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VIA E-MAIL AND FEDERAL EXPRESS

August 31, 2004

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, Fl. 2
Boston, Massachusetts 02110

Re: D.T.E. 04-33: Verizon Massachusetts Consolidated Arbitration

Dear Ms. Cottrell:

Enclosed for filing in this matter are an original and eight copies of Sprint's Comments in response to Ms. Chin's Memorandum dated August 23, 2004 to the Service List for this proceeding.

Very truly yours,

Craig D. Dingwall/mls

Craig D. Dingwall

cc: Tina W. Chin, Arbitrator
D.T.E. 04-33 Service List via electronic and/or U.S. Mail

BEFORE THE
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of 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*	)	DTE 04-33

RESPONSE OF SPRINT COMMUNICATIONS COMPANY L.P. AND SPRINT SPECTRUM L.P. TO VERIZON MASSACHUSETTS NOTICE OF WITHDRAWAL OF PETITION FOR ARBITRATION AS TO CERTAIN PARTIES

In accordance with the arbitrator's instructions for this proceeding before the Massachusetts Department of Telecommunications and Energy ("Department"),[1] Sprint Communications Company L.P. ("Sprint") and Sprint Spectrum L.P., General Partner of WirelessCo LP d/b/a/ Sprint PCS[2] (collectively "Sprint" unless otherwise noted) hereby submit this Response to the Notice of Withdrawal of its Petition for Arbitration as to Certain Parties ("Notice") that Verizon Massachusetts ("Verizon") filed with the Department on August 20, 2004. While Sprint was named as a party to the Consolidated Arbitration Petition that Verizon filed on February 20, 2004, it is no longer identified as a party to the arbitration in this latest Verizon filing. Verizon asserts that for those CLECs identified on Exhibit A to its Notice, the withdrawal of its arbitration petition is

[1]D.T.E. 04-33, Memorandum dated August 23, 2004 from Tina W. Chin, Arbitrator, to DTE 04-33 Service List.

[2]Sprint also files this response on behalf of its wireless division, Sprint Spectrum L.P. d/b/a Sprint PCS, listed on Exhibit A to the Notice. Upon information and belief, Verizon does not provide unbundled network elements to Sprint PCS.

appropriate because its interconnection agreements with these CLECs contain specific terms that permit Verizon, upon specified notice, to cease providing UNEs that are no longer subject to an unbundling obligation under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51. Verizon then argues that these agreements need not be amended in order to implement Verizon's contractual right to cease providing UNEs that were purportedly eliminated by the Federal Communications Commission's ("FCC") *Triennial Review Order* ("TRO") or the decision of the D.C. Circuit Court of Appeals in the *USTA II* case that vacated and remanded certain portions of the FCC's TRO.[3] Verizon asserts that the arbitration proceeding should proceed, however, as to those carriers identified on Exhibit B to Verizon's Notice.[4]

By listing Sprint Communications Company L.P., and Sprint Spectrum L.P. d/b/a Sprint PCS on Exhibit A of its Notice, Verizon indicated its intent to withdraw them as parties to this arbitration proceeding. As discussed in more detail below, Sprint disputes Verizon's contention that the Sprint/Verizon interconnection agreement permits Verizon to unilaterally cease providing UNEs to Sprint only upon the provision of a specified notice period. Sprint responds to the Department's inquiry regarding the effect of the FCC's Interim Order on this arbitration proceeding and on Verizon's Notice.

DISCUSSION

A. Notice Alone is Not Sufficient to Implement the Change of Law Provisions of the Sprint/Verizon Interconnection Agreement

Verizon asserts that the change of law terms of its interconnection agreement with Sprint permit it to cease providing UNEs that are no longer subject to an unbundling

[3] *United States Telecom Assoc. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*hereinafter "USTA II"*).
[4] Verizon Notice at 1.

obligation under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51 only upon the provision of advance notice as specified in the agreement. Sprint takes issue with Verizon's interpretation of the change of law terms.

The Massachusetts interconnection agreement that currently exists between Sprint and Verizon contains several provisions that relate to changes in applicable law. The specific change of law provisions contained in Section 8 of this interconnection agreement state as follows:

> 8.0 Government Compliance.
>
> 8.1 The provisions of this Agreement are subject in their entirety to the applicable provisions of the Act and any other orders, restrictions and requirements of governmental, regulatory, and judicial authorities with competent jurisdiction over the subject matter thereof. Each Party shall remain in compliance with Applicable Law in the course of performing this Agreement. Each Party shall promptly notify the other Party in writing of any governmental action that suspends, cancels, withdraws, limits, or otherwise materally affects its ability to perform its obligations hereunder.
>
> 8.2 VERIZON represents and SPRINT acknowledges that VERIZON is entering into this Agreement specifically in order to satisfy the obligations of VERIZON as set forth in the Act and the Order.
>
> 8.3 In the event that a change in Applicable Law materially affects any material terms of this Agreement or the rights or obligations of either SPRINT or VERIZON hereunder or the ability of SPRINT or VERIZON to perform any material provision hereof, the Parties shall renegotiate in good faith such affected provisions with a view toward agreeing to acceptable new terms as may be required or permitted as a result of such legislative, regulatory, judicial or other legal action.
>
> 8.4 Notwithstanding anything herein to the contrary, in the event that as a result of any unstayed decision, order or determination of any judicial or regulatory authority with jurisdiction over the subject matter hereof, it is determined that a Party ("Providing Party") shall not be required to furnish any service, facility, arrangement or benefit required to be furnished or provided to the

other Party ("Recipient Party") hereunder, then the Providing Party may discontinue the provision of any such service, facility, arrangement or benefit ("Discontinued Arrangement") to the extent permitted by any such decision, order or determination by providing sixty (60) days prior written notice to the Recipient Party, unless a different notice period or different conditions are specified in this Agreement (including, but not limited to, in an applicable Tariff (including, but not limited to, to the extent applicable, in VERIZON Tariffs D.T.E. MA Nos. 10, 14, 15, 16, or 17, or F.C.C. No. 11] or Applicable Law) for termination of such Discontinued Arrangement, in which event such specific period and/or conditions shall apply. Immediately upon provision of such written notice to the Recipient Party, the Recipient Party shall be prohibited from ordering and the Providing Party shall have no obligation to provide new Discontinued Arrangements.

8.5 Nothing contained in this Agreement shall limit either Party's right to appeal, seek reconsideration of, or otherwise seek to have stayed, modified, reversed or invalidated, any order (including, but not limited to, the Arbitration Orders), rule, regulation, decision, ordinance or statute issued by the Commission, the FCC, any court or any other governmental authority, related to, concerning or that may affect a Party's obligations under this Agreement or Applicable Law. [Emphasis Added].

Section 8.3 of the Sprint/Verizon interconnection agreement expressly states that in the event there is a change in applicable law that materially affects Sprint's or Verizon's rights or obligations, both parties will renegotiate in good faith to agree to acceptable new terms as permitted or required by the change in law. Section 8.4 of the agreement states that any party may discontinue the provision of a service or arrangement contemplated by the agreement by giving sixty days prior written notice but only if an unstayed decision, order or determination of any judicial or regulatory authority permits such discontinuation.

Additionally, Section 24.6 of the Terms and Conditions of the Sprint/Verizon Interconnection Agreement provides that "no modification, amendment, supplement to, or waiver of any provision of this Agreement, shall be effective unless the same is in

writing and signed by both Parties." Clearly Verizon cannot unilaterally change the material UNE and pricing terms of the Sprint/Verizon ICA, which is exactly what Verizon is proposing in its Notice.

Sprint has had discussions with Verizon to amend our interconnection agreement in light of the FCC's *TRO* and the *USTA II* decisions. To date, these discussions have not been successful. Sprint, however, stands ready and willing to continue to negotiate with Verizon to address the issues affected by the *TRO* and the *USTA II* decisions, as is contemplated by the change of law provisions of the Sprint/Verizon interconnection agreement.

Moreover, Sprint disputes Verizon's contention that the *USTA II* decision eliminated the unbundling obligations imposed upon it by 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51 and thereby permits Verizon to cease provisioning these UNEs only upon giving Sprint advance notice of its intent to do so. The D.C. Circuit's decision in *USTA II* determined that the FCC's sub-delegation of authority to state regulatory commissions to make impairment determinations as to specific elements was unlawful. Consequently, the Court vacated certain portions of the FCC's *TRO*, and the associated rules, that addressed the unbundling of mass market switching and dedicated transport, specifically, DS1, DS3, and dark fiber transport and interoffice transport for CMRS providers.[5] Notably, the *USTA II* decision did not vacate those rules pertaining to the unbundling of high capacity loops. In vacating the FCC's determinations that incumbent LECs must make mass market switching and dedicated transport available to CLECs as UNEs, the court remanded these issues to the FCC for re-examination of its implementation scheme.

[5] *USTA II,* 359 F.3d at 568-571, 573-574.

It is important to note, however, that the *USTA II* decision had no impact on the underlying right the 1996 Telecom Act conferred on CLECs to access UNEs at TELRIC prices. *USTA II* did not expressly find that any particular network element could not be unbundled nor did it invalidate existing interconnection agreements. The *vacatur*, in itself, does not remove Verizon's present obligation to provision UNEs. All that the *USTA II* decision does is vacate some of the FCC's unbundling rules and remand those issues to the FCC for further consideration. It does not equate to a nationwide finding of non-impairment for purposes of § 251(d)(3). *USTA II* does not supplant the FCC's right to make a determination of impairment where such a conclusion is warranted. There is therefore no basis for Verizon to argue that the specific UNEs that were the subject of the FCC's vacated rules may be immediately withdrawn. In short, the *USTA II* mandate has no immediate impact on Verizon's statutory and contractual duties to provide UNEs to CLECs.

Furthermore, Verizon remains obligated to provide UNEs, including unbundled switching and dedicated transport, pursuant to the terms of the Bell Atlantic/GTE Merger Order.[6] Specifically, Verizon agreed that:

> [f]rom now until the date on which the [FCC]'s order in [the UNE Remand and Line Sharing proceedings], and any subsequent proceedings, becomes final and non-appealable [Verizon would] continue to make available to telecommunications carriers each UNE that is required under those orders.[7]

The *Triennial Review* proceeding was an extension and consolidation of the *UNE Remand* proceeding and the *Line Sharing* proceeding. Both the *UNE Remand Order* and

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[6] *In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control*, CC Docket No. 98-184, Memorandum Opinion and Order, No. FCC 00-221, 15 FCC Rcd 14032 (rel. June 15, 2000) (*"Bell Atlantic/GTE Merger Order"*).

[7] *Bell Atlantic/GTE Merger Order* ¶ 316.

the *Line Sharing Order* were appealed to the D.C. Circuit Court and the Court remanded both decisions to the FCC in *USTA I*.[8] The FCC then consolidated the remand of those proceedings into the *Triennial Review* proceeding and sought a stay of *USTA I* to effectuate its ability to address those issues in the *Triennial Review* proceeding.[9] USTA II is a *vacatur* and remand to the FCC for further deliberations. Thus, there has been no final and non-appealable order concerning Verizon's unbundling obligations and Verizon is still obligated to offer these UNEs.

Verizon has argued that the Merger Conditions contain a sunset provision. However, the opening clause in the sunset provision states that "[e]xcept where other termination dates are specifically established herein . . ."[10] The relevant section of the Merger Conditions applicable to Verizon's UNE obligation sets forth a specific provision for termination of this unique obligation as follows:[11]

> ". . . until the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by Bell Atlantic/GTE in the relevant geographic area. The provisions of this Paragraph shall become null and void and impose no further obligation on Bell Atlantic/GTE after the effective date of final and non-appealable Commission orders in the UNE Remand and Line Sharing proceedings, respectively."

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[8] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("USTA I").

[9] On September 4, 2003, the D.C. Circuit stayed the effectiveness of its opinion until January 2, 2003. *See USTA V. FCC*, No. 00-1012, Order (D.C. Cir. Sept. 4, 2002). Then, on December 23, 2003, the D.C. Circuit granted the consent motion of the Commission and the Bell Operating Companies to extend the stay through February 20, 2003. *See USTA v. FCC*, Nos. 00-1012, 00-1015, Order (D.C. Cir., Dec. 23, 2002).

[10] Merger Conditions at paragraph 64.

[11] Merger Conditions at paragraph 39.

This UNE condition falls within the "except where" proviso and Verizon's obligations in this regard remain in effect.[12]

Additionally, Verizon ignores the obligations placed on it to provide UNEs in accordance with Section 271 of the Telecom Act and the commitments it made to provision certain UNEs in order to gain approval for its entry into the Massachusetts long distance market during the Section 271 application process at the state and federal levels.

This Department endorsed Verizon's application to enter the long distance market pursuant to Section 271 after conducting a detailed evidentiary examination over a period of several months.[13] Verizon's provisioning of UNE-P was a significant factor in the favorable disposition it received from the FCC in granting its Section 271 application. Verizon's commitment to provision the UNEs at issue in the *USTA II* decision, particularly UNE-P, formed the basis for the competitive showing necessary to gain Section 271 approval. Verizon's attempt to escape the UNE obligations it agreed to as part of its compliance with the Section 271 conditions undermines the rationale behind the grant of its Section 271 application.

The Department should reject Verizon's claim that the change of law provisions of the Sprint/Verizon interconnection agreement permit it to cease providing UNEs only upon giving Sprint some specified notice. As Sprint discussed, there are numerous

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[12] Verizon continues to dispute the applicability of this merger condition. The FCC recently sought comment on Verizon's request that it dispense with having an independent auditor examine its compliance with the *Bell Atlantic/GTE Merger Order* conditions. Public Notice, *Enforcement Bureau Seeks Comment on Verizon's Request to Discontinue Audit of Verizon's Compliance with Merger Conditions,* DA 04-2093, CC Docket 98-184 9 (rel. July 13, 2004).

[13] Docket No. 99-271Inquiry by the Department of Telecommunications and Energy Pursuant to Section 271 of the Telecommunications Act of 1996 into the Compliance Filing of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts as Part of its Application to the Federal Communications Commission for Entry into the In-Region InterLATA (Long Distance) Telephone Market.

grounds under which Verizon must continue to provide UNEs to CLECs. Any conclusions about Verizon's obligations in this regard must be made by the Department, not Verizon alone. Additionally, the Sprint/Verizon interconnection agreement contains dispute resolution procedures that would apply in cases where Sprint and Verizon disagree as to whether an unbundling obligation remains in effect. The Sprint/Verizon interconnection agreement also requires changes in applicable law to be implemented after negotiations and upon execution of a written amendment signed by both parties, not through Verizon's unilateral actions. As noted below, Verizon's conduct in discontinuing UNEs, as well as its interpretation of its interconnection agreement with Sprint, also ignores the FCC's interim rules.

Accordingly, the Department should reject Verizon's attempt to restrict the parties against whom it will arbitrate in this proceeding by making unilateral and unsupported interpretations of its obligations under its interconnection agreements.

B. Although The FCC's Interim Rules Don't Preclude This Proceeding, They Do Preclude Verizon's Proposed Unilateral UNE Changes

On August 20, 2004, the FCC issued its interim rules requiring ILECs to continue providing unbundled access to switching, enterprise market loops and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004.[14] Specifically, the FCC required ILECs to continue providing unbundled access to switching, enterprise market loops, and dedicated

[14] WC Docket No. 04-313, *In the Matter of Unbundled Access to Network Elements*; CC Docket No. 01- 338, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; Order and Notice of Proposed Rulemaking, released August 20, 2004 (*hereinafter* "Interim Rules").

transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004.[15] These rates, terms and conditions must remain in place until the earlier of the effective date of final unbundling rules promulgated by the FCC or six months after Federal Register publication of the Interim Rules, except to the extent that they are superseded by 1) voluntarily negotiated agreements, 2) an intervening Commission order affecting specific unbundling obligations, or 3) "(with respect to rates only) a state public utility commission order raising the rates for network elements."[16]

The FCC's Interim Rules also include transitional measures for the next six months (i.e., the six months following the expiration of the interim requirements of the earlier six months after Federal Register publication of this Order or the effective date of the Commission's final unbundling rules). During this transitional period, in the absence of a Commission ruling that switching, dedicated transport, and/or enterprise market loops must be made available pursuant to section 251(c)(3) in any particular case, an ILEC shall only be required to lease the switching element to a requesting carrier in combination with shared transport and loops at a rate equal to the higher of 1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004 plus one dollar, or 2), the rate the state public utility commission establishes between June 16, 2004 and six months after Federal Register publication of the Interim Rules, for this combination of elements plus one dollar.[17] Also during this transition period, in the absence of an FCC ruling that enterprise market loops and/or dedicated transport are

[15] Interim Rules at 1-2.
[16] *Id.* at 2.
[17] *Id.* at 16.

subject to Section 251(c)(3) unbundling, an ILEC shall only be required to lease the element at issue to a requesting carrier at a rate equal to or the higher of (1) 115% of the rate the requesting carrier paid for that element on June 15, 2004, or (2) 115% of the rate the state public utility commission establishes, if any, between June 16, 2004, and six months after Federal Register publication of the Interim Rules, for that element.[18] After the transition period expires, ILECs must offer on an unbundled basis only those UNEs "set forth in our [FCC's] unbundling rules, and subject to the terms and conditions set forth therein."[19]

The Interim Rules essentially freeze for six months, and limit ILEC increases during a six month transition period, the rates, terms and conditions for ILECs' provision of unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions. The Interim Rules do not impact any other issues or elements that are pending in the present arbitration proceeding, and nothing limits the Department from taking any action with respect to these other issues or elements. The Department could even raise the rates for these elements provided it has an adequate record to do so and notwithstanding the Interim Rules, given that "a state public utility commission order raising the rates for network elements" is an explicit exception to the Interim Rules freeze.[20] In the spirit of stabilizing the market and minimizing any impact on consumers, Sprint does not recommend any UNE rate increases during this one-year interim and transition period. To do so, the Department would have to notify impacted

[18] *Id.*
[19] *Id.* at 17.
[20] *Id.* at 16.

parties that these issues are pending before the Department, and give parties an adequate opportunity to engage in discovery and respond.

Finally, as noted above, Verizon may not unilaterally change the terms and conditions under which it offers UNEs pursuant to its interconnection agreement with Sprint. While it is debatable whether there has been a change of law, this debate is largely academic given that the Sprint/Verizon interconnection agreement requires changes in applicable law to be implemented after negotiations and upon execution of a written amendment signed by both parties, not through Verizon's unilateral actions. Moreover, the FCC's Interim Rules expressly require "incumbent local exchange carriers (ILECs) to continue providing unbundled access to switching, enterprise market loops and dedicated transport under the same rates, terms and conditions *that applied under their interconnection agreements* as of June 15, 2004.[21] After the transition period expires, "the specific process by which the [final unbundling rules] shall take effect will be *governed by each incumbent LEC's interconnection agreements* and the applicable state commission's processes."[22] Clearly the FCC did not contemplate unilateral pricing actions by Verizon or any other ILEC during or after the six month interim period and subsequent six month transition period.

In summary, nothing in the Interim Rules limits the Department from arbitrating the issues in this proceeding as to arbitrable issues in this proceeding that do not relate to the terms and conditions under which ILECs provide unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and

[21] Interim Rules at 1-2. As noted above, the Interim Rules do not address other UNEs, which are subject to the Sprint/Verizon ICA.
[22] *Id.* at 17.

conditions, and even as to those elements the Department could raise rates with respect to these and other elements if it has an adequate record to do so. In addition, nothing in the Interim Rules changes Verizon obligation to provide UNEs subject to the terms of the Sprint/Verizon interconnection agreement ("ICA"). Indeed, the Interim Rules, subject to certain exceptions, freeze such obligations during the interim period with respect to the switching, enterprise market loops and dedicated transport under the same rates, terms and conditions that applied under Verizon's ICAs as of June 15, 2004.

CONCLUSION

For all the foregoing reasons, Sprint objects to Verizon's contention that the change of law provisions in their interconnection agreement permits it to unilaterally terminate UNEs only upon providing advance notice to Sprint of its intent to do so. The Department should reject Verizon's attempt to circumscribe Sprint's rights under prevailing law and its interconnection agreement and permit Sprint to participate in this arbitration proceeding if the Department decides to move forward and docket this matter.

Moreover, nothing in the FCC's interim rules allows Verizon to unilaterally change its interconnection agreements, or prevents the Department from arbitrating the critical issues in this proceeding.

Respectfully submitted,

SPRINT COMMUNICATIONS
COMPANY L.P.

SPRINT SPECTRUM L.P.

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Its Attorney

August 31, 2004

CERTIFICATE OF SERVICE
MA D.T.E 04-33

I Mable L. Semple, hereby certify that, on August 31, 2004, I served copies of the foregoing comments upon the parties on the attached service list by Electronic and /or first class- mail, postage prepaid.

Dated at Washington DC August 31, 2004

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