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

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

Dear Ms. Foley:

Verizon Massachusetts (“Verizon MA”) is responding to the January 24, 2005 comments of AT&T – the only party that filed comments in response to the questions posed by the Hearing Officer in a December 8, 2004 Memorandum.¹ AT&T’s comments largely repeat arguments from its initial and reply briefs filed earlier in this proceeding which Verizon MA has already addressed. *See* Verizon MA Comments dated February 12, 2004 and March 4, 2004. AT&T’s latest arguments in response to the questions posed in the Department’s Memorandum provide no basis for the Department to conclude that it is legally precluded from eliminating the *Consolidated Arbitrations* performance plan to instead rely exclusively on the Carrier-to-Carrier (“C2C”) Guidelines and the Performance Assurance Plan (“PAP”). It has been well-over four years since the dual system was put in place. Since that time, the C2C and PAP have continued to evolve, with the input of CLECs in the New York Carrier Working Group. The experience gained with the Massachusetts PAP, including the “strong” results of an independent audit approved by the Department in 2003 (D.T.E. 03-50, Letter Order dated October 22, 2003, at 4) fully justify the Department determining that the time is now right to eliminate the redundancy and inefficiencies associated with applying two plans designed to accomplish the same result.

First, AT&T misreads the 9th Circuit’s decision in *Pacific Bell v. Pac-West Telecom, Inc.*, 325 F.3d 1114 (9th Cir. 2003) and misstates its significance for this

¹ Since this case was opened, only two carriers – AT&T and MCI – have filed any comments on the Department’s proposal to eliminate the *Consolidated Arbitrations* performance plan. MCI did not file any comments addressing the issues set forth in the December 8th Hearing Officer Memorandum.

proceeding. *Pacific Bell* did not involve, as AT&T suggests, the California commission's attempt to "interpret" the meaning of interconnection agreements in a rulemaking proceeding (AT&T Comments at 2). To the contrary, the California commission attempted to over-ride negotiated interconnection terms regarding reciprocal compensation by issuing a rule of general application without regard to the actual terms contained in any agreement. The 9th Circuit ruled that the California commission could not invalidate or modify *negotiated* interconnection agreements because to do so would impermissibly change the bargain voluntarily struck by the parties and was beyond the agency's prerogatives under Section 252 of the Act. 325 F.3d at 1127-1128. As the Court explained, "the point of § 252 is to replace the comprehensive state and federal regulatory scheme with a more market-driven system that is self-regulated through negotiated interconnection agreements." *Id.*, at 1127. The California commission's interference with the parties' voluntary bargain was the principle flaw the 9th Circuit found in the commission's approach. Here, in contrast, if the Department eliminates the *Consolidated Arbitrations* performance plan, it would not affect any contract term negotiated by the parties since that plan was solely the product of a Department order. Thus, the legal error which the 9th Circuit found the California commission committed is not implicated in this case, and the court's ruling does not prevent the Department from changing the reach of one of its own orders.

Second, AT&T asserts that eliminating the *Consolidated Arbitrations* plan "takes away from the parties the responsibility to negotiate their own changes to their interconnection agreements" (AT&T Comments at 3) and would create a bad precedent by enabling a party to avoid negotiations (*Id.*, at 4). This claim is likewise without merit. AT&T's argument would make sense if the Department were seeking to modify negotiated terms in an interconnection agreement. That is not the case with the *Consolidated Arbitrations* plan, which was imposed on Verizon MA by Department order. The Department's examination of the efficacy of that mandated plan in light of current circumstances – specifically, the existence of a more current and complete set of metrics and comprehensive penalty plan that were adopted after the *Consolidated Arbitrations* was decided – has no impact on negotiations among parties on other issues.²

Third, AT&T contends that, if the Department were to implement its proposal, "it would be exercising raw state power to eliminate *existing* contract rights of CLECs" and would thereby run afoul of constitutional prohibitions against the impairment of contracts (AT&T Comments at 5, emphasis in original; *id.*, at 7). AT&T fails to recognize that "raw state power" created the *Consolidated Arbitrations* plan, and AT&T's rights are

² AT&T maintains that Verizon MA has taken an inconsistent position in D.T.E. 03-60 where it argued that commercial negotiations, rather than litigation or regulation, are the best way to achieve greater market-based competition within the telecommunications industry (AT&T Comments at 2). Verizon MA has, of course, not been inconsistent. Commercial negotiations are, indeed, preferable for resolving issues than regulatory mandates. However, the performance standards Verizon MA is subject to in Massachusetts – both the *Consolidated Arbitrations* plan and the C2C and PAP – were fixed by regulatory fiat. The Department's proposal here seeks only to use a single set of approved metrics and penalties to govern Verizon MA's performance.

derived exclusively from the Department's exercise of that power. The Department itself recognized that the *Consolidated Arbitrations* plan was not fixed or beyond change (*Consolidated Arbitrations, Phase 3-B Order*, at 34 (1997)), and no party could have a reasonable expectation that the obligations were not subject to review. AT&T points to no authority that would prevent the Department from choosing to abandon duplicative performance plans – which were both the result of Department orders – to rely on a single set of metrics and penalties for gauging Verizon MA's wholesale performance and ensuring compliance.

The lone case cited by AT&T, *Moser v. Aminoil, U.S.A., Inc.*, 618 F.Supp. 774 (D.C.La. 1985), does not support AT&T's position. That case involved the effect of a state statute that voided certain terms in private contracts. Here, in contrast, the issue is not the impact of a statute on private contract rights, but a change in the scope of a Department order concerning a performance plan. There is no definitive case law in Massachusetts or elsewhere that applies the Contract Clause to actions by state agencies in this context. Indeed, the Massachusetts Supreme Judicial Court has questioned whether an order of the Department is even a "law" within the meaning of the Contract Clause. See *Fitchburg Gas & Electric Light Co. v. Department of Public Utilities*, 395 Mass. 836, 852 (1985). Thus, AT&T's claim that the Department's proposal would run afoul of constitutional protections is unfounded.³

Fourth, AT&T repeats an argument made in its initial comments of February 12, 2004, that the Department may only eliminate the *Consolidated Arbitrations* plan following an adjudicatory proceeding, which includes the presentation of testimony and the right to cross-examine witnesses (AT&T Comments at 6). This claim is without any basis. The right to an "adjudicatory proceeding" arises only if a person's legal rights "...are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing." G.L. c. 30A, § 1(1). AT&T has not cited (nor can it) to any provision of the constitution or General Law that grants it the right to an agency hearing for the matters at issue here. In fact, the *Consolidated Arbitrations* were conducted as arbitrations, not adjudicatory matters, under federal law. Accordingly, there was no right under either federal or state law to a full adjudicatory proceeding. The Department determined its arbitration procedures on an *ad hoc* basis; sometimes the arbitration proceeding included evidentiary hearings, sometimes they did not. *Id.* at 3. Here, the Department has adopted a reasonable process of seeking written

³ As AT&T notes, the *Moser* court found that the Louisiana statute did not violate the Contract Clause because states "may permissibly create even substantial impairments of existing contractual obligations" under certain conditions. 618 F.Supp. at 780. Courts look to various factors in determining whether there has been an unconstitutional impairment – not just the two prong analysis set forth in *Moser* that AT&T cites. For example, the severity of the impairment increases the level of scrutiny to which the legislation will be subjected and when an industry is heavily regulated, parties are considered to have less reasonable expectation that legislation will alter their contractual arrangements. See e.g., *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 411 (1983); *Koster v. City of Davenport*, 183 F.3d 762 (8th Cir. 1999).

comments on its proposal to eliminate the *Consolidated Arbitrations* plan. No further process is required by law.

Finally, AT&T argues that elimination of the *Consolidated Arbitrations* plan would be a “change of law” under its interconnection agreement that must be negotiated by the parties because it might wish to include in the agreement “some type of protection or compensation for the last rights” (AT&T Comments at 12). This claim is plainly wrong. A Department ruling in this case to eliminate the *Consolidated Arbitrations* performance plan would fix the rights and obligation of the parties and requires no negotiation to implement. AT&T’s suggestion that a Department order provides it with an opening to strike a new bargain is completely unwarranted since its rights under the *Consolidated Arbitrations* plan exist solely by regulatory mandate, and when that mandate changes, Verizon MA’s obligations have been set by the Department. Compliance with the Department’s directives is all either party can and should expect from the other party.

In closing, AT&T presents nothing in its January 25th comments establishing that the Department is legally barred from eliminating the *Consolidated Arbitrations* plan from interconnection agreements. All the Department has suggested in this docket is to rely on a single set of performance metrics and penalties to assess Verizon MA’s wholesale performance and to ensure compliance. The continued application of the initial *Consolidated Arbitrations* structure is both unnecessary and burdensome. The fact that AT&T alone has objected to the Department’s proposal underscores that there is no meaningful impact on competitors. Accordingly, 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)