COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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

VERIZON MASSACHUSETTS' REPLY TO BRIEFING QUESTIONS

INTRODUCTION

On June 15, 2004, the Department issued briefing questions that relate to issues raised by various parties' motions for emergency relief in this proceeding. As Verizon Massachusetts ("Verizon MA") explains below, the issuance of the *USTA II* mandate eliminated unbundling obligations for mass-market switching and high-capacity facilities. The Department is not empowered under either state or federal law to overturn that result, as some CLECs have suggested. Indeed, the Department has consistently applied federal law in setting Verizon MA's unbundling obligations. *See e.g.*, D.T.E. 03-59, *Order*, at 7-8 (January 23, 2004). It should not - and is *not* at liberty to – cast about for some reason, any reason (as CLECs will undoubtedly argue) to perpetuate the unbundling of UNEs that have been eliminated by either the *Triennial Review Order*[1] or the D.C. Circuit's *USTA II* decision.

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd

BACKGROUND

The Telecommunications Act of 1996 (the "Act") expressly delegates unbundling determinations to the FCC alone. 47 U.S.C. § 251(d)(2). The U.S. Supreme Court held that Congress, in adopting the Act, created a "federal regime" for unbundling, to be "guided by federal-agency regulations," and "unquestionably" took "the regulation of local telecommunications away from the states." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999). The D.C. Circuit's recent decision in *USTA II* further sharpens this point:

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

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

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

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16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

the Court emphasized that the Act placed "clear limits" on the FCC's authority to force ILECs to unbundle network elements. *AT&T Corp.*, 525 U.S. at 397. Among other things, the Court emphasized that a substantive determination of impairment consistent with the requirements of the Act was a necessary precondition for any requirement that an ILEC make a particular network element available to its competitors.[2]

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

On a second remand, the FCC issued its *Triennial Review Order*, effective October 2, 2003 – its third attempt to establish lawful unbundling rules. The *TRO*, among other things, eliminated certain UNEs on a national basis and provided for state review on a more granular basis to determine impairment under Section 251(d)(2) for others, including mass market switching, interoffice transport facilities, and high-capacity loop transport facilities, to be completed within nine months of the effective date of the order. *Triennial Review Order*, at ¶ 455. In addition, the *Triennial Review Order*

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

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

imposed new legal obligations on ILECs with respect to network modifications, commingling of UNEs with wholesale services, and conversion of special access to expanded extended loops ("EELs").

On March 2, 2004, the D.C. Circuit affirmed in part and vacated in part the FCC's rules in the *Triennial Review Order* in its *USTA II* decision. In particular, the court held that the FCC's delegation of authority to the states to make impairment findings under Section 251(d)(2) was unlawful, and further found that the FCC's national findings of impairment for unbundled local switching and dedicated interoffice and loop transport, including dark fiber, were flawed and could not stand on their own. In fact, the D.C. Circuit observed that it "doubt[ed] that the record supports a national impairment finding for mass market switches." *USTA II*, 359 F.3d at 569. Likewise, for dedicated interoffice or loop transport, the D.C. Circuit pointed out that "as with mass market switching, the [*TRO*] itself suggests that the [FCC] doubts a national impairment finding is justified on this record." *Id*. at 574. Therefore, the court vacated the FCC's rules requiring unbundled access to mass market switching and high capacity dedicated interoffice and loop transport.[4]

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

The D.C. Circuit stayed its mandate for 60 days, until May 3, 2004. It referred to this stay as a "deadline" for corrective FCC action, one that was "appropriate in light of the Commission's failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings." *USTA II*, 359 F.3d at 595.

The court subsequently agreed to the FCC's unopposed request to stay the mandate for an additional 45 days, through June 15, 2004. The FCC justified its request for extension of the stay on its March 31, 2004 request for the industry to engage in business-to-business negotiations for commercial arrangements to replace the UNEs affected by the D.C. Circuit's vacatur.

In response to the FCC's request, Verizon made clear that it is willing to negotiate with its wholesale customers for UNE replacement services. On April 21, 2004, Verizon announced a proposed framework for commercial agreements with those wholesale customers, known as "Wholesale Advantage," that would allow UNE-P customers to continue to receive all the services and capabilities that they receive today, using their current ordering systems, at modest increases over TELRIC rates.[5] The Wholesale Advantage rates generally are substantially lower than the Department-approved wholesale rates that carriers would pay for equivalent resold services under 47 U.S.C. § 251(c)(4). Moreover, the Wholesale Advantage framework allows carriers to negotiate terms to obtain additional services that are not currently available to them as part of UNE-P arrangements, such as DSL, voice mail, and inside wire service.

Verizon remains actively engaged in commercial negotiations with numerous

CLECs. As part of those negotiations, Verizon signed nondisclosure agreements with approximately 150 CLECs that expressed an interest in negotiating such terms. Verizon has negotiated with about 130 of these CLECs thus far, and negotiation sessions with additional CLECs are scheduled or will be scheduled as they make themselves available. So far, Verizon has announced letters of intent with two carriers for services to replace enterprise switching, and two others with respect to all DS0 level UNE-Ps.

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[5] Verizon MA described its plans in its Opposition to Parties' Requests for Expedited or Emergency Relief filed on June 10, 2004, in D.T.E. 03-60.

RESPONSES TO BRIEFING QUESTIONS

Briefing Question 1

> When the vacatur takes effect, what are Verizon's obligations with respect to mass market switching, UNE-P, high capacity loops, and dedicated transport under applicable federal law, giving effect to any change of law provisions in carrier's interconnection agreement? What is the appropriate role for the Department, if any, under federal law when the vacatur takes effect?

Response to Briefing Question 1

The vacatur took effect on June 16, 2004, when the D.C. Circuit issued its mandate eliminating the ILECs' unbundling obligations under Section 251 of the Act for mass-market switching, high capacity loops and dedicated transport.

In most cases, Verizon MA's existing interconnection agreements ("ICAs") permit it, either immediately or after a specified notice period, to cease providing UNEs it no longer has a legal obligation to offer under Section 251(c) of the Act, including those affected by the *USTA II* mandate.[6] In such cases, Verizon MA's discontinuation of those UNEs (*i.e.*, "delisted UNEs") will be pursuant to terms to which *both* parties agreed, in interconnection agreements that the Department approved under Section 252(e) of the Act.[7] Under federal law, an interconnection agreement, once approved, is

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

[7] For example, there are ICA provisions that allow Verizon MA to discontinue service to CLECs upon written notice. *See e.g.*, Sec. 2.2 of ICAs with CTC Communications and Choice One

"binding" on the parties. 47 U.S.C. § 252(a). *See also Global Naps, Inc. v. Verizon New England Inc.,* Memorandum of Decision, Civil Action No. 03-10407-RWZ, 02-12489-RWZ (D. Mass., May 12, 2004), Slip op. at 5-6. To the extent that Verizon MA has a right to stop providing delisted UNEs under an existing interconnection agreement, the Department cannot force Verizon MA to continue providing them in contravention of the terms of individual agreements. Moreover, the Department cannot issue a broad order requiring Verizon MA to continue providing delisted UNEs to all CLECs, regardless of the terms of their individual interconnection agreements.

For example, courts have held that a state commission decision that, under the guise of interpreting an agreement "effectively changes [its] terms," "contravenes the Act's mandate that interconnection agreements have the binding force of law." *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003). Indeed, the Ninth Circuit held that a state commission that "promulgat[es] a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements," "act[s] contrary to the [1996] Act's requirement that interconnection agreements are binding on the parties." *Id.* As the court explained, "[t]o suggest that [a state commission] could interpret an agreement without reference to the agreement at

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

issue is inconsistent with [its] weighty responsibilities of contract interpretation under § 252." *Id.* at 1128.

Consistent with these principles, at least 14 other states have declined CLECs' requests to issue blanket "standstill" orders in disregard of individual contract terms.[8] The Virginia Commission, for instance, ruled that such requests "involve existing interconnection agreements" and thus refused to "grant injunctive relief…that may preempt these binding, valid contracts."[9] The California Commission, likewise, understood that "[b]ecause different ICAs have different change of law provisions, the generic ruling sought by [the CLECs] cannot encompass the case-by-case analysis required to resolve disputes about the effect of *USTA II* on each ICA."[10] Just this week, the Ohio Commission clarified that, contrary to some CLECs' interpretation, an earlier order it had issued was "was not intended to amend any of the terms and conditions of approved Verizon North interconnection agreements." The Commission expressly

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[8] *See* Administrative Law Judge's Ruling Denying Motion, R.95-04-043, I.95-04-044, at 7 (California Pub. Utils. Comm'n June 25, 2004) ("*California Order*"); Order on Motions to Hold in Abeyance, Docket No. 040156-TP, Order No. PSC-04-0578-PCO-TP, at 6 (Florida Pub. Serv. Comm'n June 8, 2004); Order Dismissing Petition, Docket No. 18889-U (Georgia Pub. Serv. Comm'n June 1, 2004); Minutes from Open Session at 4 (Louisiana Pub. Serv. Comm'n June 9, 2004); Letter Ruling, DT 04-107 (New Hampshire Pub. Utils. Comm'n June 11, 2004); Ruling Granting Motions for Consolidation and to Hold Proceeding in Abeyance, Cases 04-C-0314 & 04-C-0318, at 7-8 (New York Pub. Serv. Comm'n June 9, 2004); Order Denying Emergency Relief, Docket No. P-100, Sub 133t, at 1-2 (North Carolina Utils. Comm'n June 11, 2004); Entry on Rehearing, Case Nos. 03-2040-TP-COI *et al.*, ¶ 15 (Ohio Pub. Utils. Comm'n July 28, 2004) ("Ohio Order"); Order Denying Petition for Clarification, ARB 531, at 6 (Oregon Pub. Util. Comm'n June 30, 2004); Open Meeting of Commission (South Carolina Pub. Serv. Comm'n June 22, 2004); Transcript of Authority Conference, Docket No. 04-00158, at 34-35 (Tennessee Reg. Auth. June 7, 2004); Order Denying Joint CLEC Motion, Docket No. 03-999-04, at 2-3 (Utah Pub. Serv. Comm'n June 14, 2004); Order Re: Motion to Hold Proceeding in Abeyance Until June 15, 2004, Docket No. 6932, at 2-3 (Vermont Pub. Serv. Bd. May 26, 2004); Order, Case No. PUC-2204-00073 and Case No. PUC 2204-00074 (Virginia State Corp. Comm'n July 19, 2004) ("*Virginia Order Dismissing Standstill Petitions*").

[9] *Virginia Order Dismissing Standstill Petitions*, at 6 (Va. S.C.C. July 19, 2004).

recognized that Verizon could discontinue service upon notice, without Commission approval, if a particular contract permitted it to do so.[11]

The Department's "appropriate role" is, therefore, to ensure that carriers abide by the terms of their interconnection agreements, including those that allow Verizon MA to discontinue, upon notice, elements that it no longer has a legal obligation to provide under Section 251(c) of the Act.[12] In particular cases where the changes in unbundling obligations in the wake of the *TRO* and *USTA II* might appear to require a contract amendment, Verizon MA will proceed with arbitration of an appropriate amendment.[13]

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10 *California Order*, at 7.

11 *In the Matter of Implementation of the F.C.C.'s Triennial Review Regarding Local Circuit Switching in the Mass Market, etc.*, Case Nos. 03-2040-TP-COI, etc., Entry on Rehearing, at 8 (July 28, 2004).

12 Verizon MA will continue to have an obligation under Section 271 of the Act to provide local switching, local loop transmission, and local transport from the truck side of its switches unbundled from other services. However, as the Department has already ruled in D.T.E. 03-59, the FCC has exclusive authority to define and enforce those Section 271 obligations. The Department found that it "does not have jurisdiction to enforce Verizon's unbundling obligations pursuant to Section 271. *See* 47 U.S.C. § 271(d)(6). The proper forum for enforcing Verizon's Section 271 unbundling obligations is before the FCC. *Id.*" D.T.E. 03-59, *Order Closing Investigation* at 19 (November 25, 2003). Based upon this finding, the Department expressly rejected CLEC claims that it could freeze the rates for Section 271 services at TELRIC levels. The Department concluded that the pricing standard for elements required to be unbundled under Section 271 is the "just and reasonable" standard set forth in Sections 201 and 202 of the Act and the FCC alone had jurisdiction to make that determination. *Id.*

13 On February 20, 2004, Verizon MA filed a petition initiating a consolidated arbitration (D.T.E. 04-33) to amend existing agreements to reflect the *TRO's* changes in unbundling obligations. Now that the *USTA II* mandate has issued, Verizon MA intends to substantially simplify its proposed amendment that is the basis of that arbitration, and to reduce the size of the arbitration by removing CLECs whose contracts require no amendment to implement the *TRO* and *USTA II* rulings. Verizon MA will file shortly its revised interconnection amendment and withdrawal as to specified CLECs. Indeed, amendments may well not be required even for agreements that might appear to call for an amendment to effect a change of law. Verizon MA expressly reserves the argument that it never had a valid legal obligation to provide the UNEs at issue, given that the FCC has yet to promulgate unbundling rules that have survived federal appellate review. Accordingly, the identification of UNEs that are not required by *USTA II* (and the earlier *TRO* and *USTA I*) cannot be considered "changes in law" within the meaning of Verizon MA's interconnection agreements, for the simple reason that those UNEs have never been lawfully required. By proceeding with the amendment and arbitration process, Verizon MA does not

Verizon MA has no intention of disconnecting any CLEC's services as a result of the issuance of the D.C. Circuit's mandate (unless, of course, the CLEC chooses that option). CLECs in Massachusetts can – if they choose to – continue providing end-to-end service to their customers on a resale basis under Section 251(c)(4). In addition, as noted, Verizon MA will also make unbundled access to those same network facilities available to CLECs on a commercially negotiated basis consistent with its obligations under Section 271 of the Act. High-capacity transport and loop services will also continue to be available through comparable access services under existing approved tariffs.

As explained above, if CLECs do not opt for commercially negotiated arrangements, Verizon MA will give them ample notice before providing service at resale equivalent rates (or for high capacity transport and loops, at special access or equivalent rates). Specifically, Verizon MA will give CLECs at least 90 days' notice, which is longer than many of Verizon MA's interconnection agreements require.[14] If any CLEC believes its interconnection agreement requires more, Verizon's notice will ask the CLEC to notify Verizon in a timely manner.

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waive the argument that it cannot be required under any of its agreements to continue to provide UNEs eliminated by the *TRO, USTA II or USTA I.*

[14] During that 90-day notice period, Verizon MA will continue to provide CLECs delisted UNEs at TELRIC rates and to accept new orders for those UNEs. Verizon MA will also continue to offer its Wholesale Advantage commercial offering and to continue to negotiate terms with CLECs during this period, and thereafter. The service alternatives that Verizon MA is making available, along with the reasonable notice periods, will ensure uninterrupted service to CLECs and their customers, thereby minimizing customer disruption or marketplace confusion.

Briefing Question 2(a)

> In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport:
>
> a) What are Verizon's obligations to provide such UNEs under Massachusetts law?

Response to Briefing Question 2(a)

Verizon MA's obligation to provide UNEs is defined by federal, not state, law. As explained above, *USTA II* makes clear that the unbundling required under the FCC's prior regulations is inconsistent with federal law, and – as other state Commissions have observed in denying standstill orders – no unbundling can be ordered in the absence of a valid finding by the FCC of impairment under Section 251(d)(2) of the 1996 Act.[15]

Furthermore, the 1996 Act preempts state commission attempts to impose unbundling obligations outside of the Section 251 process that Congress established. *See, e.g., Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 443 (7th Cir. 2003); *Pac West*, 325 F.3d at 1126-27; *Verizon North Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002). The D.C. Circuit's vacatur of specific FCC unbundling rules therefore did not leave a vacuum that the Department is free to fill. As both the Supreme Court and the D.C. Circuit made clear in vacating the FCC's first two attempts to issue UNE rules, Congress did not permit "blanket access to incumbents' networks" or determine that "more unbundling is

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[15] *See, e.g., Virginia Order Dismissing Standstill Petitions*, at 6 ("USTA II establishes that no unbundling can be ordered in the absence of a valid finding by the FCC of impairment under 47 U.S.C. § 251(d)(2). The FCC, however, currently has not made a lawful finding of impairment pursuant to § 251(d)(2) of the Act. This Commission will not mandate unbundling requirements that violate federal law."); Verizon Northwest Inc. Petition for Arbitration of an Amendment to Interconnection Agreements, Oregon Public Utilities Commission, Order *Denying Petition for Clarification of Order 04-306*, at 6 ("Contrary to the claims made by the CLECs, the

better" when it passed the 1996 Act. *AT&T Corp.*, 525 U.S. at 390; *USTA I*, 290 F.3d at 429. Instead, as the Supreme Court's decision in *AT&T* and the D.C. Circuit's decision in *USTA I* make clear, "'impairment' [is] the touchstone" to any requirement of unbundling. *USTA I*, 290 F.3d at 429. In *USTA II*, the D.C. Circuit unequivocally held that *only the FCC* has the authority to make that impairment finding. *See* 359 F.3d at 565-68. Therefore, under federal law, there must be a valid finding of impairment under Section 251(d)(2) of the 1996 Act *before* an incumbent may be ordered to provide access to a network element as a UNE at TELRIC rates. Accordingly, because there is no lawful finding of impairment by the FCC under Section 251(d)(2) of the 1996 Act, any state commission order requiring unbundling at TELRIC rates would be fundamentally inconsistent with federal law by requiring unbundling where the 1996 Act, by its terms, does not permit it.

The Department's jurisdiction for regulating intrastate telecommunications common carriers within Massachusetts is found in Chapter 159 of the Massachusetts General Laws. Nothing in that Chapter (or anywhere else in the General Laws or in Massachusetts case law) purports to give the Department independent authority to impose unbundling obligations that federal courts or the FCC itself have eliminated – nor could it. Indeed, the Department has recognized that unbundling obligations are determined by federal law. In the *Consolidated Arbitrations* proceeding, for example, the Department required Verizon MA only to unbundle or "combine UNEs in the exact

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Commission is not empowered under state law to require Verizon to continue providing UNEs where the statutory prerequisites of the Act have not been met.")

manner prescribed by the FCC and proscribed by the Court." D.P.U./D.T.E. 96-73, 96-75, 96-80/81, 96-83, 96-94, *Phase 4-E Order*, at 11 (March 13, 1998); *see also Phase 4-K Order*, at 26-27 (May 21, 1999) (in which the Department declined to mandate a recombination requirement on the Company for previously uncombined UNEs). Likewise, in D.T.E. 01-31 (Alternative Regulation), the Department recognized that "[w]ith regard to AT&T's concerns about the continuation of UNE-P, that issue is also governed by the FCC's *Triennial Review Order*." D.T.E. 01-31, Phase II, Order, at 32 n.3 (April 11, 2003). The Department cannot lawfully re-impose on Verizon MA unbundling requirements that have been eliminated by the D.C. Circuit or the FCC.[16]

Briefing Question 2(b)

> In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport:
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> (b) Do Verizon's obligations as carrier of last resort require it to offer UNEs? See Intra-LATA Competition, D.P.U. 1731, at 76 (1985).

Response to Briefing Question 2(b)

[16] Even if the Department did have authority under state law to fashion an unbundling regime – which it does not – it has not done so in this or in any other proceeding. Thus, there is no current state-law obligation on Verizon MA to unbundle its network. Moreover, if the Department were to proceed on the basis of state law, it would have to open a proceeding and provide notice of its intent since this case was opened solely and exclusively to implement federal law under the Act and the *TRO*. In such a new proceeding, the Department would have to give parties the opportunity to present testimony and argument regarding the scope of the Department's authority under state law, the standards for determining state-law unbundling, and the application of those standards in particular circumstances. And, when all that was done, no requirement placed on Verizon MA under state law could conflict with the Act's unbundling regime or FCC's rules, and in particular, could not re-impose an unbundling obligation on elements that have been eliminated by the FCC or federal courts applying federal law.

Verizon MA's "carrier of last resort" obligations, as established in D.P.U. 1731, do not require Verizon MA to offer UNEs. The Department's Order in that proceeding was issued on October 18, 1985, over ten years before adoption of the Act, which first established unbundling obligations on ILECs. The Department's order concerned the provision of *retail* services to end-user customers in Massachusetts, not wholesale services provided by carriers to one another.

In this regard, the term "carrier of last resort" is specifically defined in that Order to mean "a carrier that will be required to continue service to a particular area or exchange or to provide service to such an area or exchange, if a particular area or exchange is either left without or not provided with telephone service." D.P.U. 1731, *Order*, at 71. The intent of designating a "carrier of last resort" for the intra-LATA and/or inter-LATA market is to "ensure the continuation of [the Department's] goal of universal service." *Id*. at 73, 76. The concept of universal service has always related only to consumer, not carrier, customers, and nothing in the record of D.P.U. 1731 or elsewhere suggests otherwise. Indeed, the Department specifically designated Verizon MA (formerly NYNEX or New England Telephone) as a carrier of last resort for only "local exchange service and intra-LATA MTS, WATS and PLS" – not any type of wholesale offerings. *Id*. at 76. Therefore, any attempt to expand Verizon MA's carrier-of-last-resort obligations to wholesale customers would be contrary to the Department's decision in D.P.U. 1731, as well as the long-held, universally accepted understanding of the carrier-of-last-resort concept.

Briefing Question 2(c)

> In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport:
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> (c) Do the terms of Verizon's Alternative Regulation Plan indirectly require it to continue providing mass market switching, UNE-P, dedicated transport, and high-capacity loops at TELRIC rates, and if so, what would be the consequences should Verizon discontinue providing any of the above TELRIC-based rates?

Response to Briefing Question 2(c)

Verizon MA's Alternative Regulation Plan does not require, either directly or indirectly, that the company continue providing mass market switching, UNE-P, dedicated transport, or high-capacity loops at TELRIC rates. Verizon MA did not commit to continue providing any UNE as a condition for obtaining upward pricing flexibility for its retail business services in D.T.E. 01-31, and the Department did not condition its adoption of the Plan upon Verizon MA's continued provision of UNEs. While the Department stated that the availability of UNE-P contributed to the competitiveness of the business market, it did not rule that Verizon MA must continue to offer such UNE arrangements regardless of any change in federal law. The availability of UNE-P was one factor, among several factors, that the Department took into account in determining the degree of regulation appropriate for Verizon MA in the business market.

Indeed, the fact that certain UNEs have been eliminated because the impairment standard under the Act has not been satisfied confirms the Department's determination to give Verizon MA upward pricing flexibility for retail business services. The Department ruled in D.T.E. 01-30 that market prices that are subject to the "disciplining effects of

competitive forces" produce rates that are just and reasonable. D.T.E. 01-31, *Phase I Order*, at 19 (May 8, 2002). There is no greater competitive market than the business market, and CLECs are addressing that market with their own switches and facilities. Where there is no impairment for network facilities – hence no obligation to unbundle under Section 251 – there are no operational or economic barriers to CLECs entering the market. The D.C. Circuit in *USTA II* squarely ruled that the type of "synthetic competition" that the FCC's prior UNE regulations promoted – regulations that gave CLECs no incentive to invest in facilities and instead permitted CLECs to pocket a guaranteed margin from reselling Verizon MA services – was inconsistent with the intent of Congress (and ultimately bad for consumers). *See USTA II*, 359 F.3d at 573. The "consequences" of Verizon's discontinuation of UNEs at TELRIC rates will, therefore, be true competition and greater consumer benefits – the goals which the Alternative Regulation Plan are intended to achieve.

Briefing Question 2(d)

> In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport:
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> (d) If carriers reach agreement on terms for mass market circuit switching, may or must those agreements be filed with the Department as interconnection agreements for approval under 47 U.S.C. § 252? May or must those agreements be filed with the Department for approval as customer specific arrangements? See AT&T Communications of New England, Inc., D.P.U. 90-24 (1990). Would such terms be subject to the federal pick and choose rule? 47 U.S.C. § 252(i).

Response to Briefing Question 2(d):

As Verizon MA has explained, the *USTA II* decision eliminated unbundling requirements for mass-market circuit switching and high-capacity facilities, so these items are not subject to the requirements of Sections 251 and 252 of the Act. Thus, an agreement between Verizon MA and a CLEC relating to services that have been removed from the ambit of 47 U.S.C. § 251, by *USTA II* or the FCC, is a private, commercially negotiated, agreement, not an interconnection agreement subject to Commission approval under Section 252. These commercial agreements are, likewise, not subject to the FCC's "all-or-nothing rule" (which recently replaced its pick-and-choose rule).[17]

It is well established that negotiations and agreements with CLECs for wholesale services that are no longer required under Section 251(c) of the Act are outside the scope of Section 252. The FCC squarely held in the *Qwest Declaratory Ruling* that the Act specifically and expressly ties the filing requirements in Section 252 to the substantive requirements of Section 251(b) and (c). In particular, the FCC rejected the argument that all access agreements between ILECs and CLECs are subject to Section 252, but instead found that Section 252 applies "only [to] those agreements that contain an ongoing obligation relating to section 251(b) or (c)." 17 FCC Rcd. at 19341, ¶ 8 n.26. Therefore, "an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation" – *i.e.*, pertaining to the specific statutory

[17] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report & Order, CC Dkt. No. 01-338, FCC 04-164 (rel. July 13, 2004).

obligations set forth in section 251(b) and (c) – "is an interconnection agreement that must be filed pursuant to section 252(a)(1)." *Id*. at ¶ 8.

By the same token, however, an agreement that does *not* create an ongoing obligation pertaining to those duties – for example, an agreement for wholesale services not required to be unbundled under Section 251(c)(3) – is not subject to Section 252. As the FCC stressed in the *Qwest Declaratory Ruling,* any other result would create "unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs." *Id*. Accordingly, when the parties negotiate terms for access to a network element or service that need not be unbundled under Section 251(c), it follows that the Section 252 requirements do not apply.

That conclusion is also compelled by the text and structure of Section 252. The Section 252 filing requirement is limited by its terms to agreements that are triggered by a LEC request for interconnection services or network elements pursuant to Section 251. Section 252(a) provides that

> … upon receiving a *request for interconnection, services or network elements pursuant to section 251,* an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers.

47 U.S.C. § 252(a) (emphasis added). Thus, Section 252(a) makes it clear that only agreements negotiated as a result of Section 251 requests must be filed with the Department under Section 251(e).

Because privately negotiated, commercial agreements do not arise from Section 251 requests for interconnection, services or network elements, Section 252 does not

require that those agreements be filed with the Department, and they are not subject to other requirements of Section 252, including the FCC's all-or-nothing rule.

Finally, the Department's Order in D.P.U. 90-24 regarding the tariff approval of customer specific pricing ("CSP") arrangements would not apply here. That Order pertains to CSP tariffs for *retail* customers arising from competitive market conditions. D.P.U. 90-24, Order, at 14-20 (January 24, 1990). By contrast, non-251 inter-carrier agreements are wholesale arrangements not offered pursuant to tariff. Therefore, the Department has no jurisdiction either under the Act or its D.T.E. 90-24 Order to require the filing and approval of commercially negotiated, non-251 agreements.

Briefing Question 2(e)

> In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport:
>
> (e) Should the Department establish a transition plan to replace TELRIC-based rates for mass market circuit switching, UNE-P, high capacity loops, and dedicated transport with just and reasonable market-based rates, as has been proposed in other states, such as New York, and if so, what should be the parameters of such a plan? See, e.g., In the Matter of Telecommunications Competition in New York Post USTA II Including Commitments Made in Case 97-C-0271, N.Y.P.S.C. Case 04-C-0420. What authority would the Department have to do so?

Response to Briefing Question 2(e)

The Department should not – and indeed has no authority to – establish a plan of transition away from TELRIC-based rates for mass market circuit switching, UNE-P, high capacity loops, and dedicated transport. As discussed above, Verizon has already developed a transition plan to move CLECs from delisted UNEs to non-UNE alternatives. And, as explained previously, to the extent that Verizon MA has an

obligation to provide elements pursuant to Section 271 of the Act, the FCC has the sole and exclusive jurisdiction – as the Department has already found – to determine the scope of that obligation and prices for those elements.

As Verizon explained above and in previous filings with the Department, it will not disconnect any CLEC's service, unless the CLEC chooses that option. For UNEs affected by the D.C. Circuit's mandate, Verizon will give CLECs at least 90 days notice before moving them to non-UNE alternatives, pursuant to applicable law and interconnection agreements. During the notice period, Verizon will continue to provide the affected UNEs at TELRIC rates and will continue to accept new orders for these UNEs.

In addition, Verizon will not unilaterally increase the wholesale price it charges CLECs for UNE-P arrangements that are used to serve mass-market customers (those with fewer than 4 lines) for five months after the mandate issued – until November 15, 2004. CLECs serving these customers will also receive at least 90-days' notice of the implementation of this change.

Verizon has not yet sent any notices relating to the UNEs affected by *USTA II*. It has, however, provided notice of discontinuation of the UNEs that the FCC delisted in the *Triennial Review Order* through rulings that were either affirmed by the D.C. Circuit or not challenged on appeal. Specifically, on October 2, 2003, Verizon sent all CLECs a notice that it would discontinue the following UNEs 30 days from the date of the notice, unless a particular CLEC's contract specified a longer notice period: OCn transport; OCn loops; dark fiber transport between Verizon switches or wire centers and CLEC switches or wire centers; dark fiber feeder subloops; newly built fiber to the home;

overbuilt fiber to the home (subject to limited exceptions); hybrid loops, subject to exceptions for TDM and narrowband applications; and line sharing (which will be discontinued in accordance with the FCC's transition and "grandfathering" provisions in the TRO).

In addition, on May 18, 2004, Verizon sent notices to CLECs that after August 22, 2004, Verizon will no longer provide unbundled enterprise switching, including local circuit switching that is subject to the FCC's Four Line Cave-Out Rule, (and associated shared transport) where it can take such action under its interconnection agreements, but that Verizon will continue to make such services available on a resale basis under Section 251(c)(4) of the Act.[18] These notices also explained that Verizon is prepared to enter into commercial negotiations for alternative arrangements. If the CLEC does not opt for a commercial agreement, then after August 22, Verizon will begin billing these services at a rate equivalent to the Section 251(c)(4) resale rate.

The service alternatives that Verizon MA is making available, along with generous notice periods that exceed most contract requirements, will ensure uninterrupted service to CLECs and their customers. Verizon MA's transition plan is a fair, balanced and reasonable approach to conform the existing service arrangements to federal law. There is no need to consider imposing a different transition plan, and the

[18] On June 23, 2004, Verizon MA filed tariff revisions to implement the FCC's *TRO* determination that CLECs are not impaired without access to Enterprise Switching, including unbundled local circuit switching that is subject to the FCC's Four Line Carve-Out Rule, as well as the associated Shared Transport. The Department suspended the effective date of the tariff. Only a handful of CLECs obtain Enterprise Switching under the tariff; the overwhelming majority of CLECs obtain this former UNE under interconnection agreements.

Department has no authority to do so.[19] In particular, the Department cannot require Verizon to maintain UNEs upon rates, terms, or conditions beyond Verizon's voluntary commitments and the terms of its ICAs, nor can it perpetuate unbundling obligations (for any period, at any price) that have been eliminated by the federal courts or the FCC.

Briefing Question 2(f)

> In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport:
>
> (f) Should the Department proceed with a separate hot cuts investigation under state law? If so, may the record already compiled in D.T.E. 03-60 be incorporated into such a proceeding? Would the scope of such an investigation and standard of review of proposed hot cut processes be different from the investigation in D.T.E. 03-60?

Response to Briefing Question 2(f)

The D.C. Circuit vacated the entire range of authority that the *TRO* delegated to the states under the so-called "nine month case."[20] *See USTA II*, 359 F.3d at 564-65 As a result of the court's decision, ILECs are no longer bound to propose a batch process to handle the volume of hot cut migrations expected following the elimination of UNE-P. Thus, there is no basis or need for the Department to undertake the task it originally set for itself – evaluating whether Verizon's new batch hot cut process would have satisfied

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19 The Department's question mentions a transition plan under consideration in New York. That plan, however, derives from an approach Verizon itself proposed in 1998. It is tailored to New-York specific conditions, and the New York Commission has made clear that it would not override the terms of existing ICAs.

20 *See generally Triennial Review Order*, at ¶ 488 (subdelegating to state commissions the determination of whether batch hot cut process is necessary for a particular market within a 9 month period).

now-vacated FCC regulation 319(d)(ii) (although there is ample record evidence in D.T.E. 03-60 that the process would have done so).

Verizon will nonetheless soon begin to offer a batch hot cut process to CLECs in Massachusetts, and its affiliates will provide that process throughout the Verizon footprint. While (absent industry agreement) the Department may eventually be called upon to set rates for this process, at this point the most efficient course of action is to let matters develop without an active, litigated proceeding.

A proceeding has been underway in New York in which that state's PSC – beginning before and independently of the *TRO* – has been considering the feasibility and pricing of a bulk or batch hot cut process. The New York PSC found that Verizon's current manual hot cut process "is working," and "is well-refined and seems to do what is intended – at least at current volumes," but instituted its proceeding "to examine the issues arising from the process where loop migrations are done on streamlined (e.g., bulk) basis."[21]

Hearings were held in the New York case on January 13-14, 2004, and post-hearing briefing on the merits has been completed. Most of the CLEC participants in this case are also participating in the New York proceeding. The PSC is expected to address, among other things, whether Verizon's basic, "large job," and "batch" hot cut processes (the same processes proposed in Verizon MA's testimony submitted in this docket) are sufficiently "scalable" to handle the volume of hot cut orders that would be expected if

[21] *Proceeding on Motion of the Commission to Examine the Process, and Related Costs of Performing Loop Migrations on a More Streamlines (i.e., Bulk) Basis*, Case 02-C-1425 (N.Y. P.S.C., Order Instituting Proceeding Effective November 22, 2002) at 4.

the UNE platform were to be eliminated, as well as the costs and appropriate rates for each process. A substantive decision from the PSC is expected this summer.

The most reasonable course for the Department is to allow industry members to develop a uniform batch hot cut process throughout the Verizon states, building from the decisions made in the New York batch hot cut proceeding. Having a uniform batch hot cut proceeding in the Verizon states would have significant benefits for the industry. As AT&T's witness testified with regard to the batch hot cut issue in California,

> Verizon's California [batch hot cut] proposal is very similar to the proposal it filed in New York. This is not surprising. It makes sense for incumbent carriers, as they have in the past, to implement company wide wholesale service, practices, policies and operations support systems. This is not only more efficient for Verizon, but also for the CLECs who can develop their own systems to address only a single set of Verizon requirements and guidelines rather than different systems for each Verizon state.[22]

The same benefits would result in Massachusetts if the Department allows the opportunity for a uniform process to develop without active litigation at this point. After the process has been developed in New York, the Department can address any issues that still require Department action.[23]

By waiting for a New York decision, it is more likely that the parties will be able to reach agreement on a process for Massachusetts – or at least reduce the scope of the

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[22] *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, No. 95-04-043 and 95-04-044, Testimony of Robert V. Falcone on behalf of AT&T Communications of California, Inc. (U 5005), filed January 25, 2004 at 5.

[23] Presently, only two other Verizon states besides New York – New Jersey and California – have active hot cut proceedings. In both of those cases the evidentiary record was already developed before the issuance of the *USTA II* mandate. There is *no* other Verizon jurisdiction that is currently embarking on a *new* batch hot cut proceeding.

disputed issues that the Department must resolve. Moreover, to the extent the FCC issues interim rules that affect this Department's handling of the batch hot cut issue, the Department would also have time to consider the effect of any such requirements on this proceeding.[24]

Briefing Question 2(g)

> In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport:
>
> (g) What are Verizon's obligations pursuant to its wholesale tariff?

Response to Briefing Question 2(g)

Verizon MA intends to update its current interconnection tariff to conform to the *USTA II* decision and the FCC's *Triennial Review Order*. The Department must allow the tariff to be revised to reflect federal law and cannot impose any different or additional requirements on Verizon MA under the guise of a tariff.

Notwithstanding that fact, Verizon MA is not obligated, and indeed cannot be required, to maintain a state interconnection tariff on an ongoing basis. A recent U.S. Court of Appeals decision held that a state tariffing requirement is preempted because it

[24] In D.T.E. 01-20, the Department directed that Verizon MA file a less costly alternative to the basic hot-cut process. Verizon MA filed its WPTS proposal in response to the Department's directive, and the Department subsequently included consideration of this option in Track B of this proceeding. When the Department stayed the hot-cut track of the case in light of *USTA II*, it also stayed examination of the WPTS proposal. D.T.E. 3-60 – Tracks A and B, *Interlocutory Order on Motion to Stay of Verizon New England Inc., d/b/a Verizon Massachusetts* at 16 (April 2, 2004). Although recognizing that *USTA II* had no impact on its ability to address the WPTS process, the Department felt that, since there was still some uncertainty concerning the federal batch hot-cut requirement because of a potential stay of the *USTA II* decision, it would not continue with its review of only the WPTS process as long as that uncertainty existed. As discussed above, the Department should await the decision in New York before considering how to proceed with respect to hot-cut issues.

would "interfere with the procedures established by the federal act." *Wisconsin Bell, Inc. v. WorldCom, Inc. et al*, 340 F.3d 441, 444 (7th Cir. 2003).

In *Wisconsin Bell*, the court specifically stated that

> The district court was right to hold that the state's tariffing requirement is preempted. See *Verizon North, Inc. v. Strand, supra, 309 F.3d at 941*; [**8] *MCI Telecommunications Corp. v. GTE Northwest, Inc., 41 F. Supp. 2d 1157, 1178 (D. Ore. 1999)*; but cf. *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Services, Inc., 323 F.3d 348, 358-60 (6th Cir. 2003)*. The requirement *has* to interfere with the procedures established by the federal act. It places a thumb on the negotiating scales by requiring one of the parties to the negotiation, the local phone company, but not the other, the would-be entrant, to state its reservation price, so that bargaining begins from there. And it allows the other party to challenge the reservation price, and try to get it lowered, by challenging the tariff before the state regulatory commission, with further appeal possible to a state court--even though Congress, in setting up the negotiation procedure, explicitly excluded the state courts from getting involved in it. At the very least, the tariff requirement complicates the contractual route by authorizing a parallel proceeding.

Id.

The *Wisconsin Bell* court added that "[t]he tariff procedure short-circuits negotiations, making hash of the statutory requirement that forbids requests for arbitration until 135 days after the local phone company is asked to negotiate an interconnection agreement." 47 U.S.C. § 253(b)(1). Thus, "[t]he negotiation procedure established by the federal act provides the local phone company with a degree of protection that it would lack if the state commission could, by requiring the company to file a tariff that the commission might invalidate as unreasonable, enable would-be entrants to bypass the federally ordained procedure." Accordingly, any state requirement that Verizon MA file or maintain an interconnection tariff would be inconsistent with federal law.

Briefing Question 3

> What steps, if any, should the Department take to encourage carriers to enter voluntarily into agreements with respect to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport that promote efficiency, fairness, rate continuity, and earnings stability for all parties?

Response to Briefing Question 3

Verizon agrees with the FCC and the NTIA that commercial negotiations, rather than litigation or regulation, are "the best way to achieve greater market-based competition within the telecommunications industry."[25] In fact, Verizon had been trying to engage its competitors in such negotiations for some time before the FCC's March 2004 letter urging the industry to do so, and is actively engaged in negotiations with numerous CLECs, as noted above.

The Department can and should encourage carriers to "enter voluntarily" into commercial arrangements. The only way to advance this objective is for the Department to promptly make clear that it will not interfere in private negotiations by trying to impose filing and/or approval requirements on the agreements that result from these negotiations.

As Verizon explained in response to questions 1-1 and 1-2(d), above, commercial agreements have nothing to do with unbundling obligations under Section 251(c) and so are not subject to the filing and approval requirements of Section 252. Likewise, no state law requires the filing of non-251 agreements. Moreover, assuming state commissions

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[25] Letter from Michael D. Gallagher, Acting Asst. Secretary for Comm. and Info., National Telecomm. and Info. Admin., to FCC Chairman Michael K. Powell, dated June 16, 2004. *See* Attachment I.

had the authority to review or approve non-251 agreements, which they do not, applying filing and approval requirements to commercial agreements would introduce regulatory uncertainty into business-to-business discussions and would frustrate the commercial negotiations that the FCC has attempted to jump-start.

For instance, if issues from commercial negotiations could be submitted to state commissions for resolution, parties will be less likely to negotiate in the first place, as they recognize that the ultimate decision whether to accept particular terms will be largely out of their hands. Similarly, if state commissions could review and potentially modify voluntary commercial agreements, parties would inevitably attempt to use the regulatory process to improve further on the terms of a negotiated deal, thus diminishing their ability to lock one another in at the bargaining table. Interjecting state commissions into the process of defining commercial arrangements would circumscribe the parties' ability to retain control over the terms of their agreements, and would thus chill commercial negotiations. Private, arms-length negotiations, not regulatory intervention, will best produce service arrangements that are fair, efficient, and otherwise in the public interest.

Briefing Question 4

> Should the Department seek a declaratory ruling from the FCC as to whether the BA/GTE Merger Order requires Verizon to continue to provide mass market switching, UNE-P, dedicated transport, and high capacity loops at TELRIC?

Response to Briefing Question 4

No. To the extent that the merger conditions imposed an independent obligation upon Verizon to provide UNEs, that obligation expired of its own force in July 2003, 36 months after the Bell Atlantic/GTE merger closed, pursuant to the Merger Order's sunset

provision. *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd 14331, ¶ 64 (2000). As the Rhode Island arbitrator observed, "[t]he sun has set on VZ's obligation to provide UNEs under the Bell Atlantic/GTE Merger Order."[26]

Even if the merger condition had not sunset already, that condition would have ceased to be effective because Verizon MA's obligation to provide UNEs under the FCC's orders in the *UNE Remand* and *Line Sharing* proceedings lasted only "until the date of any final and non-appealable judicial 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." *Id*. at 14180, ¶ 316. The FCC further stated that "[t]he provisions of this Paragraph shall become null and void and impose no further obligation on Bell Atlantic/GTE after the effective date of final and non-appealable [FCC] orders in the *UNE Remand* and *Line Sharing* proceedings, respectively." *Id*. at 14316, App. D, ¶ 39.

As recognized by the FCC, both the *UNE Remand Order* and the *Line Sharing Order* were struck down by the D.C. Circuit's decision in *United States v. Telecom Ass'n. v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"). That decision, which took final effect on February 20, 2003, constitutes a final and non-appealable judicial decision that the prior UNE rules had no force and effect as of the date that certiorari of the *USTA I* decision was denied, March 24, 2003. *See Worldcom, Inc. v. U.S. Telecom Ass'n*, 538 U.S. 940 (2003) (denying certiorari).

In its *Triennial Review Order*, 18 FCC Rcd 16978 (2003), the FCC held that

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[26] *Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements,*

"once the *USTA* decision" – which the FCC recognized had vacated both the *UNE Remand Order* and the *Line Sharing Order* – "is final and no longer subject to further review, or the new rules adopted in this Order become effective, *the legal obligation upon which the existing interconnection agreements are based will no longer exist*." *Id.* at 17406, ¶ 705 (emphasis added). The FCC further stated that it would be "unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order." *Id.* Indeed, the FCC emphasized that *any* delay in implementing the *Triennial Review Order* would "have an adverse impact on investment and sustainable competition in the telecommunications industry." *Id.* at 17405, ¶ 703. It defies common sense to argue (as the CLECs have) that the FCC intended to retain investment-dampening, anticompetitive rules for Verizon, the largest RBOC.

Because it is clear that the *Bell Atlantic/GTE Merger Order* does not perpetuate unbundling obligations the FCC removed in the *Triennial Review Order* there is no reason to seek (and wait probably a very long time for) a declaratory ruling to that effect from the FCC. The Department cannot, in any event, compel Verizon to continue providing delisted UNEs until the FCC issues such a ruling, for all the reasons discussed above.

Procedural Arbitration Decision, Docket No. 3588, at 13 (April 9, 2004).

Briefing Question 5

> Is the D.C. Circuit Court's decision in USTA II a "change of law" affecting carriers' existing interconnection agreements?

Response to Briefing Question 5

As discussed above, the FCC's attempts to expand unbundling beyond the reach of the Act have been struck down by the federal courts *three times*. Accordingly, there have ***never*** been *lawful* Section 251 unbundling rules binding the ILECs and obligating them to provide local mass market switching, high capacity loops and interoffice transport, and dark fiber as UNEs. As a result, there is no "change of law" to eliminate previously lawful rules requiring provision of UNEs, but merely an affirmation that there have never been lawful UNE rules to change. As Verizon MA explained above, it does not waive this argument by choosing to follow the administrative processes set forth in its interconnection agreements that apply to actual changes in law.

Briefing Question 6

> Does § 271 of the Telecom Act require Verizon either directly or indirectly, by virtue of the trade-offs under the Act, to continue to provide delisted UNEs at TELRIC?

Response to Briefing Question 6

No. Under the Act and the FCC's implementing rules, TELRIC pricing applies only to network elements unbundled pursuant to Section 251(c)(3) of the Act . If there is no longer any unbundling obligation under Section 251(c)(3), then there is no TELRIC pricing obligation under Section 252(d). As explained above, the FCC, and only the FCC, may make the impairment determinations necessary to designate ILEC network facilities as UNEs. In the absence of any lawful impairment determination, there can be no TELRIC pricing requirement.

In its *Triennial Review Order*, the FCC expressly declined to use Section 271 to expand the Section 251 unbundling obligations to require TELRIC pricing of elements that must be unbundled pursuant to Section 271: "TELRIC pricing for checklist network elements that have been removed from the list of Section 251 UNEs is neither mandated by statute nor necessary to protect the public interest." *Triennial Review Order*, at ¶¶ 656, 659. The applicable pricing standard for Section 271 services is instead just, reasonable and nondiscriminatory rates, as set forth in Sections 201 and 202 of the Telecom Act. *Id*. at ¶¶ 662-63 (citing *UNE Remand Order*, 15 FCC Rcd at 3905, ¶ 470); *see USTA II*, 359 F.3d at 589-90 (rejecting CLECs' argument that independent Section 271 unbundling provisions incorporate requirements of Sections 251 and 252, including TELRIC pricing). The Department itself has acknowledged that Section 271 services are not subject to TELRIC-based pricing. *See* D.T.E. 03-59, *Order*, at 7 (January 23, 2004). The Department cannot, for any reason, countermand the FCC's directive not to apply TELRIC pricing to Section 271 unbundling – let alone because of a feeling that unspecified "trade-offs under the Act" might "indirectly" justify TELRIC pricing.

Finally, the Department has no jurisdiction to review pricing for Section 271 services. Section 271(d)(6) explicitly grants exclusive enforcement authority to the FCC to ensure that Verizon MA continues to comply with the market opening requirements of Section 271. *Triennial Review Order*, at ¶¶ 664-65. Indeed, the Department in D.T.E. 03-59 recognized that it "does not have jurisdiction to enforce Verizon's unbundling obligations pursuant to Section 271. See 47 U.S.C. § 271(d)(6). The proper forum for enforcing Verizon's Section 271 obligations is before the FCC." D.T.E. 03-59, *Order* at 19 (November 25, 2003).

CONCLUSION

For the foregoing reasons, the Department cannot lawfully re-impose unbundling obligations that have been eliminated by the FCC or federal courts, nor can it interfere with the orderly implementation of the *USTA II* mandate in accordance with the terms of Verizon MA's interconnection agreements.

Respectfully submitted,

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Dated: July 30, 2004