**COMMONWEALTH OF MASSACHUSETTS**
**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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| Investigation by the Department on its own motion into the appropriate regulatory plan to succeed price cap regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' retail intrastate telecommunications services in the Commonwealth of Massachusetts | DTE 01-31- Phase II (Track A) |

# REPLY OF AT&T TO VERIZON'S OPPOSITION TO, AND THE AG'S COMMENTS ON, AT&T'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR LEAVE TO PRESENT EVIDENCE AND FILE BRIEFS


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## Introduction

Verizon's opposition to *Motion Of AT&T For Summary Judgment Or, In The Alternative, For Leave To Present Evidence And File Briefs Regarding Verizon's Failure To Comply With The Department's Phase I Order* ("*Summary Judgment Motion*") is most striking for its silence on the core issue: whether Verizon has satisfied the Department's requirement to identify retail business services, in addition to private line services, that are contestable on a UNE basis. Verizon's opposition also fails to provide any analysis of the record evidence that sheds light on the issue of whether summary judgment should be granted as to the issue of compliance. Indeed, Verizon's opposition is based almost exclusively on the claim that the Department has already addressed AT&T's arguments related to the difficulty of obtaining UNEs. Verizon is wrong. As explained in detail below, AT&T's evidence and arguments in Phase II go directly to the compliance issue of which services are contestable on a UNE basis. The fact that similar (but not identical) evidence was presented for retail services generally, in Phase I, does not make such evidence irrelevant or inappropriate in this phase, where AT&T has developed such evidence on a service-by-service basis and where UNE-based competition is the issue.

## Argument

### I. THE DEPARTMENT UNAMBIGUOUSLY REQUIRED VERIZON TO IDENTIFY RETAIL BUSINESS SERVICES THAT ARE NOT CONTESTABLE ON A UNE BASIS.

Verizon argues that "the *Phase I Order* determined the issue of the ability of CLECs to compete with Verizon MA for Business services (except Private Line service*) through the use of UNEs*." *Opposition of Verizon Massachusetts To AT&T Motion For Summary Judgment* ("*Verizon Opposition*"), at 6 (emphasis added). Verizon is wrong.

The Department did not find that UNE-based competition is sufficient. Indeed it made no specific finding at all regarding UNE based competition. The Department observed and found

competition for business services generally *based on all three methods of methods of entry* (resale, UNEs and facilities based). *See*, *Phase I Order*, at 91-92. When granting pricing flexibility, however, the Department was clear that it intended to grant pricing flexibility only for those specific business services that are contestable on a UNE basis. The Department stated:

> Therefore, the Department determines that Verizon may, consistent with G.L. c.159, be granted upward pricing flexibility for its retail business services ***that are contestable on a UNE basis***.

*Id*., at 92. That is precisely why the Department required Verizon to identify those services that are not contestable on a UNE basis. *Phase I Order*, at 62, n. 39. The Department intended not to grant pricing flexibility for such services. The Department stated:

> The Department determines that Verizon may, consistent with G.L. c. 159, be granted pricing flexibility with regard to private lines services, but only after rates for special access services are moved to UNE-based levels, and, further, that ***other business services not contestable as UNEs may not be granted pricing flexibility on the basis of the record before us***.

*Id*., at 92 (emphasis supplied).

In short, contrary to Verizon's mischaracterizations, the Department's *Phase I Order* cannot be read as a blanket grant of pricing flexibility for Verizon's retail business services. The Department *Phase I Order* specifically requires in the compliance phase a distinction between retail services that are contestable on a UNE basis and those that are not. Only after the services that fall into each category are identified can the Department's *Phase I Order* be implemented, and pricing flexibility granted for the services that are contestable on a UNE basis.

## II. EVIDENCE RELATING TO THE DIFFICULTY OF OBTAINING UNES ON A SERVICE BY SERVICE BASIS WAS NOT CONSIDERED IN PHASE I AND IS DIRECTLY RELEVANT TO THE COMPLIANCE REQUIREMENT TO IDENTIFY SERVICES THAT ARE NOT CONTESTABLE ON A UNE BASIS.

Verizon argues that AT&T is seeking to relitigate issues that have been decided in Phase I. Verizon argues that the Department rejected in Phase I the same arguments that AT&T

is presenting in Phase II regarding Verizon's use restrictions, commingling prohibition, "no facilities-no build" policy and a cumbersome and uneconomic hot-cut process. Verizon is wrong again.

First, in Phase I, the Department never considered the issue of which retail business services Verizon's restrictive policies prevent the use of UNEs to compete for, apart from private line services. Indeed, apart from private line services, the Department never made a finding in the *Phase I Order* as to the effect of Verizon's use restrictions, commingling prohibition, and "no facilities-no build" policy on the ability to use UNEs to compete for any business service.

As a result, the Department specifically requested the identification of those business services that are not contestable using UNEs. *Phase I Order*, at 62, n. 39. As AT&T's evidence submitted ***only*** in this phase of the proceeding makes clear, Verizon's use restrictions, commingling prohibition, and "no facilities-no build" policy affect certain business services and not others. *See*, DTE-ATT 1-1, Phase II. Specifically, Verizon's use restrictions and commingling prohibition do ***not*** affect the ability of CLECs to obtain UNEs for purposes of providing retail service to business customers in situations where the customer can be served using UNE-P.[1] *See*, DTE-ATT 1-1, Phase II, at 4, 6, DTE-ATT 2-2, Phase II, at 3. On the other hand, Verizon's restrictions policies do affect, indeed they preclude, the ability of CLECs to obtain UNEs to provide business services that require DS1 or above level connectivity and cannot be provisioned over UNE-P. *See*, DTE-ATT 1-1, Phase II, at 5, DTE-ATT 2-2, Phase II, at 1-2. Those services require connectivity between the AT&T switch and the end-user that

[1] The ability of CLECs to serve customers using UNE-P, however, would be – by definition – adversely affected by a Verizon policy prohibiting the use of UNE-P. Moreover, the utility of UNE-P as a means of acquiring customers to be served eventually by CLECs using their own facilities is compromised by Verizon's unwillingness to implement a cost-effective process for mass migrating customers from UNE-P to UNE-L. *See*, DTE-ATT 1-1, Phase II, at 4, 6.

must be established using the combined loop and transport functionality. Because of Verizon's use restrictions, CLECs must purchase the combined loop and transport functionality as special access circuits instead of UNEs to establish that connection. *See*, DTE-ATT 1-1, Phase II, at 4-5.

Similarly, Verizon's "no facilities-no build" policy has an impact on some services and not others. Specifically, Verizon's "no facilities-no build" policy does not preclude the use of UNEs to provide service to customers that can be served by UNE-P, since Verizon already has the facilities in place to serve such customers in most instances. On the other hand, business services that require DS1 or above level connections require the provisioning of facilities, and it is in these situations where Verizon can utilize its "no facilities-no build" policy to force CLECs to purchase such facilities as special access circuits rather than UNEs.

In short, Verizon's contention that the Department rejected in Phase I AT&T's evidence and argument in Phase II is wrong. The Department never considered or made findings regarding the effect of Verizon's restrictive policies on the ability to use UNEs either generally or for any service, apart from private line services. As a result, the Department requested, for the compliance filing, the identification of services as to which UNEs are not obtainable. In order to respond directly to the Department's compliance concern, AT&T's evidence and argument in Phase II demonstrate which services Verizon's restrictive policies prevent the use of UNEs to compete for.

## III. VERIZON'S OPPOSITION FAILS TO ADDRESS, LET ALONE EXPLAIN, HOW IT HAS MET ITS BURDEN OF DEMONSTRATING WHICH SERVICES ARE CONTESTABLE ON A UNE BASIS.

### A. VERIZON BEARS THE BURDEN OF DEMONSTRATING THAT IT HAS PROPOSED PRICING FLEXIBILITY ONLY FOR THOSE SERVICES THAT ARE CONTESTABLE ON A UNE BASIS.

As the proponent of the *Compliance Filing*, Verizon bears the burden of demonstrating that its filing in fact complies with the Department's *Phase I Order*. *See*, generally, *Fitchburg Gas & Elec. Light Co. v. Department of Public Utilities*, 375 Mass. 571 (1978) (utility is required to prove its rate case before Department of Public Utilities by presenting a clear and reasonable analysis); *Boston Edison Co. v. Department of Public Utilities*, 375 Mass. 1 (1978), (utility bears burden of proving that end result in a rate proceeding is confiscatory), *cert. denied* 99 S.Ct. 301, 439 U.S. 921, 58 L.Ed.2d 314; *Fryer v. Department of Public Utilities*, 374 Mass. 685 (1978) (ordinarily complaining party seeking change in existing rates carries burden of proving new rates); *Metropolitan Dist. Commission v. Department of Public Utilities* 352 Mass. 18 (1967) (when new electric rates are initially submitted to the Department Of Public Utilities for approval, burden is upon utility to show that rates are proper); *Massachusetts Electric Co. v. Department of Public Utilities* , 419 Mass. 239 (1994) (proponents of change had burden of proving that change in one or more environmental externality values was appropriate or required).

Moreover, in *Massachusetts Electric Co. v. Department of Public Utilities*, 376 Mass. 294, 309-310 (1978), the Supreme Judicial Court made clear that a party bearing the burden of proof on an issue may not satisfy that burden by a "bald assertion." The *Massachusetts Electric* Court held that the burden must be satisfied by an analysis that considers all the factors in order to reach a reasoned result. *Id*. Similarly, Verizon cannot satisfy its burden of demonstrating that there are no services, other than private line services, that are contestable using UNEs simply by

asserting that proposition. Verizon must show how CLECs can use UNEs in the face of its use restrictions, commingling prohibitions, and "no facilities-no build" policy.

### B. VERIZON'S CONCLUSORY ASSERTION THAT ALL SERVICES, EXCEPT PRIVATE LINE SERVICES, ARE CONTESTABLE ON A UNE BASIS DOES NOT SATISFY ITS BURDEN.

In its opposition to AT&T's motion, Verizon contends that it has provided detailed discussion and diagrams explaining how AT&T and other CLECs can use UNEs to provide business services in the face of use restrictions. *Verizon Opposition*, at 7-8. In support, Verizon points to *Verizon Massachusetts' Response To The Department's Supplemental Information Request*, filed on October 15, 2002 ("*Verizon Supplemental Response*"), at 1-9, and *Reply Comments of Verizon Massachusetts*, filed on July 16, 2002 ("*Reply Comments*"), at 12-17.[2] As explained in further detail below, the "supporting" documents to which Verizon points, however, contain no explanation for how a CLEC can use Verizon's UNEs to provide bundled local and long distance service without violating Verizon's use restrictions.

First, Verizon's reliance on the *Verizon Supplemental Response* does not help Verizon. AT&T set forth a detailed analysis of the *Verizon Supplemental Response* in its motion for summary judgment, which demonstrated that Verizon's entire argument in that document was

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[2] Not surprisingly, the *Verizon Opposition* does not even mention the *Compliance Filing* itself. In that filing, Verizon merely listed retail services that it offers and then claimed to identify for each service the UNEs that can be used to provide that service. As Ms. Halloran and Ms. Waldbaum explained, such a rote listing hardly proves that the UNEs can be used as an economic and commercial matter in the face of Verizon's restrictions:

> Since unbundled network elements were defined as the network elements necessary to offer telecommunications service, it comes as no surprise that Verizon's listed services *could technically* be provided using UNEs. However, *Verizon's policies* prevent CLECs, *as an economic and commercial matter*, from using UNEs to provide competing services. Therefore, the services listed in Tab C (with a narrow exception discussed below) are not contestable using UNEs, and that is the issue in this case. *See*, *Phase I Order*, at 62, n. 39.

DTE-ATT 1-1, Phase II, at 1 (emphasis in original).

addressing an irrelevant point. In the *Verizon Supplemental Response*, Verizon argued that it had the right to impose use restrictions and never addressed the core issue in the compliance phase, the impact that such use restrictions have on the ability of CLECs to use UNEs to compete. *See, Summary Judgment Motion*, at 22-26. Thus, contrary to Verizon's contention in its opposition, there is no discussion (let alone detailed discussions and diagrams) in the *Verizon Supplemental Response* explaining how CLECs can use UNEs to provide business services without violating Verizon's use restrictions.

Second, the *Reply Comments* to which Verizon also points in its opposition is similarly devoid of any explanation for how CLECs can use UNEs to provide competitive business services in the face of Verizon's use restrictions. While Verizon provides a discussion and diagrams relating to ***private line services*** (*Reply Comments*, at 12-16), the issue of whether private line services are contestable using UNEs is not before the Department in the compliance phase. The Department has already ruled on that issue (*Phase I Order*, at 61-62), and Verizon did not request reconsideration. As to the issue that ***is*** before the Department in this compliance phase (whether there are other services that are not contestable using UNEs), Verizon's "discussion" is limited to the top half of one page (with no diagrams), where Verizon simply defends the FCC's safe harbor test and baldly asserts with no support that "UNEs that are used by CLECs for the provision of local retail services to business customers *have no use restrictions*." *Verizon Opposition*, at 16 (emphasis in original). In short, contrary to Verizon's contentions in its opposition, there is no discussion in Verizon's *Reply Comments* explaining how CLECs can use UNEs to provide business services without violating Verizon's use restrictions, apart from a bald assertion to that effect. As demonstrated above, bald assertions do

not satisfy the standard of proof required of a party with the burden of persuasion. *Massachusetts Electric Co. v. Department of Public Utilities*, 376 Mass. 294, 309-310 (1978).

### C. VERIZON'S "CRITIQUE" OF AT&T'S ANALYSIS OF E911 LISTINGS IS FLAWED BECAUSE IT RELIES ON IRRELEVANT INFORMATION AND IGNORES RELEVANT EVIDENCE IN THE RECORD.

In its summary judgment motion, AT&T presented an analysis of CLEC ***local*** listings in the E911 data base that showed that most of them are served using special access circuits. *Summary Judgment Motion*, at 20-21. As shown below, Verizon's weak attempt to rebut the analysis is fatally flawed, because it relies on irrelevant data and ignores data that are directly on point.

It is not disputed that in the original data for this case, there were 470,000 CLEC local listings in the E911 data base representing lines that are served either by full facilities based carriers or by carriers using special access circuits.[3] It is also without dispute that no full facilities based carrier has been identified that could account for facilities based lines provisioned to business customers. The weight of the evidence, therefore, suggests that there are a substantial number of ***local*** listings served by special access circuits. Since special access circuits are significantly more expensive than UNEs, Verizon's restrictive policies are clearly having a significant anticompetitive effect in the market for local service.

The only evidence that Verizon is able to muster against the weight of the evidence above is that AT&T did not take into account the fact that both AT&T and WorldCom "prefer" to use their own facilities to serve a customer. *Verizon Opposition*, at 7-8, n. 3. Verizon's reference to AT&T's and WorldCom's ***preference*** is irrelevant, in light of AT&T's testimony on the record

[3] As AT&T explained in its *Summary Judgment Motion*, it is clear that none of these 470,000 lines are served by UNE-Loops because all of those have been subtracted out. *Summary Judgment Motion*, at 20-21.

in this case that its ***ability*** to use its own facilities to serve a customer is very limited. Indeed, the hard evidence that AT&T provided regarding the extent to which AT&T is able to use its own facilities (Exh. ATT-6A (Fea Testimony), Phase I, at 9)[4] further supports AT&T's position that most of the 470,000 CLEC local listings are lines served by carriers using special access circuits rather than full facilities based carriers.[5] In any event, even if the evidence were not so heavily weighted in favor of AT&T's position and it were a matter of pure speculation as Verizon contends (*see*, Verizon Opposition, at 7, n. 3), the issue should be resolved against the party bearing the burden of proof – Verizon in this case.

### D. WHERE VERIZON HAS FAILED TO PRODUCE EVIDENCE AFTER COUNTLESS OPPORTUNITIES TO DO SO THAT WOULD PERMIT THE DEPARTMENT TO DETERMINE WHICH SERVICES ARE CONTESTABLE ON A UNE BASIS, AT&T'S MOTION FOR SUMMARY JUDGMENT MUST BE GRANTED.

There is not a single statement by a Verizon witness anywhere in the record of Phase I or Phase II explaining how a CLEC seeking to offer bundled local and long distance service to a business customer can satisfy Verizon's "safe harbor" requirements. Indeed, Verizon's discussion of its use restrictions are generally no more than legal arguments to the effect that Verizon is entitled to impose them. *See*, *Verizon Supplemental Response* and *Reply Comments.* Moreover, Verizon has systematically declined to offer any evidence as to the impact of its restrictive policies on the ability to obtain UNEs for different services, even when provided an

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[4] In order to facilitate filing of these reply comments, AT&T does not repeat here the confidential information contained in Exh. ATT-6A, Phase I, at 9. (The Department ruled such information confidential in its *Phase I Order*, at 14-15.)

[5] In its *Phase I Order*, the Department determined that it was not important for its purposes in Phase I to determine how many of the CLEC local listings were partial facilities based (*i.e.*, served by special access lines) vs. full facilities based lines, because it was looking only at the extent of total competition, not at the extent of UNE-based competition. *Id*., at 83 ("while Verizon does not disaggregate the full-facilities-based lines from the partial-facilities-based lines, this is less important than the fact that both types of competition are active in Massachusetts.") In this compliance phase, however, the extent of UNE-based competition is ***the*** issue, because the Department has determined that UNE-based competition is the predicate for granting pricing flexibility. *Phase I Order*, at 92.

opportunity to do so. *See*, ATT-VZ 1-1 through 1-7, Phase II. AT&T, on the other hand, has presented testimony detailing factually the obstacles to satisfying the safe harbor requirements and filed discovery responses with the responsible witnesses identified further explaining such problems. In short, AT&T has presented sworn testimony and offered as discovery responses factual statements of witnesses prepared to swear to their veracity.

On the record of this case, Verizon has not even submitted a *prima facia* case on the compliance issue of which services are contestable on a UNE basis. Even in the absence of the sworn testimony and evidence adduced by AT&T demonstrating the unavailability of UNEs for certain business services, the Department would have no basis for approving Verizon's compliance filing. Given AT&T's uncontested evidence, the Department should grant AT&T's motion for summary judgment and reject Verizon's compliance filing.

## IV. GIVEN VERIZON'S FAILURE TO PRODUCE FACTUAL EVIDENCE, THE AG'S COMMENTS DO NOT DEMONSTRATE A MATERIAL ISSUE OF FACT.

In his comments filed in response to AT&T's summary judgment motion, the Attorney General ("AG") recommends further hearings because he finds a material issue of fact. *Comments of The Attorney General On AT&T Communications of New England, Inc.'s Motion For Summary Judgment* ("*AG Comments*"). The AG notes that the *Verizon Supplemental Response* is primarily legal argument and states that "[o]ther than in its Supplemental Response, Verizon has produced some but not a complete factual response to AT&T's charges of non-contestability. With all due respect to the AG, he apparently finds factual assertions in Verizon's filings that do not exist.

The AG does not identify in his comments where he found the Verizon factual assertions that would create a material issue of fact, or even what those assertions are. In its *Summary*

*Judgment Motion*, AT&T reviewed the record and demonstrated the absence of a relevant factual assertion. On this basis, AT&T submits that summary judgment is proper.

If, however, the Department believes there is a material issue of fact, such an issue must be resolved by the submission of evidence subject to cross examination. To that extent, AT&T agrees with the AG.

## **Conclusion**

AT&T requests that the Department grant this motion for summary judgment and dismiss Verizon's compliance filing for failure to produce evidence demonstrating compliance. In particular:

? ? Verizon failed to produce, for any retail service, any evidence that CLECs can use UNEs within the narrow limits set by Verizon's use and commingling restrictions in a way that allows them to provide competing retail services.

? ? Verizon failed to produce, for any retail service, any evidence refuting AT&T's evidence that Verizon's "no facilities, no build policy" prevents CLECs from obtaining UNEs in situations where facilities are, in fact, available.

If, however, the Department believes that Verizon has produced sufficient evidence to raise an issue of fact as to whether certain business services are contestable on a UNE basis, then the Department must create a record by holding hearings and accepting evidence subject to cross examination in order to resolve the disputed issues of fact. Finally, the Department should grant summary judgment because Verizon failed to comply with the *Phase I Order* requiring Verizon to reduce rates for intrastate special access circuits to UNE levels.

Respectfully submitted,

**AT&T COMMUNICATIONS OF NEW ENGLAND, INC.**

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