COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Pricing of Unbundled Network Elements for Verizon New England Inc. d/b/a Verizon Massachusetts	)))))	D.T.E. 01-20 (Part A)

RESPONSE OF VERIZON MASSACHUSETTS TO AT&T'S OPPOSITION TO VERIZON'S APPEAL FROM THE HEARING OFFICER'S RULING

Pursuant to the Hearing Officer's Memorandum of August 21, 2001, Verizon Massachusetts ("Verizon MA") files these comments on AT&T's Opposition dated August 17, 2001 ("AT&T's Opposition") to Verizon MA's appeal of the Hearing Officer's ruling on Verizon's motion to compel. AT&T's Opposition to Verizon MA's appeal is nothing more than an effort to divert the Department's attention from the two simple and straightforward issues to be decided on appeal: (1) did the Hearing Officer err in refusing to order AT&T to produce information regarding AT&T's network and operational experience because it was not deemed "crucial" to Verizon's evaluation of AT&T's cost model; and (2) did the Hearing Officer err in refusing to order AT&T to produce information underlying its cost model that is allegedly the intellectual property of outside vendors or, alternatively, to strike AT&T's HAI 5.2a-MA Model and associated prefiled testimony. At bottom, AT&T's Opposition does not rebut Verizon's arguments on these two points.

ARGUMENT

I. AT&T's Focus On Irrelevant and Procedurally Inappropriate Arguments Is Nothing More Than An Attempt To Circumvent the Department's Procedures For Resolving Discovery Disputes

AT&T's eighteen page response to Verizon MA's seven page appeal of the Hearing Officer's decision is based largely on irrelevant facts and procedurally inappropriate arguments that are designed to divert the Department's attention from the relevant issues to be decided on appeal. Strangely, AT&T spends the majority of its Opposition discussing Verizon MA's alleged failure to respond adequately to various discovery requests propounded by AT&T during the course of this proceeding. The lodging of such complaints, regardless of their merit, have no place in this appeal of the Hearing Officer's ruling. Put simply, AT&T's Opposition is nothing more than a procedurally improper attempt to circumvent the Department's procedures for resolving discovery disputes.

The parties to this proceeding, including AT&T, are well aware of the procedures that the Department has made available to them in the event they are unable to resolve discovery disputes.[1] If AT&T was displeased with Verizon MA's discovery responses, AT&T could have – and should have – filed a motion to compel. Having failed to do so, however, AT&T should not be permitted to raise such issues on the appeal of an entirely unrelated issue. The adequacy of Verizon MA's discovery responses is of no legal significance to the procedural and legal questions at issue on appeal. AT&T's lengthy, irrelevant discussion is simply a ploy to direct the Department's attention away from

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[1] *See e.g.*, 220 C.M.R. 106(6)(d)(3).

AT&T's failure to respond to Verizon MA's data requests. Rather, AT&T would have the Department focus on Verizon MA's responses to various AT&T data requests – data requests AT&T never bothered to challenge, and thus are of no consequence to the issues to be decided on appeal. The Department should not accept AT&T's improper and self-serving end-run of the Department's discovery procedures.[2]

II. AT&T Does Not Rebut The Fact That The Hearing Officer Erred In Finding That The Information Regarding AT&T's Network And Operational Experience Is Not "Crucial" To Verizon MA's Evaluation Of AT&T's Cost Model

Notably absent from AT&T's Opposition is any rebuttal of Verizon MA's argument that the Hearing Officer erred in finding that the information regarding AT&T's network and operational experience was not "crucial" to Verizon MA's evaluation of AT&T's cost model. AT&T is silent because it is well aware of the Hearing Officer's ruling was based on an erroneous finding and an erroneous standard of review.

First, the information sought by Verizon MA regarding AT&T's network and operational experience is plainly relevant to Verizon MA's evaluation and validation of the cost model filed by AT&T in this proceeding. AT&T contends, and Verizon MA disputes, that the costs estimates produced by the HAI 5.2a-MA Model represent a realistic depiction of the forward-looking costs Verizon MA will incur to provide unbundled network elements. Many of the inputs to AT&T's model are based on expert opinion, engineering judgment, and vendor quotes obtained by AT&T over the past five

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[2] AT&T's suggestion that the Department should strike Verizon MA's cost studies is likewise completely without merit and should be rejected.

years.[3] Thus, to the extent the HAI 5.2a-MA Model relies on data that is several years old in building a forward-looking network operated by an efficient carrier, information regarding the costs, operations or practices of a presumably efficient carrier, such as AT&T, is highly relevant. If the expert opinions and engineering principles that are incorporated into the model are truly as forward-looking as AT&T claims, it would be reasonable for AT&T, as a profit-maximizing firm, to follow these same principles. Moreover, because many of the HAI-5.2a-MA Model's inputs are allegedly derived from AT&T's own general industry experience,[4] Verizon MA should be permitted to verify the accuracy of this information against AT&T's actual practices. Validation of the HAI 5.2a-MA Model becomes increasingly important in light of AT&T's admission that it never validated the model through the use of external data.[5] For all these reasons, Verizon MA should be allowed to discover, analyze and validate the extent to which AT&T's actual network and operational experience is consistent with the HAI- 5.2a-MA Model's inputs, assumptions and costs outputs, which AT&T would have the Department impose on Verizon MA.

Second, AT&T cannot rebut the fact that the Hearing Officer's ruling was based on an improper standard of review. The ruling concluded that production of the information was not necessary because it was "not crucial to the evaluation of the [HAI

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3 *See*, D.T.E. 01-20, *Direct Testimony of Robert A. Mercer* (May 8, 2001) at Exhibit C ("Mercer Direct Testimony").

4 Mercer Direct Testimony at Exhibit C, pgs. 85, 90-91, 105, 110-115, 117, 135, and 170.

5 *AT&T's Responses to Verizon Massachusetts Information Requests to AT&T Communications of New England, Inc., Response No. VZ-ATT 1-33* (May 29, 2001).

5.2a-MA Model]."[6] This novel standard of review – based on the degree to which the information is crucial to the requesting party – has no legal basis in Massachusetts and thus must be rejected. As Verizon MA noted in its appeal, the standard for discovery is whether the information is relevant or likely to lead to the discovery of admissible evidence, not whether it is crucial.[7] Applying the appropriate standard of relevancy leads to one unavoidable result – because the information sought regarding AT&T's network and operational experience is likely to prove or disprove the reasonableness and validity of AT&T's claims, it is discoverable.[8] Accordingly, the Hearing Officer's ruling with respect to these information requests should be overturned. AT&T's production of this relevant data is long overdue.

III. AT&T Has No Valid Response To Verizon MA's Assertion That The Hearing Officer Erred In Refusing To Order AT&T To Produce The PNR Data Or, Alternatively, To Strike AT&T's Testimony Relating To The HAI-5.1a-MA Model

Having properly determined that the PNR customer location data requested by Verizon MA was necessary for the evaluation of AT&T's cost model, the Hearing Officer should have either ordered AT&T to produce the requested data, or in the alternative, should have stricken AT&T's HAI 5.2a-MA Model and related testimony. AT&T's vague and confusing "offer" to help Verizon MA obtain limited and restricted "access" to portions of the underlying data months after it was requested was by no means an abandonment of AT&T's steadfast refusal to produce the complete database

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6 *Hearing Officer's Ruling on Verizon Massachusetts' Motion to Compel Discovery Responses by AT&T Communications of New England, Inc. and CLEC Coalition's Motion to Compel Discovery Responses by Verizon Massachusetts* (Aug. 8, 2001) at p. 9 ("Hearing Officer Ruling").

7 *See* New England Telephone and Telegraph Company, D.P.U. 91-63-A (1991) at p. 11; 220 C.M.R. § 1.06(6)(c); Rule 26(b)(1) Massachusetts Rules of Civil Procedure.

and software Verizon MA requested. If the access AT&T now offers to arrange was sufficient to allow Verizon MA to fully validate the customer location data underlying AT&T's cost model, AT&T would have arranged for such access in the first place. AT&T did not do so precisely because it knew that the cost model could not be validated under PNR's limited and restrictive conditions.

A. AT&T's Offer To Help Verizon MA Obtain Access To The Customer Location Data Compiled By PNR Is Meaningless; No Party, Including AT&T, Has Ever Been Able To Validate The Accuracy Of This Data

AT&T claims in its Opposition that it offered to help Verizon obtain access to the PNR customer location data, but that Verizon MA has "never bothered to contact AT&T" regarding its proposal.[9] AT&T's argument rings hollow for several reasons. First, AT&T's protestations are belied by its actions. The record in this proceeding is devoid of any offer by AT&T to help Verizon MA review the data compiled by PNR. Tellingly, AT&T cites to no documentation or other contact with Verizon MA to substantiate its "long-standing offer to help."[10]

In addition, not only is AT&T's offer new, it appears to be evolving over time. AT&T made no mention of this offer in its May 28 response to Verizon MA's data requests; in AT&T's July 12 opposition to Verizon MA's motion to compel, for the first

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(…footnote continued)

[8] *Id.*; *Black's Law Dictionary*, Abridged Sixth Edition, at 894.

[9] *AT&T's Opposition to Verizon's Appeal from the Hearing Officer's Ruling on Verizon's Motion to Compel and Opposition to Verizon's Motion to Strike the HAI 5.2a-MA Model or, in the Alternative, AT&T's Cross-Motion to Strike Verizon's Recurring Cost Model* (Aug. 17, 2001) at p. 5 ("AT&T's Opposition to Verizon's Appeal").

[10] AT&T's Opposition to Verizon's Appeal at p. 5.

time there is a two sentence reference to AT&T's "long-standing" offer of assistance;[11] it was not until this recent filing that AT&T expanded upon the terms of its "offer"[12] and even then AT&T's "offer" lacks the detail necessary to allow Verizon MA to know exactly what AT&T is "offering." For example, AT&T fails to explain the exact manner in which Verizon MA can access the information; and significantly, AT&T makes no mention of the cost of this "access."[13] Further, AT&T claims that much of the data is "private intellectual property that may not be released," but then contends that Verizon MA can obtain "electronic access" to it. One wonders how Verizon MA will be able to obtain electronic access to information that admittedly cannot be released. Aside from the untimely, gratuitous and contradictory nature of AT&T's pronouncements,[14] the solution proposed is not sufficient to analyze and validate the operation of AT&T's cost model.

Even if Verizon MA were afforded the limited review of the data proposed by AT&T (as has been the case in proceedings in other states), such an effort has consistently proven to be a waste of time and valuable resources. AT&T goes to great lengths to declare the ease with which Verizon MA can access, review and validate PNR's customer location database. However, if such an analysis could be performed so easily, surely AT&T would have done so itself

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[11] *AT&T's Opposition to Verizon's Motion to Compel* (July 12, 2001) at p. 13 ("AT&T's Opposition to Verizon's Motion to Compel").

[12] AT&T Opposition to Verizon's Appeal at p. 9.

[13] Estimates of the Resources Required to Support the Customer Location Model, PNR and Associates, Inc. (date unknown) at p. 2.

[14] Curiously, AT&T goes to great lengths to explain the manner in which the model utilizes the customer location data compiled by PNR. AT&T Opposition to Verizon's Appeal at pgs. 6-7. This

(footnote continued…)

The fact is that PNR has repeatedly and consistently refused to make the essential data and methodologies by which the customer locations are produced available to anyone in a manner that will permit validation. As the attached previously filed affidavit of former NERA economist Jino Kim demonstrates, on-site visits to PNR's facilities have never been a worthwhile exercise. Availing itself of AT&T's past offers, Verizon representatives have visited PNR on numerous occasions – each time attempting to examine and validate the information that is central to the operation of AT&T's cost model and at issue in this appeal – the customer location database. However, each time, PNR failed to provide the full set of models and algorithms used to produce this database, choosing instead to only make available bits and pieces of the model-produced output sheets. Unless Verizon MA gains full access to the necessary materials used to compile PNR's geocoded database – information that PNR steadfastly refuses to make available to any party, including AT&T – Verizon will not be able to conduct a detailed and meaningful analysis of AT&T's HAI-5.2a-MA Model. Because these materials have never been made available, it is undisputed that neither AT&T, Verizon, the FCC, nor any state public service commission has ever been able to validate the accuracy of the PNR customer location data.

The Hearing Officer did not dispute the relevance of the information sought by Verizon MA and acknowledged the importance to Verizon MA of being able to review and analyze the underlying data for the HAI 5.2a-MA Model.[15] The Hearing Officer

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(…footnote continued)

gratuitous explanation of the model's mechanics is completely irrelevant and only serves to obscure the question at issue – did the Hearing Officer err in not ordering AT&T to produce the relevant data.

[15] Hearing Officer Ruling at p. 9.

erred in denying Verizon MA access to documentation that is clearly relevant. Accordingly, the Department is left with two choices: (1) order AT&T to produce the customer location data compiled by PNR, or (2) in the absence of such production, strike AT&T's testimony relating to the HAI 5.2a-MA Model.

B. The Procedures Deemed Adequate By The FCC Are Inadequate And Inappropriate In The Context Of A State-Specific UNE Proceeding Designed To Determine The Actual Costs Of Providing Service

AT&T again goes to great lengths to allege that the access now offered to Verizon MA is the same access that was deemed adequate by the FCC in the federal universal service proceeding.[16] AT&T makes the misguided argument that, because the customer location data was never placed on the public record in the FCC's proceeding, there is no need to do so here. AT&T is wrong. The merits of the FCC's ruling aside, the adequacy of the access to the PNR data the parties were provided must be viewed in the context of the high level purpose to which the FCC put its model: to determine the relative cost differences among the states. The FCC's model has never been used to determine the actual costs of providing service within a state. As the FCC recently stated:

> The Commission has never used the USF cost model to determine rates for a particular element, nor was it designed to perform such a task. The model was designed to determine relative cost differences among different states, *not actual costs.* That is the purpose for which the Commission has used the model in the universal service proceedin[g].[17]

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16 AT&T Opposition to Verizon's Appeal at pgs. 11-12.

17 In the Matter of Application of Verizon VA New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon VA Long Distance), NYNEX Long Distance (d/b/a Verizon VA Enterprise Solutions) And Verizon VA Global Networks Inc., For Authorization to Provide In-Region, Inter-LATA Services in Massachusetts, CC Docket No. 01-9, *Memorandum Opinion and Order*, FCC 01-130 (rel. April 16, 2001) (emphasis added).

Furthermore, in the end, the FCC adopted a hold harmless provision that afforded the states at least as much universal service funding as they had received prior to the FCC's Order.[18] Thus, to the extent the model did not accurately estimate the costs of providing service – either a high level or a more detailed level (e.g., estimating costs at the wire center level) – no one was harmed, or could potentially be harmed, as a result of the cost estimates produced by the federal universal service cost model. That is not the case here.

Aside from whether the opportunity to review limited aspects of the customer location data at PNR was sufficient in the context of the federal universal service proceeding, it is not sufficient or appropriate when the proceeding endeavors to determine the actual costs of providing service. AT&T contends that the HAI 5.2a-MA Model accurately locates customers throughout the network and produces a realistic estimate of the actual costs of providing service to those customers. Now, more than ever, it is critical that the parties be afforded a meaningful opportunity to review and analyze the accuracy of the underlying customer location data and the method by which it is compiled and derived. As noted above and in the affidavit of Jino Kim, because PNR only affords limited access to the data and imposes severe restrictions on what Verizon MA is allowed to take away, any site visit to PNR or restricted remote access is meaningless. AT&T's attempt to draw an analogy between this proceeding and the extremely limited federal universal service proceeding should be rejected. It is nothing more than a smoke and mirrors attempt to disguise the fact that AT&T failed to meets its

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[18] In the Matter of Federal-State join Board on Universal Service, CC Docket No. 96-45, *Ninth Report and order and Eighteenth Order on Reconsideration,* FCC 99-306 (rel. Nov. 2, 1999) at ¶ 78.

evidentiary burden to substantiate its cost model. Absent production of the underlying customer location data, the Department should strike AT&T's HAI 5.2a-MA Model and associated prefiled testimony.

CONCLUSION

For the forgoing reasons, Verizon MA respectfully requests that the Department dismiss AT&T's Opposition, grant Verizon's Appeal of the Hearing Officer's Ruling, and order AT&T to supplement its answers to the subject information requests or, alternatively, strike AT&T's HAI 5.2a-MA Model and associated prefiled testimony.

Respectfully submitted,

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