COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

AT&T's MOTION TO STRIKE, OR IN THE ALTERNATIVE FOR SUSPENSION AND INVESTIGATION OF, VERIZON'S JUNE 23, 2004 TARIFF FILING SEEKING TO ELIMINATE KEY PROVISIONS OF VERIZON'S TARIFF DTE MA No. 17

Jeffrey F. Jones
Kenneth W. Salinger
Ruth T. Dowling
John T. Bennett
Michael S. Rabieh
Julia E. Green
PALMER & DODGE LLP
111 Huntington Avenue
Boston, MA 02199
617.239.0561
ksalinger@palmerdodge.com

Jay E. Gruber
AT&T Communications
of New England, Inc.
99 Bedford Street, 4th Floor
Boston, MA 02111
617.574.3149
jegruber@lga.att.com

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Introduction

AT&T Communications of New England, Inc. ("AT&T"), on behalf of itself and its affiliates including ACC National Telecom Corp. and Teleport Communications Boston, respectfully urges the Department to reject Verizon's June 23, 2004, proposal to amend Part B of Tariff DTE MA No. 17. Verizon seeks to eliminate the availability of unbundled switching and the unbundled network element platform ("UNE-P") for use by CLECs in serving: (i) small business customers that order four or more DS0 lines out of any of eleven major central offices in eastern Massachusetts; and (ii) larger "enterprise" customers, *i.e.* customers that order DS1 or ISDN-PRI lines. These proposals should be rejected on the ground that they are unlawful.

In the alternative, AT&T hereby petitions the Department for the suspension and investigation of these tariff proposals. Verizon's tariff proposals would significantly harm the Massachusetts economy by denying Massachusetts businesses the important benefits that flow from robust competition in the provision of critical wireline telephony services. Since there are also significant reasons to believe that Verizon's proposals are improper, they should not be allowed to take effect until after the Department has the opportunity to conduct a full investigation and evaluation of them.

Summary of Verizon's Tariff Proposal

Verizon's tariff proposal would make it impossible for CLECs to use UNE-P to offer competitive services to many of the most important large and small businesses in Massachusetts. It would do so in two ways.

First, Verizon seeks to stop providing unbundled switching or UNE-P for larger "Enterprise" customers that use DS1 or ISDN-PRI lines. Specifically, Verizon proposes to stop accepting orders for any DS1 DID/DOD/PBX ports or Primary Rate ISDN ports, or for any features, switch usage, shared or dedicated transport, or UNE-P arrangements associated with

such ports. According to the tariff language proposed by Verizon, it would stop accepting new orders for such elements or combinations of elements as of August 22, 2004, and any existing such elements or combinations would be replaced with unspecified "alternative arrangements" at unspecified but presumably much higher wholesale rates.[1]

Second, Verizon also seeks to reclassify certain mass market customers as if they were now enterprise customers, and on that basis to deny the use of unbundled switching to serve them. Specifically, Verizon seeks to implement a so-called "4-line carve out" which would push customers that use four or more DS0 lines out of the "mass market," and begin for the first time to treat these small business customers as if they were part of the market comprised of large "enterprise" customers. Verizon seeks permission to refuse to provide unbundled switching and related functionalities for small business customers with four or more DS0 lines served out of the Verizon central offices located at Brockton, Boston-Back Bay, Boston-Bowdoin, Boston-Franklin Street, Boston-Harrison Street, Cambridge-Bent Street, Cambridge-Ware Street, Framingham, Lowell, Lawrence, and Natick.[2]

Unless the tariff proposals are rejected or at least suspended before then, the new tariff language would take effect on July 23, 2004, and Verizon would stop honoring its legal obligation to provide these UNEs effective August 22, 2004.

Argument

I. VERIZON'S TARIFF FILING IS A CYNICAL AND INAPPROPRIATE ATTEMPT TO UNDERMINE THE DEPARTMENT'S AUTHORITY AND TO FLOUT THE DEPARTMENT'S JUNE 15 LETTER ORDER.

Several weeks ago, in a letter order dated June 15, 2004, in Docket 03-60, the Department concluded that for now "it is unnecessary" to act on emergency CLEC motions

[1] *See* Verizon's Proposed Tariff DTE MA No. 17 ¶¶ 6.1.1.A and 6.1.1.A.1.
[2] *See* Verizon's Proposed Tariff DTE MA No. 17 ¶¶ 6.1.1.A, 6.1.1.A.2, and 6.1.1.A.3.

seeking an order requiring Verizon to continue to provide all existing UNEs and UNE combinations at current rates, terms, and conditions, for both existing and new customers unless and until Verizon seeks and obtains Department approval to do otherwise. The Department reached this conclusion based on Verizon's assurance that it would continue to provide all existing UNEs and UNE combinations for at least 90 days.[3] The Department found that Verizon's 90-day assurance "provides at least short-term resolution to CLECs' concerns," agreed "that a 90-day maintenance of the status quo will allow all parties concerned to focus on continued negotiations," and "urge[d] all parties to continue good faith negotiations that may lead to commercially negotiated agreements."[4]

The Department concluded its June 15 letter order by requesting "further expression of the parties' views on issues raised in both Verizon's and CLECs' responses to the emergency motions," and established a briefing schedule – with initial comments due on July 30, and replies due by August 10 – designed to permit the Department to grapple further with these issues during the 90-day abeyance period promised by Verizon. The Department asked the parties to address a series of specific briefing questions, including questions about whether Verizon's Alternative Regulation Plan implicitly requires Verizon to continue to provide existing UNEs and UNE combinations at TELRIC-based rates, whether Verizon's obligations as a carrier-of-last-resort require it to continue to offer UNEs, and whether Verizon has other obligations under Massachusetts law to provide UNEs.

Verizon's tariff filing is a deliberate, cynical, and improper attempt to flout the Department's authority. Verizon rushed to make this tariff filing 8 days after the Department's

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[3] *See* Docket D.T.E. 03-60, Letter Order dated June 15, 2004, at 2.

[4] *Id.*

June 15 Letter Order, trying to slip through tariff amendments that would eliminate key aspects of UNE-P availability before the Department had the opportunity to investigate whether that is either permitted or desirable.

AT&T respectfully urges and requests that the Department not countenance such impertinence by Verizon. For the reasons set forth below, it would be appropriate for the Department to reject Verizon's tariff proposal on the merits. Alternatively, the Department should suspend Verizon's tariff filing, enter the standstill order requested in AT&T's still-pending emergency motion in Docket D.T.E. 03-60, and conduct a thorough investigation of the important issues identified in the briefing questions accompanying the June 15 Letter Order.

II. VERIZON'S PROPOSED ELIMINATION OF UNBUNDLED SWITCHING FOR CERTAIN SMALL BUSINESS CUSTOMERS AND FOR ALL LARGE ENTERPRISE CUSTOMERS WOULD VIOLATE VERIZON'S MASSACHUSETTS ALTERNATIVE REGULATION PLAN, AND HAS NOT BEEN SHOWN TO BE CONSISTENT WITH MORE GENERAL MASSACHUSETTS LAW AND TELECOMMUNICATIONS POLICY.

A. Verizon's Tariff Proposal Would Violate Its Alternative Regulation Plan, Which Is Premised on the Continued Ability of CLECs to Obtain UNE-P from Verizon at TELRIC-Compliant Rates to Serve All Business Customers.

Verizon's proposed elimination of unbundled switching and UNE-P for enterprise customers, and the carving-out from the mass market and into the enterprise market of small business customers who order at least four DS0 lines in certain central offices, would fundamentally change the telecommunications market landscape in Massachusetts. Doing so would not only threaten Massachusetts businesses and the Massachusetts economy with great harm, it would also be inconsistent with the entire premise of the pricing flexibility won by Verizon in its new Alternative Regulation Plan. Verizon's tariff proposal should be rejected on the ground that it is inconsistent with the Department's orders in Docket 01-31.

In Docket 01-31, Verizon successfully argued that it should be given unlimited upward pricing flexibility for its retail service offerings to business customers. To achieve this result,

Verizon represented that "the ability to lease UNEs allows CLECs to increase or decrease their supply of telecommunications services at will in response to price changes by Verizon or any other market conditions," and that as a result it cannot freely exercise any market power in providing retail services.[5] With respect to retail business services, the Department agreed. It found that traditional rate of return regulation was no longer necessary "for those retail business services that CLECs can compete against with their own UNE-based retail services."[6] The Department limited Verizon's pricing flexibility to those retail services that were competitive on a UNE basis.[7] The Department found that "by leasing UNEs, CLECs can enter the market with the same costs as Verizon (the incumbent firm), one of the two prerequisites for a market to be contestable…."[8]

If Verizon were allowed to do away with unbundled switching and UNE-P for small business customers using four or more DS0 lines served out of certain central offices, as well as for large enterprise customers using DS1 or ISDN-PRI loops, large portions of the Massachusetts telecommunications market for service to business customers will no longer be "contestable" using UNEs. The competitive environment that the Department found necessary to permit Verizon increased retail pricing flexibility will largely cease to exist.

Since Verizon took the position in Docket 01-31 that CLECs could continue to use UNE-P to contest the market for retail business services, it should not be permitted reap the benefits of the pricing flexibility it achieved in that docket while disavowing the position it took regarding the continued availability of UNE-based competition. Indeed, Verizon should be

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[5] *See Investigation by the Department on its Own Motion into the Appropriate Regulatory Plan to Succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' retail intrastate telecommunications services in the Commonwealth of Massachusetts*, D.T.E. Docket No. 01-31, Phase I Order at 39 (May 8, 2002).

[6] D.T.E. 01-31-Phase I, at 89.

[7] D.T.E. 01-31-Phase I, at 91.

estopped from seeking to take away the ability of CLECs to use UNE-P to contest Verizon's offering of retail business services in Massachusetts.[9]

At the very least, given the significant anti-competitive impact of Verizon's tariff proposal, the Department should suspend its implementation and investigate whether the Alternative Regulation Plan implicitly requires Verizon to continue providing UNE-P to business customers without any DS-0 line cutoff, in exchange for the retail pricing flexibility granted by the Department in Docket No. 01-31. Simply allowing Verizon to push forward with a tariff amendment adopting the carve-out now would permit the Company to use its retail rate flexibility to drive customer costs upward in the face of slackened competition. Such a result would irretrievably stunt the development of local services competition within Massachusetts and run counter to the pro-competitive and pro-consumer policies the Department sought to promote in adopting Verizon's Alternative Regulation Plan. At the very least, the Department should suspend adoption of Verizon's proposal and investigate whether its adoption would necessitate reverting back to rate of return regulation for applicable Verizon retail offerings.

Any claim by Verizon that enforcement of its Alternative Regulation Plan, including its clear commitment to continue to provide UNEs and UNE combinations as the quid pro quo for receiving full upward pricing flexibility on its retail business services, is preempted by the *USTA II* decision or other federal law would be without merit. AT&T has previously demonstrated that the Department retains full authority under Massachusetts law to impose

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(continued...)

[8] D.T.E. 01-31-Phase I, at 59-60.

[9] *See Niles-Robinson v. Brigham and Women's Hospital*, 47 Mass. App. Ct. 203, 206-207 (1999) (barring plaintiff under the doctrine of judicial estoppel from asserting in her civil action a position contrary and inconsistent to the position she took before the Department of Industrial Accidents with respect to applicability of the workers' compensation act to her physical condition). *See also Fay v. Federal Nat. Mortg. Ass'n*, 419 Mass. 782, 787 (1995) ("Judicial estoppel, or 'preclusion of inconsistent positions,' is an equitable doctrine which precludes a party from asserting a position in one legal proceeding which is contrary to a position it has already asserted in another.").

unbundling requirements in addition to those imposed under federal law, and that such state law power has not been preempted.[10] But enforcement of Verizon's voluntary commitments under its Alternative Regulation Plan is even easier. As the Department found in the *Consolidated Arbitrations* docket, even if it were not prepared to impose additional unbundling requirements under Massachusetts law (which it has the full power to do) it need not hesitate to order Verizon to comply with a voluntary commitment to keep providing certain UNEs or UNE combinations.[11] Furthermore, enforcement of the obligations that Verizon must meet as a condition of its retail rate flexibility under its Alternative Regulation Plan, including its obligation to keep providing UNEs and UNE combinations at TELRIC-based rates, falls within the Department's exercise of its traditional intrastate retail ratemaking authority, which is expressly protected from preemption by 47 U.S.C. § 152(b).

B. Consistent with Prior Department Orders, Verizon Should Be Required to Continue to Provide UNE-P, in Accord With Its Binding Voluntary Commitment, Pending Further Investigation of Whether Elimination of UNE-P for Most Business Customers Would Be Inconsistent With the Department's Pro-Competition Policies.

1. The Department Previously Barred Verizon From Unilaterally Stopping to Provide UNE-P.

In the *Consolidated Arbitrations* dockets, the Department found that the refusal by Verizon (then Bell Atlantic) to provide the combination of UNEs known as UNE-P "would impair the successful introduction of competition in Massachusetts," and thus would be inconsistent with the Department's well-established policy "to create efficiency-enhancing conditions that would allow local exchange competition to develop and to deliver price and

[10] *See* "AT&T's Emergency Motion For An Order To Protect Consumers By Preserving Local Exchange Market Stability," filed in Docket D.T.E. 03-60 on May 28, 2004, at 19-25, which AT&T incorporates herein by reference.

[11] D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-J Order at 9-10, and Phase 4-M Order at 9 (1999)

service benefits to customers."[12] Based on this finding, the Department "noted that [Verizon's] refusal to provide UNEs in a way that contributes to efficiency and in a manner conducive to the development of local exchange competition could raise a serious problem in the Department's review of any subsequent request by [Verizon for] approval to offer inter-LATA long distance service under Section 271 of the Act."[13]

In response to this strong leadership by the Department, in December 1999 Verizon announced "that it will voluntarily" provide the UNE-P combination "throughout Massachusetts,"[14] and asserted that "no further Department action [was] required" regarding this issue.[15] AT&T urged the Department to "issue an order memorializing [Verizon's] commitment to provide UNE-P," pointing out that no CLEC could make viable business plans if faced with the threat that Verizon could unilaterally stop providing UNE-P at TELRIC-based rates at any time.[16]

The Department explicitly agreed with AT&T "that it is unacceptable for [Verizon] to offer [UNE-P] and to have the unilateral right to withdraw it without review by the Department."[17] It explained that "[t]he uncertainty created by such a provision would undermine its value in supporting the development of conditions for a competitive local exchange market in Massachusetts."[18] The Department therefore ordered that Verizon must continue to provide

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[12] D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-J Order at 2 (1999) (quoting from the Phase 4-E Order at 12-13. *See also Id.*, Phase 4-M Order at 2 (1999) (reiterating finding that Verizon's "refusal to provide such combinations would impair the successful introduction of competition in Massachusetts.")

[13] *Id.*, Phase 4-J Order at 3 (citing Phase 4-E Order at 13-15).

[14] *See* Section V.B, beginning at page 17 below, for a discussion of Verizon's voluntary commitment and the Department's order regarding the prior "4-line carve out" under the FCC's UNE Remand Order.

[15] *Consolidated Arbitrations Docket*, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-P Order at 6 (2000).

[16] *Id.*, Phase 4-P Order at 7.

[17] *Id.*, Phase 4-P Order at 8.

[18] *Id.*, Phase 4-P Order at 8-9.

UNE-P under the terms and conditions set forth in Verizon's voluntary proposal.[19] It emphasized that with Verizon obligated to continue to provide UNE-P under both its wholesale tariff and its interconnection agreements, Verizon "cannot act unilaterally" to stop providing UNE-P at TELRIC-based rates.[20]

Consistent with this series of orders, the Department should not permit Verizon unilaterally to terminate the availability of UNE-P for retail business customers, especially without further investigation into the anti-competitive ramifications of Verizon's tariff proposal.

2. Verizon Has Not Made Any Showing that its Proposed Tariff Would Be Consistent with Massachusetts Telecommunications Policy, Including Verizon's Broad Obligations as the Carrier of Last Resort.

As noted above, the Department's June 15, 2004 letter order in Docket No. 03-60 made clear that further investigation is required to determine whether Verizon's obligations as "carrier of last resort" carries with it an obligation to continue to provide key UNEs and UNE combinations. The Department's concern is well-founded.

In D.P.U. 1731, the Department designated Verizon as a carrier of last resort with respect to local exchange services in Massachusetts.[21] The Department defined a carrier of last resort as 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."[22] While that order was principally concerned with ensuring universal telephone service to retail customers throughout Massachusetts, including in rural areas and in areas where interconnection technology lagged, its principles can and should be applied to

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[19] *Id.*, Phase 4-P Order at 9, 14.

[20] *Id.*, Phase 4-P Order at 9.

[21] *See Petition of the Attorney General for a Generic Adjudicatory Proceeding Concerning Intrastate Competition by Common Carriers in the Transmission of Intelligence by Electricity, Specifically with Respect to Intra-LATA Competition, and Related Issues*, D.P.U. 1731 (October 18, 1985).

[22] D.P.U. 1731 at 71.

wholesale consumers.[23] Indeed, the Department has already found that the recognition of a carrier of last resort remains a necessary concept even in an environment where some degree of wholesale competition exists.[24] Given that Verizon is the only carrier capable of providing access to UNEs throughout large portions of Massachusetts, it does serve as a carrier of last resort for wholesale customers. Verizon's tariff proposal should not be considered for approval, therefore, until the Department has had full opportunity to investigate the Company's obligations under state law to provide UNEs on a wholesale basis as a carrier of last resort.

As the Department has previously found, it has the power to investigate the unbundling of and interconnection with Verizon's network elements under state law.[25] At the very least, the Department would need to exercise this prerogative before allowing Verizon to suddenly impose an exception to its unbundling obligation that would generate widespread instability within the Massachusetts telecommunications market.

III. THE FCC REPLACED THE OLD "4-LINE CARVE OUT" WITH AN ECONOMIC TEST TO DEFINE THE CUTOFF BETWEEN THE MASS MARKET AND THE ENTERPRISE MARKET.

A. FCC Rules No Longer Contain Any 4-Line Carve Out, and Do Not Permit ILECs to Implement Such a Carve Out In States Like Massachusetts Where It Was Never Instituted Prior to Issuance of the *Triennial Review Order*.

Contrary to Verizon's contentions, the FCC's recent *Triennial Review Order*[26] does not envision an indefinite extension of the four-line unbundling exception created for certain

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[23] D.P.U. 1731 at 71.

[24] *See In Re Pricing and Rate-making Treatment For New Electric Generating Facilities Which Are Not Qualifying Facilities*, D.P.U. 86-36-C (May 12, 1988).

[25] *See* D.P.U. 94-185, *Vote to Open Investigation* at 3-5 (Jan. 6, 1995).

[26] *In the matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Federal Communications Commission, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, and *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, "Report and Order and Order on Remand and Further Notice of Proposed Rulemaking," No. FCC 03-36, 18 FCC Rcd. 16,978 (released August 21, 2003) (the "*Triennial Review Order*" or the "*TRO*").

metropolitan serving areas (MSAs) by the FCC's 1999 *UNE Remand Order*.[27] Rather, the *TRO* merely directs states to maintain a four-line carve-out if such an exception has been previously enforced in an effort to maintain market stability while new rules concerning the scope of unbundling for mass market switching are determined.[28] Since the four-line carve-out has never been adopted in Massachusetts, suddenly enforcing it by way of a tariff amendment runs directly counter to the intent of the *TRO* by creating unnecessary instability within the telecommunications market pending the development of new unbundling rules.

In the *UNE Remand Order*, the FCC had found that where CLECs "serve customers with four or more lines in density zone 1 in the top 50 metropolitan statistical areas ['MSAs']. . .[and ILECs] have provided nondiscriminatory, cost-based access to the enhanced extended link (EEL) throughout density zone 1," ILECs were not required to unbundle local circuit switching for CLEC service.[29] Thus, the *UNE Remand Order* defined the mass market within density zone 1 in these MSAs as excluding "end-users with four or more voice grade (DS0) equivalents or lines."[30]

The *TRO* replaced this former bright-line rule with an economic test: the FCC indicated that the cutoff between the mass market and the enterprise market should be based on "the point where it makes economic sense for a multi-line [DS0] customer to be served via a DS1 loop."[31] Thus, the regulations promulgated with the *TRO* dropped the old 4-line cutoff rule, and instead provided that this cutoff "shall take into account the point at which the increased revenue

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[27] *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, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

[28] *TRO* ¶ 525.

[29] *UNE Remand Order* ¶ 278. The rules establishing specific unbundling requirements were subsequently vacated in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("USTA I"). *See TRO* ¶¶ 31-33.

[30] *UNE Remand Order*, Appendix C, proposed 47 C.F.R. § 51.319(c)(1)(B).

opportunity at a single location is sufficient to overcome impairment and the point at which multiline end users could be served in an economic fashion by higher capacity loops and a carrier's own switching and thus be considered part of the DS1 enterprise market."[32]

Recognizing the possibility that a proper economic analysis could define the cutoff between the mass market and the enterprise market in a manner different from what the FCC had done in the *UNE Remand Order*, the *TRO* authorized the maintenance of the four-line carve-out only on an "interim" basis and only "to avoid service disruptions that may result from expanding and then possibly reducing the eligibility for local circuit switching[.]"[33] In extending the 4-line carve-out's applicability, the FCC noted that the exception was "adhered to in very few areas of the country" and directed states to "make a finding whether or not the carve out was in effect."[34]

The four-line carve-out has never been implemented in Massachusetts because Verizon neither sought nor obtained approval for alternative pricing for unbundled switching for such arrangements; Verizon therefore remains obligated to provide UNE-P for all customers.[35] Thus, Verizon's attempt in its tariff proposal for the first time to treat customers ordering four or more DS0 lines as part of the enterprise market is neither required nor authorized by current FCC rules. Verizon is incorrect when it suggests that the *TRO* permits it to begin only now to enforce a 4-line carve out in the absence of a proper economic analysis regarding the cutover between the mass market and the enterprise market.

(continued...)

[31] *TRO* ¶ 497.

[32] *TRO*, Appendix B, proposed 47 C.F.R. § 51.319(d)(iii)(B)(4).

[33] *TRO* ¶ 525.

[34] *TRO* n. 1545.

[35] *Consolidated Arbitrations Docket*, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-P Order, at 10 (2000).

B. Since Verizon Has Admitted That All UNE-P Arrangements Involving DS0 Loops Are Within the Mass Market, Verizon Should Not Be Permitted to Treat Customers With Four or More DS0 Lines As Enterprise Customers.

Furthermore, Verizon's new-found interest in the now-superceded 4-line carve out cannot be squared with the contrary position it took in Docket 03-60. Verizon should be estopped from advocating the imposition of the *UNE Remand Order*'s four-line carve out given its position, outlined just months ago, supporting a mass market definition that would have included all customers served at the DS0 level – regardless of the number of lines. Verizon should not be permitted to assert a contrary position now, especially one so singularly to its benefit.

In Pre-Filed Testimony submitted in Docket D.T.E. 03-60, Verizon argued that "[i]f the CLEC has made the economic decision to treat the customer as a mass market customer and to serve the customer location using voice-grade loops, then the DS0 lines at that customer location should be counted as [a mass market customer] for the purposes of the switching impairment analysis."[36] Verizon opined that "[t]his objective test is more reliable, and grounded in the realities of the marketplace, than an arbitrary 'cutoff' at a particular number of lines, regardless of whether the customer is actually being served as a DS1 customer."[37] Having previously conceded that all customers served by DS0 lines fall within the mass market, no matter how many DS0 lines they use, Verizon may not now argue the contrary position and seek to treat end-users for four or more DS0 lines as if they were large enterprise customers.[38] Verizon, having made its position on the correct classification of mass market versus enterprise customers so

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[36] Docket D.T.E. 03-60, Direct Testimony of John Conroy and John White on Behalf of Verizon Massachusetts, at 15, lines 13-17 (filed November 14, 2003).

[37] *Id*. at 14, lines 16-19.

[38] *See Niles-Robinson v. Brigham and Women's Hospital,* 47 Mass. App. Ct. 203, 206-207 (1999) (barring plaintiff under the doctrine of judicial estoppel from asserting in her civil action a contrary and inconsistent position to the position she took before the Department of Industrial Accidents with respect to applicability of the workers' compensation act to her physical condition).

clear seven months ago in DTE 03-60, should not be permitted to make a 180-degree turn to assert a completely contradictory position now.

IV. NO "CARVE OUT" OF MASS MARKET CUSTOMERS WITH FOUR OR MORE DS0 LINES CAN BE ALLOWED SINCE VERIZON HAS FAILED TO OFFER ACCESS TO EELS AT COST-BASED RATES.

Even in those few places where the old *UNE Remand* 4-line carve out rule was implemented and thus temporarily grandfathered, ILECs may not enforce that exception to the definition of the mass market unless they provide unfettered and non-discriminatory access to EELs. The FCC explicitly reiterated in the *TRO* its earlier conclusion that incumbent carriers may not be exempted from unbundling local switching for service to customers with four or more lines in density zone one of the top fifty MSAs unless *the incumbent also offers nondiscriminatory access to EELs at cost-based rates*.[39]

In Massachusetts, Verizon has refused to convert special access trunks to EELs or to provision new EELs in accordance with the FCC's service eligibility criteria set forth in the *TRO*.[40] Indeed, Verizon has made clear that, if permitted to get away with it, Verizon intends to stop allowing CLECs to purchase any EELs at all in Massachusetts. In a letter to Michael Eisenberg dated June 18, 2004, Verizon stated that it intends to file further tariff proposal to eliminate the availability of unbundled dedicated transport at the DS1 and DS3 levels, and thus also to eliminate the availability of EELs consisting of DS1 or higher capacity loops and transport. Under the old 4-line carve-out that Verizon now wishes to invoke for the first time, Verizon cannot eliminate access to unbundled switching while refusing to provide EELs.

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[39] *See TRO* ¶ 497.

[40] *See* Letter to John Criscitiello from Pat Anderson (Verizon-New York) (January 9, 2004) , regarding conversion of special access arrangements to EELs. (A copy of this letter has been provided to the Department as Exhibit C to AT&T's petition to admit the issue of EELs conversions to the accelerated docket.)

In addition, Verizon has refused to amend its Tariff 17 to comply with the new *TRO* service eligibility criteria on the ground that they should be "negotiated" in an ICA. Verizon conveniently insists that a change of its obligations effected by the *TRO* (and to CLECs' ultimate benefit) requires amendment to Verizon-CLEC ICAs before it can be implemented. On the other hand, Verizon has filed this tariff proposal to implement unilaterally – without amendment to its ICAs – changes in its obligations (and to its benefit) that it purports are required by the *TRO*. This maneuver is one-sided and unscrupulous, and should not be permitted.

V. IN ANY CASE, VERIZON MUST CONTINUE TO PROVIDE UNBUNDLED SWITCHING AND UNE-P UNDER SECTION 271, AND PER DEPARTMENT ORDER VERIZON MAY NOT STOP PROVIDING UNE-P AT TELRIC RATES UNLESS AND UNTIL THE DEPARTMENT APPROVES NEW JUST AND REASONABLE RATES FOR SECTION 271 SWITCHING.

Verizon's unilateral attempt in its tariff filing to stop providing unbundled switching for certain customers ordering four or more DS0 lines violates both Verizon's continuing obligations under Section 271 of the Telecommunications Act and the Department's Phase 4-P Order (dated January 10, 2000) in the *Consolidated Arbitrations* Docket.[41] Verizon's tariff proposal proclaims that after August 22, 2004 (and except where otherwise required under interconnection agreements), it will implement changes that affect CLEC enterprise customers as well as small business customers ordering four or more DS0 lines from certain central offices. Verizon proclaims, first, that it will no longer provision new orders for unbundled local circuit switching for such customers and, second, that it will replace existing switching arrangements for such customers with "alternative arrangements," including alternative pricing arrangements.[42] The

[41] D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, *Consolidated Petitions of New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications of Massachusetts, Inc., AT&T Communications of New England, Inc., MCI Telecommunications Company, and Sprint Communications Company, L.P., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration of Interconnection Agreements Between Bell Atlantic-Massachusetts and the Aforementioned Companies*.

[42] Verizon Letter (June 23, 2004), at 2; Tariff Proposal § 6.1.1.A.

first announced change violates Section 271 of the Telecommunications Act; the second violates both the Department's Phase 4-P Order and Section 271.

A. Section 271 Requires Verizon to Continue Provisioning Orders for Unbundled Local Circuit Switching.

Section 271 of the Telecommunications Act requires Bell Operating Companies ("BOCs") such as Verizon to offer a "competitive checklist" of access and interconnection services, including local circuit switching, in order to be permitted under federal law to provide interLATA services[43] -- the BOCs' facilitation of local competition is the *quid* that Section 271 demands for the *quo* of allowing the BOCs to compete for long-distance customers. Section 271 therefore requires Verizon to continue provisioning new switching orders for customers, regardless of whether Verizon has such an obligation under Section 251. Indeed, in Phase 4-P of the *Consolidated Arbitrations* Docket, Verizon explicitly recognized that – notwithstanding the old 4-line carve-out provision of the *UNE Remand Order* – it had an independent obligation under Section 271 to provide unbundled local switching to customers served by four or more DS0 lines in density zone 1 of the Boston MSA. Verizon stated that although the FCC's *UNE Remand Order* had removed "unbundled local switching from the requirements of § 251(c)(3)", Verizon remained "obligated pursuant to § 271(c)(2)(B)(vi) of the competitive checklist to provide [unbundled] local switching … even for customers with 4 or more lines in Density Zone 1 central offices."[44]

Verizon's Section 271 obligations are as clear, and as much in force, today as they were at the time of the Phase 4-P Order. As the FCC reaffirmed in the *TRO*, Section 271 imposes on BOCs an independent obligation to provide access to certain UNEs, including local circuit

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[43] 47 U.S.C. § 271(a), (c)(2)(B).

[44] *Consolidated Arbitrations* Docket, Bell Atlantic-Massachusetts Comments on Unbundled Network Element Provisioning (December 1, 1999) ("Verizon Phase 4-P Comments"), at 7-8.

switching, regardless of whether the UNEs are subject to unbundling under Section 251: "the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251."[45] Hence, Verizon cannot cease provisioning new orders for unbundled local circuit switching for customers subject to the Carve-Out Rule. Or, rather, Verizon can cease provisioning such orders only if it ceases to compete in the interLATA long distance market. As long as Verizon offers interLATA services – and as a condition for its right to offer them – Verizon is obligated under Section 271 to provide unbundled local circuit switching.

B. The Department's Phase 4-P Order in the *Consolidated Arbitrations* Docket Prohibits Verizon from Unilaterally Changing the Switching Rates for Customers Ordering Four or More DS0 Lines.

By voluntary commitment enshrined in a Department order, Verizon's rates for unbundled local circuit switching provided to customers ordering four or more DS0 lines cannot be changed until Verizon attempts to negotiate pricing changes with CLECs and until the Department has approved new rates as just, reasonable and nondiscriminatory. Verizon's attempt to change these rates unilaterally is therefore unlawful.

The Department's Order in Phase 4-P of the *Consolidated Arbitrations* Docket requires Verizon to attempt to negotiate with CLECs changes to the rates it charges for unbundled local circuit switching provided in Density Zone 1. In Phase 4-P Verizon maintained that the *UNE Remand Order*, in recognizing certain exceptions to Section 251's unbundling requirements, affected the pricing rather than the availability of network elements.[46] However, in its comments Verizon represented to the Department that it would continue to offer unbundled switching in Density Zone 1 at TELRIC rates, and Verizon further stated that it would not seek to change

[45] *TRO*, at ¶¶ 653.

these rates without first attempting to negotiate such changes with CLECs.[47] The Department incorporated these representations into its Phase 4-P Order when it required Verizon to provide UNE-P under the terms and conditions proposed in Verizon's comments.

Furthermore, no new rates may go into effect until the Department has approved them as just, reasonable and nondiscriminatory. First, in Phase 4-P of the *Consolidated Arbitrations* Docket, Verizon recognized – as it had to – the Department's authority to approve rate changes when it represented to the Department that "UNE-P will be available throughout Massachusetts without restriction, subject only to future price changes affecting certain elements that the Department will review."[48] Second, the standards for the Department's review are clear. As the FCC found, Section 271 of the Telecommunications Act requires that UNEs made available pursuant to it be priced on a just, reasonable and nondiscriminatory basis, i.e., according to the general standards set forth in Sections 201 and 202 of the federal act.[49] Similarly, the Department has independent responsibility under Massachusetts law to ensure that Verizon does not unfairly favor itself by imposing "unjust, unreasonable, unjustly discriminatory, [or] unduly preferential" rates or other terms and conditions on its provision of wholesale services to Verizon's competitors.[50]

(continued...)

[46] *See Consolidated Arbitrations Docket*, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-P Order at 10.

[47] *Id.*, Phase 4-P Order at 10.

[48] Verizon Phase 4-P Comments.

[49] *See TRO*, at ¶¶ 656-667.

[50] The Department has "general supervision" over telephone service in Massachusetts, "so far as may be necessary for the purpose of carrying out the provisions of law relative thereto." G.L. c. 159, § 12. The Department "may inquire into the rates, charges, regulations, practices, equipment and services of common carriers" to ensure that the rates are "just and reasonable." G.L. c. 159 §§ 13,14. In addition, the Department has broad powers to ensure that Verizon's "regulations or practices … affecting … rates" are not "unjust, unreasonable, unjustly discriminatory, [or] unduly preferential," including to Verizon itself. G.L. c. 159, § 14.

C. Verizon Is Attempting to Ignore the Department's Prior Orders By Unilaterally Instituting Massive Increases on Unbundled Switching Without Any Negotiated Agreement and Without Department Investigation and Approval.

Verizon's tariff filing seeks to circumvent the foregoing preconditions for establishing new rates for Section 271 switching. Verizon has not attempted to negotiate switching rate changes with CLECs, and rather than propose rates that the Department might be able to approve as just, reasonable, and nondiscriminatory, Verizon vaguely announced in the cover letter with its tariff proposal that it will establish "alternative arrangements" for Section 271 switching provided to current customers.

Three days ago AT&T received letters from Verizon dated July 2, 2004, in which Verizon came clean regarding what it means by "alternative arrangements" with respect to unbundled switching for customers in certain central officers that use four or more DS0 lines, and the separate "alternative arrangements" it is seeking to impose with respect to enterprise customers that order DS1 or ISDN-PRI lines.

With respect to small business customers that order four or more DS0 lines in the 11 central offices ("COs") targeted in Verizon's tariff proposal, Verizon asserts in its July 2 letters that it intends to assert surcharges of $12.45 per DS0 line per month for the COs in the metropolitan zone (Boston-Back Bay, Boston-Bowdoin, Boston-Franklin Street, and Boston-Harrison Street,), $11.89 for the COs in the urban zone (Brockton, Cambridge-Bent Street, Cambridge-Ware Street, Framingham, Lowell), and $7.85 for the two affected COs in the suburban zone (Lawrence, and Natick). Verizon seeks to assess these surcharges in addition to the $2.22 monthly line port charge approved by the Department in Docket 01-20.[51] Thus, the

[51] *See* Verizon's June 9, 2003, compliance filing in Docket 01-20; Verizon's Tariff DTE MA No. 17, Part M, Section 2.6.1.

"surcharges" that Verizon seeks to impose on the small business customers that are the targets of its "4-line carve out" attack would increase the monthly cost of these DS0 ports by 560 percent in the metropolitan zone COs, 536 percent in the affected urban zone COs, and 352 percent in the two affect suburban zone COs.

With respect to enterprise customers, Verizon asserts that in Massachusetts it intends to impose a monthly "surcharge" of $802.14 for each DS1 port and $901.52 for each ISDN-PRI port. These charges would be in addition to the Department-approved rates for unbundled switching. In Docket 01-20, the Department ordered that Verizon may charge $26.78 per month for an unbundled DS1 port, and $72.56 per month for an unbundled ISDN-PRI port.[52] Thus, the "surcharges" that Verizon says it intends to impose on enterprise customers would increase the monthly cost of these ports by approximately 1250% and 3000% respectively.

Verizon's letters of July 2 offer no justification or support whatsoever for these outrageous increases. Contrary to its prior representations to the Department, and in patent violation of the Department's Phase 4-P Order in the *Consolidated Arbitrations* docket, Verizon has not made any attempt to negotiate with AT&T regarding these exorbitant surcharges, and has neither sought nor obtained Department approval for these proposed new rates for wholesale enterprise switching.

The facts speak for themselves. Verizon has monopoly power, and will charge monopoly prices designed to drive competitors from the market unless the Department enforces its prior orders and bars Verizon from implementing any unilateral price changes.

[52] *See* Verizon's June 9, 2003, compliance filing in Docket 01-20; Verizon's Tariff DTE MA No. 17, Part M, Section 2.6.1.

VI. THE NOW-SUPERCEDED 4-LINE CARVE OUT APPLIED ONLY IN DENSITY ZONE 1, *I.E.*, THE FOUR CENTRAL OFFICES IN THE METROPOLITAN ZONE, AND VERIZON'S TARIFF IMPROPERLY WOULD EXTEND IT TO SEVEN OTHER CENTRAL OFFICES.

Even if Verizon could enforce the old 4-line carve-out from the FCC's definition of the mass market, which it cannot for the reasons discussed above, the scope of that carve-out would have to be much narrower than what is described in Verizon's tariff filing. The Rule applies only to central offices in Density Zone 1 within the Boston MSA. There are only four such central offices: Boston-Back Bay, Boston-Bowdoin, Boston-Franklin Street, and Boston-Harrison Street.[53] Yet Verizon proposes to enforce the rule in a total of eleven central offices. In addition to the four COs that fall within Density Zone 1, Verizon also seeks to impose the "4-line carve out" in the Brockton, Cambridge-Bent Street, Cambridge-Ware Street, Framingham, Lowell, Lawrence, and Natick central offices.[54] Some of these central offices are in the urban density zone, and others are in the suburban zone. Verizon's overreaching must be rejected.

The Department rejected a proposal in Docket 01-20 that Density Zones 1 and 2 (the "metropolitan" and "urban" zones) be consolidated into a single density zone. AT&T proposed that these two density zones be consolidated "because the Metro zone of only four wire centers bears no relation to practical marketing considerations."[55] The Department rejected AT&T's proposal because the FCC criteria for establishing rate zones are based upon UNE cost differences, not marketing considerations.[56] Verizon cannot unilaterally reclassify density zones,

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[53] Verizon's Tariff MA DTE No. 17, Part A, § 5.1.1.A.

[54] *See* Verizon Tariff Proposal, § 6.1.1.A.3.

[55] D.T.E. 01-20, *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 England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts*, Order (July 11, 2002), at 216-217 (quoting AT&T Brief at 140).

[56] *See id.*, at 218-219.

effectively overruling the Department, so as to extend the possible reach of the old *UNE Remand Order* 4-line carve-out.

Conclusion

For the reasons outlined above, AT&T respectfully urges the Department to reject Verizon's proposed tariff amendment, and not permit Verizon to cease providing unbundled switching either for enterprise customers that use DS1 or ISDN-PRI lines, or for mass market customers that use four or more DS0 lines in the central offices targeted by Verizon.

In the alternative, AT&T urges the Department to suspend Verizon's tariff proposal pending a full investigation into whether that proposal is both lawful and consistent with sound telecommunications policy in Massachusetts. AT&T respectfully suggests that the only reasonable conclusion on an objective evaluation of the facts and the law will be that Verizon's proposal is not only unlawful, but also that it would be a very bad thing for Massachusetts businesses and the economy of the Commonwealth.

Respectfully submitted,

AT&T Communications of New England, Inc.,
By its attorneys,

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Jeffrey F. Jones
Kenneth W. Salinger
Ruth T. Dowling
John T. Bennett
Michael S. Rabieh
Julia E. Green
PALMER & DODGE LLP
111 Huntington Avenue
Boston, MA 02199
617.239.0561
ksalinger@palmerdodge.com

Jay E. Gruber
AT&T Communications
of New England, In
99 Bedford Street, 4th Floo
Boston, MA 02111
617.574.3149
jegruber@lga.att.com

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