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July 29, 2004

VIA FEDERAL EXPRESS & E-MAIL

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, Second Floor
Boston, MA 02110

Re: D.T.E. 03-60

Dear :

Please accept for filing in the above-referenced proceeding the Comments of: ACN Communication Services, Inc.; Allegiance Telecom of Massachusetts, Inc.; Choice One Communications of Massachusetts Inc.; CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corporation of Massachusetts; Lightship Telecom, LLC; McGraw Communications, Inc.; RCN-BecoCom, LLC; RCN Telecom Services of Massachusetts, Inc.; segTEL, Inc.; and XO Massachusetts, Inc. (jointly, the "CLECs").

Original and nine (9) copies of this filing are attached. Please date-stamp the enclosed extera copy of this filing and return it in the attached self-addressed, postage prepaid envelope provided. Please note that this filing is also being filed in electronic format by email attachment to dte.efiling@state.ma.us.

Should you have any questions concerning this filing, please do not hesitate to contact me.

Sincerely,

Paul B. Hudson

Enclosures

cc: Paula Foley, Hearing Officer
Service List

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 the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers	**D.T.E. 03-60**

ACN Communication Services, Inc.; Allegiance Telecom of Massachusetts, Inc.; Choice One Communications of Massachusetts Inc.; CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corporation of Massachusetts; Lightship Telecom, LLC; McGraw Communications, Inc.; RCN-BecoCom, LLC; RCN Telecom Services of Massachusetts, Inc.; segTEL, Inc.; and XO Massachusetts, Inc. (jointly, the "CLECs") submit the following comments in response to the briefing questions issued by the Department seeking comment on the issues raised by their Petition for Expedited Relief filed on May 27, 2004 ("Petition").

On July 22, 2004, the FCC reportedly voted to adopt an order to address, on an interim basis, the absence of certain unbundling rules as a result of the issuance of the mandate in *USTA II*. The text of this order has not been released but is expected shortly. Because it is likely that the FCC order will impact the issues raised by the Briefing Questions and the Department's timing in addressing these issues, the CLECs have at this time provided only brief responses below, which are arranged to correspond to the order of the Department's questions.

I. Verizon Remains Obligated to Unbundle High-Capacity Loops, Transport, and Switching Under Federal Law

Although *USTA II* vacated the FCC's unbundling rules for transport and switching, Verizon remains obligated to provide these UNEs under the terms of its interconnection agreements and wholesale DTE tariffs. Verizon can seek to amend these agreements and tariffs

if it believes that changes are warranted by their terms and by applicable law. However, as set forth in the CLECs' Petition, Verizon remains required to provide these UNEs under Section 251 and the *Bell Atlantic-GTE Merger Conditions*. In addition, it appears that the action approved by the FCC on July 22, 2004 will require Verizon to continue to unbundle all of the vacated UNEs through at least February 2005, by which time the FCC intends to issue new unbundling rules that will restore at least many of the vacated UNEs. Therefore, any proceeding to "implement" *USTA II* would likely become moot before it could even be completed.

But if the Department did consider a Verizon proposal to eliminate UNEs, it should reject it. In the absence of federal unbundling rules, the Department has an independent obligation to interpret and implement Section 251. Specifically, Section 252(e)(2)(B) provides that state commissions can only approve arbitrated amendments to interconnection agreements that meet the requirements of Section 251 of the Act, "including" FCC regulations. Had Congress intended that states only consider whether an agreement meets the requirements of FCC regulations, it would have had no reason to ask states separately to consider Section 251 itself. The Department has previously exercised this authority to order unbundling of dark fiber in 1996, three years before the FCC imposed that requirement in the *UNE Remand Order*. *See* D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 3 (December 4, 1996) ("*Phase 3 Order*"). Similarly, any proceeding now before the Department would demand that the Department fill the gaps in the FCC regulations needed to assure that the resulting scheme satisfied the standards of Section 251. Based upon the record of this proceeding and other past FCC proceedings, it is clear that CLECs remain impaired without access to at least many of these facilities. *See* Petition at Exhibit 1. Thus, if Verizon seeks to "implement" *USTA II* through notice letters or tariff or contract amendments proposing to

eliminate unbundled loops, transport, or switching before the FCC has completed its upcoming remand rulemaking proceeding, the Department could not approve such an amendment without conduct its own impairment analysis of any UNEs that would be eliminated to ensure that any amendment approved by the Department would be consistent with Section 251.[1]

II. Massachusetts Law Authorizes the Department to Order Unbundling

The Briefing Questions ask for comment on the Department's authority to require unbundling pursuant to state law in the absence of federal unbundling rules. The Department unquestionably has broad authority pursuant to Mass. G.L. c. 159 §§ 12-14 to regulate all aspects of Verizon's network and telecommunications services except where its authority has been preempted. Indeed, the Department considered requiring Verizon to provide unbundled access to competitors under state law before the 1996 Act was adopted. *See* DTE 94-185. The Department's independent state law authority was explicitly preserved by Sections 251(d)(3), 251(e)(3), and 601 of the Act, and remains unaffected by *USTA II*.[2]

Earlier this week, the Connecticut Department of Public Utility Control issued a draft decision that relied on state law authority to require SBC to continue "to provision mass market switching, DS-1 and DS-3 loops for individual customers, and DS-1 and DS-3 dedicated inter-

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[1] Contrary to Verizon's June 10 response to the Petition, *USTA II* in no way limits state authority to interpret Section 251 or make impairment findings. The 1996 Act delegated certain obligations to the FCC and left other rights and obligations to states. The court's decision on subdelegation only provides instructions to the FCC on how to do *its* job; the Court did not (and could not) strip the states of the authority that they have always had under the Act and their own state law. Thus, while it is now clear that the FCC cannot delegate the initial creation of the federal UNE list, which Congress asked the FCC to do, *USTA II* does nothing to limit the authority to create additional UNEs that Congress explicitly left to the states. Indeed, *USTA II* specifically held that states had not been preempted from imposing state law requirements for any of the UNEs affected by the TRO. *USTA II*, 359 F.3d 554, 594 (D.C. Cir. 2004) ("deferring judicial review of the preemption issues until the FCC actually issues a ruling that a specific state unbundling requirement is preempted").

[2] *See* note 1, *supra*.

office transport at their current rates" until new FCC rules are in effect.[3] Rejecting SBC's argument that a state is preempted from ordering unbundling in the absence of an FCC impairment determination, the DPUC explained that Congress had explicitly preserved state law authority, a preservation that would be rendered meaningless if states were deemed to be preempted from imposing unbundling obligation that differed from the federal UNE list. While state unbundling orders may not conflict with federal law, the Department concluded that "it is illogical that the only way two regulatory schemes may not conflict is if they are identical."

The Department unquestionably could similarly rely on its state law authority to grant the Petition to preserve the UNEs that were vacated by *USTA II* on an interim basis, to the extent, if at all, that such action remains necessary after the FCC issues its forthcoming interim order. In addition, the Department may also entertain petitions, or consider on its own motion, whether any of the UNEs eliminated by the *Triennial Review Order* should be preserved in some form under state law.

III. "Transition" Requirements May be Warranted, but Only for UNEs that Clearly Will Otherwise be Withdrawn

The Department asked whether it should begin to develop a transition plan that would apply to any UNEs that are eliminated. Any "transition" plan away from the UNEs vacated by *USTA II* would at this time be unnecessary and premature. As described in the Petition and above, Verizon remains required to provide these UNEs under federal law, and would need to

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[3] *DPUC Investigation Into The Southern New England Telephone Company Unbundled Loops, Ports and Associated Interconnection Arrangements and Universal Service Fund in Light of the Telecommunications Act of 1996 – Reopener*, Docket No. 96-09-22, et al., Draft Decision (Connecticut Department of Public Utility Control, July 28, 2004). The Draft Decision would also permit SBC to discontinue unbundling if the DPUC later so authorizes through approval of an interconnection agreement or if a CLEC agrees pursuant to a commercial agreement.

demonstrate that it should not be required to provide the UNEs under federal or state law before it could amend its agreements and tariffs to withdraw a UNE. In addition, it appears that the FCC interim order will require continued unbundling of the vacated UNEs through at least February 2005, by which time the FCC expects to adopt new permanent rules that would restore some or all of the vacated UNEs. Thus, no Department action is needed now to develop a transition plan.

However, the CLECs agree that the Department should be vigilant in exercising its obligations to protect consumers and promote competition. When the FCC makes a non-impairment finding under Section 251, as it did for certain UNEs in the Triennial Review Order, it is therefore appropriate for the Department to consider whether additional rules should be adopted pursuant to state law to mitigate the harmful effect on competition and consumers of a flash cut to new rules.

IV. The Department Should Continue to Address Hot Cuts

While the status of many other UNEs remains in flux, the DS0 loop rules remain intact. As the Department is well aware, the timely availability of an effective hot cut process is an essential ingredient for competitors who seek to use their own switch and DS0 UNE loops. While the parties differ on the effectiveness of the existing process, it is undeniable that the process is not perfect and could benefit from continued attention and commitment to improvement. Thus, the Department should move forward with this portion of D.T.E. 03-60 or open a new docket.[4]

The Department could incorporate the record from D.T.E. 03-60 into any new hot cut proceeding. The scope of a new proceeding should be two-fold: (1) evaluating whether the hot

cut process is sufficiently effective to enable competition without unbundled switching; and (2) seeking to improve the hot cut process for facilities-based CLECs, Verizon, and consumers.

V. Verizon's Wholesale UNE Tariff Remains in Effect Until Amended

Notwithstanding its interconnection agreements, Verizon is obligated by state law to offer its tariffed services, including tariffed UNEs, to all carriers on a nondiscriminatory basis. If Verizon believes that it should no longer be required to tariff a particular network element, it may propose tariff amendments that would be subject to Department review and approval.[5] The Department could solicit comments on the legality and propriety of any Verizon proposal if and when Verizon submits it to the Department. Until that time, Verizon remains obligated to provide service in accordance with the terms of its Massachusetts tariffs.

VI. Merger Conditions

The Briefing Questions ask whether the Department should seek a declaratory ruling from the FCC as to whether the *BA/GTE Merger Order* requires Verizon to continue to provide mass market switching, UNE-P, dedicated transport, and high capacity loops at TELRIC. In light of the FCC's recent vote to require all ILECs to preserve the vacated UNEs, such a petition would appear to be unnecessary at this time.[6]

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[4] While the *Triennial Review Order* and Docket 03-60 tied this issue to impairment analysis for unbundled switching, the Department can and should continue to seek to improve the hot cut process no matter what happens with switching.

[5] *See, e.g.,* DTE 04-73, July 22, 2004 order suspending Verizon's proposed tariff amendments that would have altered its offering of unbundled switching.

[6] The Department need not rely on the FCC to enforce this Merger Condition, because the Conditions provide for state enforcement. *See Bell Atlantic/GTE Merger Order,* Appendix D, ¶ 63 (providing that "Bell Atlantic/GTE shall not be excused from its obligations under these federal Conditions on the basis that a state commission lacks jurisdiction under state law to perform an act specified or required by these Conditions....").

VII. No Net Change of Law Has Occurred

The Briefing Questions ask whether *USTA II* resulted in a "change of law" affecting carriers existing interconnection agreements. The key inquiry for the Department is whether there has been a *net* change of law; even though certain FCC rules have been vacated, Verizon remains obligated to provide the vacated UNEs on independent bases as set forth above and in the CLECs' Petition.[7] Therefore, Verizon may not properly seek to exercise the change of law provisions of the agreements to attempt to eliminate the UNEs vacated by *USTA II*.[8]

The parties' interconnection agreements provide CLECs with the right to dispute in good faith any attempt by Verizon unilaterally to terminate existing UNEs. If either party were permitted unilaterally to implement changes to the contracts based upon disputed interpretations of "Applicable Law," the agreements would quickly become incoherent. In the context of Verizon's Section 251 obligations, no interconnection agreement can reasonably be read by the Commission to permit Verizon to withdraw a UNE based upon an incorrect or disputed interpretation of Applicable Law. Accordingly, if a CLEC disputed Verizon's notice because it believed that Verizon remained required to unbundle pursuant to applicable law or that the agreements otherwise did not permit unilateral termination, this issue would likely arise before the Department in a dispute resolution proceeding rather than a tariff amendment or arbitration proceeding.

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[7] *See* Petition at Exhibit 1.

[8] These clauses have not been triggered on the basis that a court determined that the vacated UNEs were not required by applicable law, because the *USTA II* court reached no such conclusion. Instead, the court remanded to the FCC to determine whether these UNEs are required by Section 251. In addition, the change of law provisions of some agreements are not triggered until there has been a change of law that is nonappealable. Under those agreements, no change of law has occurred because *USTA II* remains subject to a pending petition for certiorari at the Supreme Court.

VIII. Rates for Section 271 Checklist Items

The Briefing Questions ask whether Section 271 requires Verizon either directly or indirectly to continue to provide de-listed UNEs at TELRIC. The *Triennial Review Order* found that Section 271 does not directly require checklist items at TELRIC rates.[9] However, as with all telecommunications offerings, these checklist items must be offered at rates that conform to applicable law, including the reasonableness requirements of Section 201 and Massachusetts law. States retain their state law authority to regulate services unless explicitly precluded by federal law; in this instance, Section 271 does not specify any federal role in establishing rates for checklist items or precluding a state role.

It is instructive to consider how Verizon's Section 271 case before this Department would have been handled if, for example, transport had not been required under Section 251 at the time of the § 271 application. In that event, the Department would have had to consider the reasonableness of Verizon's rate for its Section 271 transport offering, and to set such a rate if it were not established already. If in the future Verizon is no longer required to unbundle other checklist items under Section 251, the Department would have just as much authority to regulate the rate for the remaining § 271 offering as it would have had when the initial Section 271 case was before the Department.[10]

The Department's endorsement of Verizon's Section 271 application was premised on the existence of competition that relied in large part on the availability of loops, switching and transport at TELRIC rates. The sustenance of competition should be an important factor in the Department's consideration of the appropriate rate for Verizon's Section 271 offerings. The

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[9] *Triennial Review Order* at ¶ 656.

[10] The Department has a continuing role in assuring that Verizon remains in compliance with Section 271.

Department should therefore require Verizon to tariff any intrastate § 271 checklist item that is offered independently of Verizon's § 251 obligations.

Respectfully submitted,

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Dated: July 30, 2004

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 the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers	**D.T.E. 03-60**

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of 220 CMR 1.05(1) (Department's Rules of Practice and Procedure).

Dated this 30th day of June, 2004.

Carolyn W. Shaw

Carolyn W. Shaw

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