COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Verizon Massachusetts - Pricing of)

Unbundled Network Elements and) D.T.E. 01-20

Resale Services Discounts)

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RESPONSE OF VERIZON MASSACHUSETTS TO

NETWORK PLUS MOTION TO HOLD PART B OF PROCEEDING IN ABEYANCE

In accordance with the schedule established by the Hearing Officer, Verizon Massachusetts ("Verizon MA") files this response to the February 26, 2001 motion of Network Plus, Inc. ("Network Plus") to hold Part B of this proceeding in abeyance (the "Network Plus Motion"). For the reasons set forth below, Network Plus' Motion should be denied.

The cost standard for setting resale discounts under § 252(d)(3) of the Telecommunications Act has been determined by the Eighth Circuit Court of Appeals in a final ruling that is not subject to any further appeals. *Iowa Utilities Board v. F.C.C.*, 219 F.3d 744 (2000). The law is clear that resale discounts must be determined by examining the "costs that are actually avoided, not those that could be or might be avoided" when Verizon MA's services are resold. *Id.*, at 755. Thus, contrary to Network Plus' suggestion, there is no uncertainty about the cost standard that the Department must apply in this case. Since the current discount rates in Massachusetts were set using the FCC cost methodology that the Eighth Circuit has found to be unlawful, those rates must now be reset consistent with the requirements of law. The Department has recognized this obligation and established an aggressive, but achievable, schedule for examining avoided

costs. It should not permit Network Plus to derail the process. Indeed, maintaining the current discounts would allow Network Plus and other resellers to obtain Verizon MA services at rates substantially below the rates permitted under § 252(d)(3) of the Act and continues a subsidy they have received for over four years to which they were never entitled.

I. BACKGROUND

The Department opened this case on its own motion on January 12, 2001, to investigate the appropriate TELRIC-based rates for unbundled network elements and the appropriate avoided-cost wholesale discounts for Verizon resale services (the "*Vote and Order*"). In the *Vote and Order* at 6-7, the Department directed all parties to file avoided cost studies for calculating resale discounts by February 12, 2001. *Id.* At the procedural conference convened on February 8, 2001, and confirmed in a written Hearing Officer memorandum issued the following day, the Department established, without objection from any party, a schedule for the completion of Part B of the proceeding - the determination of avoided costs. Verizon MA was the only party that submitted an avoided cost study on February 12, 2001. The Network Plus Motion was filed on February 26, 2001.[(1)]

II. ARGUMENT

Network Plus' Motion is based on language in the *Vote and Order* in which the Department indicated that it would "maintain the status quo" in Massachusetts, *i.e.*, the FCC's resale costing methodology, in computing the resale discount (Network Plus Motion, at 2-3, citing *Vote and Order* at 4). Network Plus argues that, although the Eighth Circuit vacated the FCC's rules, the Court sent the matter back to the FCC to fashion new rules consistent with the law and contends that the Department should await the FCC's rulemaking before proceeding with this case. Network Plus optimistically "expects" that the FCC will issue new rules by summer (*id*., at 10).[(2)] Network Plus has misconstrued the Department's stated concerns and the meaning of the language in the *Vote and Order*.

As an initial matter, Verizon MA would note that the avoided cost study it filed generally follows the methodological approach contemplated by the FCC. The structure of the study computes a ratio of: (a) the direct and indirect expenses that are avoided in offering retail services on a resale basis; and (b) the retail revenues subject to resale (Massachusetts Resale Discount Study, Tabs 2 and 3). This is the same structure that was adopted by the FCC and was applied by the Department (in compliance with the FCC's rules) in the *Consolidated Arbitrations*. D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Phase 2 Order (December 3, 1996). The major departure from the FCC's rules relates to the issue subsequently overturned by the courts concerning the distinction between "avoided" and "avoidable" costs.

The FCC's rules, as explained in the *Local Competition Order*,[(3)] *adopted an "avoidable cost" standard based on the hypothetical assumption that the incumbent totally exited all retail markets. Local Competition Order, at ¶ 911. It was this error of*

law that the Eighth Circuit reversed. Iowa Utilities Board v. F.C.C., 219 F.3d at 755-756. The Verizon MA avoided cost study deviates from the FCC's now-vacated rules by comporting with the Act's requirements, as authoritatively determined by the Eighth Circuit, by quantifying the actual costs it will avoid in making services available for resale.

In vacating the FCC's resale pricing rules, the Eighth Circuit did not merely indicate that the FCC had failed to explain adequately its findings relating to the "avoidable" cost standard. Rather, it reversed the FCC's decision and explicitly found that "[t]he FCC's rule is contrary to statute." Id. at 756. The Court stated:

The language of the statute is clear. Wholesale rates shall exclude "costs that will be avoided by the local exchange carrier." … The plain meaning of the statute is that costs that are actually avoided, not those that could be or might be avoided, should be excluded from the wholesale rates. Id.

The Court also addressed the FCC's hypothetical construct of a 100 percent wholesale company. The Court stated:

The statute recognizes that the ILEC will itself remain a retailer of telephone service with its own continuing costs of providing that retail telephone service. … Under the statute as it is written, it is only those continuing costs of providing retail telephone service which will be avoided by selling to the competitor the services it requests which are to be excluded. Id.

Although the FCC may issue new pricing rules, there is no lawful action that it can take that would re-impose its previous standards, now invalidated by the Eighth Circuit. In short, there is no ambiguity regarding the standard that must guide either the FCC's rules or the Department's review of resale discounts, and no impediment to the Department considering whether the avoided cost study presented by Verizon MA meets the Act's requirements.[(4)]

Moreover, the Department's concern about "regulatory uncertainty," expressed in the Vote and Order, was subsequently resolved by the United States Supreme Court. When the Department issued the Vote and Order, the Supreme Court had yet to rule on the writ of certiorari relating to the Eighth Circuit's decision that the FCC's cost methodology based on its avoidable cost theory is not lawful. Since then, the Supreme Court has brought finality to this issue when, on January 22, 2001, it denied certiorari on the resale issue. Any remaining doubt as to the appropriate standard of review for determining the resale discount has thus been eliminated, and any concern about regulatory uncertainty has been removed. It is inequitable to give Network Plus the continued benefit of a higher than lawful resale discount until after the FCC acts and the Department can reflect that action in this case. The Department should act now.

Contrary to the unsupportable allegations of Network Plus, the Department is neither "jumping the gun" by proceeding with this case, nor does Verizon MA's filing "usurp" the FCC's role. Both the Department and Verizon MA are acting reasonably to effectuate the long-standing timetable for the review of resale discounts and UNE pricing that the Department established in D.T.E. 98-15 (Phases II, III) (1999). The Act requires that the Department establish such rates pursuant to the resale pricing standard in § 252(d)(3) of the Act, as clarified by the Eighth Circuit. The Department will have ample information in the case to set rates based on the Act's pricing standard. The Department should not buy into Network Plus' delaying tactic, which is intended simply to indefinitely preserve rates that were set using an unlawful cost methodology.[(5)]

The necessity to proceed on the established schedule is also required by practical considerations. In order to meet the Department's objective to complete its review of both UNE pricing and resale discounts in this calendar year, the existing schedule for Part B of the case must be maintained. The aggressive schedule established for the Part A review of UNE pricing requires that that part of the case be conducted throughout the summer, to be briefed after Labor Day. See Revised Schedule of Hearing Officer (February 22, 2001). As a practical matter, the litigants, the Department staff and Commission cannot await the actions of the FCC (and any possible judicial review) before beginning to consider the resale issue. In the best of circumstances, the matter could not be litigated until late summer, and could not be decided before the end of the year. Delaying the Part B portion of the case will render the Department's long-standing timetable for the implementation of new prices for UNEs and resale unattainable.

III. CONCLUSION

For the reasons stated above, the Network Plus Motion should be denied. The Eighth Circuit has clearly established the cost standard governing the setting of resale discounts under the Act, and the Department should proceed with its examination of the study filed by Verizon MA which correctly applies the Act's cost standard.

Respectfully submitted,

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1.

[1] It is not clear whether Network Plus' Motion is intended to be an appeal from the Hearing Officer's procedural schedule. In light of the parties' agreement with the procedural schedule for Part B at the procedural conference, it appears that Network Plus failed to raise a timely objection to that schedule or comply with the procedures set forth in the Department's regulations relating to such appeals. 220 C.M.R. 1.06(d)(6). Although Network Plus' Motion could be dismissed on purely procedural grounds, Verizon MA will address the substance of the pleading.

2.

[2] Network Plus does not address the length of time that may be needed for any judicial review of new FCC regulations.

3.

[3] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, First Report and Order (1996).

4.

[4] Network Plus claims that without FCC rules, "any attempt [by the Department] to craft a wholesale discount would be mere shots in the dark" (Network Plus Motion at 7). This contention is clearly without merit. The Department has the guidance from the Eighth Circuit regarding the law's requirements and need only follow the unambiguous direction provided by the Court.

5.

[5] Network Plus argues that its request here is similar to a request Verizon New York ("Verizon NY") made in a UNE case pending at the time the Eighth Circuit issued its decision. Network Plus' observation misses the thrust of Verizon NY's position and its relevance to this proceeding. Following the Eighth Circuit's ruling, Verizon NY sought to avoid the time, expense, and commitment of resources necessary to litigate a case that was proceeding under the FCC's TELRIC cost theory because the

Eighth Circuit had declared that methodology unlawful. Thus, it sought to suspend the case until such time as the judicial process had run its course and provided a clear, consistent, and authoritative interpretation of the requirements of the Act on the cost standard for UNEs. Here, in contrast, we have an authoritative judicial interpretation of the resale pricing standard in the Act. Thus, unlike the situation in the New York TELRIC case, there is no reason for the Department to defer its investigation - the Eighth Circuit's ruling is a final judicial decision on the resale pricing standard under the Act which can be applied by the Department to set new rates.