BRIEF FOR AMICUS CURIAE FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 11-2712

VERIZON PENNSYLVANIA INC. AND VERIZON NORTH LLC,

PLAINTIFFS/APPELLEES,

V.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *ET AL.*,

DEFENDANTS/APPELLANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, CIVIL ACTION NO. 08-CV-03436

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At this Court's invitation, the Federal Communications Commission ("FCC" or "Commission") respectfully files this brief as amicus curiae.

STATEMENT OF INTEREST

The FCC has primary responsibility for implementing and enforcing the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.* ("the Act"). The FCC has an interest in ensuring that the Act, its implementing rules, and its precedents are correctly interpreted.

QUESTIONS PRESENTED

The Court, pursuant to its Order dated March 14, 2012, invited the FCC to set forth its position on two questions:

> 1. Do competitive local exchange carriers ("CLECs") that connect to dark fiber strands leased from competitive fiber providers ("CFPs") through a Verizon Competitive Alternate Transport Terminal ("CATT") qualify as "fiber-based collocators" under 47 C.F.R. § 51.5 for purposes of determining whether requesting carriers are impaired without access to certain unbundled network elements at Verizon wire centers?
>
> Answer: As explained in Argument Section II.A., below, such CLECs may qualify as "fiber-based collocators" if, at a minimum, they enter into collocation arrangements in the Verizon wire center, and supply their own optronic equipment to light the dark fiber.
>
> 2. To what extent does the answer to Question 1 depend on the ability of those CLECs to light the dark fiber strands or on the contracting parties' agreement to lease the dark fiber strands on a long-term indefeasible right of use basis?
>
> Answer: As explained in Argument Section II.A. below, the CLEC must, among other requirements to qualify as a "fiber-based collocator," supply the optronics to light the dark fiber. As explained in Argument Section II.B., below, the Commission has not clearly addressed the question whether the contracting parties must agree to lease the dark fiber strands on an indefeasible right of use ("IRU") basis in order for the CLEC to qualify as a "fiber-based collocator." However, the answer to that question should not be outcome-determinative in this case. The district court found, as a matter of fact, that the CFP-to-CLEC dark fiber leases at issue in this case involve IRU arrangements, and the PUC's appellate briefs present no basis to challenge that finding.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

1. For most of the last century, American consumers could purchase local telephone service from only one source: their incumbent local exchange carrier ("incumbent LEC" or "ILEC"). Until the 1990s, regulators treated local telephone service as if it were a natural monopoly. As a result, states typically granted an exclusive franchise in each local service area to the incumbent LEC that owned and operated the local telephone network. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).

In the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified, in pertinent part, at 47 U.S.C. §§ 251-252) ("the 1996 Act"), Congress fundamentally altered this regulatory framework "to achieve the entirely new objective of uprooting . . . monopolies." *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 488 (2002). The 1996 statute amends the Communications Act to create "a new telecommunications regime designed to foster competition in local telephone markets"[1] by imposing "a host of duties" on incumbent LECs.[2] Foremost among these duties is the incumbent

[1] *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 638 (2002).

[2] *AT&T*, 525 U.S. at 371.

LEC's obligation "to share its network with competitors." *AT&T*, 525 U.S. at 371 (citing 47 U.S.C. § 251(c)(3)).

Section 251(c)(3) of the Act "requires [an] incumbent LEC[] to lease [to its competitors] 'on an unbundled basis' – *i.e.*, a la carte – network elements specified by the [FCC]." *Talk America, Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2258 (2011).[3] This requirement "makes it easier for a competitor to create its own network without having to build every element from scratch." *Talk America*, 131 S. Ct. at 2258. When determining which non-proprietary network elements incumbent LECs must offer to their competitors on an unbundled basis, the FCC must consider, "at a minimum," whether the incumbent LEC's failure to provide access to such elements would "impair" a competitor's ability to provide service. 47 U.S.C. § 251(d)(2).[4] Unbundled network elements ("UNEs") that are offered pursuant

[3] A "network element" is defined as "a facility or equipment used in the provision of a telecommunications service," 47 U.S.C. § 153(35), and includes, among other things, "the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network," *AT&T*, 525 U.S. at 371.

[4] The 1996 Act also directs the FCC to consider whether unbundled access to proprietary network elements is "necessary." 47 U.S.C. § 251(d)(2). This case, however, does not concern access to proprietary elements.

to section 251(c)(3) must be made available at regulated, cost-based rates. 47 U.S.C. § 252(d)(1).[5]

2. In its *Triennial Review Remand Order* ("*TRRO*"), the FCC adopted rules to implement the unbundling provisions of the Communications Act, including section 251(d)(2)'s test for "impairment."[6] The rules set out in the *TRRO* impose unbundling obligations only in situations where competitive LECs (or "CLECs") "genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition." *TRRO*, 20 FCC Rcd at 2535 (¶ 2). The rules also "remove unbundling obligations over time as carriers deploy their own networks and downstream local exchange markets exhibit . . . robust competition." *Id.* at 2536 (¶ 3).

As relevant here, the FCC in the *TRRO* found a "correlation" between the presence of fiber-based collocations[7] by competing carriers in a particular

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[5] The Supreme Court has upheld the FCC's methodology for calculating those cost-based rates as lawful and consistent with the statute. *Verizon*, 535 U.S. 467; *see also* 47 C.F.R. § 51.505(b) (specifying methodology).

[6] *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533 (2005) ("*TRRO*"), *aff'd*, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[7] "Collocation" generally involves a CLEC's lease of space in an incumbent LEC's wire center in order to place equipment necessary for interconnection or access to unbundled network elements. *See*, *e.g.*, 47 U.S.C. § 251(c)(6).

ILEC wire center (*i.e.*, the place in the incumbent LEC's network where loops and transport facilities attach to the switch) and the existence of a "revenue opportunity" sufficient to encourage CLECs to create their own facilities in the areas served by that wire center. *Id.* at 2558-59 (¶ 43).[8] Based on that finding, the FCC used the presence of such CLEC collocations as a proxy for lack of impairment: When the number of fiber-based collocations in an ILEC wire center reaches a specified threshold, CLECs that operate in the area served by the wire center may be deemed economically capable of deploying their own high-capacity loops and transport facilities (*i.e.*, no longer "impaired" without access to those UNEs at cost-based rates). *Id.* at 2588-94 (¶¶ 93-102).[9]

We discuss in more detail below what a CLEC must do to qualify as a "fiber-based collocator" under the FCC's rules (*see* Argument Section II). In general, the Commission defined that term to cover "competitive carrier

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[8] The Commission also found a correlation between such revenue opportunities and a large number of business lines in an ILEC wire center. *Id.*

[9] The FCC similarly adopted specific thresholds for the number of business lines in a wire center, which the agency also used as a proxy for lack of impairment. *See generally Qwest Corp. v. Colo. Pub. Utils. Comm'n*, 656 F.3d 1093 (10th Cir. 2011). For some UNEs, a LEC is required to reach the numeric thresholds for both fiber-based collocations and business lines in order to establish non-impairment. *TRRO*, 20 FCC Rcd at 2536-37 (¶ 5).

collocation arrangement[s], with active power supply, that ha[ve] a non-incumbent LEC fiber-optic cable that both terminates at the collocation facility and leaves the wire center." *Id.* at 2593 (¶ 102); *see also* 47 C.F.R. § 51.5 (defining "fiber-based collocator").

II. THE PROCEEDINGS BELOW

1. In September 2007, a group of CLECs asked the Pennsylvania Public Utility Commission (the "PUC") to interpret the FCC's regulatory definition of a "fiber-based collocator" as it applies to certain collocation arrangements involving Verizon's Competitive Alternative Transport Terminal offering.[10] Verizon's tariffed CATT offering permits a CLEC that provides fiber (known as a competitive fiber provider or "CFP") to bring its own fiber-optic cable into a Verizon wire center, from where the CFP can, among other things, lease dark fiber strands to other CLECs that have their own equipment collocated in the same Verizon wire center. *Verizon PA* at *2 & n.5; *see also* Joint Stipulation ¶ 7.[11] When the CFP leases dark fiber in such an arrangement, the CLEC uses its own optronic equipment located in

[10] *Verizon Pennsylvania, Inc., et al. v. Pennsylvania Public Util. Comm'n*, 2011 WL 2111118 *2-*3 (E.D. Pa. May 26, 2011) ("*Verizon PA*").

[11] "[D]ark fiber is fiber optic cable that has been deployed by a carrier but has not yet been activated through connections to optronics that 'light' it, and thereby render it capable of carrying communications." *TRRO*, 20 FCC Rcd at 2607 (¶ 133).

its collocation space in the Verizon wire center to activate the dark fiber strands it has leased, and thereby transmit telephone voice service or data traffic into and out of the wire center. *Verizon PA* at *2; *see also* Joint Stipulation ¶¶ 10-12.

The CLECs that initiated the administrative proceedings below asked the PUC to find that neither the CFP that obtains the CATT arrangement from Verizon, nor the collocated CLECs that lease dark fiber strands from the CFP, count as fiber-based collocators for purposes of determining whether CLECs are impaired at a wire center. *Verizon PA* at *3. Such a finding that the CFP and collocated CLECs are not fiber-based collocators would maximize Verizon's network element unbundling obligations. By contrast, Verizon asked the PUC to rule that both the CFP with the CATT arrangement and any unaffiliated CLECs leasing dark fiber strands from the CFP should be counted as fiber-based collocators, thereby minimizing Verizon's unbundling obligations. *Id.* The PUC ruled that the CFP leasing the tariffed CATT arrangement from Verizon counts as a fiber-based collocator, but that a CLEC leasing the CFP's dark fiber strands does not. *Id.*

Verizon appealed to the United States District Court for the Eastern District of Pennsylvania the PUC's ruling that a CLEC that leases dark fiber from a CFP should not be counted as a fiber-based collocator. *Id.*

2. The district court identified the issue before it as "whether a competitive carrier that has collocated equipment in a Verizon wire center and accesses through the [CATT] dark fiber strands within a CFP's fiber-optic cable is a fiber-based collocator as the FCC defines the term." *Verizon PA* at *4. Construing the Commission's definition of "fiber-based collocator" in Rule 51.5 and the agency's description of that rule in the *TRRO*, the district court answered that question in the affirmative, so long as the CLEC leases the dark fiber pursuant to an "indefeasible right of use" (or "IRU") and supplies the optronic equipment to "light" the fiber and transmit communications into and out of the wire center. *Verizon PA* at *4-*6.[12] Based on the language of the governing dark fiber contract in this case, the

[12] An IRU has been generally described as "an exclusive, long-term lease, granted by an entity holding legal title to a telecommunications cable or network, of a specified portion of a telecommunications cable, such as specified fiber optic strands within an optical fiber cable, or the telecommunications capacity of a cable or network, such as specific channels of a given bandwidth." *Ansari v. Qwest Commc'ns Corp.*, 414 F.3d 1214, 1215 n.2 (10th Cir. 2005). For purposes of Rule 51.5's definition of "fiber-based collocator," the Commission has indicated that "comparable" arrangements will be treated in the same manner as "a long-term IRU." *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand, 18 FCC Rcd 16978, 17231 ¶ 408 & n. 1263 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded*, *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). *See also TRRO*, 20 FCC Rcd at 2593 n.292 (citing *TRO* n.1263).

district court further concluded, as a matter of fact, that CLECs were leasing dark fiber from the relevant CFP on an IRU basis. *Id.* at *5 n.12.

3. Following briefing by the PUC and Verizon on the PUC's appeal of the district court's ruling, this Court invited the FCC to file an amicus brief addressing the two questions identified above. *See* page 2, above; *Order*, Third Circuit No. 11-2712 (filed March 14, 2012).

ARGUMENT

I. THE COMMISSION'S CONSIDERED CONSTRUCTION OF ITS RULES IN THIS AMICUS BRIEF IS ENTITLED TO DEFERENCE

An "agency's reading of its own rule is entitled to substantial deference." *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328 (2008). Indeed, an agency's construction of its own rule is "controlling" when, as in this case, the interpretation reflects a "fair and considered judgment" and is not "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997) (quotation marks and citation omitted). This rule of deference applies to the FCC's interpretation of its own regulations, as set forth in an amicus brief that (like this brief) reflects the agency's fair and considered view on the question. *Talk America*, 131 S. Ct. at 2261 (deferring to FCC rule interpretation contained in amicus brief); *see also Qwest Corp.*, 656 F.3d at 1098, 1101-02 (deferring to FCC amicus brief setting forth proper

interpretation of the business line rule for purposes of unbundling obligations).

II. THE RULE 51.5 DEFINITION OF "FIBER-BASED COLLOCATOR," AS EXPLAINED IN THE *TRRO*, SUPPORTS THE DISTRICT COURT'S RULING UNDER THE FACTS OF THIS CASE

As explained below, the CLECs in this case are qualifying "fiber-based collocator[s]" under the facts cited by the district court – specifically, each CLEC (1) has its own collocation arrangement in the Verizon wire center, (2) obtains dark fiber on an IRU basis from the CFP that maintains the CATT arrangement with Verizon, and (3) supplies its own collocated optronic equipment to activate the dark fiber and transmit communications into and out of the wire center. *Verizon PA* at *4-*6.

A. A CLEC That Connects To Dark Fiber Strands Leased From A CFP Through A Verizon CATT May Qualify As A "Fiber-Based Collocator" Under Rule 51.5.

CLECs that have collocated optronic equipment in a Verizon wire center and access through a Verizon CATT dark fiber strands within a CFP's fiber-optic cable may qualify as fiber-based collocators for purposes of determining whether an ILEC wire center meets the non-impairment threshold. The Commission's rules define a "fiber-based collocator" as:

> any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center,

> with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that
>
> (1) Terminates at a collocation arrangement within the wire center;
>
> (2) Leaves the incumbent LEC wire center premises; and
>
> (3) Is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable….

47 C.F.R. § 51.5.

Elaborating on this definition in the rulemaking order that adopted it, the Commission made clear that CLEC leases of both ILEC and non-ILEC dark fiber may qualify to be counted as fiber-based collocations, if, at a minimum, the CLEC has a collocation arrangement in the ILEC wire center and powers the dark fiber with its own optronic equipment. Citing a prior FCC order that had recognized certain CLEC leases of dark (but not lit) fiber as indicative of non-impairment for purposes of 47 U.S.C. § 251(d)(2), the Commission observed in the *TRRO* that "when a company has collocation facilities connected to [such] fiber transmission facilities obtained on an [IRU] basis from *another carrier*, *including the incumbent LEC*, these

facilities shall be counted for purposes of this [fiber-based collocation] analysis and shall be treated as non-incumbent LEC fiber facilities."[13]

Consistent with its view that the "fiber-based collocator" threshold for non-impairment is a proxy for revenue opportunities sufficient to encourage competitive investment in facilities, the Commission explained that a CLEC's use of another carrier's dark fiber is evidence that it has "aggregated sufficient revenues from traffic to justify deployment of [the] extensive optronics" needed to activate the fiber and transmit communications. *TRRO*, 20 FCC Rcd at 2608 (¶ 134).[14] Moreover, although a CLEC using another

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[13] *TRRO*, 20 FCC Rcd at 2593 n.292 (emphasis added) (citing *TRO*, 18 FCC Rcd at 17231 ¶ 408 & nn. 1263 & 1265). In the cited passages from the *TRO*, the Commission explained that "when a company has obtained dark fiber *from another carrier* on a long-term IRU basis and *activated that fiber with its own optronics*, that facility should be counted as a separate, unaffiliated facility." 18 FCC Rcd at 17231 (¶ 408) (emphasis added). *See id.* at 17231 n.1263 (stating that "when a company acquires *dark fiber*, but *not lit fiber*, *from another carrier* on a long-term IRU or comparable basis, that facility should be counted as a separate, unaffiliated facility") (emphasis added); *accord id.* at 17231 n.1265.

[14] *See also TRRO*, 20 FCC Rcd at 2608-09 (¶ 135) (noting that because dark fiber users "must still deploy significant facilities, including optronic equipment and collocation arrangements in incumbent LEC offices," the leasing of dark fiber by a CLEC involves investment that "advances the facilities deployment goals of the Act"); *id.* at 2634-35 n.496 (noting that CLEC leasing of dark fiber transport "promotes competitive investment in the requesting carriers' own facilities – *i.e.*, the optronics used to 'light' dark fiber").

carrier's dark fiber would not be supplying all of its own facilities, it would nevertheless promote efficient competition. The Commission found that "competing carriers using unbundled dark fiber transport can operate more efficiently than when using lit transport, because the competing carrier itself engineers and controls the network capabilities of the transmission and can maximize the use of previously dormant fiber." *TRRO*, 20 FCC Rcd at 2608 (¶ 135).

The PUC contends (Br. 7, 13-14) that CLEC leases of dark fiber strands from a CFP cannot constitute fiber-based collocations because the D.C. Circuit, in *Covad*, described a fiber-based collocator as "an arrangement that allows a CLEC to interconnect its facilities with those owned and operated by an ILEC." 450 F.3d at 535 n.2. The quoted footnote from *Covad*, however, did not purport to provide an exhaustive definition of a fiber-based collocator – much less address the question whether CFP-to-CLEC arrangements may qualify a competing local provider as a fiber-based collocator under the FCC's rule defining that term. Rather, that *Covad* footnote, contained in the background section of the court's opinion, simply describes a common situation in which a fiber-based collocation exists. Moreover, as discussed above, the *TRRO* makes clear that fiber-based collocators include (at a minimum) carriers with *IRU-based* dark fiber leases

from either ILECs or other CLECs, and nothing in the text of Rule 51.5 or the *Covad* decision provides otherwise.

The PUC also asserts that CLECs must "own their own fiber-optic cable" if they do not have an IRU dark fiber arrangement directly with the ILEC. Reply Br. 3. That argument, however, is at odds with the plain text of the rule. Subsection (3) of the "fiber-based collocator" definition expressly provides that – except for IRUs involving ILEC-owned dark fiber – the fiber-optic cable or comparable transmission facility must be "owned by a party *other than* the incumbent LEC or any [ILEC affiliate]." 47 C.F.R. § 51.5 (emphasis added). Here, the CFP is a "party other than" the ILEC or its affiliates.

The PUC further suggests that because the definition of "fiber-based collocator" in Rule 51.5 covers "[d]ark fiber obtained from an incumbent LEC on an [IRU] basis" but makes no comparable mention of non-ILEC dark fiber, the rule should be read to exclude all non-ILEC dark fiber. PUC Reply Br. 8.[15] It is easy to see, however, why the Commission found it necessary in

[15] *See* 47 C.F.R. § 51.5 ("A fiber-based collocator is any carrier . . . that . . . operates a fiber-optic cable or comparable transmission facility that . . . (3) Is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, *except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable*.") (emphasis added).

Rule 51.5 to address ILEC (but not CLEC) dark fiber in order to bring the former within the "fiber-based collocator" definition. The rule generally limits that term to a "fiber-optic cable or comparable transmission facility that . . . (3) Is owned by a party *other than the incumbent LEC*." 47 C.F.R. § 51.5 (emphasis added). The rule's exception (*see* note 15, above) was thus essential to *expand* the definition to cover ILEC-owned dark fiber provided pursuant to an IRU, notwithstanding the otherwise applicable limitation that the qualifying fiber be "owned" by a party other than the ILEC. By contrast, including a *CFP's* dark fiber within the definition requires no exception from the limitation that it be "owned by a party other than the incumbent LEC." CFP dark fiber qualifies as "fiber-optic cable or comparable transmission facility . . . owned by a party other than the [ILEC]" under the plain text of the general rule.

Finally, the PUC argues broadly that treating CLECs as fiber-based collocators on the basis of their use of CFP dark fiber violates the pro-competitive purposes of the network element unbundling regime because, among other things, the CLECs under such arrangements have "not made the [requisite] investment and commitment to long-term presence in the wire center." Br. 27. As noted above, the Commission explained to the contrary that dark fiber leases – when combined with CLEC-provided optronic

equipment – serve the unbundling regime's policy goals by encouraging investment in collocation space and optronic equipment, while enabling the CLEC (via its optronic equipment) efficiently to control the network capabilities of its transmissions. *TRRO*, 20 FCC Rcd at 2608-09 (¶ 135); *id.* at 2634-35 n.496.

In sum, CLECs may be eligible for "fiber-based collocator" status where, *at a minimum*, they (1) are collocated within the ILEC wire center, (2) obtain dark fiber from a CFP that purchases the CATT collocation arrangement from Verizon, and (3) activate the fiber with their own optronic equipment to power communications into and out of the wire center.[16] As we explain below, whether the CLECs *also* must lease dark fiber from a CFP on *an IRU basis* appears to be immaterial in this case, because the district court concluded, as a matter of fact, that the relevant CLECs did so here, and the PUC's appellate briefs offer no basis to disturb that finding.

[16] Neither Verizon nor the PUC challenges the district court's conclusion that the CFP itself qualifies as a fiber-based collocator under the facts of this case. Accordingly, that question is not presented on appeal and we express no view on it.

B. Although The Commission Has Not Definitively Addressed Whether A CLEC Must Lease Dark Fiber From A CFP On An IRU Basis To Qualify As A "Fiber-Based Collocator," That Question Should Not Be Outcome-Determinative On The Facts Of This Case.

Verizon suggests (Br. 18 & n.16) that a CLEC that uses CFP dark fiber need not lease the fiber on an IRU basis in order to qualify as a fiber-based collocator, and this Court has invited the Commission to address that question. As discussed below, neither the text of Rule 51.5 nor any Commission order clearly addresses this question. Ultimately, however, the answer should not be outcome-determinative in this case, because the district court found, as a matter of fact, that the relevant CLECs "are leasing dark fiber from other competitors through indefeasible right of use arrangements." *Verizon PA* at *5 n.12.

The PUC nominally disputes that the CFP-to-CLEC dark fiber relationships in this case are IRUs. *See*, *e.g.*, PUC Br. 9, 13, 15, 19. The PUC's theory appears to be that the CFP (*absent* a contractual obligation) is not subject to all of the ILEC's regulatory duties to serve other CLECs, and that the CFP may be less likely than the ILEC to remain in the market. Neither concern is pertinent to whether the contractual relationships CFPs *already have* with the relevant CLECs in this case involve exclusive, long-term leases that meet the definition of an IRU. The district court's factual

determination on that question thus appears to be effectively unchallenged. *See Verizon PA* at *5 & nn.11 & 12. Even if the PUC could be construed as challenging the district court's determination regarding the existence of an IRU, its appellate briefs fail to point to any evidence presented below that would raise a triable issue of fact on that issue. Accordingly, we submit that the Court need not reach the issue to resolve this appeal.

The text of the "fiber-based collocator" definition in Rule 51.5 expressly requires that any *ILEC-supplied* dark fiber be provided to a CLEC on an IRU basis in order for the CLEC to qualify under the rule. Nothing in the text of the rule, however, expressly imposes such a requirement with respect to non-ILEC dark fiber. The question therefore arises whether a CLEC that "maintains a collocation arrangement" in an ILEC wire center, "with active electrical power supply" (and optronic equipment) to "light" dark fiber leased from a *CFP* on a *non*-IRU basis, "operates" a "fiber-optic cable or comparable transmission facility" within the meaning of the rule.

Some language in the *TRRO* – which adopted the Rule 51.5 definition – and the *TRO* suggests that the Commission assumed that qualifying CFP-to-CLEC dark fiber arrangements would involve IRUs.[17] These portions of the

[17] *See TRRO*, 20 FCC Rcd at 2593 n.292 ("We find that when a company has collocation facilities connected to fiber transmission facilities obtained on an

FCC's orders do not, however, clearly state that an IRU is *required* for a CFP-to-CLEC dark fiber arrangement to qualify as a fiber-based collocation. Thus, although the Commission justifies requiring a long-term IRU arrangement involving *ILEC* dark fiber on the grounds that it will prevent the ILEC from engaging in "short-term gaming" of the number of qualifying fiber-based collocators in order to free itself from unbundling obligations, *TRO*, 18 FCC Rcd at 17231 n.1265, that rationale does not readily apply to CFP-to-CLEC dark fiber arrangements. Other possible economic rationales may exist for requiring CFP-to-CLEC IRUs, but the orders do not directly present them.[18] Ultimately, the lack of a definitive answer to the question of

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indefeasible right of use (IRU) basis from another carrier, including the incumbent LEC, these facilities shall be counted for purposes of this [fiber-based collocator] analysis."); *TRO*, 18 FCC Rcd at 17231 (¶ 408) ("We find . . . that when a company has obtained dark fiber from another carrier on a long-term IRU basis and activated that fiber with its own optronics, that facility should be counted as a separate, unaffiliated facility."); *id.* at 17231 n.1263 (stating that "when a company acquires dark fiber, but not lit fiber, from another carrier on a long-term IRU or comparable basis, that facility should be counted as a separate unaffiliated facility"); *id.* n.1265 (suggesting possible correlation between an IRU lease (from an ILEC) and "operat[ing]" unaffiliated fiber optic facilities).

[18] As an economic rationale, one might argue that the presence of an IRU or a comparable long-term lease commitment *by the CLEC* (to a CFP, as well as an ILEC) provides evidence of significant revenue opportunities for the CLEC at the wire center. A CFP-to-CLEC long-term IRU also could help ensure that facilities-based competition at the wire center is not transitory, but will be present for a significant period. The Commission's orders, however, do not directly present such reasoning.

whether qualifying CFP-to-CLEC dark fiber arrangements must be on an IRU basis should be immaterial in this case, because, as discussed above, the PUC's appellate briefs provide no basis to disturb the district court's conclusion that the dark fiber at issue, in fact, was provided on an IRU basis. Accordingly, this Court may resolve this appeal without determining whether an IRU is required in every case in order for a CLEC to qualify as a "fiber-based collocator."

CONCLUSION

As set forth above, a CLEC qualifies as a "fiber-based collocator" under 47 C.F.R. § 51.5 where it: (1) has its own collocation arrangement in the Verizon wire center; (2) obtains dark fiber on an IRU basis from the CFP that purchases the CATT arrangement from Verizon; and (3) supplies the optronic equipment to activate, or "light," the fiber and transmit communications into and out of the wire center. Neither the text of Rule 51.5, nor any FCC order, clearly addresses the question whether the CFP-to-CLEC dark-fiber lease *must* be on an IRU basis in order for the CLEC to qualify as a fiber-based collocator. However, that question should not be outcome-determinative given the district court's conclusion that the pertinent leases in this case were, in fact, IRU arrangements. On the basis of that factual finding, which the PUC offers no basis to disturb, the FCC

respectfully submits that the Court should affirm the judgment of the district court.

Respectfully submitted,

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April 13, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

VERIZON PENNSYLVANIA INC. AND VERIZON NORTH LLC, PLAINTIFFS/APPELLEES, v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL., DEFENDANTS/APPELLANTS.	NO. 11-2712

CERTIFICATE OF COMPLIANCE

I hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because the brief contains 4938 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii), and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Pursuant to Third Circuit Rule 31.1(c), I further certify that the text of the electronic brief is identical to the text in the paper copies and that a virus

detection program, Symantec Endpoint Protection version 11.0.4014.26, has been run on the file and that no virus was detected.

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April 13, 2012

11-2712

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Verizon Pennsylvania Inc. and Verizon North LLC, Plaintiffs/Appellees,

v.

Pennsylvania Public Utility Commission, et al., Defendants/Appellants.

CERTIFICATE OF SERVICE

I, Laurence N. Bourne, hereby certify that on April 13, 2012, I electronically filed the foregoing Brief for Amicus Curiae Federal Communications Commission with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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