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 and June 14, 2000 to become effective October 2, 2000 by New England Telephone and Telegraph Company d/b/a Bell Atlantic – Massachusetts	**D.T.E. 98-57, Phase III**

COMMENTS OF VERIZON MASSACHUSETTS

Verizon Massachusetts ("Verizon MA") is responding to the Department's September 2, 2003, Procedural Memorandum requesting that parties in this proceeding comment on "whether the Department's review of Verizon's PARTS offering is preempted by, or is otherwise inconsistent with, the *Triennial Review Order* and promulgated regulations." As discussed below, it is clear that the Department's continued investigation of Verizon MA's packet switching offering – Packet at the Remote Terminal Service[1] ("PARTS") – cannot possibly be squared with the Federal

[1] *See e.g.* CC Docket No. 98-141, ASD File No. 99-49, FCC 00-336, *In the Matter of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control*, Second Memorandum Opinion and Order (rel. Sept. 8, 2000), at ¶ 4 n.11-12 ("*Project Pronto Order*"). PARTS provides competitive local exchange carriers ("CLEC") with an end-to-end transport service between a demarcation point at the end user's premises and a CLEC's specified termination at the CLEC's collocation arrangement in the end user's serving wire center. Verizon MA Initial Brief, at 4-5. This allows CLECs to offer Digital Subscriber Line ("DSL") service over loops served by fiber feeder. It should be noted that PARTS merely provides a packetized signal to enable the data hand-off to the CLEC. Verizon MA's Reply Letter, dated November 15, 2002. It does not change the fact that CLECs continue to have access to unbundled voice-grade loops, xDSL loops, sub-loops, or line-shared loops pursuant to DTE Tariff No. 17 in their provision of telecommunications services to customers in areas where PARTS is deployed.

Communications Commission's ("FCC") findings in the *Triennial Review Order*.[2] Those findings affirm that the Department has no authority to require that Verizon MA unbundle - or even provide – a PARTS offering.

I. INTRODUCTION

Verizon MA is neither legally obligated to offer PARTS or unbundle it. *See e.g.*, Verizon MA's Letter, dated April 9, 2002; Verizon MA's Motion for Appeal, at 5-9 (October 28, 2002). In its recent *Triennial Review Order*, the FCC made a national finding that CLECs are not impaired without unbundled access to packet switching technologies. *Triennial Review Order*, ¶ 537. In addition to establishing that incumbent local exchange carriers ("ILEC") are not required to unbundle packet switching, the FCC also eliminated the limited, unbundled packet switching exemption that was created in its *UNE Remand Order*.[3] *Triennial Review Order*, ¶¶ 537-41. The FCC's decision is guided

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[2] *Review of 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, FCC 03-36 (rel. August 21, 2003) ("*Triennial Review Order*").

[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Notice of Proposed Rulemaking, FCC 99-238, CC Docket No. 96-98 (rel. Nov. 5, 1999) ("*UNE Remand Order*"). In the *UNE Remand Order*, the FCC set forth the following four conditions as limited exceptions to unbundle packet switching:

> (i) The incumbent LEC has deployed digital loop carrier systems, including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system *in which fiber optic facilities replace copper facilities in the distribution section* (e.g., end office to remote terminal, pedestal or environmentally controlled vault);
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> (ii) There are *no* spare copper loops capable of supporting the xDSL services the requesting carrier seeks to offer;
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> (iii) The incumbent LEC *has not permitted* a requesting carrier to deploy a *Digital Subscriber Line Access Multiplexer* at the remote terminal, pedestal or environmentally controlled vault or other

by the statutory goals of Section 706 of the Telecommunications Act of 1996 (the "Act") "to encourage the provision of new technologies and services to the public" and is consistent with the FCC's overall policy for broadband services. 47 U.S.C. § 157(a); *Triennial Review Order*, ¶ 541.

Based on the FCC's decision, the Department cannot require that Verizon MA offer PARTS and is preempted from imposing unbundling requirements on PARTS. Accordingly, the Department should promptly dismiss this case.

Likewise, the FCC's *Triennial Review Order* precludes the Department from considering whether Verizon MA should be required to include electronic loop provisioning ("ELP") and packetized voice signals in connection with PARTS, as AT&T erroneously suggests. Verizon MA's Motion for Appeal, at 19-20. Not only is ELP a new issue unrelated to PARTS, but the Department has no authority to require Verizon MA to modify its current network (which is not currently compatible with ELP, as envisioned by AT&T) to provide CLECs with access to a "superior, as-yet unbuilt" network, as the theoretical ELP construct would require. Verizon MA's Motion for Appeal, at 22. Indeed, in its *Triennial Review Order*, the FCC concluded that the feasibility of ELP is not established and declined to require ELP at this time. *Triennial*

> interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined by § 51.319(b); and
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> (iv) The incumbent LEC has deployed packet switching capability *for its own use*.

47 C.F.R. § 51.319(c)(5) (emphasis added). In its *Phase III Order*, the Department recognized that it could not order unbundled packet switching until each of the above FCC requirements was met. *Phase III Order*, at 88 (September 29, 2000). In its *Triennial Review Order*, the FCC "decline[s] to permit any limited exceptions to [its] decision not to unbundle packet switching," thereby eliminating this four-pronged test. *Triennial Review Order*, ¶ 540.

Review Order, ¶¶ 489 n. 1517, 491. Therefore, the Department's investigation of ELP would be unjustified and premature, and the Hearing Officer's October 18, 2002, ruling to expand the scope of this proceeding to include ELP should be overturned.

II. DISCUSSION

A. The FCC Has Preempted the Department From Requiring that Verizon MA Provide and/or Unbundle a PARTS Offering.

The Department has no regulatory authority to require that Verizon MA provide and/or unbundle a PARTS offering. In its *Triennial Review Order*, the FCC established, *on a national basis*, new rules governing the obligations of incumbent LECs to provide CLECs with unbundled access to facilities and equipment in their networks. Regarding unbundled access requirements for packet switching, the FCC occupies the field, leaving no room for state commissions to independently decide the issue.

Under the new rules, the FCC found,

> … on a national basis, that competitors are not impaired without access to packet switching, including routers and DSLAMs. Accordingly, we decline to unbundle packet switching as a stand-alone network element. We further find that the Commission's limited exception to its packet-switching unbundling exemption is no longer necessary. Lastly, our decision not to unbundle stand-alone packet switching is consistent with the goals of section 706 of the 1996 Act.

Triennial Review Order, ¶ 537. In making this determination, the FCC relied on record evidence that showed that "a wide range of competitors are actively deploying their own packet switches, including routers and DSLAMS to serve both the enterprise and mass markets." *Triennial Review Order*, ¶ 538. Consistent with its *UNE Remand Order*, the FCC concluded that, "any collocation costs and delays incurred by requesting carriers to provide packet switched services do not rise to a level so as to require … [modification

of] the Commission's previous finding not to unbundle packet switching." *Triennial Review Order*, ¶ 539.

In addition, the *Triennial Review Order* addressed the unbundling of packet switching functionality as it exists in DLC systems that are deployed in the loop plant to provide multiplexing, switching and routing functionalities between the customer premises and the central office. *Triennial Review Order*, ¶ 540. The rules adopted by the FCC for hybrid loops "do *not* require incumbent LECs to unbundle any transmission path over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is used to transmit packetized information." *Triennial Review Order*, ¶ 288 (emphasis added). Likewise, the FCC does *not* require that "incumbent LECs … provide unbundled access to any electronics or other equipment used to transmit packetized information over hybrid loops, such as xDSL-capable line cards installed in DLC systems or equipment used to provide passive optical networking (PON) capabilities to the mass market." *Triennial Review Order*, ¶¶ 289, 541. Therefore, although CLECs are entitled to access the copper subloop portion of a fiber-fed loop,[4] they are not entitled to access the fiber-feeder portion of the hybrid loop for broadband services - except to the extent necessary to provision high-capacity, TDM-based DS-1 or DS-3 loops.[5] *Triennial Review Order*, ¶ 253.

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[4] This is defined as "the distribution plant consisting of the copper transmission facility between a remote terminal and the customer's premises." *Triennial Review Order*, ¶ 253.

[5] As noted by the FCC, the fact that packetized fiber capabilities will not be available as UNEs does not relieve ILECs of their obligation to "provide unbundled access to the features, functions, and capabilities of hybrid loops that are *not* used to transmit packetized information." *Triennial Review Order*, ¶ 289 (emphasis added). The FCC requires that incumbent LECs continue to provide copper subloop unbundling, as well as "unbundled access to TDM-based features, functions, and capabilities of their hybrid loops where impairment exists." *Triennial Review Order*, ¶ 291. The FCC found that the availability of those alternatives will "provide competitive

The FCC's decision not to require unbundled packet switching is guided by the goals of Section 706 of the Act and the FCC's longstanding policy regarding broadband services. *Triennial Review Order*, ¶¶ 290, 541. Section 706 requires that the FCC encourage deployment of advanced telecommunication capability by using, *inter alia*, "methods that remove barriers to infrastructure investment." *Triennial Review Order*, ¶ 290. By precluding unbundled access to the packet-based networks (and associated transmission facilities) of incumbent LECs,[6] the FCC promotes the goals of Section 706 in two ways.

> First, it … gives incumbent LECs an incentive to deploy fiber (and associated next-generation network equipment, such as packet switches and DLC systems) and develop new broadband offerings for mass market consumers free of any unbundling requirements. … Second, … [it] will stimulate competitive LEC deployment of next-generation networks. Because competitive LECs will not have unbundled access to the packet-based networks of incumbent LECs, they will need to continue to seek innovative access options, including deployment of their own facilities necessary for providing broadband services to the mass market.

Triennial Review Order, ¶ 290. In adopting these new broadband rules, the FCC "craft[ed] unbundling rules that provide the right incentives for all carriers, including incumbent LECs, to invest in broadband facilities" and thus "strike the appropriate statutorily required balance between ensuring competitive access and maintaining incentives to invest in next-generation networks." *Triennial Review Order*, ¶ 213.

LECs with a range of options for providing broadband capabilities." *Triennial Review Order*, ¶ 291.

[6] The existence of intermodal competition for broadband services by cable companies also informs the FCC's analysis. *Triennial Review Order*, ¶ 292.

Unlike for local switching, dedicated transport, and high capacity loops, the FCC did *not* delegate to the states any role in determining whether broadband facilities should be unbundled in a particular market under a more granular analysis. The FCC expressly "limit[ed] the states' delegated authority to the specific areas and network elements identified in this Order." *Triennial Review Order*, ¶ 189. The FCC determined that "setting a national policy for unbundling some network elements is necessary to send proper investment signals to market participants and to provide certainty to requesting carriers, including small entities," and thus "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations." *Triennial Review Order*, ¶ 187. Accordingly, the FCC rejected arguments by some carriers that "states may impose any unbundling framework they deem proper under state law, without regard to the federal regime."[7] *Triennial Review Order*, ¶ 192.

The FCC cited "long-standing federal preemption principles" to conclude that states may not "enact or maintain a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in this Order." *Triennial Review Order*, ¶ 192. In particular, the FCC found that the state authority preserved by the Act under the savings provision in Section 251(d)(3) is narrow and "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." *Triennial Review Order*, ¶ 193. Explicitly *excluded* from that residual authority are attempts by states to add to the list of UNEs established by the FCC:

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[7] The FCC eliminated the provisions of 47 C.F.R. § 51.317 that previously gave states discretion to create additional unbundled network elements ("UNE"). *See* Appendix B – Final Rules, 47 C.F.R. § 51.317. States no longer have this discretion.

> If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of section 251(d)(3)(C).

Triennial Review Order, ¶ 195. The FCC further noted that where existing state requirements are inconsistent with the FCC's new framework and frustrate its implementation, "[i]t will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules."[8] *Id*.

Likewise, the FCC expressly rejected the argument that a state commission's unbundling requirements are not preempted if they share a common federal regulatory goal but differ from the FCC's rules. *Triennial Review Order*, ¶ 193. That argument is contrary to "long-standing federal preemption principles."[9]

The U.S. Supreme Court has repeatedly held that state regulations are preempted, even if they share a "common goal" with federal law, where they differ in the *means* chosen to further that goal. "The fact of a common end hardly neutralizes conflicting

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[8] It should be noted that the FCC permits parties to obtain a declaratory ruling from the Commission that a specific state requirement is consistent with the limits of Section 251(d)(3)(B) and (C). However, such a declaratory ruling by the FCC is not a condition precedent to preemption, especially where a state requirement is clearly at odds with the new federal unbundling framework established by the FCC. Saving clauses, such as the one in Section 251(d)(3), do "*not* bar the ordinary working of conflict pre-emption principles." *Geier v. American Honda Motor Company*, 529 U.S. 861, 869 (2000). Therefore, courts have "declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'" *Id*. at 870, quoting *U.S. v. Locke*, 529 U.S. 89, 106 (2000).

[9] *Triennial Review Order*, ¶ 193, n.614 ("AT&T's argument that the validity of state unbundling regulations [under section 251(d)(3)] must be measured solely against the Act and its purposes fails to recognize that the [FCC] is charged with implementing the Act and its purposes are fully consistent with the Act's purposes").

means."[10] *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 379 (2000) (citing cases). Thus, even if a state commission's unbundling requirements share a common goal of promoting competition, this is insufficient to overcome FCC preemption principles.

Accordingly, the Department does not have regulatory authority to require that Verizon MA offer PARTS or to impose unbundling obligations on Verizon MA that go beyond the national framework established by the FCC in the *Triennial Review Order*. The FCC has clearly preempted state commissions by ruling that DLC fiber fed loops using packet technology should *not* be subject to mandatory unbundling. As a result, the Department should not continue its review of PARTS or establish rules for unbundling PARTS.

B. Based on the FCC's Decision on ELP, There is No Basis for the Department to Investigate ELP At This Time.

In the October 15, 2002, ruling, the Hearing Officer expanded the scope of the proceeding to consider whether Verizon MA should be required to include ELP and packetized voice signals in connection with PARTS. Not only is ELP unrelated to PARTS, but based on the FCC's findings in its *Triennial Review Order*, there is no basis

[10] *See also Geier*, 529 U.S. at 874-86 (preempting state tort action that would have required all automobile manufacturers immediately to install airbags in favor of any other passive restraint systems because it "stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed" and thus conflicted with "important means-related federal objectives"). In addition, the Seventh Circuit recently ruled that a tariff requirement imposed by the Wisconsin Public Service Commission was preempted by the Act, even though the tariff requirement "promotes the pro-competitive policy of the federal act." *Wisconsin Bell, Inc. v. Bie*, 2003 U.S. App. LEXIS 16514, *9 (7th Cir. August 12, 2003). The court held that "[a] conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's Supremacy Clause to resolve the conflict in favor of federal law." *Id.* at *3.

for the Department to investigate the provision of ELP in this proceeding. Verizon MA's Motion for Appeal, at 19-22.

ELP is defined as a "method of transferring large volumes of local customers in the mass market from one carrier to another." *Triennial Review Order*, ¶ 491. As the FCC stated in its *Triennial Review Order*,

> … the evidence in the record suggests that an ELP process, to be effective, would require significant and costly upgrades to the existing local network at both remote terminal and central office. AT&T's ELP proposal proposes to "packetize" the entire public switched telephone network for both voice and data traffic, at a cost one party estimates to be more than $100 billion.

Triennial Review Order, ¶ 491. Thus, ELP "would entail a fundamental change in the manner in which local switches are provided and would require dramatic and extensive alterations to the overall architecture of every incumbent LEC network." *Id.*

Given its conclusions, the FCC declined to require ELP at this time.[11] Therefore, the Department should overturn the Hearing Officer's ruling to expand this proceeding to include ELP. To do otherwise would be unjustified, premature, and inconsistent with the FCC's ruling.

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[11] Verizon MA cannot lawfully be required to provide CLECs with access to a "superior, as-yet unbuilt" network, as AT&T's theoretical ELP construct would require. Verizon MA's Reply Letter, dated November 15, 2002, at 3. Such a requirement would fly in the face of recent court decisions that prohibit requiring the incumbent local exchange carrier to make specific investments - or deploy a specific technology or capability - so that it may then be unbundled. *See Iowa Utilities Board. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part and remanded in part, AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999). The Eighth Circuit reaffirmed its holding on remand. *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part and rev'd in part on other grounds, remanded, Verizon v. FCC* , 122 S. Ct. 1646 (2002).

III. CONCLUSION

For the foregoing reasons, the Department should conduct no further investigation regarding Verizon MA's PARTS offering. The FCC in its *Triennial Review Order* has addressed issues raised in this proceeding regarding the provision and unbundling of PARTS, and has spoken on ELP. The FCC has not reserved or delegated any authority to state commissions in this regard. Based on the FCC's determinations on those issues, the Department is preempted from acting further in this investigation and, therefore, this proceeding should be dismissed.

Respectfully submitted,

VERIZON MASSACHUSETTS

By its attorney,

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Barbara Anne Sousa
185 Franklin Street, 13th Floor
Boston, Massachusetts 02110-1585
(617) 743-7331

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