**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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| Proceeding by the Department 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** |

**VERIZON MASSACHUSETTS' OPPOSITION TO**
**PARTIES' REQUESTS FOR EXPEDITED OR EMERGENCY RELIEF**

## I. INTRODUCTION

On May 27, 2004, a group of competitive local exchange carriers ("CLECs") filed a Petition[1] seeking an immediate order from the Department

> clarifying that, if the D.C. Circuit's decision in *USTA II* becomes effective on or after June 15, 2004, Verizon New England Inc. would remain obligated to provide unbundled loops, transport, and switching network elements on existing rates, terms unless and until amendments to Verizon's interconnection agreements and its Massachusetts UNE tariffs that alter such obligations are approved by the Department.

[1] The CLECs' Petition - entitled "*Petition for an Expedited Order that Verizon Remains Required to Provision Unbundled Network Elements on Existing Rates and Terms Pending the Effective Date of Amendments to the Parties' Interconnection Agreements*" – was submitted by the following companies: Allegiance Telecom of Massachusetts, Inc., ACN Communications Services, Inc., Choice One Communications, LLC, CTC Communications Corp., DSLnet Communications, LLC, Focal Communications Corporation of Massachusetts, Lightship Telecom, LLC, McGraw Communications, Inc., RCN-BecoCom, LLC, RCN Telecom Services of Massachusetts, Inc., segTEL, Inc., and XO Massachusetts, Inc. (collectively referred to herein as "CLEC Petitioners").

CLECs' Petition, at 1. Likewise, on May 28, 2004, AT&T Communications of New England, Inc.[2] ("AT&T") filed an Emergency Motion for a Department 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.

AT&T's Motion, at 1. For the reasons stated below, Verizon Massachusetts ("Verizon MA") opposes both requests. Contrary to the parties' claims, the relief requested would unlawfully abrogate existing agreements by requiring Verizon MA to provide access to UNEs at TELRIC rates, even where *not* required under the terms of those agreements, pending resolution by the Federal Communications Commission ("FCC") or this Department of certain legal issues that will arise following the issuance of the D.C. Circuit's mandate in *USTA II*.[3]

The Department should reject AT&T's and the CLEC Petitioners' self-serving attempts in this proceeding to persuade the Department to act precipitously and unlawfully based on their unfounded claims that Verizon MA will take "unauthorized, unjustified, and unilateral action" that will create "market disruption" and "will substantially harm consumer choice and the continued development of competition in the markets for telecommunications services in Massachusetts" when the D.C. Circuit issues

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[2] AT&T's Motion was filed by AT&T Communications of New England, Inc., on behalf of itself and its affiliates (collectively "AT&T") and is entitled "*AT&T's Emergency Motion for An Order to Protect Consumers By Preserving Local Exchange Market Stability"* (hereinafter referred to as "AT&T's Motion").

[3] *United States Telecom Ass'n v. FCC*, 359 F.3d 554; (D.C. Cir 2004).

the *USTA II* mandate. CLECs' Petition, at 2; AT&T's Motion, at 1. Despite the parties' inflammatory and unfounded claims to the contrary, Verizon MA has no intention of disconnecting any CLEC's services as a result of the issuance of the D.C. Circuit's mandate (unless, of course, the CLEC chooses that option). Once the mandate issues, Verizon MA intends to provide CLECs with at least 90 days' notice – a period of time that exceeds the requirements of its agreements with many Massachusetts CLECs — before taking any action pursuant to applicable law and in accordance with its effective agreements. During that 90-day notice period, Verizon MA will continue to provide the de-listed UNEs at TELRIC rates and to accept new orders for those UNEs.[4] Simply put, ***there is no emergency and no risk of imminent disruption to customers when the mandate issues.*** Faced with the same CLEC claims, an Administrative Law Judge for the New York Public Service Commission ("NYPSC") decided on June 9, 2004, as follows:

> It is understandable that, as the June 15, 2004 deadline approaches, the CLECs are becoming increasingly nervous about a potential interruption in service from Verizon once the vacatur goes into effect. It appears that these fears, at least in the immediate term, are unfounded.

*See* Ruling Granting Motions for Consolidation and to Hold Proceeding in Abeyance, *Petition of Verizon New York Inc. for Consolidate Arbitration to Implement Changes in Unbundled Network Element Provisions in Light of the Triennial Review Order,* Case Nos. 04-C-0314, 04-C-0318 (NYPSC, June 9, 2004) (attached hereto as Exhibit I.)

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[4] Verizon MA will also continue to negotiate terms of interconnection agreements with CLECs during that notice period. In the absence of an interconnection agreement, after ample notice following issuance of the *USTA II* mandate, Verizon MA will move CLECs' service to resale rates (or for high capacity transport and loops, to special access rates).

*First*, neither AT&T nor the CLEC Petitioners allege that Verizon MA has actually violated its interconnection agreements with CLECs or any provision of law, but instead allege only that they fear Verizon MA *might* do so in the future when the D.C. Circuit's mandate issues (currently scheduled for June 16, 2004). That claim – based on the parties' misinterpretation of recent filings and notices issued by Verizon, future contingencies, and speculation – does not present an actual controversy that is ripe for consideration by the Department. Indeed, Verizon MA has made it clear that it intends to comply with the applicable terms of its interconnection agreements following the issuance of the mandate. Nor is there any risk of "disruption" that would justify immediate relief based on AT&T and the CLEC Petitioners' inchoate claims. Verizon MA will offer a variety of service alternatives, along with reasonable notice periods, to ensure uninterrupted service to CLECs and their customers.

*Second*, although AT&T and the CLEC Petitioners claim that they are merely asking the Department to "preserve the *status quo*" and that they are *not* seeking any substantive determination by the Department of any parties' rights under the terms of an interconnection agreement, they are actually trying to *change* the *status quo* by asking the Department to override the terms of interconnection agreements Massachusetts CLECs signed and the Department approved. To the extent that existing interconnection agreements give Verizon MA the right to cease providing UNEs under federal rules that were struck down by the *USTA II* court, the Department cannot lawfully issue a generic ruling depriving Verizon MA of those rights or otherwise to impose unbundling requirements under federal or state law in the absence of a lawful finding of impairment by the FCC. Accordingly, the Department does not have the authority to order the

blanket unbundling sought by the Petitioners or to alter specific terms of individual interconnection agreements outside the arbitration process set forth in Section 252 of the Telecommunications Act of 1996 (the "Act"). 47 U.S.C. §§ 101, *et seq*. The Department should, therefore, dismiss AT&T's and the CLEC Petitioners' requests.

## II. BACKGROUND

The 1996 Act expressly delegates final unbundling determinations to the FCC alone. In adopting the Act, the U.S. Supreme Court held that Congress created a "federal regime" for unbundling, to be "guided by federal-agency regulations," and "unquestionably" took "the regulation of local telecommunications away from the states." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378, n.6 (1999). The D.C. Circuit's recent decision in *USTA II* further sharpens this point:

> [W]hile federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so.

*USTA II*, 359 F.3d at 566. For that reason, the D.C. Circuit found the FCC's subdelegation of its unbundling authority to state commissions to be "unlawful." *Id.* at 568. Therefore, only the FCC may make unbundling determinations under Section 251(d)(2) of the Act.

Since the Act was passed in 1996, the FCC has, on three separate occasions, attempted to promulgate unbundling rules under Section 251. The Supreme Court overturned the FCC's first attempt because, in ordering blanket access to the incumbent local exchange carriers' ("ILECs") networks, the FCC had failed adequately to consider the necessary and impair standards under Section 251(d)(2) of the Act. In that decision

the Court emphasized that the Act placed "clear limits" on the FCC's authority to force ILECs to unbundle network elements. *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 397 (1999). Among other things, the Court emphasized that a substantive determination of impairment consistent with the requirements of the Act was a necessary precondition for any requirement that an ILEC must make a particular network element available to its competitors.[5]

On remand, the FCC attempted once again to enumerate the network elements that should be unbundled, but the U.S. Court of Appeals for the District of Columbia Circuit, in *USTA I*,[6] again vacated them because the FCC had failed properly to apply the impairment standards in section 251(d)(2) in establishing its unbundling rules. In doing so, the D.C. Circuit rejected the FCC's belief that "more unbundling is better," pointing out that "Congress did not authorize so open-ended a judgment." *USTA I*, 290 F.3d at 426-27.

On a second remand, the FCC issued its *Triennial Review Order*[7] ("*TRO*"), effective October 2, 2003 – its third attempt to establish lawful unbundling rules. The

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5 *See id.* at 391-392 ("Section 251(d)(2) does not authorize the [FCC] to create isolated exemptions from some underlying duty to make all network elements available. It requires the [FCC] to determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements.") (emphasis in original).

6 *United States Telecom Assoc. v. FCC*, 290 F.3d 415, 426-27 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 123 S. Ct. 1571 (2003).

7 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 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded*, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.*, 2004 WL 374262, 2004 U.S. App. LEXIS 3960 (D.C. Cir. Mar. 2, 2004) ("*USTA II*").

*TRO*, among other things, eliminated certain UNEs on a national basis and provided for state review on a more granular basis to determine impairment under Section 251(d)(2) for others, including mass market switching, interoffice transport facilities, and high capacity loop transport facilities, to be completed within nine months of the effective date of the order. In addition, the *TRO* imposed new legal obligations on ILECs with respect to network modifications, commingling of UNEs with wholesale services, and conversion of special access to EELS, *inter alia*.

Verizon MA's interconnection agreements in Massachusetts generally permit Verizon MA, either immediately or after a specified notice period, to discontinue UNEs it no longer has an obligation to provide under applicable law.[8] Nevertheless, on February 20, 2004, Verizon MA filed a petition initiating a consolidated arbitration proceeding in Massachusetts to amend all of its existing agreements so that they would contain uniform language expressly reflecting rules established in the *TRO*, including those rules that impose new obligations on Verizon MA. Verizon MA's proposed amendment was also intended to clarify the consequences of any subsequent legal developments during the course of federal court review of the FCC's decision. The filing

[8] For example, there are ICA provisions that allow Verizon MA to discontinue service to CLECs upon written notice. *See e.g.*, Sec. 2.2 of ICAs with CTC Communications and Choice One Communications. While some ICAs contain provisions that permit Verizon MA to "terminate its offering and/or provision of any Service under this Agreement upon thirty (30) days prior written notice," [*see e.g.*, Sec. 50.1 (Withdrawal of Service) of ICAs with ACN and DSLnet], other ICAs provide for longer notice periods. *See e.g.*, Sec. 8.4 (Government Compliance) of ICA with Focal Communications (providing for 60 days notice); *see also* Sec. 27.4 (Compliance with Laws) of ICAs with Lightship Telecom and McGraw Communications (providing for 90 days notice). There are also ICA provisions that obligate Verizon to provide services or a combination of network elements "only to the extent … required by applicable law." *See e.g.*, Sec. (c) (Combinations) of ICA with Allegiance; *see also* Sec. 5(c) of ICAs with RCN-BecoCom and RCN Telecom.

of this arbitration petition in D.T.E. 04-33, however, did not – and could not – alter the parties' current obligations under existing interconnection agreements, nor did Verizon MA waive any of its contractual rights under existing interconnection agreements.

On March 2, 2004, the D.C. Circuit affirmed in part and vacated in part the FCC's rules in the *TRO*. In particular, the court held that the FCC's delegation of authority to the states to make impairment findings under Section 251(d)(2) was unlawful, and further found that the FCC's national findings of impairment for unbundled local switching and dedicated interoffice and loop transport, including dark fiber, were flawed and could not stand on their own. In fact, the D.C. Circuit observed that it "doubt[ed] that the record supports a national impairment finding for mass market switches." *USTA II*, 359 F.3d at 569. Likewise, for dedicated interoffice or loop transport, the D.C. Circuit pointed out that "as with mass market switching, the [*TRO*] itself suggests that the [FCC] doubts a national impairment finding is justified on this record." *Id*. at 574. Therefore, the court vacated the FCC's rules requiring unbundled access to mass market switching and high capacity dedicated interoffice and loop transport.[9]

The court stayed its mandate for 60 days, until May 3, 2004. It referred to this

[9] The D.C. Circuit made clear in *USTA II* that it was vacating all of the FCC's attempts to delegate impairment determinations to the states, *see USTA II*, 359 F.3d at 568, and the FCC made such a delegation in the context of both high-capacity loops and transport, *see Triennial Review Order* ¶¶ 328, 394. Moreover, the D.C. Circuit made clear that it was using the term "transport" to refer to "transmission facilities dedicated to a single customer" — that is, what the FCC defines as "loops" — as well as to facilities dedicated to a "carrier." *USTA II*, 359 F.3d at 573; 47 C.F.R. § 51.319(a) (defining "loop"). The D.C. Circuit's treatment of high-capacity loops and transport was consistent with the manner in which the ILECs briefed the issue before the D.C. Circuit, by addressing both simultaneously. And the two substantive flaws the D.C. Circuit identified with respect to the FCC's analysis of high-capacity facilities — considering impairment on a route-specific basis and the failure to consider the availability of special access, *see USTA II*, 359 F.3d at 575, 577 — apply equally to the FCC's determinations as to both loops and transport, *see Triennial Review Order* ¶¶ 102, 332, 341, 401, 407.

stay as a "deadline" for corrective FCC action, one that was "appropriate in light of the Commission's failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings." *USTA II*, 359 F.3d at 595. When the mandate issues, the FCC's prior unbundling rules for these network elements will no longer exist, and the elements will not be subject to mandatory unbundling pursuant to Section 251(c) of the Act.

The court subsequently agreed to the FCC's unopposed request to stay the mandate for an additional 45 days, through June 15, 2004. The FCC's request for the extension, however, was not based on a need for more time to adopt new rules, either on a permanent or interim basis. Indeed, although Qwest filed a formal petition specifically requesting interim rules on March 29, 2004, the FCC has not even put Qwest's petition out for public comment and thus has taken no visible steps to adopt rules to replace the ones that were vacated by the *USTA II* court. Instead, on March 31, 2004, all five Commissioners jointly urged the industry to engage in business-to-business negotiations for commercially acceptable arrangements to replace the vacated UNEs, and the FCC expressly justified its request for a 45-day extension of the stay of the mandate on those negotiations.

In response to the FCC's request, Verizon has made clear that it is willing to negotiate with its wholesale customers for services to replace the UNEs affected by *USTA II*. On April 21, 2004, Verizon announced a proposed framework for commercial agreements with those wholesale customers, known as "Wholesale Advantage," that would allow UNE-P customers to continue to receive all the services and capabilities that they receive today, using their current ordering systems, at modest increases over

TELRIC rates.[10] The Wholesale Advantage rates generally are substantially lower than the rates that carriers would pay for equivalent resold services under 47 U.S.C. § 251(c)(4) and their existing interconnection agreements. Moreover, the Wholesale Advantage framework allows carriers to negotiate terms to obtain additional services that are not currently available to them as part of UNE-P arrangements, such as DSL, voice mail, and inside wire service.

Currently, Verizon is negotiating non-251 wholesale arrangements with approximately 50 wholesale customers across its footprint – including AT&T and most of the CLEC Petitioners – and has signed non-disclosure agreements with and provided information to many more.[11] Those discussions, and any agreements that flow from them, are outside the scope of Section 252, since they involve service arrangements and network elements that will not be subject to Section 251's unbundling regime, once the mandate issues.

Despite AT&T's and the CLEC Petitioners' claims to the contrary, Verizon MA has no intention of disconnecting any CLEC's services as a result of the issuance of the D.C. Circuit's mandate (unless, of course, the CLEC chooses that option). After the

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[10] A more detailed description of Verizon's plans after the mandate issues is set forth in the Declaration of Virginia P. Ruesterholz, which was filed as an attachment to the Joint Opposition of ILECs to Motions to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari, filed June 1, 2004 before the D.C. Circuit. A copy of that declaration is attached hereto as II. The D.C. Circuit denied the CLECs' motions on June 4, 2004. *See United States Telecom Ass'n v. FCC*, 2004 U.S. App. LEXIS 11063 (U.S. App. 2004). A copy of that decision is attached as Exhibit III.

[11] It should be noted that Verizon engaged in commercial negotiations with AT&T and other CLECs at the FCC over the Memorial Day weekend under the auspices of the FCC. Although the parties were not able to reach agreement at that time, Verizon is optimistic that continued negotiations will lead to agreement for UNE-replacement products on mutually beneficial terms.

mandate issues, CLECs in Massachusetts can – if they choose to – continue providing end-to-end service to their customers on a resale basis under Section 251(c)(4), or on a commercially-negotiated basis under the Wholesale Advantage framework. High-capacity transport and loop services will also continue to be available through comparable access services under existing approved tariffs or pursuant to agreements negotiated on a commercial basis.

If CLECs do not opt for commercially-negotiated arrangements, Verizon MA will give them ample notice – *after* issuance of the D.C. Circuit's mandate – before providing service to CLECs at resale rates (or for high capacity transport and loops, at special access rates). Specifically, Verizon MA plans to give CLECs at least 90 days' notice, which is longer than many of Verizon MA's interconnection agreements require. If any CLEC believes its interconnection agreement requires more, Verizon's notice will ask the CLEC to notify Verizon in a timely manner.

During that 90-day notice period, Verizon MA will continue to provide CLECs de-listed UNEs at TELRIC rates and to accept new orders for those UNEs. Verizon MA will also continue to offer its Wholesale Advantage commercial offering and to continue to negotiate terms with CLECs during this period, and thereafter. The service alternatives that Verizon MA is making available, along with the reasonable notice periods, will ensure uninterrupted service to CLECs and their customers. Therefore, if customer disruptions or marketplace confusion occur, as AT&T and the CLEC Petitioners predict, it will be because the CLECs have chosen to create them.

AT&T's and the CLEC Petitioners' baseless claims offer no justification for the Department to interfere with the orderly implementation of the *USTA II* mandate in

accordance with any applicable terms of effective interconnection agreements.

## III. ARGUMENT

### A. AT&T's and the CLEC Petitioners' Claims Are Not Ripe for Consideration Because They Are Based on Speculation, Not Concrete Facts.

Neither AT&T nor the CLEC Petitioners allege that Verizon MA has actually acted in violation of its interconnection agreements – only that they fear Verizon *might* do so in the future when the D.C. Circuit's mandate - currently scheduled for June 16, 2004 – issues. Their speculative claims are based on future contingencies and, therefore, do not raise an actual controversy that is ripe for consideration by the Department.

Although not expressly couched as such, AT&T and the CLEC Petitioners, in effect, are seeking a declaratory ruling concerning Verizon MA's obligations to continue to provide UNEs at TELRIC rates under its existing interconnection agreements, together with injunctive relief. An action for declaratory relief is not ripe if it asks the Department to declare the rights of parties when the facts giving rise to an actual controversy have not yet arisen. *See Alliance, AFSC/SEIU, AFL-CIO, et al. v. Commonwealth of Massachusetts*, 425 Mass. 534, 536-37 (1997) ("It is predicate of jurisdiction under c. 231A, § 1 [Declaratory Judgment Act], that 'an actual controversy have arisen.'"). Under Massachusetts law, an "actual controversy" exists only where there is:

> a real dispute caused by the assertion by one party of a legal relation, status or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter, where the circumstances attending the dispute plainly indicate that unless the matter is adjusted such antagonistic claims will almost immediately and inevitably lead to litigation.

*Gay & Lesbian Advocates & Defenders v. Attorney General*, 436 Mass. 132, 134-35

(2002).

Here, AT&T relies solely on its unfounded belief that "Verizon does not intend to honor its contractual commitments," AT&T's Motion at 3-5, not on an assertion that Verizon has *actually* done so. Moreover, there is no basis for AT&T's claim that any conduct by Verizon following the issuance of the mandate will "immediately and inevitably lead to litigation." As such, AT&T has failed to allege an "actual controversy" that is ripe for review.

Nor would it be proper for the Department to anticipate a breach of the parties' interconnection agreements based on AT&T's and the CLEC Petitioners' *belief* about future events. Verizon MA has clearly stated its intent to abide by federal law and the applicable terms of its interconnection agreements in Massachusetts after the mandate issues. The public filings and notices upon which AT&T and the CLEC Petitioners seek to rely to support their erroneous claims that Verizon MA will proceed unlawfully following issuance of the *USTA II* mandate plainly do *not* constitute repudiation of any interconnection agreement. Indeed, the referenced language says nothing more than that Verizon reserves the right to exercise its legal rights following the issuance of the mandate. *See* AT&T's Motion, at 3-4. Therefore, there is no case or controversy between Verizon MA and the CLECs for the Department to resolve.

Moreover, there is *no emergency* that could justify premature action by the Department on AT&T's and the CLEC Petitioners' inchoate claims. As explained above, Verizon MA has no intention of disconnecting any CLEC's services as a result of

issuance of the D.C. Circuit's mandate unless the CLEC requests that it do so.[12] CLECs in Massachusetts can continue providing end-to-end service to their customers without disruption on a resale basis under Section 251(c)(4) of the Act, by purchasing special access, or under commercially-negotiated arrangements outside the auspices of Section 251. In addition, Verizon MA will give CLECs ample notice – after issuance of the mandate – before it transitions any service to resale rates. In fact, Verizon MA will give *more* notice than its interconnection agreements generally require.[13]

Specifically, Verizon MA will give CLECs at least 90 days' notice, from the issuance of the D.C. Circuit's mandate, of the transition mechanism and will continue accepting orders for the affected services during those 90 days. If any CLEC believes that its interconnection agreement requires something more, it will have a full and fair opportunity to raise that issue with Verizon. Therefore, the service alternatives Verizon MA is making available, along with the reasonable customer notice periods, will ensure uninterrupted service to CLECs and their customers.

Finally, AT&T's suggestion that the Department should adopt a "stand-still" order to prevent Verizon from implementing certain changes to its OSS systems is an improper attempt to sidestep the Change Management Process— one purpose of which is to assure that such changes may be made with sufficient notice to CLECs and in a

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[12] Of course, Verizon MA retains its existing rights to discontinue service to CLECs that fail to pay undisputed charges for the services they use or that otherwise materially violate the terms of their interconnection agreements.

[13] By giving CLECs 90 days' notice and moving the CLECs to alternative serving arrangements instead of discontinuing their service, Verizon MA is forbearing from applying some of the terms of its interconnection agreements, which often require shorter notice or none at all and do not require Verizon to find alternative serving arrangements when a UNE is discontinued.

manner that will minimize any impact on carriers' ongoing business operations. AT&T's Motion, at 4-5. To the extent that AT&T has concerns regarding notices issued by Verizon MA pursuant to the Change Management Process, those concerns should be addressed in accordance with the procedures governing that process, not by means of an unlawful and unnecessary action for declaratory and injunctive relief.[14] In short, there will be no imminent "disruption" in the market unless the CLECs create it themselves.

### B. The Commission Has No Authority to Modify Binding Interconnection Agreements Through a Generic Ruling.

While AT&T and the CLEC Petitioners make the sweeping claim that Verizon MA cannot lawfully alter its terms and rates for provisioning UNEs without amending its interconnection agreements, Verizon MA's interconnection agreements in Massachusetts generally permit Verizon MA, at a minimum, to cease providing de-listed UNEs either immediately upon the issuance of the D.C. Circuit's mandate or shortly thereafter.[15] AT&T's Motion, at 3-4; CLECs' Petition, at 4-5.[16] In those cases, Verizon MA's discontinuation of these UNEs would be pursuant to terms to which *both*

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[14] Verizon "Wholesale Network Services OSS Interface Change Management Process" (Version 2.1, April 5, 2001) (hereafter referred to as "Process Document"). The Process Document is available on the Web at http://www22.verizon/wholesale/local/cmp/. (Follow the link for "Interface Change Management" and then for "OSS Interface Change Management Process.") This is a multi-state process covering a number of jurisdictions served by Verizon.

[15] *See* Sec. II, footnote 8 *Supra*.

[16] Counsel for the CLECs are well aware that there are interconnection agreements that permit ILECs such as Verizon to cease providing de-listed UNEs either immediately after the issuance or shortly thereafter. *See* Swidler, Berlin, Shereff & Friedman LLP, *Telecommunications Regulation Update*, March 5, 2004, p. 2 (noting that "[m]any agreements provide for a negotiation period to incorporate changes in law through negotiation and, if necessary, arbitration. While CLECs are obligated to negotiate in good faith, this process could be lengthy and could substantially delay the adverse consequences of the *USTA II* decision. *Other agreements, by contrast, permit ILECs to deny UNE access within a certain number of days of a change in law*.") (emphasis added). This is attached hereto as Exhibit IV.

parties agreed, in interconnection agreements that the Department approved under Section 252(e) of the Act.[17]

Under federal law, an interconnection agreement, once approved, is "binding" on the parties. 47 U.S.C. § 252(a). *See also Global Naps, Inc. v. Verizon New England Inc.*, Memorandum of Decision, Civil Action No. 03-10407-RWZ, 02-12489-RWZ (D. Mass., May 12, 2004), Slip op. at 5-6. To the extent that Verizon MA has a right to stop providing de-listed UNEs under an existing interconnection agreement, the Department cannot void that right by forcing Verizon MA to continue to provide them to all CLECs, regardless of the terms of their individual agreements. A state commission decision that, under the guise of interpreting an agreement "effectively changes [its] terms," "contravenes the Act's mandate that interconnection agreements have the binding force of law." *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003). Thus, the Department cannot, despite AT&T's and the CLEC Petitioners' requests, issue a generic "stand-still" order that Verizon MA must continue to provide UNEs at TELRIC rates after the issuance of the D.C. Circuit's mandate.

Indeed, the Ninth Circuit directly rejected that proposition, holding that a state commission that "promulgat[es] a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements," "act[s] contrary to

[17] Because the FCC's attempts to expand unbundling beyond the reach of the statute have now been struck down by the federal courts three times, there have ***never*** been lawful section 251 unbundling rules binding the ILECs and obligating them to provide local mass market switching, high capacity loops and interoffice transport, and dark fiber as UNEs. Accordingly, upon issuance of the mandate, there will not be a "change of law" to eliminate previously lawful rules requiring provision of UNEs, but merely an affirmation that there have never been lawful UNE rules to change. Verizon MA does not waive this argument by choosing to follow the

the [1996] Act's requirement that interconnection agreements are binding on the parties." *Id.* As the court explained, "[t]o suggest that [a state commission] could interpret an agreement without reference to the agreement at issue is inconsistent with [its] weighty responsibilities of contract interpretation under § 252." *Id.* at 1128.

Contrary to AT&T's and the CLEC Petitioners' claims, the Department's authority to resolve open issues in arbitrating *new* agreements does not extend to enabling it to modify the terms of existing agreements under the guise of "interpreting" or "applying" them. In addition, the FCC has made clear that any state attempt to require unbundling where the FCC specifically considered and rejected unbundling would be preempted. *TRO*, at ¶ 195; *see also* FCC's Brief, *USTA v. FCC*, Nos. 00-0012, at 92-93 (D.C. Cir. filed Dec. 31, 2003). Moreover, none of the other state commission orders that AT&T and the CLEC Petitioners cite alters that analysis or provides authority for the Department to attempt to override an order of a federal Court of Appeals – and particularly not to do so preemptively based on unripe facts.[18]

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administrative processes set forth in its interconnection agreement that apply to actual changes in law.

[18] For example, both the Florida and Vermont state commission arbitrators have specifically considered and rejected CLEC demands for a "standstill" order similar to the requests made by AT&T and the CLEC Petitioners in this proceeding, and have found that such an order would be unnecessary and inappropriate. *In re: Petition for arbitration of amendment to interconnection agreements with certain competitive local exchange carriers and commercial mobile radio service providers in Florida by Verizon Florida Inc*., Docket No. 040156-TP, Order No. PSC 04-0578-PCO-TP (Fla. PSC, June 8, 2004) (attached hereto as Exhibit V); *Petition of Verizon New England Inc., d/b/a Verizon Vermont, for arbitration of an amendment to interconnection agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio service providers in Vermont, pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order*, Docket No. 6932 (Vt. PSB, Order entered, 2004) (attached hereto as Exhibit VI). In addition, as stated previously, a New York administrative law judge similarly declined to issue such an order in response to a similar request. See Exhibit I attached hereto.

In conclusion, Verizon MA is committed to maintaining the **true** *status quo* of existing contract rights and obligations, which include Verizon MA's right to cease providing UNEs and to transition CLECs to alternatives to UNEs. Accordingly, to the extent that the existing interconnection agreements give Verizon MA the right to cease providing UNEs under federal rules that were struck down by the D.C. Circuit in *USTA II*, the Department cannot lawfully issue a generic blanket ruling that Verizon MA must continue to offer those existing UNE arrangements, regardless of the terms of its interconnection agreements with CLECs, and regardless of what the federal courts may say. Therefore, the Department should deny AT&T's and the CLEC Petitioners' requests because the Department does not have the authority to order the blanket unbundling sought by the parties or to alter specific terms of individual interconnection agreements

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AT&T and the CLEC Petitioners incorrectly claim that the Rhode Island commission issued a ruling similar to the one that they request here. AT&T's Motion, at 9; CLECs' Petition, at 7-8. The parties, however, neglected to quote the full statement by that commission: "*To the extent permitted by law*, VZ-RI is required to continue to provision Rhode Island's existing UNEs . . . ." Report and Order, *Implementation of the FCC's Triennial Review Order and Review of Verizon-Rhode Island's TELRIC Filings*, Docket Nos. 3550 & 2681 (R.I. PUC March 26, 2004) (emphasis added). As explained above, federal law does not permit the Department – or any other – to modify the terms of existing interconnection agreements.

AT&T's reliance on an order from the Texas arbitrators is similarly misplaced because that order simply required Verizon to give notice before transitioning its UNE arrangements – which as discussed above Verizon intends to do. AT&T's Motion, at 10-11. Likewise, the Washington commission did not issue a "stand-still" order, as AT&T and the CLEC Petitioners incorrectly claim. AT&T's Motion, at 10; CLECs' Petition, at 7-8. Rather, that order explicitly stated that Verizon is only obligated to abide by its interconnection agreements - which it plans to do – by continuing "to offer UNEs *consistent with the Agreements*." *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. § 252(b), and the Triennial Review Order*, Docket No. UT-043013, Order No. 04 (May 21, 2004) (emphasis added). Finally, although the Connecticut Department of Public Utility Control, on its own motion, recently issued a provisional order that SBC continue to provision network elements at TELRIC pending a decision in its reopened UNE docket in that state, no final order has issued, and comments in opposition to the provisional order were not due until June 9, 2004.

outside the arbitration process set forth in Section 252 of the Act.

### C. Statements Made By Verizon's Counsel at Oral Argument in *USTA II* Do *Not* Bar Verizon From Exercising Its Rights Under Its Interconnection Agreements.

Contrary to AT&T's and the CLEC Petitioners' claims, no statement made at the oral argument in *USTA II* — either by counsel for Verizon and the other ILECs or by the Judges — suggests that Verizon may not exercise any rights it has under its existing interconnection agreements. AT&T's Motion, at 12-15; CLECs' Petition, at 5-6. Instead, the colloquy quoted by the CLECs simply reflects the possibility that some existing interconnection agreements might have terms that would entitle a CLEC to continue obtaining access to UNEs despite the D.C. Circuit's vacatur of one or more of the FCC's unbundling regulations. *See* AT&T's Motion at 13-14; CLECs' Petition, at 5. Counsel for the ILECs in *USTA II* was clearly not discussing any specific agreement, let alone any specific Verizon or Massachusetts agreement, as AT&T and the CLEC Petitioners erroneously suggest. The fact remains that where a CLEC signed an interconnection agreement that entitles Verizon MA to discontinue providing a UNE after the FCC's rule requiring provision of that UNE has been declared unlawful, that CLEC has *no* basis for complaining when issuance of the D.C. Circuit's mandate has that effect.

### D. The Bell Atlantic/GTE Merger Order Does Not Impose an Independent Obligation on Verizon MA to Continue to Provide UNEs Under Vacated FCC Rules

AT&T and the CLEC Petitioners are also wrong that the Department may rely on

a four-year old condition in the *Bell Atlantic/GTE Merger Order*[19] to find, - notwithstanding the change-of-law provisions of Verizon MA's interconnection agreements - that Verizon MA must continue to provide access to UNEs under FCC regulations that were vacated more than fourteen months ago. AT&T's Motion, at 25-26; CLECs' Petition, at 8-9. That issue was fully addressed by Verizon MA in D.T.E. 04-33. *See* D.T.E. 04-33, Verizon MA's Reply to Motions to Dismiss, filed April 9, 2004.

As an initial matter, although the parties' argument about this merger condition is incorrect, the Department need not rule on that claim here. The merger conditions reflect "commitments of Bell Atlantic and GTE" and are "express conditions of [*the FCC's*] approval of the" merger. *Bell Atlantic/GTE Merger Order* ¶ 250 (emphasis added). Not only was this Department not a party to those conditions, but also enforcement of the merger conditions is *the FCC's* – not the Department's - responsibility. The FCC made this clear, explaining that, "[i]f Bell Atlantic/GTE does not . . . perform each of the conditions, . . . *we must take action* to ensure that the merger remains beneficial to the public." *Id.* ¶ 256 (emphasis added). Other state commissions have likewise recognized that interpretation and enforcement of the merger conditions is a matter for the FCC. *See e.g.*, Examiner's Report, *Verizon Maine Petition for Consolidated Arbitration*, Docket No. 2004-135, at 10-11 (ME PUC filed May 6, 2004).

Nonetheless, if the Department addresses this issue, it should reject AT&T's and the CLEC Petitioners' interpretation of the merger condition, which *no* state commission

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[19] Memorandum Opinion and Order, *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent To Transfer Control*, 15 FCC Rcd 14032 (2000) ("*Bell Atlantic/GTE Merger Order*").

has accepted. *See e.g.*, Procedural Arbitration Decision, *Petition of Verizon Rhode Island*, Docket No. 3588, at 14-15 (R.I. PUC Apr. 9, 2004) (in which the Hearing Examiner rejected the merger condition argument). Under its plain terms, Verizon MA's obligation to provide access to UNEs pursuant to the rules promulgated in the FCC's *UNE Remand Order*[20] and *Line Sharing Order*[21] ended as of "the date of a final, non-appealable judicial decision providing that th[ose] UNE[s] . . . [are] not required to be provided." *Bell Atlantic/GTE Merger Order* App. D, ¶ 39. The D.C. Circuit's decision in *USTA I*, which took effect in February 2003 and became final and non-appealable on March 24, 2003, was just such a decision.

Indeed, the FCC itself found in the *TRO* that when *USTA I* became "final and no longer subject to further review . . . the legal obligation [to provide UNEs] upon which the existing interconnection agreements are based *will no longer exist*." *Triennial Review Order* ¶ 705 (emphasis added).[22] In 2000, the Chief of the FCC's Common Carrier

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[20] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *vacated and remanded*, *United States Telecomm. Ass'n v. FCC*, 290 F. 3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

[21] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912, ¶¶ 158-160 (1999) ("*Line Sharing Order*"), *vacated and remanded*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

[22] Far from over-riding the clear limitation on Verizon's obligations, the reference to "subsequent proceedings" in ¶ 316 of the *Bell Atlantic/GTE Merger Order* (upon which AT&T so heavily relies) provides an *additional limitation* on the potential length of Verizon's obligation. Even if the D.C. Circuit had never vacated the *UNE Remand Order* and *Line Sharing Order*, the Merger Conditions make clear that where a subsequent FCC order on any subject within the scope of ¶ 39 became final, that too would put an end to the corresponding obligation under the Merger condition. The issue is academic, however, because *USTA I* was a final, non-appealable decision that put an end to any obligation under this provision.

Bureau reached precisely the same interpretation of this very merger condition in analogous circumstances, finding that a final and non-appealable court of appeals decision vacating and remanding the FCC's TELRIC rules would eliminate Verizon MA's obligation under that condition to offer UNEs at TELRIC prices. *See* Letter to Verizon from Dorothy T. Attwood, Chief, Common Carrier Bureau, FCC, 15 FCC Rcd 18327 (2000), attached hereto as Exhibit VII. Therefore, the merger conditions do not provide an independent basis under federal law to impose unbundling obligations on Verizon MA under vacated FCC rules.

### E. The Department Has No Authority to Reimpose Vacated Unbundling Obligations Under State Law

AT&T and the CLEC Petitioners assert that the Department can require Verizon MA, pursuant to state law, to continue to provide mass market circuit switching, high-capacity loops and transport, and dark fiber as UNEs notwithstanding the D.C. Circuit's mandate. AT&T's Motion, at 19; CLECs' Petition, at 8-9. In other words, the parties claim that the Department has authority under state law to nullify a federal court order. Under the Supremacy Clause, however, the Department has no such power, and any attempt to do so would be preempted by federal law.

As an initial matter, courts of appeals have repeatedly found that the 1996 Act preempts a state commission's attempt to impose unbundling obligations outside of the Section 252 process that Congress established. *See, e.g., Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 443 (7th Cir. 2003); *Pac West*, 325 F.3d at 1126-27; *Verizon North Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002). In the face of existing, binding agreements that affirmatively eliminate certain unbundling obligations once the *USTA II* mandate issues, the Department could not void those interconnection agreement terms and re-

impose the same unbundling requirements without complying with the procedural requirements of Section 252 under the Act. The Department's power to interpret binding interconnection agreements does not include the right to *change* them after they have been approved. *Pac West*, 325 F.3d at 1126-27.

Such an order would violate not only the procedural requirements of the 1996 Act, but also its substantive standards. As both the Supreme Court and the D.C. Circuit made clear in vacating the FCC's first two attempts to issue UNE rules, Congress did not permit "blanket access to incumbents' networks" or determine that "more unbundling is better" when it passed the Act. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 (1999); *USTA I*, 290 F.3d at 429. Instead, those cases make clear that "'impairment' [is] the touchstone" to any requirement of unbundling. *USTA I*, 290 F.3d at 429. Therefore, under federal law, there must be a valid finding of impairment under Section 251(d)(2) *before* an incumbent may be ordered to provide access to a network element as a UNE at TELRIC rates.

Likewise, in *USTA II*, the D.C. Circuit unequivocally held that *only the FCC* has the authority to make that impairment finding – the FCC cannot delegate that authority to state commissions. *See* 345 F.3d at 565-68. Clearly, the FCC cannot cede through its own inaction the authority that the D.C. Circuit held that it cannot grant to the states through express action. Accordingly, in the absence of a lawful FCC finding of impairment, any state commission order requiring unbundling at TELRIC rates would be

fundamentally *inconsistent* with federal law by requiring unbundling where the 1996 Act, by its terms, does not *permit* it.[23]

Accordingly, the Department has no authority to impose unbundling requirements in the absence of a lawful finding of impairment by the FCC, as AT&T and the CLEC Petitioners erroneously suggest. To do otherwise would unlawfully deprive Verizon MA of its legal rights. Even if the Department had the authority to make unbundling determinations under federal law – which it does not – those determinations could not be used to require the blanket unbundling here, since any unbundling determinations must be consistent with federal law. AT&T and the CLEC Petitioners' requests that Verizon MA be required to maintain existing UNE arrangements, regardless of federal law, clearly do not meet that standard.

[23] Contrary to AT&T's claim, the absence of lawful FCC impairment rules does not mean that there are no federal law standards or that this Department is free to order the blanket unbundling that AT&T demands. To the contrary, as the Supreme Court has already held, "Section 251(d)(2) does not authorize the [FCC] to create isolated exemptions from some underlying duty to make all network elements available. It requires the [FCC] to determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements." *AT&T Corp.*, 525 U.S. at 391. In fact, the Supreme Court stated that the availability of UNE-P "may be largely academic" in light of proper impairment rules. *Id.* at 392. Given that Congress has given the FCC – *not the Department* – sole authority to make that impairment determination, any attempt by the Department to usurp that role and impose blanket unbundling under state law is directly preempted by controlling federal law.

## IV. CONCLUSION

For the foregoing reasons, the Department should ignore AT&T's and the CLEC Petitioners' manufactured claims of imminent market "disruption" and dismiss their motions.

Respectfully submitted,

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