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July 30, 2004

VIA OVERNIGHT DELIVERY

Ms. Mary L. Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station
Boston, Massachusetts 02110

Re: D.T.E. 03-60: 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

Dear Ms. Cottrell:

A.R.C. Networks Inc. d/b/a InfoHighway Communications, Broadview Networks Inc., Broadview NP Acquisition Corp., Cleartel Telecommunications, Inc. f/k/a Essex Acquisition Corp., DSCI Corporation, Metropolitan Telecommunications, Inc., XO Communications, Inc. and XO Massachusetts, Inc., through counsel, hereby submit for filing in the above-referenced proceeding before the Massachusetts Department of Telecommunications and Energy these Comments responding to the Department's June 15, 2004 Letter Order. Enclosed please find an original and ten (10) copies of these Comments, a duplicate and a self-addressed, postage-paid envelope. Please date-stamp the duplicate upon receipt and return it in the envelope provide.

Please feel free to contact Brett Heather Freedson at (202) 887-1211 if you have any questions regarding this filing.

Respectfully submitted,

Erin W Emmott

Erin Weber Emmott (BBO# 644405)
Counsel to the Joint Parties

cc: Service List (via email)

DC01/FREEB/222886.1

Before the
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS & 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

COMMENTS OF THE JOINT PARTIES

A.R.C. Networks Inc. d/b/a InfoHighway Communications, Broadview Networks Inc., Broadview NP Acquisition Corp., Cleartel Telecommunications, Inc. f/k/a Essex Acquisition Corp., DSCI Corporation,[1] Metropolitan Telecommunications, Inc., XO Communications, Inc. and XO Massachusetts, Inc. (the "Joint Parties"), by their attorneys and pursuant to the June 15, 2004 Letter Order of the Massachusetts Department of Telecommunications and Energy (the "Department") in the above-captioned proceeding, respectfully submit these comments responding to the Department's Briefing Questions set forth therein.

Verizon New England Inc. d/b/a Verizon Massachusetts ("Verizon") is required under existing federal law to offer to competitive local exchange carriers ("CLECs") within Massachusetts access to network elements, including local switching, dedicated transport and high-capacity loop facilities, on an unbundled basis. Indeed, such unbundling obligations imposed on Verizon by the Communications Act of 1934, as amended (the "Act") and the Verizon Merger Order,[2] and set forth in Department-approved interconnection agreements

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1 DSCI Corporation is separately represented by counsel in the above-captioned proceeding, but joins the Joint Parties in filing these Comments.

2 *In re GTE Corporation, Transferor and Bell Atlantic Corporation, Transferee For Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing*

between Verizon and Massachusetts CLECs, remain despite vacatur by the Court of Appeals for the District of Columbia Circuit in the *USTA II* decision the rules promulgated by the Federal Communications Commission ("FCC") in the *Triennial Review Order*.[3] The *USTA II* decision does not invalidate the statutory unbundling obligations imposed on Verizon by federal and state law and does not, by definition, modify any interconnection agreement between Verizon and any Massachusetts CLEC. Accordingly, notwithstanding the *USTA II* decision, Verizon remains obligated to provide to Massachusetts CLECs access to the same unbundled network elements ("UNEs"), subject to the same rates, terms and conditions, as before the D.C. Circuit's *USTA II* mandate took effect.

The Department is obligated, under federal and state law, to supervise Verizon's ongoing compliance with its unbundling obligations. The Department has the authority to interpret and enforce the rates, terms and conditions for network elements offered by Verizon to Massachusetts CLECs under Department-approved interconnection agreements. Moreover, under section 252 of the Act, the Department also must review and approve any proposed agreement or wholesale tariff provision that would impact Verizon's ongoing obligations to offer to requesting carriers unbundled access to its network elements, regardless of whether such obligations arise under section 251 or section 271 of the Act. In addition, the Department may, pursuant to its authority under federal and state law, take any action deemed necessary to

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License, CC Docket No. 98-184, Memorandum Opinion and Order, FCC 00-221, 15 FCC Rcd 14032 (Jun. 16, 2000) ("Verizon Merger Order").

3 In the Matter of *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (CC Docket No. 96-98); *Deployment of Services Offering Advanced Telecommunications Capability* (CC Docket No. 98-147), Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd 16978 (rel. Aug. 21, 2003) ("*Triennial Review Order*"), *vacated and remanded in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

promote the competitive objectives of the Act, and therefore may order that Verizon offer to Massachusetts CLECs unbundled access to its network elements at TELRIC rates.

I. VERIZON IS REQUIRED UNDER EXISTING FEDERAL LAW TO PROVIDE UNBUNDLED ACCESS TO NETWORK ELEMENTS AND COMBINATIONS AT TELRIC RATES

Verizon is obligated under existing federal law to provide CLECs access to networks elements and combinations of network elements, including local switching, dedicated transport and high-capacity loop facilities, on an unbundled basis and at TELRIC rates. As an initial matter, the *USTA II* decision does not displace the unbundling rules applicable to high-capacity loop facilities promulgated in the *Triennial Review Order*. Indeed, the D.C. Circuit left intact, and did not even address, the FCC's national finding that the ability of CLECs to offer telecommunications services would be impaired without unbundled access to the high-capacity loop facilities of incumbent local exchange carriers ("ILECs"). To the contrary, the D.C. Circuit expressly stated that, as to all matters not addressed in the *USTA II* decision, "the petitions for review are...denied."[4] Consequently, the FCC's unbundling rules promulgated under section 251(c)(3) of the Act and applicable to Verizon's offering of high-capacity loop facilities remain in full force and effect notwithstanding the *USTA II* decision.

Further, the *USTA II* decision did not nullify any of the unbundling obligations imposed on Verizon by the Act, the FCC's Verizon Merger Order, and state law, or otherwise set forth in the Department-approved interconnection agreements between Verizon and Massachusetts CLECs. First, sections 251 and 271 of the Act require that Verizon provide to requesting CLECs access to network elements and combinations of network elements, including local switching, dedicated transport and high capacity loop facilities, on an unbundled basis.

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4 *USTA II*, 359 F.3d at 594.

Second, the Verizon Merger Order requires that Verizon continue to provide to requesting CLECs access to such unbundled network elements ("UNEs"), subject to the same rates, terms and conditions as before the D.C. Circuit's *USTA II* mandate took effect, until all legal challenges to the FCC's unbundling rules are finally resolved. Third, the Department-approved interconnection agreements between Verizon and Massachusetts CLECs impose on Verizon a binding obligation to provide network elements in accordance with the rates, terms and conditions set forth therein, unless and until such time as the Department approves modifications to such interconnection agreements, as required by an applicable change of law provision. Accordingly, as discussed more fully below, Verizon remains obligated to provide to CLECs access to network elements and combinations of network elements, including local switching, dedicated transport and high capacity loop facilities, on an unbundled basis and at TELRIC rates, notwithstanding the D.C. Circuit's *USTA II* mandate.

A. Verizon Must Provide To CLECs Unbundled Network Elements And Combinations of Unbundled Network Elements As Required By The Act

The unbundling obligations imposed on Verizon under sections 251 and 271 of the Act apply irrespective of whether unbundling rules promulgated by the FCC are in place. Specifically, section 251(c)(3) of the Act requires that ILECs, such as Verizon, provide to CLECs nondiscriminatory access to network elements, including, for example, high-capacity loops and transport and local switching.[5] The Act defines a network element as "a facility or equipment used in the provision of a telecommunications service. Such term also includes the features, functions, and capabilities that are provided by means of such facility or

[5] 47 U.S.C. § 251(c)(3) (stating that ILECs have a duty to provide "to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory...").

equipment...."[6] The language of the section 215(c)(3) of the Act is self effectuating and does not require FCC rules to implement the ILECs' unbundling obligations as to specific network elements. Therefore, even to extent that the D.C. Circuit has vacated the specific unbundling rules promulgated in the *Triennial Review Order*, ILECs, including Verizon, remain obligated to provide to CLECs network elements and combinations of network elements in accordance with section 251(c)(3) of the Act.

Section 271 of the Act further requires that the Bell Operating Companies ("BOCs"), including Verizon, provide to CLECs nondiscriminatory access to loops, transport, and local switching.[7] Specifically, Verizon must offer to CLECs under section 271 network elements, including without limitation, high-capacity loops and transport facilities, local switching and the UNE Platform (UNE-P), even if Verizon no longer is required to offer such network elements under section 251(c)(3). The FCC repeatedly has emphasized that section 271 of the Act imposes on the BOCs, including Verizon, a separate and distinct unbundling obligation applicable to the "Competitive Checklist" network elements, regardless of whether the same network elements are subject to the unbundling obligations imposed by section 251(c)(3).[8] Indeed, the nature of unbundling obligations imposed on Verizon by section 271 of the Act is clearly stated in the *Triennial Review Order*:

> [W]e continue to believe that 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.

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6 47 U.S.C. § 153(29).

7 47 U.S.C. § 271(c)(2)(B)(iv)-(v).

8 *See, e.g., Triennial Review Order* at, ¶ 654 (stating "the plain language and the structure of section 271(c)(2)(B) establish that BOCs have an independent and ongoing access obligation under section 271.").

> Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance market that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under section 251 unbundling analysis.[9]

Accordingly, notwithstanding the D.C. Circuit's *USTA II* mandate, section 271 of the Act imposes on Verizon a separate and distinct obligation to provide to CLECs network elements and combinations of network elements, including local switching, dedicated transport and high-capacity loop facilities, on an unbundled basis. Moreover, as discussed more fully below, the network elements and combinations of network elements offered by Verizon under section 271 of the Act offering must be implemented through interconnection agreements, and therefore must be reviewed and approved by the Department, as required by section 252 of the Act.

B. The Verizon Merger Order Requires That Verizon Provide To CLECs Unbundled Network Elements and Combinations At TELRIC Rates

The Verizon Merger Order also imposes on Verizon a separate and independent obligation to provide to requesting carriers UNEs and UNE combinations at TELRIC rates, as required prior to the date on which the D.C. Circuit's *USTA II* mandate took effect. To mitigate any adverse impact on the public interest threatened by its proposed merger with GTE Corporation ("GTE"), Bell Atlantic Corporation ("Bell Atlantic") voluntarily agreed to abide the conditions set forth in the Verizon Merger Order, which include a voluntary commitment by the merged entity (Verizon) to facilitate and preserve UNE-based competition, including UNE-P. Indeed, the Verizon Merger Order emphasized that the conditions imposed on the Bell Atlantic/GTE merger specifically were adopted to further that end.[10]

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9 *Triennial Review Order* at ¶ 655.

10 Verizon Merger Order at ¶ 3.

The plain language of the Verizon Merger Order requires that Verizon provide to all requesting carriers UNEs and combinations of UNEs, including UNE-P, transport and high-capacity loop facilities, at TELRIC rates, without interruption, until all legal challenges to the FCC's unbundling rules are finally resolved.[11] To reduce any uncertainty to CLECs that may have otherwise resulted from the Bell Atlantic/GTE merger, the Verizon Merger Order endeavored to maintain the regulatory status quo until the FCC's "final and non-appealable" unbundling rules were in place.[12] In that regard, the Verizon Merger Order states:

> [F]rom now until the date on which the Commission's Orders in those proceedings and any subsequent proceedings become final and non-appealable, Bell Atlantic and GTE will continue to make available to telecommunications carriers, in accordance with those orders, each UNE and combination of UNEs that is required under those orders, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide the UNE or combination of UNEs in all or a portion of its operating territory. This condition only would have practical effect in the event that our rules adopted in the UNE Remand and Line Sharing proceedings are stayed or vacated. Compliance with this condition includes pricing these UNEs at cost-based rates in accordance with the forward-looking cost methodology first articulated by the Commission in the Local Competition Order, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide UNEs at cost-based rates.[13]

The Verizon Merger Order clearly states that Verizon's unbundling obligations are not subject to an expiration date, and Verizon would lead the Department to believe. To date, no "final and non-appealable" Order has been issued that would cause the unbundling obligations imposed by the Verizon Merger Order to be superseded. Accordingly, the continuing effect of the Verizon

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11 *Id.* at ¶ 316.

12 *Id.*

13 *Id.*

Merger Order is evident, and the Department need not file with the FCC a Petition for a Declaratory Ruling on that issue of law.

Specifically, in *USTA II*, the D.C. Circuit vacated and remanded for further proceedings the FCC's unbundling rules applicable to local switching and dedicated transport facilities, including UNE-P, and the FCC already has stated that its proposed interim unbundling rules and further notice of proposed rulemaking to adopt permanent rules are forthcoming.[14] The *USTA II* decision therefore does not constitute a "final and non-appealable" judicial decision that would cause existing unbundling requirements imposed by the Verizon Merger Order to be superseded. Accordingly, Verizon must continue to provide UNEs and combinations of UNEs, including local switching, dedicated transport and high-capacity loop facilities, at TELRIC rates and pursuant to the same terms and conditions offered by Verizon prior to the effective date of the *USTA II* mandate.

C. Verizon Must Provide To Requesting Carriers Network Elements And Combinations In Accordance With The Rates, Terms And Conditions Set Forth In Its Interconnection Agreements

In addition to those unbundling requirements imposed on Verizon under the Act and the Verizon Merger Order, Verizon also must provide to Massachusetts CLECs network elements and combinations of network elements in accordance with the rates, terms and conditions set forth in Department-approved interconnection agreements. In Massachusetts, Verizon is a party to individual interconnection agreements with numerous CLECs, including the Joint Parties, each of which includes rates, terms and conditions applicable to the network elements and combinations of network elements offered by Verizon to those carriers. The *USTA*

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[14] Media sources have reported that FCC already has voted to adopt interim unbundling rules on July 21, 2004. *See* FCC Adopts Interim UNE Rules; Analysts See Rough Road Ahead For CLECs, TRDaily (Jul 22, 2004).

II decision does not, by definition, modify any interconnection agreement between Verizon and any Massachusetts CLEC, and does not otherwise permit Verizon to unilaterally alter the rates, terms and conditions applicable to network elements or combinations of network elements set forth in those agreements. Verizon may not, as it has asserted in its letters to Massachusetts CLECs, unilaterally discontinue its offering of network elements at TELIC rates simply by giving notice of discontinuance. To the contrary, Verizon is bound by the unbundling obligations set forth in its Department-approved interconnection agreements until such time as those agreements are properly amended in accordance with an applicable change of law provision.

Notwithstanding the *USTA II* decision, the FCC has confirmed that Verizon must comply with the unbundling obligations set forth in its Department-approved interconnection agreements, and accordingly, that Verizon must continue to provide network elements and combinations of network elements in accordance with the rates, terms and conditions set forth therein. For example, in the *Triennial Review Order*, the FCC rejected ILEC requests for it to abrogate existing interconnection agreements.[15] Moreover, in that proceeding, Verizon's counsel conceded that Verizon must comply with such unbundling obligations regardless of the outcome of the *USTA II* case. Specifically, during the oral argument challenging the *Triennial Review Order*, Verizon's counsel stated that, regardless of the outcome of the *USTA II* case, Verizon would be "subject to a number of agreements in the states, and the states will require [ILECs] to provide elements pursuant to those agreements."[16] Accordingly, Verizon must continue to

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15 *Triennial Review Order* at ¶ 701 ("we decline the request of several BOCs that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with negotiation of contract provisions.").

16 *USTA v. FCC*, D.C. Circuit Nos. 00-1012, 00-1015, Tr. Oral Arg. At 7-11 (Jan. 28, 2004).

provide to Massachusetts CLECs network elements and combinations of network elements in accordance with the rates, terms and conditions set forth in its interconnection agreements notwithstanding the *USTA II* decision.

II. THE DEPARTMENT MUST ENFORCE THE UNBUNDLING OBLIGATIONS IMPOSED ON VERIZON BY FEDERAL LAW

The Act permits, and in fact requires, that the Department oversee the rates, terms and conditions applicable to the network elements provided by Verizon to Massachusetts CLECs on an unbundled basis. Specifically, the broad delegation of authority by Congress to the state commissions, including the Department, under section 252 of the Act requires the Department to supervise Verizon's ongoing compliance with the unbundling obligations imposed by sections 251 and 271 of the Act. In light of the D.C. Circuit's *USTA II* mandate, such authority necessarily includes the following important tasks: (1) the Department must determine whether and to what extent current business relationships between Verizon and Massachusetts CLECs are impacted by the *USTA II* decision, and must interpret and enforce the unbundling obligations set forth in existing interconnection agreements consistent with existing federal law; (2) the Department must review and approve separate commercial agreements, including those agreements applicable to network elements and combinations of network elements offered by Verizon under section 271 of the Act, to ensure that such agreements are consistent with existing federal law; (3) the Department must reject any modification to Verizon's wholesale tariff offerings that would alter the availability or pricing of network elements in a manner inconsistent with existing federal law; and (4) the Department must initiate, as necessary, a proceeding to implement "just, reasonable and nondiscriminatory" rates for network elements and combinations of network elements offered by Verizon to Massachusetts CLECs under section 271 of the Act.

A. The Department Must Interpret And Enforce Verizon's Unbundling Obligations Under The Interconnection Agreements That It Has Approved

As discussed more fully above, Verizon remains obligated to provide to Massachusetts CLECs network elements and combinations of network elements in accordance with the rates, terms and conditions set forth in its Department-approved interconnection agreements until such time as those agreements are properly amended in accordance with the applicable change of law provision. Section 252 of Act requires that the Department interpret and enforce such unbundling obligations imposed on Verizon by the interconnection agreements that the Department previously approved, and furthermore, assess the impact of the *USTA II* decision on such unbundling obligations.[17] In so doing, the Department must determine: (1) whether the D.C. Circuit's *USTA II* mandates is a "change of law" within the meaning of the interconnection agreements between Verizon and Massachusetts CLECs; (2) whether and to what extent any "change of law" precipitated by the *USTA II* decision requires corresponding modifications to the existing business relationships between Verizon and Massachusetts CLECs.

As an initial matter, the Joint Parties submit that efforts by Verizon to modify its interconnection agreements to comply with the *USTA II* decision are entirely premature. The FCC's unbundling rules currently are in flux. Although the *USTA II* decision invalidated certain of the FCC's unbundling rules promulgated in the *Triennial Review Order*, the D.C. Circuit also remanded those rules for further review by the FCC. Importantly, the FCC already has committed to establish interim unbundling rules, and those rules will be forthcoming in the next several days.[18] Further, the FCC shortly will issue a further notice of proposed rulemaking to

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17 *Southwestern Bell Tel. Co. v. Pub. Util Comm'n Texas*, 208 F.3d 475, 479 (5th Cir. 2000); *see also Michigan Bell Tel. Co. v. MCIMetro*, 323 F.3d 248, 356-57 (6th Cir. 2003); *BellSouth Telecomm. Inc. v. MCIMetro*, 317 F.3d 1270, 1276 (11th Cir. 2003) (*en banc*).

18 *See supra* n. 13.

adopt permanent unbundling rules. The FCC's interim unbundling rules will help drive whether Verizon may lawfully modify the rates, terms and conditions applicable to network elements set forth in its current interconnection agreements with Massachusetts CLECs. However, prior to the date on those rules actually take effect, any efforts by Verizon to modify its interconnection agreements are unauthorized, and could result in a significant waste of resources by all interested parties.

In the first instance, the Department must determine whether the *USTA II* decision constitutes a "change of law" as to each interconnection agreement entered into by Verizon within the Commonwealth of Massachusetts. Importantly, the Department must make such determinations on a case-by-case basis, and must reject any blanket claim by Verizon that its interconnection agreements permit unilateral modifications by Verizon as to the rates, terms and conditions for unbundled network elements set forth therein. However, even to the extent that the *USTA II* decision does in fact constitute a "change of law," it does not necessarily follow that modifications to Verizon's interconnection agreements with Massachusetts CLECs are required. Specifically, as discussed more fully above, the *USTA II* decision does not impact separate and independent unbundling obligations imposed on Verizon by the Act, the Verizon Merger Order and state law. Therefore, to extent that the interconnection agreements between Verizon and Massachusetts CLECs currently provide for access to network elements on an unbundled basis, at TELRIC rates, consistent with the unbundling obligations currently imposed on Verizon by federal and state law, such agreements need not be modified in response to the *USTA II* mandate.

B. The Department Must Review and Approve *All* Agreements Impacting The Rates, Terms And Conditions Applicable To Network Elements And Combinations Provided By Verizon

In the event that Verizon enters into an agreement with any Massachusetts CLEC addressing Verizon's ongoing obligation to offer access to its network elements under section 251 or 271, such agreement must be treated by the Department as an "interconnection agreement," subject the requirements of section 252 of the Act. As such, any such agreement setting forth rates, terms and conditions applicable to network elements and combinations of network elements offered by Verizon must be filed with Department. Moreover, the Department must review and approve any agreement addressing Verizon's ongoing obligation to offer access to its network elements, or otherwise must reject such agreement if (i) the agreement (or a portion thereof) discriminates against another telecommunications carriers; or (ii) the implementation of such agreement or portion thereof is not consistent with the pubic interest, convenience or necessity. Furthermore, in the interest of preventing discrimination among carriers within the Commonwealth of Massachusetts, the Department must require that the rates, terms and conditions applicable to network elements and combinations of network elements offered by Verizon be made available for adoption, pursuant to section 252(i) of the Act, by other Massachusetts CLECs.

The FCC already has required that private agreements, including those agreements setting forth rates, terms and conditions applicable to network elements offered by the BOCs under section 271 of the Act, must be filed with the state commissions. Specifically, in response to a Petition for Declaratory Ruling filed by Qwest Communications ("Qwest"), the FCC expressly concluded that section 252 of the Act creates a broad obligation to file agreements (subject to specific narrow exceptions), including those agreements that impose on

carriers an "ongoing" obligations pertaining to, among other things, unbundled network elements.[19] In that proceeding, the FCC concluded that the state commissions should be the "first line of defense" against any efforts by the ILECs to evade their unbundling obligations. As the FCC explained:

> We rejected this [Qwest's} "cramped reading" of section 252, noting that "on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions. Instead, we broadly construed section 252's use of the term "interconnection agreement" holding that carriers must file with the state commissions for review and approval under section 252 any agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements or collocation...[20]

Accordingly, the *Qwest Declaratory Ruling* and related *Qwest NAL* make clear that any agreement entered in by Verizon and any Massachusetts CLEC pertaining to Verizon's ongoing obligation to offer network elements and combinations of network elements on an unbundled basis must be filed with Department, and subject to the Department's procedures for "review and approval" of interconnection agreements. Importantly, such agreements applicable to Verizon's unbundling obligations under section 271 of the Act fall squarely within that requirement, and must be treated as "interconnection agreements" by the Department. To the extent that any question remains as to those obligations, the state commissions are to decide that issue in the first instance.[21]

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19 Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under section 252(a) (1), WC Docket No. 02-89, Memorandum Opinion and Order, 17 FCC Rcd 19337 (2002) ("*Qwest Declaratory Ruling*").

20 Qwest Corporation, Notice of Apparent Liability for Forfeiture, FCC 04-57 (rel. Mar. 12, 2004), at ¶ 11. ("*Qwest NAL*").

21 *Qwest Declaratory Ruling* at ¶ 11.

Of further importance, the *Qwest Declaratory Ruling* supports the finding that the section 252 process for review and approval of interconnection agreements by the state commissions, including section 252(i), is critical to detect and prevent discrimination against any telecommunications carrier.[22] Specifically, section 252(i) ensures that CLECs are aware of, and may adopt the interconnection agreements of other carriers, including the rates, terms and conditions applicable to network elements. Moreover, because section 252(i) of the Act requires ILECs to offer to any carrier the same rates, terms, and conditions set forth in a specific interconnection agreement, market forces may place additional pressure on any discriminatory arrangement. Accordingly, the section 252(i) adoption process is entirely consistent with enforcing Verizon's obligation to provide to Massachusetts CLECs network elements, including local switching, dedicated transport and high-capacity loop facilities, on an unbundled basis and subject to nondiscriminatory rates, terms and conditions.

C. The Department Must Reject Modifications To Verizon's Wholesale Tariff That Do Not Comply With Federal Unbundling Requirements

Consistent with the Department's section 252 duty to review and approve the rates, terms and conditions for network elements offered by Verizon to Massachusetts CLECs, the Department also must require that Verizon's wholesale tariffs comply fully with all unbundling obligations imposed by federal and state law. Conversely, the Department must reject any proposed tariff revision that would permit Verizon to end-run its existing obligations to offer to Massachusetts CLECs networks elements, including local switching, dedicated

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22 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98), First Report and Order, FCC 96-325, 11 FCC Rcd 15499 at ¶ 167 (Aug. 8, 1996) ("*Local Competition Order*") ("...requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements... and to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest.").

transport and high-capacity loop facilities, consistent with the requirements of the Act and state law.

The Joint Parties applaud the Department's July 22, 2004 decision to suspend proposed revisions to Verizon's wholesale tariffs that are blatantly inconsistent with existing federal law, and that would have permitted Verizon to unilaterally discontinue certain UNEs offered within the Commonwealth of Massachusetts and arbitrarily re-price other network elements that Verizon continues to offer.[23] Importantly, all network elements offered by Verizon under section 271 of the Act must be subject to rates, terms and conditions that are "just, reasonable and nondiscriminatory." The Department cannot allow Verizon to implement drastic changes to it's the rates or terms under which network elements without providing any justification as to why such changes are necessary and consistent with federal and state law. Therefore, with respect to any modifications proposed by Verizon to its wholesale tariffs, the Department should require, at a minimum, that Verizon provide a comprehensive and detailed proposal regarding any and all changes that it wishes or intends to make with respect to the availability of any UNEs or UNE combinations in Massachusetts, or the pricing or terms and conditions under which they are made available. Verizon should also be directed to provide an analysis regarding the impact its proposals would have on the continued viability of wireline competition in Massachusetts and to provide justification as to how the changes in the proposed tariff revision are in the public interest. Without such information, the Department would lack the necessary tools to determine the lawfulness of Verizon's proposed tariff revisions.

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[23] Order of the Massachusetts Department of Telecommunications and Energy, D.T.E. 04-73 (rel. Jul. 22, 2004).

D. The Department Must Initiate A Proceeding, As Necessary, To Establish "Just, Reasonable and Nondiscriminatory" Rates For Network Elements Provided By Verizon

As a threshold matter, and as indicated above, any act by the Department to transition from the FCC's TELRIC pricing methodology for network elements is premature. However, in the event that Verizon is required to offer certain network elements only under section 271 of the Act, the Department must initiate a proceeding to determine the "just, reasonable and nondiscriminatory" rates applicable to such network elements.[24]

At such time as it is warranted, the Department should establish a transition plan for network elements provided by Verizon under section 271 of the Act from existing TELRIC rates, which includes a complete Department inquiry regarding rates for network elements offered by Verizon under section 271 of the Act that are "just, reasonable and non-discriminatory." Just as the FCC adopted the TELRIC pricing standard to apply to section 251 UNEs, the FCC has suggested a "just and reasonable" standard to be applied to section 271 network elements. Adopting a different pricing standard, however, does not change the process used to resolve pricing disputes, nor does it modify the pricing responsibility contained in the Act.[25] Accordingly, the Act requires that the Department arbitrate rates for network elements offered by Verizon under section 271 of the Act, in accordance with the "just and reasonable" standard for such rates, established by the FCC.

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24 47 U.S.C. § 271.

25 The Supreme Court already has affirmed the ratemaking authority of the state commissions. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 384 (1999) ("[section] 252(c)(2) entrusts the task of establishing rates to the state commissions. We think this attributes to that task a greater degree of autonomy than the phrase 'establish any rates' necessarily implies. The FCC's prescription through rulemaking, of a requisite pricing methodology no more prevents the states from establishing rates than do the statutory 'Pricing Standards' set forth in section 252(d). It is the states that will apply those standards and implement the methodology, determining the concrete result in particular circumstances.").

The Department may, consistent with the Act, determine that the current TELRIC rates applicable to UNEs also should be the "just and reasonable" rates applicable to network elements offered by Verizon under section 271 of the Act, and such rates may, in fact by TELRIC. The fact that the FCC has adopted a *potentially* more liberal pricing standard for network elements offered by the BOCs under section 271 of the does not necessarily mean that existing TELRIC rates should be changed. TELRIC rates are, by definition, "just reasonable and nondiscriminatory", and it is a fact-based economic question as to whether price levels different than the existing just and reasonable rates are appropriate. As states begin the task of defining the basic parameters of just and reasonable rates – and then deciding the specific rates to be applied – the range of just and reasonable rates necessarily must encompass the existing TELRIC rates. Thus, although section 252(d)(1) does not *automatically* apply to section 271 network elements, the existing UNE rates should still inform state commissions as to what should be considered just and reasonable because the range of just and reasonable results must encompass the existing rates. Accordingly, at such time as the Department undertakes the task of arbitrating the "just and reasonable" rates applicable to network elements offered by Verizon under section 271 of the Act, existing TELRIC rates should act as a baseline to aid the Department's pricing.

III. THE DEPARTMENT MAY REQUIRE THAT VERIZON PROVIDE TO CLECS UNBUNDLED NETWORK ELEMENTS AND COMBINATIONS, AT TELRIC RATES, CONSISTENT WITH ITS AUTHORITY UNDER STATE AND FEDERAL LAW

Under the Act, the Department is permitted to impose on Verizon any unbundling obligation that is consistent with Act and Massachusetts state law. Specifically, even in the absence of unbundling rules promulgated by the FCC, the Department may require that Verizon offer to Massachusetts CLECs network elements, on an unbundled basis and at TELRIC rates. The Act does not preempt, and in fact expressly permits the Department to issue and enforce its

own unbundling rules. Furthermore, Massachusetts state law specifically enables the Department to investigate the state of competition within intrastate telecommunications markets and to promulgate, as necessary, rules and regulations that ultimately would discipline retail rates for local telephone service. The Department's authority to impose on Verizon unbundling obligations consistent with the Act and Massachusetts state law permits the Department to to investigate Verizon's hot cut procedures, as necessary to preserve and protect CLECs' access to unbundled loops.

A. The Department May Impose On Verizon Unbundling Obligations That Are Consistent With The Act

The Department has the authority under the Act to establish and maintain ILEC unbundling obligations. In amending the Act in 1996, Congress specifically preserved state law as a basis of requiring access to network elements.[26] Pursuant to section 252 of the Act, state commissions, such as the Department, may implement unbundling rules consistent with section 251(c)(3). Indeed, section 252 charges state commissions with "ensur[ing]" that arbitrated agreements "meet the requirements of section 251 ... including the regulations prescribed by the [FCC] pursuant to section 251...."[27] In addition, section 252(e)(3) of the Act provides that "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements."[28] The Department also is authorized to make unbundling determinations on issues that the FCC has not yet resolved; pursuant to section 252(c), states are tasked with arbitrating all "open issues", which includes

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26 47 U.S.C. § 251(d)(3).

27 47 U.S.C. § 252(c)(1).

28 47 U.S.C. § 252(e)(3).

issues that might not have been resolved by the FCC.[29] As such, the Act preserves and protects the Department's independent authority under federal law to ensure continued access to UNEs in furtherance of competition.

Section 251(d)(3) of the Act also provides the Department with the authority to establish unbundling obligations, as long as those obligations comply with subsections 251(d)(3)(B) and (C). Section 251(d)(3) states that the FCC "shall not preclude the enforcement of any regulation, order, or policy of a State commission that ... establishes access and interconnection obligations of local exchange carriers."[30] Under this section, the Act protects state action that promotes the unbundling objectives of the statute and prohibits the FCC from interfering with such action. The *USTA II* mandate does not displace the Department's authority to order unbundling pursuant to these provisions of the Act.

The Department also has the authority to ensure compliance with checklist items enumerated in section 271 of the Act. Section 271(c)(2)(A) expressly provides that a BOC, such as Verizon, must implement its section 271 competitive checklist through interconnection agreements. Section 271(c)(1)(A) provides for checklist compliance through "agreements that have been approved under section 252," the approval of which is the responsibility of the Department. Accordingly, pursuant to section 252, the Department is responsible for ensuring that Verizon remains in compliance with its checklist obligations, including its obligation to provide local switching, loops, and transport at just and reasonable rates on an ongoing basis.

As discussed in AT&T's Emergency Motion for an Order to Protect Consumers by Preserving Local Exchange Market Stability, the FCC expressly has acknowledged that the authority of the state commissions, including the Department, to require ILECs, including

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29 *See* 47 U.S.C. § 252(c).

30 47 U.S.C. § 251(d)(3).

Verizon, to provide to requesting carriers access to its network elements, on an unbundled basis and at TELRIC rates, is not preempted by, and would be entirely consistent with federal law.[31] As indicated above, the Act permits the Department to issue and enforce its own unbundling obligations, as necessary to promote the pro-competitive objectives of the statute, even to the extent that such unbundling obligations are greater than those imposed by federal law. Therefore, as discussed below, even if the FCC ultimately determines that the ILECs, including Verizon, need not offer certain network elements to requesting carriers, the Department nevertheless may require unbundling of such network elements under Massachusetts state law.

B. The Department Maintains Broad Authority Under State Law To Require Unbundled Access To Network Elements At TELRIC Rates

The Department has independent authority under state law to require ongoing availability of UNEs and UNE combinations, including local switching, dedicated transport and high-capacity loop facilities, at TELRIC rates. Specifically, the Department is permitted under G.L. c.159 to investigate the state of telecommunications competition within the Commonwealth and to establish, as necessary, rules and regulations that would ensure just and reasonable retail rates for local telephone service provided to Massachusetts consumers. The authority conferred on the Department under G.L. c.159 necessarily encompasses any pro-competitive measure deemed to by the Department necessary to discipline Verizon's retail rates, and includes such measures that require unbundling of Verizon's network elements.

As discussed more fully in AT&T's March 12, 2004 letter to Department,[32] the Department already has determined that the continued availability of UNEs is critical to

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31 *See* AT&T's Emergency Motion for an Order to Protect Consumers by Preserving Local Exchange Market Stability at 21, filed May 28, 2004.

32 *See* Letter from Jay E. Gruber, Senior Attorney, Law & Government Affairs, AT&T to Mary Cottrell, Secretary, Massachusetts Department of Telecommunications and Energy (Mar. 12, 2004).

discipline, through competition, retail rates for local telephone service provided by Verizon to Massachusetts consumers.[33] Therefore, to extent that UNE-based competition within Massachusetts were diminished, the Department would be required first to determine whether the existing state of local telecommunications competition is sufficient to assure just and reasonable rates for retail telecommunications services; and second, whether certain additional unbundling obligations imposed on Verizon by the Department would in fact generate a competitive market, as necessary to sustain just and reasonable rates for retail telephone service. Accordingly, Massachusetts state law permits, and in fact requires, that the Department take affirmative steps to impose on Verizon unbundling obligations, as necessary, to maintain robust competition within Massachusetts telecommunications markets. Such obligations may require that Verizon provide to Massachusetts CLECs network elements and combinations of network elements, includeing local switching, dedicated transport and high-capacity loop facilities at TELRIC rates.

C. The Department Is Permitted Under State And Federal Law To Investigate Verizon Hot-Cut Processes

The Department may initiate a separate proceeding to investigate Verizon's hot cut procedures. As discussed more fully above, Verizon is required to provide to Massachusetts CLECs unbundled access to its loop facilities, including its high-capacity loop facilities. As a practical matter, Verizon's hot cut procedures are essential to provide to Massachusetts CLECs any meaningful access to the unbundled local loops provided by Verizon, and therefore are integrally related to Verizon's compliance with its unbundling obligations. Therefore, to the extent the Department is permitted to issue its own rules and regulations applicable to unbundled

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[33] Massachusetts Department of Telecommunications and Energy, D.T.E. 01-31, Phase I (rel. May 8, 2002).

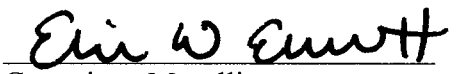
local loops provided by Verizon, the Department also is permitted to investigate, and to supervise, as necessary, Verizon's hot cut procedures.

The scope and standard of review applicable to the Department's investigation of Verizon's hot cut procedures may follow the Department's investigation in D.T.E. 03-60, to the extent that such investigation would be consistent with Massachusetts state law. Specifically, the D.C. Circuit's *USTA II* mandate did not abolish the independent authority of state commissions, including the Department, acting under state law, to investigate whether the ability of CLECs to obtain access to the ILECs' unbundled loop facilities is impaired by existing hot cut procedures. Moreover, in the interest of preserving the scarce resources of the Department and Massachusetts CLECs, such investigation should incorporate the factual record collected by the Department in D.T.E. 03-60, as authorized by the *Triennial Review Order*.

IV. CONCLUSION

Consistent with the foregoing, the Joint Parties submit that Verizon is required under existing federal and state law to provide unbundled access to network elements and combinations at TELRIC rates. The Department is permitted, and in fact required, by the Act to enforce the unbundling obligations imposed on Verizon. Accordingly, the Joint Parties request that the Department take any action necessary to enforce such federal unbundling obligations consistent with state and federal law.

Respectfully submitted,



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