciprocal compensation rates should include the end office or tandem office switching rates, as applicable, for terminating a local call originating on the other carrier's network.¹²⁵ The Panel rejects TelNet's attempt to add an additional charge on top of the Commission-approved reciprocal

¹²³ 47 C.F.R. § 51.711(a)(1).

¹²⁴ See *id.* §§ 51.701-51.717.

¹²⁵ See Verizon MI ICA, Interconnection Attach. § 7.1 & Pricing Attach., Appendix A; see also Opinion and Order, *On the Commission's Own Motion, to Consider the Total Service Long Run Incremental Costs for All Access, Toll, and Local Exchange Services Provided by GTE North Incorporated*, Case No. U-11832, 2000 Mich. PSC LEXIS 165, at *67 (MI P.S.C. May 3, 2000) ("GTE Rate Order") (approving reciprocal compensation rates set forth in Agreement).

compensation rates. In particular, TelNet proposes deleting the language in Verizon MI's proposal that ties reciprocal compensation charges to the POI so that TelNet will be able to charge Verizon MI "transport charges" when TelNet transports and terminates a call originating on Verizon MI's network.¹²⁶ According to TelNet, "Verizon's traffic is delivered far beyond the POI Verizon is advocating. If TelNet or a third carrier has to expend its resources to transport Verizon's traffic beyond the POI, they should receive standard industry compensation."¹²⁷

The Panel believes that TelNet's position is flawed in several respects. First, the Commission has already determined that reciprocal compensation for transport and termination should consist of *only* the end office or tandem office reciprocal compensation rates, so TelNet will, in fact, receive "standard industry compensation."¹²⁸ It is therefore inappropriate for TelNet to request this Panel to change the Commission-established reciprocal compensation rates in this proceeding. Second, TelNet may charge "asymmetrical rates" but only if it "proves to the state commission on the basis of a [forward-looking] cost study . . . that a higher rate is justified."¹²⁹ If TelNet believes that its costs are greater than Verizon MI's and that it will not be adequately compensated by the current reciprocal compensation rates, it may, as required by the FCC's rules, submit a cost study demonstrating that the Commission-approved tandem or end office rates are not sufficient.¹³⁰ But TelNet has not provided any evidence that its costs are greater than Verizon MI's and that it will not be adequately compensated by the current reciprocal compensation rates. Without such evidence, the Panel cannot evaluate, much less accept, TelNet's assertion that the Commission-approved reciprocal compensation rates do not sufficiently recover TelNet's transport costs.

¹²⁶ TelNet Petition, Interconnection Attach. at 23.

¹²⁷ *Id.*

¹²⁸ *See GTE Rate Order* at *67.

¹²⁹ *Id.* § 51.711(b).

¹³⁰ 47 C.F.R. § 51.711.

TelNet also fails to specify what form of “standard industry compensation” it believes should apply in addition to the Commission-ordered reciprocal compensation charges. To the extent that TelNet is arguing that Verizon MI’s UNE dedicated transport rate approved by the Commission in Case No. U-11832 should serve as a proxy for TelNet’s alleged transport costs, that claim must be rejected. The UNE dedicated transport rate approved in that proceeding is based on Verizon MI’s, not TelNet’s, costs. TelNet has produced no evidence that this rate (or any other rate that departs from existing reciprocal compensation rates) is warranted.¹³¹

In a similar vein, the Panel further finds TelNet’s claims that the FCC treats “transport” and “termination” as distinct functions in the *Local Competition Order* are beside the point.¹³² The applicable rules state that the costs of providing these functions are to be *included* in the reciprocal compensation rates. And as noted above, the FCC’s rules provide that reciprocal compensation charges are the only charges that may be assessed by one carrier for terminating the traffic of another carrier.¹³³

Finally, the Panel agrees with Verizon MI that TelNet’s proposal to include an additional UNE transport rate in the reciprocal compensation rates, coupled with its proposal that it be permitted to choose a separate POI for Verizon MI’s traffic, would have deleterious policy consequences. Were it the rule, CLECs could game the system to obtain as much payment from Verizon MI as possible and shift as many costs as possible to Verizon MI. Under TelNet’s proposal, for example, TelNet could force Verizon MI to hand off its traffic at a POI far from TelNet’s terminating switch, and then charge Verizon MI for the “dedicated transport” between that POI and TelNet’s terminating switch. At the same time, TelNet could also select a POI for

¹³¹ TelNet offers no support for its claim that the Commission approved reciprocal compensation rates are based on the premise that the ILECs would bring their traffic to the CLECs’ switches. TelNet PDAP at 77.

¹³² *Id.* at 76.

¹³³ *See* 47 C.F.R. §§ 51.701-51.717.

handing off its own traffic very close to Verizon MI's terminating switch, allowing TelNet to avoid paying Verizon MI any dedicated transport charges. Thus, under TelNet's approach, Verizon MI inevitably would pay TelNet for dedicated transport, but TelNet likely would not make any such payment to Verizon MI.

Separate Trunks and Trunk Utilization

Issue 45(D): Verizon MI ICA, Interconnection Attachment §§ 2.2, 2.3, 2.4.

A. Should TelNet be responsible for establishing separate trunk groups between POIs and each Verizon MI tandem with a subtending end office to which TelNet's originating traffic terminates?

B. Should Verizon MI be permitted to charge TelNet if TelNet fails to submit ASRs to disconnect a sufficient number of trunks to attain a utilization level of 60%?

TelNet's Position

A. No. Verizon MI should assume all responsibility on its side of the POI. Verizon MI is trying to foist its costs for proper transport and termination of traffic on TelNet.

B. No. Verizon MI's requirement that TelNet disconnect trunks with a utilization level below 60% departs from industry standard. TelNet already has incentive to disconnect underutilized trunks.

Verizon MI's Position

TelNet has a responsibility to help Verizon MI manage TelNet's traffic. If TelNet satisfies this responsibility, then it will not incur *any* costs and will not be required to pay for any trunks that may be established as a result of effective grooming by the Parties. Verizon MI's proposal that TelNet be charged if it fails to submit ASRs to disconnect interconnection trunks when necessary to attain utilization level of approximately 60% is an appropriate measure to ensure quality of service for all Verizon MI customers.

Panel's Decision

The Panel concludes that the position and language proposed by Verizon MI be adopted for Issue 45(d). The Panel notes that much of the Parties' dispute on this issue appears to be based on a misunderstanding. According to Verizon MI, its proposal simply requires TelNet to assist Verizon MI in the efficient routing of traffic originated by TelNet. TelNet, however, sees Verizon MI's proposal as an effort to "foist cost responsibility on TelNet for the completion of traffic on Verizon's side of the POI."¹³⁴ The Panel finds that TelNet's fears are unfounded. Verizon MI has made it clear that it has the responsibility to transport TelNet's traffic on Verizon MI's side of the POI to Verizon MI's terminating switches. Verizon MI's proposal simply makes clear that TelNet is obligated to work with Verizon MI to make sure that this is routed correctly and efficiently.¹³⁵

Verizon MI further agrees that for traffic subject to reciprocal compensation, TelNet will not be charged for any interconnection transport or trunking that Verizon MI provides on Verizon MI's side of the POI beyond the Commission-approved reciprocal compensation rates. In other words, once TelNet hands off its traffic to Verizon MI at the POI, Verizon MI will assume financial responsibility for that traffic and TelNet's only obligation will be to pay Verizon MI reciprocal compensation for the TelNet-originated traffic that Verizon MI terminates on its side of the POI. Given that TelNet acknowledges that it is required to pay Verizon MI

¹³⁴ TelNet Petition, Interconnection Attach. at 13.

¹³⁵ In its PDAP, TelNet objects that Verizon MI does not have a reciprocal obligation. TelNet PDAP at 79-80. TelNet does not, however, point to any proposed language suggesting that it proposed such a duty or to facts suggesting that TelNet's network would require reciprocal steps by Verizon MI. Further, it is TelNet that is connecting with Verizon MI's network, not vice versa. It is reasonable for Verizon MI to request assistance in determining how best to manage the traffic that TelNet will bring it, particularly given that Verizon MI must deal with hundreds of CLECs across its network.

reciprocal compensation,¹³⁶ there is in fact no disagreement between the Parties regarding TelNet's financial obligations.

Verizon MI has also made it clear that TelNet will not be charged if, after correctly grooming and routing its traffic, TelNet must order additional trunks.¹³⁷ TelNet has not offered any reason to doubt Verizon MI's representation. Nor has TelNet pointed to any language in Verizon MI's proposed Agreement that is inconsistent with Verizon MI's explanation.

Likewise, TelNet cannot justify its claim that "Verizon now is asking TelNet to build multiple interconnection facilities to multiple locations."¹³⁸ Verizon MI is assuming the task of building these facilities. Verizon MI simply proposes that TelNet *order* the appropriate trunks, and Verizon MI will build the facilities necessary for local interconnection (at no charge to TelNet). TelNet, for its part, is still only responsible for bearing the costs associated with bringing its traffic to a single POI on Verizon MI's network.

For the same reason, the Panel rejects the claim that requiring TelNet to establish separate trunk groups for each Verizon MI tandem in a LATA to which TelNet is sending traffic interferes with its right to select a POI.¹³⁹ As already discussed, Verizon MI agrees that TelNet may select a POI at any technically feasible point on Verizon MI's network. The language to which TelNet objects requires only that TelNet configure trunk groups from the POI "to each Verizon tandem in the LATA with a subtending End Office to which TelNet originates calls for Verizon to terminate." The purpose of this language is to ensure that the traffic, where appropriate, can bypass the Verizon MI switch at the POI location and instead be switched by Verizon MI at the appropriate tandem location. The section is therefore aimed at promoting

¹³⁶ See TelNet ICA, Interconnection Attach. § 7.1.

¹³⁷ Verizon MI Answer at 118.

¹³⁸ TelNet PDAP at 80.

¹³⁹ *Id.*

network efficiency, and does not require TelNet to establish multiple POI locations on Verizon MI's network or to bear transport costs on the Verizon MI side of the POI over and above the state-approved reciprocal compensation rate for tandem office terminations.

The Panel further concludes that TelNet's concern regarding Verizon MI's proposal for addressing underutilized trunks is unjustified. Specifically, Verizon MI's proposal requires TelNet to "promptly submit ASRs to disconnect a sufficient number of Interconnection Trunks to attain a utilization level of approximately sixty percent (60%)."¹⁴⁰ If TelNet fails to submit the ASRs, Verizon MI "may bill TelNet for the excess Interconnection Trunks at the applicable Verizon rates."¹⁴¹ Verizon MI's proposal gives it the right to charge TelNet *only* when TelNet has failed to ask Verizon MI to disconnect underutilized trunks. Thus, in such cases, TelNet is not being charged for the costs of delivering traffic, as TelNet claims, but rather it is being charged for the costs of the underutilized and inefficient facilities that Verizon MI must maintain on its network. As Verizon MI has explained, TelNet's unused interconnection trunks could potentially lead to equipment exhaustion and therefore have a negative impact on the quality of service provided by Verizon MI to all carriers and end users.

The Panel finds no merit in TelNet's claim that the Bureau rejected Verizon MI's proposed language regarding underutilized trunks in the *Virginia Arbitration Order*.¹⁴² As Verizon MI notes, the Bureau acknowledged that it was "sympathetic to Verizon's arguments about network management," but rejected language that would have permitted Verizon to disconnect underutilized trunks *unilaterally*.¹⁴³ In an effort to address the parties' concerns, the Bureau "direct[ed] the parties to include in their compliance filing a requirement that, before

¹⁴⁰ Verizon MI ICA, Interconnection Attach. §§ 2.3.2, 2.4.12.

¹⁴¹ *Id.* § 2.4.12; *see also id.* § 2.3.2.

¹⁴² *See* TelNet Petition, Interconnection Attach. at 13.

¹⁴³ *See Virginia Arbitration Order* ¶ 140.

disconnecting trunk groups, Verizon shall obtain a [firm order confirmation] from AT&T, which AT&T will provide within ten calendar days of receipt of Verizon's ASR.”¹⁴⁴ Verizon MI's proposed language in this proceeding addresses the Bureau's concern because it does not give Verizon MI the *unilateral* authority to *disconnect* TelNet's underutilized trunks. Instead, Verizon MI's proposal requires TelNet to submit an ASR asking Verizon MI to disconnect any underutilized trunks, and requires TelNet to pay for any excess interconnection trunks at the rates set forth in the Agreement.¹⁴⁵

TelNet's assertion that it has an independent incentive to disconnect underutilized trunks is unpersuasive.¹⁴⁶ Even if TelNet has such an incentive, the Agreement should contain language to ensure that TelNet's actions (or failure to act) will not negatively affect the operation of Verizon MI's network. Indeed, Verizon MI must interconnect with numerous CLECs, which places a high demand on its network resources. According to Verizon MI's data, in 2003 the number of trunks connecting Verizon MI's network to CLECs' networks in Michigan increased by 32 percent, from 12,434 to 16,498. TelNet is not similarly required to juggle competing demands on an equivalently complex system. Thus, because Verizon MI cannot unilaterally disconnect trunk groups, it is appropriate for the Agreement to ensure that TelNet monitors the trunk usage.

Finally, the Panel finds that TelNet is incorrect in stating that Verizon MI seeks to force it to “constantly monitor the trunks over which TelNet has no ‘control.’”¹⁴⁷ As Verizon MI points out, TelNet will control the trunks because it is the entity that will be ordering them, and knows how much traffic its customers are sending to Verizon MI.

¹⁴⁴ *Id.*

¹⁴⁵ Verizon MI ICA, Interconnection Attach. §§ 2.3.2, 2.4.12. TelNet's complaint that Verizon MI's proposal “does not allow TelNet to dispute the disconnection,” is therefore without merit. TelNet PDAP at 82

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

Issue 45(E): Verizon MI ICA, Interconnection Attachment §§ 2.2.5, 2.2.6.

A. Should TelNet be required to establish new one-way or two-way trunk groups to carry the traffic from the POI on Verizon MI's network to each of Verizon MI's end office when traffic on Verizon MI's side of the POI exceeds the DS-1 level?

B. Should the number of Interconnection Trunks be limited to 240?

TelNet's Position

A. No. Verizon is trying to foist cost responsibility on TelNet for completing traffic on Verizon's side of the POI.

B. No.

Verizon MI's Position

Yes. The Agreement should ensure that the Parties work together to establish direct end office interconnection trunks to carry traffic between Verizon MI's end offices and the POI (rather than sending it through the tandem switch) when traffic exceeds the DS-1 level. This requirement ensures that Verizon MI's network operates efficiently, and Verizon MI follows a similar protocol for its own trunks.

TelNet's proposal to allow it to deviate from the standard that applies to other CLECs and to Verizon MI's own operations would impermissibly increase Verizon MI's legal obligations beyond those required by the Act. Under section 251(c)(2)(C), Verizon MI is obligated to offer TelNet interconnection "that is at least *equal in quality* to that provided by the local exchange carrier to itself or to . . . any other party to which the carrier provides interconnection[.]"¹⁴⁸ Verizon MI is simply requiring TelNet to comply with the engineering practices for direct trunking that Verizon MI already has in place for itself and every other CLEC that uses Verizon MI's network in Michigan, and is therefore providing TelNet with

¹⁴⁸ 47 U.S.C. § 251(c)(2)(C) (emphasis added).

interconnection that is “equal in quality” to the interconnection Verizon MI provides to itself and other CLECs.

Panel Decision

The Panel concludes that the position and language proposed by Verizon MI be adopted for Issue 45(e). The Panel finds Verizon MI’s requirement that the Parties work together to establish direct end office trunks when traffic to a particular Verizon MI end office exceeds the DS-1 level to be reasonable. As Verizon MI explains, this requirement protects all users of Verizon MI’s network because it helps Verizon MI avoid tandem exhaust, which could lead to blocked calls.¹⁴⁹ Indeed, according to Verizon MI, if TelNet does not configure the interconnection trunks in this manner when traffic exceeds this level, Verizon MI would be required to sort TelNet’s traffic by routing it through multiple switches (the end office switch and the tandem switch), which uses up switch capacity unnecessarily and inefficiently.¹⁵⁰ Moreover, the Panel finds persuasive Verizon MI’s statement that it applies the same requirement to itself and to other CLECs.

TelNet’s objection to this proposal appears to rest on the mistaken notion that Verizon MI will charge TelNet for establishing direct end office trunk groups when its traffic to a particular

¹⁴⁹ See Verizon MI Answer at 121. Verizon MI’s local network utilizes a hub-and-spoke (or spiderweb) design. At the outside of the network — the end of the spokes — are switches that directly serve customers, known as end offices. Verizon MI end offices may be connected directly one to another; a call from a customer served out of end office A to a customer served out of end office B may travel over direct trunks from end office A to end office B. Alternatively, traffic between two end offices may be routed through a tandem switch — the hub of the wheel — when there is not enough traffic to justify establishment of direct trunks. Because tandem switches are connected to multiple end offices, they perform the function of consolidating traffic. By establishing direct end office trunks, TelNet’s traffic would be routed directly between TelNet’s network and Verizon’s central office, instead of being routed through one or more Verizon tandems.

¹⁵⁰ See Verizon MI Answer at 123. According to Verizon MI, its tandems are exhausting rapidly because CLECs have connected a very large number of interconnection trunks to Verizon MI’s tandems over the last few years. In 2003, the number of trunks connecting Verizon MI’s network to CLECs’ networks in Michigan increased by 32 percent, from 12,434 on January 1, 2003 to 16,498 on January 1, 2004. TelNet does not dispute these figures, but maintains that Verizon MI has not proven that adverse impacts will result from its interconnection. As noted above, the Panel disagrees and finds that Verizon MI has sufficiently explained the reasons for its proposals.

Verizon MI central office exceeds the DS-1 level. Verizon MI, however, has made it clear that it will not charge TelNet for establishing such direct end office trunk groups. TelNet also appears concerned that Verizon MI's proposal would always require TelNet to establish *two-way* direct end office trunk groups when traffic exceeds the DS-1 level.¹⁵¹ But Verizon MI has likewise clarified that this concern is unfounded. The plain language of Verizon MI's proposal makes clear that, if TelNet elects to use one-way trunks and the traffic on those trunks exceeds the DS-1 level, TelNet must "establish new or augment existing End Office *One-Way* Interconnection Trunks groups between the Verizon End Office and the technically feasible Point of Interconnection on Verizon's network."¹⁵² In other words, Verizon MI's proposal requires only one-way direct end office trunks if TelNet chooses to use one-way trunks, and does not require TelNet to establish two-way trunks. Because TelNet has conceded that it would not be concerned about this language if it "required only one-way trunks," it is not clear why TelNet objects to Verizon MI's proposal.¹⁵³

TelNet's claim that the Bureau rejected Verizon MI's direct end office trunking requirements in the *Virginia Arbitration Order* is incorrect.¹⁵⁴ As Verizon MI points out, the issue before the FCC concerned only the Parties' obligations with respect to the costs of two-way trunks. It said nothing about a CLEC's obligation to establish direct end office trunks when traffic goes above a manageable level, which is the issue at hand.¹⁵⁵

Finally, TelNet has failed to explain its objection to Verizon MI's proposed section 2.26, which limits the number of interconnection trunks between a POI and a Verizon MI tandem to

¹⁵¹ See TelNet Petition, Interconnection Attach. at 13 ("[Section 2.4.1] obligates TelNet to provide two-way trunks for the exchange of traffic between Verizon and TelNet at TelNet's expenses [sic].").

¹⁵² Verizon MI ICA, Interconnection Attach. § 2.2.5 (emphasis added).

¹⁵³ TelNet Petition, Interconnection Attach. at 13.

¹⁵⁴ *Id.*

¹⁵⁵ *Virginia Arbitration Order* ¶ 148.

240. As Verizon MI explains, the limitation is necessary to manage the usage and design of trunks at the tandem because each tandem has only a limited number of connection points for trunks, and a number of carriers besides TelNet, including other CLECs, CMRS providers, IXC's, and SBC, will likely need to use many of the connection points on any given tandem. TelNet's only argument is that a similar term was rejected in the *Virginia Arbitration Order*.¹⁵⁶ That decision, however, rested on specific testimony about the causes of tandem exhaust problems in Virginia.¹⁵⁷ Moreover, contrary to TelNet's claim, Verizon MI does impose similar restrictions on other providers; as Verizon MI notes, this provision is part of its model contract. In light of TelNet's failure to explain why the requirement would be burdensome, and given the un rebutted evidence Verizon MI provided of the increasing demands being made upon its network in provisioning CLECs, there is no reason to reject Verizon MI's proposed language.

Dedicated Transport

Issue 45(H): Verizon MI ICA, Interconnection Attachment, §§ 2.3, 2.4; TelNet ICA, Interconnection Attachment, § 2.1.3

Should TelNet be able to interconnect with Verizon MI's network using UNE dedicated transport provided by Verizon MI?

TelNet's Position

Yes. TelNet should be able to interconnect with Verizon's network using UNE dedicated transport provided by Verizon if dedicated transport is UNE as required by applicable law.

Verizon MI's Position

No. TelNet cannot interconnect with Verizon MI's network using UNE dedicated transport provided by Verizon MI because the FCC held in the *Triennial Review Order* that

¹⁵⁶ TelNet Petition, Interconnection Attach. at 13.

¹⁵⁷ *Virginia Arbitration Order* ¶ 90.

dedicated transport no longer includes facilities connecting a CLEC's network and an ILEC's network.

Panel Decision

The Panel concludes that the position and language proposed by Verizon MI be adopted for Issue 45(h). As Verizon MI correctly notes, the FCC held in the *Triennial Review Order* that “transmission links that simply connect a competing carrier’s network to the incumbent LEC’s network *are not* inherently a part of the incumbent LEC’s local network.”¹⁵⁸ For this reason, the FCC found that the dedicated transport network element includes only those “features, functions, and capabilities” of equipment and facilities that coincide with the incumbent LEC’s transport network — the transmission links connecting incumbent LEC switches or wire centers.¹⁵⁹ TelNet, therefore, has no legal right to interconnect with Verizon MI’s network via UNE dedicated transport. Although the D.C. Circuit remanded the issue to the Commission for further consideration of whether the FCC had correctly classified these transmission facilities under the literal terms of the Act, the court did not vacate the FCC’s rule.¹⁶⁰ Thus, the rule pertaining to UNE dedicated transport remains in effect.¹⁶¹

The Panel finds that Verizon MI’s proposed language is consistent with the *Triennial Review Order* because it permits TelNet to interconnect with Verizon MI’s network only by either providing its own facilities to the POI or obtaining such transport from a third party or

¹⁵⁸ *Triennial Review Order* ¶ 366 (emphasis added).

¹⁵⁹ *Id.*

¹⁶⁰ *See USTA II*. Further, although the D.C. Circuit noted that while the FCC must explain its rationale for excluding these facilities from unbundling obligations better, it found nothing in the record that would appear to justify unbundling such facilities: “[n]o party offers an explanation as to why ILECs rather than CLECs construct these facilities. If (as appears) they *exist* exclusively for the convenience of the CLECs, it seems anomalous that CLECs do not themselves provide them[.]” *Id.*

¹⁶¹ It is well settled that regulations that are remanded but not vacated are “le[ft] . . . in place during remand.” *National Lime Ass’n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000).

Verizon MI at tariffed rates.¹⁶² TelNet’s proposal, on other hand, improperly includes UNE dedicated transport as one of its possible methods of interconnection with Verizon MI’s network:

TelNet, in its sole discretion, may specify one or more of the following methods to interconnect with the Verizon Network:

. . .

2.1.3.2 UNE dedicated transport provided by Verizon — such leased facilities shall be provided at the rates, terms, and conditions set forth in this Agreement and consistent with applicable law.¹⁶³

Thus, as Verizon MI correctly notes, TelNet is demanding the right to interconnect with Verizon MI’s network by leasing facilities connecting TelNet’s switches that Verizon MI is not required to provide as UNEs.

TelNet concedes that its proposal is contrary to law, but maintains that its provision should be preserved in case the FCC changes its mind with respect to UNE transport. According to TelNet, the Agreement’s reference to “applicable law” will protect Verizon MI if the FCC upholds its original ruling.¹⁶⁴ The Panel rejects TelNet’s assertions. The Agreement is intended to reflect *current* law, which both Parties agree does not currently require Verizon MI to provide for UNE transport. If the law changes, then TelNet may invoke the Agreement’s change of law provision and seek an amendment requiring Verizon MI to provide UNE dedicated transport.

Typographical Errors

Issue 45(I): Verizon MI ICA, Interconnection Attachment, § 2.2; TelNet ICA, Interconnection Attachment, § 2.2.

¹⁶² Verizon MI ICA, Interconnection Attach. §§ 2.3, 2.4. If TelNet chooses to purchase transport from Verizon, it would pay the applicable access rates, which are higher than UNE transport rates.

¹⁶³ TelNet ICA, Interconnection Attach. § 2.1.3.

¹⁶⁴ TelNet PDAP at 88.

Should the Commission reject TelNet's proposed language adopted from the FCC-approved interconnection agreement between Verizon Virginia and AT&T because there are some mechanical errors such as wrong references?

TelNet's Position

No. TelNet's language from the Verizon Virginia/AT&T interconnection agreement should be adopted. The architecture is substantially the same as that currently employed by TelNet to interconnect with SBC Michigan. Any typographical errors in referencing sections can be easily corrected in the conformed contract.

Verizon MI's Position

Yes. TelNet simply copied its language from AT&T's interconnection agreement in Virginia without any regard for context. As a result, much of TelNet's proposed trunk type language does not make sense and is inconsistent with other parts of the Agreement. There is no reason to employ error-filled language when TelNet has not raised any objection about Verizon MI's corresponding language regarding trunk types.

Panel's Decision

The Panel concludes that the position and language proposed by Verizon MI be adopted for Issue 45(I). The Panel rejected TelNet's proposed network architecture and therefore, its proposals for this issue are moot.

Tandem Reciprocal Compensation

Issue 49: Verizon MI ICA, Interconnection Attachment, § 7.1; TelNet ICA, Interconnection Attachment, § 7.1.

Should TelNet be able to receive the tandem reciprocal compensation for transport and termination of traffic if its switches meet the FCC's test?

TelNet's Position

Yes. TelNet's current switches serve geographic areas equivalent to geographic areas served by tandem switches and thus meet the FCC's test. TelNet asserts that;

TelNet has one or two switches located in each of Michigan's five LATAs and each switch serves a very large geographic area, usually the entire LATA. SBC and Verizon MI use at least one tandem switch in each LATA. In the Detroit (340) LATA, SBC uses 7 tandem switches. No tandem switch of SBC or Verizon MI serves a geographic area larger than a LATA. Therefore, TelNet's switches serve geographic areas at least as large, if not larger than, geographic areas served by Verizon MI's and SBC's tandem switches.¹⁶⁵

Verizon MI's Position

No. TelNet is only permitted to receive the tandem reciprocal compensation rate if it meets the FCC's test, which requires TelNet to demonstrate that its switches are capable of serving areas geographically similar to areas served by Verizon MI's tandems. Verizon MI's language makes clear that the higher rate will be paid only if required by applicable law, while TelNet's language states that it will receive the higher rate regardless of whether it meets the FCC test. According to Verizon MI, its proposal should be adopted because it allows TelNet to receive the tandem rate if its switches qualify, while protecting Verizon MI from the prospect that another CLEC might opt into the Agreement and claim entitlement to the tandem rate without justification.

Panel's Decision

The Panel concludes that the position and language proposed by TelNet, as modified by the Panel, be adopted for Issue 49. TelNet asserts that its switches serve the entire LATA. The Panel notes that Verizon MI has not presented any evidence to refute this assertion. If Verizon MI wanted to contest the veracity of these factual representations, it should have done so in its Answer.

¹⁶⁵ Petition, Interconnection Matrix at 23.

Verizon MI indicates that it is concerned that other CLECs may “opt into” TelNet’s Agreement and thus be able to receive tandem reciprocal compensation even if their switches do not meet the FCC’s test that “the switches of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC’s tandem switch.”¹⁶⁶

Verizon MI’s concern is ill-placed. TelNet’s proposed language specifically refers to TelNet and TelNet’s current switches. When TelNet’s proposed language is only an application of the general law to TelNet’s particular switches, other CLECs cannot simply substitute “TelNet current switches” with their own switches and then claim that their switches also meet the FCC’s test. Verizon MI is essentially arguing that the Agreement should not apply the law to any specific circumstances that exist between the specific parties because another CLEC might opt in. Such an approach could render interconnection agreements useless.

Verizon MI also criticizes TelNet for not including the FCC’s test for the tandem rate in TelNet’s proposed language. The Panel notes that Verizon MI did not include the FCC’s test in its proposed language either.¹⁶⁷ However, to avoid any future confusion regarding other carriers opting into this agreement, Panel hereby directs the Parties to include language regarding the FCC’s test for the tandem rate.

Finally, the Panel notes that TelNet specifically indicated that it wanted to resolve the specific issue about its entitlement to the tandem rate in its Agreement with Verizon MI to, among other things, “avoid future disputes.” The Panel agrees with TelNet that this is exactly the type of issue that should be resolved in this arbitration. Verizon MI should not be able to avoid resolution of this important issue simply by sidestepping it and implying that this is not the

¹⁶⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) ¶ 1090 (“*Local Competition Order*”).

¹⁶⁷ Verizon MI Answer at 134.

proper time or place. TelNet should not have to expend its resources a second time to resolve this issue in yet another negotiation.

Multiplexing

Issues 50: Verizon MI ICA, Interconnection Attachment, §§ 5.2, 7.1; TelNet ICA, Interconnection Attachment, § TBD, page 39, § 7.1.

Should the Parties charge for multiplexing and cross-connection services?

TelNet's Position

Yes. Each Party should charge the other Party for multiplexing and cross-connection services.

Verizon MI's Position

No. Verizon MI argues that neither Party should charge the other for multiplexing in a typical arrangement where the Parties choose a DS-3 interface to exchange traffic at the POI. Verizon MI explains that traffic that is multiplexed up to the DS-3 level for transport on one side of the POI will likely be multiplexed back down from the DS-3 level for termination on the other side of the POI, so the Parties' multiplexing costs should approximately match up. Verizon MI further explains that as such, the Commission-approved reciprocal compensation rates fully compensate the carrier receiving a local call for its costs of transporting and terminating that call. Finally, Verizon MI argues that only a prohibition against charging for multiplexing can protect Verizon MI from unfair charges;

Verizon MI's proposal is reasonable and fair because, while Verizon MI's multiplexing charges are subject to the scrutiny of the tariff process in Michigan, TelNet's multiplexing charges are not. Because there are no constraints on the multiplexing rate TelNet may charge Verizon MI, Verizon MI's proposal protects against asymmetric and potentially exorbitant charges.⁴²³

Panel's Decision

⁴²³ Verizon MI Answer at 136.

The Panel concludes that the position and contract language proposed by Verizon MI be adopted for this issue. The Panel agrees with Verizon MI that the Commission-approved reciprocal compensation rates fully compensate the carrier receiving a local call for its costs of transporting and terminating that call, and thus that additional multiplexing charges are inappropriate in a typical arrangement where the Parties choose a DS-3 interface to exchange traffic at the Point of Interconnection (“POI”). The Panel likewise agrees with Verizon MI on the related point that traffic that is multiplexed up to the DS-3 level for transport on one side of the POI will likely be multiplexed back down from the DS-3 level for termination on the other side of the POI, so the Parties’ multiplexing costs should approximately match up. Finally, the Panel agrees with Verizon MI that only by forbidding both Parties from charging multiplexing rates in a typical arrangement where the Parties choose a DS-3 interface to exchange traffic can Verizon MI be protected from asymmetric and potentially exorbitant charges.

TelNet asserts that it wants each Party to assess multiplexing charges in a typical interface arrangement because, “[i]n [TelNet’s] experience, SBC has imposed such termination costs upon TelNet but TelNet has had difficulty collecting such costs from SBC.”¹⁶⁸ However, TelNet has not provided any evidence that it has had similar experiences with Verizon MI. As a result, there is no justification to extend this obligation to Verizon MI based on TelNet’s assertion regarding its relationship with another carrier.

TelNet also makes a new argument in its PDAP that Verizon MI’s proposed language would permit Verizon MI to assess TelNet multiplexing and cross-connect charges in the collocation context.¹⁶⁹ While TelNet’s assertion is correct, it is irrelevant to this Issue. In connection with a collocation arrangement, TelNet may request that Verizon MI provide it with

¹⁶⁸ TelNet ICA, Interconnection Attach. at 39.

¹⁶⁹ TelNet PDAP at 94-97.

multiplexing and cross-connect services on the *TelNet side* of the POI. Verizon MI is entitled to compensation for those services, which are fundamentally different from the multiplexing that each Party may have to perform on *its own side* of the POI in order to exchange traffic at the DS-3 level.

In response to Verizon MI's concern that TelNet could assess higher charges than Verizon MI if the Parties were allowed to assess multiplexing charges in a typical interface situation, TelNet states only that, "if TelNet seeks to charge unlawful or excessive rates for multiplexing, Verizon may seek relief from the MPSC."¹⁷⁰ The Panel agrees with Verizon MI that this does not adequately address its concern. Likewise, TelNet offers no substantive response to Verizon MI's assertion that the Commission-approved reciprocal compensation rates fully compensate the carrier receiving a local call for its costs of transporting and terminating that call. The Panel thus finds that TelNet has failed to refute any of Verizon MI's arguments, just as it has failed to support any of its own.

Issue 53: TelNet ICA, Interconnection Attachment § 7.1.7.xx

If the FCC or another tribunal enters an order that increases the inter-carrier compensation prior to the expiration of the instant Agreement, should the Agreement be amended to incorporate the increased rates for ISP traffic?

TelNet's Position

If the FCC or another tribunal permits an increase in the rates for ISP-traffic, the instant ICA should be amended to permit the increased rates to apply to the instant Agreement.

Verizon MI's Position

Verizon MI argues that once the FCC, the Commission, or a court determines that Verizon MI has no legal obligation to provide intercarrier compensation, the Agreement should

¹⁷⁰ *Id.* at 96.

timely reflect that law.¹⁷¹ TelNet has no legitimate claim to continue receiving payments from Verizon MI once it is determined that Verizon MI is under no obligation to pay it. Verizon MI's proposed contract language ensures that the intercarrier compensation terms of the Agreement reflect changes in the applicable law, allowing Verizon MI to cease making payments to TelNet on 30 days' notice when the governing law changes. Verizon MI's proposed language also requires the Parties to negotiate substitute compensation arrangements as appropriate, and allows either Party to invoke the Agreement's dispute resolution provisions if these negotiations are unsuccessful.

Verizon MI contends that it is important for the Agreement to be clear regarding the effect of changes in the law relating to intercarrier compensation, given the industry's history of controversy concerning this subject and the substantial amount of compensation involved.¹⁷² Verizon MI's experience in the wake of the FCC's *ISP Remand Order*¹⁷³ — which confirmed that reciprocal compensation does not apply to Internet-bound traffic — demonstrates that without specific contract language, CLECs will not implement changes of law, leading to protracted disputes and litigation.

Panel's Decision

In its Answer, Verizon MI has divided Issue 18 into Issue 18A and Issue 18B. Verizon MI grouped Issue 18A with Issues 5 and 23. Verizon MI has grouped Issue 18B with Issue 53. The Panel concludes that the position and language proposed by Verizon MI be adopted for Issues 18B and 53.

As explained in connection with Issues 5 and 23, Verizon MI's interconnection agreements with CLECs are not voluntary commercial arrangements. Rather, they dictate the

¹⁷¹ Verizon MI Answer at 37.

¹⁷² *Id.* at 38-39.

¹⁷³ *ISP Remand Order* ¶ 78.

specific terms that implement Verizon MI's legal obligations to provide certain services and payments under the Act and the FCC's rules. Where Verizon MI no longer has any legal obligation to compensate a CLEC under the Act or the FCC's rules, there is no basis for maintaining that obligation in their Agreement. Indeed, to require Verizon MI to continue to provide compensation in the absence of any legal obligation to do so would nullify the requirement that the contract comply with federal law. The Panel concludes that there is no reason to delay incorporation of binding, effective changes of law into the Parties' Agreement.¹⁷⁴

The Panel finds that Verizon MI's language establishes a mechanism for promptly and efficiently addressing changes in the law relating to intercarrier compensation that is consistent with the law and fair to both Parties.¹⁷⁵ That language makes clear that Verizon MI cannot continue to be contractually bound to an intercarrier compensation scheme after that scheme has been superseded, and definitively eliminates TelNet's ability to prolong its receipt of compensation to which it is no longer legally entitled. At the same time, Verizon MI's proposed language establishes a reasonable transition period that affords TelNet ample notice that it can no longer expect to receive such compensation, and ensures that the Parties will engage in negotiation of substitute provisions by the Parties. In this regard, Verizon MI's proposal is more favorable than the revisions TelNet proposes elsewhere in the Agreement, where TelNet states that negotiation of substitute terms is optional.¹⁷⁶ Further, TelNet has made no showing that the 30-day notice period provided under Verizon MI's proposed language is unreasonable. And the

¹⁷⁴ *Triennial Review Order* ¶¶ 703, 705 (directing carriers to begin "immediately to negotiate in good faith" to modify their interconnection agreements to reflect the FCC's new rules and noting that "it would be unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order").

¹⁷⁵ See Verizon MI ICA, GTC § 50.2.

¹⁷⁶ See TelNet ICA, GTC § 4.6 (revising Verizon MI's proposed language to state that the parties "may" negotiate new terms following changes in the law generally).

30-day period is more reasonable than the 20-day notice period provided for in language that the Commission has declined to adopt.¹⁷⁷

The Panel finds that TelNet’s language, on the other hand, is improperly one-sided. When considered in conjunction with its position concerning changes of law generally, TelNet’s proposals would give immediate effect to changes in the law that benefit TelNet — specifically, those that entitle it to increased compensation from Verizon MI — while delaying the effectiveness of all other changes until they become “mandatory and final,” meaning that they are “precedentially binding in Michigan” and the court or tribunal expressly authorizes Verizon MI to discontinue providing a particular service or payment before the expiration of its existing interconnection agreement.¹⁷⁸ But *all* changes in applicable law should have the same effect — not simply those that happen to benefit TelNet. Further, the issue of compensation for ISP-bound traffic is of great importance to both CLECs and ILECs alike in light of the substantial amounts at stake, and there is no principled reason to give preference to CLECs’ interests in this context. Finally, to the extent the law changes to entitle TelNet to increased compensation, that change is already addressed by section 4.6 of Verizon MI’s language, language that TelNet does not dispute.¹⁷⁹

Issue 62: Verizon MI ICA, Interconnection Attachment, § 16; TelNet ICA, Interconnection Attachment, § 16.

A. Should the Parties have the option of exchanging traffic through a third-party tandem switch only when both Parties already subtend that third-party tandem switch?

B. Should the Interconnection Attachment use the terms “Measured Internet Traffic?”

¹⁷⁷ DAP, SBC/MCI Arbitration at 37.

¹⁷⁸ TelNet ICA, GTC §§ 4.6, 4.7.

¹⁷⁹ See Verizon MI ICA, GTC § 4.6; TelNet ICA, GTC § 4.6.

C. Should the Parties negotiate and incorporate terms that will be consistent with Section 16 of the Interconnection Attachment in their respective agreements with third parties?

D. Should the Interconnection Attachment specify how the Parties will record and bill traffic that is exchanged through a third party's tandem?

TelNet's Position

A. Verizon proposed new language to replace TelNet's proposed Section 16 after TelNet filed its Petition. TelNet is willing to settle this issue and accept Verizon's new language.

B. No. The Panel already rejects the term "Measured Internet Traffic" above in Issues 32, 33, 40 and 41.

C. Verizon proposed new language to replace TelNet's proposed Section 16 after TelNet filed its Petition. TelNet is willing to settle this issue and accept Verizon's new language.

D. Verizon proposed new language to replace TelNet's proposed Section 16 after TelNet filed its Petition. TelNet is willing to settle this issue and accept Verizon's new language

Verizon MI's Position

Sub-Issue B: Yes. Verizon MI argues that the Interconnection Attachment should clearly describe the types of traffic that may be routed through a third party's tandem switch.

Panel's Decision

After TelNet filed the Petition for Arbitration, Verizon MI proposed new language for indirect interconnection.¹⁸⁰ The Panel notes that TelNet is willing to settle the majority of this issue and accept Verizon MI's newly proposed language except sub-issue B, which the Panel will decide separately below. Regarding sub-issue B the Panel concludes that the position and contract language proposed by TelNet be adopted for Issue 62. Verizon MI argues that the Agreement needs to clearly and precisely define the type of traffic that is subject to indirect

¹⁸⁰ Verizon MI's Answer at 140.

interconnection. However, as discussed above in Issues 32, 33, 40, 41 and 47, the Panel already rejected Verizon MI's proposed term "Measured Internet Traffic."

Issues 67 and 68: TelNet ICA, Resale Attachment §§ 3.4, 3.5.

- A. Should Verizon MI be allowed to prohibit the assignment or assumability of its customer service arrangements ("CSAs") with its end users?
- B. Should CSAs that Verizon MI cannot provide be binding upon TelNet and the customer?

TelNet's Position

The proposed language is based upon a provision approved in the *SBC/Coast Arbitration Order*.¹⁸¹ The Panel should affirm the Commission's decision that the proposed provisions are reasonable.

Verizon MI's Position

A. No. CSAs have nothing to do with interconnection requirements under the Act and are unrelated to the Parties' relationship under sections 251 and 252. TelNet cannot use this Agreement to dictate the terms of Verizon MI's separate agreements with unrelated third parties.

B. No. TelNet may not use the Agreement to summarily invalidate Verizon MI's CSAs with third parties. TelNet's reliance on the *SBC/Coast Arbitration Order* for its proposals is based on the incorrect premise that the Parties are similarly situated to the parties in that arbitration.¹⁸² Unlike SBC, however, Verizon MI does not contemplate assigning its CSAs to the CLEC. Instead, Verizon MI proposes only that it follow the Act and the FCC's implementing

¹⁸¹ Order Adopting Arbitrated Agreement, *In the Matter of the Petition of Coast to Coast Telecommunications, Inc., for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Michigan Bell Telephone Company, d/b/a Ameritech Michigan*, Case No. U-12382 (Aug. 17, 2000) ("*SBC/Coast Arbitration Order*")

¹⁸² At the time of the SBC/Coast arbitration, SBC was called Ameritech. In their Petition and Answer, the Parties referred to this entity as Ameritech. In its PDAP, TelNet referred to the entity as SBC. For consistency and to avoid confusion, the Panel refers to the entity by its current name, SBC.

rules, requiring it to make “its telecommunications services available for resale to [TelNet] on terms and conditions that are reasonable and non-discriminatory.”¹⁸³ Nothing in these requirements compels Verizon MI to assign an existing agreement with its end user to TelNet or any other CLEC, and nothing requires TelNet or any other CLEC to assume such a contract to serve the end use customer. Accordingly, the Commission’s decision in the *SBC/Coast Arbitration Order* is of no precedential value here.

Verizon MI further argues that TelNet’s proposal would lead to absurd and unlawful results. It would allow TelNet unilaterally to invalidate a CSA between Verizon MI and its third-party customer, without the consent of either party. It also would allow a Verizon MI customer to walk away from its CSA with Verizon MI without paying an agreed-upon contractual early termination fee. Finally, Verizon MI is not SBC; TelNet’s experience with SBC’s allegedly improper “win back” efforts provides no justification for imposing needless requirements on Verizon MI.

Panel’s Decision

The Panel concludes that the position and language proposed by TelNet be adopted for Issue 67 and 68. In response to Verizon MI’s argument that CSAs have nothing to do with interconnection requirements under the Act and are unrelated to the Parties’ relationship under sections 251 and 252, the Panel disagrees. The Commission has previously addressed this issue in the *SBC/Coast Arbitration Order* where the Commission concluded that, “this is an issue properly before the arbitration panel because it deals with the terms and conditions of resale services, as provided in Section 251 of the Federal Act.”¹⁸⁴

¹⁸³ 47 C.F.R. §51.603(a); *see also* 47 U.S.C. § 251(c)(4)(A); Verizon MI ICA, Resale Attach. §§ 2.1, 3.3.

¹⁸⁴ *SBC/Coast Arbitration Order* at 17.

The Panel further finds that it is reasonable for TelNet to obtain a valid CSA from Verizon MI within 10 days before TelNet may assume the CSA. The Commission in *SBC/Coast Arbitration Order* explained that without the ability to review the CSA, the CLEC “would be unable to determine precisely what obligations it is taking on, thus placing the CLEC in a position that might require litigating what contract rights actually exist.”¹⁸⁵ Similarly, the Panel disagrees with Verizon MI’s argument that TelNet’s proposed language would lead to absurd and unlawful results where the customer can walk away from the contract with Verizon MI. The Commission in the *SBC/Coast Arbitration Order* found that similar language relieved the CLEC of any obligation to perform under a contract that it could not review and did not alter the rights and responsibilities of the parties to the original contract.¹⁸⁶

Based on the *SBC/Coast Arbitration Order*, the Panel finds Verizon MI’s arguments not persuasive enough to recommend that the Commission reverse its previous decision.

Verizon MI asserts that the circumstances in this arbitration are different from those in the *SBC/Coast Arbitration Order*.¹⁸⁷ Verizon MI also asserts that adoption of TelNet’s position would violate the “spirit and purpose of the FCC’s decision eliminating the ‘pick-and-choose’ rule in favor of an all-or-nothing rule.”¹⁸⁸ As before, the Panel does not have the benefit of the complete record developed in the *SBC/Coast Arbitration Order*. As proposed for Issues 32, 33, 40, 41, 43 and 47, the Panel recommends that the Commission review the record in this case, including Verizon MI’s assertions and determine if new circumstances warrant a change in the Commission’s policy regarding this issue.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Verizon PDAP at 156-157.

¹⁸⁸ *Id.* at 158, footnote omitted.

Collocation

Issue 69: Verizon MI ICA, Collocation Attachment, § 1; TelNet ICA, Collocation Attachment, § 1.

A. Should the Agreement incorporate Verizon MI's collocation tariff by reference, thus allowing Verizon MI to unilaterally change terms and conditions of collocation?

B. Is Verizon MI's tariff that was in effect on February 4, 2003 such an obsolete tariff that the parties cannot adopt it in this Agreement?

TelNet's Position

A. The Parties should negotiate the exact terms and conditions of collocation in the Agreement. TelNet proposes to incorporate Verizon MI's 2003 tariff in the Agreement. Verizon MI's proposal is contrary to its own position in *Verizon MI v. Strand*, Docket No. 01-1013 and the Commission's decision in the *SBC/MCI Arbitration Order*.

B. The parties were negotiating this Agreement when Verizon MI's 2003 tariff was still in effect.

Verizon MI's Position

A. Yes.

B. No.

Verizon MI explains that it offers physical, virtual, and other types of collocation to all Michigan CLECs under the rates, terms, and conditions in Verizon MI's collocation tariff.¹⁸⁹ Verizon MI claims that the tariff is comprehensive, fully compliant with applicable law, and treats all CLECs in Michigan in the same, nondiscriminatory manner. Moreover, Verizon MI explains that it cannot alter the tariff without Commission assent: Section 203 of the Michigan

¹⁸⁹ Verizon North Inc. Tariff M.P.S.C. No. 20R.

Telecommunications Act establishes tariff revision procedures,¹⁹⁰ and provides for CLEC involvement and ultimate Commission discretion with respect to any proposed change.¹⁹¹

Verizon MI therefore proposes to incorporate this tariff into the Agreement by reference,¹⁹² which would allow the Agreement to automatically conform to any future tariff revisions that may become necessary to reflect regulatory, technological, or market changes. Verizon MI notes that virtually all of the interconnection agreements between Verizon operating companies and CLECs across the country incorporate the relevant collocation tariffs by reference, and that almost all of those state collocation tariffs contain terms and conditions similar, if not identical, to those TelNet challenges in this proceeding.

Verizon MI argues that there are several reasons why it makes sense to reject TelNet's proposal to spell out each and every collocation term, rate, and condition in the Agreement, and instead simply to incorporate the Michigan collocation tariff into the Agreement by reference. First, Verizon MI argues that TelNet's proposal would create different collocation rules for TelNet vis-à-vis the rest of the Michigan CLEC community, which is bound by the terms of Verizon MI's collocation tariff. Second, Verizon MI argues that, in addition to being unfair to other CLECs, requiring Verizon MI to provision collocation for TelNet under a different set of rules would be administratively unworkable. Third, Verizon MI argues that TelNet's approach would make it more difficult for the Agreement to evolve along with technology, the market, and regulation. In this regard, Verizon MI notes that, in rejecting a similar AT&T proposal to establish "an all-inclusive agreement that contains no references to Verizon's tariff and does not rely on tariff provisions for any significant purpose," the New York Public Service Commission found that "it is better to allow the new agreement between AT&T and Verizon to absorb tariff

¹⁹⁰ MICH. COMP. LAWS ANN. § 484.2203.

¹⁹¹ See *id.* §§ 24.201-24.328 (Michigan Administrative Procedures Act of 1969).

¹⁹² Verizon MI ICA, Collocation Attach. § 1.

amendments and changes that are intended to implement substantial telecommunications policy initiatives than to freeze it at its inception.”¹⁹³

Panel’s Decision

A. Should the Agreement incorporate Verizon MI’s collocation tariff by reference, thus allowing Verizon MI to unilaterally change terms and conditions of collocation?

The Panel concludes that the position and language proposed by TelNet be adopted for this portion of Issue 69.

As discussed under Issue 84, Verizon MI’s proposal would place TelNet in the position of accepting contractual changes (via the tariff process) to which TelNet has not agreed. The fundamental concept of section 251 of the Act is to allow parties to negotiate terms and conditions for interconnection, including collocation. To the extent parties are unable to negotiate these terms, either party may file for arbitration with the Commission. The Panel agrees with TelNet that Verizon MI’s position essentially eliminates the negotiation process outlined in Sections 251 and 252 of the Act. While Verizon MI may be correct that the adoption of TelNet’s position may create some administration issues for Verizon MI, these potential concerns cannot override the fundamental concept of carrier negotiation embodied in the Act.

The Panel notes that the same conclusion was reached by the FCC in the *Virginia Arbitration Order*. While the Panel notes Verizon MI’s position regarding the strength that the *Virginia Arbitration Order* should be afforded, the rationale used by the FCC applies here, “... the parties are certainly free to agree that services will be provided pursuant to tariffs filed with the appropriate commission, [w]here the parties fail to agree, however, and ask a state

¹⁹³ Order Resolving Arbitration Issues, *Joint Petition of AT&T Communications of New York, Inc., TCG New York Inc. and ACC Telecom Corp. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York Inc.*, Case No. 01-C-0095, at 2, 5 (N.Y. P.S.C. July 30, 2001).

commission to set rates or resolve other issues relating to the interconnection agreement, a carrier cannot use tariffs to circumvent the Commission's determinations under section 252..."¹⁹⁴ TelNet is negotiating its own interconnection agreement with Verizon MI and other CLECs are free to negotiate similar language in their own interconnection agreements. Furthermore, the result of individual contract negotiations is likely to result in different contracting parties operating under different contract terms. For these reasons, the Panel does not agree with Verizon MI that different collocation rules for TelNet vis-à-vis the rest of the Michigan CLEC community and may result in discrimination.

The Panel also reviewed the decision in *Verizon North I*. While Verizon MI is correct that this decision addressed whether carriers were forced to file tariffs for interconnection and did not reject the notion of incorporating tariffs by reference into a contract, the analysis provided by the Court succinctly proves the Panels' conclusion, "... the detailed procedural scheme – including negotiation, arbitration, state commission approval, FCC oversight, and federal judicial review – set out in § 252 is central to the [FTA]." ¹⁹⁵

The Commission also addressed this issue in the *SBC/MCI Arbitration Order* when the panel in that proceeding ruled in favor of MCI's proposal that "the collocation tariff incorporated must be of a date certain and not subject to changes unilaterally imposed by SBC Michigan when changes are made to the tariff."¹⁹⁶ The Panel is not persuaded that the Commission's decision should be reversed.

Verizon MI fears that TelNet's proposed language would provide TelNet with an arbitrage opportunity to mix and match tariff and agreement terms. The Commission rejected a

¹⁹⁴*Virginia Arbitration Order* ¶ 602.

¹⁹⁵*Verizon North I*, 309 F.3d at 937.

¹⁹⁶ MCI's PDAP from the SBC/MCI arbitration. See also *DAP, SBC/MCI Arbitration* at 22.

similar argument in the *SBC/MCI Arbitration Order* when it agreed with the Panel that the CLEC would not be permitted to mix and match terms for a particular order.¹⁹⁷

The Panel also believes that Verizon MI overstates CLEC involvement in the tariff filing process. According to Verizon MI, the tariff revision process “provides for CLEC involvement and ultimate Commission discretion with respect to any proposed change”¹⁹⁸ The Panel agrees with TelNet that tariff revisions are submitted on a file and use basis. The Commission does not approve tariffs and there is no publication of tariffs so that a CLEC can object prior to the tariffs becoming effective. Certainly, there is nothing in the Commission’s Communications Tariff Filing Procedures¹⁹⁹ that provides for CLEC involvement.

Rule 501 of the Rules of Practice and Procedure allows an informal complaint to be filed against a filed tariff “limited to matters involving alleged unjust, inaccurate, or improper rates or charges or unlawful or unreasonable acts, practices, or omissions of a utility,” but it does not “expressly provide for . . . a petition” to investigate a filed tariff’s noncompliance with applicable law.²⁰⁰ In an order dated November 7, 1997 in Case No. U-11410, the Commission rejected the Michigan Pay Telephone Association’s petition to initiate a contested case to investigate Ameritech Michigan’s and GTE’s tariffs. The Commission acknowledged that “it has the responsibility to review the LEC’s tariffs for compliance with applicable law,” but “[t]hat responsibility is accomplished in the daily course of business by the Staff. Should the Staff determine that a contested case is warranted to challenge any compliance, it will file a complaint

¹⁹⁷*SBC/MCI Arbitration Order* at 5-6.

¹⁹⁸ Verizon MI Answer at 157, fn 397 (citing the Michigan Administrative Procedures Act).

¹⁹⁹Opinion and Order, *In the Matter, on the Commission’s Own Motion, to Establish the Procedures and Formats for Filing Tariffs with the Commission Under the Michigan Telecommunications Act*, Case No. U-10064 (Dec. 22, 1992). Attachment A.

²⁰⁰Opinion and Order, *In the Matter of the Petition of the Michigan Pay Telephone Association to Initiate an Investigation to Determine Whether Michigan Bell Telephone Company, d/b/a Ameritech Michigan, and GTE North Incorporated are in Compliance with the Michigan Telecommunications Act and Section 276 of The Communications Act of 1934, as Amended*, Case No. U-11410 (Nov. 7, 1997), at 3.

or request the Commission to initiate a case. Once a tariff has been accepted for filing, a person who believes the tariff is inconsistent with the requirement of the law may file a complaint, and would bear the burden of proof.”²⁰¹

B. Is Verizon MI’s tariff that was in effect on February 4, 2003 such an obsolete tariff that the Parties cannot adopt it in this Agreement?

The Panel has been advised that TelNet does not object if the tariff that was incorporated into the Parties’ Agreement is the July 23, 2004 tariff. Therefore, this issue is moot.

Additional Charges for Collocation Services

Issue 70: TelNet ICA, Collocation Attachment § TBD, Page 7

Should Verizon MI have the right to assess additional charges not specified in the collocation tariff?

TelNet’s Position

Verizon MI’s language is too open-ended. Charges for collocation requests are already specified in the tariff. Verizon MI should not have the right to unilaterally determine and impose undefined “additional charges” on TelNet.

Verizon MI’s Position

Yes. Verizon MI explains that its collocation tariff provides that, on those rare occasions when the CLEC “provide[s] [Verizon MI] with specifications for any non-standard or special requirements at the time of application,” Verizon MI “reserves the right to assess the CLEC any additional charges not included in [the pricing schedule] . . . as required in association with complying with the application request.”²⁰² Thus, according to Verizon MI, if it accepts a

²⁰¹*Id* at 6.

²⁰² Verizon North Inc. Tariff M.P.S.C. No. 20R § 2.3.1(B).

CLEC's request for a unique, non-standard, arrangement, Verizon MI should be permitted to recover its costs, as required under Section 252(d)(1) of the Act.

Verizon MI argues that TelNet's proposal attempts to have it both ways: TelNet wants to retain the right to *make* such requests, but seeks to eliminate Verizon MI's right to be *compensated* for fulfilling such requests. According to Verizon MI, this proposal is inappropriate and contrary to law. Indeed, the Commission has already rejected a CLEC's attempt to alter some terms of a tariff, while seeking to preserve others: "Incorporation of the tariff terms for collocation is perfectly acceptable, and MCIIm has demonstrated no right to alter some of those tariff terms, while insisting on inclusion of others."²⁰³

Verizon MI further asserts that TelNet's claim that it will have no notice of the off-tariff charges is unfounded. Verizon MI has explained that it will provide TelNet notice of any off-tariff charges prior to performing the work. Thus, if TelNet believes that Verizon MI's charge for performing such work is too high in any specific case, TelNet may cancel its request or invoke the Agreement's dispute resolution procedures.

Panel's Decision

The Panel concludes that the position and language proposed by Verizon MI be adopted for Issue 70. In reliance upon Verizon MI's clarification and representation in its Answer that the disputed language is limited to off-tariff charges for off-tariff requests, the Panel finds that this provision should not be revised as TelNet has proposed when the tariff is incorporated into the Agreement. If a dispute arises regarding this particular issue during the pendency of the Agreement, the Panel finds that Verizon MI should be bound by the representations regarding the limited meaning of the disputed sentence that Verizon MI made in its Answer.

²⁰³ DAP, SBC/MCI Arbitration at 23.

Minor Equipment Changes

Issue 71: TelNet ICA, Collocation Attachment § TBD, Page 8

Should TelNet be required to update the application form whenever there is any minor change to the collocation equipment?

TelNet's Position

Minor improvements or alteration to the collocation equipment configuration do not need advance approval from Verizon MI. Verizon MI's proposal is too burdensome. TelNet's proposed language is from the SBC/AT&T interconnection agreement.

Verizon MI's Position

Yes. Verizon MI explains that it requires CLECs seeking to collocate in Verizon MI's central offices to submit a list of the equipment the CLEC plans to install in its collocation arrangement. Verizon MI uses these equipment lists to keep inventory of the equipment in its central offices and to ensure that all such equipment meets relevant safety standards and can be cooled by an appropriate amount of HVAC. Verizon MI notes that TelNet does not challenge this initial equipment list requirement.

Verizon MI further explains that its collocation tariff also requires CLECs adding equipment to their cages to provide Verizon MI with updated equipment lists.²⁰⁴ Verizon MI notes that there is no associated charge and no requirement that Verizon MI approve the updated list before the CLEC installs its equipment; the CLEC is merely required to *provide* the updated list before augmenting its arrangement.²⁰⁵

²⁰⁴ See Verizon North Inc. Tariff M.P.S.C. No. 20R § 2.3.5(B).

²⁰⁵ See *id.* Of course, if a CLEC proposes to add equipment to its collocation arrangement that does not meet applicable safety standards or is otherwise inappropriate for collocation, Verizon MI notes that it would have the right to demand that the CLEC not install the equipment, or remove it if it had already been installed.

Verizon MI argues that TelNet’s claim that the update requirement is “too burdensome”²⁰⁶ is implausible. Verizon MI asserts that updating equipment records is a 20-minute task that can be completed only by the CLEC and is the only way for Verizon MI to keep accurate records of the equipment collocated in its central offices. According to Verizon MI, this requirement is entirely reasonable and protects Verizon MI, end users, and other CLECs, and without this information, Verizon MI would not be able to determine whether its central offices are properly configured and conditioned, or whether all of the equipment located in them meets applicable safety requirements.

Panel’s Decision

The Panel concludes that the position and language proposed by Verizon MI be adopted for Issue 71. Verizon MI asserts that it requires equipment lists from CLECs to keep inventory of the equipment in its central offices and to ensure that all such equipment meets relevant safety standard and can be cooled by an appropriate amount of HVAC.²⁰⁷ TelNet asserts that it is burdensome for it to halt the installation and list any minor changes in an updated application form.²⁰⁸ Given the simple nature of updating an equipment list, the Panel finds TelNet’s burdensome argument unpersuasive. The Panel believes that Verizon MI’s safety concern is more critical than TelNet’s concern regarding the burdensome requirement, especially when updating equipment records should be simple “20-minute task,” an assertion that TelNet did not dispute. In addition, Verizon MI states that TelNet will not be required to halt any installation of collocation equipment. According to Verizon MI, “There is no associated charge and no

²⁰⁶ TelNet Petition, Collocation Attach. at 8.

²⁰⁷ Verizon MI Answer at 165.

²⁰⁸ TelNet PDAP at 113.

requirement that Verizon MI approve the updated list before the CLEC installs in its equipment; the CLEC is merely required to provide the updated list before augmenting its arrangement.”²⁰⁹

Six Month Forecast and Implementation Interval

Issues 72 and 73: TelNet ICA, Collocation Attachment § TBD, Pages 9-11

Should TelNet be required to provide a six month forecast of collocation prior to the application date?

TelNet’s Position

TelNet does not object to a requirement to provide periodic good faith, and non-binding forecasts of its collocation needs. However, the six-month timely and accurate forecasting requirement is anti-competitive under the Federal Act because Verizon MI will be able to quickly capitalize on new business plans and deploy new technology 6 months ahead of TelNet.

Verizon MI’s Position

Issue 72: Yes. Verizon MI explains that, under its collocation tariff, if a CLEC provides a forecast six months before applying for collocation in a particular central office, it will receive priority treatment, a 76-business-day interval for initial arrangements, and a 45-business-day interval for most augments to existing arrangements.²¹⁰ CLECs that do not properly forecast their requests, on the other hand, are potentially subject to longer intervals.²¹¹

Verizon MI notes that these forecasting requirements have been expressly approved by the FCC: “In the Collocation Reconsideration Order, the Commission made clear that an incumbent LEC could require a competitive LEC to forecast its physical collocation

²⁰⁹ Verizon Answer at 166.

²¹⁰ See Verizon North Inc. Tariff M.P.S.C. No. 20R § 2.4.1.

²¹¹ See *id.* § 2.4.2(B).

demands.”²¹² Verizon MI further notes that, in its *Collocation Waiver Order*, the FCC clarified that it would “allow Verizon and SBC to increase the provisioning interval for a proposed physical collocation arrangement by no more than 60 calendar days in the event a competitive LEC fails to provide a timely and accurate forecast.”²¹³

According to Verizon MI, other CLECs have agreed with Verizon MI’s proposed forecasting requirements, which are the same as those approved by the FCC. For example, on August 27, 2003, Verizon MI entered into a Settlement Agreement with AT&T, Covad, and Sprint in which Verizon MI agreed to file the very same forecasting requirements and associated intervals at issue here throughout the Verizon footprint, including in Michigan. Verizon MI filed revisions to the Michigan collocation tariff as required under the Settlement Agreement on October 27, 2003. Verizon MI explains that no CLEC objected, and the revisions became effective on November 2, 2003.

Verizon MI argues that TelNet’s proposal to keep Verizon MI’s short implementation intervals, but to eliminate the forecasting requirement,²¹⁴ ignores the interdependent relationship between Verizon MI’s provisioning intervals and CLEC forecasts. That is, Verizon MI’s short implementation intervals are possible only when it has adequate notice of CLEC physical collocation plans. Verizon MI also claims that this Commission has rejected other CLEC “benefit-without-the-burden proposals,” holding in one case that the “[i]ncorporation of the tariff

²¹² Memorandum Opinion and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 3748 ¶ 16 (2000) (“*Collocation Waiver Order*”) (citing Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 17806 ¶ 39 (2000) (“*Collocation Reconsideration Order*”)).

²¹³ *Collocation Waiver Order* ¶ 16. The Commission generally approved the New York PSC standards, which include a six-month forecasting requirement. See *id.* ¶ 17.

²¹⁴ See TelNet Petition, Collocation Attach. at 9-10 (proposing, for example, to eliminate the condition that “[u]nforecasted demand will be given a lesser priority than forecasted demand”).

terms for collocation is perfectly acceptable, and MCIIm has demonstrated no right to alter some of those tariff terms, while insisting on inclusion of others.”²¹⁵

Finally, Verizon MI argues that the Commission should reject TelNet’s proposal to amend Verizon MI’s collocation tariff to extend standard deadlines only when “unanticipated requests push demand beyond [Verizon MI’s] capacity limits.”²¹⁶ Verizon MI claims that it should not be held to arbitrary deadlines to complete requests that TelNet had not bothered to forecast in the first place. Verizon MI claims that its collocation tariff contains flexible language that calls on the Parties to work cooperatively to negotiate reasonable provisioning deadlines,²¹⁷ and notes that this language has been in Verizon MI’s tariff for years and has never been the subject of a dispute with a CLEC.

Issue 73: No. Verizon argues that its tariffed virtual collocation forecasting requirements should be approved for the same reasons as its tariffed physical collocation forecasting requirements, as explained in Issue 72.

Panel’s Decision

The Panel concludes that the position and language proposed by Verizon MI be adopted for both Issues 72 and 73. The Panel agrees with Verizon MI that TelNet should be required to properly forecast its physical collocation demands in order to qualify for Verizon MI’s short implementation intervals. The usefulness of such forecasts is obvious, and TelNet’s assertion that there is no “relationship between the interval and the forecasting”²¹⁸ is unavailing.

²¹⁵ DAP, SBC/MCI Arbitration at 23.

²¹⁶ See TelNet Petition, Collocation Attach. at 10.

²¹⁷ Verizon North Inc. Tariff M.P.S.C. No. 20R § 2.4.2(B).

²¹⁸ TelNet PDAP at 117.

The Panel also finds TelNet’s claim that Verizon MI’s collocation tariff gives “unforecasted collocation requests a lesser priority without a definite interval”²¹⁹ to be patently incorrect. Verizon MI’s collocation tariff clearly lays out the interval increases for unforecasted and not properly forecasted requests, none of which exceeds the two months expressly blessed by the FCC.²²⁰ Moreover, Verizon MI’s tariff makes clear that even though collocation demand is supposed to be forecasted six months in advance, there is no increase to the implementation interval so long as the CLEC forecasts its request at least *two* months in advance.²²¹

The Panel further finds TelNet’s interpretation of the *Collocation Reconsideration Order* unpersuasive. Contrary to TelNet’s argument, raised for the first time in its PDAP, the FCC made it clear in a subsequent ruling that the *Collocation Reconsideration Order* permits an incumbent LEC to “require a competitive LEC to forecast its physical collocation demands.”²²² Indeed, in this subsequent order, the FCC explicitly approved forecasting requirements *identical* to those contained in Verizon MI’s collocation tariff.²²³

Moreover, Verizon MI’s tariffed forecasting requirements were the subject of a footprint-wide settlement agreement between Verizon and several CLECs. As Verizon MI explains, as part of that settlement, it filed tariff revisions in Michigan conforming its intervals to these requirements. No CLEC objected to this tariff filing, and it was allowed to go into effect on

²¹⁹ TelNet PDAP at 116.

²²⁰ Verizon North Inc. Tariff M.P.S.C. No. 20R § 2.4.2(B) (providing that, where no forecast is received or the forecast is received less than one month prior to the application date, the Interval Start Date commences two months after the application date; where the forecast is received more than one month but less than two months prior to the application date, the Interval Start Date commences one month after the application date; and where the forecast is received two months or more prior to the application date, the Interval Start Date commences on the application date).

²²¹ *Id.*

²²² *Collocation Waiver Order* ¶ 16 (citing *Collocation Reconsideration Order* ¶ 39).

²²³ *Id.* ¶¶ 13-17.

November 2, 2003. TelNet has failed to explain why it should be exempt from these provisions.²²⁴

Reservation of CLEC's Collocation Rights

Issue 75: TelNet ICA, Collocation Attachment § TBD, Page 14

Should Verizon MI's tariff provisions govern and limit TelNet's rights under state and federal law?

TelNet's Position

Some of the language in Verizon MI's collocation tariff is taken word for word from provisions in the CFRs, but, at some places, Verizon MI's tariff language omits portions of the same CFR provisions. TelNet does not wish to contract away its collocation rights under applicable law. Accordingly, there should be a statement in the Agreement that notwithstanding incorporation of Verizon MI's tariff into the Agreement, nothing in the tariff should be construed as limiting TelNet's collocation rights under federal law.

Verizon MI's Position

No. Verizon MI argues that TelNet's proposal that the Parties' Collocation Attachment contain language stating that neither the Collocation Attachment nor Verizon MI's collocation tariff shall "limit TelNet's rights under state and federal law, including but not limited to, 47 CFR 51.323"²²⁵ is unnecessary because Verizon MI is required to comply with applicable law, including 47 C.F.R. § 51.323, whether or not the Agreement says so. Verizon MI also notes that the Agreement *does* say so; Section 4.2 provides: "[e]ach Party shall remain in compliance with

²²⁴ The Panel also rejects TelNet's suggestion that Verizon MI's wholesale organization would improperly share TelNet's forecasts with Verizon MI's retail organization. See TelNet PDAP at 114 (TelNet's Position). Such misuse of CLEC proprietary information is clearly forbidden, 47 U.S.C. § 222(b), and there is no reason to believe that Verizon MI would violate this prohibition.

²²⁵ TelNet Petition, Collocation Attach. at 14.

Applicable Law in the course of performing this Agreement.”²²⁶ Verizon MI argues that TelNet thus already has belt-and-suspenders protection, and that as a matter of contract drafting, TelNet’s proposal to include “a superfluous, collocation-specific belt” should be rejected.

Panel’s Decision

The Panel concludes that the position and language proposed by TelNet be adopted for Issue 75. The Panel agrees with TelNet that Verizon MI’s tariff does not fully set forth CLEC collocation rights under the applicable law. The incorporation of the tariff language does not relieve Verizon MI of its obligations under state and federal law.

Verizon MI argues that TelNet’s concern is already addressed by Section 4.5, which provides “if any provision of this Agreement shall be invalid or unenforceable under Applicable Law, . . . this Agreement shall be construed as if it does not contain such invalid or unenforceable provision.” The Panel disagrees. TelNet is not arguing that some provisions may be invalid or unenforceable; instead, TelNet is contending that the tariff provisions omit certain of TelNet’s collocation rights under state and federal law. Since Verizon MI has espoused no intent to limit TelNet’s collocation rights, there is no harm (and perhaps substantial benefit) in having the parties’ Agreement explicitly so provide.

Specification of Permissible Collocation Equipment

Issue 76: TelNet ICA, Collocation Attachment § TBD, Page 15

Should the Agreement list some of the permissible types of equipment that TelNet may collocate in Verizon MI’s central office?

TelNet’s Position

²²⁶ Verizon MI ICA, GTC § 4.2. Moreover, Section 4.5 provides: “[i]f any provision of this Agreement shall be invalid or unenforceable under Applicable Law, . . . this Agreement shall be construed as if it did not contain such invalid or unenforceable provision.”

TelNet’s proposed language is directly taken from Section 12.4.1 of its existing interconnection agreement with SBC. The listing is helpful because it will aid in avoiding potential future disputes.

Verizon MI’s Position

No. The 1996 Act states that CLECs are entitled to collocate in ILEC central offices only such equipment as is “necessary for interconnection or access to unbundled network elements.”²²⁷ Verizon MI explains that Section 2.4.7(B) (“Permissible Equipment”) of its collocation tariff fulfills this requirement by providing CLECs such as TelNet with the right to “the collocation and use of any equipment necessary for interconnection or access to unbundled network elements.”²²⁸ According to Verizon MI, its tariff does not list the pieces of equipment that meet this standard because such a list would soon become outdated as telecommunications markets and technologies evolve.

Verizon MI argues that the Commission should reject TelNet’s proposal to deviate from the tariff and include in the Agreement a list of equipment that is “necessary” for interconnection and/or access to UNEs, including “Optical Line Terminating Multiplexer equipment,” “asynchronous transfer mode (‘ATM’) multiplexers,” and “Digital Subscriber Line Access Multiplexers (‘DSLAM’).”²²⁹ Verizon MI notes that the FCC has specifically considered and rejected the argument that ILECs should be required to specify permissible collocation equipment,²³⁰ including “optical terminating equipment,” “ATM multiplexers,” and “DSLAMs”²³¹ — the same equipment TelNet proposes to include on its list for the Agreement

²²⁷ 47 U.S.C. § 251(c)(6).

²²⁸ Verizon North Inc. Tariff M.P.S.C. No. 20R § 2.4.7(B).

²²⁹ TelNet Petition, Collocation Attach. at 15.

²³⁰ Fourth Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 15435 ¶ 44 (2001) (“*Collocation Remand Order*”).

²³¹ *Id.*

here.²³² As the FCC found, “any list of ‘necessary’ equipment we might develop would quickly become obsolete as manufacturers develop, and carriers deploy in new ways, the ever-increasing array of equipment that technological advances have made possible.”²³³

Verizon MI argues that the fact that “TelNet’s proposed list is taken from Section 12.4.1 of its current agreement with Ameritech,”²³⁴ is immaterial. First, there is no requirement for Verizon MI to include a list in its Agreement just because it may appear in another carrier’s agreement. Second, Ameritech’s agreement with Coast to Coast Telecommunications, Inc. (which TelNet opted into) dates from September 18, 2000 — almost a year before the FCC rejected “permissible equipment” lists.

Verizon MI does not dispute that the equipment TelNet specifies is currently appropriate for collocation, but argues that some of that equipment may cease to be “necessary for interconnection or access to unbundled network elements”²³⁵ before the Agreement expires, and that Verizon MI should not be forced to continue to allow the collocation of equipment that no longer meets the Act’s standard.

Panel’s Decision

The Panel concludes that the position and language proposed by Verizon MI be adopted for Issue 76. The Panel finds particularly persuasive the FCC’s finding that “any list of ‘necessary’ equipment [the FCC] might develop would quickly become obsolete as manufacturers develop, and carriers deploy in new ways, the ever-increasing array of equipment that technological advances have made possible.”²³⁶ TelNet did not provide any evidence in support of its position that the Agreement should contain a list of permissible type of collocation

²³² TelNet Petition, Collocation Attach. at 15.

²³³ *Collocation Remand Order* ¶ 44.

²³⁴ TelNet Petition, Collocation Attach. at 15.

²³⁵ *Collocation Remand Order* ¶ 44.

²³⁶ *Id.* ¶ 44.

equipment. Instead, TelNet simply copied language from its agreement with SBC Michigan. The Panel believes that TelNet's negotiated contract provisions with other carriers is not relevant to this arbitration.

The Panel notes that Verizon MI has already agreed with TelNet that the equipment TelNet specifies is *currently* appropriate for collocation, so the Panel believes TelNet's dispute-avoidance rationale is overblown.

Finally, the Panel is concerned about one of the rationales that Verizon MI advances for not listing currently permissible equipment. Verizon MI asserts that it wants to be able to require TelNet to remove collocation equipment, apparently in mid-term of the Agreement, if that equipment ever becomes not permissible. As stated previously, the Agreement must reflect the current law. To the extent that a change of law involves collocation, the Panel expects that the parties to negotiate, and if necessary submit an amendment. If the parties have a dispute as to the extent of the change in law, the Panel expects the parties to follow the dispute resolution procedures contained in the Agreement.

Cross –Connection with other Collocated CLECs

Issue 77: TelNet ICA, Collocation Attachment, § TBD, Page 16

Should TelNet be permitted to exercise its rights under 47 CFR 51.323(h) to interconnect with other collocated carriers at Verizon MI's premises when such cross-connection arrangement will comply in all aspects with Verizon MI's technical and engineering requirements?

TelNet's Position

TelNet's proposed language is taken from the Coast to Coast/SBC interconnection agreement, which TelNet adopted and under which it is currently operating to interconnect with SBC. TelNet is exercising its right under 47 CFR 51.323(h).

Verizon MI's Position

Verizon MI explains that FCC rule 51.323(h) requires ILECs such as Verizon MI to allow collocated CLECs to interconnect their networks directly with each other, bypassing the ILEC's network.²³⁷ Verizon MI claims that TelNet is incorrect in its assertion that Verizon MI "refuses to recognize th[e] right [of collocated CLECs to interconnect with each other] in either its tariffs or its proposed ICA."²³⁸ Verizon MI argues that Section 2.4.7(I) of its collocation tariff ("Interconnection Between Collocated Spaces") offers precisely that service:

Dedicated Transit Service (DTS), which allows for interconnection between CLECs, provides a dedicated electrical or optical path between collocation arrangements (caged, cageless, and virtual) of the same or of two different CLECs within the same [Verizon MI] premises, using [Verizon MI] provided distribution facilities. DTS is available for DS0, DS1, DS3, and dark fiber cross connects. In addition, [Verizon MI] will also provide other technically feasible cross-connection arrangements, including lit fiber, on an Individual Case Basis (ICB) as requested by a CLEC²³⁹

Thus, Verizon MI argues that its collocation tariff clearly allows CLECs to interconnect to each other within a Verizon MI central office, as required by the FCC rules.

Verizon MI claims that TelNet, however, wants more than the right to interconnect with other CLECs — it wants Verizon MI to allow such interconnection in precisely the same way that SBC apparently has. Verizon MI notes that TelNet's proposal refers to a specific SBC service in an SBC interconnection agreement: "Carrier Cross-Connect Service for Interconnection" or "CCCSI."²⁴⁰ Verizon MI explains that TelNet's CCCSI proposal provides

²³⁷ 47 C.F.R. § 51.323(h).

²³⁸ TelNet Petition, Collocation Attach. at 16.

²³⁹ Verizon North Inc. Tariff M.P.S.C. No. 20R § 2.4.7(I).

²⁴⁰ See TelNet Petition, Collocation Attach. at 16.

that “TelNet may construct its own [CLEC-to-CLEC cross-connect] . . . or request Verizon to provide such connection between the two carriers’ Collocated equipment.”²⁴¹

Panel’s Decision

The Panel concludes that the position and language proposed by Verizon MI be adopted for Issue 77. The Panel agrees with Verizon MI that its Dedicated Transit Service allows for direct CLEC-to-CLEC interconnection, in compliance with 47 C.F.R. § 51.323(h). The Panel also agrees with Verizon MI that it should not have to offer an *additional* CLEC-to-CLEC interconnection service simply because SBC does so.

The Panel further finds that TelNet’s proposal is inconsistent with applicable law because it allows *the CLEC* to decide who performs the actual interconnection work. As Verizon MI correctly argues, the FCC’s rules state that the ILEC must “permit[] the collocating parties to provide the requested connection for themselves” *only if* the ILEC does not itself “provide . . . a connection between the equipment in the collocated spaces of two or more telecommunications carriers.”²⁴² The Panel also notes that the D.C. Circuit²⁴³ and the FCC²⁴⁴ have expressly rejected the proposition that ILECs should be forced to allow CLECs to perform the interconnection work within ILEC central offices. Indeed, TelNet implicitly admits in its PDAP that what TelNet actually wants is the right to decide who performs the actual interconnection work — a right the FCC rules specifically reserve for the ILEC.²⁴⁵

²⁴¹ *Id.*

²⁴² 47 C.F.R. § 51.323(h)(1).

²⁴³ See *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 423-24 (D.C. Cir. 2000) (finding that requiring ILECs to allow CLECs to install the facilities for CLEC-to-CLEC interconnection would “impose[] an obligation on [incumbent] ILECs that has no apparent basis in the statute.”).

²⁴⁴ *Collocation Remand Order* ¶ 59 (“we find that, in light of *GTE v. FCC*, we may not require an incumbent LEC to allow competitive LECs to provision cross-connects outside of their immediate physical collocation space at the incumbent’s premises.”); see also *id.* ¶ 61 (“We find that neither section 201 nor section 251 authorizes us to adopt a rule requiring physical collocation by which incumbent LECs allow competitive LECs to provision cross-connects outside of their immediate collocation space.”).

²⁴⁵ 47 C.F.R. § 51.323(h)(1).

The Panel believes that TelNet’s citation of the *Collocation Remand Order* regarding disputes involving cross-connects being addressed at the state level is misplaced. The Panel believes that the FCC’s statement refers to more general cross connect issues (*e.g.*, ensuring efficient interconnection between collocated carriers) and not the specific issue at hand. As the FCC clearly stated, “At issue in this Order are the cables that cross-connect two collocated competitive LECs. As explained further below, we find that, in light of *GTE v. FCC*, we may not require an incumbent LEC to allow competitive LECs to provision cross-connects outside of their immediate physical collocation space at the incumbent’s premises.”²⁴⁶

The Panel disagrees with TelNet that the MTA provides independent authority to require Verizon MI to allow CLECs to perform this work. The Panel believes that it would not be appropriate, to use the general non-discrimination provision of the Michigan Telecommunications Act to end-run FCC and D.C. Circuit decisions limiting the scope of the collocation-specific provision of the 1996 Act, especially since TelNet has presented no evidence of discrimination or delay. Moreover, in the *Collocation Remand Order*, the FCC recognized the ILEC *property right* in the common areas of the central office that are used to cross-connect two CLECs;²⁴⁷ this property right cannot be washed away by the Michigan Telecommunications Act.

In addition, the Panel finds absolutely no evidence to support TelNet’s charge that Verizon MI will deal with it in bad faith when provisioning DTS requests. DTS is a tariffed offering —if there had been instances of the kinds of abuse that TelNet raises in its PDAP, TelNet would cite them. Finally, TelNet has no right to particular contract language simply

²⁴⁶ *Collocation Remand Order* ¶ 59.

²⁴⁷ *Id.* ¶ 60 (It “is substantially less invasive of the incumbent’s property rights (*e.g.*, in terms of security, safety, and risk to incumbent LEC equipment)” for the incumbent LEC to provision cross-connects between two collocated CLECs, because then “the competitive LECs need not have access to the common areas for the purpose of provisioning the cross-connects.”).

because SBC has voluntarily agreed to such a provision. The Panel believes that TelNet’s negotiated contract provisions with other carriers is not relevant to this arbitration.

Technical Standards

Issue 78: TelNet ICA, Collocation Attachment, § TBD, Pages 17-18

In addition to industry standards, should TelNet be subject to Verizon MI’s internal standards in the tariff and new standards that Verizon MI may develop in the future?

TelNet’s Position

The industry standards are sufficient to protect Verizon MI and collocating CLECs. Verizon MI’s language would allow Verizon MI to unilaterally specify additional standards for new equipment and could be used to frustrate TelNet’s ability to deploy new technologies. The Agreement should also state that Verizon MI may also not require more stringent standards than the standards that Verizon MI applies to its own equipment.

Verizon MI’s Position

Verizon MI explains that Section 2.4.7(C) of its collocation tariff sets forth the risk/safety/hazard standards with which every carrier locating equipment in Verizon MI’s central offices — including Verizon MI itself — must comply.²⁴⁸ The tariff does not state specific safety rules, but rather incorporates by reference a number of different risk/safety/hazard standards and codes.²⁴⁹

Verizon MI argues that TelNet seeks to make three inappropriate changes to this section of the tariff: (1) to delete one subset of safety standards; (2) to eliminate Verizon MI’s ability to “specify the type of cable, equipment and construction standards required in situations not

²⁴⁸ Verizon North Inc. Tariff M.P.S.C. No. 20R § 2.4.7(C).

²⁴⁹ *See id.*

otherwise covered in this Tariff”; and (3) to add verbatim language from 47 C.F.R. § 51.323(c) to the tariff.²⁵⁰

Verizon MI argues that TelNet’s first proposal to eliminate for itself the codified Verizon MI risk/safety/hazard standards with which every carrier locating equipment in Verizon MI’s central offices — including Verizon MI itself — must comply is inappropriate.²⁵¹ Verizon MI claims that its equipment safety standards are publicly available and fill in the gaps left by the generic industry codes. Verizon MI further asserts that TelNet’s failure to comply with these standards would put at risk not only its own equipment, employees, and customers, but also those of Verizon MI and every other CLEC collocated in the same central office. Verizon MI argues that TelNet has failed to explain why it would be a burden to comply with these standards, which apply throughout Verizon’s footprint.

Verizon MI similarly claims that TelNet’s second proposal to eliminate Verizon MI’s ability to specify safety standards for situations not covered by the collocation tariff would introduce needless risk into the central office and network. Verizon MI notes that TelNet may well desire at some point to deploy technology the safety of which has not been ascertained, and claims that Verizon MI should have the flexibility to develop additional safety requirements in such a case. Verizon MI asserts that if TelNet wishes to dispute particular safety requirements that are developed in the future, it may invoke the Agreement’s dispute resolution procedures at that time, but that in the meantime Verizon MI should be permitted to take the steps necessary to protect its network.

²⁵⁰ See TelNet Petition, Collocation Attach. at 17-18.

²⁵¹ *Id.* at 17.

Finally, Verizon MI argues that TelNet’s proposal to add to Verizon MI’s tariff language that “is taken directly from 47 CFR 51.323(c)”²⁵² is superfluous. Verizon MI argues that it already must comply with all federal collocation regulations, including 47 C.F.R. § 51.323(c), and thus it is not necessary to add quotations from that rule to the Agreement.

Panel’s Decision

The Panel concludes that the position and language proposed by Verizon MI be adopted for Issue 78. The Panel agrees with Verizon MI that TelNet should be subject to the same risk/safety/hazard standards that apply to every other carrier locating equipment in Verizon MI’s central offices — including Verizon MI itself.²⁵³ The record here is uncontested that Verizon MI’s equipment safety standards are publicly available and fill in the gaps left by the generic industry codes, and that TelNet’s failure to comply with these standards would put at risk not only its own equipment, employees, and customers, but also those of Verizon MI and every other CLEC collocated in the same central office. The Panel finds that TelNet has failed to explain why it would be a burden to comply with these standards, which apply throughout Verizon MI’s footprint.

TelNet’s only argument in support of its position is a statement that SBC does not require additional safety standards in the SBC/AT&T agreement. As discussed in other issues, voluntary negotiated provisions involving other carriers are not relevant to this arbitration.

The Panel also agrees with Verizon MI that it must have the right to “specify the type of cable, equipment and construction standards required in situations not otherwise covered in this Tariff.”²⁵⁴ New kinds of equipment may well require safety standards that are different than those that apply to existing equipment. Verizon MI’s responsibility to Michigan’s

²⁵² TelNet Petition, Collocation Attach. at 18.

²⁵³ Verizon North Inc. Tariff M.P.S.C. No. 20R § 2.4.7(C).

²⁵⁴ *Id.*

telecommunications end users, and to all of the companies that utilize Verizon MI's central offices to serve them, requires that Verizon MI have the ability to specify safety standards that accommodate new types of equipment and technologies. The Panel finds unpersuasive TelNet's suggestion that Verizon MI would act in bad faith to delay TelNet's deployment of new technology under this clause,²⁵⁵ as TelNet has not pointed to a single case anywhere in Verizon MI's footprint even alleging such behavior, much less establishing it.

The Panel also disagrees with TelNet's recommendation that 47 C.F.R. 51.323(c) be included in the Agreement.²⁵⁶ While TelNet asserts that this Agreement is to implement and clarify federal and state rules and regulations in order to avoid future disputes on different interpretations of the laws, it is unclear how inclusion of the FCC rule will advance this concern. Inclusion of the rule itself does nothing to implement or clarify the rule. Not to mention that inclusion of this, or any other FCC rules will make the contract extremely long and unwieldy. The Panel understands that Verizon MI is obligated to comply with all FCC rules, whether they are included in the agreement or not.²⁵⁷

Duplicative Liability and Indemnification Provisions

Issue 80: TelNet ICA, Collocation Attachment § TBD, Page 20.

Should TelNet be subject to the collocation-specific liability and indemnification requirements in addition to the general liability and indemnification requirements?

TelNet's Position

²⁵⁵ See TelNet PDAP at 126.

²⁵⁶ TelNet Petition, Collocation Attach. at 18.

²⁵⁷ Verizon MI ICA, GTC § 4.2 ("Each Party shall remain in compliance with Applicable Law in the course of performing this Agreement.").

Sections 20 and 25 in the General Terms and Conditions of the instant Agreement already cover extensively the liability and indemnification issue. TelNet should not be subject to two sets of such requirements.

Verizon MI's Position

Yes. Verizon MI explains that its collocation tariff contains liability and indemnification provisions that specifically govern the unique relationship between Verizon MI and a CLEC when the CLEC collocates in a Verizon MI central office. For example, Verizon MI notes that the collocation tariff requires the CLEC to indemnify Verizon MI for damages “arising out of or relating to CLEC installation and operation of its facilities or equipment within the multiplexing node, roof space and transmitter space,”²⁵⁸ requires that both Verizon MI and the CLEC take responsibility “for all persons under their control or aegis . . . working in or on the exterior of the central office,”²⁵⁹ and provides that Verizon MI “represents, warrants and covenants that it shall comply with all applicable federal, state or local law, ordinance, rule or regulations, in connection with its provision of service within or on the exterior of the central office, including but not limited to, any applicable environmental, fire, OSHA or zoning laws.”²⁶⁰ Verizon MI proposes to incorporate these provisions by reference into the Parties’ Agreement.²⁶¹

Verizon MI claims that TelNet is mistaken in its argument that such collocation-specific provisions are unnecessary because the Agreement “already prescribes liability and indemnification requirements.”²⁶² Verizon MI asserts that the collocation tariff’s liability and indemnification provisions span several pages and specifically address collocation,²⁶³ while the

²⁵⁸ Verizon North Inc. Tariff M.P.S.C. No. 20R § 2.6(L).

²⁵⁹ *Id.* § 2.6(O).

²⁶⁰ *Id.* § 2.6(N).

²⁶¹ See Verizon MI Collocation Attach. § 1.

²⁶² TelNet Petition, Collocation Attach. at 20.

²⁶³ Verizon North Inc. Tariff M.P.S.C. No. 20R § 2.6.

Agreement’s general indemnification provision contains a single sentence, which does not apply specifically to collocation arrangements.²⁶⁴ Verizon MI claims that the general indemnification provision thus does not address all the unique issues that arise when a CLEC is allowed to access Verizon MI’s central offices to place and maintain its telecommunications equipment.

Finally, Verizon MI argues that TelNet has offered no rationale for granting it an exception from the collocation-specific liability and indemnification provisions in Verizon MI’s collocation tariff that apply to all other Michigan CLECs and Verizon MI itself.

Panel’s Decision

The Panel concludes that the position and language proposed by Verizon MI be adopted for Issue 80. The Panel agrees with Verizon MI that collocation presents unique risks of the Parties damaging one another’s networks, and that collocation-specific liability and indemnification provisions are therefore appropriate. As Verizon MI correctly notes, its tariffed collocation liability and indemnification provisions are far more specific and relevant to collocation than the Agreement’s general indemnification provision, which runs only a single sentence and does not apply specifically to collocation arrangements.²⁶⁵ The Panel finds TelNet’s counter-argument — that the Agreement’s general terms and conditions *exempt* from recovery a number of types of damage awards²⁶⁶ — to be a non sequitur.

TelNet’s assertion that “the term ‘Service Failure’ is very broad”²⁶⁷ is beside the point. TelNet, or another CLEC opting into the Agreement, could attempt to avoid the liability provisions by interpreting “Service Failures” to be limited to problems arising in the course of

²⁶⁴ Verizon MI ICA, GTC § 20.1.

²⁶⁵ *Id.*

²⁶⁶ TelNet PDAP at 128.

²⁶⁷ *Id.*

providing Services.²⁶⁸ The collocation tariff's liability and indemnification provisions make the Parties' obligations clear and unequivocal by requiring, among other things, that the CLEC indemnify Verizon MI for damages "arising out of or relating to CLEC installation and operation of its facilities or equipment within the multiplexing node, roof space and transmitter space,"²⁶⁹ and that both Verizon MI and the CLEC take responsibility "for all persons under their control or aegis . . . working in or on the exterior of the central office."²⁷⁰

Given the unique nature of the collocation provisions, the Panel is not concerned that having two different sets of liability and indemnification provisions will cause needless confusion and engender controversy.²⁷¹ The collocation liability and indemnification provisions are limited to that offering and nothing more. The general liability and indemnification provisions govern the remainder of the agreement.

Duplicative Insurance Provisions

Issue 81: TelNet ICA, Collocation Attachment § TBD, Page 21.

Should TelNet be subject to the collocation-specific insurance requirements in addition to the general insurance requirement?

TelNet's Position

TelNet has already proposed reasonable insurance requirements. Verizon MI should not be permitted to avoid negotiated insurance levels by tariffing insurance requirements. TelNet should not be subject to two sets of insurance requirements.

Verizon MI's Position

²⁶⁸ Verizon MI ICA, GTC § 25.1.

²⁶⁹ Verizon North Inc. Tariff M.P.S.C. No. 20R § 2.6(L).

²⁷⁰ *Id.* § 2.6(O).

²⁷¹ TelNet PDAP at 128.

Yes. Verizon MI explains that its collocation tariff contains insurance provisions that protect Verizon MI against the risks unique to collocation, where CLECs typically install and operate a number of large pieces of equipment — each drawing large amounts of electrical power — in Verizon MI’s central offices.²⁷² According to Verizon MI, these requirements are industry-standard, have been expressly approved by the FCC, and are a standard feature of Verizon MI’s interconnection contracts.

Verizon MI further argues that the insurance requirements in the collocation tariff, which apply to all CLECs in Michigan, cover the specific risks that arise when a CLEC collocates in a Verizon MI central office and therefore are necessary. Verizon MI notes that these provisions are included in a number of Verizon collocation tariffs throughout the country and have been approved by a number of state commissions.

Finally, Verizon MI argues that TelNet’s proposal to exempt itself from this portion of Verizon MI’s collocation tariff — arguing that the general insurance requirements set forth in the Agreement’s General Terms and Conditions section should apply instead²⁷³ — is improper.

Panel’s Decision

The Panel concludes that the position and language proposed by TelNet be adopted for Issue 81. Verizon MI argues that its collocation-specific insurance requirements are “necessary” to “cover the additional specific risks that arise when a CLEC collocates in a Verizon MI central office.”²⁷⁴ However, this assertion does not withstand scrutiny. Verizon MI recites the insurance levels that are specified in its collocation tariff on page 188 of its Answer. When these levels are compared with the general levels of insurance that Verizon MI has proposed in the instant Agreement (See Issue 12, previously discussed), it is revealed that insurance levels that

²⁷² Verizon North Inc. Tariff M.P.S.C. No. 20R § 2.7.

²⁷³ TelNet Petition, Collocation Attach. at 21.

²⁷⁴ Verizon MI Answer at 189.

Verizon MI propose are the same for both general coverage and collocation coverage. This fact refutes Verizon MI's assertion that higher levels of insurance coverage are necessary when a CLEC collocates. Thus, the Panel is not persuaded that higher levels of insurance are needed for collocation.

In any event, the fact that Verizon MI seeks to require the same level of coverage both when a CLEC collocates and when a CLEC does not collocate demonstrates that the real issue here is what level of insurance properly balances Verizon MI's need for adequate coverage and TelNet's need not to be forced to purchase excessive amounts of insurance. The Panel already discussed this issue in the context of Issue 12. That discussion applies equally here. The Panel repeats that TelNet has provided evidence that it negotiated insurance coverage specific to a collocation arrangement with Level 3. The Panel notes that TelNet has offered in this arbitration to purchase \$5,000,000 of total liability coverage and that this amount is significantly greater than the amount of coverage under its existing Agreement with Verizon MI and its collocation contract with Level 3.

For the reasons expressed here and in Issue 12, the Panel finds TelNet's proposed level of insurance coverage is sufficient and TelNet's proposed language should be adopted.

Crediting of Refunds

Issue 82: TelNet ICA, Collocation Attachment § TBD, page 22-23

Should Verizon MI be permitted to apply refunds of collocation charges paid by TelNet to any account with balances owed by TelNet?

TelNet's Position

Collocation billing issues should not be intermingled with other potentially existing issues. Verizon MI's tariff provision would enable Verizon MI to apply collocation refunds to

account balances that are in dispute. Under this one-sided provision, TelNet would not have a similar right to withhold refunds from Verizon MI if Verizon MI owed TelNet on other accounts.

Verizon MI's Position

Verizon MI explains that its collocation tariff provides that when CLECs receive refunds of non-recurring charges for collocation services, the amounts of those refunds is to be first applied as a credit toward other amounts owed by the CLEC to Verizon MI, such as for UNE services.²⁷⁵ Verizon MI claims that applying refunds to outstanding balances is a longstanding, well accepted practice that is ubiquitous in commercial relationships,²⁷⁶ and that there is no reason to prohibit it, as TelNet proposes,²⁷⁷ in this setting.

Verizon MI agrees with TelNet's assertion that Verizon MI should not be permitted to apply refunds toward amounts owed to Verizon MI that are the subject of "legitimate billing dispute[s]."²⁷⁸ As Verizon MI explains, it will seek to enforce its offset rights only in the case of balances that are not subject to a bona fide dispute.

Panel's Decision

The Panel concludes that the position of Verizon MI be adopted for Issue 82 but instructs Verizon MI to include in its proposed language the representation made by Verizon MI that it will not apply refunds to offset disputed amounts in other accounts.

²⁷⁵ Verizon North Inc. Tariff M.P.S.C. No. 20R §§ 2.10.3, 2.10.4.

²⁷⁶ See *Studley v. Boylston Nat'l Bank of Boston*, 229 U.S. 523, 528 (1913) (explaining that "[w]hat the old books called a right of stoppage—what business men call set-off—is a right given or recognized by the commercial law of each of the states," and that, "broadly speaking, it represents the right which one party has against another to use his claim in full or partial satisfaction of what he owes to the other. That right is constantly exercised by business men in making book entries whereby one mutual debt is applied against another.").

²⁷⁷ See TelNet Petition, Collocation Attach. at 22-23.

²⁷⁸ *Id.* at 23.

Obligations upon Termination

Issue 83: TelNet ICA, Collocation Attachment § TBD, Page 24

Should TelNet be required to spend resources to degrade the collocation space when TelNet terminates the collocation arrangements?

TelNet's Position

The obligation to return collocation space to its original condition upon termination of a collocation arrangement should not require TelNet to spend resources to degrade the collocation space.

Verizon MI's Position

Yes. Verizon MI's collocation tariff states that when CLECs vacate collocation arrangements, they must return the vacated spaces to their original condition, or, alternatively, must reimburse Verizon MI for the cost of doing so.²⁷⁹ Verizon MI claims that this provision is simple, straightforward, and fair in that it ensures that Verizon MI is not left to incur the costs of undoing alterations to collocation spaces that were made for the benefit of the departing CLECs and are not appropriate for the spaces' future use.

Verizon MI argues that TelNet's proposal to include language in the contract stating that if it believes that it has "improved" the space and that reversing the alterations would constitute a "degradation" of the space, it should not have to restore the collocation space to its original condition²⁸⁰ is improper. Verizon MI claims that this proposal is unreasonable because it would permit TelNet to decide for itself whether it will comply with its obligation to restore collocation space. Verizon MI agrees that there may very well be instances in which Verizon MI wishes to retain CLEC modifications to a collocation space, and notes that TelNet's hypothetical example

²⁷⁹ Verizon North Inc. Tariff M.P.S.C. No. 20R § 2.10.4.

²⁸⁰ See TelNet Petition, Collocation Attach. at 24.

of installed air conditioning facilities may be one such example.²⁸¹ But Verizon MI claims that because such decisions are intrinsically fact-specific, they should be made on a case-by-case basis through consultations between Verizon MI and TelNet.

Verizon MI asserts that if TelNet does not agree with Verizon MI's position in any specific case, it may invoke the Agreement's dispute resolution procedures. Otherwise, Verizon MI claims that the default rule should be the one that is the simplest and least likely to lead to confusion: departing CLECs must restore collocation spaces to their initial condition, or must pay to have such restoration performed.

Panel's Decision

The Panel concludes that the position and language proposed by Verizon MI, as modified by the Panel, be adopted for Issue 83. The Panel instructs Verizon MI to specifically state in the Agreement that before space is degraded, the parties must discuss the specific facts on a case-by-case basis and mutually agree to degrade the collocation space. If the parties do not mutually agree, either party may invoke the dispute resolution provisions. This modification is necessary because Verizon MI's tariffs categorically state that when a CLEC vacates its collocation arrangement, it must return the vacated spaces to their original condition, or, alternatively, must reimburse Verizon MI for the cost of doing so. There are no exceptions in Verizon MI's tariff that allow for both parties to discuss the specific facts on a case-by-case basis and mutually agreeing to degrade collocation space, which as Verizon MI admits, may be useful.

Provision of UNEs and UNE Combinations to extent required by Applicable Law

**Issue 85: Verizon MI ICA, TRO Amendment § 1.1, UNE Attachment §§ 1.1, 1.2;
TelNet ICA, TRO Amendment § 1.1, UNE Attachment §§ 1.1, 1.2**

²⁸¹ *Id.*

Should the Agreement limit or specify Verizon MI's unbundling obligations under applicable law?

TelNet's Position

Verizon MI's language is focused on limiting Verizon MI's obligations. TelNet proposes to incorporate Verizon MI's duties under 47 C.F.R. 51.307, 51.309 and 51.315.

Verizon MI's Position

Verizon MI asserts that its obligations to offer UNEs and UNE combinations are governed in the first instance by 47 U.S.C. § 251(c)(3) and the FCC's implementing rules at 47 C.F.R. Part 51, pursuant to section 2.1 of the Revised TRO Amendment.²⁸² Because TelNet has not objected to section 2.1 of the Revised TRO Amendment, and the Revised TRO Amendment controls if it conflicts with any other provisions of the Agreement, Verizon MI argues that the Commission should adopt this as a clear and concise limitation on Verizon MI's legal obligations to provide UNEs and UNE combinations.²⁸³

In the alternative, Verizon MI proposes that the Commission adopt the language that Verizon MI proposes in sections 1.1 and 1.2 of the UNE Attachment, rather than TelNet's language. Although either Party's language will be trumped by the provisions of the Revised TRO Amendment, TelNet's proposed language inappropriately freezes the current version of the FCC's Part 51 rules. Instead, as the Revised TRO Amendment and Verizon MI's proposed sections 1.1 and 1.2 provide, the UNE obligations in the Agreement should continue to track the requirements of federal law as they may change from time to time.

Panel's Decision

²⁸² Section 2.1 states that Verizon MI shall be obligated to provide access to UNEs and UNE combinations "only to the extent required by both 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51."

²⁸³ In the event of a conflict between the Revised TRO Amendment and the underlying Agreement, the Revised TRO Amendment provides that that Amendment will control. See Revised TRO Amendment § 5.1.

The Panel concludes that the position and language proposed by Verizon MI be adopted for Issue 85. TelNet does not dispute section 2.1 of the Revised TRO Amendment which provides that Verizon MI is only obligated to provide access to UNEs and UNE combinations “to the extent required by both 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51.” Since the TRO Amendment trumps other provisions of the Agreement, there is no need to consider the language in sections 1.1 and 1.2 of the Network Elements Attachment.

The Panel also agrees with Verizon MI that it would be inappropriate to adopt TelNet’s proposal, which is an unnecessary and inappropriate effort to paraphrase current FCC rules. TelNet claims that its proposed section 1.2.5 is a “direct copy” of Section 51.309(a) of the FCC’s rules, but it omits a critical qualification that permits Verizon MI to impose limitations on requests for UNEs “as provided in § 51.318.”²⁸⁴ For these reasons, it is better to incorporate Part 51 by reference, as Verizon MI proposes.

On August 20, 2004, the FCC released its *Interim UNE Rules Order* that provides for the continued availability of mass-market switching, enterprise loops, and dedicated transport under the terms of existing agreements (that is, the Verizon MI-TelNet Agreement that the Parties are currently seeking to replace), for a period of six months with a proposed transition mechanism thereafter.²⁸⁵ The *Interim UNE Rules Order* also provides that competitors such as TelNet cannot rely on the *Interim UNE Rules Order* or the rules that the D.C. Circuit vacated to “expand their contractual rights [as of June 15, 2004] by seeking arbitration of new contracts.”²⁸⁶ Instead,

²⁸⁴ 47 C.F.R. § 51.309(a). That exception includes a reference to eligibility requirements for EELs.

²⁸⁵ Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket Nos. 04-313, 01-338, FCC 04-179 (rel. Aug. 20, 2004) (“*Interim UNE Rules Order*”)¶ 29.

²⁸⁶ *Id.* ¶ 23.

the *Interim UNE Rules Order* “freez[es] in place carriers’ obligations as they stood on June 15, 2004,” even if that “preserv[es] contract terms that *predate* the vacated rules.”²⁸⁷

The Panel notes that the FCC’s *Interim UNE Rules Order* and the development of permanent UNE rules are in a state of flux. First, the *Interim UNE Rules Order* does not become effective until published in the Federal Register. In addition, Verizon MI has noted that, on August 23, 2004, the Verizon telephone companies and other ILECs filed a petition for writ of mandamus with the D.C. Circuit, seeking, among other relief, that the court vacate the *Interim UNE Rules Order*. Finally, the FCC has stated that its goal is to develop and issue revised permanent rules before the six-month standstill period expires. Due to this uncertainty, Verizon MI proposes that the requirements outlined in the FCC’s *Interim UNE Rules Order* be incorporated into the Revised TRO Amendment but only insofar as the *Interim UNE Rules Order* remains legally effective. TelNet contends that Verizon MI is arguing that there should be a special change of law provision for future changes that result from the *Interim UNE Rules Order* and Verizon MI’s appeal. TelNet opposes this proposal and states that the generic change of law provisions should be used to reflect any changes in the FCC’s UNE rules. On this point, the Panel agrees with TelNet that the generic change of law provisions (as decided by the Panel for Issues 5 and 23) should be used to amend the Agreement, to the extent necessary, to reflect the requirements of the *Interim UNE Rules Order* and any subsequent decision by either a court or the FCC.

Use of UNEs

**Issue 86: Verizon MI ICA, TRO Amendment § 1.2, UNE Attachment § 1.3;
TelNet ICA, TRO Amendment § 1.2, UNE Attachment § 1.3**

²⁸⁷ *Id.* (emphasis in original).

What limitations, if any, should the Agreement impose upon TelNet's use of UNEs?

Panel Decision

The Panel has been advised by TelNet that TelNet agrees with Verizon MI that this issue is moot. Accordingly, TelNet no longer objects to inclusion of Verizon MI's proposed language in the underlying Agreement.

The Panel finds that Verizon MI's proposed language may be included in the underlying Agreement.

Issue 88: Verizon MI ICA, UNE Attachment § 1.5; TelNet ICA, UNE Attachment § 1.5

During the term of the Agreement, should Verizon MI have the right to immediately and unilaterally terminate provision of a UNE or a combination when a change of law does not require Verizon MI to immediately cease providing such UNE or combination in mid-term of the agreement?

TelNet's Position

No. Verizon MI should not have the right to terminate provision of a UNE or combination in the middle of the Agreement unless a change of law requires Verizon MI to immediately cease providing the UNE or combination before the expiration of the contract.

Verizon MI's Position

Yes. Once Verizon MI no longer has any obligation to provide TelNet access to a UNE, the Agreement cannot require continued provision of that UNE. In fact, TelNet has already agreed to language to this effect in the TRO Amendment, so the Parties' dispute about Issue 88 should be moot.

Panel's Decision

The Panel finds that the position and language proposed by Verizon MI be adopted for Issue 88. This issue is identical to Issues 5 and 23 discussed earlier and the Panel recommends that this issue be decided using the same logic. To repeat, the Agreement must reflect the current, effective law. To the extent there is a change of law affecting Verizon MI's rights and duties under the Act, the Agreement must be amended to reflect these changes. If a particular ruling does not take effect immediately, this should be considered by the Parties when negotiating the change. As TelNet corrected noted, the FCC in the *Triennial Review Order* rejected ILECs' request to override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of provisions.²⁸⁸ In addition, if one party disagrees with another party's interpretation of a change in law, that party may invoke the dispute resolution provision of the Agreement.

Verizon MI asserts that this issue is moot because TelNet did not raise this issue in its Petition. Specifically, Verizon MI points out that the Section 1.5 of the UNE Appendix is in the base agreement and that the TRO Amendment which Verizon MI has proposed has overriding language in Section 3.8. Verizon MI asserts that TelNet has not objected to the language in Section 3.8.1 and 3.8.2 of the TRO Amendment. Therefore, Verizon MI argues that this issue is moot.

Even though the Panel adopts Verizon MI's proposal for Issue 88, it disagrees with Verizon MI assertion that TelNet did not raise this issue in its Petition. TelNet has consistently argued throughout this proceeding that **no** changes in law of any kind should take effect prior to the expiration of the contract unless the tribunal issuing the change in law directs the parties to implement the change in law prior to the expiration of the parties' contract. Furthermore,

²⁸⁸*Triennial Review Order* ¶ 701.

Sections 3.8.1 and 3.8.2 of the TRO Amendment are not change in law provisions and do not conflict with how TelNet has proposed that changes in applicable law be treated in the underlying contract.

Charging for Order Completion Delay

Issue 89A: Verizon MI ICA, UNE Attachment § 1.7; TelNet ICA, UNE Attachment § 1.7

Should TelNet be required to pay Verizon MI the Service Order Charge and the Premises Visit Charge for Verizon MI's dispatch when TelNet's customer is not ready for the service to be performed?

Panel Decision

The Panel has been advised by TelNet that it was not previously aware of information that Verizon MI has provided in its Answer. Based on Verizon MI's explanation, TelNet has advised the Panel that it withdraws its objection to this charge. The Panel finds that Verizon MI's UNE Section 1.7 language should be included in the Agreement.

Issues 89B, 90, 94, 121 and 122: Verizon MI ICA, UNE Attachment §§ 1.8-1.10, 3.2.8, 3.2.8.2, 14.3.5, and 14.3.7, TelNet ICA, UNE Attachment §§ 1.8-1.10

Issue 89B: Should TelNet be permitted to recover costs from Verizon MI if Verizon MI fails to complete a properly submitted work order for UNE or UNE combination?

Issue 90: Are the charges that TelNet proposes reasonable?

Issue 94: Should the interval for Verizon MI's loop analysis be 18 business days or 10 business days?

Issue 96: Should the interval for conditioning activities order be 15 business days or 10 business days?

Issue 121: Should the interval for preliminary analysis be 30 days or 10 days?

Issue 122: Should the interval for Bona Fide Request quote be 90 days or 30 days?

TelNet's Position

Issue 89(B): Yes. TelNet believes that it has the right to recover costs incurred due to Verizon MI's failure to properly perform under the Agreement.

Issue 90: Yes. The charges are reasonable and in no way constitute a penalty.

Issues 94, 96, 121 and 122: Verizon MI has not demonstrated that its proposed intervals are taken from the *Merger Order* performance measurements and standards. Even if they are, Verizon MI has not shown that its excessive and unreasonable intervals should be adopted in the Agreement. TelNet's proposed intervals are more reasonable and pro-competitive.

Verizon MI's Position

In the sections at issue, TelNet proposes to penalize Verizon MI in two different situations: for failure to give three business days' notice that it will not meet a UNE provisioning date;²⁸⁹ and if Verizon MI erroneously, in TelNet's judgment, notifies TelNet that Verizon MI has completed a TelNet work order.²⁹⁰ In addition, TelNet would significantly reduce Verizon MI's existing provisioning intervals for a number of services and facilities.²⁹¹

Verizon MI argues that TelNet's proposals are unreasonable, and would go well beyond the service provisioning intervals and other performance standards that have resulted from carrier-to-carrier collaboratives. These standards first applied to Verizon MI as a result of Bell

²⁸⁹ TelNet ICA, UNE Attach. § 1.8.

²⁹⁰ *Id.* § 1.9.

²⁹¹ TelNet's section 3.2.8 would reduce Verizon MI's interval for loop analysis and construction associated with conditioning or extending a loop from 18 to 10 days; its section 3.2.8.2 would reduce Verizon MI's interval for loop conditioning from 15 to 10 days; its section 14.3.5 would reduce Verizon MI's time for furnishing TelNet a preliminary analysis of the feasibility of satisfying a request for a new network element from 30 to 10 days; and TelNet's section 14.3.7 would reduce Verizon MI's time to provide a rate, availability, and installation interval quote for the new network element from 90 days to 30 days.

Atlantic/GTE *Merger Order*,²⁹² when the FCC required a comprehensive performance plan for Verizon that includes provisioning, conversion and repair intervals.²⁹³ For Verizon MI, the *Merger Order* applied a subset of the performance measurements that had been adopted through a collaborative process overseen by the California Public Utilities Commission. These *Merger Order* performance measurements and standards have proved more than sufficient to ensure that Verizon MI delivers excellent service to all Michigan CLECs, including TelNet.²⁹⁴ Although the *Merger Order* performance plan has expired according to the terms of that order, Verizon MI has offered to continue reporting on the performance measurements included in the *Merger Order* performance plan.²⁹⁵

²⁹² “In the Bell Atlantic/GTE Service Area, Bell Atlantic/GTE shall implement the Carrier-to-Carrier Performance Assurance Plan (‘the Plan’) described herein and in Attachment A.” Memorandum Opinion and Order, *In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032 (2000), (“*Merger Order*”) ¶ 16.

²⁹³ *Id.* at Merger Conditions Attachment A-2b-14 through A-2b-16 (PR-9) (conversions) and A-2b-17 through A-2b-22 (MR-2, -3, -4, -5) (repairs).

²⁹⁴ See Metrics attached to Affidavit of Julie Canny, dated Dec. 12, 2003, attached to Comments of Verizon in MPSC Case No. U-11830.

²⁹⁵ Specifically, Verizon MI would offer the following language as an additional Section 31.3 of the General Terms and Conditions of its proposed Agreement:

31.3 Merger Order Performance Plan

- (a) As used in this Section 31.3, “the Merger Order Performance Plan Provisions” shall mean and include Appendix D, Section V, “Carrier-to-Carrier Performance Plan (Including Performance Measurements)” (15 FCC Rcd at 14293-14295), and Appendix D, Attachment A, “Carrier-to-Carrier Performance Assurance Plan” (15 FCC Rcd at 14332-14431), of the Merger Order.
- (b) Subject to Sections 31.3 (c) through (e), below, to the extent required by the Merger Order Performance Plan Provisions, Verizon shall provide performance measurement results to TelNet. Subject to Sections 31.3(c) through (e), below, Verizon shall provide performance measurement results to TelNet as required by the Merger Order Performance Plan Provisions for the period that this Agreement remains in effect between the Parties, even if the obligation to provide performance measurement results pursuant to the Merger Order Performance Plan Provisions may have ended on an earlier date under Appendix D, Section V, “Carrier-to-Carrier Performance Plan (Including Performance Measurements),” Paragraph 17 (15 FCC Rcd at 14294). Performance measurement results will be provided to TelNet only for the State of Michigan.
- (c) The measurements provided for in the Merger Order Performance Plan Provisions shall be subject to change from time-to-time as provided in the Merger Order Performance Plan Provisions. In addition, on and after June 1, 2004, from time-to-time upon thirty (30) days prior written notice to TelNet, Verizon may

Verizon MI argues that these uniform, industry-wide measures should assure TelNet of Verizon MI's compliance with obligations to offer services and access in a nondiscriminatory manner to all CLECs, pursuant to section 251(c) of the Act.²⁹⁶ Verizon MI argues that establishing new performance standards just for TelNet would be not only inconsistent with the

(but shall not be obligated to) revise any measurement provided for in the Merger Order Performance Plan Provisions, (a) to apply to that measurement revisions that have been made to the comparable measurement (or provisions related to the comparable measurement) in the California Public Utilities Commission carrier-to-carrier service quality measurement plan for Verizon California Inc.* or that have been made to the comparable measurement (or provisions related to the comparable measurement) in the New York Public Service Commission carrier-to-carrier service quality measurement plan for Verizon New York Inc.,** or (b) to conform that measurement to the comparable measurement (or provisions related to the comparable measurement) in the California Public Utilities Commission carrier-to-carrier service quality measurement plan applicable to Verizon California Inc. or to the comparable measurement (or provisions related to the comparable measurement) in the New York Public Service Commission carrier-to-carrier service quality measurement plan applicable to Verizon New York Inc.

(d) If a carrier-to-carrier service quality measurement plan applicable to Verizon for Michigan is adopted, required, approved or allowed to go into effect by the Commission or the FCC when Verizon begins to report performance measurement results under such plan, Verizon may terminate its provision of performance measurement results to TelNet pursuant to this Section 31.3.

(e) For avoidance of doubt:

(i) Nothing in this Section 31.3 shall extend or expand in duration, scope or otherwise, Verizon's financial or payment obligations (including, but not limited to, any payments, credits, remedies, penalties, incentives, or other financial benefits of any type) under the Merger Order Performance Plan Provisions; and

(ii) Nothing in this Section 31.3 or the Merger Order Performance Plan Provisions shall require or obligate Verizon to provide or pay any payments, credits, remedies, penalties, incentives, or other financial benefits to TelNet.

* "California OSS OII Performance Measurements, Joint Partial Settlement Agreement" ("CA Measurements Plan"), adopted in the California Public Utilities Commission proceeding "Order Instituting Rulemaking on the Commission's Own Motion into Monitoring Performance of Operations Support Systems," Rulemaking 97-10-016, and "Order Instituting Investigation on the Commission's Own Motion into Monitoring Performance of Operations Support Systems," Investigation 97-10-017, as such "CA Measurements Plan" is modified or replaced by the California Public Utilities Commission from time-to-time.

** "New York State Carrier-to-Carrier Guidelines Performance Standards and Reports, Verizon Reports" ("NY Guidelines"), adopted in the New York Public Service Commission proceeding "Proceeding on Motion of the Commission to Review Service Quality Standards for Telephone Companies," Case 97-C-0139, as such "NY Guidelines" are modified or replaced by the New York Public Service Commission from time-to-time.

²⁹⁶ See 47 U.S.C. § 251(c).

results of the industry collaboratives, but also extremely burdensome, requiring the same Verizon personnel to implement different sets of standards for each different CLEC. Verizon would have to try to reconfigure its systems to comply with different sets of standards that apply to the same conduct, an expensive and likely futile endeavor.

Finally, Verizon MI argues that TelNet’s proposal also violates Michigan law. The Commission is authorized to assess penalties only after a complaint, notice, and hearings.²⁹⁷

And the Commission has only the authority clearly granted by the legislature:

The PSC possesses no common-law powers. It is a creature of the Legislature, and all of its authority must be found in statutory enactments. A statute that grants power to an administrative agency is to be strictly construed. Administrative authority must be plainly granted, for doubtful power in this context does not exist.²⁹⁸

Verizon MI contends that the automatic payments in sections 1.8-1.10 would be inconsistent with this requirement.²⁹⁹ Michigan law also precludes the enforcement of such self-executing liquidated damages provisions unless “the amount is ‘reasonable with relation to the possible injury suffered.’”³⁰⁰ And here, Verizon MI argues, TelNet has provided no evidence of how its proposed charges relate to any “injury” TelNet might theoretically suffer, for example, as a result of Verizon MI’s failure to provide three days’ notice that it will not meet a due date, or an allegedly erroneous notification that a work order has been completed. Therefore, it argues, even if the Commission had authority to implement those penalties, they would be impermissible under Michigan law.

Panel Decision

²⁹⁷ MICH. COMP. LAWS ANN. § 484.2205.

²⁹⁸ *Attorney General v. Michigan Pub. Serv. Comm’n*, 585 N.W.2d 310, 312 (Mich. Ct. App. 1998) (internal citations omitted).

²⁹⁹ The same is true of the penalties proposed in TelNet’s sections 1.11, 3.3.1.6 and 4.8.3. See Issues 91, 99, and 103.

³⁰⁰ *UAW-GM Human Resource Center v. KSL Recreation Corp.*, 228 Mich. App. 486, 508 (Mich. 1998) (quoting *Moore v. St. Clair Co.*, 112 Mich. App. 335, 339 (Mich. 1982)).

The Panel concludes that the position and language proposed by Verizon MI be adopted for these issues. The Panel disagrees with TelNet’s assertion that performance standards and intervals are appropriate subjects for individual carrier arbitrations. Performance standards are complex and highly technical and are based on the fundamental premise that they will apply on an industry-wide basis. As a result, performance measurements are developed through industry collaboratives. If each CLEC were permitted to insert its own standards and intervals into its Agreement, it would be extremely burdensome, requiring the same Verizon personnel to implement different sets of standards (and support systems to support those standards), depending on the CLEC. Even if the Panel were inclined to adopt TelNet’s proposal, it could not because TelNet did not provide any evidence to support its proposed measurements. It is critical that data be provided to support the development of various metrics. TelNet does not dispute that Verizon MI’s performance measurements have been successful in the past or that they would cease to be in the future if those reporting requirements are extended, as Verizon MI proposes.

As noted above, TelNet has not provided any evidence of poor performance by Verizon MI that supports the more onerous burdens it seeks to impose on Verizon MI. Nor has it established any relationship of these burdens to any damages it might incur in the event of such poor performance. It quotes the *Virginia Arbitration Order*, stating that WorldCom did not have to “give up its rights” under the *Merger Order*.³⁰¹ But the Wireline Competition Bureau was addressing WorldCom’s right “to seek dispute resolution under the terms of the *Bell Atlantic-GTE Merger Order*,”³⁰² not any rights WorldCom might have to receive performance measurement reports. In any event, Verizon MI’s proposal *extends* its reporting of its performance under the measurements in the *Merger Order*. And TelNet certainly is not giving

³⁰¹ TelNet’s Supplemental PDAP at 5.

³⁰² *Virginia Arbitration Order* ¶ 702.

up its ability to seek dispute resolution under the Agreement with respect to demonstrated inadequacies in Verizon MI's quality of service.

The Panel notes that Verizon MI's proposal is based on a collaborative process that was completed under the auspices of the California Commission, not under the direction of this Commission and likely did not include all Michigan CLECs. The Panel also notes that a petition has been filed requesting that the Commission establish performance standards and a performance remedy plan for Verizon MI.³⁰³ To the extent the Commission adopts this petition and performance standards, as well as a performance remedy plan are developed for Verizon MI, these would ultimately apply to TelNet.

In its Answer and PDAP,³⁰⁴ Verizon MI discussed whether the Commission has the legal authority to impose penalties. In light of its recommendation regarding these Issues, the Panel need not address Verizon MI's arguments. The Panel anticipates that the Commission will address these arguments if it undertakes a proceeding to establish performance standards and a performance remedy plan for Verizon MI.

Trouble Tickets

Issue 91: Verizon MI ICA, UNE Attachment § 1.11; TelNet ICA, UNE Attachment § 1.11

Should Verizon MI credit TelNet for Verizon MI's trouble isolation charges and pay TelNet a trouble isolation charge when Verizon MI determines in error that TelNet is the cause of a trouble ticket and TelNet subsequently finds that the trouble is in Verizon MI's network?

TelNet's Position

³⁰³ MCI Motion to Establish Performance Standards and an Appropriate Performance Remedy Plan for Verizon, *In the Matter of SBC's Submission on Performance Measurements, Reporting, and Benchmarks in Compliance with the October 2, 1998 Order in MPSC Case No. U-11654*. (Nov. 7, 2003).

³⁰⁴ See Verizon MI Answer at 209; Verizon MI Supplemental PDAP at 13-14.

The Commission has approved the proposed language in the SBC/TDS and SBC/XO interconnection agreements. The proposed language provides fair compensation to TelNet for costs TelNet incurs for instances where Verizon MI's identifies the source of trouble and TelNet expends its own resources to identify trouble on Verizon MI's network.

Verizon MI's Position

TelNet's proposal to add this provision is unwarranted. Where a CLEC's facilities and equipment are interconnected with those of an ILEC and a service problem occurs, it can be difficult to determine what the source of that problem is. The process of isolating and correcting a problem requires the Parties to cooperate to investigate the problem, determine its cause, and correct it. In this section, Verizon MI sought to recover only its "costs of isolating and temporarily removing the malfunctioning TelNet service from the Customer's line if the cause of voice interruption was TelNet's service."³⁰⁵ Thus, Verizon MI would recover a charge only in the limited circumstance that TelNet's service actively caused the problem, and not if Verizon MI's network caused the problem. Verizon MI also argues that under the terms of the provision it would not charge for trouble isolation where the cause of voice interruption is *not* TelNet's service. There are thus no charges to credit back to TelNet.

In addition to its unnecessary trouble isolation credit proposal, TelNet would require *Verizon MI* to pay *TelNet* a trouble isolation charge for TelNet's work in determining the cause of the service problem. Verizon MI also argues that the Commission should reject this proposal as inequitable. The need for trouble isolation between networks arises solely because TelNet has connected its equipment to Verizon MI's network. It is TelNet and its customers, not Verizon MI and its customers, that cause the costs of trouble isolation, so TelNet is the appropriate party

³⁰⁵ Verizon MI ICA, UNE Attach. § 4.8.6.5.

to bear its own costs of isolating the cause of those problems, just as Verizon MI must bear the costs of isolating the cause of problems with its customers' services.

Verizon MI also objects to allowing TelNet to determine unilaterally that Verizon MI was wrong about the source of a service problem. TelNet's proposed language states that, if "TelNet subsequently finds" — accurately or not — that the trouble resides in Verizon MI's network, TelNet can impose this charge on Verizon MI.³⁰⁶

Verizon MI also responds to TelNet's argument that the same language appears in the SBC/XO and SBC/TDS Metrocom interconnection agreements.³⁰⁷ The SBC/TDS Metrocom, Inc. interconnection agreement allows SBC to recover for trouble isolation, maintenance, and repair done in response to a trouble ticket, without regard to the source of the problem.³⁰⁸ Thus, it permits recovery of SBC's costs from the CLEC even where the CLEC is not at fault. In contrast, as noted above, Verizon MI's proposed language only allows it to recover in the case of "malfunctioning TelNet service."³⁰⁹ With respect to the SBC/XO agreement, its language addresses acceptance testing, not trouble isolation charges,³¹⁰ so Verizon MI argues that TelNet's reference to that contract is irrelevant to any issue here.

Panel Decision

Even though the Panel believes this issue may be moot, the Panel concludes that the position and language proposed by TelNet be adopted for Issue 91. The Panel believes this issue may be moot because both parties appear to be proposing the same thing. TelNet proposes to get credit for the charges that TelNet paid Verizon MI in error. If Verizon MI did not charge the

³⁰⁶ TelNet Petition, UNE Attach. at 8.

³⁰⁷ *Id.*

³⁰⁸ See Trouble Isolation Charge Amendment to Interconnection Agreement by and between Ameritech Michigan and TDS Metrocom, Inc. (Jan. 17, 2003).

³⁰⁹ Verizon MI ICA, UNE Attach. § 4.8.6.5.

³¹⁰ See Interconnection Agreement by and between Ameritech Michigan and XO Michigan, Inc., Amend. No. 1, Attach. A, §§ 8.3-8.4.

isolation costs in error, there are no charges to credit back to TelNet under the proposed language. At the same time, Verizon MI proposes to only charge TelNet when Verizon MI removes a malfunctioning TelNet service. If TelNet's service is not malfunctioning, TelNet will not be charged.

If the Panel misunderstands, it adopts TelNet's proposal. The Panel disagrees with Verizon MI's assertion that trouble in the network is solely the result of TelNet's equipment being interconnected with Verizon MI's network. Either party may be the cause of the trouble. As a result, Verizon MI may charge TelNet isolation costs when Verizon MI performs the isolation and TelNet is the cause of the trouble, and by the same token, TelNet may charge Verizon MI isolation costs when TelNet subsequently performed the isolation and Verizon MI is the cause of the trouble.

TelNet states, and the Panel agrees, that TelNet's charges for its own isolation costs would be at a rate not exceeding Verizon MI's charge for the same services.

Certain Non-Recurring Charges for Services

Issues 97, 98, and 105: Verizon MI ICA, UNE Attachment §§ 3.2.9, 3.3.1.5, 4.8.6.5; TelNet ICA, UNE Attachment §§ 3.2.9, 3.3.1.5, 4.8.6.5

Should Verizon MI be permitted to assess TelNet non-recurring charges for canceling a loop conditioning request, rescheduling a coordinated conversion, or remedying voice interruption when Verizon MI does not have cost study support for such charges and is not currently applying such charges?

TelNet's Position

Under the parties' existing Agreement, there are no charges for the activities at issue. Verizon MI is trying to create as many nonrecurring charges as it can. Verizon MI has presented

no cost study support for those charges. Verizon MI has not demonstrated that the charges for the activities at issue are not recovered via other charges.

Verizon MI's Position

Sections 3.2.9, 3.3.1.5 and 4.8.6.5 of the Agreement are necessary to compensate Verizon MI for costs directly attributable to TelNet's conduct. TelNet does not dispute that Verizon MI incurs costs in providing these services.³¹¹ Verizon MI argues that the charges in the Agreement are reasonable compensation for costs directly attributable to TelNet's conduct. Verizon MI also argues that failure to compensate it for these costs would violate the requirement under Michigan law that rates cover the underlying cost of providing the service.³¹² According to Verizon MI, there is cost study support for each of these charges.

There is no presumption that a charge is unreasonable simply because it did not appear in the parties' superseded contract. According to Verizon MI, the purpose of this proceeding is to update the existing Agreement in light of needs of past experience. This includes adding the charges in section 3.2.9, 3.3.1.5 and 4.8.6.5 that reflect changes in industry practice and standards.

Panel Decision

The Panel concludes that the position and language proposed by Verizon MI, as modified by the Panel be adopted for Issues 97, 98, and 105. TelNet no longer adheres to its initial position that because Verizon MI did not include the charges in its original agreement, it cannot include them in the new Agreement. The Panel agrees with Verizon MI that the Agreement must reflect existing law, regulations, and industry developments since the expired contract was

³¹¹ TelNet Supplemental PDAP at 13-14.

³¹² MICH. COMP. LAWS ANN § 484.2102(y) ("A rate is inadequate if it is less than the total service long run incremental cost of providing the service."); MICH. COMP. LAWS ANN. § 484.2321 ("Except as otherwise provided under section 304a, a provider of a regulated telecommunication service shall not charge a rate for the service that is less than the total service long run incremental cost of providing the service") (footnote omitted).

executed six years ago. There is no presumption that a charge is unreasonable simply because it did not appear in the parties' superseded contract.

Sections 3.2.9, 3.3.1.5 and 4.8.6.5 of the Agreement are necessary to compensate Verizon MI for costs directly attributable to TelNet's conduct. Section 3.2.9 captures the costs incurred by Verizon MI where it has performed work to condition loops for TelNet, and then TelNet cancels its order. Section 3.3.1.5 similarly permits Verizon MI to recover the costs it incurs when TelNet reschedules coordinated cutovers, forcing Verizon MI to incur the service order processing costs twice. Under section 4.8.6.5, Verizon MI is permitted to recover its costs of repairing voice service attributable to TelNet's malfunctions. TelNet does not dispute that Verizon MI incurs costs in providing these services.³¹³

Verizon MI notes that the Commission has approved these same charges in a number of agreements Verizon MI has negotiated with other CLECs in Michigan.³¹⁴ TelNet argues that these charges are not supported by any cost justification. In response, Verizon MI asserts that all of these rates are supported by cost studies on file with the Commission:

(1) **Section 3.2.9 (Change in Scheduling Loop Conditioning).** Verizon MI, in its Answer, noted that the charges in section 3.2.9 are supported by Verizon MI's Loop Conditioning Whole NRC Study Model 4.1.³¹⁵ TelNet's PDAP is silent on this issue.

(2) **Section 3.3.1.5 (Charge for Reporting New Conversion Time).** The Analog 2W Loop Service Order Charge, which is the charge being reordered in the context of a rescheduled

³¹³ TelNet Second Supplement to its PDAP at 14.

³¹⁴ See, e.g., *Interconnection Agreement*, Between Fiber Communications of Michigan and Verizon Michigan (Aug. 12, 2003) ("Brooks/VZ ICA"), available at http://www22.verizon.com/wholesale/attachments/contracts/brooks_mi_252i31intow_05.1303.pdf; *Interconnection Agreement*, Between Winn Telephone Company and Verizon Michigan (Winn/VZ ICA") (Aug. 15, 2002), available at http://www22.verizon.com/wholesale/attachments/contracts/WinnTel_ICA_8-9-02_Final.pdf.

³¹⁵ Verizon MI Answer at 217 (citing Loop Conditioning Wholesale NRC Cost Study Model 4.1, F.C.C. Memorandum Report and Order Docket No. 98-184 (filed with MI P.S.C. Dec. 5, 2000)). As TelNet is aware, Verizon MI provided a copy of this cost study to the Panel when it supplied all of the authorities cited in its initial answer. See Verizon MI Sources Cited at Tab 85 page E1 of E3.

coordinated cutover, is also supported by a cost study filed with the Commission.³¹⁶ A \$5.00 charge was approved by the Commission.³¹⁷ Indeed, the cost study supported charges well in excess of the \$5.00 rate approved by the Commission and proposed in the Pricing Attachment here.

(3) **Section 4.8.6.5 (Trouble Isolation Charge).** The Trouble Isolation Charge is based on Verizon MI's labor rate for labor group 201, Installation & Repair/Maintenance Splicers. The group 201 technicians perform the trouble isolation, and Verizon MI therefore incurs their direct labor costs. These costs are documented in Verizon MI's Labor and Overhead Rate Chart used in the cost studies filed with the Commission in Case No. U-11832.³¹⁸ Here again, the labor rate proposed by Verizon MI is substantially less than that documented in those cost studies, but allows the application of uniform rates from state to state.

The Panel cannot accept TelNet's proposal because, as the Commission determined in the *SBC/MCI Arbitration Order*, a two-party arbitration is not the appropriate forum to present or examine cost studies.³¹⁹ In that proceeding, MCI requested the ability to elect LATA-wide terminating interconnection. In opposition, SBC Michigan argued that MCI's position would lead to tandem exhaust, which raises the costs for the entire industry. In denying SBC Michigan's position, the Commission held that cost-recovery issues are best addressed in a cost study case.

The Panel notes SBC Michigan's argument that its current charges do not incorporate the possible problem with tandem exhaust. That issue is best taken up in a cost-study case.

³¹⁶ See GTE's March 11, 1999 Cost Study Compliance Filing in Case No. U-11281, Attachment BIS-01 at page E1 of E3.

³¹⁷ See Opinion and Order, *On the Commission's Own Motion, to Consider the Total Service Long Run Incremental Costs for All Access, Toll, and Local Exchange Services Provided by GTE North Incorporated*, Case No. U-11832, at 42 (Mich. P.S.C. May 3, 2000); see also Opinion and Order, *On the Commission's own Motion, to Consider the Total Service Long Run Incremental Costs for all Access, Toll, and Local Exchange Services provided by Ameritech Michigan*, Case No. U-11831 (Nov. 16, MI P.S.C. 1999).

³¹⁸ See GTE's May 5, 2000, Cost Study Filing in Case No. U-11832, Tab 8, page 1.

³¹⁹ DAP, *SBC/MCI Arbitration* at 38-39.

An arbitration case is not the appropriate forum for arguing about the TSLRIC or total element long range incremental cost (TELRIC) of an element. Examination and challenges to cost studies require more time and detail than can legitimately be achieved in an arbitration case....³²⁰

The Panel believes that the same logic applies to Issues 97, 98 and 105 and that an arbitration case is not the appropriate forum for arguing about whether Verizon MI presented any cost studies to support these charges or if the activities at issue are covered by other charges.

The Panel notes the pending *Verizon MI Cost Proceeding* and recommends that these issues be decided in that proceeding which provides the best opportunity for the Commission to fully examine and consider TelNet's position regarding the adequacy of these rates.³²¹ Until the cost proceeding is completed and revised rates are developed, the Panel recommends that Verizon MI's rates be adopted on an interim bases, and the Agreement be subject to true-up at the conclusion of the cost proceeding.

Charges for Rescheduling

Issue 99: Verizon MI ICA, UNE Attachment § 3.3.1.6; TelNet ICA, UNE Attachment § 3.3.1.6

Should an additional Service Order Charge apply to either party when that party is not ready to accept service at the scheduled conversion time?

TelNet's Position

An additional service order charge shall apply to either party if that party is not ready to accept service at the scheduled conversion time.

Verizon MI's Position

Because Verizon MI must perform numerous activities for customers throughout the day, often resulting in unanticipated delays because of the nature of the work or other uncontrollable

³²⁰ *Id.*

³²¹ TelNet's Second Supplement to its PDAP at 15.

factors, such as weather or traffic, allowing Verizon MI to arrive at an appointment within a 30-minute window is reasonable. Indeed, Verizon MI gives *all* of its customers — both wholesale and retail — appointment windows, rather than exact appointment times, and Verizon has no legal obligation to give TelNet alone a higher level of service.

TelNet’s proposed language would require Verizon MI to credit TelNet for a “Service Order Charge” that Verizon MI will incur if it is not ready at the exact appointment time. This Service Order Charge is based on Verizon MI’s costs for arranging a conversion, even though TelNet has failed to demonstrate that any costs would be incurred by TelNet in this situation, let alone that TelNet’s costs would be similar to Verizon MI’s. This proposal amounts to an impermissible penalty under Michigan law.³²²

Panel’s Decision

The Panel has been advised that TelNet is willing to withdraw its proposal to strike the last sentence of Verizon MI’s proposed UNE Section 3.3.1.6. This withdrawal leaves only the issue in the first sentence, namely whether the charge should be reciprocal. For this issue, the Panel concludes that position and language proposed by Verizon MI be adopted. The Panel believes that both parties are entitled to recover costs from delayed conversion if the other party is not ready at the scheduled time. However, the agreed-to language in section 3.3.1.6 provides for the necessary relief to both parties. According to section 3.3.1.6, if Verizon MI is not available or ready to perform the conversion, it will credit TelNet the Analog 2W Loop Service Order Charge. If TelNet is not ready to accept service, it must pay Verizon MI an additional Service Order Charge. The Panel agrees with Verizon MI that TelNet’s request for an additional Service Order Charge, on top of the credit for the Analog 2W Loop Service Order Charge is

³²² Michigan law precludes the enforcement of liquidated damages provisions unless “the amount is ‘reasonable with relation to the possible injury suffered.’” *UAW-GM Human Resource Center v. KSL Recreation Corp.*, 228 Mich. App. 486, 508 (Mich. 1998) (quoting *Moore v. St. Clair Co.*, 112 Mich. App. 335, 339 (1982)).

nothing more than a penalty. The Panel agrees with TelNet that it may incur costs when Verizon MI is not ready at the scheduled time.³²³ However, TelNet did not provide any evidence of these costs and without additional evidence, the Panel believes that the aforementioned credit is sufficient.

Pre-Qualification Charge for Line Sharing

Issue 101: Verizon MI ICA, UNE Attachment § 4.3; TelNet ICA, UNE Attachment § 4.3

Should TelNet pay charges for loop qualification that Verizon MI does not charge in the existing Agreement?

TelNet's Position

TelNet is not paying a loop qualification charge under the existing Agreement. The Pricing Attachment does not contain such charge. Verizon MI should demonstrate that the new charge is supported by its cost study and is not covered by other rate mechanisms.

Verizon MI's Position

Because TelNet has only addressed this issue in the context of line sharing, the Panel may dismiss this issue in light of Verizon MI's position on Issue 91 that Verizon MI is no longer required to provide TelNet line sharing loops as result of the D.C. Circuit's ruling upholding this part of the FCC's *Triennial Review Order*.

Even if this were not the case, Verizon MI currently does not charge CLECs in Michigan for determining whether a loop qualifies for DSL and has no immediate plans to do so. However, Verizon MI's affiliates do charge for loop qualification in other jurisdictions, and the right to do so is well established. Therefore, Verizon MI's proposed language in section 4.3 indicates that such a charge "may apply." Verizon MI would follow the requirements of the

³²³ TelNet PDAP at 135.

Pricing Attachment for establishing any such charge that it may impose, which requires either prior approval from the FCC or the Commission before Verizon MI implements a charge or mutual agreement on a rate by the Parties. Because there is no legitimate question that an ILEC may charge for loop qualification, the Agreement should not foreclose Verizon MI from doing so in the future.

Panel's Decision

The Panel recommends a specific line item for loop qualification be added to the pricing schedule. According to Verizon MI, it does not charge for loop qualification in Michigan and has no immediate plans to do so. To the extent that Verizon MI may sometime in the future decide to charge for loop qualification and has therefore proposed language to this affect, there should be line item for this service. However, the Panel agrees with TelNet that Verizon MI may not assess a charge for loop qualification until it has filed a cost study with the Commission to support its proposed rate or by mutual agreement by the Parties.

Cooperative Testing Procedures

Issue 103: Verizon MI ICA, UNE Attachment § 4.8.3; TelNet ICA, UNE Attachment § 4.8.3

Should TelNet be solely responsible for conducting tests to resolve trouble on a line-shared loop?

TelNet's Position

The Parties have agreed to work cooperatively on testing procedures. TelNet should have the same rights as Verizon MI.

Verizon MI's Position

The Panel may dismiss this issue in light of Verizon MI's position on Issue 91 that Verizon MI is no longer required to provide TelNet line sharing loops as result of the D.C. Circuit's ruling upholding this part of the FCC's *Triennial Review Order*.

Even if this were not the law, Verizon MI argues that its original proposal requiring TelNet to pay a fee for a misdirected dispatch is appropriate. If TelNet has not properly diagnosed the problem through the testing it is obligated to perform on its own equipment, and asks Verizon MI to conduct a test, Verizon MI should be able to charge TelNet for performing this work.

TelNet's proposal seeks to impose on *Verizon MI* a charge if "the error or trouble is determined to be one that [Verizon MI] should reasonably have been able to isolate and diagnose." According to Verizon MI, the responsibility to test for trouble remains at all times on TelNet and it therefore would be improper to force Verizon MI to pay TelNet under any circumstances, particularly given that Verizon MI is required under the Act to permit TelNet to interconnect to Verizon MI's network. Indeed, Verizon MI does not know of any other interconnection agreement that requires it to pay a CLEC for testing.

Panel's Decision

The Panel concludes that the position and contract language proposed by TelNet be adopted for Issue 103. According to TelNet, it should have the same rights as Verizon MI in terms of recovering costs for a misdirected dispatch. Verizon MI asserts that it, and not TelNet should be able to recover the costs for a misdirected dispatch because the addition of TelNet's equipment is the cause of the problem. The Panel disagrees. There is no evidence that the addition of TelNet's equipment is the sole cause of all network problems. In fact, Verizon MI's

own equipment could also be the cause of trouble. Thus, it is reasonable that both parties should share the financial responsibility.

Verizon MI objects to TelNet’s proposal because it would require Verizon MI to pay when Verizon MI, “should have been able to diagnose or isolate the problem.” According to Verizon MI, this language is too subjective and an invitation for future dispute and litigation.³²⁴ However, Verizon MI proposes to apply the exact same language to TelNet. It is unclear to the Panel how this language is too subjective and an invitation for future dispute when applied to one Party but not the other. The Panel believes that TelNet’s language, that gives TelNet the reciprocal right to charge for a misdirected dispatch, will encourage the Parties to work cooperatively as their agreement envisions.³²⁵

Unbundled Feeder Subloop

Issue 106: Verizon MI ICA, UNE Attachment § 6.2.2; TelNet ICA, UNE Attachment § 6.2.2

Should this Agreement or a separate agreement define the terms and conditions governing TelNet’s Telecommunications Carrier Outside Plant Cabinets (“TOPICs”)?

TelNet’s Position

TOPICs are covered under collocation. The Collocation Attachment to this Agreement should govern the terms and conditions of TOPICs.

Verizon MI’s Position

No. The language proposed in this section has now been superseded by the FCC’s *Triennial Review Order*, which eliminates any obligation of ILECs to “provide unbundled access

³²⁴ Verizon MI PDAP at 219.

³²⁵ TelNet ICA, UNE Attachment, Section 4.8.2.

to their feeder loop plant as stand-alone UNEs.”³²⁶ That part of the FCC’s *Triennial Review Order* decision was not challenged on appeal, so it is binding law.³²⁷ Section 5.7.5 of Verizon’s TRO Amendment reflects elimination of Verizon MI’s obligation to provide the unbundled feeder sub-loop. TelNet has not objected to this language, so the Panel should adopt section 5.7.5 of the TRO Amendment and dismiss this issue as moot.

Even if Verizon MI had an obligation to provide access to its sub-loop feeder plant (and it does not), TelNet’s proposed section 6.2.2 incorrectly attempts to include in the Agreement detailed terms and conditions for TOPICs, rather than incorporating, by reference, Verizon MI’s collocation tariff, which already contains the necessary terms and conditions. As explained in Verizon MI’s response to TelNet’s Collocation Attachment, any collocation rates, terms, and conditions should be governed by Verizon MI’s collocation tariff, which applies to all Michigan CLECs and is subject to regulatory oversight.³²⁸ Under TelNet’s proposal, every change to Verizon MI’s tariff would require the Parties to amend their Agreement to reflect that change.

Panel’s Decision

The Panel concludes that the position and language proposed by Verizon MI, as modified by the Panel, be adopted for Issue 106. The Panel agrees with Verizon MI that the *Triennial Review Order* specifies that the only subloops required to be unbundled are copper subloops that consist of “the copper transmission facility between a remote terminal and the customer’s premises.”³²⁹ In the *Triennial Review Order*, the FCC specifically excluded feeder loop plant from its UNE rules, “[U]nlike our previous subloop unbundling rules, however, the rules we adopt herein do not require incumbent LECs to provide unbundled access to their feeder loop

³²⁶ *Triennial Review Order* ¶ 254.

³²⁷ See Opening Brief of CLEC Petitioners and Intervenor In Support, *United States Telecomm. Ass’n v. FCC*, No. 00-1012, *et al.* (D.C. Cir., filed Jan. 16, 2004).

³²⁸ See *supra*, Verizon MI’s discussion of Collocation Attachment Issue 69.

³²⁹ *Triennial Review Order* ¶ 253.

plant as stand-alone UNEs, thereby limiting incumbent LEC subloop unbundling obligations to their distribution loop plant.”³³⁰

Despite this unambiguous language, TelNet argues that Verizon MI must provide access to fiber feeder plant “to provide a complete transmission path between the central office and the customer premises when ILECs provide unbundled access to the TDM-based capabilities of their hybrid loops.”³³¹ The Panel finds this argument unpersuasive. The language quoted by TelNet refers only to hybrid loops, and only to the very limited requirement of unbundled access to a complete transmission path over “TDM networks,” in order for CLECs “to provide broadband capabilities” over “DS1 and DS3 loops.”³³² Moreover, based on the *Triennial Review Order*, the Panel concludes that this type of access is not a §251 obligation and therefore not a proper issue for arbitration. With respect to these hybrid loops, the FCC stated that it, “encourage[s] parties to negotiate access arrangements that would facilitate competitive LEC access to copper subloops. Specifically, we expect that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECs have access to copper subloops. Of course, the terms and conditions of such access would be subject to sections 201 and 202 of the Act.”³³³

Access to Dark Fiber

Issue 107: Verizon MI ICA, UNE Attachment General § 8.1; TelNet ICA, UNE Attachment General § 8.1

Should TelNet’s access to dark fiber be subject to Verizon MI’s tariffs and other limitations?

³³⁰ *Id.* ¶ 254.

³³¹ TelNet PDAP at 139 (citing *Triennial Review Order* ¶ 253).

³³² *Triennial Review Order*, ¶¶ 289-90; see also Verizon MI TRO Amend. § 4.2.

³³³ *Id.* ¶253.

TelNet's Position

Access to dark fiber should be to the full extent of the law. Verizon MI's attempt to limit its obligations to provide dark fiber should be rejected.

Verizon MI's Position

Verizon MI argues that its proposed section 8.1 correctly states that access to dark fiber will be provided "in accordance with, . . . but only to the extent required by, Applicable Law." Verizon MI contends that "Applicable Law" includes both the *Triennial Review Order*, and the *USTA II* decision vacating certain aspects of that *Order*. Verizon MI points out that the *Triennial Review Order* and the *USTA II* decision substantially reduces its obligation to unbundled dark fiber, and that section 8.1 is thus subject to the provisions of section 3.2.5 of the TRO Amendment, which provides procedures under which the Parties may transition to this new regulatory framework.³³⁴

According to Verizon MI, for the dark fiber elements that it is still required to provide, section 8.1 reflects the FCC's recognition that dark fiber unbundling obligations are limited to already existing and available dark fiber. Incumbent carriers, according to Verizon MI, are not required to build new facilities, revoke dark fiber rights already assigned to other carriers, or grant access to dark fiber necessary to support its network in order to satisfy TelNet's needs.

Specifically, section 8.1 states that dark fiber will be provided in accordance with "the rates, terms and conditions" in the Agreement's Pricing Attachment and the "rates, terms, and conditions any of Verizon's applicable Tariffs," and that access to dark fiber will be provided "only where existing facilities are available." According to Verizon MI, while there currently are no dark fiber tariffs in Michigan, this reference provides the flexibility for adopting any subsequently filed tariffs and ensures that its prices are set and updated in a manner that is

³³⁴ Verizon MI ICA, TRO Amendment § 3.2.5; see Verizon MI discussion in Issue 149 and 152.

efficient, consistent, and nondiscriminatory for all CLECs, as required by the Michigan Telecommunications Act and the Act.³³⁵ Such tariffs will be subject to Commission approval, and TelNet may challenge such a tariff if it fails to comply with the Act.³³⁶

Verizon MI further argues that its proposal is consistent with the FCC rules, as well as the *Virginia Arbitration Order*. The FCC’s own rules define dark fiber to exclude “attached multiplexing, aggregation or other electronics.”³³⁷ The *Virginia Arbitration Order* requires that, to the extent that dark fiber contains lightwave repeaters, they should not be removed from fiber. Verizon MI’s proposal reflects both of these aspects of the dark fiber definition.

Panel’s Decision

The Panel concludes that the position and language proposed by TelNet be adopted for Issue 107. For the reasons detailed in Issue 69, the Panel rejects Verizon MI’s proposal that dark fiber be governed by tariffs.

TelNet argues that Verizon MI’s limitation of TelNet’s access to “available dark fiber facilities” is ambiguous and unsupported by any FCC order.³³⁸ Verizon MI claims that the FCC orders repeatedly make clear that Verizon MI may provide only “available” dark fiber. The Panel disagrees. In the *Virginia Arbitration Order*, the FCC only concluded that the Act does not require ILECs to construct new network elements, including dark fiber, for the sole purpose of unbundling those elements for CLECs.³³⁹ In addition, nothing in the *Third Report and Order*

³³⁵ See MICH. COMP. LAWS ANN. § 484.2102(y) (“‘Reasonable rate’ or ‘just and reasonable rate’ means a rate that is not inadequate, excessive, or unreasonably discriminatory.”); 47 U.S.C. §§ 251(c)(2)(D), (c)(3), (c)(6) (requiring provision of interconnection, unbundled access, and collocation on “rates, terms, and conditions that are just, reasonable, and nondiscriminatory”).

³³⁶ MICH. COMP. LAWS ANN. § 484.2102(y) (“‘Reasonable rate’ or ‘just and reasonable rate’ means a rate that is not inadequate, excessive, or unreasonably discriminatory.”).

³³⁷ 47 C.F.R. § 51.319(d)(1)(ii).

³³⁸ Petition, UNE Matrix, p. 29.

³³⁹ *Virginia Arbitration Order* ¶ 468.

ever mentions that “dark fiber exists ... as unused available fiber.”³⁴⁰ Nor does the *UNE Remand Order* define “available dark fiber.” Rather the *UNE Remand Order*³⁴¹ compared dark fiber to “dead count” or “vacant” copper wire because they both are “in place and easily called into service.”³⁴²

Verizon MI also argues that the FCC has “made it clear” that Verizon MI can reserve, or make “unavailable” dark fiber in order to maintain the integrity and reliability of its network and meet known customer service requirements. However, both the *Triennial Review Order* and the *UNE Remand Order* allow state commissions to establish reasonable limitations and technical parameters for dark fiber unbundling if ILECs are able to demonstrate to state commissions that unbundling dark fiber threatens their ability to provide service as a “carrier of last resort.”³⁴³ In the *UNE Remand Order*, GTE raised concerns that incumbents, because of their carrier-of-last-resort obligations, had a special need for fiber reserves. The FCC found these concerns exaggerated because the capacity of fiber can be increased many fold simply by increasing the power of the electronics that light it. A shortage of fiber capacity caused by unbundling is highly unlikely.³⁴⁴ In fact, in the *Triennial Review Order*, the FCC asked state commissions to make dark fiber “meaningfully available.”³⁴⁵

³⁴⁰ See Verizon Answer at 230 (citing Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, et. el., 16 FCC Rcd. 2101, ¶ 57 (Jan. 19, 2000)(“Third Report and Order”))

³⁴¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) (“UNE Remand Order”).

³⁴² *Id.* ¶ 174.

³⁴³ *Triennial Review Order* ¶ 385, n.1185 (citing *UNE Remand Order*, ¶ 352).

³⁴⁴ *UNE Remand Order* ¶198.

³⁴⁵ *Triennial Review Order* ¶ 385.

The Agreement already takes into account Verizon MI's needs to maintain the integrity and reliability of its network and meet known customer service requirements.³⁴⁶ Section 8.2.10 provides that Verizon MI may reserve dark fiber that has been assigned to fulfill a customer maintenance order for maintenance purposes or for Verizon's lit fiber optic systems. Under section 8.2.14.2, Verizon MI has the right not to provide TelNet with dark fiber upon showing to the Commission that TelNet's request would strand an unreasonable amount of fiber capacity, disrupt or degrade service to customers or carriers other than TelNet, or impair Verizon MI's ability to meet legal obligations. These provisions set forth the limitations the FCC allowed the Commission to establish. Verizon MI's additional proposed language is more restrictive than permitted under the FCC's rules.

Verizon MI also proposes to include the language that dark fiber consists of Verizon MI's optical transmission facilities without attached multiplexers, aggregations or other electronics.³⁴⁷ The FCC defines dark fiber as unactivated deployed fiber that is left dark, i.e., with no "opto-electronic" or "optronics" attached to light the fiber to carry a signal to serve customers.³⁴⁸ The Panel agrees with TelNet that the electronics in the FCC's definition only means "electronic devices at either end of the fiber that activates or 'lights' the fiber and enable it to carry traffic."³⁴⁹ Verizon MI's argument here is similar to the argument made in the Virginia arbitration that "fiber with regenerators or amplifiers has electronics and so, by definition, is not dark fiber."³⁵⁰ The Agreement already defines in detail dark fiber loop and dark fiber sub-loop as fiber optic strands that have not been activated through connection to electronics that "light"

³⁴⁶Verizon Answer at 231.

³⁴⁷*Id.* at 232.

³⁴⁸*Triennial Review Order* ¶ 201, n. 628 (citing Newton's Telecom Dictionary 201 (18th ed. 2002)).

³⁴⁹*Virginia Arbitration Order* ¶ 454, n.1520 (citing *UNE Remand Order*, ¶ 174).

³⁵⁰*Id.*

them and render them capable of carrying telecommunications services.³⁵¹ The Panel sees no reason to include Verizon MI's proposed language.

As it did for Issue 85, the Panel agrees with TelNet that the generic change of law provisions (as decided by the Panel for Issues 5 and 23) should be used to amend the Agreement, to the extent necessary, to reflect the requirements of the *Interim UNE Rules Order* and any subsequent decision by either a court or the FCC.

Issue 108: Verizon MI ICA, UNE Attachment § 8.2.1; TelNet ICA, UNE Attachment § 8.2.1

Should the Agreement include the limitation of how TelNet may access dark fiber loops and sub-loops?

TelNet's Position

No. Verizon MI's language is redundant and an unnecessary limitation.

Verizon MI's Position

Verizon MI again points out that, as a result of the *Triennial Review Order* and the *USTA II* decision vacating certain aspects of the *Triennial Review Order*, its obligation to unbundle dark fiber have been eliminated. Section 3.2.5 of the TRO Amendment establishes the procedures under which the changes in unbundling obligations will be implemented.³⁵²

Until such a transition takes place, Verizon MI argues that its proposal lays out definitions of dark loops and subloops that accord with the FCC's definition of dark fiber loops and subloops, and with the glossary in the Agreement's definition of dark fiber loops and subloops. Verizon MI points out that this proposed language in section 8.2.1 does not, as TelNet suggested in its petition, require that a dark fiber loop be routed through two central offices.

³⁵¹TelNet ICA, Verizon ICA, Glossary, 2.27, 2.28.

³⁵² Verizon MI ICA, Revised TRO Amend. § 3.2.5; see Issues 107, 149, and 152.

Moreover, according to Verizon MI, the language of section 8.2.1 allows TelNet, with respect to dark fiber subloops, to collocate not only at a Verizon MI central office, but also “at a Verizon remote terminal equipment enclosure.”³⁵³ Verizon MI finally argues that Verizon MI’s requirement that the central office terminal be able to be cross-connected to TelNet’s collocation arrangement simply reflects the established standard of technical feasibility under the Act.³⁵⁴

Panel’s Decision

The Panel concludes that the position and language proposed by Verizon MI be adopted for Issue 108. As an initial matter, with regard to TelNet’s claim that Verizon MI is required to provide dark fiber subloops, the Panel disagrees and finds that TelNet misreads the *Triennial Review Order*. The reference in the *Triennial Review Order* to hybrid loops applies only in the very limited circumstance where a CLEC cannot otherwise obtain a complete transmission path over “TDM networks,” in order “to provide broadband capabilities” over hybrid “DS1 and DS3 loops.”³⁵⁵ This limited exception bears no relation to TelNet’s argument that Verizon MI must provide all dark fiber sub-loops. The Panel likewise rejects TelNet’s argument that the FCC limited its analysis regarding subloops to multi-unit premise environments.³⁵⁶ The FCC explicitly made the determination, which was not challenged in the D.C. Circuit, that Verizon MI is not required to unbundle subloops.³⁵⁷ As a result, the Panel adopts Verizon MI’s view regarding its requirements to unbundled dark fiber subloops.

TelNet appears to have dropped its claim that Verizon MI’s proposal requires a dark fiber loop to be routed through two central offices, but now argues that Verizon MI’s definitions of

³⁵³ Verizon MI ICA, UNE Attach. § 8.2.1(2).

³⁵⁴ 47 U.S.C. § 251(c)(3).

³⁵⁵ *Triennial Review Order* ¶¶ 289-90.

³⁵⁶ TelNet PDAP at 148, (citing *Triennial Review Order* ¶ 347).

³⁵⁷ *Triennial Review Order* ¶ 253 (2003); *id.* ¶ 347 n.1037; see Opening Brief of CLEC Petitioners and Intervenors in Support (filed Jan. 15, 2001), *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (No. 00-1012 *et al.*).

dark fiber loops and subloops are inconsistent with the FCC’s dark fiber rules, and “narrower” than the definitions of dark fiber loop and dark fiber subloop set forth in the glossary in sections 2.27 and 2.28 (to which the Parties have agreed) because the definitions include “additional language.”³⁵⁸ The Panel is not persuaded by TelNet’s new argument. Verizon MI’s proposed language is entirely consistent with the FCC’s rules and the glossary simply provides greater detail as to how the loop is terminated at the central office and at the termination point.

Nor is the Panel persuaded by TelNet’s claim that Verizon MI’s requirement that its central office terminal be able to be cross-connected to TelNet’s collocation arrangement is improper. As Verizon MI correctly notes, this requirement simply reflects the established standard of technical feasibility under the Act.³⁵⁹ Unless TelNet has unlit fiber available in its collocation facility for such a cross-connect, in addition to any lit fiber already in use, it is not technically feasible for Verizon MI to connect its dark fiber to TelNet’s facility.

For the first time in its PDAP, TelNet now specifically challenges Verizon MI’s proposal requiring that TelNet place its customer premises equipment within thirty feet of Verizon MI’s accessible terminal.³⁶⁰ The Panel agrees with Verizon MI that its proposal is reasonable, given Verizon MI’s legitimate need to protect its network. The Panel is persuaded that because there is often unlimited access to customer facilities, Verizon MI needs to place termination facilities close to one another to protect them. The Panel also finds persuasive Verizon MI’s argument that it follows the same procedures with its own customers and TelNet cannot obtain superior service.³⁶¹

³⁵⁸ TelNet PDAP at 146. For example, TelNet points to Verizon MI’s language that the accessible terminal in Verizon’s central office must cross-connect to TelNet’s collocation arrangement located in Verizon MI’s central office.

³⁵⁹ 47 U.S.C. § 251(c)(3).

³⁶⁰ TelNet PDAP at 147.

³⁶¹ 47 U.S.C. § 251(c)(2)(C); 47 C.F.R. § 51.311. In addition, the thirty foot limitation is consistent with standard engineering practice guidelines, which are designed to avoid the need for further construction in order to reach the

As it did for Issue 85, the Panel agrees with TelNet that the generic change of law provisions (as decided by the Panel for Issues 5 and 23) should be used to amend the Agreement, to the extent necessary, to reflect the requirements of the *Interim UNE Rules Order* and any subsequent decision by either a court or the FCC.

Limitation on Splicing of Dark Fiber

Issue 108B: Verizon MI ICA, TRO Amendment § 3.7.1; UNE Attachment §§ 8.2.2, 8.2.3; TelNet ICA, TRO Amendment § 3.7.1; UNE Attachment §§ 8.2.2, 8.2.3

Should the Agreement require that TelNet access dark fiber loops, sub-loops or inter-office facilities (IOF) only at pre-existing accessible terminals and that dark fibers that are not terminated on an existing accessible terminals are not available to TelNet?

TelNet's Position

No. TelNet's proposed language in Section 8.2.1 adequately protects Verizon MI's interest. Any limitation on where TelNet can access dark fiber without Verizon MI proving technical infeasibility is contrary to the 1996 Act.

Verizon MI's Position

Verizon MI argues that it is required by statute to offer access to dark fiber only at "technically feasible point[s]."³⁶² Consistent with the statute, Verizon MI's proposal lawfully and reasonably restricts TelNet's access to dark fiber by identifying points where it is technically feasible to access the fiber. First, section 8.2.2 states that TelNet can access dark fiber at pre-existing accessible terminals. Second, section 8.2.3 requires Verizon MI to splice dark fiber to

demarcation point. Verizon MI's proposal is also consistent with the FCC's definition of demarcation points, which was revised in 1990 to ensure that the demarcation point would be near the point where the wiring enters the customer's premises. *See Report and Order and Further Notice of Proposed Rulemaking, Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68.213 of the Commission's Rules Filed by the Electronic Industries Association*, 5 FCC Rcd 4686, 4692 ¶ 30 (1990) ("Wiring Order").

³⁶² 47 U.S.C. § 251(c)(3).

the extent required by applicable law. Third, Verizon MI argues that its TRO Amendment makes it clear that Verizon MI will rearrange or splice in-place cable at “existing splice points,” as a routine network modification.

Verizon MI argues that these limitations are lawful and reasonable, because repeated access at other points can render the fiber strand unusable or degrade the transmission capabilities of the fiber optic facilities by causing cracks in the glass-silica based core of the dark fiber strand. As a result, the Agreement reasonably reflects Verizon MI’s obligation to provide access to UNEs “at any technically feasible point.”

Panel’s Decision

The Panel concludes that the position and language proposed by Verizon MI be adopted for Issue 108B. Verizon MI is correct that it is required by statute to allow access to dark fiber only at “technically feasible point[s]” and the Panel finds that Verizon MI’s proposal appropriately defines the points where it is technically feasible to access the dark fiber. As Verizon MI notes, Section 8.2.2 states that TelNet can access dark fiber at pre-existing accessible terminals; Section 8.2.3 requires Verizon MI to splice dark fiber to the extent required by applicable law; and Verizon MI’s TRO Amendment provides that Verizon MI splice in-place dark fiber at “existing splice points” as a routine network modification. These splicing provisions comport with the FCC’s requirements of access at “technically feasible points.”³⁶³

For the first time in its PDAP, TelNet argues that Verizon MI has proposed that “‘existing splice points’ are limited to ‘accessible terminals.’”³⁶⁴ While Section 8.2.2 refers only

³⁶³ *Id.* The Panel finds persuasive Verizon MI’s assertion that repeated splicing jeopardizes not only Verizon MI’s service, but also the service of other carriers that employ Verizon MI’s high capacity fiber optic systems. As Verizon MI points out, the FCC’s Wireline Competition Bureau has recognized such concerns. *Virginia Arbitration Order* ¶ 451.

³⁶⁴ TelNet PDAP at 150-51.

to access at pre-existing terminals, and prior law supports that limitation,³⁶⁵ section 8.2.3 requires splicing whenever required by applicable law. And section 4.5.1 of the TRO Amendment now provides TelNet with access not simply at accessible terminals, but also at “existing splice points.” Thus, there is nothing in Verizon MI’s proposal that suggests that Verizon MI will limit splice points to “accessible terminals.”

The Panel also rejects TelNet’s argument that the term “pre-existing” in these sections is redundant and restrictive. There is nothing ambiguous about the term “pre-existing.” It simply clarifies that Verizon MI is not required to create new terminals for Telnet; it is not a further limitation.³⁶⁶ The Panel notes that if Verizon MI creates new terminals in the course of serving its own customers, these new terminals would be available to CLECs, and TelNet would not be denied access to these new terminals by this language. Nor is this language inconsistent with Verizon MI’s concession that it will splice dark fiber at existing splice points.

Duty to Install/Routine Network Maintenance

Issues 116: Verizon MI ICA, TRO Amendment § 3.7; Verizon MI ICA, Pricing Attachment § 3.0; UNE Attachment §§ 11.0, 11.1, and 12.11; TelNet ICA, TRO Amendment § 3.7; TelNet Pricing Attachment § 3.0; UNE Attachment §§ 11.0, 11.1, and 12.11

Should the agreement include the language that Verizon MI shall provide TelNet with interoffice facilities (“IOF”) where facilities are available and Verizon MI will not install new electronics and new facilities, when the same provision already limits Verizon MI’s obligation only to the extent required by applicable law?

³⁶⁵ See *UNE Remand Order* ¶ 206; *Virginia Arbitration Order* ¶ 451.

³⁶⁶ *Triennial Review Order* ¶ 645 (“[w]e do not require incumbent LECs to construct transmission facilities so that requesting carriers can access them as UNEs at cost-based rates.”).

TelNet's Position

No. The Agreement should not attempt to define the scope of applicable law by enumerating specific limitations when the scope of applicable law may still be subject to interpretation and where the provisions already contain a general limitation that limits Verizon MI's duty only to the extent required by applicable law.

Verizon MI's Position

Verizon MI's proposed section 11 states that Verizon MI will provide unbundled interoffice facilities only "where facilities are available." The *Triennial Review Order* provides that Verizon MI is not required to build new facilities: "We do not require incumbent LECs to construct transmission facilities so that requesting carriers can access them as UNEs at cost-based rates."³⁶⁷ Thus, according to Verizon MI, the Agreement should clearly state that Verizon MI is only required to make "routine network modifications." Verizon MI also argues that its proposal expressly reflects the FCC's holding that ILECs are entitled to compensation for routine network modifications,³⁶⁸ which section 4.5.1 of the TRO Amendment makes clear. TelNet's proposal, on the other hand, omits any reference to new builds or to TelNet's obligation to pay for routine network modifications, and is thus flatly contrary to the FCC's clear directives.

Panel's Decision

The Panel concludes that the position and language proposed by TelNet be adopted for Issue 116. The Panel agrees with TelNet that the phrase, "where facilities are available" does not appear in any FCC order. In fact, after reviewing the *Triennial Review Order*, the Panel notes that the FCC spent considerable time attempting to define routine network modifications and Verizon MI's proposal may have the effect of limiting this obligation. In the *Triennial Review*

³⁶⁷ *Id.*.

³⁶⁸ *Id.* ¶ 640 ("The Commission's pricing rules provide incumbent LECs with the opportunity to recover the cost of the routine network modifications we require here.")

Order, the FCC held that ILECs, “in provisioning high-capacity loop facilities to competitors, must make the same routine modifications to their existing loops that they make for their own customers.”³⁶⁹ Thus, confusion may result from Verizon MI’s use of the term “available.” Verizon MI could argue that facilities are not “available” for reasons other than the fact they had not yet been built.

Verizon MI also proposes to include the language that Verizon MI will not construct new electronics and new facilities.³⁷⁰ The Panel finds the proposed language overly broad and inconsistent with the FCC rules. The FCC does not require ILECs to construct new transport facilities to meet specific CLEC point-to-point demand requirements for facilities that the ILEC has not deployed for its own use.³⁷¹ In *Iowa Utilities Board*, the Eight Circuit agreed that Section 251(c)(3) requires “unbundled access only to an incumbent LEC’s existing network – not to a yet unbuilt superior one.”³⁷² However, the court continued to explain that ILECs can be required to modify their facilities to accommodate interconnection or access to network elements.³⁷³ In addition, the FCC in the *Triennial Review Order* specifically required ILECs to install new electronics in order to activate loops that are not currently activated,³⁷⁴ and to deploy bucket trucks to reach aerial cable and install equipment castings.³⁷⁵ The requirement for ILECs to modify their networks also applies to all transmission facilities.³⁷⁶ Verizon MI’s language would permit Verizon MI to issue a “no facilities available” response to CLECs’ orders for high-

³⁶⁹ *Id.* ¶ 633.

³⁷⁰ Verizon MI UNE Attachment 11.1.

³⁷¹ *Triennial Review Order* ¶636

³⁷² *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 812-13 (8th Cir. 1997).

³⁷³ *Id.* at 813.

³⁷⁴ *Triennial Review Order* ¶ 633.

³⁷⁵ *Id.* ¶ 637.

³⁷⁶ *Id.* ¶ 638.

capacity loops by attaching equipment and facilities to its network, which the FCC found is unacceptable in the *Triennial Review Order*.³⁷⁷

Verizon MI argued before the FCC that the FCC lacked authority to compel ILECs to deploy new equipment to meet CLECs' demands because adding capacity or circuits, including constructing and modifying loops by adding electronics, would unlawfully force Verizon MI to provide superior quality access.³⁷⁸ The FCC concluded that except for building a loop from scratch, CLECs are entitled to routine modifications that ILECs provide to their customers.³⁷⁹

The Panel also disagrees with Verizon MI's argument that TelNet's proposed deletion of UNE Section 11.1 would require Verizon MI to perform network modification without compensation. Section 3.7.1 of the TRO Amendment already provides that Verizon MI will charge for routine network modification at rates set forth in the Pricing Attachment.

Limitation of TelNet Pricing

Issues 118 and 133: Verizon MI ICA, Pricing Attachment § 3.0; UNE Attachment § 12.11; TelNet Pricing Attachment § 3.0, UNE Attachment § 12.11

Should TelNet charge Verizon MI mutual and reciprocal rates for usage-based charges for network signaling and call-related database access at TelNet's tariffed rates if the tariffed rates are lower than Verizon MI's rates while Verizon MI's rates do not have such a limitation?

Should the Agreement provide that TelNet's rates for services to Verizon MI may not exceed Verizon MI's rates for comparable services unless TelNet shows to Verizon MI that its costs for providing the services exceed Verizon MI's costs, or at Verizon MI's request, shows the same to the Commission or the FCC?

³⁷⁷*Id.* ¶¶ 631 and 633.

³⁷⁸*Id.* ¶ 639.

³⁷⁹*Id.*

Panel's Decision

The Panel has been advised by TelNet that TelNet is withdrawing this issue. The Panel accepts TelNet's request.

Resale NRCs

Issues 135 and 136: Verizon MI ICA, Pricing Attachment, Appendix A; TelNet ICA, Appendix A

Should Verizon MI charge TelNet non-recurring charges for resale services under the same rates, terms and conditions that it would impose on its own end user customers and should TelNet be entitled to applicable discounts?

TelNet's Position

Yes. If TelNet elects to resell Verizon MI services to a customer, Verizon MI should not be permitted to charge TelNet for non-recurring charges that Verizon MI's end user customer would not have to pay. Verizon MI's proposed language would deprive TelNet of receiving an NRC discount that is applicable.

Verizon MI's Position

A. Verizon MI must be fully compensated for all of the functions it performs in providing services to TelNet for resale.

B. No. The NRCs at issue relate to functions provided only to resellers, not to retail customers. The Act does not require Verizon MI to provide discounts off activities that are performed only for wholesale customers.

Panel's Decision

The Panel concludes that the position and contract language proposed by TelNet, as modified by the Panel, be adopted for Issues 135 and 136. The Panel believes that this issue was

decided by the Commission in Case No. U-11281, when the Commission issued an Order addressing the first cost study filed by GTE (Verizon MI's predecessor). Among other things, GTE proposed specific NRCs for Resale Service and the Commission rejected these charges stating:

“Included in GTE’s proposal for nonrecurring charges are separately developed charges for ordering and installing resale services. Trimble Aff., filed Jan. 21, 1997, at 20 & Attach. 2. These charges must be removed. The rates, terms, and conditions of resale services, including applicable nonrecurring charges, must be determined by applying the resale discount percentage approved in this order to the nonrecurring charges in GTE’s retail tariffs.”³⁸⁰

The Panel disagrees with Verizon MI that the Commission did not address the issue of whether the resale discount applies to services that are not provided to retail customers but instead are provided only to wholesale customers. As the above quote indicates, the Commission has explicitly held that the only permissible way to establish NRCs “for ordering and installing resale service” is by applying the resale discount to whatever NRCs are contained in GTE’s retail tariff.

The Commission came to the same conclusion in U-11832. In that proceeding, the Staff noted that GTE had proposed NRCs for resale services using a “bottom up” analysis, rather than applying the approved resale discount to retail charges. In response, GTE argued that, “the avoided cost method required by 47 USC 252(d)(3) applies to retail telecommunications services that will be resold by CLECs to retail end users ... the statutory provision does not embrace activities undertaken by the ILEC for a CLEC.”³⁸¹ GTE also argued that retail costs are not

³⁸⁰ *Opinion and Order, On the Commission’s Own Motion, to Consider the Total Service Long Run Incremental Costs and to Determine the Prices of Unbundled Network Elements, Interconnection Services, Resold Services, and Basic Local Exchange Services for GTE North Inc.*, Case No. U-11281, (MI P.S.C. Feb. 25, 1998) at 20-21, (emphasis added).

³⁸¹ *Opinion and Order, On the Commission’s Own Motion, to Consider the Total Service Long Run Incremental Costs for All Access, Toll, and Local Exchange Services Provided by GTE North Inc.*, Case No. U-11832 (MI P.S.C. 2000) at 37-38.

avoided when it develops and implements a wholesale ordering and provisioning system. The Commission rejected GTE's arguments, relying on its Order in U-11281. While Verizon MI asserts that the Commission made a mistake by relying on its Order in U-11281, the Panel is not aware that Verizon MI sought reconsideration of the Commission's decision. Therefore, Verizon MI may not charge TelNet any NRCs that it does not charge its retail customers for ordering and installing resale services, and Verizon MI must discount such services by the applicable wholesale discount.

TelNet states that on Appendix A to the Pricing Attachment, Verizon MI lists the NRCs that it wishes to impose on resale service but does not use the cloverleaf symbol which Verizon MI uses to indicate a specific rate was derived from the cost study. TelNet asserts that this is an admission by Verizon MI that it does not have cost study to support these charges.³⁸² In response to this assertion, Verizon MI states in its PDAP that the NRCs are supported by cost studies on file with the Commission and that TelNet has not proven otherwise.³⁸³

The Panel cannot accept TelNet's position on this point. As discussed previously, the Commission concluded in the *SBC/MCI Arbitration Order* that a two-party arbitration is not the appropriate forum to present or examine cost studies.³⁸⁴ In addition, the Panel believes that these issues are best addressed in the *Verizon MI Cost Proceeding*. This gives the best opportunity for the Commission to fully examine and consider TelNet's position regarding the adequacy of these NRC rates. At the conclusion of that proceeding, the Agreement should be updated to reflect any revised rates.

Loop Rate Zones

³⁸² TelNet PDAP at 159.

³⁸³ Verizon MI PDAP at 244.

³⁸⁴ *DAP, SBC/MCI Arbitration* at 38-39.

Issue 137: Verizon MI ICA, Pricing Attachment, Appendix A; TelNet ICA, Pricing Attachment, Appendix A

Should Verizon MI split loop rates into three zones?

TelNet's Position

Verizon MI should establish three different rates for loops less than 12,000 feet, for loops between 12,000 feet and 18,000 feet and for loops longer than 18,000 feet. Not until Verizon MI's highly skewed average loops are deaveraged will there be any meaningful competition in Verizon MI's service territories.

Verizon MI's Position

Verizon MI argues that its approach of deaveraging loop rates by geography complies with the Commission's decision in the *Ameritech Michigan Rates and Services Restructuring Order*, and that TelNet has offered no good reason to deviate from this established approach that applies to all Michigan ILECs. Verizon MI further states that, because its cost study could not be modified to calculate rates according to loop length as TelNet proposes, Verizon MI would have to complete a time-consuming and expensive cost study to comply with TelNet's unlawful request. Verizon MI also argues that TelNet's proposal conflicts with the FCC's rules and that a two-party arbitration is not the appropriate forum for adopting an entirely new method for deaveraging loop rates.

Panel's Decision

The Panel concludes that the position and contract language proposed by Verizon MI, as modified by the Panel, be adopted for Issue 137. As noted previously, a two-party arbitration is not the appropriate forum for arguing about whether Verizon MI should split its loop rates into three zones. Specifically, the Panel believe that the examination and challenges to loop

deaveraging require more time and detail than can legitimately be achieved in an arbitration proceeding. As TelNet's own consultant has concluded, Verizon MI's cost model cannot be manipulated to determine the total cost of a loop based on loop length.³⁸⁵ According to Verizon MI, to calculate costs by loop length as TelNet requests, Verizon MI would be forced to change its cost model from what the Commission approved in Case No. U-11832 and to complete a new loop cost study. Verizon MI asserts that such a study would take many months to complete and would be enormously burdensome and expensive. In addition, any modification of Verizon MI's loop rates will affect other carriers who are not parties to this arbitration proceeding.

The Panel notes the pending *Verizon MI Cost Proceeding* and recommends that this issue be decided in that proceeding which provides the best opportunity for the Commission to fully examine and consider TelNet's position to split Verizon MI's loop rates into three zones as well as TelNet's assertions that the lack of competition in Verizon MI's service territory is a result of Verizon MI's rates structure and that Verizon MI's loop rates for CLECs are higher than the monthly rates Verizon MI charges its retail customers.³⁸⁶ The Panel further recommends that the Agreement be updated, to the extent necessary to reflect the outcome of the cost proceeding.

Level of Verizon MI's Rates

Issue 138, 140, 141, 143, 144, and 145: Verizon MI ICA, Pricing Attachment, Appendix A; TelNet ICA, Pricing Attachment, Appendix A

Are certain of Verizon MI's proposed rates reasonable?

TelNet's Position

³⁸⁵ E-mail from Norman Witte to John Kern *et al.* (June 25, 2004) (Attached as **CONFIDENTIAL** Attachment 2).

³⁸⁶ TelNet PDAP at 160-61.

Certain of Verizon MI's proposed rates are exorbitant and unreasonable. Many of the excessive charges are not based on cost studies and Verizon MI has failed to provide any support for these rates that would permit their adoption.

Verizon MI's Position

Verizon MI should not be required to alter rates that were approved by the Commission or are derived from Commission-approved costs and the Commission-approved common cost allocation factor. It would be unreasonable and unlawful to impose upon Verizon MI SBC's rates, or any other rates not based on Verizon MI's costs. Verizon MI's costs generally are higher than SBC's costs due to factors such as the more rural nature of Verizon MI's service area. It would violate the Act to base Verizon MI's rates on those of another ILEC. Verizon MI further asserts that it would violate Michigan law to impose SBC's rates on Verizon MI given SBC's lower costs.

Panel's Decision

The Panel concludes that the position and contract language proposed by Verizon MI, as modified by the Panel, be adopted for Issues 138, 140, 141, 143, 144 and 145.

As discussed previously, a two-party arbitration is not the appropriate forum for arguing about the adequacy of Verizon MI's rates and supporting cost studies. In addition, any modification of Verizon MI's rates will affect other carriers who are not parties to this arbitration proceeding. The Panel notes the *Verizon MI Cost Proceeding* and therefore recommends that these issues be decided in that proceeding which provides the best opportunity for the Commission to fully examine and consider TelNet's position regarding the adequacy of Verizon MI's rates as well as TelNet's assertions that the lack of meaningful competition in Verizon MI's service territory competition appears to be driven by several factors, including excessive prices

that Verizon MI charges local exchange carriers, that certain rates are not supported by cost studies, that Verizon MI should not adjust cost studies from one proceeding with a common cost factor from another proceeding and, the application of the cost studies to support rates.³⁸⁷ Until the *Verizon MI Cost Proceeding* is completed and revised rates are developed, the Panel recommends that Verizon MI's rates be adopted on an interim basis, and the Agreement be subject to true-up at the conclusion of the cost proceeding, if necessary.

Even if it were appropriate to consider TelNet's proposal, the Panel cannot accept TelNet's proposed rates because as TelNet admits, its proposal is based on SBC rates which may, or may not have any relationship to Verizon MI cost structure.³⁸⁸

Verizon MI's Unilateral Pricing

Issue 148: Verizon MI ICA, TRO Attachment § 1.3; TelNet ICA, TRO Attachment § 1.3

Should the TRO Amendment contain a provision that protects TelNet from Verizon MI establishing unilateral prices and imposing such unilateral prices on TelNet?

TelNet's Position

Yes. TelNet must have a means of protecting itself from unilateral charges set by Verizon MI. If the parties cannot agree upon the rates, terms and conditions for the provision of a UNE, there must be a methodology for resolving the dispute.

Verizon MI's Position

Verizon MI should not be required to alter rates that were approved by the Commission or are derived from Commission-approved costs and the Commission-approved common cost allocation factor. It would be unreasonable and unlawful to impose upon Verizon MI SBC's

³⁸⁷ TelNet PDAP at 162-168.

³⁸⁸ *Id.*

rates, or any other rates not based on Verizon MI's costs. Verizon MI's costs generally are higher than SBC's costs due to factors such as the more rural nature of Verizon MI's service area. It would violate the Act to base Verizon MI's rates on those of another ILEC. Verizon MI further asserts that it would violate Michigan law to impose SBC's rates on Verizon MI given SBC's lower costs.

Panel's Decision

The Panel concludes that the position and language proposed by TelNet be adopted for Issue 148. The language in dispute simply allows the parties to use the dispute resolution provisions if they cannot mutually agree when a change of law results in a change in obligations to provide UNEs.³⁸⁹ TelNet also proposes to add a new provision to the Pricing Attachment to the Revised TRO Amendment that has the same effect. This provision would state that:

§ 1.5 Notwithstanding any other provision in this Amendment or the Agreement, Verizon shall not unilaterally impose any charge for services upon TelNet. If the parties cannot agree upon a charge for a service, the dispute shall be resolved in accordance with the dispute resolution procedures of the Agreement.³⁹⁰

The Panel notes that TelNet's proposal is similar to language proposed by Verizon MI in section 2.3 of the TRO Amendment. Section 2.3 requires the Parties to negotiate the rates, terms and conditions for new UNE obligations and to amend the Agreement in writing. Even though TelNet's proposal does not specify a written amendment, the Panel expects that an amendment will be negotiated by the Parties to reflect any revised UNE obligations. TelNet's language simply states that the dispute resolution process will be used if the Parties are unable to negotiate the amendment.

³⁸⁹ TelNet ICA, Pricing Attach. § 1.3.

³⁹⁰ *Id.* at § 1.5.

The Panel does not agree with Verizon MI that the dispute resolution procedures in the Agreement has no application to disputes about an amendment to address a newly imposed obligation. As was discussed in Issues 5 and 23, if there is a change in law such that new UNE obligations are imposed on Verizon MI or existing obligations are removed, the contract must be amended to reflect the current law. The Panel agrees that the dispute resolution process should be used in this instance before either party files a section 252 petition. The Panel does not find TelNet's proposal will require the parties to always commence the dispute resolution process before agreeing upon pricing, as Verizon has alleged.³⁹¹ If the parties agree on the rate, there is no dispute and no basis for either party to commence the dispute resolution process.

Nor does the Panel agree with Verizon MI that TelNet's proposal is designed to force Verizon MI to provide free service.³⁹² TelNet has proposed no language that would entitle it to free service. If the Parties wish, they may include in the Agreement language to the effect that any service provided pursuant to the TRO Amendment should be adjusted so that TelNet pays whatever rate is determined to be appropriate for the time period that TelNet receives such service. The Panel believes that such a result is the only reasonable interpretation of the language that TelNet has proposed, but suggests such explicit additional language to remedy Verizon MI's concern.³⁹³

Finally, the Panel does not agree with TelNet that this issue is integrally related to Issue 163. This issue addresses the establishment of rates, terms, and conditions for obligations that *do not exist today*. Exhibit A to the Pricing Attachment to the Revised TRO Amendment, which is the subject of Issue 163, sets forth prices for services that Verizon MI is obligated to provide *today*. That exhibit does not propose any prices for the provision of services pursuant to

³⁹¹ Verizon Supplemental Answer at 8.

³⁹² *Id.* at 9-10.

³⁹³ See also Verizon MI PDAP at 261, n 711.

obligations that might be imposed in the future. Therefore, the resolution of Issue 163 will have no impact on the resolution of this issue.

More generally, the Panel agrees with Verizon MI that Issue 163 is distinct from all of the other issues that TelNet has raised with respect to Verizon MI's Revised TRO Amendment. Issue 163 addresses the specific rates that Verizon MI is permitted to charge for various services that it may be obligated to provide to TelNet. Thus, the subject matter of Issue 163 is whether Verizon MI should be permitted to charge the rates that it has proposed or, instead, should be permitted to charge some other rate. In contrast, with respect to other issues (though not this issue), TelNet has proposed to delete language establishing Verizon MI's right to impose *some* charge. The purely legal question whether Verizon MI has the right to charge anything at all for a particular service is legally and conceptually distinct from the question of what the correct rate for that service is, assuming Verizon MI is not required to provide the service at no extra charge. Accordingly, Issue 163 will be addressed separately from these other issues.

Terms in TRO

**Issue 149: Verizon MI ICA, TRO Attachment §§ 2.2, 2.3, 2.18, 3.5.2, 3.5.3.1;
TelNet ICA, TRO Attachment §§ 2.2, 2.3, 2.18, 3.5.2, 3.5.3.1**

A: Should the TRO Attachment define terms “dark fiber transport,” and “dedicated transport” based on portions of the *Triennial Review Order* that the D.C. Circuit remanded to the FCC?

B: Should the TRO Attachment include term “qualifying service” because the *USTA II* decision vacated the FCC's distinction between qualifying service and non-qualifying service?

TelNet's Position

The Court remanded the FCC’s decision that entrance facilities were no longer considered to be part of dedicated transport. Such exclusion in the TRO Attachment is premature.

Verizon MI’s Position

Yes. Rules promulgated in the *Triennial Review Order* that were remanded by the D.C. Circuit but not vacated remain binding federal law. Any future modifications that might be made to those rules, whether on remand by the FCC or in the event of further judicial review, are addressed by other provisions of the Revised TRO Amendment, such as sections 2.3 and 3.1.

Panel’s Decision

The Panel concludes that the position and contract language proposed by Verizon MI be adopted for Issue 149.³⁹⁴ The Panel agrees with Verizon MI that under basic administrative law principles, there is a legally significant distinction between the decision by a court to vacate an agency’s rule and the decision merely to remand the rule for further consideration by the agency. As the D.C. Circuit — the court that reviewed the *Triennial Review Order* — has explained, “vacatur is one remedy available” when a court cannot uphold an agency’s action, but “reviewing courts generally limit themselves to remanding for further consideration an agency order wanting an explanation adequate to sustain it.”³⁹⁵

³⁹⁴ With respect to one aspect of Issue 149A, the Panel notes that Verizon MI’s Revised TRO Amendment does not contain the “entrance facilities” language, which appeared in sections 3.5.2.1 and 3.5.3.1 of the original TRO Attachment, that TelNet had disputed. Because Verizon MI’s proposal does not include the language that TelNet proposed to delete — and because TelNet did not propose to add any language of its own — the Commission need not rule on TelNet’s dispute with respect to those two provisions; the two remaining provisions related to “entrance facilities” to which TelNet objected, however, also appear in the Revised TRO Amendment and are addressed here. With respect to what was formerly Issue 149B, given that TelNet now agrees with Verizon MI that the Revised TRO Amendment should not include a definition of the term “Qualifying Services,” there is no longer an open issue for the Commission to resolve.

³⁹⁵ *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1047-48 (D.C. Cir. 2002); see also *Allied-Signal, Inc. v. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (holding that an “inadequately supported rule . . . need not necessarily be vacated” and that the “decision whether to vacate depends on the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed”) (citation and internal quotation marks omitted).

Remand and vacatur, therefore, are distinct remedies with different consequences. Indeed, in its decision in *USTA II*, the D.C. Circuit expressly distinguished between those regulations that it “vacate[d]” and those that it “remand[ed].”³⁹⁶ Of particular relevance here is that the D.C. Circuit, after listing the aspects of the FCC’s decision that it was vacating, stated that it was only “remand[ing] the Commission’s decision to exclude entrance facilities from the definition of ‘network element’ for further development of the record to allow proper judicial review.”³⁹⁷ The Panel agrees with Verizon MI that the D.C. Circuit’s decision must be read to have purposefully imposed a remedy with respect to the FCC’s exclusion of entrance facilities from the definition of the dedicated transport network element that is different from the remedy it imposed with respect to the FCC’s dedicated transport and dark fiber rules, which it expressly vacated.³⁹⁸ Moreover, the Panel agrees with Verizon MI that the difference between vacatur and remand is that, when a rule is remanded but not vacated, the rule is “le[ft] . . . in place during remand.”³⁹⁹ Adopting TelNet’s position on this issue would treat the FCC’s rule with respect to entrance facilities as though the D.C. Circuit had vacated it, when it is clear that the D.C. Circuit made a conscious decision not to do so. The Panel recognizes, as TelNet notes (Supp. PDAP at 9), that the FCC is free to reach a different conclusion on remand; the FCC is also free to re-adopt the same rule if it provides a justification that avoids the errors the court identified. But the Panel disagrees with TelNet’s view that the possibility of the FCC adopting a different rule on remand is relevant to the question of what law is in effect today. As explained above, the D.C. Circuit made a conscious decision not to vacate the FCC’s ruling as to entrance facilities.

³⁹⁶ 359 F.3d at 594.

³⁹⁷ *Id.*

³⁹⁸ The Panel notes that, because the D.C. Circuit vacated the FCC’s rules requiring Verizon MI to provide unbundled access to all high-capacity transport and dark fiber, there is little benefit to TelNet from adoption of its proposed language. Even if entrance facilities were not expressly excluded from the definitions of high-capacity transport and dark fiber transport, as Verizon MI proposes, Verizon MI would still have no obligation under current federal law to provide access to such facilities as UNEs.

³⁹⁹ *National Lime Ass’n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000).

That rule, therefore, remains in effect until such time as the FCC determines to change it, and it is not premature for an interconnection agreement to reflect that decision.

Definition of Route

Issue 150: Verizon MI ICA, TRO Attachment § 2.19; TelNet ICA, TRO Attachment § 2.19

Should the TRO Attachment include a definition of “Route”?

TelNet’s Position

No. The FCC defined “route” in the TRO for its “trigger” analysis. That definition should not be applied in each instance where the term “route” is used in the Agreement and the TRO Amendment.

Verizon MI’s Position

This issue is moot. Verizon MI’s Revised TRO Amendment does not contain a definition of “Route.”

Panel’s Decision

It appears this issue has been resolved by the Parties. TelNet proposes to delete the definition of “Route” while Verizon MI asserts that the its Revised TRO Amendment does not contain this definition. The Panel agrees with Verizon MI that the definition of “Route” was deleted and therefore this issue is moot.

Issue 152: Verizon MI ICA, TRO Attachment §§ 3.1.1.3, 3.5.2.3, 3.5.3.2; TelNet ICA, TRO Attachment §§ 3.1.1.3, 3.5.2.3, 3.5.3.2

What transition mechanism should be established in situations where Verizon MI has the right to unilaterally terminate provisioning of loops and transports?

TelNet’s Position

The termination of services should be subject to a transition period mutually agreed upon by the parties or failing mutual agreement, established by the Commission.

Verizon MI's Position

No. Verizon MI's proposed transition periods, which TelNet has not proposed to modify, are reasonable and should be adopted.

Panel's Decision

The Panel concludes that the position and language proposed by TelNet be adopted for Issue 152. Verizon MI argues that the parties have already agreed upon a transition period for all non-conforming facilities, which are defined as facilities that Verizon MI is no longer obligated to provide by operation of non-impairment findings by the FCC or the Commission.⁴⁰⁰ Under Verizon MI's proposal, the non-conforming facilities would be subject to the 30-90 day transition period during which TelNet must act.⁴⁰¹ TelNet suggests that the non-conforming facilities should be subject to a transition period mutually agreed upon by the parties, and failing agreement, via resolution by the Commission.

The Panel believes that one advantage of TelNet's language is that it is flexible enough to account for different periods of time depending on the specific type of non-conforming facility at issue. The Panel finds that a "one size fits all" approach is unlikely to be the best solution. Undoubtedly, it will take different periods of time to transition from one non-conforming facility than it might take to transition from another non-conforming facility. As discussed in Issue 18A, this issue is a matter of significant public interest. It will unquestionably affect not only TelNet, but the customers that TelNet serves. TelNet's proposed language also would take into account situations where the FCC may impose transition periods different than Verizon MI's strict

⁴⁰⁰Verizon MI ICA, TRO Attachment, § 2.16.

⁴⁰¹ *Id.* at § 3.8.2.

proposal.⁴⁰² Without TelNet’s proposed language, all facilities upon the FCC or the Commission’s finding of non-impairment would have a contractual 30-90 transition period as proposed by Verizon MI.

The Panel also notes that the 30-90 day transition period is much shorter than the FCC contemplated in the *Triennial Review Order*. The FCC rejected the ILECs’ request to mandate a transition period, and instead treated the negotiation period under §252(b) as practically a transition period.⁴⁰³ The Parties will have 135 days to negotiate after the effective date of the non-impairment finding before either party may submit to the Commission for arbitration.⁴⁰⁴ The Commission has nine months to resolve the dispute.⁴⁰⁵ If loops or dedicated transports become non-conforming on the effective date of the FCC or the Commission’s non-impairment finding,⁴⁰⁶ Verizon MI effectively bypasses the §252(b) negotiation process.

Finally, the Panel notes Verizon MI’s statement that “TelNet has not proposed to modify Verizon MI’s proposed transition periods, which are cross-referenced in the sections TelNet does proposed to modify.”⁴⁰⁷ The Panel cannot agree with Verizon MI that TelNet has not proposed to modify Verizon MI’s proposed transition periods. TelNet has inserted its proposed language in Section 3.1.1.3, Section 3.5.2.3, and Section 3.5.3.2. All three of these sections make reference to Section 3.8. Verizon MI is essentially arguing that TelNet should have proposed that its language be included in Section 3.8 instead of the three sections where TelNet has proposed the language be inserted. The Panel finds that where TelNet’s proposed language should be inserted in the TRO Amendment is not an issue of substance and should not determine

⁴⁰² See, for example, the FCC adopted a three-year transition period for line sharing arrangement. *Triennial Review Order* ¶ 264.

⁴⁰³ *Triennial Review Order* ¶ 701.

⁴⁰⁴ *Id.* n. 2087.

⁴⁰⁵ *Id.*

⁴⁰⁶ Verizon MI ICA, TRO Attachment, §§ 3.1.1.3, 3.5.2.3, 3.5.3.2.

⁴⁰⁷ Verizon Supplemental Answer at 18.

how Issue 152 should be decided. TelNet has clearly proposed a different transition mechanism than Verizon MI has proposed. If the Commission accepts the Panel's ruling on this issue, the parties should remedy any confusion, if confusion exists, in the compliance Agreement that they will be required to file after the Commission issues a final Order in this case.⁴⁰⁸

Loops Served by UDLC

Issue 154: Verizon MI ICA, TRO Attachment § 3.1.4.2; TelNet ICA, TRO Attachment § 3.1.4.2

When TelNet pays Verizon MI the cost to construct a loop, should TelNet receive a refund of some of the construction costs if Verizon MI subsequently utilizes the new loop during its depreciable life to provide service to or on behalf of carriers or customers other than TelNet?

TelNet's Position

Yes. If TelNet pays the cost to construct a loop and Verizon MI subsequently utilizes all or part of that loop for carriers and customers other than TelNet, TelNet should be refunded a reasonable portion of the costs that it paid Verizon MI.

Verizon MI's Position

No. TelNet's proposed refund is inequitable, as it would require Verizon MI to bear costs incurred entirely as a result of TelNet's decision to request construction of a new loop. In any event, TelNet does not claim that it currently orders UNE loops from Verizon MI or intends to do so at any point in the future.

Panel's Decision

The Panel concludes that the position and language proposed by Verizon MI be adopted for Issue 154. At the outset, the Panel notes that two issues are uncontested. First, the *Triennial*

⁴⁰⁸ The Panel notes that this discussion relates to the original TRO Amendment and not the Revised TRO Amendment. However, the Panel expects the Parties to conform the Revised TRO Amendment to reflect all recommendations of this DAP after the Commission issues its order.

Review Order does not require Verizon MI to construct a brand-new copper loop in a situation where TelNet seeks to obtain an unbundled loop to serve a customer that Verizon MI currently serves using IDLC.⁴⁰⁹ Second, it is appropriate for TelNet to pay for the costs of constructing a new copper loop if TelNet requests that Verizon MI build a new loop so that TelNet can provide service to a customer currently served over IDLC.

Although the Parties agree on these two points, they disagree on what should happen if, after Verizon MI builds a loop at TelNet's request, the customer switches to another carrier (whether back to Verizon MI or to a different competitor) during the "depreciable life" of the loop. Specifically, TelNet has proposed that, if Verizon MI "utilizes such [a] [l]oop during its depreciable life to provide service to or on behalf of [a] carrier or customer other than TelNet, Verizon and TelNet will mutually agree on a fair and reasonable method of reimbursing TelNet for all or a portion of such costs," and will "employ the dispute resolution procedures of the Agreement" if they cannot agree.⁴¹⁰ Although the Panel appreciates that TelNet may feel that its money is wasted if it cannot retain a customer for the entire depreciable life of the loop, the Panel does not agree with TelNet that it is equitable for TelNet to bear less than the full cost of constructing the loop.⁴¹¹

First, as TelNet does not dispute, federal law does not obligate Verizon MI to build a loop for TelNet; nor does it compel TelNet to request that Verizon MI build such a loop. Having

⁴⁰⁹ As the FCC explained, when a customer is served using IDLC "a one-for-one transmission path between an incumbent's central office and the customer premises may not exist at all times." *Triennial Review Order* ¶ 297. Moreover, the IDLC system is "integrated directly into the switches of incumbent LECs." *Id.* As a result, without substantial work that is "not always desirable for either carrier," there is not a distinct "loop" that can be provided to a competitor on an unbundled basis. *See id.* ¶ 297 n.855. For this reason, the FCC recognized that "in most cases" competitors seeking an unbundled loop for a customer currently served using IDLC will obtain from the incumbent "a spare copper facility" or a loop through a "Universal DLC system[]," either of which can be unbundled. *Id.* ¶ 297.

⁴¹⁰ TelNet ICA, TRO Attach. § 3.1.4.2.

⁴¹¹ The Panel notes that TelNet has other options of recovering its costs for loops including the application of early termination fees.

made the entirely voluntary decision to purchase a loop — and caused Verizon MI to incur costs that it never would have incurred but for TelNet’s request — it is appropriate for TelNet to bear the full cost of its decision.

Second, TelNet’s proposed language would apply not only in the unlikely event that Verizon MI serves its own customer using the loop built at TelNet’s request (rather than the IDLC arrangement it had been using), but also in the event that the customer switches to another competitor. Regardless of which carrier uses the loop after TelNet has voluntarily requested that Verizon MI build it, the Panel finds that it is equitable for TelNet to pay the entire cost of a loop built at its request. But the inequity of permitting TelNet to avoid some of the cost is magnified if the loop is used by a different competitor. That competitor did not request that Verizon MI build the loop; indeed, given the choice, that competitor might have decided not to ask Verizon MI to do so. There is no equitable reason to require the competitor to pay costs that Verizon MI incurred at TelNet’s request. Even if there were an equitable basis for imposing such costs on the other competitor, the Panel agrees with Verizon MI that there is no legal mechanism to force the competitor to pay a portion of those costs. TelNet’s Agreement cannot impose such obligations on third parties, and TelNet has offered no evidence that Verizon MI’s agreements with other competitors include terms that would compel them to pay Verizon MI in this situation.

Finally, the Panel disagrees with TelNet’s claim that its proposed language would promote competition. On the contrary, if other competitors knew that winning customers from TelNet came at the cost of paying for part of a loop built at TelNet’s request, they would be less likely to compete for that customer’s business. In this way, TelNet’s proposed language may serve to “lock in” these individuals as TelNet’s customers, even if they are dissatisfied with

TelNet's service and wish to move to another carrier. The Panel finds that such a result would be detrimental to the promotion of competition in Michigan.

As it did for Issue 85, the Panel agrees with TelNet that the generic change of law provisions (as decided by the Panel for Issues 5 and 23) should be used to amend the Agreement, to the extent necessary, to reflect the requirements of the *Interim UNE Rules Order* and any subsequent decision by either a court or the FCC.

Performance Standards

**Issue 155: Verizon MI ICA, TRO Attachment §§ 3.1.4.3, 3.6.1, 3.6.2.6, 3.7.2;
TelNet ICA, TRO Attachment §§ 3.1.4.3, 3.6.1, 3.6.2.6, 3.7.2**

Should Verizon MI's performance in providing new services required under the TRO Amendment be subject to the standard provisioning intervals or performance measure or remedies, if any, contained in the Agreement or elsewhere?

TelNet's Position

Yes. Without any reasonable performance standards, it would be impossible for TelNet to provide potential customers with assurance of completion dates and other matters.

Verizon MI's Position

No. The existing performance measurements are based on Verizon MI's standard provisioning processes. Inclusion of these new services (which utilize different and lengthier provisioning processes) in existing performance measurements would skew the results, rendering them inaccurate.

Panel's Decision

The Panel concludes that the position and language proposed by Verizon MI, as modified by the Panel, be adopted for Issue 155. As discussed above, with respect to Issues 89B, 90, 94,

96, 121, and 122, the Panel recommends approval of Verizon MI's GTC § 31.3, under which Verizon MI has proposed voluntarily to provide certain performance measurement results to TelNet. The Panel agrees with Verizon MI that those performance measurements are based on the standardized processes that Verizon MI employs for various tasks. However, as Verizon MI has explained — and TelNet does not dispute — the services at issue here, which involve IDLC loops, commingling arrangements, conversions of special access arrangements, and provisioning of facilities where Verizon MI must first perform network modifications, all involve new, non-standard processes, and generally require additional provisioning time.⁴¹² The Panel finds that it would skew the results of existing performance measurements, which were not designed with these new services in mind, to include Verizon MI's performance in provisioning these services in the existing measurements.

The Panel also notes that, contrary to TelNet's claim, Verizon MI is not proposing to exempt its performance as to these services from its legal requirements. But the only currently applicable legal requirements in Michigan are those set forth by the FCC in interpreting the nondiscrimination standard imposed by the 1996 Act. The FCC has explained that, for “functions that are analogous to those that a BOC provides to itself, its customers or its affiliates, the nondiscrimination standard requires the BOC to offer requesting carriers access that is equivalent in terms of quality, accuracy, and timeliness.”⁴¹³ And for “functions that have no retail analogue, the BOC must offer access sufficient to allow an efficient competitor a meaningful opportunity to compete.”⁴¹⁴ Verizon MI is not proposing to be permitted to provide

⁴¹² See, e.g., *Virginia Arbitration Order* ¶¶ 575-78 (2002) (agreeing with Verizon that it needed extra time for provisioning IDLC loops); *Triennial Review Order* ¶ 639 (noting that “routine network modifications [might] affect loop provisioning intervals”).

⁴¹³ Memorandum Opinion and Order, *Application by SBC Communications Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Michigan*, 18 FCC Rcd 19024, App. C ¶ 27 (2003) (“*Michigan (2d) 271 Order*”).

⁴¹⁴ *Id.* ¶ 28 (internal quotation marks omitted).

discriminatory service, but merely not to have its performance for certain orders assessed using measurements that TelNet does not dispute are inapplicable to those orders. TelNet argues⁴¹⁵ that the performance measurements might be modified in the future to account for these new services and that Verizon MI's performance should not be excluded from such measurements. The Panel agrees. To the extent the Agreement is not clear on this point, the Panel instructs the Parties to make this a specific provision that any carrier-to-carrier service quality measurement plan and performance remedy plan that might be adopted or approved by the Commission at any future date will apply notwithstanding Verizon MI's voluntary reporting of its performance under other provisions of GTC § 31.3.

Commingling Charges

Issues 157: Verizon MI ICA, TRO Attachment §§ 3.6.1, 3.6.2.3; TelNet ICA, TRO Attachment §§ 3.6.1, 3.6.2.3

Can Verizon MI impose a nonrecurring charge for the alleged cost of commingling when no such costs appear to exist?

TelNet's Position

No. Verizon MI has not been able to explain the basis for imposing a nonrecurring charge for commingling. Nor has Verizon MI provided any cost study to support such a charge. Each type of service that is commingled already has a nonrecurring charge. The mere fact that TelNet can purchase two types of services and use those services in conjunction with each other does not result in any changes to Verizon MI's network or cause Verizon MI to incur additional costs.

Verizon MI's Position

Issues 157 and 159: Yes. Verizon MI should be permitted to impose a nonrecurring charge for the costs of commingling and administrative charges associated with conversions of

⁴¹⁵ TelNet Supplemental PDAP at 17-18.

existing special access arrangements, both of which are incurred only because of TelNet's request.

Panel's Decision

In its PDAP, Verizon MI addresses Issues 157 and 159 together. The Panel elects to address Issue 157 separately and address Issue 159 and 163 together. The Panel concludes that the position and language proposed by Verizon MI be adopted for Issue 157. TelNet has proposed to delete language stating that Verizon MI may charge TelNet a rate specified in the Pricing Attachment to the Revised TRO Amendment for performing specific services at TelNet's request. The only legal question for this issue is whether Verizon MI has the right to impose any charge at all for these services. The separate question of the appropriate rate for these services is addressed in Issue 163.

The Panel agrees with Verizon MI that, despite TelNet's proposal to delete language that Verizon MI has proposed, the Parties do not actually have a dispute about Verizon MI's legal right to impose some charge. That is, TelNet does not argue that the 1996 Act or any FCC decision prohibits Verizon MI from imposing charges to "offset Verizon's costs of implementing and managing commingled arrangements" or to convert a circuit that TelNet originally purchased as special access to a UNE combination or commingled arrangement.⁴¹⁶

Instead, TelNet disputes the specific rates that Verizon MI has proposed to charge for each of these services. The Panel finds that this dispute does not provide a basis for TelNet's proposed deletions from sections 4.4.1 and 4.4.2.3. The language that TelNet proposes to delete does not establish the rate that Verizon MI may charge, it simply states that Verizon MI may charge whatever rate is set forth for these services in Exhibit A to the Pricing Attachment to the Revised TRO Amendment. As noted above, that question is addressed in Issue 163. Verizon

⁴¹⁶ Verizon MI Revised TRO Amendment §§ 4.4.1, 4.4.2.3

MI's proposed language should be retained to make clear that Verizon MI may charge, and TelNet must pay, the applicable rates included in Exhibit A.

Recertification of Existing EELs

Issue 158: Verizon MI ICA, TRO Attachment §§ 3.6.2.1.5, 3.6.2.2; TelNet ICA, TRO Attachment §§ 3.6.2.1.5, 3.6.2.2

Should TelNet be required to recertify existing EEL arrangements under the *Triennial Review Order*'s new certification requirements? If so, what transition period should apply and what information should be provided?

TelNet's Position

No. The *Triennial Review Order* does not require re-certification for existing EELs. The new criteria set forth in the *Triennial Review Order* for certifying EELs only applies to new EELs. When TelNet certifies new EELs under the new criteria, it should only be required to provide Verizon MI the information required by the FCC for certification.

Verizon MI's Position

A. Yes. TelNet makes no claim that it purchases any EELs, nor that it has attempted to certify EELs, under either the old or new rules. Even assuming that this issue is not therefore moot, the FCC's certification requirement makes no exception for already-purchased EELs. They should therefore meet the certification rules.

B. Assuming that this issue is not moot, Verizon MI has proposed a reasonable transition period, which should be adopted.

C. The information requested in Verizon MI's proposed language, which applies both to certification of new EELs and re-certification of existing EELs (assuming the latter dispute is not

moot), is consistent with the FCC's rules, and should pose no burden for TelNet as it must have such information in its possession to certify that it complies with those rules.

Panel's Decision

A. The Panel agrees with Verizon MI that this sub-issue, which addresses whether TelNet must certify that any EELs it currently obtains from Verizon MI satisfy the FCC's new certification criteria, is moot. TelNet did not state in its Petition that it currently purchases *any* EELs from Verizon MI. As Verizon MI correctly noted, if TelNet does not currently obtain EELs from Verizon MI, then it would not have any obligation to recertify those EELs under the FCC's new criteria. TelNet has not attempted to supplement the record to demonstrate that it currently purchases EELs from Verizon MI, or even asserted that it does so. For this reason, the Panel recommends that the Commission find that this sub-issue is moot and reserves judgment on the question whether Verizon MI has correctly interpreted the FCC's new EEL certification rules. Because the Panel did not issue a recommendation as to whether Verizon MI correctly interpreted the FCC's new EELs certification rules, the language proposed by Verizon MI for sub-issues B and C should not be included in the Agreement. Inclusion of this language has the effect of prejudging the outcome of these issues. In addition, Verizon MI has stated that there are currently no CLECs in Michigan purchasing EELs from Verizon MI. However Verizon MI asserts that while CLECs do not have EELs as of June 2004, they may have purchased such EELs in the past two months or may do so in the future under their existing agreements which continue to reflect the FCC's prior rules. Verizon MI asserts that if these CLECs opt into TelNet's Agreement after ordering EELs that qualify under the old rules (but not the current rules), they may claim that they have no obligation to recertify their EELs if the TelNet Agreement does not address the recertification issue. Since no CLEC has purchased any EELs,

the Panel believes that Verizon MI's concerns are exaggerated. However in order to address this potential concern, the Panel recommends that the Parties develop language requiring carriers that opt into this Agreement, be required to negotiate or arbitrate if necessary, sub-issues B and C.

Retag Fee

Issue 160: Verizon MI ICA, TRO Attachment § 3.6.2.5; TelNet ICA, TRO Attachment § 3.6.2.5

Should the retag fee for conversion be imposed on conversion of DS0 circuits or only on DS1s?

TelNet's Position

TelNet has agreed to pay Verizon MI a retag fee. However, only one retag fee is appropriate if Verizon MI is retagging a DS1 circuit or multiple DS0 circuits within a DS1.

Verizon MI's Position

If TelNet requests conversion of some DS-0 circuits within a DS-1, TelNet should pay the retag fee for each DS-0, because Verizon MI must retag each DS-0. Verizon MI, however, agrees with TelNet that, if it requests conversion of a DS-1 in a single order, then only a single retag fee is appropriate.

Panel's Decision

The Panel concludes that the position and language adopted by Verizon MI, as modified by the Panel, be adopted for Issue 160. As the name implies, this fee compensates Verizon MI for the cost of physically changing the paper tag that is used to identify a circuit when TelNet requests to convert that circuit from special access to a UNE. Verizon MI explains that retagging is necessary because the converted UNE circuit has a different circuit ID from the special access

circuit and that tagging the circuit with the correct circuit ID facilitates future maintenance and ordering activities. TelNet does not dispute this.

The Parties also agree that, if TelNet submits a single order to convert an entire high-capacity circuit known as a DS-1⁴¹⁷ (where the interface at the end-user's demarcation point is at the DS-1 level, so only a single tag has to be replaced), TelNet should be required to pay a single, \$20 retag fee. Verizon MI's proposed language reflects this point of agreement, by providing that the retag fee will apply on a "per circuit" basis. Where the interface at the end-user's demarcation point is at the DS-1 level, the "circuit" at issue is a DS-1. In this situation, applying the retag fee on a per circuit basis, as Verizon MI proposes, results in only a single retag fee being applied.

The Parties' disagreement is about how the retag fee should be applied if TelNet seeks to convert *some* of the DS-0 circuits on a DS-1, while leaving the rest of them as special access, or if TelNet seeks to convert an entire DS-1, but Verizon MI must replace the tags on 24 separate DS-0 circuits.

Verizon MI states that in these scenarios, Verizon MI must replace the tags on individual DS-0 circuits because each separate circuit must carry its own tag, with the correct, unique circuit ID. Although TelNet correctly notes that only one visit to the site is required in these instances, Verizon MI asserts that replacing between 2 and 24 unique tags involves more work than replacing a single tag. Moreover, Verizon MI asserts that if TelNet converts 12 of the DS-0 circuits in a DS-1 in September and then converts the remaining 12 DS-0 circuits in October,

⁴¹⁷ A DS-1 is equivalent to 24 DS-0s, which are voice-grade circuits. In other words, a DS-1 can carry 24 simultaneous voice conversations.

Verizon MI would be required to perform two site visits and replace 12 separate tags on each occasion.⁴¹⁸

TelNet asserts that if Verizon MI retagged 20 DS0 circuits within one DS1, the cost would be \$400. TelNet characterizes such multiple fees as “significant” and proposes that the retag fee be on a “per DS1 basis.” TelNet states that when a CLEC requests a conversion for multiple DS0s in a DS1, Verizon MI only needs to dispatch one visit to the site.⁴¹⁹

As discussed previously, a two-party arbitration is not the appropriate forum for arguing about the adequacy of Verizon MI’s rates and supporting cost studies. In addition, any modification of Verizon MI’s rates will affect other carriers who are not parties to this arbitration proceeding. The Panel notes the pending *Verizon MI Cost Proceeding* and recommends that this issue be decided in that proceeding which provides the best opportunity for the Commission to fully examine and consider the Parties’ positions that cost do, or do not vary, when retagging multiple circuits. Until the *Verizon MI Cost Proceeding* is completed and revised rates are developed, the Panel recommends that Verizon MI’s rates be adopted on an interim bases, subject to true-up at the conclusion of the cost proceeding.

Ability to dispute of an auditor’s EEL certification findings

Issue 161: Verizon MI ICA, TRO Attachment § 3.6.2.7; TelNet ICA, TRO

Attachment § 3.6.2.7

Should TelNet be allowed to dispute an auditor’s determination that TelNet has not met the certification requirements for EEL eligibility?

TelNet’s Position

⁴¹⁸ Indeed, it is theoretically possible for TelNet to require Verizon MI to perform 24 site visits, if it converts one DS-0 at a time. Neither Party claims that this is a likely possibility, however.

⁴¹⁹ Petition, TRO Matrix at 21.

Yes. Verizon MI is selecting and paying the “independent” auditor. The auditor could make a mistake. At least minimum recourse should be available to TelNet to enable it to disagree with any adverse findings of the auditor.

Verizon MI’s Position

No. The FCC did not provide for any right of review of the independent auditor’s determination and, moreover, the general dispute resolution procedure in the Agreement is inapplicable to any dispute TelNet might have with the independent auditor’s finding.

Panel’s Decision

The Panel concludes that the position and language proposed by TelNet be adopted for Issue 161. Verizon MI asserts that the FCC did not provide CLECs with any right to obtain review of the independent auditor’s conclusion. The Panel disagrees. While the FCC set forth basic principles regarding carriers’ “rights to undertake and defend against audits,” it also stated that the details in implementing the audits are better dealt with in interconnection agreements. The FCC further stated that state commissions are in a better position to address the implementation of these audits.⁴²⁰ The Panel believes that Verizon MI misunderstands the role of the state commissions with respect to these audits. Contrary to Verizon MI’s assertion, state commission review is not limited to determining the independence of the auditor but rather all aspects of the audit. Nor does the Panel agree with Verizon MI’s assertion that all disputes must be brought to the Commission before the audit is completed.⁴²¹

Similar to other provisions in the agreement, the ILEC’s right is not absolute and must be subject to the CLEC’s challenge. Otherwise, the auditor could intentionally or obviously err and TelNet would have no recourse or protection. Such a mistake could be devastating to TelNet

⁴²⁰ *Triennial Review Order* ¶ 625.

⁴²¹ Verizon MI PDAP at 293.

and should not be ignored. Therefore, the Panel concludes that the FCC did not preclude CLEC review of the auditor's conclusions.

Verizon MI also challenges the applicability of the dispute resolution procedure set forth in §14 of the Agreement to the dispute on the auditor's finding. The Panel agrees with TelNet that Section 14 provides that the dispute resolution procedure applies to disputes "between the parties regarding the interpretation or enforcement of this Agreement or any of its terms." As a result, any dispute on whether TelNet has complied with the service eligibility criteria is a dispute on the enforcement of section 3.6.2.7 of the TRO Amendment. In any event, the parties can make the right to dispute the auditor's findings a provision of the Agreement and thus be subject to the dispute resolution procedure.

Applicability of State Law

Issue 162: TelNet ICA, TRO Attachment § TBD

Should TelNet be forced to contract away its un-preempted state law rights?

TelNet's Position

No. The Amendment must recognize the Commission's authority under state law. The Commission has recognized that CLECs in Michigan have certain rights under state law.

Verizon MI's Position

TelNet has identified no specific provisions in the Agreement or the Revised TRO Amendment that it claims could be construed to eliminate any state law rights TelNet has that are not preempted by federal law. As a result, TelNet's proposed language is either inoperative or an invitation to future litigation and, in either event, is inconsistent with the 1996 Act processes for creating interconnection agreements.

Panel's Decision

The Panel concludes that the position and language proposed by TelNet be adopted for Issue 162. The Panel agrees with TelNet that the TRO Amendment should recognize state law to the extent that it is not preempted by federal law.

First, TelNet is proposing that any state law that is not preempted by federal law not be precluded from being recognized. In the *Triennial Review Order*, the FCC disagreed with the ILECs' argument that states were preempted from regulating UNE provisions as a matter of law.⁴²² TelNet's proposed language closely tracks the FCC's holding that "the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 and do not 'substantially prevent' the implementation of the federal regulatory regime."⁴²³

Verizon MI argues that the TRO Amendment is meant only to add to the existing base Agreement by adding provisions reflecting new federal rules.⁴²⁴ Contrary to Verizon MI's claim that TelNet's proposed language is beyond the scope of the TRO Amendment, the *Triennial Review Order* itself recognized that section 252(e)(3) preserves the states' authority to establish or enforce state law in their review of interconnection agreements.⁴²⁵ Therefore, the TRO Amendment is the appropriate forum to clarify the role of state law as recognized by the FCC in the *Triennial Review Order*.

The Commission emphasized the importance of state law to interconnection agreements in Case No. U-14121 when it concluded that, "The Commission's authority to exercise its jurisdiction over the SBC/Sage agreement at issue is not limited to the FTA." The Commission found that sections 355, 357 and 359 of the MTA applied to the interconnection agreement, "In

⁴²²*Triennial Review Order* ¶ 192.

⁴²³*Id.* ¶ 193.

⁴²⁴Verizon MI Supplemental Answer at 41-42.

⁴²⁵*Triennial Review Order* ¶ 191.

order for the Commission to perform these statutory duties, the SBC/Sage agreement must be formally filed with the Commission for its consideration.”⁴²⁶

Verizon MI also argues that the Commission does not have the authority under state law to require the CLEC to provide additional UNEs.⁴²⁷ The Panel notes that Section 355(2) of the MTA requires providers of local service to unbundled the loop and switch port. Under Section 102(x), the port is defined as the “entirety of the local exchange” except the loop. Section 356 regulates collocation under state law. Section 357 regulates resale obligations under the state law. Section 358 regulates number portability under state law. Section 359 regulates rates for termination of local service under state law. Section 352 regulates other interconnection services under state law. The Panel declines to conclude that all of these provisions have been preempted in their entirety by federal law. Rather, the Panel finds that TelNet’s proposed language reasonably makes clear that TelNet, by agreeing to certain provisions in Verizon MI’s proposed TRO Amendment, is not intending to contract away any rights that it may have under state law.

Verizon MI asserts that TelNet did not identify any specific dispute that justifies the inclusion of TelNet’s proposed language. According to Verizon MI, under the process established in the 1996 Act for the creation of interconnection agreements, carriers are supposed to identify their disputes with some specificity, to permit meaningful negotiation, and to assist the Commission in resolving disputes by presenting them in concrete form.⁴²⁸ Verizon MI contends that if there are specific state law requirements that TelNet contends are not preempted by federal law and that TelNet is concerned might be negated by some provision of the Agreement or the Revised TRO Amendment, it was incumbent upon TelNet to identify those

⁴²⁶Order, *On the Commission’s Own Motion, to Require SBC Communications Inc., and Sage Telecom, Inc. to Submit their Recently Negotiated Agreement for the Provision of Telecommunications Services in Michigan for Review and Approval*, Case No. U-14121 at 3. (April 28, 2004).

⁴²⁷See Verizon MI’s Supplemental Answer at 42.

⁴²⁸See 47 U.S.C. § 252(b).

specific provisions and to propose specific language with respect to them. However, the Panel does not believe that a simple “reservation of rights” proposal as offered by TelNet requires the identification of a specific dispute and the Panel believes that an acknowledgement of the Commission’s jurisdiction is appropriate.

Pricing

Issues 159 and 163: Verizon MI ICA, TRO Pricing Attachment, Exhibit A; TelNet ICA, TRO Pricing Attachment, Exhibit A

Should the TRO Amendment include the Pricing Attachment when Verizon MI has not provided cost support for any of the prices that it proposes to charge?

TelNet’s Position

No. Verizon MI should not be permitted to impose charges without demonstrating that the charges are reasonable.

Verizon MI’s Position

Yes. Verizon MI’s prices are based on valid cost estimates and should be adopted at least on an interim basis.

Panel’s Decision

The Panel concludes that the position and language proposed by Verizon MI, as modified by the Panel, be adopted for Issues 159 and 163. As discussed previously, this issue addresses the specific prices that Verizon MI may charge, and TelNet must pay, for the various services that the *Triennial Review Order* requires Verizon MI to provide. Verizon MI contends that the rates in Exhibit A to the Revised TRO Amendment reflect its best estimates of the costs that it incurs in performing those functions, based on its costs for similar services. Verizon MI proposes to charge TelNet the rates listed in Exhibit A on an interim basis, pending submission

of cost studies and determination of final prices by the Commission.⁴²⁹ The Panel recommends that Verizon MI's pricing be interim, subject to a true-up at the conclusion of *Verizon MI Cost Proceeding*.

The Panel disagrees with TelNet's position that the resolution of Issue 148 controls this issue. As discussed with respect to Issue 148, the language TelNet has proposed (and the comparable language found in §2.3 of Verizon MI's Revised TRO Amendment) sets forth a process for establishing rates, terms, and conditions for obligations that might be imposed in the future, but that do not exist today. By contrast, the rates at issue here are for obligations that do exist today.

In addition, contrary to TelNet's claims, the Panel agrees with Verizon MI that the effect of adopting TelNet's position would be that, for at least some time, Verizon MI would be obligated to perform services for TelNet but would have no rates to charge TelNet. The Panel finds that Verizon MI is rightly unwilling to provide service for free to any competitor subject to "true-up," given the possibility that competitors — not only TelNet, but any CLEC that might opt in to this Agreement under section 252(i) — may not have the financial wherewithal to pay those charges once permanent rates are established. On the contrary, if Verizon MI's proposed rates are adopted on an interim basis, the Panel has no doubt that Verizon MI will promptly refund to TelNet any amount by which the interim rates exceed the permanent rates if the Commission should determine that such a refund is appropriate after permanent rates are established. The Panel also notes that TelNet has not alleged (let alone demonstrated) that

⁴²⁹ TelNet asserts, based on a footnote to Exhibit A, that Verizon MI is contending that it should have the right unilaterally to impose and change prices. The Panel agrees with Verizon MI that TelNet has misread the footnote, which clearly states that "rate schedules shown are subject to unilateral change by Verizon, *unless and until finalized in connection with an executed interconnection agreement amendment.*" Verizon MI Pricing Attach. at 2, note. The italicized phrase makes it clear that the estimated rates may be changed *only* until this Commission approves the Verizon-TelNet Agreement. After that point, Verizon MI would have no authority to make "unilateral" changes to its proposed prices.

Verizon MI's proposed interim rates are so high that they will prevent TelNet from offering service pending the adoption of final rates. Nor has TelNet made any allegations, or submitted any evidence, as to the extent to which it is likely to request that Verizon MI perform any of the services for which Verizon MI has proposed interim rates and, therefore, become obligated to pay those rates.

Although the Panel recognizes that, in an ideal world, the Revised TRO Amendment would contain permanent rates from the outset, the above considerations lead the Panel to conclude that Verizon MI's interim-rate proposal is reasonable, as its rates are based on its costs for similar services. TelNet, in contrast, proposes no rates at all, and it is unreasonable to require Verizon MI to provide service for free, even on an interim basis.

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Petition of **TelNet Worldwide,)**
Inc. for Arbitration of interconnection rates, terms,)
conditions, and related arrangements with)
Verizon North Incorporated and Contel of the)
South, Inc., d/b/a/ Verizon Systems)

Case No. U-13931

P R O O F O F S E R V I C E

Linda Dabrowski, affirms that on September 8, 2004, she served a copy of the attached Decision of the Arbitration Panel upon those persons shown on Attachment A, via first class mail.

Linda Dabrowski Digitally signed by Linda Dabrowski
DN: CN = Linda Dabrowski, C =
US, O = Kern and Assoc., Inc.
Date: 2004.09.08 08:04:21 -05'00'

Linda Dabrowski

Subscribed and sworn to before me on
this 8th day of September, 2004.

Pat Miller Digitally signed by Pat Miller
DN: CN = Pat Miller, C = US, O =
Kern and Assoc., Inc.
Date: 2004.09.08 08:04:54 -05'00'

Patricia L. Meyer-Miller
Cook County, Illinois
My Commission expires: 08/24/06

ATTACHMENT A

Mr. Norman C. Witte
Attorney & Counselor
119 E. Kalamazoo Street
Lansing, MI 48933-2111

Catherine K. Ronis, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037

Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48909-7721