VIA OVERNIGHT & ELECTRONIC MAIL

July 29, 2004

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

Re: Proceeding by the Department of Telecommunications and Energy on Its Own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers, D.T.E. 03-60

Dear Ms. Cottrell:

Enclosed for filing are Conversent's Comments in Response to June 15 Order. Please contact me if you have any questions. Thank you.

Very Truly Yours,

Gregory M. Kennan
Director of Regulatory Affairs & Counsel
Conversent Communications of Massachusetts, LLC

GMK/cw

Enclosure

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COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department of Telecommunications and Energy on Its Own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers	**D.T.E. 03-60**

CONVERSENT'S COMMENTS IN RESPONSE TO JUNE 15 ORDER

Conversent Communications of Massachusetts, LLC ("Conversent") offers the following comments in response to the Department's order dated June 15, 2004. In that order, the Department sought the parties' views on issues raised by the motions of AT&T and a group of other CLECs[1] for a Department order requiring Verizon to continue offering certain unbundled network elements at TELRIC rates.

Irrespective of any interim rules the Federal Communications Commission (FCC) might issue, the Department should require Verizon to continue offering UNEs — particularly high capacity DS1 and DS3 loops[2] and dedicated interoffice transport (including dark fiber interoffice transport) — at the rates, terms and conditions in Verizon's wholesale tariff, DTE MA No. 17, unless and until the FCC issues final rules that expressly supersede such state requirements. Massachusetts law provides an independent basis to require Verizon to continue to unbundle

[1] AT&T's Emergency Motion for an Order to Protect Consumers by Preserving Local Exchange Market Stability, May 28, 2004; Petition for Expedited Relief filed by ACN Communication Services, Inc.; Allegiance Telecom of Massachusetts, Inc.; Choice One Communications of Massachusetts Inc.; CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corporation of Massachusetts; Lightship Telecom, LLC; McGraw Communications, Inc.; RCN-BecoCom, LLC; RCN Telecom Services of Massachusetts, Inc.; segTEL, Inc.; and XO Massachusetts, Inc., May 27, 2004.

[2] As explained below in Part I, the D.C. Circuit decision in *United States Telecom Association v. FCC,* No. 00-1012 (D.C. Cir. March 2, 2003) ("*USTA II"*), did not obviate Verizon's obligation to provide high-capacity DS1 and DS3 loops at TELRIC prices. Without waiving, but expressly reserving, the foregoing position, Conversent suggests that in light of Verizon's repeated (but incorrect) assertions to the contrary, the Department should require Verizon to continue providing high-capacity loops at TELRIC prices under its wholesale tariff to avoid doubt on the issue.

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

Discussion

I. The Department Should Require Verizon to Comply with its Wholesale Tariff Notwithstanding the Issuance of Interim Rules by the FCC.

The FCC has announced that it will issue interim rules regarding the UNEs affected by the issuance of the mandate in the *USTA II* decision. These interim rules are expected any day. Issuance of such interim rules, however, should not deter the Department from requiring Verizon to adhere to its wholesale tariff. Adherence to the tariff will better serve Massachusetts consumers and providers, primarily by provider greater stability to telecommunications markets and consumers in the Commonwealth.

First, the parameters of any interim FCC rules are unknown, while all Massachusetts providers are familiar with the Verizon wholesale tariff and have been working with it for some years. To the extent the interim rules are different from the present requirements of the wholesale tariff, Massachusetts telecommunications providers will be forced to incur the effort and expense of transitioning to the new rules. Second, any FCC interim rules likely will be appealed, and on an expedited basis. Such an appeal will create further confusion and uncertainty like that the Department and parties have been experiencing over the last several months. If the interim rules are overturned, the Department and carriers will be back where we are today, but having lost the time, effort, and money spent transitioning to the interim rules.

For the reasons discussed below, the Department is in a better position than the FCC to ensure the stability of Massachusetts telecommunications markets and the protection of the

competition from which consumers benefit. The Department has independent state-law authority under which it can — and should — require Verizon to continue providing the same UNEs and other services it provides today, without any dislocation or confusion. In so doing, the Department will provide needed rate and service stability, while preserving the likely outcome at the federal level after remand. There is little downside and much potential benefit from such a course of action.

II. The *USTA II* Mandate Does Not Abrogate Verizon's Obligation to Provide High-Capacity Loops as UNEs at TELRIC Prices.

At the outset, Verizon is wrong in its repeated claims that the issuance of the Court of Appeals mandate in *USTA II* eliminated the unbundling requirement for high capacity DS1 and DS3 loops. The mandate (copy attached) entered judgment "in accordance with the opinion of the court." The *USTA II* opinion simply does not address high-capacity loops. Verizon fails to explain how the Court of Appeals' mandate entering judgment in accordance with an opinion that does not address the issue could obviate its legal obligation to provide such loops.

If, *arguendo,* the *USTA II* mandate does affect high-capacity loops, the effect could only result from extending to such loops the Court's invalidation of the FCC's sub-delegation of decision-making authority to the states. Even if so, an invalidation of the state's role in the decision-making process for federal unbundling requirements does not affect the FCC's threshold determination that CLECs are impaired on a nationwide basis without access to high-capacity loops.

Under the delegation scheme established by the TRO, the FCC's nationwide finding of impairment with respect to high-capacity loops could be refuted in particular cases if the state commission found that specified non-impairment triggers were satisfied. Thus, even if the D.C.

Circuit's invalidation of the sub-delegation of decision-making authority to the states applied to high-capacity loops — and it could only apply implicitly — the most that could be said is that *USTA II* invalidated the states' ability to find *exceptions* to the FCC's nationwide impairment finding. The nationwide impairment finding itself was unaffected.

Thus, nothing in *USTA II* can be read to invalidate the FCC's finding of a national presumption that carriers are impaired in the absence of unbundled high-capacity loops. Indeed, the Court did not even criticize the impairment triggers for high-capacity loops. Therefore, Verizon's obligation to unbundle DS1 and DS3 loops at TELRIC prices continues.

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

To prevent harm to consumers by disruption of telecommunications competition and destabilization of telecommunications markets in the Commonwealth, the Department should mandate that Verizon continue to provide unbundled high-capacity loops and dark fiber dedicated transport in Massachusetts under its wholesale tariff unless and until the FCC issues final rules that expressly supersede such state-law requirements. The tariff provides a basis under state law — independent of any federal obligation — for Verizon's continued provision of the UNEs specified therein. Unless and until Verizon files an amended tariff and the Department approves it or allows it to go into effect, Verizon's obligations continue, and Verizon may not discontinue any UNEs or increase the price for those UNEs in violation of that tariff.

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

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

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

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

Part A, § 1.4.1.C. Among the network elements that Verizon provides under this tariff are: interoffice transmission facilities (Part B, § 2), local loops (Part B, § 5) including DS1 and DS3 high capacity loops (§5.3), local switching (Part B, § 6), expanded extended local loops (EELs) (Part B, § 13), UNE Platforms (Part B, § 15), UNE combinations (Part B, § 16), and dark fiber (Part B, § 17).

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

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

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

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

The New Hampshire Public Utilities Commission recently determined, in response to petitions similar to those at issue here, that Verizon was obligated to continue offering UNEs under its Statement of Generally Available Terms (SGAT), which is a tariff in New Hampshire. The Commission said:

> The Commission notes that the SGAT is a tariff in New Hampshire, with the terms and conditions set out in Verizon's Tariffs 84 and 86, and that all CLECs may purchase from Tariffs 84 and 86 without any separate agreement with Verizon. Tariffs cannot be changed without prior Commission approval.

Joint Competitive Local Exchange Carriers Petition for Expedited Order, Dkt. No. DT 04-107, secretarial letter dated July 1, 2004, at 2.[3] The same result should obtain here.

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

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

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that -
>
> > (A) establishes access and interconnection obligations of local exchange carriers;

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[3] http://www.puc.state.nh.us/Regulatory/Secretarial Letters/071604slDT04107.pdf

> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

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

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

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

TRO ¶ 195.

If the Department were to require Verizon to keep the existing UNEs in its tariff in place until the FCC issues permanent rules after a remand proceeding, and Verizon believed that such a mandate were preempted, paragraph 195 states that Verizon's recourse is to seek a declaratory ruling from the FCC. If Verizon sought such a ruling, it is doubtful that three FCC commissioners would vote to preempt the requirement.

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

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

Third, maintaining the unbundling rules in the tariff "does not substantially prevent implementation of the requirements of [§ 251] and the purposes of [the Act]." § 251(d)(3). ILECs, including Verizon, "are subject to a host of duties intended to facilitate market entry." *AT&T Corp.v. Iowa Utilities Board,* 525 U.S. 366, 371 (1999). As the Supreme Court has said, the statute was "designed to give aspiring competitors every possible incentive to enter local retail telephone markets." *Verizon Communications Inc. v. FCC,* 535 U.S. 467, 489 (2002). The Act "grant[s] . . . 'most promiscuous rights' . . . to competing carriers vis-à-vis the incumbents." *AT&T,* 525 U.S. at 397. State unbundling rules requiring unbundling do not *prevent* implementation of the goals of the Act; they *promote* it.

In addition to the lack of merit in Verizon's preemption argument, it is rather late in the day for Verizon to suggest that the FCC has preempted the states' unbundling decisions with respect to, for example, dark fiber. The Department ordered unbundling of dark fiber *seven and*

a half years ago in the December 1996 *Consolidated Arbitrations* Phase 3 Order. This was nearly three years before the FCC required unbundling of dark fiber in the November 1999 *UNE Remand Order*.[4] The FCC was explicitly aware of several state commission decisions mandating unbundling of dark fiber — and federal court decisions upholding them — when it issued the *UNE Remand Order*. *See id.* ¶ 326. Yet, neither in the *UNE Remand Order* nor since then has the FCC stated that it was preempting such state decisions.

In fact, Verizon has had ample opportunity to raise preemption arguments regarding Massachusetts' dark fiber unbundling requirements before the FCC and other fora. For example, it did not appeal the Department's Phase 3 Order on preemption or any other grounds. In another example, in the Rhode Island § 271 proceeding, Verizon claimed that it should not be required to comply with the Massachusetts dark fiber requirements in Rhode Island because the Massachusetts requirements went beyond what the *UNE Remand Order* required. Report of the Rhode Island Public Utilities Commission on Verizon Rhode Island's Compliance with Section 271 of the Telecommunications Act of 1996, Dec. 14, 2001, CC Docket No. 01-324, at 143.[5] When the Rhode Island Commission required Verizon to provision dark fiber as in Massachusetts, however, Verizon complied with the order, did not appeal it, and raised no preemption claim at the FCC. *In re Application by Verizon New England Inc., etc.,* CC Docket No. 01-324, Memorandum Opinion and Order, FCC 02-63, ¶ 93 (Feb. 22, 2002). That it has not raised such preemption arguments indicates that even Verizon believes that they lack merit.

Finally, Verizon's arguments cannot succeed in the face of recent, explicit FCC acknowledgments that the states have an independent right under state law to require unbundling.

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[4] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-268 (November 5, 1999) ("*UNE Remand Order"*).

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

In its brief in support of its motion for further stay of the D.C. Circuit mandate in *USTA II,* the FCC was clear:

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

United States Telecom Association v. FCC, Motion of the Federal Communications Commission to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari, May 24, 2004, at 9 ("FCC Stay Motion").[6]

3. *USTA II* Is Not a "Change of Law" Under Verizon's Interconnection Agreements.

USTA II does not constitute a change in law under most, if not all, interconnection agreements. Verizon's standard definition of "Applicable Law" encompasses both federal and state requirements:

> All effective laws, government regulations and government orders, applicable to each Party's performance of its obligations under this Agreement.

See, e.g., Interconnection Agreements between Verizon Massachusetts and AccessPlus Communications, Inc., Feb. 12, 2003, Glossary § 2.8[7], and Metro Teleconnect Companies, Inc., April 15, 2003, Glossary § 2.8[8].

As discussed above, there has been no change in state law governing Verizon's obligations to provide the UNEs and other offerings under its wholesale tariff. Since the

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[6] Note that the FCC's brief refers only to mass market switching and dedicated transport as the elements for which state-law unbundling determinations would be required. Thus, the FCC does not believe that USTA II invalidated its unbundling mandate for high-capacity loops.

[7] http://www.mass.gov/dte/telecom/intercon_agreements/219accessplus.pdf.

[8] http://www.mass.gov/dte/telecom/intercon_agreements/47metrotica.pdf.

definition of "Applicable Law" includes both state and federal requirements, there has been no "change in law" under the interconnection agreements.[9]

B. Verizon May Amend Its Tariff Only Through the Normal Statutory Process.

Verizon must comply with its tariff unless and until amended. To amend that tariff, Verizon must pursue the normal legal process. Massachusetts law provides a specific method under which a public utility may amend a tariff.

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

G.L. c. 159, § 19.

If Verizon does file tariff amendments seeking to convert high-capacity loops and/or dedicated transport to special access or other offering, then the Department should suspend the tariff filing and commence an investigation of the appropriateness of the proposed amendments, as it did last week in D.T.E. 04-73.[10] In such an investigation, Verizon will have the burden of proof to show that the proposed amendment is justified, that any proposed alternative service is

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[9] The likely outcome of the USTA II remand proceedings at the federal level is reissuance of the unbundling rules in substantially the same form as in the *TRO,* but without the subdelegation to the states that the D.C. Circuit found unlawful. *See* Part V below. Thus, there likely will be no change of federal requirements, as well.

[10] *Investigation by the Department of Telecommunications and Energy on its own motion as to the propriety of the rates and charges set forth in the following tariff: M.D.T.E. No. 17, filed with the Department on June 23, 2004 to become effective on July 23, 2004 by Verizon New England, Inc. d/b/a Verizon Massachusetts,* D.T.E. 04-73, Suspension Order (July 22, 2004).

not "unjust, unreasonable, . . . improper, or inadequate," and that the rate for any proposed alternative is just and reasonable.[11] G.L. c. 159, §§ 14, 16, 20.

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

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

Verizon plans to exploit the absence of federal unbundling rules by ceasing to provide dark fiber, DS-1, and DS-3 dedicated transport, high-capacity loops, and other UNEs at TELRIC rates, and to substitute overpriced and unnecessary special access services.

Conversent's concern is neither hypothetical nor hysterical. The FCC itself has recognized the seriousness of the problem. In its motion for stay of the *USTA II* mandate, the FCC stated, "Issuance of the mandate in this case would immediately create regulatory uncertainty and market disruption by re-opening a number of the issues that the FCC resolved in the *Order*." FCC Stay Motion at 10.

Verizon has publicly proposed to substitute various special access services for the UNEs it claims it no longer must unbundle at TELRIC rates after *USTA II* became effective. Verizon's prices for these services are many multiples of the prices for analogous UNEs at TELRIC rates. Forcing CLECs to use these special access services will devastate telecommunications

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[11] To the extent that Verizon proposes to substitute special access services for UNEs, it is unlikely that its rates are just and reasonable. *See* Part VIII.B below.

competition in Massachusetts. For example, in the New York Post-*USTA II* Proceeding[12], Verizon has proposed, as a substitute for the mileage rates for UNE dark fiber dedicated transport, the ring mileage rates for its Intellilight Optical Transport Service ("IOTS") — a designed, managed, controlled, SONET-based, lit optical transport service. IOTS is an inappropriate proxy for dedicated dark fiber transport for many reasons, principally because it includes design, management, monitoring, and control services that are not included in the dark fiber offering.[13] Verizon's proposed rate for the IOTS service — $1100 per month per mile for the first 20 miles, $520 per month per mile for additional miles[14] — is orders of magnitude greater than the current mileage rate for dark fiber of $49.70 per mile[15].

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[12] *In the Matter of Telecommunications Competition in New York Post USTA II Including Commitments Made in Case 97-C-0271,* Case 04-C-0420 ("NY Post-*USTA II* Proceeding").

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

By contrast, under Verizon's dark fiber offering, the CLEC designs, constructs, configures, and manages its own network. This allows a CLEC to design and manage its network, but requires the CLEC to incur the necessary expense to do so. All that Verizon provides the dark fiber customer is an unlit inert pair of fiber optic strands *on an as-is basis*, between two Verizon central offices, nothing more, nothing less. See VZ Tariff DTE MA No. 17, §§ 17.1.1.A, 17.1.2.A.2, 17.3.1.B. And, since the CLEC must be collocated in both offices, the CLEC must place its own (not Verizon's) electronic equipment on each end of the fiber cable in order to "light" the cable so as to provide the necessary transmission capability. *Id.* §§ 17.1.2.A.2, 17.3.1E. In addition, Verizon will only provide dark fiber if spare, unused strands are available; it will not construct dark fiber facilities, nor will Verizon introduce additional splice points to accommodate dark fiber requests. *Id.* § 17.1.1B. Verizon only warrants that the dark fiber was up to specifications at the time it was installed. It does not guarantee that the transmission characteristics of dark fiber will remain constant over time, and takes no responsibility for risks associated with the introduction of future splices on the dark fiber. *Id.* § 17.2.1.C-.D. The CLEC is responsible for designing its own system, and must go through a complicated ordering process to acquire dark fiber from Verizon. *Id.* § 17.1.3.

[14] VZ Tariff FCC No. 11, §31.7.21.

[15] VZ Tariff DTE MA No. 17, Part M, § 2.17.1 (specifying a rate of $4.97 per 1/10 mile).

Conversent's current annual cost for unbundled dark fiber in Massachusetts is about $471,000. If forced to pay Verizon's prices for the IOTS service, Conversent's costs would skyrocket to over $9,312,000 — *an increase of over 1870 percent*. Such an increase would force Conversent to exit most of the areas it currently serves.

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

> [M]any of the largest ILECs have indicated that once the mandate issues, they will immediately stop providing certain network elements at TELRIC rates, notwithstanding the terms of existing interconnection agreements. The potential for disruption could cripple CLECs' ability to retain existing customers and to attract new ones. The resulting market uncertainty might jeopardize the ability of CLECs to maintain investment and financing. And if ILECs carry out their plans to raise the rates CLECs must pay for network access, this would threaten higher retail phone rates for consumers.

FCC Stay Motion at 11.

Although Verizon has said that it will give carriers 90 days' notice before seeking to convert UNEs affected by *USTA II* to special access services, the Department, consumers, and carriers can take little comfort from that assurance. It only postpones the inevitable. CLECs are unable to obtain high-capacity loops from alternative sources in most locations in any amount of time, and unable to obtain dedicated interoffice transport from alternative providers within 90 days (even in the few locations where it exists). An 1800 percent cost increase will have the same devastating effect today or in 90 days. To prevent market disruption and harm to consumers, the Department should require Verizon to continue providing UNEs under the tariff until the FCC issues final rules that expressly supersede the tariff.

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

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

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

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

As explained above in Part I, high-capacity loops were not affected by the *USTA II* remand. Even if, for arguments's sake, the D.C. Circuit did invalidate the FCC's unbundling requirement for high-capacity loops, it is inconceivable that on remand or the FCC will remove all high-capacity loops from the list of network elements that must be unbundled at TELRIC prices. The D.C. Circuit did not criticize the impairment triggers for high-capacity loops. Like dark fiber, all five FCC Commissioners voted to unbundle high-capacity loops. Thus, the overwhelmingly likely result on any remand — if indeed the issue is subject to the remand —

will be that the FCC will re-adopt the same substantive test but retain to itself the decision-making authority.

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

It likewise is inconceivable that all currently unbundled dark fiber, DS-1, and DS-3 dedicated transport would fail to satisfy the impairment test of § 251(d)(2). To the contrary, the FCC likely will mandate that most or all of these transport facilities satisfy the § 251(d)(2) standard and must continue to be unbundled under § 251(c)(3). Notably, in the *TRO,* all five FCC Commissioners ruled that dark fiber dedicated transport should remain a UNE.

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

Thus, the question for the FCC on remand of the *TRO* will not be whether unbundling of dedicated transport will be required. Dedicated transport, including dark fiber transport, surely will continue to be unbundled to a large extent. The task for the FCC will be to explain more fully the basis for adopting a route-by-route analysis and the extent to which a nearby route for

which the self-provisioning trigger is met is relevant to a route where the trigger is not met. Indeed, on remand the FCC is unlikely to substantially modify the route-by-route analysis. The FCC could well reissue the same or very similar substantive rules (perhaps with some further explanation as to the appropriateness of deeming a route to be the relevant market), but retaining the decision-making authority to itself (perhaps with state participation but not state delegation).

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

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

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

provide high-capacity loops and dark fiber under the rates, terms, and conditions in its wholesale tariff.

VI. The Department Should Require Verizon to Continue Offering the UNEs It Offered When the Department Recommended that It Receive Section 271 Authorization.

Verizon has received approval under § 271 to provide in-region, interLATA service in Massachusetts and throughout its region. The Act "requires Verizon to continue to satisfy the 'conditions required for . . . approval' of its section 271 application after the [FCC] approves its application." *FCC Massachusetts §271 Approval Order,* ¶ 250.[16] The most fundamental of the conditions required for § 271 approval are "that barriers to competitive entry in the local markets have been removed and the local exchange markets today are open to competition." *Id.* ¶ 234. The fourteen-point competitive checklist "embodies the critical elements of market entry under the Act." *Id.*

Thus, Verizon must continue to comply with the section 271 competitive checklist, including § 271(c)(2)(B)(iv) and (v). Those provisions impose an obligation on Verizon to provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services," 47 U.S.C. § 271(c)(2)(B)(iv), and "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services," *id,* § 271(c)(2)(B)(v). These requirements are independent of Verizon's obligation to provide unbundled loops and interoffice transport under Section 251(c).

There can be no question that there are many barriers to entry for high-capacity loops and dark fiber interoffice transport. With respect to DS1 loops, the FCC said:

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[16] *In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts,* CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130 (April 16, 2001).

> [O]ur impairment findings rely most heavily on the economic feasibility of competitive LECs to self-deploy and recover sunk costs. Competitive LECs do not have the ability to recover sunk costs in self-deploying DS1 loops. Furthermore, the other economic and operational barriers faced by competitive LECs in self-deploying loops generally, *e.g*., the inability to obtain reasonable and timely access to the customer's premises both in laying the fiber to the location and bringing it into a building thereafter, as well as convincing customers to accept the delays and uncertainty associated with deployment of alternative loop facilities exist with DS1 loop self-deployment. Indeed, because the ability to absorb the additional "costs" associated with these other economic and operational barriers over time becomes increasingly more difficult at lower loop capacity levels, these barriers impact the ability to self-deploy at a DS1 level to an even greater extent than at higher loop capacity levels.

TRO ¶ 326 (footnotes omitted). The FCC echoed these findings for DS3 loops:

> The inability to recover the significant fixed and sunk construction costs of DS3 loops, coupled with the additional barriers to loop deployment associated with accessing rights-of-way; obtaining and paying for building access; and other service provisioning delays impair the ability of requesting carriers to self-provision single DS3 loops. Unlike deployment at even the lowest OCn level, the record indicates that a single DS3 loop, generally, can not provide a sufficient revenue opportunity to overcome these barriers. Because our impairment analysis rests most heavily on the ability of a self-deploying carrier to recover its sunk and fixed costs, the inability to recover such costs at a single DS3 level results in impairment. In finding impairment based on the inability to recover sunk costs, we find that the other economic and operational barriers faced by competitive LECs in self-deploying loops generally, *i.e.*, difficulties in acquiring municipal and private rights-of-ways as well as gaining building access from owners of multiunit premises, exist for competitive LECs with respect to single DS3 loop deployment.

Id. ¶ 320 (footnotes omitted). Similalry, with respect to dark fiber, the FCC said:

> We make our determination of impairment based on the high sunk costs associated with deploying fiber facilities and the lack of evidence showing on a route-specific basis alternative fiber facilities. The same economic factors and barriers, especially the sunk cost of deploying fiber, that affect the ability of carriers to self-deploy lit transport apply equally to dark fiber transport.

Id. ¶ 320.

In addition to the barriers to entry posed by the prospect of self-provisioning DS1 and DS3 loops and dark fiber, the Department has specifically found that "special access pricing is a barrier to entry for CLECs that want to compete against Verizon's retail private line services."

D.T.E. 01-31-Phase I Order[17] at 61. The barrier to entry exists because competitors using special access "incur economically-inefficient wholesale costs since the wholesale inputs (special access services) that the CLECs purchase are not based at incremental cost; rather, these inputs . . . are priced well above incremental cost." *Id.*[18] To ensure that the pricing of special access services did not constitute a barrier to entry, the Department found that it would be necessary to "price intrastate special access services in the same manner as UNEs (*i.e.,* incremental cost plus a reasonable market for indirect costs)." *Id.* at 62.

With such barriers, the Department simply cannot find that the local exchange market continues to be open to competition in Massachusetts. Accordingly, to remove these barriers and ensure that local markets remain open to competition, the Department should require Verizon to continue to provide high capacity DS1 and DS3 loops and dedicated dark fiber transport at TELRIC rates.

VII. The Pricing Flexibility Granted Verizon in its Alternative Regulation Plan was Predicated upon Continued Market Contestability via UNEs.

There can be no question that the Department's decision to grant pricing flexibility to Verizon under its Alternative Regulation Plan was based in large measure on the continued availability of UNEs to competitors. Verizon obtained pricing flexibility in the business services market because the Department found that Verizon lacked market power in the market for those services. D.T.E. 01-31 Phase I Order at 25, 91-95. The Department found, "Of the three components examined in a market power study, supply elasticity of the competing firms is the most significant because, despite a high market share and a low market demand elasticity, a high

[17] *Investigation by the Department of Telecommunications and Energy on its Own Motion into the Appropriate Regulatory Plan to Succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' Intrastate Retail Telecommunications Services in the Commonwealth of Massachusetts,* D.T.E. 01-31-Phase I, Order of May 8, 2002 ("D.T.E. 01-31-Phase I Order").

supply elasticity can eliminate market power." *Id.* at 37 (footnote omitted). The Department further found that the availability of UNEs was an important factor in determining supply elasticity: the supply elasticity of resellers, UNE-P, and UNE-loop providers was high, while the supply elasticity of other facilities-based CLECs was lower. *Id.* at 57-58.

Lower still was the supply elasticity of CLEC competitors for private-line services, which had to rely on Verizon's non-UNE special access. *Id.* Importantly, the Department found that, "the supply elasticity of private line services (Verizon's retail and CLECs' special access services) has not been proven to be high enough to permit granting Verizon's request [for pricing flexibility]." *Id.* at 62.

Thus, the availability of UNEs formed the foundation upon which Verizon's pricing flexibility was based. Verizon now proposes to remove many of the bricks from that foundation, and replace them with special access services, which the Department expressly found were barriers to entry, the presence of which precluded a grant of pricing flexibility. The Department should not permit Verizon to demolish the foundation of its retail pricing plan. On the contrary, the Department should require Verizon to maintain that foundation in as good condition as when the plan was established. The Department should order Verizon to continue to provide all UNEs offered in May 2002 at TELRIC prices, for the duration of the alternative regulation plan.

VIII. For The UNEs That the FCC Delists After the Remand Proceeding, The Department Should Closely Scrutinize the Rates for Substitute Services and Should Set a Reasonable Transition Timetable.

As discussed previously, the Department should require Verizon to continue providing UNEs at their current (TELRIC-based) prices under existing state tariff unless and until final FCC rules specifically supersede the tariffed requirements. For the UNEs that the FCC

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[18] Verizon is bound by those findings and may not attack them collaterally in this proceeding.

determines are no longer subject to unbundling under final rules that expressly supersede state requirements, the Department can, and should, establish a transition plan. The Department should act decisively to prevent rate shock from a too-rapid rise in the prices for telecommunications services that formerly were unbundled. Further, the Department should closely examine the rates that Verizon plans to charge for any substitute services to ensure that they are just and reasonable.

A. A Two-Year Transition Period After Issuance of Superseding FCC Rules is Reasonable.

The Department should establish a reasonable transition period over which Verizon will incrementally raise rates for services formerly provided as UNEs. In the New York Post-USTA II Proceeding, Verizon has proposed a four-step, two-year transition for dark fiber dedicated transport. A two-year, four-step ramp-up in prices for dark fiber dedicated transport would be reasonable and would allow sufficient time to make alternative arrangements where feasible and appropriate. The first increase should not occur for ninety days after the FCC issues final rules that expressly supersede state requirements.

B. The Department Should Closely Scrutinize the Prices for Substitute Services.

At least as important as a transition period is the price that the Department allows Verizon to set for services in lieu of the network elements it no longer must unbundle.

The Department's authority to scrutinize the prices that Verizon charges for any substitute services arises under both federal and state law. Under section 252(c) of the Act, the Department is required to "establish any rates for interconnection services or network elements according to [§ 252](d)." Section 252(d), as implemented by the FCC, requires TELRIC-based pricing for interconnection under § 251(c)(2) and network elements under § 251(c)(3). However, §252(c)(2) also requires the state commission to establish rates for "services." Such

"services" necessarily include those that the ILECs have said should be substituted for network elements they are no longer required to unbundled. Therefore, the Department has authority under the Telecommunications Act to establish the prices for substitute services.

Such authority also exists under state law. G.L. c. 159, §14 grants the Department the authority to "determine just and reasonable rates, fares and charges to be charged for the service to be performed."

The Department should not assume that the rates for substitute services proposed by Verizon are just and reasonable, but should closely scrutinize the rates to ensure that they are. As described above, Verizon has proposed to substitute the mileage rates for its IOTS service for dark fiber mileage rates at an increase of more than 1,800 percent over current rates for dark fiber, including in those rates implicit charges for activities that are simply not applicable to the provision of dark fiber. On its face, the rate increase appears unjust and unreasonable.

More generally, the Department should view with skepticism Verizon's proposal to substitute special access services for UNE high-capacity loops and transport. The supra-competitive pricing of Verizon's special access services is a barrier to entry that stifles competition in the telecommunications market in the Commonwealth.

> [S]pecial access pricing is a barrier to entry for CLECs that want to compete against Verizon's retail private line services because special access services impose higher costs on CLECs than are imposed on Verizon. . . . CLECs that seek to provide services in competition with Verizon's retail private line services incur economically-inefficient wholesale costs since the wholesale inputs (special access services) that the CLECs purchase are not priced at incremental cost; rather, these inputs, because of historical universal service policies, are priced well above incremental cost. The record shows that because there is a significant cost differential between Verizon's wholesale costs and potential entrants' wholesale costs, entrants may have difficulty exerting downward competitive pressure on Verizon's retail rates if Verizon raises retail prices above economically efficient levels.

D.T.E. 01-31-Phase I Order at 61-62 (citation and footnotes omitted).

Likewise, the Department also should not presume that Verizon's rates for interstate special access services are just and reasonable. In a petition filed with the U.S. Court of Appeals for the D.C. Circuit, a coalition of special access users has alleged that the average rate of return that ILECs earned nationwide on special access services in 2002 approached 40 percent. The petitioners calculated that the ILECs' special access rates and returns provided them with revenues of more than $5 billion over the 11.25% rate of return that the FCC found reasonable under federal price cap regulation. *Petition of AT&T Corp. et al. for a Writ of Mandamus,* filed with the D.C. Cir., November 5, 2003, at 16-17.[19] If those are the returns that Verizon earns on its special access services, it is no surprise that Verizon seeks to substitute special access charges for UNEs it claims it is no longer required to provide.

IX. The Department Should Continue and Expeditiously Conclude the Investigation Into the Alternative Hot Cut Process That Arose from the Verizon UNE Proceeding.

The Department should presently resume its examination of Verizon's WPTS alternative hot cut process and conclude it expeditiously. The Department should proceed regardless of whether it resumes the batch and large job hot cuts in this docket.

The WPTS investigation arose from the Department's directive, fully two years ago, that Verizon develop an alternative hot cut approach that would be less costly than the hot cut process Verizon described in connection with its UNE rate proposal. D.T.E. 01-20 Order[20] at 499-500.

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[19] The petition seeks a D.C. Circuit order requiring the FCC to commence a rulemaking petition to revise special access rates and to act on the petitioners' request for interim relief seeking relief from $5 billion in annual overcharges. The petitioners claimed FCC inaction in addressing repeated requests to examine the issue, including but not limited to failure to act on a petition for emergency relief that AT&T filed in October 2002. *See In re AT&T Corp., Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,* Docket RM-10593, Petition for Rulemaking, October 15, 2002, available through the Electronic Comment Filing System on the FCC web site.

[20] *Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided-Cost Discount for Verizon New*

Extensive testimony and discovery regarding the WPTS system was exchanged in this proceeding prior to its being stayed in April.

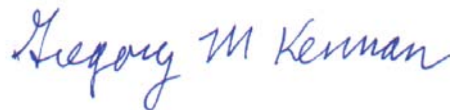
When it stayed this proceeding, the Department suggested that if the batch and large job investigations did not resume, it could "peel off" the WPTS investigation and conduct it separately. Interlocutory Order on Motion to Stay at 15-16. If the Department does not resume the batch and large job inquiries, Conversent respectfully suggests that it is time for the Department to do just that.

Conclusion

Notwithstanding any interim rules that the FCC might issue, the Department should require Verizon to continue to offer UNEs subject to the *USTA II* remand at the rates, terms, and conditions in its wholesale tariff until the FCC issues final rules that expressly supersede Verizon's state-law requirements. Also, the Department should expeditiously conclude its evaluation of Verizon's alternative WPTS hot-cut proposal.

July 29, 2004

Respectfully Submitted,



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England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts, D.T.E. 01-20 (July 11, 2002).

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

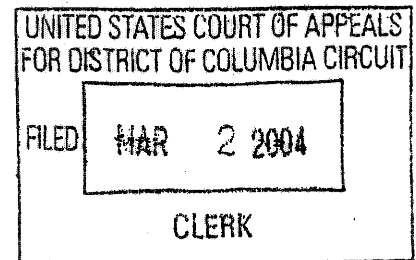
No. 00-1012 **September Term, 2003**

United States Telecom Association,
Petitioner

v.

Federal Communications Commission and
United States of America,
Respondents

Bell Atlantic Telephone Companies, et al.,
Intervenors



Consolidated with 00-1015, 00-1025, 01-1075, 01-1102, 01-1103, 03-1310, 03-1311, 03-1312, 03-1313, 03-1314, 03-1315, 03-1316, 03-1317, 03-1318, 03-1319, 03-1320, 03-1324, 03-1325, 03-1326, 03-1327, 03-1328, 03-1329, 03-1330, 03-1331, 03-1338, 03-1339, 03-1342, 03-1347, 03-1348, 03-1360, 03-1372, 03-1373, 03-1385, 03-1391, 03-1393, 03-1394, 03-1395, 03-1400, 03-1401, 03-1424, 03-1442

On Petitions for Review of an Order of the
Federal Communications Commission

Before: EDWARDS and RANDOLPH, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

JUDGMENT

These causes came on to be heard on the petitions for review of an order of the Federal Communications Commission and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the petitions for review be denied in part and dismissed in part for lack of standing and as unripe; the FCC's order be vacated in part, and the cases remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

MANDATE
Pursuant to the provisions of Fed. R. App.Pro.41(a)
ISSUED: 6/16/04
BY:
ATTACHED: ___ Amending Order
___ Opinion
___ Order on Costs

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

Date: March 2, 2004

Opinion for the court filed by Senior Circuit Judge Williams.