COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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

AT&T's REPLY COMMENTS REGARDING THE DEPARTMENT'S BRIEFING QUESTIONS ON VERIZON'S OBLIGATIONS TO PROVIDE UNEs

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Introduction

The theme of Verizon's comments boils down to a very simple message to the Department: "under the current state of the law, we (Verizon) can do whatever we want to new entrants dependent upon our network elements to offer Massachusetts consumers competing local service, and you (Department) are powerless to stop us." Fortunately for the citizens of Massachusetts, Verizon is wrong.

In its comments, Verizon asserts that it has expansive private power, unfettered by state public interest, to set prices and establish terms and conditions for network facilities that are needed by dependent competitors and were built with Massachusetts ratepayers' dollars under government protection. Verizon claims that it may take such action in accordance with its own private interests and that the Department is without jurisdiciton to stop it. Verizon seeks to support such an extreme position by selectively quoting, out of context, various federal court cases, and by seeking to apply the language from such cases to circumstances far beyond the facts to which that language relates. In AT&T's reply comments below, we demonstrate the gaping holes in Verizon's "legal analysis."

In these reply comments, AT&T addresses Verizon's arguments on the threshold issue of the Department's authority under state and federal law to require continued unbundling of essential network elements. AT&T also addresses a fatal omission in Verizon's proposal for how hot cut issues should be handled in Massachusetts. AT&T's silence in these reply comments regarding the other issues raised by the Department's briefing questions should not be considered agreement with Verizon's position. On the contrary, we vigorouly disagree and believe that the arguments we presented in our intial comments fully address Verizon's claims.

I. THE DEPARTMENT HAS JURISDICTION AND AUTHORITY UNDER BOTH STATE AND FEDERAL LAW TO ACT TO PROTECT COMPETITION IN MASSACHUSETTS

A. VERIZON'S RELIANCE ON SELECTED FEDERAL CASES IN SUPPORT OF ITS ARGUMENT THAT THE DEPARTMENT LACKS AUTHORITY TO PROTECT COMPETITION IN MASSACHUSETTS IS MISPLACED.

1. Verizon Misconstrues *AT&T Corp v. Iowa Utilities Board*, 525 U.S. 366 (1999) ("*Iowa I*").

Verizon begins its comments with a selected quote from a footnote in "*Iowa I*", which Verizon would have the Department believe robs it and all other state commissions of authority over the provision of intrastate telecommunications services, notwithstanding the numerous express provisions to the contrary in the Telecommunications Act of 1996 itself.[1] Verizon quotes language that, if taken literally and outside the context of the issue addressed, would indeed require the elimination of the Department's Telecommunications Division , given Verizon's hyperbolic assertion that "the Federal Government has taken the regulation of local telecommunications competition away from the States."[2]

The obvious problem with Verizon's argument, of course, is that it goes too far. Not even Verizon argues that the state has no responsibility to regulate local telecommunications services. Indeed, Verizon must concede that state is charged with the responsibility of arbitrating, approving and enforcing interconnection agreements under Section 252 of the 1996 Act. Moreover, as explained in detail in AT&T's Initial Comments, the express language of the 1996 Act explicitly preserves the states' rights to impose pro-competitive requirements on incumbent local exchange carriers and, as

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[1] *See*, AT&T's July 30, 2004 Comments ("AT&T Initial Comments"), at 10-11, for a description of the 1996 Act's express reservation of states' rights to regulate intrastate telecommunications services.

[2] Verizon's July 30, 2004 Comments ("Verizon Initial Comments"), at 1.

numerous courts have found, that go beyond the requirements mandated by FCC regulations.[3] The language Verizon quotes, therefore, cannot possibly mean what Verizon suggests. And certainly, that has been demonstrated in numerous court decisions since *Iowa I*.[4] Indeed, as pointed out in AT&T's Initial Comments, since *Iowa I*, and with a full awareness of it, courts have found not only a role for the states, but a role that involves the unbundling of network elements beyond those required by the FCC.[5] Moreover, under the express terms of 1996 Act, states may order unbundling requirements under state law *even if the FCC were to purport to preempt states from doing so*, provided that such state requirements meet the requirements of Section 251(d)(3).[6]

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[3] AT&T Initial Comments, at 9-13.

[4] *See*, AT&T's Initial Comments, at 10, citing *Southwestern Bell Tel. v. Public Utility Commission of Texas.*, 208 F.3d 475, 481 (5th Cir. 2000); *AT&T Comms. of NJ* v. *Bell Atlantic-NJ, Inc.*, No. Civ. 97-CV-5762(KSH), 2000 WL 33951473, at *14 (D.N.J. June 6, 2000). *See also, Michigan Bell Telephone Company v. MCIMETRO*, 323 F.3d 348, 358-359 (6th Cir. 2003) ("The Act permits a great deal of state commission involvement in the new regime it sets up for operation of local telecommunications markets, 'as long as state commission regulations are consistent with the Act.'").

[5] *See*, AT&T's Initial Comments, at 10, citing *Southwestern Bell Tel. Co. v. Waller Creek Comms*, Inc. 221 F.3d 812 (5th Cir. 2000); *In re Petition of Verizon New England*, 173 Vt 327, 795 A.2d 1196, 1200 (2002); *Southern New England Telephone Company v. Department of Public Utility Control*, 261 Conn. 1, 36, 803 A.2d 879 (2002).

[6] Section 251(d)(3) states (emphasis supplied):

> In prescribing and enforcing regulations to implement the requirements of this section, ***the Commission shall not preclude*** the enforcement of any regulation, order, or policy of a State commission that--
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> (A) establishes access and interconnection obligations of local exchange carriers;
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> (B) is consistent with the requirements of this section; and
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> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

As for the purposes and objectives of the referenced section and part, the header leaves no doubt: "PART II – DEVELOPMENT OF COMPETITIVE MARKETS." The FCC, therefore, does not have the authority under the 1996 Act to prevent states from ordering unbundling beyond that required by the FCC when such unbundling furthers the pro-competitive purposes of 1996 Act.

The issue the *Iowa I* Court was asked to resolve in the cited part of the decision was whether the FCC had the authority to prescribe unbundling requirements at all, even though such requirements applied to intrastate services. The *Iowa I* Court's holding on this issue goes no further than the issue it resolved. The Court held that the FCC has such authority, but in doing so did not rule at all on the extent of state authority, especially with regard to matters that the FCC does not address.

2. Contrary to Verizon's Claims, *Verizon North v. Strand,* 309 F.3d 935 (6th Cir. 2002) and *Wisconsin Bell v. Bie,* 340 F.3d 441 (7th Cir. 2003) Do Not Preclude The Department From Ordering Access To UNEs Under Interconnection Agreements Based On State Law Nor Even Under State Tariffs In The Circumstances Present In Massachusetts.

Verizon relies on *Verizon North v. Strand*, 309 F.3d 935 (6th Cir. 2002) and *Wisconsin Bell v. Bie*, 340 F.3d 441 (7th Cir. 2003) as support for its argument that the Department has no power under state law to order unbundling because such power has been preempted by the 1996 Act. Verizon's reliance is misplaced.

In both cases, the court found that a state may not order an ILEC to file a state tariff (i) as a method for providing UNEs (ii) in a situation in which the ILEC had not voluntarily filed a tariff. In such situations, the court found such a method for providing UNEs would undermine the method of providing UNEs prescribed by the 1996 Act, *i.e.*, the negotiation and arbitration of interconnection agreements. The courts' objection, however, was *not* based on any holding that states are preempted from requiring access to UNEs under state law. In both cases, the court was concerned *only* with the method used to effect such access requirements. Rather, in the situations presented in those cases, the courts found that imposing access requirements via state tariff would undermine the negotiation and arbitration process for providing UNEs that is prescribed by the 1996

Act. Thus, under *Verizon North v. Strand* and *Wisconsin Bell v. Bie*, states remain free to require ILECs to provide access to UNEs based on state law when such access requirements are imposed in the context of negotiating, arbitrating and enforcing interconnection agreements.

Moreover, *Verizon North v. Strand* and *Wisconsin Bell v. Bie* do not preclude states from prescribing access requirements by tariff in all situations. Indeed, the Sixth Circuit, which issued the *Verizon North v. Strand* case, held only seven months later that the Michigan Public Service Commission *could* enforce UNE access requirements in a state tariff even though such requirements were not present in the ILEC's interconnection agreement. In *Michigan Bell Telephone Company v. MCIMETRO*, 323 F.3d 348, 359 (6th Cir. 2003), the court stated:

> The Act does not impliedly preempt Michigan's tariff regime. The Commission can enforce state law regulations, even where those regulations differ from the terms of the Act or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services.

The court found that the concerns present in *Verizon North v. Strand* were not present in *Michigan Bell Telephone Company*. In *Michigan Bell Telephone Company*, the state was not ordering the ILEC to *file* a state tariff, but rather it was *enforcing* an *existing* state tariff. Existing state tariffs are not preempted by federal law, especially where they do not prevent the interconnection agreement method for providing UNEs.

In Massachusetts, Verizon has voluntarily filed a tariff under state law. It was not ordered to do so by the Department. However, once filed under M.G.L. c. 159, the Department has jurisdiction to ensure that Verizon's tariff complies with all requirements of state and federal law. Indeed, the Department may not approve a tariff filed under state law unless it complies with state law. Stated differently, Verizon is not free to file a

tariff in Massachusetts that patently conflicts with either state or federal law. The Department has both the power and the obligation to ensure that Verizon's tariff complies with all applicable law, including state law and policy, so long as CLECs and ILECs may also enter into interconnection agreements as prescribed by the 1996 Act.

3. Contrary to Verizon's Claims, *USTA II* Does Not Support Verizon's Unproven Claim That The Provision Of UNEs At TELRIC Is Simply A Method For Guaranteeing Profits For Verizon's Competitors.

Verizon also cites language from *USTA II* regarding the relationship between impairment and universal service in an attempt to support an otherwise unsupported claim that is wholly unrelated to the focus of the *USTA II* decision. In its initial comments here, Verizon simply could not resist making the same unsupported claim it has repeated so many times that it has apparently taken as truth -- even though it has never been proven. Indeed, the hard evidence is to the contrary. Verizon thus claimed yet again, that the FCC's impairment and TELRIC regulations simply "permitted CLECs to pocket a guaranteed margin from reselling Verizon MA services." Verizon has never explained why, if the purchase of UNEs at TELRIC is such a profitable opportunity, it has not sought to take advantage of this guaranteed profit stream by competing in, say, SBC's service territory using UNEs. Or why SBC has not tried to do the same in Massachusetts. The fact that Verizon is not willing to "put its money where its mouth is" speaks volumes.

B. CONTRARY TO VERIZON'S CLAIMS, THE ABSENCE OF FCC RULES FOR DETERMINING IMPAIRMENT DOES NOT CONSTITUTE AN AFFIRMATIVE FINDING OF "NO IMPAIRMENT."

Verizon repeatedly seeks to convert a Circuit Court Decision vacating the FCC's rules for determining impairment, largely on legal "subdelegation" grounds, into an

affirmative finding of non-impairment. Verizon never explains where or how such a finding was --or even could have been -- made in *USTA II* or elsewhere. Verizon never points to a record that shows flourishing competition from multiple competitors none of which require unbundled network elements from Verizon. Indeed, there are not such findings. Nevertheless, according to Verizon, the *vacatur* of FCC rules for determining impairment demonstrates that "there are no operational or economic barriers to CLECs entering the market."[7]

The Department must clearly reject this transparent *non sequitur*. Just over two weeks ago, the Connecticut Department of Public Utilities Commission ("DPUC") recognized the logical absurdity of Verizon's argument in its July 28 Draft Decision that concluded it had the authority under state law to impose a standstill order.[8] The Connecticut DPUC stated, "[a]t the root of this issue is the difference between an affirmative finding of non-impairment and the absence of any finding."[9] The Connecticut DPUC ruled:

> the Telco [SBC] asserts that the Department "must conform to federal law and may not prevent implementation of federal policy" and that "states cannot ignore federal limits on unbundling." The Department agrees; however, *it disagrees with the Company suggestion that the lack of stated policy equates to an affirmative finding against such a policy.*[10]

The DPUC went on to state:

> Therefore, the Department concludes that any assertion made by the Telco that the Department cannot impose unbundling requirements on the Company lacks relevance and is hereby

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7 Verizon Initial Comments, at 17.

8 July 28, 2004, Draft Decision, Docket Nos. 96-09-22RE01, 99-03-13RE01, 00-05-06RE03, 00-12-15RE01.

9 *Id*., at 8.

10 *Id*., at 9 (emphasis added; footnotes omitted).

> rejected. . . . [B]ecause the FCC must make a finding of impairment to unbundle certain elements, the fact that there has been no discussion or decision regarding a network element does not equate to a nationwide finding of non-impairment for purposes of § 251(d)(3), just as it does not equate to a nationwide finding of impairment. Rather, by virtue of § 251(d)(3), the status of any network element is left undecided *and left to the states* if they are authorized under state law to determine the element's status.[11]

The Department need not waste any time on an argument that is predicated on the equivalence of (i) a court decision vacating rules under which a finding of impairment or non-impairment might have been made with (ii) an agency's affirmative finding of non-impairment based on record evidence supporting that result. Verizon's argument that any state determination of unbundling would be inconsistent with, and preempted by, the *absence* of federal law must necessarily fail, both as a matter of logic and common sense.

C. VERIZON IS WRONG WHEN IT ARGUES THAT, MERELY BECAUSE EACH INTERCONNECTION AGREEMENT IS DIFFERENT, THE DEPARTMENT MAY NOT IMPOSE A "BLANKET" STANDSTILL ORDER.

Verizon devotes many pages in its initial comments to, and cites many cases in support of, its argument that the Department cannot issue a blanket standstill order because such an order would fail to give effect to the terms of individual interconnection agreements.[12] The gist of Verizon's argument is summed up in the following statement:

> 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.[13]

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11 *Id*., at 10.

12 Verizon Initial Comments, at 7-11.

13 Verizon Initial Comments, at 8.

Verizon, however, is wrong. The Department can and should issue a blanket stanstill order -- precisely because each agreement must be enforced according to its terms. The qualifying clause in Verizon's statement above, i.e., "[t]o the extent that Verizon MA has a right to stop providing delisted UNEs under an existing interconnection agreement," is one of the very sources of the Department's power to issue a blanket standstill order. It is by now a matter of black letter law that state public utility commissions have authority to interpret and enforce interconnection agreements.[14] In order to ensure that such authority is preserved, the Department has the inherent power to stop Verizon from acting unilaterally, based on its own interpretation of an interconnection agreeement, before the Department has the opportunity to perform its lawful function to interpret and enforce those agreements. The Department certainly has the authority to require Verizon to continue providing UNEs unless and until Verizon demonstrates that it has the right to cease providing UNEs under the terms of existing interconnection agreements. Depending on the language in an interconnection agreement, it may not only be necessary for Verizon to demonstrate that it is entitled to exercise an asserted "change in law," it may also be required to prove that it is no longer bound by its commitments in the Bell Atlantic/GTE Merger Order before it may cease providing UNEs under the relevant interconnection agreement.

Moreover, because the Department has the power to establish unbundling obligations under state law, the Department can impose unbundling obligations that may be relevant to the interpretation of interconnection agreements. Under its general supervisory and police powers, the Department has the power to stop Verizon from

[14] *See, e.g., Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475, 479-80 (5th Cir. 2000) *See also: Michigan Bell Tel. Co. v. MCIMetro*, 323 F.3d 248, 356-57 (6th Cir. 2003); *BellSouth Telecom. Inc. v. MCIMetro*, 317 F.3d 1270, 1276 (11th Cir. 2003) (*en banc*).

taking precipitous unilateral action that would profoundly disrupt Massachusetts telecommunications markets -- with concomitant injury to the welfare of Massachusetts consumers -- until the Department can take the steps necessary to establish permanent unbundling obligations.

D. VERIZON'S CLAIM THAT THE DEPARTMENT AGREES THAT IT LACKS JURISDICTION OVER SECTION 271 UNE PRICING IS WRONG.

On pages 23-32 of AT&T's Initial Comments, we demonstrated that the rates, terms and conditions pursuant to which Verizon must provide Section 271 UNEs must be included in "binding agreements that have been approved under section 252[.]"[15] Nothing in Verizon's initial comments rebuts AT&T's arguments that Section 271 UNEs must be included in interconnection agreements that are arbitrated, if necessary, and approved by the Department. Verizon, however, tries to argue – based on D.T.E. 03-59-A – that the Department agrees with Verizon that it (the Department) is powerless to review the rates of Section 271 elements included in such agreements. One again, Verizon is wrong. The Department *has* exercised its power over the pricing of Section 271 UNEs, and it is certainly free to exercise such power again. Moreover, the language in D.T.E. 03-59-A on which Verizon relies to argue that the Department disavows its jurisdiction of Section 271 pricing is dicta, which – as evidenced by the briefing questions in this docket – the Department does not consider final and binding.

1. The Department Has Exercised Its Jurisdiction over Section 271 Pricing.

As we pointed out in AT&T's Initial Comments, in the *Consolidated Arbitrations*, Phase 4-P Order, the Department ordered Verizon to offer UNE-P under Section 251 of

[15] 47 U.S.C. § 271(c)(1)(A).

the 1996 Act, despite Verizon's willingness, and indeed preference, to provide UNE-P without a Department order. The Department ordered that Verizon must continue to provide UNE-P under the terms and conditions set forth in Verizon's voluntary proposal.[16] 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.[17] Similarly, the Department was concerned about unilateral Verizon action to raise the price of switching in a UNE-P combination, if and when the switching element of UNE-P were no longer required as a Section 252 UNE.[18] In that regard, the Department clearly expected it had the authority to hold Verizon to its commitment not to raise the price of switching (when it becomes a Section 271 element) without negotiation with CLECs and ultimate Department approval pursuant to arbitration.[19] In short, the Department's ruling makes no sense unless it *expected* to enforce Verizon's Section 271 UNE pricing obligations, and at a minimum prevent Verizon from being the arbiter of what constitutes just and reasonable pricing under Section 271 in the first instance.[20]

Moreover, in D.T.E. 03-59-A, the case in which Verizon finds language that it claims supports its position, the Department in fact asserted jurisdiction over enterprise

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16 *Id.*, Phase 4-P Order at 9, 14.

17 *Id.*, Phase 4-P Order at 9.

18 *Id.*, Phase 4-P Order at 9 ("Until new rates become effective, Bell Atlantic will continue to offer the switching component of existing UNE-P arrangements at the approved UNE-P rates[.]")

19 *Id.*

20 *See*, Maine Docket No. 2002-135, Hearing Examiner's Report (July 23, 2004). The Report concluded that Verizon should not be free to set whatever rates for Section 271 UNEs it deems – in its own private interest – to be "just, reasonable and nondiscriminatory." The Report found that the Commission had concurrent jurisdiction with the FCC to review Section 271 UNE rates and recommended that it exercise that authority to require Verizon to maintain Section 271 UNE rates at TELRIC unless and until the FCC approved another rate. *Id.*, at 22-23.

switching as a Section 271 element and required Verizon to file a tariff pursuant to which Verizon must provide such service in the Commonwealth.[21] Finally, despite dicta suggesting that it did not believe that it had jurisdiction over the pricing of Section 271 elements, the Department in fact asserted such jurisdiction when it approved market based pricing for enterprise switching.[22] Indeed, a hearing examiner's recommended decision in Maine recognized and cited with approval the Department's assertion of jurisdiction over enterprise switching and its pricing in D.T.E. 03-59-A .[23]

2. Contrary to Verizon's Claim, the Department Did Not Resolve The Issue of Section 271 Pricing Jurisdiction in D.T.E. 03-59-A.

In D.T.E. 03-59-A, the Department's decision on the issue of its Section 271 pricing authority was an ancillary -- and unnoticed – issue. The decision was made on the basis of a necessarily limited set of briefs, given that many significant competitive carriers in the Massachusetts telecommunications market were not even participating in that docket. Accordingly, the Department's decision cannot fairly – either as a matter of procedural or substantive law -- be read to bind parties who had no ability to be heard on this important issue. The notice opening the docket indicated that it was opened to investigate whether the Department should petition the FCC for a waiver of its finding that switching for business customers served by high-capacity loops should no longer be

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[21] D.T.E. 03-59-A, at 8, n. 9

[22] *Id.* Moreover, the Department also recognized its jurisdiction to enforce the Performance Assurance Plan as a condition of Verizon's Section 271 approval by the FCC. *Id*., at 8, n. 8.

[23] Maine Docket No. 2002-135, Hearing Examiner's Report (July 23, 2004), at 19 ("The Massachusetts Department of Telecommunications and [Energy] recently found that it could approve or deny, on the basis of market-based pricing, the prices included in Verizon's wholesale tariff for its §271 obligations because those services are jurisdictionally intrastate.")

unbundled.[24] There was absolutely nothing in the notice that indicated the Department would consider how pricing and jurisdiction over switching for business customers would be handled in the event that such switching were not unbundled.

The Department apparently recognizes the importance of soliciting legal argument from a broad spectrum of the Massachusetts telecommunications industry before finally deciding this important issue, because it has posed a briefing question in this docket regarding the proper rates for Section 271 UNEs. If the Department believed that it had finally determined that it has no jurisdiction over Section 271 pricing, there would be no need to pose such a question here. Clearly, the Department did not intend that its earlier decision, which affected only a limited set of parties and addressed an issue that was not noticed when the docket was opened, should compromise the ability of the majority of Massachusetts CLECs, especially interexchange carriers, to be heard on this issue, which is fundamental to the continued well being of bundled local and long distance competition in Massachusetts following Verizon's vertical reintegration and ability to offer long distance service pursuant to Section 271.

It is clear from the Department's decision in D.T.E. 03-59-A that it did not have the benefit of the analysis AT&T set forth in its July 30 initial comments in this docket,[25] which demonstrated that Section 271 elements must be included in "binding agreements that have been approved under section 252[.]"[26] In D.T.E. 03-59-A, the Department based its decision on the text of Section 252(c) alone and concluded that "Section 252(c)

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[24] D.T.E. 03-59, Vote and Order To Open Investigation (August 26, 2003) ("This proceeding is docketed as D.T.E. 03-59. The proceeding will investigate the applicability in Massachusetts of the FCC's finding that switching for business customers served by high-capacity loops should no longer be unbundled and will determine whether the Department should petition the FCC for a waiver of its finding.")

[25] *See*, AT&T's Initial Comments, at 23-32.

[26] 47 U.S.C. § 271(c)(1)(A).

refers only to the compulsory arbitration of rates and conditions for network elements in compliance with local exchange carrers' obligations under Section 251, without any reference to Section 271." The Department's attention, however, was apparently not directed to Section 271 itself, which – as AT&T made clear in its initial comments in this docket – requires that the checklist items specified therein be contained in "binding agreements that have been approved under section 252[.]"[27]

In sum, the Department implicitly recognized its power to enforce just and reasonable pricing of Section 271 elements in the *Consolidated Arbitrations* docket, which included comments from virtually all competitive carriers in Massachusetts at the time,. Although the Department made statements regarding its lack of jurisdiction to consider pricing of Section 271 elements in D.T.E. 03-59-A, that issue had not been noticed, and resolution of that issue was not required in order to resolve the issues that had been noticed. And critically, carriers that were not been parties in that case -- and that had the greatest interest in the proper resolution of the issue of Section 271 pricing jurisdiction, including interexchange carriers -- had not been heard. Thus, it is perfectly proper for the Department to seek legal analysis on this important issue from a broad spectrum of the telecommunications industry in Massachusetts and to make its decision on that issue in light of the full arguments presented here.

3. The Department Should Aggressively Assert All The Authority It Has To Protect And Further Policies It Has Established and Found To Be In The Public Interest.

It goes without saying that, once the Department has determined what is in the public interest, it should – within the limits of its authority – pursue those objectives.

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[27] 47 U.S.C. § 271(c)(1)(A).

Where the Department has considered evidence, informed by economic theory and its own regulatory judgments, and found that long run incremental pricing of monopoly inputs required by new entrants in a competitive market best promotes the interest of the public in fair and vigorous competitive markets, the Department should seek to ensure that Section 271 element prices conform to that standard.

In D.T.E. 01-31, the Department found that competition in the retail market for private line services could not produce just and reasonable rates if Verizon's competitors could not obtain the inputs required to provide a competing private line service at TELRIC.[28] The Department determined that, where Verizon charges above cost access prices for wholesale private line services relied upon by competitors, competition could not be relied upon to produce just and reasonable rates if Verizon were granted pricing flexibility for private line services. As a result, the Department denied pricing flexibility to Verizon unless it lowered its wholesale input prices to TELRIC.[29] In short, the Department determined that the public interest requires input pricing at long run incremental cost, if the Department is to rely on competition to ensure just and reasonable rates.

Having determined the policies necessary to promote the public interest in lower prices driven by fair competition, the Department should act to the limits of its authority, if necessary, to enact those policies for the public good. If the Department were to decline to assert jurisdiction over Section 271 pricing, it would not be doing all it could to protect the public's interest in competition and lower prices.

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[28] D.T.E. 01-31 (May 8, 2002), at 61-62.

[29] *Id*.

E. THE DEPARTMENT CAN AND SHOULD CONTINUE TO REQUIRE VERIZON TO PROVIDE UNBUNDLED ACCESS TO HIGH CAPACITY LOOPS, BECAUSE – CONTRARY TO VERIZON'S CLAIMS – *USTA II* DID NOT VACATE THE FCC'S RULES REQUIRING SUCH ACCESS.

In its initial comments, Verizon argues that *USTA II* vacated the rules pursuant to which impairment is to be determined for high capacity loops.[30] *USTA II*, however, makes no findings, rulings, or determinations regarding high capacity loops. Verizon is constructing its claim of *vacatur* as to this issue out of whole cloth. In fact, a careful review of *USTA II* indicates that the *USTA II* Court expressly relied on the FCC's rules under which high capacity loops are made available as a basis for rejecting the CLEC challenge to the FCC's decision to deny access to hybrid loops.

In the Triennial Review Order, the FCC found that CLECs are not impaired without access to hybrid loops, because CLECs have available to them the capabilities of DS-1 and DS-3 loops, which provide a substitute for hybrid loops. The FCC stated:

> As discussed above, in addition to subloop unbundling, *the availability of TDM-based loops, such as DS1s and DS3s*, provide competitive LECs with a range of options for providing broadband capabilities. We therefore find that competitive LECs retain alternative methods of accessing loop facilities in hybrid loop situations and disagree with WorldCom and others concerning the appropriate unbundling requirements for the next-generation broadband features, functions, and capabilities of hybrid loops. [31]

The CLECs challenged the FCC's determination in *USTA II*. The *USTA II* Court, however, upheld the FCC's decision to deny unbundled access to hybrid loops. In reaching its conclusion, the *USTA II* Court explicitly recognized the FCC's reliance on the availability of the loop alternatives identified by the FCC. The *USTA II* Court stated:

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30 Verizon Initial Comments, at 4, n. 4.

31 TRO, at ¶ 291 (emphasis added; footnotes omitted).

> Nor can we say that the Commission was arbitrary or capricious in thinking that any damage to broadband competition from denying unbundled access to the broadband capacities of hybrid loops is likely to be mitigated by the availability of loop alternatives or intermodal competition. With regard to loop alternatives, we agree with the CLECs that these alternatives are not a perfect substitute for the ILECs' hybrid loops, but we understand the Commission to say only that they are a partial substitute; they will mitigate, not eliminate, CLEC impairment.[32]

Thus, the Court in *USTA II* could not have reached this result had it also eliminated access to ubnundled high capacity loops.

II. VERIZON'S PROPOSAL IN ITS INTIAL COMMENTS FOR ADDRESSING HOT CUTS OMITS THE MOST ESSENTIAL METHOD FOR HIGH VOLUME HOT CUTS AND IS UNACCEPTABLE FOR THAT REASON.

In its intial comments, Verizon argues that it is no longer under an obligation to propose a batch hot cut process, but nonethless states that it intends to proceed with the development and implementation of one.[33] In its initial comments, AT&T demonstrated the legal authority that allows, and the public interest that compels, the Department to continue with the implementation of a high volume hot cut process. We will not repeat those argument here; instead, we focus on our concerns regarding Verizon's proposal to allow the Hot Cut proceeding in New York to establish a batch hot cut that will be used throughout Verizon's footprint, including Massachusetts.

AT&T's principal concern is the apparent failure of Verizon to include the "large job" process in its proposal. Indeed, AT&T and many other carriers in New York rejected Verizon's "batch" hot cut process as entirely inadequate and stated their intent and preference to continue using the large job process, as modified in accordance with

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32 *USTA II*, 359 F.3d at 582.

33 Verizon Initial Comments, at 23-24.

the improvements proposed in CLEC testimony and in hearings in New York. It became evident in the New York proceeding that characteristics of the batch hot cut process were developed by Verizon for its own benefit, not for the benefit of CLECs. AT&T opposes any approach in Massachusetts that does not include the large job process and an opportunity to press for the implementation of the improvements recommended in New York (and indeed recommended here in Massachusetts in prefiled testimony before the Department stayed the impairment proceedings).

If Verizon's proposal is to be taken seriously, all processes that are the subject of the Hot Cuts case in New York should be included. Moreover, any hot cut rates approved for such processes in New York should be made available in Massachusetts, at the CLEC's option. Under those circumstances, AT&T would not oppose a limited stay of proceedings in Massachusetts pending the outcome of the New York case. Upon the issuance of the New York order, the Department should seek comment on implementing the processes and rates in Massachusetts as described above. To ensure that Massachusetts consumers do not become hostage to delays in New York, the Department should establish a date by which it will resume a hot cuts investigation in Massachusetts if the New York Commission has not acted.

Conclusion

AT&T applauds the Department's willingness and interest in determining its authority to act to preserve competition in Massachusetts. Certainly, Massachusetts citizens expect the Department to exercise the full extent of its power to protect their telecommunications services from disruption and monopoly exploitation. Anything less would be an abdication of the Department's responsibility to protect the public interest. The Department would not want to decline to act in the public interest, only to discover

later that it possessed full power to do so. The Department's briefing questions are a first step toward determining the full scope of its powers to protect the public interest so that it may act accordingly.

Respectfully submitted,

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