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

Covad Communications Company ("Covad") respectfully submits these reply comments to the initial comments filed in response to the Hearing Officer's June 10, 2002 Procedural Memorandum, which requested that the parties provide comments on the effect on this case 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").[1]

I. Introduction

This Department is faced with the same question faced by so many state commissions throughout the country. Across the nation, incumbent monopolists are urging state commissions to suspend, delay, and remand pending matters until the uncertainty surrounding *USTA* is resolved by the FCC in its Triennial Review. Not surprisingly, that is exactly the position Verizon has taken here. Delay in the implementation of the pro-competitive provisions of the 1996 Telecommunications Act is, of course, exactly what the incumbents desire. The longer the regulatory environment remains uncertain, the longer the capital markets remain closed to CLECs, and the longer

consumers in Massachusetts and throughout the country are denied the benefits of the competition, innovative products, and lower prices.[2] And, lest we forget, the longer the incumbents like Verizon maintain their grip over the local exchange market.

As Covad explained at length in its initial comments, the uncertainty engendered by *USTA* demands action by this Department. Under Verizon's view of *USTA*, it is presently not obligated to unbundle anything. If the Department were to stay this matter, it would give credence to that argument and thereby send a dangerous signal to Massachusetts CLECs, all of whom are grasping for legal certainty. Now is just the time that this Department should step in and remove any uncertainty concerning Verizon's obligation to unbundle its network. Pursuant to its FCC merger conditions, Verizon's present legal obligation to comply with both the FCC's *UNE Remand* and *Line Sharing* orders remains unchanged by *USTA*. The Department should move forward with this case and ensure that Verizon meets those obligations. The Department has ample authority under both independent state law and the 1996 Act to unbundle PARTS and make it available to carriers seeking to line share. This case should move forward.

II. Reply Comments

A. Verizon Ignores Its Merger Obligations

What is most notable – but perhaps not surprising -- about Verizon's comments is their failure to acknowledge, much less even mention, Verizon's present legal obligation to comply with the requirements of *both* the FCC's *UNE Remand* and *Line Sharing*

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[1] Covad notes its general agreement with the comments of AT&T and WorldCom, as well as other CLECs. In the interest of brevity, Covad focuses these reply comments to Verizon's initial comments.

[2] Indeed, just two weeks ago, Covad announced that it will be offering ADSL line shared service that is 20 percent less expensive than the incumbents' ADSL line shared service (Covad's service is $39.95 versus those of the incumbents that approach $50.00) with a monthly introductory rate of $21.95, demonstrating once again that competition produces innovative products at lowers prices. That concept is after all what our economy is based upon.

orders. Indeed, Verizon goes so far as to argue that it has "no obligation" to provide line sharing or unbundle packet switching,

This claim is verifiably wrong. As Covad explained in its initial comments, in approving the Bell Atlantic/GTE merger, the FCC imposed a merger condition on Verizon that requires it to comply with the FCC's *UNE Remand* and *Line Sharing* orders until the FCC acts on the D.C. Circuit's remand. That obligation is unaffected by *USTA*. It is disappointing that Verizon, in its zest to avoid unbundling PARTS, would hide this critical fact from the Department.

This merger condition is intent on providing legal certainty to CLECs while the FCC considers the remand of its two key orders. In other words, the merger condition ensures that Verizon's unbundling obligations remain "as is" despite the remand. In short, if Verizon was obligated to unbundle PARTS before *USTA*, which it was, the merger condition guarantees that it still is today.

It is critical that this Department ensure that Verizon comply with its present legal obligation to unbundle PARTS and provide line sharing over it. Indeed, without access to PARTS, CLECs would be unable to serve Massachusetts customers served via that network architecture. The eyes of the investment community are watching to see if CLECs can execute their business plans over the next year. It would be fundamentally unfair, and certainly contrary to the intent of the FCC's merger conditions, for this Department to stay its investigation of the unbundling of PARTS. Such a stay would only serve to fuel Verizon's argument that it no longer is required to unbundle anything (including a loop), thereby creating more uncertainty for carriers operating in Massachusetts. The Department should move forward with this case.

B. Verizon Overstates the Effect of *USTA*

Verizon also severely overstates the breath of *USTA*. Verizon first distorts *USTA* to conclude that no further unbundling is possible under *USTA's* construction of the 1996 Act's impair standard. As Verizon puts it: "Under the Court's reasoning, the competitive nature of the [broadband] market means that any requests for additional unbundled network elements do not meet the 'impair standard' of Section 251(d)(2)." (Verizon Comments, p. 5.) That is simply false. All *USTA* said in regard to the FCC unbundling of the HFPL was that the FCC "failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite)." The D.C. Circuit then remanded the matter to the FCC to consider the relevance of such competition. The D.C. Circuit gave no opinion whether or not line sharing meets the "impair" standard of the 1996 Act. Nor did the court provide any opinion concerning whether the existence of cable and satellite competition would or should necessarily remove line sharing from the FCC's minimum list of UNEs. The court only required that the FCC "consider the relevancy of such competition." The FCC, and every state in this country, are well within their rights to order line sharing and the unbundling of PARTS despite the existence of cable competition.

As Covad explained in its initial comments, it would not object to a reopening in this matter to allow parties to present evidence on this question. However, we disagree with Verizon's reading of how *USTA* affects this case. We stress that *USTA* has little affect on the analysis of whether to unbundle PARTS loops and make them available to carriers seeking to line share. The mere existence of cable broadband competition does not change the fundamental fact that a carrier seeking to enter the Massachusetts DSL

market on a ubiquitous basis is impaired without the ability to access Verizon's loop network, including PARTS. In the first place, there can be no serious debate that competitors are unable to economically duplicate the loop (or cable) infrastructure throughout Massachusetts. That fact is the same whether the market is viewed on a nationwide, or more granularly, on a Massachusetts specific basis. There does not appear to be any geographic variation in the availability of the loop in general, or of the HFPL in particular.[3] The existence of cable facilities that might provide broadband services does not mean that CLECs are now able to provide line shared or other loop services via an alternative platform. CLECs have no legal right to access any of the nation's cable facilities, because the FCC has refrained from ordering open access to the cable plant.[4] In addition, cable companies are not required to unbundle their networks to competitors. Finally, the cable network is incompatible with DSL. As a result, CLECs are impaired without access to line shared loops and PARTS loops. This is the type of evidence Covad expects to provide the Department on reopening.

With respect to *USTA's* discussion of unbundling factors application to UNEs generally, the most important point to note is that many of these factors have little or no bearing on line sharing or the unbundling of PARTS to carriers seeking to provide broadband services. Issues such as retail rate structure and subsidies, for example, are not relevant to line sharing. DSL rates do not include implicit subsidies. But the

[3] While the D.C. Circuit indicated that the FCC should conduct a localized analysis for some or all elements, it did not suggest that such an analysis must be conducted for loops. There simply are no relevant geographic variations on xDSL-capable loops (which are used for line sharing) that would change the existing impair analysis. As Covad noted in its initial comments, the PARTS architecture should be unbundled because it falls squarely within the FCC's definition of a loop with attached electronics.

[4] *See In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, and Internet Over Cable Declaratory Ruling Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, FCC 02-77 (rel. March 14, 2002).

existence of those subsidies, and their affect on competition, was the focus of the D.C. Circuit's review of the FCC's construction of the impair standard.

Finally, Covad notes that, in the main, it is not requesting unbundling beyond that required by the FCC. As Covad explained in its initial comments, it believes the PARTS architecture should be unbundled because it is a loop with attached electronics. The FCC has consistently unbundled loops and there should be no serious debate concerning whether loops should continue to be unbundled. In the alternative, we argue that the unbundling of PARTS meets the FCC's criteria for unbundling packet switching. Those criteria are still in effect as the *UNE Remand Order* was not vacated. Covad is also requesting the ability to line share over fiber-fed loops, a right the FCC has affirmed and Verizon is presently obligated to comply with.

As another alternative argument, Covad asserts that the Department should unbundle PARTS, and make it available for line sharing, under either its independent state authority or the authority provided under the 1996 Act. In exercising that authority, in an abundance of a caution, the Department should reopen this matter to allow carriers to provide evidence and briefing on the effect of the D.C. Circuit Decision on the impair analysis.

C. Verizon Misconstrues State Authority Under the 1996 Act

Verizon argues that this Department has "no authority independently to determine whether [PARTS] should be unbundled." (Verizon Comments, p. 8.) Verizon goes on to state that "state commissions are not free to mandate unbundling beyond that ordered by the FCC." Thus, Verizon argues that even if the Department went forward with this

matter, it should not and legally could not take any evidence on the "impair" standard of the 1996 Act.[5]

Verizon's argument is contradicted by the 1996 Act and a slew of FCC regulations and orders authoritatively interpreting it. As set out in greater detail in Covad's initial comments, this Department need only ensure that its unbundling regime fulfills the pro-competitive purposes of the 1996 Act. Indeed, in determining the scope of its own unbundling regime, the Department need only look to the plain language of the Act: Section 251 requires only that state commissions act consistently with the requirements of that section (*i.e.*, the pro-competitive unbundling requirements); and do not "substantially prevent implementation of the requirements" of Section 251 or its pro-competitive purposes. Unless and until the FCC were to declare that line sharing in all circumstances in all regions would affirmatively violate Section 251 – a preposterous conclusion – a state decision unbundling line shared loops could not and would not violate the pro-competitive requirements or the purpose of that section. As the Supreme Court recently held, the very purpose of the Act was "to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property," and competitors must therefore be placed "on equal footing with the incumbents."[6]

In fact, before its *Line Sharing Order*, the FCC interpreted that 1996 Act to allow state commissions the authority to order ILECs to provide line sharing. In its *Advanced Services Order*, predating the *Line Sharing Order*, the FCC stated unequivocally that

[5] Verizon generally argues that the Department need not reopen the record for any purpose. That argument flies in the face of this Departments prior conclusion that this case be reopened to allow carriers to conduct discovery and present additional evidence in light of Verizon's rollout of PARTS.
[6] *Verizon Communications, Inc. v. FCC*, 122 S. Ct. 1646, 16661 (2002).

"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, and regardless of whether it offers advanced services."[7] Thus, the FCC agrees that states can impose their own unbundling requirements, including line sharing.

Beyond independent state authority, as Covad also pointed in out its initial comments, FCC Rule 51.317 specifically authorizes states to unbundle the ILECs' network beyond the FCC's minimum list of UNEs upon an independent finding that such unbundling meets the "impair" standard of the 1996 Act. This rule also provides the FCC's impair standard.

In short, this Department's authority, under either state or federal law, to unbundle PARTS and provide it to carriers seeking to line share remains unchanged.

D. The Department Should Consider an End-to-End UNE

Covad also restates its request that any reopening in this matter should allow carriers to present evidence supporting the end-to-end unbundling of PARTS (as opposed to the plug and play unbundling requested previously). The end-to-end UNE has already been adopted in numerous states (e.g., Illinois, Wisconsin, and by a Texas arbitrator's decision[8]) while other state commissions are presently considering such unbundling (e.g., California, Indiana,[9] New York, and Minnesota). This Department deserves a full record upon which to assess Covad's request for an end-to-end broadband UNE.

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[7] *In the Matter of Deployment of Wireline Services Offering Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, FCC 98-48, ¶ 98 (rel. March 31, 1999).

[8] The Texas arbitrator's decision is currently before the Texas Commission in Public Utility Commission of Texas Docket No. 22469.

[9] In fact, just last week, the Indiana commission rejected an Ameritech request to "hold in abeyance" the commission's consideration of unbundling the NGDLC architecture. The Indiana commission did so citing to its "broad authority" under the 1996 Act to require additional unbundling. As the Indiana commission

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 and in its Covad's initial comments.

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Respectfully submitted,

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explained, placing these issues in abeyance "would amount to putting the development of competition on hold for an indefinite period of time.") *In the Matter of the Commission Investigation and Generic Proceeding On Ameritech Indiana's Rates for Interconnection, Service, Unbundled Elements, and Transport and Termination Under the Telecommunications Act of 1996 and Related Indiana Statutes*, IURC Case No. 40611-S1 (Phase II), June 28, 2002 Entry, pp. 2-3.