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BY ELECTRONIC AND OVERNIGHT MAIL

January 11, 2005

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, Second Floor
Boston, MA 02110

Re: D.T.E. 04-33

Dear Ms. Cottrell:

On behalf of ACN Communication Services, Inc.; CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corporation of Massachusetts; and Lightship Telecom, LLC (jointly, the "CLECs"), we urge the Department to deny what Verizon Massachusetts characterizes as a "Motion for Relief" from the *Procedural Order* ("Verizon's Motion"). In the Motion, Verizon basically seeks reconsideration of the portion of the Department's December 15, 2004 *Procedural Order* that requires Verizon to continue to provide unbundled network elements ("UNEs") not covered by the FCC's *Interim Rules Order*[1] to CLECs that were permitted to remain in the arbitration pending the completion of the proceeding.[2] As explained below, Verizon's contentions have no merit and its request for relief should be rejected.

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[1] *In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783 (rel. Aug. 20, 2004) ("*Interim Rules Order*"). The UNEs not covered by the *Interim Rules Order*, and therefore that are covered by the DTE's order in question, are OCn loops, OCn transport, enterprise switching, the feeder portion of the loop on a stand-alone basis, signaling networks, most call-related databases; and "broadband" mass market loops.

[2] Verizon had sought to withdraw these CLECs from the arbitration on the grounds that its interconnection agreements ("ICAs") with them permit Verizon to unilaterally cease offering UNEs to them upon notice.

First, Verizon's Motion overlooks the obvious. Verizon claims that the *Procedural Order* overrides the change-of-law provisions of some of its ICAs that allow Verizon to discontinue UNEs which are not required by "applicable law." Verizon submits that, in the absence of the *Procedural Order*, these ICAs would permit it to discontinue the UNEs that have been eliminated under federal law upon notice. Thus, it reasons, any action by the Department to define Verizon's legal obligations would impermissibly override Verizon's rights under these contracts. Whether or not Verizon's interpretation of these contracts is correct, it is most certainly incorrect to ignore the Department's authority to interpret and to make "applicable law." As the Department recognizes, 47 U.S.C. § 252(b) specifically grants the Department the authority to resolve the issues being disputed in this arbitration. In addition, "Verizon itself has acknowledged that the Department may exercise jurisdiction over its facilities pursuant to G.L. c. 159," [3] and the Department has held that its "state law authority over network facilities is an explicit grant of statutory authority to regulate network elements" and promote competition in the telecommunications industry.[4] The Department is therefore clearly within its rights to protect its jurisdiction and its consumers by temporarily maintaining the status quo pending the completion for its proceedings – just as the FCC did in its *Interim Order*. These decisions by the Department and the FCC do not override the contracts' "applicable law" provisions; they *are* the applicable law.

Indeed, a reason that change-of-law provisions often are keyed to "applicable law" rather than a more specific reference to the FCC's unbundling regulations is to provide state and federal regulators with the opportunity to assure that changes in law are implemented in accordance with other laws and policies. These contract provisions therefore explicitly contemplate that one change in law may prompt regulators to establish legal obligations related to the process by which the change in law is to be implemented.[5] For instance, Section 27.4 of Lightship's ICA with Verizon provides,

> [I]f, as a result of any decision, order or determination of any judicial or regulatory authority with jurisdiction over the subject matter hereof, it is determined that BA is not required to furnish any service, facility or arrangement, or to provide any benefit required to be furnished or provided to Lightship hereunder, then BA may

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[3] *See D.T.E. 03-60/04-73 Consolidated Order,* at 24.

[4] *See D.T.E. 03-60/04-73 Consolidated Order,* at 25.

[5] *See, e.g.,* ACN Communications Services ICA with Verizon-MA, General Terms and Conditions §§ 4.7 & 50.1, UNE Attachment § 1.5; CTC Communications Corp. ICA with Verizon-MA, Adoption Agreement § 2.2, UNE Remand Amendment § 1.5, DSLnet Communications LLC ICA with Verizon-MA, General Terms and Conditions §§ 4.7 & 50.1, UNE Attachment § 1.5; Focal Communications Corporation of Massachusetts ICA with Verizon-MA, General Terms and Conditions § 8.4, Part II Unbundled Network Elements and Combinations § 1.7.2. In making this argument, CLECs do not attempt to interpret their ICAs with Verizon or concede in any way that Verizon has the right to implement changes in law upon notice.

> discontinue the provision of any such service, facility, arrangement or benefit to the extent permitted by any such decision, order or determination by providing ninety (90) days prior written notice to Lightship, unless a different notice period or different conditions are specified in this Agreement (including, but not limited to, in an applicable Tariff or Applicable Law) for termination of such service, in which event such specified period and/or conditions shall apply.[6]

That is exactly what the Department has done. Because the Department's December 15, 2004 *Procedural Order* is the "applicable law" that governs Verizon's obligations with respect to these UNEs, and because the results of the pending arbitration that determines Verizon's unbundling obligations will also be "applicable law," the Order does not and cannot conflict with the change-of-law provisions in the interconnection agreements.

Second, contrary to Verizon's claims, the Department's decision does not result in inappropriate disparate treatment among CLECs.[7] Verizon submits that the Department's decision does not treat the carriers that were withdrawn from the proceeding the same as those that remain in it.[8] Verizon glosses over the fact that the CLECs that remain in this proceeding, however, have specifically decided to dispute Verizon's interpretation of how changes in law should be implemented, while other carriers either have not or are yet to do so.[9] Therefore, these other carriers are being treated in accordance with there individual willingness to arbitrate the disputed issues at this time. To the extent they wanted to participate in this arbitration, the Department gave them the opportunity to do so.[10]

Third, this Department decision does not conflict with the conclusions the Department made in the *Consolidated Order* in D.T.E. 03-60/04. Verizon contends that the requested relief from the *Procedural Order* is warranted because the Department's decision is incongruous with the Department's finding in the Consolidated Order that it "did not have any basis under state law, the BA/GTE Merger Order, or Section 271 upon which [it] could, at this time, require

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[6] Lightship Telecom, LLC ICA with Verizon-MA, General Terms and Conditions § 27.4 (emphasis added) (Lightship adopted the Level 3 ICA).

[7] *See* Verizon's Motion at 6.

[8] *See* Verizon's Motion at 4 & 6-7.

[9] Verizon's suggestion that CLECs, who are in this arbitration and have ICAs that permit Verizon to cease offering UNEs upon notice, go through the dispute resolution process and file a complaint if they oppose Verizon's interpretation and implementation of law is nonsensical, especially since these CLECs are attempting to resolve such issues in this proceeding. *See* Verizon's Motion at 6-7.

[10] *See D.T.E. 04-33 Procedural Order,* at 26 (permitting parties that did not raise additional issues to participate in the proceeding so long as they filed a Letter of Continued Participation by December 24, 2004).

Verizon to continue provisioning UNEs delisted by USTA II."[11] Verizon suggests that standstill requests were rejected for this reason and therefore that the Department's decision requiring Verizon to offer those UNEs not addressed by the *Interim Rules Order* until the Department rules on Verizon's rights and responsibilities is inconsistent with the *Consolidated Order*.[12] Contrary to Verizon's characterization, however, the *Consolidated Order* did not address the merits of CLEC standstill requests. Rather, the Department "denied as moot" these requests because the FCC had in the intervening months already ordered that the *status quo* be maintained in its *Interim Rules Order*.[13] In addition, the Department did not undercut this FCC decision, as Verizon claims, by ordering that Verizon continue to offer those UNEs not addressed by the *Interim Rules Order*. Nothing in the *Interim Rules Order* addresses those other UNEs.

For the foregoing reasons, the Department should deny Verizon's Motion for Relief.

Consistent with the Arbitration Ground Rules, seven (7) copies of this letter are attached. Please date-stamp the enclosed extra copy of this filing and return it in the attached, postage prepaid envelope provided. Please note that CLECs will submit this filing in electronic format by E-mail attachment to dte.efiling@state.mass.us.

Should you have any questions concerning this filing, please do not hesitate to contact us.

Sincerely,

Russell M. Blau
Philip J. Macres

Counsel for ACN Communication Services, Inc.; CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corporation of Massachusetts; and Lightship Telecom, LLC.

cc: Tina Chin, Arbitrator
DTE 04-33 Service List

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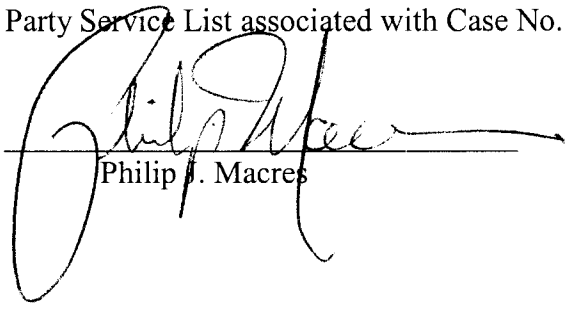
[11] *See D.T.E. 04-33 Procedural Order,* at 32.

[12] Verizon's Motion at 7-8.

[13] *See D.T.E. 03-60/04-73 Consolidated Order,* at 57-58.

CERTIFICATE OF SERVICE

I certify that on this 11th day of January, 2005, copies of the foregoing letter were sent via postage prepaid first class mail to the Active Party Service List associated with Case No. 04-33.



Philip J. Macres

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order	)	D.T.E. 04-33

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