COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers	D.T.E. 03-60

AT&T's EMERGENCY MOTION FOR AN ORDER TO PROTECT CONSUMERS BY PRESERVING LOCAL EXCHANGE MARKET STABILITY

Jeffrey F. Jones
Kenneth W. Salinger
Ruth T. Dowling
Julia E. Green
PALMER & DODGE LLP
111 Huntington Avenue
Boston, MA 02199
617.239.0561
ksalinger@palmerdodge.com

Jay E. Gruber
AT&T Communications of New England, Inc.
99 Bedford Street, 4th Floor
Boston, MA 02111
617.574.3149
jegruber@lga.att.com

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Introduction

In order to prevent unnecessary disruption of Massachusetts telecommunications markets, and resulting harm to Massachusetts consumers, AT&T Communications of New England, Inc., on behalf of itself and its affiliates (collectively "AT&T") – including (i) ACC National Telecom Corp. ("ACC") and (ii) TC Boston Holdings, Inc. and TC Boston Holdings II, Inc., as the sole partners comprising a Massachusetts partnership known as Teleport Communications Boston (collectively, "Teleport")[1] – move for an emergency order requiring Verizon to continue to provide and accept new orders for all existing unbundled network elements ("UNEs") and UNE combinations at Department-approved, TELRIC-compliant rates, unless and until Verizon is permitted to do otherwise by Department-approved change of existing interconnection agreements ("ICAs") or other order of the Department, or by negotiated agreement.

It is vitally important that the Department issue such a standstill order before June 16, 2004. The requested order is needed to preserve the Department's authority to interpret and enforce the ICAs that it has approved in Massachusetts. In the absence of such an order, Verizon threatens to take unauthorized, unjustified, and unilateral action that will substantially harm consumer choice and the continued development of competition in the markets for telecommunications services in Massachusetts. This temporary restraining order should maintain the status quo until final federal or state unbundling rules are in place or until the Department can determine what effect, if any, the *USTA II* decision[2] would have – if it were to take effect – on Verizon's obligation to provide UNEs under existing ICAs.

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[1] AT&T, ACC, and Teleport have separate interconnection agreements with Verizon-Massachusetts. Such separate interconnection agreements are operationally important, as these three companies each, to a great degree, operate and manage their own respective networks and require separate rights of interconnection. As discussed below, however, these three ICAs contain essentially identical "change of law" protections.

[2] *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"). The D.C. Circuit stayed *USTA II* until June 15, 2004, and the FCC has now sought a further stay pending the FCC's forthcoming petition to the United States Supreme Court for a writ of certiorari.

To be clear, AT&T is not asking the Department to prejudge the ultimate legal effect of an expiration of the *USTA II* stay, nor is AT&T asking the Department to determine at this time Verizon's legal rights and obligations under its ICAs and other applicable law if *USTA II* should go into effect. The Department need not, and should not, make any definitive and final determination of those issues, because they are not yet properly before the Department. If *USTA II* were to take effect, and Verizon believed it was entitled to change its existing obligations to provide UNEs and UNE combinations, it would be contractually obligated under its ICAs first to attempt to negotiate a commercial resolution. If those negotiations were unsuccessful, only then would the Department have before it the specific changes that Verizon seeks to make in its legal obligations to provide UNEs, in the context of a Verizon request to modify specific contractual duties to each CLEC. Before that time, the specific issues for Department decision are not ripe.

At this time, AT&T is merely asking the Department to bar Verizon from engaging in unlawful and unauthorized self-help. The requested standstill order is needed to preserve the Department's ability to make any needed determination of Verizon's legal rights and obligations ***before*** Verizon acts on its own self-serving determination of those rights and obligations. It is important that the Department make crystal clear that if *USTA II* were to take effect it would ***not*** give Verizon free rein to raise UNE rates or to restrict access to UNEs (for existing or new retail customers), and that such changes could only be made ***after*** Verizon properly invokes the change of law provisions of its existing ICAs, ***after*** it adheres to the processes required to negotiate and, as necessary, resolves any outstanding issues before the Department, and, most importantly, ***after*** it obtains approval from the Department to implement any changes.

As the Department is aware, commercial negotiations between Verizon and competing local exchange carriers ("CLECs") may offer an opportunity for resolving these industry disputes

on a long-term basis, if those negotiations reflect the needs of willing buyers and willing sellers which both have market incentives to enter into commercial agreements. AT&T continues to seek a mutually acceptable, negotiated solution that would preserve wholesale access to UNEs at rates and on other terms and conditions that support broad mass market competition and are commercially reasonable for all. The Department can and should preserve the availability of the unbundled network platform ("UNE-P") at current rates in the meantime and thereby preserve the possibility of local exchange competition in Massachusetts.

Argument

I. THE DEPARTMENT MUST ACT TO PREVENT VERIZON FROM UNILATERALLY DISRUPTING COMPETITIVE SERVICES.

A. Verizon Has Threatened to Take Unilateral Action to Deny or Hamper Access to Unbundled Network Elements.

Verizon currently provides UNEs pursuant to its interconnection agreements ("ICAs") with AT&T and other CLECs. Verizon remains bound to provide UNEs under those ICAs unless and until those provisions are modified. Verizon has made clear, however, that it does not intend to honor its contractual commitments and that, if the stay of *USTA II* expires on June 15, 2004, Verizon will refuse to provide unbundled mass market switching, dedicated transport, or UNE-P at current TELRIC rates.

Just days ago Verizon told the Department that it should not be required to continue providing "all existing unbundled network element … arrangements at existing prices" pending arbitration of Verizon's efforts to do away with its contractual obligations under existing ICAs to provide UNEs, because Verizon believes that if *USTA II* were to take effect then Verizon would no longer have "any legal obligation" to do so.[3] Verizon went on to assert that when the *USTA II*

[3] Docket D.T.E. 04-33, *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*
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decision becomes effective Verizon intends to pursue unilaterally "any rights Verizon may have to cease providing UNEs and to transition CLECs to alternatives to UNEs."[4] This echoes Verizon's assertion to the New York Public Service Commission that if and when the *USTA II* mandate "takes effect, Verizon will have no legal obligation to continue offering mass- market circuit switching or dedicated transport at TELRIC rates."[5] In sum, it has become evident that Verizon intends to act unilaterally upon its own notion of its rights should a mandate in the *USTA II* case become effective. But Verizon doesn't identify which provisions of its ICA with AT&T gives it the right unilaterally to abandon the provisioning of UNEs. AT&T strongly disputes any claim by Verizon of such a right. Department intervention is warranted.

It is essential that the Commission adopt a standstill order before the *USTA II* mandate becomes effective. Verizon and its Verizon-East affiliates are racing to implement by June 20, 2004, various Operational Support Systems ("OSS") changes that, if activated, could allow Verizon to immediately deny or hinder CLEC access to UNEs. Verizon has announced these plans at the Change Management Process meetings in which Verizon and CLEC representatives discuss changes to service ordering procedures. One such change would enable Verizon to impose a higher charge for the services offered in place of "denied" UNEs.[6] Verizon is also

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Triennial Review Order, "Verizon Massachusetts' Reply in Support of its Motion to Hold this Proceeding in Abeyance," filed May 25, 2004, at 2-3.

[4] *Id.* at 3. Verizon has begun making the same threats throughout its footprint. *See, e.g.*, D.C. PSC Case TAC-19, *Petition of Verizon Washington, DC Inc. for Arbitration Pursuant to Section 252(B) of the Telecommunications Act of 1996*, "Verizon Washington, DC Inc.'s Reply To Sprint Communications Company L.P.," dated May 17, 2004, p. 3. Available at: http://dcpsc.org/edocket/docketsheets_pdf_FS.asp?caseno=FCTAC_19&docketno=48.

[5] New York Public Service Commission Case 04-C-0420, I*n the Matter of Telecommunications Competition in New York Post USTA II Including Commitments Made in Case 97-C-0271*, "Reply Comments of Verizon New York," filed April 23, 2004, at 3-14

[6] Change Request C03-1905 would introduce a new "271 product" that would "replace Port and Platform products that will be restricted in Top 50 MSA's Density Zone 1 end offices." *See:* http://www22.verizon.com/wholesale/attachments/calendar/12-03_meeting_materials-revised.pdf, Materials for December 9, 2003 CMP meeting, at computer image page 40 of 139; *see also:* *http://www22.verizon.com/wholesale/attachments/calendar/AprilMeetingMaterials.pdf*, Materials for April 13, 2004 CMP meeting, at computer image page 24 of 113. A related change would enable Verizon to reject CLEC orders

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implementing changes to its systems that would cause orders to be rejected if Verizon's database does not show that a CLEC has affirmatively agreed to pay new charges proposed by Verizon (but not approved by the Department),[7] or does not show that a CLEC's interconnection agreement specifically authorizes the CLEC to order a given service.[8] The mere implementation of these OSS changes, which are capable of being activated at any moment, adds to the concern already created by the failure of Verizon and its affiliates to provide assurance that they will maintain the status quo if the *USTA II* mandate becomes effective so that carriers and regulators can undertake an orderly review of the transitional steps (if any) that may be appropriate and that can be implemented without disrupting local service markets.

B. Unilateral Action by Verizon Would Seriously Disrupt the Telecommunications Markets, Frustrate Consumer Choice, and Cause Irreparable Harm to Consumers and CLECs Alike.

A refusal by Verizon to continue to provide unbundled mass market switching and dedicated transport at current TELRIC rates would create chaos and wreak havoc in the Massachusetts local telecommunications markets. The serious financial and operational harm

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for four or more UNE-P lines at single customer location in density zone one of the 50 largest Metropolitan Statistical Areas (MSAs). Initially, Verizon insisted that the *TRO* mandated this restriction on the availability of UNE-P lines (Change Request C03-1854) http://www22.verizon.com/wholesale/attachments/calendar/12-03_meeting_materials-revised.pdf, Materials for December 9, 2003 CMP meeting, at computer image page 39 of 139. In fact, the *TRO* only directed states to consider whether such restrictions would impair competition, nothing more. After the *USTA II* decision was issued, Verizon retained the initiative, but shifted the rationale, arguing that the restriction was "mandated" five years ago in the FCC's 1999 *UNE Remand* decision. http://www22.verizon.com/wholesale/attachments/calendar/AprilMeetingMaterials.pdf, Materials for April 13, 2004 CMP meeting, at computer image page 24 of 113.

[7] *See:* http://www22.verizon.com/wholesale/attachments/calendar/AprilMeetingMaterials.pdf, Materials for April 13, 2004 CMP meeting, C03-1966, at computer image page 25 of 113. The rationale given for this change is "Triennial Review Order – FCC 03-36 paragraphs 639-640." However, the text of that passage makes clear that there is no mandate to impose those charges and that in any event since the costs of network modifications is typically recovered in recurring monthly charges, "there may not be any double recovery of those costs." *TRO*, ¶640.

[8] *See:* http://www22.verizon.com/wholesale/attachments/calendar/AprilMeetingMaterials.pdf, Materials for April 13, 2004 CMP meeting, C03-2253, at computer image page 22 of 113. Verizon contends that this "CLEC Tracking" provision is mandated by *TRO* ¶¶700-706. Those paragraphs, however, only discuss a transition period for adopting changes to interconnection agreements to implement decisions in the *TRO*. There is no mention of a "mandate" for ILECs to increase the likelihood that orders are to be rejected. Moreover, upon information and belief, when Verizon's ordering system rejects orders, only a generic rejection code will be issued. This means that

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that would befall CLECs will inevitably carry over to Massachusetts consumers. The Department cannot allow this to happen.

A few days ago, the FCC asked the D.C. Circuit to grant a further stay of its *USTA II* mandate while the FCC asks the United States Supreme Court to review the case. The FCC explained the vital importance of ensuring that the ILECs continue to provide UNEs under existing terms and conditions while the implications of the *USTA II* decision are sorted out. The FCC pointed out that:

> During the periods following vacatur and remand of the [FCC's] impairment standard and unbundling rules in *AT&T* and *USTA I*, the Bell operating companies (the largest ILECs) agreed to continue abiding by the vacated unbundling rules pending the adoption of permanent rules. But none of the ILECs have made any such voluntary commitments in this case. To the contrary, many of the largest ILECs have indicated that once the mandate issues, they will immediately stop providing certain network elements at TELRIC rates, ***notwithstanding the terms of existing interconnection agreements***. The potential for disruption could cripple CLECs' ability to retain existing customers and to attract new ones. *See Order [TRO]* ¶¶ 466-467. The resulting market uncertainty might jeopardize the ability of CLECs to maintain investment and financing. And if ILECs carry out their plans to raise the rates CLECs must pay for network access, this would threaten higher retail phone rates for consumers.[9]

The interim relief sought here by AT&T is necessary to prevent just such market disruption and unnecessary harm to Massachusetts consumers.

AT&T currently purchases UNE-P from Verizon in order to serve residential and small business customers. A unilateral refusal by Verizon to provision UNE-P at TELRIC rates would fundamentally impair AT&T's ability to compete. To put it bluntly, AT&T would have no economically viable means of providing service to its local mass market customers. It would be

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automated remedies cannot be used, but rather manual intervention will be required. This will add to the administrative cost of processing customers' orders – and delay their fulfillment.

[9] *USTA v. FCC*, D.C. Circuit Nos. 00-1012, 00-1015, "Motion of the Federal Communications Commission to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari," filed May 24, 2004 ("FCC's Motion for Stay"), at 11 (emphasis added). The FCC quoted from the Verizon-New York Reply Comments in NY PSC Case 04-C-0420, cited above, as evidence of Verizon's intent to disrupt the market by refusing "to continue offering mass-market circuit switching or dedicated transport at TELRIC rates" if *USTA II* were to take effect.

forced to withdraw its lowest priced plans, stop accepting orders from many of its customers, exit higher cost zones, and pass on price hikes with the inevitable loss to its customer base and good will. Verizon's unilateral action would thus have the effect of driving AT&T from the local telephone markets in Massachusetts and denying consumers competitive choice.

Current regulatory treatment of Verizon's retail services is predicated on the continued availability of competitive offerings using UNE-P. The FCC's approval of Verizon's Section 271 application for long distance entry in Massachusetts relied heavily on findings that the availability of CLEC market entry using UNE-P demonstrated that the local market was irrevocably open to competition.[10] Similarly, the Department has given Verizon upward pricing flexibility for most of its retail offerings to business customers, but only to the extent that Verizon's retail business services "are contestable on a UNE basis."[11] Thus, the FCC and the Department have both found that Massachusetts consumers will not experience the benefits of competition in the absence of competitive entry using UNE-P. Since the importance of competitive offerings based on UNE-P are well established, the Department should ensure that Verizon does not unilaterally deny access to UNE-P at Department-approved TELRIC rates.

Contrary to the contention of Verizon and other ILECs, use of Total Service Resale ("TSR") is not an alternative that would permit AT&T to offer ***AT&T*** services to its customers. TSR essentially limits AT&T to offering customers services and packages that mirror those of Verizon, while the services that AT&T's customers want from AT&T are distinct and different. AT&T is able to provide distinct and different services because, by using UNE-P, it has purchased the full functionality of Verizon's switch. A conversion from UNE-P to resale would

[10] *In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order, No. FCC 01-130 (released April 16, 2001), ¶¶ 41, 117-118, 233-234.

thus force a mirroring of Verizon's offering, denying to new and potential customers the opportunity to obtain services that better suit their needs than those offered by Verizon. Even worse, the sudden and forced use of TSR would eliminate features and services that are currently being enjoyed by AT&T's customers. The sudden elimination of the services that AT&T's customers have relied upon would disrupt their businesses as well. It goes without saying that this would result in the loss of customers and damage to AT&T's goodwill and reputation.

Moreover, even if it could be assumed counterfactually that AT&T could serve its current Massachusetts customers through TSR – and it cannot – conversion to resale upon the sudden elimination of UNE-P on or after June 15 is simply not possible as an operational matter. AT&T has invested hundreds of millions of dollars in its operations support systems ("OSS") to support entry into the local market through UNE-P; and its current OSS are not designed to serve its UNE-P customers through resale. It would be impossible for AT&T immediately to transition its UNE-P customers in its current embedded base to resale or immediately to serve new customers through resold services, because its does not have the systems infrastructure to do it.

If unilateral action by Verizon forces AT&T and other CLECs to make a precipitous withdrawal of services from the market or impose sudden and uneconomic price hikes, or both, it is not clear whether the reputation of CLECs would even permit viable reentry or market share growth. The increase in retail rates for existing customers and the effective withdrawal of AT&T and other competitors from large parts of the state will sour consumers not just on AT&T service but on the very idea of local competition. Customers who were once willing to experiment with an entirely new concept – local phone competition – will be reluctant to be burned twice. These reputational and competitive harms will result in substantial and irreparable harm to AT&T, other CLECs, and the entire competitive local telephone market.

[11] D.T.E. 01-31-Phase I, at 91-92 (2002); D.T.E. 01-31-Phase II, at 30-32 (2003).

Disruption in competition in the local service market will also have profound effects on competition for long distance services. Since Verizon received its long distance authority pursuant to Section 271, it has amassed a huge market share for long distance services – much higher than the local market shares attained by all CLECs in the aggregate. If competitors are unable to offer local/long distance service bundles on the same basis as Verizon, they will be severely hindered in their ability to compete for stand-alone long distance as well.

II. OTHER STATE COMMISSIONS HAVE PRESERVED THE STATUS QUO BY ISSUING STANDSTILL ORDERS REQUIRING VERIZON AND OTHER ILECS TO CONTINUE TO PROVIDE UNES AND UNE COMBINATIONS AT CURRENT TELRIC RATES.

The authority of state commissions to grant the interim relief sought here by AT&T, and the appropriateness of doing so, are both demonstrated by recent actions in other states.

The Rhode Island Public Utilities Commission ("RI PUC") recently recognized this fact, and ordered Verizon to continue providing UNE-P and all other existing UNEs, at TELRIC rates, until such time as the RI PUC is convinced that Verizon no longer has any legal obligation to do so. The RI PUC stated that it "will maintain the status quo in Rhode Island regarding UNEs," ruled that "VZ-RI is required to continue to provision Rhode Island's existing UNEs currently priced at existing TELRIC rates until it receives permission to terminate this obligation for a specific network element from this Commission," and concluded with an order that "Verizon-Rhode Island must obtain approval from the Rhode Island Public Utilities Commission prior to terminating its obligation to provision existing Rhode Island UNEs at TELRIC rates."[12]

The Connecticut Department of Public Utility Control ("DPUC") has issued a stand-still order to SBC Connecticut, pending a decision on the DPUC's authority to require the continued

[12] Rhode Island Public Utilities Commission, Order No. 17990, Docket Nos. 3550 and 2681, *In re Implementation of the FCC's Triennial Review Order and Review of Verizon Rhode Island's TELRIC Filings*, at 7-8 (issued March 26, 2004).

provisioning of UNEs at previously-determined rates, terms and conditions.[13] The DPUC found that "the Department must take the necessary action to ensure the interests of the public are not adversely affected by any irreconcilable difference that may ensue from these negotiations," referring to the commercial negotiations between CLECs and ILECs fostered by the FCC. The DPUC has ordered SBC Connecticut to "continue to provision the network elements at their currently total service long run incremental cost-based prices until it is otherwise directed by the Department." It contemplates making a decision on its authority by July 7, 2004, after the stay of the mandate of *USTA II* is currently due to expire.

The Washington State Utilities and Transportation Commission also granted an interim stand-still request by CLECs in the context of granting Verizon's Washington affiliate's request for an abeyance of interconnection agreement arbitrations until June 15, 2004, stating: "Verizon's motion … is granted, subject to the condition that Verizon maintains the status quo under the existing interconnection agreements in Washington State by continuing to offer UNEs consistent with the Agreements at existing rates pending completion of the arbitration."[14]

On May 5, 2004, the Texas Public Utility Commission issued a similar order abating the pending interconnection agreement arbitrations, and requiring SBC to continue to offer UNEs consistent with existing ICAs, pending resolution of any disputed issues.[15]

A few weeks later, the Arbitrators in a separate Texas arbitration proceeding expressed serious concern about Verizon's Texas affiliate's "patently obvious" lack of commitment "to

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[13] *DPUC Investigation Into the Southern New England Telephone Company Unbundled Loops, Ports and Associated Interconnection Arrangements and Universal Service Fund In Light Of the Telecommunications Act of 1996 – Reopener, et al*., Dockets Nos. 96-09-22, 99-03-13, 00-05-06 and 00-12-15, Decision (May 20, 2004).

[14] *In the Matter of the Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon Northwest Inc. with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Washington Pursuant to 47 U.S.C. Section 252(b), and the Triennial Review Order*, Docket No, UT-043013, Order No. 04 (May 21, 2004), at 6.

[15] *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Texas PUC Docket No. 28821, "Order Abating Proceeding" (May 5, 2004).

continue providing UNEs under the parties' ICAs during both the pendency of the requested abatement until June 15, and any arbitration proceeding thereafter."[16] They went on to find that "the Arbitrators do not agree with Verizon's position that it can simultaneously threaten to discontinue service and negotiate in good faith."[17] Consequently, the Arbitrators estopped Verizon from discontinuing any UNE listed in Verizon's October 3, 2003 industry letter, required Verizon to file a 30-day notice of discontinuation if it wanted to exercise its asserted rights to discontinue, and invited CLECs to pursue expedited dispute resolution and seek interim relief under the Texas PUC's rules: "This will allow the [Texas] Commission to address the issue of whether Verizon can unilaterally discontinue UNEs without amending its ICAs, which … is a position strongly opposed by the CLEC parties in this proceeding."[18]

III. THE DEPARTMENT CAN AND SHOULD ACT NOW TO PRESERVE THE STATUS QUO PENDING RESOLUTION OF ANY LEGAL UNCERTAINTIES THAT COULD ARISE IF *USTA II* WERE TO BECOME EFFECTIVE.

Just days ago the FCC told the D.C. Circuit that if the *USTA II* "mandate is not stayed, both the FCC and state commissions will be forced to undertake, presumably on an emergency basis, extremely burdensome proceedings to establish new rules and arrangements for access to unbundled elements."[19] The FCC correctly observed that "[t]he devotion of considerable federal and state resources to such complex and burdensome tasks would prove entirely wasteful and unnecessary if the rules that [the D.C. Circuit] vacated are ultimately upheld by the Supreme

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[16] *Petition of Verizon Southwest for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Texas Pursuant to 47 U.S.C. Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order*, Texas PUC Docket No. 29451, Order No. 8 (May 20, 2004), at 8.

[17] *Id*.

[18] *Id.* at 9.

[19] FCC's Motion for Stay, at 8.

Court."[20] The FCC argued that these are compelling reasons why the D.C. Circuit should further stay issuance of its mandate in *USTA II*.

For much the same reasons, it makes eminent good sense for the Department to issue the standstill order requested by AT&T. State commissions in Rhode Island, Connecticut, Texas, and Washington have already issued similar orders, as discussed above. As explained below, the Department has full authority to enter such an order to preserve the status quo and protect the stability of the local exchange market in Massachusetts.

A. If *USTA II* Were to Take Effect, It Would Not Result in a Finding of Non-Impairment that Relieves ILECs of all Unbundling Obligations, But Rather in a Remand to the FCC for Determining UNE Unbundling Requirements.

Department action requiring Verizon to honor its contractual commitments to provide UNEs unless and until the contracts are modified pursuant to the "change of law" procedures specified therein is entirely consistent with the *USTA II* decision. Indeed, *USTA II* does not make a finding of non-impairment that would alleviate Verizon's obligations to provide UNEs to foster local competition. Even Verizon has acknowledged this fact.

Counsel for Verizon represented to the D.C. Circuit that an order vacating portions of the *TRO* – which is all that it obtained, though it had sought far more – would not, by itself, terminate Verizon's obligation to provide unbundled switching and dedicated transport. In its Petition for Writ of Mandamus, Verizon asked for much broader relief than was ultimately granted by the Court. In addition to asking the Court to vacate the FCC's unbundling rules, Verizon also sought an order directing the FCC to adopt, establish, and apply a new impairment standard within 45 days, and providing for a "transition plan" that would do away with UNE-P if

[20] FCC's Motion for Stay, at 8.

the FCC "fail[ed] to develop lawful rules" within that period.[21] Despite Verizon's request for a Court order that it could stop providing unbundled switching if the FCC rules were vacated and not replaced with new unbundling rules, the Court *declined* to grant such relief.

At oral argument before the D.C. Circuit, Verizon's counsel conceded that if the only relief it obtained was the vacatur of some FCC unbundling rules, then it would be required to continue to provide all UNEs under its existing interconnection agreements at least until there was a subsequent finding – by the FCC or the Court – that CLECs were not impaired without access to particular elements. This admission was made during the following exchange:[22]

> Judge Edwards: … Now, assume you're right on all of that and the conclusion is that [the FCC] cannot delegate [to the states]. Whatever else they can do – what's the remedy? …
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> Mr. Kellogg [counsel for Verizon]: The remedy is to remand to the FCC to vacate the decision or the parts of the decision that we challenge that allow such delegation and to direct the Department to do what Congress and the courts told them to do, which is to make an impairment determination.
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> Judge Edwards: Where does that leave your clients, in your view, with respect to the precise matters that are at issue? … [D]o they remain in limbo? That is, do they remain as they are now? Do you assume impairment, no impairment, what? What are you imagining?
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> Mr. Kellogg: Well, it's a difficult question, Your Honor, because –
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> Judge Edwards: That's why I'm raising it.
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> Mr. Kellogg: -- we are subject, ***we are subject to a number of agreements in the states, and the states will continue to require us to provide elements pursuant to those agreements***.
>
> Judge Edwards: ***Right.***
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> * * *
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> Mr. Kellogg: Until there is a law, the remedy is a lawful unbundling regime that–

[21] *USTA v. FCC*, D.C. Circuit Nos. 00-1012, 00-1015, Verizon's "Petition For Writ of Mandamus To Enforce the Mandate of This Court," filed August 28, 2003, at 30.

[22] *USTA v. FCC*, D.C. Circuit Nos. 00-1012, 00-1015, Transcript of Oral Argument, January 28, 2004, at 7-11 (emphasis added).

> Judge Williams: Yes, **but we don't have the authority to do that**, only the FCC can do that, so that question is, the question Judge Edwards is driving at and I'm interested in is if we agree with you on the delegation, do we say that the whole, that all the rules that are covered by the delegation are vacated effective 60 days after our decision or something like that[,] or what do we do?
>
> Mr. Kellogg: Well, your honor, … we would urge the Court to provide a much more specific remedy. … We would ask the Court to impose strict guidelines on the Department to reach a new and lawful unbundling decision. We would ask the Court to provide specific guidance, even more specific than provided in *USTA*, on the relevant factors going into that decision…. [A]nd we would ask the Court to direct the Department to the extent that they cannot make a lawful impairment [finding], which we do not believe they can do in most markets for switching and transport, then they have to develop a prompt transition mechanism away from the artificial competition of the UNE-P to the sort of facilities-based competition that Congress envisioned.

Three points are noteworthy here. First, counsel for Verizon explicitly recognized that a *vacatur* would not, by itself, relieve it of its current obligations to provision UNEs. Second, Judges Edwards and Williams concurred in that evaluation. Third, while the Court's order, if it ever takes effect, would vacate portions of the *Triennial Review Order*, the Court did *not* grant Verizon the remainder of the relief it sought. Verizon expressly asked the D.C. Circuit to rule that by a date certain it could stop providing unbundled mass market switching and dedicated transport, but the Court's decision provides no such relief.

In short, as both the Court and counsel for Verizon recognized, if *USTA II* as issued were to take effect, it would not, by itself, change the law in a fashion that would relieve Verizon of its obligations to continue to provision UNEs. Thus, *USTA II* did not (and the Court recognized that it could not) impose the kind of "lawful unbundling regime" that Verizon and the other RBOCs sought. All it could do – and all it did do – was to issue an order that vacated specific FCC rules and directed the FCC to review the matter consistent with the Court's rulings.

Critically, the Court did *not* rule that the FCC is precluded from finding that any of the currently provided UNEs must continue to be provided under the terms of 47 U.S.C. § 251. Rather, the Court only criticized the FCC's method for evaluating the evidence presented to it.

Thus, if *USTA II* were to take effect, the FCC would remain fully authorized on remand to make virtually the same unbundling decisions that it made in the *TRO*. Thus, an interim order requiring Verizon to continue providing UNEs on existing terms unless and until the Department rules on a Verizon request to change the terms of its ICAs is entirely consistent with *USTA II*.

B. The Department Has the Authority to Preserve the Status Quo Pending Resolution of Legal Uncertainties.

1. The Department Can Act to Preserve its Power to Enforce Verizon's Obligations Under Its Existing Interconnection Agreements.

Verizon must comply with the terms of its interconnection agreements to provide UNEs in accordance with the contract terms unless and until Verizon meets its burden of demonstrating in accordance with contractually mandated procedures that it should be relieved of its contract obligations to do so. The sources of the Department's authority to order Verizon to do so are many, as detailed and explained below. At the outset, however, we point out the most obvious source of power: the power to interpret and enforce ICAs that it previously approved.

The FCC recently told the D.C. Circuit that if *USTA II* were to take effect then state commissions would have to step in "to determine the rights of competitors and incumbents under existing 'interconnection agreements.'"[23] The Department's power to enforce ICAs it approved between Verizon and a CLEC is well established. "[T]he Act's grant to the state commissions of plenary authority to approve or disapprove … interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved."[24] This same power to interpret ICAs necessarily includes the power to order Verizon to continue to offer UNEs under existing ICAs at current prices and other existing terms

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[23] FCC's Motion for Stay, at 9.

[24] *Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475, 479-80 (5th Cir. 2000) *See also: Michigan Bell Tel. Co. v. MCIMetro*, 323 F.3d 248, 356-57 (6th Cir. 2003); *BellSouth Telecom. Inc. v. MCIMetro*, 317 F.3d 1270, 1276 (11th Cir. 2003) (*en banc*).

and conditions unless and until Verizon establishes to the Department's satisfaction that Verizon no longer has any obligation – under its existing ICAs, federal law, state law, the Bell Atlantic/GTE merger conditions, or otherwise – to provide unbundled mass market switching, dedicated transport, or some other UNE.

Under Verizon's interconnection agreements with CLECs, Verizon may not unilaterally cease complying with the obligations to provide UNEs based on its own position that the law has changed and no longer requires that it provide such UNEs. Verizon is subject to contractual obligations to provide those UNEs, unless and until those contract obligations are modified in accordance with the contract procedures for obtaining such contract modification. If Verizon believes that it has a basis under its interconnection agreements for obtaining a modification of its contract obligations, Verizon is contractually bound to follow the ICA procedures for obtaining those modifications. In this motion, we are asking the Department to enforce the contract, *i.e.*, require Verizon to follow the contract procedures for modifying its obligation. If CLECs do not agree that Verizon has a right to cease providing UNEs, then Verizon must come before the Department and meet its burden of demonstrating that its right under the contract for modifying its contract obligations has been triggered. We are asking the Department to require Verizon to follow the contract procedures.

Verizon is expressly obligated under the current ICA to provide AT&T with unbundled loops, switching, dedicated transport, other UNEs, and combinations thereof, at TELRIC-compliant rates approved by the Department.[25] AT&T's ICA provides that, "in the event that as a result of any decision, order or determination of any judicial or regulatory authority" Verizon is no longer required "to furnish any service or item or provide any benefit required to be furnished or provided to AT&T … then AT&T and [Verizon] shall promptly commence and conduct

negotiations in good faith with a view toward agreeing to mutually acceptable new terms as may be required or permitted as a result of such decision, order or determination."[26] In addition, "[i]n the event that any legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement or the rights or obligations of either AT&T or [Verizon] hereunder … the Parties shall renegotiate in good faith such affected provisions with a view toward agreeing to acceptable new terms as may be required or permitted as a result of such legislative, regulatory, judicial or other legal action."[27]

Thus, as Verizon's appellate counsel before the D.C. Circuit recognized, the ICA procedure guarantees that disputed changes of law do not permit any party to make any precipitous and potentially disruptive unilateral modifications to local phone service (and competition) based on its self-serving interpretation of "changed" law. Instead, the parties must first work together to try to agree on a contractual amendment that reflects any such change. If the parties are unable to agree upon the scope or implementation of a change of law, the parties may seek the assistance from the Department to resolve the dispute. Resolution of such a dispute would require the Department to determine the scope of Verizon's unbundling obligation under federal law in the absence of FCC guidance or rules, as well as the scope of Verizon's unbundling obligation under Massachusetts law.

Moreover, as discussed above, even if *USTA II* were to take effect it would not materially affect any material term of the existing ICAs, because nothing in *USTA II* constitutes a finding that Verizon has no obligation under either federal law or Massachusetts law to provide unbundled mass market switching and dedicated transport at TELRIC rates. *USTA II* does not

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[25] *See, e.g.*, AT&T's ICA, Part II, Article 2; Teleport's ICA, Article 9; and ACC's ICA, Articles 15 & 16.

[26] AT&T's ICA, General Terms and Conditions, Article 7.4; *see also* Teleport's ICA, Article 28.0; ACC's ICA, Article 35.0.

address or provide an answer to the question of whether CLECs remain impaired in any particular area in the absence of access to UNEs and UNE combinations. It draws no conclusions as to what obligations the ILECs have to provide UNEs and UNE combinations. If, however, Verizon claims that *USTA II* materially affects a material term of the ICA, it is required to follow the process set out in the ICA to resolve the dispute.

2. The Department Can Act to Preserve its Power Under the 1996 Telecommunications Act, Especially in the Absence of FCC Rules, to Require Verizon to Provide Specified UNEs At TELRIC Prices.

The FCC has recognized the important role that state commissions would have to play to maintain stability and ultimately to enforce the ILECs' continuing unbundling obligations if the *USTA II* mandate were ever to take effect. In its motion asking the D.C. Circuit to continue its stay of *USTA II*, the FCC first emphasized the crucial rule that state commissions must play in implementing the unbundling requirements of the Act. The FCC wrote: "As the United States Supreme Court has recognized, the local competition provisions of the 1996 create 'a hybrid jurisdictional scheme' in which the states participate extensively in the Act's implementation."[28] With this division of labor in mind, the FCC told the D.C. Circuit that if the *USTA II* "mandate is not stayed, both the FCC and state commissions will be forced to undertake, presumably on an emergency basis, extremely burdensome proceedings to establish new rules and arrangements for access to unbundled elements."[29] For the same reason, the Department has authority under federal law to enter the standstill order requested herein by AT&T.

The Department has authority under federal law to direct Verizon to preserve the *status quo* regarding the availability and pricing of existing UNEs, and *USTA II* does nothing to

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[27] AT&T's ICA, General Terms and Conditions, Article 7.3. *See also, e.g.*, Teleport's ICA, Articles 29.20 and 29.21; ACC's ICA Article 42.17.

[28] FCC's Motion for Stay, at 5 (quoting *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 489 (2002), and also citing *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 378 n.6, 384 (1999)).

preclude the Department's exercise of that authority. Section 252 of the Telecommunications Act explicitly authorizes state commissions to implement the unbundling requirement contained in 47 U.S.C. § 251(c)(3). It charges state commissions with "ensur[ing]" that arbitrated agreements "meet the requirements of section 251. . .*including* the regulations prescribed by the [FCC] pursuant to section 251. . .."; and it authorizes state commissions to reject any arbitrated agreement found not to "meet the requirements of section 251. . ., *including* the regulations prescribed by the [FCC] pursuant to section 251."[30] State commissions thus have authority to implement not just FCC regulations issued pursuant to Section 251, but also have authority to enforce Section 251 itself, including the unbundling requirement in 47 U.S.C. § 251(c)(3).

This authority extends beyond the formation stage of interconnection agreements. The 1996 Act empowers state commissions to interpret and enforce unbundling obligations in arbitration agreements that they have approved.[31]

Furthermore, state commissions are authorized to make unbundling determinations on issues that the FCC has not settled. The Act explicitly makes state commissions responsible for arbitrating all "open issues," 47 U.S.C. §252(c), which necessarily includes issues that are open because the FCC has not issued regulations which resolve them.

3. The Department Can Act to Preserve Its Power Under Massachusetts Law to Require UNEs at TELRIC Rates.

If the *USTA II* decision were to take effect, state commissions would have to determine whether Verizon and other ILECs should be required to continue to provide UNE-P as a matter

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[29] FCC's Motion for Stay, at 8.

[30] 47 U.S.C. § 252(c)(1), (e)(2)(B) (emphasis added).

[31] *Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475, 479-80 (5th Cir. 2000) ("the Act's grant to the state Departments of plenary authority to approve or disapprove … interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state Departments have approved"); *See also Michigan Bell Tel. Co. v. MCIMetro*, 323 F.3d 248, 356-57 (6th Cir. 2003); *BellSouth Telecom. Inc. v. MCIMetro*, 317 F.3d 1270, 1276 (11th Cir. 2003) (en banc).

of state law. The FCC made precisely this point in its recent motion for a further stay of the *USTA II* mandate. As the FCC stated, "[i]n the absence of binding federal rules, state commissions will be required to determine not only the effect of [the D.C. Circuit's] ruling on the terms of existing [interconnection] agreements but also the extent to which mass market switching and dedicated transport should remain available under state law."[32] For much the same reason, the Department has full power under state law to enter the standstill order requested by AT&T, as a necessary interim step to preserve the status quo pending consideration of whether in the absence of federal unbundling rules Verizon should be required to provide unbundled mass market switching and dedicated transport under Massachusetts law.

The Department has "general supervision" over telephone service in Massachusetts, "so far as may be necessary for the purpose of carrying out the provisions of law relative thereto." G.L. c. 159, § 12. The Department "may inquire into the rates, charges, regulations, practices, equipment and services of common carriers" to ensure that the rates are "just and reasonable." G.L. c. 159 §§ 13,14. In addition, the Department has broad powers to ensure that Verizon's "regulations or practices … affecting … rates" are not "unjust, unreasonable, unjustly discriminatory, [or] unduly preferential," including to Verizon itself. G.L. c. 159, § 14.

The Department has correctly recognized that this broad authority includes the power to require Verizon to permit wholesale access to UNEs on competitively viable terms and conditions. In January 1995, the Department began to explore ways to break the local telephone monopoly and bring competition to the market for local telecommunications services by opening an investigation into, among other issues, whether Verizon (then NYNEX) should be required to unbundle elements of its local network and lease them at wholesale rates to new entrants that

[32] FCC's Motion to Stay, at 9.

would use them to provide competing retail services.[33] After enactment of the 1996 Act, the Department continued along this procompetitive path, overseeing the unbundling of Verizon's local network pursuant to federal law.

As the FCC noted in its recent filing with the D.C. Circuit,[34] the exercise of Department authority to require UNEs at TELRIC rates under Massachusetts law is not preempted by, and would be entirely consistent with, federal law. The 1996 Act expressly permits states to adopt and enforce pro-competitive measures that go beyond the requirements of federal law.[35] Thus, even if the Department determines that Verizon's obligation to provide unbundled mass market switching or dedicated transport at TELRIC rates under federal law is in procedural hiatus, the Department could ensure the continued vibrancy of retail competition in Massachusetts by ordering Verizon to continue providing such access to UNEs and UNE-P at rates reflecting forward-looking economic costs. A continuing requirement to provide such UNEs could not possibly be inconsistent with FCC rules, because there would be no FCC rules. Furthermore, as discussed below, even if the FCC subsequently found that unbundling of a particular element was not required under federal law, the Department retains full authority to order the unbundling of that element at cost-based rates under Massachusetts law.

The 1996 Act specifically preserves the ability of states to impose state law requirements when reviewing interconnection agreements.[36] Congress preserved this state autonomy with

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[33] D.P.U. 94-185, "Vote to Open Investigation" at 3-5 (Jan. 6, 1995).

[34] FCC's Motion to Stay, at 9.

[35] 47 U.S.C. § 253(e)(3).

[36] The Act provides that "nothing in this section shall prohibit a State Department from establishing or enforcing other requirements of State law in its review of an agreement." 47 U.S.C. § 252(e)(3). Section 252(e)(3) thus represents "an explicit acknowledgment that there is room in the statutory scheme for autonomous state Department action." *Puerto Rico Tel. Co. v. Telecom. Reg. Bd. of Puerto Rico*, 189 F.189 F.3d 1, 14 (1st Cir. 1999); *see also Southwestern Bell Tel.*, 208 F.3d at 481 (§ 252(e)(3) "obviously allows a state Department to consider requirements of state law when approving or rejecting interconnection agreements"); *AT&T Comms. of NJ v. Bell Atlantic-NJ, Inc.*, No. Civ. 97-CV-5762(KSH), 2000 WL 33951473, at *14 (D.N.J. June 6, 2000) ("§ 252(e)(3) gives states the authority to impose unbundling requirements beyond those mandated by FCC regulations.").

only one qualification: a state Department may enforce or establish state law requirements "subject to section 253 of this title," § 252(e)(3), which prohibits states from imposing legal requirements that create barriers to competitive entry. Thus, so long as it does not invoke state law to create barriers to entry in violation of § 253 of the Act, a state may exercise its inherent sovereign power to regulate the terms of competitive access to local telephone networks.

Two other savings clauses further demonstrate that the 1996 Act envisions an active role for states to impose additional unbundling requirements that go beyond the minimum set of requirements, or floor, set by federal law. First, 47 U.S.C. § 261(c) provides that "[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Department's regulations to implement this part." Second, Section 601(c) of the Telecommunications Act of 1996 establishes a special rule of construction for interpreting the Act. Congress specified that the Act "shall not be construed to modify, impair, or supersede . . . State[] or local law unless expressly so provided."[37]

In sum, the 1996 Act authorizes this Department to impose unbundling requirements under state law that go beyond what FCC regulations require. Federal regulation does not preempt the field unless it is so pervasive as to leave "no room" for parallel state requirements.[38] Verizon can make no case for field preemption here, where Congress explicitly reserved a role for states in regulating local telecommunications competition within the 1996 Act and states have adopted parallel regulatory requirements pursuant to that authority.[39]

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[37] P.L. 104-104 § 601(c)(1), 110 Stat. 56, 143 (1996).

[38] *Hillsborough County, Florida* v. *Automated Medical Laboratories, Inc*., 471 U.S. 707, 713, 105 S.Ct. 2371, 2375 (1985).

[39] *See id.*

As the Massachusetts Supreme Judicial Court has explained, in determining whether State law has been preempted we must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[40] The Supreme Judicial Court has held that the Telecommunications Act of 1996 does not "occupy the field," and thus does not preempt the imposition of additional obligations under state law, because Congress has expressly reserved to the States the power to do so.[41] Thus, federal law establishes but a floor for unbundling requirements, upon which this Department may impose additional unbundling obligations under state law. In light of the serious harm that would be imposed on CLECs and the public if Verizon's obligations to provide existing UNEs at the current rates suddenly vanished, this Department should exercise its authority to maintain the status quo.[42]

The state commissions in Maine, Vermont, Rhode Island, and Connecticut have all correctly found that they may impose unbundling requirements which go beyond any federal requirements established to date by the FCC. For example, the Maine Public Utilities Commission recently issued an order requiring Verizon to unbundle copper subloops that terminate on a pole or remote terminal box designated by the CLEC even though such unbundling is not required by federal law.[43] The Maine Commission noted with approval the Vermont Supreme Court's determination that federal law sets only a floor for unbundling and

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[40] *Roberts v. Southwestern Bell Mobile Systems, Inc.*, 429 Mass. 478, 486 (1999).

[41] *Id.* at 487.

[42] At the very least and if Verizon decides to offer certain UNEs but gives notice of increased rates, the Department has authority under G.L. c. 159, § 20 to suspend the initiation of such rate change until final determination of Verizon's obligations to provide UNEs and the appropriate rates for such UNEs.

[43] Docket No. 2002-704, *Investigation of Skowhegan OnLine Inc.'s Proposal for UNE loops*: ORDER, Part I (April 1, 2004).

that states may impose additional consistent unbundling requirements.[44] It determined that requiring unbundling of copper subloop was not inconsistent with the Act, was technically feasible, and was in the public interest, and thus permissible.[45] The highest courts in Vermont, Rhode Island, and Connecticut have upheld state commission orders which similarly impose unbundling requirements which go beyond FCC rules. *See Petition of Verizon New England, Inc.*, 173 Vt. 327, 795 A.2d 1196, 1200 (2002) (holding that Public Service Board's power under Vermont law to order Verizon to combine unbundled network elements was not preempted even if FCC had declined to order such combinations under federal law); *Verizon New England, Inc. v. Rhode Island Public Utilities Comm'n*, 822 A.2d 187, 193 (R.I. 2003) (holding that Public Utilities Commission was not preempted from regulating voice messaging services ["VMS"] under Rhode Island law as a result of the FCC's finding that under federal law VMS are information services not subject to regulation); *Southern New England Telephone v. Department of Public Utility Control*, 261 Conn. 1, 35, 803 A.2d 879, 900 (2002) (holding that Department of Public Utility Control's power under Connecticut to regulate the terms and conditions under which ILEC must offer certain "enhanced services" for resale was not preempted, despite ILEC's claim that it had no obligation to make such an offering under federal law).

Similarly, in *Southwestern Bell Tel. Co. v. Waller Creek Comms., Inc.*, 221 F.3d 812 (5th Cir. 2000), the Fifth Circuit confronted a challenge by Southwestern Bell to a Texas Public Utility Department decision ordering it to combine UNEs for a competitor. Southwestern Bell had argued that the decision was illegal because it had been based on an FCC regulation specifying when ILECs had to combine elements, which regulation had been vacated by the Eighth Circuit. The Fifth Circuit squarely rejected the argument: "Nothing in the

[44] Docket No. 2002-704, *Investigation of Skowhegan OnLine Inc.'s Proposal for UNE loops*: Addendum to Examiner's Report at 1 (February 17, 2004), at 12.

Telecommunications Act forbids such combinations. Even if the Eighth Circuit's decision on this issue is correct – which we do not decide today – it does not hold that such arrangements are prohibited; rather, it only holds that they are not required by law." *Id.* at 821.

In sum, it is well established that the exercise of the Department's authority under Massachusetts law requiring Verizon to provide mass market switching and dedicated transport is not preempted by, and is consistent with, federal law. Thus, there can be no doubt that the Department may enter the more limited, standstill order requested in this motion by AT&T.

4. The Bell Atlantic/GTE Merger Order Requires Verizon to Continue to Provide Unbundled Mass Market Switching and Dedicated Transport.

Verizon also remains obligated to provide unbundled switching and dedicated transport at TELRIC prices under the terms of the *Bell Atlantic/GTE Merger Order*.[46] Because the Bell Atlantic/GTE merger had an inherently anticompetitive impact on local competition, the FCC approved the merger on certain conditions, including conditions specifically designed to facilitate and preserve UNE-based local competition.[47]

One of the conditions was designed to ensure that Verizon would continue to provide all UNEs and UNE combinations, without interruption, until all legal challenges to the FCC's unbundling rules were finally resolved. "To reduce uncertainty to competing carriers from litigation that may arise in response to our [the FCC's] orders in our UNE Remand and Line Sharing proceedings," Verizon agreed that:

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[45] *Id*. at 16-19.

[46] *In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent To Transfer Control*, CC Docket No. 98-184, Memorandum Opinion and Order, No. FCC 00-221, 15 FCC Rcd 14032 (rel. June 16, 2000) ("*Bell Atlantic/GTE Merger Order*").

[47] *Bell Atlantic/GTE Merger Order* ¶ 3 ("[W]e find in this Order that, absent conditions, the merger of Bell Atlantic and GTE will harm consumers of telecommunications services."); *id.* ¶ 247 ("We believe that the Applicants' package of conditions, with the modifications by this Department, alters the public interest balance of the proposed merger by mitigating substantially the potential public interest harms while providing additional public interest benefit.").

> [F]rom now until the date on which the [FCC]'s orders in those proceedings, ***and any subsequent proceedings***, becomes final and non-appealable [Verizon would] continue to make available to telecommunications carriers each UNE that is required under those orders.[48]

This "UNE Merger Condition" remains in effect until "the date of a final, non-appealable judicial decision providing that th[ose] UNEs or combination of UNEs are ***not*** required to be provided by Bell Atlantic/GTE in the relevant geographic area."[49] The *UNE Remand Order* was reversed by *USTA I*, the *TRO* was the FCC's order on remand from that decision, and *USTA II*, if it becomes effective, would vacate parts of the *TRO* and remand to the FCC.[50] Because *USTA II* would only vacate and remand to the FCC, there will have never been a final and non-appealable judicial decision that "th[ose] UNEs or combination of UNEs are ***not*** required to be provided."

As a result, even if the Department did not have authority under both state and federal law to require Verizon to continue providing UNEs in accordance with its ICAs, Verizon would still be required to provide unbundled network elements in accordance with the *Bell Atlantic/GTE Merger Order*. In its submissions in pending ICA proceedings in various states, Verizon has proffered three reasons why it claims that this merger condition is no longer binding. As explained below, none of these three arguments comes close to carrying Verizon's heavy burden of demonstrating that the merger condition that it drafted does not govern here.[51]

a. The UNE Merger Condition Contains a Specific Sunset Clause Which Makes Clear that This Condition is Still In Effect.

In other states Verizon has contended that the UNE Merger Condition has expired by virtue of the last sentence of that condition, which states that "[t]he provisions of this Paragraph

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[48] *Bell Atlantic/GTE Merger Order* ¶ 316 (emphasis added).

[49] *Id.*; *see also id.*, App. D, ¶ 39 (emphasis added).

[50] The *TRO* is expressly captioned as an "Order on Remand" in both the *UNE Remand* docket (CC Docket NO. 96-98) and the *Line Sharing* docket (CC Docket No. 98-147). And that is, of course, why the appeal of the *TRO* was transferred from the Eight Circuit to the D.C. Circuit and assigned to the same panel that heard *USTA I*.

shall become null and void and impose no further obligation of Bell Atlantic/GTE after the effective date of final and non-appealable Department orders in the UNE Remand and Line Sharing proceedings, respectively."[52] Verizon is wrong. The FCC expressly stated that this sunset provision would not be satisfied "until the date on which the Department's order in those proceedings, ***and any subsequent proceedings***, become final and non-appealable."[53] That has not yet happened.

Nor would *USTA II*, if it goes into effect, trigger termination of the UNE Merger Condition. The D.C. Circuit in *USTA II* did not hold that Verizon is "not required" to provide UNEs within the meaning of the UNE Merger Condition. The very purpose of the UNE Merger Condition is to preserve the *status quo* should a court stay or vacate the unbundling rules that the FCC adopts in the UNE Remand proceedings. As discussed above, the *USTA II* decision, if it goes into effect, will do nothing more than vacate the FCC's rules. It does not resolve the underlying issue of whether CLECs are impaired in the absence of specific UNEs.

The FCC found both that the Bell Atlantic/GTE merger would reduce local competition and that affirmative steps were necessary to facilitate UNE-based competition. In particular, the FCC recognized that local competition was unlikely if carriers did not have a clear entitlement to particular UNEs.[54] Thus, the intended purpose of the condition was to provide the necessary certainty to induce local entry, and Verizon's tortured reading of its merger obligation is contrary to this purpose.[55] The Merger Conditions were created to produce stability and build competitive local markets until litigation regarding the UNEs and UNE combinations that incumbent local

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[51] *See United States v. Seckinger,* 397 U.S. 203, 210 (1970) ("[A] contract should be construed most strongly against the drafter").

[52] *Bell Atlantic/GTE Merger Order,* App. D ("Market Opening Conditions"), ¶ 39.

[53] *Bell Atlantic/GTE Merger Order*, ¶ 316 (emphasis added)

[54] *Bell Atlantic/GTE Merger Order* ¶ 316; *Ameritech-SBC Merger Order* ¶ 394.

[55] *Bell Atlantic/GTE Merger Order* ¶ 316; *Ameritech-SBC Merger Order* ¶ 394.

exchange carriers ("ILECs") are required to provide under the 1996 Act is finally resolved. Final resolution has not yet come, and because Verizon is using the current uncertainty to undermine UNE-based competition, application of the merger condition requirement to provide UNEs and UNE combinations is mandatory.

b. The Specific Sunset Clause in the UNE Merger Condition Is Not Trumped by the More General Sunset Provision in the Bell Atlantic/GTE Merger Order.

In the alternative, Verizon has contended in other states that the UNE Merger Condition has expired because there is a three-year sunset date that applies generally to the merger conditions. However, the general sunset provision cited by Verizon explicitly exempts from its reach any provision that has its own "termination dates" that are "specifically established therein." Verizon has argued that the termination date in the UNE Merger Condition is not "*specifically* established" because it does not refer to a particular date.

Verizon's interpretation of "specifically" is flatly inconsistent with the standard meaning of the word. "Specific" means "explicitly set forth; definite."[56] The Merger Condition that Verizon must maintain UNEs until "the date of a final, non-appealable judicial decision providing that th[ose] UNEs or combination of UNEs *are not required to be provided* by Bell Atlantic/GTE in the relevant geographic area" qualifies fully with the dictionary definition of "specific."

The Verizon interpretation is also patently inconsistent with the purpose of the "any subsequent proceeding" provision. The sunset provision language does not require a date certain. Had that been the intention, the language could have easily specified "a date certain" requirement rather than using the term "specifically." Thus, the three-year general sunset provision, by its unambiguous terms, does *not* apply to or overrule the more particular UNE

Merger Condition. Notably, the FCC's Enforcement Bureau has endorsed this same, plain language reading of the cognate merger condition in the *SBC/Ameritech Merger Order*.[57]

Finally, any possible inconsistency between the specific sunset provision contained within the UNE Merger Condition and the more general sunset provision that applies only to conditions without specific termination provisions would have to be resolved by giving full force to the specific provision in the UNE Merger Condition. The Bell Atlantic/GTE merger conditions constitute an agreement between Verizon and the FCC that CLECs are entitled to enforce as third-party beneficiaries. In the case of a conflict between a specific and a general provision of a contract, the specific provision controls.[58] The same rule of construction applies to orders or regulations issued by an administrative agency.[59]

c. Paragraph 705 of the *TRO* Did Not Terminate Verizon's Obligations to Provide UNEs Under the Bell Atlantic/GTE Merger Order.

Verizon has also argued that its merger obligations were implicitly repealed by paragraph 705 of the *TRO*. That assertion is also clearly wrong. First of all, the *TRO* could not, as a matter of law, have amended Verizon's obligation under the entirely separate legal requirements of the *Bell Atlantic/GTE Merger Order*. And Paragraph 705 of the *TRO* makes no such claim. Instead, it purports to read a deadline into ICAs that contain no specific time line for the completion of

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[56] American Heritage Dictionary, Second College Edition (1982), p. 1173.

[57] *See* Memorandum Opinion and Order, *Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, 17 FCC Rcd. 19595, ¶ 3 n.7 (2002).

[58] *See, e.g., Kobico, Inc.* v. *Pipe*, 44 Mass.App.Ct. 103, 108 (1997), citing Restatement (Second) of Contracts § 203(c) (1981) ("specific terms and exact terms are given greater weight than general language") and *Lembo* v. *Waters*, 1 Mass.App.Ct. 227, 233, 294 N.E.2d 566 (1973) ("'If the apparent inconsistency is between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and pro tanto nullification of the former.' Corbin, Contracts, s 547, p. 176."). *See also, e.g.*, 11 Richard A. Lord, Williston On Contracts § 32.10 (9th ed. 1999) ("Where general and specific clauses conflict, the specific clause governs the meaning of the contract").

[59] *See United States* v. *Paddack*, 825 F.2d 504, 514 (D.C. Cir. 1987) (holding that where agency regulations were ambiguous, a federal review board acted reasonably in resting a decision on the more specific rather than the more general regulation).

change of law dispute resolution solely with respect to disputes over implementation of the *TRO* changes to the FCC's unbundling rules before all appeals of the *TRO* are complete. This paragraph by its terms applies only to the changes in obligations set forth in the *TRO*. It does not apply, nor does it even reference, merger conditions agreed to by Verizon, which are distinct from and independent of the FCC's UNE rules (and contract change of law requirements).

As noted above, the merger conditions were *additional* requirements accepted by Bell Atlantic/GTE to mitigate the harm to competition resulting from their merger. In return for the right to proceed with an otherwise anticompetitive merger, Bell Atlantic/GTE voluntarily agreed to maintain UNEs and UNE combinations throughout the full term of the legal wrangling over the UNE Remand and Line Sharing proceedings. The FCC's *TRO* has not disturbed or displaced that obligation nor has the decision in *USTA II*. The Merger Conditions remain in effect.

Conclusion

For the reasons explained above, AT&T respectfully requests that the Department bar Verizon from taking any unilateral actions -- under color of *USTA II* or otherwise – to restrict AT&T's access to existing UNEs, or to change the prices paid for existing UNEs for existing or new customers, unless and until this Commission approves such changes. Verizon has made statements suggesting that it believes its obligation to provide certain UNEs will evaporate on June 15, if the *USTA II* stay expires, and that it is free to withhold the provision of those UNEs or increase their price. By this motion, AT&T asks the Department to assert its authority to determine Verizon's rights and obligations under its interconnection agreements and under all applicable law ***before*** Verizon acts on its own self-serving determination of its rights and obligations.

Specifically, AT&T asks the Department to issue an order that Verizon must continue to provision all existing UNEs and UNE combinations at current TELRIC rates for both existing

and new customers unless and until Verizon seeks and obtains, after due process and consideration of all relevant facts and legal authority, a Department determination that Verizon has the right under its ICAs and applicable law to discontinue the provision of specific UNEs that it has been obligated to provide under its ICAs or that it has the right to increase the prices of such UNEs above those specified in its ICAs.

Respectfully submitted,

AT&T Communications of New England, Inc.,
By its attorneys,

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Jeffrey F. Jones
Kenneth W. Salinger
Ruth T. Dowling
Julia E. Green
PALMER & DODGE LLP
111 Huntington Avenue
Boston, MA 02199
617.239.0561
ksalinger@palmerdodge.com

Jay E. Gruber
AT&T Communications
of New England, Inc.
99 Bedford Street, 4th Floor
Boston, MA 02111
617.574.3149
jegruber@lga.att.com

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