

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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NYNEX/Teleport Arbitration)	D.P.U./D.T.E. 96-73/74
NYNEX/Brooks Fiber Arbitration)	D.P.U./D.T.E. 96-75
NYNEX/AT&T Arbitration)	D.P.U./D.T.E. 96-80/81
NYNEX/MCI Arbitration)	D.P.U./D.T.E. 96-83
NYNEX/Sprint Arbitration)	D.P.U./D.T.E. 96-94
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Performance Assurance Plan)	D.T.E. 03-50
_____)	

REPLY COMMENTS OF VERIZON MASSACHUSETTS

On February 12, 2004, AT&T Communications of New England, Inc. (“AT&T”) filed the only comments opposing the elimination of the existing *Consolidated Arbitrations* performance plan in favor of the performance standards and remedies set out in the Department’s Carrier-to-Carrier (“C2C”) Guidelines and the Performance Assurance Plan (“PAP”). Verizon MA supported the termination for many of the same reasons suggested by the Department in its January 22, 2004 Memorandum requesting comments on the issue (“*Request for Comments*”): “[t]he standard in the C2C are more comprehensive than those in the *Consolidated Arbitrations* plan...;” “the C2C Guidelines are subject to ongoing assessment and updating through the Carrier Working Group...;” and “the C2C Guidelines and PAP were developed with the participation of a larger and more diverse group of CLECs and at a time when CLECs and Verizon [MA] had more experience with provisioning issues than were the *Consolidated Arbitrations* performance

standards and penalties.” *Request for Comments*, at 3. AT&T does not dispute these observations or even argue that the *Consolidated Arbitrations* performance plan is in any way superior to the PAP. Instead, AT&T objects on the basis of purported procedural deficiencies in relying solely on the PAP and the importance of continuing with the *Consolidated Arbitrations* plan. For the reasons described below, none of AT&T’s arguments would prevent the Department from terminating the performance standards initially adopted in the *Consolidated Arbitrations*. Therefore, the Department should eliminate the Consolidated Arbitration performance plan and adopt the Massachusetts PAP as the successor performance standards under the Consolidated Arbitrations.

I. ARGUMENT

A. **The Department Has the Legal Authority to Terminate Verizon MA’s Consolidated Arbitrations Performance Standards Obligations and Rely on the Massachusetts PAP Requirements.**

There is no dispute about the fact that: (1) the Massachusetts PAP performance standards are more comprehensive than those in the *Consolidated Arbitrations*; (2) the metrics included in the *Consolidated Arbitrations* plan are fully covered by the PAP standards; (3) the PAP standards are subject to ongoing updating and review by Verizon and CLECs as part of the New York Carrier Working Group; (4) all changes mandated by the New York Public Service Commission are subject to review and approval by the Department; and (5) the penalties paid under the PAP far exceed the amounts calculated under the *Consolidated Arbitrations* plan (Verizon MA Initial Comments at 3-9).¹ Contrary to AT&T’s arguments, there is no legal impediment for the Department to rely

¹ Under the Department’s present rules, CLECs are paid the higher of the credits calculated under the PAP or the *Consolidated Arbitrations*. The PAP credit is almost always the higher amount (Verizon MA Comments at 9).

solely on the PAP structure, which is demonstrably more comprehensive, provides for more credits to CLECs and has and will continue to be the up-to-date industry standard for performance metrics.

1. The Doctrine of “Reasoned Consistency” Presents No Legal Impediment To Eliminating Redundant Performance Plans.

AT&T cites the Supreme Judicial Court’s (the “Court”) holding that “[a] party to a proceeding before a regulatory agency...has a right to expect and obtain reasoned consistency in the agency’s decisions.’ *Boston Gas Co. v. Dept. of Public Utilities*, 367 Mass. 92, 104, 324 N.E.2d 372, 379 (1975)” (AT&T Initial Comments at 2). AT&T conveniently omitted the subsequent holdings in the Court’s decision in the *Boston Gas* case: “This does not mean that every decision of the Department in a particular proceeding becomes irreversible in the manner of judicial decisions constituting res judicata, but neither does it mean that the same issue arising as to the same party is subject to decision according to the whim or caprice of the Department every time it is presented...In view of the Department's prior pattern of treatment of this item, an unexplained deviation from that pattern cannot be permitted.” *Boston Gas* at 104-105.

In the *Boston Gas* decision, the Court criticized the Department for erratically, and without explanation, applying inconsistent policies on a ratemaking issue in a series of different rate cases affecting various regulated entities. *Id.* at 103. And even after criticizing the Department, the Court did not prohibit the Department from taking the action that it did; it simply remanded the case to the Department with orders to provide “a statement of its reasons” if it chose to decide the case in the same way. *Id.* at 105. Thus, the “reasoned consistency” doctrine does not prevent the Department from revisiting an

issue in the future, so long as any change in policy is otherwise supportable and explained by the Department.²

In stark contrast to the “erratic” and “clearly inconsistent” treatment of an issue described by the Court in *Boston Gas*, at 103-104, in this case, the Department is considering a change in a deliberate and reasonable manner. In its *Request for Comments*, the Department has already articulated the rationale for incorporating a single performance plan and has sought input from affected parties on the issue. *Request for Comments* at 2-3. The Department will consider the comments filed and presumably issue a written decision explaining what action it takes. Nothing more is needed.

Finally, AT&T states that “[t]here is no evidence of any change of facts or circumstances since the Department’s decisions in D.T.E. 99-271...” that would justify the change being considered by the Department (AT&T Initial Comments at 5). It has been well-over three years since the dual system was put in place. Since that time, the PAP Guidelines have continued to evolve, with the input of CLECs in the New York Carrier Working Group. The experience gained with the Massachusetts PAP, including the “strong” results of an independent audit approved by the Department in 2003 (D.T.E. 03-50 (Letter Order from the Commission dated October 22, 2003) at 4) fully justify the Department determining that the time is now right to eliminate the redundancy and inefficiencies associated with applying two plans designed to accomplish the same result. There is no violation of any precept of “reasoned consistency” for the Department to make the requisite findings to eliminate the dual reporting requirements.

² AT&T’s suggestion that the legal standard for the Department using the Massachusetts PAP is “strong reasons” (AT&T Initial Comments at 3) is not supported by any cited case law. Nonetheless, there are strong and compelling reasons to apply the Massachusetts PAP uniformly for all CLECs.

2. The Administrative Procedures Act Presents No Legal Impediment To Eliminating Redundant Performance Plans.

AT&T erroneously cites to the Massachusetts Administrative Procedure Act as requiring an adjudicatory proceeding before the Department may decide the issues set forth in its *Request for Comments* (AT&T Initial Comments at 6). This argument is without any basis. The definition of an “adjudicatory proceeding” becomes operative only if a person’s legal rights “... are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing.” G.L. c. 30A, § 1(1). AT&T has not cited (nor can it) to any provision of the constitution or General Law that grants it the right to an agency hearing for the matters at issue here. In fact, the *Consolidated Arbitrations* were conducted as arbitrations, not adjudicatory matters, under federal law. As described by the Department:

The [Telecommunications Act of 1996] and the [FCC’s] regulations further provide for binding arbitration in the event that negotiations cannot be concluded within a specified time, upon petition to the state public utility commission by either party to the negotiation. 47 U.S.C. § 252. This proceeding is the result of such petitions.

Consolidated Arbitrations (Phase 1) at 1-2 (November 8, 1996). Accordingly, there was no right under either federal or state law to a full adjudicatory proceeding. The Department determined its arbitration procedures on an *ad hoc* basis; sometimes the arbitration proceeding included evidentiary hearings, sometimes they did not. *Id.* at 3. In any event, there was no *right* to such procedures in these federally mandated arbitrations.

Accordingly, the Administrative Procedures Act does not require the initiation of a full adjudicatory proceeding in this case. The Department has adopted a reasonable process of seeking written comments, and the Department may alter the requirements

adopted under the *Consolidated Arbitrations* without the need to conduct an evidentiary hearing.

3. The Department's Precedent on Reconsideration Presents No Legal Impediment To Eliminating Redundant Performance Plans.

AT&T argues that the elimination of the redundant performance plans adopted in the *Consolidated Arbitrations* would violate the Department's standards for reconsideration (AT&T Initial Comments at 7). There is no merit to this argument for a number of reasons. First, the Department's standards for a motion for reconsideration are inapposite because no one has petitioned the Department for reconsideration of a previous order. More importantly, however, the grounds for reconsideration are not relevant, even by analogy, in this case.

The Department requires that motions for reconsideration be filed within 20 days after the issuance of an order. 220 C.M.R. 1.11(10). This time limit is the same as the time set out for an appeal of an order, which is grounded on notions of finality. *Consolidated Arbitrations Phase 4-M* (1999) at 10. The standard applied by the Department for reconsideration, are limited to extraordinary circumstances or mistake or inadvertence. *Id.* at 5-6, citing *inter alia*, *North Attleboro Gas Company*, D.P.U. 94-130-B at 2 (1995); *Commonwealth Electric Company*, D.P.U. 92-3C-1A at 3-6 (1995); *Boston Edison Company*, D.P.U. 90-270-A at 2-4 (1991); *Boston Edison Company*, D.P.U. 1350-A at 4-5 (1983); and *New England Telephone and Telegraph Company*, D.P.U. 86-33-J at 2 (1989). However, this doesn't mean that once a decision is made by the Department it remains "cast in stone" in perpetuity. Nor does it mean that when it is time to revisit an issue, any change must meet the reconsideration standards. The Department's actions with regard to the *Consolidated Arbitrations* are particularly instructive.

The Department established TELRIC prices for UNEs in the *Consolidated Arbitrations*. See, e.g., *Consolidated Arbitrations Phase 4, et seq.* As with performance standards, the UNE prices established in the *Consolidated Arbitrations* were incorporated into interconnection agreements. Compare AT&T Interconnection Agreement, Part IV.A, footnote and AT&T Interconnection Agreement, Paragraph 11. The Department determined that it was appropriate to revisit UNE rates on a five-year cycle. *Bell-Atlantic Massachusetts*, D.T.E. 98-15 (Phases II, III), at 15 (1999). Similarly, more than five years have elapsed since performance standards were established under the *Consolidated Arbitrations*, and it is now appropriate for the Department to revisit the issue.

Thus, the appropriate standard for review is not “extraordinary circumstances” that would be required for a motion for reconsideration, but rather a *de novo* review of the appropriate performance mechanism that should be applied. For the reasons cited by the Department in its *Request for Comments* and by Verizon MA in its initial comments, applying the Massachusetts PAP for all CLECs (and terminating the redundant plan adopted in the *Consolidated Arbitrations*) is the only reasonable and appropriate course of action.

B. The Application of the Massachusetts PAP for all CLECs Does Not Violate Any Due-Process or Contract Rights.

Finally, AT&T asserts that the method of adopting the Massachusetts PAP and the process by which it is updated over time violates CLECs’ due-process rights (AT&T Initial Comments at 7-8). This argument also has no merit.

AT&T concedes, as it must, that the penalties under the Massachusetts PAP have been higher than those adopted under the *Consolidated Arbitrations* (*id.* at 7). It then

goes on to claim, inaccurately, that the PAP can change at any time in violation of AT&T's rights. This is nonsense.

AT&T complains that the "PAP incorporates ever-changing C2C metrics that are modified in industry working groups." AT&T fails to mention that it is fairly represented and is an active member in these industry working groups (*i.e.*, the Carrier Working Group). Moreover, PAP changes adopted by the New York Public Service Commission do not automatically become effective in Massachusetts but require Department approval. Verizon MA is obligated under the Department's orders in D.T.E. 99-271 to file those changes "within ten calendar days of any [New York Public Service Commission] action affecting the New York PAP and to apprise us of the status of that action." D.T.E. 99-271 (Order or Motions for Clarification and Reconsideration) (November 21, 2000), at 14. Thus, changes in the New York PAP must be filed with the Department, but approval is not automatic. The Department requires that Verizon MA make such filing "...so that the Department may assess the necessity and appropriateness of the New York changes in Massachusetts' context. It is possible, although unlikely, that a change made in New York would not be appropriate for the Massachusetts PAP." *Id.*

For example, in February 2003, Verizon MA notified the Department about a change in the New York PAP approved by the New York Public Service Commission. *See* Letter from Bruce P. Beausejour dated February 12, 2003 docketed in D.T.E. 03-50. Before considering whether to adopt the changes for Massachusetts, the Department solicited initial and reply comments from all registered local exchange carriers in Massachusetts. *See* Memorandum from Joan Foster Evans, dated April 24, 2003. It is not surprising that there were no comments on the changes, since they had been

developed collaboratively by the Carrier Working Group. Nonetheless, the due-process rights of any interested person, including AT&T, were protected since they were notified of the change and given the opportunity to be heard on the matter.³ No more is required or appropriate.

Accordingly, the adoption of the Massachusetts PAP requirements for all CLECs does not violate anyone's due-process rights, and therefore, there is no legal impediment for the Department to terminate the plan adopted in the *Consolidated Arbitrations*.

II. CONCLUSION

As AT&T itself has pointed out “the Department’s early work in developing an initial set of performance metrics, standards and remedies [in the *Consolidated Arbitrations*] laid the foundation for their further development in New York’s carrier-to-carrier collaborative’ See AT&T Motion at 2.” D.T.E. 99-271 (September 5, 2000), at 30, fn.23. The Massachusetts PAP has been in place for over three years and has proven to be a success. It has been implemented, audited and updated in collaboration with CLECs, and is the industry standard for measuring Verizon MA performance in relation with CLECs. The performance standards adopted in the *Consolidated Arbitrations* have been in effect for more than five years and have now been completely superceded by the PAP standards. The continued application of the initial *Consolidated Arbitrations* structure is both unnecessary and burdensome. The Department should adopt the Massachusetts PAP as the successor performance standards under the

³ As described above, there is no right to an adjudicatory hearing on such matters, although if circumstances warranted such a procedure (*e.g.*, to resolve a contested factual assertion), the Department is not prohibited from granting a request for a hearing.

Consolidated Arbitrations, and thus incorporate them by reference in every interconnection agreement with Verizon MA.

Respectfully submitted,

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