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Paula Foley, Esquire  
Department of Telecommunications & Energy  
One South Station, 2<sup>nd</sup> Floor  
Boston, MA 02110

**Re: D.T.E. 03-50 – Verizon Massachusetts Performance Assurance Plan**

Dear Ms. Foley:

The Department opened this proceeding on its own motion on January 22, 2004, to determine whether it should terminate the obligations of Verizon Massachusetts (“Verizon MA”) under the *Consolidated Arbitrations* performance standards in favor of the performance standards and remedies set out in the Department’s Carrier-to-Carrier (“C2C”) Guidelines and the Performance Assurance Plan (“PAP”) (“*Request for Comments*”). According to the Request for Comments, “[a]t this point in time, administering two performance standards plans may be an unnecessary burden on Department Staff, the CLEC community, as well as Verizon [MA]” *Request for Comments*, at 3. As explained in Verizon Massachusetts Initial and Reply Comments, the Department should terminate Verizon MA’s obligations under the *Consolidated Arbitrations* performance standards. There is no dispute about these facts: (1) the Massachusetts PAP performance standards are more comprehensive than those in the *Consolidated Arbitrations*; (2) the metrics included in the *Consolidated Arbitrations* plan are fully covered by the PAP standards; (3) the PAP standards are subject to ongoing updating and review by Verizon and CLECs as part of the New York Carrier Working Group; (4) all changes mandated by the New York Public Service Commission are subject to review and approval by the Department; and (5) the penalties paid under the PAP far exceed the amounts calculated under the *Consolidated Arbitrations* plan.<sup>1</sup>

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<sup>1</sup> Under the Department’s present rules, CLECs are paid the higher of the credits calculated under the PAP or the *Consolidated Arbitrations*. The PAP credit is almost always the higher amount (Verizon MA Comments at 9).

In its comments, AT&T raised several arguments against elimination of the *Consolidated Arbitrations* plan including a claim that the Department was legally precluded from doing so because the plan was incorporated into its interconnection agreement. The Hearing Officer issued a Memorandum on December 8, 2004, asking the parties to address three questions bearing on AT&T's contention. Verizon MA's responses to the Hearing Officer's questions are set forth below.

**Question 1** – The Consolidated Arbitrations performance standards are incorporated by reference into numerous CLEC interconnection agreements. AT&T contends in its Initial Comments that the “right to Verizon performance remedies under the [interconnection agreements] constitutes a legally enforceable obligation of Verizon that cannot be modified by the independent and unilateral actions of third parties” (AT&T Comments at 2). Is the Department precluded from eliminating the Consolidated Arbitrations performance standards from interconnection agreements by a decision in this docket, or is the Department required to conduct an arbitration or engage in some other procedure for purposes of determining whether to eliminate the Consolidated Arbitrations performance standards from interconnection agreements? Please explain. Also please comment on the applicability of *Pacific Bell v. Pac-West Telecom, Inc.*, 325 F.3d 1114 (9th Cir. 2003) (Ninth Circuit Court found that the California Public Utilities Commission did not have the authority to issue a generic rulemaking order applicable to all interconnection agreements), or any other relevant case law, to this question.

Contrary to AT&T's claim, the Department is not precluded from eliminating or modifying Verizon MA obligations under the *Consolidated Arbitrations* performance standards. Those standards were not the product of a voluntary agreement between Verizon MA and any CLEC but were set and incorporated into interconnection agreements by order of the Department in an arbitration. Nothing prevents the Department from modifying its order by determining now that Verizon MA's wholesale performance should be assessed using a single, comprehensive and current set of metrics, rather than over-layering that comprehensive set of metrics with a duplicative and outdated plan. Indeed, earlier in this proceeding, MCI WorldCom made such a suggestion asserting that “[i]t seems logical for the Carrier-to-Carrier metrics (as may be amended from time to time) to supersede those of the *Consolidated Arbitrations* once appropriate remedies for the Carrier-to-Carrier metrics are adopted ...” See MCI WorldCom Comments of January 19, 2000, in the *Consolidated Arbitrations*. The Department has adopted remedies under the PAP, and it is now “logical” that the PAP be the sole source of metrics and penalties.

The Department itself recognized that the *Consolidated Arbitrations* plan was not fixed or beyond change. In the very order adopting the plan, the Department stated that changes would be considered as experience was gained. See *Consolidated Arbitrations, Phase 3-B Order*, at 34 (1997). The Department's decision establishing the plan thus

recognized that subsequent events might provide cause for revisions, and consequently, no party could reasonably expect that the plan would be frozen. Although the Department noted that changes in the plan would be considered upon the filing of a petition by any party, the Department has undertaken that assessment here on its own motion, which is surely within its prerogatives.

The Department has previously recognized that events had overtaken the evaluation of performance measures developed in the *Consolidated Arbitrations* and relied instead on the PAP to set performance standards for Verizon MA. For instance, although the Department was assessing flow through metrics in the *Consolidated Arbitrations*, it terminated the case with the adoption of the PAP. The Department stated:

Our investigation of C2C guidelines and flow-through measurements in the Section 271 proceeding provides the most up-to-date and appropriate forum for resolving these issues. The Department has already adopted the C2C guidelines, which are in place now, and those guidelines include a percent flow-through metric. In addition, the Department is currently addressing penalties and remedies in the Section 271 proceeding, D.T.E. 99-271, where it is developing a performance assurance plan for [Verizon]. *Phase 3-G Order*, at 4 (June 12, 2000).

In short, the Department's early effort in the *Consolidated Arbitrations* to define performance guidelines has been effectively superseded by the Department's adoption of the more comprehensive and current scheme reflected in the C2C Guidelines and PAP. Since the *Consolidated Arbitrations* plan was the product of a Department order, the Department can reassess the efficacy of that plan in light of current circumstances, just as it said it might.

The *Pacific Bell* decision referenced in the Hearing Officer's question does not prevent the Department from changing or eliminating the *Consolidated Arbitrations* plan. In that case, the California commission established a rule relating to reciprocal compensation on Internet-bound traffic in a generic proceeding that purportedly overrode the terms of existing negotiated interconnection agreements. The 9<sup>th</sup> Circuit ruled this was impermissible under the Act. The court held that a state agency could not negate the terms of negotiated agreements because such action was inconsistent with the limited authority granted to state commissions under Section 252 of the Act. 325 F.3d at 1127-1128. The court also ruled that "[t]he Act did not grant state regulatory commissions additional general rule-making authority over interstate traffic." *Id.* at 1126-1127. Here, the Department would not affect any negotiated term of an interconnection agreement by eliminating the *Consolidated Arbitrations* plan. Rather, since that plan was established and incorporated in agreements solely by orders of the Department in an arbitration, the Department would not be over-riding negotiated terms of any agreement, which was the legal error the 9<sup>th</sup> Circuit found in the California commission's actions.

**Question 2** – If the Department has authority to eliminate the Consolidated Arbitrations performance standards from interconnection agreements by a decision in this docket, must the Department conduct an adjudicatory hearing, as AT&T contends in its Initial and Reply Comments? (AT&T Comments at 6, citing G.L. c. 30A, § 1(1)). If so, what would be the factual issues in dispute and type of evidence to be examined?

There is no reason why the Department must conduct an adjudicatory proceeding to eliminate the *Consolidated Arbitrations* performance plan from interconnection agreements. The Department has already established the C2C Guidelines and the PAP as appropriate standards for gauging Verizon MA's performance and ensuring Verizon MA's compliance with its wholesale obligations. AT&T and other CLECs participated in the proceeding in which the C2C and PAP were adopted by the Department. Moreover, AT&T and other CLECs participate in the New York Carrier Working Group which regularly addresses additions, deletions, and modifications to the performance metrics as well as the PAP. The Department would simply be eliminating duplicative measurement schemes and substituting one approved plan for another.

**Question 3** – Procedurally, how would Verizon and CLECs implement a Department decision in this docket eliminating the Consolidated Arbitrations performance standards from their interconnection agreements? Would such a Department decision constitute a change of law requiring revision of these interconnection agreements pursuant to the agreements' change-of-law provisions? Please explain.

A Department decision eliminating the *Consolidated Arbitrations* performance standards from interconnection agreements could be implemented simply by Department order. Where interconnection agreements reference the *Consolidated Arbitrations* plan, they do so with a simple reference to the Department's arbitration proceeding. For instance, Section 11 of the AT&T agreement states: "The Parties hereby agree that the performance standards and remedies approved by the Department in the Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83 and 96-94, shall be incorporated by reference into this Agreement and shall govern the provision of services hereunder, as applicable." Agreements with other CLECs whose interconnection agreements incorporate the Department's *Consolidated Arbitrations* plan contain substantially similar language. There is no need for any further action, such as proceeding under the change of law provisions of the contracts or formal amendment, because a Department order substituting the C2C Guidelines and PAP for the *Consolidated Arbitrations* plan would on its own establish the rights and responsibilities of the parties. In fact, this is precisely the case with the C2C and PAP as Verizon MA is governed by them by Department directive without formal incorporation of them into interconnection agreements.

In summary, there is no legal impediment to the Department eliminating the *Consolidated Arbitrations* plan from interconnection agreements. The plan was not negotiated by the parties but was included in agreements by order of the Department.

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When it adopted the plan, the Department indicated that it may in the future be subject to review and possible change, and therefore, no party could expect that it would remain fixed for all time. The 9<sup>th</sup> Circuit's *Pac Bell* decision is not on point because it dealt with a different set of circumstances – an agency's effort to erase terms of voluntary negotiated agreements. Here, the Department would be substituting one approved performance plan for another, and not over-riding any negotiated term of an interconnection agreement. Moreover, it makes sense to use the latest and most comprehensive set of metrics to assess Verizon MA's performance. The Massachusetts PAP has been in place for over three years. It has been implemented, audited and updated in collaboration with CLECs, and is the industry standard for measuring Verizon MA's wholesale performance. The continued application of the initial *Consolidated Arbitrations* structure is both unnecessary and burdensome. The administrative efficiencies to be achieved through the use of a single, comprehensive and equitable set of standards to be applied to Verizon MA's wholesale relationship with CLECs cannot be overstated. The Department can and should terminate Verizon MA's obligations under the *Consolidated Arbitrations* performance standards.

Sincerely,

/s/Bruce P. Beausejour

Bruce P. Beausejour

cc: Mary L. Cottrell, Secretary  
Michael Isenberg, Esquire, Director - Telecommunications Division  
Julie Westwater, Esquire, Hearing Officer  
Service List (electronic distribution)