DEPARTMENT OF TELECOMMUNICATIONS
COMMONWEALTH OF MASSACHUSETTS

Investigation by the Department of)

Telecommunications and Energy on its)

own Motion into the Appropriate Regulatory)

Plan to succeed Price Cap Regulation for) D.T.E. 01-31

Verizon New England, Inc. d/b/a Verizon)

Massachusetts' intrastate retail)

telecommunications services in the)

Commonwealth of Massachusetts)

COMMENTS ON SCOPE OF PROCEEDING BY NETWORK PLUS, INC.

AND ALLEGIANCE TELECOM OF MASSACHUSETTS, INC.

Pursuant to the Department's Order issued May 7, 2001 in the above-captioned proceeding, Network Plus, Inc. ("Network Plus") and Allegiance Telecom of Massachusetts, Inc. ("Allegiance") hereby submit this comments on the proper scope of the issues in this proceeding.

Preliminary Statement

More than five years ago, the Department approved a petition by NYNEX, now Verizon, to replace traditional original cost or "rate of return" regulation of its retail telephone service with an alternative form of "price cap" regulation, under which Verizon's retail rates are constrained by price ceilings, calculated using an index that reflects inflation, productivity growth, and certain other "exogenous" changes in costs.[(1)] In accepting Verizon's proposal, the Department ordered Verizon to freeze its rates for basic residential service until August 2001 and announced its intention to review its price cap regulation after six annual price cap filings, to coincide with the end of the residential rate freeze in August 2001. Following the filing of Verizon's sixth annual price cap filing (currently under review in D.T.E. 00-101), the Department initiated this

proceeding on its own motion, by Order issued February 27, 2001. The Department directed Verizon to propose a going-forward regulatory scheme for its retail telephone service including, at a minimum, a plan for regulating or deregulating retail prices and service quality, and for intrastate access charge reform similar to that approved by the Federal Communications Commission ("FCC") for interstate access charges.[(2)] The Department provided no discrete guidance for Verizon in fashioning that proposal, either in terms of the success, *vel. non*, of the existing price-cap regulation, or the need for changes in the existing scheme. Nor did it address the information it would deem relevant to considering such proposal.

On April 12, 2001, Verizon filed a sweeping proposal for retail phone service deregulation that would freeze basic residential service at current levels for three years, after which Verizon would be free to propose increases subject to the Department's approval.[(3)] In addition, Verizon's proposal would all but eliminate the Departmental oversight of (1) any *new* services provided by Verizon and (2) services to business customers. Verizon's proposal would eliminate the index formula that constrains Verizon's pricing flexibility, but would retain the Department's price floors for existing services until changed by the Department. Verizon contends that its Plan "recognizes the competitive forces that have reshaped Massachusetts' telecommunications markets and is consistent with the Department's long standing policy to substitute the discipline of the marketplace for direct regulatory intervention."[(4)] Verizon also claims that the telecommunications market in Massachusetts is "irreversibly open to competition," citing the Department's approval of its Application under Section 271 of the Act to provide in-region IntraLATA phone service. Finally, Verizon has submitted evidence regarding the competition it allegedly faces on a statewide basis, showing the total number of business and residential lines served by resellers, the penetration of CLECs into central offices by way of collocation, the number of daily service requests in the state and other state wide data.[(5)]

After Verizon filed its plan, Allegiance and Network Plus submitted a letter to the Department seeking to enlarge the procedural schedule beyond the extremely truncated one initially proposed by the Department, based on: (i) the broad scope of the substantive issues in this proceeding, (ii) the large amount of data and other information relevant to those substantive issues, and (iii) the need for an opportunity for all of the parties to obtain such information from Verizon. In particular, Allegiance and Network Plus emphasized the need on the part of the Department to have before it market-by-market evidence of competition, as well as evidence of Verizon's financial performance under the existing price cap, and prospectively under its proposal for alternative regulation. The letter also expressed the concern of Allegiance and Network Plus that the price floors may not be adequate to protect competitors against predatory pricing and price squeezes, in which facilities-based competitors may face Verizon retail prices that are so low relative to its UNE prices that it is impossible for competitors to match Verizon's retail prices. At the prehearing conference held on May 4, 2001, the Department, as well as the parties, agreed that it was premature at this juncture to establish a procedural schedule *before* the Department determined the scope of the issues to be considered. Thus, the

parties were asked to submit two rounds of comments regarding the proper scope of the issues in this proceeding.

ARGUMENT

The Department cannot and should not adopt Verizon's proposal for retail rate deregulation and access charge reform without first considering a number of issues in regard to whether Verizon's rates will remain at just and reasonable levels. Specifically, Verizon should be required to submit information regarding, and the parties should be allowed to address: (1) the level of competition in the relevant product and geographic markets served by Verizon; (2) Verizon's past and projected profitability and financial performance under existing regulatory scheme; (3) the efficacy of existing price floors on Verizon's services, both with respect to the Department's current regulation of Verizon's local service as well as under the form of regulation now proposed by Verizon; (4) the safeguards that should be adopted to avoid exclusionary behavior on the part of Verizon, whether in the form of anticompetitive tying of or cross subsidization between regulated and unregulated and services, or through predatory pricing resulting in a price squeeze on the competing services provided by CLECs; and (5) the procedures that should be adopted for considering allegations of misconduct on the part of Verizon, such as complaint procedure, periodic filing requirements, and Department audits.

A. The Department Must Determine the Threshold Legal Issue of Whether it Can Rely *Solely* On Competition to Establish Just and Reasonable Rates for Local Retail Phone Service.

A threshold issue in this proceeding is the extent to which the Department is free to rely solely on competition in the markets served by Verizon to set just and reasonable rates, as it would under Verizon's alternative regulation proposal. Verizon would have the Department lift the remaining price cap controls on existing residential rates after three years, eliminate those controls on rates to business customers immediately, deregulate rates on new services, and eliminate the indices currently used by the Department limit Verizon's ability to implement changes to its rate structure on short notice, retaining only the existing controls on Verizon's minimum rates. As demonstrated below, the Department must consider a broad range of issues before granting such relief.

Although the Department should be commended for its commitment to encouraging the introduction of competition in the local exchange market, that commitment, by itself, does not warrant action in derogation of statute by deregulating local telephone service at this juncture. Such a "field of dreams" approach to market-based regulation - eliminating or reducing regulatory oversight, in the hope that competition will emerge in the long run

to keep rates at just and reasonable levels - places the competitive cart before the regulatory horse. As a common carrier subject to Chapter 159 of the Massachusetts General Laws, Verizon's rates are required to be "just and reasonable." M.G.L.A. 159 § 17.[(6)] Moreover, under Section 14 of Chapter 159, if the Department concludes, after hearing upon complaint or its own motion, that Verizon's rates are "unjust, unreasonable, unjustly discriminatory . . . or insufficient to yield reasonable compensation for the service rendered," it must establish just and reasonable and nondiscriminatory rates to be observed thereafter. M.G.L.A. 159 § 14. The Department has made clear that "light-handed" or "market-based" regulation cannot be adopted unless it can be shown that market forces are sufficient to constrain rates to just and reasonable levels.[(7)] Verizon witness Dr. Taylor observes that market-based solutions cannot be divorced from the statutorily mandated outcome of regulation, stating that "[c]ompetition should function as [a] price control mechanism. The purpose of adapting regulation to competition is to replicate - to the extent possible - the regulatory outcome . . . ."[(8)] While the Department may place increased reliance on competitive market forces in achieving the "just and reasonable" regulatory mandate, it must at the same time retain some standard by which to ensure that the rates charged by Verizon coincide with the regulatory outcome. Section 14 of Chapter 159 directs that all common carrier rates be just and reasonable but it does not specify the means by which that regulatory prescription is to be attained. Such a statutory scheme leaves the Department with considerable discretion in formulating an appropriate ratemaking methodology. That every rate charged by every common carrier must be just and reasonable does not require that the cost of each service to each customer be ascertained and the corresponding rates be fixed with respect to some specific allocation of costs. For it has been long recognized that "under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling."[(9)] It necessarily follows that rate-making agencies such as the Department are not bound to follow any single regulatory formula; they are permitted, unless their statutory authority plainly prohibits it "to make the pragmatic adjustments which may be called for by particular circumstances."[(10)] The freedom to adopt methodologies appropriate to the circumstances cannot, however, be divorced from the basic regulatory outcome dictated by the statute.

Clearly, the Department is precluded from abandoning all methods of ensuring that the rates that result under market-based approach coincide with the statutorily mandated outcome of just and reasonable rates. Such is the core holding of the Supreme Court's decision in *FPC v. Texaco, Inc.*,[(11)] reversing an order of the Federal Power Commission ("FPC") exempting from regulation all existing and future jurisdictional sales of natural gas by small producers in order to "increase . . . exploratory efforts . . . to facilitate the entry of the small producer into the interstate market and to stimulate competition among producers to sell gas in interstate commerce.[(12)] The FPC disclaimed any intent to deregulate the sales by small producers, insisting that "the Commission would continue to regulate such sales in the course of regulating the rates of pipelines and large producers to whom the small producers sell their gas."[(13)] In reversing the FPC's order, the Court held that the FPC could not rely upon market forces alone in concluding that the market price of gas coincided with the just and reasonable rate required by the statute. According to the Court:

In subjecting producers to regulation because of anticompetitive conditions in the industry, Congress could not have assumed that "just and reasonable" rates could conclusively be determined by reference to market price. Our holding in *Philips* implies just the opposite. This does not mean that the market price of gas would never, in an individual case, coincide with just and reasonable rates or not be a relevant consideration in the setting of area rates . . . it may certainly be taken into account along with other factors, ... *It does require, however, the conclusion that Congress rejected the identity between the "true" and the "actual" market price*."[(14)]

The decision of the Court of Appeals for the District of Columbia Circuit in *Farmers Union Cent. Exchange, Inc. v. F.E.R.C.*[(15)] confirms that the Department is not free to rely *solely* upon competition in setting just and reasonable rates. There, the court reversed a decision by the Federal Energy Regulatory Commission ("FERC") that abandoned regulatory oversight of individual rates in favor of an extremely generous overall revenue constraint, on the ground that the economics of the industry dictated that rate regulation should serve only "to restrain gross overreaching and unconscionable gouging" in order to keep rates within the zone of "commercial reasonableness," not "public utility reasonableness."[(16)] Acknowledging that its methodology would allow investors to earn "creamy returns," the FERC stated that such returns would rarely if ever be achieved in practice because of the alleged existence of a competition that purportedly would act to constrain rates within the statutorily mandated "zone of reasonableness."[(17)] Citing the lack of any monitor to measure the efficacy of the market as a regulator of just and reasonable rates, the court stated that:

such ratemaking does not comport with FERC's statutory responsibilities. FERC's methodology, therefore, exposes a range of permissible prices that would exceed the "zone of reasonableness" by definition, unless competition in the oil pipeline market drives the actual prices back down into the zone. But nothing in the regulatory scheme itself acts as a monitor to see if this occurs or to check rates if it does not. This is the fundamental flaw in the Commission's scheme.[(18)]

Nor does the Department's *Price Cap Order* hold otherwise. Far from exempting Verizon's retail phone rates from further regulation, in its *Price Cap Order*, the Department specifically determined that the rates resulting under price cap regulation would be just and reasonable from the start, by "reviewing the reasonableness of the Company's current earnings as a means of assessing whether the existing rates are an appropriate starting point for alternative regulations, or whether further proceedings are necessary."[(19)] Moreover in replacing rate of return regulation with price caps on a going forward basis, the Department made clear that "price cap regulation is *not* deregulation, it is merely another way for regulators to control the rates charged by a firm."[(20)] According

to the Department, "price cap regulation replaces company-specific, test year cost-based control of a firm's rates with an index representing the expected changes in costs for the average firm in the industry. In both cases, the rates are being controlled by regulation."[(21)] Indeed, the Department explicitly distinguished price cap regulation from the type of market-based regulation now being sought by Verizon - in which case it stated it would be required to assess the level of competition faced by Verizon - on the ground that its existing regulation of just and reasonable rates would remain in place. The Department thus stated that:

If NYNEX were requesting market based pricing in the instant petition, it would certainly be required to make a showing of effective competition in order for the Department to consider granting such relief. As noted, because NYNEX is merely requesting a change in the methodology for regulatory control of its rates, we have found that no threshold showing of a particular level of competition is necessary, and the rules established in D.P.U. 1731 are not being changed.[(22)]

B. The Department Must Define Verizon's Burden of Proving that Competition it Faces in the Relevant Local Telephone Service Markets is Sufficient to Constrain its Rates to Just and Reasonable Levels.

Even if the Department had the authority to allow the *de facto* deregulation proposed by Verizon, it could only do so after engaging in a substantial inquiry into the level of competition faced by Verizon. Clearly, the highly aggregated, non market-specific evidence submitted by Verizon in support of its proposal is insufficient to establish that individual rates are just and reasonable. For example, the fact that "in February, 2001, Verizon processed some 18,000 local service requests in Massachusetts from Resellers,"[(23)] that "Verizon processed some 33,000 local service requests from CLECs in February 2001 for UNE and UNE-P customers in Massachusetts,"[(24)] that "competing carriers have about 1,900 collocation arrangements in Verizon MA central offices, which give them access to more than 98 percent of Verizon MA's business lines and 97 percent of Verizon MA's residence lines . . .,"[(25)] does not answer the ultimate question to be determined - *i.e.*, whether such purported competition constrains individual rates, for individual services, in individual markets, at just and reasonable levels. Just as one example of how the number of collocations can be misleading, both Allegiance and Network Plus have repeatedly encountered situations in which they were collocated in a central office, but could not offer service from that central office for an extended period of time because of Verizon's delays in provisioning interoffice transport from that central office. Without interoffice transport, the existence of a collocation did not and could not permit Allegiance or Network Plus to compete with Verizon for the business of customers served by that central office; therefore, these carriers could not act to restrain

Verizon from engaging in pricing at levels in excess of those that are "just and reasonable."

In order to prevail, Verizon must be able to establish, on a rate-by-rate, service-by-service, and market-by-market basis, that it faces sufficient competition such that each of its rates is automatically constrained to just and reasonable levels, without the need for regulatory intervention. Clearly, Verizon can collect the information needed for such an examination by the Department. In fact, Verizon's New York affiliate filed on May 15, 2001 with the New York Public Service Commission ("NYPSC") its proposed alternative regulation plan that is far more comprehensive in this respect than the filing made in this Docket on April 12, 2001.[(26)]

With respect to conducting such an examination, the court's decision in *Farmers Union* has become the litmus test by which the legal and evidentiary bases for agency efforts to supplant traditional cost-based regulation with market-based approaches are to be judged. The court in *Farmers Union* specifically recognized the first tentative steps then being taken in the direction of relaxed regulatory oversight in accordance with the competitive market model, but noted that in order to loosen regulatory oversight, an agency must first determine that whatever mode of regulation remains, the statutory requirement of just and reasonable rates will be satisfied. According to the court:

Moving from heavy to lighthanded regulation within the boundaries set by an unchanged statute can, of course, be justified by a showing that under current circumstances the goals and purposes of the statute will be accomplished through substantially less regulatory oversight. We recognize that this court has sanctioned dramatic reductions in regulatory oversight under, for example, the FCC and ICC licensing provisions, both of which require that the licensee operate in accordance with the "public interest." In both cases, this court found that the agency adequately assured meaningful enforcement of the . . .[regulatory] standard.[(27)]

In the wake of *Farmers Union*, a number of federal agencies, including the FCC, the Interstate Commerce Commission, and the FERC, have adopted a market-based regulatory approach that relies on a fact intensive market-power analysis - mirroring that which takes place in antitrust cases - in lieu of traditional cost of service ratemaking in which costs are apportioned to individual services in accordance with cost causation, the benefits accorded various classes of consumer, elasticity of demand and a host of other factors. Thus, for example, in Order No. 572,[(28)] the FERC established procedures to enable it to comply with *Farmers Union* by requiring oil pipelines desiring to charge market based rates to (1) define the relevant geographic and product markets; (2) identify the competitive alternatives for shippers, including potential competition and other competition constraining the pipeline's ability to exercise market power, and (3) compute the market concentration (HHI) and other statistical market power measures based on the information provided about competitive alternatives.[(29)] As noted above, the Department

has recognized that an extensive examination of competition would be required as a prerequisite to granting Verizon the right to engage in market-based pricing.[(30)] Just as detailed allocations are required to establish individual just and reasonable rates for common carriers using detailed cost allocations to individual customers and services,[(31)] the same type of detailed market analysis would have to be performed in determining the appropriateness of market-based rates, with reference to highly detailed evidence of competition in each individual market.

The Department's undertaking here is therefore necessarily more exacting than it was in evaluating Verizon's application to provide in region intraLATA telephone service under Section 271 of the Telecommunications Act of 1996, 47 U.S.C. § 271. There, unlike here, the only issue was whether the market for retail phone service was sufficiently open to permit Verizon to enter the long distance market, without causing irreparable harm to existing competition in *that* market. As such, the purpose of the Department's inquiry involved the same concerns that underlay the line of business restrictions embodied in the consent decree issued by the district court in its Modified Final Judgment in *AT&T v. United States*.[(32)] In *this* proceeding, in contrast, the question is whether the level of competition is sufficient to constrain retail phone rates and service quality to just and reasonable and nondiscriminatory levels, which necessarily involves a determination regarding individual rates and services, and thus a market-by-market competitive analysis. Verizon, unlike its New York counterpart, has not provided the information required to conduct such an examination and needs to do so before the Department proceeds any further.

C. The Department Must Consider Evidence Regarding Verizon's Financial Historical and Forecasted Financial Performance.

At the same time, the Department must consider Verizon's financial performance under the existing price cap regime, and Verizon's forecasts regarding its future financial performance.

It is axiomatic that a company facing the level of competition claimed by Verizon to justify the pricing flexibility it seeks should not possess the ability to reap monopoly profits, either on an overall total company basis, or from the provision of retail services for which it allegedly faces significant competition. Moreover, consideration of Verizon's earnings should be required so as to ensure that Verizon's existing rates under the Department's price cap rules have remained at just and reasonable levels, prior to any further relaxation of regulation with regard to Verizon's retail prices, just as the Department deemed necessary in its *Price Cap Order*.[(33)]

In this respect, this proceeding is similar to Case 00-C-1945, now pending before the NYPSC. There, the NYPSC has directed Verizon to submit a detailed analysis of Verizon's earnings and financial condition (past and projected) "to ensure that rates are just and reasonable."[(34)] In fact, on May 15, 2001, Verizon New York Inc. filed such a detailed analysis with the NYPSC that will be examined in conjunction with its proposed alternative regulation plan.[(35)] Moreover, the NYPSC stated that it assumed that Verizon

would not seek "a degree of upward pricing flexibility that could result in a major rate increase; if it did, the schedule we are setting here would have to be modified to allow for the full-fledged rate case that would ensue."[(36)] In the present case as well, before Verizon MA is granted virtually unlimited flexibility to raise and lower rates on its business customers in Massachusetts, and to set its rates on new services, it should submit sufficient data regarding its financial performance, which it did not provide in its April 12, 2001 filing, to allow an informed determination of the extent of its monopoly power over individual markets and services.

D. The Department Must Consider Evidence Regarding Verizon's Ability to Engage in Exclusionary Conduct.

The Department must also consider the ability of Verizon to engage in predatory pricing, price squeezes, and other exclusionary conduct, if its request for reduced regulation were granted. It bears emphasis that in addition to removing price caps on much of its existing non-residential service, in addition to all new services, Verizon's proposal would eliminate all current restrictions on its ability to change its price structure, and would retain the existing price floors only on existing services. Accordingly, Verizon would have an increased motivation and opportunity to engage in anticompetitive exclusionary behavior, such as pricing its services below cost, tying the sale of new services to an obligation on the part of its customers to purchase its existing services instead of competitive offerings, and offering its retail services at prices lower than those that CLEC customers could offer.

The Department must determine whether the existing minimum price floors are sufficient to prevent such exclusionary behavior on the part of Verizon. In its *Price Cap Order*, the Department imposed a price floor for those services where Verizon controls an essential input for a competitor's offering of a competing service, equal to the wholesale rate that at least one competitor pays to Verizon in order to offer the service plus Verizon's marginal cost of related overhead.[(37)] For all other services, the Department imposed a price floor equal to the marginal cost as reported in Verizon's most recent marginal cost study.[(38)] Obviously such protections would be insufficient to address efforts by Verizon to tie the sale of new services to old services in bundled offerings to business customers or to otherwise cross-subsidize new services by retaining high wholesale rates on UNEs and resale while making its own retail prices appear more attractive by offering new services or enhanced services not subject to the Department price floors at below cost prices. (Moreover, by bundling telecommunications services with enhanced services such as voice mail that are not subject to resale, Verizon would be able to avoid any requirement that it allow CLECs to resell the bundled package.) Included in the Department's analysis should be the question whether existing constraints have protected CLECs against anticompetitive behavior on the part of Verizon.

E. The Department Must Consider Adopting Safeguards to Prevent Verizon from Engaging in Exclusionary Conduct.

In view of the rate flexibility sought by Verizon, the Department must consider the need to adopt safeguards to prevent Verizon from engaging in anticompetitive conduct, particularly those associated with the competitive advantages enjoyed by Verizon as a result of the vertical integration between Verizon's wholesale and resale arms. For example, the Department has long heard complaints regarding the ability of Verizon to discriminate in favor of its own retail arm, through the use of non-recurring charges imposed on CLECs that are not reflected in published retail tariffs and represent only intra-company transfer payments for Verizon, as well as in the length of provisioning intervals, maintenance intervals, billing and other services provided CLECs. At least one state has ordered Verizon to separate its retail and wholesale functions,[(39)] and many other states (including Massachusetts) have ordered strict codes of conduct for intracorporate transactions engaged in by electric utilities and gas companies with integrated wholesale and resale operations.[(40)] The Department should consider the need for the full range of such safeguards in this proceeding.

F. The Department Should Consider a Number of Procedural Issues Regarding the Rights of Carriers Aggrieved by Anticompetitive Behavior on the Part of Verizon.

Finally, the Department should consider a number of procedural issues, including the adoption of procedures for addressing complaints by retail customers and CLECs concerning any attempts on the part of Verizon to engage in excessive pricing, exclusionary conduct, anticompetitive tying, predatory pricing or price squeezing, or any other unlawful conduct. Such procedures could include expedited consideration of complaints, periodic filings on the part of Verizon reporting any complaints from customers or competitors, audits by the Department and a host of other possible procedures to ensure compliance by Verizon with the regulatory requirements imposed by the legislature.

CONCLUSION

For the forgoing reasons, Allegiance and Network Plus respectfully request that the Department define the scope of this proceeding broadly to include the above-described issues and information.

Respectfully submitted,

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1.

[1] *Petition of New England Telephone and Telegraph Company d/b/a NYNEX for an Alternative Regulatory Plan for the Company's Massachusetts Intrastate Telecommunications Services*, D.P.U. 94-50 (1995) ("*Price Cap Order*").

2.

[2] *See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order, *Low-Volume Long-Distance Users*, CC Docket No. 99-249, Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Eleventh Report and Order, 15 FCC Rcd 12962, petitions for review pending, *Texas Office of Pub. Util. Counsel et al. v. FCC*, 5th Cir. Nos. 00-60434 (and consolidated cases)(2000).

3.

[3] Verizon would have the Department retain the current access charge rates, as it believes no reduction in such rates is necessary. However, Verizon proposes a revenue neutral plan, should the Department deem

access charge reform necessary, which would decrease access charge rates with a corresponding increase in the residential dial tone rate.

4.

[4] Testimony of Robert Mudge at 3.

5.

[5] *See* Testimony of William Taylor at 7-9.

6.

[6] Nothing in the 1996 Telecommunications Act requires the Department to relax its oversight of Verizon's rates. To the contrary, the Act is geared to opening up the market to competition. *See* 47 U.S.C. § 251 (b)-(c). The Act does not force competition to occur, does not raise any presumptions regarding the existence of competition, and does not require the Department to rely on competition in setting rates. Nor does it preempt state jurisdiction with regard to the regulation of local telephone rates.

7.

[7] *New England Telephone and Telegraph Co. dba NYNEX*, D.P.U. 94-50, 1995 WL 125590 ("*Price Cap Summary Judgment Order*") (holding that the Department has broad authority to employ the appropriate methodology in carrying out its ratemaking function, the only requirement is that the resulting rates by just and reasonable).

8.

[8] Testimony of William Taylor at 11.

9.

[9] *FPC v. Hope Natural Gas*, 320 U.S. 591, 602 (1944), *see also Wisconsin v.* FPC, 373 U.S. 294 (1963); *FPC v. Natural Gas Pipeline*, 315 U.S. 575 (1942); *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 591 (1945); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *New England Telephone & Telegraph Co. v. Department of Public Utilities*, 371 Mass. 67, 71, 83-85 (1976) ("[o]ur fundamental law requires no particular theory or method to be used in determining a rate base, provided the resulting rates are not confiscatory."); *New England Telephone & Telegraph Co. v. Department of Public Utilities*, 331 Mass. 604, 616 (1954) ("[the court] would not construe the Constitution of this Commonwealth as compelling the use of any particular theory or method or combination of theories or methods for determining a rates base, and we would not be justified in laying hold of any part of our fundamental law for purposes of overriding the department merely because a particular approach to rate regulation not be used.").

10.

[10] *FPC v. Natural Gas Pipeline*, 315 U.S. at 776-777.

11.

[11] 417 U.S. 380 (1974).

12.

[12] *Id*. at 383.

13.

[13] *Id*. at 384.

14.

[14] *Id*. at 399 (emphasis added).

15.

[15] 734 F.2d 1486 (D.C.Cir., 1984).

16.

[16] *See Williams Pipe Line Co.*, 21 FERC (CCH) ¶ 61,,260, 61,597 (1982).

17.

[17] *Id*.

18.

[18] *Id*. at 1509, citing *Texaco, Inc. v. FPC*, 474 F.2d 416, 422 (D.C. Cir. 1972), *approved in relevant part and vacated on other grounds*, 417 U.S. 380 (1974).

19.

[19] *Price Cap Order*, 1995 WL 386802 at *16.

20.

[20] *Id*. at *45.

21.

[21] *Id*.

22.

[22] *Id*.

23.

[23] *See* Testimony of Robert Mudge at 10.

24.

[24] *Id*. at 11.

25.

[25] *Id.*

26.

[26] *See* Verizon New York Inc.'s Incentive Plan, Case No. 00-C-1945 (filed with NY P.S.C. May 15, 2001) ("Verizon-NY's 5/15/01 Incentive Plan") (containing comprehensive Initial Panel Testimony of Verizon New York Inc. on the New York Competitive Marketplace and Exhibits in Support thereof), *available at* http://www.bellatlantic.com/regulatory/ny/00-C-1945/ .

27.

[27] *Farmers Union*, 734 F.2d at 1510 (citations omitted).

28.

[28] *Market-Based Ratemaking for Oil Pipelines*, Order No. 572, 59 FR 59148 (1994) FERC Stats. & Regs. (Regulations Preambles, 1991-1996) ¶31,007 at 31,183, order denying rehearing, Order No. 572-A, 69 FERC ¶ 61,412 (1994).

29.

[29] *See* 18 C.F.R. § 348.1; *see also Koch Gateway Pipeline Co.* 85 FERC ¶ 61,013, 1998 WL 679484 (1998)(applying antitrust style market analysis to application of gas pipeline to charge market-based transportation rates in several geographic markets).

30.

[30] *See Price Cap Order* at *45.

31.

[31] *Colorado Interstate*, 324 U.S. at 591; *Farmers Union*, 734 F.2d at 1528-1529.

32. [32] *See United States v. American Tel. & Tel. Co.*, 552 F Supp. 131 (D. D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 US 1001 (1983).

33.

[33] *Price Cap Order*, 1995 WL at * 16.

34.

[34] Case 00-C-1945, *Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon and to Investigate the Future RegulatoryFramework*, Ruling on Scope and Schedule at 5 (February 27, 2001).

35.

[35] *See ,e.g., Verizon-NY's 5/15/01 Incentive Plan* at Initial Panel Testimony of Verizon New York Inc. on the Incentive Plan for New York and Exhibit and Support therefor.

36.

[36] *Id*. at 6.

37.

[37] *Price Cap Order* at *79.

38.

[38] *Id*.

39.

[39] *See* Docket Nos. P-00991648, P-00991649, Opinion and Order, at 213-25 (Pa. P.U.C. August 26, 1999) (ordering strict structural separation of Verizon Pennsylvania's wholesale and retail business operations), *modified by*, Docket No. M-00001353, Opinion and Order, 30-32 (Pa. P.U.C. Apr. 11, 2001) (ordering functional/structural separation of Verizon Pennsylvania's wholesale and retail operations).

40.

[40] *See Relationship Between Electric and Gas Distribution Companies and Their Affiliates*, D.P.U./D.T.E. 97-96 (June 1, 1998).