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Jesse Reyes, Esquire
Hearing Officer
Commonwealth of Massachusetts
Department of Telecommunications and Energy
One South Station, Floor 2
Boston, MA 02110

Dear Mr. Reyes:

In its April 12, 2005, Notice, the Department requests comments as to whether Verizon Massachusetts' ("Verizon MA") offering of Section 271 arrangements through negotiated agreements "constitutes common carriage pursuant to G.L. c.159, §§ 12 and 19." *Notice*, at 1-2. The threshold question for the Department is *not* whether Section 271 services are considered common carriage, but whether the Department has jurisdiction at all over such services. It does not. As stated in Verizon MA's March 31st letter, Section 271 arrangements are *not* governed by state law, but rather are subject exclusively to federal jurisdiction, which preempts any state regulation.

The Federal Communications Commission ("FCC") has held that Congress granted "*sole authority* to the [FCC] to administer . . . section 271" and intended that the FCC exercise "*exclusive authority* . . . over the section 271 process."[1] A state commission's role is limited to "consultation" before Section 271 authority is given. 47 U.S.C. § 271. This is reiterated in the *Triennial Review Order*, in which the FCC stated that "[i]n the event that a BOC has already received Section 271 authorization, Section 271(d)(6) grants the Commission [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271."[2]

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1 Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U S West Petitions to Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392, 14000-01, ¶¶ 17-18 (1999) ("*InterLATA Boundary Order*") (emphases added). Indeed, the Department has also recognized that sole authority to administer Section 271 of the Telecommunications Act of 1996 (the "Act") rests with the FCC. *See* D.T.E. 03-59, *Order Closing Investigation*, at 19 (November 24, 2003).

2 *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd

Likewise, the courts have held that "Congress has clearly charged the FCC, and *not the State commissions*," with enforcement of Section 271 requirements. *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) (emphasis added). In *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004), the court clearly explained the limited role state commissions play under Section 271 and held that state commissions have no authority to "parlay [their] limited role in issuing a recommendation under section 271 . . . into an opportunity to issue an order" — whether under federal law or "ostensibly under state law" — "dictating conditions on the provision" of 271 elements. The court found that such efforts are preempted because they "bump[] up against" the procedures that are "spelled out in some detail in sections 251 and 252" and "interfere[] with the method the Act sets out" in Section 271. *See also In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-8917, 17 FCC Rcd 19337, at ¶¶ 8, 12 & n.26 (2002) (holding that commercial agreements for Section 271 services should not be subject to the same requirements that Congress applied only to agreements implementing Sections 251 of the Act).

Where state commissions have been given a specific role under the 1996 Act, they cannot assume greater authority than ceded to them by Congress. For example, courts have ruled that state commissions may not impose tariff filing requirements in the Section 251 context because it would undermine the federally ordained procedure for negotiating interconnection agreements. *See Wisconsin Bell, Inc. v. Bie, Inc. et al*, 340 F.3d 441, 444 (7th Cir. 2003); *Verizon North, Inc. v. Strand*, 309 F.3d 935, 941 (6th Cir. 2002). These decisions apply with all the more force when the agreements concern Section 271 arrangements, where the FCC and courts have concluded emphatically that there is *no* state role.

In exercising its preemptive authority over Section 271 arrangements, the FCC has clearly indicated its strong preference for arms-length, commercial agreements. *Triennial Review Order*, ¶ 664. The FCC has also declared that the pricing and non-discrimination standards set forth in Section 201 and 202 of the Communications Act of 1934 would apply to such arrangements. *Triennial Review Order* ¶ 656; *USTA II*, 359 F.3d at 588-89. Accordingly, any attempt by the Department to regulate Section 271 arrangements solely within the province of the FCC and impose state requirements pursuant to the common carrier statute – or any other state statute for that matter - would contravene federal law.

16978, ¶ 665 (Aug. 21, 2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. Mar. 2, 2004) ("*USTA II*"), *cert. denied*, *NARUC v. United States Telecom Ass'n*, Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004).

A state cannot opt out of or circumvent the FCC's rules based on its view of state-specific facts or law, as suggested by the Department's inquiry. Under the Supremacy Clause, "[t]he statutorily authorized regulations of [a federal] agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988). That holding is supported by a long line of Supreme Court precedent. The federal government has the power to preempt any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

In assessing whether such a conflict exists, the Supreme Court has emphasized that "[f]ederal regulations have no less preemptive effect than federal statutes." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153 (1982). Moreover, the Court has held that a federal regulation that "consciously has chosen not to mandate" particular action preempts state law that would deprive an industry "of the 'flexibility' given it by [federal law]." *Id.* at 155. Indeed, unless Congress expressly states otherwise, a statutory "saving clause" that preserves some state authority does not diminish the preemptive force of federal regulations, and states may not depart from those "deliberately imposed" federal standards. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-74, 881 (2000). The Act embodies that *same* principle in that it permits preemption of any state law or regulatory requirement that undermines implementation of FCC rules.

Because the Department is preempted from regulating Section 271 services, it need not reach the question of whether Verizon MA's offering of Section 271 arrangements through negotiated agreements "constitutes common carriage under state law."[3] Whatever they are labeled, Section 271 arrangements are *not* subject to regulation by the Department because federal law has placed such arrangements squarely and exclusively within the jurisdiction of the FCC.

Although the Department has general supervisory authority over telecommunications carriers and can require that they tariff their common carriage services, the Department may lawfully exercise its authority *only* where it has jurisdiction over the carrier's services or operations. For instance, the Department has no jurisdiction over interstate services and can exercise no regulatory authority over them even though such services are common carriage provided within the Commonwealth.[4] *See*

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3 Verizon's fulfillment of its Section 271 obligations pursuant to commercial agreements is subject exclusively to federal jurisdiction regardless of whether such agreements contain standardized and/or carrier-specific rates, terms and conditions.

4 *See Crockett Tel. Co. v. FCC*, 963 F.2d 1564, 1566 (D.C. Cir. 1992) ("The FCC has exclusive jurisdiction to regulate interstate common carrier services including the setting of rates."); *New England Tel. & Tel. Co. v. AT&T Communications, Inc.*, 623 F. Supp. 1231, 1234 (D. Me. 1985) ("It is well settled that the FCC has exclusive jurisdiction over rates and charges for interstate service.").

Investigation of the Department on its Own Motion into Verizon New England Inc. d/b/a Massachusetts' Provision of Special Access Services, D.T.E. 01-34, Order on AT&T Motion to Expand Investigation (August 9, 2001) (finding that the Department has no jurisdiction over the rates or terms of interstate special access services). Likewise, the Department has no jurisdiction over commercial mobile radio services ("CMRS") because federal law vests jurisdiction over these services with the FCC. *See Investigation by the Department on its Own Motion on Regulation of Commercial Mobile Radio Services*, D.P.U. 94-73, Order (1994) (state statue and Department regulations regulating CMRS – including tariffing requirement for services – found to be preempted by federal law). Like interstate special access services and CMRS, Section 271 arrangements are within the exclusive jurisdiction of the FCC and entirely outside the scope of the Department's regulatory authority. Thus, the Department cannot circumvent federal law by asserting jurisdiction over Section 271 offerings under state common carriage statutes.

In short, Section 271 of the Act provides *no* independent authority for any state commission to impose its own requirements on Section 271 arrangements. The FCC – not the Department – is solely responsible for the interpretation and enforcement of Verizon's Section 271 obligations. Indeed, a Mississippi federal court recently reiterated that "§ 271 explicitly places enforcement authority with the FCC" and "is the prerogative of the FCC." *BellSouth Telecommunications, Inc. v. Mississippi Public Service Comm'n*, No. 3:05CV173LN, slip op at 17 (April 13, 2005). Accordingly, any action by the Department to impose a state regulatory requirement (such as tariffing) on Section 271 arrangements would be inconsistent with that federal determination and is preempted as a matter of law.

Sincerely,

Bruce P. Beausejour

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cc: Service Lists D.T.E. 03-60, 04-73, 03-59