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September 14, 2005

VIA HAND DELIVERY

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

Re: D.T.E. 04-33: Petition of Verizon New England Inc. for Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts, Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*

Dear Secretary Cottrell:

XO Communications Services, Inc., through counsel, hereby submits an original and seven (7) copies of its Opposition to the Motion of Verizon Massachusetts for Partial Clarification and/or Reconsideration in the above-captioned proceeding. Enclosed please also find one additional copy of this filing. Please date-stamp the additional copy upon receipt and return it to the courier.

Please feel free to contact the undersigned counsel at (202) 887-1211 if you have any questions or require further information.

Respectfully submitted,

Brett Freedson HH

Brett Heather Freedson

cc: Service List, D.T.E. 04-33

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act, As Amended, and the *Triennial Review Order*	)))))))	D.T.E. 04-33

OPPOSITION OF XO COMMUNICATIONS SERVICES, INC.

XO Communications Services, Inc. (formerly XO Massachusetts, Inc. and Allegiance Telecom of Massachusetts, Inc.), through counsel and pursuant to the Memorandum of the Massachusetts Department of Telecommunications and Energy (the "Department") in the above-captioned proceeding,[1] hereby submits this Opposition to the Motion of Verizon Massachusetts for Partial Clarification and/or Reconsideration of certain determinations by the Department implementing the *Triennial Review Order*[2] and the *Triennial Review Remand Order*.[3] For the reasons set forth herein, the Department

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1 Memorandum from Jesse S. Reyes, Hearing Officer to D.T.E. 04-33 Service List, Re: Deadline to Filings Opposition to Motions for Clarification or Reconsideration of Arbitration Order in D.T.E. 04-33 (Aug. 25, 2005).

2 *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*").

3 *In the Matter of Unbundled Access to Network Elements* (WC Docket No. 04-313); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338), Order on Remand, 04-290 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*").

should reject the clarifications of the Department's Arbitration Order[4] requested by Verizon Massachusetts ("Verizon") that would improperly limit the unbundling obligations imposed on Verizon by the Federal Communications Commission ("FCC"), under with section 251(c)(3) of the 1996 Act.[5]

I. THE DEPARTMENT SHOULD NOT RENDER A DETERMINATION THAT VERIZON AND MCI WERE SEPARATE ENTITIES ON THE EFFECTIVE DATE OF THE *TRIENNIAL REVIEW REMAND ORDER*

Consistent with Verizon's advocacy in this proceeding,[6] the Department declined to arbitrate, at the outset, whether the wire center and route locations designated by Verizon exceed the thresholds set forth in the *Triennial Review Remand Order* for section 251(c)(3) loop and dedicated transport unbundling relief.[7] Rather, as Verizon proposed, the Department determined that Verizon may avail itself of the dispute resolution process prescribed by the FCC where Verizon believes that a competitive local exchange carrier ("CLEC") has requested access to an unbundled network element ("UNE") that Verizon no longer is obligated to provide under section 251(c)(3) of the

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4 *Petition of Verizon New England Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act, As Amended, and the Triennial Review Order,* D.T.E. 04-33, Arbitration Order (Jul. 14, 2005) ("Arbitration Order").

5 47 U.S.C. § 251(c)(3).

6 Initial Brief of Verizon Massachusetts at 143 ("...there is no need to litigate in advance the question of whether particular offices currently meet those criteria."), 150 ("...the Department should not determine which Verizon central offices satisfy the various unbundling criteria for loops and transport; Reply Brief of Verizon Massachusetts at 20 (...there is no reason to litigate in advance any issues regarding whether wire centers satisfy the FCC's non-impairment criteria for high-capacity loops under the TRRO. Verizon has not challenged any CLEC order for DS1 or DS3 loops in Massachusetts, so there is nothing, yet, for the Department to do.")

7 Arbitration Order at 279.

1996 Act.[8] The determination sought by Verizon's Motion – that Verizon and MCI be treated as separate entities for the purpose of applying the "non-impairment" criteria set forth in the *Triennial Review Remand Order* – is tantamount to a request that the Department immediately review and approve the wire center and route locations at which Verizon claims section 251(c)(3) loop and dedicated transport unbundling relief is available. Verizon cannot have it both ways. Consistent with the Arbitration Order, the Department should consider whether Verizon and MCI are "affiliated" carriers only in the context of a live dispute, initiated by Verizon for the purpose of challenging a CLEC self-certification that a requested UNE remains available, subject to the non-impairment criteria set forth in the *Triennial Review Remand Order.*

Even if the Department considers Verizon's request for a declaration that Verizon and MCI were separate entities on the effective date of the *Triennial Review Remand Order* (and it should not), any claim by Verizon that the pending merger of Verizon and MCI was mere "speculation" on that date is entirely without merit.[9] Indeed, Verizon and MCI executed an Agreement and Plan Merger approved unanimously by MCI's Board of Directors on February 14, 2005, nearly one month prior to the March 11, 2005 effective date of the *Triennial Review Remand Order.*[10] On the effective date of the *Triennial Review Remand Order*, the merger of Verizon and MCI was imminent. Therefore, if the Department elects to review Verizon's designation of wire center and route locations exceeding the thresholds for section 251(c)(3) loop and dedicated

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8 *Id. See also* Initial Brief of Verizon Massachusetts at 144-46.

9 *See* Reply Brief of Verizon Massachusetts at 21.

10 *See* Verizon/MCI Form S-4, Proxy Statement and Prospectus, dated Aug. 31, 2005.

transport unbundling relief set forth in the *Triennial Review Remand Order*, the Department should treat MCI as Verizon's affiliate.[11]

II. THE DEPARTMENT SHOULD UPHOLD ITS DETERMINATION THAT A 30-DAY TIME PERIOD IS REASONABLE FOR VERIZON TO DISPUTE A CLEC SELF-CERTIFICATION

In its Arbitration Order, the Department appropriately determined that Verizon must dispute a CLEC's "self-certified" request to obtain a UNE within a period of thirty (30) days where Verizon seeks to retroactively re-price the requested UNE if Verizon prevails in the dispute.[12] Indeed, as noted by the Department, "incorporation of a time interval provides guidelines to the parties as to their rights and obligations."[13] If the time limitation imposed by the Arbitration Order is not maintained, the ongoing threat of litigation by Verizon would adversely impact the abilities of Massachusetts CLECs to manage development of their networks for the long term. Accordingly, the Department should deny Verizon's request to modify the 30-day time period during which Verizon may dispute a CLEC self-certification.

Importantly, the time limitation imposed by the Department does not burden Verizon, or otherwise deny Verizon a reasonable opportunity to dispute CLECs' "self-certified" requests to obtain UNEs where Verizon believes that such UNEs no longer are available under section 251(c)(3) of the 1996 Act. The information gathered

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[11] Importantly, Verizon also claims that a wire center or route location "de-listed" under section 251(c)(3) of the 1996 Act cannot later be subject to unbundling on the basis of changed factual circumstances. *See* Motion of Verizon Massachusetts for Partial Clarification and/or Reconsideration of Arbitration Order at 11. Therefore, the Department must act with an abundance of caution where, as here, a pending merger of carriers would substantially impact continuing availability of UNEs at several wire centers within the Commonwealth of Massachusetts.

[12] Arbitration Order at 287-88.

[13] *Id.*

by Verizon for the purpose of identifying, and continuing to identify, wire center and route locations that exceed the thresholds set forth in the *Triennial Review Remand Order* for section 251(c)(3) unbundling relief remains in Verizon's exclusive control. Thus, Verizon unquestionably maintains the capabilities to immediately analyze all CLEC self-certifications, and to determine whether those self-certifications should be disputed. Moreover, Verizon has already submitted its proposed list of wire centers and route locations at which Verizon claims section 251(c)(3) loop and dedicated transport unbundling relief is available. Accordingly, identifying those CLEC orders that conflict with Verzon's lists and providing notice to the requesting CLEC within thirty (30) days of the CLEC's request presents no genuine burden. Verizon's Motion, therefore, offers the Department no compelling reason to reverse the time limitation set forth in its Arbitration Order.

III. THE DEPARTMENT SHOULD CLARIFY THAT VERIZON IS IMMEDIATELY OBLIGATED TO PROVIDE COMMINGLING, CONVERSIONS AND ROUTINE NETWORK MODIFICATIONS

As indicated in the Motion for Reconsideration of XO Communications Services, Inc., Verizon's obligations to perform commingling, conversions and routine network modifications, as required by the *Triennial Review Order*, became effective within the Commonwealth of Massachusetts on July 14, 2005.[14] Therefore, as ordered by the Department, Verizon must immediately perform these services upon request by any Massachusetts CLEC. Although counsel for Verizon orally committed, in the course of negotiations on a conforming amendment between Verizon and certain CLEC parties to this proceeding, to immediately process CLEC orders for commingling and conversions,

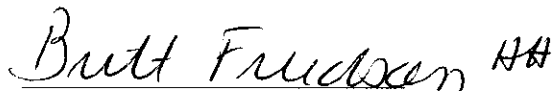
[14] Motion for Reconsideration of XO Communications Services, Inc. at 5-6.

Verizon's Motion suggests that such services may be delayed until the parties execute the final interconnection agreement amendment resulting from this proceeding.[15] Therefore, for avoidance of doubt, the Department must clarify that Verizon's obligations to perform commingling, conversions and routine network modifications, as required by the *Triennial Review Order*, became effective within the Commonwealth of Massachusetts on July 14, 2005, regardless of the date on which the interconnection agreement amendment conforming to the Department's Arbitration Order finally is executed by the parties.

CONCLUSION

For the reasons set forth herein, XO Communications Services, Inc. respectfully requests that the Department deny the Motion of Verizon Massachusetts for Partial Clarification and/or Reconsideration in the above-captioned proceeding.

Respectfully submitted,



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[15] *See* Motion of Verizon Massachusetts for Partial Clarification and/or Reconsideration at 7-9. Moreover, counsel for Verizon recently sent an email to Massachusetts CLECs providing the conforming amendment, but notifying the CLECs that the amendment cannot be signed until the Department issues its order on reconsideration. This potential stalling tactic contradicts the intent of the Arbitration Order and the Department's policy that its orders are not stayed during reconsideration.