COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own Motion, Pursuant to G.L. c. 159 §§ 12 and 16, into the collocation security policies of Verizon New England Inc. d/b/a Verizon Massachusetts	))))))	**D.T.E. 02-8**

REPLY BRIEF OF COVAD COMMUNICATIONS COMPANY

INTRODUCTION

Verizon's initial brief does little other than repeat the unsupported arguments presented in its panel testimony. These arguments cannot hide the fact that, as discussed in Covad's initial brief, there is no evidence to support Verizon's claim that its security measures are completely inadequate and incapable of controlling the alleged threat presented by CLEC "foot traffic." Verizon's brief does present several arguments that are of particular concern to Covad, and which should be specifically rebutted.

ARGUMENT

I. VERIZON IGNORES THE REAL COSTS THAT ITS "SEPARATE AND SECURE ONLY" PROPOSAL WILL IMPOSE ON COMPETITORS AND THE MARKET.

Verizon proposes that the Department allow it to impose a new collocation rule that would ban physical collocation in Massachusetts where Verizon says that it cannot provide separate and secure space for a collocation arrangement. Verizon maintains that the Department should not be concerned about any anti-competitive effect of this proposal because (1) only one existing CCOE arrangement is located in commingled space in a CO without available separate

and secure space, and (2) the costs of converting that arrangement to virtual would be minimal since in can be converted "in place." Verizon Brief at 31. Verizon's extraordinarily narrow characterization of the problems with its proposal allows it to ignore the true costs and sweeping nature of the suggested measure.

Covad is in a unique position to comment on this proposal, since Covad owns the CCOE arrangement, located in the Hopkinton CO, that would be converted to virtual should the Department adopt Verizon's proposal. From Covad's perspective, converting the Hopkinton CCOE arrangement to virtual would be very costly to Covad's business here in Massachusetts. This is so for several reasons. First, as discussed further below, Covad considers virtual collocation to be far inferior to physical collocation. Covad no longer enters into virtual collocation arrangements at all, and has converted all of its previous virtual arrangements to physical. Verizon's proposal would take Covad in exactly the opposite direction from the one Covad has determined best meets its business needs. Verizon asserts that imposing such a drastic change in Covad's business plans would not be costly to Covad because the conversion would be "in-place," meaning that no equipment would be moved. This is Verizon's idea of a bargain. Covad would go from having direct 24-hour access to its equipment to having no direct access to its equipment, and Verizon believes Covad should be pleased because Verizon will not charge it for the privilege.

This argument shows that Verizon is completely out of touch with how CLECs operate in a competitive market that depends on access to essential facilities Verizon controls. Like other CLECs, Covad makes decisions about where it invests its resources "based on ease of getting the collocation arrangement, costs, and other investment choices. We have decided to invest in some locations and not invest in others based on how easy it is to do business." Tr. 560.

Whether physical collocation is available is a key criterion in making such choices, since Covad's experience with virtual collocation has been uniformly poor. In fact, of the 19 virtual collocation arrangements Covad had at one time, all have been converted to physical. Tr. 559. In trying to do business through virtual arrangements, Covad found that it could not support service level agreements with its customers, making such arrangements unacceptable from a business perspective. "Although it's technically feasible, it's not operationally feasible to continue virtual collocation arrangements." Id.

Thus, the impact on Covad of a forced conversion to a virtual arrangement in Hopkinton has little to do with whether Verizon charges for the conversion, and everything to do with whether Covad's business operations in the Hopkinton CO are at all compatible with virtual collocation, which they are not. Tr. 563, 566. As Michael Clancy of Covad testified, Covad "would cease doing business in any office that was converted to virtual" and if Hopkinton becomes such a CO, Covad will likely lose a very large customer that is served through the physical collocation arrangement in Hopkinton. Id. This is not some theoretical concern for Covad; this is a real customer, with which Covad has a real agreement – a customer - that would be difficult or impossible to continue serving if Verizon has its way.

Further, Verizon's assertion that only Covad will be affected by the "separate and secure only" proposal willfully ignores the scope of the proposal. Verizon asks the Department to outlaw CCOE in a commingled setting, meaning that CLECs will be limited to only virtual arrangements in COs where "separate and secure" space is unavailable. This limitation greatly accelerates space exhaust. Under current regulations, if separate and secure space is exhausted, a CLEC can request a commingled CCOE arrangement (as Covad did in Hopkinton). Verizon's proposal would rob CLECs of that option. Already, there are 37 Massachusetts COs without

separate and secure space, as Verizon admits. Verizon Brief at 32, n. 42. If the Department adopts Verizon's proposal, it would effectively close those 37 COs to further physical collocation arrangements. In the remaining 131 COs (excluding Hopkinton, which would also be immediately affected) where CLECs are collocated, exhaust would be reached sooner, since the option of locating a CCOE in commingled space would be eliminated. Thus, Verizon's argument that only the Hopkinton CO would be affected by the "separate and secure" requirement is as wrong as it can be. *Every* CO where CLECs are collocated would be affected, 38 of them immediately, and the remainder at some point in the future.

II. VERIZON MISSTATES OR IGNORES CRITICAL LEGAL PRECEDENT.

Covad is also uniquely positioned to comment on Verizon's tendency to misstate or ignore critical legal precedent related to a CLEC's right to physical collocation. As the Department noted in its *Vote and Order to Open Investigation*, Covad litigated to obtain the right to place a CCOE arrangement in other than separate space, as is the case in Hopkinton. The Department ruled against Covad in that case. *Covad/Bell Atlantic Arbitration*, D.T.E. 98-21 (1998). In its *Advanced Services Order*, however, the FCC adopted Covad's position, that CLECs have the right to request CCOE arrangements located in space commingled with ILEC equipment.[1] In response to the *Advanced Services Order*, the Department reversed its findings in the *Covad* case, and "required Verizon to submit tariff revisions that included the alternative collocation arrangements, including cageless collocation, required by the FCC." *Vote and Order to Open Investigation* at 4, citing *Teleport Petition*, D.T.E. 98-58, at 26 n.20 (1999). Had the

[1] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order, FCC 99-48 (released March 31, 1999)

original *Covad* order remained in force, Covad would not have been allowed to physically collocate as it has in Hopkinton, allowing it to serve a major customer.

Verizon apparently believes that time stopped in 1998, since it continues to rely on the Department's order in D.T.E. 98-21 in support of its "separate and secure only" proposal. Verizon states that this proposal is "consistent with the Department's previous decision in D.T.E. 98-21 (*Covad Communications Company*), which rejected Covad's proposal for unsecured cageless collocation arrangements in Massachusetts." Verizon brief at 31. The Department's order in D.T.E. 98-21 is simply not the law in Massachusetts, and the consistency of Verizon's proposal with the order in that case is grounds for denying the Verizon proposal, not granting it.

Verizon also chooses to ignore a more recent legal development that is not helpful to its cause. In its initial panel testimony, Verizon emphasized that it had appealed the FCC's collocation regulations, 47 C.F.R. § 51.323, which were promulgated in the *Collocation Remand Order*, and which continue to require, generally, that ILECs offer CCOE even in commingled space, if suitable separate and secure space is not available. Exh. VZ-MA-1 at 15-16. Verizon characterized the FCC regulations, 47 C.F.R. § 51.323, and its appeal thereof, in the following manner:

> Those provisions, along with other collocation issues decided in the *FCC Remand Order*, issued August 8, 2001, are pending review before the U.S. Court of Appeals for the D.C. Circuit (the "Court") in Nos. 01-1371 and 01-1379. The basis for that appeal is that, on remand from the Court's decision in *GTE Service Corporation*, the FCC re-imposed highly intrusive space allocation and access requirements for "physical collocation" on incumbent local exchange carriers ("ILEC") that grant unwarranted rights to CLECs to control the specific location of their equipment within the ILEC's premises and to access that collocated equipment. The petitioners argue, *inter alia*, that in doing so, the *FCC Remand Order* - which was released one month before the events of September 11th - effectively establishes a default rule that forecloses ILECs from requiring segregated space and separate entrances, thereby unduly interfering with the ILEC's fundamental right to manage effectively the use of its property and its

> obligations to protect the security of its telecommunications infrastructure and the safety of its employees.

Exh. VZ-MA-1, at 15-16 (footnotes omitted).

Verizon conveniently neglected to mention in its brief that the D.C. Circuit dismissed its petition for review on June 18, 2002, rejecting every single one of the arguments set forth above. *Verizon et al. v. FCC et al*, 292 F.3d 903 (D.C. Cir. 2002). Perhaps Verizon hopes to gain some tactical advantage by revealing its position on this case only in its reply brief, a dubious tactic at best. Regardless, the FCC's regulations remain intact, and they do not allow Verizon to impose the blanket "separate and secure only" requirement that is one of the centerpieces of its proposal.

III. VERIZON IGNORES THE OVERWHELMING EVIDENCE THAT VIRTUAL COLLOCATION IS VASTLY INFERIOR TO PHYSICAL COLLOCATION.

Verizon spends several pages of its brief extolling the virtues of virtual collocation, arguing that CLECs are simply misguided in their view that virtual collocation is such a poor choice compared to physical that some CLECs, including Covad, would rather abandon a CO that try to do business through a virtual arrangement. Verizon Brief at 54-58. Indeed, Verizon goes so far as to argue that "in some cases, [virtual] is the preferred method even when physical collocation is available." Verizon Brief at 54. Simple arithmetic belies this argument.

As Verizon itself points out, there are a total of 953 collocation arrangements in 169 Massachusetts COs. Verizon Brief at 5, n. 6. Five of these arrangements, or about 0.5 percent of the total, are virtual. Id. Further, as Verizon witness Reney did testify, in three of the five cases of virtual collocation, the CLEC chose virtual although physical was available. Tr. 739. Since this testimony implies that in the other two cases, the CLEC preferred physical and was only able

to get virtual, this evidence shows that CLECs prefer physical to virtual collocation by a ratio of 950 to 3 (or about 317 to 1).

If CLECs' extreme dislike of virtual collocation were merely a position taken for litigation purposes in this contested case, one would expect their actual business decisions to reflect a more sanguine attitude toward virtual collocation. But there it is: when it is time to put their money and business relationships on the line, CLECs choose physical collocation 317 times more often than they choose virtual. This overwhelming preference for physical collocation is not surprising, given the inherent operational limitations of virtual collocation, as discussed by Mr. Clancy at the hearing. Tr. 563-66. Covad, in fact, has converted every one of its 19 virtual collocation arrangements to physical because of those operational difficulties.

Verizon argues that the unanimous CLEC position, in both testimony and practice, against virtual collocation is merely "scant and outdated anecdotal testimony regarding their allegedly negative experiences with virtual collocation in jurisdictions other than Massachusetts." Verizon Brief at 54. Verizon does not attempt to explain how Covad's actual decision to convert all of its 19 virtual collocation arrangements to physical could be considered "anecdotal." Verizon also does not attempt to identify any characteristic of virtual collocation that might vary from state to state such that a CLEC's negative experience in one state would not justify its reluctance to try it again in Massachusetts. As Mr. Clancy testified, "[t]he rules that apply to virtual collocation . . . apply in Massachusetts equally to the way they apply anywhere else administratively." Tr. 558-59.

Verizon fails to grasp that it is the very nature of virtual collocation that makes it inferior to physical from a CLEC's perspective.[2] As Mr. Clancy testified, CLECs enter into service level agreements with their customers that allow them to compete, and they can only support those service level agreements through physical arrangements that allow direct 24-hour access to equipment. Tr. 563-66. Verizon does not dispute that CLECs are united in their position that unless they can differentiate themselves from Verizon by offering the kind of service that can be supported only with a physical arrangement, there is no way for a CLEC to compete with Verizon. The CLECs' position only makes sense. If a CO is converted to virtual-only, Verizon becomes the monopoly provider of a host of services that were being provided by a competitive market. The most any CLEC could promise a customer would be exactly what every other CLEC offers: the least common denominator service provided by Verizon. CLECs have already voted with their feet on what they think of that prospect, and the result is 317 to 1.

CONCLUSION

Verizon's arguments in this case ultimately have little to do with the subject the Department set out to investigate, namely the security of essential telecommunications facilities in the aftermath of last year's terrorist attacks. If Verizon were truly concerned about security, it would have presented detailed data about the status of security measures in place at each of its facilities, and it would have suggested a range of measures designed to improve security without placing undue costs and burdens on any party. Rather than take such an even-handed approach, Verizon continue to recycle the same arguments against physical collocation in general that it has been pursuing since the Telecommunications Act was passed. These arguments, and the

[2] Perhaps this is due to the fact that none of Verizon's witnesses have ever worked for a CLEC and have no experience dealing with Verizon from a CLEC's point of view. Tr. 160-62.

proposals they attempt to justify, simply deny the basic premise of the Act, that facilities-based competition in the local telecommunications market depends on competitors having access to the essential facilities controlled by the ILEC.

In this case, however, Verizon adds the new and equally arrogant argument that CLECs do not know how to run their own businesses. Verizon dismisses as "anecdotal" the overwhelming evidence that virtual collocation is fundamentally inconsistent with every CLEC's business plans. Verizon asserts that these concerns are misplaced, and CLECs should be happy to turn over control of their equipment to Verizon in so-called "critical" COs, and should be happy being forced to rely on virtual collocation where separate and secure space is not available in other COs. Verizon is clearly wrong. As discussed above, CLECs enter into service level agreements with their customers that allow them to compete, and they can only support those service level agreements through physical arrangements that allow direct 24-hour access to equipment. Also, CLECs can only differentiate themselves from Verizon by offering the kind of service that can be supported only with a physical arrangement.

The Department should base its decision in this docket on the evidence presented, not on Verizon's gratuitous opinions about how CLECs run their businesses. The evidence shows clearly that Verizon has done nothing to make a case that its security measures are inadequate, much less inadequate in a manner that can only be cured by systematically limiting and

eliminating CLECs' presence in Verizon COs. On the evidence, all of Verizon's proposals should be rejected.

Respectfully submitted,

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