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' RESPONSE TO
PARTIES' MOTIONS TO DISMISS

On March 15, 2004, the Competitive Carrier Coalition[1] (the "CCC"), Sprint Communications Company, L.P. ("Sprint") and Z-Tel Communications, Inc. ("Z-Tel") (herein collectively referred to as the "Parties") filed separate Motions to Dismiss this proceeding concerning Verizon New England Inc.'s, d/b/a Verizon Massachusetts' ("Verizon MA"), Petition for Arbitration ("Petition") filed February 20, 2004. As discussed below, their Motions are unfounded and should fail.

First, Verizon MA's Petition is not premature based on Bell Atlantic/GTE merger conditions, as the CCC suggests. CCC's Motion at 3. The Bell Atlantic/GTE merger condition, by its express terms, expired in July 2003 and applied only to two earlier FCC orders, not to the *Triennial Review Order*.

[1] The CCC includes the following companies: Allegiance Telecom of Massachusetts, Inc., ACN Communications Services, Inc., Adelphia Business Solutions Operations, Inc., d/b/a Telcove, CoreComm Massachusetts, Inc., CTC Communications Corp., DSLnet Communications, LLC, Focal Communications Corporation of Massachusetts, ICG Telecom Group, Inc., Level 3 Communications, LLC, Lightship Telecom, LLC, LightWave Communications, Inc., PAETEC Communications, Inc., RCN-BecoCom, LLC, and RCN Telecom Services of Massachusetts, Inc.

Second, Verizon MA properly requested negotiations with competitive local exchange carriers ("CLECs") to amend its interconnection agreements and initiated this arbitration in accordance with the timetable established in the Federal Communications Commission's ("FCC") *Triennial Review Order*[2] and the Telecommunications Act of 1996 (the "Act"). Thus, contrary to the Parties' claims, Verizon MA's Petition conforms to all applicable formal and procedural requirements under Section 252 of the Act and analogous Department rules. CCC's Motion at 6-8; Sprint's Motion at 6-7; Z-Tel's Motion at 3-4. Likewise, the timing of Verizon MA's filing is consistent with the FCC's directives regarding rapid implementation of the *TRO* rules.

Third, the Parties' efforts to delay the amendment of Verizon MA's interconnection agreements based on the recent D.C. Circuit decision are erroneous. CCC's Motion at 10-11; Sprint's Motion at 6-8. Nothing in the D.C. Circuit's recent decision affirming in part and vacating in part the *TRO* appeal warrants the dismissal of Verizon MA's Petition. Under federal law, the Department has the responsibility to resolve disputed issues presented by Verizon MA's Petition in accordance with the Section 252(b) timetable under the Act. Accordingly, the CCC, Sprint and Z-Tel present no basis for dismissing Verizon MA's Petition and, therefore, their Motions should be denied by the Department.

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[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*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.*, 2004 WL 374262, 2004 U.S. App. LEXIS 3960 (D.C. Cir. Mar. 2, 2004) ("*USTA II*").

I. ARGUMENT

A. The Bell Atlantic/GTE Merger Does Not Prevent Implementation of the *Triennial Review Order*.

The CCC claims that the conditions contained in the *Bell Atlantic/GTE Merger Order*[3] prevent implementation of the *Triennial Review Order* until that order has become "final and non-appealable." CCC's Motion at 3 (citing *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd at 14180, ¶ 316). The CCC relies on the following quote from that Order:

> In order to reduce uncertainty to competing carriers from litigation that may arise in response to our orders in the UNE Remand and Line Sharing proceedings, from now until the date on which the Commission's orders in those proceedings, and any subsequent proceedings, become final and non-appealable, Bell Atlantic and GTE will continue to make available to telecommunications carriers, in accordance with those orders, each UNE and combination of UNEs that is required under those orders, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide the UNE or combination of UNEs in all or a portion of its operating territory. This condition only would have practical effect in the event that our rules adopted in the UNE Remand and Line Sharing proceedings are stayed or vacated.

Id. at 4 (quoting *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd at 14180, ¶ 316). The CCC claims that the *Triennial Review Order* is a "subsequent proceeding," as referred to in the *Bell Atlantic/GTE Merger Order*. *Id*. at 5. Therefore, because the *Triennial Review Order* is not yet "final and non-appealable," Verizon MA still must provide CLECs with access to the UNEs required in the vacated *UNE Remand Order* and *Line Sharing Order*. *Id*. at 6. The CCC's argument is without merit.

First, the merger condition on which the CCC relies — like virtually *all* of the conditions in the *Bell Atlantic/GTE Merger Order* — expired of its own force in July 2003, which was 36

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[3] *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000) ("*Bell Atlantic/GTE Merger Order*").

months after the Bell Atlantic/GTE merger closed. The merger conditions contain a sunset clause, which provides that, with limited exceptions not relevant here, "*all* Conditions set out in th[e] [Order] . . . *shall cease to be effective and shall no longer bind Bell Atlantic/GTE in any respect* 36 months after the Merger Closing Date." *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd at 14331, ¶ 64 (emphasis added). Because the merger closed in July 2000, the condition on which the CCC relies would have ceased to be effective, even if the D.C. Circuit's decision vacating the *UNE Remand Order* and the *Line Sharing Order* had not become final and non-appealable as of March 24, 2003.

Second, the CCC ignores the clear terms of the *Bell Atlantic/GTE Merger Order* and the FCC's holdings in the *Triennial Review Order*. Specifically, Paragraph 316 of the *Bell Atlantic/GTE Merger Order* states that the obligation to provide those UNEs lasts only "until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide the UNE or combination of UNEs in all or a portion of its operating territory." *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd at 14180, ¶ 316. Similarly, the merger condition itself states clearly that "[t]he provisions of this Paragraph shall become null and void and impose no further obligation on Bell Atlantic/GTE after the effective date of final and non-appealable [FCC] orders in the UNE Remand and Line Sharing proceedings, respectively." *Id*. at 14316, App. D, ¶ 39. Both the *UNE Remand Order* and the *Line Sharing Order* were struck down by the D.C. Circuit's decision in *USTA I*.[4] That decision took final effect on February 20, 2003, and certiorari was denied on March 24, 2003. It constitutes a final and non-appealable judicial decision that the prior UNE rules had no force and effect. Thus, any UNE obligations

[4] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

perpetuated by the *Bell Atlantic/GTE Merger Order* ceased to be effective as of the date that certiorari was denied.

This is precisely what the FCC's Common Carrier Bureau has already ruled in analogous circumstances. It held that "[t]he *Merger Conditions* require Verizon's incumbent local exchange carriers . . . to comply with certain [FCC] rules until the date of any final and non-appealable judicial decision concluding the litigation concerning those rules by invalidating them." Letter Clarification, *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd 18327, 18328 (2000) (footnote and internal quotation marks omitted). Thus, it held that, if the Supreme Court vacated the FCC's TELRIC rules, the Bell Atlantic/GTE merger conditions "would not independently impose an obligation to follow any finally invalidated pricing rules." *Id.* Likewise, here, the *UNE Remand Order* and the *Line Sharing Order* have been "finally invalidated," and the *Bell Atlantic/GTE Merger Order* imposes no independent obligation.

Finally, in considering arguments comparable to those of the CCC, the FCC determined in the *Triennial Review Order* that the new obligations and limitations contained in that order must be implemented promptly. It noted concerns that the negotiation process to implement the *Triennial Review Order* "may be unnecessarily delayed where a change of law provision provides for interconnection agreement modification pursuant to 'legally binding intervening law or final and unappealable [judicial] orders.'" *Triennial Review Order*, 18 FCC Rcd at 17406, ¶ 705 (internal quotation marks omitted; alteration in original). The FCC held that "once the *USTA* decision" — which the FCC recognized had vacated both the *UNE Remand Order* and the *Line Sharing Order* (*see id.*) — "is final and no longer subject to further review, or the new rules adopted in this Order become effective, *the legal obligation upon which the existing interconnection agreements are based will no longer exist*." *Id.* (emphasis added). The FCC

stated further 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." *Id.* Indeed, the FCC highlighted its belief that *any* delay in implementing the *Triennial Review Order* would "have an adverse impact on investment and sustainable competition in the telecommunications industry." *Id.* at 17405, ¶ 703. Therefore, there is no basis for perpetuating a set of UNE obligations that were struck down in a final and non-appealable decision nearly two years ago in *USTA I*.

B. Verizon MA Properly Requested Negotiations with CLECs Regarding an Amendment to Its Interconnection Agreements.

Z-Tel argues that Verizon MA failed to follow the change-in-law provisions in its interconnection agreement to initiate negotiations. Z-Tel's Motion at 1-2. Specifically, Z-Tel claims that Verizon MA's October 2, 2003, Notice, entitled "NOTICE OF DISCONTINUATION OF UNBUNDLED NETWORK ELEMENTS AND NOTICE OF AVAILABILITY OF CONTRACT AMENDMENT,"[5] did not satisfy the specific terms of its agreement. *Id*. at 3-5. Z-Tel also asserts that the *Triennial Review Order* did not, at that time, constitute a change in law under it agreement because the *TRO* was not "final and unappealable." *Id.* at 3-4. Z-Tel's arguments are spurious. First, the *Triennial Review Order* provides that, even if Verizon MA had not sent the October 2nd Notice, "negotiations" for purposes of amending interconnection agreements with respect to the *TRO* should be "deemed" to have commenced on October 2, 2003. *Triennial Review Order*, 18 FCC Rcd at 17405, ¶ 703. Indeed, the FCC specifically held that "a party cannot contend that the negotiation time period did not begin because another party failed to send a request for negotiation." *Id*. at 17405, ¶ 703 n.2088.

Second, Z-Tel mischaracterizes Verizon MA's October 2nd Notice in numerous ways.

[5] The October 2nd Notice is included as Exhibit 3 to Verizon MA's Petition.

Far from being "oblique," as Z-Tel claims, the notice could hardly have been clearer in making available a draft amendment and inviting Z-Tel to engage in negotiations with Verizon MA. It states, in pertinent part, that:

> In addition, this letter serves as confirmation that Verizon is prepared to comply with all other provisions of the Triennial Review Order, provided it has not otherwise been stayed or reversed on appeal, subject to negotiation and execution of an appropriate amendment to your interconnection agreement that applies the changes in law effected by the Triennial Review Order to the specifics of the commercial environment.
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> **To the extent notice of such changes in law, or notice of termination of service/facilities availability, is required under your interconnection agreement, this letter shall serve as such notice.**
>
> Verizon's proposed contract amendment implementing the provisions of the Triennial Review Order has been posted on Verizon's Wholesale Web Site and may be accessed via the electronic link at the bottom of this letter. This proposed contract amendment also explains the mechanism for transitioning existing service arrangements that will no longer be available on an unbundled basis to alternative services.
>
> Carriers seeking to amend their interconnection agreements should review the draft amendment and contact Verizon to proceed with completion of the contracting process. You can either send an email to contract.management@verizon.com or contact Renee L. Ragsdale, Manager Interconnection Services. Ms. Ragsdale's address is 600 Hidden Ridge, Irving, TX 75038 and her telephone number is 972-718-6889.
>
> Please be advised that the Triennial Review Order provides that October 2, 2003 shall be deemed to be the notification request date for contract amendment negotiations associated with the Triennial Review Order. In accordance with Section 252(b) of the Act, from the 135th day to the 160th day after such negotiation request date, either party may request the state regulatory commission to arbitrate the terms of the contract amendment.

See Verizon MA's Petition, Exhibit 3 at 2 (emphasis in original).

In response to identical notices, some CLECs engaged in negotiations with Verizon MA regarding the terms of that amendment. Z-Tel, however, admits that it chose *not* to respond to Verizon MA's invitation to negotiate. Z-Tel's Motion at 5. Z-Tel claims that it understood Verizon MA's Notice as leaving it to the CLEC to decide whether an amendment was necessary,

and that it thought the better course was to wait until all appeals of the FCC's *Triennial Review Order* were complete before commencing negotiations. *See id.* at 5, 8-9. But Verizon MA clearly stated that its Notice served to initiate the change-of-law process and that "*either* party may request the state regulatory commission to arbitrate the terms of the contract amendment" in the event negotiations were unsuccessful. Verizon MA's Petition, Exhibit 3 at 2 (emphasis added). Verizon MA's Notice could not reasonably have been read to leave it to Z-Tel to decide whether negotiations and, ultimately, an arbitration should take place.

Likewise, Z-Tel's claim that the *Triennial Review Order* was not a "change in law" because it was the subject of various appeals is unsupportable. Z-Tel Motion's at 3. It is black-letter law that a regulation is effective until and unless it is stayed or vacated, and nothing in Z-Tel's agreement with Verizon MA prohibits a party from implementing a regulatory order until that order has been upheld on appeal. Even if the agreement had any such provision, the FCC preempted all such provisions of interconnection agreements. *See Triennial Review Order*, 18 FCC Rcd at 17406, ¶ 705 (holding that any change-of-law provision relying on "final and unappealable [judicial] orders" should be deemed satisfied when the original *USTA* decision was final or the *Triennial Review Order* took effect). Nor was there any basis for Z-Tel to assume that it should "await the outcome" of appeals of the FCC's order before engaging in any contract renegotiations. Z-Tel's Motion, at 8-9. To the contrary, the FCC explicitly stated that "[o]nce a contract change is requested by either party, we expect that negotiations and any timeframe for resolving the dispute would commence immediately." *Triennial Review Order*, 18 FCC Rcd at 17405, ¶ 704.

Accordingly, Z-Tel's failure even to reply to Verizon MA's formal October 2nd Notice was inconsistent with Z-Tel's obligation under Section 251(c) of the Act to negotiate in good

faith. *Id*. at 17406, ¶ 706 ("Finally, we reiterate that section 251(c) imposes a good faith negotiation requirement that applies to both incumbent LECs and competitive LECs."). In light of Z-Tel's failure to negotiate in good faith, the Department arguably should not even allow Z-Tel to come forward now, *after* Verizon MA has filed for arbitration, to challenge Verizon MA's draft amendment (much less entertain Z-Tel's Motion to Dismiss).[6]

C. Verizon MA's Petition Complies With Applicable Procedural Requirements Under Federal and State Law.

1. The Act's Section 252 Timetable Applies to Verizon MA's Petition.

In the *Triennial Review Order*, the FCC established that the timetable set forth in 47 U.S.C. § 252(b) for the arbitration of interconnection agreements under the Communications Act of 1934, as amended by the 1996 Act, also applies to amendments to interconnection agreements regarding any of the *Triennial Review Order's* unbundling requirements and limitations that are not self-effectuating. *Triennial Review Order*, 18 FCC Rcd at 17405, ¶ 703. Thus, the FCC stated that "incumbent and competitive LECs [should] use section 252(b) as a default timetable for modification of interconnection agreements that are silent concerning change of law and/or transition timing."[7] *Id*. Moreover, the FCC made clear that the timing set forth in Section 252(b) applies "even in instances where a change of law provision exists." *Id.* at 17405, ¶ 704. As a result, the FCC noted that, in all such cases, "a state commission should be able to resolve a

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[6] Z-Tel's claim that Verizon MA was required to pursue the dispute resolution process - as set forth in Z-Tel's interconnection agreement - before filing an arbitration petition with the Department is contrary to the terms of that agreement. The agreement provides that, if negotiations are unsuccessful (as they were here, given Z-Tel's failure to negotiate) "either party may pursue *any* remedies available to it under this Agreement, . . . , *including* . . . instituting an appropriate proceeding before the [State] Commission." Z-Tel Agreement at § 4.6 (emphasis added). Z-Tel incorrectly reads "any remedies" to mean *only* the dispute resolution process set forth in the agreement.

[7] As the FCC stated, "under the section 252(b) timetable, where a negotiated agreement cannot be reached, parties would submit their requests for state arbitration as soon as 135 days after the effective date of this Order but no longer than 160 days after this Order becomes effective." *Triennial Review Order*, 18 FCC Rcd at 17405, ¶ 703. The *Triennial Review Order* became effective on October 2, 2003, and Verizon MA filed its petition on February 20, 2004, within the 135-160 day window.

dispute over contract language at least within the nine-month timeframe envisioned for new contract arbitrations." *Id.* at 17406, ¶ 704.

Z-Tel and Sprint, however, claim that Verizon MA's Petition is premature because the Section 252(b) timetable was intended by the FCC to apply only "in the case of 'modification of interconnection agreements that are silent concerning change of law and/or transition timing.'" Sprint's Motion at 8 (quoting *Triennial Review Order*, 18 FCC Rcd at 17405, ¶ 703); *see also* Z-Tel's Motion at 6-7. Z-Tel also argues that the Section 252 negotiation and arbitration process is unavailable to incumbents, such as Verizon MA. *See id.* at 10-11. Both arguments are directly contrary to the FCC's determinations in the *Triennial Review Order*.

As an initial matter, while Sprint alludes to dispute resolution provisions in the parties' agreement, it fails to explain how Verizon MA has failed to comply with the requirements of those provisions. But even if Sprint had done so, its argument would still be inconsistent with - and trumped by - the FCC's ruling.

The FCC held that, for amendments relating to the rules promulgated in the *TRO*, the Section 252(b) timetable would apply to interconnection agreements with *or* without change-of-law provisions. *See Triennial Review Order*, 18 FCC Rcd at 17405, ¶ 704 (Section 252(b) timetable applies "in instances where a change of law provision exists" and state commissions should resolve any disputes about amendments "at least within the nine-month timeframe" set out in § 252(b)). Moreover, the FCC held that "in the interconnection *amendment* context, *either the incumbent or the competitive LEC may make . . . a request*" to initiate negotiations to amend an agreement. *Id.* at 17405, ¶ 703 n.2087 (emphasis added). Therefore, Sprint's and Z-Tel's claims should be rejected.

2. Verizon MA's Petition Satisfies the Elements of Section 252.

Sprint, Z-Tel, and the CCC contend that Verizon MA's Petition should be dismissed because it does not comply with the requirements of Section 252(b)(2) of the Act and analogous Department rules to state the unresolved issues, discuss each party's position on those issues, and identify other issues resolved by the parties.[8] Sprint's Motion at 6-7; Z-Tel's Motion at 10-11; CCC's Motion at 6-8. Their claims are without merit.

As an initial matter, the requirements that apply to a petition for arbitration of a new agreement under Section 252(b)(2) do not necessarily apply to Verizon MA's petition to amend existing agreements. To be sure, the FCC has held that the "section 252(b) *timetable*" and negotiation process apply. *Triennial Review Order*, 18 FCC Rcd at 17405-06, ¶¶ 703-704 (emphasis added). But the FCC did not hold that a petition seeking resolution of disputes over amendments that implement the *Triennial Review Order* would necessarily have to comply with all of the formal requirements for a petition for arbitration of a new agreement, as Sprint and the CCC suggest. The *Triennial Review Order* presents a novel situation, envisioning the prompt amendment of thousands of interconnection agreements nationwide. State regulatory commissions can be expected to follow reasonable procedures that fit this unique situation, rather than adhere to an overly formalistic approach that will undermine the FCC's directive for parties to make any "necessary changes to their interconnection agreements in response to [the *TRO*] in a timely manner." *Id*. at 17405, ¶ 702.

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[8] The CCC also complains that, even though Verizon MA filed its petition with the Department on February 20, 2004, the CCC did not receive that petition on the same day, but instead received it one business day later, on February 23, 2004. CCC's Motion at 7 n.16 (citing 47 U.S.C. § 252(b)(2)(B)). The FCC, however, has refused to dismiss an arbitration proceeding in identical circumstances, holding that it would be a more "appropriate" remedy to allow "the opposing party 25 days to respond." Memorandum Opinion and Order, *Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, 16 FCC Rcd 6224, 6228-29, ¶¶ 8-9 (2001) ("*Virginia Order*").

Even if those formal requirements of Section 252(b)(2) did apply, Verizon MA has complied appropriately with those requirements in light of the circumstances presented here. Verizon MA *has* set forth in detail the issues presented by its draft amendment and fully explained its positions regarding those amended terms. Because Verizon MA has initiated a consolidated proceeding, as explicitly permitted by Section 252(g) - for the convenience of the Department and the parties – it was not feasible to describe the position of each of the parties on the unresolved issues. This is, in large part, due to the fact that Verizon MA has generally received little in the way of response to its proposal — and most of the responses that Verizon MA has received did not represent serious efforts at negotiation and/or arrived very late in the process. Accordingly, Verizon MA has simply been unable to set forth other parties' position on the various issues because *most* of the parties, Sprint excepted, have yet to take any positions.[9]

Verizon MA has complied with the clear purpose behind Section 252(b)(2), which is to set forth clearly the disputed issues that the Department may be called upon to resolve. As the Department is aware, each of the parties will have an opportunity in its response to Verizon MA's Petition to set forth its own position on each of the issues in its own words. Rather than detailing in the Petition the responses Verizon MA received from a very few CLECs, the more reasonable and efficient approach would be for the parties to review each others' positions in response to Verizon MA's Petition, identify the issues, and proceed to resolve them or have the Department arbitrate the claims.

[9] It should be noted that the vast majority of the CCC's members have provided *no* comments to Verizon MA – and those who did provide comments to Verizon MA either submitted them a few days before the Petition was filed or after that filing was made.

Moreover, in all events, and particularly in light of the unique circumstances present here, the drastic remedy of *dismissal* would be a disproportionate and inappropriate response to any perceived technical defects in Verizon MA's Petition. The FCC has determined that "delay in the implementation of the new rules we adopt in [the *TRO*] will have an adverse impact on investment and sustainable competition in the telecommunications industry." *Id.* at 17405, ¶ 703. Verizon MA's Petition sufficiently frames the issues presented to the Department for resolution and provides all parties clear notice of Verizon MA's position and a fully adequate basis to respond. The appropriate course, therefore, is for the Department to allow this proceeding to move forward with an eye towards implementing the FCC's *TRO* determinations, giving all parties a full and fair opportunity to present their positions.[10]

Finally, in support of their respective Motions, Sprint and the CCC cite to an order of the North Carolina Utilities Commission ("NCUC") holding in abeyance the proceeding that Verizon initiated in that state. Sprint's Motion at 7; CCC's Motion at 8-9. That argument is erroneous.

First, Sprint and the CCC fail to acknowledge that, in approximately 20 other states, proceedings to amend existing interconnection agreements are underway and have not been dismissed. Second, the NCUC's decision is based, in large measure, on the incorrect conclusion that the D.C. Circuit's decision in *USTA II*, which vacated the *Triennial Review Order* in part, warranted at least a delay in acting on Verizon's petition. Verizon is, therefore, seeking to lift the stay imposed by the NCUC.

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[10] Memorandum Opinion and Order, *Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, 16 FCC Rcd 6224, 6229, ¶ 9 (holding that, where a petition had failed to meet Section 252's service requirement, a "draconian remedy, such as dismissing outright the preemption petition before us, would contravene the intent of section 252(b) – to ensure a forum for parties to bring interconnection disputes for timely resolution").

As previously stated, the fact that certain aspects of the *Triennial Review Order* (in particular, that state commissions would make impairment determinations) have been vacated provides *no* basis to postpone the task of amending interconnection agreements to reflect the *TRO*'s limitations on unbundling, which were upheld essentially in their entirety in *USTA II*. Indeed, to be clear, Verizon MA seeks to memorialize – through this amendment - those portions of the *Triennial Review Order* that were not challenged or were upheld by the D.C. Circuit. Accordingly, the Parties' Motions must be rejected.

D. The D.C. Circuit's Decision Does Not Alter the Department's Obligation to Undertake this Arbitration to Implement Promptly the TRO Rulings.

Sprint argues that "Verizon's Petition should…be dismissed because of the decision by the United States Court of Appeals for the District of Columbia in *United States Telecom Ass'n v. FCC*, Nos. 00-1-12, 00-1015, 03-1310 et al. … issued on March 2, 2004." Sprint's Motion at 4. Likewise, the CCC claims that this proceeding would waste administrative resources, because the "law on which the Petition purports to be based is still undetermined." CCC's Motion at 10. The CCC points to the fact that the D.C. Circuit vacated portions of the *Triennial Review Order* and that Verizon MA is filing a modified version of its *TRO* amendment, and that Verizon MA has requested the Department to abate its nine-month TRO implementation proceeding in D.T.E. 03-60. *Id.* at 10-11. Neither Sprint nor the CCC, however, cite anything in the D.C. Circuit's *USTA II* decision that warrants such dismissal. Thus, their arguments are without merit.

First, the federal rules that Verizon MA seeks to implement are not "undetermined." Although the D.C. Circuit vacated certain portions of the *Triennial Review Order*,[11] many of the FCC's rulings in the *TRO* (and, in fact, virtually all of the FCC's rulings "delisting" UNEs) were

[11] It should be noted that Verizon MA's Petition does not include those portions of the *Triennial Review Order* that were vacated by the D.C. Circuit.

not affected by the D. C. Circuit's decision, either because the Court upheld the relevant rules or because they were not challenged in the first place.[12] Thus, there is no need to wait for the outcome of *USTA II* before amending interconnection agreements to reflect those rulings, to the extent that they are not self-effectuating under the agreements. Indeed, the FCC specifically anticipated that some parties might argue that the new rules contained in the *Triennial Review Order* should not be implemented until all appellate challenges are exhausted, and rejected that argument. *See id.* at 17406, ¶ 705. The FCC held that "delay in the implementation of the new rules we adopt in this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry."[13] *Id.* at 17404, ¶ 703.

As a result, the *TRO* rulings that the D.C. Circuit's decision left intact are of critical importance and must promptly be given effect in Verizon MA's interconnection agreements. The unaffected *TRO* decisions include those where the FCC:

- Determined that the broadband capabilities of hybrid copper-fiber loops and fiber-to-the-home facilities are not subject to unbundling;

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[12] *See, e.g.*, *USTA II*, 2004 U.S. App. LEXIS 3960, at *72-73 (upholding FCC's decision not to unbundle broadband capacity of hybrid loops); *id.* at *76-77 (upholding FCC's decision not to unbundle "fiber-to-the-home" loops); *id.* at *80-81 (affirming FCC's decision not to unbundle line sharing); *id.* at *86-87 (upholding FCC's decision not to unbundle enterprise switching); *id.* at *88 (upholding FCC's decision not to unbundle signaling or call-related databases except in narrow circumstances); *see also id.* at *59-60 (upholding FCC's decision to require routine network modifications). By contrast, the portions of the *Triennial Review Order* that were overturned by the D.C. Circuit were primarily those that either required unbundling or that delegated authority to state commissions. *See, e.g.*, *id.* at *30 (vacating all portions of the *Triennial Review Order* that "delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements"); *id.* at *31 (vacating FCC's nationwide unbundling mandate as to mass market switching); *id.* at *48 (vacating the "national impairment findings with respect to DS1, DS3, and dark fiber").

[13] The FCC explicitly determined that the new unbundling requirements – and particularly the newly enacted *limitations* on unbundling – must be implemented promptly – and no party challenged that determination on review. Thus, any effort by the Parties to delay implementation of those *TRO* requirements and await the outcome of the D.C. Circuit's decision *before* amending the interconnection agreements is contrary to the FCC's clear intent and the realization of the Act's pro-competitive purposes.

- Eliminated the obligation to provide line sharing as an unbundled network element and adopted transitional line-sharing rules;

- Eliminated unbundling requirements for OCn loops, OCn transport, enterprise switching, and packet switching;

- Eliminated unbundling requirements for signaling networks and virtually all call-related databases, except when provisioned in conjunction with unbundled switching;

- Required ILECs to make routine network modifications to unbundled transmission facilities;

- Required ILECs to offer subloops necessary to access wiring in multi-tenant environment;

- Eliminated unbundled access to the feeder portion of the loop on a stand-alone basis;

- Required ILECs to offer unbundled access to the network interface device ("NID") on a stand-alone basis; and

- Found that the pricing and UNE combination rules in Section 251 of the Act do not apply to portions of an incumbent's network that must be unbundled solely pursuant to Section 271 of the Act.

The fact that *USTA II* vacated or remanded some *TRO* rulings (*e.g.*, concerning mass-market switching and interoffice transport) is no reason to dismiss this arbitration. Verizon MA's amendment, filed in accordance with the FCC's *Triennial Review Order*, accommodates potential changes in the parties' legal obligations, including those that may occur as a result of D.C. Circuit's decision and possible subsequent appellate and FCC actions. Accordingly, there is no need to delay this proceeding as to any aspect of Verizon MA's proposed amendment.

Second, Sprint and the CCC note that, in a separate proceeding (D.T.E. 03-60), Verizon MA filed an Expedited Motion to Stay Track A of that docket because the D.C. Circuit's decision "invalidates both the FCC's delegation of authority to determine whether CLECs [competitive local exchange carriers] are impaired without access to [certain] unbundled network

elements ("UNE") and the substantive tests that the FCC promulgated for making such determinations." Sprint's Motion at 4, quoting from Verizon MA's March 3, 2004, Expedited Motion (D.T.E. 03-60) at 1; CCC's Motion at 10-11. However, Verizon MA has not acted inconsistently in requesting that state commissions (including the Department) cease the *TRO* implementation proceedings, given that the D.C. Circuit struck down the very basis for holding those proceedings.

In D.T.E. 03-60, Verizon MA explained that continuing with *that* proceeding would be inefficient given the fact that the D.C. Circuit invalidated the FCC's delegation of authority to the state commissions.[14] Without the jurisdictional authority to proceed, "it would be feckless [for the Department] to continue *these* [D.T.E. 03-60] proceedings, which exist under an unlawful delegation and are aimed at the wrong substantive tests." *See* Verizon MA's March 3, 2004, Expedited Motion (D.T.E. 03-60) at 2 (emphasis in original). Therefore, Verizon MA properly requested that a stay be granted in D.T.E. 03-60, pending a decision as to "whether there will be any continuing role for state commissions following a determination on remand by the FCC." *Id.*; *see also* Verizon MA's March 12, 2004, Comments (D.T.E. 03-60) at 8-9.

By contrast, the D.C. Circuit's decision in *USTA II* does not affect the process that the FCC expected carriers to use in making appropriate changes to their interconnection agreements in response to the *Triennial Review Order*. The FCC directed carriers to use the timeline established in Section 252(b) of the Act, and the Department has the responsibility, under binding federal law, to resolve disputed issues presented by Verizon MA's Petition in accordance with that timeline. *Triennial Review Order*, 18 FCC Rcd at 17404-5, ¶¶ 703-04. Accordingly,

[14] *See USTA II Order*, 2004 WL 374262, at *30 (vacating the *TRO* rules that "delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements").

Verizon MA's interconnection agreements should be promptly amended to reflect the *TRO* rulings that remain effective under *USTA II*, and these Motions to Dismiss must be denied.

E. Verizon MA Properly Retained the Right to Amend Its Petition to Conform to *USTA II*.

In its Petition, Verizon MA explicitly acknowledged that there were pending proceedings in the D.C. Circuit and before the FCC that might affect the applicability of the *Triennial Review Order*. *See* Verizon MA's Petition at 4-5. Verizon MA stated that in the event of any change in law, it might be necessary to modify the Petition accordingly. Z-Tel, however, suggests that because the *Triennial Review Order* has been "unravel[ed]," there has "been no net change in law," and the Department should, therefore, retain the "*status quo ante*" during this time of "legal uncertainty." Z-Tel's Motion at 13. Z-Tel's arguments are unfounded.

The true "*status quo ante*" is that there are *no* unbundling obligations at all, as the D.C. Circuit struck down both the *UNE Remand Order* and the *Line Sharing Order* in 2002. *See United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"); *Triennial Review Order*, 18 FCC Rcd 17406, ¶ 705 (noting that the "legal obligation upon which the existing interconnection agreements are based will no longer exist" once the *USTA* decision was final or the *Triennial Review Order* took effect). Moreover, Z-Tel's claim that the *Triennial Review Order* has been "unravel[ed]," or that there has been "no net change in law" betrays a serious misreading of *USTA II*, which affirmed virtually every portion of the *Triennial Review Order* insofar as it cut back on incumbents' unbundling requirements. The FCC has emphasized its belief that *any* delay in implementing the *Triennial Review Order* would "have an adverse impact on investment and sustainable competition in the telecommunications industry." *Triennial Review Order*, 18 FCC Rcd at 17405, ¶ 703. Z-Tel's arguments present no basis for ignoring either the *Triennial Review Order* or the D.C. Circuit's *USTA II*.

Finally, Z-Tel complains that Verizon MA had no right to acknowledge the then-forthcoming D.C. Circuit's decision, and argues that the Department should reject any future modifications that Verizon MA may make in this proceeding. Z-Tel's Motion at 12. Z-Tel relies on Section 252(b)(4)(A) of the Act, which provides that a state commission "shall limit its consideration" to the "issues set forth in the petition and the response." *Id.* at 13 (quoting § 252(b)(4)(A)). But the Department knows from experience that parties to ongoing Section 252 arbitrations commonly adjust their positions in reaction to an intervening court decision, particularly a decision that concerns the validity of the very rule being applied. And, in any event, while *USTA II* might affect *how the issues are resolved*, the issues remain the same. Thus, taking the D.C. Circuit's decision into account does not require the Department to consider *any* issues that are not "set forth in the petition and the response." *Id*.

F. Sprint's Claim That This Petition Should Be Dismissed Because Verizon MA Failed to Negotiate in Good Faith Is Erroneous.

In its Petition, Verizon MA pointed out that "virtually none" of the CLECs provided a timely response to Verizon's October 2, 2003 notice initiating negotiations. Sprint states that "[t]his is a patently false assertion by Verizon." Sprint's Motion at 5. Sprint further claims that, because of Verizon MA's failure to negotiate, the Department should dismiss this proceeding or, alternatively, dismiss Verizon MA's Petition as to Sprint. Sprint's Motion at 2. Sprint's argument is erroneous.

The fact is that "virtually none" of the CLECs responded to Verizon MA's request for negotiations. Sprint is one of the very few that did. And contrary to Sprint's account, Verizon MA has not "purposefully avoided" meaningful discussion of Sprint's proposals. *Id*. at 6. Verizon MA discussed those proposals with Sprint and thoughtfully considered them, but Verizon MA ultimately rejected Sprint's changes to the amendment. Verizon MA's refusal to

accept Sprint's proposals, however, does not constitute bad faith negotiation. *See School Committee of Newton v. Newton School Custodians Assn.,* 438 Mass. 739, 751, 784 N.E.2d 598 (2003) (noting that the obligation to bargain in good faith "shall not compel either party to agree to a proposal or make a concession") (internal quotes and citation omitted); *School Committee of Newton v. Labor Relations Comm.,* 388 Mass. 557, 573, 447 N.E.2d 1201 (1983) (same); *see also Schwanbeck v. Federal-Mogul Corporation et al, ,* 31 Mass. App. Ct. 390, 578 N.E.2d 789 (1991) (noting that "[a] party may, consistent with good faith dealing, break off negotiations.").[15]

Further, while Verizon MA disagrees with the particulars of Sprint's account of the parties' discussions with respect to the *TRO* amendment, those kinds of arguments will not advance the process of promptly concluding the amendment process. It makes no sense for the Department to dismiss Verizon MA's Petition with regard to Sprint and order Verizon MA to reinitiate negotiations, just because Verizon MA and Sprint failed to reach agreement on a *TRO* amendment. Dismissing Sprint from the proceeding would mean only that Verizon MA would have to file for individual arbitration against Sprint, raising the same issues as those presented in this consolidated arbitration. It is unlikely that, after conducting a consolidated arbitration, the Department will make different decisions on the same issues in a Sprint-specific arbitration. This inefficient approach makes no sense, either for the Department or the parties.

Even if the Department were to consider dismissing Verizon MA's Petition as to Sprint, there is no basis for considering Sprint's suggestion that Verizon MA's Petition be dismissed as to all Massachusetts CLECs. Sprint's bad faith allegations pertain only to Sprint's dealings with

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[15] The FCC itself relied on labor law precedents when it defined the "good faith" requirement of Section 251. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Provider*s, 11 FCC Rcd 15499, 15577-78, ¶¶ 154-155 & nn.288, 292 (1996); *see also In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5454, ¶ 22 n.42 (Mar. 16, 2000) (noting that "the good faith negotiation requirement of Section 251 . . . relies substantially on labor law precedent").

Verizon MA, not to any other CLEC. Thus, even if Sprint's allegations had any merit (which they do not), they provide no basis for dismissing Verizon MA's Petition as to all other CLECs.

G. The Department Should Not Dismiss Verizon MA's Petition As It Relates To Routine Network Modifications.

In the alternative, the CCC argues that the Department should dismiss Verizon MA's Petition insofar as it relates to routine network modifications. CCC's Motion at 12. It claims that the *Triennial Review Order* "did not establish new law," but rather "clarified that Verizon's refusal to perform such modifications violated existing law." *Id.* (citing *Triennial Review Order*, 18 FCC Rcd at 17377, ¶ 639 n.1939). Thus, the CCC argues that no change to the interconnection agreement is necessary. The CCC's interpretation of the *Triennial Review Order* is incorrect.

The FCC explicitly recognized that, by adopting a rule as to routine network modifications, it was at long last "resolv[ing] a controversial competitive issue that has arisen repeatedly, in both this proceeding and in the context of several section 271 applications." *Triennial Review Order*, 18 FCC Rcd at 17371-72, ¶ 632. Nor did the FCC imply, let alone hold, that its prior (vacated) rules required incumbents to perform routine network modifications.[16]

[16] The CCC also claims that Verizon MA should not be allowed to implement its proposed rates for routine network modifications, because Verizon is already recovering those costs in its UNE rates. CCC's Motion at 12-13. This issue is more appropriately resolved during the course of this proceeding, rather than on a motion to dismiss.

II. CONCLUSION

For the reasons discussed above, the Department should deny the Parties' Motion to Dismiss.

Respectfully submitted,

VERIZON MASSACHUSETTS

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