COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own	)	
Motion as to the propriety of the rates and charges set forth in M.D.T.E. No. 17, filed with the Department on May 5, 2000 to become effective June 4 and June 6, 2000 by New England Telephone and Telegraph Company d/b/a Bell Atlantic – Massachusetts	)	D.T.E. 98-57, Phase III

COVAD'S COMMENTS ON THE EFFECT OF THE FCC'S TRIENNIAL REVIEW ORDER

Covad Communications Company ("Covad") respectfully submits these comments in accordance with the Hearing Officer's September 2, 2003 Procedural Memorandum, which requested that parties provide comments on the effect on this case of the Federal Communications Commission's ("FCC") *Triennial Review Order*.[1] The answer to this question is that, notwithstanding the *Triennial Review Order*, the Massachusetts Department of Telecommunications and Energy ("Department") has the authority to move forward with this case; and it should do so in order to ensure that local competition in Massachusetts is not adversely (and permanently) affected by Verizon's sudden rollout of PARTS. Covad respectfully responds as follows:

I. Will this Department Preserve Voice and Data Competition in Massachusetts?

As an initial matter, numerous parties have indicated that they will appeal the broadband portions of the *Triennial Review Order*. Such a process will take months if not years to be completed. Thus, at this point, the Department and the parties are in the

[1] *In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Service Offering Advanced Telecommunications Capacity*, CC Docket No. 98-147 (FCC 03-06), rel. August 21, 2003.

same position that they were prior to the *Triennial Review Order*. Despite this reality, Covad expects that Verizon will continue to seek to delay competitors' access to the unbundled network elements ("UNEs") they need to provide broadband retail offerings in competition with Verizon's offerings. As the Department is aware, Verizon has made numerous attempts to delay this proceeding already. This Department should reject any further attempt at delay by Verizon and should require this case to proceed.

Under the authority of Telecommunications Act of 1996 (the "Act"), the *Triennial Review Order* has vested state commissions with responsibility for determining the future of competition in the local telecommunications market. The future of competition will hinge upon the ability of competitors to compete with Verizon's data products, which Verizon itself provisions over PARTS. PARTS is an acronym for Packet at Remote Terminal Service. In order to ensure the future of competition in the Massachusetts internet access market the Department must examine whether competitors are entitled to access hybrid copper-fiber loops (also known as PARTS) pursuant to this Department's independent state law authority, and its authority under Section 271 of the Act.[2]

In addition, the future of competition in the residential market is dependent upon competitors being able to provide a bundled voice and data product. This Department must also review the DSL needs of competitors for loops provisioned over the High Frequency Portion of the Loop ("HFPL") used to provide a line splitting service (CLEC voice and CLEC data) via hybrid loops and a line shared service (ILEC voice and CLEC data) via hybrid and all-copper loops. This issue is appropriate for this proceeding.

[2] "Hybrid Loops" refer to loops comprised of both fiber and copper facilities. Verizon has named its hybrid loop architecture "PARTS."

It seems unlikely that, with respect to Massachusetts' markets, this Department would find that limiting competitors' access to only copper loops is sufficient for competition and line sharing can simply be eliminated as a UNE given the strong positive impact line sharing has had on the development of DSL competition in Massachusetts and the creation of a new market for residential DSL service. In support of this Department's authority to pursue these critical issues, Covad offers the following analysis.

II. The Department's Independent State Law Authority to Unbundle PARTS and HFPL is Preserved by the Act and Has Not Been Preempted by the FCC.

A. The Department Has Independent State Law Authority to Unbundle PARTS and HFPL.

This Department has independent authority under Massachusetts law to require Verizon to provide competitors with unbundled access to PARTS and the HFPL. The FCC decision did not affect that authority. Under the Massachusetts General Laws, the Department has broad authority to investigate service offerings in the context of proposed tariffs.[3] The Department also has independent state law authority under its ability to hold public hearings upon notice of a proposed rate change.[4] In 1996, this Department made it clear that the Department had acted under state law in requiring Verizon to offer competitors access to dark fiber as an unbundled network element before the FCC required dark fiber to be unbundled.[5] The Department determined that dark fiber was an

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[3] MASS GEN. LAWS ANN. ch 159 §19.

[4] *Id*. at §20.

[5] *Consolidated Arbitrations*, 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*"). Under State action, the Department ordered dark fiber as an unbundled network element.

essential part of Massachusetts local exchange service. This Department has been proceeding, and has the authority to continue to proceed, pursuant to state law.

Accordingly, this Department can, should, and indeed must order the unbundling of PARTS and the HFPL under its own independent state law authority.

B. The Department's Independent State Law Authority is Preserved by the Act.

It is likewise beyond dispute that the authority granted under its independent state law authority is not preempted by the federal Telecommunications Act. Section 252(e)(3) of the Act, entitled "Preservation of authority" explicitly states that:

> [N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.[6]

Likewise, Section 251(d)(3) of the Act, entitled "Preservation of State access regulations" states:

> In prescribing and enforcing regulations to implement the requirements of this section, the [Federal Communications] Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that - (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.[7]

Accordingly, the Act preserves Massachusetts's independent authority.

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[6] 47 U.S.C. § 252(e)(3).

[7] 47 U.S.C. § 251(d)(3).

C. The Department's Independent State Law Authority Was Not Preempted by the FCC in its *Triennial Review Order*.

It is likewise beyond dispute that the authority granted under independent state law is not preempted by the FCC's *Triennial Review Order*. Nor could it be. While the FCC has the authority to interpret the Act, it does not have the authority to re-write it. Indeed, any deference previously accorded to the FCC's interpretation of the Act under the *Chevron* doctrine has long since been forfeited because the FCC's interpretation of the Act has been repeatedly reversed by the D.C. Circuit.[8] Thus, notwithstanding any statements in the *Triennial Review Order*, the Act defines this Department's authority, and, as set forth above, the Act does not evince any general Congressional intent to preempt state law unbundling orders. Rather, the Act expressly preserves such state law authority.

Should this Department place stock in the FCC's interpretation of the Act in its *Triennial Review Order*, it is worth noting that even the FCC recognized that the aforementioned provisions of the Act expressly indicate Congress' intent not to preempt state regulation, and forbid the FCC from engaging in such preemption:

> Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. Many states have exercised their authority under state law to add network elements to the national list.[9]

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[8] MCI v. AT&T, 512 U.S. 218,229 (1994) (holding that an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear).

[9] *See Triennial Review Order*, at ¶ 191.

The FCC further acknowledges in the *Triennial Review Order* that Congress expressly declined to preempt states in the field of telecommunications regulation:

> We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.[10]

Accordingly, the FCC has explicitly acknowledged that this Department retains its independent unbundling authority.

1. The FCC Held that State Law Authority is Preserved Unless the Exercise of That Authority Would "Substantially Prevent Implementation" of Section 251.

In its *Triennial Review Order* the FCC claimed to identify a narrow set of circumstances under which federal law would act to preempt state laws unbundling orders:

> Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 and do not "substantially prevent" the implementation of the federal regulatory regime…
>
> [W]e find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation.[11]

Based upon the Eight Circuit's *Iowa Utilities Board I* decision the FCC specifically recognized that state law unbundling orders that are inconsistent with the FCC's unbundling orders are <u>not</u> *ipso facto* preempted:

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[10] *See Triennial Review Order*, at ¶ 192.

[11] *See Triennial Review Order*, at ¶¶ 192, 194.

> That portion of the Eighth Circuit's opinion reinforces the language of [section 251(d)(3)], i.e., that state interconnection and access regulations must "substantially prevent" the implementation of the federal regime to be precluded and that "merely an inconsistency" between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3).[12]

In sum, the FCC's *Triennial Review Order* confirms that "merely an inconsistency" between state rules providing for competitor access and federal unbundling rules is ***insufficient*** to create such a conflict. Rather, the FCC recognized that the state laws would not be subject to preemption unless they "substantially prevent implementation" of section 251.

2. The FCC Did Not Conclude That Any Existing State Commission Orders Unbundling the HFPL or Hybrid Loops Would "Substantially Prevent Implementation" of the Act or the FCC's Rules.

In its *Triennial Review Order*, the FCC did not preempt ***any existing*** state law unbundling requirements, nor did it act to preclude the adoption of ***any future*** state law unbundling requirements. This is significant because several states, including California and Minnesota, have exercised their independent state law authority to unbundle the HFPL.[13] Likewise, several states, including Illinois, Wisconsin, Indiana, and Kansas, have exercised their independent authority to unbundle hybrid loops.[14] The FCC

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[12] *See Triennial Review Orde*r, ¶ 192 n. 611 (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 806).

[13] **California:** CPUC Docket No. R.93-04-003/I.93-04-002; Open Access and Network Architecture Development, Permanent Line Sharing Phase, D. 03-01-077(Jan. 30, 2003); **Minnesota:** MPUC Docket No. P-999/CI-99-678; *In the Matter of a Commission Initiated Investigation into the Practices of Incumbent Local Exchange Companies Regarding Shared Line Access* (Oct. 8, 1999).

[14] **Illinois:** ICC Docket No. 00-0393; P*roposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service* (March 14, 2001); **Wisconsin:** WPSC Docket No. 6720-TI-161; Investigation into Ameritech Wisconsin's Unbundled Network Elements (March 22, 2002); **Indiana:** *IURC Cause Number 40611-S1, Phase II; In the Matter of the Commission Investigation and Generic Proceeding on Ameritech Indiana's Rate's for Interconnection, Service, Unbundled Termination Under the Telecommunications Act of 1996 and Related Indiana Statutes* (Feb. 17, 2001); **Kansas:** KCC Docket No.

declined to preempt any of these unbundling orders, stating only that "in *at least some circumstances* existing state requirements will not be consistent with our new framework and may frustrate its implementation."[15] Accordingly, the FCC specifically acknowledged that in many circumstances state law unbundling of the HFPL and hybrid loops would be consistent with the FCC's framework and would not frustrate its implementation.

Recognizing its ability to preempt state unbundling orders was limited (if existent at all), the FCC declined to issue a blanket determination that all state orders unbundling the HFPL or hybrid loops were preempted. Rather, the FCC invited parties to seek declaratory rulings from the FCC regarding whether individual state unbundling orders "substantially prevent implementation" of Section 251. Contrary to this standard, however, the FCC stated that it was "*unlikely*" that it would refrain from preempting a state law or Order that required the "unbundling of network elements for which the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national basis."[16] While the FCC's preemption analysis (or more accurately, its unsupported supposition) is flawed, it is important to note that even pursuant to this faulty analysis the FCC expressly refused to conclude that an order unbundling the HFPL or hybrid loops would be preempted as a matter of law, thereby signaling to state commissions that the HFPL and hybrid loops could be unbundled under particular circumstances.

01-GIMT-032-GIT; *In the Matter of the General Investigation to Determine Conditions, Terms, and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning, and Line Sharing* (Jan. 13, 2003).

[15] *See Triennial Review Order*, ¶ 195.

[16] *See Triennial Review Order*, ¶ 195.

3. State Law Access Requirements Are Valid "As Long as the Regulations Do Not Interfere With the Ability of New Entrants to Obtain Services."

The proper analysis to determine whether state access laws impermissibly conflict with the federal regulatory regime is set forth in *Michigan Bell v. MCIMetro*, 323 F.3d 348 (6th Cir. 2003). In *Michigan Bell*, the Sixth Circuit Court of Appeals refused to preempt an Order of the Michigan Public Service Commission ("PSC") (allowing MCI to transmit resale orders by fax pursuant to its Michigan tariff) which SBC argued "conflicted" with MCI's tariff, and hence, the Act. Conducting its preemption analysis the Sixth Circuit first noted that the Michigan PSC's authority was expressly preserved by the Act:

> When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. ***In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition***, stating that the Act does not prohibit state commission regulations 'if such regulations are not inconsistent with the provisions of [the FTA].'[17]

The Court then explained that "as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted.[18] The Court later reiterated that an Order of the Michigan Commission would be affirmed provided that it "does not frustrate the purposes of the Act."[19] An order requiring unbundled access to PARTS and the HFPL under Massachusetts law would not prevent a carrier from taking advantage of the network opening provisions of the Act, nor

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[17] *Michigan Bell*, 323 F3d at 358.

[18] *Id*. at 359.

[19] *Id*. at 361.

would such unbundling frustrate the purposes of the Act. The Court unequivocally stated:

> The Commission can enforce state law regulations, ***even where those regulations differ from the terms of the Act*** or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services.[20]

Accordingly, contrary to the FCC's statement that it is "unlikely" that state laws requiring access to hybrid loops would escape preemption, it is clear that this Department had, and continues to have the authority to implement state law and require access to PARTS and the HFPL under Massachusetts law because such orders would not interfere with the ability of new entrants to obtain services.

4. Contrary to its "Unlikely" Prediction, the FCC Acknowledges Unbundling Will Be Required Under Certain Circumstances.

Although the FCC stated that it was "unlikely" to refrain from preempting a state law unbundling access to hybrid loops, the *Triennial Review Order* broadly identifies the circumstances that would lead the FCC to decline to preempt a state commission order unbundling a network element that the FCC has declined to unbundle nationally. Specifically, in its discussion of state law authority to unbundle network elements, the FCC states that "the availability of certain network elements may vary between geographic regions."[21] Indeed, according to the FCC, such a granular "approach is required under *USTA*."[22] Thus, if the requisite state-specific circumstances exist in a particular state, state rules unbundling network elements not required to be unbundled

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[20] *Id*.

[21] *See Triennial Review Order*, ¶196.

[22] *See Triennial Review Order*, para. 196 (citing *USTA*, 290 F.3d at 427).

nationally are permissible in that state, and would not substantially prevent the implementation of section 251.

D. The Department Has the Authority to Require Verizon to Provide Access to PARTS and the HFPL Consistent with Federal Law Based Upon Massachusetts-Specific Facts.

1. Access to PARTS Based Upon Massachusetts-specific facts.

Although the FCC concludes in the *Triennial Review Order* that competitors are not impaired without access to the packetized transmission capabilities of next-generation hybrid fiber-copper loop facilities, the FCC's national finding was based on a finding that unbundling these transmission capabilities "would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities."[23] The FCC's national finding also rests on the continuing availability of copper subloop and TDM transmission access for competitive LECs to provide competitive alternatives to the incumbent LECs' packetized broadband service offerings.[24] As discussed further below, however, in Massachusetts, neither of these alternatives to packetized transmission capabilities would allow competitive LECs to offer viable competitive alternatives to Verizon's packetized broadband service offerings. Moreover, in Massachusetts, neither of the FCC's stated goals – namely, promoting the deployment of fiber plant by the incumbent LECs and promoting facilities-based investment by competitive LECs – would be thwarted by a requirement to unbundle packetized broadband transmission capabilities. On the contrary, in Massachusetts, such an unbundling requirement would actually promote these stated goals of the FCC.

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[23] *See Triennial Review Order*, para. 288.

This Department itself in its Comments before the FCC stated that:

> Regarding investment, the FCC has found that industry investment in infrastructure to support high-speed and advanced services is strong and has increased dramatically since 1996 …
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> The MDTE recommends that the FCC assure that its pricing rules allow ILECs to account for opportunity costs and risks associated with investment in advanced technologies, which may be different than the costs and risks for plain old telephone service or even for today's advanced services, such as DSL ...
>
> Regarding the relationship between ILEC unbundling requirements and investment in facilities, ***ILECs should not object to unbundling*** as long as they earn a return on their investment that accounts for their risk appropriately, and their depreciation schedules match market realities. The MDTE has already designed existing UNE rates to reflect the risk ILECs face in providing wholesale services … The MDTE's UNE rates were set with reference to a cost of capital that reflects a competitive market, and depreciation rates that incorporate forward looking projection lives …[25]

As discussed above, this state has the requisite authority to require access to PARTS under its independent, state law authority. Moreover, as discussed above, the FCC *Triennial Review Order* expressly declined to preempt state laws or regulations which are inconsistent with the FCC's own unbundling requirements. Instead, the FCC merely established a declaratory ruling process for parties to seek preemption of particular state laws or regulations in future proceedings before the FCC. Furthermore, the FCC expressly recognized that the granular, state-specific circumstances applying in a specific state might warrant a different regulatory regime than the national unbundling framework established in the FCC's rules.

Critically, one of the grounds of statutory authority cited by the FCC in its analysis of competitor access to packetized broadband transmission capabilities is section

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[24] *See Triennial Review Order*, para. 291.

706 of the Communications Act, which requires the FCC ***and the States*** to promote the deployment of advanced telecommunications capabilities. This statutory directive, however, applies with equal force to the state commissions as it does to the FCC.[26] In other words, with respect to the goals of promoting advanced telecommunications deployment, Congress has conferred equal regulatory authority to the state commissions as it has to the FCC. Thus, the Department has just as much authority as the FCC to fulfill the goals of section 706 of promoting advanced telecommunications deployment. As discussed below, both of the FCC's stated goals of infrastructure deployment by incumbent LECs and by competitive LECs will not be thwarted by unbundling packetized broadband transmission capabilities in Massachusetts.

The Department has already received voluminous record evidence in other proceedings demonstrating that Verizon will actually save money by deploying fiber-based networks in Massachusetts. Verizon admits in the UNE cost proceeding that an efficient, forward-looking network architecture assumes a hybrid copper-fiber construct. As the evidence in these proceedings makes clear, Verizon's deployment of a hybrid fiber-copper network has simply enhanced and continues to enhance the efficiency and cost-saving characteristics of its legacy loop plant. Thus, there is little question that, regardless of any unbundling requirement, Verizon would deploy just as much fiber in their network in Massachusetts as it would in the absence of an unbundling requirement applying to the broadband transmission capabilities of hybrid fiber-copper loops. As

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[25] Comments of the Massachusetts Department of Telecommunications and Energy, CC Docket No. 01-338, 96-98, 98-147, at 7.

[26] *See* 47 U.S.C. nt 157 ("The Commission and *each State commission with regulatory jurisdiction over telecommunications services* shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans…").

noted above, the Department itself has stated that "Regarding the relationship between ILEC unbundling requirements and investment in facilities, ILECs should not object to unbundling as long as they earn a return on their investment that accounts for their risk appropriately, and their depreciation schedules match market realities. The MDTE has already designed existing UNE rates to reflect the risk ILECs face in providing wholesale services …"[27]

Covad expects that Verizon will attempt to convince the Department that a prime reason why it should not direct the unbundling of PARTS is that such a UNE would have to be priced at TELRIC pricing that is below Verizon's costs. Verizon has been attacking TELRIC pricing as inadequately covering its "costs" for years. Apparently even the endorsement of TELRIC by the United States Supreme Court does not deter Verizon from taking this position. TELRIC pricing was approved by the U.S. Supreme Court in *Verizon Communications Inc. v. FCC* as a pricing methodology that is both reasonable and consistent with the FCC's authority under the Telecommunications Act of 1996.[28] Specifically the Supreme Court has stated, "we cannot say that the FCC acted unreasonably in picking TELRIC to promote the mandated competition."[29] In the same discussion, the Supreme Court rejected Verizon's now standard argument that TELRIC pricing contradicts the public interest in competition between facilities-based carriers because it will remove stimulation for CLECs to make their own investments in equipment. On this point the Court stated:

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[27] Comments of the Massachusetts Department of Telecommunications and Energy, CC Docket No. 01-338, 96-98, 98-147, at 7.

[28] *Verizon Communications Inc. et al. v. Federal Communications Commission et al.*, 535 U.S. 467, 122 S. Ct. 1646 (2002).

[29] *Verizon Communications Inc.* at 508.

> At the end of the day, theory aside, the claim that TELRIC is unreasonable as a matter of law because it stimulates but does not produce facilities-based competition founders on fact. The entrants have presented figures showing that they have invested in new facilities to the tune of $55 billion since the passage of the Act through 2000…[30]

Covad has built a nationwide facilities-based broadband network from the ground up. Verizon's claim that TELRIC pricing is either unfair or inconsistent with the Act should be firmly rejected.

There is little question that, in Massachusetts an unbundling requirement for PARTS will only enhance facilities-based investment by CLECs. Furthermore, the lack of such an unbundling requirement will demonstrably thwart such investment. In fact, Covad does not now have a commercially viable method of provisioning DSL through Verizon's remote terminals, and Verizon refuses to admit that it has any obligation to facilitate such access. Specifically, in Massachusetts, collocation at remote terminals is vastly more expensive than collocation at central offices ("CO") due to the larger number of collocations and the diminishing access to customers per collocation arrangement. Each central office can have literally hundreds of remote terminals between the CO and the end users. Under these cost constraints, there is little question that, in Massachusetts, far from using copper subloops to compete with Verizon's PARTS offering, competitors would simply refrain from competing for these, primarily residential, customers at all. This would directly result in a corresponding absence of investment in central office collocated facilities, local network packet switching capability, and backhaul network capacity. Thus, there is little question that in Massachusetts, the lack of an unbundling

requirement for PARTS will lead to a corresponding lack of investment in facilities-based competition by CLECs.

Finally, there is little question that in Massachusetts, the alternatives of copper subloop access and TDM transmission access are not true alternatives to unbundled access to packetized hybrid fiber-copper facilities. As explained above, in Massachusetts, collocation at remote terminals is vastly more expensive than collocation at central offices due to the larger number of collocations and the diminishing access to customers per collocation arrangement. Furthermore, TDM transmission facilities, such as a DS1 loop, are not true substitutes for packetized broadband transmission facilities in Massachusetts. In Massachusetts, a UNE DS1 loop has a non-recurring charge and a monthly recurring charge that are significantly more expensive than the equivalent charges for a DSL loop. Clearly, consumers and home-based businesses cannot afford (and do not need) the higher cost DS1 services. TDM-based services offer symmetric services and service level guarantees more suitable to certain classes of business customers – not substitutes for Verizon's mass market broadband offerings. Thus, unlike the FCC's national impairment finding, in Massachusetts, access to copper subloops and TDM transmission facilities does not alleviate competitors' need for access to the unbundled packetized transmission capabilities of hybrid fiber-copper loop facilities.

2. Access to the HFPL Based Upon Massachusetts-specific facts.

While the FCC's *Triennial Review Order* found that competitors are not impaired on a national basis without access to the HFPL, the FCC also made clear that state-

[30] *Verizon Communications Inc*. at 516. (The Court also stated "…actual investment in competing facilities since the effective date of the Act simply belies the no-stimulation argument's conclusion.") at 504.

specific facts could warrant a different unbundling requirement in a particular state. Such state-specific circumstances warrant the unbundling of the HFPL in Massachusetts. That is, the facts relied upon by the FCC in reaching a national finding of non-impairment without access to the HFPL do not exist in Massachusetts. Because of these Massachusetts-specific circumstances, an obligation imposed by Massachusetts law to unbundle access to the HFPL would not substantially prevent implementation of section 251, and the FCC's federal unbundling regime. Accordingly, the FCC would be unlikely to preempt such a finding.

The primary and deciding factor relied upon by the FCC to make a national finding of non-impairment with respect to the HFPL is the supposed ability of competitors to obtain revenues from all of the services the loop is capable of offering, including voice and data bundles using line splitting. In the state of Massachusetts, however, Verizon has not made line splitting operationally available in the same manner as its own retail voice and data bundles. Indeed, there are significant financial and operational obstacles to CLEC's providing line splitting in Massachusetts. For example, there are customer impacting limitations on timing of line splitting orders; there are discriminatory versioning policies for submission of line splitting orders; Verizon recently unilaterally and arbitrarily determined that it would refuse to act on a change request to implement line splitting migrations – even though every requesting CLEC gave this change request a rating of 5 (reflecting the highest level of importance); and Verizon continues to refuse to provision line splitting with resold voice service. Because of the operational and cost disadvantages competitive data providers continue to face in providing line split voice and data bundles in Massachusetts, competitors face severe

competitive disadvantages in obtaining "all potential revenues derived from using the full functionality of the loop."[31] Accordingly, the assumption underlying the FCC's conclusion that competitors are not impaired without access to the HFPL does not comport with the facts as they exist in Massachusetts. In the end, it is consumers that pay the price by losing their opportunity to choose their data provider.

Thus, in Massachusetts, the requisite state-specific circumstances exist for Massachusetts to unbundle access to the HFPL under its independent state law authority, without substantially preventing the implementation of section 251 of the federal Communications Act.

III. The Department Has Authority Pursuant to Section 271 of the Act to Require Verizon to Provide Unbundled Access to PARTS and the HFPL.

In addition to its authority to unbundle network elements under the independent state law authority, this Department also has the authority to enforce the unbundling requirements of Section 271 of the federal Telecommunications Act. The FCC made clear in the *Triennial Review* that section 271 creates independent access obligations for the Regional Bell Operating Companies:

> [W]e continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.[32]
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> Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.[33]

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[31] *See Triennial Review Order*, ¶ 258.

[32] *See Triennial Review Order*, ¶ 653.

[33] *See Triennial Review Order*, ¶ 655.

Thus, there is no question that, regardless of the FCC's analysis of competitor impairment and corresponding unbundling obligations under section 251 for *incumbent LECs*, as a Bell Operating Company Verizon retains an independent statutory obligation under section 271 of the Act to provide competitors with unbundled access to the network elements listed in the section 271 checklist.[34] There is no question that Verizon's network access obligations include the provision of unbundled access to loops under checklist item #4: "Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling, without mentioning section 251."[35]

In addition, the Department has independent authority to enforce these section 271 BOC obligations. Specifically, the Massachusetts General Laws grant to this Department broad authority to investigate service offerings in the context of proposed tariffs.[36] The Department also has independent state law authority under its ability to hold public hearings upon notice of a proposed rate change.[37] This investigative authority encompasses the authority to ensure that Verizon fulfills its statutory duties under section 271. Furthermore, not even Verizon would dare to argue that the Department's enforcement of Verizon's section 271 checklist obligations would "substantially prevent the implementation" of any provision of the federal Telecommunications Act. In fact, where state enforcement activities do not impair

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[34] *See* 47 U.S.C. § 271(c)(2)(B).

[35] *See Triennial Review Order*, ¶ 654.

[36] MASS GEN. LAWS ANN. ch 159 §19.

[37] *Id*. at §20.

federal regulatory interests, concurrent state enforcement activity is clearly authorized.[38] Indeed, the Act expressly preserves a state role in the review of a BOC's compliance with its section 271 checklist obligations, and requires the FCC to consult with state commissions in reviewing a BOC's section 271 compliance.[39] Thus, the Department clearly has the authority to enforce Verizon's obligations to provide unbundled access to loops under Section 271 checklist item #4.

A. The Department Has the Authority Under Section 271 to Require Verizon to Provide Access to PARTS.

It is evident that the broadband transmission capabilities of hybrid fiber-copper loops meet the section 271 checklist item 4 definition of "local loop transmission from the central office to the customer's premises, *unbundled from local switching or other services*."[40] Thus, the packetized transmission capability of hybrid fiber-copper loops is clearly a form of loop transmission that the Bells themselves routinely use to provide xDSL services separately from narrowband voice services. The only difference is that, with hybrid fiber-copper loops, the medium used to provide this loop transmission includes fiber as well as copper, as opposed to simply copper.

The section 271 checklist, however, is not medium-specific requirement for loops made of copper alone. Rather, the statutory checklist applies simply to "local loop

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[38] *See Florida Avocado Growers v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). Courts have long held that federal regulation of a particular field is not presumed to preempt state enforcement activity "in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *See De Canas v. Bica*, 424 U.S. 351, 356, 96 S.Ct. 933, 936, 47 L.Ed.2d 43 (1976) (quoting *Florida Avocado Growers*, 373 U.S. at 142, 83 S.Ct. at 1217).

[39] *See* 47 U.S.C. § 271(d)(2)(B) (requiring the FCC to consult with state commissions in reviewing BOC compliance with the 271 checklist).

[40] *See* 47 U.S.C. § 271(c)(2)(B)(iv).

transmission" – without regard to the medium used to provide such transmission (whether it be copper, fiber, wood, rubber, or another yet to be discovered medium), and without regard to the electrical or logical characteristics of such transmission. Indeed, since the earliest 271 proceedings, the FCC has routinely analyzed BOC compliance with the 271 checklist by examining BOC performance with respect to providing unbundled access to loops without regard to whether such loops are provided over pure copper or hybrid fiber-copper loop facilities – including digital loops such as ISDN loops, DS1 loops, and DS3 loops, all of which are routinely provisioned over both all-copper and hybrid fiber-copper facilities.[41] Furthermore, whether or not these transmission capabilities are provided in a packetized format is irrelevant to an analysis of the BOC's section 271 compliance. Rather, the only relevant criterion is whether the BOC provides loop transmission capability to competitors in a non-discriminatory manner – in other words, whether the BOC provides the same transmission capability, in the same time and manner that it routinely provides to itself or its own affiliate. There is no question that Verizon does in fact routinely provide itself access to the packetized transmission capabilities of their hybrid fiber-copper loops.

Furthermore, as discussed above, the fact that the FCC has concluded that competitors are not entitled nationally to access the packetized transmission capabilities of hybrid fiber-copper loops *as UNEs from incumbent LECs* under section 251(c)(3) and section 251(d)(2) is irrelevant to the analysis of whether competitors retain the right to such access as *unbundled loop transmission from BOCs* under section 271 checklist item

[41] *See, e.g., Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404, at paras. 273-336.

4. As explained above, the FCC's *Triennial Review Order* expressly recognized that Verizon's facilities, including loop facilities, would remain subject to section 271's unbundling requirements notwithstanding the FCC's impairment and unbundling determinations with respect to UNEs under section 251(c)(3) and 251(d)(2). Indeed, the BOCs themselves have sought relief from this separate section 271 unbundling requirement in the form of a forbearance petition before the FCC – belying any claim they might make here that such a requirement does not exist.[42]

The only remaining question about access to hybrid fiber-copper loops under section 271 is the appropriate price. The FCC's *Triennial Review Order* makes clear that unbundled access to facilities under section 271 should be priced under the standards of sections 201 and 202 of the Act. As explained above, this Department is not precluded from applying a forward-looking, long-run incremental cost standard to price access to the packetized transmission capabilities of hybrid fiber-copper loops. Indeed, the FCC itself has applied such a cost standard under sections 201 and 202 of the Act.

B. The Department Has the Authority Under Section 271 to Require Verizon to Provide Access to HFPL.

Although the FCC concluded in its *Triennial Review* that competitors are not impaired without unbundled access to the HFPL pursuant to section 251(c)(3) of the Act, the FCC acknowledged that section 271 creates separate, statutory HFPL unbundling obligations for the Bells, wholly separate and apart from the statutory unbundling obligations in section 251. Verizon cannot deny that section 271 checklist item 4 requires the Bells to provide access to the HFPL. By its plain language, checklist item 4

[42] *See Verizon Petition for Forbearance of the Verizon Telephone Companies Pursuant to Section 160(c),* CC Docket 01-338 (filed July 29, 2002).

requires the Bells to provide access to "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[43] The HFPL is clearly a form of loop transmission—a loop transmission that Verizon itself routinely uses to provide xDSL services separately from narrowband voice services.[44] In light of this clear statutory language, there is no question that Verizon remains under a statutory obligation to offer unbundled HFPL loop transmission to competitors, notwithstanding the FCC's finding of no impairment pursuant to section 251.

Each time the FCC has reviewed a 271 application since the advent of line sharing the FCC has insisted the BOC long distance applicant offer non-discriminatory access to the HFPL in order to comply with checklist item #4.[45] To this day, months after its decision to eliminate HFPL access as annunciated in its February 20, 2003 press release, the FCC continues to look at the non-discriminatory availability of line sharing as an integral component of its checklist item #4 analysis in section 271 proceedings.[46] The significance of this point cannot be overstated. The FCC required Qwest, the BOC long distance applicant, to provide non-discriminatory access to the HFPL as a precondition to gaining long distance authority pursuant to checklist item #4 of section 271 more than a

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[43] *See* 47 U.S.C. § 271(c)(2)(B)(iv).

[44] In other words, Verizon customers typically purchase narrowband voice services without also purchasing xDSL, and pay a separate monthly fee in order to add xDSL services to their local loop.

[45] *See, e.g., Joint Application by SBC Communications, Inc., et al., for Provision of In-Region InterLATA Services in Kansas and Oklahoma,* Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, ¶¶. 214-219 (2001).

[46] *See Application by Qwest Communications International, Inc., for Authorization to Provide In-Region, InterLATA Services in Minnesota,* Memorandum Opinion and Order, WC Docket No. 03-90, FCC 03-142, para. 53, and App. C, ¶¶ 50-51; *See Application by SBC Communications, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Michigan,* Memorandum Opinion and Order, WC Docket No. 03-138, FCC 03-228, paras. 133-143.
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month after the FCC voted to eliminate line sharing (the HFPL) as a UNE.[47] There is simply no question that the Act, and the FCC, require Verizon to provide non-discriminatory access to the HFPL if Verizon desires to provide long distance services.

IV. The Department Clearly Has the Power and Authority to Save Voice and Data Competition; the Only Question is Whether the Department Will Do So.

Covad respectfully submits that it has demonstrated, beyond credible refutation, that this Department has the statutory authority to grant competitors unbundled access to PARTS and the HFPL. Covad will demonstrate in this proceeding that Massachusetts-specific laws and Massachusetts-specific facts oblige this Department to require unbundled access to these elements that are essential to the ability of competitors to provide Massachusetts consumers competitive data services. Covad appreciates the opportunity granted by this Department to submit these Comments, and looks forward to demonstrating to this Department that Massachusetts telecommunications consumers are entitled to, and deserve, the benefits of competition: better services and lower prices.

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[47] *See id.* at ¶ 1.