ISSUED: May 14, 2002

D.T.E. 98-57 Phase IV

Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in the following tariff: M.D.T.E. No. 17, filed with the Department on April 6, 2001, to become effective May 6, 2001, by Verizon New England, Inc. d/b/a Verizon-Massachusetts.

ORDER ON JOINT PETITION FOR APPROVAL OF SETTLEMENT AGREEMENT AND FINAL ORDER

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ORDER ON JOINT PETITION FOR APPROVAL OF SETTLEMENT AGREEMENT AND FINAL ORDER

I. INTRODUCTION AND PROCEDURAL HISTORY

On January 12, 2001, Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") filed with the Department of Telecommunications and Energy ("Department") proposed revisions to its tariff M.D.T.E. No. 17, with an effective date of February 11, 2001. These proposed revisions included changes to rates for meet point interconnection arrangements, the method used to calculate the Unbundled Telecommunications Carrier Reciprocal Compensation rate, and Verizon's collocation regulations regarding the application of direct current ("DC") collocation power rates. These changes went into effect on February 11, 2001. Prior to this filing, Verizon's tariff permitted Verizon to assess charges for DC power "per fused amp provided" to a competitive local exchange carrier's ("CLEC") physical collocation arrangement. The changes that went into effect permitted charges "per load amp, per feed," as ordered by a CLEC on its collocation application, and also provided for random inspections to verify the actual power load drawn.

On April 6, 2001, Verizon filed with the Department revisions to its tariff M.D.T.E. No. 17, with an effective date of May 6, 2001. The tariff filing proposed further clarifying language to the DC power provisioning terms and new enforcement provisions to control the power load drawn by physical collocation arrangements. On April 9, 2001, the Department sought comments on the tariff revisions from all parties to the proceedings in D.T.E. 98-57 Phase I. On April 12, 2001, Sprint Communications Company L.P. ("Sprint")

filed comments. On April 13, 2001, the Department received comments from Conversent Communications of Massachusetts, LLC ("Conversent") and WorldCom, Inc. ("WorldCom"), and joint comments from AT&T Communications of New England, Inc. ("AT&T"), Covad Communications Company ("Covad"), and Allegiance Telecommunications of Massachusetts, Inc. ("Allegiance").[1] Verizon filed reply comments on April 18, 2001.

On May 2, 2001, upon review and consideration of these comments, the Department permitted the April 6, 2001 tariff revisions to go into effect, pending further investigation and subject to true-up (D.T.E. 98-57 Phase IV, Hearing Officer Memorandum (May 2, 2001)). The Department docketed the investigation of this proposed tariff filing as D.T.E. 98-57 Phase IV. Pursuant to notice duly issued, the Department indicated that all parties to D.T.E. 98-57 Phase I would be parties to Phase IV of this proceeding, and requested comments from the parties on the need for discovery, pre-filed testimony, and evidentiary hearings.[2] The Department received comments on the procedural schedule only from Verizon,

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[1] The Department has no record of Allegiance having filed a petition to intervene in D.T.E. 98-57 Phase I or Phase IV. The Department did consider these comments, however, because AT&T and Covad are intervenors.

[2] Furthermore, the Department's notice advised all other persons that the deadline for filing motions to intervene was May 17, 2001. The Department received no motions to intervene. On October 1, 2001, XO Communications ("XO"), formerly Nextlink Massachusetts, Inc., submitted a copy of a recent order of the Federal Communications Commission ("FCC") that XO believed may be instructive in this proceeding. See Order Terminating Tariff Investigation, CC Docket No. 01-140 (Sept. 26, 2001). XO never moved to intervene in this proceeding, although it did so in D.T.E. 98-57 Phase III. In D.T.E. 98-57 Phase I, XO was on the "distribution list," and was not an intervenor or a limited participant. Therefore, XO's submissions in this docket were not properly filed. Although the Department may still take official notice of the FCC order pursuant to 220 C.M.R. § 1.10(2), the order did not make any findings, but merely terminated an investigation because Verizon had withdrawn revisions to Tariff

AT&T, Sprint, and joint comments from Covad and Allegiance. As a result of a late-arising issue in D.T.E. 98-57 Phase I regarding access to interoffice transport from a mid-span meet, the Department expanded the scope of D.T.E. 98-57 Phase IV to include this issue.[3] D.T.E. 98-57 Phase I-B, at 27-28 (2001).

On July 10, 2001, Verizon and AT&T filed a Joint Motion for Entry of Order According to the Terms as Stipulated by the Parties to approve language for M.D.T.E. No. 17 relative to access to interoffice transport facilities from mid-span meet arrangements. The Department granted the motion and removed that issue from further consideration in this proceeding. D.T.E. 98-57 Phase IV, Letter Order (July 20, 2001). Pursuant to 220 C.M.R. § 1.10(8), the stipulated terms are hereby incorporated into this final Order.

On June 14, 2001, Verizon filed the direct testimony of Bruce Lear and Peter Bahr. On July 5, 2001, Sprint filed the rebuttal testimony of Edward Fox. On July 10, 2001, AT&T filed the rebuttal testimony of Allan Poretsky. On August 6, 2001, Verizon filed the rebuttal testimony of Bruce Lear. No other party filed testimony. On July 2 and 3, 2001, Verizon submitted responses to 24 information requests issued by the Department and 3 information

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FCC Nos. 1 and 11 regarding rates charged to collocators for DC power. Order Terminating Tariff Investigation at 2-3. The order holds no precedential value in this proceeding.

[3] Because the Department ordered further investigation on the issue of interoffice transport from a mid-span meet and ordered that the evidence on that issue would be heard in this proceeding, the hearing officer set a procedural schedule that provided an opportunity for discovery and pre-filed testimony and set a schedule for evidentiary hearings (D.T.E. 98-57 Phase IV, Hearing Officer Memorandum (May 25, 2001)). As noted immediately below, this issue was removed from further consideration when the Department granted a stipulation of terms by Verizon and AT&T.

requests issued by AT&T. On July 30, 2001, AT&T submitted responses to 17 information requests issued by Verizon.[4]

On October 5, 2001, the hearing officer granted Verizon's request for a continuance of the evidentiary hearing scheduled for October 10, 2001, in order to allow all parties more time for settlement discussions on the remaining issue of DC power provisioning. On November 5, 2001, the hearing officer granted an assented-to request by Sprint for an additional extension of the procedural schedule to allow further settlement discussions.

On December 21, 2001, Verizon, Sprint, and Covad (collectively, "Joint Petitioners") filed a Joint Petition for Approval of Settlement Agreement. The settlement agreement was executed on December 20, 2001, and provides inter alia for the filing of new tariff revisions including rates, terms, and conditions agreed upon by the Joint Petitioners.[5] The hearing officer directed all parties that wanted to submit comments on the settlement to file comments with the Department by January 9, 2002 (D.T.E. 98-57 Phase IV, Hearing Officer Memorandum (Dec. 27, 2001)). WorldCom filed its Comments in Partial Opposition to the Joint Petition for Approval of Settlement Agreement on January 9, 2002. No other party filed

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4 AT&T asserts that the attachment to its response to VZ-ATT 1-4 is proprietary. AT&T filed a Motion for Protective Treatment of Confidential Information on February 12, 2002. This will be addressed below.

5 The Department notes these tariff revisions are identical to the tariff revisions that Verizon submitted to the Pennsylvania Public Utility Commission pursuant to a settlement agreement executed on November 20, 2001. The Department further notes that the Pennsylvania Public Utility Commission approved the settlement agreement and tariff revisions without modification. Pennsylvania Public Utility Commission et al. v. Verizon Pennsylvania, Inc., Pa. P.U.C., Nos. R-00016329, R-00016329C001, and R-00016329C002 (Dec. 19, 2001).

comments or opposition. The hearing officer directed the Joint Petitioners to file reply comments, which the Joint Petitioners filed on February 6, 2002.[6]

II. MOTION FOR PROTECTIVE TREATMENT OF CONFIDENTIAL INFORMATION

A. Position of AT&T

AT&T argues that the attachment to its response to the information request VZ-ATT 1-4 should be granted protective treatment because it contains competitively sensitive and highly proprietary information and trade secrets (Motion of AT&T Communications of New England, Inc. for Protective Treatment of Confidential Information ("AT&T Motion") at 1). AT&T states that the information contained within the responses is not publicly available, is not shared with non-employees for personal use, and is only disseminated to employees subject to non-disclosure agreements for internal business reasons (id. at 3). Further, AT&T claims that the attachments contain valuable commercial information that competitors could use unfairly for their own competitive advantage (id. at 4). Specifically, AT&T states that the information is highly proprietary because it identifies the locations and sizes of AT&T's New York power installations (id.). AT&T argues that competitors could use the information to identify the sizes and locations of AT&T's collocation arrangements in New York, and disclosure would permit competitors to target specific geographic areas for competition (id.). AT&T argues that the

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6 In addition, the hearing officer had also directed the Joint Petitioners to address two specific questions regarding the proposed tariff language (D.T.E. 98-57 Phase IV, Hearing Officer Memorandum (Jan. 7, 2002)). The Joint Petitioners filed their responses on January 18, 2002 (Joint Petitioners' Comments on Proposed Tariff References (Jan. 18, 2002)).

information must be protected for five years in order to avoid giving AT&T's competitors an unfair competitive advantage (id.). No party filed an opposition to this motion.

B. Standard of Review

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

> The [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the Department shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data, regardless of physical form or characteristics, received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth (a) ("specifically or by necessary implication exempted from disclosure by statute").

G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, confidential, competitively sensitive or other proprietary information"; second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all

such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113 at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also Standard of Review for Electric Contracts, D.P.U. 96-39 at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer"); Colonial Gas Company, D.P.U. 96-18 at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

All parties are reminded that requests for protective treatment have not been and will not be granted automatically by the Department. A party's willingness to enter into a non-disclosure agreement does not resolve the question of whether the response should be granted protective treatment. Boston Electric Company, D.T.E. 97-95, Interlocutory Order on

(1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998) ("BECo Interlocutory Order").

C. Analysis and Findings

The Department has recognized that disclosure of location-specific information about collocation arrangements could allow competitors "to know which exchanges warrant greater sales and marketing resources, and which may not." Verizon New England, Inc. d/b/a Verizon Massachusetts, D.T.E. 01-31 Phase I, Interlocutory Order on Verizon Massachusetts' Appeal of Hearing Officer Ruling Denying Motion for Protective Treatment (Aug. 29, 2001) ("Verizon Interlocutory Order") at 9. Therefore, the Department held that such information may be protected as competitively sensitive information in order to avoid anti-competitive targeting of customers and to prevent competitors from gaining an unfair competitive advantage. Id.

The information request, VZ-ATT 1-4, requested "all documentation of AT&T power readings performed by Mr. Poretsky's engineers in Verizon NY's central offices for the months of April, May, and June of 2001." The attachments to VZ-ATT 1-4 contain information about the names and addresses of certain collocation arrangements, the number of feeds, and the ampere readings measured from those feeds (VZ-ATT 1-4, att. 1). The Department finds that the attachments contain information that is competitively sensitive and that there is a need to protect this information from disclosure to the public in order to avoid anti-competitive targeting of customers and to prevent competitors from gaining an unfair competitive advantage.

Although the Department finds that the attachments contain competitively sensitive information, the Department may protect only as much information as is necessary to avoid the harm identified. G.L. c. 25, § 5D. In the Verizon Interlocutory Order, the Department considered similar location-specific wire center information concerning the number of resold and retail lines in each wire center. Verizon Interlocutory Order at 10. The Department found that the number of lines would fluctuate over time and that the competitive harm resulting from the disclosure of "stale" information would be reduced significantly. Id. Therefore, the Department held that wire center identification should be redacted for a period of two years to avoid competitive harm. Id.

AT&T argues that the information that can reveal locations and sizes of AT&T's collocation arrangements in New York should be protected for a period of five years because AT&T's collocation presence does not change substantially from year to year, and it requires a substantial amount of time to plan for, order and occupy collocation facilities once they are completed (AT&T Motion at 4). The Department finds that redacting the wire center identification and addresses from the attachments for a period of five years will be necessary to protect AT&T from the harm arising from disclosure.

Therefore, the Department grants the motion to give protective treatment to the attachments for a period of five years. The Department orders AT&T to file a copy of the same documents for the public record, redacting all collocation-specific names, identifiers, and addresses. At the expiration of the term of protective treatment, AT&T will have the

opportunity to move the Department to extend that protection upon a showing of good cause pursuant to the Department's precedent in granting such motions.

III. PETITION FOR APPROVAL OF SETTLEMENT AGREEMENT

A. Introduction

The Joint Petitioners request that the Department approve the proposed Settlement Agreement and approve the terms and conditions set forth in the proposed tariff (Joint Petition at 13). The proposed Settlement Agreement provides that Verizon will file the proposed tariff language with the Department.[7] The Joint Petitioners propose to modify Verizon's DC collocation power tariff relative to auditing, penalties and incentives, and notification processes (Joint Petition at 5). The Joint Petitioners argue that the settlement is in the public interest and achieves a just and fair compromise by the parties (Joint Petition at 11). They further state that the settlement "contains a series of procedures and puts a process in place to provide an incentive program to dissuade CLECs from exceeding their stated power loads, and to resolve disputes in the event Verizon's audit program finds a CLEC using more power than the load for which it is being billed" (id.). They argue that this incentive program is in the public interest because exceeding power load "may result in insufficient power capacity being

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[7] The proposed Settlement Agreement also provides that if in the future a Verizon affiliate in another state seeks to implement tariff language or requirements addressing issues substantially similar to those raised in D.T.E. 98-57 Phase IV, it must use the tariff language that is substantially similar to that in Exhibit 1 of the proposed Settlement Agreement (Joint Petition, Exh. A ("Proposed Settlement Agreement") at ¶ 2). We decline to make a determination regarding this provision because this provision pertains to regulatory filings that Verizon affiliates will submit in other states, over which the Department does not assert jurisdiction.

available to support future collocation arrangements or to meet Verizon customer needs, and could possibly even result in service outages" (id. at 12). They further argue that it is in the public interest to have fair processes in place to provide for power auditing procedures, penalties, adequate notice of infractions and opportunities to correct them, and the ability to seek resolution of disputes (id.). Finally, the Joint Petitioners state that the settlement will minimize the demand on party and Department resources spent litigating these issues in the future (id.).

B. Standard of Review

As a matter of policy, the Department encourages parties to avoid time-consuming and costly litigation by reaching settlement at the earliest possible stage in a dispute. Boston Gas Company, D.P.U. 96-50-C (Phase I), at 8 (1997); Berkshire Gas Company, D.P.U. 89-112/89-1121/89-1122/89-1123/89-1124, at 8 n.1 (1989). The Department has broad discretion in the evaluation of stipulations and settlements under G.L. c. 30A, § 10, and the Department's procedural rules under 220 C.M.R. § 1.10(8). Although the moving parties have reached a proposed settlement on the remaining issues, the Department still must evaluate whether the terms of all stipulations reached are just and reasonable in light of the record developed and the Department's principles in reviewing tariff filings of common carriers. G.L. c. 159, §§ 19, 20; New England Telephone and Telegraph Company, D.P.U. 90-206-B/91-66-B, at 11-12 (1993).

C. Proposed Tariff Provisions

1. DC Power Billing and Auditing

a. Joint Petitioners

The proposed tariff language permits Verizon to conduct random inspections of CLEC power use to determine whether CLECs are using more power than their stated load for which they are being billed (Joint Petition at 5; id., Exh. A, exh. 1 ("Proposed Tariff") at § 2.3.5E). If testing indicates that a CLEC has exceeded the ordered load, Verizon will send the CLEC a certified statement including a detailed notice of the method of testing and results[8] (Joint Petition at 5). The proposed tariff provides that if the excess power load is within an applicable buffer zone above the load stated in the last power application,[9] the CLEC has ten business days to reduce the power being drawn or to submit a revised power application (Proposed Tariff at § 2.3.5E.2.a). If the excess power drawn is greater than the buffer zone, then Verizon will take a second measurement no sooner than one hour and no later than two days after the initial reading (Joint Petition at 6; Proposed Tariff at § 2.3.5E.3.a).

Verizon will give the CLEC notice by telephone or e-mail to the person designated in advance by the CLEC to receive the notice that Verizon will take a second measurement (Joint

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8 This notice will include the following information: (1) initials or identifying number of the Verizon technician(s) who performed the test; (2) the date of the test; (3) the time of the test; (4) the make, model and type of test equipment used; (5) the length of monitoring and the results of the specific audit; (6) the total load amps currently being billed; (7) how the test was done; and (8) any other relevant information or documents (Proposed Tariff at § 2.3.5E.3.d).

9 The buffer zone depends upon size of the collocation arrangement's fuse and upon the number of violations of the power application (Proposed Tariff at § 2.3.5E.2.b).

Petition at 6; Proposed Tariff at § 2.3.5E.3.a). Verizon will not wait for the CLEC or require it to be present during the second Verizon test (Joint Petition at 6; Proposed Tariff at § 2.3.5E.3.a).[10] The CLEC may perform testing at its own collocation cage, and the CLEC will not wait for Verizon or require it to be present during the CLEC test, but at the CLEC's request, Verizon will send a representative to accompany the CLEC to conduct a joint test at the CLEC cage at no charge to the CLEC (Joint Petition at 6; Proposed Tariff at § 2.3.5E.3.c). The CLEC will send its own audit measurements to Verizon, if they are taken in response to Verizon's notification of excess power load and if the CLEC's measurements contradict Verizon's audit measurements (Joint Petition at 6; Proposed Tariff at § 2.3.5E.3.c).

b. WorldCom

WorldCom states that the Department's and the parties' ultimate goal should be to create a usage-based rate structure in which CLECs pay only for the power that they actually use (WorldCom's Partial Opposition to the Joint Petition for Approval of Settlement Agreement at 1 ("Partial Opposition")). WorldCom states that such a structure would obviate the need for programs to curb power loads (id.). Nevertheless, WorldCom states that the penalty incentive program described in the Proposed Settlement Agreement is a "vast improvement" over the April 6, 2001 tariff (id.). WorldCom thus does not oppose these provisions (id.).

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[10] Verizon will assess the miscellaneous collocation charge for the second inspection (Proposed Tariff at § 2.3.5E.3.b).

c. Analysis and Findings

Verizon has an obligation to maintain its network's stability. When Verizon previously billed on a "per fused amp" basis, Verizon could rely upon the fused amp demand in planning for the appropriate power distribution capacity, because a CLEC would be unable to draw more current than the amps fused. Because Verizon now bills for "the total number of load amps ordered,"[11] there is a possibility that the actual power drawn may be greater than the load amps ordered, because a CLEC may order a fuse size up to 2.5 times greater than the load amps ordered. M.D.T.E. No. 17, § 2.2.1.B.1 (Apr. 6, 2001). Therefore, Verizon must actively monitor the network, and the existing tariff provides for random testing. M.D.T.E. No. 17, § 2.3.5E (Apr. 6, 2001).

The Proposed Tariff improves the existing tariff by providing a procedure for retesting and verification. Rather than automatically penalizing CLECs if the first inspection reveals that the CLEC is drawing more power than ordered, CLECs would have the opportunity to correct

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[11] We note that billing for the total number of load amps ordered is a marked improvement over billing on a per fused amp basis, which always leads to an overcharge to CLECs. We decline, however, to review WorldCom's suggestion that "a usage-based rate structure in which CLECs pay for only the power that they actually use" should be the ultimate goal and that this would obviate the need for programs to curb power loads (see Partial Opposition at 1). WorldCom has not presented evidence in this proceeding to demonstrate that a usage-based rate structure, one that would reduce the charge to CLECs that use less than the amount of power ordered, would in fact be better than the proposed settlement terms. We have previously found that the cost of providing DC power depends upon certain fixed costs for power distribution capacity, not just variable costs. See Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-G, at 17, 19, 21-22 (1998). Further, this would not obviate the need to monitor power loads because Verizon must have accurate estimates of capacity required in order to maintain network stability.

the error or to perform more testing to verify whether Verizon's testing is accurate. Proposed Tariff at § 2.3.5E.3.c. Verizon would also be required to provide CLECs with more detailed information regarding the method of testing. Proposed Tariff at § 2.3.5E.3.d.

The proposed language provides for more accurate auditing results and for cooperation. The Proposed Tariff auditing provisions, in combination with Verizon's move to bill on a per load amp basis, will greatly contribute to network stability and will be beneficial to competition because Verizon will recover DC power costs from CLECs more accurately. In addition, given the agreement among the Joint Petitioners to these terms and the lack of opposition to the auditing procedures, the Department finds that the terms are just and reasonable.

2. Attestations of Power Consumption

a. Joint Petitioners

The proposed tariff requires each CLEC to submit to Verizon by the last day of June, annually, a written statement listing all of the CLEC's completed collocation arrangements in Massachusetts and attesting that the CLEC is not exceeding the total load of power as ordered on its collocation application (Proposed Tariff at § 2.3.5F). If a CLEC fails to submit the statement by the end of June, Verizon must notify that CLEC that it has 30 days to submit the statement (id.). If the CLEC fails to submit the statement by the end of the 30-day period, Verizon will increase the billing of DC power to bill for the total number of amps fused (id.). If Verizon performs a second audit of DC power load at a collocation arrangement and the audit still reveals a power load higher than that specified on the collocation application plus a buffer zone, the CLEC must submit to Verizon, within 15 days of the date that the CLEC

received notice of the result of the second audit, a non-scheduled attestation of the power being drawn at each of its remaining collocation arrangements (Proposed Tariff at §§ 2.3.5E.3.d, 2.3.5E.3.g). If the CLEC fails to submit the non-scheduled attestation, Verizon will apply the miscellaneous collocation power service charge for any subsequent DC power inspection that Verizon performs before the next scheduled attestation (id.).

The Joint Petitioners argue that these attestations are necessary because the number of CLECs requiring collocation power from Verizon, and the CLECs' power requirements, can change very rapidly, and having current and reliable information is critical (Joint Petitioners' Reply Comments, at 1 (Feb. 6, 2002)). Further, Verizon states that it needs to ensure that a CLEC will submit an augmentation request if it needs more power, rather than simply drawing more power than it had ordered in its collocation applications (Testimony of Bruce Lear at 9 (June 14, 2001); see also DTE-VZ 1-19).

b. WorldCom

WorldCom opposes the provisions that require CLECs to submit scheduled and non-scheduled attestations of power loads (WorldCom Partial Opposition at 1). WorldCom argues that these requirements are administratively burdensome and cannot be justified (id. at 2). WorldCom further argues that for those CLECs that have been found by virtue of Verizon audits not to be overdrawing power, there should not be an assumption that other unaudited collocation arrangements may be in violation (id.). WorldCom claims that the attestation requirement implies that the other collocation arrangements do overdraw current (id.).

WorldCom contends that Verizon already has on file all CLEC collocation applications, which list the DC power requirements for each collocation arrangement, including "the total load of power" ordered, and therefore, requiring CLECs to restate what is already in Verizon's files is "a meaningless chore that causes CLECs to generate useless paperwork" and provides Verizon with no new information (id. at 1-2). WorldCom asserts that failure by a CLEC to file required attestations will enrich Verizon unfairly and permit Verizon to apply a charge that it otherwise would not impose (id.). WorldCom claims that striking Sections 2.3.5E.3.g and 2.3.5F does not in any way harm Verizon (id. at 2). WorldCom argues that striking these sections simply means that Verizon will not receive redundant confirmation of what is already in its files (id.).

WorldCom contends that requiring CLECs to submit attestations is unnecessary and does not justify the burden that it places on CLECs, if the purpose of the requirement is to prompt CLECs to update their collocation applications by requesting power augmentations (id.). WorldCom argues that the penalties provided in the Proposed Tariff § 2.3.5E.4 are "more than a reasonable incentive for [CLECs] to take the steps necessary to stop power overdraws" (id.). WorldCom further argues that, by comparison, the attestation requirement itself provides no incentive to refrain from overdrawing power, and that the only incentive to comply with the attestation requirement is to avoid the penalties for not complying with the attestation requirement.

c. Analysis and Findings

WorldCom bases its opposition of the proposed tariff's terms requiring CLECs to submit scheduled and non-scheduled attestations of power loads upon the fact that CLECs already submit power load information on Verizon's CLEC collocation application form and that Verizon's records reflect any changes when a CLEC augments or reduces the amount of power originally requested (Partial Opposition at 1; see also WorldCom Comments on Verizon's April 6, 2001 Collocation Power Tariff Revisions at 4 (April 13, 2001)). This argument, however, ignores the basic premise of the proposed changes in the way that Verizon assesses charges for DC power; that is, the actual power load drawn may not correspond to the requested power load stated on the collocation application (see Joint Petition at 11-12). The Joint Petitioners argue that having current and reliable information is critical because the number of CLECs requiring collocation power and their power needs can change rapidly during the year (Joint Petitioners' Reply Comments at 1). Further, they argue, when CLECs exceed their stated power load in a central office, there may be insufficient power capacity available to support future collocation arrangements or to meet Verizon customer needs, resulting in possible service outages (Joint Petition at 12). The Department agrees. The Department has held that "forecasting future demand is an essential tool in maintaining an efficient network operation and in assuring that future needs are met with adequate resources." New England Telephone & Telegraph Company, D.T.E. 98-57 at 176 (2000). We find that requiring CLECs to submit the scheduled and non-scheduled attestations is justified because the attestations are useful aids for Verizon in the planning and allocation of its network resources in

order to fulfill its duty "to provide an acceptable level of service to all of its customers, both retail and wholesale." (See D.T.E. 98-57 at 177).

We also find that the required attestations are reasonable and do not place an undue administrative burden upon CLECs. The CLECs are in the best position to monitor power loads drawn by their own equipment. At the very least, when a CLEC reconfigures its equipment in a collocation arrangement, it is reasonable to expect that the CLEC would verify its own power usage. It would then be up to the CLEC to decide whether it requires a DC power augmentation. Thus, the CLEC should already have in its own records the more current information that it needs in order to comply with the attestation requirements. Therefore, we find that the additional reporting requirements do not pose a significant additional burden upon the CLECs. The Department finds that the attestation requirements are just and reasonable.

3. Penalties

a. Joint Petitioners

The proposed tariff language also revises the penalty provisions that apply when the audited load exceeds the CLEC's stated load. Under the April 6, 2001 tariff, if the audited load was above the load ordered but within the buffer zone, Verizon would bill the CLEC at 110 percent of the load ordered if the CLEC did not reduce the load or revise its power application within 5 days. M.D.T.E. 17, § 2.3.5E.2 (Apr. 6, 2001). Further, if the audited load was above the buffer zone, Verizon would bill the CLEC at the full fused capacity for the

next six months, and assess the miscellaneous collocation power service charge for performing the inspection. M.D.T.E. 17, § 2.3.5E.3 (Apr. 6, 2001).[12]

Under the Proposed Tariff, if the audited load is above the load ordered but within the buffer zone, Verizon would bill the CLEC at the audited load if the CLEC does not reduce the load or revise its power application within 10 business days (Joint Petition at 7; Proposed Tariff at § 2.3.5E.2.a). If, however, the audited load is above the buffer zone, Verizon would bill the CLEC at the audited load for a period of 4 months or greater, depending upon the number of previous violations found within the previous 12 months (Joint Petition at 8; Proposed Tariff at § 2.3.5E.4).[13] In addition, the CLEC would pay a separate and additional penalty to a fund designated by the Department, in an amount measured as the difference between the billing at the fused capacity and the billing at the audited load for the number of months in the penalty period (Joint Petition at 8; Proposed Tariff at § 2.3.5E.4). The Joint Petitioners' proposal leaves the fund to be designated to receive the additional penalties within the discretion of the Department. If the audited load reveals more than 3 violations within the same consecutive 12 months, Verizon would bill the CLEC at the fused capacity for at least 6 months, until Verizon

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[12] Under the January 12, 2001 Tariff, Verizon would bill the CLEC a penalty of twice the total amps fused when an inspection found actual power drawn is greater than that ordered.

[13] For the first such violation in a 12 month period, Verizon would bill the CLEC for the audited load amount for 4 months (Joint Petition at 8; Proposed Tariff at § 2.3.5E.4.a). For the second such violation within the same consecutive 12-month period, Verizon would bill the CLEC for the audited load amount for 5 months (Joint Petition at 8; Proposed Tariff at § 2.3.5E.4.b). For the third such violation within the same consecutive 12-month period, Verizon would bill the CLEC for the audited load amount for 6 months (Joint Petition at 8; Proposed Tariff at § 2.3.5E.4.c).

receives an attestation that the CLEC is not exceeding its power order or until the CLEC requests an augmentation specifying the revised power requirements[14] (Joint Petition, at 9; Proposed Tariff, § 2.3.5E.4.d).

In the event that a CLEC disputes the results of a power audit, the Proposed Tariff provides certain procedures for dispute resolution. First, Verizon and the CLEC must make a good faith effort to resolve the issue (Joint Petition at 7; Proposed Tariff, § 2.3.5E.3.f). If the parties do not resolve the issue, then either party may invoke the "Abbreviated Dispute Resolution Process"[15] (Joint Petition at 7; Proposed Tariff, § 2.3.5E.3.f).

b. Analysis and Findings

Some parties objected to the penalty incentive provisions in the April 6, 2001 tariff. AT&T, Covad, Sprint, and WorldCom had argued that the April 6, 2001 penalty provisions were excessive and punitive (Joint Comments of AT&T, Covad, and Allegiance Regarding Certain Provisions of April 6, 2001 Proposed Revisions to Tariff No. 17 at 8 (Apr. 13, 2001);

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[14] In this case, the CLEC would not pay penalties to the fund designated by the Department .

[15] In response to the Department's inquiry about the "abbreviated dispute resolution process" ("ADRP") referred to in the Proposed Tariff, the Joint Petitioners agreed that the Department's Accelerated Docket for Disputes Involving Competing Telecommunications Carriers, 220 C.M.R. § 15.00 et seq. may be the process applicable to certain disputes under the Proposed Tariff (Joint Petitioners' Comments (Jan. 18, 2002) at 1-2). The Joint Petitioners state that striking Section 2.3.5E.5 of the Proposed Tariff, which refers to "self-executing" ADRP rulings, and replacing references to the ADRP with direct references to the Accelerated Docket procedure do not materially change the provisions and are generally consistent with the original proposed tariff language (id.). Therefore, the Department directs Verizon to revise the Proposed Tariff, when it files the revisions, by striking Section 2.3.5E.5 and replacing the references to the Abbreviated Dispute Resolution Process with direct references to the Department's Accelerated Docket procedure.

Comments of Sprint at 3 (Apr. 12, 2001); WorldCom Comments on Verizon's April 6, 2001 Collocation Power Tariff Revisions at 3 (Apr. 13, 2001)). WorldCom argued that the penalty incentives should be structured on a "sliding scale" (WorldCom Comments at 3-4 (Apr. 13, 2001). No party opposed the revised penalty incentive provisions in the Proposed Tariff.

The penalty structure of the Proposed Tariff is an improvement over the penalties provided in the April 6, 2001 tariff. The Proposed Tariff structures the penalties on a sliding scale according to the number and degree of the violations of a CLEC's collocation power order. Further, the Proposed Tariff allows a CLEC to reduce its power load or revise its collocation power application within 10 business days instead of only 5. This is a more reasonable length of time for a CLEC to cure the violation. The Proposed Tariff also makes explicit a procedure for resolving disputes about the results of power audits and the resulting penalties. The Department finds that the Proposed Tariff addresses the objections that the parties had made regarding the April 6, 2001 tariff. Therefore, the Department finds that the penalty incentive provisions in the Proposed Tariff are just and reasonable.

4. Fault for Delays in Requested Augmentations

a. Joint Petitioners

If the CLEC has requested a power augmentation, and the audited load would have been within the augmented load plus the applicable buffer zone, and if the power augmentation is late due to the "fault" of Verizon, the Proposed Tariff provides that the parties will not count this instance for the purposes of determining what type of penalty to impose (Joint Petition at 9; Proposed Tariff at § 2.3.5E.6). If the issue of fault is in dispute, the Joint Petitioners argue, a

CLEC may dispute penalties through the dispute resolution procedures provided in its interconnection agreement with Verizon, or through the Department's Accelerated Docket procedure, if the CLEC believes that is has been penalized unjustly (Joint Petitioners' Reply Comments at 1 (Feb. 6, 2002)).

b. WorldCom

WorldCom suggests that the language in Section 2.3.5E.6 regarding augmentations that are late "due to the fault of" Verizon should be modified (WorldCom Opposition at 2-3). WorldCom conjectures that "[t]here may be many factors that cause delays that Verizon would argue are not its 'fault'" (id. at 3). WorldCom argues that the parties should not have to "pars[e] out which events may or may not fall within the definition of Verizon's 'fault'" (id.). WorldCom argues that the tariff should be changed to make clear that if a requested augmentation is late, and Verizon's inability to provide the power augmentation on time is not the "fault" of the CLEC, then Verizon will not impose the otherwise applicable penalty. (id.).

c. Analysis and Findings

Although WorldCom argues that Section 2.3.5E.6 should be revised in order to avoid disputes over what events are Verizon's fault, WorldCom's proposed change to the Joint Petitioners' proposed tariff does not relieve the parties from having to determine which events fall within the definition of "fault." The Joint Petitioners argue that this term need not be changed because the Department's Accelerated Docket for Disputes Involving Competing Telecommunications Carriers, 220 C.M.R. §§ 15.00 et seq., could be used to resolve disputes regarding the issue of late augmentations under the proposed tariff (Joint Petitioners' Reply

Comments at 1). The Department agrees, but cautions the parties that the issues still must meet the Department's standards for inclusion on the Accelerated Docket.[16] Nevertheless, the Department finds that the terms of Section 2.3.5E.6 are just and reasonable because Verizon will not penalize a CLEC for exceeding the provisioned load amps where Verizon's failure to provision a requested DC power augmentation on time is the cause of the excess load, and because the tariff revisions provide the CLECs with sufficient opportunity to dispute billings.

5. Designated Fund

The Proposed Tariff provides that CLECs will pay separate and additional penalties for certain violations to a fund to be designated by the Department (Proposed Tariff at § 2.3.5E.4). Although the Joint Petitioners have left the designation of the particular fund to the discretion of the Department, the Joint Petitioners suggest designating a fund such as a "Universal Telephone Assistance Plan" ("UTAP") or the Red Cross (Joint Petition for Approval of Settlement Agreement at 10; Joint Petitioners Comments on Proposed Tariff References at 1). The Joint Petitioners explain that UTAP is a fund in Pennsylvania that helps Pennsylvania residential Lifeline customers pay their overdue basic telephone service bills (Joint Petitioners Comments on Proposed Tariff References at 1). The Department notes that no such fund exists in Massachusetts. The Department instead designates the "Verizon Residence Directory

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[16] After a party requests inclusion on the Accelerated Docket, the Department will assist the parties in mediation for 20 days. 220 C.M.R. § 15.03(5). During this time, the Department will determine whether the issues presented are appropriate for inclusion on the Accelerated Docket. See 220 C.M.R. § 15.04(2) for a non-exclusive list of factors considered. Although a dispute concerning fault for a late DC power augmentation likely would be the type of issue that the Department would include in the Accelerated Docket, the Department makes that determination on a case-by-case basis.

Assistance Fund," which is used to fund Enhanced 911 and dual-party TDD/TTY telephone message relay services for deaf, hard-of-hearing, and speech-impaired persons in Massachusetts. The Department finds that designating this fund will serve purposes similar to the Joint Petitioners' original proposal and will benefit consumers.

IV. ORDER

After due notice and consideration, it is

ORDERED: That AT&T's Motion for Protective Treatment of Confidential Information is GRANTED for a period of five years and AT&T shall file, within thirty (30) days of this Order, redacted copies of the protected documents consistent with the findings herein; and it is

FURTHER ORDERED: That Verizon shall file, within thirty days (30) of the date of this Order, a compliance tariff consistent with the Department's approval of the Joint Motion for Entry of Order According to the Terms as Stipulated by the Parties in D.T.E. 98-57 Phase IV, Letter Order (July 20, 2001), relative to interoffice transport facilities from mid-span meet arrangements, and it is

FURTHER ORDERED: That the Settlement Agreement between Sprint, Covad, and Verizon, attached as Exhibit A to the Joint Petition for Approval of Settlement Agreement (December 21, 2001), is APPROVED, consistent with the findings herein; and it is

FURTHER ORDERED: That Verizon shall file, within thirty days (30) of that date of this Order, a compliance tariff consistent with the draft tariff relative to DC power provisioning, marked as Exhibit 1 of the Settlement Agreement between Sprint, Covad, and Verizon, and consistent with the changes directed herein.

By Order of the Department,

Paul B. Vasington, Chairman

James Connelly, Commissioner

W. Robert Keating, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner

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

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