D.T.E. 01-20-Part A-C December 15, 2004

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts.

---

# ORDER ON VERIZON MASSACHUSETTS' MOTION TO REOPEN THE RECORD

APPEARANCES: Bruce P. Beausejour, Esq.
Verizon
185 Franklin Street, Rm. 1403
Boston, MA 02110
-and-
Robert N. Werlin, Esq.
Keegan, Werlin & Pabian, LLP
21 Custom House Street
Boston, MA 02110-3525
FOR: VERIZON NEW ENGLAND, INC. d/b/a
VERIZON MASSACHUSETTS
Intervenor

Thomas Reilly
Attorney General
By: Karlen J. Reed, Assistant Attorney General
Utilities Division
One Ashburton Place
Boston, MA 02108
Intervenor

Jay E. Gruber, Esq.
AT&T Communications of New England, Inc.
99 Bedford Street, 4th Floor
Boston, MA 02111
-and-
Jeffrey J. Jones, Esq.
Kenneth W. Salinger, Esq.
Palmer & Dodge, LLP
111 Huntington Avenue
Boston, MA 02199-7613
FOR: AT&T Communications of New England, Inc.
Intervenor

Richard C. Fipphen, Esq.
MCI, Inc.
200 Park Avenue, 6th Floor
New York, NY 10166
Intervenor

Eric Branfman, Esq.
Philip J. Macres, Esq.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W. Suite 300
Washington, DC 20007
FOR: Allegiance Telecom of Massachusetts, Inc.
FOR: El Paso Network, LLC
FOR: PaeTec Communications, Inc.
FOR: Network Plus, Inc.
FOR: CTC Communications Corp.
FOR: Global Broadband, Inc.
Intervenors
FOR: RCN-BecoCom, LLC
Limited Participant

Donald Sussman
Director of Industry and State Regulatory Affairs
Allegiance Telecom
1919 M Street NW Suite 420
Washington, D.C. 20003
Intervenor

Eric Krathwohl, Esq.
Emmett E. Lyne, Esq.
Rich, May Bilodeau & Flaherty, P.C.
176 Federal Street, 6th Floor
Boston, MA 02110-2223

FOR: BrahmaCom, Inc.
FOR: Essential.com, Inc.
FOR: Norfolk County Internet, Inc.
FOR: Servisense, Inc.
FOR: Freedom Ring Communications d/b/a Bayring Communications
FOR: The Association of Communications Enterprises
FOR: XO Massachusetts, Inc.

Intervenors

Karen Nations, Regulatory Director
XO Massachusetts, Inc.
45 Eisenhower Drive, 5th Floor
Paramus, NJ 07652

Intervenor

Alan D. Mandl, Esq.
Mandl & Mandl, LLP
10 Post Office Square, 6th Floor
Boston, MA  02109

FOR: Covad Communications Company

Intervenor

Scott Sawyer, Esq.
Vice President-Regulatory Affairs
Conversent Communications of Massachusetts, LLC
222 Richmond Street, Suite 301
Providence, RI 02903

Intervenor

Douglas Denny-Brown, General Counsel
Yvette Bigelow, Esq.
RNK Telecom Inc.
333 Elm Street
Dedham, MA 02026

Intervenor

Craig Dingwall, Esq.
Director, State Regulatory/Northeast
Sprint Communications Company L.P.
401 9th Street, N.W., Suite 400
Washington, D.C. 20004
Intervenor

Robert A. Ganton, Esq.
Trial Attorney
Regulatory Law Office
Department of the Army
Litigation Center, Suite 700
901 N. Stuart Street
Arlington, VA 22203-1837
FOR: United States Department of Defense and all other Federal Executive Agencies
Intervenor

Jonathan E. Canis, Esq.
Kelley Drye & Warren LLP
1200 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
-and-
Tamara Connor, Esq.
Michael B. Hazzard, Esq.
Kelley Drye & Warren LLP
800 Towers Crescent Drive, Suite 1200
Vienna, VA 22182
FOR: Z-Tel Communications, Inc.
Intervenor

William J. Rooney, Jr. General Counsel
John O. Postl, Assistant General Counsel
Global NAPs, Inc.
89 Access Road, Suite B
Norwood, MA 02062
Intervenors

Andrew O. Isar, Esq.
Miller & Isar
7901 Skansie Avenue Suite 240
Gig Harbor, WA 98335
FOR: The Association of Communications Enterprises
Intervenor

Barlow Keener, President and CEO
BrahmaCom, Inc.
32 Wexford Street
Needham, MA 02494
FOR: Brahmacom, Inc.
Intervenor

William D. Durand, Esq.
Executive Vice President and Chief Counsel
New England Cable Television Association, Inc.
100 Grandview Road, Suite 310
Braintree, MA 02184
Limited Participant

Terry Romine
Director of Legal and Regulatory Affairs
Adelphia Business Solutions
One North Main Street
Coudersport, PA 16915
Limited Participant

Rodney L. Joyce, Esq.
Shook, Hardy & Bacon, LLP
Hamilton Square
600 14th Street, N.W., Suite 800
Washington, DC 20005-2004
FOR: Network Access Solutions Corp.
Limited Participant

Paul C. Besozzi, Esq.
Patton Boggs, LLP
2550 M Street NW
Washington, DC 20037
FOR: New England Public Communications Council, Inc.
Limited Participant

TABLE OF CONTENTS


I. INTRODUCTION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Page 1
- A. Motion to Re-Open . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Page 1
- B. The Department's Orders in the D.T.E. 01-20 Proceeding . . . . . . . . . Page 2
- C. The Department's D.T.E. 01-20 Investigation . . . . . . . . . . . . . . . . . Page 4
- D. Overview of TELRIC . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Page 6

II. STANDARD OF REVIEW . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Page 9

III. POSITIONS OF THE PARTIES . . . . . . . . . . . . . . . . . . . . . . . . . . . . Page 10
- A. Verizon . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Page 10
- B. AT&T . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Page 21
- C. MCI . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Page 29
- D. XO . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Page 33

IV. ANALYSIS AND FINDINGS . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Page 36
- A. Verizon's Motion to Reopen the D.T.E. 01-20 Record . . . . . . . . . . . Page 36
  - 1. Summary of Conclusions . . . . . . . . . . . . . . . . . . . . . . . . . . Page 36
  - 2. The TELRIC Requirement . . . . . . . . . . . . . . . . . . . . . . . . . Page 37
- B. Alternative Forms of Relief . . . . . . . . . . . . . . . . . . . . . . . . . . . . Page 47
  - 1. Introduction . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Page 47
  - 2. Federal Fora . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Page 47
  - 3. Supreme Judicial Court . . . . . . . . . . . . . . . . . . . . . . . . . . . Page 49
  - 4. "Global" Rate Case . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Page 50
- C. Next UNE Rates Investigation . . . . . . . . . . . . . . . . . . . . . . . . . Page 52

V. ORDER . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Page 53

ORDER ON VERIZON MASSACHUSETTS' MOTION
TO REOPEN THE RECORD

# I. INTRODUCTION

## A. Motion to Re-Open

On August 18, 2003, Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") filed with the Department of Telecommunications and Energy ("Department") a Motion to Reopen the Record ("Motion") in D.T.E. 01-20, the Department's review of the pricing of Verizon's unbundled network elements ("UNEs"). In support of the Motion, Verizon filed cost studies (Motion, Atts. A through D) accompanied by the Testimony of Harold E. West, III and Marsha S. Prosini ("West/Prosini testimony"). AT&T Communications of New England, Inc. ("AT&T"), WorldCom, Inc. (now, "MCI" ) and XO Massachusetts, Inc. ("XO") filed oppositions to Verizon's Motion on September 3, 2003 ("AT&T Opposition," "MCI Opposition," and "XO Opposition," respectively). AT&T included in its opposition a cross-motion to strike the new evidence submitted by Verizon in the West/Prosini testimony and cost studies. Verizon replied to the oppositions on September 10, 2003 ("Reply"). On May 12, 2004, the Department conducted an oral argument[1] on Verizon's Motion, in which Verizon, AT&T, MCI, and XO participated.[2] The Department issued one information request during the oral argument, to which Verizon filed its response on May 21, 2004.

---

[1] All transcript citations in this Order are to the transcript of the May 12, 2004 oral argument.

[2] AT&T and MCI presented a joint argument at the oral argument.

B. The Department's Orders in the D.T.E. 01-20 Proceeding

The Department opened the D.T.E. 01-20 docket on January 12, 2001, to establish new rates for the UNEs Verizon offers to competitive local exchange carriers ("CLECs"),[3] and issued its final ruling in the compliance phase of this proceeding two-and-one-half years later, with an August 6, 2003 Letter Order denying a motion for reconsideration of the Commission's July 16, 2003 stamp-approval of Verizon's final Compliance Filing. See UNE Rates, D.T.E. 01-20, Vote and Order to Open Investigation (2001) ("Vote and Order"); Letter Order (August 6, 2003) ("Reconsideration Letter Order").

On July 11, 2002, the Department issued its 520-page D.T.E. 01-20-Part A Order[4] ("UNE Rates Order"), making determinations on the development of recurring and nonrecurring rates for CLECs' use of Verizon's UNEs, based on the Federal Communications Commission ("FCC")-established Total Element Long-Run Incremental Cost ("TELRIC")[5]

---

3 The Department first established UNE rates, rates for interconnection, and the avoided-cost discount for resale services in Massachusetts as part of the Department's Consolidated Arbitrations proceeding, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 ("Consolidated Arbitrations"). The Department initially adopted the TELRIC method and approved UNEs rates in the Consolidated Arbitrations Phase 4 Order (December 4, 1996). The Department's review in this docket was undertaken pursuant to the five-year review cycle established in Investigation of Resale Tariff of Bell Atlantic, D.T.E. 98-15-Phases II/III (March 19, 1999).

4 Part B of the Department's D.T.E. 01-20 proceeding, established to develop a new avoided-cost discount, remains in abeyance pending issuance of new resale discount rules by the FCC. See UNE Rates Order at 2-3 and n.4.

5 TELRIC is a method of determining the cost of network elements based on incremental costs of equipment and labor, not counting embedded costs. See 47 U.S.C. § 252(d)(1)(A); 47 C.F.R. § 51.505. The FCC developed the TELRIC

(continued...)

method. The Department established the effective date of Verizon's new wholesale tariff, D.T.E. MA Tariff No. 17 ("Tariff 17"), as August 5, 2002.[6]

Following parties' motions for reconsideration and clarification of the UNE Rates Order, on September 24, 2002, the Department issued an Order Granting Verizon's and AT&T's Motions for Reconsideration, In Part, and Requesting Additional Evidence ("Additional Evidence Order") on four issues raised in Verizon's and AT&T's motions for reconsideration. Subsequently, the Department issued its D.T.E. 01-20-Part A-A Order (January 14, 2003) ("Reconsideration Order"), deciding the motions for reconsideration and clarification.[7] As directed in the Reconsideration Order, Verizon submitted its initial

---

[5](...continued)
method to implement Sections 251 and 252 of the Telecommunications Act of 1996, which outline obligations for incumbent local exchange carriers in opening up local telephone markets to competition.

[6] The Department established the effective date of Verizon's new Tariff 17 in the UNE Rates Order and in an additional order on parties' motions for time extensions, D.T.E. 01-20-Part A, Order on Motions Filed by Verizon for Extension (July 30, 2002) ("Extension Order"). The Department directed Verizon to file interim switching rates on August 5, 2002, and, upon final approval of its Compliance Filing, to retroactively true-up the remaining UNE rates to that effective date. Extension Order at 14. The coordinated, or manual, hot cut rate was excepted from the rates to be retroactively trued-up. Id.

[7] Commissioner Connelly and Commissioner Keating each issued separate opinions concurring in part and dissenting in part with the Reconsideration Order and questioning whether the cumulative impact of the TELRIC rates would have an equitable result and would achieve the goal of promoting facilities-based competition in the Massachusetts telecommunications market. Reconsideration Order at 153-175 (Commissioner Connelly's separate opinion), 176-177 (Commissioner Keating's separate opinion). Commissioner Connelly also stated that "[t]he orders will, I fear, lead to UNE rates that risk unconstitutionally denying Verizon a reasonable opportunity
(continued...)

D.T.E. 01-20-Part A compliance filing on February 13, 2003.[8] In the subsequent Order, D.T.E. 01-20-Part A-B (May 29, 2003) ("Compliance Order"), the Department approved, in part, and rejected in part, Verizon's initial compliance filing and directed Verizon to re-file it with certain corrections and revisions. Verizon submitted the revised compliance filing on June 12, 2003, and supplemented it on July 2, 2003. On July 14, 2003, the Department issued a Letter Order ("Compliance Letter Order") approving, in part, and denying, in part, Verizon's revised compliance filing and ordering Verizon to file final corrected tariff pages. Upon receipt on July 16, 2003, the Department stamp-approved Verizon's final Compliance Filing. Finally, on August 6, 2003, the Department denied a motion for reconsideration of the stamp-approval filed by Conversent Communications of Massachusetts, LLC ("Conversent"). See Reconsideration Letter Order.

C. The Department's D.T.E. 01-20 Investigation

The UNE Rates Order was the result of a comprehensive Department investigation that had the primary objective of assessing whether Verizon had substantiated the reasonableness of its numerous UNE and interconnection cost components. See UNE Rates Order at 4. The Department granted intervention in this proceeding to Verizon; AT&T; MCI; XO; Conversent; the Attorney General of the Commonwealth of Massachusetts; Brahmacom, Inc.;

---

[7](...continued)
for recovery of costs prudently incurred to serve customers." Id. at 175.

[8] Verizon supplemented its filing on February 27, February 28, March 3, and March 4, 2003, and responded to two Department information requests, designated CF-1 (April 16, 2003) and CF-2 (June 26, 2003).

Essential.com, Inc.; Norfolk County Internet, Inc.; Servisense, Inc.; FairPoint Communications Solutions Corporation; Freedom Ring Communications d/b/a Bay Ring Communications; the Association of Communications Enterprises; Global NAPs, Inc.; PaeTec Communications, Inc.; RNK, Inc. d/b/a RNK Telecom; Sprint Communications Company, L.P.; United States Department of Defense and All Other Federal Executive Agencies ("DOD"); Z-Tel Communications, Inc. ("Z-Tel"); CTC Communications Corp.; Global Broadband, Inc.; and Eastern Telephone, Inc. Also, intervenors Allegiance Telecom of Massachusetts, Inc., Covad Communications Company, El Paso Networks, LLC, and Network Plus, Inc. participated collectively on some matters in the proceeding as the "CLEC Coalition." The Department granted limited participant status to Adelphia Business Solutions; New England Cable Television Association, Inc.; Network Access Solutions Corporation; RCN-BecoCom, LLC; and the New England Public Communication Council, Inc.

On May 8, 2001, Verizon and AT&T filed direct cases in D.T.E. 01-20-Part A, consisting of their respective proposed cost models, model inputs, proposed rates, direct testimony, and supporting documentation. The Department conducted 18 days of evidentiary hearings between January 7 and February 15, 2002, at which Verizon, AT&T and MCI, DOD, and the CLEC Coalition sponsored witnesses.[9] Two additional days of hearings were held on October 22 and 23, 2002, pursuant to the Department's Additional Evidence Order. Pre-filed testimony and exhibits of Verizon, AT&T, the CLEC Coalition, the DOD, Z-Tel, and the

---

9 The pre-filed testimony of Z-Tel's witness, who did not testify at the hearings, was admitted into the evidentiary record pursuant to an affidavit.

Department, plus all responses to information requests (numbering approximately 1,500), were admitted into evidence. The evidentiary record also includes responses to 103 record requests by the Department; a dozen record requests by Verizon, AT&T, and the Attorney General; and certain exhibits and testimony from the Department's investigation in D.T.E. 98-57-Phase III regarding digital subscriber line and line sharing issues. See UNE Rates Order at 7; Reconsideration Order at 3.

D. Overview of TELRIC

In making its determinations in the UNE Rates Order, and post-Order reconsideration and compliance phases, the Department employed the TELRIC method established by the FCC in its Local Competition Order[10] to implement the pricing requirements of the Telecommunications Act of 1996 ("Telecommunications Act" or "Act").[11] See UNE Rates Order at 2-4, 13-15, 20-27. On May 13, 2002, the Supreme Court of the United States ("Supreme Court") upheld the FCC's TELRIC methodology as a reasonable method for setting UNE rates under the Act, reversing a decision of the United States Court of Appeals for the Eighth Circuit that invalidated TELRIC. Verizon Communications, Inc., et al. v. Federal Communications Comm'n, et al., 535 U.S. 467 (2002). Incumbent local exchange carriers ("ILECs") had appealed the Eighth Circuit's decision to the Supreme Court, including the Eighth Circuit's determination that use of the TELRIC methodology presented no "ripe"

---

[10] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. August 8, 1996) ("Local Competition Order").

[11] 47 U.S.C. §§ 151 et seq.

takings claim. Although it reversed the Eighth Circuit's invalidation of TELRIC, the Supreme Court affirmed the Eighth Circuit on the takings issue, finding the ILECs' claim was not ripe for "want of any rate to be reviewed." Id. at 523-524.

ILECs had asserted before the Supreme Court – as they had previously in the FCC proceeding leading to the Local Competition Order[12] – that the TELRIC method for setting rates, by excluding ILECs' historical costs from consideration, was, by its nature, confiscatory. Id. at 493, 497. The Supreme Court concluded that TELRIC rates, although the product of a departure from traditional ratemaking methods, were still subject to the "constitutional bar on confiscatory rates." Id. at 528. However, in addition to rejecting the ILECs' confiscation claim as unripe due to lack of an actual state commission-set rate for review,[13] the Supreme Court pointed out that the Telecommunications Act, unlike traditional utility ratemaking methods, tied the concept of "just and reasonable rates" for UNEs to the Act's prescribed forward-looking method of setting them:

> While the Act is like its predecessors in tying the methodology to the objectives of "just and reasonable" and nondiscriminatory rates, 47 U.S.C. § 252(d)(1), it is radically unlike all previous statutes in providing that rates set "without reference to a rate-of-return or other rate based proceeding," § 252(d)(1)(A)(i). The Act thus appears to be an explicit disavowal of the familiar public-utility model of rate regulation (whether its fair-value or cost-of-service incarnations) presumably still being applied by many states for retail sales ..., in favor of novel rate setting

---

12 See Local Competition Order at ¶¶ 733-740.

13 The Supreme Court stated: "[T]he incumbent carriers do not present the portent of a constitutional taking claim in the way that is usual in ratemaking cases. They do not argue that any particular, actual TELRIC rate is 'so unjust as to be confiscatory,' that is, as threatening an incumbent's 'financial integrity.'" 535 U.S. 467, 523-524, citing Duquesne Light Co. v. Barasch, 488 U.S. 299, 307, 312 (1989).

> designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property. ... [T]o the extent that the incumbents argue that there was at least an expectation that some historically anchored cost-of-service method would set wholesale lease rates, no such promise was ever made. ... Any investor paying attention had to realize that he could not rely indefinitely on traditional rate making methods but would simply have to rely on the constitutional bar on confiscatory rates.

Id. at 489, 528. Thus, the Supreme Court concluded that exclusion of historical costs did not of itself make TELRIC rates confiscatory:

> [The ILECs] seek to apply the rule of constitutional avoidance in saying that "cost" ought to be construed by reference to historical investment in order to avoid a serious constitutional question, whether a methodology so divorced from investment actually made will lead to a taking of property in violation of the Fifth (or Fourteenth) Amendment. The Eighth Circuit did not think any such serious question was in the offing, ... and neither do we.

Id. at 523 (internal citation omitted). Finding that the ILECs "failed to carry their burden of showing unreasonableness [of the FCC's TELRIC method] to defeat the deference due the Commission," the Supreme Court concluded: "TELRIC appears to be a reasonable policy for now, and that is all that counts." Id. at 523-524.

Consistent with the Supreme Court's decision, FCC guidance, and our December 1996 Order in Phase 4 of the Consolidated Arbitrations, the Department based its determinations in its July 11, 2002 UNE Rates Order, and the subsequent Orders in this docket, on the FCC's directives in the Local Competition Order to apply the TELRIC method to implement the UNE pricing requirements of the Telecommunications Act. See UNE Rates Order at 2-4, 13-15, 20-27.

On September 15, 2003, the FCC issued In the Matter of Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by

Incumbent Local Exchange Carriers, WC Docket No. 03-173, Notice of Proposed Rulemaking, FCC 03-224 (rel. September 15, 2003) ("TELRIC NPRM"). With the TELRIC NPRM, the FCC began a review of its TELRIC pricing rules with a tentative conclusion that the TELRIC standard should be adjusted to reflect "real-world attributes" of an ILEC's network. TELRIC NPRM at ¶¶ 4, 52. However, until the FCC implements a modified TELRIC standard, the strictly forward-looking review prescribed by the Local Competition Order, which the Department has employed in its D.T.E. 01-20 proceeding, remains the governing standard for state commissions to establish UNE rates.

## II. STANDARD OF REVIEW

The Department's procedural rule on reopening hearings, 220 C.M.R. § 1.11(8), states, in pertinent part: "[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause." Good cause for purposes of reopening has been defined as a showing that the proponent has previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the decision. Machise v. New England Telephone and Telegraph Company, D.P.U. 87-AD-12-B at 4-7 (1990); Boston Gas Company, D.P.U. 88-67-Phase II, at 7 (1989); Tennessee Gas Pipeline Company, D.P.U. 85-207-A at 11-12 (1986).

## III. POSITIONS OF THE PARTIES

### A. Verizon

Verizon argues in its Motion that "good cause" exists for the Department to reopen the record in this proceeding for the "limited purpose" of accepting new evidence regarding its claim of confiscation for the following reasons: (1) Verizon's claim and proffered evidence involve the "material" issue of whether the UNE rates the Department has set fail to provide Verizon with adequate compensation and thus are confiscatory and an unconstitutional taking;[14] and (2) the evidence Verizon now seeks to admit could not have been developed and presented prior to the Department's stamp-approval of Verizon's Compliance Filing on July 16, 2003, because until then Verizon could not calculate the resulting "confiscatory shortfall" with "specificity" (Motion at 1, 2-3; Reply at 2, 3-5; Tr. at 14-17). Noting that the Supreme Court rejected the confiscation claim brought by ILECs in Verizon Communications v. Federal Communications Comm'n on grounds that there was no rate before the Court for review, Verizon argues that the circumstance anticipated by the Court – a specific rate alleged to be confiscatory – has arrived: "We now have that specific rate order. We now have identified what that rate is. We are now in the position to assess that impact of that rate on the company's financial integrity and present that to the Commission" (Tr. at 17, 20, 31-32). Verizon states that granting its Motion will prejudice no party, because the UNE rates are

---

[14] Specifically, Verizon asserts that the UNE rates set in this proceeding fail to provide Verizon with "just compensation, as required by the Fifth and Fourteenth Amendments to the United States Constitution and the Declaration of Rights of the Massachusetts Constitution" (Motion at 1).

already in effect and presumably will remain so pending disposition of its claim; thus there is no valid countervailing interest to weigh in considering its Motion (Motion at 1, 4, 9).

Verizon insists that the Department must reopen the record to examine its purported evidence in order to make an informed judgment as to whether modification of the final rates or "other remedial action" is appropriate (id. at 1-2). According to Verizon, the exact nature of the reopened proceeding and the confiscation-related issues to be addressed are not at issue in its procedural Motion, but should be "taken up on a reopened record" in which the Department "can fashion a remedy" (Tr. at 40-41, 82).

Verizon bases its Motion to Reopen on a claim that the rates are too low for Verizon to recover both its prudently-incurred historical investments to provide UNEs to CLECs and the "real-world operating costs" of continuing to provide them (Motion at 2, 4; Tr. at 35-36). Verizon argues that the new rates will force Verizon to provide UNEs at an ongoing loss, so that it will be unable to earn a sufficient rate of return, threatening its financial integrity and ability to attract capital (Motion at 2, 4-8). This, Verizon concludes, makes the rates confiscatory as a matter of federal and state constitutional law (id. at 2). Responding to the CLECs' arguments that the Department cannot grant relief by raising the UNE rates because the Department must adhere to TELRIC pricing, Verizon argues that TELRIC is not the only standard with which the rates must comply; they must also be sufficient under the Federal and Massachusetts constitutions (Tr. at 83). "If the application of TELRIC rates result in confiscation of property, an improper taking, then those rates cannot stand," Verizon argues (id.).

Citing the West/Prosini testimony and cost studies, Verizon offers the following data to support its claim that the Department-approved UNE-platform ("UNE-P")[15] and UNE-loop ("UNE-L") rates are confiscatory (see Motion at 5; Reply at 5; Tr. at 35-36):

(1) Verizon's cost of providing a loop is over $25, and its cost of providing UNE-P is over $40; whereas, pursuant to the D.T.E. 01-20 orders, the statewide average UNE-L rate is $13.93, and the average UNE-P rate is $18.69. As a result, Verizon calculates it will recover less than 60 percent of the cost of providing a loop and less than 50 percent of the cost of providing UNE-P.

(2) The Department determined that the appropriate cost of capital to be used in setting UNE rates is 11.45 percent. The Department-ordered UNE rates, retroactive to August 5, 2002, will reduce Verizon's return on investment to 3.29 percent for 2002; as the new rates were in effect for only five months of 2002, Verizon expects the reduction in rate of return to be "magnified in the future."

(3) If historical growth trends in loop and UNE-P orders are projected forward, at the rates set by the Department, Verizon's annual shortfall would be more than $113 million by 2005; and Verizon's net income would reach zero if it sold about twelve percent more lines as UNE-P.

(4) If Verizon had sold all of its lines in 2002 at the UNE-P rates set by the Department, it would have recovered less than 75 percent of its wholesale-related costs, resulting in a shortfall of approximately $320 million.

The two new studies demonstrate a "vast gap" between the Department-approved UNE rates and the costs involved in providing UNEs, Verizon states (Motion at 4; Tr. at 36). This evidence is proof of a taking, Verizon asserts, because the Federal Constitution, Massachusetts law, and the Act require that agencies set just rates that provide a utility the opportunity to meet its cost of service and earn a fair and reasonable return on its investment (Motion at 6;

---

15 UNE-P is an offering of individual network elements (loops, switching, and transport) that may be combined into a complete set to provide an end-to-end circuit for a competitive carrier.

Reply at 4-5).[16] The Act's requirement that competitors pay a "just and reasonable" rate for UNEs means "a rate that is based on cost," Verizon adds (Motion at 6). Further, the rates must permit Verizon to attract capital, compensate investors, and assure confidence in the company's financial integrity (id. at 7).[17] In contrast to these requirements, Verizon claims, the new UNE rates do not cover Verizon's historical investment and operating expenses, and they threaten its financial integrity (id.).

Verizon argues that its overall rate of return need not be considered, because, in a regulatory environment where all of an incumbent's business is open to competition, a state commission cannot justify confiscatory UNE rates by factoring in other revenues that are subject to competition (id. at 8; Tr. at 37-39).[18] Verizon counters the arguments of AT&T, MCI, and XO that Verizon's claim can only be considered by the Department (if at all) in the context of a "global" rate case as follows:

---

16 Citing NYNEX, D.P.U. 94-50 (1995) (quoting Fitchburg Gas and Elec. Light Co. v. Dep't of Pub. Utils., 371 Mass. 881, 884 (1977): "Confiscatory rates violate articles 1, 10, and 12 of the Declaration of Rights of the Massachusetts Constitution, and the Fourteenth Amendment to the United States Constitution"; Duquesne, 488 U.S. at 307; Town of Hingham v. Dep't of Telecomm's and Energy, 433 Mass. 198, 202 (2001)).

17 Citing Fitchburg Gas and Elec. Light Co., 371 Mass. at 884; Leopoldstadt, Inc. v. Comm'r of the Div. of Health Care Finance and Policy, 436 Mass. 80, 89 (2002); FPC v. Hope Natural Gas Co., 320 U.S. 591, 605 (1944).

18 Citing Brooks-Scanlon Co. v.R.R. Comm'n, 251 U.S. 396, 399 (1920); Smith v. Ill. Bell Tel. Co., 282 U.S. 133 (1930); Mich. Bell Tel. Co. v. Engler, 257 F.3d 587, 593 (6th Cir. 2001).

First, Verizon argues that opposing parties' claim that UNE rates have only minimal effect on Verizon's rate of return "misunderstands the evidence." Even if the proper constitutional standard requires looking at the company's return as a whole (which Verizon claims it does not), it would be unreasonable for the Department to lower Verizon's rates when its rate of return is already as low as 3.88 percent. Furthermore, the change in rate of return from 3.88 percent to 3.29 percent is for the latter five months of 2002 only. Verizon contends that as the new UNE rates are applied over an entire year, and as the volume of UNE-L and UNE-P CLECs purchase increases due to the reduced UNE rates, Verizon will suffer even more loss and greater reduction to its overall rate of return (Reply at 6).

Second, Verizon argues that the opposing parties' assertion that the appropriate legal standard requires consideration of all of the company's revenues is wrong. According to Verizon, regulators may not rely on revenues from competitive services or other jurisdictions to justify confiscatory rates (id. at 7-8; Tr. at 37-39, 84-85).[19] According to Verizon, the CLECs' arguments and the cases they have cited apply to takings claims in a different regulatory environment, in which utilities were monopoly providers (Reply at 7-8; Tr. at 37). In that context, rates for some services above cost, and some services below cost, can be compensatory as a whole (Tr. at 37). But in this circumstance, where retail services are subject to competition, the company cannot be required to "set its rates for competitive services at above cost, above market levels" in order to "cross-subsidize" below-cost regulated

---

[19] Citing Brooks-Scanlon, 251 U.S. at 399; Smith v. Ill. Bell, 282 U.S. at 160-161; Mich. Bell, 257 F.3d at 594.

rates, i.e., UNE rates, Verizon argues (id. at 37-39, 85). Instead, Verizon states, "UNE rates on their own must provide just and reasonable compensation" (Reply at 7-8).

Third, Verizon asserts that the CLECs' argument that if the UNE rates are inadequate, Verizon can make up the shortfall in its retail rates is backward. Rather, Verizon claims, as UNE rates are lowered, CLECs can undercut Verizon's rates to gain customers, and Verizon will lose retail revenue as well. Further, if Verizon tries to raise retail rates to make up the shortfall, it will lose even more customers to CLECs and the "'death spiral' will only accelerate" (id. at 6-7; Tr. at 38-39).

Fourth, Verizon argues that the Supreme Court has foreclosed the argument that a challenge to UNE rates can only be considered in a global rate proceeding, noting that "a takings claim could be brought for a 'particular, actual TELRIC rate' on the ground that it is confiscatory." Verizon Communications v. Federal Communications Comm'n, 535 U.S. at 524. The Supreme Court further stated that once a state has set specific UNE rates, "those rates are subject to challenge on the basis that they fail to provide adequate compensation." Id. (Tr. at 16-17, 30-33). Thus, Verizon asserts, specific UNE rates, not overall rate structures, are an appropriate focus of a takings claim (Reply at 9; Tr. at 17, 31-33).

Finally, Verizon argues that opposing parties' claim that historical costs are an improper measure for determining if rates are confiscatory need not be resolved in the disposition of this motion (Reply at 9; Tr. at 40-41). For now, Verizon asserts, it is sufficient that its proffered evidence is relevant to the constitutional claims it seeks to have heard

(Reply at 9). Then, if the merits of its claims are reached in a reopened record, Verizon states, in order to determine confiscation, the UNE rates must be evaluated "against an objective constitutional benchmark," and, according to Verizon, that benchmark is Verizon's historical costs and actual operating expenses for providing UNEs (Tr. at 35-36). Although historical investment need not be taken into account in ratemaking formulas, it may need to be considered in assessing the constitutionality of the consequences of those formulas, Verizon contends (Motion at 7; Reply at 9).[20] According to Verizon, the "principle that a public utility is entitled to charge rates that meet its cost of service, including a fair and reasonable return" means Verizon is entitled to recover its actual historical investment costs (Reply at 9; Tr. at 35).[21]

Verizon asserts that the Department has both the obligation and the jurisdiction to consider Verizon's constitutional claims, and failure of the Department to reopen the record for its own review and "for subsequent review in the courts" would be reversible error (Motion at 9; Reply at 2-3; Tr. at 33-34, 42-44, 87-88). While acknowledging that it could have appealed after the Department's final ruling in the proceeding, Verizon states that it should not have to resort to judicial review to have its claim heard (Motion at 4). Verizon asserts that the Department is obligated to hear its claim because:

---

20 Citing Duquesne, 488 U.S. at 317 (Scalia, J., White, J., O'Connor, J., concurring); Verizon Communications v. Federal Communications Comm'n, 535 U.S. at 527 n.37 (quoting Duquesne, 488 U.S. at 317).

21 Citing Hingham, 433 Mass. at 203.

> When a regulated entity presents serious allegations that rates may result in a taking, it is beyond dispute that the agency must consider those allegations and look at the relevant evidence, and failure to do so constitutes reversible error. Parties have a constitutional right to have adequate compensation awarded at the time of the taking, and cannot lawfully be forced to await appeal, or some later action, in order to present a takings claim (id.) (emphasis in original) (internal citations omitted).[22]

According to Verizon, the Massachusetts Supreme Judicial Court ("SJC") has stated that, when a party claims rates are confiscatory, new evidence should be considered because violation of the Constitution is at stake (Motion at 3-4; Reply at 2).[23] Moreover, Verizon states, judicial decision of Verizon's claim will involve federal district court review of the Department's decision, and the court will need a "proper record to decide the takings issue" (Reply at 11; Tr. at 34, 88). Verizon is now "seeking to create that record," as an insufficient record for review would necessitate a remand by the court for further factual development (Reply at 11; Tr. at 34, 43, 88).[24] Thus, the availability of a court appeal "is a reason to ensure that a proper factual record is created, not ... a reason to decline to take the evidence," Verizon argues (Reply at 11-12).

---

[22] Citing Jersey Cent. Power and Light Co. v. FERC, 810 F.2d 1168, 1176-1179 (D.C. Cir. 1987) (agency may not refuse to consider serious allegations that rates result in taking); Preseault v. ICC, 494 U.S. 1, 11 (1990) (Constitution requires "'reasonable, certain, and adequate provision for obtaining compensation' at the time of the taking") (quoting Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 124-125 (1974)).

[23] Citing Boston Gas Co. v. Dep't of Pub. Utils., 359 Mass. 292, 299 n.8 (1971) (quoting Opinion of the Justices, 328 Mass. 679, 690 (1952)).

[24] Citing United Mine Workers of Am. v. Dole, 870 F.2d 662, 673 (D.C. Cir. 1989); Fla. Power and Light Co. v. Lorion, 470 U.S. 729, 744 (1985); Beach Communications, Inc. v. FCC, 959 F.2d 975, 987 (D.C. Cir. 1992); Zussman v. Rent Control Bd. of Brookline, 371 Mass. 632, 636 (1976).

Furthermore, despite CLECs' claims to the contrary, the Department has jurisdiction over Verizon's confiscation claim because it is a proper forum and the claim is ripe for consideration, Verizon asserts (id. at 12; Tr. at 15-17). Verizon contends that a takings claim regarding regulated rates is ripe when the agency has made a final rate determination and administrative remedies have been exhausted (Reply at 13; Motion at 3; Tr. at 15-16).[25] According to Verizon, its proper remedy is to seek a change in the final rate at issue; not, as MCI and AT&T assert, to seek "external" compensation by asking the Department to reopen other rate proceedings such as D.T.E. 01-31 (Reply at 13-14). Where UNE rates are involved, Verizon adds, the Supreme Court has stated that once a state has set the specific rates, "those rates are subject to challenge" on grounds that they fail to provide adequate compensation (Motion at 3; Tr. at 16-17. 32-33). Verizon concludes that, because the Department has set final rates that have gone into effect, it must reopen the record to permit Verizon to present its evidence that the rates are confiscatory (Motion at 3, 8; Tr. at 16-17, 33).

Verizon asserts that the Department has jurisdiction to hear its claim because the Department accepted jurisdiction to determine UNE rates under Section 252 of the

---

[25] Citing Duquesne, 488 U.S. at 307; Hope Natural Gas, 320 U.S. at 605; Ill. Bell Tel. Co. v. FCC, 911 F.2d 776, 780 (D.C. Cir. 1990); Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 194 (1985) (taking claim is not ripe until government entity charged with implementing regulations has reached final decision regarding application of the regulations to the property at issue); Daddario v. Cape Cod Comm'n, 425 Mass. 411, 415 (1997) (takings claim should be considered when there is final and authoritative decision from which court can determine whether a regulation has "gone 'too far'"); Commonwealth v. Blair, 60 Mass. App. Ct. 741 (2004).

Telecommunications Act, and it is the Department's particular rates that it seeks to challenge (Reply at 12; Tr. at 42-44).[26] MCI's arguments on jurisdiction are "plainly wrong," Verizon argues (Reply at 12). First, Verizon counters, MCI asserts that the Hobbs Act deprives the Department of jurisdiction, but in fact the Hobbs Act gives the federal court of appeals exclusive jurisdiction to review the lawfulness of FCC orders (id.).[27] In this case, such a review has "already been done" in Verizon Communications v. Federal Communications Comm'n, 535 U.S. at 523, in which the Supreme Court ruled on the FCC's adoption of TELRIC (id.). Here, Verizon seeks relief from the Department's rates, not the FCC's TELRIC order (id.).

Regarding MCI's argument that Verizon's takings claim may only be brought before the FCC or a federal district court, Verizon contends that the Supreme Court did not suggest that there were "exclusive" mechanisms for challenging rates as confiscatory (id.).[28] Verizon argues that the FCC is not, in fact, an appropriate venue at all (Tr. at 19-24, 32-33). According to Verizon, the FCC can only address TELRIC on a "methodological" or "systemic" basis, as it has in the Local Competition Order and is doing prospectively in the TELRIC NPRM; it cannot, and "doesn't have the jurisdiction to," address the confiscatory nature of particular rates set by a state commission and "adjust them to make them

---

[26] Citing Jersey Cent. Power, 810 F.2d 1168.

[27] Citing Pacific Bell v. Pac-West Telecom, Inc., 325 F.3d 1114, 1126 ($9^{th}$ Cir. 2003).

[28] Citing Verizon Communications v. Federal Communications Comm'n, 535 U.S. at 534.

constitutionally adequate. That is something which only this [state] Commission can do, because this Commission has the power to set the UNE rates" (Tr. at 22, 32-33).

Meanwhile, the availability of court review does not preclude, but rather assumes, development of a proper factual record by the Department, Verizon reiterates (Reply at 13). Because the Department accepted the delegation to set UNE rates under the Telecommunications Act, pursuant to 47 U.S.C. § 252(e)(6), the constitutional challenge to the Department's rates would go to a federal district court, and "where there haven't been specific detailed findings from the commission that implemented or established the rates, the case … gets remanded back to the state commission to make specific detailed findings on the financial impact on the company" (Tr. at 42-44). Verizon asserts that if it appealed directly to federal district court, besides risking dismissal of its claim for failure to exhaust administrative remedies with the Department, remand to develop the factual record on the takings issue would be an "inevitable result" (id. at 33-34).

Finally, in response to the other parties' comments, Verizon emphasizes that the only issue now before the Department is whether to reopen the record, not to litigate Verizon's confiscation claims and decide them on the merits (Reply at 1, 4; Tr. at 40-41, 82, 84). The opposing parties' assertions regarding takings law are beside the point in this procedural motion, Verizon states; the appropriate time for CLECs to analyze Verizon's proposed evidence and present alternative evidence is after the record is reopened (Reply at 10). In deciding this Motion, it is sufficient that Verizon's proffered evidence "raises serious questions" about the constitutional adequacy of the new UNE rates (id.; Tr. at 17, 40-41).

Hence, Verizon claims, its Motion meets the Department's standard for reopening the record: it raises information that both was unknown to the company prior to the Department's finalization of UNE rates, and is relevant to a material issue, whether the rates comply with the federal and state constitutions (Reply at 2, 4, 10; Tr. at 14-17). Lastly, with regard to AT&T's Cross-Motion to Strike the West/Prosini testimony and cost studies, Verizon argues that AT&T's cross-motion should be denied because the inclusion of its proffer of evidence with Verizon's Motion to Reopen is proper and useful to the Department and parties in determining whether Verizon has met the standard to reopen the record (Reply at 14 n.6).

B. AT&T

AT&T urges the Department to deny Verizon's Motion because, as a threshold matter, the Motion and proffered evidence do not provide sufficient showing that the confiscation claim should be considered on the merits, and the Department cannot grant the relief Verizon seeks (AT&T Opposition at 1-5; Tr. at 45-46, 51-53, 62-63, 67, 89-94). Thus, the Motion is "both procedurally and substantively without merit" and fails to meet standard for reopening the record, AT&T asserts (AT&T Opposition at 1). Furthermore, AT&T notes, after the Consolidated Arbitrations proceeding, the Department refused a similar request by AT&T to re-evaluate UNE rates that AT&T claimed were "not commercially viable"; instead, the Department set a "presumptive rule" in D.T.E. 98-15 that the Department "would not revisit UNE rates more than once every five years" (Tr. at 48).

Even if Verizon's proposed evidence is accurate, AT&T argues, it would not support a finding of confiscation, because a confiscation claim cannot be based on a "narrow slice of the business" (AT&T Opposition at 10; Tr. at 51-57). A confiscation claim cannot be pursued "if it is clear on the face of the claim that if all of the allegations were proven the relief still couldn't be granted," AT&T maintains (AT&T Opposition at 5; Tr. at 62-63). Therefore, AT&T contends, because Verizon's proffered evidence would be inadequate to make out a takings claim even if true, Verizon has not proven that its proposed evidence would be sufficient to support any change in the Department's decision in the case, as required by the standard of review (AT&T Opposition at 5; Tr. at 53-56, 62-63, 89-94).

AT&T further asserts that Verizon's Motion fails to meet the Department's standard of review not only because the proposed evidence is insufficient to have a significant impact on the decision, but also because Verizon has failed to prove that it was unable to present its proposed new evidence before the Department made its final decision in this proceeding (AT&T Opposition at 5, 16). Verizon's claim that it could not have introduced its proposed evidence earlier has no merit, AT&T contends. While Verizon may not have known the specific rates that would be set, it knew, from the outset of the case, that the rates set would be TELRIC-based and that its historic costs would not be considered (AT&T Opposition at 16; Tr. at 92). AT&T asserts that, according to Verizon's current reasoning, the rates Verizon itself proposed at the beginning of this proceeding would be confiscatory[29] (AT&T Opposition at 16; Tr. at 92). If the arguments Verizon raises in its Motion had merit, AT&T states,

---

29 AT&T calculates that the rates Verizon originally proposed would have produced a UNE-P charge of approximately $29 per month; Verizon now states it costs about $40 a month to provide UNE-P (AT&T Opposition at 16).

"Verizon could, and hence should, have raised them and proffered supporting evidence at any time during this proceeding" (AT&T Opposition at 16).

AT&T argues that Verizon's Motion fails to make a viable confiscation claim and therefore its appropriate recourse is to the courts, because: (1) the Department cannot grant the relief Verizon seeks; the relief sought violates state and federal law regarding the TELRIC method of setting UNE rates, which does not permit consideration of historical costs; and (2) a confiscation claim cannot be heard in a rate case looking at only a portion of Verizon's business or single set of customers; rather, a confiscation claim can only be considered through analysis of Verizon's overall costs, rates, and revenues (id. at 1-2, 10-11; Tr. at 51-53, 60-62, 89-94).[30] Such a rate of return case would have to "revisit all of the conclusions" the Department reached in Alternative Regulation Plan, D.T.E. 01-31-Phase I (2002), D.T.E. 01-31-Phase II (2003), and, thus, Verizon's Motion and confiscation claim are inconsistent with, and amount to a collateral attack on, the Department's findings in that docket (AT&T Opposition at 3-4; Tr. at 50-52).

Regarding the first point, AT&T asserts that the Department cannot lawfully set UNE rates above TELRIC-compliant levels (AT&T Opposition at 6-7). For the Department to grant the relief Verizon seeks, i.e., to increase its UNE rates, would be unlawful, AT&T states, as the Department would violate its statutory obligation to set UNE rates that comply with the Telecommunications Act and TELRIC, and not on any other basis (id.; Tr. at 46, 69-70).

---

[30] Citing Alternative Regulation Plan, D.T.E. 01-31-Phase II, at 68-72 (2003); New England Telephone and Telegraph Company, D.P.U. 84-267 (1985); Cambridge Electric Light Company, D.P.U. 490 (1981).

Neither the Act nor TELRIC methodology permit consideration of rate of return in setting UNE rates (AT&T Opposition at 6).[31] Verizon's argument that the Telecommunications Act's reference to "just and reasonable rates" entitles it to recover historical costs is "the very claim that, in Verizon versus FCC, the Supreme Court rejected," AT&T asserts (Tr. at 56, 91, citing Verizon Communications v. Federal Communications Comm'n, 535 U.S. 467). Rather, rates must be "just and reasonable without regard to historic rate-of-return-regulation-type law," AT&T states (Tr. at 91). Thus, according to AT&T, contrary to Verizon's theory that confiscation occurs if TELRIC rates do not permit it to recover its historic investment, the Supreme Court has determined that, under TELRIC ratesetting, "that's not confiscation" (id. at 56).

In sum, AT&T states that the Department "does not have the option of setting some other kind of rate" for UNEs (Tr. at 46, 67). "This does not mean that the Department cannot consider the adequacy of Verizon's rate of return on investment: it means only that it cannot undertake an investigation into that adequacy as a basis for setting UNE rates" (AT&T Opposition at 6-7; see Tr. at 67-68, 93).

Regarding its second point, AT&T argues that Verizon's takings claim also cannot succeed on the merits because its proposed evidence does not show that its overall rates have the total effect of denying Verizon the ability to earn an economic return on its network (AT&T Opposition at 7; Tr. at 56-57). Verizon's confiscation claim would remain unfounded

---

[31] Citing 47 U.S.C. § 252(d)(1)(A) (barring setting UNE rates "by 'reference to a rate-of-return or other rate-based proceeding'").

even if it could prove its UNE rates are set below historic costs, AT&T argues, because requiring a public utility to provide certain services at rates below some measure of cost does not constitute a taking if the company can earn an acceptable return on its overall business (AT&T Opposition at 8, 11-12; Tr. at 51-53, 56-57, 60-62). Verizon's claim that its return on investment is unreasonably low cannot be evaluated by looking at only a portion of Verizon's business or single set of customers; rather, a confiscation claim can only be considered through analysis of Verizon's overall costs, rates, and revenues, AT&T contends (AT&T Opposition at 10-11).

If Verizon had a legitimate claim that its overall return is too low, the only way for the Department to address it would be in a broad rate-of-return and cost-of-service investigation, AT&T asserts (AT&T Opposition at 1-5; Tr. at 45, 51, 67, 93-94). AT&T contends that Verizon's proposed evidence is irrelevant, because Verizon's claim that its average cost of providing UNE-L or UNE-P exceeds its per unit revenues, even if accurate, cannot be the basis of a finding that its overall return is so low as to constitute a taking (AT&T Opposition at 8, 12). To satisfy its burden of proof, Verizon would have to show that its overall rates do not permit it to earn a fair return; i.e., that the "total effect" is unreasonable (id.; Tr. at 56-57).[32] A public utility may be required to provide particular services at non-compensatory rates, and, as long as it makes a profit on its overall business, the utility

32 Citing Mass. Elec. Co. v. Dep't of Pub. Utils., 376 Mass. 294, 299 (1978); Automobile Insurers Bureau of Mass. v. Comm'r of Ins., 420 Mass. 599, 612-613 (1995).

cannot make out a claim that its property was taken without just compensation, AT&T states (AT&T Opposition at 8-9; Tr. at 61, 90).[33]

Rates for service "'provided by a regulated public utility must allow a fair rate of return for investors on the value of the property used in providing those services,'"[34] and, in this case, the "property as a whole" is Verizon's network, AT&T asserts (AT&T Opposition at 9-10; Tr. at 56-57). Verizon uses the same physical network to provide all of its services; it "does not have a UNE network that it uses just for UNEs, and another network for other things. It has a network," AT&T states (Tr. at 56-57). Nor does Verizon have a separate set of investors for its wholesale UNE business (AT&T Opposition at 9-10).

A public utility's confiscation claim must be proven with regard to the utility's "entire rate base," AT&T asserts (id.; Tr. at 60-62).[35] Where only a portion of its total rates or a "narrow slice of the business" are alleged to be set below cost, the utility has failed to state an actionable takings claim (AT&T Opposition at 9-10; Tr. at 53, 60-61). Verizon has invested in a network used to provide multiple services, and it receives constitutionally adequate

---

33 Citing Baltimore and O.R. Co. v. United States, 345 U.S. 146, 147-150; Pan American World Airways v. Civil Aeronautics Bd., 256 F.2d 711, 712 (D.C. Cir. 1958); Brooklyn Eastern District Terminal v. United States, 302 F.Supp. 1095, 1100 (E.D.N.Y. 1969); Northwestern Pacific R.R. Co. v. United States, 228 F.Supp. 690 (N.D. Cal. 1964); Southern Pac. Co. v. Pub. Utils. Comm'n, 260 P.2d 70 (Cal. 1953, en banc); Guam v. Fed. Maritime Comm'n, 329 F.2d 251, 254 (D.C. Cir. 1964).

34 Hingham, 433 Mass. at 205.

35 Citing Lake of the Woods Util. Co. v. State Corp. Comm'n, 286 S.E.2d 201, 205, 206 (1982).

compensation as long as its rates, in the aggregate, produce a sufficient rate of return, AT&T contends (AT&T Opposition at 9-10; Tr. at 51-57).

Verizon seeks to ignore retail revenues while declaring UNE rates to be confiscatory, but the Department rejected such an approach in D.T.E. 01-31, AT&T states (id. at 11; Tr. at 51-52).[36] Nor can such an approach be squared with past regulatory practice in the telecommunications industry, AT&T adds, noting that telecommunications carriers have been required to provide some lines of service at rates below historic or incremental costs, with the understanding that they would be made whole through profits on other lines of business (AT&T Opposition at 11-12; Tr. at 61).

AT&T further argues that Verizon cannot demonstrate that any deficiency in its overall return on investment is due to the UNE rates (AT&T Opposition at 7, 12-13; Tr. at 72).[37] If Verizon's rate of return is too low, "it cannot blame that fact on UNEs," because Verizon's proposed evidence, according to AT&T, demonstrates an average revenue shortfall for lines served on a retail basis greater than for lines served on a UNE basis[38] (AT&T Opposition at 3;

---

36 Citing D.T.E. 01-31-Phase I, at 99; D.T.E. 01-31-Phase II, at 70 ("conducting a cost-of-service analysis 'for only one set of Verizon customers' would have the very real danger of facilitating the ability of Verizon 'to cross-subsidize competitive services with revenues from regulated services'").

37 Citing Automobile Insurers Bureau, 420 Mass. at 612-613 (deficiency in returns must be shown to be "solely the result of the rate-setting and not of other factors").

38 While Verizon claims that the retroactive application of new UNE rates to August 2002 will reduce its 2002 return on Massachusetts operations to 3.29 percent, AT&T calculates the return would be just 3.88 percent if the UNE rates were unchanged (AT&T Opposition at 13, citing West/Prosini testimony, Att. A at 3 (Tab 43-01)).

Tr. at 51, 72). UNEs are "a very small portion of all the revenue-producing services" Verizon provides,[39] AT&T states, and Verizon fails to account for recently approved increases in its basic residential rates, or its newly approved upward pricing flexibility for retail business services (AT&T Opposition at 13-15, 17, citing D.T.E. 01-31-Phase I, Phase II). If low rates for Verizon's retail offerings are keeping Verizon's return down, AT&T asserts, Verizon has only its own pricing and marketing decisions to blame. It cannot demand that its wholesale rates be raised to recover the alleged revenue shortfall when its retail rates are below historic cost (id. at 14, 15). Rather, the Department has found that "a cost-of-service, rate-of-return analysis only makes sense" if revenues are considered in the aggregate, AT&T states (id. at 15; Tr. at 51-52).[40]

The Department cannot properly address the merits of Verizon's claims by reopening a case that addresses only one set of rates, AT&T asserts (AT&T Opposition at 16, 17). Rather, the only way to meaningfully evaluate Verizon's claims is to conduct a "full blown investigation into Verizon's rate of return" (id. at 17). AT&T concludes that such a proceeding would pose a substantial burden for the Department and all parties involved, and it would be an entirely different type of proceeding with a different form of relief than a reopened UNE "confiscation" proceeding (AT&T Opposition at 16-17; Tr. at 68). Moreover,

---

39 AT&T calculates that Verizon sold no more than five percent of its network capacity as UNEs in 2002 (AT&T Opposition at 13, citing West/Prosini Testimony, Att. A at 8 (Inputs), 14 (UNE Forecast)).

40 Citing D.T.E. 01-31, at 69-70 ("the Department found that 'conducting an embedded cost-of-service study today for only one set of Verizon customers would be difficult, and, more importantly, would not produce an economically rational result'").

even if the Department were to undertake a rate case in response to Verizon's Motion, AT&T concludes, "the relief that the Department would be able to grant would not extend to setting UNE rates not based on TELRIC" (Tr. at 67). Lastly, with its Opposition, AT&T includes a Cross-Motion to Strike the West/Prosini testimony and cost studies and all references to them in Verizon's Motion. AT&T argues that it was improper for Verizon to submit as proposed evidence unsworn testimony and alternative cost studies, because unfair prejudice can result from unauthorized presentation of extra-record evidence (AT&T Opposition at 18-19).

C. MCI

MCI opposes Verizon's Motion to Reopen on grounds that: (1) it is untimely; (2) the Department lacks jurisdiction to entertain Verizon's takings claim; (3) Verizon's claims are premature, as it has not taken other measures to remedy its claimed financial distress; and (4) Verizon fails to make a prima facie showing of a taking (MCI Opposition at 1).

MCI asserts that Verizon's claim that it could not calculate its shortfall until final rates were adopted is not credible (id. at 4). When the Department issued the July 11, 2002 UNE Rates Order, MCI and other parties, just like Verizon, were able to use the cost models and inputs adopted in the proceeding to generate the new UNE rates long before Verizon's final Compliance Filing; and thus Verizon was "well aware" of the resulting rates in time to formulate its motion for reconsideration (id. at 3). Yet, although Verizon argued in its reconsideration motion that the UNE Rates Order would drive rates below forward-looking TELRIC costs, at the time Verizon made no claim that the rates constituted an unconstitutional taking (id. at 3-4). According to MCI, the proper time to raise the takings claim was a motion for reconsideration, and having failed to properly preserve the issue, Verizon cannot allege the existence of previously unknown "new evidence" as good cause to reopen the record (id. at 4-5).

In any case, MCI continues, the Department lacks jurisdiction to grant the relief Verizon requests - i.e., to raise its UNE rates, even if they were determined by proper application of the TELRIC methodology – because the FCC's TELRIC regulations, upheld by the Supreme Court in Verizon Communications v. Federal Communications Comm'n, are binding on all state commissions, must be applied as written, and preempt all inconsistent state policies and laws (id. at 5-7).[41] Raising UNE rates above levels consistent with TELRIC (and thus, with the Telecommunications Act and FCC regulations) would constitute reversible error, MCI asserts (id. at 7).

MCI emphasizes that "[u]nder no circumstances … is the Department authorized to hear Verizon's takings claim" (id. at 9). MCI asserts that the Department's delegated authority to determine UNE rates ended with its rejection of the higher rates Verizon proposed and adoption of TELRIC-based rates; the question of whether TELRIC-compliant rates may effect a taking is "exclusively the domain of the FCC and the federal courts" (id. at 7). MCI

---

41 Citing US West Communications, Inc. v. Hamilton, 224 F.3d 1049, 1055 (9th Cir. 2000); GTE South, Inc. v. Morrison, 199 F.3d 733, 742-743 (4th Cir. 1999) (Hobbs Act requires state commissions to apply FCC's regulations as written); Pacific Bell, 325 F.3d at 1126 n.10 (under Telecommunications Act, state commissions are "deputized" Federal regulators confined to the role the Act delineates); MCI Telecom Corp. v. Bell Atlantic-Pa., 271 F.3d 491, 516 (3d Cir. 2001) (any state commission determination that deviates from FCC regulation must be struck down); 47 U.S.C. § 261(c) (preserving state authority insofar as its exercise is not inconsistent with the Act or FCC regulations); 47 U.S.C. § 253(a).

delineates the proper procedure for Verizon to undertake as follows. First, venue for Verizon's takings claim would properly lie with the FCC, which may grant relief from TELRIC rules upon a showing that their application will result in confiscatory rates (id. at 8).[42] If the FCC were to deny relief, Verizon could either file an action in the United States Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1), seeking compensation from the federal government for the federal agency's unconstitutional pricing method; or, it could bring a takings claim in the appropriate federal court pursuant to 28 U.S.C. § 1331 or judicial review provisions of the Telecommunications Act, 47 U.S.C. § 252(e)(6) (id. at 8-9).

Regardless of the procedure, however, MCI argues that Verizon's claim would be premature in any forum, because Verizon has not exhausted its state administrative remedies – such as seeking modifications to retail pricing flexibility in its D.T.E. 01-31 Alternative Regulation Plan that would allow it to recover its alleged revenue shortfalls; utilizing the structure of the current plan to increase rates for other services; or requesting a general increase in rates by filing a traditional rate case (id. at 9-12). Because Verizon has these options to address revenue deficiencies if it were "truly at a point where its financial integrity was being substantially compromised," its takings claim is not ripe for review in any forum, MCI argues (id. at 12).

Finally, MCI asserts that Verizon, with its proffered evidence that the new UNE rates will not permit it to recoup historical investment, has not made the requisite showing to prove

---

42 Citing Verizon Communications v. Federal Communications Comm'n, 535 U.S. at 528, n.39; 47 C.F.R. § 1.3 (permitting petition to FCC for waiver of its rules); Local Competition Order at ¶ 739.

a taking, "even if [the evidence] is true – and it is not" (id. at 12-13). According to MCI, the Supreme Court has determined that loss of historical investment is irrelevant to a takings analysis, particularly in the context of UNE rates, which are to be based on forward-looking costs (id. at 13-14).[43] To show a regulatory taking in the UNE context, Verizon must meet a high burden of proving that the "total effect" produced by the UNE rates, the extent of competitors' leasing of UNEs, and the "offsetting impact of other revenue" have threatened its financial integrity or ability to attract capital (id. at 14).

MCI argues that Verizon's proffered evidence fails to demonstrate any threat to its financial integrity.[44] MCI asserts that measurement of the "'total effect' of any purported taking" must take into account the various means by which Verizon generates revenue; and

---

[43] Citing Verizon Communications v. Federal Communications Comm'n, 535 U.S. at 489, 495-496, 511-512.

[44] In support of this argument, MCI states that:

(1) using Verizon's figures, a $20 million reduction in 2002 earnings (due to the new UNE rates), compared to its average net investment of $3.36 billion, would result (under the Department-set UNE rates) in a loss of average net investment, or total rate base, of 0.58 percent (id. at 13, citing West/Prosini testimony at 22).

(2) Verizon's most recent Form 10-K filed with the Securities and Exchange Commission ("SEC") reported a 2002 net income of $233.2 million; to allege that a $20 million loss would threaten Verizon's financial integrity is "absurd" (id. at 15).

(3) Verizon's claim that, with the new UNE rates, its 2002 return on average net investment would be 3.29 percent "says nothing" about Verizon's financial integrity; its return on average net investment for 2002 before the Department's UNE rates determinations was 3.87 percent (id., citing West/Prosini testimony at 22).

must consider the factors, in addition to UNE rates, affecting Verizon's return on investment, such as "its form of regulation, economic conditions, the reduction in first and second access lines due to competition from wireless and cable modem services, and the impact of wireless competition on toll revenues" (id. at 15-16).[45] Investors look at total revenues in assessing financial integrity, MCI asserts, and likewise, the Department, Supreme Court, and FCC will look at "Verizon's bottom line, not at prognostications of returns on individual UNEs and services" (id. at 16-17). In conclusion, MCI states that there would be "no point in litigating" Verizon's new cost studies, because Verizon has not acted to improve its financial condition, and further, its financial condition is not materially affected by the new UNE rates (id. at 18).

D. XO

XO opposes Verizon's Motion to Reopen, stating that Verizon fails to meet its heavy burden of showing good cause, first, because Verizon's Motion is untimely; and second, because the Motion fails substantively. Verizon knew, XO contends, that TELRIC rates would be different from rates based on historical costs, and cannot "claim that this is a new revelation" (XO Opposition at 1). XO points out that, not only were the TELRIC rates discernible from the record during the extensive proceeding, but Verizon's own proposed rates were significantly less than what Verizon now claims it needs to avoid confiscation (id. at 3;

---

[45] Citing Local Competition Order ¶ 739; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; and Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, at ¶ 167 (rel. Aug. 21, 2003) ("Triennial Review Order").

Tr. at 76-77). Verizon could have raised the financial implications of TELRIC-based rates earlier in the proceeding, and thus, XO states, the time for Verizon to raise a confiscation claim is long past (XO Opposition at 1, 3; Tr. at 76).

In addition, XO argues that Verizon's confiscation claim is improper substantively. XO contends that, while the Department is bound to implement TELRIC-based (i.e., forward-looking) UNE rates, Verizon bases its confiscation claim on historical costs - "which is the basis upon which UNE rates are not to be set" (XO Opposition at 2, 4).[46] Verizon's Motion constitutes a "backdoor attack on the TELRIC methodology" that the Department lacks authority, under federal law, to consider, XO asserts (id. at 4-5).

Further, XO contends, Verizon's Motion amounts to a petition seeking impermissible "single issue" rate relief (id. at 3). XO states that a proper inquiry in a confiscation claim involves review all of a company's costs, rates and revenues, not just a "subset," in order to assess whether the rates set deprive the company of a "fair and reasonable return" and jeopardize its financial integrity by leaving it insufficient operating capital or ability to raise future capital (id. at 2). XO notes that such an inquiry here would be burdensome, unnecessary, and contrary to the Department's recent decision to move away from this type of inquiry in granting Verizon retail pricing flexibility in D.T.E. 01-31 (id. at 2-3). Given this flexibility, XO asserts, "one might infer that Verizon is seeking a competitive advantage by refraining from raising rates for other services that it could raise" to mitigate its claimed revenue shortfall (id. at 3, 5).

---

[46] Citing Verizon Communications v Federal Communications Comm'n, 535 U.S. at 467.

Finally, XO argues that denial of Verizon's Motion would serve the public interest (Tr. at 75). In balancing the interests of Verizon and its competitors, the Department, and the public, XO asserts, there is a clear interest in finality, after all parties have expended time and resources in the lengthy UNE proceeding, and there is an interest in encouraging competition (id. at 80). XO maintains that the higher UNE prices Verizon seeks would have the effect of reducing competition, and "the interest of competition" weighs against reopening the record in this UNE proceeding, on which CLECs have already relied to make business plans, investments, and other decisions (Tr. at 74-75, 80). XO thus disputes Verizon's claim that no prejudice would result from reopening the record (XO Opposition at 1, 4). According to XO, the wait for implementation of new UNE rates due to the lengthy Department proceeding "exacerbated … well-known financing pressures" on CLECs (id. at 4). XO expects that, should Verizon's Motion be granted, Verizon will argue to defer implementation of the newly set rates (id. at 1-2). Any such delay, XO asserts, would cause "obvious harm" for CLECs for whom UNE rates are a significant cost (id. at 2). Further, many CLECs might not have the resources to participate in another UNE case immediately following the two-and-a-half year effort just completed (Tr. at 74-75). XO concludes that it may violate "prudent caution to so soon revisit UNE rates that were established after all that effort" in this proceeding (id.).

## IV. ANALYSIS AND FINDINGS

### A. Verizon's Motion to Reopen the D.T.E. 01-20 Record

#### 1. Summary of Conclusions

The Department's standard of review requires that good cause be shown to reopen a closed evidentiary record. The Department has defined good cause for purposes of reopening as a showing that the movant has "previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the decision." See D.P.U. 87-AD-12-B at 4-7; D.P.U. 88-67-Phase II, at 7; D.P.U. 85207-A at 11-12. In order to rule on Verizon's Motion to Reopen the Record in D.T.E. 01-20 to receive parties' evidence and argument on Verizon's confiscation claim, the Department must determine whether Verizon has met the burden imposed by our standard of review, particularly with regard to whether we may, given the mandated TELRIC standard, conduct further UNE rates proceedings on the basis of Verizon's proposed evidence supporting its claim of confiscation.

While we agree with Verizon that, according to the Supreme Court's decision in Verizon Communications v. Federal Communications Comm'n, 535 U.S. 467 (2002), a confiscation claim regarding TELRIC rates is ripe when there are specific rates for review (see Tr. at 17, 32-34), we do not conclude (nor did the Supreme Court suggest) that a state commission is the appropriate forum for this review in the first instance.[47] Because federal law

---

[47] As discussed further in the following sections, the Supreme Court identified two methods for confiscation-related review of state commission-set UNE rates: (1) federal district court, pursuant to the Act; and (2) the FCC, pursuant to the Local Competition Order. 535 U.S. at 524, 528 n.39.

requires that state commissions establishing UNE rates must use the TELRIC method (see 535 U.S. 467; see generally Local Competition Order; 47 U.S.C. § 252(d)(1)(A)(i); see also TELRIC NPRM at ¶¶ 29, 37 (affirming use of TELRIC method for setting UNE rates)), Verizon's proffered evidence of confiscation, using historical cost data that would be precluded from a TELRIC investigation, does not provide a basis for further UNE rates proceedings before the Department. Therefore, we conclude that Verizon has not met the Department's standard of review to reopen the record in our UNE rates investigation. In so ruling, we do not leave Verizon without a remedy, as Verizon has other means, pursuant to federal and state law, to pursue its confiscation claim. We explain these conclusions in the following sections.

### 2. The TELRIC Requirement

In order to determine whether Verizon has met the Department's standard to reopen the record, we first look to the scope and governing law of the D.T.E. 01-20 investigation. In the UNE Rates Order, we explained at length that our proceeding was governed by the FCC's TELRIC methodology, and that we would not take a results-driven approach in applying TELRIC principles. See UNE Rates Order at 13-27. At the outset, we noted that the Supreme Court had recently approved TELRIC as the proper method for setting UNE rates, and that, although parties in the proceeding had disagreements as to "just what the [TELRIC] standard requires," all of the parties agreed that TELRIC was the required method to use in setting UNE rates. Id. at 15, 20. Furthermore, we stated:

> The Department's objective in this Order is to set UNE rates that most accurately reflect the TELRIC costs of particular UNEs. It is not to reach a biased outcome promoting either investment or UNE-based competition through either "high" or "low" UNE rates. ... We will not conclude that UNE rates are "wrong" or

> "illegal" if they do not provide a sufficient margin for market entry when compared to retail rates (which are not cost-based). Nor will we conclude that rates are wrong if CLECs decide that it is more efficient for them to enter the market using UNEs instead of building their own facilities. In addition, appropriately cost-based rates should compensate Verizon for its forward-looking costs, so that Verizon will have incentives to continue to invest in its network facilities.

Id. at 20 (internal citation omitted). Throughout the investigation, and post-UNE Rates Order reconsideration and compliance phases, the Department and all parties were aware that we were working within the confines of TELRIC, regardless of any party's opinion of the merits of the TELRIC method, and regardless of the results that TELRIC, properly applied, would produce; it was "undisputed in this proceeding that the proper method for setting UNE rates is the FCC's TELRIC methodology," and, in fact, we had no other option. UNE Rates Order at 20.

The Department conducted its UNE rates proceeding pursuant to the authority delegated to it in the Telecommunications Act;[48] and federal law requires the Department to set UNE rates using TELRIC, and not by any other method. The Supreme Court approved the use of the TELRIC method requiring state commissions to "set rates charged by incumbents for leased elements on a forward-looking basis untied to the incumbents' investment." Verizon Communications v. Federal Communications Comm'n, 535 U.S. at 475. The Department is bound by the Telecommunications Act and by the Supreme Court-approved TELRIC methodology the FCC established in interpreting the Act. Therefore, to conduct a UNE rates proceeding setting rates by another method (i.e., by taking into account Verizon's rate of

---

48 47 U.S.C. §§ 251, 252.

return and historical investment costs, as Verizon requests) would violate the federal law governing UNE rates[49] (see id.; AT&T Opposition at 6, citing 47 U.S.C. § 252(d)).

Moreover, we note that the Massachusetts Supreme Judicial Court ("SJC") has recently opined that a high level of deference is to be accorded a state commission in decisions made pursuant to delegated authority under the Telecommunications Act. The SJC concluded that, when a case requires "interpretation of a complex statutory and regulatory framework," its standard of review for petitions under G.L. c. 25, § 5 involves:

> "great deference to the department's expertise and experience in areas where the Legislature has delegated to it decision making authority." Stow Mun. Elec. Dep't v. Department of Pub. Utils., 426 Mass. 341, 344 (1997), quoting Wolf v. Department of Pub. Utilis., 407 Mass. 363, 367 (1990). Where the FCC has expressly delegated authority to the department, we have accorded deference to the department's interpretation of that delegation. MCI Telecom. Corp. v. Department of Telecom. & Energy, 435 Mass. 144, 151 (2001).

MCI WorldCom Communications Inc. v. Dep't of Telecom. and Energy, 442 Mass. 103, 112 (2004). The SJC suggested in that opinion that the Department's interpretation of an interconnection agreement pursuant to the Telecommunications Act required an even greater measure of deference to the state commission because "Congress has explicitly delegated authority to interpret and enforce interconnection agreements to the department."[50] Id.

---

49 Section 252(d)(1)(A)(i) of the Telecommunications Act provides that state commission determinations of the "just and reasonable rate" for UNEs be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the … network element."

50 Compare Pacific Bell, 325 F.3d at 1126-1127, 1126 n.10 (utilities commission precluded by Telecommunications Act from issuing generic order applicable to all interconnection agreements; Act grants the Federal government substantial
(continued…)

Verizon bases its argument for reopening the D.T.E. 01-20 record on the assertion that the Department has set the new UNE-P and UNE-L rates at levels so low that Verizon is unable to recover its historical investments and the costs of continuing to provide UNEs (Motion at 2, 6).[51] Verizon asserts that the UNE-P and UNE-L rates must be modified because they result in an unconstitutional taking, and must be replaced with rates that ensure Verizon's "financial integrity" (id. at 2, 4-8). However, because Verizon's assertion involves UNE rates, the Department could only address it within the confines of TELRIC, which prohibits

---

[50](...continued)
authority over intrastate matters specifically addressed in provisions of the Act, and state commissions are confined to the role the Act delineates); MCI Telecom Corp., 271 F.3d at 516 (interconnection agreement must comply with the Act and FCC regulations; if state commission's interpretation conflicts with FCC regulations, FCC interpretation must control under Supremacy Clause and under plain language of the Act). Thus, the federal courts in these cases concluded that a state commission was entitled to deference in interpreting the provisions of the Telecommunications Act only to the extent that the commission's interpretation complied with, or did not exceed, the commission's delegated authority under FCC regulations and the Act.

[51] In its Motion, Verizon also challenges the TELRIC-compliance of the UNE-P and UNE-L rates established in D.T.E. 01-20 by asserting that the rates are not "just and reasonable" as required by the Telecommunications Act (Motion at 2, 6), but Verizon combines this assertion with its takings claim:

> These rates suffer from an even more critical flaw than their failure to comply with TELRIC – they will not come close to allowing Verizon MA to recover its prudent historical investments and the associated real-world operating costs of providing UNEs to CLECs [id. at 2].
>
> The rates set by the Department not only fail to satisfy this [just and reasonable] test under the TELRIC standard, but are manifestly insufficient as a matter of state and federal constitutional law [id. at 6].

the use of the incumbent's historical costs in establishing UNE rates, as specified in Section 252(d)(1)(A)(i) of the Telecommunications Act. See UNE Rates Order at 13-27. Therefore, the Department cannot grant the relief Verizon requests by reopening the D.T.E. 01-20 record: in order to comply with the Department's delegated authority under the Act, we would be obligated to apply TELRIC again when establishing the "new" UNE-P and UNE-L rates.

In essence, Verizon is seeking to combine a confiscation claim with what Verizon believes are the failings of TELRIC. Arguing that TELRIC may be applied to produce a variety of results, as variances among different state decisions indicates, Verizon states that, of the Department's individual determinations that went into the final setting of the UNE rates, "[a]ny one of those decisions is potentially subject to change and potentially changing the outcome of that TELRIC rate," and further contends that "if the Department were to decide to change one or more of those decisions" the Department might "arrive at a constitutionally valid rate" (Tr. at 83-84). Such an argument cannot be the basis for reopening the record here. If, in its Motion to Reopen, Verizon were to directly challenge the rates as non-TELRIC-compliant, such a claim would amount to a second motion for reconsideration of the UNE Rates Order and would fail as procedurally improper.[52] Moreover, unless the

---

[52] In the reconsideration phase of this proceeding, Verizon did challenge the TELRIC-compliance of some of the Department's individual determinations in the UNE Rates Order, but did not address the issue whether the rates were confiscatory. As we discuss further below, Verizon may, of course, challenge the TELRIC-compliance of the Department's UNE rates on appeal, in addition to appealing on confiscation grounds.

Department is overturned on a yet-to-be-filed appeal, the matter of the TELRIC-compliance of the Department's UNE-P and UNE-L rates is a settled issue.[53] And, as AT&T notes, "that's not the basis for this motion" (Tr. at 88-89). Now that the Department has completed its investigation and all of the discrete determinations that comprised the UNE Rates Order and Reconsideration Order, and the time for challenging the TELRIC-compliance of those determinations before the Department has passed, Verizon's argument necessarily focuses on challenging the end result, on the theory that the rates, though TELRIC-compliant, are confiscatory (Tr. at 31-32). Again, because the Act and FCC regulations preclude the Department from setting UNE rates on a basis other than TELRIC, we can offer no remedy by reopening the record.

Verizon counters that, although the Supreme Court approved the TELRIC method for setting UNE rates, the Court left open the possibility that specific rates set by the TELRIC method could be challenged as confiscatory (Motion at 3, citing 535 U.S. at 467, 524). From this, Verizon concludes that it may bring a constitutional challenge to the Department-approved UNE-P and UNE-L rates that allows Verizon to present evidence to the Department regarding

---

53 Lawful rates remain in effect, whether under G.L. c. 159, § 14, or under G.L. c. 164, § 94. See Investigation by the Department of Telecommunications and Energy on its own Motion as to the Propriety of the Rates and Charges Set Forth in the Following Tariff: M.D.T.E. No. 17, filed with the Department on April 10, 2002, to become effective May 10, 2002, by Verizon New England, Inc. d/b/a Verizon Massachusetts, D.T.E. 02-26, Letter Order at 5 (May 9, 2002) (UNE rates set in Consolidated Arbitrations proceeding are TELRIC-compliant and the ongoing review in D.T.E. 01-20 does not change that status until a superseding order of the Department issues). Verizon did not seek a stay of the rates stamp-approved on July 16, 2003, therefore, those rates are in effect.

its historical investment costs – evidence that it could not present in a TELRIC proceeding (see Motion at 7; Reply at 9). Verizon further concludes that it is proper for the Department to hear the claim by reopening the record, because the Department is the entity that set the rates (Motion at 3; Reply at 4, 12; Tr. at 33). However, in anticipating challenges to state commissions' UNE rate orders, the Supreme Court noted that specific, actual TELRIC rates are to be reviewed in federal district courts, pursuant to the Telecommunications Act, or may be brought before the FCC, pursuant to the Local Competition Order. 535 U.S. at 524, 528 n.39.

Rather than explain how the Department could, contrary to TELRIC, address Verizon's historical costs in a reopened UNE proceeding, Verizon asserts that "the Department does not need to resolve this question on this motion" (see Reply at 9). Verizon argues that once the D.T.E. 01-20 record is reopened, the Department may then determine whether historical costs are an appropriate measure of whether the UNE rates effect a taking (id. at 9-10). "For now," Verizon asserts, it is sufficient that Verizon's proffered evidence is "relevant" and "raises serious questions as to whether the new UNE rates comply with the federal and Massachusetts constitutions" – a "material issue" likely to have a "significant impact on the decision" (id.). Once the record is reopened, Verizon states, the Department can somehow "fashion a remedy" (Tr. at 82).[54]

---

[54] Verizon also argues that, where a utility advances a constitutional claim that rates are confiscatory, Jersey Central Power and Light Co. v. FERC, 810 F.2d 1168 (D.C. Cir. 1987), entitles the utility to a rehearing for specific findings by the agency that set the rates (Motion at 4; Reply at 12; Tr. at 43-44). As Verizon notes, in remanding the case (continued…)

However, the Department's standard of review does not allow it to reopen a record without some basis for conducting further proceedings. The only basis Verizon presents is its proffer of evidence regarding historical costs, which may not be taken into account when establishing UNE rates under the required, forward-looking TELRIC method. In refusing to invalidate TELRIC as a confiscatory method, the Supreme Court rejected the argument that Verizon here advances: that because Verizon is entitled to charge rates that meet its cost of service, including a fair and reasonable return, that means Verizon is necessarily entitled to recover its actual historical investment costs when UNE rates are determined (Motion at 6; Reply at 9; Tr. at 35). The Supreme Court, however, referring to TELRIC as a "brand new"

---

[54](...continued)
to the Federal Energy Regulatory Commission ("FERC"), the Jersey Central Power Court cited the necessity for the FERC to make findings on the reasonableness of the rates and their financial impact on the company. Jersey Central Power, 810 F.2d at 1176-1178, 1182. Specifically, the Court found that the FERC had failed to give "'reasoned consideration to each of the pertinent factors'" (id. at 1177 (emphasis added)) in order to make a determination that the rates were "just and reasonable" pursuant to the Federal Power Act, 16 U.S.C. § 824(d)(a) (1982), and the standard of judicial review under Hope Natural Gas, 320 U.S. 591. Jersey Central Power, 810 F.2d at 1175, 1182. As the Supreme Court noted in Verizon Communications v. Federal Communications Comm'n, 535 U.S. at 489, 528, "just and reasonable" rates under the Telecommunications Act has a different meaning than it did in Jersey Central Power, where the definition of "just and reasonable" in the Federal Power Act coincided with the constitutional standard for confiscation. Id. (see Tr. at 65-66). The D.C. Circuit Court criticized the FERC for failing to consider evidence properly before it and for making its rate determination "summarily." Jersey Central Power, 810 F.2d at 1171-1172, 1178, 1181-1182. The Department, on the other hand, in developing the extensive record in this proceeding and making its rate determinations in compliance with TELRIC, has met the Jersey Central Power requirement to make sufficient and reasoned findings on the pertinent factors (see Tr. at 65-67). Jersey Central Power would require the Department to reopen the record had it failed to adequately consider and make findings regarding relevant evidence; but, as discussed in this section, Verizon's proffered evidence is not relevant to setting UNE rates under the Act.

ratemaking method under which "just and reasonable rates" means something different than it did under the traditional public utility model of rate regulation, found that the Telecommunications Act's mandate that UNE rates be set "without reference to a rate-of-return or other rate based proceeding" meant that "state commissions are subject to that important limitation previously unknown to utility regulation." 535 U.S. at 489, 493, 528, citing 47 U.S.C. § 252(d)(1)(A)(i). While the Supreme Court did not foreclose the possibility that specific TELRIC rates could be confiscatory, it did find that the exclusion of historical costs, pursuant to the Act, was not a basis for a finding of confiscation. See 535 U.S. at 495, 497-502.

Verizon's proffered evidence of historical costs is therefore not relevant to the Department's determination of rates for UNE-P and UNE-L, and does not raise a material issue that would have a significant impact on the final, TELRIC-based (and TELRIC-compliant) decision already rendered. Because the Department cannot raise UNE rates above TELRIC levels to compensate Verizon for its alleged "revenue shortfalls," a reopened UNE rate proceeding would be redundant, and Verizon likely would again consider the resulting rates to be confiscatory.[55]

In addition to disputing the relevance of Verizon's evidence on historical costs to a TELRIC-based UNE rates proceeding, the CLECs also question whether the evidence upon which Verizon relies as support for its Motion was "previously unknown or undisclosed" as

---

55 Because we deny Verizon's Motion to Reopen the D.T.E. 01-20, we deem it unnecessary to rule on AT&T's Cross-Motion to Strike the testimony and cost studies Verizon included with its Motion.

required by the Department's standard of review. In its Motion, Verizon argues that it could not have raised the issue of confiscatory rates earlier, because it could not compute the degree of confiscation "with specificity" until after the Department adopted the full panoply of final rates in this proceeding with its July 16, 2003 stamp-approval (Motion at 1, 2-3; Reply at 2, 3-5). We agree that the UNE rates we established in this proceeding did not become "final" until the Commission stamp-approved Verizon's final Compliance Filing on July 16, 2003. However, at the outset of this proceeding, almost four years ago, parties knew that the Department was required to apply TELRIC principles to establish UNE rates, an exercise in which the Department would establish rates without evaluation of Verizon's historical costs for those elements (see AT&T Opposition at 16; XO Opposition at 1; Tr. at 77). In fact, the UNE-L and UNE-P rates Verizon itself proposed at the beginning of this proceeding were lower than what Verizon now claims in its Motion are necessary for it to recover its historical costs (see AT&T Opposition at 16).[56] Assuming that Verizon was aware of its costs at the time of its initial UNE rates proposal in this proceeding, it is difficult not to conclude that, had the Department approved Verizon's own proposal, Verizon would likely now consider that act to be confiscatory.

---

[56] In its initial May 2001 filing in D.T.E. 01-20, Verizon proposed a statewide loop rate of $18.75 (Exh. VZ-37, Part B-1, Line 7); in its Motion to Reopen, Verizon argues that its cost of providing a loop is over $25.00 (Motion at 5). In 2001, Verizon proposed a UNE-P rate of approximately $29.00 (see AT&T Opposition at 16). Verizon argues in its Motion to Reopen that a UNE-P rate of approximately $40.00 is necessary for Verizon to recover its costs (Motion at 5).

B. Alternative Forms of Relief

1. Introduction

In ruling as we do on Verizon's Motion to Reopen, we do not leave Verizon without a remedy. Even Verizon does not contend that the Department is the only available or appropriate forum for its claim. Verizon remains able, as it acknowledges, to seek review of the Department's UNE rates Orders alleging both non-compliance with TELRIC and confiscation (Motion at 4; Reply at 11; Tr. at 33-34, 43).[57] In the following sections, we briefly discuss the fora in which Verizon may seek review of its claims, including the FCC, federal district court, and the Massachusetts Supreme Judicial Court.[58] We also conclude that none of these fora require the Department to reopen its D.T.E. 01-20 proceeding before such review is sought.

2. Federal Fora

As both Verizon and the CLECs acknowledge, federal district court is a proper forum in which a challenge to a particular UNE rate set by a state commission is to be heard (AT&T Opposition at 1; MCI Opposition at 9; Reply at 11; Tr. at 20, 33-34, 43). In Verizon Communications v. Federal Communications Comm'n, the Supreme Court noted the

---

[57] In bringing its Motion to the Department in the first instance, Verizon states that it seeks to create "a proper record" on the takings issue, because an insufficient record "would necessitate a remand by a court for further factual development" (Reply at 11; Tr. at 33-34, 43).

[58] In this proceeding, the Department approved a request by Verizon to extend the judicial appeal period until 20 days after the Department issues its final Order in D.T.E. 01-20. See D.T.E. 01-20, Motion of Verizon to Extend Judicial Appeal Period (stamp-granted January 17, 2003).

Telecommunications Act's provision that "TELRIC rates ... are to be set or approved by state commissions and reviewed in the first instance in the federal district courts." 535 U.S. at 524, citing 47 U.S.C. § 252(e)(6).[59]

As the Supreme Court also recognized, the FCC has provided a means for ILECs to seek relief from TELRIC rates. 535 U.S. at 528 n.39, citing Local Competition Order at ¶ 739; see also TELRIC NPRM at ¶ 40. The FCC stated in its order establishing the TELRIC methodology that ILECs "may seek relief" from the methodology "if they provide specific information to show that the pricing methodology, as applied to them, will result in confiscatory rates." Local Competition Order at ¶ 739; see 535 U.S. at 528 n.39. While the Supreme Court cited this statement in contemplation of a challenge to TELRIC "in advance of a rate order" (535 U.S. at 528 n.39), pursuant to the Local Competition Order, an ILEC would not likely be foreclosed from petitioning the FCC with "specific information" (such as the information Verizon seeks to introduce in the Department's D.T.E. 01-20 proceeding via its Motion), demonstrating that a state commission's rate order has resulted in confiscatory rates.[60]

In the May 2004 oral argument, Verizon argued that the FCC's statement in the Local Competition Order, upon which the Supreme Court relied, is outdated, as the FCC's order was issued in 1996, and that the FCC's statement does not pertain to specific rates set by state

---

59 Section 252(e)(6) of the Telecommunications Act provides that where a state commission makes a determination on network element charges "any party aggrieved by such determination may bring an action in an appropriate Federal district court."

60 In addition, Verizon may also petition the FCC for a waiver, suspension, or amendment of its rules pursuant to 47 C.F.R. § 1.3.

commissions, but rather provides a means of addressing "methodological" concerns with TELRIC (Tr. at 20-24, 32-33). However, in its recently issued TELRIC NPRM, the FCC reiterated the possibility of the FCC's providing a mechanism for addressing alleged confiscatory rates demonstrated by ILECs:

> With respect to cost recovery, we note that the Commission offered incumbent LECs the opportunity to seek relief from the TELRIC pricing rules if they could demonstrate the rules had been applied to produce confiscatory rates, and the Commission did not foreclose the possibility of establishing a separate mechanism to recover embedded costs not recovered through UNE rates.

TELRIC NPRM at ¶ 40. Therefore, while state commissions remain obligated to apply TELRIC in establishing UNE rates, the FCC indicated that it provides a forum for ILECs to seek cost recovery not available under TELRIC.

3. Supreme Judicial Court

We also note that the Massachusetts SJC has jurisdiction under G.L. c. 25, § 5 ("Section 5")[61] to decide a takings claim arising from a Department decision. Parties raising

---

[61] Section 5 provides, in part:

> No evidence beyond that contained in the record shall be introduced before the court, except that in cases where issues of confiscation or of constitutional right are involved the court may order such additional evidence as it deems necessary for the determination of such issues to be taken before the commission and to be adduced at the hearing in such manner and upon such terms and conditions as to the court may seem proper. Whenever the court shall order additional evidence to be taken, the commission shall promptly hear and report such evidence to the court so that the proof may be brought as nearly as reasonably possible down to the date of its report thereof to the court. The commission may, after hearing such evidence, modify its findings as to facts and its original

(continued…)

confiscation claims on appeal to the SJC from Department Orders are "entitled to an independent review as to both law and fact." Boston Edison Co. v. Dep't of Pub. Utils., 375 Mass. 1, 9 (1978), and cases cited therein. The SJC must then determine whether the record sustains the claim of confiscation. See id. at 10-11, 13. The SJC does not require the Department to reopen a record to examine a confiscation claim before a party appeals; nor is remand always necessary for determination of the claim.[62] Rather, the SJC makes a threshold determination as to whether confiscation is ascertainable on the record, whether it needs to remand the case for the Department to take further evidence, and under what instructions the Department is to do so. See id.; New Eng. Tel. and Tel. Co. v. Dep't of Pub. Utils., 371 Mass. 67, 72 (1976); Boston Gas Co. v. Dep't of Pub. Utils., 359 Mass. 292, 300 (1971).

4. "Global" Rate Case

In addition to the CLECs' arguments that the Department cannot hear Verizon's confiscation claim in the context of a reopened UNE rates proceeding governed by TELRIC, the CLECs assert that, if the Department were to conduct a proceeding to investigate confiscation, the Department would need to either undertake a "global" or traditional rate case

---

[61](…continued)

> decision or orders by reason of the additional evidence so taken, and it shall file with the court such amended decision or orders and such modified or new findings.

[62] The SJC stated that "we do not read the statute as requiring a possibly useless remand before we can consider the legal effect of alleged additional evidence." New Eng. Tel. and Tel. Co. v. Dep't of Pub. Utils., 371 Mass. 67, 72 (1976). Even when the SJC requires production of new evidence, it need not remand to the Department for full evidentiary proceedings. Boston Gas Co. v. Dep't of Pub. Utils., 359 Mass. 292, 300 (1971) (citations omitted).

investigating Verizon's rate of return and cost of service, or require a petition by Verizon for modification of its retail rates under the D.T.E. 01-31 Alternative Regulation Plan ("Plan")[63] (AT&T Opposition at 2-5, 17-18; MCI Opposition at 9-12; XO Opposition at 2, 5; Tr. at 50-52, 67). Verizon is opposed to either course of action (i.e., a traditional rate proceeding or exogenous cost adjustment petition under the Plan), ironically arguing that if the Department were to require a proceeding other than the reopening of D.T.E. 01-20, the Department would be "reopen[ing] and redo[ing] all of the decisions on telecommunications rates that it has made over the course of two years in D.T.E. 01-31" (Reply at 13; see also Reply at 5-9 (Verizon makes clear that it is not requesting any kind of Department relief outside of reopening D.T.E. 01-20)).

Although we have determined that reopening the record in D.T.E. 01-20 is not the proper course of action to address Verizon's confiscation claim based on evidence that would be precluded from a TELRIC review, we also agree that the CLECs' proposals to conduct a "global" rate case or to require Verizon to file a petition for an exogenous cost adjustment to its retail rates are likewise not suitable means to address Verizon's allegation of confiscation resulting from Department-set UNE rates. In the sections above, we have identified several avenues from which Verizon may choose to achieve review of its claim, and until we are

---

63 In D.T.E. 01-31-Phase I (2002) and Phase II (2003), as part of a long-term effort to evolve regulatory requirements and oversight to match the evolution of market forces, the Department implemented a comprehensive Plan for regulatory treatment of Verizon's retail rates. The Department-approved Alternative Regulation Plan replaced the "price cap" form of regulation that had been in effect since 1995. Before 1995, the Department regulated Verizon's rates pursuant to a "traditional" rate of return regime.

directed by a reviewing body, if we are so directed, to undertake a full, further investigation into Verizon's retail and/or wholesale rates in order to decide the confiscation issue, we will not reopen and reexamine the Department's decisions in either D.T.E. 01-31 or D.T.E. 01-20.

C. Next UNE Rates Investigation

Pursuant to the five-year review cycle established in Investigation of Resale Tariff of Bell Atlantic, D.T.E. 98-15-Phases II/III (March 19, 1999), the Department is scheduled to commence its next investigation of Verizon's UNE rates in March 2006. Compliance Order at 63. However, we note that new FCC rules will bring significant changes concerning UNEs to the industry. The United States Court of Appeals for the District of Columbia Circuit's remand to the FCC of its Triennial Review Order,[64] and the FCC's action in response to the remand, will modify the UNEs Verizon will continue to be required to provide to CLECs. Accordingly, the Department authorizes Verizon to file its next UNE cost filing with the Department on or before March 1, 2006.

---

64 In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. August 21, 2003) ("Triennial Review Order"), vacated in part and remanded in part, United States Telecom Association v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That the August 18, 2003, motion of Verizon Massachusetts to reopen the record in D.T.E. 01-20-Part A is hereby denied.

By Order of the Department,

_____________/s/_______________
Paul G. Afonso, Chairman

_____________/s/_______________
James Connelly, Commissioner*

_____________/s/_______________
W. Robert Keating, Commissioner*

_____________/s/_______________
Eugene J. Sullivan, Jr., Commissioner

_____________/s/_______________
Deirdre K. Manning, Commissioner

* Commissioner Connelly and Commissioner Keating join in Section IV.C of this Order and express no opinion as to the other sections.

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within 20 days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of 20 days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971.