COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT for SUFFOLK COUNTY

No. _____

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AT&T COMMUNICATIONS OF NEW ENGLAND, INC.,
Appellant,

v.

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY,
Appellee.

_____

ON APPEAL FROM A RULING OF LAW BY THE
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

_____

MOTION FOR RESERVATION AND REPORT TO THE FULL COURT

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AT&T Communications of New England, Inc., ("AT&T") requests that the Single Justice of the Supreme Judicial Court, Suffolk County, without deciding this matter, reserve and report to the full Supreme Judicial Court the question of law raised by AT&T's petition for appeal from an order issued by the Department of Telecommunications and Energy (the "Department"). AT&T brings this motion pursuant to G.L. c. 211 § 6, G.L. c. 231 § 112, Mass.R.Civ.P. 64, and Mass.R.App.P. 5.

I. THIS APPEAL CONCERNS AN ISSUE OF LAW OF SUBSTANTIAL PUBLIC IMPORTANCE, APPROPRIATE FOR DECISION BY THE FULL COURT.

The Department's holding that the broad powers delegated to it by the Massachusetts Legislature have been preempted by federal law concerns a matter of substantial public importance. It is an issue that may appropriately be reserved and reported to the full Court, as this appeal does not require any finding of facts.

This appeal concerns a ruling of law made by the Department in an order issued that it on January 30, 2004, No. D.T.E. 98-57 Phase III-D (the "Phase III-D Order"). The Department held, incorrectly, that it is preempted from regulating certain intrastate telecommunications services under Massachusetts law merely because the Federal Communications Commission (the "FCC") has chosen not to regulate those services under federal law.

The Department's ability to promote the development of local exchange competition, and to protect the interests of Massachusetts consumers, could be severely limited if the Department had no power to impose any regulatory requirements in addition to those established by the FCC under federal law.

II. THERE IS A PROBABLE GROUND FOR APPEAL, SINCE FEDERAL LAW DOES NOT PROHIBIT THE DEPARTMENT FROM ADOPTING ADDITIONAL INTERCONNECTION REQUIREMENTS TO PROMOTE LOCAL COMPETITION.

There is a probable ground for appeal in this matter, which makes it fit for judicial inquiry by the full Supreme Judicial Court.

Quite simply, the FCC's decision not to require incumbent local exchange carriers like Verizon to unbundle "packet switching" under federal law does **not** operate to preempt the Department's power to impose such requirements under Massachusetts law. See Petition for Appeal, ¶¶ 6-15. The Department's ruling of law that its power in this area has been preempted is in error.

In the realm of federal preemption, one must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Roberts v. Southwestern Bell Mobile Systems, Inc., 429 Mass. 478, 486 (1999). In the field of telecommunications, Congress has made clear its intent **not** to preempt state rules that go beyond the minimum requirements established in federal rules.

The Telecommunications Act of 1996 (the "TCA") expressly authorizes States to impose additional requirements upon incumbent local exchange carriers

("ILECs") like Verizon so long as those requirements are "not inconsistent with" federal rules. See 47 U.S.C. §§ 251(d)(3), 261(c). Thus, the TCA does not "occupy the field." Roberts, 429 Mass. at 487. To the contrary, the TCA expressly authorizes states "to implement additional requirements that would foster local interconnection and competition."[1] Michigan Bell Telephone Co. v. MCIMetro Access Transmission Services, Inc., 323 F.3d 348, 358 (6th Cir. 2003).

Under these circumstances, federal rules established by the FCC only set the regulatory floor, and the Department retains the power to impose additional requirements under Massachusetts law. See, e.g., Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 170-171 (2000). See also, e.g., Atherton v. FDIC, 519 U.S. 213, 227-228, 117 S.Ct. 666, 674-675 (1997) (federal statute imposing minimum requirements establishes a "floor," which does not preempt State imposition of additional requirements); California Federal Savings and Loan Ass'n v. Guerra, 479 U.S. 272, 284-285, 107 S.CT. 683, 691 (1987) (same);

[1] Congress intended the TCA "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

Tri-Nel Management, Inc. v. Board of Health of Barnstable, 433 Mass. 217, 222-224 (2001) (local ban on smoking which imposed limitations in addition to those in state statute was "not inconsistent with," furthered the intent of, and thus not preempted by the state rules).

As courts in three neighboring states have held, state public utility commissions like the Department remain free to impose unbundling, interconnection, or other obligations that go beyond federal requirements, and doing so is entirely consistent with the federal scheme and congressional intent to promote the development of local exchange competition. Petition of Verizon New England, Inc., 795 A.2d 1196, 1200 (Vt. 2002) (holding that Public Service Board's power under Vermont law to order Verizon to combine unbundled network elements was not preempted even if FCC had declined to order such combinations under federal law); Verizon New England, Inc. v. Rhode Island Public Utilities Comm'n, 822 A.2d 187, 193 (R.I. 2003) (holding that Public Utilities Commission was not preempted from regulating voice messaging services ["VMS"] under Rhode Island law as a result of the FCC's finding that under federal law VMS are information services not subject to regulation); Southern New England Telephone v. Department of Public

Utility Control, 261 Conn. 1, 35, 803 A.2d 879, 900(2002) (holding that Department of Public Utility Control's power under Connecticut to regulate the terms and conditions under which ILEC must offer certain "enhanced services" for resale was not preempted, despite ILEC's claim that it had no obligation to make such an offering under federal law).

There is no conflict between state and federal law, and thus no preemption under the TCA, when it is possible to comply simultaneously with both sets of regulations. E.g., Arthur D. Little, Inc. v. Comm'r of Health and Hospitals of Cambridge, 395 Mass. 535, 550 (1985); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1218, 10 L.Ed.2d 248 (1963). For there to be conflict preemption, "there must be more than mere difference between the state and federal regulatory systems; rather, compliance with the two must be a 'physical impossibility.'" Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Abrams, 899 F.2d 1315, 1322 (2nd Cir. 1990) (quoting Florida Lime, 373 U.S. at 143). No "physical impossibility" would be created if the FCC tells Verizon that under federal law it need not do something, but the Department rules under Massachusetts law that Verizon must do it after all.

Conclusion

For the reasons stated above, AT&T respectfully urges the Single Justice to reserve and report to the full Supreme Judicial Court the important question of law raised by this appeal.

Respectfully submitted,

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