Conversent Communications

VIA ELECTRONIC & OVERNIGHT MAIL

June 9, 2004

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, Second Floor
Boston, MA 02110

Re: TRO Switching Investigation, 03-60

Dear Ms. Cottrell:

Enclosed for filing is Conversent's Response in Support of a Standstill Order. If you have any questions, do not hesitate to contact me. Thank you.

Very Truly Yours,

Gregory M Kennan

Gregory M. Kennan
Director, Regulatory Affairs and Counsel

Cc: Service List

GMK/cw

Enclosure

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**

CONVERSENT'S RESPONSE IN SUPPORT OF A STANDSTILL ORDER

Conversent Communications of Massachusetts, LLC ("Conversent") joins with AT&T[1] and a group of other CLECs[2] in moving for a Department order requiring Verizon to continue offering certain unbundled network elements, so as to reduce the legal uncertainty created by the D.C. Circuit decision in *United States Telecom Association v. FCC,* No. 00-1012 (D.C. Cir. March 2, 2003) ("*USTA II"*).

Specifically, the Department should require Verizon to continue offering UNEs — particularly dedicated interoffice transport (including dark fiber interoffice transport) and high capacity loops — at the rates, terms and conditions in Verizon's wholesale tariff, DTE MA No. 17, until the FCC establishes new rules or the existing FCC rules are reinstated.

By so doing, the Department will serve the interests of consumers by preserving the stability of telecommunications markets and preventing disruption of telecommunications competition in Massachusetts.

[1] AT&T's Emergency Motion for an Order to Protect Consumers by Preserving Local Exchange Market Stability, May 28, 2004 ("AT&T Motion").

[2] Petition for Expedited Relief filed by ACN Communication Services, Inc.; Allegiance Telecom of Massachusetts, Inc.; Choice One Communications of Massachusetts Inc.; CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corporation of Massachusetts; Lightship Telecom, LLC; McGraw Communications,

Discussion

I. The Department Should Require Verizon to Continue to Provide Dark Fiber Interoffice Transport and High-Capacity Loops at the Rates, Terms, and Conditions in its Wholesale Tariff.

To prevent harm to consumers by disruption of telecommunications competition and destabilization of telecommunications markets in the Commonwealth, the Department should mandate that Verizon continue to provide unbundled dark fiber dedicated transport and high-capacity loops in Massachusetts under its wholesale tariff until the FCC issues its order on remand or the Supreme Court reverses the *USTA II* decision. The tariff provides a basis under state law — independent of any federal obligation — for Verizon's continued provision of the UNEs specified therein. Unless and until Verizon files an amended tariff and the Department approves it or allows it to go into effect, Verizon's obligations continue, and Verizon may not discontinue any UNEs in violation of that tariff.

A. Verizon's Tariff Requires It to Provide the UNEs Specified Therein as a Matter of State Law.

1. The Tariff Constitutes a Legal Requirement That Verizon Continue to Provide UNEs.

Verizon's obligations to provide UNEs are set forth in the Department-approved Tariff DTE MA No. 17. The tariff explicitly specifies Verizon's obligation:

> This tariff sets forth the terms, conditions, and pricing under which the Telephone Company [Verizon] offers to provide to any requesting CLEC, pursuant to Section 251 of the Act, interconnection, access to network elements, and ancillary telecommunications services available within each LATA in which such CLECs operate within the Commonwealth of Massachusetts. The services contained herein are in addition to those being provided and/or available on an individual contract basis between the Telephone Company and the CLEC.

Inc.; RCN-BecoCom, LLC; RCN Telecom Services of Massachusetts, Inc.; segTEL, Inc.; and XO Massachusetts, Inc., May 27, 2004 ("CLEC Petition").

Part A, § 1.4.1.C. Among the network elements that Verizon provides under this tariff are: interoffice transmission facilities (Part B, § 2), local loops (Part B, § 5), local switching (Part B, § 6), expanded extended local loops (EELs) (Part B, § 13), UNE Platforms (Part B, § 15), UNE combinations (Part B, § 16), and dark fiber (Part B, § 17).

The tariff obligates Verizon to provide the UNEs contained therein as a mater of state law. Massachusetts law is explicit: all public utilities are required to file schedules of rates and charges for all services rendered or to be rendered in the Commonwealth, as well as "all conditions and limitations, rules and regulations" affecting such services. G.L. c. 159, § 19. In addition,

> No common carrier shall, except as otherwise provided in this chapter, charge, demand, exact, receive or collect a different rate, joint rate, fare, telephone rental, toll or charge for any service rendered or furnished by it, or to be rendered or furnished, from that applicable to such service as specified in its schedule filed with the department and in effect at the time.

Id. State law, therefore, prohibits Verizon from deviating from its tariff — including refusing or ceasing to offer services specified in the tariff.

Importantly, Verizon's obligations under the tariff are in addition to, and independent of, its obligations under any interconnection agreement. On this, the tariff's own words are explicit: the services in the tariff are "*in addition to* those being provided and/or available on an individual contract basis between the Telephone Company and the CLEC." Tariff DTE MA No. 17, Part A, § 1.4.1.C (emphasis added). Thus, irrespective of whatever change-of-law provisions exist in the various CLECs' interconnection agreements, Verizon must continue to offer, and CLECs are entitled to obtain, the UNEs provided in the tariff.

2. Verizon's Tariff Obligations Under State Law Are Not Preempted.

The Telecommunications Act preserves the states' authority to require access and unbundling.

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that -
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. § 251(d)(3). The unbundling obligations of Tariff No. 17 satisfy these criteria.

Verizon has argued elsewhere that any state-mandated unbundling that goes beyond what the FCC has required is "inconsistent" with the Act and thus unlawful. "[T]he FCC has made clear that any state attempt to require unbundling where the FCC specifically considered and rejected unbundling would be preempted." Verizon Massachusetts' Reply in Support of its Motion to Hold this Proceeding in Abeyance, filed in DTE 04-33, May 21, 2004, at 3 (citing *Triennial Review Order ("TRO")* ¶ 195). Verizon overstates the FCC's interpretation of the preemptive effect of the *TRO*. What the FCC actually said is much narrower:

> Parties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) may seek a declaratory ruling from this Commission. If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C). Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instances for the

> subject states to amend their rules and to alter their decisions to conform to our rules.

TRO ¶ 195.

If the Department were to issue a standstill order that keeps the existing UNEs in Verizon's tariff in place until the FCC rules, and Verizon believed that such an order were preempted, paragraph 195 states that Verizon's recourse is to seek a declaratory ruling from the FCC. If Verizon sought such a ruling, it is doubtful that three FCC commissioners would vote to preempt the standstill order.

First, the FCC has *not* "found no impairment . . . or otherwise declined to require unbundling on a national basis" with respect to dedicated transport, dark fiber, or high-capacity loops. To the contrary, it continued to require unbundling of these elements in the *TRO,* and, on remand, is likely again to require unbundling of these elements to a great degree. See Part III below. State tariffs that require unbundling of those elements, therefore, cannot be inconsistent with the FCC's expressed determinations.

Second, to the extent that the *vacatur* of the unbundling requirements for dedicated DS-1, DS-3, and dark fiber transport has resulted in a temporary absence of federal requirements, then state unbundling rules do not impose "inconsistent" requirements. "Inconsistent" is defined as "not compatible with another fact or claim." *Merriam-Webster Online Dictionary,* www.m-w.com. State unbundling rules cannot be "not compatible" with an absence of rules.

Third, maintaining the unbundling rules in the tariff also "does not substantially prevent implementation of the requirements of [§ 251] and the purposes of [the Act]." § 251(d)(3). ILECs, like Verizon, are "are subject to a host of duties intended to facilitate market entry." *AT&T Corp.v. Iowa Utilities Board,* 525 U.S. 366, 371 (1999). As the Supreme Court has said, the statute was "designed to give aspiring competitors every possible incentive to enter local

retail telephone markets." *Verizon Communications Inc. v. FCC,* 535 U.S. 467, 489 (2002). The Act "grant[s] . . . 'most promiscuous rights' . . . to competing carriers vis-à-vis the incumbents." *AT&T,* 525 U.S. at 397. State unbundling rules requiring unbundling do not *prevent* implementation of the goals of the Act; they *promote* it.

In addition to the lack of merit in Verizon's preemption argument, it is rather late in the day for Verizon to suggest that the FCC has preempted the states' unbundling decisions with respect to, for example, dark fiber. The Department ordered unbundling of dark fiber *seven and a half years* ago in the December 1996 *Consolidated Arbitrations* Phase 3 Order. This was nearly three years before the FCC required unbundling of dark fiber in the November 1999 *UNE Remand Order* (FCC 99-238). The FCC was explicitly aware of several state commission decisions mandating unbundling of dark fiber — and federal court decisions upholding them — when it issued the *UNE Remand Order. See id.* ¶ 326. Yet, neither in the *UNE Remand Order* nor since then has the FCC stated that it was preempting such state decisions.

In fact, Verizon has had ample opportunity to raise preemption arguments regarding Massachusetts' dark fiber unbundling requirements before the FCC and other fora. For example, it did not appeal the Department's Phase 3 Order on preemption or any other grounds. In another example, in the Rhode Island § 271 proceeding, Verizon claimed that it should not be required to comply with the Massachusetts requirements in Rhode Island because they went beyond what the *UNE Remand Order* required. Report of the Rhode Island Public Utilities Commission on Verizon Rhode Island's Compliance with Section 271 of the Telecommunications Act of 1996, Dec. 14, 2001, CC Docket No. 01-324, at 143.[3] When the Rhode Island Commission required Verizon to provision dark fiber as in Massachusetts, however, Verizon complied with the order,

[3] http://www.ripuc.ri.gov/order/pdfs/VRI271_%20FinalReport16815.pdf

did not appeal it, and raised no preemption claim at the FCC. *In re Application by Verizon New England Inc., etc.,* CC Docket No. 01-324, Memorandum Opinion and Order, FCC 02-63, ¶ 93 (Feb. 22, 2002). That it has not raised such preemption arguments indicates that even Verizon believes that they lack merit.

Finally, Verizon's arguments cannot succeed in the face of recent, explicit FCC acknowledgments that the states have an independent right under state law to require unbundling. In its brief in support of its motion for further stay of the D.C. Circuit mandate in *USTA II,* the FCC was clear:

> In the absence of binding federal rules, state commissions will be required to determine not only the effect of this Court's ruling on the terms of existing agreements *but also the extent to which mass market switching and dedicated transport should remain available under state law.*

United States Telecom Association v. FCC, Motion of the Federal Communications Commission to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari, May 24, 2004, at 9 ("FCC Motion").

B. Requiring Continued Provision of UNEs Under the Tariff is Greatly More Efficient than Interpreting and Resolving Disputes Under Many Different Interconnection Agreements.

AT&T and the other CLECs have suggested that the Department require Verizon to comply with the provisions of the various CLECs' interconnection agreements, to maintain stability on Massachusetts telecommunications markets by precluding Verizon from acting unilaterally to discontinue providing UNEs subject to the *USTA II* remand. AT&T Motion at 15-18; CLEC Petition at 8. Verizon unquestionably has an obligation to comply with its interconnection agreements, and ordering Verizon to comply with such agreements is a plausible way to maintain stability while the FCC and/or courts resolve the issues.

Conversent suggests, however, that this is not the best or most efficient way to address the problem. A better and more efficient way is to require Verizon to continue offering services under its wholesale tariff. This method offers the advantage of uniformity and consistency, in that one set of rules will govern all UNE obligations.

It is more administratively efficient to address Verizon's continued provision of UNEs by requiring continued adherence to the tariff than by a requirement to comply with the provisions of potentially hundreds of interconnection agreements, which could involve hundreds of different contractual provisions. Verizon has active interconnection agreements with some 150 CLECs in Massachusetts.[4] If the Department undertook to resolve individual disputes through arbitrations or the rapid response process, the Department will do little else for the foreseeable future. Thus, examining each individual agreement would be a colossally inefficient use of the Department's resources.

Further, even if the Department addresses these issues in individual interconnection agreements it will still have to address Verizon's compliance with the tariff. Verizon's tariff explicitly states that the services provided thereunder are *in addition to* services provided under any interconnection agreement. VZ Tariff DTE MA Part A, § 1.4.1.C. Thus, irrespective of any efforts to amend interconnection agreements, Verizon will still be required to offer the UNEs specified in the tariff, unless and until amended. Therefore, regardless of any change of law or other provision in any interconnection agreement, the Department will still have to address a tariff amendment.

[4] As set forth in Appendix I to Verizon's petition for arbitration in DTE 04-33.

C. Alternatively, the Department Should Require Verizon to Pursue the Normal Statutory Process for Amending Its Tariff.

In the alternative, the Department should require Verizon to pursue the normal process for amending its tariff. Massachusetts law provides a specific method under which a public utility may amend its tariffs.

> Unless the department otherwise orders, no change shall be made in any rate, joint rate, fare, telephone rental, toll, classification or charge, or in any rule or regulation or form of contract or agreement in any manner affecting the same as shown upon the schedules filed in accordance with this chapter, except after thirty days from the date of filing a statement with the department setting forth the changes proposed to be made in the schedule then in force and the time when such changes shall take effect, and such notice to the public as the department orders, to be given prior to the time fixed in such statement to the department for the changes to take effect.

G.L. c. 159, § 19.

If Verizon does file tariff amendments seeking to convert dedicated transport and/or high-capacity loops to special access or other offering, then the Department should commence an investigation of the appropriateness of the proposed amendments. In that investigation, Verizon will have the burden of proof to show that the proposed amendment is justified, that any proposed alternative service is not "unjust, unreasonable, . . . improper, or inadequate," and that the rate for any proposed alternative is just and reasonable. G.L. c. 159, §§ 14, 16, 20.

In addition, as noted above, the Department's 7½ year-old unbundling decision in the *Consolidated Arbitrations* Phase 3 Order is embodied in the tariff. If Verizon believes that the Department's decision is no longer consistent with federal law, then it should be put to its proof in a tariff amendment proceeding. It should not be allowed unilaterally to decide that it is no longer required to offer dark fiber and other elements on an unbundled basis.

D. Other States Are Granting Relief of the Type Requested Here.

Conversent's request is modest — to have the Department maintain the status quo during the period of legal uncertainty that exists until the FCC can act or the *USTA II* decision's fate is determined by further judicial proceedings. As pointed out in our April 15 reply to Veizon's response to motions to dismiss the arbitration proceeding, D.T.E. 04-33, the Rhode Island Commission Arbitrator — the Commission's General Counsel — recently did just that in that state's arbitration case. He decided that "the current terms of [interconnection agreements] with CLECs for which [Verizon] has petitioned for arbitration can continue in effect as written in regards to those issues reversed, remanded and soon to be vacated by the D.C. Circuit Court. In other words, the status quo prevails." *In re: Petition of Verizon-Rhode Island For Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Rhode Island to Implement the Triennial Review Order,* Docket No. 3588, Procedural Arbitration Decision at 10 (April 9, 2004) ("RI Decision"). The Connecticut and Washington Commissions have issued similar orders. *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*, Docket No. 96-09-22, et al., Decision (CT DPUC, May 20, 2004); *Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon Northwest Inc.*, Docket No. UT-043013, Order No. 4 (Wash. Util. and Transp. Comm., May 21, 2004). The same result should obtain in Massachusetts.

II. Verizon's Plan to Discontinue the UNEs Subject to the USTA II Remand Will Devastate Competition, to the Detriment of Consumers.

Conversent is concerned that if the *USTA II* decision goes in effect, Verizon will exploit the absence of federal unbundling rules by ceasing to provide dark fiber, DS-1, and DS-3 dedicated transport, high-capacity loops, and other UNEs at TELRIC rates and will substitute overpriced and unnecessary special access services.

Conversent's concern is neither hypothetical nor hysterical. Verizon has publicly and repeatedly stated its view that once the *USTA II* mandate is issued on June 15th, it no longer is required to provide the UNEs subject to the *vacatur* in that case. For example, in comments filed recently in New Jersey, Verizon said, "The obligation to unbundled these elements [mass market switching and high-capacity (DS-1, DS-3 and dark fiber) transport] set forth under 47 U.S.C. § 251 terminates with the mandate." Letter from Bruce D. Cohen of Verizon to Secretary Izzo of the New Jersey Board of Public Utilities, Docket No. TO0309075, June 1, 2004 at 4. In comments filed in a New York Public Service Commission proceeding to examine Verizon's obligations after *USTA II,* Verizon said, "the *USTA II* order also vacated the FCC's rules concerning the provision of dedicated transport on an unbundled basis. Accordingly, once the stay of that order expires, Verizon will not have any obligation to provide dedicated transport on an unbundled basis at TELRIC prices." *In the Matter of Telecommunications Competition in New York Post USTA II Including Commitments Made in Case 97-C-0271,* Case 04-C-0420 ("NY Post-*USTA II* Proceeding"), Initial Comments of Verizon New York Inc. on the Implementation of a UNE Rate Transition Plan Pursuant to the Pre-Filing Statement, April 16, 2004, at 9. Similarly, in a federal court action challenging its obligation to perform routine network modifications when provisioning high-capacity loops, Verizon stated, "once the D.C. Circuit's mandate in *USTA II* takes effect, Verizon will no longer be required to provide [a

CLEC] with high capacity facilities . . . ." *Verizon Virginia Inc. v. Cavalier Telephone, LLC,* Civil Action No. 3:04CV230, Plaintiff's Motion to Hold Proceeding in Abeyance (and Memorandum in Support), filed April 8, 2004, at 2.

The FCC itself has recognized the seriousness of the problem. In its motion for stay of the *USTA II* mandate, the FCC stated, "Issuance of the mandate in this case would immediately create regulatory uncertainty and market disruption by re-opening a number of the issues that the FCC resolved in the *Order*." FCC Motion at 10.

Verizon has publicly proposed to substitute various special access services for the UNEs it claims it no longer must unbundle at TELRIC rates once *USTA II* becomes effective. Verizon's prices for these services are orders of magnitude greater than the prices for analogous UNEs at TELRIC rates. Forcing CLECs to use these special access services will devastate telecommunications competition in Massachusetts. For example, in the NY Post-*USTA II* Proceeding, Verizon has proposed, as a substitute for UNE dark fiber dedicated transport, the ring mileage rates for its Intellilight Optical Transport Service ("IOTS") — a designed, managed, controlled, SONET-based, lit optical transport service. As Conversent showed in that proceeding, IOTS is an inappropriate proxy for dedicated dark fiber transport,[5] and Verizon's

[5] The tariffs for the two services show how different they are. The differences between the services include, but are not limited to, the following: IOTS is a special access-type lit service customized through intricate design, and highly managed, controlled and serviced by Verizon personnel. The customer obtains (at a premium price) a diversely routed ring architecture or topology designed to provide "managed optical transport of multiple protocols." VZ Tariff FCC No. 11, § 7.2.19(A). Of course, Verizon's tariffed charges are designed to compensate Verizon for all the services and functions associated with designing, operating and "managing" the various levels of transmission capacity that are offered. Under IOTS, Verizon will make available transmission of at least 15 different protocols, ranging from SONET OC3 through OC48 and Gigabit Ethernet, using specific industry technical specifications. *Id.* § 7.2.19(C)(5). Through IOTS, a customer may connect multiple locations. *Id.* § 7.2.19(B). Verizon engineers will perform the design and configuration requirements to provision IOTS ring and Verizon technicians will construct the ring after it and the customer have mutually agreed upon its design. *Id*

By contrast, under Verizon's dark fiber offering, the CLEC designs, constructs, configures, and manages its own network. This allows a CLEC to design and manage its network, but requires the CLEC to incur the necessary expense to do so. All that Verizon provides the dark fiber customer is an unlit inert pair of fiber optic strands *on an as-is basis*, between two Verizon central offices, nothing more, nothing less. See VZ Tariff DTE MA No. 17, §§ 17.1.1.A, 17.1.2.A.2, 17.3.1.B. And, since the CLEC must be collocated in both offices, the CLEC must place its

proposed rate for the IOTS service — $1100 per month per mile for the first 20 miles, $520 per month per mile for additional miles[6] — would result in a rate increase of greater than 1700 percent in New York.[7] The effect in Massachusetts undoubtedly would be of the same magnitude.[8]

This sudden discontinuance of UNEs and extreme increase in the costs of Verizon substitute services will wreak havoc with competition in Massachusetts, to the detriment of consumers. As the FCC observed:

> [M]any 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. 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.

FCC Motion, at 11.

To prevent market disruption and harm to consumers, the Department should order Verizon to continue providing UNEs under the tariff until the FCC issues new rules or the Supreme Court reverses *USTA II*.

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own (not Verizon's) electronic equipment on each end of the fiber cable in order to "light" the cable so as to provide the necessary transmission capability. *Id.* §§ 17.1.2.A.2, 17.3.1E. In addition, Verizon will only provide dark fiber if spare, unused strands are available; it will not construct dark fiber facilities, nor will Verizon introduce additional splice points to accommodate dark fiber requests. *Id.* § 17.1.1B. Verizon only warrants that the dark fiber was up to specifications at the time it was installed. It does not guarantee that the transmission characteristics of dark fiber will remain constant over time, and takes no responsibility for risks associated with the introduction of future splices on the dark fiber. *Id.* § 17.2.1.C-.D. The CLEC is responsible for designing its own system, and must go through a complicated ordering process to acquire dark fiber from Verizon. *Id.* § 17.1.3.

[6] VZ Tariff FCC No. 11, §31.7.21.

[7] Conversent submitted this analysis to the New York Commission in Reply Comments dated April 23, 2004 in the NY Post-*USTA II* Proceeding, at pp. 9, 14. A copy is available on request.

[8] Conversent has not precisely calculated the magnitude of the potential rate increase in Massachusetts. However, Verizon's mileage rate for dark fiber in Massachusetts is $49.70 per month per mile ($4.97 per month per 1/10 mi.), and in New York, $58.20. While the mileage charge is not the only component of the price Conversent pays Verizon for dark fiber, it is a substantial component. Given that the dark fiber mileage charge in Massachusetts is

III. Requiring Continued Provision of Dedicated Transport and High-Capacity Loops Preserves the Likely Result at the Federal Level.

It makes no sense to permit Verizon to commence disconnection procedures or to invoke other change of law provisions in the various interconnection agreements, when, as explained below, the likely result of further FCC or judicial proceedings will be reinstatement of the majority of UNEs subject to the *USTA II* remand.

Verizon is erroneous to suggest that the *USTA II* mandate will allow Verizon to discontinue access under section 251(c)(3) to high capacity loops (dark fiber, DS-1 and DS-3 loops) in *all* customer locations and to discontinue dark fiber, DS-1, and DS-3 dedicated transport for *all* routes. This is an overbroad response to the *USTA II* decision. Indeed, it is likely that on remand the FCC will issue unbundling rules substantially similar to those in the TRO (but without delegation of decision making authority to the states, which the D.C. Circuit found unlawful). Therefore, requiring continued unbundling of dedicated transport and high-capacity loops preserves the likely result at the federal level after remand.

A. The FCC Will Continue to Require Unbundling of Dedicated Transport, Including Dark Fiber Transport.

As we pointed out in our April 15, 2004 reply to Verizon's response to the parties' motions to dismiss in the Verizon arbitration docket, DTE 04-33, and May 11, 2004 response to Verizon's motion to hold that proceeding in abeyance, it is inconceivable that all currently unbundled dark fiber, DS-1, and DS-3 dedicated transport would fail to satisfy the impairment test of § 251(d)(2). To the contrary, the FCC likely will mandate that most or all of these transport facilities satisfy the § 251(d)(2) standard and must continue to be unbundled under §

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less than that in New York, it is likely that the rate increase in Massachusetts from conversion to IOTS would be at least as great as the increase in New York.

251(c)(3). Notably, in the *TRO,* all five FCC Commissioners ruled that dark fiber dedicated transport should remain a UNE.

In addition, and notwithstanding the vacatur and remand of the FCC's scheme for determining nationwide impairment findings, the D.C. Circuit in *USTA II* did not rule that all dark fiber, DS-1, and DS-3 transport failed to satisfy the § 251(d)(2) impairment standards. Indeed, the Court overturned the FCC's transport unbundling rules not so much because of perceived flaws with the transport impairment standard as because of the states' role in applying that standard under the FCC's rules. *USTA II,* slip op. at 26-28. To the extent that the Court addressed the substance of the *TRO*'s dedicated transport unbundling rules, it questioned — but did not reject outright — the FCC's choice of a route-by-route impairment analysis. In the Court's view, the FCC had not explained why it was appropriate not to consider similar routes as relevant to the impairment inquiry and why a route, as opposed to some other market definition, was the appropriate market. *Id*. at 28-29.

Thus, the question for the FCC on remand of the *TRO* will not be whether unbundling of dedicated transport will be required. Dedicated transport, including dark fiber transport, surely will continue to be unbundled to a large extent. The task for the FCC will be to explain more fully the basis for adopting a route-by-route analysis and the extent to which a nearby route for which the self-provisioning trigger is met is relevant to a route where the trigger is not met. Indeed, on remand the FCC is unlikely to substantially modify the route-by-route analysis. The FCC could well reissue the same or very similar substantive rules (perhaps with some further explanation as to the appropriateness of deeming a route to be the relevant market), but retaining the decision-making authority to itself (perhaps with state participation but not state delegation).

At the same time, as the Court notes in its discussion of the sub-delegation issue, under the rules the Court struck down, the states were empowered to make a finding of non-impairment even when the self-provisioning triggers were not met, if the state determined that a route was suitable for multiple competitive supply, based on specified "economic characteristics." *Id.* at 27; *TRO* ¶ 410. Without the sub-delegation to the states that the Court found unlawful, the substance of the FCC's rules, including the process in ¶ 410 for finding non-impairment when the self-provisioning triggers are not met, could well be upheld by the Court on further review.

Consequently, the question is not *whether* Verizon continues to have a Section 251 unbundling obligation with respect to dark fiber, DS-1, and DS-3 transport. It most certainly does under §§ 251(d)(2) and 251(c)(3). The question is one of delineating exactly *where*, in *which* markets, at *which* customer locations, and on *which* routes, does the unbundling obligation exist.

B. High-Capacity Loops Will Continue to be Subject to the Unbundling Requirement.

Likewise, it is inconceivable that all high-capacity loops will be removed from the list of network elements that must be unbundled at TELRIC prices. At the outset, Verizon is wrong in claiming that the *USTA II* mandate will eliminate the unbundling requirement for such loops. *USTA II* simply does not address high-capacity loops. Verizon fails to explain how the Court of Appeals' mandate resulting from an opinion that does not address the issue could obviate its legal obligation to provide such loops.

If the *USTA II* mandate does affect high-capacity loops, the effect could only result from extending to such loops the Court's invalidation of the FCC's sub-delegation of decision-making authority to the states. Nothing in *USTA II* can be read to invalidate the FCC's finding of a national presumption that carriers are impaired in the absence of unbundled high-capacity loops.

Nor did the Court criticize the impairment triggers for high-capacity loops. Like dark fiber, all five FCC Commissioners voted to unbundle high-capacity loops. Thus, the overwhelmingly likely result on any remand — if indeed the issue is subject to the remand — will be that the FCC will re-adopt the same substantive test but retain to itself the decision-making authority.

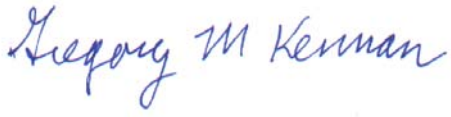
By requiring Verizon to provide continued access to dark fiber transport and high-capacity loops, the Department would preserve the likely outcome at the federal level. Allowing Verizon to discontinue all dark fiber UNE transport and high-capacity loops now would needlessly disrupt and destabilize the Massachusetts telecommunications market and eliminate customer choice. To prevent this harm, the Department should require Verizon to continue to provide dark fiber and high-capacity loops under the rates, terms, and conditions in its wholesale tariff.

Conclusion

The Department should immediately order that Verizon continue to offer UNEs subject to the *USTA II* remand at the rates, terms, and conditions in its wholesale tariff until the FCC issues its order on remand or the Supreme Court reverses the *USTA II* decision.

June 9, 2004

Respectfully Submitted,



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