COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts	**D.T.E. 01-20**

ALLEGIANCE'S REPLY COMMENTS TO VERIZON'S RESPONSE TO THE CLEC COALITION'S MOTION FOR RECONSIDERATION AND CLARIFICATION

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In accordance with the Hearing Officer's schedule for filing comments regarding motions for reconsideration or clarification that were made on August 14, 2002 in this proceeding regarding the Department's July 11, 2002 Order ("Order"), Allegiance Telecom of Massachusetts, Inc.[1] hereby submits its reply comments to Verizon Massachusetts' August 29, 2002 responsive comments ("Verizon Response") to the CLEC Coalition's August 14, 2002 Motion for Reconsideration and Clarification. For the reasons set forth herein, the Department should reject Verizon's criticisms of the CLEC Coalition's Motion.[2]

[1] Conversent Communications of Massachusetts, LLC will be filing separate Reply Comments to reflect its concerns regarding the issues associated with the hot cut NRCs and the collocation rate transition plan.

[2] Allegiance's decision not to address each and every argument made by Verizon in response to the CLEC Coalition's Motion should not be construed as a concession that Verizon's arguments have merit. Instead, Allegiance has limited its response to the more critical issues.

ARGUMENT

I. CONTRARY TO VERIZON'S CRITICISMS, RECONSIDERATION OF THE DEPARTMENT'S DECISION REGARDING HOT CUT NRCS IS APPROPRIATE BECAUSE THE DEPARTMENT FAILED TO CONSIDER VERIZON'S 271 PUBLIC INTEREST OBLIGATIONS AND ITS DECISION IS BASED ON THE ERRONEOUS CONCLUSION THAT VERIZON'S HOT CUT PROCESS IN MASSACHUSETTS DIFFERS FROM ITS HOT CUT PROCESS IN NEW YORK AND NEW JERSEY.

In its Response, Verizon contends that the CLEC Coalition's request that the Department reconsider its decision regarding the coordinated hot cut NRC is improper because the Department expressly rejected the argument advanced by the CLEC Coalition in its Order. Verizon contends that, contrary to the arguments of the CLEC Coalition, the Department considered Verizon's Section 271 public interest obligations when it noted that the Department of Justice had expressed concern over Verizon's hot cut rate in New Jersey, and that Verizon had used a $35 rate in seeking Section 271 approval for that state at the FCC.[3] Verizon's assertion is absolutely wrong because the Department never expressly addressed or considered the Section 271 public interest concerns in its Order. Indeed, not once does the Department mention Verizon's Section 271 public interest obligations in its analysis.

Verizon argues further that the Department expressly recognized that Verizon's Non-Recurring Cost Model ("NRCM") will yield hot cut costs that will "significantly exceed the $35.00 charge that exists in certain other Verizon jurisdictions."[4] Verizon asserts that the Department did not, as the CLEC Coalition explained in its Motion for Reconsideration and Clarification, reject the $35.00 rate on the mistaken premise that the hot cut process in

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[3] Verizon Response at 41 (citing Order at 492 & n.182).

[4] Verizon Response at 41 (citing Order at 499).

Massachusetts involves different tasks than the hot cut process in New Jersey or New York, but rather established "what it viewed as a TELRIC rate."[5]

Again Verizon's assertions are wrong. The Order plainly states that, "This cost difference [between the $35 hot cut rate Verizon charges in other jurisdictions and the Massachusetts rate] exists, in large part, because the hot cut process includes tasks that the CLECs have specifically requested in order to ensure trouble-free migration of customers from Verizon to other carriers."[6] Moreover, earlier in the Order, the Department noted, in distinguishing between the hot cut process in New Jersey and the process in Massachusetts, that "Verizon's hot cut costs in this proceeding are based on tasks that have evolved, in part, in response to CLEC requests."[7] As the CLEC Coalition explained, however, the hot cut process in Massachusetts is virtually the same as the hot cut processes followed in New York and New Jersey.[8] Verizon does not contest this fact. Thus, the Department's decision, which rests on its conclusion that a difference does exist, is mistaken and, accordingly, needs to be reconsidered.

Verizon further argues that the CLEC Coalition's 271 public interest arguments are meritless because "[t]he statutory standard for setting UNE rates is contained in section 252 of the Act and the FCC's implementing regulations…[and that] section 271 considerations have nothing to do with the Department's obligation to set TELRIC-compliant rates here."[9] Verizon submits that "[s]ections 251 and 252, as well as the FCC regulations, require that

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[5] Verizon Response at 41.

[6] Order at 499.

[7] Order at 493.

[8] CLEC Coalition's Motion for Reconsideration and Clarification at 7-8.

UNE rates be based on the forward-looking *costs* of providing network elements, regardless of whether the incumbent has section 271 approval."[10] Verizon fails to acknowledge that with its 271 authority to provide interLATA telecommunications traffic, it now has an ongoing duty to comply with 271 requirements, which includes the 271 public interest obligations, as well as the duty to comply with Sections 251 and 252. Indeed, complying with these obligations is essentially the *quid pro quo* associated with obtaining and maintaining 271 authority, *i.e.*, they do not cease once 271 authority is granted. Therefore, newly established UNE rates must be in the public interest as section 271 requires.

That being said, Verizon's argument that, "[t]he CLEC Coalition's position boils down to an argument that, once Verizon obtains section 271 approval with one set of rates, a state commission can never increase those rates, even if it determines that forward-looking costs have increased because, for example, the ILEC has put in place new processes or procedures at the CLECs' request"[11] is incorrect and clearly misses the point. In particular, when establishing new UNE rates, the Department must find that they are in the public interest as Section 271 mandates. The Department cannot overlook this requirement and allow Verizon to circumvent this obligation in a cost proceeding that occurs after its Section 271 authority has been granted.

As the Department is aware and as the CLEC Coalition explained, Verizon reduced its hot cut rates in New Jersey in an effort to obtain Section 271 authority and this authority likely

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[9] Verizon Response at 42.

[10] Verizon Response at 42.

[11] Verizon Response at 42.

would not have been granted if Verizon-NJ did not offer the $35 dollar hot cut rate.[12] Because the same issue and hot cut process now exists in Massachusetts (even though Verizon's Section 271 authority has already been granted), Verizon should be required to provide the same coordinated hot cut process at no more than $35.00; otherwise, its Section 271 authority should be revoked or suspended. Verizon New Jersey voluntarily agreed to reduce its hot cut rate to $35 (a rate reduction that Verizon contends drove its rates far below cost), in order to have in-region InterLATA authority. Because the hot cut tasks in New Jersey and Massachusetts are the same, Verizon Massachusetts should equally be able to afford to charge the $35 rate, since doing so is the cost of keeping its 271 authority in Massachusetts.

As the CLEC Coalition explained,[13] under the Section 271 public interest standard, it must be shown that the "BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."[14] With respect to pricing UNEs, the Court of Appeals clarified that the public interest does not guarantee profitability, "*but whether the UNE pricing selected here doomed competitors to failure.*"[15] The Department erroneously overlooked this concern and the fact that its Order could have such repercussions and conceivably doom CLECs.

As urged by the CLEC Coalition, reconsideration of this determination in the Order is appropriate because the Department mistakenly concluded that the hot cut process in

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[12] *See* CLEC Coalition's Motion for Reconsideration and Clarification at 8.

[13] *See* CLEC Coalition's Motion for Reconsideration and Clarification at 8-12.

[14] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan,* Memorandum Opinion and Order, 12 FCC Rcd 20543, FCC 97-298, ¶ 386 (1997) ("*Ameritech Michigan 271 Order*").

[15] *Sprint Communications Company, L.P v. FCC,* 274 F.3d 549, 554 (D.C. Cir. Dec. 28, 2001) (emphasis added).

Massachusetts was different and failed to address Section 271 public interest concerns. For these reasons, the Department should grant the CLEC Coalition's Motion for Reconsideration of this ruling and render a decision that is consistent with the CLEC Coalition's request.

II. CONTRARY TO VERIZON'S ARGUMENTS, RECONSIDERATION OF THE DEPARTMENT'S DEVELOPMENT OF NON-RECURRING COSTS IS APPROPRIATE AND JUSTIFIED BY THE EVIDENCE.

A. The Department Should Reconsider Its Decision And Reject Verizon's NRCM.

Verizon argues that the Department should not reconsider its decision and throw out Verizon's NRCM, as the CLEC Coalition requested, because the Department made substantial modifications to Verizon's NRCM in the Order.[16] Verizon contends that the Department corrected the weakness associated with it by requiring that task times be based on the low end of the 95 percent confidence interval and that the FLAFs be adjusted downward by 20 percent across the board.[17] Verizon cannot, however, refute the basic fact that, as the CLEC Coalition made perfectly clear, the underlying task time information gathered from the survey is inherently unreliable and biased.[18] No matter how the Department tries to cure the infirmities associated with the survey and the task times that were gathered from it, the survey sample is no better than the unreliable and biased data that went into it. Therefore, because of these problems and because task times are the cornerstone of Verizon's NRCM, the Department should grant the CLEC Coalition's Motion for Reconsideration of this Department ruling and flatly reject Verizon's NRCM as a Pennsylvania Administrative Law Judge recently did.[19]

B. If The Department Does Not Reject Verizon's NRCM, The Department Should Reconsider Its Decision And Use Minimum Times And Further Reduce Verizon's FLAFs.

1. Use Of Minimum Times Is The Appropriate Interim Alternative.

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[16] *See* Verizon Response at 44-45.

[17] *See* Verizon Response at 45.

[18] *See* CLEC Coalition's Motion for Reconsideration and Clarification at 21-23.

[19] *Generic Investigation Re Verizon Pennsylvania's Unbundled Network Element Rates*, Docket No. R-00016683, Recommended Decision, at 74 (Penn. P.U.C. May 3, 2002).

With respect to the CLEC Coalition's alternative request (to fully reject Verizon's NRCM) that the Department rely on minimum times as an interim measure until Verizon provides reliable data, Verizon argues that reconsideration is inappropriate and should be rejected because the CLEC Coalition previously made this argument in its briefs.[20] Verizon contends that the Department rejected this argument because the "use of minimum task time reported would be inappropriate because it would fail to capture the information provided by the entire sample."[21] Verizon maintains that minimum times do not represent the most "efficient" time because workers encounter a wide variety of working environments and types of transaction that may affect the time required to perform a task, and using the mean time appropriately captures that variation.[22] Verizon's arguments are, however, unavailing and fail to refute the need for reconsideration of this issue as the CLEC Coalition requested.

Indeed, as the Department found, Verizon "was unable to substantiate the criteria it used to obtain a random, representative sample."[23] The Department further held that "although Verizon indicates that it obtained responses from urban, suburban, and rural environments, it was unable to demonstrate how it ensured that the sample was representative of the population."[24] The Department noted that "if Verizon's sample included a disproportionate quantity of complex tasks, the resulting costs would be overstated."[25]

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[20] Verizon Response at 44.

[21] Verizon Response at 45 (citing the Order at 464).

[22] Verizon Response at 45.

[23] Order at 469.

[24] Order at 469.

[25] Order at 469-470.

Because Verizon failed to meet its burden of proof in this regard, there is no proof that using minimum task time estimates would be inappropriate as the Department found.

Verizon also attacks the CLEC Coalition's proposed bifurcated approach that would use the minimum task times, except that when there are fewer than 30 observations the task time average should be reduced by 79 percent. Verizon asserts that "the CLEC Coalition's proposal to use the minimum times for tasks for which there are 30 or more observations would force Verizon MA to use the minimum time precisely where its survey, and therefore the resulting average time is most reliable."[26] Verizon's argument is, however, unavailing because the Department found that its survey resulted in task times that are upwardly biased and entirely overstated.[27] If data is upwardly biased, having more observations does not cure the bias: taking an average of biased data will yield a biased average. As the CLEC Coalition explained previously, the task times that are the least likely to suffer from bias and that are the most reliable in the sample are the minimum times.[28]

Verizon further argues that the CLEC Coalition's proposal to reduce Verizon's times by 79 percent where there are fewer than 30 observations makes no sense because it can result in task times that are below the minimum time reported.[29] The intent of the CLEC Coalition's proposed 79 percent reduction, however, is to address the increased bias and unreliability of the task times as the sample size drops below 30. The prime example is where a task time is based on one subject matter expert's ("SME") or one individual's time estimate because that

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[26] Verizon Response at 46.

[27] *See* Order at 462-463.

[28] *See* CLEC Coalition's Motion for Reconsideration and Clarification at 18.

[29] Verizon Response at 46.

task time will be designated the minimum, maximum, and average time for that task. To account for upward bias associated with the time estimate, it needs to be reduced by some amount and the CLEC Coalition has recommended 79 percent based on its observations of Verizon's NRC task time data, which basically is the overall difference between the average and minimum times for samples with 30 or more observations.[30] Notably, in New Hampshire, when only one SME provided the task time for a specific task, the New Hampshire PUC reduced the task time by a significant percentage to account for upward bias.[31]

The Department's decision to use the low end of the 95 percent confidence interval does not, however, address the upward bias associated with one individual's response. Verizon's attempt to keep the bias and overstatement in these task times is a transparent attempted to keep the associated NRCs inflated. These shortcoming associated with the Order were overlooked by the Department and need to be addressed and corrected, as the CLEC Coalition requested in its Motion for Reconsideration.[32]

2. Further Reduction To Verizon's FLAFs Is Necessary.

Verizon argues that the CLEC Coalition offers no basis that the Department reconsider its determination and adjust the Forward-Looking Adjustment Factors ("FLAFs") downward by 50 percent across the board.[33] Verizon is, however, unable to reconcile the arbitrary and capricious nature of the Department's Order - there is no support in the Order that demonstrates that a 20 percent downward adjustment of the FLAFs is sufficient as a general

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[30] *See* CLEC Coalition's Motion for Reconsideration and Clarification at 18-20.

[31] *Petition for Approval of Statement of Generally Available Terms Pursuant to the Telecommunications Act of 1996*, New Hampshire Public Service Commission Docket No. DT 97-171, Order Granting In Part and Denying in Part, Order No. 23,738 at 63-65 (July 6, 2001) ("*NH SGAT Order*").

[32] *See* CLEC Coalition's Motion for Reconsideration and Clarification at 16-21.

matter, yet there is support for a 50 percent reduction across the board. Verizon states that "[e]ven assuming the Department's conclusion regarding a few specific FLAFs relating to the hot cuts were correct, it says nothing about whether Verizon MA's FLAFs for the hundreds of other unrelated tasks were too low, let alone that they were all too low by a factor of 50 percent."[34] Verizon overlooks the fact that the Department never closely inspected every FLAF for every task when it cut them by 20 percent.

Therefore, for the reasons the Department concluded that a 20 percent reduction was appropriate, a decision that Verizon did not ask the Department to reconsider, the Department can easily revisit its decision and make an internally consistent decision by reducing all FLAFs by 50 percent as a general matter. Indeed, if a close examination of Verizon's NRC tasks reveals that such a reduction should be made, the Department's support for a 50 percent reduction across the board is far more just and reasonable than a 20 percent reduction, as the CLEC Coalition explained.[35]

III. CONTRARY TO VERIZON'S CLAIMS, RECONSIDERATION AND CLARIFICATION OF THE DEPARTMENT'S DECISION THAT VERIZON SUBMIT A COLLOCATION RATE TRANSITION PLAN IS APPROPRIATE BECAUSE IT RESULTS IN UNLAWFUL RETROACTIVE RATEMAKING.

In response to the CLEC Coalition's concern that Verizon's collocation rate transition plan results in impermissible retroactive ratemaking, Verizon argues that the CLEC Coalition's opposition is premature.[36] Verizon notes that the Department specifically "require[d] Verizon to submit [the restructuring] plan as part of its compliance filing" and there will be ample

[33] Verizon Response at 46.

[34] Verizon Response at 46-47.

[35] CLEC Coalition's Motion for Reconsideration and Clarification at 21-23.

opportunity to respond to Verizon's transition proposal in the compliance phase of this proceeding.[37] Allegiance recognizes that it will have an opportunity to further comment on the details of Verizon's proposal during the compliance phase of the proceeding and hereby reserves it right to raise any appropriate and relevant legal arguments at that time. Despite this, the Department, in ordering that Verizon submit a collocation rate transition plan based on Verizon's submissions in its Reply Brief, overlooked the fact that it ordered Verizon to institute a plan that will result in unlawful retroactive ratemaking as the CLEC Coalition explained in its Motion for Reconsideration and Clarification. Even though the details of Verizon's plan have not been submitted, the Department cannot implicitly endorse or permit such a result as it did in its Order.

Conceding the validity of the CLEC Coalition's concerns, Verizon tries to brush off them off by stating that its assertions in its Reply Brief that "[m]onthly recurring costs that have been paid prior to the date of transition…will be applied to the new non-recurring charge" were erroneous.[38] Verizon cavalierly clarifies that it has "**agreed** to *waive* the NRCs for all cross connects in use prior to the transition date."[39] This statement does not, however, abate the concerns that Verizon's transition plan will result in illegal retroactive ratemaking for cross connects that are *not in use*. Further, Verizon's attempt to appear generous by claiming that it has "agreed" to waive the charges for previously used cross connects is entirely disingenuous because regardless of whether it has agreed or not, the fact still remains that permitting

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[36] Verizon Response at 49.

[37] Verizon Response at 49.

[38] Verizon Response at 49 & n.21.

[39] Verizon Response at 49 (bolding added).

Verizon to assess a NRC when they were never originally anticipated is retroactive ratemaking in its basic form that the Department by law may not allow.

Moreover, Verizon's desire to recover non-recurring costs for cross connects that were previously ordered but that are not being used still results in retroactive ratemaking. Verizon's effort to explain this away is pure nonsense. It does not matter whether the cross connects are used or not because parties ordering the cross connects never anticipated such NRCs when they ordered them. Indeed, to permit Verizon to impose NRCs upon CLECs long after the cross connects were ordered at a zero NRC is blatant retroactive ratemaking.

CONCLUSION

Wherefore, for the foregoing reasons, the criticisms in Verizon's Response are unavailing and fail to discredit the soundness of the CLEC Coalition's Motion for Reconsideration and Clarification. The Department should accordingly grant the CLEC Coalition's Motion in its entirety and render a decision consistent with the CLEC Coalition's request.

Respectfully submitted,

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