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August 16, 2004

BY OVERNIGHT MAIL

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, Second Floor
Boston, MA 02110

Re: D.T.E. 03-60

Dear Ms. Cottrell:

Please accept for filing in the above-referenced proceeding the Reply Comments of : ACN Communication Services, Inc.; Allegiance Telecom of Massachusetts, Inc.; Choice One Communications of Massachusetts Inc.; CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corporation of Massachusetts; Lightship Telecom, LLC; McGraw Communications, Inc.; RCN-BecoCom, LLC; RCN Telecom Services of Massachusetts, Inc.; segTEL, Inc.; and XO Massachusetts, Inc. (jointly, the "CLECs").

The original and nine (9) copies of this filing are attached. Please date-stamp the enclosed extra copy of this filing and return it in the attached, postage prepaid envelope provided. Please note that this filing is also being in electronic format by email attachment to dte.efiling@state.mas.us.

Should you have any questions concerning this filing, please do not hesitate to contact me.

Sincerely,

Paul B. Hudson

Enclosures

cc: Paula Foley, Hearing Officer
Service List

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**

REPLY COMMENTS OF CLEC PETITIONERS

ACN Communication Services, Inc.; Allegiance Telecom of Massachusetts, Inc.; Choice One Communications of Massachusetts Inc.; CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corporation of Massachusetts; Lightship Telecom, LLC; McGraw Communications, Inc.; RCN-BecoCom, LLC; RCN Telecom Services of Massachusetts, Inc.; segTEL, Inc.; and XO Massachusetts, Inc. (jointly, the "CLECs") submit the following reply to Verizon's comments filed in this proceeding on July 30, 2004.

Many of Verizon's arguments are rebutted by the CLEC's May 27, 2004 Petition and their July 30, 2004 comments and will not be addressed again here. Instead, this reply rebuts key fallacies that underlie Verizon's core argument. Verizon contends that the Department is powerless to protect competition and consumers if Verizon rushes to eliminate UNEs prematurely before the FCC completes its new rulemaking proceeding. Contrary to Verizon's assertion, the Department plainly has sufficient authority to grant the CLECs' Petition or take other action necessary to protect competition and consumers in Massachusetts.

I. *USTA II* Does Not "Eliminate" Verizon's Unbundling Obligations

The central premise of Verizon's comments is that *USTA II* "eliminated" Verizon's obligation to provide unbundled high-capacity loops, transport, and switching. Verizon is completely wrong. While *USTA II* vacated the FCC's rules for certain UNEs, it did not rule that

any of the vacated UNEs were inherently unlawful or find a lack of impairment for any UNE. Had it done so, the court would have had no reason to remand the case to the FCC for further proceedings to develop new unbundling rules – rules that are expected to restore at least many of the vacated UNEs. The court decision has in no way diminished Verizon's statutory obligation to unbundle network elements without which competitors would be impaired. As demonstrated in the CLEC's Petition, even the narrowest interpretation of the record of the *Triennial Review* and DTE 03-60 clearly reflects that CLECs are impaired without access to at least many of the vacated UNEs.[1] Thus, at this moment, some of Verizon's precise obligations under Section 251 may be debatable,[2] but they certainly are not eliminated.

II. *USTA II* Does Not Diminish the Department's Independent Authority Under State or Federal Law

As noted above, because the transport and switching rules were vacated, Verizon's obligation to provide certain of these facilities pursuant to Section 251 may be debatable. If Verizon insists on forcing this debate now by trying to withdraw UNEs before the FCC completes its remand proceeding, then the task would fall to the Department to bridge the new gaps between the FCC's remaining regulations and the standards of Section 251 and state law and policy. But despite the fact that the Department has previously exercised this authority – such as when it ordered Verizon to unbundle dark fiber in 1996[3] – Verizon now argues that the Department is powerless to do anything because, in Verizon's words, "no unbundling can be

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[1] *See* Petition at Exhibit 1.

[2] Even if Verizon is no longer required to provide certain of these UNEs under Section 251, it remains required under the Bell Atlantic-GTE Merger conditions. This issue is now pending before the FCC in its Dockets 98-141 and 98-184.

[3] The dark fiber decision is an appropriate analogy, whereas Verizon's analogy to the PARTS decision is not. The Department declined to unbundle PARTS because the FCC had found that CLECs were not impaired without access to packet switching. This is not the same as the instant case, or the case of dark fiber, where the FCC had not completed its impairment analysis.

ordered in the absence of a valid finding by the FCC of impairment under Section 251(d)(2) of the Act."[4]

On the contrary, the federal Act not only permits but *requires* state commissions to consider unbundling above and beyond the FCC's national list of network elements. Section 252(e)(2)(B) provides that state commissions can only approve arbitrated amendments to interconnection agreements that meet the requirements of Section 251 of the Act, "including" FCC regulations. Had Congress intended that states only consider whether an agreement meets the requirements of FCC regulations, it would have had no reason to ask states separately to consider Section 251 itself. Rejecting a similar argument made by SBC, a draft decision of the Connecticut Department of Public Utility Control recently observed:[5]

> At the root of this issue is the difference between an affirmative finding of non-impairment and the absence of any finding. The situation the Department faces in the aftermath of USTA II is that there is no longer any finding regarding impairment which the Department must apply, or with any rules it may promulgate from which they could conflict. ... 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.

None of the three federal cases cited by Verizon involved a court decision analogous to the present situation, such as the preemption of a state unbundling order entered without the benefit of a prior effective FCC determination of impairment. In other words, none of these cases found a conflict between a state decision and federal inaction. Meanwhile, Verizon conveniently ignores the fact that numerous state decisions to require unbundling in the absence of a federal

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[4] Verizon Comments at 12.

[5] *DPUC Investigation Into The Southern New England Telephone Company Unbundled Loops, Ports and Associated Interconnection Arrangements and Universal Service Fund in Light of the Telecommunications Act of 1996 – Reopener*, Docket No. 96-09-22, et al., Draft Decision (Connecticut Department of Public Utility Control, July 28, 2004) ("DPUC Draft Standstill Decision") at 8-10.

impairment finding have been affirmed. For example, more than a dozen state commissions, including this Department, required ILECs to unbundle dark fiber prior to the FCC decision to make dark fiber a UNE. None of these state decisions were ultimately invalidated on the basis that the state lacked authority to require such unbundling in the absence of a prior FCC impairment finding.

Even more significantly, the savings clauses in the Act unambiguously make clear that states may impose additional unbundling obligations based upon state law, so long as their requirements are consistent with and do not substantially prevent implementation of Section 251. *See* Sections 251(d)(3), 251(e)(3), and 601 of the Act. The fact that something is not required by federal law does not mean that federal policy prohibits such a requirement. Earlier this year, after *USTA II*, the Pennsylvania Public Utility Commission reaffirmed its earlier decision pursuant to state law to require Verizon to continue to unbundle most enterprise switching that the *TRO* had eliminated.[6] State commissions clearly possess the lesser authority under their state laws to order unbundling of UNEs that the *TRO* had intended to preserve.

The savings clauses in the Act would be rendered a nullity by Verizon's argument that states can only order unbundling already ordered by the FCC. The Connecticut DPUC found that SBC's similar interpretation of Section 251 "would render [the savings clause in] § 251(d)(3) meaningless," explaining that:[7]

> If the FCC's lack of determination equated to a finding of non-impairment for the purposes of preemption, then state commissions can produce no independent regulations which would be "consistent with" and "not substantially prevent the implementation of" the Telcom Act. ... Additionally, when employing [SBC's]

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[6] *Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market*, Docket No. I-00030100, Order on Reconsideration (May 27, 2004) at 12.

[7] DPUC Draft Standstill Decision at 11.

> reasoning, the state would be left solely to regulate network elements that the FCC has previously determined meet an impairment standard. ... In that environment, state regulations could only exist if they mirrored federal regulations. If such a regulatory framework were the intent of Congress, it would have provided for that requirement in § 251(d)(3). The Department further believes that if this were Congress' intention, it would not have created the state authority "carve-out" exception in that section.

Like SBC, Verizon's position would leave the Department only to rubber-stamp the decisions of the FCC and stand helpless when then FCC had not acted. Congress clearly did not intend to so limit the states, especially from acting in a manner that promotes the goals of and is consistent with the federal Act.

If there were still any doubt that the Department's independent authority survived *USTA II*, the court itself said so. *USTA II* found that states had not yet been preempted from seeking to impose additional unbundling requirements.[8] Verizon is therefore wrong in its assertion that *USTA II* held that only the FCC has the authority to order unbundling. While *USTA II*'s subdelegation holding precludes the FCC from delegating *its* obligations to the states, the decision in no way limits authority that Congress delegated *directly* to states, or the inherent authority that states retained.[9] *USTA II* speaks only to the FCC's obligations under the Act; this Commission's independent state law authority – which is explicitly preserved by the savings clauses – remains unaffected by *USTA II*.

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[8] *See* CLEC Comments, at 3, fn. 1, *citing USTA II*, 359 F.3d 554, 594 (D.C. Cir. 2004) ("deferring judicial review of the preemption issues until the FCC actually issues a ruling that a specific state unbundling requirement is preempted").

[9] *See. e.g.,* DPUC Draft Standstill Decision at 8 ("The actions of the DC Circuit Court to vacate the federal rules does not diminish the authority of the Legislature or the requirements it has imposed on telecommunications service providers by state statute.")

III. A Department Order Requiring Continued Unbundling Would Not Override the Parties' Interconnection Agreements

Verizon argues that any determination that certain UNEs remain required by federal or state law would unlawfully override existing contract terms in certain interconnection agreements that allow Verizon to terminate UNEs no longer required by "Applicable Law." The CLECs have never argued to the Department that these contract terms should be overridden; rather, these contract terms are simply not applicable, because Verizon remains obligated to provide UNEs under the Applicable Law of Section 251 and the Merger Conditions, notwithstanding the vacatur of the FCC regulations.[10] *USTA II* does not make any finding that Verizon "is not required by Applicable Law to provide" UNE transport or switching; it merely found that the FCC had offered an inadequate justification for its rules. No interconnection agreement can reasonably be read to permit Verizon to withdraw a UNE based upon an incorrect or disputed interpretation of Applicable Law. Because the CLECs are still entitled to these UNEs under Section 251 and the Merger Conditions, they will dispute any assertion by Verizon that their change of law provision has been triggered by *USTA II* in a manner that would permit Verizon to withdraw any of the vacated UNEs.

State commissions unquestionably possess authority to resolve disputes that arise under interconnection agreements. The FCC has explained that "the state commissions' roles in arbitrating and enforcing the requirements of interconnection agreements will remain central, as Congress intended."[11] Verizon's comments agree that the Department has an important role "to ensure that carriers abide by the terms of their interconnection agreements." Verizon Comments at 10. If Verizon seeks to eliminate UNEs that that remain required under Applicable Law, the

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[10] *See* Petition at Exhibit 1.

[11] *Core Communications, Inc., v. Verizon Maryland Inc.*, File No. EB-01-MD-007, Memorandum Opinion and Order, FCC 03-96 (rel. April 23, 2003) at ¶ 26.

CLECs will seek the Department's intervention to exercise this role to enforce the parties' agreements. Contrary to Verizon's assertion, the CLECs are not trying to run from their interconnection agreements; indeed, if necessary, the CLECs would be relying upon enforcement of the contract dispute resolution terms to protect their rights.

While it may be possible for the Department to resolve this dispute through dozens of independent contract dispute resolution cases down the road, such a process would, in comparison to grant of the Petition in this proceeding, result in an inefficient use of Department resources and would fail to provide stability that is needed in the interim to protect consumers and promote competition in Massachusetts.[12] But whichever course the Department chooses, its determination of which UNEs are required by "Applicable Law" would preserve, rather than override, the terms of the parties' contracts.

IV. Transition Rules

Verizon argues that the Department need not consider the terms of any transition plan away from UNEs because Verizon has already developed such terms itself. Verizon Comments at 20-22. The Department should decline the fox's kind offer to guard the henhouse. While the CLEC comments explained that no state transition plan for the vacated UNEs is needed at this time, if and when such a plan is needed to protect competition or consumers, the Department should of course seek input from CLECs and the public to establish appropriate terms.

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[12] Verizon tries to make much of the fact that some states have decided not to grant requests for standstill relief. Approximately the same number of states have now granted standstill petitions, but rather than engage in a point-by-point debate over each order, it is more constructive to emphasize that no state has decided that an ILEC can unilaterally eliminate a UNE notwithstanding a CLEC's protest of its right to do so. The states that have denied standstill relief at this time have merely deferred this dispute, presumably until Verizon sends its notice letters and CLECs petition the commissions for dispute resolution.

V. Conclusion

The Department should grant the CLEC's Petition in this proceeding to provide market stability and protect consumers until the FCC is able to complete its new rulemaking proceeding. At a minimum, the Department should continue the process of analyzing these issues so that it would be ready to act if and when Verizon attempts to eliminate UNEs prematurely on the basis of *USTA II*.

Respectfully submitted,

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Dated: August 17, 2004

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**

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of August, 2004 served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of 220 CMR 1.05(1) (Department's Rules of Practice and Procedure).

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