COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own Motion as to the propriety of the rates and charges set forth in M.D.T.E. No. 17, filed with the Department on May 5, 2000 to become effective June 4 and June 6, 2000 by New England Telephone and Telegraph Company d/b/a Bell Atlantic – Massachusetts	)	D.T.E. 98-57, Phase III

COVAD'S COMMENTS IN RESPONSE TO THE HEARING OFFICER'S JUNE 10, 2002 PROCEDURAL MEMORANDUM

Covad Communications Company ("Covad") respectfully submits these comments in accordance with the Hearing Officer's June 10, 2002 Procedural Memorandum, which requested that parties provide comments on the effect of the recent decision in *United States Telecom Ass'n v. FCC*, Nos. 00-1012 et al. (D.C. Cir., slip op. May 24, 2002), 2002 U.S. App. LEXIS 9834 (*"USTA"* or "D.C. Circuit Opinion"). For the reasons discussed below, the Department should proceed with its agenda of promoting competition in the Massachusetts local exchange market and move forward with this case by opening the record for the limited purpose of hearing additional evidence concerning: (1) Whether and how Verizon's PARTS architecture, as now deployed and better understood by carriers, should be unbundled as an end-to-end UNE (distinct from the "plug and play" option); and (2) Whether in light of the D.C. Circuit Opinion, Verizon is still obligated to unbundle PARTS.

I. Introduction and Summary

By the June 10th Procedural Memorandum, the Hearing Officer asked the parties to provide comments concerning the effect of the D.C. Circuit's recent decision in *United States Telecom Ass'n v. FCC*, Nos. 00-1012 et al. (D.C. Cir., slip op. May 24, 2002),

2002 U.S. App. LEXIS 9834 ("*USTA*" or "D.C. Circuit Opinion"). In that case, the D.C. Circuit remanded to the FCC both its *UNE Remand Order*[1] and its *Line Sharing Order.*[2] Based on this decision, the Hearing Officer asked that the parties address the following issues:

1. What is the effect of the D.C. Circuit's ruling in *USTA* on this proceeding?

2. Should the Department proceed with its investigation or wait for the FCC to address packet switching in its Triennial Review?

3. If the Department proceeds, what is the appropriate standard of review and analysis required?

4. Is the current record in this proceeding sufficient to support the type of analysis now required under the "impair" standard? If not, what is the scope of the evidence that must be developed?

The overarching answer to each of these questions is clear: notwithstanding *USTA*, the Department has the authority to move forward with this case; and it should do so in order to ensure that local competition in Massachusetts is not adversely (and permanently) affected by Verizon's sudden rollout of PARTS.

As an initial matter, the D.C. Circuit Opinion does not lessen this Commission's authority to move forward with the issues presented by Verizon's deployment of PARTS. The D.C. Circuit did not vacate the *UNE Remand Order*, nor could it affect this state's authority under either the 1996 Telecommunications Act or independent state law to order Verizon to unbundle PARTS. Even more importantly, Verizon, pursuant to its FCC merger conditions, is still required to continue to provide UNEs, *including line sharing*,

[1] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order And Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) ("*UNE Remand Order*").
[2] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98 (rel. Dec. 9, 1999) ("*Line Sharing Order*").

in accordance with the *UNE Remand* and *Line Sharing* orders until such time as the FCC issues its order on remand (in the Triennial Review), or at the least June 2003. Thus, this Commission has ample authority to move forward with this matter and order Verizon to unbundle its PARTS architecture.

With that said, Covad does believe that there is a need to reopen the record in this case. First, in an abundance of caution, the Department should reopen the record to allow carriers to submit evidence on whether, in light of *USTA*, Verizon should be obligated to unbundle PARTS under the "impair" standard of the 1996 Act. Covad believes that the "scope of the evidence" and "standard of review and analysis" need not be determined at this time, but it clearly should include an analysis of whether the wholesale reconstruction of a local cable network is a realistic economic alternative for carriers seeking to enter the broadband market in Massachusetts.[3]

In addition, a reopening should also provide an opportunity for parties to submit additional evidence on the need to unbundle PARTS as an end-to-end UNE, as opposed to the plug and play (line card collocation) option which has been the focus of this case thus far. As Covad has grown to understand the NGDLC architecture, it has become apparent that the end-to-end UNE is the most efficient manner for CLECs to have access to line shared loops served via NGDLC. Indeed, states have begun to order other ILECs to unbundle the NGDLC architecture as an end-to-end UNE based on the authority granted them in the 1996 Act, independent state law, and because of the simple fact that the DLC fiber/copper loop is still just that: a loop with attached electronics. Covad does not believe the present record has fully addressed the factual, technical, and policy

[3] Covad, of course, does not believe that carriers could create new cable networks to enter the Massachusetts broadband market (or it would have done so itself by now).

grounds supporting such end-to-end unbundling of PARTS. The Department, therefore, should reopen this matter to assure a complete record on the issues and facts concerning the unbundling of the PARTS architecture as an end-to-end UNE.

It is imperative that the Department move forward on this important policy matter. Like other ILECs before it, Verizon is intent on deploying fiber-fed NGLDC architecture throughout Massachusetts. This architecture provides Verizon access from the customer to the Central Office. It is a loop. It also provides Verizon the ability to provide DSL-based services to a greater number of Massachusetts customers (as it lessens the length of the copper segment of the loop). And most importantly, no matter what you call it, the NGDLC architecture is the local bottleneck that competing carriers must access to provide their services (whether voice or DSL) to Massachusetts customers served via NGDLC.

Verizon has refused to make this architecture available to CLECs under nondiscriminatory terms and conditions. It has refused to make it available as an end-to-end UNE, instead only offering it as a wholesale "service" (that can be pulled at Verizon's leisure) at non-TELRIC based rates. Verizon has further refused to allow carriers to collocate line cards at the remote terminal to allow CLECs access to the NGDLC architecture on the same terms and conditions as Verizon. Thus, by Verizon's mandate, the PARTS architecture remains off limits to CLECs seeking to purchase it as a UNE at TELRIC-based rates. Yet, over the next year, as the FCC contemplates its Triennial Review proceeding, Verizon will continue to deploy PARTS, making more and more Massachusetts customers "unavailable" to competitors -- and helping Verizon

dominate the addressable market for customers who want DSL service and who are served over fiber loops.

The Department should act decisively here to order Verizon to unbundle PARTS and ensure that all Massachusetts customers have the choice envisioned by the 1996 Telecommunications Act.

1. WHAT IS THE EFFECT OF THE D.C. CIRCUIT'S RULING IN *USTA* ON THIS PROCEEDING?

A. The D.C. Circuit Opinion Did Not Eliminate Verizon's Continuing Legal Obligation to Provide Line Sharing and UNEs

As a legal matter, it is important for the Department to recognize what the *USTA* decision did not do. Significantly, it *did not* vacate the *UNE Remand Order*. That order is, of course, the source of Verizon's obligation to provide loops and packet switching. It remains in full force. The D.C. Circuit also *did not* vacate Section 51.317 of the FCC's rules, by which the FCC explicitly gave states the authority to further unbundle incumbent carriers' networks. The D.C. Circuit, therefore, *did not* and *could not* affect this state's authority under the 1996 Act, currently binding FCC regulations, or independent state law to order Verizion to unbundle its PARTS loop architecture and provide it to carriers seeking to line share.

Perhaps most importantly, *USTA* did not modify Verizon's legal obligation to continue to make available all UNEs -- including loops, line sharing and packet switching -- as required under the FCC's *UNE Remand* and *Line Sharing* orders. This obligation stems from the FCC's merger conditions in the Bell Atlantic/GTE Merger case. In conditionally approving that merger, the FCC adopted a merger condition that obligated

Verizon to continue to provide UNEs, including line sharing, priced at TELRIC, under the exact circumstances faced here. Specifically, the FCC decreed:

> In order to reduce uncertainty to competing carriers from litigation that may arise in response to our orders in the UNE Remand and Line Sharing proceedings, from now until the date on which the Commission's orders in those proceedings, and any subsequent proceedings, become final and non-appealable, Bell Atlantic and GTE will continue to make available to telecommunications carriers, in accordance with those orders, each UNE and combinations of UNEs that is required under those orders, until the date of any final and non-appealable juridical decision that determines that Bell Atlantic/GTE is not required to provide the UNE or combination of UNEs in all or a portion of its operating territory. This condition only would have practical effect *in the event the UNE Remand and Line Sharing proceedings are stayed or vacated.* Compliance with this condition includes pricing these UNEs at cost-based rates in accordance with the forward looking cost methodology first articulated by the Commission in the Local Competition Order, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide such UNEs at cost-based rates.[4]

These merger conditions do not sunset until 36 months after the Bell Atlantic/GTE merger closed, or June 2003. Thus, Verizon is under a continuing obligation to provide UNEs and line sharing pursuant to these orders until the FCC issues its order on remand (in the Triennial Review) and until that order itself becomes final and non-appealable. Moreover, the FCC has stated unequivocally that "[w]hile we continue to evaluate the Court's opinion and consider all the Commission's options, in the meantime, the current state of affairs for access to network elements remains intact."[5]

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[4] *In the Application of GTE Corporation, Transferor, and Bell Atlantic Corporation , Transferee, For Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-194, FCC 00-221 (rel. June 16, 2000), ¶ 316 ("*Merger Order*")(emphasis added).

[5] State of Michael Powell, available at www.fcc.gov/Speeches /Powell/Statements/2202/stmkp212.html

It is not a matter of debate whether Verizon is still obligated to provide UNEs and line sharing as delineated in the FCC's *Line Sharing* and *UNE Remand* orders. It is. And this Department has an obligation under the 1996 Act to ensure that Verizon meets those unbundling obligations. There is no reason to hold in abeyance the important issues concerning the unbundling of PARTS.

B. The D.C. Circuit Opinion Did Not Affect This State's Authority to Require the Unbundling of PARTS

Even if Verizon was not required to provide line sharing pursuant to the FCC's *Merger Order*, this Commission could (and should) proceed with its consideration of the unbundling of PARTS for several additional reasons. The Department has authority under at least two additional bodies of law – the 1996 Act and state law -- to require the unbundling of PARTS (and line sharing) in Massachusetts. These authorities are separate from and independent of the FCC's *Line Sharing Order* and remain in full force.

As noted above, the Department has independent authority under federal law to require Verizon to provide line sharing over the PARTS architecture in this proceeding. FCC Rule 51.317[6] and the *UNE Remand Order* authorize this Department to unbundle the ILECs' networks beyond the FCC's minimum list of UNEs upon an independent finding that such unbundling meets the "necessary and impair" standard.[7] This authority is independent of any minimum line sharing requirements set out by the FCC in the *Line*

[6] The *USTA* decision did not disturb this rule.

[7] *UNE Remand Order* at ¶ 153 (finding that § 251(d)(3) provides state commissions with the ability to establish additional unbundling obligations); *id*. ¶ 155 ("[s]ection 51.317 of the Commission's rules codifies the standards state commissions must apply to add elements to the national list of network elements we adopt in this order…[m]odification of this rule will enable state commissions to add additional unbundling obligations consistent with sections 251(d)(3)(B) and (C) of the Act"). *See also Local Competition First Report and Order*, 11 FCC Rcd at 15627 ¶¶ 244, 283, 310 (Affirming the FCC's expectation that states impose pro-competitive requirements in addition to those imposed by the FCC).

Sharing Order. Thus, the Department has the independent authority to require ILECs to unbundle PARTS and provide line sharing in Massachusetts.

This independent authority is firmly grounded in the Telecom Act, the FCC's implementing orders, and the controlling case law. Section 251(d)(3) of the Telecom Act provides that the FCC shall not preclude the enforcement of any state commission regulation, order or policy that (A) establishes access and interconnection obligations of ILECs; (B) is consistent with the requirements of § 251; and (C) does not substantially prevent implementation of this section and the purposes of §§ 251-261. Similarly, § 261(b) of the Telecom Act states:

> Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulation after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.[8]

On the specific issue of line sharing, the FCC's *Advanced Services Order*, which remains in effect, states "nothing in the Act, our rules, or case law precludes states from mandating line sharing, regardless of whether the incumbent LEC offers line sharing to itself or others, and regardless of whether it offers advanced services."[9] Accordingly, the Telecom Act and the FCC's implementing orders clearly authorize this Department to establish unbundling obligations that may exceed the FCC's currently effective minimum requirements.

[8] "This part" is "Part II – Development of Competitive Markets," including 47 U.S.C §§ 251-261.
[9] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, FCC 98-48, ¶ 98 (rel. Mar. 31, 1999) ("*Advanced Services Order*").

Reviewing courts have repeatedly upheld this broad interpretation of the independent unbundling and ratemaking authority of state commissions. At the highest level, the U.S. Supreme Court reviewed and implicitly approved independent state authority pursuant to FCC Rule 51.317. In *AT&T Corp. v. Iowa Utilities Bd.*, the Supreme Court noted that "[i]f a requesting carrier wants access to additional elements, it may petition the state commission, which can make other elements available on a case-by-case basis."[10]

Accordingly, this Department has the authority -- independent of the *Line Sharing Order* -- to impose additional unbundling requirements. The D.C. Circuit decision did not affect that authority.[11]

Covad also notes that even if Verizon has no obligation it provide a line shared loop, the Department should still move forward its consideration of unbundling PARTS. Importantly, PARTS loop can and should be unbundled for CLECs seeking to purchase stand-alone loops. Irrespective of the *Line Sharing Order*, carriers have a right to purchase stand-alone loops and use them to provide whatever service they desire, *e.g.*, voice and/or DSL. Thus, no matter the status of the *Line Sharing Order*, there is good reason to move forward with this case and ensure that carriers seeking to purchase stand-alone loops have access to PARTS loops.

[10] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 388 (1999) (*AT&T v. IUB*). While the Supreme Court remanded FCC Rule 51.319 (the necessary and impair standard) back to the FCC for further justification, it did *not* remand or note with any disfavor FCC Rule 51.317.

[11] *Consolidated Arbitrations*, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 3 (December 4, 1996) ("*Phase 3 Order*"). Under State action, the Department ordered dark fiber as an unbundled network element.

C. The D.C. Circuit's Ruling Is Not Yet Effective

As the Department considers the current set of comments, it should be cognizant of the fact that the D.C. Circuit's ruling is not yet effective, and may not be for quite some time, if ever. The Opinion cannot become effective until the D.C. Circuit issues its Mandate, which will not occur until at least July 8, 2002.[12] Indeed, the D.C. Circuit's Opinion may not become effective on July 8, 2002, because parties to the Court's Judgment may seek rehearing of the D.C. Circuit's Opinion, which automatically "stays the mandate until disposition of the petition or motion."[13] Likewise, the FCC may, and if not, parties to the proceeding may, seek Supreme Court review of the D.C. Circuit's Opinion. Parties have 90 days from the date of the Court's Judgment, or 90 days from the denial of a petition for rehearing in which to seek *certiorari* before the United States Supreme Court.[14] Finally, the FCC may, and if not, parties to the proceeding may, seek a stay of the Mandate pending Supreme Court review.

Accordingly, any assessment of the D.C. Circuit's Opinion cannot be complete until the D.C. Circuit issues its mandate.[15]

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[12] Federal Rule of Appellate Procedure 41(b) provides: "The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later." Federal Rule of Appellate Procedure 40(a)(1) provides: "a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time." Accordingly, because a U.S. agency, the FCC, is a party to the D.C. Circuit's judgment, the parties have 45 days to file a petition for rehearing. The D.C. Circuit's Opinion was issued on May 24, 2002.

[13] FED. R. APP. PROC. 41(d)(1).

[14] U.S. SUP. CT. R. 13.1 and 13.3.

[15] The Procedural Memorandum also perhaps overstates the scope of the *USTA* decision by indicating that the D.C. Circuit "remanded and vacated" the *Line Sharing Order*. It is not entirely clear, however, that this is the case. In the discussion section of its opinion, the D.C. Circuit indicates that "the Line Sharing Order must be vacated and remanded." However, in its ordering paragraph at the end of its decision, the court merely "remands both the Line Sharing Order and the Local Competition Order to the Commission for further consideration in accordance with the principles outlined above." There is no mention of a vacatur in this ordering paragraph. It is unclear, therefore, whether the court meant to vacate the *Line Sharing Order*.

2. SHOULD THE DEPARTMENT PROCEED WITH ITS INVESTIGATION OR WAIT FOR THE FCC TO ADDRESS PACKET SWITCHING IN ITS TRIENNIAL REVIEW?

There is good reason for the Department to move forward with this matter. Indeed, any uncertainty engendered by the D.C. Circuit Opinion requires that the Department step in to fill in the gaps. Ever since the passage of the 1996 Act, the incumbents have appealed almost every state or FCC decision that unbundled anything. The ILECs have had some limited success in stalling the eventual outcomes of those appeals. The ILECs certainly have had significant success in using the litigation and the appellate process as a means to create large-scale uncertainty for CLECs seeking to enter the market, thereby staving off CLEC entry into the local exchange market. As ILEC appeals and intervening court decisions have come and gone, this Department, like almost every other state commission, has moved forward with its agenda to promote competition and bring to consumers the benefits of the 1996 Act. History has affirmed the logic of this choice. While the Eighth Circuit -- at the invitation of the ILECs -- first struck the FCC's TELRIC pricing rules on jurisdictional grounds, the United States Supreme Court eventually reversed that Eighth Circuit decision. When the Eighth Circuit later struck the FCC's TELRIC rules (again) on substantive grounds, the United States Supreme Court (again just this May) reversed that Eighth Circuit decision. When the Supreme Court remanded to the FCC its original list of UNEs, on remand, the FCC re-instated almost all of its original UNE list. Each time this Department has faced legal uncertainty, it has moved forward to open the local exchange market to competition, just as the 1996 Act requires.

At no time in the last five plus years has any commission had the luxury of making a decision free of uncertainty. If legal uncertainty was a valid reason for a state commission not to act, we should have stopped attempting to implement the Act in 1997. The present uncertainty should lead the Department to action, not inaction. Now is just the time that carriers seeking to enter Massachusetts need the Department to step in and provide certainty to an industry that appears to be headed into uncertainty until the FCC's Triennial Review is complete. That is not expected until at least the end of this year, but more likely well into 2003. Massachusetts consumers have waited long enough to reap the benefits of the 1996 Act.

Verizon, no doubt, would have the Department wait perhaps another year-plus before sorting out the important issues concerning its deployment of PARTS. For now, by Verizon's mandate, the PARTS architecture remains off limits to CLECs seeking to purchase it as a UNE at TELRIC-based rates. Yet over the next year Verizion will continue to deploy it, locking in more and more Massachusetts customers who want a DSL/voice package.

This is just the situation contemplated by the 1996 Act -- to allow state commissions to step in where the FCC has left off and promote the pro-competitive intentions of the 1996 Act. The Department should use the authority given to it and act decisively now to make PARTS available to CLECs seeking to provide competitive alternatives to Massachusetts consumers. When the FCC acts in the Triennial Review, the Department then can determine whether the FCC's decision affects the Department's actions here. Waiting perhaps another six months to a year will simply result in another year of lost opportunities. While the ILECs can afford to wait, CLECs cannot. With the

increasing constraints of the capital markets, it is essential that CLECs have the opportunity to execute their business plans now, not at some undetermined time in the future. The Department should move forward with this matter.

3. IF THE DEPARTMENT PROCEEDS, WHAT IS THE APPROPRIATE STANDARD OF REVIEW AND ANALYSIS REQUIRED?

4. IS THE CURRENT RECORD IN THIS PROCEEDING SUFFICIENT TO SUPPORT THE TYPE OF ANALYSIS NOW REQUIRED UNDER THE "IMPAIR" STANDARD? IF NOT, WHAT IS THE SCOPE OF EVIDENCE THAT MUST BE DEVELOPED?

Covad answers Questions 3 and 4 in tandem. Covad does believe that a change of scope – or at least a refreshing -- of the record in this docket is necessary for two reasons. First, to the extent the Department wishes to leave itself the option of conducting an "impair" analysis to unbundle the PARTS architecture, and allow line sharing over it, a reopening of this matter (in an abundance of caution) may well be appropriate. That reopening should allow parties to present additional evidence concerning whether, in light of the D.C. Circuit Opinion, Verizon should continue to be obligated to unbundle PARTS under the "impair" standard of the 1996 Act.

Beyond this general statement of scope, the Department need not make any additional conclusions concerning either the "scope of evidence" or the "analysis required" by this reopening. For example, the "analysis required" is a question that can be best answered upon briefing after the evidence has been submitted. With that said, Covad does believe the evidence and analysis should address whether either: (i) the wholesale reconstruction of a local cable network, or (ii) the collocation of DSLAMs at or near all of Verizion's remote terminals, are realistic economic alternatives for carriers

seeking to enter the broadband market in Massachusetts in a ubiquitous manner. The answer is that they are not, and the evidence will prove as much.

Second, reopening should serve another important purpose. Up to now, the focus of this case has been on whether the unbundling of the PARTS architecture satisfies the FCC's packet switching criteria as delineated in the *UNE Remand Order*. Carriers, including Covad and AT&T, therefore argued at length that Verizon's fiber-fed loops, when deployed, would meet the FCC's four-part criteria for unbundling packet switching. Covad still believes these criteria are met. Covad and other carriers then argued that Verizon should be obligated to "unbundle" PARTS and provide carriers the ability to collocate line cards at the remote terminal in the middle of the NGDLC architecture (where the fiber and copper portion of the loop meet).

As time has passed, and Covad has become more familiar with the NGDLC architecture underlying PARTS, it has become apparent that the most efficient means of accessing that architecture is through an end-to-end UNE. Specifically, Verizon should provide end-to-end unbundled access to fiber-fed digital loop carrier architectures, including but not limited to PARTS.

Verizon's offering of a wholesale Broadband Service appears to be its answer to CLEC requests for such an end-to-end UNE. Clearly, CLECs deserve the chance to comment on the inadequacies of that proposed offering. Importantly, Verizon is only offering this functionality as a "service" not as a UNE. This distinction is important. First, by offering it as a "service" Verizion saves for itself the ability to revoke and/or modify the terms and conditions of that service at any time. Likewise, as it is offered as a "service," Verizon prices it based on its own contrived so-called "market based" pricing,

not TELRIC. Not surprisingly, Verizon's offering is not a viable alternative to a UNE offering priced in accordance with TELRIC principles.

The Department deserves the opportunity to consider the end-to-end UNE fully. And it should therefore have a complete record before it addressing all factual, technical, and policy issues supporting the end-to-end UNE. In summary, the factual and legal analysis supporting such an end-to-end offering are threefold:

?? First, the NGDLC architecture is nothing more than a loop with attached electronics. To the extent unbundled loops are available on a standalone or line sharing basis, which they are, so too should PARTS loops.[16] There is therefore no need for the Department to conduct either a "impair" analysis or a "packet switching" analysis to unbundle the NGDLC loop. The packet switching criteria are inapplicable because those rules contemplate a "stand-alone" DSLAM being deployed by the ILEC, either at the remote terminal or in the central office. In the PARTS architecture, however, there is no standalone DSLAM. Instead, the system as a whole, with its attached electronics, provide the full functionality of the loop.

?? Second, even if the packet switching criteria of the still effective *UNE Remand Order* apply, they are met here because of the sole reason that Verizon is not allowing CLECs to collocate at remote terminals under the same terms and conditions as Verizon (*e.g.*, line card collocation). Verizon has elected not to collocate stand-alone DSLAMs at its remote terminals, and instead, has opted to install line cards, which provide the DSLAM's functionality, at the remote terminals. At the same time, Verizon has strenuously resisted allowing CLECs to collocate line cards at the remote terminal. Thus, the FCC's conditions for unbundling packet switching have been met. The record in this case already supports this conclusion.

?? Third, even if the packet switching criteria were not met, CLECs would be impaired without access to an end-to-end UNE. There simply is no other viable economic alternative for CLECs to provide ubiquitous broadband service to Massachusetts consumers. Thus, the end-to-end UNE should be unbundled because the 1996 Act's impair standard is met. As stated, a reopening is needed to take into account the D.C. Circuit Opinion.

Covad is not asking the Department to make any final determinations concerning any of these issues now. Covad only raises them so the Department realizes the need to

[16] The FCC clearly defined the parameters of a loop in its *UNE Remand Order*: "The definition of a network element is not limited to facilities, but includes features, functions, and capabilities as well. Some

ensure that a complete record exists upon which it could address the legal and factual reasons supporting an end-to-end unbundling of the PARTS architecture.

The Department should be keenly interested in hearing the arguments concerning the request for an end-to-end UNE. In fact, state commissions have already ordered such a UNE based on the fact that the UNE is a loop, that it satisfies the packet switching criteria, and that it satisfies the impair standards of the 1996 Act.[17] Moreover, some incumbents, such as SBC, have openly stated their preference for an end-to-end UNE over the plug-and-play option. In Illinois, SBC has publicly stated its intention to continue rollout of its version of PARTS (called Project PRONTO) despite the present requirement in Illinois that it unbundle PRONTO on a end-to-end basis.[18] In a pending Indiana commission proceeding, SBC explicitly stated its preference for an end-to-end UNE and further committed that the ordering of such a UNE would not affect its deployment of PRONTO.[19]

Covad does not believe that reopening the scope of this docket would set this case back. Before the *USTA* decision, the Department had already reopened this case to allow carriers to conduct discovery and present additional evidence in light of Verizion's actual

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loops, such as integrated digital loop carrier (IDLC), are equipped with multiplexing devices, without which they cannot be used to provide service to end users." *UNE Remand Order ¶ 175.*

[17] *Investigation Into Ameritech Wisconsin's Unbundled Network Elements*, Public Service Commission of Wisconsin Case No. 6720-TI-161, Final Decision, pp. 10-12, 89 (March 19, 2002) (Commission orders unbundling of an end-to-end UNE under the federal "impair" standard, as a loop, and pursuant to state law). *Illinois Bell Company Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service*, Illinois Commerce Commission Case No. 00-0393,Order On Rehearing (September 26, 2001), p. 37 (Commission orders Ameritech to unbundle end-to-end UNE under the federal "impair" standard and state law). *See also AT&T Communications of Indiana, Inc. TCG Indianapolis, Petition For Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Indiana Bell Telephone Company, Incorporated, d/b/a Ameritech Indiana Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Indiana Utility Regulatory Commission Cause No. 40571-INT-03, Order (November 20, 2001), pp. 67-68 (Based on state authority, Commission finds that high frequency portion of the loop is a separate UNE which Ameritech must provide in situations where it is using the same loop to provide voice service to the end user).

[18] SBC/Ameritech Accessible Letter, April 19, 2002, CLEC AM02-149.

deployment of PARTS. That reopening would have likely resulted in carriers conducting discovery and presenting evidence to support the very arguments described above. Consistent with that re-opening, the Department should now make clear that the re-opening would allow carriers to present additional evidence supporting the end-to-end UNE.

In short, the end-to-end UNE is an important alternative that deserves full consideration by this Department.

CONCLUSION

For the reasons discussed above, Covad urges the Department to move forward with this matter and reopen the record and widen the scope of this case in the manner described above.

Dated: June 24, 2002

Respectfully submitted,

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[19] Reply Testimony of Christopher Boyer on Behalf of Ameritech Indiana, IURC Cause No. 4-611-SI (Phase 2) April 24, 2002, p. 5.