Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration	)	WC Docket No. 02-359

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 2003 **Released:** December 12, 2003

By the Chief, Wireline Competition Bureau:

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I. INTRODUCTION AND BACKGROUND

1. In this Order, we resolve open issues in dispute between Cavalier Telephone, LLC (Cavalier or Petitioner) and Verizon Virginia, Inc. (Verizon) (collectively the Parties) arising out of negotiations for interconnection and unbundled access under section 251(c) of the Telecommunications Act of 1996 (1996 Act).[1] On February 4, 2003, at Cavalier's request, we preempted the jurisdiction of the Virginia State Corporation Commission (Virginia Commission).[2] The Virginia Commission had declined to arbitrate the interconnection disputes raised by Cavalier.[3] Consequently, we decide these issues today pursuant to section 252(e)(5) of the Act and the Commission's rules implementing that section.[4]

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[1] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The Telecommunications Act of 1996 amended the Communications Act of 1934. *See* 47 U.S.C. §§ 151 *et seq.* We refer to the Communications Act as amended by the 1996 Act and other statutes, as the Communications Act, or the Act. Throughout this Order, we will use "Party" or "Parties" when referring specifically to either Cavalier or Verizon, or both, respectively.

[2] *See* Petition of Cavalier Telephone, LLC Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration, WC Docket No. 02-359 (filed Nov. 7, 2002) (Cavalier Preemption Petition); *see Pleading Cycle Established for Comments on Petition of Cavalier Telephone, LLC for Preemption Pursuant to Section 252(e)(5)*, WC Docket No. 02-359, Public Notice, DA 02-3152 (rel. Nov. 14, 2002); *Petition of Cavalier Telephone, LLC, Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia*, *Inc. and for Arbitration*, Memorandum Opinion and Order, 18 FCC Rcd 1558, DA 03-357 (WCB rel. Feb. 4, 2003) (*Cavalier Preemption Order*) (preempting the Virginia Commission and inviting Cavalier to file a Petition for Arbitration).

[3] Cavalier, the petitioning carrier in this proceeding, originally brought its interconnection disputes with Verizon to the Virginia Commission, as envisioned in § 252(b). *See* 47 U.S.C. § 252(b); *see also* Petition of Cavalier Telephone, LLC for Arbitration with Verizon Virginia, Inc. Pursuant to 47 U.S.C. § 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Case No. PUC-2002-00171 (filed Aug. 14, 2002) (Virginia Petition). On October 11, 2002, the Virginia Commission issued an Order of Dismissal, declining to arbitrate the issues under the Act so that Cavalier and Verizon could immediately proceed before this Commission under § 252(e)(5). *See Petition of Cavalier Telephone, LLC, for Arbitration with Verizon Virginia, Inc Pursuant to 47 U.S.C. § 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996,* Case No. PUC-2002-00171, Order of Dismissal at 5 (Oct. 11, 2002) (*Order of Dismissal*). The Virginia Commission had previously declined to arbitrate other interconnection disputes between competitive LECs and Verizon, requiring this Commission to assume jurisdiction under § 252(e)(5). *See infra* para. 2 note 9.

[4] *See* 47 U.S.C. § 252(e)(5); 47 C.F.R. §§ 51.801 *et seq.; see also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16122-32, paras. 1269-95 (1996) (*Local Competition First Report and Order*) (subsequent history omitted); *Procedures for Arbitrations Conducted Pursuant to Section 252(e)(5) of the Communications Act of 1934, as amended*, 16 FCC Rcd 6231 (2001) (*Arbitration Procedures Order*) (adopting rules for the conduct of § 252(e)(5) arbitration proceedings and delegating authority to the Chief, Wireline Competition Bureau (Bureau), to be assisted by Bureau staff, to serve as arbitrator. *Id.* at para. 8.

2. Cavalier has petitioned for resolution of a range of issues.[5] These issues include disputes relating to network architecture, unbundled network elements (UNEs), and more general terms and conditions that affect Cavalier's ability to compete effectively with Verizon in the Commonwealth of Virginia as contemplated by Congress in enacting the 1996 Act.[6] We decide all unresolved issues presented to us in the Cavalier Arbitration Petition and Verizon's response, and limit our consideration to only those issues.[7] In doing so, we apply current Commission rules and precedents, including those most recently adopted in the *Triennial Review Order*; and the Parties' briefs and testimony address such rules and precedents where relevant.[8] To that end, we note that the Bureau has previously arbitrated certain issues regarding interconnection between other competitive LECs and Verizon in Virginia.[9]

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[5] *See* Petition of Cavalier Telephone, LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration*,* WC Docket No. 02-359 (filed Aug. 1, 2003) (Cavalier Arbitration Petition).

[6] *Id.* at Ex. A.

[7] *See* Answer of Verizon Virginia, Inc. to Petition of Cavalier Telephone, LLC*,* WC Docket No. 02-359 (filed Sept. 5, 2003) (Verizon Answer/Response*)*; *see also* 47 U.S.C. §§ 252(b)(4)(C) (state commission shall resolve each issue in petition and response), 252(c) (state commission shall resolve by arbitration any open issue), 252(b)(4)(A) (state commission shall limit its consideration to the issues set forth in the petition and response; *Procedures Established For Arbitration of An Interconnection Agreement Between Verizon and Cavalier*, WC Docket No. 02-359, Public Notice, DA 03-2733 (rel. Aug. 25, 2003) at Item A.3 (*Cavalier-Verizon Procedural Public Notice*).

[8] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) *(Triennial Review Order), corrected by* Errata, 18 FCC Rcd 19020 (2003) *(Triennial Review Order Errata), petitions for review pending, United States Telecom Ass'n v. FCC,* D.C. Cir. No. 00-1012 *(and consolidated cases); see also* 47 U.S.C. § 252(c); *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218, 00-249, and 00-251, Memorandum Opinion and Order, 17 FCC Rcd 27039, 27043, para. 3 (2002) (*Virginia Arbitration Order*) (relating to non-cost issues).

[9] *See Virginia Arbitration Order,* 17 FCC Rcd at 27043 (resolving disputes between Verizon and WorldCom, AT&T and Cox in Virginia). The Commission recently released the text of the order addressing the cost-related issues presented by two of the parties in the *Virginia Arbitration Order. See Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218 and 00-251, Memorandum Opinion and Order, 18 FCC Rcd 17722, (2003) (*Virginia Cost Issues Arbitration Order*).

II. PROCEDURAL HISTORY

3. Cavalier filed its Arbitration Petition on August 1, 2003.[10] The Commission released the text of the *Triennial Review Order* on August 21, 2003.[11] Because the rules adopted in the *Triennial Review Order* went into effect on October 3, 2003, these new rules now govern the resolution of the Parties' unresolved issues.[12] To enable the Parties to consider the impact of the *Triennial Review Order* rules on their issues, Verizon requested a modification of the proposed arbitration procedural schedule to extend the August 26, 2003 deadline for Verizon's response to the Cavalier Arbitration Petition, as well as certain other dates. Cavalier responded to Verizon's motion proposing alternative dates.

4. On August 25, 2003, the Bureau released the *Cavalier-Verizon Procedural Public Notice* establishing the schedule for the remainder of the proceeding, as well as the procedures that would apply from that point until the arbitration award was issued.[13] Verizon filed its Answer/Response on September 3, 2003, resulting in a total of 23 identified unresolved issues for our initial consideration.[14] The following paragraphs briefly summarize the subsequent filings, hearings and related activities that have culminated in the release of this Order today.

5. *Resolution of Certain Previously Identified Unresolved Issues*. When Cavalier filed its Arbitration Petition, Cavalier identified 21 unresolved issues in dispute which it

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[10] At the initial joint pre-filing conference on March 4, 2003, the Parties indicated they were continuing to negotiate their disputes in an effort to resolve additional issues and limit the number of issues for arbitration. They requested the ability to continue negotiations prior to Cavalier filing its Petition for Arbitration. The Bureau agreed, and on July 22, 2003 held a second joint pre-filing conference wherein the Parties proposed a tentative schedule for proceeding with the arbitration.

[11] *See supra* note 8.

[12] *See OMB grants Emergency Approval Of New Rules Adopted In Triennial Review Order; Effective Date Is October 2, 2003,* CC Docket No. 01-338, Public Notice, 18 FCC Rcd 18516 (2003); *see also supra* para. 2.

[13] *Cavalier-Verizon Procedural Public.* Cavalier requested that the Bureau adopt the same procedures used for the *Virginia Arbitration. See Cavalier Preemption Order* at para. 5 and note 23. Specifically, Cavalier requested that we follow the procedures set forth in *Procedures for Arbitrations Conducted Pursuant to Section 252(e)(5) of the Communications Act of 1934, as amended*, Order, 16 FCC Rcd 6231 (2001) (*Arbitration Procedures Order*); *Procedures Established For Arbitration of Interconnection Agreements Between Verizon and AT&T, Cox, and WorldCom*, CC Docket Nos. 00-218, 00-249, 00-251, Public Notice, DA 01-270 (rel. Feb. 1, 2001) (*AT&T/Cox/WorldCom Procedural Public Notice*). Because the Bureau had not specified a format for Cavalier's arbitration petition that differed from the specified for the *Virginia Arbitration,* Cavalier filed its petition in accordance with the format specified in the *AT&T/Cox/WorldCom Procedural Public Notice.* On August 26, 2003, the Bureau issued an erratum to the *Cavalier-Verizon Procedural Public* to correct two minor items relating on the attached schedule. These corrections did not modify the dates specified on the schedule attached to the August 25, 2003 public notice.

[14] *See* Answer of Verizon Virginia, Inc. to Petition of Cavalier Telephone LLC, WC Docket No. 02-359 (filed Sept. 5, 2003) (Verizon Answer/Response). Certain of these issues were subsequently resolved during the course of the proceeding. *See infra* para. 5.

requested the Bureau to arbitrate.[15] Verizon identified an additional four issues in its Answer/Response.[16] During the course of the arbitration process, the Parties were able to resolve some of these issues and withdraw them from the Arbitrator's consideration.[17] As a result, the Arbitrator resolves 14 issues in dispute in this Order. None of these issues involve the determination of appropriate new cost methodologies, nor were any cost studies submitted for review.

6. *Mediation Session*. On August 19, 2003, the Arbitrator and staff convened a mediation session to discuss possible resolution of disputes regarding the Directory Listing process, including Yellow Pages listings (Issue C18). The Parties were ultimately able to reach resolution of this matter and withdraw Issue C18.[18] The Parties did not seek mediation on any other issue.

7. *Written, Pre-Filed Testimony*. The Parties filed direct and rebuttal testimony on September 23, and October 9, 2003, in accordance with the schedule established by the Bureau.[19] In addition, each Party requested the ability to offer limited surrebuttal testimony on certain

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[15] *See* Cavalier Arbitration Petition at Ex. A. Before Verizon filed its response, the Parties settled two of Cavalier's identified issues. *See* Letter from Stephen T. Perkins, Counsel for Cavalier, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-359 (filed Sept. 4, 2003) (Cavalier's Sept. 4 Resolved Issues Letter) (withdrawing Issues C15 and C20).

[16] Verizon Answer/Response at Ex. B (identifying four Verizon issues, two of which -- V2 and V34 -- were subsets of corresponding Cavalier-identified issues*, i.e.*, C28 and C21, respectively.)

[17] *See* Letter from Kimberly A. Newman, Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-359 (filed Oct. 2, 2003) (Verizon's Oct. 2 Resolved Issues Letter) (requesting removal from consideration of Issues C11, C19, C28 (same as V2) and V25 as a result of resolution or withdrawal by Cavalier of its corresponding issue in dispute); Letter from Stephen T. Perkins, Counsel for Cavalier, WC Docket No. 02-359 (filed Nov. 12, 2003) (Cavalier's Nov. 12 Resolved Issue Letter) (withdrawing Issue C12); Letter from Stephen T. Perkins, Counsel for Cavalier, WC Docket No. 02-359 (filed Dec. 5, 2003) (Cavalier's Dec. 5 Resolved Issue Letter) (withdrawing Issue C18); *see also* Letter from Stephen T. Perkins, Counsel for Cavalier, WC Docket No. 02-359 (filed Dec.4, 2003) (Cavalier's Dec. 4 Resolved Sub-Issue Letter) (withdrawing sub-issue related to dark fiber connectivity maps in Issue C10). Many of the issues raised by the Parties contain a number of sub-issues.

[18] *See supra* para. 5.

[19] On October 3, 2003, the Bureau issued a revised schedule affecting certain filing dates. *See* Letter from Julie Veach, Assistant Division Chief, CPD, WCB, to Counsel for Cavalier and Verizon, WC Docket No. 02-359 (Oct. 3, 2003) (*Revised Schedule Letter*) (revising filing dates for testimony, discovery and certain other requirements due to emergency closing of offices, but leaving the Hearing dates and post-Hearing deadlines intact); s*ee also* Direct Testimony of Cavalier Telephone, LLC, WC Docket No. 02-359 (filed Sept. 23, 2003) (Cavalier Direct Testimony); Rebuttal Testimony of Cavalier Telephone, LLC, WC Docket No. 02-359 (filed Oct. 10, 2003) (Cavalier Rebuttal Testimony); Direct Testimony of Verizon Virginia, Inc., WC Docket No. 02-359 (filed Sept. 23, 2003) (Verizon Direct Testimony); Rebuttal Testimony of Verizon Virginia, Inc., WC Docket No. 02-359 (filed Oct. 10, 2003) (Verizon Rebuttal Testimony). The Parties marked their pre-filed direct and rebuttal testimony as exhibits and moved them into evidence at the hearing. For convenience, however, we will refer to the testimony by type as filed rather than as entered by its exhibit number.

issues at the Hearing.[20] Prior to the Hearing date, the Bureau notified the Parties that it would permit written surrebuttal testimony limited to the issues for which it was requested.[21] The Arbitrator reiterated the disposition of the surrebuttal requests at the opening of the Hearing on October 16, 2003.[22] The Parties filed their surrebuttal testimony and responsive testimony, accordingly.[23]

8. *Discovery*. Discovery began on September 8, 2003, pursuant to the general guidelines the Arbitrator had adopted to govern this process.[24] Prior to discovery beginning, the Parties had mutually agreed to certain self-imposed discovery limitations to facilitate the process, as they had discussed at the pre-filing conference in March. The last day to propound discovery was September 25, 2003, and responses were due on October 10, 2003.[25] The Parties did not ask the Arbitrator to resolve any discovery disputes.

9. *Evidentiary Hearing*. The evidentiary hearing, at which the Parties submitted documentary evidence and orally examined witnesses, began on October 16 and concluded on October 17, 2003. In preparation for the Hearing, the Parties filed Evidence and Witness

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[20] These requests were submitted via electronic mail rather than filed as formal motions in this proceeding. Verizon requested the ability to introduce a new witness at the Hearing, Mr. Jay Griles from Virginia Power Company, to address allegations made by Cavalier's witness, Matthew Ashendon, on the same issue. Cavalier opposed permitting this new Verizon witness to appear because Cavalier would not have an opportunity to cross-examine him. Cavalier requested the ability to offer surrebuttal testimony from Cavalier witnesses (who had already provided written testimony) with respect to Issue C3, the assertion by Verizon that Verizon does not misroute any traffic, and Issue C27, the assertion by Verizon witness Louis Agro that Cavalier's "truck roll" issue is covered by the Performance Assurance Plan. Verizon indicated it did not oppose Cavalier's limited surrebuttal as long as it was able to offer Mr. Giles' surrebuttal testimony.

[21] Written surrebuttal testimony was permitted to enable each Party to offer the surrebuttal testimony each requested while providing an opportunity for the other Party to have time to prepare a response. The written surrebuttal testimony was scheduled to be filed on October 20, 2003 and the response by October 22, 2003.

[22] *See* Transcript of the Testimony of October 16, 2003, Volume: 1, Case: Petition of Cavalier Telephone, WC Docket No. 02-359, Arbitration Hearing (Tr.) at 10-11.

[23] *See* Surrebuttal Testimony of Cavalier Telephone, LLC, WC Docket No. 02-359 (filed Oct. 20, 2003) (Cavalier Surrebuttal); Reply Surrebuttal Testimony of Cavalier Telephone, LLC, WC Docket No. 02-359 (filed Oct. 22, 2003) (Cavalier Reply Surrebuttal); Surrebuttal Testimony of Verizon Virginia, Inc, WC Docket No. 02-359 (filed Oct. 20, 2003) (Verizon Surrebuttal); Surrebuttal Testimony of Verizon Virginia, Inc, WC Docket No. 02-359 (filed Oct. 22, 2003) (Verizon Reply Surrebuttal).

[24] *See Cavalier-Verizon Procedural Public Notice* at Item C. and Attach. I. The Bureau also entered a Protective Order to govern the material exchanged by the Parties during Discovery. *See Petition of Cavalier Telephone, LLC, Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia*, *Inc. and for Arbitration*, Protective Order, DA 03-2826 (rel. Sept. 3, 2003), Errata (rel. Sept.16, 2003) (*Cavalier Protective Order*).

[25] The original dates were September 22, 2003 and October 3, 2003, respectively, however these dates also were changed as a result of the *Revised Schedule Letter*. *See supra* para. 7 & note 19.

Designations.[26] Each Party raised a variety of objections to certain of the other Party's designated evidence or witnesses.[27] The Arbitrator ruled on these objections from the bench at the opening of the Hearing, denying all objections and allowing each Party to offer the witnesses and evidence specified in their October 10 filings.[28] The Bureau held a pre-hearing conference on October 14, 2003, to explain the schedule that issues would be heard at the Hearing as well as other procedural matters related to the conduct of the Hearings.[29] The Bureau sent the Parties a confirming letter that same day outlining what had been addressed at the conference.[30] The Hearing was transcribed, and a copy of the transcript was filed with the Secretary of the Commission for inclusion in the record.[31]

10. *Joint Decision Point Lists and Revised Final Contract Language*. The *Cavalier-Verizon Procedural Public Notice* required the Parties to jointly file Decision Point Lists (JDPLs).[32] At the conclusion of the Hearing, the Arbitrator instructed the Parties, on the record, to file a final JDPL reflecting only that proposed contract language that the Parties mutually agreed was to be considered by the Arbitrator in resolving the issues.[33] When the "final" JDPL

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[26] *See* Cavalier Witnesses and Exhibit Lists, WC Docket No. 02-359 (filed Oct. 10, 2003) (Cavalier Witness/Evidence List); Verizon Virginia Inc.'s Witnesses and Evidence, WC Docket No. 02-359 (filed Oct. 10, 2003) (Verizon Witness/Evidence Lists).

[27] *See* Cavalier's Objections to Verizon's Witnesses and Evidence, WC Docket No. 02-359 (filed Oct. 14, 2003) (Cavalier Witness Objections); Verizon Virginia Inc.'s Objections to Cavalier Telephone's Witness and Exhibit Lists, WC Docket No. 02-359 (filed Oct. 14, 2003) (Verizon Witness Objections). Objections were based on such things as irrelevance and introducing new testimony in rebuttal rather than direct.

[28] *See* Tr. at 10-11.

[29] *See Cavalier-Verizon Procedural Public Notice* at Item F.

[30] *See* Letter from Jeremy Miller, Competition Policy Division, WCB, to Counsel for Cavalier and Verizon, WC Docket No. 02-359, Hearing Schedule and Procedures (dated Oct. 14, 2003) (*Hearing Schedule and Procedures Letter*). In anticipation of the October 14, 2003 pre-hearing conference, the Bureau invited the Parties to discuss their preferred order of issues to be heard, desired time allotments for cross-examination, waiver of cross, if any, and other related matters necessary to ensure that the Hearing proceeded smoothly in the time allotted so that all issues would be covered. The Parties submitted a proposal regarding procedures for the Hearing via electronic mail on October 9, 2003. The Commission largely adopted those proposals as set forth in the *Hearing Schedule and Procedures Letter*.

[31] *See supra* note 22; *see also* Transcript of the Testimony of October 16, 2003, Volume: 2, Case: Petition Of Cavalier Telephone, WC Docket No. 02-359, Arbitration Hearing (filed Nov. 12, 2003).

[32] *See Cavalier-Verizon Procedural Public Notice* at Item. D; *see also* Letter from Jeremy Miller, Acting Assistant Division Chief, CPD, WCB, to Counsel for Cavalier and Verizon, WC Docket No. 02-359 (dated Sept. 12, 2003) (*JDPL Letter*). This letter indicated that the JDPL was expected to be a synthesis of information already before the Bureau in the proceeding.

[33] *See* Tr. at 652 requiring this final JDPL to be filed on October 21, 2003; *see also* Tr. at 648-661 for the general discussion regarding the issue with the JDPLs. Certain proposed contract language in the second JDPL, filed on Oct. 10, 2003, appeared not to have been properly submitted in the record by the Party proposing it; and neither the Bureau nor the other Party had proper notice that it was the current contract language being offered by that Party for that unresolved issue.

was submitted, however, the parties indicated they could not agree whether certain contract language was properly before the Bureau for consideration.[34]

11. In order to resolve the matter promptly, the Arbitrator provided written instructions to the Parties the next day regarding the submission of final proposed contract language and the basis for those instructions.[35] The Bureau explained that section 51.807(d)(2) of the rules permits the Parties to continue to negotiate during the arbitration process after "final offers" are filed and to "submit subsequent final offers following such negotiations."[36] The Bureau explained that Cavalier and Verizon were both entitled to submit new proposed language for consideration relating to an unresolved issue only if such language resulted from negotiations that had occurred between the Parties on that issue subsequent to the filing of the Cavalier Arbitration Petition and Verizon Answer/Response. If, however, subsequently proposed contract language related to a new issue neither raised in the Cavalier Arbitration Petition nor the Verizon Answer/Response, it would be not be considered.[37]

12. Finally, the Bureau indicated that when a Party decides to revise previously proposed contract language for the Arbitrator's consideration, it must do so in a manner that clearly enables staff (and the opposing Party) to identify the new language.[38] Similarly, when entire issues or sub-issues are resolved by the parties during the arbitration process, the

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[34] *See* Letter from Kimberly A. Newman, Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-359 (filed Oct. 21, 2003) (transmitting, on behalf of both Parties, the "final" JDPL and noting the Parties' disagreement with the language contained therein).

[35] *See* Letter from Richard Lerner, Associate Bureau Chief, WCB, to Counsel for Cavalier and Verizon, WC Docket No. 02-359, (dated Oct. 24, 2003) (*Final Proposed Contract Language Letter*). This letter also reminded the Parties about the restricted nature of this arbitration proceeding and provided instructions regarding *ex parte* presentations that the parties may be giving in other proceedings that relate to issues before the Arbitrator in this proceeding. Prior to sending the letter, the Arbitrator discussed its contents with the parties via teleconference. In issuing these instructions, the Arbitrator exercised his authority to adopt those procedures necessary to facilitate the process. *See Arbitration Procedures Order,* 16 FCC Rcd at 6233, para. 8 (the arbitrator shall conduct such proceedings as he or she deems necessary and appropriate); *see also Cavalier-Verizon Procedural Public Notice* at Item H.1.

[36] *See* 47 C.F.R. 51.807(d)(2). The *Final Proposed Contract Language Letter* explained that the initial "final offers" were the proposed contract language identified by the Parties in the Cavalier Arbitration Petition and the Verizon Answer/Response.

[37] See 47 U.S.C.§ 252(b)(4)(A); *see also Cavalier-Verizon Procedural Public Notice* at Item A.3. During the course of the proceeding, Verizon proposed a language change to § 11.7.6 of the contract that was not identified as in dispute in the Cavalier Arbitration Petition or the Verizon Answer/Response. This proposed language raised a new issue and therefore is not considered. *See* Tr. at 653-654.

[38] The Arbitrator and opposing Party must receive some form of written correspondence filed in the proceeding, *e.g.*, a letter or pleading, having the specific purpose of clearly identifying newly proposed contract language relating to an unresolved issue resulting from ongoing negotiations that the Party is offering.

Petitioner is obligated to inform the Arbitrator in writing and to submit revised proposed contract language, if necessary, to reflect such resolution.[39]

13. The Bureau encouraged the Parties to continue to negotiate after submission of their final contract language, but indicated they could not file any additional proposed language for consideration after the date of that submission.[40] The Parties made all required filings relating to the final proposed contract language as specified by the Bureau.[41]

14. *Post-Hearing Briefs*. The Parties filed post-hearing briefs and reply briefs as required in accordance with the schedule established.[42] The Briefs were submitted on October 27, 2003, and Reply Briefs on November 3, 2003.

15. Consistent with the Commission's rules and the procedures governing this arbitration, the Bureau encouraged the Parties to work together to mutually resolve any procedural, scheduling or other related administrative matters that arose rather than bringing them first to the Bureau for resolution. The Parties' efforts to this end contributed to the Bureau's ability to keep this proceeding on track and to issue this Order within the nine month timeframe encouraged by the Commission.[43] This cooperative dealing with one another and the Bureau was in addition to the Parties' continued efforts throughout the course of the proceeding to attempt to mutually resolve the disputed substantive issues that had arisen during their interconnection negotiations and were before the Bureau for decision.[44]

III. UNRESOLVED ISSUES

[39] *See Cavalier-Verizon Procedural Public Notice* at Item H.4.; s*ee also* Tr. at 654-654.

[40] To the extent that an issue or sub-issue was resolved after the final contract language was filed, the Parties could file proposed languages necessary to eliminate that issue from proposed contract language in dispute.

[41] *See* Cavalier Telephone, LLC's Notification of Subsequent Final Offers, WC Docket No. 02-359 (filed Oct. 24, 2003); Amended Final Offer of Verizon Virginia Inc., WC Docket No. 02-359 (filed Oct. 24, 2003); *see also* Parties Final Proposed Contract Language, WC Docket No. 02-359 (filed Oct. 29, 2003) (Final Proposed Language).

[42] *See Cavalier-Verizon Procedural Public Notice* at Item G; s*ee also* Post-Hearing Brief of Cavalier Telephone, LLC, WC Docket No. 02-359 (filed Oct. 27, 2003) (Cavalier Brief); Reply Brief of Cavalier Telephone, LLC, WC Docket No. 02-359 (filed Nov. 3, 2003) (Cavalier Reply Brief); Post-Hearing Brief of Verizon Virginia Inc., Docket No. 02-359, (filed Oct. 27, 2003) (Verizon Brief); Reply Brief of Verizon Virginia Inc., WC Docket No. 02-359 (filed Nov. 3, 2003) (Verizon Reply Brief).

[43] In the *Arbitration Procedures Order*, the Commission encouraged the release of an arbitration award within the 9-month period after the date on which an incumbent LEC is deemed to have received a request to negotiate, even though the Commission is not bound by the 9-month deadline imposed on the states by § 252. For purposes of the Commission's resolution of issues presented for arbitration pursuant to § 252(e)(5) of the Act, the date on which a Petition for Arbitration is filed with the Commission shall be deemed to be the 135th day after which the incumbent LEC, in this case Verizon, received the request to negotiate.

[44] *See supra* para. 5 (identifying the issues that were resolved and removed from consideration during the course of the proceeding).

A. Standard of Review

16. Section 252(c) of the Act sets forth the standard of review to be used in arbitrations by the Commission and state commissions in resolving any open issue and imposing conditions upon the Parties in the interconnection agreement.[45] This provision states that any decision or condition must meet the requirements of section 251 and accompanying Commission regulations; establish rates in accordance with section 252(d); and provide an implementation schedule.[46] As described above, section 252(e)(5) requires the Commission to issue an order preempting a state commission that fails to act to carry out is responsibilities under section 252, and to assume the responsibility of the state commission.[47] Rule 51.807, which implements section 252(e)(5), provides that (a) the Commission is not bound to apply state laws or standards that would have otherwise applied if the state commission were arbitrating the section 252 proceeding; (b) except as otherwise provided, the Commission's arbitrator shall use final offer arbitration; and (c) absent mutual consent of the parties, the arbitrator's decision shall be binding on the parties.[48] Rule 51.807 also provides the arbitrator additional flexibility to resolve interconnection issues.[49]

17. We apply the Commission's current rules and precedents in deciding which proposed contract language to adopt. To the extent an issue presented here touches upon an issue previously decided in the *Virginia Arbitration Order*, the Bureau's decisions in that proceeding provide guidance and precedent only insofar as the Commission's rules upon which that order was based have not changed, and only to the extent that the factual scenarios presented herein are similar.[50] Similarly, the Commission has granted Verizon section 271 authority for

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[45] 47 U.S.C. § 252(c).

[46] 47 U.S.C. §§ 252(c)(1)-(3).

[47] 47 U.S.C.§ 252(e)(5); *see also* 47 C.F.R. § 51.803(d).

[48] *See* 47 C.F.R. §§ 51.807(b), (d), (h); *see also Local Competition First Report and Order*, 11 FCC Rcd at 16127-32, paras. 1283-95.

[49] *See Arbitration Procedures Order*, 16 FCC Rcd at 6232, paras. 4-6. Rule 51.807(f)(3) was amended to broaden the scope of "final offer arbitration" as specified in § 51.807(d)(1) so that, if a final offer submitted by one or more parties fails to comply with the other requirements of the rule, or if the arbitrator determines in unique circumstances that another result would better implement the Act, the arbitrator has discretion to direct the parties to submit new final offers or to adopt a result not submitted by any party that is consistent with § 252 of the Act and the Commission's rules adopted pursuant to that section. In granting additional flexibility to the arbitrator, the rules do not specify every circumstance where the arbitrator may exercise this discretion, but indicate that additional flexibility is necessary to facilitate the efficient and expeditious discharge of the Commission's statutory responsibility under § 252 of the Act. *See* 47 C.F.R. § 51.807(f)(3); *Arbitration Procedures Order*, 16 FCC Rcd at 6232, paras. 5-6; *see also Virginia Arbitration Order,* 17 FCC Rcd at 27054, para 30.

[50] For example, at the time the *Virginia Arbitration Order* was adopted, the Bureau applied the unbundling rules adopted in the Commission's *UNE Remand Order*. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3699, para. 2 (1999) (UNE Remand Order), reversed and remanded in part sub. nom. United States Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) (*USTA*), *cert. denied sub nom.*
(continued….)

Virginia.[51] Consistent with our resolution of an issue previously considered in the *Virginia Arbitration Order*, any changes in our rules since the issuance of our *Verizon Virginia Section 271 Order* or material differences in the factual circumstances before us today are reflected in the contract language we adopt. Finally, to the extent that the rules upon which this Order is based are modified in the future, the Parties may rely on the change of law provisions in their respective agreements to implement such changes.

18. Finally, in resolving the issues before us in this arbitration, we decline to adopt entire package final offer arbitration. Rather, we apply issue-by-issue final offer arbitration, and find that, for certain issues, it is appropriate within an issue to select portions of language from both Parties to resolve the dispute or to adopt some but not all of a single Party's proposal.[52] In other cases, we have found it necessary to avail ourselves of the ability to modify a Party's proposal somewhat where such modifications can bring the agreement into conformity with the Act and Commission rules, or where modification is necessary to maintain consistency with our resolution of the issue.[53] Similarly, we have determined that for some issues, the proposed language offered by a Party is unnecessary as language elsewhere in the agreement addresses its concerns.[54] Moreover, we have found it necessary to direct the Parties to make certain language modifications to their Agreement in their compliance filing with respect to issues where the existing or proposed language violates section 251 of our rules or a prior Commission order, and would therefore be a basis for rejection of the Agreement when submitted for approval.[55] We

(Continued from previous page)
WorldCom, Inc. v. United States Telecom Ass'n, 123 S.Ct. 1571 (2003 Mem.). The *UNE Remand Order* was vacated and remanded by the D.C. Circuit in *USTA,* 290 F.3d 415. The rules adopted by the Commission in the *Triennial Review Order,* which became effective on October 2, 2003, interpret the unbundling requirements of § 251 of the Act as a result of the *USTA* court's remand and other judicial decisions. *See Triennial Review Order,* 18 FCC Rcd 16978. To the extent the issues raised by the Parties in this proceeding involve UNEs or any other issue subject to remand, we conduct a *de novo* review based on the rules adopted in the *Triennial Review Order* as applied to the evidence presented herein.

[51] *Application by Verizon Virginia Inc., Verizon Long Distance, Inc., Verizon Enterprise Solutions Virginia Inc., Verizon Global Networks Inc., and Verizon Select Services of Virginia Inc., for Authorization to Provide In-Region, InterLATA Services in Virginia*, WC Docket No. 02-214, Memorandum Opinion and Order, 17 FCC Rcd 21880 (2002) (*Verizon Virginia Section 271 Order).*

[52] *See, e.g.*, Issues C3, C4; s*ee also Virginia Arbitration Order,* 17 FCC Rcd at 27054-55, paras. 31-32.

[53] *Id*. Modifying the Parties' proposed language where we are able rather than rejecting the language and directing the Parties to develop and submit additional new language for review, conserves administrative resources and results in the ability to issue a final arbitration award more expeditiously. *See, e.g.*, Issue C4 (where we modify the words "Verizon" and "Cavalier" in § 7.2.6 of Verizon's proposed language to "the transiting Party" and "the originating Party" respectively, to reflect the reciprocal transit obligations proposed by Cavalier and adopted by the Commission in that same section).

[54] *See, e.g.*, Issue C14 (where we decline to adopt Cavalier's language regarding Integrated DLC loop provisioning, but point to another provision in the agreement where Cavalier's request is partially resolved).

[55] *See* 47 U.S.C.§ 252(e)(2)(B). *See, e.g.*, Issue C10 (where we strike the language indicating Verizon is not obligated to splice dark fiber to provide to Cavalier as contrary to routine network modification rules adopted in the *Triennial Review Order); see also* Issue C9 (where we direct the parties to file new language to conform the proposed language to the *Virginia Cost Issues Arbitration Order)*.

explain the basis for how we determine the final contract language for each unresolved issue within the discussion of each issue below.[56] In addition, we provide within each discussion the specific contract language we adopt.

B. True-Up

19. The Commission requires that an arbitration award issued by the Bureau pursuant to delegated authority that establishes rates for interconnection, resale, or UNEs must contain a requirement that the arbitrated interconnection agreement contain a true-up provision.[57] This true-up provision will apply in the event that the Commission ultimately modifies any rates the Bureau establishes and ensures that no carrier is disadvantaged by our orders in the event that they are subsequently modified by the Commission on review.[58] Certain issues we resolve herein do relate to the appropriate rates associated with that issue. Accordingly, in the event that the Commission, on review, establishes rates that differ from those established in this Order or in any subsequent Bureau order addressing the Parties' compliance filings,[59] any rates established by this Order shall be trued-up to the rates subsequently ordered. Any such true-up shall apply retroactively to the effective date of the Bureau's order adopting the Parties' compliance filings. Payment of the net true-up amount owed by the appropriate party to the interconnection agreement shall be made to the other party to the agreement in accordance with the billing practices and other relevant provisions delineated in the agreement. To the extent that there is a disagreement between the Parties as to the amount of any such true-up or to the appropriate true-up procedures, such disagreement shall be subject to the dispute resolution provisions of the interconnection agreement.

C. Disposition of the Issues

1. Issue C2 (Compensation for Responding to Network Rearrangements)

a. Introduction

20. When the number of trunks connected to a tandem switch reaches a certain level, Verizon adds another tandem switch to the LATA network to avoid tandem exhaust.[60] At that time, under the previous interconnection agreement between the Parties, if Cavalier interconnected at the first tandem it would be required to establish new facilities to carry its traffic to the new tandem. Cavalier proposes language here that would require each Party to

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56 We reiterate that we base our decisions on current Commission rules and precedent, and therefore reject or modify Parties' proposals that extend beyond existing law.

57 *See Arbitration Procedures Order*, 16 FCC Rcd at 6233, para. 10; *see also Virginia Cost Issues Arbitration Order*, 18 FCC Rcd at 17737, para. 26.

58 *Id*.

59 *See infra* para. 208.

60 *See* Verizon Direct Testimony of Albert Panel at 5.

reimburse the other for reasonable costs incurred when one Party's network rearrangement causes the other to move existing facilities or establish new facilities.[61] Verizon opposes this language.[62]

b. Positions of the Parties

21. Cavalier explains that its proposal stems from problems it experienced recently when Verizon rehomed two tandems in Virginia.[63] Cavalier incurred costs associated with the rehomings, which were magnified due to Verizon's unacceptable delays.[64] Cavalier points out that Verizon's own witness admitted that a competitive LEC could incur several hundred thousand dollars costs in connection with a Verizon tandem rehoming.[65] Cavalier's costs included leasing duplicate transport facilities from Verizon during the protracted period of rearrangement, and internal expenses, such as for increased switch ports and labor costs.[66] Cavalier argues that these costs are too exorbitant for it to bear and Verizon should be responsible for them because it caused the network rearrangement.[67] Cavalier also claims that Verizon may have reimbursed or borne the costs of independent telephone companies with which it interconnects when these carriers responded to Verizon's network rearrangements and thus that Cavalier's proposal is consistent with Verizon's prior conduct.[68]

22. Cavalier disputes Verizon's contention that tandem rehoming benefits all carriers. Instead, Cavalier argues that Verizon has a financial incentive to handle traffic through a tandem because it can charge a higher reciprocal compensation rate for tandem traffic than for traffic switched at the end office.[69] Cavalier also argues that direct interconnection between carriers, which Verizon claims would reduce the necessity and frequency of tandem rehomings, could not be achieved quickly enough to make a difference in the short term.[70] Accordingly, as owner of the tandem switching facilities, Verizon is the only carrier that can impose or require order in the

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[61] *See* Final Proposed Language at 1 (Cavalier Proposed § 9.6).

[62] Verizon Brief at 5.

[63] *See* Cavalier Direct Testimony of Cole at 1-3.

[64] *Id.*

[65] Cavalier Reply Brief at 2 (citing Tr. at 29-30).

[66] *See* Cavalier Direct Testimony of Cole at 2.

[67] *See* Cavalier Reply Brief at 2.

[68] *Id.* Cavalier presented evidence suggesting that Verizon may at some time have paid or borne the costs of independent telephone companies in responding to Verizon's network rearrangements. *See* Cavalier Rebuttal Testimony of Clift at 3-4 & Ex. MC-1R; *see also* Tr. at 16-17 *cited in* Cavalier Reply Brief at 2 n.2.

[69] Cavalier Brief at 5-6.

[70] *Id.* at 6.

tandem rehoming process.[71] Cavalier also notes that section 252 does not require direct interconnection.[72]

23. In response to Verizon's argument that Cavalier need not lease duplicate facilities because it has the option, under section 4.1.1 of the proposed Agreement, to "connect[] to all of Verizon's tandems through a single point in the LATA," Cavalier claims that Verizon never before has offered Cavalier the option of not directly connecting at the new tandem.[73] Cavalier complains that Verizon's proposed section 4.1.1, and accompanying schedule 4.2.7, which itemizes end office interconnection arrangements between the Parties in Virginia, are at best vague, and, at worst, inconsistent with Verizon's argument about tandem rehomings.[74] Schedule 4.2.7, which specifies only three points of interconnection (POIs) between Cavalier and Verizon, does not explicitly recognize that Cavalier exchanges a significant amount of traffic through end offices, not tandems.[75] Cavalier fears that, under Verizon's proposal, Verizon may not provide sufficient capacity between the POI and a new tandem, which would make Cavalier's network vulnerable to blockage. Blockage historically has been a problem between the Parties.[76] Moreover, based both on its own experience and another carrier's recent experience, Cavalier expresses skepticism that Verizon actually will effect its POI commitment.[77] Accordingly, Cavalier asks, if the Bureau rejects Cavalier's reimbursement proposal, that it modify Verizon's section 4.1.1 to explicitly allow Cavalier to select its POIs, including its existing POIs, with all transport costs to the new tandems to be borne by Verizon.[78]

24. Verizon explains that its tandem switches establish a connection between trunks connected to competitive LECs, interexchange carriers, wireless carriers, some independent telephone companies, and Verizon's end office switches.[79] When the number of trunks connected to a tandem reaches a certain level, Verizon must add another tandem to the LATA

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[71] *Id.*

[72] *Id.* (citing 47 U.S.C.§ 252).

[73] *Id.* at 2 (quoting Verizon Answer/Response at 3 and citing *id*. at Ex. C (Verizon's Proposed Agreement to Cavalier) at § 4.1.1). It points out that Verizon's industry letters do not present a single point of interconnection (SPOI) as an alternative. Cavalier Brief at 3; Cavalier Reply Brief at 4.

[74] Cavalier Brief at 3, 5.

[75] *Id.* at 5. Cavalier adds that Schedule 4.2.7 does list 60 end offices where Cavalier exchanges traffic with Verizon. *Id*.

[76] *Id.* at 4. Cavalier also criticizes the SPOI concept. Cavalier notes that the SPOI creates the potential for a single point of failure in the interconnection of the two networks, further taxing Verizon's switches, rather than decentralizing the burden on them, and further discourages the kind of facilities-based competition in which Cavalier is engaged. *Id*. at 3-4 (citing Tr. at 25-26), 6.

[77] *See id*. at 3-4.

[78] Cavalier Reply Brief at 1-2, 3-4 (citing Tr. at 30-32, 35, 40, 43, 44).

[79] Verizon Brief at 2; *see also* Verizon Rebuttal Testimony of Albert Panel at 3.

network to serve the increased carrier demands.[80] At that time, all carriers, including competitive LECs who interconnect at the first tandem, need to rehome trunks to the new tandems.[81] Verizon notes that nearly 275,000 competitive LEC trunks have been added in Virginia as a result of "explosive CLEC growth."[82] Verizon argues that all carriers benefit from these arrangements because if tandem capacity is not added, all carriers connected to the tandem will experience trunk blockage and service disruptions.[83] Verizon argues that its longstanding arrangement with all competitive LECs is that each carrier bears the costs associated with network rearrangements.[84] It also denies that it reimburses independent telephone companies under the similar circumstances.[85]

25. Verizon also denies that it historically caused any delays associated with tandem rehomings in Virginia.[86] Rather, in the cases referred to by Cavalier, Verizon claims to have been at the mercy of some 50 other carriers that it could not control.[87] All carriers must cooperate to make the rehoming process proceed smoothly.[88] Regardless, Verizon argues, the possibility that delays may result from rehoming does not justify requiring Verizon to pay Cavalier's expenses incurred in connection with a rehoming project.[89] Verizon points out that Cavalier could completely avoid these delays by moving its traffic off Verizon's tandems and connecting directly with other carriers' networks.[90]

26. In any case, Verizon argues, under the contract it has proposed to Cavalier, Cavalier need not lease facilities to a new tandem. Instead, pursuant to its proposed section 4.1.1, to which Cavalier has already agreed,[91] and in accordance with subsection 251(c)(2)(B) of the Act,[92] Cavalier can establish one or more POIs for all traffic in a LATA, and "if Cavalier

80 Verizon Brief at 2; *see also* Verizon Rebuttal Testimony of Albert Panel at 3; Tr. at 20.

81 *See* Verizon Brief at 2-3 (citing Verizon Direct Testimony of Albert Panel, at 5).

82 Verizon Reply Brief at 5 (citing Tr. at 47).

83 Verizon Brief at 3 (citing Verizon Direct Testimony of Albert Panel at 6); Verizon Reply Brief at 5 (citing *Virginia Arbitration Order*, 17 FCC Rcd at 27118-19, paras. 155-56).

84 Verizon Brief at 3 (citing Verizon Direct Testimony of Albert Panel at 5).

85 *Id*.; Verizon Reply Brief at 5 (quoting Tr. at 10).

86 Verizon Brief at 4-5 (citing Tr. at 49, 66).

87 *Id*. (citing Tr. at 66).

88 *Id*. at 4-5.

89 *Id*. at 5 (citing Verizon Rebuttal Testimony of Albert Panel at 2-3).

90 *Id*. at 5 (citing Verizon Rebuttal Testimony of Albert Panel at 4); Verizon Reply Brief at 3-4.

91 Verizon Reply Brief at 2; *see also* Cavalier Arbitration Petition at Ex. B (Aug. 1 Draft Agreement) § 4.1.

92 47 U.S.C. § 251(c)(2)(B) *cited in* Verizon Reply Brief at 4.

chose to have a POI that wasn't at that [new] tandem, then Verizon would be responsible for the transport to get to that particular tandem."[93] Verizon admits that this differs from its prior contract arrangements, where POIs were selected by mutual agreement and not solely by the competitive LEC.[94] Verizon claims, however, that the Parties have been operating within this new network architecture since April 2003.[95] Verizon stipulates that the language set forth in section 4.1.1 "contractually obligate[s it] to pay the costs of transporting Cavalier's traffic from the POI to the new tandem."[96] Accordingly, Verizon argues, the Bureau should reject Cavalier's proposed language that would require each Party to reimburse the other for reasonable costs incurred when one Party's network rearrangement causes the other to move existing facilities or establish new facilities.[97]

c. Discussion

27. First, we reject Cavalier's proposal that Verizon reimburse it for network rearrangements. Cavalier complains that Verizon has, in the past, reimbursed or otherwise borne some share of the costs incurred by interconnecting independent telephone companies when the latter incurred costs responding to Verizon's network rearrangements. We will not order Verizon to reimburse Cavalier when a rearrangement of the Verizon network has some collateral impact on Cavalier. Rather, we believe that Verizon's offer to establish transport facilities from the old to the new tandem should limit Cavalier's costs.

28. Although we reject Cavalier's broad language, we modify Verizon's proposal to reflect its offer, as Cavalier requests. Verizon contends that, under section 4.1.1 of its proposed agreement with Cavalier, Cavalier could avoid altogether the kind of expenses it incurred during the prior tandem rehomings. Because we do not think section 4.1.1 is as explicit as Verizon claims, we modify that section.

29. According to Verizon, the Parties previously operated under a contract that required mutual consent as to the location of the Parties' POIs.[98] Apparently, when Verizon rehomed its tandem, this mutual consent requirement enabled Verizon to change the POI. Verizon states that under section 4.1.1 of the new agreement, Cavalier has the sole right to select one or more POIs.[99] Thus, pursuant to section 4.1.1, and in accordance with subsection

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[93] Verizon Brief at 4 (quoting Tr. at 30); *see also* Verizon Reply Brief at 2; Tr. at 44.

[94] *See* Verizon Reply Brief at 3; Tr. at 35-37.

[95] Verizon Reply Brief at 2 (citing Ex. 1 (Apr. 1, 2003 Amendment No. 3 to Interconnection Agreement between Verizon and Cavalier at § 2.1.1)).

[96] *Id*. at 2-3 (citing Tr. at 30).

[97] *Id*. at 6.

[98] *See id*. at 3; Tr. at 35-37.

[99] *See* Verizon Brief at 3 (citing Verizon Direct Testimony of Albert Panel at 6); Verizon Reply Brief at 2-3 (citing Tr. at 30); *see also* Tr. at 40, 44.

251(c)(2)(B) of the Act,[100] Cavalier will now be able to establish one or more POIs for all traffic in a LATA, and those POIs will remain unchanged, regardless of how many tandem rehomings occur.[101] Further, "if Cavalier cho[oses] to have a POI that [i]sn't at that [new] tandem, then Verizon w[ill] be responsible for the transport to get to that particular tandem."[102] According to Verizon, the cost of transport between the original and the new tandem will not be the subject of any additional charge but will be recovered as part of the tandem-switched reciprocal compensation rate these carriers collect in Virginia.[103] Verizon's section 4.1.1, which is titled "Points of Interconnection," provides, in toto –

> Each Party, at its own expense, shall provide transport facilities to the technically feasible Point(s) of Interconnection on Verizon's network in a LATA selected by Cavalier.[104]

30. Verizon stipulates that this language "contractually obligate[s it] to pay the costs of transporting Cavalier's traffic from the POI to the new tandem."[105] We do not believe that, as drafted, section 4.1.1 captures Verizon's offer with clarity.[106] Moreover, we believe that other provisions of the Agreement make this more rather than less ambiguous.[107] Because we find reasonable Verizon's agreement to carry the traffic from the POI selected by Cavalier to the new

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[100] 47 U.S.C. § 251(c)(2)(B) *cited in* Verizon Reply Brief at 4.

[101] Verizon Brief at 4 (citing Verizon Direct Testimony of Albert Panel at 6); Verizon Reply Brief at 1-2.

[102] Verizon Brief at 4 (quoting Tr. at 30); Verizon Reply Brief at 1-2.

[103] *See* Tr. at 35-40.

[104] *See* Verizon Answer/Response, Ex. C (Verizon Proposed Agreement to Cavalier) at § 4.1.1.

[105] Verizon Reply Brief at 1-2 (citing Tr. at 30).

[106] As drafted, the clause "selected by Cavalier" in § 4.1.1 does not clearly modify "technically feasible Point(s) of Interconnection on Verizon's network." We note that, despite Verizon's testimony to the contrary, *see* Tr. at 44, proposed § 4.1.1 does not appear to have been derived from language adopted by the Bureau in the prior arbitration or from the AT&T contract that resulted from that arbitration. The "Points of Interconnection" provision in the Verizon-AT&T agreement provides that "Verizon shall permit AT&T to interconnect at any technically feasible point on Verizon's network, including, without limitation, tandems, end offices, outside plant and Customer premises, as described in and in accordance with Schedule 4." *See* Interconnection Agreement Under §§ 251 and 252 of the Telecommunications Act of 1996 by and between Verizon-Virginia Inc. and AT&T Communications of Virginia, Inc., CC Docket No. 00-251, at § 4.1.2 (filed Sept. 3, 2002).

[107] Language from § 4.1.1 is repeated in the general introductory paragraph of § 4.0. § 1.63, which defines "Point of Interconnection" is ambiguous as to whether Cavalier has the right to select the POI or whether the Parties must mutually agree to it, as apparently was true under the prior agreement. Specifically, § 1.63 provides, in part, that "[a]s set forth in this Agreement, a Point of Interconnection shall be at (i) a technically feasible point 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*." Verizon Answer/Response, Ex. C at § 1.63 (emphasis added). It is possible to read the italicized language to require mutual agreement as to both the "technically feasible point on Verizon's network in a LATA" and the "Fiber Meet point."

tandem and beyond for no more than it would have charged Cavalier to terminate traffic delivered to the original tandem, we direct it to modify section 4.1.1 of the Agreement as set forth below.[108]

d. Arbitrator's Adopted Contract Language

31. With respect to Issue C2, and in accordance with the foregoing discussion, the Arbitrator adopts the following language:

> 4.1.1 Each Party, at its own expense, shall provide transport facilities to the technically feasible point(s) of interconnection on Verizon's network in a LATA selected by Cavalier. Notwithstanding any other language contained in this Agreement, including schedules and attachments hereto, this section 4.1.1 shall be interpreted to permit Cavalier the sole right to select and maintain one or more technically feasible points of interconnection on Verizon's network, including preexisting Cavalier points of interconnection. In the event of a network rearrangement by Verizon, including a tandem rehoming, the point of interconnection shall not change unless Cavalier so requests. In the event of such a network rearrangement by Verizon, this section 4.1.1 shall be interpreted to require Verizon to continue to provide transport from the existing point of interconnection and Cavalier shall pay Verizon no more than the reciprocal compensation rate that it paid before the network rearrangement occurred. Cavalier shall have the right to designate additional points of interconnection in its sole discretion and subject to technical feasibility. In the event of a conflict between this section 4.1.1 and any other provision of this Agreement, this section 4.1.1 shall govern.

2. Issue C3 (Call Detail for Traffic Over Interconnection Trunks)

a. Introduction

32. The Parties disagree whether, and to what extent, a Party sending traffic over interconnection trunks must provide certain information regarding the origin of those calls, necessary for billing, or may be held responsible for calls that lack that information. Both Parties propose language designed to facilitate accurate billing, to the appropriate carrier, for telephone exchange service traffic and exchange access traffic.[109] Verizon's proposed language

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[108] Cavalier voices concern that Verizon might not provide sufficient capacity between the POI and the new tandem, which would make Cavalier's network vulnerable to blockage. *See* Cavalier Brief at 4. We note that Verizon's duty under 47 U.S.C. § 251(c)(2)(D) to provide interconnection on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, includes the duties to forecast future capacity utilization needs, adequately plan for them, and implement those plans so blockages do not occur. *See Core Communications, Inc. v. Verizon Maryland Inc.,* File No. EB-01-MD-007, 18 FCC Rcd 7962, 7980, 7983, paras. 47, 53 (2003).

[109] *See* Final Proposed Language at 1-4 (Cavalier Proposed §§ 1.12(b), 1.46, 1.48, 1.62(a), 1.87, 5.6.1, 5.6.6, 5.6.6.1, 5.6.6.2, 6.3.9, 7.2.2, Verizon Proposed §§ 1.87, 5.6.1, 5.6.6, 5.6.6.1, 5.6.6.2, 6.3.9, 7.2.2).

would require the originating Party to include identifying information, specifically the Calling Party Number (CPN), on calls transported to the receiving Party.[110] Cavalier proposes similar language, but would expand the information that must be provided.[111] Both proposals would allow the receiving Party to bill the originating Party directly if that Party does not pass along sufficient billing information on 95 percent or more of calls transported to the receiving Party.[112] Verizon also proposes language obligating it to provide billing information only to the extent the carrier originating the call provides such billing information to Verizon and the provision of such billing information is consistent with industry guidelines.[113]

b. Positions of the Parties

33. Cavalier maintains that as a transiting carrier, Verizon is obligated to pass correct billing information on to other carriers.[114] Cavalier contends, however, that information necessary to identify the proper carrier and calling number is missing on 17 percent of all minutes that Verizon transits to Cavalier's network.[115] According to Cavalier, this problem arises in part from Verizon's mixing of traffic on local exchange and exchange access trunk groups.[116] Cavalier contends that the problem arises when originating carriers deliver one type of traffic

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[110] For purposes of Verizon's proposal, the "originating Party" is the Party delivering the traffic for termination. The "receiving Party" is the Party to which the originating Party delivers the traffic. *See* Final Proposed Language at 2-3 (Verizon Proposed §§ 5.6.6.1, 5.6.6.2). These terms apply with respect to interexchange traffic from an interexchange carrier and local traffic that originates with a third party (*i.e.*, transit traffic).

[111] This information includes the following codes, which help identify the carrier originating the call, the number placing the call, or the type of call: the CPN, the Carrier Identification Code (CIC), the Local Routing Number (LRN), the Operating Company Number (OCN), and/or the Jurisdiction Information Parameter (JIP). *See* Final Proposed Language at 1-2 (Cavalier Proposed §§ 1.12(b), 1.46, 1.48, 1.62(a), 5.6.6).

[112] *See* Final Proposed Language at 2-4 (Cavalier Proposed §§ 5.6.6.1, 5.6.6.2, Verizon Proposed §§ 5.6.6.1, 5.6.6.2). Cavalier explains that its proposal would permit Cavalier, to the extent Verizon does not provide adequate billing information on up to 5% of calls, to bill Verizon "at a prorated local/access ratio." Cavalier Brief at 8. Furthermore, Cavalier explains that its proposal also would permit Cavalier, to the extent Verizon does not provide adequate billing information on more than 5% of calls, to bill Verizon at Switched Exchange Access rates for those calls. Cavalier Brief at 8. *See* Final Proposed Language at 3-4 (Cavalier Proposed § 5.6.6.2).

[113] *See* Final Proposed Language at 2-3 (Verizon Proposed §§ 5.6.6.1, 5.6.6.2).

[114] In normal circumstances, the terminating carrier would use this information to render a bill for the call to the originating carrier if that carrier is not Verizon. *See* Cavalier Brief at 10; Verizon Brief at 5.

[115] Cavalier Reply Brief at 7; Cavalier Brief at 13; Cavalier Direct Testimony of Haraburda at 1-2. *See* Cavalier Direct Testimony of Cole at 4. For example, Cavalier maintains that in Richmond, on July 8, 2003, Verizon misrouted 23,763 minutes of Access Traffic on Local Trunks. Cavalier Direct Testimony of Cole at 5-6; *see also* Cavalier Direct Testimony of Haraburda at 3-4. This "misrouting will cause our trunks groups to be sized incorrectly over the long term." Cavalier Direct Testimony of Cole at 6. Cavalier contends that Verizon omits CIC or OCN on 17% of calls, or over 64 million minutes, from the August 1, 2003 Carrier Access Billing Records. Cavalier Rebuttal Testimony of Whitt at 1.

[116] Cavalier Brief at 10-11, 17; Cavalier Direct Testimony of Cole at 6; Cavalier Rebuttal Testimony of Whitt at 2; Cavalier Direct Testimony of Whitt at 6.

and Verizon sends it to Cavalier in a manner that makes it look like a different type of traffic.[117] Cavalier maintains that it currently has $8 million in uncollectible access and local termination revenue because of inaccurate billing information or because Verizon has done something to change the appearance of the traffic.[118]

34. An example of traffic that is unable to be properly identified is when an interexchange carrier sends a Cavalier-bound call to a Verizon end office, rather than to a Verizon tandem switch.[119] Verizon first determines that the called party is a Cavalier customer, not a Verizon customer. Consequently, and according to Cavalier, contrary to the express language of the current agreement,[120] Verizon then reoriginates the call and routes it to Cavalier's switch over Cavalier's local interconnection trunks, rather than the appropriate access traffic trunks.[121] The Parties indicate that in this circumstance, Cavalier is unable to identify the originating carrier – even though Verizon should know its identity based on the trunk group over which it received the call or the identifying information sent to Verizon by that carrier and even though Verizon would bill the carrier that passed the call to Verizon at access rates.[122] In such cases, Cavalier does not even know that the call originated from an interexchange carrier.[123] The call appears to be a local call originating from Verizon, which Cavalier would bill to Verizon at the local reciprocal compensation rates, rather than appropriately billing the originating interexchange carrier at the higher Switched Exchange Access Service rates.[124] In yet another example, the record shows that when an originating carrier populates the call record with zeros, Verizon re-populates the call record with the called party's number in order to permit the call to be transported to Cavalier.[125]

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[117] Cavalier Brief at 9, 13; Cavalier Direct Testimony of Whitt at 2.

[118] Cavalier Brief at 16; Cavalier Direct Testimony of Whitt at 7.

[119] This situation may arise when an interexchange carrier fails to conduct a local or line number portability (LNP) dip to determine which local carrier serves a called party. Verizon Reply Brief at 10; Tr. at 80-82, 95-98. *See* Cavalier Brief at 8-9, 11.

[120] Cavalier Brief at 8*; see also* Aug. 1 Draft Agreement § 5 (specifying what type of traffic should be sent over interconnection trunks).

[121] *See* Verizon Reply Brief at 10 (conceding that Verizon sends an access call over Cavalier's local interconnection trunks); Cavalier Brief at 9, 10-13.

[122] *See* Tr. at 91-92, 96-97.

[123] Tr. at 95-97, 124. *See* Cavalier Brief at 8-10.

[124] *See* Cavalier Brief at 8-9, 11-13.

[125] Cavalier Brief at 9, 10-13; Verizon Brief at 10-11; Verizon Reply Brief at 9-10; Verizon Rebuttal Testimony of Smith at 6. Verizon explains that this practice arose as an accommodation to independent telephone companies that cannot process calls where the "From Number" field includes zeros. To enable the call to be completed, Verizon inserts the "To Number" in both fields in this circumstance. Verizon Brief at 10-11.

35. To resolve the problem, Cavalier proposes that Verizon must include any adequate combination of CPN, CIC, LRN, OCN, and/or JIP information on calls it passes to Cavalier.[126] Cavalier asserts that Verizon is in a better position than Cavalier to require originating carriers to supply the necessary information.[127] According to Cavalier's proposal, if Verizon passes sufficient information to allow proper billing of traffic on less than 95 percent of all calls, Cavalier would be permitted to bill Verizon directly, for those insufficiently identified calls that exceed 5 percent, at the higher of the intrastate Switched Exchange Access Service rates or the interstate Switched Exchange Access Service rates.[128]

36. Verizon claims that Cavalier's language is unnecessary, because Verizon already includes sufficient information for Cavalier to bill the originating carrier, in accordance with industry guidelines established for all receiving carriers.[129] Verizon contends that Cavalier's language would require Verizon to collect more information than industry standards require, would require Verizon to send codes to Cavalier that Verizon's billing systems do not currently support,[130] and would hold Verizon responsible for termination charges if it failed to pass this information to Cavalier.[131] Verizon claims that it cannot selectively weed out calls that lack sufficient billing information, and that it would not block such calls.[132] Verizon asserts that

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[126] Cavalier Brief at 7-8; 17; Cavalier Direct Testimony of Cole at 7. *See* Cavalier Direct Testimony of Haraburda at 2. Cavalier's proposal states, in this respect, "To facilitate accurate billing to the originating carrier, each Party shall pass sufficient information to allow proper billing, in the form of Calling Party Number ("CPN"), CIC, LRN, OCN, and/or JIP information on each call, including Transit Traffic, carried over the Interconnection Trunks." Final Proposed Language at 2 (Cavalier Proposed § 5.6.6).

[127] Cavalier Brief at 9; Cavalier Direct Testimony of Whitt at 10.

[128] *See* Final Proposed Language at 3-4 (Cavalier Proposed § 5.6.6.2); Cavalier Brief at 7-8. Cavalier's proposal also provides that if the receiving Party is not compensated for traffic the originating Party transits without adequate billing information, then the originating Party must cease routing such traffic upon 10 days notice from the receiving Party. *See* Final Proposed Language at 4 (Cavalier Proposed § 5.6.6.2).

[129] Verizon Brief at 6; Verizon Rebuttal Testimony of Smith at 1.

[130] Verizon states that Cavalier's language requiring Verizon to send billing information over SS7 signaling streams, rather than billing tapes, would require Verizon to fashion a separate billing system for Cavalier. Verizon Brief at 7-9. Verizon claims that one reason many calls are delivered without the calling number is that some carriers use multi-frequency signaling instead of SS7 signaling, and multi-frequency signaling does not deliver the calling number. Verizon Rebuttal Testimony of Smith at 6. Verizon also maintains that Cavalier's language is ambiguous, specifically its language requiring Verizon to pass "CPN, CIC, LRN, OCN, and/or JIP information on each call." Verizon Rebuttal Testimony of Smith at 3. Verizon asserts that, even though Cavalier contends that this language requires merely "any adequate combination" of call information, the use of the words "and/or" in that sentence indicates that Cavalier wants CIC, LRN, OCN, and JIP information on each call record. Verizon asserts, however, that including the words "any adequate combination" in Cavalier's language would be confusing and vague. *Id.; see also* Final Proposed Language at 2-4 (Cavalier Proposed §§ 5.5.6, 5.6.6.1, 5.6.6.2).

[131] Verizon Brief at 5. We note that Verizon's proposed language also enables Cavalier to bill Verizon for these unidentified calls based on certain identified factors. *See* Final Proposed Language at 2-3 (Verizon Proposed §§ 5.6.6.1, 5.6.6.2).

[132] Verizon Rebuttal Testimony of Smith at 7.

Cavalier's language would require it to serve as a billing intermediary for Cavalier, a role that Verizon is under no obligation to serve.[133] In fact, Verizon contends that is it is not required to provide transit service, and declares that if the Bureau adopts Cavalier's proposal, Verizon would cease transiting traffic to Cavalier altogether.[134]

37. Verizon asserts that it sends to Cavalier all billing information that originating carriers include on their calls, and that it does not misroute calls.[135] Verizon explains that not all carriers have a CIC and that some carriers do not include the CPN or OCN on their calls, and Verizon has no control over this situation.[136] If this information is missing on a call, Verizon claims that it would be unable to supply that information on the call record it generates for Cavalier. Verizon suggests that Cavalier could solve its billing problems by interconnecting directly with originating carriers, which would diminish Cavalier's need for Verizon's transit service.[137] Verizon also contends that the issues Cavalier raises should be resolved on an industry-wide basis in the Ordering and Billing Forum (OBF).[138] Verizon asserts that its proposed language would require it to send information to Cavalier consistent with industry standards, and that this makes sense because billing is an industry-wide concern.[139] Verizon also contends that its proposal would ensure that Cavalier would receive the same information Verizon uses to bill for its own terminating services.[140]

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[133] Verizon Brief at 7-8; Verizon Answer/Response at 6 (citing *Virginia Arbitration Order,* 17 FCC Rcd at 27102, para. 119).

[134] Verizon Brief at 6; Verizon Rebuttal Testimony of Smith at 1.

[135] Verizon Brief at 6; Verizon Rebuttal Testimony of Smith at 1. Verizon contends that at least some of the calls Cavalier complains about are likely traffic from wireless carriers, which may appear as access traffic but which is properly routed over local trunks. Verizon Brief at 10; Verizon Rebuttal Testimony of Smith at 2.

[136] Verizon Brief at 6. For example, Verizon explains that interexchange carriers are the only carriers that have CICs, so those local exchange carriers that are not interexchange carriers will not have CICs. Verizon Rebuttal Testimony of Smith at 4. In addition, originating carriers often fail to provide the CPN. Verizon Rebuttal Testimony of Smith at 5-6. Verizon claims that the OBF acknowledges that CIC cannot be passed on each call, and there are guidelines to govern which information should be passed when the CIC is not available. Verizon Rebuttal Testimony of Smith at 4.

[137] Verizon Brief at 9; Verizon Rebuttal Testimony of Smith at 7. Cavalier maintains that it cannot negotiate directly with the originating carrier in instances where minutes are not associated with a carrier. Cavalier Rebuttal Testimony of Whitt at 3.

[138] Verizon Brief at 8, 10. *See* Verizon Answer/Response at 6 (citing *Virginia Arbitration Order,* 17 FCC Rcd at 27344-45, para. 628).

[139] Verizon Brief at 6.

[140] Verizon Brief at 6.

c. Discussion

38. We adopt portions of both Parties' language.[141] We find it reasonable, based on the call scenarios addressed above, to require Verizon, at a minimum, to pass to Cavalier the information Verizon receives from the originating carrier, to enable Cavalier to render an accurate bill to the call's originating carrier. We note that, as with the *Virginia Arbitration Order*, the Commission has not yet had occasion to determine whether incumbent LECs have a duty to provide transit service under the Act or whether incumbent LECs must serve as billing intermediaries for other carriers, nor do we find clear Commission precedent or rules declaring such duties.[142] In the absence of such a precedent or rule, we decline, on delegated authority, to determine for the first time that Verizon has such duties under the Act. Where a Party undertakes to voluntarily provide transit service, however, and proposes to incorporate the terms of such service into a provision of an interconnection agreement which is subject to arbitration by the Bureau, we have determined whether such provisions are reasonable.[143]

39. We find that in some circumstances, such as where a Cavalier-bound interexchange call is delivered to Verizon's end office, and Verizon reoriginates it to Cavalier's switch, Verizon passes calls to Cavalier in a manner that makes it difficult for Cavalier to identify the originating carrier or calling party and, therefore, to bill the appropriate originating carrier for the call, at the proper rate.[144] In so doing, we find that Verizon improperly impedes Cavalier's right to share terminating access revenues for that call, as required by the provisions

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[141] We adopt Verizon's proposed §§ 5.6.1 and 6.3.9. We adopt Cavalier's proposed §§ 1.12(b), 1.48, and 1.62(a). Because we are adopting reciprocal obligations in the context of Issue C4, we also adopt Cavalier's proposed §§ 1.87 and 7.2.2, to reflect the reciprocal nature of transit service for purposes of this Agreement. *See infra* Issue C4. We adopt Verizon's proposed § 5.6.6.1 with modifications to reflect our conclusion that Verizon shall pass CPN, CIC, LRN, and OCN information to Cavalier and to reflect our understanding that Cavalier would bill Verizon, as the originating Party, under the circumstances outlined in Verizon's proposal. We adopt portions of both Parties' language with respect to § 5.6.6.2, to make that section consistent with § 5.6.6.1. We also adopt portions of both Parties' language with respect to § 5.6.6, to reflect our conclusion that Verizon shall pass CPN, CIC, LRN, and OCN information to Cavalier, to reflect our understanding that the Parties have resolved their dispute with respect to V/FX traffic, and to reflect our understanding that because transit traffic is included among the traffic dealt with in § 5 of the Agreement generally, it need not be separately identified in § 5.6.6. *See* Aug. 1 Draft Agreement § 5.1 (prescribing parameters for trunk groups used for interconnection as including Reciprocal Compensation Traffic, Measured Internet Traffic, Transit Traffic, translated LEC IntraLATA 8YY Traffic, InterLATA Toll Traffic and IntraLATA Toll Traffic between the Parties' respective Telephone Exchange Service Customers).

[142] *See Virginia Arbitration Order*, 17 FCC Rcd at 27101-02, paras. 117, 119.

[143] *See e.g.*, *Virginia Arbitration Order*, 17 FCC Rcd at 27100, para. 115 ("Given the absence of Commission rules specifically governing transit service rates, we decline to find that Verizon's additional charges are *unreasonable*. We also find that Verizon's proposed 60-day transition period is *reasonable*, providing AT&T adequate time to arrange to remove its transit traffic from Verizon's tandem switch once the traffic meets the DS1 threshold. We determine, however, that Verizon's language allowing it to terminate tandem transit service after this transition period at its "sole discretion" is not *reasonable*.") (italics added).

[144] *See supra* para. 34.

of Section 6 of the Agreement.[145] There are other ramifications as well. For example, misidentification of the originating carrier or the calling party can skew Cavalier's traffic factor ratios, which can impact other charges Cavalier pays to Verizon.[146] In addition, as explained more fully in Issue C5, this also affects Cavalier's ability to contact the true originating carrier in question, to work out direct connections based on an understanding of traffic flows between Cavalier and such carrier.[147]

40. Because Verizon does have control over how it passes calls to Cavalier, we conclude that Verizon must pass to Cavalier information necessary to identify the originating carrier or calling party in order to render accurate bills, to the extent that Verizon has that information in some ascertainable form.[148] Verizon shall pass traffic to Cavalier in a way that does not eliminate critical information from calls and does not add information that misidentifies the calling party or the jurisdictional nature of the call. The language we adopt is intended to address the issue of how Verizon miscategorizes traffic sent to Cavalier, specifically the circumstances under which Verizon routes access traffic over local interconnection trunks. Similarly, the language we adopt is intended to preclude Verizon from populating call record fields with incorrect data and then failing to provide Cavalier information Verizon has regarding the calls' origination.[149] We agree that billing issues such as these are of great interest to the industry as a whole, and acknowledge that the OBF may ultimately be an appropriate body to resolve them in a manner that sets specific new industry standards and guidelines. We find, however, that for purposes of this Agreement, Verizon should not impede Cavalier's ability to bill the appropriate carrier at the appropriate rates for calls Cavalier terminates by failing to provide identifying information it has. We agree that Verizon is unable to pass to Cavalier

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[145] *See* Aug. 1 Draft Agreement § 6. *See Telephone Number Portability*, Fourth Memorandum Opinion and Order on Reconsideration, 16 Comm. Reg. 757, rel. July 16, 1999, paras. 74, 80 (*Telephone Number Portability Fourth Memorandum Opinion and Order on Reconsideration*) citing *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8424 (1996) (stating that the forwarding carrier must provide "the necessary information to permit the terminating carrier to issue a bill")). Similarly, we find that where an originating carrier populates the call record with zeros, which Verizon inappropriately re-populates with the called party's number – an essentially fictitious OCN – Cavalier is unable to identify the calling party and, in some cases, even the jurisdictional nature of the call, and consequently is unable properly to bill for that call. *See supra* para 34.

[146] *See, e.g.*, Aug. 1 Draft Agreement § 5.6.7.

[147] *See infra* Issue C5. In this regard, we reject Verizon's argument that Cavalier could easily resolve this issue by contacting offending originating carriers and forming a direct interconnection arrangement with those carriers.

[148] While we decline to require Verizon to pass to Cavalier call information that Verizon does not possess, we note that, to the extent Verizon transports traffic from another carrier, Verizon is likely able to identify that carrier as a result of its physical interconnection with such carrier or call identification information it receives, and thus must provide this information to Cavalier where available. *See* Tr. at 126.

[149] *See supra* para. 34. In this regard, we disagree with Verizon's assertion that its proposed language would require it to provide Cavalier with "the same information Verizon uses to bill for its own terminating services." Verizon Brief at 6. We note that Verizon has admitted that it has the ability to bill and collect revenue for every call it has a role in completing. Tr. at 126.

information that Verizon does not receive and we do not expect Verizon to attempt to obtain information it does not have. Rather, the language we adopt is designed to address instances where Verizon performs actions that have the effect of disguising the nature of certain calls, affecting Cavalier's ability to bill the appropriate carrier at the appropriate rate for those calls.[150]

41. We disagree that the language we adopt would require Verizon to serve as a "billing intermediary" between Cavalier and originating carriers, in violation of the Bureau's finding in the *Virginia Arbitration Order*.[151] Indeed, although there is no requirement that Verizon involve itself in the payment of access charges or reciprocal compensation on traffic it does not originate, the language Verizon itself proposes in 5.6.6.1 and 5.6.6.2 places it in that position.

42. The language we adopt would not require Verizon to "juggle varying degrees" of call detail for different carriers.[152] We do not require Verizon to modify its billing systems or to provide billing tapes that differ from those currently provided. Rather, we require Verizon to provide, in addition to those billing tapes, whatever information it has about the originating carrier or calling party number to Cavalier for those calls where such information is not readily apparent on the billing tapes sent to Cavalier and Cavalier requests such information. Verizon's reliance on our finding in the *Virginia Arbitration Order* that the Bureau did not require Verizon to provide additional billing information beyond that already agreed to in the contract is misplaced. There, AT&T had not explained why it required additional billing information. In contrast, Cavalier has more than justified in this proceeding why additional information is both required and warranted. We find that establishing a 5 percent threshold for calls without adequate billing information, above which Cavalier can bill Verizon for such calls at a higher access rate,[153] will discourage Verizon from passing exchange traffic over local interconnection

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[150] In this respect, we disagree with Verizon that its proposed language would ensure Cavalier has all the information Verizon has regarding the identity of the called party or originating carrier. *See* Verizon Brief at 6. By its own admission, Verizon demonstrates that this is not the case. Tr. at 94-97.

[151] The language we adopt addresses the manner in which Verizon delivers traffic to Cavalier when Verizon provides transiting services on behalf of other carriers and Cavalier is the receiving/terminating carrier. Verizon's role in this regard is distinct from a billing services provider or billing intermediary. We disagree with Verizon's characterization of the Bureau's *Virginia Arbitration Order*, with regard to Verizon's obligation to provide transit services. *See* Verizon Brief at 7. There, the Bureau found that Verizon would not be permitted to abruptly terminate transit service "with no transition period or consideration of whether WorldCom has an available alternative," because that would "undermine WorldCom's ability to interconnect indirectly with other carriers in a manner that is inconsistent with" a fundamental purpose of the Act, which is to "promote the interconnection of all telecommunications networks by ensuring that incumbent LECs are not the only carriers that are able to interconnect efficiently with other carriers." *Virginia Arbitration Order*, 17 FCC Rcd at 27101-02, para. 118 (citing Collocation Remand Order, 16 FCC Rcd 15435, 15478, para. 84 (2001) (internal quotations omitted)).

[152] *See* Verizon Brief at 7-8.

[153] We find that a 5% threshold is a reasonable margin of error for missing call data. We read both Parties' proposals for § 5.6.6.1 to require Verizon (which, in the case of Verizon's proposed language, would be the "originating Party" on all traffic it delivers, including transit traffic, while Cavalier would be the "receiving Party") to pay Cavalier for those calls, up to 5% of all calls passed, for which Verizon fails to provide adequate information to bill the appropriate carriers, at a prorated local/access ratio established by the calls that have adequate billing (continued….)

trunks and discourage Verizon from populating fields of call records with inaccurate and inappropriate data.[154] Because we acknowledge that Verizon need not alter its billing systems to pass on information it has available in some form, we omit reference to the JIP, which Cavalier had proposed to include and which we find Verizon's billing systems do not support. Similarly, we do not adopt Cavalier's proposed sections 6.3.9, which would require Verizon to provide SS7 signaling streams instead of the currently-provided billing tapes.[155]

d. Arbitrator's Adopted Contract Language

43. With respect to Issue C3, and in accordance with the foregoing discussion, the Arbitrator adopts the following language:

> 1.12(b) – "Carrier Identification Code" or "CIC" is a numeric code assigned by the North American Numbering Plan (NANP) Administrator for the provisioning of selected switched services. The numeric code is unique to each entity and issued to route the call to the trunk group designated by the entity to which the code is assigned.
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> 1.48 – "Local Routing Number" or "LRN" is a 10-digit number in the Service Control Point (SCP) database maintained by the Numbering Portability Administration Center (NPAC), used to identify a switch with ported numbers.

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information. In addition, we understand Cavalier's proposal regarding § 5.6.6.2 to require Verizon to pay Cavalier for those calls, exceeding 5% of all calls passed, for which Verizon fails to provide adequate information to allow proper billing, at the higher of the intrastate or interstate Switched Exchange Access Service rate. Cavalier Brief at 8. This understanding of Cavalier's intent for § 5.6.6.2 is consistent with Verizon's proposed § 5.6.6.2, and we therefore adopt language for §§ 5.6.6.1 and 5.6.6.2 to reflect these assumptions, which we conclude are reasonable. Specifically, we adopt language for § 5.6.6.1 that would permit Cavalier to charge Verizon (as the originating Party), for up to 5% of calls that Verizon passes without adequate information. In addition, to the extent Cavalier's proposed § 5.6.6.2 would require Verizon to pay Cavalier the Switched Exchange Access Service rate for all calls with inadequate billing information if the number of such calls exceeds 5%, instead we adopt language for § 5.6.6.2 that would require Verizon to pay Cavalier, in cases where the amount of calls lacking adequate billing information exceeds 5%, the appropriate Switched Exchange Access Service rate only for those calls that exceed 5%, and the prorated local/access ratio for those calls up to 5%, consistent with treatment given these calls in § 5.6.6.1.

[154] We disagree that it is appropriate to copy the "To Number" to the "From Number" field in order to route the call to Cavalier. Doing so precludes Cavalier from knowing which carrier originated the call, information Verizon necessarily has to bill that carrier for such call. *See* Verizon Brief at 11. We also disagree that the OBF requires this result. As indicated in Cavalier Hearing Exhibit C-6, the OBF has resolved that the OCN field should be populated with the OCN of the company that originated the call, but that the tandem company may not be able to correctly populate this field if the originating company has ported out numbers. However, we do not read this document as authorizing the tandem company to populate this field with a number of its own choosing. *See* Cavalier Brief at 14-15.

[155] *See* Tr. at 127; *Telephone Number Portability Fourth Memorandum Opinion and Order on Reconsideration*, 16 Comm. Reg. 757, para. 80 (citing *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8424 (1996)). We note that Cavalier has provided no specific justification for requiring SS7 signaling streams, although the record reflects that carriers that do not use SS7 signaling streams do not pass calling party information.

1.62(a) – "Operating Company Number" or "OCN" is a four-place alphanumeric code that uniquely identifies providers of local telecommunications service and is required of all service providers in their submission of utilization and forecast data.

1.87 – "Tandem Transit Traffic" or "Transit Traffic" means Telephone Exchange Service traffic that originates on either Party's network or the network of another carrier (competitive local exchange carrier, independent telephone company, commercial mobile radio service (CMRS) carrier, or other local exchange carrier) and is transported through either Party's switch that performs a tandem function to either Party or another carrier that subtends the relevant switch (performing a tandem function), to which such traffic is delivered substantially unchanged. "Transit Traffic" and "Tandem Transit Traffic" do not include or apply to traffic that is subject to an effective Meet-Point Billing Arrangement.

5.6.1 – Terms and Conditions for Meet Point Billing are addressed in Section 6 only.

5.6.6 – To facilitate accurate billing to the originating carrier, each Party shall pass sufficient information to allow proper billing, in the form of Calling Party Number ("CPN"), CIC, LRN, and/or OCN information on each call, carried over the Interconnection Trunks. Except as set forth in Sections 4.2.7.15(c) and 5.7.6.9 of this Agreement with respect to the determination of V/FX Traffic (as such traffic is defined in Section 4.2.7.15(c)) and billing of applicable charges in connection with such V/FX traffic, the Parties agree to use appropriate information in the form of CPN, CIC, LRN, and/or OCN information, as set forth below.

5.6.6.1 – If the originating Party passes sufficient information to allow proper billing of traffic, in the form of CPN, CIC, LRN, and/or OCN information, on ninety-five percent (95%) or more of the calls that it sends to the receiving Party, the receiving Party shall bill the originating carrier the Reciprocal Compensation Traffic termination rates, Measured Internet Traffic rates, intrastate Switched Exchange Access Service rates, intrastate/interstate Transit Traffic rates, or interstate Switched Exchange Access Service rates applicable to each relevant minute of traffic (including Exhibit A and applicable Tariffs), for which sufficient information to allow proper billing of traffic, in the form of CPN, CIC, LRN, and/or OCN information, is passed. For the remaining (up to five percent (5%) of) calls without sufficient information to allow proper billing of traffic, in the form of CPN, CIC, LRN, and/or OCN information, the receiving Party shall bill the originating Party for such traffic at Reciprocal Compensation Traffic termination rates, Measured Internet Traffic rates, intrastate Switched Exchange Access Service rates, intrastate/interstate Transit Traffic rates, or interstate Switched Exchange Access Service rates applicable to each relevant minute of traffic (including Exhibit A and applicable Tariffs), in direct proportion to the

minutes of use of calls passed with sufficient information to allow proper billing of traffic, in the form of CPN, CIC, LRN, and/or OCN information.

5.6.6.2 – If the originating Party passes sufficient information to allow proper billing of traffic, in the form of CPN, CIC, LRN, and/or OCN, on less than ninety-five percent (95%) of its calls, the receiving Party shall bill the originating Party the higher of its intrastate Switched Exchange Access Service rates or its interstate Switched Exchange Access Service rates for that traffic passed without sufficient information to allow proper billing of traffic, in the form of CPN, CIC, LRN, and/or OCN information, which exceeds five percent (5%), unless the Parties mutually agree that other rates should apply to such traffic. For any remaining (up to five percent (5%) of) calls, without sufficient information to allow proper billing of traffic, in the form of CPN, CIC, LRN, and/or OCN information, the receiving Party shall bill the originating Party for such traffic at Reciprocal Compensation Traffic termination rates, Measured Internet Traffic rates, intrastate Switched Exchange Access Service rates, intrastate/interstate Transit Traffic rates, or interstate Switched Exchange Access Service rates applicable to each relevant minute of traffic (including Exhibit A and applicable Tariffs), in direct proportion to the minutes of use of calls passed with sufficient information to allow proper billing of traffic, in the form of CPN, CIC, LRN, and/or OCN information. Notwithstanding any other provision of this Agreement, if the receiving Party is not compensated for traffic passed without sufficient information to allow proper billing of traffic, in the form of CPN, CIC, LRN, and/or OCN information, then the originating Party must cease routing such traffic from its switch(es) to the receiving Party upon ten (10) days' written notice to the other Party. If the receiving Party is not compensated for such traffic, and the originating Party does not cease routing such traffic upon ten (10) day's written notice from the receiving Party, then the receiving Party may cease receiving or terminating such traffic immediately, without further notice or any liability whatsoever to the originating Party.

6.3.9 – Cavalier shall provide Verizon with the Originating Switched Access Detail Usage Data (EMI category 1101XX records), recorded at the Cavalier end office switch, on magnetic tape or via such other media as the Parties may agree, no later than ten (10) business days after the date the usage occurred.

7.2.2 – Transit Traffic may be routed over the Interconnection Trunks described in Sections 4 and 5. Each Party shall deliver each Transit Traffic call to the other Party with CCS and the appropriate Transactional Capabilities Application Part ("TCAP") message to facilitate full interoperability of those CLASS Features supported by the receiving Party and billing functions. In all cases, each Party shall follow the Exchange Message Interface ("EMI") standard and exchange records between the Parties. For such Transit Traffic, each Party shall also deliver other necessary information consistent with industry guidelines; such information shall be sufficient to allow proper billing of such Transit Traffic, including but not limited to CPN, CIC, LRN, and/or OCN information.

3. Issue C4 (Third-Party Charges)

a. Introduction

44. Cavalier proposes language that would recognize that the Parties have reciprocal obligations to each other to the extent each Party provides Transit Service on behalf of the other Party.[156] Verizon proposes language that would establish distinct obligations depending on which Party provides Transit Service. Under the first part of Verizon's proposal, Cavalier would be obligated to pay Verizon for Transit Service that Cavalier originates, and to reimburse Verizon for whatever charges a terminating carrier levies upon Verizon, and not Cavalier, for the delivery or termination of Cavalier traffic, unless Cavalier successfully disputes the charges. Second, Verizon's proposal provides that, where a third-party carrier's central office subtends a Cavalier Central Office, Cavalier would make Tandem Transit Service available to Verizon at Verizon's request, so that Verizon could terminate calls to that third-party carrier's Central Office that subtends a Cavalier Central Office.[157]

b. Positions of the Parties

45. Cavalier proposes language for section 7.2.6 that would provide for reciprocal obligations should Cavalier begin to provide Transit Service for Verizon.[158] Cavalier opposes Verizon's proposed section 7.2.6 language because it would hold Cavalier responsible for unspecified third-party charges without a reciprocal obligation from Verizon in the event Cavalier provides Transit Service for Verizon.[159] Cavalier maintains that previously Verizon has not billed Cavalier for third-party termination of transit calls,[160] because under normal industry billing practices, the terminating carrier should bill the originating carrier directly.[161] Cavalier contends that it should not be held responsible for unspecified billing charges that Verizon chooses to pay a third-party terminating carrier, at least not without a reciprocal obligation from Verizon.[162] Cavalier characterizes Verizon's proposal as seeking indemnification from Cavalier

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[156] *See* Final Proposed Language at 4 (Cavalier Proposed § 7.2.6). For the purposes of this section, transiting carrier means the carrier that provides Transit Service for calls originated by another carrier.

[157] *See* Final Proposed Language at 4-5 (Verizon Proposed §§ 7.2.6, 7.2.7).

[158] Cavalier maintains that it is unclear whether the underlying agreement between AT&T and Verizon provides for reciprocal transit obligations. Cavalier Direct Testimony of Clift at 2; Cavalier Rebuttal Testimony of Whitt at 5.

[159] Cavalier Direct Testimony of Clift at 2.

[160] Cavalier Rebuttal Testimony of Whitt at 4-5.

[161] *Id*.

[162] Cavalier Direct Testimony of Clift at 2; Cavalier Rebuttal Testimony of Whitt at 5.

in case of billing disputes, and Cavalier does not want to assume responsibility for any bill Verizon chooses to pay to a terminating carrier.[163]

46. Verizon contends that Cavalier should reimburse Verizon if a terminating carrier bills Verizon, rather than Cavalier, for traffic that Cavalier originates and sends to a Verizon tandem for termination by the third carrier.[164] Verizon maintains that its language would obligate it to cooperate with Cavalier to dispute charges, at Cavalier's expense, but ensures that Cavalier pay any charges associated with Cavalier's own traffic.[165] By contrast, Verizon asserts that Cavalier's proposed language would require Cavalier to reimburse Verizon only for those charges that Cavalier deems "proper."[166] Verizon indicates that it agrees that the Parties' transit obligations should be reciprocal, but Verizon opposes Cavalier's language because it would revise several contract provisions,[167] while Verizon's proposed language for reciprocal transit obligations – should Cavalier begin to offer transit service – would be contained in a single contract provision.[168] Verizon maintains that it is not required to provide Transit Service at all or to serve as a billing intermediary between carriers, and that Cavalier should develop direct billing relationships with other carriers.[169]

c. Discussion

47. We adopt Cavalier's proposed language for section 7.2.6, with respect to reciprocal obligations for Transit Service, with modifications that include some language from Verizon's proposed section 7.2.6. We reject Verizon's proposed section 7.2.7.

48. While Cavalier does not currently provide Transit Service to other carriers, it has indicated that it plans to do so.[170] Thus, it is appropriate in the context of this Agreement to include the terms that will apply when Cavalier does provide Transit Service that Verizon originates, particularly in light of Verizon's agreement in principle that Transit Service obligations should be reciprocal.[171] We find that Verizon's proposed language does not, in fact,

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[163] Cavalier Rebuttal Testimony of Whitt at 4-5.

[164] Verizon Brief at 11; s*ee also* Verizon Answer/Response at 9.

[165] Verizon Brief at 12-13; s*ee also* Verizon Answer/Response at 9; Verizon Direct Testimony of Smith at 12.

[166] Verizon Brief at 11; s*ee also* Verizon Direct Testimony Smith at 11.

[167] Verizon points out that Cavalier amends §§ 1.87 and 7.2.6 to provide reciprocal Transit Service obligations, even though Cavalier does not provide Transit Service for Verizon. *See* Verizon Brief at 12-13; Verizon Answer/Response at 9; Verizon Direct Testimony of Smith at 13; Verizon Rebuttal Testimony of Smith at 8.

[168] Verizon Brief at 13.

[169] Verizon Brief at 11-12; Verizon Rebuttal Testimony of Whitt at 4–5.

[170] Cavalier Brief at 19.

[171] Verizon Brief at 12-13.

provide a reciprocal obligation between the Parties, despite the fact that Verizon states it does not object to reciprocal Transit Service obligations.[172]

49. The Parties agree that in normal circumstances, the terminating carrier would bill the originating carrier directly, based on the billing information the transiting carrier passes along with the call. We do not see any indication that Cavalier originates calls to Verizon without including necessary information for terminating carriers to render bills directly to Cavalier. Under these circumstances, if Verizon passes along adequate billing information, terminating carriers should be able to bill Cavalier directly.[173] Nevertheless, it appears that in some cases terminating carriers bill Verizon for these calls.[174] While we agree that Cavalier is the appropriate Party to be billed for calls it originates, Verizon's proposed language neither indicates under which circumstances it would pay charges billed to it by a terminating carrier nor does it provide guidance regarding how Cavalier may determine whether the charges reflect the actual type of call which Cavalier originated.[175] Rather, Verizon's proposed language indicates that Verizon will pay charges levied by a terminating carrier and then attempt to recover those charges from Cavalier, regardless of which charges should appropriately apply to the call.

50. We find that Verizon's proposed language obligates itself only to dispute charges from a terminating carrier at Cavalier's request. This is of little value to Cavalier because Verizon also seeks to require Cavalier to pay for expenses that Verizon incurs to dispute the charges, including attorneys' fees, without regard to whether the third party charges are ultimately deemed proper or improper. We nevertheless agree that the Parties should cooperate as indicated in Verizon's proposed section 7.2.6 to dispute any charges imposed by the terminating carrier on the transiting carrier that appear improper because the terminating carrier did not receive sufficient or accurate information from Verizon about the call. In such cases, the transiting carrier is the entity most likely to know the information that was provided to the terminating carrier regarding the type of traffic and its point of origination and whether that information is consistent with information the transiting carrier received about the call. This

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[172] We find that Verizon's proposed language obligates Cavalier to reimburse Verizon for charges it pays to carriers terminating Cavalier traffic, but we do not find that Verizon's proposal similarly obligates Verizon to reimburse Cavalier for charges Cavalier might pay to another carrier in a circumstance where Cavalier provides Transit Service to Verizon. *See* Final Proposed Language at 4-5 (Verizon Proposed §§ 7.2.6, 7.2.7).

[173] We note that in certain cases, Verizon terminates traffic to one carrier on behalf of another carrier and does not always transmit the information necessary to enable the terminating carrier to appropriately identify the type of call and bill the appropriate originating carrier. *See supra* Issue C3.

[174] We cannot determine whether this is due to omissions by Verizon in billing information passed to terminating carriers (*see supra* note 173), or whether terminating carriers may simply choose to bill Verizon rather than Cavalier. *See* Tr. at 172.

[175] We find Verizon's willingness to pay charges levied by a terminating carrier puzzling in light of Verizon's stated objection to serve as a "billing intermediary" for Transit Service. *See supra* Issue C3. In this instance, however, Verizon's proposed language indicates that it would do so rather than insisting that such terminating carrier bill Cavalier directly. *See* Final Proposed Language at 4-5 (Verizon Proposed § 7.2.6).

information is essential when resolving disputes regarding proper charges.[176] We thus adopt the portion of Verizon's language that indicates it will work cooperatively with Cavalier to dispute the charges. Similarly, we adopt Verizon's language regarding full payment of charges ordered by an appropriate commission, court, or other regulatory body. If a dispute regarding charges has risen to the level of resolution by such a body of competent jurisdiction, these ordered charges should be deemed to be "properly imposed" under Cavalier's proposed section 7.2.6 and thus, Cavalier should not object to their payment.[177]

d. Arbitrator's Adopted Contract Language

51. With respect to Issue C4, and in accordance with the foregoing discussion, the Arbitrator adopts the following language:

> 7.2.6. – Each Party shall pay the other Party for Transit Service that the paying Party originates, at the rate specified in Exhibit A, plus any additional charges or costs that the terminating CLEC, ITC, CMRS carrier, or other LEC, properly imposes or levies on the compensated Party for the delivery or termination of such traffic, including any Switched Exchange Access Service charges. In the event the transiting Party bills the originating Party for charges or costs that the terminating CLEC, ITC, CMRS carrier, or other LEC imposes or levies on the transiting Party for the delivery or termination of the originating Party's traffic, the transiting Party will, upon the originating Party's request, work cooperatively with the originating Party to dispute such charges or costs with the terminating CLEC, ITC, CMRS carrier, or other LEC. In the event the Commission or a court or arbitrator of competent jurisdiction orders the transiting Party to pay (in whole or in part) charges or costs that the terminating CLEC, ITC, CMRS carrier, or other LEC imposes or levies on the transiting Party for the delivery or termination of the originating Party's traffic, the originating Party will reimburse the transiting Party in full for the charges or costs that the transiting Party is ordered to pay.

4. Issue C5 (Reasonable Assistance with Direct Interconnection)

a. Introduction

52. Both Parties agree to language stating that neither Party shall take any actions to prevent the other Party from entering into direct and reciprocal traffic exchange agreements with

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[176] We reject Verizon's position that Cavalier's language might require Verizon to serve as a billing intermediary, and we reject Verizon's characterization of the Bureau's conclusions regarding transit services in the *Virginia Arbitration Order*. *See supra* note 151.

[177] In adopting these provisions from Verizon's proposed § 7.2.6, we modify the language slightly to be consistent with the general reciprocal transit service obligations that Cavalier proposes in § 7.2.6. Accordingly, we substitute the word "Verizon" with "transiting Party" and the word "Cavalier" with "originating Party." *See* Final Proposed Language at 4-5 (Verizon Proposed § 7.2.6).

third parties. Each Party, however, proposes additional language to address Cavalier's request for Verizon to take an active role in Cavalier's negotiations with third-party carriers.[178] Cavalier's proposed language would obligate Verizon to provide "affirmative but reasonably limited assistance" to Cavalier, assistance which would include "timely providing information, timely responding to inquiries, and . . . participating in discussions and negotiations with third parties."[179] Verizon proposes language that would require it to provide contact information to Cavalier and, in the event Cavalier's "commercially reasonable efforts to initiate negotiation" with a third party fail, "to assist Cavalier in scheduling a conference call and/or meeting" with the third party.[180] Verizon's proposal would not obligate it to participate in any conference calls or meetings between Cavalier and third parties.[181]

b. Positions of the Parties

53. Cavalier contends that Verizon's cooperation is essential to Cavalier's ability to enter into direct traffic exchange agreements with third-party carriers because Verizon possesses information concerning its relationship with third-party carriers that Cavalier has found, in past negotiations, would aid its understanding of traffic flow and billing between Verizon and the third party.[182] Cavalier maintains that it needs certain information regarding the compensation arrangements for the traffic it is indirectly exchanging with these third parties through Verizon, and that this is information that only Verizon possesses.[183] Cavalier also alleges that Verizon has failed to respond to Cavalier's request for assistance negotiating direct agreements with third parties, despite Verizon's current contractual duty to cooperate.[184] According to Cavalier,

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[178] Cavalier's desire to enter these direct relationships results both from the obligation, imposed by § 7.2.3 of the Agreement, to "exercise best efforts" to enter into such agreements, and from routing and billing difficulty Cavalier has experienced with traffic that Verizon transits from third-party carriers for termination with Cavalier. *See supra* Issue C3.

[179] *See* Final Proposed Language at 5-6 (Cavalier Proposed § 7.2.8).

[180] *See* Final Proposed Language at 5-6 (Verizon Proposed § 7.2.8).

[181] *Id.*

[182] Cavalier Brief at 23; Cavalier Reply Brief at 9; Cavalier Direct Testimony of Clift at 3-4. For example, Cavalier maintains that Verizon is the only entity in a position to know how intercarrier billing actually works, or whether traffic is being routed over the correct trunk group. Cavalier Brief at 23; Cavalier Direct Testimony of Clift at 4-5.

[183] Cavalier Brief at 23-24; Cavalier Rebuttal Testimony of Clift at 7. Cavalier opposes Verizon's language because Cavalier is already able to obtain the contact information it needs. Cavalier Brief at 23. Moreover, Cavalier indicates that it is insufficient simply to rely on the publicly available interconnection agreement between Verizon and the third party carrier for whom Verizon is performing the transiting service, because it is necessary for Cavalier to know how Verizon treats the traffic it receives and transits for termination to Cavalier or other carriers. Cavalier Reply Brief at 9.

[184] Cavalier Direct Testimony of Clift at 3-4. Although the witness does not cite any section of the Parties' current agreement, we note that § 4.9 of the Price Schedule attached to that agreement provides that "[t]he Parties will, upon request, provide each other with all reasonable cooperation and assistance in obtaining [reciprocal local traffic (continued….)

Verizon wishes to discourage direct connection between other carriers in order to safeguard its current transit revenue,[185] yet Verizon refuses to provide the necessary information to enable Cavalier to bill the originating carrier for the terminating service Cavalier provides.[186]

54. Verizon claims it has no duty under the Act to help Cavalier negotiate traffic exchange agreements.[187] Verizon claims that Cavalier's proposal would be burdensome and would require access to competitively sensitive Verizon information.[188] Verizon maintains that Cavalier has not demonstrated a need for Verizon's help,[189] and Cavalier can find all the information it needs on the signaling stream and billing tapes that Verizon sends to Cavalier.[190]

c. Discussion

55. We adopt a modified version of both Parties' proposed language. We begin with the mutually acceptable language regarding the duty not to hamper the other Party's negotiations with third-party carriers. In addition, because we agree with Verizon that Cavalier's proposed language may impose upon Verizon an inappropriate duty to negotiate Cavalier's direct traffic agreements with other carriers,[191] we adopt Verizon's proposed language, but modify it in two respects. First, we find that the duty to assist negotiations with third-party carriers should be reciprocal between Verizon and Cavalier, and we modify Verizon's proposal accordingly.[192] Second, we find that Verizon comes into possession of important information regarding origination and termination through Verizon's provision of a transit service, such as the nature and amount of traffic that carriers pass through Verizon's network, matters for which terminating and originating carriers may have inconsistent or incomplete information. Carriers need to know this basic information in order to form a direct relationship that properly accounts for their traffic to each other. Therefore, we also modify Verizon's language to incorporate certain limited aspects of Cavalier's proposal that reflect this finding. We share Verizon's concern that an open-ended obligation to provide information could require Verizon to share proprietary

(Continued from previous page)
exchange arrangements with third parties]" and indicates that "[t]he Parties agree to work cooperatively in appropriate industry fora to promote the adoption of reasonable industry guidelines relating to transit traffic." Cavalier Arbitration Petition at Ex. C.

[185] Cavalier Brief at 24; Cavalier Rebuttal Testimony of Clift at 8-9.

[186] *See supra* Issue C3; Cavalier Brief at 8.

[187] Verizon Brief at 14.

[188] Verizon Brief at 15; Verizon Answer/Response at 11; Verizon Direct Testimony of Smith at 14.

[189] Verizon notes that Cavalier negotiated an arrangement with Cox without Verizon's help. Verizon Brief at 15-16; Verizon Rebuttal Testimony of Smith at 8-9. Cavalier asserts that its negotiations with Cox may have been much shorter if Verizon had supplied requested billing information. Cavalier Brief at 23.

[190] Verizon Brief at 15-16; Verizon Answer/Response at 12.

[191] *See* Verizon Reply Brief at 15; Verizon Rebuttal Testimony of Smith at 8.

[192] This approach is consistent with our treatment of transit traffic generally. *See supra* Issue C4.

information with Cavalier.[193] We understand Cavalier's proposal to permit it to request information that pertains solely to its relationship with the third-party carrier with whom Cavalier seeks to interconnect directly, and we modify the contract language accordingly.

d. Arbitrator's Adopted Contract Language

56. Accordingly, the Arbitrator adopts Verizon's proposed language with respect to Issue C5, modified as follows:

> 7.2.8. – Neither Party shall take any actions to prevent the other Party from entering into a direct and reciprocal traffic exchange agreement with any carrier to which it originates, or from which it terminates, traffic. Upon request, either Party (the requested Party) shall provide to the other Party (the requesting Party) the names, addresses and phone numbers of points of contact of CLECs, ITCs, CMRS providers, and/or other LECs with which that Party wishes to establish reciprocal Telephone Exchange Service traffic arrangements in the Commonwealth of Virginia, provided that the requested Party has such information in its possession. In the event that the requesting Party makes commercially reasonable efforts to initiate negotiation of a direct and reciprocal traffic exchange agreement with a CLEC, ITC, CMRS carrier or other LEC and such efforts are not successful, the requested Party will, upon written request (including, without limitation, a statement detailing such efforts by the requesting Party), provide affirmative but reasonably limited assistance to the requesting Party. Such affirmative but reasonably limited assistance shall consist of (1) making commercially reasonable efforts to assist the requesting Party in scheduling a conference call and/or a meeting between the requesting Party and such third party carrier, (2) timely providing information regarding the nature of the traffic exchanged between the third-party carrier and the requesting Party through the requested Party, and (3) timely responding to inquiries. Notwithstanding any provision here, in no event shall the requested Party be required to participate in interconnection negotiations, mediations, arbitrations, hearings, litigation or the like involving the requesting Party and a third-party carrier, or to take any actions in connection therewith, except as explicitly set forth in this section 7.2.

5. Issue C6 (911/E911)

a. Introduction

57. Cavalier proposes language that would establish notification and cost-allocation obligations to govern both Parties' interaction with the Public Safety Answering Points (PSAPs)

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[193] *See* Verizon Brief at 15; Verizon Answer/Response at 11; Verizon Direct Testimony of Smith at 14.

regarding 911/E911 service to Cavalier's customers.[194] Specifically, Cavalier asks the Bureau to adopt contract terms that would: (1) require the Parties jointly to inform PSAPs of 911/E911 procedures applicable to each Party; (2) require Verizon not to charge PSAPs for 911/E911 functions that Cavalier performs; and (3) require Verizon to reduce its 911/E911 charges to PSAPs to reflect 911/E911 functions that Cavalier performs.[195] Verizon proposes to retain the language found in the underlying AT&T agreement.[196]

b. Positions of the Parties

58. Cavalier asserts that Verizon's 911/E911 charges to PSAPs should reflect the fact that when customers switch their local service provider from Verizon to Cavalier, Cavalier performs part of the 911/E911 service for that customer and consequently incurs 911/E911-related costs that it should appropriately recover from the PSAPs.[197] However, Cavalier contends that Verizon does not reduce Verizon's charges to the PSAPs to reflect that Verizon's costs decrease when a customer switches to Cavalier. Cavalier concedes that Verizon still performs a 911/E911 function after a customer switches to Cavalier, but Cavalier maintains that Verizon's function changes but Verizon's tariff does not account for this, which leads to double billing.[198] As a result, Cavalier complains that PSAPs have refused payment to Cavalier for the 911/E911 costs it incurs. To solve this problem, Cavalier proposes language that would require Verizon to cooperate to clarify which LEC is owed for which 911/E911 services, including reducing the rates Verizon charges the PSAPs, in order to identify and account for the 911/E911 service that Cavalier provides to its customers.[199]

59. Verizon asserts that its 911/E911 costs, as the administrator of the 911/E911 system, are not reduced by Cavalier's provision of local services which include 911/E911 service.[200] Verizon maintains that its costs are fixed and unrelated to which LEC serves a

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[194] A PSAP is defined as "a facility that has been designated to receive emergency calls and route them to emergency service personnel." 47 U.S.C. § 222(h) (4).

[195] *See* Final Proposed Language at 6 (Cavalier Proposed §§ 7.3.9, 7.3.10).

[196] *See* Final Proposed Language at 6 (Verizon Proposed §§ 7.3.9, 7.3.10).

[197] Cavalier indicates that it provides three 911/E911 functions for its customers: entry of customer names and addresses into Verizon's database, automatic location identification, and routing 911 calls, in conjunction with Verizon, to the appropriate PSAP. Cavalier Direct Testimony of Clift at 7; Cavalier Rebuttal Testimony of Clift at 9.

[198] Cavalier Direct Testimony of Clift at 8. Cavalier argues that Verizon's process results in double billing of the PSAP because it applies its tariffed charges based on "1000 local exchange lines, even though those exchange lines are Cavalier lines." Cavalier Direct Testimony of Clift at 7 (emphasis omitted).

[199] Cavalier Brief at 24-26; Cavalier Direct Testimony of Clift at 5.

[200] Verizon Reply Brief at 20; Verizon Answer/Response at 13.

particular customer.[201] In addition, Verizon contends that Cavalier should resolve this issue directly with the PSAPs, and asserts that the Virginia Commission is the appropriate forum to deal with 911/E911 tariffed retail charges to PSAPs.[202] Cavalier concedes that this issue is currently before the Virginia Commission, but is not sure how or when it will be resolved.[203] Therefore, as a short-term solution, Cavalier maintains that Verizon should offset its PSAP charges against Cavalier's charges until the Virginia proceeding is concluded.[204]

c. Discussion

60. We reject Cavalier's proposed language, and adopt the language Verizon offers for sections 7.3.9 and 7.3.10. We do not find the Parties' Agreement to be the proper vehicle to address this issue, particularly when the issues are pending before the Virginia Commission. Accordingly, we find that the Virginia Commission is the appropriate forum to adjudicate 911/E911 retail tariff disputes. Consequently, we defer to the outcome of the Virginia Commission's proceeding.

d. Arbitrator's Adopted Contract Language

61. Accordingly, the Arbitrator adopts the following language for Issue C6:

> 7.3.9 – Verizon and Cavalier will work cooperatively to arrange meetings with PSAPs to answer any technical questions the PSAPs, or county or municipal coordinators may have regarding the 911/E911 arrangements.
>
> 7.3.10 – Cavalier will compensate Verizon for connections to its 911/E911 pursuant to Exhibit A.

6. Issues C9 (xDSL-Capable Loops)

a. Introduction

62. Cavalier and Verizon disagree about the language governing certain operational and pricing issues for xDSL-capable loops. Cavalier seeks additional protection against inaccuracies in Verizon's loop qualification information,[205] which is used to determine the technical characteristics of loops to determine their suitability for providing xDSL service.

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[201] Verizon Reply Brief at 20; Verizon Direct Testimony of Green at 5; Verizon Rebuttal Testimony of Green at 3-4.

[202] Verizon Answer/Response at 13-14.

[203] Cavalier Brief at 26-27. *See* Establishing Rules Governing the Provision of Enhanced 911 Service by Local Exchange Carriers, Order for Notice and Comment or Requests for Hearing, PUC-2003-00103, (Va Comm'n Aug. 1, 2003).

[204] Cavalier Brief at 26-27; Cavalier Direct Testimony of Clift at 9.

[205] Cavalier Brief at 27-29.

Verizon states that its existing loop qualification process is adequate.[206] Cavalier also proposes language that would allow it to obtain unbundled xDSL-capable loops that more closely track the requirements of the specific "ReachDSL" service it offers.[207] Verizon claims that its standard loop offerings, coupled with the availability of line conditioning, already allow Cavalier to offer the services it desires.[208] The Parties also disagree as to what rates Verizon may charge Cavalier for loop qualification and conditioning in Virginia.[209] Cavalier also seeks to reduce the required maintenance and repair intervals associated with xDSL-capable loops to require quicker repairs. Cavalier proposes language that would prohibit Verizon's practice of occasionally substituting 2-wire HDSL loops with 4-wire interfaces when Cavalier orders 4-wire DS1-compatible loops, because Cavalier states that it has experienced more problems with the substituted loops.[210] Verizon asserts that its standard maintenance and repair interval and provisioning practices for xDSL-capable loops meet Cavalier's needs, and satisfy Verizon's obligations under the Act and Commission rules.[211]

b. Access to Loop Qualification Information

(i) Positions of the Parties

63. According to Cavalier, in some situations it receives loop qualification information from Verizon indicating that no xDSL-capable loops are available to serve a customer, but subsequently Verizon nonetheless is able to provide xDSL service to that customer.[212] Cavalier thus speculates that it has access to inferior loop qualification information than is available to Verizon. To address this situation, Cavalier proposes language requiring that new Verizon xDSL customers have the right to transfer to Cavalier at no charge if, within 60 days prior to initiating service with Verizon, Cavalier obtained loop qualification information indicating that no xDSL-capable loop was available to serve that customer.[213]

64. Cavalier also states that the loop qualification language proposed by Verizon entails a needlessly complicated process that Verizon has not adequately explained or justified.[214]

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[206] Verizon Brief at 20-21, 25-26.

[207] Final Proposed Language at 7-8 (Cavalier Proposed §§ 11.2.3 – 11.2.8(a)).

[208] Verizon Brief at 21-24.

[209] *Compare* Final Proposed Language, Ex. A, Part VI (Cavalier Pricing Attachment) *with* Final Proposed Language, Ex. A, Part VI (Verizon Pricing Attachment).

[210] Cavalier Brief at 30-32.

[211] Verizon Brief at 26-27, 29.

[212] Cavalier Brief at 27-29 & Exs. C9-1, C9-2.

[213] Final Proposed Language at 10 (Cavalier Proposed § 11.2.13).

[214] Cavalier Brief at 28; Cavalier Reply Brief at 12.

Thus, Cavalier proposed a contract provision providing for access to loop qualification information through more "simple and straightforward language."[215]

65. Cavalier also asserts that Verizon's standard loop qualification provisions should be rejected. According to Cavalier, Verizon has not adequately justified the extensive mechanized and manual processes that would be used to obtain loop qualification information.[216] Finally, Cavalier asserts that Verizon waived its right to assert its proposed loop qualification changes to section 11.2.12 by failing expressly to raise its issue V26 in responding to Cavalier's petition, and instead raising them as part of issue C9.[217]

66. Verizon claims to provide Cavalier and other competitive LECs with access to the same loop qualification information that Verizon itself uses.[218] Verizon maintains that this parity of access was confirmed in the *Verizon Virginia Section 271 Order*,[219] and that Cavalier's examples fail to demonstrate discriminatory conduct.[220] The changes made in Verizon's loop qualification systems since the time it received section 271 approval for Virginia improved the access or detail of information provided to competitive LECs.[221] Verizon states that its use of line-and-station transfers and line conditioning – not better access to loop qualification information – allows it to provide xDSL service where loop qualification information initially indicates that no xDSL-capable loop is available.[222] These capabilities already are available to competitive LECs, giving Cavalier an equal opportunity to provide xDSL service to these customers.[223]

67. Verizon claims that its loop qualification proposal is justified as the implementation of a process to which competitive LECs in a New York DSL collaborative agreed, approved by state commissions, including the Virginia Commission, and approved by the Commission for purposes of section 271 approval.[224] Finally, Verizon claims that it did not

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[215] Cavalier Direct Testimony of Edwards at 2; Cavalier Brief at 28.

[216] Cavalier Brief at 27; Cavalier Reply Brief at 12.

[217] Verizon Answer/Response at 4.

[218] Verizon Brief at 21; Verizon Direct Testimony of Albert Panel at 8.

[219] Verizon Brief at 21 (citing *Verizon Virginia Section 271 Order*, 17 FCC Rcd at 21895, 21898, paras. 29, 34).

[220] *Id*. at 23-24.

[221] Verizon Reply Brief at 22; Tr. at 436-37.

[222] Verizon Brief at 25; Verizon Direct Testimony of Albert Panel at 13. In the context of xDSL service, a "line-and-station transfer" involves switching a customer's service from a loop that is not suitable for providing xDSL service to an available loop that is suitable for providing xDSL service. Verizon Direct Testimony of Albert Panel at 13.

[223] Verizon Brief at 25-26.

[224] Verizon Reply Brief at 20-22. Verizon also claims that Cavalier has deleted much of the language that would give it a right to access loop qualification information. Verizon Brief at 20. We note, however, that Cavalier's (continued….)

waive its right to propose revised loop qualification language regarding section 11.2.12 by raising them in the context of issue C9 rather than issue V26, because they are the same issue.[225]

(ii) Discussion

68. We generally adopt Verizon's language, with the exception of section 11.2.12.2. For that section, as discussed below, we do not adopt either Party's proposed language, but instead we direct the Parties to submit in their compliance filings revised language in accordance with the *Virginia Arbitration Order* and *Virginia Cost Issues Arbitration Order*.[226] As an initial matter, we reject Cavalier's assertion that Verizon has waived its right to propose its changes to section 11.2.12, and agree with Verizon that issues C9 and V26 concern the same fundamental issues. Further, we note that section 11.2.12 clearly is in dispute under issue C9, and our rules permit the Parties to submit revised final offers with respect to the issues in dispute.[227] We thus find that Verizon's proposed section 11.2.12 is properly before us.

69. Further, Cavalier submits no direct evidence that indicates that Verizon's processes and procedures to identify xDSL-capable loops would provide unequal access to loop qualification information. Cavalier presents only the inference it draws from the circumstances where Verizon provides xDSL service.[228] Verizon adequately rebuts Cavalier's inference of unequal access by explaining how Verizon is able to provide xDSL service using line-and-station transfers and line conditioning, which it similarly makes available to Cavalier where requested to provision xDSL-capable loops.[229]

70. Verizon asserts that its proposed loop qualification language accurately describes the processes developed in collaboration with competitive LECs, and approved by the Virginia Commission and this Commission for purposes of section 271 approval. Cavalier does not claim

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revised proposed contract language restores much of those provisions. Final Proposed Language at 9-10 (Cavalier Proposed § 11.2.12).

[225] Verizon Brief at 30; Verizon Rebuttal Testimony of Albert Panel at 13-14.

[226] 47 C.F.R. § 51.807(f)(3); *see also supra* para. 16 n.49.

[227] 47 C.F.R. § 51.801(d); *see also supra* para. 11.

[228] One Cavalier witness testified that Cavalier has anecdotal evidence of customers seeking xDSL service from Cavalier, being "told it was unavailable" but ultimately obtaining xDSL service from Verizon. Cavalier Direct Testimony of Edwards at 1-2. However, Cavalier provides no evidence of which party told the customer that xDSL service is not available. Indeed, in the specific examples Cavalier provides, Cavalier, not the end-user customer, is the party receiving the loop qualification information. Similarly, Cavalier, not Verizon, is the party informing Cavalier's potential customer that xDSL service is not available when, in fact, it might be possible for Cavalier to provide xDSL service to that customer following conditioning of the loop or a line-and-station transfer. *See* Cavalier Brief at Ex. C9-1. We thus find no evidence that Verizon is misleading customers regarding the availability of xDSL service when provided by Cavalier.

[229] To the extent that Verizon regularly performs such activities to provide service to its own customers, it must perform those functions for Cavalier, 47 C.F.R. § 51.319(a)(8), and Verizon does. Verizon Brief at 25-26.

that this process violates the Act or Commission rules, nor does it even state its specific concerns regarding Verizon's language. We find, however, that aspects of Verizon's loop qualification language regarding mechanized loop qualification information charges run counter to the Bureau's determinations in the *Virginia Cost Issues Arbitration Order*.[230] Further, we find Verizon's proposed section 11.2.12.2 language to be ambiguous as to whether Cavalier is restricted from using alternative methods of loop qualification generally available to other competitive LECs, contrary to the Bureau's determinations in the *Virginia Arbitration Order* and the *Virginia Cost Issues Arbitration Order*.[231] Consequently, we do not adopt Verizon's proposed section 11.2.12.2. Because we reject the language that both Parties submitted, pursuant to section 51.807(f)(3) of the Commission's rules we direct the Parties to submit in their compliance filings revised language in accordance with the *Virginia Arbitration Order* and the *Virginia Cost Issues Arbitration Order*.[232]

(iii) Arbitrator's Adopted Contract Language

71. As discussed above, the Arbitrator adopts the following language:

11.2.12 – "Digital Designed Loops" are comprised of designed loops that meet specific Cavalier requirements for metallic loops over 18k ft. or for conditioning of ADSL, HDSL, IDSL, SDSL or BRI ISDN (Premium) Loops. "Digital Designed Loops" may include requests for:

A) a 2W Digital Designed Metallic Loop with a total loop length of 18k to 30k ft., unloaded, with bridged tap(s) removed, at Cavalier's option;

B) a 2W ADSL Loop of 12k to 18k ft. with bridged tap(s) removed, at Cavalier's option;

C) a 2W ADSL Loop of less than 12k ft. with bridged tap(s) removed, at Cavalier's option;

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[230] *Virginia Cost Issues Arbitration Order*, 18 FCC Rcd at 17963, para. 616 (disallowing mechanized loop qualification information charges); *see also infra* para. 90.

[231] *See Virginia Arbitration Order*, 17 FCC Rcd at 27230-32, paras. 397-99; *Virginia Cost Issues Order*, 18 FCC Rcd at 17963-64, paras. 615-18. For example, the Bureau found in the *Virginia Cost Issues Arbitration Order* that the availability of an alternative tool for loop qualification, Verizon's Loop Facility Assignment and Control System (LFACS), should make the need for manual loop qualification rare. *Virginia Cost Issues Arbitration Order*, 18 FCC Rcd at 17963, paras. 615, 617. To the extent the language Verizon has proposed for § 11.2.12.2 does not recognize that Cavalier may use LFACS for loop qualification purposes, this proposed language must be modified.

[232] 47 C.F.R. § 51.807(f)(3); *see also supra* para. 16 n.49. We further note that, to the extent that Cavalier has actual evidence of discriminatory access to loop qualification information, it can file a complaint with the Commission or the Virginia Commission.

D) a 2W HDSL Loop of less than 12k ft. with bridged tap(s) removed, at Cavalier's option;

E) a 4W HDSL Loop of less than 12k ft with bridged tap(s) removed, at Cavalier's option;

F) a 2W Digital Designed Metallic Loop with Verizon-placed ISDN loop extension electronics;

G) a 2W SDSL Loop with bridged tap(s) removed, at Cavalier's option;

H) a 2W IDSL Loop of less than 18k ft. with bridged tap(s) removed, at Cavalier's option.

Requests for repeaters for 2W and 4W HDSL Loops with lengths of 12k ft. or more shall be considered pursuant to the Network Element Bona Fide Request process set forth in Exhibit B.

11.2.12.1 – Verizon shall make Digital Designed Loops available to Cavalier at the rates as set forth in Exhibit A.

11.2.12.3 – The Parties will make reasonable efforts to coordinate their respective roles in order to minimize Digital Design Loop provisioning problems. In general, unless and until a shorter period is required under Applicable Law, where conditioning or loop extensions are requested by Cavalier, an interval of eighteen (18) business days will be required by Verizon to complete the loop analysis and the necessary construction work involved in conditioning and/or extending the loop as follows:

A. Three (3) business days will be required following receipt of Cavalier's valid, accurate and pre-qualified service order for a Digital Designed Loop to analyze the loop and related plant records and to create an Engineering Work Order.

B. Upon completion of an Engineering Work Order, Verizon will initiate the construction order to perform the changes/modifications to the Loop requested by Cavalier. Conditioning activities are, in most cases, able to be accomplished within fifteen (15) business days. Unforeseen conditions may add to this interval, unless such additional time is not permitted pursuant to Applicable Law.

C. After the engineering and conditioning tasks have been completed, the standard Loop provisioning and installation process will be initiated, subject to Verizon's standard provisioning intervals.

11.2.12.4 – If Cavalier requires a change in scheduling, it must contact Verizon to issue a supplement to the original service order. If Cavalier cancels the request for conditioning after a loop analysis has been completed but prior to the commencement of construction work, Cavalier shall compensate Verizon for an Engineering Work Order charge as set forth in Exhibit A. If Cavalier cancels the request for conditioning after the loop analysis has been completed and after construction work has started or is complete, Cavalier shall compensate Verizon for an Engineering Work Order charge as well as the charges associated with the conditioning tasks performed as set forth in Exhibit A.

c. Loops Up To 30,000 Feet in Length

(i) Positions of the Parties

72. Cavalier proposes that Verizon make available to it all xDSL-capable loops up to 30,000 feet in length, including different features than Verizon's standard loop offerings.[233] Cavalier asserts that, although it can order loops from Verizon of the lengths it needs, Verizon's standard loop offerings include features that hinder Cavalier's ability to provide xDSL service, and that its proposed language is less complex.[234] Cavalier further claims that "it has never been offered loops over [18,000 feet] with reasonable loop conditioning rates in the event that load coils or other impediments must be removed."[235]

73. In addition, Cavalier claims that the power spectral density (PSD) mask[236] restrictions associated with Verizon's loop offerings improperly prevent Cavalier from providing its "ReachDSL" service over those loops.[237] With respect to the IDSL, SDSL, and digital designed metallic loop (DDML) loop types, Cavalier claims that Verizon improperly narrows the ways in which a technology can comply with the relevant PSD mask industry standard.[238] Specifically, Cavalier asserts that its service is in compliance with ANSI T1.417, the relevant national standard for PSD masks, which provides two approaches for demonstrating compliance.

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[233] Final Proposed Language at 8 (Cavalier Proposed § 11.2.8(a)).

[234] Cavalier Reply Brief at 13; Cavalier Direct Testimony of Edwards at 2.

[235] Cavalier Reply Brief at 13 n.43.

[236] PSD masks are a tool to help ensure that advanced services technologies can be deployed without causing harmful interference with other deployed loop technologies. PSD masks chart the maximum power and frequency levels that a particular xDSL technology will attain. Knowing these power and frequency levels allows engineers to deploy xDSL technologies in a way that minimizes interference from crosstalk between that xDSL technology and other technologies deployed within the same loop plant. *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912, 20991, para. 181 n.390 (1999) (*Line Sharing Order*).

[237] Final Proposed Language at 7-8 (Cavalier Proposed §§ 11.2.4 – 11.2.8(a)).

[238] Cavalier Brief at 32-35; Cavalier Reply Brief at 16-17; Cavalier Rebuttal Testimony of Ko at 1-5.

"Method A" requires a showing that the technology fits within certain predefined "classes" of PSD masks.[239] "Method B" involves a calculation-based approach to demonstrate compliance with the deployment guidelines of the PSD mask standard.[240] Cavalier submitted evidence that the ReachDSL technology satisfies the ANSI T1.417 standard using Method B, but asserts that Verizon's proposed language only allows it to use Method A.[241] Cavalier similarly maintains that the PSD mask and DC line power restrictions specified in Verizon technical reference TR 72575, associated with Verizon's ADSL and HDSL loops, limit Cavalier's ability to deploy the technology to offer ReachDSL service.[242]

74. Verizon states that it should not be required to create a new loop offering encompassing all loops up to 30,000 feet.[243] Verizon states that its standard loop offerings, in conjunction with line conditioning, already meet Cavalier's needs.[244] Specifically, Verizon states that it offers loops longer than 18,000 feet in length, which can be conditioned as needed by Cavalier to provide services using ReachDSL technology.[245] Verizon notes that Cavalier's concern about conditioning for loops longer than 18,000 feet was raised by Cavalier and rejected in the *Verizon Virginia Section 271 Order*.[246]

75. Verizon also claims that its proposed language associated with its xDSL-capable loops would not prevent Cavalier from offering ReachDSL service, despite Cavalier's contrary interpretation of that language.[247] Regarding the IDSL, SDSL, and DDML loop types, Verizon acknowledges that either Method A or Method B of demonstrating compliance with the ANSI T1.417 standard is proper, and it offers revised language in an effort to accommodate Cavalier's concerns.[248] Verizon, however, states that it cannot simply adopt that same language for its provisions regarding ADSL and HDSL loops. Verizon maintains that such a change for ADSL and HDSL loops, which are shorter than 18,000 feet, would require significant and needless modifications to its ordering, provisioning, and maintenance systems when its standard loop offerings already meet Cavalier's needs.[249] Specifically, Verizon states that "Verizon's language

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239 Cavalier Brief at 32-35; Cavalier Reply Brief at 16-17; Cavalier Rebuttal Testimony of Ko at 2.

240 Cavalier Brief at 32-35; Cavalier Reply Brief at 16-17; Cavalier Rebuttal Testimony of Ko at 3.

241 Cavalier Brief at 32-35; Cavalier Reply Brief at 16-17; Cavalier Rebuttal Testimony of Ko at Exs. KK-2, KK-3.

242 Cavalier Brief at 32; Cavalier Rebuttal Testimony of Ko at 4-5; Tr. at 438; *see also* Final Proposed Language at 7-8 (Verizon Proposed §§ 11.2.4 – 11.2.6).

243 Verizon Reply Brief at 28.

244 Verizon Brief at 20-22.

245 *Id*.

246 *Id*. at 22 (citing *Verizon Virginia Section 271 Order*, 17 FCC Rcd at 21964, para. 149).

247 Verizon Reply Brief at 28.

248 Tr. at 439-30; Final Proposed Language at 8-9 (Verizon Proposed §§ 11.2.7 – 11.2.8(a)).

249 Verizon Brief at 21-24; Verizon Reply Brief at 28.

does not prevent Cavalier from deploying its ReachDSL technology over one of Verizon's numerous, existing under-18,000 foot loop offerings."[250] Independently, at the hearing, Verizon asserted that the issue of loops shorter than 18,000 feet was not properly raised by Cavalier, and thus is not properly before us.[251]

(ii) Discussion

76. We adopt Verizon's provisions, modified to reflect Cavalier's ability to offer its ReachDSL service using those loops.

77. *New Loop Offering For All Loops Up To 30,000 Feet*. We do not adopt Cavalier's proposal for a new loop offering encompassing all loops up to 30,000 feet in length. We find that Verizon's separate loop offerings are adequate to satisfy its obligations under the Act and Commission rules, once Cavalier's concerns regarding PSD mask limits are addressed through changes in the language addressing the specific loop types.[252] Although Cavalier states that it cannot always get access to loops greater than 18,000 feet in length,[253] we note that the Commission reached the opposite conclusion in the *Verizon Virginia Section 271 Order*.[254] Cavalier has not provided a factual or legal basis for this Bureau to reach a different conclusion here. Cavalier presents no evidence that the mere fact that loops need to be conditioned in some circumstances violates section 251 or Commission rules. Further, we observe that Verizon largely has accepted Cavalier's proposed new loop offering for loops longer than 18,000 feet, which we adopt as modified to address PSD mask requirements, as discussed below. This provides Cavalier yet another option for obtaining loops longer than 18,000 feet. To the extent that Cavalier's true concern actually relates to the rates for conditioning these loops,[255] we address that issue below.[256]

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[250] Verizon Reply Brief at 28.

[251] Tr. at 439-40.

[252] Verizon demonstrates that eliminating the distinctions among its separate loop offerings in favor of the single loop offering proposed by Cavalier would require significant changes to its ordering, provisioning, and maintenance systems. Verizon Brief at 21-24; Verizon Reply Brief at 28. The mere fact that Verizon would incur costs in making such loops available is not in itself sufficient to decline imposing an unbundling obligation if it otherwise is required for compliance with the Act or Commission rules.

[253] Cavalier Rebuttal Testimony of Edwards Rebuttal at 2 ("My understanding is that, in the past, Verizon has refused Cavalier access to xDSL loops over 18,000 feet in length.").

[254] *Verizon Virginia Section 271 Order*, 17 FCC Rcd at 21964, para. 149 (responding to Cavalier's claim that it could not get access to loops over 18,000 feet to provide xDSL service by "find[ing] that Verizon's offerings for the provision of DSL-capable loops over 18,000 feet are reasonable.").

[255] Cavalier Reply Brief at 13 n.43 (stating that Cavalier "has never been offered loops over [18,000 feet] with reasonable loop conditioning rates in the event that load coils or other impediments must be removed").

[256] *See infra* Part III.C.6.d.

78. *Deployment of ReachDSL on IDSL, SDSL, and DDML Loops*. We adopt Verizon's proposed language regarding IDSL, SDSL, and DDML loops, modified as discussed below. Both Parties agree that ANSI T1.417 is the applicable PSD mask standard, and that either Method A or Method B may be used to demonstrate compliance.[257] The Parties continue to disagree, however, regarding the specific language that should be used. We find that mirroring the phrasing of Cavalier's reference to a different technical standard in its proposed section 11.2.9 would properly incorporate both methods for demonstrating compliance with the ANSI T1.417 standard, as well as accommodating future modifications to that standard. We thus adopt Verizon's sections 11.2.7, 11.2.8, and 11.2.8(a), modified to replace Verizon's proposed reference to the ANSI T1.417 standard with language adapted from Cavalier's proposed section 11.2.9.[258]

79. *Deployment of ReachDSL on ADSL and HDSL Loops*. We adopt Verizon's proposed language regarding ADSL and HDSL loops, modified to reflect that Cavalier may deploy its ReachDSL technology on those loops. As an initial matter, we reject Verizon's claim that PSD mask issues relating to loops shorter than 18,000 feet – specifically ADSL and HDSL loops – are not properly before us.[259] We find that Cavalier's petition raises the issue of PSD masks as a general matter, without respect to particular loop lengths.[260] As discussed above, we decline to adopt Cavalier's proposed language, which needlessly would require extensive changes to Verizon's systems, when such changes are not necessary to enforce Cavalier's rights under section 251 and the Commission's rules. In particular, Verizon states that its proposed "language does not prevent Cavalier from deploying its ReachDSL technology over one of Verizon's numerous, existing under-18,000 foot loop offerings."[261] Thus, for clarification, we add the sentence "Notwithstanding the foregoing, Cavalier may deploy its ReachDSL technology on such loops." at the end of Verizon's proposed sections 11.2.4, 11.2.5, and 11.2.6.

80. Finally, we note that Cavalier has proposed a change to section 11.2.3 of the Agreement, addressing the "2 Wire ISDN Digital Grade Loop." Specifically, Cavalier proposes to delete the requirement that when Verizon provides loop extension equipment, "[s]uch request will be treated as request for a Digital Designed Loop pursuant to Section 11.2.12."[262] Cavalier provides no discussion or explanation regarding why it proposes this change. In the absence of

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257 Cavalier Brief at 32-35; Cavalier Reply Brief at 16-17; Verizon Brief at 22-24; Verizon Reply Brief at 26-28.

258 We note that Cavalier remains obligated to provide Verizon with information regarding the advanced services it intends to offer pursuant to § 51.231 of the Commission's rules. 47 C.F.R. § 51.231.

259 Tr. at 439-40.

260 Cavalier Request for Arbitration, Ex. A at 2 (discussing issue C9).

261 Verizon Reply Brief at 28.

262 *Compare* Final Proposed Language at 7 (Cavalier Proposed § 11.2.3) *with* Final Proposed Language at 7 (Verizon Proposed § 11.2.3).

any explanation, and because Verizon's proposed language is taken from an approved interconnection agreement,[263] we adopt Verizon's proposed section 11.2.3.[264]

(iii) Arbitrator's Adopted Contract Language

81. As discussed above, the Arbitrator adopts the following language:

11.2.3 "2 Wire ISDN Digital Grade Loop" or "BRI ISDN" provides a channel with 2-wire interfaces at each end that is suitable for the transport of 160 kbps digital services using the ISDN 2B1Q line code, as described in ANSI T.1601-1998 and Verizon TR 72575, as revised from time to time. In some cases, loop extension equipment may be necessary to bring the line loss within acceptable levels. Verizon will provide loop extension equipment only upon request. Such request will be treated as request for a Digital Designed Loop pursuant to Section 11.2.12.

11.2.4 "2-Wire ADSL-Compatible Loop" or "ADSL 2W" provides a channel with 2-wire interfaces at each end that is suitable for the transport of digital signals up to 8 Mbps toward the Customer and up to 1 Mbps. from the Customer. In addition, ADSL-Compatible Loops will be available only where existing copper facilities can meet applicable industry standards. The upstream and downstream ADSL power spectral density masks and dc line power limits in Verizon TR 72575, Issue 2, as revised from time to time, must be met. Notwithstanding the foregoing, Cavalier may deploy its ReachDSL technology on such loops.

11.2.5 "2-Wire HDSL-Compatible Loop" or "HDSL 2W" consists of a single 2-wire non-loaded, twisted copper pair that meets the carrier serving area design criteria. The HDSL power spectral density mask and dc line power limits referenced in Verizon TR 72575, Issue 2, as revised from time to time, must be met. HDSL compatible Loops will be available only where existing copper facilities can meet applicable specifications. The 2-wire HDSL-compatible loop is only available in former Bell Atlantic service areas. Notwithstanding the foregoing, Cavalier may deploy its ReachDSL technology on such loops.

11.2.6 "4-Wire HDSL-Compatible Loop" or "HDSL 4W" consists of two 2-wire non-loaded, twisted copper pairs that meet the carrier serving area design criteria. The HDSL power spectral density mask and dc line power limits referenced in Verizon TR 72575, Issue 2, as revised from time to time, must be met. HDSL compatible Loops will be available only where existing copper facilities can meet

[263] Verizon Brief at 19.

[264] Final Proposed Language at 7 (Verizon Proposed § 11.2.3). We note, however, that the adoption of this language does not authorize Verizon to impose any charges prohibited elsewhere in this order. *See infra* Part III.C.6.d.

applicable specifications. Notwithstanding the foregoing, Cavalier may deploy its ReachDSL technology on such loops.

11.2.7 "2-Wire IDSL-Compatible Metallic Loop" consists of a single 2-wire non-loaded, twisted copper pair that meets revised resistance design criteria. This UNE loop, is intended to be used with very-low band symmetric DSL systems that meet ANSI T1.417, as revised from time to time, and are not compatible with 2B1Q 160 kbps ISDN transport systems. The actual data rate achieved depends upon the performance of Cavalier-provided modems with the electrical characteristics associated with the loop. This loop cannot be provided via UDLC. IDSL-compatible local loops will be provided only where facilities are available and can meet applicable specifications. Verizon will not build new copper facilities.

11.2.8 "2-Wire SDSL-Compatible Loop", is intended to be used with low band symmetric DSL systems that meet ANSI T1.417, as revised from time to time. This UNE loop consists of a single 2-wire non-loaded, twisted copper pair that meets ANSI T1.417, as revised from time to time. The data rate achieved depends on the performance of the Cavalier-provided modems with the electrical characteristics associated with the loop. SDSL-compatible local loops will be provided only where facilities are available and can meet applicable specifications. Verizon will not build new copper facilities.

11.2.8(a) "2-Wire Digital Designed Metallic Loop" 18-30 Kft. provides a channel with 2-wire interfaces at each end, which is intended to be used for digital services beyond 18 Kft. Cavalier may deploy any loop technology that meets ANSI T1.417, as revised from time to time. The average normalized power in any 100 kHz band must not exceed unity and the peak PSD must not exceed that of the Spectrum Management standard template by more than 2.5 dB. The transmit power is limited to 14.0 dBm. This loop may be ordered with load coil removal under the terms and conditions for load coil removal under Digital Designed Loops.

d. Pricing of Loop Qualification and Conditioning

(i) Positions of the Parties

82. Cavalier explains that the Virginia Commission never has set rates for xDSL-related services and that the Parties have been unable to agree on the prices that should apply for the conditioning of xDSL-capable loops.[265] Cavalier specifically challenges Verizon's "standard" proposed charges in Virginia.[266] In light of the Bureau's August 29, 2003 release of

[265] Cavalier Brief at 35; Cavalier Reply Brief at 18.

[266] *See* Cavalier Brief at 35.

the *Virginia Cost Issues Arbitration Order*, Cavalier proposes to adopt the AT&T/WorldCom rates when they become effective, subject to challenge in the normal course of that proceeding and this one.[267] It argues that the prices for loop conditioning in this proceeding should conform to this Bureau's determination in the *Virginia Cost Issues Arbitration Order* because the Bureau acted there in the stead of the Virginia Commission and set the only such prices ever specifically set for these services in Virginia.[268] In response to Verizon's claim that Cavalier cannot opt into the loop conditioning rates set by this Commission in the Virginia Cost Issues Arbitration without adopting the terms and conditions of the AT&T agreement, Cavalier notes that Verizon does not explain how it believes Cavalier's proposal departs from those terms and conditions.[269]

83. Until the rates set by the Bureau in the Virginia Cost Issues Arbitration become final, Cavalier requests that the Commission adopt the lowest Verizon prices for loop conditioning that exist within the Cavalier footprint, specifically the rates set by the Maryland Commission.[270] Although Verizon argues that a Maryland rate cannot be imported to Virginia, Cavalier argues that position is inconsistent with the way Verizon's own proposed rates were set.[271] Cavalier cites a document produced to it in discovery by Verizon, which traces the source of ten of Verizon's 11 "standard" xDSL loop qualification and conditioning rates in Virginia as "VA Billed," meaning, apparently, that Verizon has charged these rates to a customer under an interconnection agreement in Virginia.[272] Verizon subsequently represented to the Commission that these ten rates are "equal to or lower than [the] comparable rate in NY."[273] Cavalier claims that Verizon, itself, has not demonstrated that these "mystery rates that are equal to or lower than New York rates" are Virginia-specific.[274] In response to Verizon's claim that its proposed rates are TELRIC compliant because they were approved in this Commission's *Verizon Virginia Section 271 Order*, Cavalier notes that Verizon has argued, in a separate proceeding with respect

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267 Cavalier Brief at 36. We note that, although AT&T, Cox, and WorldCom were parties to the prior arbitration, Cox did not seek arbitration of rates. *See Virginia Cost Issues Arbitration Order*, 18 FCC Rcd at 17726, para. 1 n.1.

268 Cavalier Brief at 36-37. Cavalier also notes that, to the extent that these prices actually become part of effective agreements between AT&T/WorldCom and Verizon, § 252(i) requires Verizon to make available to Cavalier prices that become part of an effective interconnection agreement between it and AT&T/WorldCom. *Id*. at 36.

269 Cavalier Reply Brief at 18.

270 Cavalier Brief at 35, 37. Cavalier argues that cost models and data used by incumbent LECs often are very similar in neighboring states. Cavalier Brief at 35 (citing *Commission Investigation and Generic Proceeding on Ameritech Indiana's Rates for Interconnection, Service, Unbundled Elements, and Transport and Termination under the Telecommunications Act of 1996 and Related Indiana Statutes*, 2003 Ind. PUC LEXIS 116, at *35-*41 (Ind. Util. Reg. Comm'n Feb. 17, 2003)).

271 *See* Cavalier Reply Brief at 18.

272 Cavalier Brief at 37 (citing Ex. C9-3 (Verizon Response to Cavalier Discovery Request) at 0861); *see also* Cavalier Reply Brief at 19.

273 *See* Verizon Brief at Ex. 2; *see also* Tr. at 457-58.

274 *See* Cavalier Reply Brief at 18.

to certain UNE prices, that it would be inappropriate to derive TELRIC assumptions from the record in the Virginia 271 case.[275] Moreover, Cavalier argues, Verizon has not explained why rates that passed muster for purposes of a 271 proceeding are sufficient in the context of a 251-252 arbitration.[276] Although Verizon argues that Cavalier has not provided any cost studies to back up its proposed prices, Cavalier points out the same is true of Verizon.[277]

84. Verizon urges the Commission to reject Cavalier's request that the Bureau adopt the loop conditioning rates set in the *Virginia Cost Issues Arbitration Order*, as inconsistent with section 252(i). According to Verizon, neither section 252(i) nor the Commission's rules permit a party to adopt a rate separate from the accompanying terms and conditions for providing that network element that are contained in the Parties' interconnection agreement.[278] Since Cavalier has requested changes to language in the AT&T agreement, and a carrier must adopt legitimately related terms and conditions of the element associated with a rate in order for the carrier to adopt that rate, Verizon argues, it would be premature for the Bureau to decide whether Cavalier is entitled to AT&T's rates for loop conditioning because it is unclear whether Cavalier will adopt all related terms and conditions.[279]

85. Verizon also opposes Cavalier's request that, until the AT&T/WorldCom rates become effective, the Bureau adopt the lowest Verizon rates approved by a public service commission within Cavalier's footprint, particularly the Maryland loop conditioning rates.[280] Verizon argues that, in the *Verizon Virginia Section 271 Order*, the Commission rejected this exact request, and found that the use of Verizon's Virginia "proxy" rates produced rates within the range that a reasonable application of TELRIC principles would produce.[281] Verizon argues that, since Cavalier has not filed cost studies and rates must be cost based, the Bureau cannot set rates.[282] Verizon also claims that Cavalier has not submitted other evidence to support its contention that Verizon's rates in Virginia are inappropriate, therefore, it argues, the Bureau

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[275] *Id*. (citing Cavalier Ex. C16-4 (Rebuttal testimony of Robert W. Woltz, Jr. in Virginia SCC Case No. PUC-2002-00088 (filed June 2003)) at 8).

[276] Cavalier Brief at 37.

[277] Cavalier Brief at 37; Cavalier Reply Brief at 18.

[278] Verizon Reply Brief at 29 (citing 47 U.S.C. § 252(i)).

[279] Verizon Brief at 28 & n.3; Verizon Reply Brief at 29-30 & n. 2 (citations omitted).

[280] *See* Verizon Brief at 27 (citing Tr. at 470).

[281] Verizon Brief at 27 (citing *Verizon Virginia Section 271 Order*, 17 FCC Rcd at 21950-52, paras. 124-26, 128); Verizon Reply Brief at 28-29.

[282] Verizon Brief at 27.

should adopt the TELRIC-compliant rates it has already approved in the *Verizon Virginia Section 271 Order*, and reject Cavalier's proposals.[283]

(ii) Discussion

86. In accordance with Cavalier's proposal, we adopt the loop qualification and conditioning rates set in accordance with this Bureau's August 29, 2003 *Virginia Cost Issues Arbitration Order*.[284] If final rates have not been approved by the Bureau in that proceeding when the Cavalier-Verizon agreement arbitrated here becomes effective, we direct the Parties to negotiate interim loop qualification and conditioning rates, based upon the rates set forth in AT&T/WorldCom's October 28, 2003 compliance filing in the Virginia Cost Issues Arbitration and Verizon's November 18, 2003 Reply thereto, subject to true-up against the rates the Bureau approves in that proceeding. We find that this solution more likely than either of the Parties' proposals to achieve appropriate, Virginia-specific rates for loop qualification and conditioning.

87. The Parties agree that the rates that Verizon currently charges for loop qualification and conditioning in Virginia were not set by the Virginia Commission. Rather, according to information provided by Verizon to the Bureau, the existing rates were derived from New York rates and are "equal to or lower than" the comparable rates in New York.[285] Although, as we discuss further below, we adopt Cavalier's proposal that loop qualification and conditioning rates be set in accordance with the *Virginia Cost Issues Arbitration Order*, we do not adopt Cavalier's interim proposal. Cavalier stated at the hearing that, if final rates have not been set in the Virginia Cost Issues Arbitration by the effective date of its agreement with Verizon, it requests on an interim basis the rates set by the Maryland commission.[286] The language it proposes in its agreement provides, instead, that certain prices will be set "[a]t the lowest Verizon rate approved by a public service commission within Cavalier's footprint."[287] Cavalier presents no specific information as to what these interim rates are or how they were set. In the absence of any specific information, the Bureau cannot assess whether these proposed

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[283] *Id.*; Verizon Reply Brief at 29 (citing *Verizon Virginia Section 271 Order*, 17 FCC Rcd at 21950-51, paras. 124-26).

[284] Cavalier Brief at 35. Although Cavalier's briefs specifically address Verizon's rates for load coil and bridged tap removal, Cavalier's interlineations of the proposed pricing schedule also indicates that it opposes other Verizon rates for loop qualification and conditioning. Verizon was directed to source those rates, *see* Tr. at 466-74, which it did. *See* Verizon Brief at Ex. 2. Based upon these filings, and in accordance with the *Virginia Cost Issues Arbitration Order*, we set the rates that Verizon may charge Cavalier for loop qualification and conditioning.

[285] *See* Verizon Brief at Ex. 2; *see also Verizon Virginia Section 271 Order*, 17 FCC Rcd at 21950, para. 126, *cited in* Verizon Reply Brief at 29.

[286] Tr. at 470.

[287] Final Proposed Language, Ex. A at 4 (Cavalier Proposed Pricing Attachment).

interim rates comply with section 252(d) of the Act.[288] Accordingly, we decline to adopt Cavalier's interim proposal.

88. As Verizon argues, in its *Verizon Virginia Section 271 Order*, the Commission found Verizon's current proxy rates to be "within the range that a reasonable application of TELRIC principles would produce."[289] It is well-established, however, that, when the Commission applies TELRIC pricing principles to determine whether an incumbent LEC has complied with section 271, it does not conduct a *de novo* review of a state's pricing determinations.[290] Rather, it makes a general assessment of compliance with TELRIC principles.[291] In the Virginia Cost Issues Arbitration, the Bureau, standing in the stead of the Virginia Commission did apply its pricing rules to resolve numerous specific issues pertaining to the rates that Verizon may charge AT&T and WorldCom in Virginia.[292] In the *Virginia Cost Issues Arbitration Order*, the Bureau applied existing Commission rules, including TELRIC principles, to resolve pricing issues regarding Verizon's Virginia operations.[293] That Order contained a detailed analysis of Verizon's proposed rates for loop qualification and conditioning services in Virginia, including the services at issue here.[294] In the *Virginia Cost Issues Arbitration Order*, the Bureau selected the appropriate cost model for most non-recurring charges related to loop qualification and conditioning services and directed those parties to submit compliance filings for these charges.[295] AT&T/WorldCom made their compliance filing in the Virginia Cost Issues Arbitration on October 28, 2003, and Verizon filed its Reply on November 18, 2003. Both filings contain, *inter alia*, proposed loop qualification and conditioning rates. The compliance filings will be addressed by the Bureau in a forthcoming order.

89. Because the rates set by the Bureau in its recent *Virginia Cost Issues Arbitration Order* determined specific rates that Verizon may charge two competitive LECs in Virginia and considered Verizon's own evidence concerning its Virginia operations, those rates are more

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[288] 47 U.S.C. § 252(d).

[289] *See Verizon Virginia Section 271 Order*, 17 FCC Rcd at 21950, para 124, *cited in* Verizon Brief at 27.

[290] *Application of Verizon Pennsylvania Inc, Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region InterLATA Services in Pennsylvania,* CC Docket No. 01-138, 16 FCC Rcd 17419, 17453, para. 55 (2001).

[291] *Sprint Communications v. FCC,* 274 F.3d 549, 556 (D.C. Cir. 2001) ("When the Commission adjudicates § 271 applications, it does not – and cannot – conduct *de novo* review of state rate-setting determinations. Instead, it makes a general assessment of compliance with TELRIC principles." (citation omitted)).

[292] *See Virginia Cost Issues Arbitration Order*, 18 FCC Rcd at 17727, paras. 2-3.

[293] *See id.*

[294] *Compare id*. at 17958-79, paras. 605-661 *with* Final Proposed Language, Ex. A at Part IV (Cavalier Proposed Pricing Attachment); Final Proposed Language, Ex. A at Part IV (Verizon Proposed Pricing Attachment).

[295] *See generally Virginia Cost Issues Arbitration Order*, 18 FCC Rcd at 17727, paras. 2-3.

appropriate than the either the interim rates that Cavalier advocates or the proxy rates, imported from New York, upon which Verizon relied in its Virginia 271 application and that were found to be generally TELRIC compliant.[296] We reject Verizon's argument that Cavalier must, under section 252(i), also "opt in" to the terms and conditions accompanying the AT&T/WorldCom arbitrated rates, to be entitled to them. Cavalier initiated its own arbitration and asked the Bureau to set loop qualification and conditioning rates. We adopt the rates set in accordance with our earlier order. Cavalier is not "opting in" to the AT&T agreement under section 252(i).

90. Accordingly, we direct the Parties to incorporate the loop qualification and conditioning rates set in accordance with this Bureau's August 29, 2003 *Virginia Cost Issues Arbitration Order* into the Parties' Pricing Schedule, Exhibit A to the Parties' Agreement.[297] We note that our prior order allows Verizon to charge for: (1) Manual Loop Qualification;[298] (2) Engineering Query;[299] (3) Engineering Work Order;[300] (4) Bridged Tap Removal when the combined length of all taps does not exceed 2,500 feet, with no single tap longer than 2,000 feet;[301] and (5) Load Coil Removal on loops more than 18,000 feet.[302] Verizon may not: (1) charge for Mechanized Loop Qualification;[303] or (2) charge for Cooperative Testing;[304] (3) impose a mandatory charge for WideBand Testing if the competitive LEC does not request it;[305] or (4) impose an ISDN electronics charge.[306] If final rates have not been approved by the Bureau in the Virginia Cost Issues Arbitration by the time Cavalier and Verizon make their compliance filing, the Parties are directed to negotiate interim rates. These interim rates, which shall be subject to true up against the final rates approved by the Bureau in the Virginia Cost Issues

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[296] In this proceeding Cavalier is seeking to have rates set for services that are identical to services that the Bureau set rates for in the Virginia Cost Issues Arbitration. *Id.* There is no basis for charging different rates to different carriers for identical services. *See Local Competition First Report and Order*, 11 FCC Rcd at 15929, para. 862 ("pricing for interconnection, unbundled elements, and transport and termination of traffic should not vary based on the identity or classification of the interconnector.").

[297] As Cavalier proposes, these rates are subject to that proceeding's true-up provision. *See* Cavalier Brief at 36; *see also Virginia Cost Issues Arbitration Order*, 18 FCC Rcd at 17737, para. 26 (citing *Arbitration Procedures Order*, 16 FCC Rcd at 6233, para. 10).

[298] *See Virginia Cost Issues Arbitration Order*, 18 FCC Rcd at 17964, para. 618.

[299] *See id*.

[300] *See id.* at 17972, 17974, paras. 639, 643.

[301] *See id.* at 17972, 17973-74, paras. 639, 642.

[302] *See id.* at 17972-73, paras. 639-41.

[303] *See id.* at 17963, para. 616.

[304] *See id.* at 17969, para. 632.

[305] *See id.* at 17965-66, para. 622.

[306] *See id.* at 17979, para 660.

Arbitration, shall be based upon AT&T/WorldCom's October 28, 2003 compliance filing and Verizon's November 18, 2003 Reply.

(iii) Arbitrator's Adopted Contract Language

91. As discussed above, the Arbitrator adopts the following language:

EXHIBIT A
VERIZON VIRGINIA INC. and CAVALIER

DETAILED SCHEDULE OF ITEMIZED CHARGES

Service or Element Description:	Recurring Charges:	Non-Recurring Charges:
Standard Digital Loops	All: No charge / Mechanized Loop Qualification per Loop Provisioned $1.69/Wideband Test Access System (optional)	All: $*/ Manual Loop Qualification per Loop Request $No charge/Cooperative Testing
2 Wire ADSL compatible Loops (up to 12,000 feet)	See rates for 2 Wire ADSL Loops as set forth above	
2 Wire ADSL compatible Loops (up to 18,000 feet)	See rates for 2 Wire ADSL Loops as set forth above	
2 Wire HDSL compatible Loops (up to 12,000 feet)	See rates for 2 Wire HDSL Loops as set forth above	
4 Wire HDSL compatible Loops (up to 12,000 feet)	See rates for 4 Wire HDSL Loops as set forth above	
2 Wire SDSL compatible Loops	See rates for 2 Wire SDSL Loops as set forth above	
2 Wire IDSL compatible Loops (up to 18,000 feet)	See rates for 2 Wire IDSL Loops as set forth above	
Digital Designed Loops		
2 Wire ADSL compatible Loop (up to 12,000 feet) with Bridged Tap removal	See rates for 2 Wire ADSL Loops as set forth above	

		Removal of Bridged Taps when combined length of all taps does not exceed 2,500 feet, with no single tap longer than 2,000 feet: $*
		Engineering Query: $*
		Engineering Work Order Charge: $*
2 Wire ADSL compatible Loop (up to 18,000 feet) with Bridged Tap removal	See rates for 2 Wire ADSL Loops as set forth above	
		Removal of Bridged Taps when combined length of all taps does not exceed 2,500 feet, with no single tap longer than 2,000 feet: $*
		Engineering Query: $*
		Engineering Work Order Charge: $*
2 Wire Digital Designed Metallic Loop (up to 30,000 Feet) Non-loaded with Bridged Tap options	See rates for 2 Wire ADSL and 2 Wire HDSL Loops as set forth above	
		Required Removal of Load Coils on Loops over 18,000 feet $*
		Removal of Bridged Taps when combined length of all taps does not exceed 2,500 feet, with no single tap longer than 2,000 feet: $*
		Engineering Query: $*
		Engineering Work Order Charge: $*

2 Wire Digital Designed Metallic Loop with ISDN Loop Extension Electronics	See rates for 2 Wire ISDN Loops as set forth above	
		Required Removal of Load Coils on Loops over 18,000 feet $*
		Addition of Range Electronics: No charge
		Engineering Query: $*
		Engineering Work Order Charge: $*
2 Wire HDSL compatible Loops (up to 12,000 feet) with Bridged Tap removal	See rates for 2 Wire HDSL Loops as set forth above	
		Removal of Bridged Taps when combined length of all taps does not exceed 2,500 feet, with no single tap longer than 2,000 feet: $*
		Engineering Query: $*
		Engineering Work Order Charge: $*
4 Wire HDSL compatible Loops (up to 12,000 feet) with Bridged Tap removal	See rates for 4 Wire HDSL Loops as set forth above	
		Removal of Bridged Taps when combined length of all taps does not exceed 2,500 feet, with no single tap longer than 2,000 feet: $*
		Engineering Query: $*
		Engineering Work Order Charge: $*

2 Wire SDSL compatible Loops with Bridged Tap removal	See rates for 2 Wire SDSL Loops as set forth above Removal of Bridged Taps when combined length of all taps does not exceed 2,500 feet, with no single tap longer than 2,000 feet: $* Engineering Query: $* Engineering Work Order Charge: $*
2 Wire IDSL compatible Loops (up to 18,000 feet) with Bridged Tap removal	See rates for 2 Wire IDSL Loops as set forth above Removal of Bridged Taps when combined length of all taps does not exceed 2,500 feet, with no single tap longer than 2,000 feet: $* Engineering Query: $* Engineering Work Order Charge: $*

* To be replaced with final rate set by the FCC in CC Docket Nos. 00-218, 00-249, and 00-251, including true-up pursuant to ¶ 10 of the FCC's January 17, 2001 Order, FCC 01-21, 16 FCC Rcd (rel. Jan. 19, 2001).

e. Maintenance and Repair Interval

(i) Positions of the Parties

92. Cavalier proposes language that would require Verizon to respond to all maintenance and repair requests for xDSL-capable loops in the same time interval as it does for DS1 loops.[307] Cavalier asserts that this shorter interval is necessary because its xDSL customers

[307] Final Proposed Language at 9-10 (Cavalier Proposed § 11.2.12(C)).

use those loops in a way similar to how T1 circuits are used.[308] While acknowledging that Verizon does not provide maintenance and repair within Cavalier's requested intervals for other competitive LECs, or even Verizon retail customers, Cavalier states that those customers "would also benefit from such an interval."[309]

93. Verizon responds that its maintenance and repair intervals for xDSL-capable loops are the same as those for POTS.[310] It makes no sense, according to Verizon, to adopt the same intervals for a predominantly business service (DS1) as for a predominantly residential service (xDSL).[311] Verizon asserts that maintenance and repair intervals should be based on the nature of the particular product, and not the way in which customers use that product.[312] Verizon notes that its current maintenance and repair intervals have been adopted in Virginia for purposes of the Carrier-to-Carrier Guidelines, and it expresses concern about its ability to administer a system that required different intervals for different carriers.[313] Further, Verizon states that Cavalier's proposal would result in Cavalier customers receiving superior service to Verizon's own retail customers.[314]

(ii) Discussion

94. We reject Cavalier's proposed new language. Cavalier has not demonstrated – or even claimed – that Verizon must provide maintenance and repair of xDSL-capable loops within the shorter intervals Cavalier seeks in order to provide nondiscriminatory access to loops or to comply with section 251.[315] Consequently, we reject Cavalier's proposal. We note that collaboratives regarding the performance measures established under the Virginia Carrier-to-Carrier Guidelines are ongoing in Virginia,[316] which are the appropriate fora for this issue. If Cavalier wishes a shorter interval for maintenance and repair of xDSL-capable loops, it should raise its proposal in that forum.

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[308] Cavalier Brief at 30.

[309] *Id*.

[310] Verizon Brief at 29.

[311] *Id*. at 29-30; Verizon Rebuttal Testimony of Albert Panel at 8.

[312] Verizon Reply Brief at 24.

[313] Verizon Brief at 29.

[314] *Id*. at 29.

[315] *See, e.g.*, Cavalier Brief at 30 ("Cavalier's customers need an improved service interval for xDSL loops comparable to that for T1 circuits, and Cavalier suspects that customers of other CLECs or Verizon would also benefit from such an interval.").

[316] Verizon Reply Brief at 24; Tr. at 453-54.

(iii) Arbitrator's Adopted Contract Language

95. As discussed above, the Arbitrator does not adopt any language with respect to this aspect of issue C9.

f. 4-Wire DS1 Loops

(i) Positions of the Parties

96. Cavalier states that when it orders "4-wire DS1-compatible loops," Verizon occasionally provides 2-wire HDSL DS1 loops with 4-wire interfaces at each end.[317] Cavalier states that its customers frequently experience performance problems with those loops.[318] Thus, Cavalier proposes language to require Verizon to provide loops with four wires end-to-end when Cavalier orders 4-wire DS1-compatible loops, rather than substituting 2-wire HDSL DS1s with 4-wire interfaces.[319] Cavalier states that ordering a 4-wire HDSL loop is not a desirable alternative because of lengthier maintenance and repair intervals associated with those loops.[320]

97. Verizon responds that, in some cases where Cavalier has ordered a 4-wire DS1-compatible loop, the deployed network configuration and technology does not allow for the provisioning of an end-to-end 4-wire DS1 loop without the addition of new electronics.[321] In those instances, Verizon substitutes a 2-wire HDSL DS1 loop with 4-wire interfaces, just as it would do for its own retail customer ordering a comparable product.[322] Verizon states that this network condition is not ascertainable until its employees are in the field actually seeking to provision the loop.[323] To provide an end-to-end 4-wire DS1 loop in those instances would require it to construct facilities, which is not required by the Act.[324] Verizon further notes that Cavalier has other options for providing DS1 service, including a 4-wire HDSL loop offerings, if Cavalier finds Verizon's 4-wire DS1-compatible loop offering inadequate.[325] Verizon explains

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[317] Cavalier Brief at 31-32.

[318] *Id*. at 30-32.

[319] Final Proposed Language at 8-9 (Cavalier Proposed § 11.2.9).

[320] Cavalier Brief at 31.

[321] Verizon Reply Brief at 25; Tr. at 433. Thus, Cavalier mischaracterizes Verizon's position when it asserts that Verizon seeks the right to substitute 2-wire facilities "for no specific reason." Cavalier Brief at 32.

[322] Verizon Reply Brief at 25; Tr. at 434.

[323] Verizon Reply Brief at 25; Tr. at 430-31.

[324] Verizon Reply Brief at 26.

[325] Verizon Brief at 26-27; Verizon Rebuttal Testimony of Albert Panel at 9.

that, in order to comply with Cavalier's proposed language, it would be required to construct new facilities in some instances, which is beyond what is required by the Act.[326]

(ii) Discussion

98. We adopt Verizon's language, modified as discussed below, because Cavalier's language would impose obligations beyond what is required by the Act or Commission rules. Verizon demonstrates that it only substitutes 2-wire HDSL DS1s with 4-wire interfaces when it is unable to provision an end-to-end 4-wire DS1 loop due to the existing network configuration and technology. Thus, because Verizon does not do so for its own retail customers at this time, Verizon's refusal to install new electronics to enable it to provide Cavalier an end-to-end 4-wire loop is consistent with the Commission's rules in this context.[327] Under the Commission's rules, Verizon need only perform network modifications if it routinely does so to serve its own customers.[328] Verizon states that, rather than installing new electronics, it makes the same substitution of a 2-wire HDSL DS1 loop with 4-wire interfaces to serve its own customers.[329] For clarity, however, we insert the phrase "unless Verizon routinely does so to serve its own customers" at the end of the sentence "Verizon will not install new electronics" in section 11.2.9.

(iii) Arbitrator's Adopted Contract Language

99. As discussed above, the Arbitrator adopts the following language:

> 11.2.9 "DS-1 Loops" provides a digital transmission channel suitable for the transport of 1.544 Mbps digital signals. This Loop type is more fully described in Verizon TR 72575, as revised from time to time. The DS-1 Loop includes the electronics necessary to provide the DS-1 transmission rate. A DS-1 Loop will be provided only where the electronics necessary to provide the DS-1 transmission rate are at the requested installation date currently available for the requested DS-1 Loop. Verizon will not install new electronics unless Verizon routinely does so to serve its own customers. If the electronics necessary to provide Clear Channel (B8ZS) signaling are at the requested installation date currently available for a requested DS-1 Loop, upon request by Cavalier, the DS-1 Loop will be furnished with Clear Channel (8ZS) signaling, Verizon will not install new electronics to furnish Clear Channel (B8ZS) signaling. Notwithstanding any other provision of this Agreement, Verizon will provide DS-1 Loops consistent with, but only to the

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[326] Verizon Reply Brief at 26.

[327] Thus, we need not reach the parties' claims regarding the substitutability of 4-wire HDSL loops when a 4-wire end-to-end loop is desired. *See* Verizon Brief at 26-27; Cavalier Brief at 31.

[328] 47 C.F.R. § 51.319(a)(8); *Triennial Review Order*, 18 FCC Rcd at 17371-78, paras. 632-41.

[329] Should Verizon's practices with respect to provisioning 4-wire DS1-compatible loops to its retail customers change, however, such that it routinely installs new electronics in such circumstances where the existing deployed network does not otherwise enable it, we would expect Verizon to do so for Cavalier, as well. *Id*.

extent required by any applicable order or decision of the FCC or the Commission.

7. Issue C10 (Dark Fiber)

a. Introduction

100. The Parties disagree about operational and informational issues associated with determining the location and availability of dark fiber. Dark fiber is "unused fiber within an existing fiber optic cable that has not yet been activated through optronics to render it capable of carrying communications services."[330] Users of dark fiber loops and dark fiber interoffice facilities "provide the electronic equipment necessary to activate the dark fiber strands to provide services."[331] Cavalier proposes to expand the information Verizon provides in response to dark fiber inquiries, particularly when dark fiber is reported as unavailable.[332] To help ensure the accuracy of the information it receives, Cavalier further requests changes to the dark fiber field survey process to enable Cavalier employees to attend the surveys and to limit the cost of the surveys.[333] In addition, Cavalier seeks to establish a queue for its dark fiber inquiries, giving Cavalier priority access to dark fiber on requested routes as it becomes available.[334] Verizon states that these additional procedures and processes are burdensome and unnecessary, particularly given its willingness to search for alternative routes through intermediate offices in order to fill Cavalier's dark fiber requests.[335]

b. Dark Fiber Inquiries

(i) Positions of the Parties

101. Cavalier seeks a variety of additional information about the availability of dark fiber in Virginia. Under Cavalier's proposal, Verizon would respond to dark fiber inquiries by indicating whether dark fiber is "(i) installed and available, (ii) installed but not available, or (iii) not installed."[336] Cavalier asserts that this would formalize a process similar to Verizon's current practice.[337] After a response that dark fiber is not available, Verizon would be required to explain why dark fiber is not available, including whether splicing or other work needs to be

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[330] *Triennial Review Order*, 18 FCC Rcd at 17164-65, para. 311.

[331] *Id*.

[332] Final Proposed Language at 15-17 (Cavalier Proposed § 11.2.15.4).

[333] *Id*. at 17-18 (Cavalier Proposed § 11.2.15.5(ii)).

[334] *Id*. at 17 (Cavalier Proposed § 11.2.15.4.1).

[335] Verizon Brief at 30-37.

[336] Final Proposed Language at 15-17 (Cavalier Proposed § 11.2.15.4).

[337] Cavalier Brief at 45; Cavalier Direct Testimony of Ashenden at 2.

performed, or whether no fiber at all is present between the points specified by Cavalier.[338] In addition, when fiber is installed, regardless of availability, Verizon would be required to inform Cavalier of the locations of all "pedestals, vaults, [and] other intermediate points of connection," and which portions have available fiber.[339] Cavalier claims that it needs this additional information to guide its decision whether to continue pursuing dark fiber along particular routes or to particular locations, and to help resolve disputes regarding the availability of dark fiber.[340]

102. Verizon responds that additional information is not needed to resolve uncertainty about the availability of dark fiber, and that it never has provided the information sought by Cavalier in response to dark fiber inquiries.[341] According to Verizon, in the absence of evidence of discrimination, there is no need for changes to its dark fiber processes.[342] Verizon claims that Cavalier's proposal simply would impose expensive new obligations on Verizon without good reason.[343] For example, Verizon asserts that information regarding whether "fiber is present but needs to be spliced" is unnecessary, because Cavalier is not entitled to access dark fiber at splice points.[344] Verizon likewise states that the information it provides in response to dark fiber inquiries has been held to be sufficient in other Commission proceedings.[345] Verizon also asserts that Cavalier should request a field survey if it seeks additional information about a dark fiber inquiry.[346] Moreover, Verizon notes that it already searches for alternative routes to meet Cavalier's requests for dark fiber, rendering the detailed information sought by Cavalier unnecessary.[347] Verizon also states that the cost of providing the information sought by Cavalier is not included in its rates.[348]

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338 Final Proposed Language at 15-17 (Cavalier Proposed § 11.2.15.4).

339 *Id*.

340 Cavalier Brief at 45-46.

341 Verizon Brief at 37.

342 Verizon Reply Brief at 31.

343 Verizon Brief at 36.

344 *Id*.

345 *Id*. at 36-37 (citing *Verizon Virginia Section 271 Order*, 17 FCC Rcd at 21960-62, paras. 145-47; *Application by Verizon Maryland Inc., Verizon Washington, D.C. Inc., Verizon West Virginia Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia*, Memorandum Opinion and Order, WC Docket No. 02-384, 18 FCC Rcd 5212, 5286-87, paras. 123-26 (2003)).

346 Verizon Reply Brief at 35-36.

347 Verizon Brief at 33; Verizon Direct Testimony of Albert Panel at 24; Final Proposed Language at 15-16 (Verizon Proposed § 11.2.15.4).

348 Verizon Brief at 37.

(ii) Discussion

103. Section 51.307(e) of the Commission's rules requires incumbent LECs to "provide to a requesting telecommunications carrier technical information about the incumbent LEC's network facilities sufficient to allow the requesting carrier to achieve access to unbundled network elements consistent with the requirements of this section."[349] We adopt Cavalier's proposed section 11.2.15.4, modified as discussed below, to require Verizon to provide additional information in response to dark fiber inquiries, pursuant to this rule. We agree with Cavalier that much of the technical information about Verizon's network that it seeks in response to dark fiber inquiries is needed for Cavalier to have meaningful and nondiscriminatory access to unbundled dark fiber. We find persuasive Cavalier's claim that it needs additional information as a basis for its decision whether to continue pursuing dark fiber along particular routes or to particular locations, and to help resolve disputes regarding the availability of dark fiber.[350] Verizon concedes that the availability of dark fiber has been a subject of dispute both between Cavalier and Verizon specifically, and among other carriers more generally.[351] Further, as Cavalier states, a response that merely indicates that fiber is or is not available is "too nebulous to [Cavalier] to know whether that means the fiber between point A and point B doesn't exist, has never been put in the ground, or whether there is fiber available between the two points and maybe some capacity will become available in the distant future."[352]

104. We also find that additional information sought by Cavalier is needed to ensure access to unbundled dark fiber consistent with the Commission's rules regarding routine network modifications. The Commission's rules require incumbent LECs to "make all routine network modifications" to unbundled loops or transport facilities.[353] The *Triennial Review Order* provides that "[t]he requirement we establish for incumbent LECs to modify their networks on a nondiscriminatory basis is not limited to copper loops, but applies to all transmission facilities, including dark fiber facilities."[354] We find that requiring Verizon to provide Cavalier an explanation of why dark fiber is not available in response to dark fiber inquiries will allow Cavalier a meaningful opportunity to enforce its right to routine network modifications to unbundled dark fiber. Although Verizon asserts that it should not have to provide additional information in response to a dark fiber inquiry when Cavalier instead could request a field survey, we note that, to provide the more limited information we require here, Verizon need not conduct a full field survey by dispatching technicians to the field to acquire new information, but rather need only provide the information already in its records. To the extent that Cavalier requires still further information, it then may seek a field survey, if it so chooses.

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[349] 47 C.F.R. § 51.307(e).

[350] Cavalier Brief at 45-46.

[351] Tr. at 245-46.

[352] *Id*. at 255.

[353] 47 C.F.R. §§ 51.309(a)(8)(i), (e)(5)(i).

[354] *Triennial Review Order*, 18 FCC Rcd at 17375, para. 638.

105. We reject Verizon's claim that Cavalier does not need information about whether fiber needs to be spliced. Providing Cavalier access to information regarding the need for dark fiber to be spliced allows Cavalier to enforce its right to routine network modifications. Verizon must splice dark fiber to make it available to Cavalier on an unbundled basis to the extent required by the Commission's routine network modification rules. Although Verizon is correct that Cavalier is not entitled to access dark fiber at splice points, Verizon must perform routine network modifications to dark fiber sought by Cavalier, including "rearranging or splicing cable."[355] The *Triennial Review Order* states that this obligation requires incumbent LECs to "make the same routine modifications to their existing dark fiber facilities for competitors as they make for their own customers – including work done on dark fiber to provision lit capacity to end users."[356] As a result, to the extent that Verizon would splice cable in order to provide a lit service to a retail customer, it likewise must do so at any point throughout its network to provide dark fiber to Cavalier. According to testimony, Verizon routinely splices fiber for purposes of providing service to retail customers.[357] Although language not disputed by the Parties states that "Verizon shall not be required to perform splicing to provide fiber continuity between two locations," it goes on to state that "Notwithstanding anything else set forth in this Agreement, Verizon shall provide Cavalier with access to Dark Fiber Loops and Dark Fiber IOF in accordance with, but only to the extent required by, Applicable Law."[358] We thus direct the Parties to strike the sentence "Verizon shall not be required to perform splicing to provide fiber continuity between two locations" to eliminate ambiguity regarding Verizon's obligation with respect to splicing pursuant to the Commission's routine network modifications rules as it is addressed in section 11.2.15.1 of the Agreement.[359]

106. As noted in the *Triennial Review Order*, "[a]lthough the record before us does not support the enumeration of these activities in the same detail as we do for lit DS1 loops, we encourage state commissions to identify and require such modifications to ensure nondiscriminatory access."[360] Similarly, the record here does not allow us to identify other modifications, beyond splicing, which would constitute "routine network modifications" that

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[355] 47 C.F.R. §§ 51.309(a)(8)(ii), (e)(5)(ii). In light of these newly-adopted rules, Cavalier's need for information thus differs from what it would have needed solely under the *Virginia Arbitration Order*, contrary to Verizon's claims. Verizon Reply Brief at 30. In that *Order*, we held that competitive LECs do not have the right to access dark fiber at splice points, and Verizon is never required to splice new dark fiber routes or add electronics to make available dark fiber. *Virginia Arbitration Order*, 17 FCC Rcd at 27260-61, 27263-64, 27269-70, paras. 451, 457, 467. While competitive LECs still do not have the right to access dark fiber at splice points, the routine network modification rules give them the right to have dark fiber spliced, or electronics added, to the extent that such activities fall within the scope of those rules. 47 C.F.R. §§ 51.309(a)(8)(ii), (e)(5)(ii). As we discuss below, the record in this proceeding is inadequate to fully enumerate what such activities include.

[356] *Triennial Review Order*, 18 FCC Rcd at 17375, para. 638.

[357] Tr. at 267-75.

[358] Aug. 1 Draft Agreement § 11.2.15.1.

[359] Aug. 1 Draft Agreement § 11.2.15.1.

[360] *Triennial Review Order*, 18 FCC Rcd at 17375, para. 638.

must be performed by Verizon. However, we encourage the Virginia Commission to undertake a proceeding "to make dark fiber meaningfully available" as other states have done.[361]

107. For these reasons, we find that Cavalier is entitled to information about "whether fiber is: (i) installed and available, (ii) installed but not available, or (iii) not installed," as well as a description "in reasonable detail the reason why fiber is not available, including, but not limited to, specifying whether fiber is present but needs to be spliced, whether no fiber at all is present between the two points specified by Cavalier, whether further work other than splicing needs to be performed, and the nature of any such further work other than splicing," when a request for dark fiber is denied.[362]

108. We reject Verizon's claim that the dark fiber information it provides is adequate because it was accepted for purposes of prior section 271 proceedings.[363] The section 271 proceedings utilized were completed prior to the effective date of the *Triennial Review Order*. Thus, the Commission's rules regarding the availability of unbundled dark fiber generally, and with respect to routine network modifications specifically, have changed since Verizon's section 271 approvals were granted.[364] We find that, as discussed above, additional information is required for Cavalier to enforce its rights under rules that were not in place at the time of those prior proceedings.

109. We do not adopt Cavalier's proposed language seeking information about "pedestals, vaults, other intermediate points of connection." To the extent that that information is needed to explain why a request for dark fiber is denied, Verizon is required to provide that explanation pursuant to other language in this provision. Cavalier is not entitled to access to dark fiber at intermediate points of connection, nor has it otherwise explained why this specific information is needed. We therefore decline to adopt that language from Cavalier's proposed section 11.2.15.4.

110. We also do not adopt the last sentence of Cavalier's proposed section 11.2.15.4, which states: "This provision is intended to reduce uncertainty about whether or not dark fiber is 'terminated' or not.'" As Cavalier itself concedes, this is not the sole purpose of the provision.[365] Therefore, deleting that sentence will avoid confusion regarding the scope of the provision.

111. We also reject Verizon's claim that the information requirements should not be adopted because their cost is not included in its current rates.[366] Verizon has submitted no

[361] *See, e.g.*, *id*. at 17216-17, para. 385.

[362] Final Proposed Language at 15-17 (Cavalier Proposed § 11.2.15.4).

[363] Verizon Brief at 36-37.

[364] *See generally Triennial Review Order*, 18 FCC Rcd at 17164-67, 17213-17, 17371-78, paras. 311-14, 381-85, 632-41; 47 C.F.R. §§ 51.309(a)(6), (a)(8)(i), (e)(3), (e)(5)(i).

[365] Cavalier Direct Testimony of Ashenden at 2.

[366] Verizon Brief at 37.

evidence that the information needed to respond to Cavalier would not readily be available, nor has it provided any evidence regarding the costs it would incur to respond. Further, as discussed above, Verizon need only provide the information already in its records. Moreover, the pricing of the dark fiber inquiry process was not properly raised, having not been addressed in either Cavalier's petition[367] or Verizon's reply,[368] and thus we do not address it here. We thus adopt Cavalier's proposed section 11.2.15.4, modified as discussed above.

(iii) Arbitrator's Adopted Contract Language

112. As discussed above, the Arbitrator adopts the following language:

11.2.15.4 – A Dark Fiber Inquiry Form must be submitted prior to submitting an ASR. Upon receipt of Cavalier's completed Dark Fiber Inquiry Form, Verizon will initiate a review of its cable records to determine whether Dark Fiber Loop(s) or Dark Fiber IOF may be available between the locations and in the quantities specified. Verizon will respond within fifteen (15) Business Days from receipt of the Cavalier's Dark Fiber Inquiry Form, indicating whether Dark Fiber Loop(s) or Dark Fiber IOF may be available (if so available, an "Acknowledgement") based on the records search except that for ten (10) or more requests per LATA or large, complex projects, Verizon reserves the right to negotiate a different interval. The Dark Fiber Inquiry is a record search and does not guarantee the availability of Dark Fiber Loop(s) or Dark Fiber IOF. Where a direct Dark Fiber IOF route is not available, Verizon will provide, where available, Dark Fiber IOF via a reasonable indirect route that passes through intermediate Verizon Central Offices at the rates set forth in Exhibit A. Any limitations on the number of intermediate Verizon Central Offices will be discussed with Cavalier. If access to Dark Fiber IOF is not available, Verizon will notify Cavalier, within fifteen (15) Business Days, that no spare Dark Fiber IOF is available over the direct route nor any reasonable alternate indirect route, except that for voluminous requests or large, complex projects, Verizon reserves the right to negotiate a different interval. Where no available route was found during the record review, Verizon will identify the first blocked segment on each alternate indirect route and which segment(s) in the alternate indirect route are available prior to encountering a blockage on that route, at the rates set forth in Exhibit A. In responding to Dark Fiber Inquiries from Cavalier, Verizon will identify whether fiber is: (i) installed and available, (ii) installed but not available, or (iii) not installed. Where fiber is not available, Verizon shall describe in reasonable detail the reason why fiber is not available, including, but not limited to, specifying whether fiber is present but needs to be spliced, whether no fiber at all is present between the two points specified by Cavalier, whether further work other than splicing needs to be performed, and the nature of any such further work other than splicing. Use of

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[367] *See generally* Cavalier Petition.

[368] *See generally* Verizon Answer/Response.

information provided by Verizon pursuant to this provision shall be limited to Cavalier's engineering and operations personnel. Cavalier's marketing personnel shall not be permitted access to, or use of, this information.

c. Field Survey

(i) Positions of the Parties

113. Cavalier states that, in the past, the surveys performed by Verizon to verify the availability of dark fiber yielded different results than Verizon's original records, resulting in disagreements between Cavalier and Verizon regarding dark fiber access.[369] Thus, Cavalier proposes that its employees would accompany the Verizon employees conducting the field survey.[370] Cavalier asserts that this would allow it to verify Verizon's determinations regarding dark fiber availability, and to pose questions about the particular dark fiber at issue.[371] Joint dark fiber field surveys would be no more difficult than the vendor meets that Verizon conducts for DS0 circuits, Cavalier claims, and would be a substantial improvement over the burdensome process that has sometimes resulted when the Parties disagree about the results of a field survey conducted solely by Verizon.[372]

114. According to Cavalier, the uncertain cost of a field survey also is a deterrent to its use of the process.[373] Thus, Cavalier proposes language placing limits on what it could be charged for the field survey.[374] Specifically, Verizon would provide an up-front budget estimate, and could only charge Cavalier beyond that amount for unforeseeable expenses that arose in conducting the field survey.[375]

115. Cavalier also proposes that the Parties negotiate a separate means of resolving dark fiber disputes.[376] Cavalier claims that in situations such as disagreements between Verizon's records and the results of a field survey, the Agreement should provide an opportunity for further discussion to help resolve disputes.[377] Cavalier, however, asserts that while it "seeks

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[369] Cavalier Brief at 42-43 & Exs. C10-3, C10-5.

[370] Final Proposed Language at 17-18 (Cavalier Proposed § 11.2.15.5(ii)).

[371] Cavalier Direct Testimony of Ashenden at 4.

[372] Cavalier Brief at 41-44; Cavalier Direct Testimony of Ashenden at 4.

[373] Cavalier Direct Testimony of Ashenden at 3-4.

[374] Final Proposed Language at 17-18 (Cavalier Proposed § 11.2.15.5(ii)).

[375] *Id*.

[376] *Id*.

[377] Cavalier Brief at 43-44.

both a joint field survey and a dispute resolution mechanism," at a minimum we should "at least award Cavalier one or the other."[378]

116. Verizon maintains that the need to coordinate with Cavalier employees to schedule and conduct the field survey would add significant complexity and bureaucracy to the process, and limit Verizon's ability to schedule the remainder of its work efficiently.[379] Further, Verizon states that the employees that conduct the field survey likely would not be able to answer many of the questions that Cavalier would likely pose.[380] These requirements, Verizon claims, would actually add cost and uncertainty to the field survey process.[381] Verizon asserts that the field survey disputes cited by Cavalier do not demonstrate problems with Verizon's existing process, which has been revised since they occurred.[382] Verizon also asserts that Cavalier has not demonstrated that the Agreement's general dispute resolution process would be inadequate for addressing dark fiber disputes.[383]

(ii) Discussion

117. We adopt Verizon's proposed section 11.2.15.5(ii), modified to allow Cavalier personnel to attend the field surveys. As an initial matter, we reject Cavalier's proposed language that would limit its obligation to pay the full costs of the field survey.[384] We dealt with this issue squarely in the prior *Virginia Arbitration Order*, and found that when a competitor requests "a field survey to confirm the viability of a fiber path, it is reasonable for [the competitor] to bear the expense of that survey, regardless of the result, just as Verizon must do when it performs such surveys for itself."[385] Indeed, to the extent that Cavalier personnel are able to attend the field survey, Cavalier does not object to paying its cost.[386] We thus apply our prior holding that it is reasonable for the competitive LEC bear the cost of the field survey.

118. Given that Cavalier is paying the cost of the field survey, however, we find it reasonable for Cavalier to have the option of having its personnel accompany Verizon personnel when the field survey is conducted. Verizon notes that the employees it sends to conduct the

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[378] Cavalier Reply Brief at 21.

[379] Verizon Brief at 34; Verizon Direct Testimony of Albert Panel at 21.

[380] Verizon Rebuttal Testimony of Albert Panel at 13.

[381] *Id*.

[382] Verizon Reply Brief at 34.

[383] Verizon Brief at 35.

[384] Final Proposed Language at 17-18 (Cavalier Proposed § 11.2.15.5(ii)).

[385] *Verizon Arbitration Order*, 17 FCC Rcd at 27271, para. 471.

[386] Tr. at 277.

field surveys may not be able to answer all of Cavalier's questions.[387] We find, however, that Cavalier should have the option to choose whether to observe the field survey for which it is paying, notwithstanding the fact that all its questions may not be answered by the Verizon personnel conducting the field survey. We agree with Cavalier that this could help resolve some uncertainty regarding the availability of dark fiber that can remain in some cases even after the completion of a field survey.[388] As noted above, Cavalier also states that this would help allay its concern about the cost of the field survey process. We reject Verizon's concern that its need to coordinate with Cavalier will create significant administrative burdens.[389] Under this provision, Verizon need not modify the schedule it ordinarily would employ when conducting a field survey, but must inform Cavalier of that schedule and allow Cavalier to send its employees to observe the field survey pursuant to that schedule.

119. We do not adopt Cavalier's proposed language that would require the Parties to negotiate a new means of dispute resolution specific to dark fiber disputes.[390] As Verizon notes, the Agreement already contains a provision providing for the resolution of disputes related to the Agreement, including dark fiber disputes.[391] Cavalier has not provided any evidence why this existing mechanism is inadequate in the case of dark fiber disputes. Thus, we reject Cavalier's proposal to establish a dark fiber dispute resolution mechanism as duplicative and unnecessary.

120. Although we grant Cavalier's request to allow it to participate in field surveys, because we do not adopt Cavalier's proposed cost limitations and new dispute resolution process, we find that Verizon's proposed section 11.2.15.5(ii) provides a better starting point.[392] We thus modify Verizon's proposed section 11.2.15.5(ii) by adding the sentence "At Cavalier's option, its personnel may observe the conducting of the field survey." before the sentence "Verizon shall perform a field survey subject to a negotiated interval." Observation by Cavalier includes the right to ask questions, although we recognize that the Verizon personnel conducting the field survey may not always have the information needed to answer Cavalier's questions.

(iii) Arbitrator's Adopted Contract Language

121. As discussed above, the Arbitrator adopts the following language:

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387 Verizon Brief at 34-35.

388 We thus reject Verizon's assertion that Cavalier's cited problems with delay and uncertain results from prior field surveys are inadequate to justify changes to Verizon's current field survey process, which was revised following the *Virginia Arbitration Order*, and accepted for purposes of demonstrating checklist compliance in the *Verizon Virginia Section 271 Order*. Verizon Reply Brief at 34. Verizon has not demonstrated how the changes to its process would have resolved the concerns raised by Cavalier, nor has it shown that Cavalier's precise concerns were raised and rejected in the *Verizon Virginia Section 271 Order*.

389 Verizon Brief at 34.

390 Final Proposed Language at 17-18 (Cavalier Proposed § 11.2.15.5(ii)).

391 Verizon Brief at 35; Aug. 1 Draft Agreement § 28.11.

392 Final Proposed Language at 17 (Verizon Proposed § 11.2.15.5(ii)).

> (ii) A field survey that shows the availability of dark fiber pairs between two or more Verizon central offices, a Verizon central office and a Cavalier central office or a Verizon end office and the premises of a Customer, shows whether or not such pairs are defective, shows whether or not such pairs have been used by Verizon for emergency restoration activity and tests the transmission characteristics of Verizon dark fiber pairs. If a field survey shows that a Dark Fiber Loop or Dark Fiber IOF is available, Cavalier may reserve the Dark Fiber Loop or Dark Fiber IOF, as applicable, for ten (10) Business Days from receipt of Verizon's field survey results. If Cavalier submits an order for access to such Dark Fiber Loop or Dark Fiber IOF after passage of the foregoing ten (10) Business Day reservation period, Verizon does not guarantee or warrant the Dark Fiber Loop or Dark Fiber IOF will be available when Verizon receives such order, and Cavalier assumes all risk that the Dark Fiber Loop or Dark Fiber IOF will not be available. At Cavalier's option, its personnel may observe the conducting of the field survey. Verizon shall perform a field survey subject to a negotiated interval. If Cavalier submits an order for a dark fiber pair without first obtaining the results of a field survey of such pair, Cavalier assumes all risk that the pair will not be compatible with Cavalier's equipment, including, but not limited to, order cancellation charges.

d. Queue Provisions

(i) Positions of the Parties

122. Cavalier notes that when Verizon denies a request for dark fiber, Cavalier has no idea when such dark fiber might become available.[393] Cavalier must re-submit a request for dark fiber at just the right time once dark fiber does become available, or another carrier might get the dark fiber first.[394] Alternatively, Cavalier must constantly re-submit dark fiber inquiries, incurring a dark fiber inquiry fee in each instance, to avoid missing out on newly-available dark fiber.[395] To address this situation, Cavalier proposes a dark fiber "queue," similar to the queue Verizon uses in making available collocation space.[396] Under Cavalier's proposed language, up to four years after Cavalier inquires about the availability of dark fiber along a route or to a location, Verizon would hold the request in queue, giving Cavalier the first opportunity to obtain

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[393] Cavalier Brief at 38-39.

[394] *Id*. at 38.

[395] *Id*.

[396] Final Proposed Language at 17 (Cavalier Proposed § 11.2.15.4.1).

dark fiber when it becomes available.[397] Cavalier agrees to respond promptly when dark fiber becomes available to avoid delay in the assignment of the dark fiber.[398] According to Cavalier, there is no support for Verizon's claims that the queue process would be unworkable and burdensome.[399]

123. Verizon maintains that the creation and operation of the proposed queue would impose significant economic and operational burdens.[400] According to Verizon, the proposal calls for it to create a queue system that is far more burdensome and difficult to maintain than the queue for collocation, given the vastly greater numbers of fiber routes than collocation spaces, and the greater turnover in available dark fiber.[401] Verizon asserts that its current process of providing available dark fiber only in response to dark fiber inquiries is "fair, well understood and applied uniformly to all carriers."[402] Verizon also notes that there is no guarantee that Cavalier still would want the dark fiber if it becomes available years down the road, wasting Verizon's time and effort in maintaining the queue.[403] Ultimately, Verizon claims that the proposed queue goes beyond anything required by the Act.[404]

(ii) Discussion

124. We do not adopt Cavalier's proposed section 11.2.15.4.1, which would require a dark fiber queue. Verizon demonstrates that the queue proposed by Cavalier would increase its administrative burdens, particularly under the language proposed by Cavalier, which would require daily, manual dark fiber inquiries for two to four years.[405] Although Cavalier states that it is willing to accept a different duration for the queue, it provides no evidence that could form the basis either for its proposed two-to-four year queue or for some alternative interval. We agree with Verizon that comparisons to its collocation queue are not relevant, because of the significantly larger numbers of dark fibers in Virginia than collocation spaces.[406] Nor has Cavalier demonstrated that its queue is required by the Act or Commission rules. As we discuss above, the additional information we require in response to dark fiber inquiries should help

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397 *Id*.

398 Cavalier Rebuttal Testimony of Ashenden at 1-2.

399 Cavalier Brief at 39.

400 Verizon Brief at 31-32.

401 *Id*. at 32.

402 Verizon Rebuttal Testimony of Albert Panel at 11-12.

403 Verizon Brief at 32; Verizon Direct Testimony of Albert Panel at 18; Verizon Rebuttal Testimony of Albert Panel at 11.

404 Verizon Brief at 32; Verizon Direct Testimony of Albert Panel at 19.

405 Verizon Brief at 31.

406 *Id*. at 32.

Cavalier better plan its activities and ensure compliance with the dark fiber unbundling rules. Further, as Verizon states, its current process for assigning dark fiber is understood by and applies equally to all competitive LECs.[407] We are concerned that Cavalier's ability to place its requests in queue would place it in a superior position to other competitive LECs with respect to access to unbundled dark fiber. Although Verizon speculates that other competitive LECs could opt into such a provision as well, they may not be able to do so quickly, if in fact they are able to do so at all.[408]

(iii) Arbitrator's Adopted Contract Language

125. As discussed above, the Arbitrator does not adopt any language regarding this aspect of issue C10.

8. Issue C14 (Integrated DLC Loops)

a. Introduction

126. The Parties disagree about Verizon's obligation to provide unbundled access to loops served by Integrated Digital Loop Carrier (Integrated DLC or IDLC) systems.[409] As the Commission noted in the *Triennial Review Order*, unbundling in the context of Integrated DLC systems presents particular challenges not always present in the case of other hybrid loops.[410] Nonetheless, the Commission required incumbent LECs "to provide requesting carriers access to a transmission path over hybrid loops served by Integrated DLC systems," recognizing "that in most cases this will be either through a spare copper facility or through the availability of Universal DLC systems."[411]

127. Cavalier proposes language that would require the Parties to conduct trials of two processes for unbundling access to loops served by Integrated DLC systems, and seeks unbundled access to such loops using one of these processes whenever Verizon uses Integrated DLC systems to serve end users.[412] Verizon claims to offer adequate alternatives to unbundling

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[407] Verizon Rebuttal Testimony of Albert Panel at 11-12.

[408] In particular, the Commission currently is evaluating whether to retain the "pick-and-choose" rule. *Triennial Review Order*, 18 FCC Rcd at 17409-10, 17412-16, paras. 713, 720-29.

[409] Integrated DLC loops are a specific type of "hybrid loop," which is defined as "a local loop composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant." 47 C.F.R. § 51.319(a)(2).

[410] Specifically, because the Integrated DLC "system is integrated directly into the switches of incumbent LECs" and incumbent LECs "typically use concentration as a practice for engineering traffic on their networks," meaning that "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*, 18 FCC Rcd at 17154, para. 297.

[411] *Id*.

[412] Final Proposed Language at 19-21 (Cavalier Proposed § 11.4).

Integrated DLC loops, and thus claims that there is no need to conduct trials of unbundling the loops served by Integrated DLC systems themselves.[413]

b. Positions of the Parties

128. Cavalier expresses dissatisfaction with the level of service it is able to provide over unbundled spare copper loops or Universal Digital Loop Carrier (Universal DLC or UDLC) systems when serving a customer that Verizon previously served by Integrated DLC systems.[414] Cavalier asserts that Verizon must unbundle the loops served by Integrated DLC systems themselves, and proposes language that requires the Parties to conduct trials of hairpin/nail-up and multiple switch-hosting processes for unbundling such loops.[415] If the tests are successful, Cavalier proposes provisions requiring that the Parties meet to develop procedures to implement that unbundling process for Integrated DLC loops "on a fully available, commercial basis under the same rates, terms, and conditions as an unbundled loop provisioned over copper."[416]

129. Verizon responds that it is not obligated to unbundle loops served by Integrated DLC systems.[417] Verizon states that when Cavalier requests an unbundled loop to serve a customer that Verizon had served using Integrated DLC systems, Verizon first seeks to provide Cavalier with a spare copper loop or loop served by a Universal DLC system.[418] If no spare copper loop or Universal DLC loop is available, Verizon offers either to perform a line-and-station transfer[419] to make available space on copper or UDLC facilities or to construct a new copper loop or UDLC.[420] Verizon claims that this allows it to meet its obligation under the *Triennial Review Order* to provide either a spare copper loop or UDLC or other "technically

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413 Verizon Brief at 38-39.

414 Cavalier Direct Testimony of Vermeulen at 7-8 (discussing inadequacy of loops served by Universal DLC systems).

415 Final Proposed Language at 19-21 (Cavalier Proposed §§ 11.4.1 – 11.4.6). The "hairpin/nail-up" option generally involves configuring a semi-permanent path and disabling certain switching functions. *Triennial Review Order*, 18 FCC Rcd at 17154, para. 297 n.855. The "multiple switch hosting" option proposed by Cavalier would involve "grooming of the integrated loops, such that discrete groups of multiplexed loops may be assigned to transmission facilities, or the termination of loops to integrated network access systems." Final Proposed Language at 19 (Cavalier Proposed § 11.4.3).

416 *Id*. at 20 (Cavalier Proposed § 11.4.5).

417 Verizon Brief at 38.

418 *Id*.

419 As discussed above, a "line-and-station transfer" in the xDSL context involves switching a customer's service from a loop that is not suitable for providing xDSL service to an available loop that is suitable for providing xDSL service. Similarly, a line-and-station transfer also can be used to switch a customer's service from a loop served by an Integrated DLC system to an available spare copper loop or Universal DLC loop. Verizon Direct Testimony of Albert Panel at 13.

420 Verizon Brief at 38.

feasible methods of unbundled access."[421] In light of the small number of lines served by IDLC where there is no spare copper loop or UDLC, Verizon sees no justification for conducting trials of methods for unbundling IDLC loops.[422]

130. Verizon notes that, at Cavalier's request, Verizon previously reviewed the hairpin/nail-up process, and found that this approach is not cost-justifiable.[423] With respect to Cavalier's proposed multiple switch hosting process, Verizon states that the approach is not technically feasible given Verizon's current network technology.[424] Verizon also maintains that the 60 days Cavalier has proposed for each trial is too short.[425] Finally, Verizon contends that Cavalier has not adequately demonstrated that Integrated DLC loops should be unbundled "under the same rates, terms, and conditions as an unbundled loop provisioned over copper."[426]

c. Discussion

131. We decline to adopt Cavalier's proposed language. While Verizon is obligated to offer unbundled loops served by Integrated DLC systems where no spare copper loops or Universal DLC loops are available, the *Triennial Review Order* does not require Verizon to use the particular methods proposed by Cavalier.

132. When a competitive LEC seeks access to an unbundled loop to serve a customer that an incumbent LEC is serving using an Integrated DLC loop, the *Triennial Review Order* gives the incumbent LEC three choices[427]: (1) unbundle a spare copper loop;[428] (2) unbundle a Universal DLC loop; or (3) provide unbundled access to a transmission path over the hybrid loop served by the Integrated DLC system.[429] Verizon's refusal, under any circumstances, to unbundle access to Integrated DLC loops is not consistent with the Commission's rules. The hybrid loop unbundling rules only require incumbent LECs to provide a technically feasible

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[421] *Id*. (citing *Triennial Review Order*, 18 FCC Rcd at 17154, para. 297).

[422] *Id*. at 39.

[423] *Id*. at 39-40.

[424] *Id*. at 40-41.

[425] *Id*. at 41-42.

[426] Verizon Direct Testimony of Albert Panel at 26-27.

[427] Because Integrated DLC loops are "hybrid loops," they are subject to the obligation to unbundle either spare copper facilities or a DS0 transmission path on the hybrid loop. *Triennial Review Order*, 18 FCC Rcd at 17154, para. 297.

[428] Incumbent LECs have the option, instead of unbundling the hybrid loop, "to provide a homerun copper loop . . . if the incumbent LEC has not removed such loop facilities." *Id.* at 17153-54, para. 296.

[429] Specifically, the *Order* states that incumbent LECs must "provid[e] unbundled access to hybrid loops" for narrowband service by providing "an entire non-packetized transmission path capable of voice-grade service (*i.e.*, a circuit equivalent to a DS0 circuit) between the central office and customer's premises." *Id.*

method of access to a DS0 transmission path over the Integrated DLC loop where no spare copper loop or Universal DLC loop is available.[430]

133. We also find that the specific language proposed by Cavalier is at odds with the *Triennial Review Order*. Because incumbent LECs only are required to provide "a technically feasible method of unbundled access" to a transmission path over the Integrated DLC loop,[431] we reject Cavalier's language that would require Verizon to conduct trials of the specific hairpin/nail-up and multiple switch hosting unbundling processes.[432] We also reject Cavalier's claim that Verizon should be required to unbundle Integrated DLC loops whenever desired by Cavalier.[433] The *Triennial Review Order* gives incumbent LECs the choice whether to unbundle Integrated DLC loops when spare facilities are available, and the choice of technically feasible methods of Integrated DLC loop unbundling.[434]

134. Despite rejecting Cavalier's proposed contract language relating to unbundled Integrated DLC loops, we note that Verizon is obligated under other, undisputed terms of the Agreement to provide unbundled Integrated DLC loops when a spare copper loop or Universal DLC loop is not available. Specifically, section 11.2 of the Agreement provides, in pertinent part:

> Subject to the conditions set forth in Section 11.7, Verizon shall allow Cavalier to access Loops unbundled from local switching and local transport as required by Applicable Law, in accordance with the terms and conditions set forth in this Section 11.2. *The following enumeration of specific loop types in this Agreement does not preclude Cavalier from requesting, to the extent Verizon is required to provide under Applicable Law, additional Loop types*.[435]

Pursuant to this provision, Cavalier is entitled to request unbundled Integrated DLC loops, as permitted by the *Triennial Review Order* and Commission rules, even though unbundled Integrated DLC loops are not specifically enumerated in the interconnection Agreement.

135. We further note that section 11.7.6 of the Agreement specifies that, in those cases where Cavalier requests an unbundled loop to serve a customer that Verizon is serving using an

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[430] *Id*. at 17153-54, paras. 296-97.

[431] *Id*. at 17154, para. 297.

[432] Final Proposed Language at 19-21 (Cavalier Proposed § 11.4).

[433] *See* Cavalier Direct Testimony of Vermeulen at 7-8 (discussing inadequacy of loops served by Universal DLC systems).

[434] The *Order* recognizes that incumbent LECs have successfully provided unbundled access to Integrated DLC loops through various methods, including the hairpin method requested by Cavalier. *Triennial Review Order*, 18 FCC Rcd at 17154, para. 297 n.855.

[435] Aug. 1 Draft Agreement § 11.2 (emphasis added).

Integrated DLC system, "Verizon shall, where available, move the requested Loop(s) to a spare physical Loop, if one is existing and available, at no additional charge to Cavalier."[436] Section 11.7.6 then proceeds to state that:

> If, however, no spare physical Loop is available, Verizon shall within three (3) Business days of Cavalier's request notify Cavalier of the lack of available facilities. Cavalier may then at its discretion make a Network Element Bona Fide Request to Verizon to provide the unbundled Local Loop through the demultiplexing of the integrated digitized Loop(s). Cavalier may also make a Network Element Bona Fide Request for access to Unbundled Local Loops at the Loop concentration site point. Notwithstanding anything to the contrary in this Agreement, standard provisioning intervals shall not apply to Loops provided under this Section 11.7.6.[437]

As discussed above, where a spare copper loop or Universal DLC loop is not available, Commission rules require Verizon to unbundle the Integrated DLC loop itself. Subject to that underlying unbundling obligation, however, Verizon is free also to continue to offer Cavalier the options specified in section 11.7.6.[438]

136. With respect to Cavalier's request that the rates for unbundled Integrated DLC loops should be the same as for an unbundled loop provisioned over copper, we conclude that Cavalier has not provided evidence that would allow us to determine appropriate TELRIC rates for unbundled Integrated DLC loops. We agree with Verizon that Cavalier has not justified this rate proposal. Indeed, Cavalier has presented no evidence to support any determination of the proper rates for unbundled Integrated DLC loops beyond its mere assertion in its proposed contract language. Verizon, on the other hand, also has not provided any cost-related data demonstrating that rates for unbundled Integrated DLC loops should not be the same as for copper loops. Because the Parties did not submit evidence regarding the cost of provisioning an unbundled Integrated DLC loop in those circumstances where no spare copper loop or Universal DLC loop is available, we have no basis for considering appropriate rates in this Order.

137. As a result, under the Agreement as it currently stands, because the Parties have provided no evidence relating to the appropriate costs of Integrated DLC loop unbundling, loops unbundled pursuant to section 11.2 that are not specifically enumerated, such as Integrated DLC loops, are priced through the Bona Fide Request (BFR) process:

> Verizon shall, upon request of Cavalier and to the extent required by Applicable Law, provide to Cavalier access to its Network Elements on an unbundled basis for the provision of Cavalier's Telecommunications Service. Any request by Cavalier for access to a Verizon Network Element not provided pursuant to this

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436 *Id*. at § 11.7.6.

437 *Id*.

438 *See supra* para. 132.

> Agreement or pursuant to another interconnection agreement in accordance with the terms and conditions of Section 28.13 hereof shall be treated as a Network Element Bona Fide Request.[439]

This BFR process will govern until the Parties negotiate a provision that specifically establishes the rates, terms, and conditions for access to a transmission path over hybrid loops served by Integrated DLC systems.

d. Arbitrator's Adopted Contract Language

138. As discussed above, the Arbitrator does not adopt any new language regarding issue C14, but instead clarifies that other, undisputed provisions in the Agreement require Verizon to unbundle Integrated DLC loops when no spare copper loop or Universal DLC loop is available.

9. Issue C16 (Pole Attachments)

a. Introduction

139. The Parties disagree about language Cavalier proposes in an attempt to expedite the pole attachment process. Section 251(b)(4) of the Act requires all LECs to provide access to poles, ducts, conduits, and rights-of-way in a nondiscriminatory manner consistent with section 224 of the Act.[440] The current pole attachment arrangements permit Verizon, as well as all other entities attached to Verizon's poles, to "engineer" the pole to make it ready for a new attachment and to bill the new attacher accordingly.[441] Cavalier proposes language that would change Verizon's make-ready process for accommodating Cavalier's pole attachment requests under section 224 of the Act.[442] Verizon opposes Cavalier's proposal, asserting that it would affect the rights of nearly every other attacher in Virginia,[443] and indicating Verizon has streamlined its pole attachment process since Cavalier last made use of the process.[444]

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[439] *Id*. at § 11.8.1. Although we do not resolve the pricing of unbundled Integrated DLC loops in this proceeding, we note that any charges imposed through the BFR process should not allow double-recovery by permitting Verizon to recover for costs that also will be included in recurring or non-recurring charges imposed on other competing carriers in the future. *See Virginia Arbitration Order*, 17 FCC Rcd at 27274, para. 478 & ns. 1958-99.

[440] 47 U.S.C. § 251(b)(4). Section 224 provides for the regulation of pole attachments on poles owned by utilities including local exchange carriers, electric, gas, water, steam, or other public utility. 47 U.S.C. § 224*; see also* 47 C.F.R. § 1.1403.

[441] Cavalier Direct Testimony of Ashenden at 8-10; Cavalier Brief at 48-49. This process is referred to as the "make-ready" process. This means that Verizon, the power company, the cable company, and any other attached competitive LEC each send out separate field teams to determine the impact on their respective attachment and to take any necessary steps to accommodate the planned new attachment. *See* 47 U.S.C. §§ 224(h), (i).

[442] Final Proposed Language at 21-25 (Cavalier Proposed § 16.2).

[443] Verizon Brief at 42.

[444] Tr. at 337-39; Verizon Brief at 44.

b. Positions of the Parties

140. Cavalier wants to substitute the current system which involves multiple rounds of engineering and make-ready work on a single stretch of poles by each attacher with a single, unified engineering and make-ready process.[445] Under Cavalier's proposal, a single third party contractor would simultaneously perform the engineering and make-ready services on behalf of all attached entities on the pole, and render the new attacher a single bill.[446] Cavalier claims it has experienced excessive pole attachment delays and make-ready costs in the past.[447] It concedes that the Commission stopped short of requiring such a procedure in a recent pole attachment case, but asserts that the Commission left the door open for such a future requirement by indicating that such a process would probably be more efficient.[448] Cavalier's proposed language would also require Verizon to complete the engineering and make-ready work process within 45 days after its application is submitted.[449] Cavalier believes that this proceeding is an appropriate forum for resolving this dispute, as Verizon is the primary obstacle to its resolution.[450]

141. Verizon argues that Cavalier's proposal should be rejected for at least three reasons: (1) it calls for Verizon to assume the role of project coordinator for all pole attachers in Virginia, which it is not required to do under the Act; (2) Cavalier is not in a position to complain the current process is inefficient because Cavalier has insufficient experience with it;[451] and (3) even if a new process were needed it should be addressed in a proceeding which would

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[445] Cavalier Arbitration Petition at 23-24.

[446] Cavalier Brief at 49.

[447] Cavalier Rebuttal Testimony of Ashenden at 13; Cavalier Brief at 49. Cavalier implicitly concedes that other attachers often caused the delays it faced. Cavalier Brief at 48-49.

[448] Cavalier Direct Testimony of Ashenden; Cavalier Rebuttal Testimony of Ashenden at 9 (citing *Cavalier Telephone Company, LLC v. Virginia Electric and Power Company,* File No. PA-99-005, Order, 17 FCC Rcd 24414 (2002) (*Virginia Electric and Power*)); Cavalier Brief at 49-50.

[449] Final Proposed Language at 24-25 (Cavalier Proposed § 16.2.8). The proposed final language, however, conflicts with Cavalier's statement that it would like to see an end-to-end 45-day process, but would be satisfied if applications were approved or denied within 45 days (without restarting the 45-day clock at a whim as it alleges Verizon does) and make-ready work completed within a reasonable time. Cavalier Rebuttal Testimony of Ashenden at 12-13.

[450] Cavalier Rebuttal Testimony of Ashenden at 11-12. Cavalier states that it has been able to reach a similar agreement with entities other than Verizon and that such a process has been followed in eastern Virginia where Verizon's poles are not involved. Cavalier Direct Testimony of Ashenden at 11; Cavalier Rebuttal Testimony of Ashenden at 11.

[451] Verizon Rebuttal Testimony of Young at 4; Verizon Brief at 43. Verizon notes that in the two year period since Cavalier experienced delays associated with prior attachments to Verizon's poles, Verizon has modified and centralized its pole attachment process, appointing a Single Point of Contact (SPOC) based in Richmond. Tr. at 337-339; Verizon Brief at 44; Verizon Reply Brief at 44.

allow for the participation of all affected attachers.[452] Instead, Verizon proposes to continue following the current pole attachment process which the Virginia Commission and this Commission approved in approving its section 271 application.[453] Verizon also points to the Commission's rejection of a similar pole attachment proposal by Cavalier in *Virginia Electric and Power*.[454]

c. Discussion

142. We decline to adopt the language proposed by Cavalier. First, the record indicates that Verizon's current pole attachment process has been streamlined and centralized since Cavalier's prior experience with the process.[455] Second, given the multilateral nature of pole attachment arrangements, the process contemplated by Cavalier's proposed language would affect the interests of numerous entities not parties to this Agreement.[456] These parties may refuse to embrace a unified process, resulting in Verizon's inability to implement the process advocated by Cavalier even if we were to adopt Cavalier's proposed language.[457] Finally, the language advocated by Cavalier would require Verizon to attempt to renegotiate potentially all of its pole attachment license agreements in Virginia, imposing a potentially unreasonable burden on Verizon in the absence of evidence of discriminatory treatment toward Cavalier.

143. In declining to adopt Cavalier's language, however, we note the need for continued processing of pole attachment applications in an efficient and timely manner. Competitive LECs like Cavalier that seek to attach to poles, as contemplated in section 251(b)(4) of the Act, do so to compete with incumbent LECs.[458] If evidence exists that the pole attachment

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[452] Verizon Direct Testimony of Young at 7; Verizon Rebuttal Testimony of Young at 1-4.

[453] Verizon Direct Testimony of Young at 2-3; Verizon Brief at 42 (citing *Verizon Virginia Section 271 Order*, 17 FCC Rcd at 21986-87, para. 193). Verizon further asserts that in making its determination that Verizon was in compliance with Checklist Item 3, the Virginia Hearing Examiner in the state 271 proceeding rejected essentially the same argument from Cavalier. Verizon Direct Testimony of Young at 10; Verizon Brief at 42-43; Virginia Hearing Examiner's Report at 97. In addition, Verizon distinguishes the issue Cavalier raises here from what it characterizes as a superficially similar but fundamentally different issue in the *Virginia Arbitration Order.* Where WorldCom proposed the use of its own contractors to perform make-ready work on Verizon's poles due to a shortage of Verizon contractors, noting even that the Bureau adopted Verizon's language after Verizon agreed to a minor modification. Verizon Answer/Response at Exhibit A.

[454] Verizon Direct Testimony of Young at 7-8 (citing *Virginia Electric and Power,* 17 FCC Rcd at 24421, para. 21 (order was released subsequent to the *Verizon Virginia Section 271 Order*)).

[455] Tr. at 337-338.

[456] These entities have § 224 rights under the Act as well rights under their individual License agreements with Verizon. Cavalier's proposal could affect these rights without their ability to be heard.

[457] The process advocated by Cavalier would be more appropriately considered on a statewide basis, where all entities to be affected by this process would have an opportunity to participate.

[458] *See* 47 U.S.C. § 251(b)(4).

process is not functioning to ensure that such access is made available expeditiously, Cavalier could revisit this issue in the future.

d. Arbitrator's Adopted Contract Language

144. The Arbitrator adopts the following language:

> 16.0 – ACCESS TO RIGHTS-OF-WAYS Section 251(b)(4) —To the extent required by applicable law and where facilities are available, each Party ("Licensor") shall provide the other Party ("Licensee") access for purposes of making attachments to the poles, ducts, rights-of-way and conduits it owns or controls, pursuant to any existing or future license agreement between the Parties. Such access shall be in conformance with 47 U.S.C. § 224 and on terms and conditions and prices comparable to those offered to any other entity pursuant to each Party's applicable tariffs (including generally available license agreements).

10. Issue C17 (Customer Contacts)

a. Introduction

145. Cavalier expresses concern about improper conduct by Verizon representatives either during misdirected calls intended for Cavalier or during calls to Cavalier customers initiated by Verizon. Cavalier proposes expanded obligations addressing each Party's conduct during contacts with the other Party's customers, and asks for mandatory investigations and liquidated damages in the event of improper conduct.[459] Verizon claims that its existing practices governing customer contacts are adequate, and thus objects to the additional obligations and liquidated damages proposed by Cavalier.[460]

b. Positions of the Parties

146. Cavalier states that there have been numerous instances of improper contacts between Verizon employees and Cavalier customers, including the disparagement of Cavalier, improper efforts to win back customers from Cavalier, and misrepresentation of Cavalier customers' obligations to Verizon or its affiliates.[461] Cavalier also expresses concern that Verizon's retail operations have access to information about Cavalier and its customers from Verizon's wholesale operations.[462] When Cavalier has brought concerns about improper contacts to Verizon's attention, it believes that Verizon has not taken adequate internal steps to address

[459] Final Proposed Language at 25-28 (Cavalier Proposed § 18.2).

[460] Verizon Brief at 45-48.

[461] Cavalier Brief at 53-56 & Ex. C17-1.

[462] *Id.*

the problems.[463] Cavalier further maintains that it suffers economic harm from improper contacts, for which it is not compensated.[464]

147. To prevent these sorts of incidents from recurring, Cavalier recommends a variety of expanded obligations regarding both Parties' contacts with each other's customers. Specifically, Cavalier proposes to modify sections 18.2.1 and 18.2.2 of the Agreement, which govern a carrier's responsibility to serve as the single point of contact for its customers, to make these obligations equivalent for both Cavalier and Verizon.[465] In the event that one Party "receives or responds to an inquiry from a Customer of the other party, or a prospective Customer of the other party," Cavalier proposes prohibitions on marketing products and services, and against disparaging or discriminating against the other Party during such contacts.[466] In such cases, Cavalier also proposes expanded obligations to provide referrals to the correct Party.[467] According to Cavalier, if, as Verizon claims, improper customer contacts are rare, then these provisions seldom will be triggered, creating only a small burden for Verizon.[468]

148. Cavalier suggests language requiring each Party to implement codes of conduct and train its employees regarding proper behavior during contacts with the other Party's customers.[469] Under Cavalier's proposal, an investigation and reporting system would be required in the event of reported improper customer contacts, with a system of liquidated damages that would apply in the event of verified misconduct.[470] Cavalier also proposes that remedies related to customer contacts specified in section 18.2 of the Agreement are not exclusive remedies, but that Parties also may pursue their claims in other appropriate fora.[471]

149. As a threshold issue, Verizon claims that Cavalier's proposals are "not appropriate for consideration in this arbitration, which is intended to determine the terms and conditions under which the Parties will satisfy their interconnection and other network access obligations under section 251 of the Act."[472] Regarding the substance of Cavalier's proposals, Verizon's proposed sections 18.2.1 and 18.2.2 only address Cavalier's responsibility to serve as

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[463] *Id*. at 55.

[464] Cavalier Reply Brief at 28; Cavalier Direct Testimony of Zitz at 4.

[465] Final Proposed Language at 25-26 (Cavalier Proposed §§ 18.2.1, 18.2.2).

[466] *Id*. at 26 (Cavalier Proposed § 18.2.3.4).

[467] *Id*. at 26 (Cavalier Proposed § 18.2.3.4).

[468] Cavalier Brief at 55-56.

[469] Final Proposed Language at 26-27 (Cavalier Proposed § 18.2.5).

[470] *Id*. at 26-28 (Cavalier Proposed §§ 18.2.5 – 18.2.7).

[471] *Id*. at 28 (Cavalier Proposed § 18.2.8).

[472] Verizon Brief at 28.

the single point of contact for its customers.[473] In the remainder of section 18.2, Verizon proposes more limited language than Cavalier, requiring that Parties not disparage one another when responding to misdirected calls, and providing for referrals only in the case of misdirected repair calls.[474] Verizon alleges that, given the existing procedures it already has in place, the burdensome proposed investigation and reporting requirements and system of liquidated damages payments are not warranted by the small number of isolated instances of problematic customer contacts cited by Cavalier, nor by instances of lawful conduct on the part of Verizon's Yellow Pages affiliate.[475] Verizon further states that it should not be required to train its employees in the products and services offered by Cavalier in order to meet the extensive referral obligations suggested by Cavalier.[476] Finally, Verizon asserts that such mechanisms could create incentives for competing carriers to assert dubious claims in the hopes of receiving liquidated damages payments.[477]

c. Discussion

150. As an initial matter, we reject Verizon's claim that this issue is not appropriate for consideration in the arbitration. Cavalier properly presented this issue in its petition and the arbitration, among other things, evaluates the terms and conditions relating to the Parties' compliance with section 251 of the Act and associated Commission rules.[478] Such compliance requires Verizon to interconnect with Cavalier and provide access to UNEs on "terms and conditions that are just, reasonable, and nondiscriminatory."[479] We note that it is Verizon's position as the provider of UNEs to Cavalier that gives rise to the possibility of such contacts in many instances, for example during contacts by Verizon personnel performing maintenance and repair on behalf of Cavalier.[480] We find that terms addressing each Party's contacts with the other Party's customers arising out of the relationships governed by section 251 properly may be considered in this arbitration. Moreover, we note that the Commission has considered factors such as improper customer contacts in evaluating carriers' compliance with their unbundling obligations for purposes of section 271.[481] We thus find that we may consider issue C17 raised by Cavalier.

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[473] Final Proposed Language at 25 (Verizon Proposed §§ 18.2.1, 18.2.2).

[474] *Id*. at 25-26 (Verizon Proposed §§ 18.2.3 - 18.2.4).

[475] Verizon Brief at 47-48.

[476] Verizon Direct Testimony of Smith at 16.

[477] Verizon Reply Brief at 45; Tr. at 215.

[478] 47 U.S.C. § 252(c); 47 C.F.R. § 51.807(c).

[479] 47 U.S.C. §§ 251(c)(2), (3).

[480] *See, e.g.*, Cavalier Direct Testimony of Zitz at 2-4; Cavalier Brief at Ex. C17-1.

[481] *See, e.g.*, *In the Matter of Application By SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in*
(continued….)

151. We adopt Cavalier's proposed sections 18.2.1 and 18.2.2, which require Cavalier to serve as the contact point for inquiries or maintenance and repair requests from its end-user customers and Verizon to serve as the contact for inquiries or maintenance and repair requests from its end-user customers.[482] Although Verizon's proposed sections 18.2.1 and 18.2.2 do not expressly make these obligations mutual, Verizon acknowledges that such a division of responsibility is proper.[483]

152. We also adopt Cavalier's proposed sections 18.2.3, 18.2.3.1, 18.2.3.2, and 18.2.3.3, modified as discussed below.[484] Cavalier proposes to revise section 18.2.3 to eliminate the restriction that limits the section's scope to misdirected "repair" calls.[485] As Cavalier demonstrates, the possibility of problematic customer contacts is not limited solely to misdirected repair calls, but also could arise in the context of other misdirected calls.[486] Further, we note that Verizon's claimed current informal practices are not dissimilar to what would formally be required under this language.[487] Consistent with the evidence, we revise Cavalier's section 18.2.3.2 and 18.2.3.3 to eliminate the limiting reference to misdirected "repair" calls, instead applying those sections' referral and non-disparagement obligations to all types of misdirected calls.

153. We reject Cavalier's proposed section 18.2.3.4. This section would impose referral and non-disparagement obligations on each Party in the context of any calls from the other Party's customers or "prospective Customers."[488] It also would restrict each Party from providing information about its own products and services during contacts with customers or "prospective Customers" of the other Party.[489] Protection against disparagement and a referral obligation in the context of misdirected calls already are encompassed in the revisions to section 18.2.3.2 discussed above, and thus would be duplicative here. The proposed restriction on providing information about the called carrier's services is overly broad, and thus potentially anticompetitive. "Customers" or "prospective Customers" of one carrier with respect to certain

(Continued from previous page)
Michigan, Memorandum Opinion & Order, WC Docket No. 03-138, 18 FCC Rcd 19024, 19070, para. 86 (2003) (considering claims of improper customer contacts for purposes of evaluating SBC's satisfaction of its OSS obligations under the standard of § 271).

482 Final Proposed Language at 25-26 (Cavalier Proposed §§ 18.2.1, 18.2.2).

483 Verizon Direct Testimony of Smith at 15.

484 Final Proposed Language at 26 (Cavalier Proposed §§ 18.2.3 - 18.2.3.3).

485 *Id*. at 26 (Cavalier Proposed § 18.2.3).

486 Cavalier Brief at 53-56 & Ex. C17-1.

487 Verizon Brief at 45-46 (referrals); Tr. at 209-10 (referrals); Final Proposed Language at 26 (Verizon Proposed § 18.2.4) (non-disparagement).

488 Final Proposed Language at 26 (Cavalier Proposed § 18.2.3.4).

489 *Id*.

services might also be customers or prospective customers of the other carrier with respect to other services. Such a broad restriction on a carrier providing information about its products and services to its own customers goes beyond the requirements of the Act and the Commission's rules. Indeed, as Verizon points out, the scope of "prospective Customers" could include virtually all customers located in Cavalier's service area,[490] and Cavalier offers no limiting definition that would allow it to be applied in a more reasonable manner. Given the protections of section 18.2.3.2 in the case of customers actually seeking to contact Cavalier, but contacting Verizon instead, the imposition of the unworkably broader requirements proposed by Cavalier is not justified.

154. We reject Verizon's proposed section 18.2.4 as unnecessary. As proposed, Verizon's section 18.2.4 imposes a non-disparagement requirement in the case of misdirected inquiries, other than repair calls, from the other Party's customer.[491] As discussed above, such protections already are incorporated into the modified section 18.2.3.2 we adopt.

155. We adopt portions of Cavalier's proposed section 18.2.5, as discussed below. The first sentence of Cavalier's proposed section 18.2.5 imposes on each Party the obligation to implement procedures to ensure "appropriate professional conduct" by its employees when engaging in contacts with the other Party's customers and to train its employees with respect to that policy.[492] We find this to be a reasonable step for the Parties to take in ensuring that their employees act in a manner consistent with the obligations each Party has undertaken in this portion of the Agreement. Indeed, Verizon asserts that it already has policies of this general nature in place, and provides instructions to its employees with respect to those policies. We anticipate that such policies also would address other types of problems, such as misrepresentations to Cavalier's customers regarding their obligations for distinct services that they obtain from Verizon, which Cavalier raises but which do not appear to be the subject of any express language. In addition to adopting the first sentence of section 18.2.5, we also adopt the third sentence of section 18.2.5 that defines "appropriate professional conduct" for purposes of this section.[493] We decline, however, to adopt Cavalier's additional proposed language relating to a Verizon affiliate offering discounted Yellow Pages listings.[494] To the extent that Cavalier believes that this or any other action by Verizon violates this section 18.2, it may file a complaint or pursue other legal action to enforce its rights under this Agreement, as discussed below.[495] We also decline to adopt Cavalier's proposed second sentence of section 18.2.5, which would

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[490] Verizon Brief at 46.

[491] Final Proposed Language at 26 (Verizon Proposed § 18.2.4).

[492] *Id*. at 26-27 (Cavalier Proposed § 18.2.5).

[493] Because we adopt more limited requirements under § 18.2 than originally proposed by Cavalier, we thus reject Verizon's claim that the prohibition on employee conduct in violation of § 18.2 is overly broad due to the breadth of obligations imposed under Cavalier's proposed § 18.2. Verizon Brief at 46.

[494] Final Proposed Language at 26-27 (Cavalier Proposed § 18.2.5).

[495] *See infra* para. 157.

establish formal internal investigation and reporting requirements in the event of reports of improper customer contacts. We agree with Verizon that the establishment of a formal investigation and reporting mechanism does not appear warranted by the volume of reported violations,[496] and further find it unnecessary in light of Cavalier's rights under this Agreement. Such formal processes also could be subject to abuse, as Verizon notes.[497] We would expect each Party to have processes already in place to investigate claims of employee misconduct arising from any aspect of their employment including those related to carrying out duties under this Agreement.[498] Instead, because we adopt many of Cavalier's proposed requirements, Cavalier now is in a position to enforce those obligations as it would other provisions of this Agreement.

156. Similarly, we reject Cavalier's proposed sections 18.2.6 and 18.2.7, providing for liquidated damages in the event of improper customer contacts.[499] Cavalier's proposed liquidated damages provisions are unnecessary in light of our adoption of section 18.2.8, discussed below, which will enable Cavalier to raise concerns about compliance with the requirements of sections 18.2 through the contract's dispute resolution mechanism,[500] or through other means available for enforcing the terms of this contract and seeking monetary damages for violations.[501]

157. We adopt portions of Cavalier's proposed section 18.2.8 providing that each Party may seek relief for a violation of section 18.2 through any forum of competent jurisdiction, with the modifications discussed below.[502] As Verizon concedes, Cavalier should have the ability to pursue claims in the event of significant harm caused by improper customer contacts.[503] We therefore direct that any liability of either Party under section 18.2 expressly be excluded from any liability limitation provisions of the Agreement. To conform section 18.2.8 to the language we adopt in section 18.2.5, we modify the term "improper conduct" in section 18.2.8 to reference "inappropriate professional conduct" instead. We have made a conforming modification to section 25.5 of this Agreement as well to specifically exclude section 18.2 violations from general limitation of liability provisions.[504] Cavalier's proposed section 18.2.8 also restricts the

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[496] Verizon Brief at 47-48. Cavalier provided specific evidence regarding only approximately 15 allegedly improper contacts over a five-year period. Cavalier Brief at Ex. C17-1. As discussed below, while we do not require Verizon to implement the formal investigation and reporting procedures sought by Cavalier, it may wish to use such procedures in particular cases to invoke the resulting liability limitations of § 18.2.8. *See infra* para. 157.

[497] Verizon Brief at 46-48.

[498] Indeed, it appears that Verizon does have such processes in place. *Id*. at 48.

[499] Final Proposed Language at 27-28 (Cavalier Proposed §§ 18.2.6 – 18.2.7).

[500] Aug. 1 Draft Agreement § 28.11.

[501] *See infra*, para. 157.

[502] Final Proposed Language at 28 (Cavalier Proposed § 18.2.8).

[503] Tr. at 216-17.

[504] *See infra* Part III.C.14 (discussing Issue C25 – Limitation of Liability).

injured Party from seeking such relief for the first occurrence of a particular type of misconduct if the other Party certifies that it has investigated the matter and taken proper remedial action.[505] While we do not require the adoption of a formal investigation and reporting process, we nonetheless believe it is appropriate to permit the Parties voluntarily to undertake such actions in order to limit their liability under this provision of the Agreement. Because we do not adopt Cavalier's proposed liquidated damages provisions under section 18.2.6, we do not adopt the last sentence of Cavalier's proposed section 18.2.8, which cross-references that liquidated damages provision.

d. Arbitrator's Adopted Contract Language

158. As discussed above, the Arbitrator adopts the following language with respect to issue C17:

> 18.2 – Customer Contact, Coordinated Repair Calls and Misdirected Inquiries
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> 18.2.1 – Each party will recognize the other party as the customer of record of all Services ordered by the other party under this Agreement. Each party shall be the single point of contact for its own Customers with regard to all services, facilities or products provided by the other party directly to that party, and other services and products which each party's Customers wish to purchase from that party or which they have purchased from that party. Communications by each party's Customers with regard to all services, facilities or products provided by the other party to that party and other services and products which each party's Customers wish to purchase from that party or which they have purchased from that party, shall be made to that party, and not to the other party. Each party shall instruct its Customers that such communications shall be directed to that party, and not to the other party.
>
> 18.2.2 – Requests by each party's Customers for information about or provision of products or services which they wish to purchase from that party, requests by that party's Customers to change, terminate, or obtain information about, assistance in using, or repair or maintenance of, products or services which they have purchased from that party, and inquiries by that party's Customers concerning that party's bills, charges for that party's products or services, and, if that party's Customers receive dial tone line service from that party, annoyance calls, shall be made by the that party's Customers to that party, and not to the other party.
>
> 18.2.3 – Cavalier and Verizon will employ the following procedures for handling misdirected calls:

[505] Final Proposed Language at 28 (Cavalier Proposed § 18.2.8).

18.2.3.1 – Cavalier and Verizon will educate their respective Customers as to the correct telephone numbers to call in order to access their respective repair bureaus.

18.2.3.2 – To the extent Party A is identifiable as the correct provider of service to Customers that make misdirected calls to Party B, Party B will immediately refer the Customers to the telephone number provided by Party A, or to an information source that can provide the telephone number of Party A, in a courteous manner and at no charge. In responding to misdirected calls, neither Party shall make disparaging remarks about the other Party, its services, rates, or service quality.

18.2.3.3 – Cavalier and Verizon will provide their respective contact numbers to one another on a reciprocal basis.

18.2.4 – Deleted

18.2.5 – Each party shall provide adequate training, and impose sufficiently strict codes of conduct or standards of conduct, for all of its employees and contractors to engage in appropriate professional conduct in any contact with the other party's customers. For purposes of this section 18.2.5, "appropriate professional conduct" shall be deemed to be conduct that is in accordance with sections 18.2 of this Agreement, as well as all applicable industry standards.

18.2.6 – Deleted

18.2.7 – Deleted

18.2.8 – The provisions of section 18.2 of this Agreement shall not be construed to preclude either party from seeking relief in any forum of competent jurisdiction, except that each party shall be barred from seeking relief in any forum of competent jurisdiction in response to the first occurrence of any particular type of allegedly inappropriate professional conduct reported by one party to the other, if the alleged violation is confirmed through investigation and the investigating party certifies in good faith to the non-offending party that it has: (a) promptly investigated any report of alleged wrongdoing, and (b) taken prompt, reasonable, and appropriate remedial or disciplinary action in response to any improper conduct identified by the investigating party.

11. Issue C21/V34 (Assurance of Payment)

a. Introduction

159. Verizon's proposed section 20.6 would permit it to demand "adequate assurance of payment" from Cavalier if the latter: cannot demonstrate that it is creditworthy, fails to timely pay a bill, admits it is unable to pay its debts when due, or is the subject of a bankruptcy or similar proceeding.[506] Under Verizon's proposed language, the "assurance of payment" may take the form of a cash deposit or letter of credit equal to two months' charges for services rendered in connection with the Agreement by Verizon to Cavalier. In addition, pursuant to Verizon's proposed subsections (x) and (y), if Cavalier fails to timely pay two or more bills within a 60-day period or three or more bills in a 180-day period, Verizon may demand additional assurance of payment in the form of monthly advanced payments of estimated charges. Cavalier opposes Verizon's proposed language.[507] We adopt a modified version of Verizon's proposed language.

b. Positions of the Parties

160. Cavalier argues that Verizon's proposed section 20.6 exposes Cavalier to the risk of disproportionately high deposits and advance payment, provides Verizon with far too much latitude, and does not comport with the Commission's *Deposit Policy Statement,* which was issued after the *Virginia Arbitration Order* in another proceeding to which Verizon was a party.[508] Although, in the *Virginia Arbitration Order*, the Bureau approved language similar to Verizon's proposal here, Cavalier notes that AT&T apparently did not object to the assurance of payment requirements and the Commission expressly exempted WorldCom from those requirements as long as the latter's net worth exceeded $100 million, an exemption Verizon has not offered Cavalier.[509] Cavalier also claims that there are major unsupportable differences between Verizon's proposed section 20.6 and the AT&T language.[510] Cavalier notes that Verizon itself acknowledges that it has modified the AT&T language concerning "'when Verizon can exercise its remedies and what those remedies will be.'" Accordingly, Cavalier argues, Verizon's proposed language should be rejected.

161. Cavalier also argues that Verizon's proposal is inconsistent with the Commission's *Deposit Policy Statement*.[511] First, although in that Statement the Commission recommended that carriers define a "proven history of late payment" trigger for requiring a

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[506] *See* Final Proposed Language at 33-35 (Verizon Proposed § 20.6).

[507] Cavalier Brief at 61.

[508] Cavalier Brief at 65 (citing *Verizon Petition for Emergency Declaratory and Other Relief*, WC Docket No. 02-202, Policy Statement, 17 FCC Rcd 26884 (2002) (*Deposit Policy Statement*)).

[509] *Id*. at 62; Cavalier Reply Brief at 33 (citing *Virginia Arbitration Order*, 17 FCC Rcd at 27390, para. 728).

[510] *Id*. at 33 (quoting Verizon Brief at 56).

[511] Cavalier Brief at 63.

deposit to include a failure to pay more than a *de minimis* amount within a set period, Cavalier asserts that Verizon's two-month deposit provision contains neither a *de minimis* exception nor any reference to a proven history of late payment.[512] As drafted, Cavalier argues, section 20.6 would allow Verizon to demand a $5 million deposit if it only *thinks* Cavalier may be unable to pay a bill, rather than requiring Verizon to apply an objectively determined measure of financial stability.[513] It would also allow Verizon to make such a demand if Cavalier failed to pay only one of between 200 and 300 bills that Cavalier receives from Verizon each month, not all of which are timely received.[514] Indeed, although Verizon argues that its proposed language tracks the Commission's recommendations concerning late payment and advance payment, Cavalier claims that subsections (x) and (y) of Verizon's proposed section 20.6 are *additional* assurances of payment, not initial deposit obligations.[515] Cavalier argues that, if it disputed more than five percent of Verizon's charges on any two bills in a 60-day period or three bills in a 180-day period, such dispute would trigger these "additional assurance of payment" provisions of subsections (x) and (y), bringing the total "assurance of payment" that Verizon could demand to $7.5 million.[516] Further, although the Commission suggested in the *Deposit Policy Statement* that carriers bill in advance for usage-based services currently billed in arrears, Cavalier claims that it already advance pays 70-80 percent of its bills from Verizon.[517] Cavalier contends that this fact undermines Verizon's entire rationale for insisting on an assurance of payment.[518]

162. Although Verizon testified at the hearing that bill disputes are handled pursuant to an orderly process, Cavalier argues that the proposed Agreement is silent as to any such process.[519] In Cavalier's experience, Verizon unilaterally decides whether a dispute is *bona fide* and then unilaterally determines what action it will take.[520] Verizon accuses Cavalier of having a "tendency to litigate rather than pay its bills,"[521] but Cavalier explains that sometimes litigation is

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512 *See id.* at 63-64 (citing *Deposit Policy Statement*, 17 FCC Rcd at 26887-88, para. 6).

513 *See* Cavalier Reply Brief at 32.

514 *See id.* (citing Tr. at 311-12.

515 *See id*. at 37 (citing Verizon's Brief at 58).

516 Cavalier explains that it currently pays about $2.5 million per month to Verizon. Therefore, Verizon could request $5 million under its initial deposit/letter of credit requirement, and an additional $2.5 million under the additional assurance of payment provisions set forth in subsections (x) and (y). *See* Cavalier Brief at 64 (citing Tr. at 12).

517 *Id*. at 64; Cavalier Reply Brief at 37 (citing Tr. at 321). Cavalier also argues that proposed § 20.6 runs afoul of the Commission's *Deposit Policy Statement* because it bears the "potential for discrimination" and "may not be as objective as [Verizon] claim[s]." Cavalier Brief at 65 (citing *Deposit Policy Statement*, 17 FCC Rcd at 26894, para. 21).

518 Cavalier Reply Brief at 37.

519 *See* Cavalier Brief at 63 (citing Tr. at 313-315).

520 *Id*. (citing Tr. at 314-15).

521 *See* Cavalier Reply Brief at 33 (citing Verizon Brief at 56).

the only way that it can get Verizon to take its bill disputes seriously.[522] Cavalier accuses Verizon of "chaotic" billing and claims that Verizon will use "all means available to apply unilateral and unjustified payment pressures on Cavalier even when billing is inaccurate."[523]

163. Finally, although Verizon argues that the potential risk from other competitive LECs warrants the inclusion of section 20.6 in its agreement with Cavalier, Cavalier responds that each carrier is unique and Verizon's arguments about generalized risk are misplaced.[524] Moreover, Cavalier points out, the rights that would be granted to Verizon under section 20.6 are not reciprocal; as drafted, that section provides Cavalier with no protection should Verizon prove unwilling or unable to pay its bills to Cavalier.[525] According to Cavalier's testimony, these charges to Verizon currently amount to several million dollars per year.[526]

164. Verizon argues that proposed Section 20.6 is nearly identical to language that the Bureau adopted in the *Virginia Arbitration Order*.[527] Verizon notes that, in that order, the Bureau acknowledged that "Verizon has a legitimate business interest in receiving assurances of payment … from its competitive LEC customers."[528] To the extent that its proposal varies from

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[522] *See id*. at 33-35.

[523] *See id*. at 38. Cavalier cites examples of billing disputes with Verizon, including a case it litigated before the United States District Court for the Eastern District of Virginia, and a very recent instance when, in response to Cavalier's request that certain bills be consolidated, Verizon allegedly (1) demanded ASRs; (2) announced it would charge Cavalier for the ASRs; and (3) warned that service disruptions to Cavalier's customers might occur in connection with the bill consolidation. Cavalier files certain court filings from litigation with Verizon in support of its argument that Verizon does not always consider Cavalier's billing disputes to be *bona fide*. *See id.* at 32-35 & n.98, Ex. C21-1-C21-5.

[524] *Id*. at 36.

[525] *Id*. at 36-37.

[526] *See* Cavalier Rebuttal Testimony of Whitt at 8-9.

[527] Verizon Brief at 55-56; Verizon Reply Brief at 53 (citing *Virginia Arbitration Order*, 17 FCC Rcd at 27389-90, para. 727).

[528] *See* Verizon Brief at 57-58; Verizon Reply at 53 (quoting *Virginia Arbitration Order*, 17 FCC Rcd at 27389-90, para. 727). Concerning the agreements that resulted from the prior AT&T/Cox/WorldCom arbitration, Verizon states that, contrary to Cavalier's assertion, AT&T was not exempted from the assurance of payment provision and asserts that Cavalier neither asked for the $100 million net worth exemption set forth in the WorldCom agreement, nor contends that it would fall within this exemption. Verizon Reply Brief at 54-55. Verizon also notes that the Bureau added the net worth exemption to the WorldCom agreement "to help 'establish Verizon's right to request assurances of payment from smaller or less-stable competitive LECs that may opt into the agreement.'" Verizon Reply Brief at 55 (quoting *Virginia Arbitration Order*, 17 FCC Rcd at 27390, para. 972 [sic 728]). Moreover, the Bureau rejected WorldCom's request that the assurance of payment provision be omitted. Verizon Reply Brief at 55 (citing *Virginia Arbitration Order*, 17 FCC Rcd at 27389-90, paras. 726-27).

the adopted language, Verizon claims that it either clarifies that language[529] or is supported by the Commission's *Deposit Policy Statement*.[530]

165. Verizon contends that, contrary to Cavalier's position, subsections (x) and (y) are consistent with the terms of the Commission's *Deposit Policy Statement*. First, under subsections (x) and (y), Verizon may only bill Cavalier in advance for monthly services if Cavalier misses two payments in a 60-day period or three payments in a 180-day period. Thus, as suggested by the *Deposit Policy Statement*, these subsections contain "'clear and explicit' standards for defining a 'proven history of late payment'" and "'advance billing is triggered only by concrete, objective standards … narrowly tailored to target only those customers that pose a genuine risk of nonpayment.'"[531] Verizon also argues that these provisions protect Cavalier in conformity with the *Deposit Policy Statement* because they ensure that Verizon cannot invoke the assurance of payment provisions if: (1) bills are the subject of *bona fide* dispute;[532] (2) the undisputed amount due is less than five percent of the total amount billed in the relevant period;[533] or (3) Cavalier has not received the bill.[534] Verizon also claims to treat every dispute as

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[529] Verizon explains that § 20.6 clarifies the language adopted in the prior Virginia Arbitration by specifying the circumstances under which it can exercise its right to request assurance of payment, and when it can draw upon the proposed letter of credit. *See* Verizon Brief at 56-57 (citing Verizon Rebuttal Testimony of Smith at 12; Tr. at 310). Verizon explains that its proposed language permits it to request a letter of credit from Cavalier equal to two months' anticipated charges, but only permits it to draw upon that letter to satisfy bills that are more than 30 days in arrears. Verizon Brief at 56-57 (citing Verizon Rebuttal Testimony of Smith at 12; Final Proposed Language at 33-35 (Verizon Proposed § 20.6)).

[530] Verizon argues that that subsections (x) and (y) to § 20.6 "were intended to be consistent with" the Commission's Policy Statement insofar as they track certain Commission recommendations as to how carriers might guard against the risk of nonpayment by connecting carriers. *See* Verizon Brief at 58-59 (citing *Deposit Policy Statement*, 17 FCC Rcd at 26887-88, para. 6).

[531] Verizon Reply Brief at 55-56 (quoting *Deposit Policy Statement*, 17 FCC Rcd at 26896, 26897, paras. 27, 29); *see* Verizon Brief at 58-59.

[532] Verizon Brief at 58; Verizon Reply Brief at 56. Although Cavalier claims that, under subsections (x) and (y) of § 20.6, if it "disputed more than 5% of Verizon charges on any two bills in 60 days, or three bills in 180 days, then Verizon could demand an additional $2.5 million" advance payment, Verizon says that is incorrect. Because § 20.6 explicitly excludes amounts subject to *bona fide* dispute and forbids Verizon from using any amounts subject to *bona fide* dispute to invoke the assurance of payment provisions, Verizon claims that disputed amounts would not be subject to subsections (x) and (y). *See* Verizon Reply Brief at 53 (quoting Cavalier Brief at 62), 54 (citing Verizon Rebuttal Testimony of Smith at 12; Tr. at 310).

[533] Verizon argues that this policy responds to the concern expressed in the *Deposit Policy Statement* that *de minimis* past due amounts not trigger assurance of payment provisions. Verizon Reply Brief at 56 (citing *Deposit Policy Statement*, 17 FCC Rcd at 26896, 26897, paras. 27, 29).

[534] Verizon notes that, because bills are not payable unless they are received, Cavalier's alleged concern is unfounded that Verizon will invoke the assurance of payment provision if Verizon furnishes a bill late or Cavalier does not receive a bill. *See* Verizon Reply Brief at 55 (citing Cavalier Brief at 62; Tr. at 311-12). Verizon argues this policy is consistent with the Commission's *Deposit Policy Statement*. *Id*. at 55 (citing *Deposit Policy Statement*, 17 FCC Rcd at 26897, para. 29).

bona fide and argues that Cavalier may escalate, if Verizon determines that a dispute is not *bona fide*, under section 28.9 of the Agreement.[535] Indeed, Verizon points out that section 28.9, which is not in dispute, sets forth, in precise detail, the procedures governing *bona fide* disputes.[536] Verizon also challenges Cavalier's contention that Cavalier's deposit and prepayment liabilities could total $7.5 million, if the "additional assurance of payment" provisions of subsections (x) and (y) were triggered.[537]

166. Verizon argues that Cavalier's position, which would eliminate the approved language, would subject Verizon to undue risk of nonpayment in two ways. First, due to the volatility in the industry, which has already resulted in the bankruptcy of 144 carriers, Cavalier might suddenly declare bankruptcy and thus Verizon would risk nonpayment for services already provided.[538] Second, because Cavalier has a "tendency to litigate rather than pay its bills" the risk of nonpayment is particularly high in this case.[539] Verizon argues that this risk should be placed with Cavalier and its investors, not Verizon.[540] Finally, Verizon argues that, even if Cavalier is financially stable and assurance of payment provisions are not necessary in its case, under section 252(i),[541] other carriers could opt into Cavalier's agreement in Virginia. Should such other carriers became insolvent, Verizon would be left without a payment recovery mechanism.[542]

c. Discussion

167. We adopt a portion of Verizon's proposed language with modifications.[543] As we recognized in the *Virginia Arbitration Order*, Verizon has a legitimate business interest in receiving assurances of payment, where warranted, from its competitive LEC customers,

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[535] *See id.* at 53 (citing Tr. at 313-14).

[536] *Id*. at 54 (citing Verizon Response, Ex. C at § 28.9).

[537] *Id*. at 56-57.

[538] *See* Verizon Brief at 56-57 (citing Tr. at 316; Verizon Rebuttal Testimony of Smith at 14); *see also id.* at Ex. 6 (list of competitive LEC bankruptcy filings between July 1, 1996 and September 19, 2003).

[539] *See* Verizon Brief at 56 (citing Verizon Direct Testimony of Smith at 25; Tr. at 313).

[540] *See id.* at 57 (citing Verizon Rebuttal Testimony of Smith at 14).

[541] 47 U.S.C. § 252(i).

[542] *See* Verizon Brief at 59.

[543] We note separately that Cavalier complains that, although it charges Verizon several million dollars per year, rights granted to Verizon under § 20.6 are not reciprocal. *See* Cavalier Rebuttal Testimony of Whitt at 8-9. These Cavalier-Verizon charges, however, are access charges and are not the subject of the interconnection Agreement. *See id*. Thus, they are for services provided by Cavalier to Verizon pursuant to Cavalier's FCC exchange access tariffs. *See* Aug. 1 Draft Agreement at Ex. A, Part II (interstate exchange access services provided by Cavalier to be priced in accordance with Cavalier's FCC exchange access tariff).

including carriers that may opt into Cavalier's interconnection agreement.[544] Nevertheless, a significant part of Verizon's proposed language is not consistent with the Commission's *Deposit Policy Statement*, which was issued by the Commission subsequent to the release of the Bureau's *Virginia Arbitration Order*.[545] To the extent that Verizon is at risk of nonpayment by its competitive LEC customers and protection may be warranted, the *Deposit Policy Statement* sets forth lawful parameters and we apply them here.[546]

168. First, we reject the portions of Verizon's proposed section 20.6 that would permit Verizon to demand "adequate assurance of payment" from Cavalier in the form of a cash deposit or letter of credit equal to two months' charges for services rendered under the Agreement by Verizon to Cavalier.[547] As Cavalier argues, Verizon's language is highly subjective.[548] Lacking any specific criteria, it is, moreover, unacceptably susceptible to discriminatory application.[549] This is the sort of vague language about which the Commission expressed misgivings in the *Deposit Policy Statement*.[550] Although we agree that some protection is appropriate from a customer with a proven history of late payment, that concern is sufficiently addressed under our revisions to subsections (x) and (y).

169. Second, we adopt a modified version of Verizon's proposed subsections (x) and (y). In the *Deposit Policy Statement*, the Commission noted that, that under existing interstate access tariffs, carriers may seek deposits of up to two months of access billing from customers

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[544] *Virginia Arbitration Order*, 17 FCC Rcd at 27389-90, para. 727.

[545] We also note that Verizon has sought reconsideration of the Bureau's resolution of the "Assurance of Payment" issue as it related to WorldCom in the *Virginia Arbitration Order*. *See* Verizon's Petition for Clarification and Reconsideration of July 17, 2002 Memorandum Opinion and Order at 38, Docket Nos. 00-218, *et al*. (filed Aug. 16, 2002). As Cavalier suggests, AT&T did not challenge Verizon's proposed Assurance of Payment provision in that arbitration. *See* Cavalier Brief at 62.

[546] Although the *Deposit Policy Statement* concerned proposed deposit provisions for interstate services and therefore applied standards set forth in §§ 201-202 of the Act, we believe that its guidance pertains to deposit or advance payment provisions incumbent LECs might seek to impose on competitors under §§ 251-252 of the Act. We note that neither Party has argued that the *Deposit Policy Statement* is inapplicable here.

[547] *See* Final Proposed Language at 33-35 (Verizon Proposed § 20.6).

[548] *See* Cavalier Reply Brief at 32. For example, under this provision, Verizon may determine, subject only to its "reasonable judgment," whether Cavalier is "creditworthy." As Cavalier argues, rather than requiring Verizon to apply an objectively determined measure of financial stability, this language vests Verizon with broad discretion to decide when a deposit is necessary. *See id.*

[549] *See Deposit Policy Statement*, 17 FCC Rcd at 26894, para. 21, *cited in* Cavalier Brief at 65. Similarly, Verizon's proposed language that would permit it to demand a deposit or letter of credit, should Cavalier admit that it is unable to pay its debts when due, or become the subject of a bankruptcy or similar proceeding, is also susceptible to discriminatory application. *See Deposit Policy Statement,* 17 FCC Rcd at 26890, 26894, paras. 11, 21-22.

[550] *See Deposit Policy Statement*, 17 FCC Rcd at 26894, para. 21.

with a proven history of late payment.[551] Accordingly, the Commission recommended that carriers address the risk of nonpayment by defining a proven history of late payment trigger for requiring such a deposit. Separately, the Commission recommended that carriers "[b]ill in advance for usage-based services currently billed in arrears, based on average usage over a sample period, perhaps phasing in the first advance bill over a period of several months."[552] Verizon's proposed language in subsections (x) and (y) seeks neither a deposit requirement nor to *bill* Cavalier in advance for services currently billed in arrears. In fact, as Cavalier points out, Verizon already bills in advance for approximately 70-80 percent of the services it provides to Cavalier.[553] Rather, proposed subsections (x) and (y) would allow Verizon to demand assurance of payment consisting of monthly advanced *payments* of estimated charges.[554] Although in their briefs the Parties assert that Cavalier already pays 70-80 percent of its bills from Verizon in advance,[555] we believe that is a mischaracterization. At the hearing, Cavalier's witness for this issue testified that Verizon currently *bills* Cavalier in advance for services.[556] If there is a proven history of late payment by Cavalier, it is consistent with the *Deposit Policy Statement* to permit Verizon to require one month's advance payment from Cavalier for a discrete period.[557]

170. As noted, the Commission recommended in the *Deposit Policy Statement* that, to demonstrate entitlement to a customer deposit, carriers should, in their tariffs, define a trigger for a "'proven history of late payment' … to include a failure to pay the undisputed amount of a monthly bill in any two of the most recent twelve months."[558] Verizon proposes language that would define a proven history of late payment as Cavalier's failure to "pay (x) two (2) or more bills (in respect of amounts not subject to a *bona fide* dispute) that Verizon renders at any time during any sixty (60) day period or (y) three (3) or more bills (in respect of amounts not subject to a *bona fide* dispute) that Verizon renders at any time during any one hundred eighty (180) day period."[559] We are concerned that, because of the large number of bills Verizon renders to Cavalier every month, the proposed language could be misinterpreted to require advance payment in circumstances not contemplated by the *Deposit Policy Statement.* Cavalier testified

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[551] *See id*. at 17 FCC Rcd at 26888-89, 26890, paras. 7, 12.

[552] *Id*. at 17 FCC Rcd at 26896, para. 26.

[553] Tr. at 321; *see also* Cavalier Direct Testimony of Whitt at 12.

[554] "Advance *billing* means, for example, that a bill is generated on January 1, due February 1, for services provided in January." Advance *payment*, which Verizon seeks under subsections (x) and (y) "means, for example, that a bill would be generated on December 1, due January 1, for services provided in January." *Deposit Policy Statement*, 17 FCC Rcd at 26888 n.26 (emphasis added).

[555] *See* Cavalier Brief at 64; Verizon Reply Brief at 56.

[556] Tr. at 321.

[557] *See Deposit Policy Statement*, 18 FCC Rcd at 26896, para. 26.

[558] *Id.*

[559] Final Proposed Language at 34 (Verizon Proposed § 20.6).

that Verizon renders 200-300 bills to it every month.[560] Verizon's proposed language could trigger the advance payment requirement if Cavalier failed to timely pay two individual bills within a 30-day period, as long as the total of those two individual bills exceed the *de minimis* amount. Accordingly, we revise Verizon's proposed language to define the proven history of late payment trigger as nonpayment of the total amount due (and not subject to *bona fide* dispute) under bills rendered by Verizon in either (x) two consecutive thirty-day periods; or (y) three 30-day periods within a 180-day period, when the amounts past due exceed the *de minimis* amount.

171. In the *Deposit Policy Statement*, the Commission also directed carriers to ensure that the proven history of late payment provision is not triggered unless "both the past due period and the amount of the delinquent payment are more than *de minimis*."[561] Under its proposed language, Verizon would not be entitled to request advance payment when the undisputed unpaid amount "represents less than five percent (5%) of the total amount of Verizon's bills rendered to Cavalier."[562] This addresses only the past due amount and not the past due period. With respect to the former, although Verizon defines a "*de minimis*" amount as less than five percent of the total undisputed amount due, we set the *de minimis* percentage to be ten percent or less of the total amount due because we are concerned about evidence that there have been problems in the past with Verizon's billing, including nonreceipt of bills, software problems, and apparent billing inaccuracies.[563] We note that, pursuant to sections 28.9.3 and 28.9.3.1 of the Agreement, under certain circumstances, amounts subject to *bona fide* dispute are to be deposited with a third-party

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[560] *See* Tr. at 311-12.

[561] *See Deposit Policy Statement*, 17 FCC Rcd at 26896, para. 26.

[562] Final Proposed Language at 34 (Verizon Proposed § 20.6). As Verizon argues, § 28.9 of the Parties' proposed agreement, which is undisputed, specifies at some length the procedures concerning the handling of billing disputes. *See* Verizon Reply at 54; *see also* Aug. 1 Draft Agreement § 28.9. Although Cavalier complains that there is no orderly process for handling billing disputes, proposed § 28.9, to which it has not objected, belies that assertion. We are concerned, however, that § 28.9.1 requires the "billed Party" to "establish that the bill was not timely received." This seems counter-intuitive in the case where the bill has not been received at all, which apparently has happened in the past. *See* Tr. at 310-12. We address this concern in our treatment of the *de minimis* amount.

[563] *See* Tr. at 310-11, 312, 315-16; *cf. supra* n.562. It is unclear whether, under the prior agreement, the disputed amounts were considered exempt under a *bona fide* dispute provision. We note that Cavalier testified that past billing disputes between the Parties resulted in multimillion dollar credits for Cavalier. Tr. at 316. In light of all of the evidence, we also reject Verizon's argument that, because Cavalier has a "tendency to litigate rather than pay its bills," the risk of nonpayment by Cavalier is particularly high. Verizon Brief at 56. We also note that, although Verizon worries that Cavalier might suddenly declare bankruptcy (*see* Verizon Brief at 57), no evidence was presented that Cavalier is near bankruptcy; in fact, Verizon's witness testified that Cavalier currently is paying its bills on time. *See* Tr. at 316, 318. We note that the Commission has previously found in another context that ten percent may constitute a *de minimis* amount. *See MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 78-72, Decision and Order, 4 FCC Rcd 5660 at paras. 2, 4 (1989) (interstate traffic deemed to be *de minimis* when it amounts to ten percent or less of the total traffic on a special access line).

escrow agent.[564] Accordingly, Cavalier may also be required to set aside amounts it disputes, which provides Verizon with additional protection.

172. Finally, we are concerned that proposed section 20.6 does not specify any procedure pursuant to which Verizon may invoke its protections. It also does not specify a *de minimis* past-due period, as recommended by the *Deposit Policy Statement*. Given the Parties' past history of billing disputes, we believe additional language is required. Accordingly, we require Verizon to provide Cavalier with ten days' written notice of its intent to invoke its right to advance payment for specific past due amounts. We permit Cavalier an additional ten days from receipt of Verizon's notice to dispute any amounts Verizon contends are past due and also to identify specific amounts as the subject of a *bona fide* dispute. In that case, these disputed amounts will be subject to the *bona fide* dispute provisions set forth in section 28.9, rather than the past due provisions set forth in section 20.6. We believe these additional protections also address the concern identified in the *Deposit Policy Statement* that amounts that are only a few days past due should not be considered in invoking an advance payment or deposit obligation.[565]

d. Arbitrator's Adopted Contract Language

173. The Arbitrator adopts the following language for section 20.6:

> If Cavalier fails to timely pay more than ten percent (10%) of the total amount due (and not subject to *bona fide* dispute under section 28.9) under bills rendered by Verizon in either (x) two consecutive thirty-day periods; or (y) three thirty-day periods within a 180-day period, Verizon may invoke the protections of this section. If there is such a failure to timely pay by Cavalier, Verizon may demand advance monthly payment of Cavalier's charges. The advance payment that Verizon may demand shall be 1/6 of Cavalier's actual undisputed billed usage during the six-month period preceding the last delinquency. Verizon shall true-up Cavalier's advance payments against actual billed charges once per calendar quarter. Verizon's right to advance payment under this section 20.6 will terminate one year from Cavalier's last delinquent payment. In order to invoke this advance pay provision, Verizon must provide Cavalier with ten days' written notice, in which it must identify specific bills and corresponding amounts that it contends have neither been timely paid nor are the subject of a *bona fide* dispute. Cavalier shall respond in writing within ten days of receipt of such notice. In the event that Cavalier asserts that specific unpaid amounts are the subject of a *bona fide* dispute, these amounts shall be subject to section 28.9 and shall not be

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[564] These circumstances include when Cavalier has a proven history of late payments. *See* Aug. 1 Draft Agreement §§ 28.9.3, 28.9.3.1.

[565] The last sentence of Verizon's proposed § 20.6 provides that, by demanding a deposit, letter of credit or other security, Verizon does not waive other rights it may have under the Agreement to be paid for its services or to discontinue service for nonpayment. We reject this language. To the extent that it addresses deposits and letters of credit, it concerns provisions we reject above. Further, we do not believe that § 20.6 as adopted could be read to preclude Verizon from exercising its other rights under the Agreement.

considered past due under this section 20.6. Notice under this section shall be provided in accordance with section 28.12.

12. Issue C24 (Notice of Termination of Services for Non-Payment)

a. Introduction

174. The Parties disagree about the requirements that should apply before one Party can give the other Party a notice of a termination of service in the event of non-payment under the contract.[566] Pursuant to rules established by the Virginia Commission, when one carrier intends to terminate the service of another carrier it must first provide that carrier 60-days notice.[567] Once that notice is provided, the Virginia Commission typically requires the carrier receiving such notice to provide at least a 30-day notice to its respective customers that their service may be in jeopardy. Cavalier proposes language that would require a Party preparing to send a 60-day notice for non-payment to first obtain the permission of the Virginia Commission (after that commission had considered the validity of the billing dispute) prior to sending the termination notice.[568]

b. Positions of the Parties

175. As a protection against having to notify each of its customers of a service discontinuance as a result of Verizon's determination that an invoice dispute is not *bona fide*, Cavalier proposes that each Party must undertake the additional step of obtaining state approval prior to initiating the 60-day notice procedure.[569] According to Cavalier, Verizon's proposal gives Verizon the unilateral right to force Cavalier to give notice to its customers that it may exit the market, regardless of whether that is Cavalier's intention.[570] Cavalier asserts that its proposed language is a minor shift to prevent a drastic situation whereby Verizon could use a payment dispute to drive Cavalier out of business. Finally, Cavalier claims its proposal is not intended to require a formal evidentiary hearing before a termination notice is permitted to be sent.[571]

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[566] The Parties also use the term "embargo" when referring to a termination of existing service or a refusal to provide new services. We will refer to both of these actions as a "termination of service."

[567] *See* 20 VA. Admin. Code § 5-423-80. This provision also requires notice to the Virginia Commission at the same time.

[568] The 60-day notice would also apply in the case of a material breach or default under the contract, however the Parties limit their discussions to cases relating to failure to pay amounts due under the contract.

[569] Cavalier Direct Testimony of Whitt at 13-14; Cavalier Brief at 65-66. Cavalier refers to a prior billing dispute with Verizon where Verizon provided the 60-day notice to Cavalier; the Virginia Commission required Cavalier to provide notice to each of its customers; and Cavalier ended up with a significantly smaller customer base as a result of its customers' uncertainty.

[570] Cavalier Arbitration Petition at 23.

[571] Cavalier Direct Testimony of Whitt at 13-14.

176. Verizon claims that its contract language reflects notification requirements for the termination of service imposed on carriers under Virginia law.[572] Verizon argues that Cavalier's proposed language goes well beyond such requirements, by requiring Verizon to obtain additional regulatory approval prior to complying with the Virginia Commission's current notice requirements.[573] Verizon insists that if Cavalier objects to the notification rules as overly burdensome, it should seek to amend those rules in the appropriate state commission forum.[574] Verizon also claims that Cavalier's proposal would encourage Cavalier not to pay its bills as Verizon would have to continue providing service during the pendency of the regulatory proceeding to determine if notice could be given.[575]

c. Discussion

177. We reject Cavalier's proposed language and adopt Verizon's language in its entirety. As an initial matter, the Bureau addressed the very same language Verizon is proposing here in the *Virginia Arbitration Order,* concluding that the language adequately balances the interests of both parties.[576] We find that the additional regulatory approval proposed by Cavalier would impose an unreasonable and unnecessary burden on Verizon when it legitimately attempts to minimize further monetary losses by giving appropriate notice and opportunity to cure in the event of non-payment.[577] Other provisions of the Agreement provide Cavalier a detailed process for disputing billed charges it deems improperly imposed.[578] When this process is followed, these *bona fide* disputes are not subject to termination notifications until resolved through the dispute resolution process also provided in the Agreement.[579] In such a case, the Parties will have had several months of dispute resolution in which Cavalier will have had an opportunity to present its case prior to the issuance of a termination notice. On the other hand, charges that are

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[572] Verizon Testimony of Smith at 23*; see also* Verizon Answer/Response at Ex. A; Verizon Brief at 60.

[573] Verizon Brief at 60.

[574] Verizon contends that the notice requirement is imposed upon Cavalier by Virginia law, not any provision of Verizon's proposed language. Verizon Direct Testimony of Smith; Verizon Brief at 61-62.

[575] Verizon Direct Testimony of Smith at 25-26; Verizon Rebuttal Testimony of Smith at 16-17; Tr. at 313; Verizon Brief at 61. Verizon maintains that Cavalier already may initiate a proceeding to attempt to prevent any service termination it believes is unwarranted. Verizon Direct Testimony of Smith at 23-24; Verizon Brief at 64.

[576] *See Virginia Arbitration Order,* 17 FCC Rcd at 27392, para. 732.

[577] The current 60-day notice process allows a 30 day opportunity to cure before Cavalier would be required to notify its customers. Unpaid charges that were previously *bona fide* disputes but have been settled in Verizon's favor would also appropriately be cause for embargo or termination of service.

[578] Aug. 1 Draft Agreement § 28.9.

[579] *Id.*

not disputed and remain unpaid may justify termination of service, and the language proposed by Verizon provides a sufficient notice period and an opportunity to cure.[580]

178. In light of the procedural safeguards and dispute resolution processes that are available prior to terminating service after notice, the additional protection that Cavalier seeks to impose is unwarranted.[581] While, in theory, a notice of termination could be used for anticompetitive purposes, we find that other provisions of the interconnection agreement with which Verizon is obligated to comply serve to prevent an abuse of the process for sending a termination of service notice for non-payment.[582] Should Cavalier believe that Verizon is sending a termination notice for a purpose other than collecting legitimate past due billings, Cavalier may always petition the Virginia Commission for relief.[583] Finally, to the extent Cavalier believes the Virginia Commission's customer notification requirements create an undue competitive burden, those issues are more appropriately addressed in the context of the Virginia Commission's proceeding adopting those notification requirements.

d. Arbitrator's Adopted Contract Language

179. Based on the conclusions above, the Arbitrator adopts the following language.

> 22.4 – If either Party defaults in the payment of any amount due hereunder, except for amounts subject to a *bona fide* dispute pursuant to Section 28.9 hereof with respect to which the disputing Party has complied with the requirements of Section 28.9 in its entirety or if either Party materially violates any other material provision of this Agreement, and such default or violation shall continue for sixty (60) days after written notice thereof, the other Party may terminate this Agreement or suspend the provision of any or all services hereunder by providing written notice to the defaulting Party. At least twenty-five (25) days prior to the effective date of such termination or suspension, the other Party must provide the defaulting Party and the appropriate federal and/or state regulatory bodies with written notice of its intention to terminate the Agreement or suspend service if the default is not cured. Notice shall be posted by overnight mail, return receipt

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[580] *See Virginia Arbitration Order,* 17 FCC Rcd at 27392, para. 732 (granting Verizon's request to terminate service when a competitive LEC withholds payment for service without a *bona fide* reason). The current 60-day notice process allows a 30-day opportunity to cure before Cavalier would be required to notify its customers. Unpaid charges that were previously *bona fide* disputes but have been settled in Verizon's favor would also appropriately be cause for embargo or termination of service.

[581] These dispute resolution procedures are set forth in § 28.9 of the Agreement. *See* Aug. 1 Draft Agreement § 28.9.

[582] Aug. 1 Draft Agreement § 28.9

[583] Verizon points out that according to Cavalier's own testimony, such a petition was successful in Delaware. *See* Verizon Rebuttal Testimony of Smith at 16; Cavalier Direct Testimony of Whitt at 14-15.

requested. If the defaulting Party cures the default or violation within the sixty (60) day period, the other Party shall not terminate the Agreement or suspend service provided hereunder but shall be entitled to recover all reasonable costs, if any, incurred by it in connection with the default or violation, including, without limitation, costs incurred to prepare for the termination of the Agreement or the suspension of service provided hereunder.

13. Issue C25 (Limitations of Liability)

a. Introduction

180. The Parties disagree about the appropriate exclusions to the general limitation of liability provisions contained in the agreement. Cavalier proposes to add an additional exclusion that would entitle it to relief where Verizon violates any law governing communications.[584] Verizon asserts that including this provision is commercially unreasonable and would effectively nullify the limitations on liability to which Cavalier has already agreed.[585]

b. Positions of the Parties

181. Cavalier argues that its rights to damages under the Act and related state and federal rules and regulations should not be eliminated at Verizon's insistence.[586] Cavalier claims that eliminating these rights through the limitation of liability provisions contained in section 25 of the agreement would diminish Verizon's incentive to perform its obligations under the agreement.[587] Cavalier acknowledges the existence of the Virginia Commission's Performance Assurance Plan (PAP), but claims it is too complex and subject to interpretation to provide full monetary damages.[588] Cavalier asserts that the PAP provides no compensation for serious legal violations.[589]

182. Verizon argues that Cavalier's proposal effectively guts the limitation of liability provision of the agreement by adding an exclusion that is so broad as to virtually eliminate any limiting effect.[590] Verizon asserts that the Bureau previously rejected a similar request from

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[584] Cavalier Brief at 67.

[585] Verizon Brief at 65.

[586] Cavalier Arbitration Petition at 23; Cavalier Brief at 67; Cavalier Reply Brief at 43.

[587] Cavalier Brief at 68; Cavalier Reply Brief at 42.

[588] Cavalier Brief at 68; Cavalier Reply Brief at 42*; see also* Cavalier Rebuttal Testimony of Whitt at 11. Cavalier claims this is especially true given that the Virginia Commission recently tilted any Verizon payments under that plan strongly away from UNE-L providers and towards UNE-providers. Cavalier Direct Testimony of Whitt at 15.

[589] Cavalier Rebuttal Testimony of Whitt at 11.

[590] Verizon Brief at 65; Verizon Reply Brief at 60.

WorldCom in the *Virginia Arbitration Order*.[591] According to Verizon, such a provision would give Cavalier recourse any time Verizon failed to provide perfect service to Cavalier.[592] Verizon contends that the Act only requires it to provide service to Cavalier at parity with its own customers, not perfect service,[593] and the PAP adequately addresses Cavalier's concerns.[594] Verizon points out that Cavalier's proposed language is also inconsistent with provisions in all six of Verizon's Virginia tariffs, as well as its tariff on file at the Commission.[595] Finally, Verizon states that it has agreed to three additional exclusions to address Cavalier's concerns that the PAP does not redress serious violations of law.[596]

c. Discussion

183. We reject Cavalier's proposed section 25.5.10 language. We agree with Verizon that this language is commercially unreasonable and would eviscerate any limitations on liability Cavalier agrees to elsewhere in the agreement. While Cavalier claims it is a limited exception to the general limitations on liability, we find that the breadth of the language could conceivably entitle Cavalier to seek redress under virtually any law or regulation that could arguably be related to telecommunications service. Moreover, the Commission previously found that the Virginia Commission's PAP is an appropriate means for ensuring performance and providing financial remedies related to Verizon's obligations under the Act.[597] Finally, Verizon's willingness to include the additional exclusions identified in the contract language we adopt below, as well as the additional exclusion we discussed in Issue C17 above, significantly mitigates any concerns Cavalier may have that Verizon could engage in harmful conduct for which Cavalier is unable to seek redress.[598]

[591] Verizon Brief at 65.

[592] *Id*. at 66-67.

[593] Verizon Direct Testimony of Romano at 4.

[594] Verizon Rebuttal Testimony of Agro at 1-3; Verizon Brief at 65-66; Verizon Reply Brief at 60-61.

[595] Verizon Direct Testimony of Romano at 2-4; Verizon Brief at 65; Verizon Reply Brief at 61-62. Cavalier's language would allow Cavalier to hold Verizon financially responsible including, without limitation, for lost profits and/or consequential damages.

[596] Verizon Rebuttal Testimony of Romano at 2. Verizon has agreed to exclude defamation, misleading or inaccurate advertising, and violation of the antitrust laws from the limitations on liability.

[597] *Verizon Virginia Section 271 Order,* 17 FCC Rcd at 21980-90, para. 198; *see also Virginia Arbitration Order,* 17 FCC Rcd at 27048-49, paras. 17-18; Verizon Rebuttal Testimony of Agro at 3.

[598] *See supra* para. 158 (resolving Issue C17 in part by permitting either Party to seek relief in any forum of competent jurisdiction for alleged inappropriate professional conduct by the other Party under § 18.2 of the agreement). We include a modification to § 25.5.1 to expressly reference the exclusion we adopt to resolve Issue C17. We note that the specific exclusions enumerated in § 25.5 are in addition to any other express exclusions that may appear elsewhere in the agreement.

d. Arbitrator's Adopted Contract Language

184. The Arbitrator adopts the following language:

25.5.1 under Sections 18.2, Customer Contact, Coordinated Repair Calls and Misdirected Inquiries; 24, Indemnification; or 28.7, Taxes.

25.5.7 for a claim of defamation;

25.5.8 for a claim of misleading or inaccurate advertising; or

25.5.9 for a claim of violation of antitrust laws (including a claim for trebled or multiple damages under such antitrust laws).

14. Issue C27 (Cavalier Charges for Truck Rolls and Winback-Related Functions)

a. Introduction

185. Cavalier proposes certain language in the pricing schedule that would permit it to charge Verizon for technician dispatches, or "truck rolls," that are required when Verizon claims to have activated a new loop to a Cavalier customer but, in fact, delivers an inactive line.[599] Separately, Cavalier proposes to charge Verizon for activities that it must perform when a Cavalier customer, who is served over loops provided to Cavalier by Verizon, switches to Verizon, which Cavalier terms a "winback."[600] Cavalier proposes to set the charges for these activities at whatever Verizon charges it for similar services. Verizon opposes these Cavalier charges.[601]

b. Jurisdiction

(i) Positions of the Parties

186. Cavalier argues that this Commission has jurisdiction to require Verizon to reimburse Cavalier for certain functions it performs. In response to Verizon's argument, described at greater length below, that, in the *Virginia Arbitration Order*, the Bureau found that the Commission lacks jurisdiction over competitive LEC charges, Cavalier asserts that the *Virginia Arbitration Order* does not support Verizon's claim. Instead, Cavalier argues, the Bureau declined in that order to impose price caps on competitive LEC rates, and determined that challenges by Verizon to the justness and reasonableness of such rates should be brought to

[599] Final Proposed Language at 37 (Cavalier Proposed Ex. A(2), Part IV).

[600] *Id*. at 36-37.

[601] Verizon Reply Brief at 62.

the Virginia Commission.[602] Cavalier argues that, since it bases its proposed winback and truck roll rates on Verizon's own charges in Virginia, Verizon would be hard-pressed to demonstrate that Cavalier's charges are unjust or unreasonable.[603] Cavalier also notes that although it did attempt to file its proposed charges in a tariff, the Virginia Commission, in a letter described below, rejected its filing and told Cavalier that such charges belonged in its interconnection agreement.[604]

187. Verizon claims that the Bureau acknowledged in the *Virginia Arbitration Order* that it lacks jurisdiction over intrastate rates charged by competitive LECs to incumbents.[605] In that order, the Bureau found:

> [T]he Bureau, acting as the Virginia Commission for purposes of this proceeding, is authorized by section 252 to determine just and reasonable rates to be charged by Verizon, not petitioners. As Cox points out, the Commission has ruled that it would be *inconsistent with the Act* for a state commission to impose section 251(c) obligations on competitive LECs.[606]

188. Verizon argues that this jurisdictional ruling cannot be trumped by a Virginia Commission letter, which Cavalier offered into evidence, that rejected Cavalier's proposed tariff and directed Cavalier to seek compensation for the services at issue through an interconnection agreement.[607] Verizon disputes Cavalier's claim that if the Bureau does not permit these charges, Cavalier is without a forum to present its proposed charges for review. Instead, Verizon argues, the letter indicates on its face that Cavalier's underlying tariff filing was too vague for the Commission to understand.[608] Verizon also notes that, although the Parties have agreed to

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602 Cavalier Reply Brief at 43-44 (citing *Virginia Arbitration Order*, 17 FCC Rcd at 27324-25, paras. 588-89). Cavalier also cites to §§ 20.2 and 20.5 of the Parties' Agreement as support for its argument that interconnection agreements may contain competitive LEC rates. Cavalier Reply Brief at 43 n.135. These sections govern the procedures for changes and challenges to the rates of both Parties. *See* Cavalier Arbitration Petition, Ex. B at §§ 20.2, 20.5.

603 Cavalier Reply Brief at 45.

604 Cavalier Brief at 78 (citing Cavalier Direct Testimony of Clift at 20 & Ex. MC-11; Tr. at 619-20). Cavalier also argues that Verizon should be estopped from challenging the Bureau's jurisdiction to arbitrate this issue because the Parties previously agreed to arbitrate the issues of truck rolls and winbacks. *See id.* at 78-79.

605 Verizon Brief at 68-69 (citing *Virginia Arbitration Order*, 17 FCC Rcd at 27324-25, paras. 588-89); Verizon Reply Brief at 62. Verizon also disputes as "demonstrably wrong" Cavalier's contention that Verizon consented to jurisdiction and thus should be estopped from raising jurisdictional defenses. Verizon Reply Brief at 64. Verizon cites to its Answer/Response, Direct and Rebuttal Testimony and to its Brief in which it raised this defense. Verizon Reply Brief at 64. It further argues that Cavalier's waiver and estoppel theories are without legal merit. *See id.* at 65 & nn. 7-9 (citations omitted).

606 Verizon Reply Brief at 64 (quoting *Virginia Arbitration Order*, 17 FCC Rcd at 27324-25, para. 588).

607 *Id.*; *see* Cavalier Direct Testimony of Clift at Ex. MC-11.

608 *Id.* at 63 (citing Cavalier Brief at 78).

certain Cavalier charges in their Agreement, these are reciprocal compensation rates, which the Commission's rules prescribe, rates upon which the Parties have agreed, or rates for which the Virginia Commission has approved a tariff.[609]

(ii) Discussion

189. Verizon argues that, in the *Virginia Arbitration Order*, the Bureau found that the Commission lacked jurisdiction over competitive LEC charges. We disagree and assert jurisdiction to decide this issue. In the *Virginia Arbitration Order*, the Bureau declined to make a determination of a just and reasonable competitive LEC rate under Virginia law, and instead noted that, in that proceeding, it applied federal law.[610] We have jurisdiction to do the same here. To the extent that Cavalier has demonstrated that it performs tasks comparable to those performed by Verizon, it would violate section 251(c)(2)(D) to allow Verizon to assess a charge on Cavalier but disallow a comparable charge by Cavalier on Verizon.[611]

c. Truck Rolls

(i) Positions of the Parties

190. According to Cavalier, approximately 11.66 percent of new loop installations[612] by Verizon require a truck roll by Cavalier.[613] These truck rolls occur when Verizon gives

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[609] Verizon Brief at 69-70.

[610] In the Virginia Arbitration, Verizon asked the Bureau, under Issue I9, to cap the prices of certain services provided to Verizon by the competitive LECs at the rates that Verizon charged for comparable services. Verizon argued that permitting the petitioners to set their own rates would be unjust and unreasonable, in violation of Virginia law. *See Virginia Arbitration Order*, 17 FCC Rcd at 27324, para. 587. The Bureau found that, to the extent that it believed that petitioners' rates for those services, which were the subject of tariffs on file with the Virginia Commission, did not comply with Virginia law, Verizon could challenge those rates before the Virginia Commission. *See Virginia Arbitration Order*, 17 FCC Rcd at 27325, para. 589. The Bureau also noted that, with the exception of reciprocal compensation, § 252's pricing provisions establish standards for setting "just and reasonable" rates under § 251(c), which applies exclusively to incumbent LECs. *Id.* at 27324, para. 588. The Bureau found that it would be inconsistent with the Act for it to impose § 251(c) obligations on competitive LECs. *See id.*

[611] *See Local Competition First Report and Order*, 11 FCC Rcd at 15612, para. 218 (terms and conditions of interconnection for competitive LEC should be no less favorable than for incumbent). We also reject Cavalier's argument that Verizon should be estopped from raising a jurisdictional defense or deemed to have waived it. *See* Cavalier Brief at 78-79. Cavalier argues that Verizon previously agreed, in the context of a settlement agreement, to compensate Cavalier for parallel winback functions, only to claim after the agreement had been executed that Cavalier does not perform comparable functions. *See id.* at 72, 78-79; *see also* Tr. at 631. Assuming *arguendo* the veracity of this assertion, this is not the proper forum to challenge Verizon's performance of its settlement agreement. Rather, Cavalier should pursue enforcement of it settlement contract with Verizon under the dispute resolution provisions of that agreement. As Verizon argues, it raised its jurisdictional argument throughout its filings in this proceeding. *See* Verizon Reply Brief at 64. In any case, it is not clear that an estoppel or waiver argument could vest jurisdiction in this Bureau if it did not otherwise exist. *See id.* at 65.

[612] Although Cavalier would impose a premises visit for both new loops and hot cuts, *see* Final Proposed Language at 37 (Cavalier Proposed Ex. A(2), Part IV), the witness testified that this problem occurs with new loops (continued….)

inaccurate information to Cavalier, indicating that the new loop is operational although, in fact, the customer lacks dialtone. Cavalier must then perform a truck roll to attempt to isolate the reason for lack of service.[614] Cavalier proposes to assess a nonrecurring Premises Visit Fee of $47.55 for these truck rolls.[615] In some instances, additional truck rolls and "vendor meets" may be necessary. Cavalier also proposes to assess a $47.55 nonrecurring charge for additional truck rolls and a charge of $50 for the first half hour and an additional $16 per quarter hour when Verizon is tardy or does not appear for the scheduled vendor meet.[616] Cavalier sets these "reimbursement" charges at whatever Verizon charges Cavalier for similar services.[617] Cavalier points out that Verizon charges Cavalier for a premises visit when Verizon installs a new loop.[618] Similarly, when it dispatches a technician, Verizon imposes a charge on Cavalier, even if Cavalier arrives late or not at all.[619] Verizon also apparently charges Cavalier for opening a maintenance trouble ticket if a new loop is not working.[620] Verizon's missed appointment charges are listed in the pricing schedule to the Parties' Interconnection Agreement.[621]

191. In response to Verizon's argument that it is already subject to performance standards in Virginia that carry substantial monetary penalties for nonperformance under the Virginia PAP, Cavalier argues that the PAP metrics cited by Verizon contain data irrelevant to new loop installations, which mask the new loop installation problem that Cavalier is experiencing, and skew the results in favor of Verizon.[622] Cavalier also asserts that an audit by the New Jersey Commission has confirmed that Verizon's PAP data are inaccurate and unreliable, which is to be expected because Verizon's performance data is self-reported.[623] In

(Continued from previous page)
rather than hot cuts. *See* Tr. at 647. It is typically a problem with POTS services. Tr. at 631. According to Cavalier's witness, new loop installations constitute approximately 50% of Cavalier's new customer installations. *Id.* at 647. Accordingly, approximately 5.83% of the time when Verizon delivers a loop to Cavalier, Cavalier must initiate a truck roll. *See id.*

[613] *See* Tr. at 646-47.

[614] Cavalier Brief at 72-74 (citing Cavalier Direct Testimony of Webb at 5, 6, 8 & Exs. AW-1-4; Tr. at 633-34); *see also* Cavalier Reply Brief at 45. Cavalier also notes that no record evidence supports Verizon's Brief "musings" as to why Cavalier might be unable to reach a customer. *Id*. (citing Verizon Brief at 70); *see also* Verizon Reply Brief at 66.

[615] *See* Final Proposed Language at 37 (Cavalier Proposed Ex. A(2), Part IV).

[616] *See* Cavalier Brief at 74.

[617] *See id*. at 74-75 (citing Cavalier Direct Testimony of Clift at 23; Tr. at 616-17).

[618] *Id*. at 73 (citing Tr. at 584, 589).

[619] *Id*. (citing Tr. at 585-88).

[620] *See* Tr. at 635.

[621] *Id*. at 587-88.

[622] *See* Cavalier Brief at 80 (citing Cavalier Surrebuttal Testimony of Clift at 2-3).

[623] *See id*. (citing Cavalier Rebuttal Testimony of Clift at Ex. MC-5R).

any case, Cavalier argues, the PAP was never intended to be a compensation mechanism for an individual competitive LEC but was designed to prevent backsliding after a carrier has been granted authority to provide in-region long distance under section 271.[624] Finally, Cavalier notes that, notwithstanding thousands of Cavalier truck rolls caused by undelivered or otherwise failed new loops, Verizon has never made a single PAP payment to Cavalier based upon loop installation failures and missed appointments.[625] Thus, the PAP utterly fails to compensate Cavalier for its truck rolls.[626]

192. Verizon argues that, even if the Bureau does have jurisdiction to consider Cavalier's proposed charges, it should reject them outright. With respect to truck rolls, Verizon argues that there are many reasons, which are beyond the control of Verizon, why Cavalier might be unable to reach its customer immediately after a loop is installed.[627] Verizon also contends that Cavalier could reduce its truck rolls by participating in Verizon's Cooperative Testing program for digital (or xDSL-capable) loops, which cost the same as analog loops.[628] Verizon states that if cooperative testing shows that the service is not working, Verizon will not charge Cavalier to resolve the problem.[629]

193. Verizon argues that it is subject to performance standards in Virginia under the Virginia PAP, which contains a comprehensive set of performance measurements for timeliness, reliability, and quality of service, as well as self-executing remedies that carry substantial monetary penalties for nonperformance.[630] Thus, Verizon claims, Cavalier is wrong in its assertion that Verizon suffers no consequence by failing to deliver dial tone or keep its appointments. Verizon notes that section 26.1 of the proposed Agreement specifically incorporates Verizon's responsibilities under the PAP.[631] Verizon points out that the PAP has been approved by both the Virginia Commission and the FCC in the context of its approval of Verizon's in-region long distance application for Virginia.[632] Although Cavalier claims that the

[624] *Id*. at 79.

[625] *Id*. (citing Cavalier Surrebuttal Testimony of Clift at 3); Cavalier Reply Brief at 45.

[626] Cavalier Brief at 79.

[627] Verizon Brief at 70; Verizon Reply Brief at 66. For example, the customer may not be home when Cavalier calls, the customer may not yet have purchased a telephone or the customer may have decided not to answer the call. Verizon Reply Brief at 66.

[628] Verizon Brief at 70-71 (citing Verizon Answer/Response, Ex. C at Ex. A, Part VI).

[629] *Id*. (citing Verizon Rebuttal Testimony of Albert Panel at 21-22); *see also* Verizon Reply Brief at 66.

[630] Verizon Brief at 71; Verizon Reply Brief at 67 (citing Cavalier Brief at 72; *Establishment of a Performance Assurance Plan for Verizon Virginia Inc*., PUC-2001-00226, Order (Va. Comm'n July 18, 2002) (*Virginia PAP Order*) (additional citations omitted)).

[631] Verizon Brief at 71.

[632] *Id*. (citing *Virginia PAP Order*; *Verizon Virginia Section 271 Order*, 17 FCC Rcd at 21989-90, para. 198); *see also* Verizon Reply Brief at 67 (citations omitted).

PAP does not cover missed appointments and loops that were not properly delivered, Verizon argues the contrary is true; the PAP was recently modified to hold Verizon financially accountable for the very performance lapses about which Cavalier complains.[633] Verizon points out that Cavalier also can petition the Virginia Commission to change the benchmark measurements set forth in the PAP. Verizon also states that the Virginia PAP contains carrier-specific remedies which should assure carrier-specific performance for Cavalier[634] and claims that the reason that Cavalier has not received payments under the PAP is because Verizon has provided Cavalier with better service than Verizon provides to its own retail customers in Virginia.[635] Moreover, Verizon argues, were the Bureau to adopt special measures and penalties for Cavalier, other competitive LECs would also demand special treatment, whereas the PAP avoids nondiscriminatory treatment of competitive LECs.[636] Although Verizon concedes that the PAP does not provide dollar-for-dollar reimbursement for Cavalier truck rolls, it argues that the Act does not require such dollar-for-dollar reimbursement and that the PAP strikes the right balance by requiring Verizon to pay Cavalier only when it provides Cavalier with worse service than it provides itself.[637]

194. Verizon also argues that Cavalier's proposed truck roll charges, which, in effect, seek "cost-free maintenance," are ill-advised as a policy matter because Verizon should not have to subsidize Cavalier's maintenance costs. Verizon contends that Cavalier's proposal, which contains no limiting language, provides no incentive for Cavalier to reduce its truck rolls; rather, it provides Cavalier with the "perverse incentive" to increase its truck rolls at the expense of Verizon's rate-payers.[638] Verizon also points out that Cavalier has not submitted any cost studies to support its proposed charges.[639]

(ii) Discussion

195. Cavalier has demonstrated that Verizon fails to provide a working loop to Cavalier in more than 11 percent of new loop installations, which we agree is unacceptable.[640]

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633 Verizon Brief at 71-72 (citing Verizon Rebuttal Testimony of Argo at 6; Verizon Surrebuttal Testimony of Argo at 1); Verizon Reply Brief at 68.

634 Verizon Brief at 72 (citing Verizon Rebuttal Testimony of Argo at 7).

635 *Id.* at 73; Verizon Reply Brief at 67-68 (citing Verizon Surrebuttal Testimony of Argo at 2-3).

636 Verizon Brief at 73.

637 Verizon Reply Brief at 68-69 (citing *Virginia Arbitration Order*, 17 FCC Rcd at 27382, para. 709; *Carrier to Carrier Guidelines* at 6).

638 *Id*. at 69.

639 Verizon Brief at 70.

640 *See* Tr. at 647. Although Verizon suggests that many reasons beyond Verizon's control could cause Cavalier to be unable to reach its customer, *see* Verizon Brief at 70; Verizon Reply Brief at 66, we concur with Cavalier that Verizon did not present evidence to support this contention. *See* Cavalier Reply Brief at 45.

Rather than impose truck roll charges on Verizon, we believe it is more sensible to adopt a variation of the solution proposed by Verizon by requiring it to participate in additional up-front testing at no charge to Cavalier.[641] Verizon states that Cavalier could "reduce its truck rolls by participating in Verizon's Cooperative Testing program for digital (or xDSL-capable) loops."[642] Also, according to Verizon, digital loops cost the same as analog loops.[643] Accordingly, for new loop installations, Verizon may either: (1) develop a cooperative testing program for POTS service, which shall perform the same functions as its cooperative testing program for digital loops, for which it may not charge Cavalier;[644] or (2) provide digital loops and cooperative testing to Cavalier and charge Cavalier no more than it would charge for analog loops. Should Verizon elect the latter alternative, it may not impose additional or different charges for the provision of digital loops than for the provision of analog loops.

(iii) Arbitrator's Adopted Contract Language

196. The Arbitrator adopts the following insert to Section 11.14 Cooperative Testing:

> 11.14 Cooperative Testing
>
> 11.14.1 Pursuant to methods and procedures developed as part of the DSL Provisioning Process in New York, at Cavalier's request, Cavalier and Verizon shall perform cooperative testing of DSL-capable Loops. Further, for all Cavalier new loop installations, Verizon shall either (1) provide a cooperative testing program for analog service that shall perform the same functions as its cooperative testing program for digital loops, or (2) provide digital loops and cooperative testing for all Cavalier new loop installations at the identical recurring and non-recurring rates that apply to its provision of analog loops. If Verizon selects the foregoing option (2), Verizon may not impose additional or different charges for the provision of digital loops than for the provision of analog loops. Verizon may not charge Cavalier for its cooperative testing programs.

197. Insert at beginning of Exhibit A, Part VI. Unbundled Loops:

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[641] Accordingly, we do not address the Parties' debate as to whether the Virginia PAP adequately compensates Cavalier for Verizon's performance lapses.

[642] Verizon Brief at 70-71; Verizon Reply Brief at 66 (citing Verizon Rebuttal Testimony of Albert Panel at 21-22).

[643] Verizon Brief at 70-71; Verizon Reply Brief at 66.

[644] We note that, in the *Virginia Cost Issues Arbitration Order*, we disallowed any charge for cooperative testing. We found there that competitors should not have to pay an additional charge when Verizon does not meet its obligation to provide a functioning loop. *See Virginia Cost Issues Arbitration Order*, 18 FCC Rcd at 17969, para. 632. That reasoning applies here with equal force.

> Consistent with Section 11.14, Verizon must either (1) provide a cooperative testing program for analog loops or (2) provide digital loops and cooperative testing for all Cavalier new loop installations at the identical recurring and non-recurring rates that apply to its provision of analog loops. If Verizon selects the foregoing option (2), Verizon may not impose additional or different charges for the provision of digital loops than for the provision of analog loops. Verizon may not charge Cavalier for its cooperative testing programs.

d. Winbacks

(i) Positions of the Parties

198. When Verizon delivers a loop to Cavalier in Virginia, it charges Cavalier $13.49 for installing the new loop, which is comprised of a $10.81 Service Order Connect charge and a $2.68 Installation charge.[645] Cavalier argues that when it turns a customer over to Verizon, Verizon should compensate it for performing corresponding and comparable "winback" functions to those for which Verizon charges it under the $13.49 charge. Cavalier bases its proposed winback charge upon Verizon's $13.49 loop installation charge, which, it argues, is a "reasonable and measured proposal."[646]

199. Cavalier argues that when it turns a customer over to Verizon, it performs almost the same services for Verizon as when Verizon turns a customer over to it, but it receives no compensation for these services.[647] Cavalier points out that, under cross-examination, the Verizon witness could not confirm what individual functions were included in the Service Order Connect and Installation charges and was unfamiliar with any cost study that supported her assertion that Verizon would perform these functions free of charge.[648] Cavalier also notes that the Verizon witness did confirm that Cavalier also pays a disconnect charge when a Cavalier customer served via a Verizon-provided loop leaves Cavalier for Verizon.[649]

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[645] Verizon Reply Brief at 70; *see also* Verizon Answer/Response, Ex. C, Ex. A at Part VI, Unbundled Loops, 2-Wire Analog Loops (POTS Loops). We note that there is some discrepancy as to whether Verizon's installation charge is $2.88 or $2.68. $2.68 appears to be the correct number. *See* Verizon Answer/Response, Ex. C, Ex. A at Part VI; Tr. at 617-18.

[646] Cavalier Brief at 77 (citing Cavalier Direct Testimony of Clift at 23; Tr. at 612-13 (additional citations omitted)).

[647] *Id*. at 75.

[648] *Id*. at 77 (citing Tr. at 642-43).

[649] Verizon charges Cavalier $5.98 for disconnecting the customer. This is made up of a $4.91 Service Order Disconnect charge and a $1.07 Installation Disconnect charge. Verizon Answer/Response, Ex. C, Ex. A at Part VI; *see also* Tr. at 597-98.

200. With respect to winbacks, Verizon contends that, when a customer moves from Cavalier to Verizon, Cavalier does not provide Verizon with the facility for the customer's line; instead, this is a Verizon facility.[650] Thus, when Verizon assesses service order processing and installation charges on Cavalier, it is providing Cavalier with a new UNE loop facility.[651] But, Verizon argues, it makes no sense to allow Cavalier to charge Verizon for what the latter characterizes as a "UNE installation charge," which is what Cavalier characterizes a "winback charge."[652] Verizon admits that both Parties perform "virtually the same functions" when either carrier moves a customer to the other.[653] Nevertheless, Verizon denies that it charges Cavalier for any of these functions.[654] Instead, Verizon contends, the $13.49 charge is for installation of a UNE loop, which, it asserts, is a service that Cavalier does not provide to Verizon.[655]

201. Moreover, Verizon argues, the "winback" services for which Cavalier proposes to charge Verizon, such as deleting switch translations, porting a number, and discontinuing customer billing are retail functions properly charged to an end-user.[656] Verizon says it does not charge Cavalier for these retail functions.[657] Verizon claims that Cavalier would have to perform these functions if its customer switched to a third carrier or discontinued its telephone service altogether.[658]

202. Further, Verizon contends, Cavalier "plucks" the $13.49 charge from Verizon's pricing schedule and attempts to apply it to Verizon but produces no evidence that its costs are the same as Verizon's; Verizon argues that the costs are not the same.[659] Verizon also attacks Cavalier's belated argument that the Verizon disconnect charge is a winback charge.[660] Verizon

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650 Verizon Reply Brief at 70.

651 Verizon Brief at 74. Verizon explains that the associated nonrecurring charge is intended to cover its one-time costs for provisioning the loop, such as dispatching a technician to rearrange facilities in order to make a loop available to Cavalier's customer, or to cross-connect the loop to Cavalier's collocation arrangement. *Id.*

652 *See* Verizon Reply Brief at 70.

653 *Id*. at 70.

654 *Id*. at 70 (citing Cavalier Brief at 76; Cavalier Direct Testimony of Ferrio at 3).

655 Verizon Brief at 74-75; Verizon Reply Brief at 70 (citing Cavalier Direct Testimony of Ferrio at 3).

656 Verizon Reply Brief at 70.

657 *Id*. at 72. In fact, Verizon denies charging Cavalier for any of the following functions, which Cavalier asserts are performed during a "winback": (1) Initiate Service Order; (2) Provide CSR upon request; (3) Service Order Confirmation; (4) Delete Switch Translations; (5) Install intercept as applicable; (6) Jump wire from Frame to Collo; (7) Update SOA; (8) Coordinate LNP; (9) Test/Trouble Shoot; (9) Expedite. Verizon Brief at 74 (citing Verizon Rebuttal Testimony of Albert Panel at 23).

658 Verizon Reply Brief at 70-72.

659 Verizon Brief at 73.

660 *Id*. at 75; Verizon Reply Brief at 71 (citing Tr. at 683; Cavalier Brief at 77).

asserts that the disconnect charge was approved by the Virginia Commission to compensate Verizon for disconnecting a loop; it is not a winback charge.[661] Verizon assesses a disconnect charge whenever Cavalier stops providing service to a customer over a loop, not just when Cavalier returns a customer to Verizon.[662] Since Cavalier does not provide UNE loops to Verizon, it obviously does not disconnect them, so no such charge is appropriate. Moreover, Verizon argues, the $13.49 charge that Cavalier seeks to recover for winbacks is based upon Verizon's charge for installation of a UNE, not its disconnection, so the Bureau should not rely upon the disconnect charge.[663] Finally, Verizon also contends that allowing Cavalier to recover a "winback" charge from Verizon would be unduly discriminatory because no other carrier in Virginia compensates Cavalier for such a processing charge.[664] Accordingly, should Cavalier wish to recover this kind of a charge, it should be contained in a tariff applicable to all similarly situated carriers.

(ii) Discussion

203. We will permit Cavalier to impose a winback charge on Verizon for the tasks it performs when it migrates a customer to Verizon. Cavalier argues that Verizon's $10.81 Service Order Connect and $2.68 Installation charges covered tasks performed by Verizon that correspond to winback functions Cavalier performs for Verizon when a Cavalier customer served by UNE loops migrates to Verizon.[665] In rebuttal, Verizon's witness, who is a Senior Product Manager for xDSL Products and Line Sharing, testified that Verizon "does not charge Cavalier for any of" the activities specified by Cavalier, specifically initiating a service order, provisioning the Customer Service Record (CSR), confirming the service order, deleting switch translations, installing an intercept, installing a jump wire from the frame to the collocation, updating the Service Order Administration (SOA) database, testing/trouble shooting, or expediting a service order.[666] Under cross-examination by Cavalier's counsel and Commission staff, however, the witness admitted that Verizon does perform many of these functions although she was not familiar with all of them.[667] She also admitted that she did not know whether costs

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[661] Verizon Brief at 75; Verizon Reply Brief at 71 (citing *Bell Atlantic-Virginia, Inc.*, Case No. PUC970005, Order, Ex Parte: To determine prices Bell Atlantic-Virginia, Inc. is authorized to charge Competitive Local Exchange Carriers in accordance with the Telecommunications Act of 1996 and applicable State law, at 24 (Va. Comm'n Apr. 15, 1999)).

[662] Verizon Brief at 75; Verizon Reply Brief at 71.

[663] *See* Verizon Brief at 75 (citing Cavalier Direct Testimony of Ferrio at 3).

[664] *Id*. at 75-76 (citing Tr. at 636).

[665] *See* Cavalier Direct Testimony of Ferrio at 2-3.

[666] Verizon Direct Testimony of Albert Panel at 2; Verizon Rebuttal Testimony of Albert Panel at 23 (citing Cavalier Direct Testimony of Ferrio at 3). Verizon's witness also stated that Verizon does not charge Cavalier to update the E911 database or to port the customer's telephone number to Verizon, which are two other activities performed in the winback process. *See* Verizon Direct Testimony of Albert Panel at 30; *see also* Verizon Rebuttal Testimony of Albert Panel at 22.

[667] *See* Tr. at 590-595.

associated with particular functions were recovered through the Service Order Connect and Installation charges,[668] or whether some costs "were buried in OSS-type costs or not."[669] Although the Verizon witness testified originally that Verizon did not charge for "winbacks" it became clear under examination that she meant that Verizon does not include a service called "winbacks" in the charges it lists on its proposed Schedule A, rather than meaning that Verizon does not recover the costs of some or all of the services identified by Cavalier under its proposed winback charge.[670]

204. Verizon argues that it is inappropriate to allow Cavalier to impose a winback charge on Verizon because, when Cavalier turns the loop over to Verizon, it does not provide the same functionality as Verizon does when it performs the loop installation provisioning tasks that are the basis for the Service Order Connect and Installation charges. We disagree. The Verizon witness testified that Cavalier is responsible for effecting certain key functions for the benefit of Verizon in the course of transferring customers from Cavalier to Verizon.[671] In particular, when Verizon submits a local service request to Cavalier to move a customer Cavalier serves over a UNE loop to Verizon, Cavalier is required to initiate a loop disconnect with Verizon.[672] That is, Cavalier is required to order and coordinate a date for the customer's loop to be switched from Cavalier to Verizon.[673] Further, Cavalier is required to pay Verizon to effect the switch because, although Verizon performs the actual disconnect task, it is Cavalier's responsibility to arrange for the necessary physical work to move the customer from Cavalier to Verizon.[674] Thus, the move from Cavalier to Verizon cannot be conducted unilaterally by Verizon, and, contrary to Verizon's allegations, the work Cavalier performs in connection with the Verizon winback is not solely for the benefit of Cavalier's internal records.[675] In fact, we find that Cavalier's work in connection with a Verizon winback is similar in purpose and scope to the work that Verizon is responsible for performing when Cavalier submits a local service request to Verizon to move a customer from Verizon to Cavalier.

205. In its direct testimony, Cavalier specifically identified the services for which it proposed to charge Verizon as the same or similar to services covered by Verizon's Service

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[668] *See id*. at 607-08.

[669] *Id*. at 593-94.

[670] *Compare* Tr. at 640 *with id.* at 592-95, 607-08. We also note that although the Verizon witness originally testified that Verizon does not impose a disconnect charge, she later modified that testimony to indicate that Verizon does impose a charge for disconnection of an unbundled loop. *See id*. at 597-98, 606-07.

[671] Tr. at 640-42.

[672] *Id*. at 596-98, 606-07, 640-42; *see also id*. at 636-37.

[673] *Id*. at 636-39.

[674] *Id*. at 640-42. Although Verizon performs the physical disconnect, Cavalier pays Verizon to perform that task. *Id*.

[675] *Id*. at 636-42. *Cf.* Verizon Reply Brief at 70-72.

Order Connect and Installation charges.[676] To rebut this testimony, Verizon should have produced a witness who was familiar with its cost studies and could testify as to exactly what functions and associated costs are recovered in Verizon's $10.81 Service Order Connect and $2.68 Installation charges. Verizon's witness admitted both that in the loop installation process Verizon performs similar functions to those that Cavalier performs in the winback process, and that the associated costs might be recovered in these charges. Accordingly, the written testimony that Verizon "does not charge Cavalier for any of" the other activities specified by Cavalier[677] can only mean that individual charges for these activities do not appear in the Pricing Schedule, rather than that the charges contained in the schedule do not subsume these activities.[678] Based on the evidence presented, we conclude that Verizon does perform similar functions to those performed by Cavalier in the winback process, and that the associated costs may be recovered in Verizon's $10.81 Service Order Connect and $2.68 Installation charges.[679] In any event, Verizon has failed to establish any other method through which the costs are recovered. Accordingly, we allow Cavalier to recover these charges when it migrates a UNE-loop customer to Verizon.

(iii) Arbitrator's Adopted Contract Language

206. The Arbitrator adopts the following language:

IV. UNE-Related Functions Performed by Cavalier

WINBACKS

Winbacks – Service Order
Recurring Charges – N/A
Non Recurring Charges – $10.81

[676] *See* Cavalier Direct Testimony of Ferrio at 2-3.

[677] *See* Verizon Rebuttal Testimony of Albert Panel at 23.

[678] *See* Tr. at 592-95; 607-08. If that is not what the Verizon witness meant by this testimony, her written testimony was inconsistent with her oral testimony. In light of this, we find incredible her assertion that Verizon "does not charge Cavalier for *any* of" the other activities specified by Cavalier, particularly since Verizon admits that both Parties perform virtually the same functions when either carrier moves a customer to the other. *See* Verizon Reply Brief at 70. We also disagree with Verizon that these charges must be the subject of a Cavalier tariff filed with the Virginia Commission. *See* Verizon Brief at 76. In this instance, Cavalier seeks to recover from Verizon for functions for which Verizon charges it. To the extent that Cavalier intends to charge other carriers for similar services, that should be the subject of an agreement between those carriers.

[679] We believe that it is reasonable to permit Cavalier to charge Verizon the rate Verizon charges it for the same or similar services. Generally, rates charged by competitors are presumed reasonable as long as they do not exceed the comparable rate charged by the incumbent. *See generally Local Competition First Report and Order*, 11 FCC Rcd 16040-42, paras. 1085-89. To the extent that Cavalier sought to justify a higher rate, we agree with Verizon that a cost study would be appropriate. *See id*. at 16042, para. 1089. Because, however, Cavalier seeks only to charge Verizon what Verizon charges it, we disagree that a cost study is necessary. To the extent that Verizon's charges for comparable services are reduced in the future, Cavalier should also reduce its charges to the same level.

Winbacks – Installation
Recurring Charges – N/A
Non Recurring Charges – $2.68

Total
Recurring – N/A
Non Recurring Charges - $13.49

V. Cavalier Collocation Services

Intrastate collocation –Under the same rates, terms, and conditions as applicable per Verizon – VA SCC Tariff No. 218, as amended from time to time.

VI. Cavalier Operation Support Systems

Under the same rates, terms, and conditions specified in this Exhibit A for analogous Verizon operation support systems functions

VII. All Other Cavalier Services Available to Verizon for Purposes of Effectuating Local Exchange Competition

Available at rates comparable to Verizon charges or at Cavalier's tariffed rates or generally available rates.

IV. ORDERING CLAUSES

207. Accordingly, IT IS ORDERED that, pursuant to Section 252 of the Communications Act of 1934, as amended, and Sections 0.91, 0.291 and 51.807 of the Commission's rules, 47 U.S.C. § 252 and 47 C.F.R. §§ 0.91, 0.291, 51.807, the issues presented for arbitration are determined as set forth in this Order.

208. IT IS FURTHER ORDERED that Cavalier Telephone, LLC and Verizon Virginia, Inc. SHALL INCORPORATE the above determinations into a final interconnection agreement, setting forth both the negotiated and arbitrated terms and conditions, to be filed with the Commission, pursuant to Section 252(e)(1) of the Communications Act of 1934, 47 U.S.C. § 252(e)(1), within 45 days from the date of this Order.

By Order of the Bureau Chief,

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William F. Maher, Jr.
Chief, Wireline Competition Bureau