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 Large Business Customers Served by High-Capacity Loops	)))))))	D.T.E. 03-59

DSCI AND INFOHIGHWAY REPLY TO
VERIZON RESPONSE TO VERIFIED OFFER OF PROOF

INTRODUCTION

DSCI Corporation ("DSCI") and InfoHighway Communications Corporation ("InfoHighway") (collectively, the "Carriers") reply as follows to Verizon's October 27, 2003 Response (hereinafter "VZ Response") to their Verified Offer of Proof filed on October 15, 2003 (hereinafter "Verified Offer").

The Triennial Review Order ("TRO") [1] made a national finding that competitive local exchange carriers ("CLECs") are not impaired in using switching facilities to serve DS-1 enterprise customers but authorized State Commissions to file waiver petitions with the Federal Communications Commission ("FCC") based on locally collected evidence of operational or economic impairments. Verizon argues that the Department of Telecommunications and Energy ("DTE") should terminate this docket, without opportunity for mutual discovery, hearings or briefs, alleging that the Carriers cannot

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[1] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (Aug. 21, 2003).

possibly demonstrate impairment. The Carriers strongly disagree with Verizon's factual and legal conclusions. The Department should not shut its eyes at this early stage of this critical inquiry for a significant, vibrant and customer-affecting segment of the Massachusetts competitive marketplace. This docket generated requests to participate and other pleadings from DSCI, InfoHighway, PAETEC, Lightship, RNK Telecom, the Department of Defense, the Attorney General and at least six other CLECs. Participants should be allowed a full opportunity to demonstrate impairment that justifies a waiver petition. The Department should schedule a prompt conference to determine how to identify and resolve the disputed legal and factual issues prior to the deadline for seeking relief at the FCC.[2]

ARGUMENT

I. THE CARRIERS' EXISTING DS-1 CUSTOMER BASES ARE IMPAIRED UNDER TRO STANDARDS.

Verizon began this docket by representing that the scope of the DS-1 enterprise market in Massachusetts was too insignificant to merit investigation.[3] In response, the Verified Offer established without rebuttal that Verizon had understated the size of this market by many orders of magnitude[4] and has ignored repeated requests to establish processes for hot cuts from Verizon's UNE-P and surrogate platforms to CLEC-provided

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[2] Despite Verizon's assertions that the Second Circuit enterprise switching stay was inadvertent or not on the merits, it has remained in effect for several weeks. The ultimate ruling on the stay should provide guidance as to whether the December 31, 2003 deadline will be extended.

[3] Comments of Verizon-Massachusetts (September 16, 2003), pp. 7-8 (claiming only 37 DS-1 loops are provided with Verizon switching, representing less than 1% of competitive marketplace).

[4] Verified Offer (Confidential Version) at 7 (demonstrating that DS-1 orders by the Carriers alone – excluding BridgeCom, Met Tel and other DS-1 CLECs with similar business strategies – are many times higher than Verizon's figure and represent a very significant percentage of the competitive marketplace in Massachusetts).

alternatives.[5] Verizon's answer is not to challenge the accuracy of the facts alleged by the Carriers but, once again, to try to prematurely terminate this docket without examination of the facts.[6] Verizon's attempt to cut off Department inquiry into the Massachusetts enterprise market should not be countenanced.[7]

Verizon's main argument is that the operational impairment evidence offered by the Carriers and other CLECs need not be considered because it is not within what Verizon terms the FCC's "mandatory operational criteria," which it argues are limited to difficulties in obtaining "(1) standalone loops; (2) collocation space; or (3) cross-connects."[8] This cramped reading of the TRO is not consistent with the Order's text or underlying purpose. The paragraph cited by Verizon (¶ 456) directs State Commissions to examine local evidence "according to our impairment standard discussed above" – referring to Part V.B.1 (TRO at ¶¶ 61-113). It then states "[i]n particular," that State Commissions should look at the three specific factors cited by Verizon. The use of "in particular" demonstrates that the FCC did not intend for the three specified ¶ 456 factors to constitute an exclusive list. Indeed, Part V.B.1 extensively discusses operational issues

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5 Verified Offer, pp. 10-11 (discussing multi-stage DS-1 migration processes and a June 18, 2003 meeting between Verizon, DSCI and a facilities-based CLEC where DSCI requested a DS-1 hot cut trial. Verizon has not responded to this request and subsequent requests to date). See also PAETEC Letter Comments (Oct. 21, 2003), at 1 (noting that PAETEC "has engaged Verizon in hot cut discussions and found it slow to respond, although Verizon has admitted that a DS1 hot cut process is technically feasible").

6 In response to Verizon's first attempt, the Attorney General urged the Department to allow participants a full opportunity to seek to establish the existence of impairments in the enterprise marketplace. Attorney General Letter Comments (Oct. 9, 2003), at p. 2.

7 Indeed, even additional carriers are likely affected by the outcome of this docket. As noted in Lightship's Intervention and subsequent pleadings, CLECs are affected by the TRO in all of their State jurisdictions, forcing them into difficult resource allocation issues. The fact that the Carriers have taken a leading role in this docket does not mean other CLECs are not affected or interested, only that the Carriers' participation allows them to concentrate resources in other states.

8 VZ Response, pp. 3-5 (citing TRO at ¶ 456).

that extend far beyond the three enumerated factors that may affect impairment decisions.[9] Moreover, one of the objectives of the TRO – encouraging the development of facilities-based alternatives to the ILEC – would be furthered by developing a seamless process whereby the Carriers' DS-1 customers could be shifted from Verizon's network over to facilities-based CLECs.[10]

Verizon's refusal to cooperate in developing a DS-1 hot cut process to date has effectively marooned the Carriers' respective customer bases on Verizon's network. Verizon will have the opportunity to further profit from its operational inaction by jacking up the Carriers' rates from the cost-based TELRIC rates approved by the Department to higher rates.[11] Such increases on the Carriers' existing customer bases, if unchecked, would likely kill off this competitive market segment -- which barely has had the chance to begin due to Verizon's provisioning difficulties with UNE-P DS-1 circuits

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[9] E.g., TRO at ¶ 77 ("Operational barriers [that] could significantly delay or reduce the quality of the services an entrant is attempting to offer" must be taken into account); ¶ 81 (significant cost disadvantages relative to incumbent are relevant to impairment analysis); ¶ 91 (focusing on importance of "technical or operational barriers solely or primarily within the incumbent LEC's control" in deciding whether unbundling is required until "the incumbent LEC determines whether or how it might cure the provisioning or operational problems"); see also TRO at ¶ 456 (noting that "state commissions should consider evidence, which could include performance metrics and standards for BOCs … of whether these factors are impairing entrants….").

[10] As a final point, as noted in earlier pleadings by the Carriers', the FCC's national finding of no impairment assumes that hot cuts are not needed for DS-1 enterprise switching, a remarkable (and inaccurate) assertion made with virtually no record support. TRO at ¶ 451 & notes 1379-85 (citing to virtually all propositions to a single CLEC in Bell South region); see also Comments of PAETEC, DTE 03-59 (October 21, 2003), p. 2 (noting inaccuracy of the FCC's finding relative to lack of hot cuts and encouraging investigation by the Department). The Department's waiver petition should include facts that demonstrate the inaccuracy of the FCC's assertion as applied to the Massachusetts marketplace, to the extent that is found by the Department.

[11] As the Department is well aware, TELRIC rates already include direct costs, allocated common costs and a substantial profit allowance. Additionally, contrary to Verizon's statements that the existence of its resale product (at much higher rates) undercuts the Carriers' impairment claims (VZ Response at pp. 6-7), the FCC has ruled expressly that offering resale or other tariffed wholesale services does not entitle ILECs to avoid unbundling obligations. TRO at ¶ 102.

over the past two years.[12] Even if the Carriers try to place orders to migrate customers over to CLEC-provided switching facilities, Verizon's lack of experience and processes with this type of hot cut, combined with its execrable record at transferring DS-1 customers from Verizon resale to UNE-P platforms and at repairing DS-1 circuits,[13] demonstrate that Verizon cannot be expected to accomplish DS-1 hot cuts in the seamless non-customer affecting fashion demanded by enterprise customers.[14] The inability to ensure a seamless transfer of UNE-P customers off of Verizon's network and switching over to CLEC-provided networks and switching, due to factors within the ILEC's control, is a quintessential case of operational impairment that is a barrier to competition. If Verizon's hot cut processes are as good as it claims (VZ Response at p. 5 n. 3), the current impairment that results from the inability of the Carriers and other UNE-P CLECs to transition customers in seamless fashion to other serving arrangements should be able to be disproved, to satisfaction of the Carriers and the Department, in relatively short order.

Moreover, if Verizon is going to refuse to develop a DS-1 hot cut process—a position that Verizon has not yet taken with the Carriers in their discussions to date—the economic and operational impairment case with respect to the Carriers' existing customer bases becomes immeasurably strengthened. As noted in the Verified Offer (at 12), Verizon can convert the Carriers' UNE-P customers back to Verizon retail by a virtually cost free and disruption free billing record change. In contrast, Verizon seeks to require

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12 See Verified Offer, pp. 9 - 10.

13 Id.

14 TRO at ¶¶ 46, 128 (discussing quality and reliability sensitivity of enterprise customers).

the Carriers to (1) order and install a new DS-1 circuit through either a facilities-based CLEC or their own facilities, (2) schedule and complete the local number portability ("LNP") cut over, and (3) abandon the Verizon facilities, with delays, charges and potential disruptions at every stage.[15] The total per-circuit charges associated with this form of migration would cost as much as $2,000 when loop ordering, truck rolls from both the facilities-based CLECs and the enterprise customer's PBX vendors, reconfiguration of new circuits without adequate records and similar costs are factored in. The stark difference between the seamless, cost free conversion of customers from the Carriers back to Verizon and the difficult and costly transfer from Verizon's UNE-P and surrogate platforms to alternative CLEC serving arrangements absolutely qualify as an operational and economic impairment under the TRO's standards.

Finally, if Verizon refuses to implement a DS-1 hot cut process and forces the Carriers and other CLECs to migrate to other CLEC facilities, it is highly likely that Verizon and recipient CLECs will be unable to complete the many steps needed to transfer the Carriers' extensive customer bases during the very short Transition Period established in the TRO (as short as 90 days for some CLECs). The disruptive nature of the shift to alternative arrangements may independently justify a waiver to the FCC. [16]

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[15] VZ Response at pp. 6-7.

[16] Verizon notes that arrangements for transitioning the Carriers' embedded customers – which Verizon continues to refer to as being "very small" despite the evidence to the contrary in the Verified Offer would be handled under the "transition implementation framework under the negotiation provisions of the [1996 Telecommunications Act] and existing interconnection agreements," citing the TRO at ¶¶ 700-06. This is true but it ignores that the Transition Period could be as short as 90 days for CLECs without change of law provisions in interconnection agreements and discounts the chaos that would result from mass exodus of DS-1 customers off of the Verizon platforms. Verizon marketing staff will no doubt try to take advantage by comparing the ugly CLEC transition process to the simple records change needed to go back to Verizon.

II. The Carriers Can Establish Operational and Economic Impairment for New DS-1 Enterprise Customers in Many Geographic Areas But Cannot Possibly Complete The Necessary Analysis Within the 90-Day Period Established in the TRO, Justifying a Waiver Petition.

The Verizon Response correctly notes that the Carriers did not introduce specific evidence of economic or operational impairment with respect to new customers in geographic areas across Massachusetts. As discussed in the Verified Offer, the TRO established a complex, multi-step analysis for establishing impairment relative to new customers that cannot possibly be completed within the 90 day period established in the Order, justifying a waiver petition for additional time (to the extent the period is not extended by the appellate courts or the FCC itself in connection with the ongoing stay proceedings initiated by the Carriers and several other CLECs). The Carriers and their facilities-based wholesale providers (including PAETEC and Lightship) are familiar with the Massachusetts wholesale markets and have identified (1) no ubiquitous providers that can compete with Verizon, and (2) many areas in the Commonwealth where Verizon has no competitors or no realistic hope of getting any in the future (based on distance-sensitive loop charges and the like).[17] The Department should not allow enterprise customers in these areas to be served only by the ILEC.

Verizon argues, based solely on the words in the TRO that State Commissions "have 90 days" from the effective date of the Order to file waiver petitions, that the 90 day period cannot be waived under any circumstances to allow for additional time for investigation.[18] This is a slim reed on which to hang an argument that might lead to immediate loss of any possibility of competitive alternatives to Verizon in the

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[17] See TRO at ¶ 454 (discussing factors that might justify economic impairment).

[18] VZ Response at pp. 8-9.

Commonwealth, and indeed, is contradicted in the text of the TRO where the FCC expressly stated in the enterprise switching discussion that any of its rules can be waived by a petition based on "good cause."[19] If the Department agrees with the Carriers that substantial areas in the Commonwealth will lack competitive alternatives absent unbundled local switching but that the 90 day period is insufficient to conduct discovery, prepare economic and operational analyses, find facts and prepare a waiver petition to the FCC, [20] the limited text cited by Verizon does not bar the Department from filing a waiver petition that articulates the above "good causes" and seeks additional time.

Verizon's proposal that the Department can revisit the need for enterprise switching beyond the initial 90 day period based on "changes in specific operational and economic criteria"[21] is intriguing but falls apart under scrutiny. The language certainly applies to cases where a State Commission finds impairment (such as argued by the Carriers in Section I above) but later revisits the issue based on evidence that the operational or economic circumstances supporting impairment have changed. It is less likely, and contrary to the express reference to "changes" in the TRO text, for it to apply where, as here, (1) a state lacks time to render an impairment finding within the initial 90 day period, (2) the enterprise switching obligation lapses, and (3) the State Commission

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19 TRO at ¶ 455 n. 1395.

20 One particular difficult aspect, as noted in the Verified Offer (at pp. 16-17), is that the determination of two critical inputs in determining enterprise impairment – namely, the geographic areas to be used in the analysis and the so-called cross-over point where customers served by a certain number of DS-0 lines will be considered enterprise customers — need not be determined by State Commissions until the end of the mass markets investigation. Due to the difficulty of these determinations and the importance of the issue to the mass market investigation, the Attorney General has asked the Department to defer the cross over finding to DTE 03-60. Attorney General Letter Comments (Oct. 9, 2003), p. 1, n. 1. This is understandable but it takes away a key input that the Carriers would need to prove impairments in particular geographic areas.

21 VZ Response at 9 (citing TRO at ¶ 455).

attempts to file for a waiver based on an initial finding – not due to "changes" in conditions—that operational or economic impairment exists in various parts of the state.

III. The Department Should Suspend and Investigate any Verizon Efforts to Increase UNE Rates Following a No Impairment Finding.

As discussed in the Verified Offer (at 18-20), the Department should suspend and investigate any Verizon price increase that follow a no impairment finding in Massachusetts to ensure that they comport with the "just, reasonable and not unduly discriminatory" pricing standard established in the TRO. Contrary to Verizon's claim (VZ Response at 10-11), the Carriers note that they are not contending that a "just and reasonable" rate must necessarily equal the TELRIC rate. The Carriers do argue, as noted in the Verified Offer, that marketplace alternatives that must be considered in determining what is the just and reasonable rate in the Commonwealth are presently very close to Verizon's current TELRIC rates.[22]

While "just and reasonable" rate complaints associated with the Massachusetts local exchange market certainly can be brought at the FCC, Verizon incorrectly argues that an overburdened and understaffed FCC is "the agency that alone has the authority" to review rates following a no impairment finding.[23] State Commissions have ample and longstanding authority under federal and state law to make determinations, based on application of federally-mandated standards, concerning the reasonableness of rates affecting in-state telecommunications services. Nothing in the TRO or the Communications Act suggests that all state authority over switching pricing has been

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[22] Verified Offer at p. 19 (observing that "wholesale prices for unbundled local switching are in a range close to the Department-approved TELRIC rates in effect now….").

[23] VZ Response at pp. 11-12.

preempted, especially given the FCC's resource constraints and the longstanding expertise and understanding by State Commissions over local markets and competitive conditions. [24]

The Department need not and should not allow Verizon to jack up DS-1 UNE-P rates to higher than current levels that would choke off competition while CLECs are forced to wait many months or years for the FCC to undertake the necessary detailed investigation of local Massachusetts switching market issues to resolve the rate complaint.

CONCLUSION

For the reasons stated above and in the Verified Offer, the Department should continue this investigation and schedule a conference at the earliest possible date to determine a new schedule for resolving the issues raised herein.

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[24] See also TRO at ¶ 192 (rejecting preemption claims in connection with network element issues so long as the state action does not "thwart" the intent of the federal rules). Allowing a State to determine based on a record whether a rate is "just and reasonable" fully comports with the purposes of federal law.