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 the tariff filings by Verizon – New England, Inc., d/b/a Verizon – Massachusetts	DTE 98-57, Phase III

AT&T'S OPPOSITION TO VERIZON'S APPEAL OF THE OCTOBER 18, 2002, PROCEDURAL ORDER

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I. INTRODUCTION AND PROCEDURAL BACKGROUND.

A principal focus of the Department's work in Phase III of this proceeding is to ensure that consumers are not denied competitive choice in the retail market for bundled voice and DSL service, by ensuring that CLECs are able to offer both voice and data services over all unbundled loops. This issue has particular urgency because, as the Department has already noted, the growing deployment of Integrated Digital Loop Carrier ("IDLC") in Verizon's network threatens to truncate or preclude such competitive choice. Verizon's appeal of the procedural order issued on October 18, 2002, is the latest of Verizon's many efforts to delay the Department's investigation and resolution of issues concerning such access. Verizon has done so in a transparent attempt to acquire, expand, and make permanent its first-mover advantage in the retail offering of unified DSL and voice services. AT&T respectfully urges the Department to undertake the further proceedings contemplated in its May 2002 decision to reopen this docket and described in more detail in the Hearing Officer's recent procedural order, and to do so as quickly as possible.

On May 24, 2002, the Department announced that on its own motion it was reopening this proceeding. It did so to examine Verizon's introduction of an updated network architecture for fiber-fed loops in Massachusetts by deploying Asynchronous Transfer Mode ("ATM") technology together with Next Generation Digital Loop Carrier (NGDLC) equipment, in order to offer packetized data services on a wholesale basis (Verizon's so-called PARTS service offering). The Department reopened this investigation to provide for further discovery, evidence, and hearings regarding the implications – for CLEC access to unbundled loops – of Verizon's newly announced NGDLC plans. Verizon did not seek reconsideration of that order.

On the same day, the United States Court of Appeals for the District of Columbia issued its decision in *U.S. Telecom Ass'n v. FCC*, 290 F.3d 415 (May 24, 2002) regarding the FCC's

UNE Remand and Line Sharing Orders. The Department solicited and received comments regarding the effect, if any, of the D.C. Circuit's ruling upon this proceeding. By a Hearing Officer ruling dated October 18, 2002, the Department reiterated its prior determination to investigate the implications of Verizon's new network architecture plans. As the Hearing Officer's notice properly observed, the factual issues that need to be investigated and resolved forthwith include: (i) the ability of CLECs to obtain non-discriminatory access to and interconnect with DLC-fed loops on an unbundled basis in order to offer consumers competitive choice of both voice and data services, and (ii) the feasibility under the ATM technology that Verizon is and will be deploying for CLECs to obtain access to voice as well as data signals in packetized form, which would permit highly efficient electronic loop provisioning ("ELP").

Verizon's appeal of the Hearing Officer's October 18, 2002, procedural notice does not say anything new. To the contrary, Verizon has merely repeated the arguments it made in April 2002 in its failed effort to convince the Department not to reopen this proceeding, and again on June 24 and July 1, 2002, in its failed effort to convince the Department that somehow the *U.S. Telecom* decision was reason to abandon its determination that additional inquiry is required to resolve disputed factual issues regarding Verizon's planned new architecture for DLC-fed loops. The arguments made by Verizon in its procedural appeal merely underscore why further investigation is required, and why it should be expedited.

Much of the recent progress toward local competition in Massachusetts will be for naught if CLECs are not given efficient, non-discriminatory access to the technology being deployed to serve fiber-fed loops. As the *U.S. Telecom* decision confirms, CLEC access to unbundled loops and their attached electronics are essential to competitive development. Indeed, the D.C. Circuit rightly refers to unbundled loops as "essential facilities" without which CLECs are unable to offer service to most customers. *U.S. Telecom*, 290 F.3d at 426. In several recent decisions,

including orders made in the alternative regulation and special access dockets, the Department has begun to establish a new paradigm for local competition in Massachusetts. To fully realize the progress made by the Department in those decisions and others CLECs must be allowed efficient access to and connections with fiber-fed loops.

II. ARGUMENT.

The premise for Verizon's appeal is that the Hearing Officer has purportedly abused his discretion by issuing the October 18, 2002, procedural order. *See* Verizon's Appeal at 4-5. The charge of abuse of discretion has no merit. Indeed, given the Department's prior decision to reopen this proceeding on its own motion, it makes little sense.

The Department must determine how best to promote consumer welfare by facilitating the offering of highly competitive voice and data services to all Massachusetts residents, including all those served on DLC-fed loops. Verizon has announced plans to revamp the physical architecture of its fiber-fed loops and has begun aggressively to implement those plans. But at the same time, Verizon is refusing to provide CLECs with access to those loop facilities on an unbundled basis. Verizon claims that under current federal rules it can cease unbundling DLC-fed loops the moment that ATM and NGDLC technology are deployed in concert. Verizon also claims that the Department should decline to exercise its discretion to order such unbundling as a matter of Massachusetts policy. This claim raises important, and disputed, issues of fact that cannot be resolved without investigation based on appropriate discovery, testimony, hearings, and briefing.

The same is true of the related issue, whether Verizon should be directed to offer unbundled loops on which both the voice and data signals are transmitted via ATM technology, in order to facilitate highly efficient electronic loop provisioning ("ELP") and consumer choice:

Verizon's appeal delineates numerous disputed issues of fact regarding ELP that can only be resolved after discovery and factual investigation.

The Department has full authority to determine whether Verizon's effort to deny non-discriminatory access to unbundled loops utilizing NGDLC and ATM technology is permissible. It has authority not only to enforce relevant FCC rules, but also retains full authority to impose additional unbundling obligations that are consistent with the federal rules. Under established legal principles, a state requirement is "consistent with" a federal rule so long as the regulated entity (e.g., Verizon) can comply with both sets of rules.

The Department is rightly worried that Verizon is striving to obtain an insurmountable first-mover advantage and to lock up the market for unified DSL and voice services in Massachusetts, in a manner that will decrease consumer welfare by substantially reducing consumer choice among competitive options. Similarly, the Department is rightly concerned that Verizon is attempting to deploy an NGDLC/ATM architecture that will facilitate a Verizon hegemony over DSL services, and further harm consumers by impeding the use of ELP. ELP will reduce the substantial transaction costs associated with customers choosing new service providers that use their own switches to offer competing services. Prompt investigation of ELP is appropriate to ensure that it can be rolled out as efficiently as possible if the Department agrees that it is appropriate for Massachusetts.

A. Verizon's "Packet Switching" Mantra is Misplaced, and In Any Case Shows Why Further Discovery and Hearings are Needed Regarding Unbundled Access to DLC-Fed Loops.

1. Unbundled Loops are Essential Facilities for Competition.

This proceeding will go a long way towards determining whether CLECs are given a fair opportunity to access local loops on a nondiscriminatory basis in Massachusetts. Whether a loop is used to carry voice communications via an analog signal, a digitized signal, or a combination

of the two, or is used to carry data via an ADSL signal or otherwise, or is used to support both voice and data services, it remains a local loop. Its basic functionality is the establishment of a connection between a defined demarcation at the customer premise and the Verizon central office, or in the case of an unbundled loop between the customer premise and the CLEC point of interconnection.

Access to unbundled local loops is "critical to encouraging market entry" among CLECs. *First Local Competition Order*, ¶ 377. The loop element remains "a natural monopoly," and the ILECs' continued control of local loops allows them "to control telecommunications access to most homes and businesses." *Ass'n of Communications Enterprises* v. *FCC*, 235 F.3d 662, 663 (D.C. Cir. 2001). Because the loop is an "essential facility," local exchange competition is not feasible unless loops remain available to competitors on an unbundled basis. *U.S. Telecom*, 290 F.3d at 426; *see also Verizon Communications Inc* v. *FCC*, ___ U.S. ___ n.27, 122 S.Ct. 1646, 1672 n.27 (2002). It would be "an obvious burden to market entry" if a CLEC had to "construct an entire network of its own" before being able to offer local exchange service. *Petition of Verizon New England Inc.*, ___ Vt. ___, 795 A.2d 1196, 1201 (2002). Indeed, the Second Circuit recently held that under the Sherman Antitrust Act Verizon could face liability to retail customers of CLECs if Verizon does not provide reasonable access to unbundled loops, under the essential facilities doctrine. *Law Offices of Curtis V. Trinko, L.L.P.* v. *Bell Atlantic Corporation*, 305 F.3d 89, 108 (2d Cir. 2002). While the D.C. Circuit's *U.S. Telecom* decision may have questioned the methodology used to formulate the FCC's UNE Remand Order with respect to other elements, its opinion raised no question as to the necessity of unbundling loops.

Unbundled access to the loop includes non-discriminatory access to all of the loop's features and functionalities, including attached electronics. Indeed, separate and apart from FCC regulations, this obligation is implicit in the language of the Telecommunications Act itself.

Verizon must provide "just, reasonable, and nondiscriminatory" access to unbundled elements. 47 U.S.C. § 251(c)(3). Verizon cannot do so by denying CLECs access to certain loop features or functionalities that Verizon makes available to itself or its own retail customers. That would be the epitome of discriminatory access, in violation of Verizon's express statutory obligations. *See* 47 C.F.R. § 51.313(b) ("the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements … shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself.").

Verizon's overdue decision to deploy Next Generation Digital Loop Carrier technology necessary to support its proposed PARTS offering will still result in loops that carry voice and data signals from the end user to the Central Office (CO). This natural upgrade to the local network architecture should not cloud the issue before the Department. Whether data or voice or both are being packetized over fiber fed loops by NGDLC, or transmitted via older digital or analog means, there remains no doubt that CLECs are entitled to access those loop functionalities on a nondiscriminatory basis.

2. Further Investigation Will Assist the Department in Addressing Verizon's Erroneous Assertion that ATM Technology In the Loop Constitutes "Packet Switching."

Verizon again seeks to cloud this fundamental point regarding the primacy of unbundled access to loops, by arguing that CLECs are seeking to unbundle "packet switching" or "advanced services" in this proceeding. That is incorrect. Verizon's assertion that NGDLC-fed loops magically become packet switching and stop being loops the instant that ATM technology is added to the feeder plant is in error. The deployment of packet technology in the loop feeder performs an aggregation, not a switching function. Switching, including true packet switching,

occurs after the loop reaches the Verizon Central Office, where the loop is connected to a Verizon or a CLEC switch.

In any case, Verizon's contention that its new architecture will involve "packet switching," and that the facilities used to transmit signals from the NID at a customer premise to a Verizon central office will no longer be "loops," raises disputed factual issues that must be resolved through prompt investigation. The Department should permit discovery and evaluate the evidence through testimony and hearings in order to determine whether, as AT&T pointed out in prior comments, the functionality provided by the NGDLC technology Verizon is deploying is no different than that provided by "traditional" analog loops – the transmission of signal between an end user and the central office.

AT&T believes that the evidence will show that Verizon's rollout of NGDLC using ATM technology will not involve packet switching, even as defined in current FCC regulations. For example, the Wisconsin commission has found that in this technology the DSLAM functionality is only performed in part through electronics at the RT, but also uses additional equipment in the CO. As the commission noted, this is something materially different from the DSLAM technology that the FCC has for the present labeled as packet switching. *See* Final Decision, Wisconsin PSC docket 6720-TI-161, at 92-93 (March 22, 2002).

Indeed, AT&T expects the evidence to show that unbundled access to the unified NGDLC loop will facilitate the deployment of both packet and circuit switches by CLECs. Verizon purports to favor using access to unbundled network elements to facilitate such facilities-based competition. *See* Verizon's Appeal at 14. Verizon's NGDLC architecture, as currently envisioned or as it may be slightly modified after Departmental review, cannot reasonably be construed as constituting packet switching if it complements and encourages the development of, rather than substitutes for, CLEC-owned packet switches. A CLEC that

purchases an unbundled NGDLC loop and provides data service over it will have to connect the loop to its own packet switch and router. The electronics in the NGDLC loop in no way obviate the need for packet switching.

3. Even If Loops Served with ATM over DSL Did Involve Packet Switching, Further Investigation Would be Required to Determine Whether Such Loops Should be Unbundled Either under Federal Rules or as a Matter of State Policy.

Even if the Department were to determine that packet switching is somehow implicated in Verizon's new network architecture, further proceedings would be necessary. At the very least, the Department would need to investigate whether the four conditions set forth in 47 C.F.R. § 51.319(c)(5) are met because unbundling of packet switching is required if these conditions are met. *See Initial Brief of AT&T* in DTE 98-57-III, at 5-6 (Dec. 18, 2001); *Reply Comments of AT&T* in DTE 98-57-III, at 4-10 (Apr. 25, 2002). Once again, the parties disagree on this point. Verizon's unilateral position is not reason for inaction but, to the contrary, reason for the Department to proceed with this reopened investigation.

Separate and apart from whether these four conditions have been met, if loops utilizing NGDLC and ATM technology involve "packet switching" the Department would also have to decide whether to order that Verizon provide unbundled access to such facilities as a matter of state policy. The Department could not decide that important issue without all of the facts before it. Further discovery and factual investigation regarding the need for unbundled access to Verizon's proposed new loop architecture, or to any variant thereof, is therefore required.

4. Verizon's Discussion of a Purportedly Interstate "Service" Has No Bearing on the Unbundling of Local Loop Facilities.

Verizon also asserts that since its PARTS "service" is being tariffed at the federal level as an interstate service, the Department is without authority to consider the unbundling and tariffing of the underlying physical facilities in Massachusetts. *See Verizon Motion for Appeal* at 5-9.

This is a red herring, tossed aside by Verizon to distract the Department from the issues in this proceeding. The fact that Verizon has decided to provide a federally tariffed wholesale "service" over NGDLC equipment does nothing to relieve it of its obligations to offer CLECs access to the unbundled components of its network in a nondiscriminatory manner. Granting CLECs access to the PARTS service through federally tariffed rates is no more a substitute for ensuring that CLECs gain non-discriminatory access to loop equipment deployed in a manner that permits efficient interconnection than would the filing of a special access tariff be a legal substitute for Verizon's obligation to offer unbundled T1.5 loops. The Telecommunications Act contains no provision allowing an ILEC to offer a "service" as a substitute and replacement for its obligation to offer access to unbundled network elements. Calling its actions the offering of a federally tariffed service is, thus, a calculated attempt to distract the Department. It is not the PARTS "service" that is at issue here. It is the NGDLC network deployment that Verizon is deploying, and which will support the PARTS service. This Department need not exercise jurisdiction over the federal PARTS tariff to have unquestioned jurisdiction over Verizon's local network architecture and its deployment – under both state and federal law. What is at issue here, therefore, is how, when, and under what conditions CLECs receive access to unbundled local loops in Verizon's new network design. The federal PARTS tariff has nothing to do with that question.

Federal regulations specifically require that CLECs be provided access to the loop and "attached electronics". 47 C.F.R. § 51.319(a)(1). As a number of state commissions have found, NGDLC and ATM technology is part of the loop as it is integral to the function of the loop – the transmission of voice and data. *See* Wisconsin Public Service Commission, Texas Public Utilities Commission and Illinois Commerce Commission decisions cited in *AT&T's Initial Comments* at 7-8. The assertion that a carrier may use such a loop to transmit signals that could

in part involve jurisdictionally interstate services is irrelevant to the separate question of whether CLECs should have non-discriminatory access to the unbundled loop facility.

Verizon disputes these contentions. That is its right. But it is not Verizon's right to have its positions accepted as correct on its mere say-so. The Department cannot resolve these factual disputes without an appropriate record and, hence, without affording the parties the opportunity for discovery, presentation of testimony, cross-examination of witnesses, and briefing of the issues. Such investigation can and should be undertaken and completed expeditiously, as soon as the Department denies Verizon's baseless appeal of the Hearing Officer's procedural order.

B. The Decision to Allow Evidence Concerning Electronic Loop Provisioning Was Not an Abuse of Discretion.

The Hearing Officer's decision to permit evidence concerning Electronic Loop Provisioning ("ELP") wisely recognizes the potential importance of such for local telecommunications competition. As AT&T made clear in its earlier comments, Verizon's deployment of ATM technology will facilitate the electronic provisioning of loops. *See AT&T Initial Comments* at 13-14. Such electronic provisioning would allow telecommunications carriers to transfer a customer from one carrier to another without the need for inefficient and inaccurate manual hot-cuts. *See id.* This type of electronic transfer would substantially improve the speed and accuracy of customer transfers and spur facilities investment on the part of CLECs. *See id.* at 15. ELP, however, will not become a reality unless Verizon packetizes data and voice transmissions as part of its NGDLC architecture deployment, and delivers them both at the OCD in the central office or to any technically feasible point. *See id.* at 16. While Verizon is reconfiguring its network via its deployment of NGDLC PARTS technology to packetize data signals, it should be required to make the incremental additional step of adding packetized voice transmission capability. *See id.* at 16.

Verizon disputes these assertions. Once again, however, this dispute merely underscores the need for factual investigation of these issues. Verizon's unsupported – and, AT&T submits, erroneous – contentions cannot be accepted until they are tested through discovery, evidence, and cross-examination. Verizon argues that ELP is not "merely a logical or incremental extension of PARTS or a function of the deployment of Next Generation Digital Loop Carrier technology . . . [ELP] is inconsistent with Verizon's current and planned network." *Id.* at 19. AT&T disagrees, and believes a fully-developed record will show that ELP is both logical and efficient, and that the only reason why Verizon has not designed its NGDLC roll-out to accommodate it is that ELP is also pro-competitive. Once again, the only way to resolve AT&T and Verizon's differing views on the technical feasibility of ELP is to move forward with evidentiary proceedings and gather the facts necessary to determine whether it is a technology within reach in Massachusetts.

Verizon also states, without any record support, that ELP "could easily cost many billions of dollars for the industry." *Id.* at 20 As AT&T stated in its Initial Comments on this issue, there is strong evidence to the contrary. *See AT&T Initial Comments* at 16. Specifically, SBC has publicly stated that the technology capable of supporting ELP pays for itself in cost savings. *Id.* (citing to SBC Investory Briefing, *SBC Announced Sweeping Broadband Initiative*, at 2 (October 18, 1999)). Regardless, Verizon's position once again highlights the need for further evidentiary proceedings. Only through further discovery and hearing fact finding can the Department make an informed decision regarding this issue.

The Hearing Officer's decision to permit discovery and evidence regarding ELP was, therefore, entirely reasonable. Given the benefits that ELP could bring to Massachusetts consumers through greater competition and facilities investment, and the timeliness of the issue given Verizon's plans to convert much of its network to NGDLC technology at this time, it

makes no sense to accede to Verizon's demand that the Department simply ignore ELP and refuse to investigate it further.

C. Verizon's Plea for Inaction and Delay Should Be Rejected.

Verizon urges the Department to defer completely to federal authorities, and do nothing while awaiting the results and fallout of the FCC's Triennial Review. *See* Verizon's Appeal at 3, 5, 15, 18-19. While Verizon urges the Department needlessly to delay its investigation and decision-making processes pending possible action in Washington, Verizon does not propose to delay its own construction efforts for the same time period. To the contrary, Verizon clearly intends to continue its NGDLC roll out, according to its own design and its own self-serving view of its legal obligations, without waiting for "clarification" from the FCC. AT&T respectfully urges the Department not to countenance such a plainly one-sided approach. First, as the Hearing Officer correctly observes, consumers would be poorly served by permitting Verizon to obtain and secure a substantial first-mover advantage in providing voice and DSL services over fiber-fed loops. Second, there is no point in waiting as no FCC action can possibly resolve state policy issues. Either now or later the Department will have to determine whether consumer welfare is improved by (i) letting Verizon reassert a legal, never mind a practical, monopoly over local loops, or (ii) alternatively, requiring non-discriminatory access to unbundled fiber-fed loops through ELP using available NGDLC and ATM technology.

1. The Hearing Officer Correctly Recognized that Now is the Time to Determine Whether Verizon is Configuring its Network Appropriately.

As the Department is aware, Verizon has already begun its rollout of the NGDLC architecture to various remote terminals throughout Massachusetts. Now is the best time to determine whether this architecture is being configured in a pro-competitive or an anti-competitive fashion. It makes no sense to wait to consider this critical issue until after Verizon

has substantially implemented its network modifications. Furthermore, the Hearing Officer's observation that Verizon may obtain an "unfair first-mover advantage … because of the time necessary for CLECs to develop competitive retail offerings based on the PARTS architecture" is well-founded. *Hearing Officer Ruling* at 7. If CLECs are denied nondiscriminatory access to loops carrying packetized voice and data signals through Verizon's NGDLC equipment, it could effect their ability to efficiently provide telecommunications services for years to come. The Department must move forward with this proceeding to prevent Verizon from gaining such an unfair competitive advantage.

Verizon's argument that the Department should await the resolution of all regulatory legal uncertainty – at the same time that Verizon rushes forward with its network deployment – if accepted, would cripple the Department's ability to take action. Verizon and the other RBOCs have pursued a deliberate strategy of attempting to foment regulatory uncertainty by refusing to recognize and instead challenging the mandates of the 1996 Act and of the FCC's implementing regulations. Verizon cannot thereby divest the Department of the power to Act. Acceptance of Verizon's attempt to delay investigation of its NGDLC plans will do nothing more than allow Verizon to move forward with its plans in a manner that will allow it to hinder the development of local exchange competition. The Department must conduct an investigation now, in order to ensure that this does not happen. The Hearing Officer's procedural ruling is correct – regulatory questions regarding Verizon's PARTS architecture must be resolved now, before long term competitive damage is inflicted upon the Massachusetts telecommunications market.

Verizon's acquisition and abuse of a first-mover advantage in the retail DSL market in New York is instructive. Although DSL technology has been understood by Verizon for perhaps two decades, it was CLECs that first proposed to introduce DSL to consumers in NY. Verizon was totally unprepared at the time when CLECs first sought to obtain DSL grade loops from

Verizon, to offer its own retail service. Verizon's response was to block CLEC efforts first to offer a DSL product at all (stand alone DSL), and then to block CLEC efforts to offer a line sharing arrangement whereby the DSL CLEC could partner with Verizon to offer the customer a DSL/voice combination over a single line. While Verizon blocked competitors from obtaining effective market entry, Verizon itself entered the New York Market with a highly advertised voice/data combination called "Infospeed." In fact, Verizon used its first mover advantage to acquire the heart of the DSL retail market -- more than 200,000 customers region-wide. Verizon has used this advantage to insulate customers form competitive choice by making it difficult for customers to change from one DSL carrier to another. Verizon has also leveraged its first mover advantage in the DSL market to disrupt competition in the voice market. When a Verizon DSL/Voice customer seeks to transfer either its voice or data business to a CLEC, Verizon rejects the voice order or data order depending upon the service that the customer chooses to change, even though the customer has made a valid selection. Verizon does this without lawful authorization. Conversely, when an AT&T Voice/data customer seeks out Verizon for voice service, Verizon simply migrates the customer's voice service to itself, without regard to the effects on the customer's DSL service.

2. The Department Has Broad Authority to Investigate and Require the Unbundling of DLC-Fed Loops Using ATM Packet Technology.

The Hearing Officer correctly rejected Verizon's baseless argument, repeated on appeal, that the FCC has "sole authority" to determine whether unbundling requirements should apply to the PARTS architecture. *See Hearing Officer's Ruling* at 7; *Verizon Motion for Appeal* at 9-16. Verizon claims that the Telecommunications Act "grants no authority on state commissions to add or retain UNEs apart from FCC requirements." Verizon's Appeal at 11. That assertion is patently untrue.

The Telecommunications Act of 1996 specifically provides that state commissions may exercise their authority pursuant to state law in imposing additional unbundling requirements upon ILECs, so long as those additional requirements are not inconsistent with federal rules. *See* 47 U.S.C. §§ 261(c), 251(d)(3), 252(e)(3). Under these circumstances, federal regulations established by the FCC only set the floor for unbundling and access requirements. *See Goodrow* v. *Lane Bryant, Inc.*, 432 Mass. 165, 170-71 (2000). Any additional unbundling requirements imposed by the Department will not be preempted by federal law so long as there is no conflict between state and federal requirements and it is possible for Verizon to comply with both state and federal regulation. *See Arthur D. Little, Inc.* v. *Comm'r of Health and Hospitals of Cambridge*, 395 Mass. 535, 550 (1985).

The Vermont Supreme Court's decision in *Petition of Verizon New England* recently confirmed these principles. *Petition of Verizon New England Inc.*, ___ Vt. ___, 795 A.2d 1196, 1200 (2002). In that case, the Court affirmed an order by the Vermont Public Service Board requiring Verizon to offer CLECs combinations of UNEs that were ordinarily combined and to resell voice mail as a telecommunications service. *See Petition of Verizon New England*, 795 A.2d at 1207-08. While there was no federal rule that required Verizon to combine the UNEs at issue, the Vermont Board's decision was upheld because there was no federal prohibition upon such combinations and thus no conflict between state and federal law existed. *See id.* at 1204. As the Vermont Court observed in reference to the Act: "there can be no claim of preemption where federal law intends for states to enforce their own regulatory requirements, in addition to the minimum requirements set by federal law." *Id.*

This holding by the Vermont Supreme Court is directly on point. Verizon is unable to distinguish it in any way, and fails to cite any contrary authority. This is not due to unfamiliarity. Not only did Verizon bring the appeal that resulted in this holding, but in addition

AT&T has cited this decision in recent filings with the Department. Verizon can muster no response, because there is none.

Indeed, the FCC itself has confirmed that state commissions retain authority to order the unbundling of additional elements, beyond the minimum set of unbundling requirements promulgated from time to time by the FCC. Verizon makes the contrary claim, asserting that pursuant to the *UNE Remand Order* "any state unbundling mandate is inherently inconsistent with § 251." Verizon's Appeal at 12. That assertion is, once again, patently false. In fact, the FCC has held that 47 U.S.C. § 251(d)(3) "provides state commissions with the ability to establish additional unbundling obligations, as long as the obligations comply with subsections 251(d)(3)(B) and (C)." *UNE Remand Order* ¶ 153. Verizon's apparent attempts to mislead the Department regarding the governing law speaks volumes about its credibility on these issues.

Whether a new ATM-based architecture for DLC-fed loops is properly characterized as part of the loop or as "packet switching" per Verizon, the Department is well within its authority to examine its unbundling. The Department may, therefore, investigate and – if appropriate – adopt unbundling requirements without creating a conflict with federal law. The D.C. Circuit has suggested that an ILEC may be ordered to provide access to particular unbundled network elements in a particular market, consistent with the federal Telecommunications Act, where a regulator has "reason to think doing so would bring on a significant enhancement of competition." *U.S. Telecom*, 290 F.3d at 429. The Department needs to proceed with the factual investigation outlined by the Hearing Officer in order to determine whether the facts support such a conclusion in Massachusetts with respect to loops that will be served with NGDLC and ATM technology, and with respect to implementing ELP.

III. CONCLUSION.

For the reasons stated above, AT&T respectfully urges the Department to reject Verizon's appeal, and to expedite the further investigation required in this proceeding.

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