COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts	)	D.T.E. 01-31 (Phase I)

INITIAL BRIEF OF VERIZON MASSACHUSETTS

PUBLIC VERSION

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This Department and the Federal Communications Commission ("FCC") have already found that the Massachusetts local exchange market is irreversibly open to competition.[1] No economic, regulatory or legal barriers to competitive entry and expansion exist in any segment of the market in which local exchange carriers choose to compete. This is dramatically evidenced by the stunning growth in local competition in Massachusetts. On a statewide basis, more than 20 percent of customers – approximately 1.1 million lines – are served by a carrier other than Verizon Massachusetts ("Verizon MA"). In the most densely populated areas of the Commonwealth, the competition is especially fierce: competitive local exchange carriers ("CLECs") are estimated to have captured almost **[PROPRIETARY]** of the market in just a few short years. Massachusetts is at the point where competitive forces, rather than government regulation, are sufficient to discipline Verizon MA, and it is time for the Department to permit Verizon MA to compete on equal terms with other carriers.

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1 *Evaluation of the Massachusetts Department of Telecommunications and Energy* (October 16, 2000), CC Docket 00-176, at 1; *see Application of Verizon New England for Section 271 Authority*, Memorandum and Order, CC Docket No. 01-90, at ¶ 234 (April 16, 2001).

In the face of this overwhelming evidence of competition, AT&T and the Attorney General request individual supply and demand studies on a wire-center-by-wire-center basis, an exercise that would be both wasteful and unnecessary. Their call for the mechanical application of theoretical models would have the Department ignore the clear and unrefuted evidence regarding significant and pervasive competition throughout the Commonwealth. There is, however, nothing theoretical about the extensive competitive data Verizon MA has presented here, nor can there be any question concerning the economic principles that should guide the Department's evaluation. Any CLEC seeking to serve Massachusetts customers can either utilize Verizon MA's vast network through resale, unbundled network elements ("UNEs") or UNE-Ps, or, like AT&T Broadband, can invest in its own network. With such ease of market entry and proven market penetration, the request for detailed neighborhood-by-neighborhood market power analyses is simply irrelevant. The Department should reject these requests and proceed to give Verizon MA the market pricing flexibility it needs to compete.

I. PROCEDURAL BACKGROUND

Verizon MA has been subject to price-cap regulation for its retail services since 1995. *See*, *NYNEX Price Cap Plan*, D.P.U. 94-50 (1995). Under price caps, Verizon MA's retail rates were adjusted annually based on a formula that accounted for inflation and productivity.

The 1995 plan expired in August 2001. Prior to its expiration, the Department opened this investigation to determine the appropriate form of regulation for Verizon MA in an increasingly competitive market.[2] Verizon MA filed its proposed alternative regulation plan on

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[2] *Order on Scope*, at 1, fn.1. This case addresses pricing policies for Verizon MA's retail services. Wholesale intrastate services are regulated by the Department under policies mandated by the Telecommunications Act of 1996. Prices and policies for the sale of unbundled network elements and resold services were established by the Department in the *Consolidated Arbitrations*, D.P.U./D.T.E. 96-

(footnote continued…)

April 12, 2001, and subsequent to that date, other parties filed comments. On June 21, 2001, the Department issued its *Order on Scope*, which established two phases for the case, the first to evaluate the present state of competition[3] and the second to adopt a plan for Verizon MA's retail rate regulation that is appropriate for the level of competition found to exist.

The evidence in Phase I confirms the Department's previous determination: the local exchange market in the Commonwealth is irreversibly open to competition. In addition, Verizon MA proved that the market is not only open, it is robustly competitive. Customers throughout the Commonwealth have competitive choices – whether from resellers, carriers obtaining UNEs from Verizon MA, or full facilities based carriers. It is now time for the Department to proceed to Phase II and adopt an alternative regulation plan that is consistent with these market conditions.

II. STANDARD OF REVIEW

The standard of review appropriate for considering the extent of competition in local markets is that which was applied to AT&T when it sought competitive treatment of its services in the Commonwealth.

On April 12, 1991, AT&T was granted Department approval for the market-based pricing of its intraLATA and Massachusetts interLATA services. *AT&T*, D.P.U. 91-79 (1992).[4] The

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(…footnote continued)

73/74, 96-75, 96-80/81, 96-83, 96-94. Those prices are presently under comprehensive Department review in D.T.E. 01-20.

3 The Department stated that Phase I is intended to investigate the "levels of competition, the specific standard of review, and the necessary Department findings regarding sufficient competition…." *Order on Scope*, at 17.

4 AT&T proposed that the Department establish two broad service classifications for the purpose of regulating AT&T's Massachusetts intrastate services. The two service classifications would consist of "Category M" services (market-based pricing would be permitted) and "Category D" services (Department regulation of prices would continue). *Id*. at 1.

Department's decision was based on its conclusion that the subject services were "sufficiently competitive":

> [A] finding that a service is "sufficiently competitive" permits the Department to approve market-based pricing of the service. We also consider whether there are sufficient safeguards to protect against unfair pricing practices that potentially could result from market-based pricing.

Id. at 18.

The Department found that AT&T's large market share did not prevent its customers from "price-shop[ing]" among competing long distance carriers in Massachusetts. The Department also concluded that the absence of entry barriers was a further justification for market pricing of AT&T's services. In particular, the Department noted the presence of over 40 interexchange carriers certificated to provide long distance service in the Commonwealth. *Id*. at 33:

> There are few barriers to entry and expansion in any segment of the market in which these IXCs choose to compete. While many of these firms are resellers, rather than facilities-based carriers such as MCI and Sprint, resellers are able to apply some degree of competitive pressure to AT&T with value-added services and a focus on market niches.

Id. (footnote omitted). Ultimately, the Department concluded that AT&T's competitors had the capacity to serve enough of AT&T's customers to make it "economically irrational" for AT&T to engage in supracompetitive pricing. *Id*.[5]

In December 1995, the Department went even further and reclassified AT&T as a "nondominant" telecommunications carrier, (*AT&T*, D.P.U. 95-131 (1996)), basing its decision

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[5] In approving AT&T's request for market pricing, the Department made no findings concerning AT&T's classification as a dominant carrier. *Id*. at 34.

on the presence of significant competition[6] and ease of market entry. Again, the Department determined that the level of competition was sufficient to limit AT&T's ability to charge supracompetitive prices. *Id*. at 8.

In short, the Department has recognized that its determination of whether a market is "sufficiently competitive" is "inherently judgmental" (D.P.U. 1731, at 18 (1985)) and requires the consideration of a range of factors from the structure of the market, the ease of competitive entry, the number of competitors, the presence of actual competitive activity and the extent of competitive loses by the incumbent. As described more fully below, the evidence in Phase I demonstrates, by any of these measures, that the local exchange market in Massachusetts is sufficiently competitive.

The record also shows that AT&T and the Attorney General cannot refute Verizon MA's evidence. Rather, these parties have resorted to arguing that yet *more* proof is needed to demonstrate the obvious. For example, although there is at least one competitive carrier present in each and every Verizon MA wire center, these opposing parties have asked the Department to conduct specific market power analyses on 68 different services in each of 272 wire centers. (Exh. ATT-1, at 27-28).

As Verizon MA demonstrated when refuting AT&T witness Dr. Mayo's and Attorney General witness Dr. Selwyn's wire center study proposal, the requested analysis would consist of *18,000* different market share studies, which could take years to complete.[7] The Department

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[6] The Department measured the level of competition both in terms of the number of competitors and their purchase of switched access minutes from Verizon MA.

[7] There are 272 wire centers in Massachusetts, and AT&T and the Attorney General propose market studies on 68 different services in each of those wire studies (68 x 272 = 18, 496). *See,* Exh. VZ-4, at 3; and Exh. VZ-5A, at 6.

should not waste time attempting to meet this unreasonable demand, particularly since, as Dr. Mayo has previously argued, market share data is *not* necessarily the best or even a necessary measure of whether market power exists.

Rather, in D.P.U. 91-79, when market pricing for AT&T's Massachusetts services was at issue, AT&T witness Dr. Mayo observed that market-share data often lead to "specious conclusions." Dr. Mayo's expert opinion at the time was that the Department should focus its attention not on theoretical market share studies, but rather on barriers to entry. Dr. Mayo stated that the "issue of entry barriers is perhaps the most important qualitative factor, *for if entry barriers are very low it is unlikely that market power, whether individually or collectively exercised, will persist for long.*" *See*, Exh. VZ-4, at 7-8, *citing* D.P.U. 91-79, Mayo Direct, at 15-16, emphasis added.

In language that was prescient of Dr. Taylor's observations in this case, Dr. Mayo discussed the difficulty of using theoretical market share analyses when trying to draw conclusions in the real world:

> Ideally, if we could measure all relevant demand and supply elasticities, we could arrive at relatively precise estimates of market power. Such evidence, however, is rarely, if ever, available and is not readily susceptible to direct measurement. Therefore, other criteria must be utilized….

Exh. VZ-4, at 9, *citing* D.P.U. 91-79, Mayo Direct at 15-16. Accordingly, Dr. Mayo urged the Department to rely upon "other criteria," which consisted of evidence of the type presented by Verizon MA in Phase I of the present case:

> The presence of numerous competitors, the demonstrated vulnerability of AT&T's market share, the widespread availability of transmission capacity, the minimal amount of economic barriers to entry, and the fundamentally pro-competitive demand conditions in the interLATA market clearly point toward the presence of effective competition.

Exh. VZ-4, at 9, *citing* D.P.U. 91-79, Mayo Direct at 33.[8]

Verizon MA has met the Department's long established standard for proving that a market is sufficiently competitive. Moreover, Verizon MA has met Dr. Mayo's entry barriers standard. The evidence in Phase I demonstrates the ease of entry, presence of numerous competitors, the vulnerability of Verizon MA's market share, the widespread availability of capacity in the form of unbundled loops, switching and transport through ubiquitous collocation, and the presence of effective facilities based competitors with networks of their own, such as AT&T Broadband. Not only are there no barriers to entry, the availability of Verizon MA's network for use by competitors enables competition at affordable cost and without significant CLEC investment. None of the opposing parties has presented any evidence refuting these facts because no such evidence exists. Moreover, the Department should not grant AT&T and the Attorney General the years they seek to gather it.

III. MASSACHUSETTS LOCAL EXCHANGE MARKETS ARE SUFFICIENTLY COMPETITIVE AND IRREVERSIBLY OPEN TO COMPETITION.

The Department relies on the presence of effective competition as the basis for permitting market-based pricing for a regulated telecommunications carrier. Whether there is effective competition can be evaluated by examining three criteria: (1) ease of entry and the absence of barriers to entry; (2) the capacity of competitors to sustain competition; and (3) competitive inroads (*see*, Exh. VZ-4, at 5). As described above, intervenors' numerous references to detailed market share analyses and arcane theoretical and mathematical measures to assess the sufficiency

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[8] AT&T witnesses have taken similar positions in proceedings in other jurisdictions when the matter at issue was the regulation of AT&T. *See e.g.*, Exh. VZ-4, at 10-12 (AT&T's position in the FCC's non-dominance proceeding that "market share alone is not a valid measure of market power;" information in a market-share number may be "diluted substantially… with an "inherited high [market] share;" and the presence of a high

(footnote continued…)

of competition are without merit, since, as Dr. Mayo has previously argued, in a market without significant barriers to entry, no firm can exercise market power, regardless of its market share (*see*, Exh. VZ-5A, at 9).

A. Ease of Entry/Absence of Barriers to Entry.

1. Structural Ease of Entry

The Telecommunications Act of 1996 requires incumbent local exchange carriers to provide access to their networks, both on an unbundled basis as well as a resale basis. Competitive carriers can use the incumbent's network at either the incumbent's cost or, if acting as a reseller, at the incumbent's avoided cost.[9] Telecommunications Act of 1996, Pub. L. No. 104, 110 Stat. 56 (1996) ("Telecom Act"); *see* 47 U.S.C. § 251(c). These aspects of the Telecom Act eliminate barriers to entry by allowing competitive carriers to avoid the costs of building networks (*see*, Exh. VZ-5A, at 3).

The ability of competitors to increase supply when another competitor raises prices is one important measure of the presence of effective competition. The Telecom Act's UNE requirements ensure that Verizon MA cannot increase retail prices to supracompetitive rates because CLECs can utilize Verizon MA's own facilities to undercut such prices (*see*, Exh. VZ-5A at n. 4).

The Department's implementation of the provisions of the Telecom Act has ensured that legal, regulatory and market based barriers to entry have been eliminated in Massachusetts. As

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(…footnote continued)

market share at a "given point in time provides no information of the incumbent firm's vulnerability to market-share losses.").

9 The Department has established avoided-cost discounts and TELRIC-based rates at which competitive local exchange carriers can acquire services for resale and unbundled elements, respectively. TELRIC-

(footnote continued…)

Verizon MA witness Dr. Taylor testified: "As a result, competition is now practical for any service in any geographic area of Massachusetts where a competitor can supply any portion of the facility or service as efficiently as Verizon" (Exh. VZ-2, at 5). Since entry into Massachusetts' markets is "comparatively easy," competitive pressure exists on retail prices for all services in all geographic areas (*id.*).[10]

In addition to existing competition, Dr. Taylor explained that the potential entry or expansion from carriers not yet in the market "effectively disciplines Verizon's retail prices even if there were little current competition on the ground" (Exh. VZ-2 at 5).[11] Indeed, AT&T witness Dr. Mayo conceded that the availability of UNEs and resold services restrains or

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(…footnote continued)

based rates are designed "to allow recovery of forward-looking incremental costs, plus a uniform markup to cover common costs" (Exh. VZ-5A, at n. 3).

[10] Dr. Taylor explained what he meant by the term "comparatively easy" and the evidence supporting his observation in various discovery responses. *See, e.g.,* Exh. AG-VZ 4-8 ("Dr. Taylor's direct testimony reference to the ease of entry in Massachusetts telecom markets summarized the effect of Congress' implementation of the 1996 Telecommunications Act, the resultant elimination of economic barriers to entry and the Department's approved incremental cost-based UNE prices and avoided cost resale discount. The point made was that these events result in a dramatic reduction in the cost of entry for a CLEC."); Exh. AG-VZ 1-2 ("'Comparatively easy' and the context of this response means the ability of potential competitors to enter the market in response to profitable opportunities within a short period without incurring significant sunk costs. Market-power analyses, as described, for example, in the U.S. Department of Justice *Merger Guidelines*, usually use a 2-year time period."); Exh. AG-VZ 1-1 ("'Comparatively easy' is used to indicate the fact that barriers to entering the local exchange market in Massachusetts are low. Competitors can purchase unbundled network elements and interconnection at forward-looking economic cost and can purchase resale services and quickly provide service with virtually no sunk investment. Competitors are providing service and are successfully competing with Verizon."); and Exh. AG-VZ 2-11 (where Dr. Taylor provided "evidence of comparatively easy entry" by referencing, among other things, the Department's 2000 Annual Report, Exh. AG-12).

[11] As AT&T's Mr. Fea also explained: "So even though the plant may be there for residential services, it may not have been upgraded yet to provide that type of service….[T]hey'll upgrade electronics and amplifiers and cable equipment….And then ultimately that equipment plugs into a Class 5 switch, which will provide local dial tone" (Tr. 4, at 655-56). The "actual construction of the network takes six to nine months on average…." (Tr. 4, at 695).

Many of the activities, in fact, could be accomplished "in parallel" (Tr. 4, at 694-95). Indeed, only thirty days would be necessary to the extent the competitor chose to obtain UNEs, UNE-P or resale of Verizon MA's services (Tr. 4, at 695-96). Additionally, Mr. Fea was not aware of any problem with UNE-P availability (Tr. 4, at 698; *see also* Exh. AG-VZ 2-19).

eliminates any potential market power that Verizon MA might otherwise have (Tr. 4 at 701). He also agreed that uncommitted or potential competitors are considered in the market analysis prescribed by the Department of Justice (Tr. 4 at 713-14) and therefore "their competitive impact is included in the market-share" – thus disciplining Verizon MA's price movements (Tr. 4 at 713-14).[12] As a result, as Dr. Taylor explained, "pricing above competitive levels cannot be sustained and that even if there were no actual competitors actively participating in the market, Verizon's pricing would be constrained" (Exh. AG-VZ 1-4).

Moreover, the number of CLECs in the market is sufficiently large to dispel any reasonable concerns regarding Verizon MA's ability to prevent "effective" competition (Exh. VZ-5A, at 20).[13] Whether the number of CLECs competing across Massachusetts is 161,[14] 80 or 50 (*see* Tr. 2, at 330), given the elimination of entry barriers, Dr. Taylor testified that any Verizon MA attempt to price above competitive levels "would be met with new or expanded CLEC entry as those firms attempted to capture the profits caused by the (temporary) price increase. In other words, there are simply too many actual and potential CLEC entrants to maintain a collusive price" (Exh. VZ-5A, at 20).

As Dr. Mayo also conceded, "where barriers to entry and expansion are low or nonexistent, then regardless of the extent of competition within the market the incumbent firm

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12 This is a direct admission that all CLECs authorized to provide service in Massachusetts should be considered in any analysis of market share because the availability of UNEs at TELRIC prices qualifies them as uncommitted entrants.

13 "Effective" competition, in turn, does not require that a customer always have a competitive choice, "only that no company be able to hold the market price above the competitive level" (Exh. NEPCC-VZ 2-1). As no substantive barriers to entry or expansion exist in Massachusetts, Dr. Taylor further explained, "an entrant could thus supply output in the Massachusetts telecommunications market, were prices raised above the competitive level, within a one year period as set out in the Merger Guidelines of the U.S. Department of Justice." *See also* Exh. AG-VZ 2-2.

14 *See* Department of Telecommunications and Energy 2000 Annual Report (Exh. AG-12).

will be endowed with little monopoly power" (Exh. ATT-1, at 24). Accepting Dr. Mayo's logic, the Department should reasonably conclude that, regardless of its current market share, Verizon MA has no significant market power since the Department has eliminated barriers to entry (Exh. VZ-5A, at 9).

In light of this absence of meaningful market power, Attorney General witness Dr. Selwyn's application of the Herfindahl-Hirschman Index ("HHI") is irrelevant. Moreover, a correct HHI analysis includes both existing and potential market entrants. Dr. Selwyn's calculation, even if it were relevant, does not conform to the standards for an HHI analysis as set forth in the Horizontal Merger Guidelines of the Department of Justice and the Federal Trade Commission.[15]

The evidence shows that entry barriers in Massachusetts are sufficiently low to discipline Verizon MA's pricing decisions. Consequently, the Department should conclude that the Massachusetts telecommunications market is sufficiently competitive to allow market-based pricing by Verizon MA.

2. The Evidence of Actual Competitive Entry Into the Massachusetts Telecommunications Market Is Overwhelming.

The evidence of the ease of competitive entry and of the resulting competition is compelling. In January 2001, in *every* Verizon MA central office, including those in the smallest and most rural areas, at least two of the three modes of CLEC entry were already in use. And all three modes of entry permitted by the Telecom Act were employed in *88 percent* of the central

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[15] *See*, U. S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, at § 1.3 (1997) and Exh. VZ-5A at 19. For example, Dr. Selwyn failed to take account of the market shares of firms that could enter Massachusetts with relatively little sunk costs, "even when they do not currently sell services in the relevant market" (Tr. 4, at 713-714). As AT&T witness Dr. Mayo conceded, "uncommitted entrants" must be considered to part of the market for purposes of any analysis under the Horizontal Merger Guidelines.

offices in the state (Exh. VZ-1, at 8). The fact is that customers in every city and town in Massachusetts can choose to be served by a carrier other than Verizon MA (*see*, Exh. VZ-3A, at 4).

The unrefutted evidence in Phase I establishes that the number of lines served by competitors is significant and growing; the variety of new technologies and competitive entries has expanded the universe of actual and potential competitors; strong individual competitors have emerged; and there is a strong potential for rapid additional entry (*see, generally*, Exh. VZ-2 at 6-11).

Further, while there is no reason to analyze each of the Verizon MA services in each of Verizon MA's 272 wire centers to conclude that there are no significant barriers to entry and expansion, an examination of CLEC competitive activity in individual wire centers nonetheless demonstrates that large numbers of Verizon MA customers have already switched to competitive alternatives. *See*, Exh. VZ-5A, at 6-7. As Mr. Doane explained in reviewing the data contained in Verizon MA's Massachusetts Competitive Profile:

> The fact that, across Massachusetts, roughly one-quarter to one-third of business lines are currently being served by a provider other than Verizon MA demonstrates quite forcefully that there exists no significant barriers to entry.

(Exh. VZ-5A, at 12). Moreover, Mr. Doane explained the number of competitive entrants on a wire-center basis confirms the vibrant competitive landscape (*id.*, at 15-18).

Although a firm's market share has no relevance when barriers to entry are low, as Dr. Mayo, Dr. Taylor and Mr. Doane opined, the detailed and voluminous data contained in the initial and updated Massachusetts Competitive Profiles establish convincingly that competitive

entry is widespread and reflects a sustainable reality.[16] As evidenced in Table 1 below, lines served by competitors from January to December 2001 have grown significantly. Further, competitors are now migrating from one method of entry (resale) to a broader method of entry (CLEC-switched). As the number of resold lines has declined from 269,000 in January to 217,000 in December 2001, the number of CLEC-switched lines has increased dramatically from 554,700 to 841,200. At the same time, Verizon MA retail lines have declined in actual terms, from 4.324 million to 4.157 million.

Table 1: **Massachusetts Estimated Access Lines in Service**									
	January 2001			**May 2001**			**Nov./Dec. 2001**		
	Business	**Residence**	***Total***	**Business**	**Residence**	***Total***	**Business**	**Residence**	***Total***
VZ-MA Retail	1,526,200	2,797,700	4,323,900	1,525,400	2,717,900	4,243,300	1,431,900	2,725,400	4,157,300
Resale	237,000	32,000	269,000	206,300	28,700	235,000	192,600	24,400	217,000
UNE-P	17,500	9,800	27,300	36,300	10,100	46,400	48,200	7,200	55,400
CLEC Switched	411,700	143,000	554,700	503,200	179,400	682,600	625,600	215,600	841,200
Total Competitive	666,200	184,800	851,000	745,800	218,200	964,000	866,400	247,200	1,113,600

As Table 2 demonstrates, in sorting wire centers in Massachusetts by the four UNE density zones (metropolitan, urban, suburban and rural), it is evident that CLEC penetration levels have grown materially from May to December 2001, particularly as compared to Verizon MA retail lines.

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[16] *See, generally*, Exh. VZ-3A, Attachment 1 and Exh. DTE-VZ RR 2, Attachment 1. The initial Profile contained Verizon MA retail, resale and UNE-P line data for January 2001 and the same information (as well as CLEC-switched data) for May 2001. The updated Profile is in the same format as Section A of the original Profile, with the most recent data available used for each category. For retail, resale and UNE-P, the data reflect lines through November 2001. E911 (CLEC-switched) data were available only on a

(footnote continued…)

Table 2: Massachusetts Estimated Access Lines by Density Zone										
	Retail		Resale		UNE-P		CLEC Switched		Total Competitive	
	Business	Residence	Business	Residence	Business	Residence	Business	Residence	Business	Residence
[PROPRIETARY]										
[PROPRIETARY]										

Tables 3 and 4, below, further demonstrate the increases in competitive lines relative to overall lines and the rate of growth of competitive lines by density zone, respectively, from May to December 2001.[17]

Table 3: Competitive Lines as a % of Total Lines by Density Zone			
	Business	Residence	Total
[PROPRIETARY]			

Table 4: Competitive Lines - % Growth from May to November/December 2001			
	Business	Residence	Total
[PROPRIETARY]			

Finally, the evidence (*see* Table 5 below) also establishes that the distribution of lines, as a percentage of all lines served, is greatest in the urban and suburban UNE zones. Rural

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(…footnote continued)

snapshot basis and were captured on January 4, 2002, thus providing a reasonable estimate for December, 2001. *See* RR DTE-VZ 2 (Massachusetts Competitive Profile Update).

17 As Mr. Doane explained, estimating CLEC market shares by examining the number of lines themselves is "conservative since entrants generally target larger, more profitable customers. Thus, entrants' combined share of lines is typically less than their share of revenues in any given wire center" (Exh. VZ 5A, at 15). The above estimates of CLEC market shares, therefore, are conservative.

exchanges represent only **[PROPRIETARY]** of the business lines and **[PROPRIETARY]** of the residence lines, for a total of approximately **[PROPRIETARY]** of lines statewide.

Table 5: **Distribution of Access Lines by Density Zone (% of All Lines Served)**			
	Business	**Residence**	**Total**
[PROPRIETARY]			

The evidence is uncontroverted: competitive providers are present and serving customers throughout the state and competitors' lines are growing as Verizon MA's retail lines are declining. Competitors now serve **[PROPRIETARY]** of all lines in rural areas, **[PROPRIETARY]** in suburban areas, **[PROPRIETARY]** in urban areas and **[PROPRIETARY]** in metropolitan Boston. Indeed, the percentage of lines served by competitors in each of the UNE areas is greater when considering only business lines.

For the most lucrative market segment, business customers, the CLECs have made substantial and sustainable market penetration in just a few short years. Even in rural Massachusetts, **[PROPRIETARY]** of business lines are served by CLECs. In the suburban market, CLECs now serve **[PROPRIETARY]** of business lines. Most dramatically, CLECs now serve **[PROPRIETARY]** and **[PROPRIETARY]**, respectively, of the urban and metropolitan business lines.[18]

In addition to all of the above, Verizon MA has built a vast new infrastructure to accommodate CLEC growth. That infrastructure is a significant sunk investment for Verizon MA and an incredible boon to both current and potential competitors:

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[18] *See* Table 3 above.

> Between 1998 and 1999, Verizon MA nearly doubled the number of interconnection trunks provisioned for CLECs. Verizon MA provisioned over 90,000 interconnection trunks during 1999, and in 2000 [Verizon MA] met even greater CLEC demand by provisioning an additional 154,000 interconnection trunks – over an 80 percent increase. The total number of CLEC trunks is now about 350,000 – more than half as many interconnection trunks in service as Verizon MA has in its entire Massachusetts network.

(Exh. VZ-1, at 8).

The dynamic pace at which CLECs are exercising the full range of competitive entry options is extraordinary (Exh. VZ-2, at 7-8). In January 2001, there were 851,000 lines served by competitors of Verizon MA (*id.*). The Massachusetts Competitive Profile, updated for December 2001, provides information detailing competitive activity in each Verizon MA central office, including estimates of the number of access lines served by competitors. The data show that competitors were serving over 1,113,000 lines (*see* Table 1). Stated simply, less than five years after the passage of the Telecom Act, CLECs serve over 21 percent of the total number of lines in Massachusetts (*see* Table 1).

In January 2001, there were about 554,700 CLEC-switched lines in service. By May 2001, the number of CLEC-switched lines increased by 127,900 (Table 1). By December 2001, the number of CLEC-switched lines had grown by another 158,600 – a growth rate of over 50 percent (*see* Table 1). Strong facilities based competitors in Massachusetts, including AT&T, RCN, WorldCom and Broadview, are investing significant sums (Exh. VZ-1, at 11). As of January 2001, these competitors had deployed at least 48 local switches, which can serve customers within a wide radius of the serving switch (*id.*).[19] Several CLECs, most notably

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[19] Facilities based competitors have also constructed extensive fiber networks, including SONET rings in major business centers and industrial parks. This method of facilities competition has been used successfully by MFN as well as the telecommunications subsidiaries of local electric companies such as

(footnote continued…)

WorldCom (with its purchase of MFS, Brooks Fiber, and the former DEC Corporation private network) and AT&T (through its acquisition of ACC, Teleport and MediaOne) have built or bought networks that stretch across the state. The reach of these competitive networks is significant (*id.*).[20]

In addition, CLECs are effectively using UNEs and UNE-Ps to compete in Massachusetts. As of January 2001, there were over 85,000 UNE loops (the facility from the customer's premises to the CLEC collocation site) in service in 191 Verizon MA central offices. CLECs were also providing 27,000 lines throughout the state using UNE-P, reflecting approximately a 130 percent increase over the prior six months (*id.* at 11). By December 2001, lines served by UNE-Ps had more than doubled (Table 1). In January 2001, CLECs were providing a competitive alternative to Verizon MA using UNE-P in at least 97 percent of the central offices in Massachusetts (*i.e.*, CLECs had UNE-P arrangements in at least 263 of the 272 Verizon MA central offices) (*id.*).[21] By December 2001, 100 percent of Verizon MA central offices had UNE-P arrangements (*see* Exh. DTE-VZ RR 2, Attachment1).

(…footnote continued)

BecoCom and NEESCom (Exh. VZ-1, at 13). For example, through its partnership with NSTAR, RCN offers services in about 20 central offices with its own facilities (which in some cases overlap the more than 200 communities listed in RCN's resale tariff). Similarly, NEESCom, the telecommunications subsidiary of National Grid, provides city-to-city and switch-to-building connectivity to competing carriers and Internet providers. NEESCom's network extends throughout the Massachusetts Electric Company service territory, with new links being developed via partnerships with other carriers (Exh. VZ-1, at 14).

[20] Because some facilities-based competitors serve customers without ever "touching" the Verizon MA network, it is necessary to use estimates to determine the number of lines they serve. CLEC customer listings in the E-911 database capture lines that are served by these carriers. However, the total lines may be understated if a customer has multiple lines but only one E-911 listing (*e.g.*, a PBX with one main listed number (Exh. VZ-1, at 12). The issue of estimating the number of lines served by facilities-based competition is discussed in Section IV.B, *infra*.

[21] The Profile indicates that the number of UNE platforms and facilities based lines increased by over 147,000 between January 2001 and May 2001 (Exh. VZ-3A, at 3). Lines served by resale decreased by only 34,000 during the same period (*id.*). As of December 2001, the number of UNE-P and CLEC-switched lines increased by another 167,600 (see Table 1) since May. During that same time, resale lines decreased by only 18,000 (*see* Table 1).

Resale competition is also thriving (*id*. at 8). In January 2001, 54 companies had active resale operations throughout Massachusetts (*id*. at 8-9). An examination of CLEC tariffs showed they were offering competitive local exchange services, private line service, intraLATA toll, optional features (such as Caller ID, Call Waiting, Speed Dialing and others), as well as a variety of volume and time-commitment discounts to both business and residential customers (*id*. at 9). Statewide, the number of business lines served by resellers today equals 13 percent of the total number of business lines now served by Verizon MA (*see* Table 1). In January 2001, in 51 central offices, the number of business lines served by resellers equaled more than 20 percent of those served by Verizon MA. In some smaller central offices, the total reseller business line count was equal to 30 percent of the number of business lines served by Verizon MA (Exh. VZ-1, at 9-10). By any measure, these are significant numbers and demonstrate an irreversibly open market with the capability of disciplining Verizon MA's behavior without Department price regulation.

B. The Evidence Demonstrates that Competitors have a Sustained Presence in Massachusetts.

Not only is the evidence of competition overwhelming but competitors have the capacity to sustain that competition in Massachusetts. CLECs are not simply relying upon Verizon MA via resale or UNE-P to serve their customers but, as noted above, have invested significant sums in competing facilities in Massachusetts (Exh. VZ-1, at 11). Cable operators, such as AT&T Broadband and RCN, provide the equivalent of local loops, dial tone, switching for local and long distance calling, vertical features, and Internet access entirely over their own facilities (Exh. VZ-1, at 12; Exh. VZ-2, at 10). AT&T Broadband, which currently provides local phone service to customers in 64 Massachusetts communities, plans to add an additional 73 more communities (Exh. VZ-2, at 9).

Other competitive providers have built significant fiber networks in Massachusetts (Exh. VZ-1, at 13), while still others have deployed fixed wireless cable services more rapidly and at lower cost than landline services (*id.* at 14). Dr. Taylor testified that competitors have also invested extensively in collocation throughout Verizon MA's wire centers to obtain pieces of Verizon MA's network. (Exh. VZ-1, at 10; Exh. VZ-2, at 9). The growth of capacity that competitors have deployed has the prospect of reaching almost all Massachusetts end-users (Exh. VZ-2, at 10).

The presence of these strong competitors with in-place capacity demonstrates that competition can be successfully sustained (Exh. VZ-2, at 9). As indicated in the updated Profile, competitors increased the number of lines served in Massachusetts to over 1,113,000 in December 2001, representing more than a 31 percent increase since January 2001 (*see* Table 1). Of particular significance is that of the over 1.1 million CLEC lines, about 75 percent are provided by CLECs that either have their own end-to-end networks (as AT&T Broadband) or have deployed their own switches, thereby obtaining only loop or transport facilities from Verizon MA (*see* Table 1).

The undeniable fact is that CLECs have invested heavily in their own telecommunications networks and will not, as a whole, walk away from these investments (Exh. VZ-4, at 16). Moreover, even where they have no facilities, competitors can resell Verizon MA's services and use UNE-P arrangements at cost-based rates to provide services. The intense competition we are seeing in Massachusetts today is thus not some temporary phenomenon caused by transient events but is the product of business strategies of numerous carriers drawn to an attractive Massachusetts telecommunications market.

Network Plus and the Attorney General nevertheless maintain that the health of the CLEC industry is not good and suggest that the Department should not assume that competition in Massachusetts will continue (Exh. NP-1, at 17-25; Exh. AG-1, at 55-56). Their claim is without merit.

Dr. Taylor testified that individual business failures are a normal part of the competitive process (Exh. VZ-4, at 16). In fact, he explained that the failure of some CLECs may actually increase the competitive strength of the market. Dr Taylor testified:

> [E]ven if some individual CLECs exit the local market, the remaining competitors are likely to purchase their assets (in the case of a facilities-based CLEC) and/or take over their customer bases. This process strengthens the purchaser's network and product mix and, ultimately, strengthens competition.

(Exh. VZ-4, at 16; Tr. 3, at 413). AT&T's own witness, Mr. Fea, explained that the assets of exiting carriers become available to more successful telecommunications companies, sometimes at pennies on the dollar. (Tr. 4, at 609).[22]

Network Plus and the Attorney General also ignore that the major competitors are not "start-up" CLECs but include AT&T (and its Teleport subsidiary), AT&T Broadband – one of the largest cable companies in the country, and WorldCom (and its MCI Metro and MFS

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[22] In fact, as reported in a recent Reuters article, AT&T's president announced that AT&T itself was "trolling" for inexpensive assets (Tr. 3, at 561):

> AT&T Corporation, the No. 1 U.S. long-distance telephone and cable television company, on Thursday said it may buy fiber-optic networks and equipment from smaller communications companies that declare bankruptcy and flood the market with inexpensive assets. "We think we can create infrastructure now, because of the bankruptcies and the size of the bulk pile of assets out there to pick over, cheaper than we could if we had to build it all ourselves," AT&T president Dave Dorman said at the Lehman Brothers telecom trends and technology conference. "We think there's a great opportunity for AT&T to be an acquiror [sic] of assets in this reconsolidation period that we're going through on a very attractive basis and very opportunistically substituting for capital spending that we ordinarily would have already made.

subsidiaries) (*id.* at 15). However, even so-called start-up companies have the ability to compete directly with Verizon MA through their rights to acquire access to Verizon MA's network at wholesale rates set by the Department (Tr. 3, at 414). As a result, these companies can acquire all of the scale and scope advantages that the Verizon MA network has available through UNEs, UNE-P and resale services (*id.*).[23]

Finally, the data in this case belie the claims of Network Plus and the Attorney General. During the period in 2001 when a number of CLECs fell by the wayside, the level of competitive activity increased substantially. As shown on Table 4, competitive lines grew by over 15 percent from May to November/December 2001. That rate of growth occurred despite CLEC failures and the continued down turn in the economy. Network Plus and the Attorney General have presented nothing to establish that the failure of some CLECs has harmed the vibrant competitive market in the Commonwealth.

IV. INTERVENORS' ARGUMENTS ARE WITHOUT MERIT

A. There Is No Value In the Proposals of AT&T and the Attorney General for Formal Market Power Studies on a Wire-Center Basis.

AT&T's and the Attorney General's claim that the Department should conduct formal market power studies to gauge the extent of competition is completely without merit and should be rejected by the Department. As previously discussed, their proposal would have the Department conduct approximately 18,000 separate market-power studies, which Dr. Taylor

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[23] Newtork Plus and the Attorney General also ignore the potential that new entrants will have on the market (Tr. 3, at 367). The Department of Justice, in its horizontal merger guidelines, considers such entities "uncommitted entrants" who have the ability to compete within a certain time frame because of low barriers to entry into the market (*id.* at 368). Accordingly, because of low barriers to entry into the competitive telecommunications market in Massachusetts, those companies who currently have no revenues, but who have the opportunity to provide service, have a competitive effect on the Massachusetts market for telecommunication services (*id.*).

testified was "a draconian procedure which, by design, could never be carried out by the Department in any reasonable or useful manner" (Exh. VZ-4, at 3).[24]

Dr. Taylor testified that, apart from being impossible to complete within any reasonable period, their proposal suffered from several fatal theoretical flaws. First, Dr. Taylor explained that to implement the quantitative tests advanced by Dr. Mayo and Dr. Selwyn would require the Department to estimate the price elasticity of the demand curve facing a firm at the *competitive* price. To undertake this quantitative analysis would require generally unobtainable market data from competing carriers, information regarding actual and potential competing services, and assumptions as to likely responses to changes in the incumbent firm's price. Dr. Taylor explained that such omniscience – including knowledge of existing and potential capacities and locations, likely costs of expansion, the degrees to which services can substitute for those of the incumbent and appropriate weights to assign to each factor – is highly improbable (Exh. VZ-4, at 4). In fact, competing carriers in this investigation have chosen *not* to assist the Department by providing *any* of their own customer data in this docket – precisely because disclosure of the relevant information would have supported the determination that competition is alive and well in Massachusetts.

Second, Dr. Taylor testified that rates for Verizon MA services have been pervasively regulated, and it is difficult to know *a priori* what rate levels would result in the absence of regulation (Exh. VZ-4, at 27). As Dr. Taylor explained in discussing the Landes and Posner

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[24] It is also unnecessary to define a wire center as a relevant geographic market because in each wire center all CLECs eligible to provide service in Massachusetts have the same opportunity to enter or expand entry by way of UNEs. Since, as Dr. Mayo recognizes, it is necessary to include these "uncommitted" entrants in an HHI analysis, the HHI in each wire center would necessarily be the same and equal to the HHI calculated at the statewide level. Similarly, it is unnecessary to define each Verizon MA service as a separate relevant product market since the same UNEs can be used to provide all services.

treatise cited by Dr. Mayo,[25] this "requires knowledge of the market share at the firm's profit-maximizing price and output level. Virtually nothing is known about such a measure that pertains to regulated telephone services" (Exh. VZ-6 at 6).

Finally, Dr. Taylor testified that although enforcement agencies and economic theorists accept economic models of market power, "they also recognize the impracticalities of using such measures *directly* in a real-world evaluation of market power" (Exh. VZ-4, at 1, emphasis added). Dr. Taylor explained that far more observable economic measures such as barriers to entry and expansion and evidence of economic loss should be used for evaluating effective competition (*id.*). These are precisely the factors the Department has looked to in the past and which should guide its evaluation in this case. Verizon MA has presented extensive data on the factors that are key to a determination of effective competition – the presence of numerous competitors, the vulnerability of Verizon MA's market share, the widespread availability of capacity in the form of unbundled loops, switching and transport through ubiquitous collocation, and the presence of effective facilities based competitors with networks of their own.[26] No party has provided any basis for the Department to ignore the real-world evidence before it in favor of theoretical economic models.

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25 *See* William M. Landes and Richard A. Posner "Market Cover in Antitrust Cases," *Harvard Law Review,* March 19, 1981: 937-996; *see also* Exh. VZ-4, at 5.

26 As Dr. Taylor explained, the term "effective competition" refers to a sufficient level of competition to "prevent an individual firm from profitably holding the market price above the competitive level for a significant, i.e., nontransitory, period of time (Exh. VZ-4 at 2). Under the Merger Guidelines of the U.S. Department of Justice, a potential entrant represents an example of "effective competition" if it is likely that it can supply output in response to a price increase above competitive levels within a one-year period (Exh. VZ-4 at 2; Exh. AG-VZ 2-2 and Exh. NEPCC-VZ-2-1).

B. Verizon MA Has Reasonably Estimated the Number of Lines Served by Facilities-Based Competitors Using E-911 Data.

AT&T and the Attorney General take issue with the accuracy of Verizon MA's estimate of competitive lines derived from the E-911 database (Exh. ATT-5, at 1-8; Exh. AG-1, at 39-45). Their claim totally misses the mark. Although Verizon MA's estimate is reasonable, the precise number is not significant, and the criticism of the intervenors is a red herring. Verizon MA used the estimate only to demonstrate that entry barriers were low as evidenced by the significant level of competitive activity, that facilities-based competition was a significant component of the overall competition, and that competitive lines are growing rapidly. No party in this case has offered any contrary evidence concerning competitive activity. The record demonstrates that the estimate is a conservative depiction of the level of facilities-based competition in Massachusetts.

AT&T's witness contends that the Profile may overstate the level of competitive lines because of the way AT&T reported certain data to the E-911 database (Exh. ATT-5, at 3-5). According to Ms. Waldbaum, AT&T's practice is to include every telephone number behind a PBX, including direct inward dial ("DID") numbers, when a customer migrates from Verizon MA to AT&T (*id.* at 5). Ms. Waldbaum admits that this is not the industry standard (*id.*). On the other hand, if a customer uses telephone numbers assigned to AT&T (*i.e.*, no migration), AT&T may not include all of the numbers behind the PBX in the E-911 database – only the "lead" number (*id.*).

Contrary to AT&T's contention, its method of reporting "ported" numbers behind a PBX makes no material difference in Verizon MA's estimate. Mr. Conroy explained that ported numbers are only a small portion of AT&T's overall lines in the Profile (Exh. VZ-8, at 4). The vast majority of AT&T business listings use telephone numbers that have been assigned to

AT&T.[27] Thus, while the Profile results could be somewhat different, the issue raised by AT&T is insignificant and would not affect the conclusions that can be drawn from the data. Of particular note is that AT&T had its own data which it could compare with Verizon MA's estimate to "correct" the record. It is telling that AT&T did not produce any of its own data to support the allegation that Verizon MA's estimate was over-stated.

In addition, even the small percentage of AT&T business listings that may be "ported" numbers does not establish that the E-911 figures overstate CLEC-switched lines. First, Verizon MA cannot determine what portion of the AT&T ported lines are behind a PBX or are, in fact, regular business lines (Exh. VZ-8, at 5, fn.5).[28] If AT&T's ported lines are regular business lines, then the use of the E-911 database does not overstate the number of CLEC-switched lines.

Second, the total number of AT&T E-911 listings could actually *understate* the number of lines served by AT&T. When a business customer uses telephone numbers assigned to AT&T, AT&T does not list all of these numbers in the E-911 database because AT&T has specific information about which numbers are DID (only DID numbers would not be listed in E-911 because they cannot be used to make outgoing 911 calls). Of the business listings for AT&T's own telephone numbers that are included in the E-911 database, some amount are

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[27] Nor did Ms Waldbaum's modification at hearing change that conclusion. As Mr. Conroy explained, "prior to the first quarter of 1999, AT&T was putting numbers into the E911 database" in a manner comparable to how Verizon MA counted its retail Centrex lines (Tr. 2, at 158). After January 1, 1999, AT&T admitted that, if a customer used telephone numbers assigned to AT&T (*i.e.*, no migration), AT&T may not have included all of the numbers behind the PBX in the E-911 database -- only the "lead" number. Significantly, as of July 1999, six months after AT&T claimed to have started including only the lead number for "assigned" PBX customers, the total number of CLEC listings in the E911 database was 266,000. This number represented *all* CLECs, and *both* residence and business lines (Tr. 2, at 160). AT&T – and the PBX lines associated with it – reflected only a portion of those listings. By contrast, in December 2001, total CLEC-switched lines in the database amounted to 841,200 lines (*see* Table 1). The effect of Ms Waldbaum's revision to her testimony, therefore, is "de minimis" (*id.*).

[28] This is because AT&T does not consistently distinguish between Business and Business PBX classes of service when entering listings in the E-911 database. This practice is contrary to the E-911 guidelines (Exh. VZ-8, at 5, fn.5).

certainly PBX customers where the "lead" number is listed in the E-911 database (*id.* at 5-6). Associated with these lead numbers would be other telephone numbers, and therefore actual lines, that are served by AT&T. However, in the case of such PBX customers, there may be many more lines provided by the CLEC than the single E-911 listing, thereby *understating* the number of CLEC-switched lines used to serve the business customer. It is not possible for Verizon MA to identify the significance of this understatement (AT&T does not distinguish PBX from non-PBX business customers) (Exh. ATT-5, at 4, ftnt.2, AT&T may not include all telephone numbers behind a PBX when a customer uses telephone numbers assigned to AT&T).

AT&T also claims that Verizon MA's estimate of CLEC lines is also suspect because it is inconsistent with data reported by the FCC for the same period (Exh. ATT-1, at 33). According to AT&T, an FCC report on local competition concludes that there were 509,731 end-user lines served by reporting CLECs in Massachusetts as of December 31, 2000, compared to the 851,000 lines estimated by Verizon MA (*id.*). AT&T's reliance on the FCC report is without merit.

AT&T failed to identify that *only eleven* CLECs reported data to the FCC, while there are over 60 CLECs providing service to customers in Massachusetts (VZ-MA Exhibit 3A, at 5). The FCC's report itself notes that the lines reported by CLECs are understated (*id.*, citation omitted). Moreover, the FCC indicates that states with Long Distance approval (as of the report date of December 2000) show the greatest competitive activity. Massachusetts data highlight that in January 2001, even before Long Distance approval, CLECs were already serving almost 20 percent of the lines served by Verizon MA (*id.* at 5-6).

C. The Existing Performance Assurance Plan and Other Available Remedies Protect Effective Competition.

Just before hearings began, the Department issued an Interlocutory Order requesting that parties address what effect on competition, if any, may result from current or future provisioning

problems by Verizon MA. *Interlocutory Order on Verizon's Motion to Strike, or in the Alternative, To Supplement Surrebuttal*, at 6 (December 13, 2001). In particular, the Department sought comments on the possible effects to competition, if any, on provisioning problems that follow a cycle of "non-compliance ? investigation/penalty ? correction" (*id.* at 5).[29] The Attorney General suggests that this cycle threatens the competitive environment because the penalties are insufficient to ensure Verizon MA's compliance and CLECs could be forced into protracted enforcement proceedings (Tr. 1, at 99-100). These concerns are without merit.

Verizon MA provision of resold services, UNEs, and interconnection facilities are subject to clearly defined performance standards and performance plans that provide for substantial monetary penalties for sub-standard service. The Department has adopted the New York Carrier-to-Carrier Guidelines which contain detailed reporting requirements and standards for literally hundreds of activities associated with Verizon MA's delivery of wholesale services to CLECs. (*Evaluation of the Massachusetts Department of Telecommunications and Energy*, CC Docket No. 00-176, at 15 (October 16, 2000). Under the Department-approved Performance Assurance Plan ("PAP"), Verizon MA faces potential penalties of up to $155 million for its failure to meet the established standards. *Application of Verizon New England for Section 271 Authority*, Memorandum and Order, CC Docket No. 01-90, at ¶241 (April 16, 2001). Verizon MA is also subject to a performance plan and penalties under the Department's *Consolidated Arbitrations*. *Consolidated Arbitration*, Phases 3, 3-A, 3-B, 3-C, 3-D, 3-E, 3-F and 3-G. Both the Department and the FCC have found that these performance plans provide Verizon MA with meaningful economic incentives to ensure that it continues providing quality wholesale services.

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[29] The Department specifically indicated that it was not interested in evidence on Verizon MA's provisioning compliance or non-compliance; but rather, on the effect on a market structure that relies on the provisioning

(footnote continued…)

Evaluation of the Massachusetts Department of Telecommunications and Energy, CC Docket No. 00-176, at 412 (October 16, 2000); *Application of Verizon New England for Section 271 Authority,* Memorandum and Order, CC Docket No. 01-90, at ¶¶ 240-247 (April 16, 2001).

In addition, both the Department and the FCC have continuing jurisdiction over Verizon MA and can take action if service levels are not maintained. Contrary to the Attorney General's claim that enforcement can be burdensome and time consuming for CLECs, the Department has adopted a complaint process, which ensures that disputes are handled expeditiously. That process, adopted in D.T.E. 00-39-A (2000), provides for a written recommended decision no more than 52 days after a complaint is docketed. 220 C.M.R. §§ 15.08, 15.09. The Department has ensured that CLEC disputes are addressed quickly, without unnecessary delay.

The Attorney General's position is also not supported by the facts.[30] As shown by the monthly performance reports filed with the Department, Verizon MA's wholesale performance is strong and has improved over time. PAP credits to CLECs dropped substantially from April 2001 ($1,247,953) to October 2001 ($94,047)[31] (Exhs. AG-5 and AG-9 (PAP/CCAP Market Adjustment Summary)). In October 2001, Verizon MA achieved perfect scores in nine of twelve critical measures and was not assessed market adjustments for any mode of entry category,

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(…footnote continued)

cycle described above. *Interlocutory Order*, at 6.

30 The Attorney General cites the "admittedly anecdotal" experience of his witness, Dr. Selwyn, in obtaining a T-1 line at ETI's office to support his position. However, as Dr. Taylor noted: "[D]rawing conclusions from a sample of one frequently leads to the wrong conclusion" (Exh. VZ-7 at 11). Verizon MA provided a summary of the facts surrounding this particular order (Exh. VZ-3A, at 12; Attachment 2). The facts demonstrate that the length of time required to install the services for ETI was not the result of inadequate service by Verizon MA (Exh. VZ-5A, at 4). As is clear from the ETI experience, the Attorney General's comments concerning other end users with purported service issues may, in fact, be attributable to third parties, rather than Verizon MA (*id*.).

31 On January 25, 2002, Verizon MA filed with the Department the final PAP results for October 2001 and preliminary PAP results for December 2001. The final PAP credits for October were $105,914, and the preliminary PAP credits for December were $86,536.

special provisions or change control (Exh. AG-8). The mechanisms which this Department has implemented to assess Verizon MA's performance on an on-going basis and to provide incentive to meet service standards are working.

D. AT&T's Claims Concerning the Special Access Services Are Without Merit.

Unable to refute Verizon MA's demonstration of effective competition, AT&T raises a number of issues concerning special access services to deflect attention from the overwhelming evidence of competition on the record.[32] AT&T presented no evidence to support its claims, and its effort is unavailing.

First, AT&T's contention that the Massachusetts special access market is not competitive flies in the face of the FCC's determination that it is. Specifically, the FCC has granted Verizon MA both "Phase I" and "Phase II" pricing flexibility (*see* Tr. 3, at 564-65; *see also* Exh. VZ-6 at 5-8) based on its finding that there is sufficient competition for the provision of special access and dedicated transport services in Massachusetts to preclude the exercise of market power.[33] AT&T presented no data in this case to give the Department any basis for concluding that the FCC's determination is wrong.

Second, AT&T suggests that because special access prices are higher than UNE rates, CLECs are at a competitive disadvantage when they provide exchange services over special access services (Exh. ATT-2, at 11). Here too, AT&T makes only an unsubstantiated allegation

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[32] AT&T attempted in this case to raise the issue of Verizon MA's performance in provisioning and maintaining special access services for CLECs. The Department properly struck AT&T's testimony on performance related matters because it is considering those issues in a separate docket. *Interlocutory Order on Verizon's Motion to Strike, or in the Alternative, to Supplement Surrebuttal*, D.T.E. 01-31-Phase I, at 4, (December 13, 2001), *citing* Department's Investigation in D.P.U. 01-34.

[33] *See Fifth Report and Order and Further Notice of Proposed Rulemaking*, CC Docket Nos. 96-262, 93-1, 98-63, 98-157, FCC 99-206, Adopted August 5, 1999. *See also Memorandum, Opinion and Order*, CCB/CPB Nos. 00-24, 00-28, Adopted March 13, 2001 at 5 and 7.

unsupported by any concrete evidence. Indeed, its entire case on this point consists of the bald assertion that the Department should deny Verizon MA pricing flexibility in the business market until CLECs can obtain the special access services at UNE rates. AT&T failed to provide any analysis demonstrating that the pricing of special access services limited its ability to compete in the high-end business market where those services are used. In contrast, Verizon MA's Competitive Profile provides clear evidence that there is intense competition across all segments of the business market. As discussed above, even in rural Massachusetts, **[PROPRIETARY]** of business lines are served by CLECs. In the suburban market, CLECs now serve **[PROPRIETARY]** of the business lines. Competitive inroads in urban and metropolitan areas are even more stunning; CLECs now serve **[PROPRIETARY]** and **[PROPRIETARY]**, respectively, of the urban and metropolitan business lines (Table 3).

Finally, AT&T complains about purported difficulties it is experiencing in converting AT&T's existing special access arrangements into UNEs (Exh. ATT-3, at 3). AT&T's complaint is with the FCC which has established specific criteria a carrier must meet in order to convert existing special access circuits to UNEs.[34] AT&T's inability to satisfy the FCC's specific requirements hardly provides cause for the Department to conclude that there is an absence of effective competition in any Massachusetts market.[35]

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[34] Supplemental Order Clarification, *Implementation of the Local Competitive Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183 (June 7, 2000).

[35] AT&T complains that ILECs may be impeding CLEC efforts to convert special access service to UNEs. (Exh. ATT-3, at 3). As with its other special access claims, AT&T failed to substantiate its allegation. Indeed, AT&T did not provide even a single example in which Verizon MA improperly applied FCC rules governing special access conversions.

V. VERIZON MA'S COMMENTS ON COMMISSIONER VASINGTON'S QUESTIONS CONCERNING CAPPING PRICES IN CERTAIN GEOGRAPHIC AREAS BASED ON A RELATIONSHIP TO PRICES IN OTHER GEOGRAPHIC AREAS.

During hearings, Commissioner Vasington asked a number of questions about a hypothetical regulatory structure that would cap prices in geographic areas the Department concluded were not sufficiently competitive, based upon the pricing flexibility it allowed in geographic areas where it found sufficient competition (Tr. 4, at 526-527). As Verizon MA understands Commissioner Vasington's hypothetical, the "cap" on prices in the "less-competitive" area would be fixed relative to prices in the "more-competitive" area, based on the relative UNE loop costs to provide service in each area. If, for example, the UNE loop cost to provide a service to the "less-competitive" area is twice the UNE loop cost to provide the service in the "more-competitive" area, the cap in the "less-competitive" area would be fixed at twice the price level in the "more-competitive" area. Using a numerical example, if the UNE loop cost in the "more-competitive" and "less-competitive" areas to provide a service were $10 and $20, respectively, and Verizon MA priced a service at $12 in the "more-competitive" area, then the price cap for that service in the "less-competitive" area would be $24.

Verizon MA further understands that Commissioner Vasington's hypothetical assumes that retail service prices can be deaveraged, but that nothing would "require the price [in "less-competitive" areas] to go up" unless Verizon MA chooses to "take advantage of the pricing flexibility to price the rural area up" (Tr. 4, at 731). That is, Verizon MA would be able to hold the price of a service at its current level even "if the price is already below cost" (Tr. 4, at 731). Verizon MA also understands that nothing in Commissioner Vasington's hypothetical would

require Verizon MA to reduce the price of any service in a "less-competitive" area unless the cap described above warranted such a price change.[36]

As discussed in detail above, the evidence establishes that there is effective competition for services throughout the state, and therefore, no factual basis exists for the Department to conclude that any areas are less competitive. However, if the Department nonetheless concludes that pricing constraints should apply in selected service areas for a transitional period (perhaps two years) because of other public policy considerations, Verizon MA offers the following comments on the hypothetical raised by Commissioner Vasington.

First, the hypothetical structure will not generally harm competition. A key outcome of competition is that prices move towards economic cost. The price cap described by Commissioner Vasington for the "less-competitive" area is tied to the underlying cost in that area, in the sense that the relative price-cost margin in the "less-competitive" area is bounded by the relative price-cost margin in the "more-competitive" area where market forces are adequate to control price. If competitive forces in the "more-competitive" area were to move prices toward cost, so too would the price cap, and possibly the service price, in the "less-competitive" area. There is no harm to competitors as a result of more efficient pricing in all areas.

Moreover, in "more-competitive" areas, sufficient competition exists to protect consumers and the competitive process and thus the success of individual competitors will be based on the advantages they bring to the market, not to any inherent disadvantage competitors have relative to Verizon MA. The hypothetical does not diminish any competitor's ability (in either "more-competitive" or "less-competitive" areas) to obtain access to UNEs at incremental

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[36] Parenthetically, Verizon MA also understands that the proposal is intended to apply solely to basic exchange service.

cost based prices. Nor does the structure affect the Department's imputation rules or the obligation Verizon MA has to make its retail telecommunications services available for resale at a wholesale discount. In short, all the legislative and regulatory safeguards to competition remain in effect to protect competitors.

Thus Commissioner Vasington's hypothetical proposal would permit the movement of prices towards costs in "less-competitive" areas and would not disadvantage entrants in either ("more" or "less-competitive") area. However, the proposed regulatory structure *would* disadvantage Verizon MA relative to its competitors. First, the evidence in this case shows detailed statewide and wire-center data on the number of resellers, UNE entrants, CLECs using their own switches, and CLECs and other service providers collocating at Verizon MA central offices. This evidence warrants granting Verizon MA pricing flexibility in *all* parts of the state, and any constraint on Verizon MA's ability to set prices would disadvantage Verizon MA relative to its (unconstrained) competition.

Second, because Commissioner Vasington's hypothetical proposal would apply to one competitor (but not all) in a market assumed to be competitive, Verizon MA would be placed at an artificial competitive disadvantage. Suppose for simplicity that economic costs for some service were the same across "more" and "less-competitive" areas, so that the price cap for the service in "less-competitive" areas would be set equal to the price in "more-competitive" areas. Suppose also that market conditions in the "more-competitive" area implied that Verizon MA's service would be more profitable at a lower price. In setting its price in the "more-competitive" area, Verizon MA would have to take into account the financial effect of reducing prices in both "more" and "less-competitive" areas, while Verizon's competitors would not. As a result, some

price reductions Verizon MA might otherwise make in the "more-competitive" market, *i.e.*, if regulation were symmetrical, would not take place.

The Department should also consider the effect of Commissioner Vasington's hypothetical proposal on consumers. Dr. Mayo, for example, noted that the Department should be concerned with "consumer welfare" (versus the Attorney General's proposition that the cap should be "as low as possible") and also opined that the Department's decision should be "driven by concerns of economic efficiency and universal service and the opening of the markets to competition" (Tr. 4, at 733). Verizon MA concurs that consumer welfare is advanced when all competitors are free to enter and operate without constraint. Dr. Taylor explained that: "In markets subject to competitive forces, regulation is not benign, and superfluous regulation in the presence of competition is not merely an innocuous safety net. Such regulation can exclude efficient firms from entering, and can raise costs, inhibit competition and ultimately reduce consumer welfare" (Exh. VZ-2, at 13 (footnote omitted)).

Commissioner Vasington's hypothetical, therefore, may adversely affect Verizon MA's ability to compete and cause associated harm to consumers in general.

VI. CONCLUSION

For the reasons stated above, the Department should conclude that the local exchange market in Massachusetts is sufficiently competitive to allow market-based pricing throughout the state. No barriers to entry or expansion exist that hinder the ability of competitors to serve any corner of the state that they choose. The number of competitors and the lines they serve is

significant and growing at a rapid pace. The time has come to permit Verizon MA to compete on equal footing with other providers in the Massachusetts telecommunications market.

Respectfully submitted,

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