D.T.E. 01-34 August 9, 2001

Investigation by the Department of Telecommunications and Energy on its own motion pursuant to G.L. c. 159, §§ 12 and 16, into Verizon New England Inc. d/b/a Verizon Massachusetts' provision of Special Access Services.

ORDER ON AT&T MOTION TO EXPAND INVESTIGATION

APPEARANCES: Bruce P. Beausejour, Esq.
Barbara Anne Sousa, Esq.
Verizon Massachusetts
185 Franklin Street - Room 1403
Boston, MA 02110

-and-

Barbara Landry, Specialist
Verizon
125 High Street, 11th Floor
Boston, MA 02110
Intervenor

Thomas Reilly
Attorney General
By: Karlen J. Reed
Wilner Borgella, Jr.
Assistant Attorneys General
200 Portland Street, 4th Floor
Boston, MA 02114
Intervenor

Terry Romine, Director of Legal and Regulatory Affairs
Catherine Fox, Manager of Legal and Regulatory Affairs
Adelphia Business Solutions
One North Main Street
Coudersport, PA 16915
Intervenor

Eric Branfman, Esq.
Philip J. Macres, Esq.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
FOR: ALLEGIANCE TELECOM OF MASSACHUSETTS, INC.
FOR: EL PASO NETWORK, LLC
FOR: PAETEC COMMUNICATIONS, INC.
Intervenors

Robert Aurigema, Senior Attorney
AT&T Communications, Inc.
32 Avenue of the Americas, Room 2700
New York, NY 10013

-and-

Patricia A. Jacobs
State Director, Law & Government Affairs
AT&T
99 Bedford Street, Suite 420
Boston, MA 02111

-and-

Jeffrey F. Jones, Esq.
Kenneth W. Salinger, Esq.
Jay E. Gruber, Esq.
Palmer & Dodge, LLP
One Beacon Street
Boston, MA 02108-3190
FOR: AT&T COMMUNICATIONS OF NEW ENGLAND, INC.
Intervenor

Audrey Wright
Cable and Wireless USA, Inc.
1130 Connecticut Avenue, N.W.
Washington, D.C. 20036

-and-

Steven A. Augustino, Esq.
Andrew M. Klein, Esq.
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Washington, D.C. 20036
FOR: CABLE & WIRELESS USA, INC.
Intervenor

Scott Sawyer, Esq.
Vice President-Regulatory Affairs
Conversent Communications of Massachusetts, LLC
222 Richmond Street, Suite 301
Providence, RI 02903
Intervenor

Karen Nations, Regulatory Director
XO Massachusetts, Inc.
45 Eisenhower Drive, 5th Floor
Paramus, NJ 07652

-and-

Eric Krathwohl, Esq.
Emmett E. Lyne, Esq.
Rich, May Bilodeau & Flaherty, P.C.
176 Federal Street, 6th Floor
Boston, MA 02110-2223
FOR: CTC COMMUNICATIONS CORPORATION
FOR: XO MASSACHUSETTS, INC.
Intervenors

Paul Rebey, Esq.
Focal Communications Corporation of Massachusetts
200 N. LaSalle - Suite 1100
Chicago, IL 60601
Intervenor

Michael J. Shortley, III
Global Crossing North America, Inc.
180 South Clinton Avenue
Rochester, NY 14646

-and-

Steven A. Augustino, Esq.
Andrew M. Klein, Esq.
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Washington, D.C. 20036
FOR: GLOBAL CROSSING NORTH AMERICA, INC.
Intervenor

William J. Rooney, Jr. General Counsel
John O. Postl, Assistant General Counsel
Global NAPs, Inc.
89 Access Road, Suite B
Norwood, MA 02062

-and-

Cameron F. Kerry, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC
One Financial Center
Boston, MA 02111
FOR: GLOBAL NAPs, INC.
Intervenor

Michael R. Romano
Director - State Regulatory Affairs
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021

-and-

Eric J. Krathwohl, Esq.
Emmett E. Lyne, Esq.
James M. Avery, Esq.
Rich, May Bilodeau & Flaherty, P.C.
176 Federal Street, 6th Floor
Boston, MA 02110-2223

-and-

Tamar E. Finn, Esq.
Philip J. Macres, Esq.
Paul O. Gagnier, Esq.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W. Suite 300
Washington, D.C. 20007
FOR: LEVEL 3 COMMUNICATIONS, LLC
Intervenor

Douglas Denny-Brown, General Counsel
Yvette Bigelow, Counsel
RNK Telecom Inc.
333 Elm Street
Dedham, MA 02026
Intervenor

Cathy D. Thurston, Esq.
Sprint Communications Company L.P.
401 9th Street, NW, Suite 400
Washington, DC 20004
Intervenor

Christopher J. McDonald, Esq.
WorldCom, Inc.
200 Park Avenue, 6th Floor
New York, NY 10166
Intervenor

John J. Jones, General Counsel
RCN-BecoCom, LLC
105 Carnegie Center, 3rd Floor
Princeton, NJ 08540
Limited Participant

ORDER ON AT&T MOTION TO EXPAND INVESTIGATION

I. INTRODUCTION

On March 14, 2001, the Department of Telecommunications and Energy ("Department") opened an investigation into Verizon New England Inc. d/b/a Verizon Massachusetts' ("Verizon") provision of special access services.[1] The purpose of this investigation is to determine through presentation of evidence: (1) whether Verizon's special access services are unreasonable under G.L. c. 159, § 16; and (2) if so, what steps Verizon should be required to take to improve its special access services. In the Order opening the investigation, the Department stated that it would investigate special access services provided by Verizon pursuant to state tariff.

Shortly after opening the investigation, the Department received two motions to expand the scope of the proceeding. On March 30, 2001, Conversent Communications of Massachusetts, LLC ("Conversent") filed with the Department a Motion to Expand the Scope of Proceeding. In its motion, Conversent asked the Department to expand this investigation to include Verizon's provision of high capacity unbundled loops. On April 6, 2001, AT&T Communications of New England, Inc. ("AT&T") filed with the Department a Motion to Expand Investigation ("Motion"). In its motion, AT&T asks the Department to expand this investigation to include special access offerings provisioned under the federal access tariff.

The Hearing Officer asked for comments on both motions. On April 23, 2001, the

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[1] Special access services consist of non-switched dedicated line services, and are used by interexchange carriers to connect their customers to the carrier's point of presence for the exchange of long distance traffic. Special access services are also used to transmit high speed data.

following parties filed comments in support of both motions: PaeTec Communications, Inc. ("PaeTec") and Allegience Telecom of Massachusetts, Inc. ("Allegience") ("PaeTec/Allegience Comments"), CTC Communications, Corporation ("CTC"), Level 3 Communications, LLC ("Level 3"), and XO Massachusetts, Inc. ("XO") ("CTC/Level 3/XO Comments"), and Cable & Wireless USA, Inc. ("C&W") and Global Crossing North America, Inc. ("Global Crossing") ("C&W/Global Crossing Comments"). Also on April 23, 2001, Verizon filed comments in opposition to both motions ("Verizon Comments"). On April 30, 2001, AT&T, Conversent, and Verizon filed reply comments.

On April 30, 2001, the Hearing Officer issued an information request to Verizon asking Verizon to identify the percentage of special access services it had provisioned over the past year under the state tariff, and the percentage provisioned under the federal tariff. Verizon responded that 0.6 percent of special access services were provisioned in the past year under the state tariff, and 99.4 percent were provisioned under the federal tariff.

On June 20, 2001, the Hearing Officer issued a ruling denying Conversent's Motion, citing existing performance metrics and penalties for Verizon's provision of high capacity loops. This Order addresses AT&T's Motion.

II. AT&T'S MOTION

In its Motion, AT&T argues that the Department should investigate special access services in Massachusetts provisioned under the federal tariff because of Verizon's alleged poor performance in this area, and the "inherently local consequences" and anticompetitive effect of that poor performance (Motion at 2). AT&T also states that because most of the special access services that Verizon provisions in Massachusetts are provided under the federal tariff, there

may be little for the Department to investigate absent the federally tariffed services (id. at 3). According to AT&T, the Department must include the federally tariffed services in its investigation in order to address and resolve the special access problems faced by competitive local exchange carriers ("CLECs") and their customers in Massachusetts (id. at 4).

AT&T asserts that the Department has jurisdiction[2] to investigate and regulate the quality of Verizon's performance in provisioning special access circuits ordered under the federal tariff (id.). AT&T argues that federal law does not preempt us with respect to intrastate traffic on federally tariffed circuits based on the following preemption analysis:[3] (1) Congress explicitly contemplated concurrent jurisdiction in the telecommunications field, and there is no clear Congressional intent to preempt state law; (2) there is no federal law with which any intrastate service quality directive of a state commission could conflict; (3) since there are no federal wholesale access service quality standards, no service quality remedy imposed by a state commission could put [Verizon] in the position of being physically unable to comply with both state and federal law; and (4) neither Congress nor the Federal Communications Commission ("FCC") has undertaken comprehensive regulation of telecommunications service quality that would demonstrate an intent to "occupy the field" of intrastate access service quality (id. at 6). AT&T further argues that federal law expressly contemplates state regulatory authority over

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2 AT&T cites to our general supervisory authority in G.L. c. 159, § 12(d) as a basis for our jurisdiction to regulate the intrastate traffic on federally tariffed circuits.

3 AT&T bases its argument on a decision by the Minnesota Public Utility Commission. In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. against U.S. West Communications, Inc. Regarding Access Service, 2000 Minn. PUC LEXIS 53 (Docket No. P-421/C-99-1183; August 15, 2000) ("Minnesota PUC Decision").

mixed-use access facilities,[4] and that FCC regulations preempt only inconsistent state regulation (AT&T Reply Comments at 4).

III. POSITIONS OF THE PARTIES

All parties that submitted comments (with the exception of Verizon) agreed with AT&T's argument that federally tariffed services should by included in this investigation. Parties pointed out that state and federally tariffed circuits share the same ordering processes, equipment and connections, and the same provisioning and service quality problems (Allegiance/PaeTec Comments at 2; CTC/Level 3/XO Comments at 4; C&W/Global Crossing Comments at 3). Some parties emphasized their dependence on Verizon to provide services to their customers (C&W/Global Crossing Comments at 2), while others stated that as a practical matter the Department's investigation must include federally tariffed circuits to establish an adequate sample size for performance measurement and to achieve a solution to special access problems (CTC/Level 3/XO Comments at 4; C&W/Global Crossing Comments at 4).

The CLECs that filed comments also agree with AT&T that the Department has jurisdiction to address federally tariffed special access circuits in this investigation. Certain parties note that the circuits in question carry up to 90 percent *intrastate* traffic, and the Department has jurisdiction to regulate intrastate traffic, even if transported over interstate circuits (Allegiance/PaeTec Comments at 2). Other parties argue that the Department is preempted only if its actions are in conflict with the FCC regulatory scheme, and that the federal regulatory scheme has not occupied the entire field of service quality (CTC/Level 3/XO

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[4] AT&T cites Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) (overlapping federal/state jurisdiction), and 47 U.S.C. §§ 261, 253(b) (reserving to the states authority to impose state requirements not in conflict with the Act).

Comments at 6). Some parties identify instances where the Department has had authority to review service quality in the past, including service quality of mixed use facilities, and other instances where analogous Department action in the field of electric regulation did not conflict with a federal scheme of rate regulation (CTC/Level 3/XO Comments at 5-6). Other parties state that the filed rate doctrine[5] does not immunize a carrier from regulatory scrutiny under an agency's statutory authority to ensure that the rates, terms and conditions of service are just, reasonable and nondiscriminatory (Allegience/PaeTec Comments at 4). Finally, several parties addressed language in the FCC's Verizon Massachusetts Order[6] regarding special access problems, stating that Section 208 (47 U.S.C. § 208) is the appropriate federal procedural remedy for carriers to address interstate special access problems, but is not the exclusive remedy (id. at 3).

Verizon argues that the Department does not have regulatory authority in this area because the FCC maintains exclusive jurisdiction over interstate tariffed services (Verizon Comments at 7). According to Verizon, the FCC has determined that special access services carrying ten percent or more interstate traffic must be tariffed at the federal level, and that the federal tariff comprehensively governs all terms and conditions under which the carrier provides service (id. at 10). Verizon further contends that the FCC's conclusion that special

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5 The filed rate doctrine forbids a carrier from charging rates for its services other than those properly filed with the appropriate federal regulatory agency (e.g., FCC). Blacks Law Dictionary, at 628 (6th ed., 1998).

6 Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130 (rel. April 16, 2001) ("Verizon Massachusetts Order").

access services must be tariffed at the federal level necessarily preempts state regulation of the quality of those services; carriers may address claims of inadequate service on federally tariffed special access services by filing a Section 208 complaint with the FCC (id. at 11). Furthermore, Verizon claims that absent some FCC delegation of authority to the states,[7] the Department has no authority to require a different, or better, quality of service than is required under the federal tariff, because that different quality of service would effectively alter the terms and conditions of service provided under the federal tariff (id.).

Verizon also argues that any attempt by the Department to impose performance standards, measurements, or penalties relating to federally tariffed special access services would violate the Communications Act and the filed rate doctrine, which prohibits states from modifying the terms of federal tariffs (id. at 13). Verizon points out that the primacy of the federal tariff applies not only to rates, but to terms and conditions of service (id.). Because Verizon's federal tariff covers the subjects of provisioning, maintenance, and remedies for noncompliance,[8] any state action to alter these terms would be invalid under the filed rate doctrine (id. at 14).

III. ANALYSIS AND FINDINGS

The CLECs argue that Congress intended to leave quality of service regulation authority

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[7] According to Verizon, the FCC has jurisdiction over the entire federally tariffed service, and the FCC has neither reserved nor delegated any of its authority to state regulatory commissions (Verizon Reply Comments at 2).

[8] Verizon offers as examples the following tariff provisions: access order standard intervals (§ 5.2.1), customer recourse for missed installation dates (§ 5.2.3), credit allowance for service interruptions (§ 2.4.4), and allowable damages for service issues (§ 2.1.3) (Verizon Comments at 14 n.15).

with the states, and therefore the FCC cannot preempt the Department. According to the CLECs, when Congress passed the Telecommunications Act of 1996, it intended to reserve to the states jurisdiction over quality of service of intrastate communications. 47 U.S.C. § 253 ("nothing in this section shall affect the ability of a State to impose … requirements necessary to … ensure the continued quality of telecommunications services …"); § 261 ("nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services … as long as the State's requirements are not inconsistent with this part or the [FCC's] regulations …"). Therefore, the CLECs conclude that the Department has jurisdiction to investigate and regulate the quality of Verizon's provision of federally tariffed special access services.

The Supreme Court enunciated a test for determining whether preemption occurs in Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355 (1986) ("Louisiana PSC"). Louisiana PSC states that the critical question to determine when preemption occurs is whether Congress intended that federal regulation supersede state law. Louisiana PSC at 369.[9] The FCC's jurisdiction is defined by Congress in 47 U.S.C. § 152; see also 47 U.S.C. §§ 201-205 (FCC jurisdiction over common carrier service and charges). Congress has given the FCC jurisdiction over, among other things, interstate communication.

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[9] Louisiana PSC identified six circumstances where preemption occurs: (1) Congress expresses a clear intent to preempt state law; (2) outright or actual conflict between federal and state law; (3) compliance with federal and state law is in effect physically impossible; (4) implicit in federal law is a barrier to state regulation; (5) Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law; and (6) state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Louisiana PSC at 368-369. Verizon argues the first item on this list.

Id. The FCC's jurisdiction in this area is plenary. North Carolina Utilities Commission v. FCC, 537 F.2d 787, 793 (4th Cir. 1976). Therefore, Congress has made it clear that it intends to preempt state regulation in interstate communications, and has given that authority to the FCC.

The FCC's jurisdiction over interstate communications includes jurisdiction over mixed interstate/intrastate communications. Id. at 794. The Supreme Court in Louisiana PSC implicitly recognized that the FCC may regulate the subject matter and preempt conflicting state rules where the FCC cannot "separate the interstate and the intrastate components of [its] asserted … regulation."[10] PUC of Texas v. FCC, 886 F.2d 1325, 1331 (D.C. Cir. 1989). In the case of special access service, the interstate and intrastate traffic is not separable, but is combined on the same facilities. See also North Carolina Utilities Commission (telephone terminal equipment); NARUC (inside wiring). Therefore, the FCC can regulate special access services and preempt states because the interstate and intrastate aspects of special access services are inseparable.

The FCC's own rules provide for federal jurisdiction over mixed use special access lines. Under FCC rules, if the interstate traffic on the circuit is more than ten percent of the

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10 "Where it [is] *not* possible to separate the interstate and the intrastate components of the [] FCC regulation … the Act sanctions federal regulation of the entire subject matter (which may include preemption of inconsistent state regulation) if necessary to fulfill a valid federal regulatory objective." Illinois Bell Telephone v. FCC, 883 F.2d 104, 114 (D.C. Cir. 1989); see also PSC of Maryland v. FCC, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (FCC preemption is permissible when (1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would negate the exercise by the FCC of its own lawful authority because regulation of the interstate aspects of the matter cannot be unbundled from regulation of the intrastate parts).

total traffic, then costs for the circuit are allocated to the interstate jurisdiction, and the circuits are offered under federal tariff. 47 C.F.R. § 36.154; In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Decision and Order, FCC 89-224 (rel. July 20, 1989). This is known as the "ten percent rule," and this rule establishes a bright line between federal and state jurisdiction over mixed use special access services. Under the ten percent rule, the FCC alone regulates special access services with more than ten percent interstate traffic, such as 99.4 percent of the services at question here.[11] In order for the Department to regulate the quality of federally tariffed special access services, the Department would need a delegation of authority from the FCC, and has received none.

The quality of service of federally tariffed special access services is regulated at the federal level. Tariffing of mixed interstate/intrastate special access services with more than ten percent intrastate traffic is at the federal level. MTS and WATS Market Structure Order.[12] The FCC has exclusive jurisdiction over the terms and conditions contained in the federal tariff. 47 U.S.C. § 203. In addition, the FCC requires monitoring and reporting of special access services through the Automated Reporting Management Information System ("ARMIS"). ARMIS tracks information on installation intervals (including percent commitments met), and

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[11] The Department notes that the FCC currently has an open docket on this same question In the Matter of Petition of US West, Inc. for Declaratory Ruling Preempting State Commission Proceedings to Regulate US West's Provision of Federally Tariffed Interstate Service, CC Docket No. 00-51.

[12] In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Decision and Order, FCC 89-224 (rel. July 20, 1989).

repair intervals (including average intervals).[13] Moreover, the Communications Act requires that the FCC resolves carrier complaints through Section 208 complaint proceedings. 47 U.S.C. § 208. In the Verizon Massachusetts Order, the FCC stated that "to the extent that parties are experiencing problems in the provisioning of special access services ordered from Verizon's federal tariffs, we note that these issues are appropriately addressed in the [FCC's] section 208 complaint process." Verizon Massachusetts Order" at ¶ 231; see also id. at ¶ 211. A Section 208 complaint proceeding would be the appropriate federal remedy for poor performance of federally tariffed services.

In summary, Congress has delegated authority for interstate, and by extension mixed use, communications to the FCC. The FCC's authority is exclusive, and the FCC has not delegated any of this authority to the states (including this Department). In addition, reporting, monitoring, and complaint resolution for federally tariffed special access services are regulated at the federal level. Remedies for quality of service violations of federally tariffed special access services lie with the FCC. We cannot grant AT&T's request because to do so would be inconsistent with the FCC's exclusive jurisdiction over the quality of service of federally tariffed special access services. The Department concludes that it is preempted from investigating and regulating quality of service for federally tariffed special access services. Accordingly,

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[13] The FCC does not set service quality standards in ARMIS; instead the FCC benchmarks one carriers's performance against the performance of other carriers. In the Matter of Policy and Rules Concerning Rates for Dominant Carriers and Amendment of Part 61 of the Commission's Rules Require Quality of Service Standards in Local Exchange Carrier Tariffs, CC Docket No. 87-313, Memorandum Opinion and Order, FCC 97-168 (rel. May 30, 1997).

AT&T's Motion to Expand Investigation is denied.[14]

IV. SPECIAL ACCESS SERVICES REPORT

As noted above, Verizon has informed the Department that over 99 percent of special access services that it provisions in Massachusetts are provisioned under the federal tariff. The Special Access Report filed by Verizon on May 24, 2001, which includes only intrastate special access services, identifies Verizon's performance for less than one percent of the special access services provisioned in Massachusetts over the past year. Because of the very small sample size, this data does not provide the Department with an accurate view of Verizon's provision of special access services in the Commonwealth. Therefore, in order to receive a statistically valid sample size, the Department will require that Verizon supplement its May 24,

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[14] Because the Department finds that it is preempted from establishing a performance plan for federally tariffed special access services, we do not reach Verizon's argument that the filed rate doctrine precludes the Department from establishing performance standards and penalties. The Department notes that Verizon's federal special access tariff includes provisions that define maintenance intervals and credit allowances, (FCC Tariff No. 11, sec. 2.4.4) and provisioning intervals and credits FCC Tariff No. 11, sec. 2.4.11).

Under the filed rate doctrine, deviation from the tariff is not allowed under any circumstances. AT&T v. Central Office Telephone, 524 U.S. 214, 222 (1998). The reach of the filed rate doctrine extends beyond rates. Unlawful discriminatory "privileges" are not limited to discounted rates; discriminatory preferential treatment is also prohibited. Id. at 224. In Central Office Telephone, faster guaranteed provisioning of orders for the same rate is a privilege within meaning of filed rate doctrine. Id. at 225. The filed rate doctrine circumscribes the remedies that the Department could order at the conclusion of the special access investigation, including monitoring, reporting, performance standards, and credits to CLECs/customers. See Town of Norwood v. New England Power, No. 99-1047 (1st Cir. 2000) (filed rate doctrine prohibited Town of Norwood's requested injunctive relief where "any meaningful relief … would require alteration of tariffs").

It is unlikely that the Department could craft a remedy sought by AT&T that would not violate the filed rate doctrine.

2001 Special Access Report with data on federal special access services in the same manner as intrastate special access services. Verizon has stated that its provisioning of federal circuits is identical to its provisioning of in-state circuits. Therefore, the Department orders Verizon to file a supplemental Special Access Report, to include data from the federally tariffed special access services. The information is to be filed under the same criteria identified in our March 14, 2001 Special Access Services Investigation Order.[15] To be clear, the Department will use data related to the provision of interstate special access services as evidence relevant to findings we may make regarding the reasonableness of intrastate special access services. But, we will not apply any findings or potential remedies to interstate services.

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[15] The Department notes that any possible remedies established by this proceeding would not apply to federally tariffed special access services.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That AT&T's Motion to Expand Investigation is hereby denied; and it is

FURTHER ORDERED: That Verizon file, within 30 days from the date of this Order, a comprehensive report on its special access services provided pursuant to FCC Tariff No. 11, containing the information set forth in this Order and the Department's Vote and Order Opening Investigation dated March 14, 2001.

By Order of the Department,

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James Connelly, Chairman

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

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Deirdre K. Manning, Commissioner