

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Hearing Officer Notice soliciting comments on)	
whether the Department of Telecommunications and)	
Energy should open an investigation to establish an)	D.T.E. 03-45
instate Universal Service Fund.)	
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COMMENTS OF VERIZON MASSACHUSETTS

Verizon Massachusetts (“Verizon MA”) hereby addresses the Hearing Officer Notice (“Notice”), issued May 29, 2003, regarding a petition filed by Richmond Connections, d/b/a Richmond Networx (“Petitioner”) requesting that the Department institute a proceeding to establish an instate Universal Service Fund (“USF”). That Notice seeks comments on two issues: (1) whether the Department has sufficient statutory authority under existing federal and state statutes to establish a USF in Massachusetts; and (2) whether the Department should open a formal docket to investigate the establishment of an instate USF for purposes of “reduc[ing] the arbitrage opportunities and the price squeeze problems presented by an interaction of deaveraged wholesale prices and averaged retail prices.” Notice, at 2, citing *D.T.E. 01-31-Phase II Order*, at 83 (April 11, 2003). The answer is “no” on both counts.

First, the Department does not have the authority under Massachusetts law to establish an instate USF, as described in Section 254 of the Telecommunications Act of 1996 (the “Act”). The enabling statutes contain no express or implied grant of authority to the Department for this purpose. As discussed below, where the Legislature believes

that particular societal goals should be promoted through a general funding mechanism, it does so through an express grant of authority to the Department. The Legislature has not done so here, and a statutory delegation of power would, therefore, be required for the Department to implement any instate USF.

Second, the Department should not open a proceeding to investigate the establishment of an instate USF because it is not necessary to ensure the provision of affordable, comparably priced telecommunications services in Massachusetts.¹ In accordance with the Department's Order in D.T.E. 01-31, the same statewide retail rates apply to all Verizon MA's residential customers. That rate structure ensures that retail customers' rates are affordable and comparable throughout Massachusetts, thus obviating the need for an instate USF under Section 254 of the Act.

Moreover, the Petitioner has provided *no* support for its claim that it cannot compete effectively with Verizon MA in Western Massachusetts because of its internal costs and Verizon MA's charges. Petition, at 2. Verizon MA's deaveraged wholesale rates for unbundled network elements ("UNE") in rural areas, recently approved in D.T.E. 01-20, are not "significantly higher than" the Company's statewide, averaged retail rates for residential customers, as the Petitioner alleges. Petition, at 2. Thus, there are no "arbitrage opportunities or price squeeze problems," even in the Suburban and Rural zones where the Petitioner chooses to operate. *D.T.E. 01-31-Phase II Order*, at 83.

The Petitioner is also not limited to purchasing UNEs or UNE-P from Verizon MA. The Petitioner currently operates as a reseller, offering a wide variety of telecommunications services in Western Massachusetts. Petition, at 1-2. The Petitioner

¹ It should be noted that the Federal Communications Commission ("FCC") has not deemed Massachusetts a high cost area for the purpose of establishing an interstate USF.

can expand its services to other rural parts of the state by purchasing Verizon MA's retail services at the discounted resale rate. Petition, at 1-2. The Petitioner also has the option of building its own facilities. The economic choice is the Petitioners to make.

Simply put, the Petitioner seeks an instate USF as a *means* of obtaining lower rural UNE loop rates. The Department should not be drawn into the complex process of establishing an instate USF to fix a problem that does not exist. Disrupting the Department's recently adopted wholesale and retail rates for Verizon MA serves neither the public interest nor the goal of universal service and would, in effect, subsidize unnecessarily the Petitioner. The Petitioner has economically viable alternatives, such as resale, available to serve its customer base. Accordingly, there is no demonstrated need for establishing an instate USF in Massachusetts nor for the Department to conduct an investigation beyond this round of comments.

ARGUMENT

A. The Department Lacks the Legal Authority to Establish an Instate USF.

Section 254 of the Act allows state commissions to establish an intrastate universal service support mechanism. However, the Act does not require it - and is not an independent source of authority for a state commission to establish such a fund. All the Act requires is that, if a state chooses to adopt a funding mechanism, it must be consistent with rules promulgated by the FCC and may not rely on or burden federal universal service support mechanisms. 47 U.S.C. § 254(f). The only basis for the Department to establish a USF is under state law, and the Department's regulatory authority is derived and shaped solely by state statutes. *Zach v. Department of Public Utilities*, 406 Mass. 217, 227 (1989).

Although the Department has broad statutory power to regulate telecommunications services and rates under its general ratemaking authority,² that power is not unlimited. Mass. General Laws, c. 159, § 12(d); *see generally City of Newton v. Department of Public Utilities*, 367 Mass. 667, 679 (1975). As with other state agencies created by the Legislature, the Department's power must be expressly conferred by the Legislature or reasonably necessary to carry out the Legislature's intent. *Id.* at 679-80.

Specifically, the Legislature has recognized that the Department must be given express authority to assess fees or create special funds and, therefore, has enacted specific statutory language in such cases. Those explicit references authorize the Department to address issues that are not contemplated under the Department's general delegation of power. None of those statutes, however, address the establishment of a USF for telecommunications services.³

For example, under Mass. General Laws c. 25, § 17, the Department has express authority to impose an annual assessment upon public utilities (including telecommunications carriers) to help defray the Department's general operating expenses, *inter alia*. Pursuant to Mass. General Laws c. 25, § 18, the Department may also impose an additional assessment against the same regulated companies to reimburse the Commonwealth for funds appropriated by the General Court for the operation and general administration of the Department and for funding benefit costs. In addition,

² It should be noted that the Department is preempted from regulating the rates, entry, terms and conditions of wireless carriers operating in Massachusetts. *Re: Regulation of Commercial Mobile Radio Services*, D.P.U. 94-73 Order, dated August 5, 1994; *see also* 47 USC § 332(c)(3). Therefore, wireless carriers, such as Verizon Wireless, should not be expected to contribute to any USF.

³ By contrast, applicable statutes governing the Department's regulation of gas and electric utilities explicitly address the provision of universal service. *See e.g.*, Mass. General Laws c. 164, §§ 1A(a), 1B(d), and 1F(7).

Mass. General Laws c. 25, § 12O permits the assessment of fees against electric companies for a separate trust fund used for Department activities related to the regulation of those companies.

Likewise, the Legislature recently enacted a law (Chapter 239 of the Acts of 2002) to enable the Department to establish a funding mechanism for Enhanced 911 (“E911”), relay services and the TDD/TTY equipment distribution program in Massachusetts and carriers’ recovery of associated costs. In accordance with that law, the Department opened a rulemaking proceeding (D.T.E. 03-24) to adopt regulations (220 C.M.R. §§ 16.00 et seq.) relating to the implementation and administration of that new funding mechanism, as well as a separate investigation to determine the level of the carriers’ surcharge (D.T.E. 03-63).

A review of the Department’s statutory grant of authority indicates no specific or general language empowering the Department to impose a USF fee on telecommunications carriers subject to its jurisdiction and to transfer the proceeds to other carriers. In fact, there are no state statutes authorizing the Department to require any type of contributions from carriers or their customers to subsidize other carriers’ services.

As with other funding mechanisms in Massachusetts, the Department’s power cannot be implied, but must be expressly conferred by statute. This is consistent with other jurisdictions, where state commissions are specifically authorized by statute to establish an instate USF.⁴ Similarly, some state commissions have dismissed USF

⁴ See e.g., Maine Revised Statutes, Title 35-A, § 7104; 2000 Mich. Pub. Acts 295; Mich. Comp. Laws § 484.2316a; Alaska Stat. § 42.05.840; Minn. Stat. § 237.16; Mo. Rev. Stat. § 392.248; Mont. Code Ann. §§ 69-3-840, 69-3-842; N.M. Stat. Ann. § 63-9H-6; 17 Okl. Stat. 139.106;

investigations because they lacked statutory authority to establish this funding mechanism. *See e.g.*, Michigan Public Service Commission,⁵ Case No. U-11899, Opinion and Order, dated September 28, 1999; New Hampshire Public Utility Commission, Docket No. DT 00-015, Order No. 23,602, dated December 22, 2000. The Department should act accordingly and decline to open an investigation into the establishment of an instate USF because it lacks the requisite legal authority to establish such a fund.

B. An Instate USF Is Not Necessary to Provide Affordable Telecommunications Services at Reasonably Comparable Rates in Massachusetts.

The purpose of a USF is to ensure that consumers in high cost areas of a state, typically rural areas, have access to comparable services at reasonably comparable rates as customers in urban areas of the state. *See e.g.*, 47 U.S.C. § 254(b)(3). The Petitioner, however, fails to demonstrate that there is a problem in any area of Massachusetts with the affordability or availability of telecommunications services which needs addressing through an instate USF. Indeed, the Petitioner does not point to a single service that is available in urban areas, but is either not available in Western Massachusetts or only available at rates higher there than in any other part of the state. Rather, the Petitioner's sole claim is that it may be unable to provide competing services to Verizon MA in rural areas because Verizon MA's UNE rates in those areas are "significantly higher than" its retail rates. Petition, at 2.

Oregon Rev. Stat. c.759.425; S.C. Code Ann. § 58-9-280; Tex. Utilities Code §§ 56.021, 56.022; Utah Code Ann. § 54-8b-15.

⁵ The Michigan Commission has since received statutory authority to establish an instate USF and subsequently opened an investigation to consider that issue. The Commission recently concluded that there was no need to create such a fund. Case No. U-13477, Order dated February 5, 2003.

Essentially, the Petitioner seeks to have the Department create a USF to solve an alleged price squeeze that it contends exists in rural areas. The Petitioner's argument is without merit and provides no basis for the Department to consider crafting a USF, *even if* it had the legal authority to do so.

Contrary to the Petitioner's claim, there is no price squeeze between Verizon MA's wholesale rates in Western Massachusetts and its retail rates. The rates referred to by the Petitioner were recently established by the Department after considerable litigation in D.T.E. 01-20 (TELRIC Proceeding) and D.T.E. 01-31 (Alternative Regulation Proceeding). The effect of those rate changes was to deaverage and reduce wholesale UNE rates and to increase retail rates on a statewide, averaged basis, respectively.⁶ What the Petitioner really seeks here is a *further* rate reduction in UNE rural loop rates – under the ruse of an instate USF.

It is unreasonable and unnecessarily disruptive for the Department to tamper with its recent rate changes in D.T.E. 01-20 and D.T.E. 01-31. Clearly, an instate USF is not necessary to promote affordable, comparably priced service in Massachusetts. Verizon MA provides telecommunications services to residential customers statewide on an averaged rate basis. The Petitioner has failed to show that it cannot provide affordable service to its customers. In fact, the Petitioner has provided *no* cost data to demonstrate that it is operating efficiently and cost effectively, and support its claims that an instate USF is warranted to promote universal service under the Act.

⁶ As a result of newly established UNE rates in D.T.E. 01-20 and the recent increases in the residence Dial Tone Line charge in D.T.E. 01-31, Verizon MA's retail rates are set to cover the UNE costs, on an averaged basis, plus a mark-up equal to the resale discount. *D.T.E. 01-31-Phase II Order*, at 78. The Department recognized that this pricing scheme must be balanced against its competing goal of rate continuity. *Id.* at 78, 81.

In addition, the Petitioner's contention that Verizon MA's UNE rural loop rates are "significantly higher than" its retail rates is incorrect. Petition, at 2. A comparison between the package of services provided by the Petitioner⁷ shows that the opposite is true. Notwithstanding that fact, if Verizon MA's retail rates were below its wholesale rates – which they are not, the Petitioner can still offer its rural customers all services that are available in urban areas and at comparable rates by reselling Verizon MA's retail services.⁸ The resale discount applies to all retail services offered by Verizon MA, thereby enabling the Company's competitors to purchase like services at rates below currently available retail rate levels.

Given the fact that the Petitioner has multiple choices for market entry – resale, UNE-P, a combination of facility-based and UNE entry or pure facility-based entry, there is no basis for the Petitioner's claims. Therefore, even if the Department had legal authority to establish an instate USF (which it does not), the Department should *not* consider opening an investigation. Accordingly, the Petitioner's request should be rejected.

CONCLUSION

For the foregoing reasons, the Department should not open an investigation regarding an instate USF. First, the Department has no legal authority to establish such a

⁷ The Petitioner, operates as a competitive local exchange carrier ("CLEC"), offers a wide array of telecommunications services, including "local, long distance, digital subscriber line and Internet services to both residential and business customers." Petition, at 1.

⁸ Resale enables competitors to operate in limited geographical areas with a fixed margin over each of Verizon's service offerings. The availability of resale sufficiently meets the Department's well-established imputation test for Verizon MA's retail rates, as set forth in D.T.E. 94-185. *D.T.E. 94-185-C Order*, at 9 (1997).

fund. As is the case with other state funding mechanisms, the Department would require a specific statutory grant of authority.

Second, even if the Department were to become empowered to create an instate USF, the Petitioner fails to show the need for implementing this fund in Massachusetts. The purpose of a USF is to ensure the provision of affordable, comparably priced telecommunications service to all consumers, including low-income customers and those in rural, insular and high cost areas. Verizon MA's current wholesale/retail rate structure does not impede that goal in any way. Moreover, the Petitioner has the ability to resell Verizon MA's retail services, thereby providing a readily available means of ensuring affordable service.

Respectfully submitted,

VERIZON MASSACHUSETTS

Its Attorney,

Barbara Anne Sousa
185 Franklin Street, 13th Floor
Boston, Massachusetts 02110-1585
(617) 743-7331

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