COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department of	**)**	
Telecommunications and Energy on Its Own	**)**	
Motion To Implement the Requirements Of	**)**	**DTE. 03-60**
The Federal Communications Department's	**)**	
Triennial Review Order Regarding Switching	**)**	
For Mass Market Customers	**)**	

CONVERSENT COMMUNICATIONS OF MASSACHUSETTS, LLC'S OPPOSITION TO VERIZON'S MOTION TO STAY - TRACK A AND COMMENTS ON JURISDICTIONAL BASIS FOR GOING FORWARD

Conversent Communications of Massachusetts, LLC ("Conversent") hereby submits its opposition to the Expedited Motion to Stay - Track A submitted by Verizon in the above captioned docket.[1] In its Motion, Verizon seeks an immediate stay of the Department's proceedings regarding the Federal Communications Department ("FCC's") Triennial Review Order ("TRO") in light of the decision issued March 2 by the United States Court of Appeals for the District of Columbia ("DC Circuit").[2] For the reasons described below, Verizon's Motion should be denied and the Department should continue with its fact-finding, including whether, on a route-by-route basis, there are three self-provisioners or two wholesalers of dedicated transport, including dark fiber dedicated transport, DS-1 dedicated transport and DS-3 dedicated transport.[3]

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[1] Conversent agrees with Verizon that it is incumbent on the Department to proceed with the hot cut portion of the proceeding.

[2] *See United States Telecom Association v. Federal Communications Commission* (Docket No. 00-1012) (D.C. Circuit March 2, 2004).

[3] Because of the critical importance of unbundled dark fiber dedicated transport to Conversent's business plan, much of Conversent's pleading focuses on such dark fiber transport.

Conversent would like the Department to note that the decision issued by the D.C. Circuit has not taken effect.[4] Several parties, including three Commissioners (a majority) of the FCC, have indicated their intent to seek a stay and review of the D.C. Circuit's decision to The United States Supreme Court. Conversent is optimistic that the Supreme Court, which issued a very strong opinion in May of 2002 in support of competition and affirming the FCC's TELRIC methodology, will accept this case and affirm the FCC's findings, especially with respect to the conclusion of all five (5) FCC Commissioners that dark fiber transport must be unbundled at TELRIC rates, subject to the application of the impairment triggers by state commissions. Accordingly, in order to ensure that the most complete factual record is available within the time frame provided under the TRO, Conversent is prepared to proceed as scheduled with the hearings in this docket.[5]

As stated by AT&T, even if, the end of the day, the FCC is compelled to reanalyze the impairment issue under the Telecommunications Act (as distinguished from the independent power and responsibility of state commissions to make their own unbundling and other policy decisions as a matter of state law), it will need to base any further findings on granular, market-specific factual findings. For this reason, state commissions that gather the relevant facts within their jurisdictions will be able to provide important input too, and thereby influence the FCC's ultimate findings. Moreover, it is important to note that the D.C. Circuit Court of Appeals, with

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[4] *Id*., at 62 (noting that the portions of the *TRO* vacated by the DC Circuit will be stayed until "no later than the later of (1) the denial of any petition for rehearing or rehearing en banc or (2) 60 days from today's date").

[5] Nonetheless, Conversent appreciates the uncertainty created by the D.C. Circuit decision and the resources that the Department would have to expend to go forward. For this reason, if the Department is inclined to temporarily defer the proceedings, Conversent would recommend that the Department, at the very least, follow the "Florida Approach" in order to ensure the record in the proceeding is as complete as possible. Conversent proposes the following: (1) the parties agree to stipulate to the admission of all pre-filed testimony and associated exhibits into the record of the proceeding; (2) the Department enters into the record of this proceeding all pre-filed testimony and associated exhibits filed by the parties; (3) the parties agree to reserve the right to cross examine the witnesses should the proceeding recommence; (4) the Department holds the proceeding in abeyance, pending the outcome of the various appeals of the DC Circuit decision and any FCC action; and (5) the Department schedules a status conference for 30 days after the issuance of its order holding the proceeding in abeyance to update the status of the *TRO*.

respect to unbundled transport, did not vacate the impairment triggers. The Court took no issue with the FCC's conclusions that a finding of non-impairment would be found based on the existence of three self-provisioners or two wholesalers. It is true that in dicta, at pages 28 and 29, the Court criticized the point-to-point route approach by asserting that it "ignore[d]" facilities deployment along similar, nearby routes. However, this criticism demonstrates the Court's misunderstanding of an important aspect of the FCC's impairment triggers for DS-1, DS-3 and dark fiber dedicated transport. That is, that even where the triggers have not been met, such as in connection with a nearby route, an ILEC may demonstrate that facilities deployment for such route is nevertheless possible.[6]

For all of the above reasons, the Department should deny Verizon's Motion to Stay Track A of these proceedings.

The Department has requested that the parties specifically address the jurisdictional basis for going forward for this proceeding. The remainder of this pleading will address the jurisdictional issues.

A. The Department Has the Authority to Continue its Application of the Impairment Triggers and to Proceed with its Investigation into Hot Cut Processes and Rates.

The D.C. Circuit Court decision has no impact on the hot cut portion of the Department's proceedings. The Department should continue the phase of these proceedings that will establish the TELRIC non-recurring cost for basic hot cuts, using a more efficient, less manually intensive process, as well as for bulk and batch hot cuts.

The Department should press on with the application of the impairment analysis for loops, transport and switching. The Department continues to have full delegation of authority from the FCC under the *TRO* to continue its application of the impairment triggers. In fact, Verizon's Petition for Arbitration is based on the change of law caused by the *TRO*, and its

[6] 47 C.F.R. §51.319(e)(3)(ii).

proposed *TRO* Amendment contemplates that findings of non-impairment will be made by the Department.

B. **The Department Should Act Now to Keep the Status Quo in Place to Fill the Void Caused by The D.C. Circuit Decision.**

Given that there is legal uncertainty as to the applicable federal rules construing and applying the impairment standard for transport and switching, the Department certainly has the authority to use its own independent authority to address unbundling on its own in this or another proceeding. Indeed, this may be the only way to ensure that Verizon's statutory obligation to provide UNEs will be enforced. The Department could establish such UNEs under state law on a permanent basis or it could merely enter an order that keeps existing wholesale tariffs in place until such time as the FCC sets new rules or the *TRO* is reinstated.

The authority for such an approach should not be questioned since the Department has previously asserted that it has independent state authority to regulate unbundled access to network elements if necessary.[7] Further, the Department has exercised this authority by ordering *additional* unbundling in the context of a consolidated arbitration proceeding. Specifically, the Department ruled that dark fiber is an UNE that Verizon is required to provide at TELRIC rates.[8] This ruling has been in effect since well in advance of the FCC's *UNE Remand Order* and the *Triennial Review Order,* and has never been appealed by Verizon. Indeed, Verizon's tariffed dark fiber offering in Massachusetts is based on a compliance filing that Verizon made following the DTE's ruling in the consolidated arbitration docket.

Moreover, The FCC has itself concluded that, in absence of clear federal rules, states may exercise their authority to arbitrate interconnection agreements to impose the requirements

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[7] See *Consolidated Arbitrations*, DPU/DTE 96-73/74, 96-75, 96-80/81, 96-83, 96-94 - Phase 4-E Order dated at pp. 3-12 (noting independent state authority to regulate unbundled access to network elements if necessary).

[8] *Consolidated Arbitrations*, 96-73/74, 96-75, 96-80/81, 96-83, 96-94 Phase 3, at 49 (1996) and Phase 4-N (Bell Atlantic will provide dark fiber, a UNE on which the FCC deferred to state action and one that this Department ordered Bell Atlantic to Provide).

of Section 251 where appropriate. In particular, prior to February 1999, there were no federal rules governing the exchange of ISP-bound traffic. In the absence of such rules, many states, in exercising their authority to arbitrate interconnection disputes under Section 252, imposed reciprocal compensation obligations under Section 251(b)(5) on the exchange of ISP-bound traffic. When the FCC finally addressed the matter in February 1999, it held that this traffic was not subject to Section 251(b)(5) because it was not "local." Nevertheless, the FCC concluded that states had the authority to interpret interconnection agreements as requiring the payment of reciprocal compensation for ISP-bound traffic until such time as the FCC adopted rules governing the exchange of this traffic. As the FCC explained,

> In the absence of a federal rule, state commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation. Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law.[9]

Thus, the Department has historically had the authority to unbundle - consistent with Section 251 and federal rules - and this authority continues today. The Department can and should make it clear that, if, hypothetically, the D.C. Circuit Court's recent decision were to take effect and relevant portions of the *TRO* were as a result vacated, the Department's ruling that dark fiber is a UNE will remain operative until the Department rules otherwise.

Until such time as the FCC's unbundling rules are reinstated or there are new federal unbundling rules, there will be tremendous uncertainty as to the circumstances in which Verizon

[9] See Intercarrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689, ¶ 26 (1999) rev'd on other grounds Bell Atlantic Tel. Cos. v. FCC, 206 F.3d 1

must provide unbundled transport and switching in Massachusetts. Given this uncertainty, the Department should order that the *status quo* be maintained and that all current UNEs that are set forth in Verizon's wholesale tariff remain available to competitive LECs while the Department continues to implement the *TRO* in Docket 03-60, and/or until the Department enacts its own rules to govern unbundling in Massachusetts, and/or new federal unbundling rules are implemented by the FCC.

At the very least, the Department should mandate that Verizon continue to provide unbundled dark fiber dedicated transport in Massachusetts as if no relevant change of law has occurred. It is likely that most or all of these dark fiber facilities will ultimately be mandated as UNEs under federal law. As stated above, all five (5) commissioners of the FCC ruled that dark fiber dedicated transport should remain a UNE in the *Triennial Review Order*. In addition, the D.C. Circuit overturned the FCC's transport unbundling rules not so much because of perceived flaws for the transport impairment standard as because of the state's role under the FCC's rules in applying that standard (a ruling that itself has no bearing on the states' authority to implement the Communications Act outside of the specific delegation of authority of the FCC).[10] By mandating access to dark fiber, therefore, the Department would preserve the likely ultimate outcome at the federal level while simultaneously giving itself time to proceed with the triggers and if it so chooses to adopt state unbundling rules. The Department should issue its mandate immediately, consistent with federal law and accordance with independent state law.

(D.C. Cir. 2000).

[10] The D.C. Circuit Court's criticism of the FCC's delegation to the states is especially infirm with respect to transport since the state's role is essentially limited to a counting exercise - is there the requisite number of self-provisioners or wholesalers along a specific route, or not?

C. **The Department Has The Authority to Enact its Own Unbundling Rule or Rules Under Section 251(d)(3) and Section 261.**

The Communications Act reserves for the Department the authority to implement Section 251(c) so long as the Department's implementation is consistent with the requirements of the Communications Act and the FCC's rules. For example, Section 251(d)(3) expressly authorizes the Department to implement rules to govern the unbundling of networks.[11] The Department is free to exercise that authority in this or another proceeding. Given that there could soon be no clear federal rules in place governing unbundled transport and switching unbundling (i.e., once the D.C. Circuit lifts the stay on its vacatur), it can hardly be said that there are federal rules that would preclude the enforcement of any regulation, order or policy of a state commission that "establishes access and interconnection obligations of this section."[12] State action to enact rules at this time would be both "consistent" with Section 251 (since there would be no federal rules) and enacted in such a way as not to "substantially prevent implementation of the requirements of" Section 251 (since the State will be acting directly to implement Section 251 requirements in the absence of federal regulation).

Section 261 of the Communications Act also expresses congress's unambiguous intent to grant States a free hand to enforce the requirements of Section 251 and to advance competition, so long as the States act in accordance with the requirements of the Federal Act. For example, Section 261(b) states that,

> Nothing in this part [which includes Section 251] shall be construed to prohibit any State commission … from prescribing regulations after [the adoption of the 1996 act], in fulfilling the requirements, to the extent that such regulations are not inconsistent with the provisions of this part.[13]

In addition, Section 261(c) authorizes states to impose regulations on intrastate services provided by telecommunications carriers "that are necessary to further competition in the provision of

[11] *See* 47 U.S.C.§251(d)(3).

telephone exchange service and exchange access" so long as such requirements are consistent with the FCC's and the requirements of the statute.[14] This provision is significant because if gives states the freedom to adopt regulations that would promote competition in the provision of services over which they have unquestioned jurisdiction, intrastate local exchange and access services, so long as those regulations do not violate federal regulations or statutory requirements. A fair reading of this provision is that, in exercising authority over intrastate services, a state's unbundling regulations may also apply to interstate traffic so long as they are not inconsistent with federal law. Conversent submits that, in the absence of clear federal rules interpreting and applying impairment standards for transport and switching, state rules that are enacted in accordance with Section 251(d)(3) and Section 261 are especially warranted to ensure that Verizon complies with its "duty" to provide unbundled network elements under Section 251(c), as Congress expected. Thus, the Department should proceed now to preserve the *status quo* of network elements currently offered in Verizon's wholesale tariff in Massachusetts and to ensure that the network elements that have been unbundled - especially dark fiber dedicated transport -- remain unbundled.

D. <u>The DTE Has the Authority to Insist That Verizon Comply with its Section 271 Unbundling Requirements</u>

Finally, once an incumbent LEC, such as Verizon, has obtained authority to enter the long distance market, it must continue to abide by the requirements of 47 U.S.C.§271. Pursuant to this statute, even in the absence of federal Section 251(c) unbundling rules, Verizon has a continuing duty to provide unbundled access to, "inter alia", its local loops, as well as local transport -- including DS-1, DS-3 and dark fiber transport, at "just and

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[12] 47 U.S.C. §251(d)(3).
[13] 47 U.S.C.§ 261(b).
[14] *See* 47 U.S.C.§ 261(c).

reasonable" rates.[15] Verizon may take the position that its existing special access tariff provides DS-1 and DS-3 level transport at "just and reasonable" rates in accordance with Section 271. This cannot be said for dark fiber transport because Verizon's special access tariff does not contain a dark fiber offering. Accordingly, it is imperative that Verizon be required to file a dark fiber tariff under Section 271.

There can be no serious question that dark fiber transport is included within checklist item V. The FCC has defined interoffice unbundled transport to include dark fiber.[16] In order to comply with checklist item V, a BOC must provide the transport facilities that fall within the FCC's definition of interoffice transport, referred to as "interoffice transmission facilities" in the FCC's rules.[17] Accordingly, after the FCC added dark fiber transport to the definition of interoffice transmission facilities, the regional Bell Operating Companies have been required under checklist item V to provide interoffice dark fiber transport. The FCC has addressed all issues associated with the provision of dark fiber transport under Section 271 in this manner.[18] As the FCC held in

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[15] *See* checklist items in 47§271(c)(2)(B).

[16] *UNE Remand Order* ¶ 330 *reversed on other grounds United States Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) (the obligation to unbundle dedicated interoffice transport includes dark fiber); *TRO* ¶ 359 *reversed on other grounds United States Telecom Ass'n v. FCC*, Dkt No. 00-10012 and cons. cases (D.C. Cir. Mar. 2, 2004) ("We find on a national level that requesting carriers are impaired without access to unbundled dark fiber transport facilities."); n.1097 ("Dark fiber transport facilities… are transport facilities without any activated electronics."),; 47 C.F.R. § 51.319(d)((1)(ii) (defining the "interoffice transmission facility network elements" to include "Dark fiber transport").

[17] *See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, 12 FCC Rcd 20543, ¶ 299 (stating that compliance with the transport requirements of Section 251(c)(3) and the FCC's "implementing rules" is "mandated by" checklist items II and V). Checklist item II is relevant to interoffice transport only insofar as it requires that BOCs make their operations support systems available to competitors seeking to obtain access to unbundled network elements.

[18] *See Joint Application of New England 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 Rhode Island*, CC Docket No. 01-324, Memorandum Opinion and Order, 17 FCC Rcd 3300, ¶ 93 (2002*); Application by Verizon New England 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 Vermont, CC Docket No. 02-7*, Memorandum Opinion and Order, 17 FCC Rcd 7625, ¶¶ 56-7 (2002); *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for*

the *UNE Remand Order*, a BOC's obligation under checklist item V to provide the facilities within the definition of interoffice transmission facilities does not end when the application of Section 251(d)(2) yields the conclusion that Section 251(c)(3) unbundling at TELRIC rates is no longer required. At that time, the BOC must continue to provide all of the same interoffice transmission facilities, including dark fiber, on just and reasonable rates, terms and conditions.[19]

The Department should insist that Verizon file tariffs in the proper forum within 30 days to implement the unbundling obligations set forth in Section 271, as a condition of continued authorization to offer long distance services to customers in Massachusetts. Verizon's Section 271 tariffs should include the terms, conditions and rates for unbundled access to loops as well as to DS-1, DS-3 and dark fiber transport.

Verizon has never filed any tariffs in any jurisdiction to implement the obligations for unbundling set forth in Section 271. However, in the absence of clear federal rules governing the unbundling of transport under Section 251, the Department should insist that Verizon do so now under Section 271, rather to wait and see what develops in connection with the D.C. Court decision. By tariffing dark fiber transport pursuant to Section 271, Conversent will have some notice of what Verizon will charge if dark fiber transport along a route or routes meets the triggers and therefore no longer must be priced at TELRIC. This in turn, will provide Conversent with the information it needs to determine if it will i) self-provision dark fiber for this route, ii) obtain dark fiber from a third party vendor (if one exists), or iii) continue to take dark fiber transport from Verizon under "just and reasonable" rates. If Verizon refuses to tariff dark fiber, DS-1 and DS-3

Authorization To Provide In-Region, InterLATA Services in Pennsylvania, CC Docket No. 01-138, Memorandum Opinion and Order, 16 FCC Rcd 17419, ¶¶ 109, 112-13 (2001).

transport pursuant to Section 271, the Department should inform Verizon that it will seriously consider withdrawing its previous recommendation that Verizon be permitted to enter into the long distance market in Massachusetts.

Dated: March 12, 2004

Respectfully Submitted,

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[19] *UNE Remand Order* ¶ 470 ("If a checklist network element does not satisfy the unbundling standard in section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a)").