COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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

VERIZON MASSACHUSETTS' OPPOSITION TO
AT&T'S MOTION FOR PARTIAL RECONSIDERATION

Verizon Massachusetts ("Verizon MA") opposes AT&T Communications of New England, Inc.'s ("AT&T") Motion for Reconsideration filed December 24, 2004. That Motion seeks to amend the schedule established in the Department's December 15, 2004, *Procedural Order*, pending the Federal Communications Commission's ("FCC") issuance of new unbundling rules announced in its December 15, 2004, press release.[1] AT&T's Motion at 1-2. Contrary to AT&T's claims, there is no legitimate basis for delaying modifications of the interconnection agreements to conform to federal law and, therefore, this arbitration should proceed promptly, as set forth in the Department's *Procedural Order*. Accordingly, the Department must reject AT&T's Motion.

[1] "FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers: New Network Unbundling Rules Preserve Access to Incumbents' Networks by Facilities-Based Competitors Seeking to Enter the Local Telecommunications Market," FCC News Release, Dec. 15, 2004 ("FCC News Release").

First, delaying this arbitration further unjustifiably prevents implementation of the numerous rulings issued by the FCC in the *Triennial Review Order*[2] that are binding and legally effective today. These preemptive federal rulings, which were either upheld by the D.C. Circuit or not challenged in the first place, include, among others, the elimination of unbundling requirements for OCn loops, OCn transport, enterprise switching, the feeder portion of the loop on a stand-alone basis, signaling networks and virtually all call-related databases; and the determination that the broadband capabilities of hybrid copper-fiber loops and fiber-to-the-premises facilities are not subject to unbundling. There has never been any legitimate basis for CLECs' attempts to block amendments to reflect the rulings, and Verizon MA should not have to wait any longer to implement changes that should have been reflected in contracts many months ago.

Second, the FCC's decision announced on December 15th affects only certain network elements that were the subject of the *USTA II* remand and the FCC's *Interim Order*.[3] As described in its press release, the FCC's new rules decline to require any unbundling of mass-market switching and dark fiber loops, and eliminate unbundling for high-capacity loops and transport under defined circumstances. For these elements, there is no need to await the issuance of final rules. Verizon MA's has proposed language in its interconnection agreement amendment that does not assume any particular outcome of

---

[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36, 18 FCC Rcd 16978 (rel. August 21, 2003) *("Triennial Review Order"* or *"TRO"*), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) *("USTA II"), cert. denied, NARUC v. United States Telecom Ass'n*, Nos. 04-12, 04-15 & 04-18, 125 S.Ct. 313 (U.S. Oct. 12, 2004).

[3] Order and Notice of Proposed Rulemaking, Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, WC Docket No. 04-313, FCC 04-179, 19 FCC Rcd 16783 (rel. Aug. 20, 2004) ("*Interim Rules Order*").

the FCC's rulemaking, but provides that whatever the FCC's findings are, they will be promptly implemented. Accordingly, it is not necessary to await the FCC's written decision before moving forward. Verizon MA's approach assures that the FCC's objective of a "speedy transition" to the final unbundling rules is achieved for mass market switching, dark fiber loops, high capacity loops, and transport. By contrast, AT&T's Motion is an effort to delay the expeditious implementation of binding federal law and should not be sanctioned.

Finally, AT&T's Motion fails to satisfy the Department's standard for reconsideration. The Department was well aware when it issued its order in this proceeding on December 15, 2004, of the pending issuance by the FCC of its final rules relating to the *USTA II* remanded elements. The Department correctly decided to proceed with this arbitration and called for the parties to submit an agreed upon list of issues to be addressed in the case by February 15, 2005. AT&T points to no facts that the Department overlooked in making its decision or a mistake in its ruling that warrants reconsideration.

ARGUMENT

In its Motion, AT&T requests that "the Department reconsider its decision regarding the schedule in this case and establish a schedule similar to the one issued, but commencing from the date that the FCC issues its new rules." AT&T Motion at 2. AT&T further requests that "the Department's order delegate to the Hearing Officer authority to establish a schedule consistent with the above and subject to change as events may require." *Id.* at 3. AT&T argues that "[a]ccording to the FCC's press release, questions regarding the availability of UNEs important to AT&T may be factually

intensive and require additional discovery and testimony in this proceeding."[4] *Id*. at 2. Therefore, AT&T contends that "[i]t makes little sense to establish a schedule for negotiating and arbitrating issues when many of the issues that will be presented in the arbitration are subject to specific rules that have not yet been made public" and "can only be efficiently and effectively addressed after the parties have had an opportunity to review the FCC's Order." *Id.* at 2, 5.

AT&T is wrong. There is no reason to delay this proceeding any further.

A. There is no basis for delaying this arbitration to implement FCC rulings that were affirmed in USTA II or were not appealed.

Verizon initiated negotiation of a *TRO* Amendment ***more than one year ago,*** on October 2, 2003, the effective date of the *Triennial Review Order*. Although a number of CLECs have signed Verizon's *TRO* Amendments, many others have done their best to avoid implementing binding federal law — despite the FCC's finding that even a months-long delay in implementing the *TRO*'s rulings "will have an adverse impact on investment and sustainable competition in the telecommunications industry." *Triennial Review Order*, ¶¶ 703, 705.

As a result, 15 months after the *Triennial Review Order* took effect, there has been little progress toward execution of an amendment to reflect even the *TRO* rulings were either upheld by the D.C. Circuit in its *USTA II* decision or not challenged in the

[4] AT&T's presumption that expert testimony and evidentiary hearings will be required is unfounded. This proceeding raises only legal issues, which may be resolved on the basis of briefs, without the need for prefiled testimony or a hearing. Moreover, in *TRO* arbitrations in other jurisdictions (*e.g.*, Washington, Vermont), several carriers, including AT&T, MCI, Sprint, and the CLEC group represented by the Kelley Drye firm, have expressly agreed that no hearing or prefiled testimony was necessary to address the same issues arising from the same amendments as those presented here. Thus, there is no reason why that same approach cannot be adopted in Massachusetts.

first place. These rulings, include, among others, the elimination of unbundling requirements for OCn loops, OCn transport, enterprise switching, the feeder portion of the loop on a stand-alone basis, signaling networks and virtually all call-related databases; and the determination that the broadband capabilities of hybrid copper-fiber loops and fiber-to-the-premises facilities are not subject to unbundling. The FCC's December 15th decision does not affect these "delisted" UNEs, and there is no basis for stalling the amendment of applicable interconnection agreements to clarify Verizon MA's obligations.[5] AT&T's Motion would, however, place even these rulings into limbo when they should have been implemented many months ago.[6]

B. For the elements that are the subject of the FCC's December 15th decision, the Department should arbitrate contract language that ensures prompt implementation of final FCC rules.

The FCC's December 15th decision declines to require any unbundling of mass-market switching and dark fiber loops, and eliminates unbundling for high-capacity loops and transport under defined circumstances.[7] The Department should ensure by the

---

[5] A large number of Verizon MA's interconnection agreements contain terms that enable it to cease providing a UNE when it is no longer required under Section 251 of the Telecommunications Act by FCC rule or a court decision.

[6] CLECs have raised various claims in this and other proceedings to evade implementing any of the FCC's *TRO* rules. For example, they asserted that Verizon MA had an independent obligation to unbundled network elements under (1) state law, (2) Verizon MA's carrier of last resort obligation, (3) the Department's alternative regulation plan, and (4) the terms of the Bell Atlantic/GTE merger. The Department has rejected each of their contentions. *See Consolidated Order*, D.T.E. 03-60/04-73 (Dec. 15, 2004). The Department ruled that it is preempted by federal law in cases in which the FCC has made a finding under Section 251 of the Telecommunications Act regarding a particular element. *Id.* at 21-23.

[7] With regard to mass-market switching, the FCC stated: "Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching." It also ruled that: "Competitive LECs are not impaired without access to dark fiber loops in any instance." For high-capacity loops and dedicated transport, the FCC established non-impairment standards based on the number of business lines and/or fiber-based collocators contained in the relevant wire center(s). *See* FCC News Release.

prompt resolution of this arbitration that the FCC's decision is reflected in applicable interconnection agreements without any further delay.

The FCC has emphasized that it is in the public interest for its rulings to be implemented expeditiously. In the *Triennial Review Order*, the FCC stated that it would be "unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order." *Triennial Review Order*, ¶ 705. Indeed, the FCC noted that *even a months-long delay* in implementing the *TRO* rulings "will have an adverse impact on investment and sustainable competition in the telecommunications industry." *Triennial Review Order*, ¶¶ 703, 705. In its *Interim Rules Order*, the FCC once again stressed the need to ensure that interconnection agreements promptly reflect changes in federal unbundling obligations and, in this regard, expressly endorsed proceedings like this one to ensure a "speedy transition" to any permanent rules eliminating unbundling requirements for mass-market switching, high-capacity loops, and dedicated transport. *Interim Rules Order*, ¶ 22. The FCC expected these proceedings to conclude *before* adoption of new unbundling rules, so that any amendments to agreements "may take effect quickly" in the event the final rules "decline to require unbundling of the elements at issue." *Interim Rules Order*, ¶ 23.

More generally, the FCC has emphasized the importance of making a "speedy transition" to implement new unbundling rules. *Id.* at ¶ 22. Verizon's amendment is designed to ensure that in the event of future changes in federal law, parties will not be obligated to negotiate and ultimately to litigate cumbersome changes to their agreements. For example, the FCC's permanent unbundling rules appear to impose substantial obligations on incumbents to provide unbundled access to high capacity loops and

transport. If that obligation is subsequently narrowed through judicial or administrative action, such changes should be implemented through an orderly process without the Department's intervention, contributing to clarity and commercial certainty. If the FCC's rules go into effect without contract amendments in place to govern the transition to those rules, the result will be unnecessary uncertainty and controversy.[8] As FCC Chairman Powell has aptly observed, the clarity that will result from prompt implementation of the permanent rules is something that "[c]onsumers demand . . . and competitors and incumbents alike need." *Interim Rules Order*, Concurring Statement of Chairman Powell.

For the elements subject to the FCC's new rules, Verizon MA's has proposed language in its interconnection amendment that does not assume any particular outcome of the FCC's final rulemaking, but provides that whatever the FCC's findings are, they will be promptly implemented. This is a sound approach that protects the rights of all parties and enables the Department to conclude this proceeding as soon as possible to comply with the FCC's objective of a "speedy transition" to the final unbundling rules. AT&T's suggestion that the Department cannot proceed until the ink has dried on the FCC's new rules is simply a stratagem of delay that will keep in place unbundling requirements that have never been lawful. There has not been complete certainty in the eight years since the FCC first attempted to adopt lawful unbundling rules, and absolute regulatory certainty is probably impossible to achieve. But there is more certainty today than ever before, and Verizon MA's contractual proposals ensure that whatever the FCC decides will be implemented expeditiously.

[8] Of course, the FCC's final decision may make amendment of agreements unnecessary to implement certain findings. Accordingly, Verizon MA reserves its right to take whatever action is appropriate to comply with binding FCC orders.

C. AT&T's Motion fails to satisfy the Department's standard for reconsideration.

When the Department issued its December 15th *Procedural Order*, it was fully aware of the status of the FCC remand proceeding regarding mass market switching, dark fiber loops, high capacity loops, and transport. The Department, nevertheless, correctly concluded that this proceeding should move forward. Its decision was not the result of any overlooked facts or mistake – indeed, AT&T's Motion points to none – but a clear recognition that it was time to act to bring the applicable interconnection agreements into line with federal law. AT&T's Motion provides no basis for the Department to second guess its decision.

CONCLUSION

Despite the FCC's admonitions to promptly implement the *TRO* rulings, AT&T and other CLECs have done everything they can to avoid doing so. AT&T's Motion is simply another delaying tactic to avoid amending the agreements to conform to preemptive federal law — regardless of FCC directives and/or statutory and contractual requirements. Accordingly, that Motion should be denied.

Respectfully submitted,

VERIZON MASSACHUSETTS

By its attorneys,

/S/_____

Bruce P. Beausejour
Barbara Anne Sousa
185 Franklin Street – 13th Floor
Boston, MA 02110-1585
(617) 743-2445

Dated: December 31, 2004