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Decision 07-02-034 February 15, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition of Verizon California, Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in California Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order.	A.04-03-014 (Filed March 10, 2004)

ORDER GRANTING LIMITED REHEARING OF DECISION (D.) 06-02-035 ON THE ISSUE REGARDING THE APPLICATION OF THE FCC'S DS1 CAP, MODIFYING THE DECISION, AND DENYING REHEARING, AS MODIFIED, IN ALL RESPECTS

I. SUMMARY

In this decision, we grant limited rehearing to modify Decision (D.).06-02-035 (or "the Decision"), which adopted an amendment to the existing interconnection agreements ("ICAs") that various competitive local exchange carriers ("CLECs") and commercial Mobile Radio Service Providers ("CMRS") have with Verizon California, Inc. ("Verizon"). Changes in federal unbundling obligations of incumbent local exchange carriers ("ILECs") resulted in this change-of-law proceeding. The purpose of this proceeding is for the Commission to resolve those issues on which the parties were unable come to an agreement after their attempts at negotiation.

We modify our ruling regarding the application of the FCC's DS1 cap. We originally held that the DS1 cap applies on all routes. We have carefully reconsidered this issue and have determined that the DS1 cap applies only on routes where DS3 is not

available as an unbundled network element ("UNE"). In addition, we correct clerical errors. Rehearing of D.06-02-035, as modified, is denied in all respects.

II. FACTS/BACKGROUND

On March 10, 2004, Verizon filed this petition for arbitration to implement the change-of-law provisions necessitated by Federal Communications Commission ("FCC") orders and court rulings. On August 21, 2003, the Federal Communication Commission ("FCC") released its *Triennial Review Order* ("*TRO*"), which revised the list of UNEs that ILECs must provide to requesting carriers.[1] The *TRO* also reinterpreted the "impair" standard of Section 251(d)(2) of the Telecommunications Act of 1996.[2]

On March 2, 2004, the D.C. Circuit issued *USTA II*, which invalidated much of the *TRO*.[3] In response to the court's remand in *USTA II*, the FCC released the *Triennial Review Remand Order* ("*TRRO*").[4] *USTA II* held, among other things that unbundling criteria must take into account relevant market characteristics that capture significant variation, define relevant markets, connect those markets to the FCC's impairment findings, and consider whether the element is significantly deployed on a competitive basis. (*USTA II*, *supra*, at pp. 563-575.)

In December 2004, Verizon submitted an updated amendment to its petition for arbitration. After the *TRRO* was issued, this arbitration was re-started by Administrative Law Judge ("ALJ") Ruling in June 2005.

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[1] *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, in the Matter of Review of the §251 Unbundling Obligations of Incumbent Local Exchange Carriers* ("*TRO*") (2003) 18 FCC Rcd 16978, FCC 03-36.

[2] Telecommunications Act of 1996 (the 1996 Act), Pub. L. 104-104, 110 Stat. 56, codified at 47 U.S.C. 151 *et seq*.

[3] *United States Telecom Ass'n v. FCC* ("*USTA II"*) (D.C. Cir. 2004) 359 F.3d 554, cert. *denied,* (2004) 125 S.Ct. 313.

[4] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand* ("*TRRO*") (Feb. 4, 2005) 20 F.C.C. Rcd. 2533, FCC 04-290.

A Prehearing Conference was held on January 5, 2006, at which the parties agreed that the filings previously submitted would resolve the routine network modifications (RNM) issues without evidentiary hearings. Opening Briefs on the disputed issues were filed on December 23, 2005, and Reply Briefs, on January 13, 2006.

On February 21, 2006, the Commission issued D.06-02-035. It confirms the October 6, 2005 ALJ ruling that any carrier with an interconnection agreement with Verizon which has a dispute over the change-of-law provisions related to the FCC's *TRO* and *TRRO* will be subject to the outcome of this proceeding. This is a two-track proceeding. The first track involves disputed issues that do not require hearings, including issues relating RNMs, which are the subject of this decision. The Batch Hot Cut portion is the second track with a separate procedural schedule.

Two rehearing applications were filed in this proceeding. One of the rehearing applications was jointly filed on March 15, 2006 by A+ Wireless, Inc. and 15 other competitive local exchange carriers and commercial mobile radio service providers ("Joint CLECs").[5] They challenge D.06-02-035 on the following grounds: (1) Paragraph 210 of the *TRO* does not support the argument that unbundling relief is "customer neutral"; (2) the adopted changes concerning Fiber-to-the-Home ("FTTH") and Fiber-to-the-Curb ("FTTC") conflict with FCC Rule §51.319; (3) the ruling that FTTH and FTTC relief is not limited to mass market customers is contrary to FCC intent; and (4) the decision to impose a DS1 transport cap on all routes erroneously relies on a decision issued by the federal court in the Western District of Texas and is contrary to D.06-01-043, which adopted an amendment to existing ICAs between SBC California and various CLECs.

[5] The Joint CLECs are A+ Wireless, Inc., California Catalog & Technology, Inc., CBeyond Communications, LLC, CF Communications, LLC d/b/a Telekenex, Curatel, LLC, DMR Communications, Inc., Mpower Communications Corp., NII Communications, Ltd., North County Communications, Inc., TCast Communications, Inc., The Telephone Connection Local Services, Inc., Telscape Communications, Inc., U.S. TelePacific Corp., Utility Telephone, Inc., Wholesale Air-Time, Inc., and XO Communications Services, Inc.

On March 23, 2006, Verizon also filed an application for the rehearing of D.06-02-035 on numerous grounds: (1) requiring Verizon to provide entrance facilities to CLECs at Total Element Long Run Incremental Cost ("TELRIC") rates is inconsistent with Section 251(c)(3) of the 1996 Telecommunications Act; (2) the new tariff notice requirements to CLECs before eliminating a tariffed intrastate or interstate access service is discriminatory and inconsistent with the FCC's and the Commission's rules concerning notice of tariff changes; (3) the amendment language with respect of certification of orders for high-capacity facilities does not comply with Section 251(c)(3); (4) allowing a CLEC to certify its compliance with the FCC's Enhanced Extended Loop ("EEL") eligibility criteria by letter or email is contrary to FCC intent and would result in unnecessary delays in EEL provisioning; (5) permitting CLECs to pre-certify EELs is contrary to the *TRO*; (6) the Decision incorrectly defines the term "affiliate" and improperly treats MCI as an affiliate retroactively; and (7) omitting transition pricing language is inconsistent with the *TRRO* transition plan and the structure of the adopted amendment.

On April 7, 2006, the Joint CLECs collectively filed an Opposition to Verizon's rehearing application ("Joint CLECs' Response") generally opposing Verizon's arguments on all counts. Specifically, the Joint CLECs alleged the following: (1) the Commission correctly determined that entrance facilities are available to CLECs at TELRIC rates for use in interconnection; (2) the Commission should not eliminate the additional notice requirements associated with tariff changes that will affect the availability of commingling arrangement; (3) the Commission should uphold its determination that CLECs may submit written blanket certifications of eligibility for high-capacity facilities; (4) the Commission properly ruled on EEL certification procedures; (5) the Commission properly defined "affiliate" for purposes of defining fiber-based collocator; and (6) the Commission should reject Verizon's assertion that Section 3.6.3.1 should be revised to enable Verizon to increase the prices of newly-de-listed loop and transport UNEs.

We have reviewed each allegation of error set forth in both applications for rehearing. Except as to our ruling regard the application of the FCC's DS1 cap, we find no merit to the allegations. For the reasons stated below, we will grant a limited rehearing in order to modify our ruling on the DS1 cap. We also correct clerical errors. Thus, we deny rehearing of D.06-02-035, as modified, in all respects.

III. DISCUSSION

A. The Decision Correctly Determined that Entrance Facilities Shall Be Provided to CLECs at TELRIC Rates for Use in Interconnection. (Issue 20)

Verizon urges the Commission to reverse its ruling in D.06-02-035 requiring Verizon to provide entrance facilities at TELRIC rates.[6] An entrance facility is a form of dedicated transport that provides a transmission path between the networks of an ILEC and a CLEC.[7] The parties agree that both the *TRO* and the *TRRO* held that entrance facilities need not be unbundled, and are no longer a UNE under Section 251(c)(3).

Verizon claims that the Commission's ruling is inconsistent with FCC's findings on this issue, and that the FCC has never held that Section 251(c)(2) requires the provision of interoffice transport facilities. Verizon argues that "the FCC made clear that an ILEC must provide interconnection for the linking of the networks, but not the transport facilities that the CLEC brings to the interconnection point."[8]

The Joint CLECs argue that although the FCC declassified entrance facilities as a UNE under Section 251(c)(3), that decision does not affect the requirement that ILECs provide entrance facilities at TELRIC prices when used for interconnection pursuant to Section 251(c)(2). They state that the *TRO* clearly stated, and the *TRRO* affirmed, that ILECs must continue to provide entrance facilities to CLECs for

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[6] D.06-02-035, pp. 97-99.

[7] *TRRO, supra*, ¶136.

[8] Verizon Rhg. App., p. 5; emphasis in original.

interconnection under Section 251(c)(2), although they need not provide them as UNEs under Section 251(c)(3).[9] The CLECs assert that the FCC recognized that entrance facilities fall into two distinct uses: (1) when used by CLECs for backhaul to their own networks, they would be delisted as UNEs; and (2) when used for interconnection with the ILEC's network, they would continue to be available at TELRIC rates.

The Joint CLECs cite the *TRO* as support for the distinction in the treatment of entrance facilities when put to the separate uses described above:

> [C]ompetitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order to carry traffic to and from its end users. These links constitute the incumbent LEC's own transport network. However, in order to access UNEs, including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link from the UNEs on the incumbent LEC network to their own equipment located elsewhere….*Competitive LECs use these transmission connection between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic. Unlike the facilities that incumbent LECS must explicitly make available for Section 251(c)(2) interconnection, we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks for the purpose of backhauling traffic.*[10]

In addition, the Joint CLECs note that the FCC reaffirmed, in the *TRRO*, its finding that ILECs must offer dedicated transport needed for Section 251(c)(2) interconnection at cost-based rates, although they need not be unbundled and are no longer a UNE under Section 251(c)(3). *TRRO*, ¶140 provides as follows:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of

[9] Joint CLECs' Response, p. 1.

[10] Joint CLECs' Response at 3, citing *TRO*, ¶365 (footnote omitted) (emphasis added).

> competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service [footnote omitted]. *Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.*[11]

D.06-02-035 determined that the *TRO* and *TRRO* do not support Verizon's contention that interconnection responsibilities do not include facilities, and that interconnection, like UNEs, should be priced at TELRIC.[12] With respect to signaling, D.06-02-035 found that the CLECs' reference to *TRRO* ¶140 as support for Verizon's obligation to provide access to signaling is inappropriate because that section says nothing about signaling. D.06-02-035 determined that *TRO* ¶548 is the appropriate source although it is narrower in scope in that Verizon would be obliged only to allow the CLECs' signaling networks to interconnect with the Verizon signaling network, not to unbundle Verizon's own signaling network for the CLECs to use.[13]

The *TRO* and *TRRO* leave no doubt that Verizon has a continuing obligation to offer Section 251(c)(2) interconnection facilities at cost-based rates, although Verizon no longer has to offer unbundled access to entrance facilities as a UNE, pursuant to Section 251(c)(3) of the 1996 Act. To Verizon's argument that an ILEC has an obligation to provide interconnection for the linking of networks, but not the transport facilities that the CLEC brings to the point of interconnection, the FCC clearly stated that an ILEC must continue to provide transport facilities for interconnection purposes:

> [W]e note that, to the extent that requesting carriers need facilities in order to 'interconnect [] with the incumbent LEC's] network, section 251(c)(2) of the Act expressly

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[11] *TRRO, supra*, at ¶140, citing *TRO, supra*, at ¶366 (emphasis added).

[12] D.06-02-035, p. 98.

[13] *Id*, p. 99.

> provides for this and we do not alter the Commission's interpretation of this obligation.[14]

Verizon points to other states that purportedly endorse the view that "the only facilities the FCC requires ILECs to provide for purposes of §251(c)(2) interconnection are the very limited facilities need to connect the two networks *at the interconnection point*, such as cross-connect wires within a central office the CLEC has selected as an interconnection point."[15] Verizon goes on to list Arbitrator Awards in other states. As we noted in D.07-01-019, we are not bound by decisions in other states. Furthermore, Arbitrator Awards in those states are not necessarily the decisions of the respective state regulatory commissions.[16] Those awards must be adopted by the state commission. Even if they are, this Commission is not bound by the outcomes of the decisions of other state commissions.

Verizon states that it does not fully repeat AT&T's arguments, but it agrees with and incorporates all of AT&T's arguments in its rehearing application of D.06-01-043.[17] To the extent that Verizon incorporates AT&T's arguments, we incorporate our resolution of the entrance facilities and SS7 issues in a manner identical to our ruling with regard to AT&T in D.07-01-019.[18]

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[14] *TRO, supra*, ¶366 (footnote omitted).

[15] Verizon Rhg. App., p. 5 (emphasis in original; footnote omitted).

[16] Order Granting Limited Rehearing of Decision (D.) 06-01-043 on the Issue Regarding Rules on Fiber-To-The Home (FTTH), Fiber-To-The Curb (FTTC) and Hybrid Loop, Modifying the *Decision and Denying Rehearing, As Modified In All Respects* ("*Order Disposing of Rehearing Application for D.06-01-043*") [D.07-01-019] (2007) ___ Cal.P.U.C.3d ___.

[17] Verizon Rhg. App., p. 7, fn. 10.

[18] *Order Disposing of Rehearing Application for D.06-01-043* [D.07-01-019].

In D.07-01-019, we were persuaded by a federal district court case involving Southwestern Bell Missouri (SBC-MO) and the Missouri Public Service Commission.[19] In *Southwestern Bell*, SBC-MO asserted that an arbitration order violated the *TRRO* by requiring SBC to provide entrance facilities at TELRIC rates, although CLECs are no longer impaired with respect to entrance facilities, and are not entitled to these facilities as UNEs under Section 251(c)(3). The Missouri Commission held that CLECs are entitled to entrance facilities, as needed for interconnection pursuant to Section 251(c)(2), and TELRIC is the correct rate for these facilities. The Court concluded that the Missouri Commission's Arbitration Order correctly implements the FCC's rulings on entrance facilities as set forth in the *TRRO* and the *TRO*. As here, the Court relied on *TRRO*, *supra*, at ¶140 (*TRO*, *supra*, at ¶366), when it stated as follows:

> The TRRO is clear…that the FCC's 'finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to §251(c)(2) for the transmission and routing of telephone exchange service and exchange access service.' [Citation omitted.] 'Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.'[20]

We find no merit in Verizon's challenge to our finding that entrance facilities and SS7, when used for interconnection pursuant to Section 251(c)(2), shall be priced at TELRIC rates. We also concur that the CLECs are entitled to entrance facilities, as needed, for interconnection pursuant to Section 251(c)(2).

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[19] *Southwestern Bell Telephone v. Missouri Public Service Commission* (2006) ___F. Supp. ___, 2006 U.S. Dist. LEXIS 65536.

[20] *Id.*, at [*15].

B. The FCC's FTTH, FTTC and Hybrid Loop Rules apply to all customers. (Issues 6(d) & 7(a))

This dispute focuses on whether the FCC's unbundling relief for FTTH, FTTC, and hybrid loops is limited to the mass market, or whether it applies to all customers. D.06-02-035 finds that the FCC's FTTH, FTTC, and hybrid loop rules apply to all customers, not just to mass market customers.[21] Verizon's position coincides with D.06-02-035's that the FTTH rules apply to all customers, including enterprise customers.

As we noted in D.07-01-019,[22] it is significant that the FCC was careful to delete from the rules any qualification limiting the scope of the relief to a particular segment of the market, but chose instead to use the broad term "customer premises." As the rule originally appeared in the *TRO*, it referred to "a residential unit." But, in the *TRO Errata*, the FCC replaced the words "a residential unit" with "an end user's customer premises."[23] A similar change was made to FCC Rule §51.319(a)(3)(i) in the *FTTC Order Errata*.[24]

In their rehearing application, the Joint CLECs allege that the Commission's decision regarding Verizon's obligation to provide unbundled access to [newly-built] FTTH and FTTC loops directly conflicts with FCC Rule §51.319.[25] They further claim that D.06-02-035's ruling that FTTH and FTTC unbundling relief applies to all customers is contrary to the FCC's intent and other state commission decisions. They urge the

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[21] D.06-02-035, pp. 21-25.

[22] Order Disposing of Rehearing Application for D.06-01-043 [D.07-01-019], *supra*, at p. 6 (slip op.).

[23] *Errata, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* (2003) *18 FCC Rcd 19020, ¶¶37-38 ("TRO Errata").*

[24] *Errata, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-388, 2004 FCC LEXIS 6241, ¶11 (FCC Oct. 29, 2004)("*FTTC Order Errata*").

[25] Joint CLEC Rhg. App., pp. 4-10.

Commission to look not only at the rules themselves, but also at the instructions in the orders. The Joint CLECs contend that it is clear that the FCC did not intend to apply its FTTH and hybrid loop rules to DS1 and DS3 loops.

We disagree with the Joint CLECs. We are persuaded that the FCC's loop unbundling rules are customer-neutral, and that the unbundling rules apply with equal force to every customer served by that loop type.[26] The text of the FTTH rule provides that: "A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, serving an end-user's customer premises…."[27] The rule as it originally appeared in the *TRO* referred to "a residential unit," but the FCC later changed the "residential unit" reference. In the *TRO Errata*, the FCC replaced "residential unit" with "an end user's customer premises."[28] We note also that the text of the hybrid loop rule makes no reference to customer classes in its statement that: "An incumbent LEC is not required to provide unbundled access to the packet switched features, functions and capabilities of its hybrid loops."[29]

Accordingly, D.06-02-035's ruling on this issue is consistent with the Commission's goal of promoting broadband deployment in California. We therefore find the Joint CLECs' allegations on this issue lacking in merit and, thus, affirm our ruling that the FCC's FTTH, FTTC, and hybrid loop rules apply to all customers.

C. The FCC DS1 Cap Applies Only on Routes Where UNE DS3 Is Not Available. (Issue 10(b))

The issue here is whether a CLEC should be prohibited from obtaining more than ten unbundled DS1 dedicated transport circuits on each route where DS3 dedicated

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[26] See *TRO, supra,* ¶210 & ¶197.

[27] 47 C.F.R. §51.319(a)(3).

[28] See *"FTTC Order Errata," supra*, ¶11.

[29] 47 C.F.R. §51.319 (a)(2)(i).

transport is available as a UNE.[30] D.06-02-035 held that the ten-circuit DS1 transport cap applies on all routes. The Joint CLECs assert that the ten circuit limitation for DS1 transport applies only on those transport routes where DS3 transport is not available as a UNE. They say that the purpose of the FCC's limitation on DS1 transport is to prevent CLECs from evading the elimination of DS3 transport UNEs by ordering multiple DS1 circuits instead. Verizon's view is that the FCC's DS1 cap applies on all transport routes.

Both parties relied on FCC Rule §51.319(e)(2)(ii)(B), which provides as follows:

> Cap on unbundled DS1 transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.[31]

The Joint CLECs concede that this rule does not explicitly address the limitation on the applicability of the DS1 transport cap; however, they cite *TRRO*, ¶128 as the basis for their conclusion that the DS1 cap applies only where DS3 is not available as a UNE:

> Limitation on DS1 Transport. On routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits….When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply.[32]

The Joint CLECs' application for rehearing urged the Commission to reverse its ruling in D.06-02-035, and mirror the sound reasoning of D.06-01-043. In particular,

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[30] DS1 and DS3 transport facilities are transport facilities dedicated to a particular carrier to be used for transmission between or among ILEC wire centers. A DS1 transport facility can carry 24 voice calls simultaneously, while DS3 has 28 times the capacity of DS1 facilities.

[31] 47 C.F.R. §51.319(e)(2)(ii)(B).

[32] *TRRO, supra,* at ¶128.

they assert that D.06-02-035 improperly relies on *CBeyond Communications of Texas, L.P. v. The Public Utility Commission of Texas*, a federal court decision from the Western District of Texas.[33] *CBeyond* held that the ten-circuit DS1 transport cap set forth in Rule §51.319(e)(2)(ii)(B) applies on all routes. It held further that when the FCC makes apparently inconsistent statements in an order and a regulation, the regulation controls.

We acknowledge that D.06-02-035 relied on *CBeyond*. Upon further review, however, we do not find *CBeyond* to be persuasive. *CBeyond* resolves what it calls an "unambiguous conflict" between a rule [Rule §51.319(e)(2)(ii)(B)] and the order [*TRRO* ¶128] by simply disregarding the order. *CBeyond* states that "when a rule promulgated by an agency is in direct and unambiguous conflict with the underlying order giving rise to it, the rule controls."[34]

There are at least two problems with *CBeyond's* approach. First, it gives no deference to the FCC's interpretation regarding the unbundled DS1 cap and UNE DS3 in ¶128 of the *TRRO*. It is well-established that deference should be shown to the FCC, as the regulating agency, in its interpretation of statutes and regulations applicable to it:

> [W]e must defer to the [FCC's] interpretation so long as it is 'based on a permissible construction of the statute.' [citation omitted.] Ultimately, if the Commission's reading of the statute is reasonable, Chevron requires us 'to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.' [citation omitted.][35]

Secondly, as the court in *CBeyond* notes, there is "almost no public authority" in support of the assertion that where there is conflict between an agency

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[33] *Cbeyond Communications of Texas, L.P. v. PUC of Texas* (W. D. Tex. Jan. 24, 2006) ___ F. Supp. ___, 2006 U.S. Dist LEXIS 7381.

[34] *Id*. at p. [*15].

[35] *Covad Communications Co. and Dieca Communications, Inc. v. FCC* (2006) 450 F.3d 528, 537 citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, (2005) 545 U.S. 967.

regulation and an order, the rule controls.[36] *CBeyond* strained to find that authority. It came up with *SBC Inc. v. FCC* (3d. Cir. 2003) 414 F.3d 486, a case in which SBC unsuccessfully challenged an FCC order on the grounds that the Commission violated the Administrative Procedure Act (APA) by improperly revising 47 C.F.R. §51.711 without notice and opportunity for comment, and was arbitrary and capricious.[37] *CBeyond* cited the following quotation from *SBC Inc.* as authority for its theory regarding conflicting regulations and orders:

> SBC also argues that section *51.711(a)(3)* of our rules must be interpreted to require both a functional equivalence test and a comparable geographic area test based on the Local Competition Order addressing this issue. As the [Attwood Letter] correctly noted, however, the [FCC] has previously addressed the import of this language in the [NPRM] and stated that 'although there has been some confusion stemming from additional language in the text of the [Local Competition Order] regarding functional equivalency, *section 51.711(a)(3)* is clear in requiring only a geographic area test.' We affirm this interpretation.[38]

From this quotation, *CBeyond* concludes that: "Essentially, the FCC took the position that since the order and the regulation sent conflicting signals, it was appropriate for the parties to look to the regulation, rather than the order, for a

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[36] *CBeyond*, supra at *15.

[37] The gist of SBC's argument is that a Commission order eliminated the functional equivalency test ("FET") in determining appropriate compensation between carriers, without notice and comment. The only regulation the FCC adopted to determine a CLEC's entitlement to a tandem rate was 47 C.F.R. §51.711(a)(3), which said nothing about an FET. Previously, in response to other states that had applied an FET, the FCC indicated that their interpretations were inconsistent with §51.711(a)(3). Then, the FCC sought comment on whether §51.711(a)(3) should be amended to include an FET.

[38] *SBC Inc., v. FCC* (3d Cir. 2005) 414 F.3d 486, 500 (3d Cir. 2005), 2005 U.S. App. LEXIS 14220.

clarification of its intent."[39] This interpretation stretches credulity and paints the FCC's analysis with too broad a brush. The statement is fact-specific. The FCC merely affirmed that §51.711(a)(3) is clear and any confusion resulting from an order in the Local Competition proceeding does not change the fact that §51.711(a)(3) requires a geographic area test only, and not an FET. *SBC Inc.* is inapposite and cannot reasonably be stretched to stand for the proposition advanced by the *CBeyond* court.

The bottom line is that in order to resolve the DS1 cap/UNE DS3 issue, *CBeyond* conveniently crafted a "rule" for which it admits there is "almost no public authority." The *CBeyond* court's rationale is also inconsistent in deferring to the FCC on in this instance, but giving no deference to the FCC's interpretation of *TRRO* ¶128.

Equally significant is the fact that *CBeyond* is devoid of the competitive and economic rationale that undergirds the FCC's unbundling scheme and its DS1 cap policy. The FCC's unbundling regime is designed to foster a competitive market in telecommunications, consistent with the 1996 Act. The FCC recognizes that UNEs are vital to the continued development of competition in the local exchange market, preferably facilities-based competition.

The FCC "evaluate[s] impairment through a focus on wire centers, the end-points of routes, in a manner that accounts for both actual and potential competition."[40] Tier 1 wire centers are large wire centers characterized by the significant presence of or potential for competitive facilities, as measured by fiber-based collocation and business lines. Tier 2 wire centers are medium-sized wire centers, and Tier 3 wire centers are small. Where two large wire centers (or Tier 1) are connected, the ILEC need not provide any transport as a UNE.[41] Where both wire centers are at least Tier 2, DS1 must be provided as a UNE, but not DS3. The Commission eliminated unbundling

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[39] *CBeyond, supra* at *18.

[40] *TRRO, supra,* ¶87.

[41] See *TRRO, supra,* ¶112, ¶126.

requirements in Tier 1 and Tier 2 wire centers for DS3 transport because "due to the potential revenues available at the DS3 level, we find that scale economies sometimes are sufficient to recover the fixed and sunk costs of deploying transport facilities."[42] Where a Tier 3 (small) wire center is involved, both DS1 and DS3 must be provided as UNEs because a CLEC is unlikely to install any transport facilities.[43]

The FCC imposed a ten-loop limit on DS1s "[b]ecause it is generally more efficient for a CLEC to self-deploy a DS3 (and channelize it, if necessary) rather than use ten or more DS1-UNEs."[44] The DS1 ten cap limit works as follows: Where DS1 transport is still available as a UNE (denoting impairment), and DS3 transport is not available as a UNE (denoting non-impairment), the CLECs are prevented from taking advantage of UNE pricing by using only DS1s on such routes. Instead, they are encouraged to self-deploy DS3 because it is more efficient and increases facilities-based competition.

The cap applies on routes where DS3 is not available as a UNE. If DS3 is available as a UNE, it too would have TELRIC pricing and there would be no need to limit the purchase of DS1s since both would have TELRIC pricing. The DS1 ten cap limit where DS3 is not available as a UNE, as expressed in *TRRO* ¶128, fosters the self-deployment of DS3 and encourages facilities-based competition, which is the overarching goal of the 1996 Act. That is why the FCC drew the DS1 cap line at ten where DS3 is not available as a UNE. The court has been "generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn…are

[42] DS1 facilities have less capacity and generate less revenue, making them less prone to deployment by CLECs.

[43] *TRRO, supra*, ¶123.

[44] *Covad Communications Co., supra*, p. 542, citing *TRRO*, ¶2633.

patently unreasonable, having no relation to the underlying regulatory problem."[45] Verizon has failed to show that *TRRO* ¶128 is patently unreasonable.

For all of the above reasons, we do not subscribe to the holding in *CBeyond*. As we noted in D.07-01-019, we are not bound to follow it. In *Spielholz v. the Superior Court of Los Angeles County et al*., 86 Cal.App.4th 1366 (2001), a California state court was urged to follow a federal appellate decision which upheld a federal district court ruling that a challenge to service quality was an attack on the reasonableness of approved rates, and may be treated as a federal case regardless of whether the issue was framed in terms of state law.[46] The *Spielholz* court disagreed that a challenge to service quality necessarily attacks the reasonableness of rates approved by the FCC. Just as a California state court in *Spielholz* disagreed with the holding of a Seventh Circuit federal court decision and chose not to follow it, we decline to follow *CBeyond*.

Therefore, we grant limited rehearing to modify D.06-02-035's ruling that the DS1 cap applies on all routes so that the cap applies only on routes where DS3 is not available as a UNE. The Joint CLECs' language in Section 3.5.1.1.2 is adopted, and Verizon's language is rejected. Our modification makes D.06-02-035 and D.06-01-043 consistent on this issue.

D. Unbundled Access to Newly-Built FTTH and FTTC Loops (Issue 6)

The Joint CLECs object to D.06-02-035's ruling that the FCC's FTTH Rule for New Builds (Rule §51.319(a)(3)(ii)) does not require the ILEC to provide access on an unbundled basis, and therefore adopted Verizon's proposed amendment language. Verizon's language states as follows: "Verizon is not required to provide nondiscriminatory access to a Fiber to the Home (FTTH) or Fiber-to-the-Curb (FTTC) Loop, or any segment thereof, on an unbundled basis when Verizon deploys such a Loop

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[45] *Cassell v. FCC* (D.C. Cir. 1998) 154 F.3d 478, 485 (internal quotation marks and citation omitted).

[46] See *Bastien v. AT&T Wireless Services, Inc*. (7th Cir. 2000) 205 F.3d 983.

to the customer premises of an end user that has not been served by any loop facility other than the FTTH or FTTC loop."[47]

The CLECs maintain that this ruling conflicts with Rule §51.319(a)(3)(ii)), which provides:

> (ii) New builds. An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC deploys such a loop to an end user's customer premises that previously has not been served by any loop facility.

The Joint CLECs assert that the phrase "or any segment thereof" allows Verizon to deny CLECs the ability to access the copper loop from a customer premises to the curb where there is copper from a premise to the curb because Verizon would view that as "part of the FTTC loop."[48]

D.06-02-035 disagrees with the CLECs' interpretation of the rule. We continue to believe that the only access is for "Overbuilds," which is addressed in Rule §51.319(a)(3)(iii). We concur with Verizon that the FCC's rules only address overbuild situations where the FTTH or FTTC loop is replacing a copper loop, not where it is replacing another FTTC or FTTH loop.[49] Therefore, we affirm the adoption of Verizon's proposed phrases "or any segment thereof," and "other than a FTTH or FTTC Loop."

E. It is Reasonable to Permit the CLECs to Have Additional Time In Advance of Proposed Tariff Changes that Will Affect the Availability of Commingling Arrangements. (Issue 17(g))

D.06-02-035 requires Verizon to give at least 60 days' notice of a proposed change in its access tariffs in those cases where the CLEC is using the affected service as

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[47] D.06-02-035, p. 19.

[48] Joint CLECs Rhg. App., p. 3

[49] D.06-02-035, p. 20.

part of a commingled arrangement. (D.06-02-035, p. 89) It also requires Verizon to grandfather the special access services in its California tariff in the event that loss of services would impact a CLEC's commingling arrangement.

In its rehearing application, Verizon challenged the notice requirement only, not the grandfathering ruling. Verizon asserts that giving the CLECs greater notice than other customers under a Verizon tariff violates the filed tariff doctrine, which requires nondiscriminatory treatment of all entities subscribing to service under the tariff. Verizon asserts further that "[b]ecause the Commission has not offered a legitimate basis for discriminating among customer groups, its ruling is impermissibly discriminatory and violated the filed-rate doctrine."[50]

We addressed the same alleged discrimination issue in the rehearing of D.06-01-043.[51] As we noted in D.06-01-043, "[t]his notice has nothing to do with the notice required by this Commission and the FCC for implementing tariff changes.[52] It simply gives the affected CLEC addition time to plan, in advance of formal filings at this Commission or at the FCC."[53] The rationale that we presented in that decision applies here, as well. Our rationale was that not all discrimination among customers is illegal, only that which is "undue." Therefore, we found as follows:

> …We find that a CLEC purchasing an access service for commingling with a UNE is different from other customers, since the CLEC is relying on the commingled arrangement of an access service and a UNE to provide service to its

[50] Verizon Rhg. App., p. 12 [footnote omitted].

[51] Application of Pacific Bell Telephone Company, d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996 ("SBC Federal Unbundling Rules Decision") [D.06-01-043] (2006) ___Cal.P.U.C.3d ___.

[52] *Id.* at p. 70 (slip op.).

[53] *Ibid.*

> customer. Without that access portion of the arrangement, the CLEC cannot provide service to its customer.[54]

We believe that discriminatory treatment is considered "undue" only if it provides an advantage to some customers and a disadvantage to others. To establish any such effect, comparison must be made between comparable situations. (See *Reuben H. Donnelley Corp. v. Pacific Bell* [D.91-01-016] (1991) 39 Cal.P.U.C.2d 209, 242.) Verizon's attempt to argue that the interexchange carriers are in the same position as the CLECs because they cannot provide service to their customers without Verizon's originating and/or terminating access services is unavailing.[55] As pointed out by the Joint CLECs:

> Interexchange carriers are specifically excluded from purchasing UNEs for use in providing long-distance services [footnote omitted], so Verizon's one and only example of a "similarly-situated" customer must fail. CLECs and IXCs are *not* "similarly-situated" with respect to their ability to use UNEs to provide service to end-users. Thus, there is no "undue discrimination" in the Commission's requirement that Verizon notify CLECs at least 60 days before changing or eliminating access tariffs that affect commingling arrangements.[56]

In sum, Verizon's claim that the Commission imposed a new notice requirement for interstate access tariff changes is without merit. The Commission is well aware that it cannot change federal tariffs, as it noted in D.06-01-043.[57.] Neither the federal nor the state tariff is being changed; they remain intact. In resolving this contract dispute, the Commission has simply determined that Verizon should notify its CLEC

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[54] *Ibid.*

[55] *Id*., pp. 70-71 (slip op.).

[56] Joint CLECs' Response, p.12.

[57] *SBC Federal Unbundling Rules Decision* [D.06-01-043], *supra*, at p. 72 (slip op.).

customers 60 days before making changes to tariffs that would affect the price or availability of a service a CLEC uses in a commingling arrangement.

For all of the above reasons, we affirm the Decision's ruling that the CLECs' request to have 60 days notice of a proposed change in the access tariff is reasonable because the CLECs will rely on the commingled arrangement to provide service to their customers and will need time to plan how to transition to another service, if necessary.

F. Blanket Certifications for High-Capacity Facilities Comply with the FCC's Eligibility Certification Requirements. (Issue 11(a))

D.06-02-035 held that certification of eligibility to order high-capacity loops and transport may be submitted by means of a "blanket certification" letter. The Commission ruled that the CLEC "may" use Verizon's electronic ordering system and noted that "[s]ince this section does not refer to EEL certifications, we will retain the CLECs proposed language that allows for a 'blanket certification'."[58] Accordingly, the Commission adopted the CLECs' language for Section 3.6.1.3.

Verizon argues against Section 3.6.1.3 on the grounds that blanket certifications do not take into account FCC limits on ordering UNE facilities in competitive markets, as set forth in *TRRO*, ¶234.[59] Also, Verizon asserts that Section 3.6.1.3 ignores the FCC's caps on the number of unbundled loop and transport circuits a CLEC may order. Verizon's most strenuous argument against blanket certification is that the "ruling allows the CLECs to submit a 'blanket certification letter,' rather than use

[58] D.06-02-035, p. 49. The reason for distinguishing between wire center self-certifications and EEL self-certifications is that the former will be undertaken only once per wire center. For this and other reasons, the Commission does not view blanket certifications as being problematic.

[59] *TRRO* ¶234 requires a CLEC to certify that its request is consistent with the requirements of Parts IV ("Unbundling Framework"), V ("Dedicated Interoffice Transport"), and VI ("High-Capacity Loops") of the *TRRO*, and is therefore entitled to unbundled access pursuant to §251(c)(3) of the 1996 Act. CLECs are entitled to UNE high-capacity facilities only out of wire centers that are impaired under the FCC's criteria. (47 C.F.R. 51.319(a) & (e).)

Verizon's electronic ordering process, to certify the requested facilities."[60] Indeed, Verizon asserts that its access service request ("ASR") process is the sole method by which a CLEC may submit an order to Verizon.

We conclude that the language the Commission adopted in 3.6.3.1 is not inconsistent with the requirements set forth in *TRRO*, ¶234. In addition, the loop and transport cap, i.e., the number of loops and transport a CLEC may purchase at a particular wire center, has no relevance to CLEC self-certification. Therefore, we affirm the Decision's ruling on the blanket certification issue for high-capacity and transport loops.

One of the problems with Verizon's approach is that it turns a certification issue into an ordering issue. As the Joint CLECs point out, ordering and certifying are not the same, and self-certification does not occur at the time of ordering.[61] Moreover, we do not find sufficient reason to require CLECs to use an electronic process when a CLEC can comply with the FCC's requirement by sending a self-certification letter. Mandating that CLECs use Verizon's ASR process would require them to spend resources updating their processes. Since wire center self-certification will be undertaken only once per wire center, unlike EEL self-certification, it would be inefficient and wasteful to require the CLECs to develop an electronic process for this purpose.

G. The Commission's Rulings on EEL Certification Procedures Comply with Federal Law. (Issue 21(a))

1. CLECs May Self-Certify EEL Eligibility by Letter or by E-mail.

D.06-02-035 ruled that in order to satisfy the FCC's service eligibility criteria to convert existing circuits/services to Enhanced Extended Links ("EELs") or to

[60] Verizon Rhg. App., p. 16.

[61] Joint CLECs' Response, p. 17.

order new EELs, the CLECs shall be permitted to self-certify their eligibility by letter or e-mail.[62] The Decision therefore adopted the CLECs' language for Section 3.11.1.1.5:

> Before accessing a converted High Capacity EEL, a new high-capacity EEL, or part of a high-capacity commingled EEL as a UNE, ***CLEC Acronym TXT***shall be permitted to self-certify by letter or e-mail its compliance with the service eligibility criteria. Alternatively,***CLEC ACRONYM TXT***may, following prior written notice to Verizon that ***CLEC ACRONYM TXT***'s submission of an order for an EEL constitutes certification that the service eligibility for the EEL are met, self-certify by submission of EELs orders.

Verizon would require all requests for EELs to be processed only through its electronic ordering system, the ASR system. In reliance on TRO ¶623 and ¶624, the Decision ruled that "[t]o the extent possible, we encourage CLECs to use Verizon's electronic ordering system, but we will not require its use."[63] TRO ¶623 and ¶624 provide in pertinent part as follows:

> We conclude that requesting carrier self-certification to satisfying the qualifying service eligibility criteria for high-capacity EELs is the appropriate mechanism to obtain promptly the requested circuit, and consistent with our findings of impairment [citation omitted]. A critical component of nondiscriminatory access is preventing the imposition of any undue gating mechanisms that could delay the initiation of the ordering or conversion process. Unlike the situation before the Commission when it issued the *Supplemental Order Clarification*, which only addressed EEL conversions, new orders for circuits are subject to the eligibility criteria. Due to logistical issues inherent to provisioning new circuits, the ability of requesting carriers to begin ordering without delay is essential [footnote omitted].

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[62] EELs are high capacity loop and transport combinations that can run directly between an end user and an interexchange carrier (IEC)/CLEC office. They are end-to-end circuits that can be used to provide local exchange services, as well as to originate and terminate long-distance service. (*USTA II*, *supra*, at p. 590)

[63] D.06-02-035, p. 104.

> We do not specify the form of such a self-certification, but we readopt the Commission's finding in the *Supplemental Order Clarification* that a letter sent to the incumbent LEC by a requesting carrier is a practical method.[64]

Verizon believes that a misunderstanding about Verizon's EEL ordering process led to an erroneous decision.[65] Verizon suggests that the use of its ASR system for EEL *ordering* has been confused with its use for EEL *certification*. Verizon argues that since there is no other way to order an EEL from Verizon than by submitting an ASR, there is no reason to allow the CLECs to certify their eligibility for EELs by using a letter or e-mail.

In their Response, the Joint CLECs view Verizon's proposal as an attempt to reverse the EEL self-certification process and require CLECs to combine self-certification with ordering. As the Joint CLECs point out, self-certification and ordering are two separate issues.[66] The Joint CLECs state that combining ordering with self-certification would make it easier for Verizon to reject self-certification. They also maintain that the purpose of EEL self-certification is to encourage local facilities-based competition, and to prevent interexchange carriers from using high-capacity EELs to offer lower prices for long distance services.

Verizon has not demonstrated that the Commission violated federal law in permitting CLECs to self-certify their eligibility for EEL certification by letter or e-mail. As we noted above, *TRO* ¶623 and ¶624, while not specifying the form of self-certification, clearly state that a letter sent to the incumbent LEC by a requesting carrier is a practical method.

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[64] *TRO*, *supra*, ¶623 & ¶624.

[65] Verizon Rhg. App., p. 19.

[66] Joint CLECs' Response, p. 20.

We therefore affirm the Decision's ruling on this issue. We also affirm the Decision in rejecting Verizon's proposal to require the CLEC to prove that it has satisfied the criteria listed in FCC Rule §51.318(b)(2).[67] We agree that it would be too onerous for the CLEC and contrary to the FCC's intent, as described in *TRO* ¶623 above.

2. Verizon's Objection to CLEC "Pre-Certification" Is Actually "Self-Certification" by Letter, which the FCC Allows

Verizon also objects to Amendment §3.11.2.1.5, which states that alternatively, a CLEC "may, following prior written notice to Verizon that [CLEC]'s submission of an order for an EEL constitutes certification that the service eligibility criteria for the EEL are met, self-certify by submission of EELs orders."68 Verizon interprets this Amendment to mean that a CLEC may send a single letter to Verizon simply stating that any future EEL order will itself constitute certification. Verizon argues that a CLEC cannot demonstrate in advance, with a blanket pre-certification letter, that any EEL it orders in the future will satisfy the network-specific and circuit-specific criteria the FCC established.

Verizon's argument has no merit. Verizon is misinterpreting the Amendment, and confusing self-certification with pre-certification. This appears to be a back-door way of objecting to self-certification by letter, which we have already established that the CLECs are permitted to do, pursuant to TRO ¶623 and ¶624. Verizon's objection to pre-certification is without foundation and is rejected.

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[67] The Commission rejected Verizon's proposed language in Section 3.11.2.1.5 that would require the CLEC to provide specific information to demonstrate its compliance with FCC Rule §51.318. However, the Commission adopted Verizon's language in that section calling for certifications to be done on a circuit-by-circuit basis, as required by *TRO* ¶599.

[68] Verizon Rhg. App., p. 22.

H. The Commission's Definition of "Affiliate" for Purposes of Definition of "Fiber-Based Collocator" Is Correct. (Issue 24m)

The Commission endorsed the Joint CLECs' language which states that the term "fiber-based collocator" shall not apply to Verizon, any affiliate, or any entity subject to a binding agreement that, if consummated, would result in its becoming an affiliate of Verizon.[69] Verizon claims that this language contradicts the federal definition of "affiliate." It states that the FCC's Rule 51.5, adopted in the *TRRO*, defines "fiber-based collocator" by referring to 47 U.S.C. §153(1), and under this provision, "affiliate" is defined as a:

> … person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent.

Verizon asserts that by re-defining "affiliate" to include potential affiliates, the Commission failed to correctly implement the *TRRO*. Verizon states further that "the Commission's adopted language would improperly include in the Fiber-based Collocator count not just Verizon's affiliates, but also 'any entity' that is *considering* a merger with Verizon."[70]

We are not persuaded by Verizon's arguments. The Commission's definition of "affiliates" includes only *actual legal alliances* of carriers, i.e., entities that have binding agreements that would result in an affiliate relationship with Verizon, if consummated. Rather, we are persuaded by the Joint CLECs' arguments recognizing Verizon's opportunities to game the system, and the Commission's desire not to allow Verizon to delay an inevitable alliance to skew the number of fiber-based collocators in order to de-list wire centers. As noted by the Joint CLECs, the Commission was aware of

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[69] D.06-02-035, p. 129. The Commission adopted the CLECs' proposed language in Section 4.7.22.

[70] Verizon Rhg. App., p. 25 (emphasis in original).

the potential mergers between AT&T/SBC and Verizon/MCI, alliances not publicly acknowledged in the FCC's *TRO* and *TRRO* proceedings. The Commission correctly sought to prevent a windfall for Verizon with respect to de-listing wire centers when it merged with MCI. Verizon could have de-listed wire centers when it knew that it intended to form an alliance with one of the carriers included in the count. There would be no recourse or ability to exclude the affiliate at a later date because once a wire center is de-listed, it cannot become re-listed.[71] Verizon could thus take advantage of the "once de-listed, always de-listed" rule. The Commission's definition is consistent with the spirit and the letter of the FCC rule.

I. The Commission Correctly Rejected Verizon's Argument that Section 3.6.3.1 of the Amendment Should Be Revised. (Issue 11(g)) Should Be Revised. (Issue 11(g))

Verizon asserts that the Commission should "reinstate" pricing language that it inadvertently omitted from the adopted provisions of Section 3.6.3.1, which governs the continued provision of high-capacity loop and transport elements after post-March 11, 2005 wire center non-impairment determinations. Verizon claims that the Commission erred in neglecting to address the pricing component of the transition plan in Section 3.6.3.1.[72] Verizon would have the Commission reinstate language that would apply the same percentage rate increases to newly-declassified network elements as the *TRRO* set for high-capacity loop and transport elements de-listed as of March 11, 2005.

The Joint CLECs point out that the language that Verizon claims the Commission inadvertently omitted "appears *for the very first time* on page 29 of Verizon's Application for Rehearing."[73] They say that there was never any language for the Commission to reinstate because Verizon did not propose the language in the joint mark-up of the amendment submitted to the Commission on December 16, 2005. Nor

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[71] *TRRO, supra*, ¶88, ¶90 & ¶101.

[72] Verizon Rhg. App., p. 28.

[73] Joint CLECs' Response, p. 26 (emphasis in original).

was the issue addressed by Verizon's language included in the Joint Disputed Points List filed with the Commission on December 14, 2005. Although Verizon mentioned the issue in its comments on the draft decision, it failed to offer language that could be used to implement its proposal.

Verizon's claim that the *TRRO* requires the adoption of its newly-proposed language is incorrect. The *TRRO* adopted default transition rates for high-capacity loop and transport UNEs that were declassified as of March 11, 2005:

> Of course, the transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangement superseding this transition period. The transition mechanism also does not replace or supersede any commercial arrangements carriers have reached for the continued provision of transport facilities or services.[74]

These transition rates were designed to be in place during specific transition periods, but the transition mechanism neither replaces nor supersedes any commercial arrangements the parties may reach for the continued provision of high-capacity loop facilities or services. The *TRRO* did not specify transition periods or transition rates applicable to network elements declassified after March 11, 2005. Rather, the transition issues were left to the parties to resolve by negotiation and arbitration pursuant to Section 252 of the 1996 Act. As such, Verizon was obliged to raise the transition rate issue, provide proposed contract language, and justify its proposal. Verizon failed to do any of the above.

IV. CONCLUSION

We grant limited rehearing to modify our holding that the FCC's DS1 cap applies on all routes. We have carefully reconsidered this issue and have determined that the DS1 cap applies only on routes where DS3 transport is not available as a UNE. In

[74] *TRRO, supra*, ¶145. See also *TRRO, supra*, ¶198.

addition, we correct clerical errors. The rehearing of D.06-02-035, as modified, is denied in all respects.

THEREFORE, IT IS ORDERED:

1. Limited rehearing of D. 06-02-035 is granted for the purpose of making the following modifications:

> a. On page 36 of D.06-02-035, the paragraphs 1 and 2, immediately following the quotation, shall be deleted, and replaced with the following:
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> "On January 24, 2006, a federal district court from the Western District of Texas issued *CBeyond Communications of Texas, L.P. v. The Public Utility Commission of Texas* (W. D. Tex. Jan. 24, 2006) ___ F. Supp. ___ , 2006 U.S. Dist LEXIS 7381. That court held that the ten-circuit DS1 transport cap set forth in the FCC's regulations in Section 51.319(e)(2)(ii)(B) applies on all routes, without regard to whether DS3 is available as a UNE. The opinion stated further that when there is a conflict between a regulation and an order, the regulation controls. On January 25, 2006, Verizon filed a motion for official notice of *CBeyond.*
>
> "Prior to issuing D.06-02-035, we were persuaded by the court's decision in *CBeyond.* However, for the reasons articulated in this decision, we are modifying our ruling. We find *CBeyond's* rationale to be without adequate legal support, materially deficient in explaining the economic and competitive policy behind the DS1 ten-circuit cap, and we do not concur with the outcome. Accordingly, we choose not to follow *CBeyond*. The CLECs' language in Section 3.5.1.1.2 is adopted, and Verizon's language is rejected."
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> b. Finding of Fact No. 16 on p. 139 is modified to read as follows:
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> > "The DS1 limitation applies only on those routes for which the FCC determines that there is no unbundling obligation for DS3 transport."

2. D.06-02-035 is further modified as follows:

    a. On page 2, “March 2003” should be “March 2004.”

    b. On page 104, “failutre” should be “failure.”

3. Rehearing of D.06-02-035, as modified, is denied in all respects.

This order is effective today.

Dated February 15, 2007, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners