COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In re Petition of Verizon New England Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	**Docket No. 04-33**

REPLY BRIEF OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC. ACC CORPORATION AND TELEPORT COMMUNICATIONS-BOSTON

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"the concept of materiality governs."[44] But these standards would effectively be eliminated under Verizon's approach. Instead, Verizon's proposal would require *perfect* performance by the CLEC, defining *any* non-compliance, even a single circuit among thousands, to constitute material non-compliance. (Amendment 2, at 3.4.2.7). This substitution of perfection instead of materiality is designed to foist the cost of the audit improperly onto the CLEC.

There is no justification for this approach in the *TRO*. Because the process embodied in Verizon's proposal amounts to an impermissible "pre-audit," and "unauthorized audits" it should be rejected. The amendment proposed by AT&T, in contrast, accurately reflect the requirements established by the FCC, and thus should be adopted.

ISSUE 31 Should the Amendment address Verizon's Section 271 obligations to provide network elements that Verizon no longer is required to make available under Section 251 of the Act? If so, how?

The issue presented here is whether terms and conditions relating to Section 271 elements should, or indeed must, be included in interconnection agreements filed pursuant to Section 252. Verizon's argument in its initial brief, however, repeatedly conflates the issue presented here with a different issue that Verizon prefers to argue. Instead of addressing the issue presented, Verizon argues that Section 271 obligations are not the same as Section 251 obligations. As a matter of simple logic, the fact that the obligations are not the same does not mean that Section 271 obligations must not be included in Section 252 interconnection agreements. Indeed, the express language of

[44] *TRO* ¶ *626-628, n1904,1905.* See the discussion of the concept of materiality defined in the American Institutes of Certified Public Accountants (AICPA) professional standards Statements on Standards for Attestation Engagements (SSAE) No. 10, now codified at AICPA section AT 601.

Section 271 *requires* that the obligations imposed by that section be included in interconnection agreements filed pursuant to Section 252.

In order to address a different issue from the one presented, Verizon responded to an argument Verizon claimed AT&T made, rather than the one AT&T actually made. In the Joint Issues Matrix (and again in its initial brief), AT&T had pointed to the clear and unambiguous language in Section 271. Section 271(c)(2)(A) establishes the requirements by which a Bell Operating Company ("BOC") may be authorized to offer in-region long distance service. One of the requirements is to provide "access and interconnection pursuant to one or more agreements described in paragraph (1)(A)."[45] Paragraph (1)(A) states in pertinent part:

> A Bell operating company meets the requirements of this subparagraph if it has entered into one or more ***binding agreements that have been approved under section 252*** of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities[.][46]

Finally, Section 271 makes clear that the terms and conditions for access and interconnection that must be included in the agreements approved under Section 252 are terms and conditions for the 14 checklist items listed in Section 271.[47] In short, if a BOC like Verizon wants to avail itself of the commercial benefits associated with offering in-

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45 47 U.S.C. 271(c)(2)(A).

46 47 U.S.C. 271(c)(1)(A).

47 *See*, 47 U.S.C. 271(c)(2)(B) ("Competitive checklist: Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following: [14 checklist items listed].")

region interLATA service, it must offer the fourteen checklist items in binding agreements filed pursuant to Section 252.[48]

Nowhere in Verizon's initial brief does Verizon seek to rebut this argument. Instead, Verizon mischaracterizes AT&T's argument, creating a straw man, which Verizon seeks to rebut. After referring to AT&T's argument regarding the Section 271 language requiring Section 271 obligations in Section 252 proceedings, Verizon erroneously asserts, "In *USTA II*, the CLECs argued, *as AT&T does here*, 'that the independent § 271 unbundling provisions incorporate all the requirements imposed by §§ 251-252, including pricing and combination.'"[49] Verizon then uses *USTA II* to disprove the argument Verizon claims AT&T made.[50] While Verizon presented an argument for why Section 271 elements are not subject to the same requirements as Section 251 UNEs, and cited to a variety of irrelevant cases,[51] it failed to address entirely

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[48] Significantly, Section 271(c)(2)(A) is written in the present tense. At any given moment, Verizon is qualified to provide long-distance service only if it is complying with two essential requirements: (1) "access and interconnection" must be offered "pursuant to one or more agreements described in [Section 271(c)](1)(A)]" and (2) such "access and interconnection" must include the checklist items specified in subparagraph (B)., 47 U.S.C. § 271(c)(2)(A)(i)(I) and (c)(2)(A)(ii).

[49] *Verizon Initial Brief*, at 140 (emphasis added). In fact, Verizon makes repeated efforts to erroneously recharacterize AT&T's position in this case as one that the *USTA II* Court rejected. *See, id.*, at 140 (According to Verizon, "In reviewing the FCC's determinations, the D.C. Circuit considered and rejected the precise argument made by the CLECs in the Joint Matrix, Issue 31, at 89-90 (*i.e.*, that because section 271 (c)(1)(A) and (c)(2)(A) refer to section 252 agreements, section 271 obligations are therefore to be enforced in section 252 arbitrations.")) *See also*, Verizon Initial Brief, at 136 (Verizon cites to the December 15, 2005 Decision on issue of the pricing standard to be used in Section 271 elements, not on whether Section 271 elements should be included in interconnection agreements).

[50] *See, id.*., at 140 ("The D.C. Circuit, however, held that 'the CLECs *have no serious argument*' that section 251 obligations apply to section 271 checklist items four, five, six and ten (i.e., unbundled elements.")(quoting *USTA II*, 359 F.3d at 589; emphasis in Verizon's brief).

[51] Not a single one of the cases cited by Verizon have anything to do with the issue of whether Section 271 check list items must be included in interconnection agreements approved pursuant to Section 252. In *SBC Communications Inc. v. F.C.C.*, 138 F.3d 410, 416, 417 (D.C. Cir.1998), the Court determined only that the FCC, and not the State commissions, is responsible for deciding the merits of a BOC request for interLATA authorization. It did not even purport to construe the language in Section 271 as it relates to the issue presented here. In *Indiana Bell Company, Inc. v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (7th Cir. 2004), the state commission had ordered Indiana Bell, as a condition of its recommendation for Section 271 approval, to offer a performance plan as "an alternative means of

AT&T's demonstratively correct argument that the checklist items of Section 271 must be included in "binding agreements that have been approved under section 252[.]"

Moreover, Verizon's reliance on the Department's Phase III-D decision in D.T.E. 98-57.[52] is misplaced. On page 136 of its initial brief, Verizon asserts that "there is no lawful basis to include section 271 obligations *in the section 252 Amendment under arbitration*" (emphasis added). In support of this argument Verizon points to the Department's Phase III-D Decision,[53] in which the Department considered whether Verizon's PARTS architecture must be unbundled *and made a part of a tariff.* In its Phase III-D Decision, the Department was not even asked to consider the language in Section 271 which requires the Section 271 elements to be included in a Section 252 agreement because such language would have been irrelevant to the issue presented there. When the Department found that it did not have authority to enforce Section 271 unbundling obligations as part of a tariff review, such a holding does not apply to the present case involving a Section 252 arbitration. Section 271 check list items must be

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obtaining interconnection" that would be available to all carriers, including those without interconnection agreements. *Id.*, at 496-97. The *Indiana Bell* Court found such an order inconsistent with the Telecommunications Act of 1996, because it forced the ILEC to provide Section 251 elements in a process outside of the negotiation and arbitration process contemplated by the Act. *Id.* Clearly, the *Indiana Bell* Court did not construe the Section 271 language requiring check list items to be contained in Section 252 agreements. The *Qwest Declaratory Ruling*, 17 FCC Rcd 19337 (2002), to which Verizon cites on page 138 of its initial brief, addresses the issue of which terms and conditions are sufficiently close to Section 251 UNEs to be included in a Section 252 agreement. It never addressed the issue of whether Section 271 check list items must be contained in a Section 252 agreement. Finally, the FCC's *InterLATA Boundary Order*, 14 FCC Rcd 14392 (1999), to which Verizon points on page 137 is completely irrelevant to the issue of whether Section 271 check list items must be contained in a Section 252 agreement. It merely holds that the FCC, and not the states, has the power to modify InterLATA boundaries.

52 D.T.E. 98-57, Phase III-D (January 30, 2004) ("Phase III-D Decision").

53 *Verizon Initial Brief*, at 136, citing and quoting from Phase III-D Decision.

included in Section 252 agreements, and it is the Department's responsibility to review, approve and enforce such agreements.[54]

BRIEFING QUESTION 1 **Notwithstanding the carrier's substantive arguments in this proceeding regarding proposed rates, terms, or conditions for any specific service, for each carrier's individual interconnection agreement, please identify each and every term that is relevant to whether or not the interconnection agreement's change of law or dispute resolution provisions permit the parties to implement changes of "applicable law" without first executing an amendment to the interconnection agreement. In providing your response, please quote the relevant interconnection agreement provisions, citing them by section, and provide highlighted copies of the relevant language.**

BRIEFING QUESTION 2 **Indicate whether a change of law or dispute resolution provision has been triggered and state the date on which each condition precedent or party obligation (e.g., notice requirements) was met, if applicable, with regard to the implementation of the Triennial Review Remand Order or any other statutory, judicial, or regulatory change, state or federal, that you claim did modify the parties' rights under the interconnection agreement.**

A. March 10 Briefing Questions Applicable to AT&T Communications of New England, Inc. and Teleport Communications-Boston

In its two March 10 briefing questions, the Department asked the parties to (1) identify specific provisions in their interconnections agreements that permit or prohibit the parties from implementing changes of "applicable law" without first executing an amendment to the interconnection agreement, and (2) indicate whether a change of law or dispute resolution process had been triggered, together with the triggering event and its date. Instead of responding to the Department's questions, Verizon presented a lengthy

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[54] *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*).