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) D.T.E. 01-20

the Appropriate Avoided Cost Discount for Verizon New England,)

Inc. d/b/a Verizon Massachusetts' Resale Services in the)

Commonwealth of Massachusetts)

_____)

MOTION TO STRIKE VERIZON TESTIMONY AND FOR EXTENSION OF TIME TO FILE REBUTTAL TESTIMONY

Allegiance Telecom of Massachusetts, Inc., Covad Communications Company, El Paso Networks, LLC, and Network Plus, Inc. (collectively "CLEC Coalition") respectfully request that the Department strike all the testimony and cost studies that Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") submitted in this proceeding on May 8, 2001 that was previously addressed or the Department directed be filed in DTE 98-57 Phase III. The issues recently and fully litigated in that proceeding should not be relitigated here and remaining DTE 98-57 Phase III issues should be addressed in that proceeding.

In addition, the CLEC Coalition requests that the Department strike all the testimony and cost studies that Verizon filed on May 8, 2001 relating to collocation, or in the alternative, establish a separate track to evaluate such rates. This proceeding was initiated to focus solely on UNE rates, and no notice has been provided in this docket that it would encompass collocation rates; however, if collocation rates are to be reviewed in this proceeding, an alternative track should be established so that the review of collocation rates is done in a manner that allows for appropriate due process.

Moreover, as a result of (i) the postponement of the technical workshop sessions, (ii) Verizon's continuing failure to provide a protective agreement and related proprietary information that will enable the Parties to view the key materials submitted by Verizon six days ago, and (iii) the pendency of the above motions, the Department should, at a minimum, extend the time to file rebuttal testimony to June 29, 2001 or four weeks after the Department issues a decision on the CLEC Coalition's motion to strike, whichever is later, and extend the time for filing rebuttal testimony an additional two weeks if the collocation issues, the xDSL and line sharing issues, or both are added to Part A of this docket.

I. FACTUAL BACKGROUND

On January 12, 2001, the Department issued its Vote and Order opening this investigation to review unbundled network element ("UNE") rates and the avoided cost discount for resale services in the Commonwealth of Massachusetts ("*Vote and Order*").[(1)] The Commission did so because the five-year cycle that it established for evaluating UNE rates was upon it. In the *Vote and Order*, the Department divided the investigation into two parts to run on parallel tracks: (1) Part A for the development of new TELRIC-based UNE rates; and (2) Part B for the development of a new avoided cost discount. Initially, the Department further divided Part A into two phases: (1) Phase I for consideration of the appropriate TELRIC model; and (2) Phase II to review the appropriate inputs to that model. Furthermore, the Department established a February 12, 2001 deadline for submission of proposed TELRIC models for calculating UNE rates and proposed avoided cost studies for calculating the wholesale discount. Finally, the Department scheduled a procedural conference for February 8, 2001. Significantly, the Department, in its *Vote and Order*, never mentioned that collocation rates would be examined during this proceeding.

On February 8, 2001, the Department held a procedural conference in this docket. At the procedural conference, the hearing officer considered the Motion, filed by AT&T Communications of New England, Inc.'s ("AT&T") on February 6, 2001, to Extend the Time for Filing Models until March 12, 2001, and Requesting that UNE Cost Models and Model Inputs be Investigated by the Department in a Unified Proceeding. Thereafter, the Hearing Officer granted, in part, and denied, in part, AT&T's Motion by establishing a procedural schedule that unified the review of the Part A UNE cost model and inputs, and

set an April 12, 2001 deadline in Part A of this investigation for the submission of direct cases, including cost models, inputs, supporting documentation, direct testimony and proposed rates. Again, there was no mention of collocation.

On February 15, 2001, Verizon filed an Appeal of the Hearing Officer's Ruling on the Part A Procedural Schedule ("*Verizon 2/15/01 Appeal*") that required that Verizon file its direct case by April 12, 2001. In support of its Appeal, Verizon attached the Sworn Affidavit of Michael J. Anglin, Director of Service Costs for Verizon ("Anglin Affidavit"). In its Appeal, Verizon requested additional time to file its UNE cost studies and the Anglin Affidavit sought to demonstrate that an extension was proper because of the time required to assemble the studies. Although Verizon's Appeal and the Anglin Affidavit repeatedly referred to Verizon's preparation of cost studies for "UNEs," neither document disclosed that Verizon was also preparing a collocation case or that it needed additional time to do so.

On February 22, 2001, the Department rendered an Interlocutory Order on Verizon's Appeal and granted Verizon's request and, accordingly, allowed Verizon until May 1, 2001 to file its direct case and UNE cost studies.[(2)] On April 26, 2001, Verizon requested 3 additional days to file its direct case because it required more time to prepare its UNE cost studies ("*Verizon 4/26/01 Extension Request*"). Once again, Verizon did not disclose in its request that it was at the same time preparing a collocation case or that it needed more time to do so. The Hearing Officer in turn granted Verizon's request and established the new date of May 4, 2001 for it to file its direct case.[(3)] AT&T then requested that the filing date be extended to May 8, 2001. The date was adopted and it became the ultimate filing date.[(4)] Notably, the revised procedural schedule issued May 4, 2001 only referenced "Part A: Development of UNE Rates" and did not make any reference to collocation rate development. Accordingly, on May 8, 2001, Verizon filed its direct case. Its filing included testimony and cost studies supporting its recurring and nonrecurring UNEs along with testimony and cost studies supporting collocation rates and xDSL and line sharing rates that were already reviewed or scheduled to be reviewed in DTE 98-57 Phase III.

On May 10, 2001, Verizon filed a motion in DTE 98-57 Phase III to defer the cost and rate issues for loop conditioning for CSA-compliant loops and line sharing collocation augmentation into this proceeding ("*5/10/01 Motion to Defer*"). On Friday, May 11, 2001, the hearing officer in that proceeding requested that parties comment on Verizon's motion by Tuesday, May 15, 2001.

By way of background, DTE No. 98-57 Phase III addressed Verizon's proposed line sharing and digital subscriber line ('xDSL") tariff offerings. These offerings were fully investigated and litigated in that case and on September 29, 2000, the Department rendered an order on the proposed offerings.[(5)] With respect to the rate issues, the Department rendered a decision regarding Verizon's proposed rates for line qualification and loop conditioning, wideband testing, cooperative testing, collocation augmentation and engineering implementation, splitter installation, splitter monthly administrative support, splitter equipment support, cross-connects, POT bay/splitter termination charge,

and other miscellaneous rates. Verizon moved for reconsideration of a number of different determinations, some of which included the collocation augmentation intervals that were established in the *DTE 98-57 Phase III 9/29/00 Order* along with the associated fees for performing an augmentation and the loop conditioning and qualification costs. Importantly, Verizon did not request reconsideration of any of the other rate decisions rendered in the September order. With respect to these two requests, the Department, in a reconsideration Order dated January 8, 2001, granted Verizon's request to revise the collocation augmentation and engineering fees established in the September order but denied reconsideration of the loop qualification and loop conditioning rates.[(6)]

After releasing its reconsideration order in DTE 98-57 Phase III, the Department further clarified that Verizon could charge CLECs for conditioning loops if the loop was CSA compliant unless the CLEC could demonstrate that the loop cannot support xDSL service.[(7)] The Department stated that associated rates for such conditioning would be considered in the continuing phase of the DTE 98-57 Phase III proceeding. At this time, DTE 98-57 Phase III is still ongoing and is expected to address these remaining issues, among other things.[(8)]

II. ARGUMENT

A. The xDSL and Line Sharing Issues that Verizon Seeks to Introduce into this Proceeding that were Addressed or are Scheduled to be Addressed in DTE No. 98-57 Phase III Should be Stricken.

As discussed above, Verizon, in its May 8, 2001 filing, submitted testimony and cost studies supporting its recurring and nonrecurring UNE rates. In addition, Verizon filed testimony and cost studies supporting its xDSL and line sharing rates (that were recently decided in DTE 98-57 Phase III) as well as collocation rates. Such xDSL and line sharing issues should be stricken from this proceeding because the associated issues were either fully litigated or have been designated to be addressed in the ongoing aspects of DTE 98-57 Phase III.

Importantly, Verizon has admitted that it is attempting to transport into this proceeding issues that have been docketed to be decided in DTE 98-57 Phase III. In fact, Verizon's *5/10/01 Motion to Defer* in DTE 98-57 Phase III is an outright admission that it is trying to do precisely that. Its request to defer the ongoing rate issues to this proceeding fails, however, to mention its attempt to relitigate other issues that were fully and finally decided by this Department in that proceeding just a few short months ago.

The Department should not permit Verizon to seek backdoor reconsideration or to further litigate these recently decided issues in this proceeding. Clearly, Verizon is not satisfied either with the Department's order or reconsideration order rendered in DTE 98-57 Phase III and is using this proceeding as a mechanism to obtain a second reconsideration of the

Department's rulings, the first motion for reconsideration having been denied just four months ago. For example, in its May 8, 2001 filing, Verizon submitted testimony and proposed recurring and/or nonrecurring rates for loop qualification and conditioning, wideband testing, splitter installation, and splitter monthly administrative support. As discussed above, every single one of these rates was very recently investigated in DTE 98-57 Phase III, with final rates established in that docket. A reexamination of these rates is wholly inappropriate at this time, and especially so in this proceeding.

Significantly, Verizon is attempting to avoid the threshold and overarching DTE 98-57 Phase III decisions relating to loop conditioning and qualification. In particular, the Department, in its September 29, 2000 order, rejected Verizon's proposed tariff charges for mechanized loop database, manual loop qualifications, and engineering queries as well as any charges for loop conditioning, including adding ISDN electronics.[(9)] In the January 8, 2001 reconsideration order, the Department rejected Verizon's request for reconsideration of this decision. Verizon, apparently unsatisfied with this result, now seeks to get around such determinations by relitigating them here.

Parties in this proceeding and DTE 98-57 Phase III should not be required to relitigate such recent DTE rulings -- to do so would be patently unfair and extremely prejudicial. Indeed, CLECs and the Department spent a significant amount of time and effort litigating xDSL and line sharing issues in DTE 98-57 Phase III. If the Department permits Verizon to avoid such determinations by relitigating these recently decided issues in this proceeding, all the resources expended litigating in DTE 98-57 Phase III would be entirely wasted, and the parties would be deprived of the extensive record assembled in that docket. The Department should recognize that CLECs cannot afford the expenses associated with relitigating these issues. The cost to CLECs of lawyers and expert witnesses in that proceeding was substantial. Engaging lawyers and expert witnesses to relitigate the same issues just a few months later would impose a substantial barrier to competition. Forcing CLECs to relitigate also would destabilize financial markets that properly expect the Department's decisions to be effective for more than a few months. Indeed, the Department recognized the need for stability when it established a five-year cycle to review UNE rates. The Department should apply a similar principle to DTE 98-57 Phase III and not revisit the determinations made there just months later. For the foregoing reasons, the Department should strike all testimony and cost studies that Verizon filed in this proceeding that were addressed or belong in the DTE 98-57 Phase III proceeding, including loop qualification, loop conditioning, wideband testing, cooperative testing, collocation augmentation and engineering implementation, splitter installation, splitter monthly administrative support, splitter equipment support, cross-connects, and the POT bay/splitter termination charge.

B. Verizon's Collocation Testimony Should be Stricken, or in the Alternative, the Department Should Move Collocation to a Separate Track.

As previously mentioned, Verizon included in its May 8, 2001 filing testimony and cost studies addressing collocation. This testimony should also be stricken from the record in

this proceeding because such issues are entirely outside of the established scope of this proceeding.

As set forth in the Factual Background above, the Department, in its *Vote and Order*, initiated this proceeding to examine UNE rates. The *Vote and Order*, as previously noted, does not mention that collocation rates would be examined. It is clear from the Communications Act that UNEs and collocation are distinct issues: UNEs are described in Section 251(c)(3), while collocation is described in Section 251(c)(6). The Department and the Hearing Officer, in its subsequent decisions relating to the procedural schedule for this proceeding, never suggested that collocation issues would be addressed.[(10)] Moreover, Verizon never mentioned in the *Verizon 2/15/01 Appeal* or the *Verizon 4/26/01 Extension Request* that it required additional time to complete collocation testimony and cost studies. In fact, the record is entirely devoid of any evidence that would put parties in this proceeding on notice that collocation rates would be addressed, in this docket, especially on the current schedule.

The CLEC Coalition was therefore shocked to see that a major portion of Verizon's May 8, 2001 filing consisted of collocation studies and testimony. The CLEC Coalition learned from Hearing Officer Chin on May 11, 2001 that the Department had stated its intent to consider collocation rates in this proceeding in its 271 comments to the Federal Communications Commission. Such statements in another docket before another agency hundreds of miles away, although commendable, cannot be deemed to give counsel in this proceeding that were not involved in Verizon's 271 proceeding proper notice that collocation would be part and parcel of this investigation. Clearly, counsel for the members of the CLEC Coalition had no reason to review filings in the Federal Communications Commission docket to learn the scope of this proceeding. Instead, they quite reasonably looked to this proceeding to learn its scope. The resulting reality is that the CLEC Coalition had neither official notice nor actual knowledge that it was the Department's intent to review collocation rates in this proceeding. Despite any references made in the Federal Communications Commission proceeding, the lack of notice in this proceeding that collocation rates would be investigated should prevent such rates from being examined here, at least on the present schedule.

The CLEC Coalition, as a result of the lack of notice, is not prepared to address collocation issues under the established procedural schedule, and requiring it to do so would constitute a denial of due process. Just as Verizon engaged a witness separate from its UNE Panel to provide collocation testimony, the CLEC Coalition will need to engage a collocation specialist to provide expert testimony on that subject. Engaging such a specialist and having him or her review Verizon's testimony, propound discovery, review the answers that will come 10 days after the requests are propounded, and prepare testimony, simply cannot be adequately done on the present schedule. The CLEC Coalition therefore requests that the Department strike these issues from this proceeding.

In the alternative, the CLEC Coalition requests that the Department establish a separate track, such as a Part C to this docket, to address collocation issues. In doing so, a new procedural schedule should be established that gives all parties sufficient time to prepare

properly for a full blown collocation rate proceeding. Importantly, doing so would not disrupt this phase of the proceeding because Verizon's collocation testimony and cost studies are separate and apart from its direct case that addresses recurring and non-recurring UNE rates. Moreover, such a decision would benefit all parties involved by removing the distractions associated with collocation issues while the Department examines UNE rates and vice versa, thus paving the way for a more thorough and focused investigation in each of these areas.

C. The Department Should Extend the Time to File Rebuttal Testimony.

Along with the foregoing motions to strike, the CLEC Coalition respectfully moves for an extension of time for the filing of rebuttal testimony to June 29, 2001, or four weeks after the date on which the Department rules on the CLEC Coalition's motion to strike, whichever is later. The current deadline for filing pre-filed rebuttal testimony is June 8, 2001.

An extension is reasonable and justified in part because of the rescheduling of the technical conference in this proceeding. At the time that the early June deadline for rebuttal testimony was established, the technical conference was scheduled for May 16-17, 2001. On May 11, 2001, the Department deferred the technical conference by nearly three weeks, to June 4-5, 2001. The CLEC Coalition requires sufficient time to gather and process information obtained at the technical conference in order to determine whether additional discovery is needed and to complete its rebuttal testimony.

This motion is further justified by the fact that Verizon still has not provided to the members of the CLEC Coalition a proposed protective agreement so that the parties may obtain the proprietary information that was filed with the Department. The CLEC Coalition asked Verizon to supply a protective agreement on May 7 and May 9, 2001. The Department of Defense/Federal Executive Agencies and AT&T have made similar requests. When the CLEC Coalition had not received any response from Verizon by May 11, it asked Hearing Officer Chin to intercede on its behalf with Verizon. As of this writing, Verizon has still not responded to any of these multiple requests for a protective agreement that would permit the parties to review Verizon's proprietary material. In fact, the material that has now been withheld for six days for lack of a protective agreement is the very material that is most critical to the CLEC Coalition's experts' evaluation of Verizon's cost studies. Consequently, the CLEC Coalition will remain unable to develop comprehensive rebuttal testimony until it obtains access to Verizon's confidential filings.

Finally, but perhaps most importantly, if the Department denies the CLECs' motion to strike, the Coalition will require additional time to retain additional witnesses and conduct additional research and discovery beyond what they had reasonably expected in preparation for this proceeding. For the reasons set forth above, the CLEC Coalition reasonably did not expect loop conditioning, loop qualification, line sharing, and collocation to be a part of this proceeding. Comprehensive responses on these critical issues will require substantial additional time and effort. If the CLEC Coalition is provided inadequate time to prepare for these substantial additional issues, it would be

deprived of a meaningful opportunity to present a complete and balanced case to the Department on issues that are critical not only to the business plans of CLECs but to the survival of competition in the Commonwealth. Verizon was afforded many months to prepare its testimony in this case. Under these circumstances, the CLEC Coalition's proposal for a few additional weeks is eminently reasonable.

For the foregoing reasons, the CLEC Coalition moves that the date for filing rebuttal testimony be continued to June 29, 2001, or four weeks after the Department issues a decision on the CLECs' motion to strike, whichever is later, and that two additional weeks be provided if the collocation issues, the xDSL and line sharing issues, or both, are added to Part A of this docket.

III. CONCLUSION

For the foregoing reasons, the CLEC Coalition requests that the Department (1) strike Verizon's testimony and cost studies that were filed in this proceeding on May 8, 2001 that relate to xDSL and line sharing issues addressed or that are scheduled to be addressed in DTE 98-57 Phase III; (2) strike Verizon's collocation testimony and cost studies, or in the alternative, establish a separate track to address collocation rates separate and apart from the UNE rate investigation; (3) grant the extension to file rebuttal testimony as requested herein.

Finally, given the fact that if this motion is denied in whole or in part, the CLEC Coalition will be forced to engage new expert witnesses to deal with new issues, the

CLEC Coalition respectfully requests that the Department rule on this motion by the end of the day on May 15, 2001.

Respectfully submitted,

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1.

[1] DTE 01-20, Vote and Order to Open Investigation (Mass. D.T.E. Jan. 12, 2001).

2.

[2] DTE 01-20, Interlocutory Order on Appeal Filed By Verizon New England, Inc. d/b/a Verizon Massachusetts of Hearing Officer's Ruling on the Procedural Schedule (Mass. D.T.E. Feb. 22, 2001) ("*DTE 01-20 2/22/01 Interlocutory Order*").

3.

[3] DTE 01-20, Hearing Officer Ruling on Motion Filed By Verizon New England, Inc. d/b/a Verizon Massachusetts for Extension of the Filing Date (Mass. D.T.E. Apr. 30, 2001) ("*DTE 01-20 4/30/01 Hearing Officer Ruling*").

4.

[4] DTE 01-20, Memorandum from Hearing Officer Chin to D.T.E. 01-20 Parties Granting AT&T's Request for Extension of Time (Mass. D.T.E. May 4, 2001) ("*DTE 01-20 5/4/01 Revised Procedural Schedule*").

5.

[5] DTE 98-57 Phase III, Order (Mass. D.T.E. Sep. 29, 2000) ("*DTE 98-57 Phase III 9/29/00 Order*").

6.

[6] DTE 98-57 Phase III, Order on Motions for Reconsideration, Clarification, Extension of Time, and Extension of Judicial Appeal Period, and Request for Reexamination of Compliance Filing (Mass. D.T.E. Jan. 8, 2001).

7.

[7] DTE 98-57 Phase III, Clarification Order (Mass. D.T.E. Feb. 21, 2001).

8.

[8] DTE 98-57 Phase III, Memorandum from Jesse Reyes and Paula Foley, Hearing Officers to DTE 98-57 Phase III Parties Establishing Procedural Schedule for Remaining Issues in D.T.E. 98-57 Phase III (Mass. D.T.E. Apr. 19, 2001).

9.

[9] *DTE 98-57 Phase III 9/29/00 Order* at 101-102.

10.

[10] *See DTE 01-20 5/4/01 Revised Procedural Schedule; DTE 01-20 4/30/01 Hearing Officer Ruling*; *DTE 01-20 2/22/01 Interlocutory Order.*