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March 5, 2004

VIA HAND DELIVERY and ELECTRONIC MAIL

Luly E. Massaro, Commission Clerk
Rhode Island Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

Re: Docket No. 3550 - DPUC Implementation of the Federal Communications Commission's Triennial Review Order

Dear Ms. Massaro:

Enclosed please find an original and nine (9) copies of AT&T Communications of New England, Inc.'s Opposition to Verizon's Motion to Stay.

Should you have any questions regarding the foregoing, please do not hesitate to contact me.

Very truly yours,

BROWN RUDNICK BERLACK ISRAELS LLP

By: _____
William M. Dolan III

/dm
Enclosure
cc: Service List (w/enclosure) Via Electronic Mail and First Class Mail

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Docket 3550 – Implementation of the Requirements of the FCC Triennial Review Order
Service List Updated 2/25/04

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

In Re: Implementation of the Requirements of The Federal Communications Commission's Triennial Review Order	)))	Docket No. 3550

AT&T COMMUNICATIONS OF NEW ENGLAND, INC.'S OPPOSITION TO VERIZON'S MOTION TO STAY

AT&T Communications of New England, Inc., ("AT&T") respectfully urges the Commission to deny Verizon's motion to stay, and instead to continue with its investigation of the facts which demonstrate that CLECs have been and are unable to compete in the local exchange mass market in Rhode Island without access to unbundled switching and UNE-P at TELRIC-compliant prices.

Verizon suggests that the Commission would be "feckless" if it continued these proceedings.[1] But Verizon has it backwards. It is Verizon that asks the Commission to be irresponsible, by ignoring deadlines in the FCC's *Triennial Review Order* that remain in place, and by ignoring the continuing importance of completing the fact finding that is at the core of the proceedings in this docket.

Verizon has a strong interest in diverting attention away from the facts showing that CLEC mass market entry is impaired without UNE-P. From Verizon's perspective, continuation of this investigation is inconsistent with Verizon's desire to divorce public policy determinations in this area from the facts. But that is not a reason to stay or terminate this investigation.

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[1] Verizon's Motion to Stay at 2.

The simple truth is that the recent *USTA II* decision by the United States Court of Appeals for the District of Columbia Circuit has not taken effect, and is quite likely to be stayed for a long period of time. By its terms it will not take effect until at least 60 days after issuance, and perhaps for much longer. As Verizon concedes, the Court stayed the effect of its decision until the *later* of: (i) denial of any petition for rehearing or rehearing on banc; or (ii) 60 days from March 2, 2004. Furthermore, there is a strong likelihood that during this period the D.C. Circuit's decision may be stayed pending review by the United States Supreme Court. The majority of FCC commissioners who voted in favor of the *TRO* already have announced their intention to seek both a stay and Supreme Court review of the DC Circuit decision.[2] AT&T and a number of other parties, including NARUC, wholeheartedly support the FCC majority's actions. AT&T is highly optimistic that the Supreme Court, which issued a very strong opinion in May 2002 in support of competition,[3] will accept this case and affirm the FCC's findings and rules as well as the right of the states to implement rules critical to support telecommunications competition, especially (but not exclusively) for mass market consumers. AT&T is equally optimistic that the DC Circuit's decision will be stayed, in no small part because of the marketplace confusion and consumer harm that Verizon and other ILECs would likely attempt to create if the decision were allowed to become effective before the Supreme Court has the opportunity to review it.

NARUC's President has urged the FCC to "immediately seek certiorari of this decision," and has indicated that NARUC itself "expects to seek review of this decision."[4] The Michigan PSC has agreed, issuing a statement "in support of the majority of the Federal Communications

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[2] "Statement of FCC Commissioners Michael J. Copps, Kevin J. Martin, and Jonathan S. Aderstein on the D.C. Circuit's Decision to Eliminate the FCC's Rules," dated March 3, 2004 (attached).

[3] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002).

[4] NARUC Press Release issued March 3, 2004 (attached).

Commission's (FCC) decision to instruct their General Counsel to seek a stay and to appeal to the Supreme Court a recent D.C. Circuit decision," and indicating that the Michigan PSC intends to work with NARUC on an appeal of the Court's ruling.[5] Similarly, the President of the National Association of State Utility Consumer Advocates (NASUCA) noted that "[t]he Court's decision ... puts at risk the meager competitive gains in local telephone service seen by residential and small business consumers in the last two years," and "strongly urge[d] the FCC to appeal the Circuit Court decision to the United States Supreme Court for a final word on these crucial issues."[6]

AT&T respectfully urges the Commission to join with NARUC, NASUCA, and other state public utility commissions both in urging the FCC to seek further review and a stay of the misguided *USTA II* decision by the D.C. Circuit, and in supporting and working with NARUC and the FCC on such an appeal.

Verizon's motion cannot explain away the simple fact that at this time the FCC's *Triennial Review Order* remains in effect and the rules and deadlines imposed by the FCC for completing the Commission's nine-month proceeding remain in place. If this proceeding were stayed, the Commission could find itself backed into a position where it could no longer comply with its current obligations under the *TRO*.

But even if the D.C. Circuit decision were to survive these expected challenges, it remains critical that the Commission move forward with the state-specific investigatory and fact-finding role that was inherent in the *TRO* process. It is important to note that the Court did not make any finding of non-impairment, nor did it direct the FCC to make any such finding. Hence,

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[5] Michigan PSC Press Release dated March 3, 2004 (attached).

[6] NASUCA Press Release dated March 3, 2004 (attached).

the Court's order would not in any way end Verizon's existing obligations to provide unbundled mass market switching and UNE-P. Rather, the decision (if it were ever to take effect) would remand the matter to the FCC "for a re-examination of the issue." Decision at 22.

Even if, at the end of the day, the FCC is compelled to re-analyze the impairment issue under the Telecommunications Act (as distinguished from the independent power and responsibility of state commissions to make their own unbundling and other policy decisions as a matter of state law), it will need to base any further findings on granular, market-specific factual findings. For this reason, state commissions that gather the relevant facts within their jurisdictions will be able to provide important input to and thereby influence the FCC's ultimate findings. But they will be able to play this critical role if and only if they have the information on market conditions within their jurisdictions. Conversely, states that fail to move forward and develop an evidentiary record which they can share with the FCC will be rendered mute, and irrelevant to any such FCC review. Verizon's motion to stay is essentially a request that the Commission marginalize itself with respect to any future unbundling decisions by the FCC with respect to Rhode Island.

The DC Circuit's decision expressly recognizes that states have invaluable – and clearly lawful – input into the unbundling decisions, both in fact gathering and providing advice on how they affect critical decisions involving local competition. Specifically, the Court held that "a federal agency may turn to an outside entity for advice and policy recommendations, provided the agency make the final decision itself." Decision at 17. This has already prompted the chair of the New York Commission to announce that because his commission and the parties have "already made significant progress in developing the underlying factual record that will be needed . . ." the New York Commission will "continue to be actively engaged in gathering

relevant data and factual information . . ."[7] Similarly, Commissioner Robert Nelson of the Michigan PSC, and the Chair of the NARUC Telecommunications Committee, has noted the importance of state-specific factual determinations by state commissions if only to "assist the FCC in the determinations they will have to make pursuant to" the recent D.C. Circuit decision.[8]

Regardless who makes the next round of decisions concerning impairment, the states are best positioned to gather the critical facts. For this reason, continuing forward with this proceeding, in order to permit testing – through cross-examination and argument – of the written evidence which has already been filed by the parties, will help ensure an outcome that reflects the facts on the ground in Rhode Island, and thus best serves the interests of Rhode Island consumers. No other agency can develop the facts which demonstrate the severe limits on the ability of CLECs to enter and serve the mass market in Rhode Island without access to unbundled switching and UNE-P as effectively as the Commission. The Commission will never be better positioned to create a full and complete record than it is right now.

Verizon tries to argue that the Commission cannot continue forward because the D.C. Circuit decision purportedly "invalidates ... the substantive tests that the FCC promulgated" for determining "whether CLECs are impaired without access to unbundled elements."[9] Verizon's claim that the Court struck down the FCC's interpretation of the statutory impairment standard, which continues to require Verizon to provide unbundled elements wherever CLECs would be impaired without them, is dead wrong. To the contrary, the Court spoke quite favorably about the FCC's findings that the impairment standard tests whether CLEC market entry would be impaired without access to an unbundled network element, and thus that the impairment standard

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7 Statement from NY PSC Chairman William M. Flynn, March 3, 2004 (attached).

8 Quoted in NARUC Press Release issued March 3, 2004 (attached).

9 Verizon's Motion to Stay at 1.

requires consideration of barriers to entry such as sunk costs, ILEC absolute cost advantages, first-mover advantages, and operational barriers to entry within the sole or primary control of the ILEC. Decision at 23. The only criticism made by the Court regarding the FCC's definition of the impairment standard was based on a mistaken reading of the *TRO*. The Court was concerned that the FCC's impairment definition would be unduly vague unless the question of whether future CLEC market entry would be uneconomic without access to an unbundled network element was clearly defined to specify the kind of CLEC to be considered in answering this question. Decision at 24-25. But in fact the FCC provided this specificity. In the *TRO*, the FCC stressed that neither carrier-specific nor business plan-specific approaches would be appropriate in determining whether future market entry by CLECs would be impaired without access to a particular unbundled element.[10] Rather, an analysis of whether such entry would be economic "must be based on the most efficient business model for entry rather than to any particular carrier's business model."[11] Thus, a finding of non-impairment with respect to a particular UNE would only be appropriate if there is evidence sufficient to demonstrate that an efficient CLEC would most likely find it economic to enter the market without access to that UNE, given the range of likely costs, revenue opportunities, and competitive risks (*i.e.*, "the cost and risk of failure").[12] In sum, we know what the impairment standard measures, with more than enough specificity for the Commission to be able to continue its factual investigation.

The Commission clearly has the authority to continue this proceeding. First, the Commission continues to have full delegation of authority from the FCC under the *TRO*. If, hypothetically, the D.C. Circuit's recent decision were to take effect and relevant portions of the

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[10] *TRO* ¶ 115.

[11] *TRO* ¶ 517.

[12] *TRO* ¶¶ 77, 517.

TRO were as a result vacated, the Commission would still have jurisdiction to proceed, however. As the Commission has previously held, when it ordered Verizon to offer UNE-P in Rhode Island, it has full authority under both federal and state law to order Verizon to offer unbundled network elements in Rhode Island.[13] That remains correct. The federal Telecommunications Act requires Verizon to provide access to unbundled network elements wherever CLECs would be impaired without them, and the Commission retains power to enforce that requirement of federal law.[14] In addition, the Commission has broad powers under Rhode Island law to regulate Verizon's network and wholesale services and has previously recognized its authority under state law to require Verizon to provide access to unbundled network elements.[15]

For all of these reasons, AT&T opposes Verizon's motion to stay the proceedings in of this docket. Under any likely scenario, the Commission will be asked, at a minimum, to provide facts and counsel on whether competition has (or can) develop in Rhode Island in the absence of key unbundled network elements. Before it can respond, and before it can act, the Commission will need to make findings regarding the factual evidence that has already been presented in the parties' prefiled testimony.

AT&T agrees with Verizon (*see* footnote 4 of Verizon's motion to stay) that the Commission should also move forward on to address all of the hot cut issues that have been raised in this proceeding and in Docket 2681. The lack of economically viable, efficient, and scalable hot cut processes in Rhode Island continue to pose a serious barrier to the expansion of

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[13] *See* Order 16,012 (issued Dec. 6, 1999).

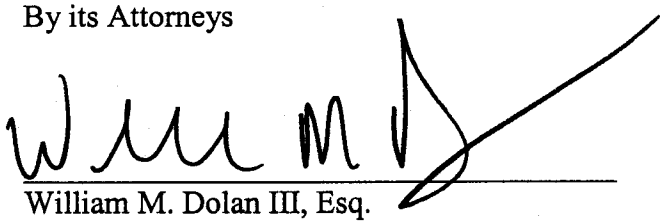
[14] *See*, 47 U.S.C. § 251 (imposing a duty on Verizon to provide access and interconnection) and 47 U.S.C. § 252 (conferring jurisdiction on state commissions to determine rates, terms and conditions of such access and interconnection).

[15] *See* Order 16,012 (issued Dec. 6, 1999) (holding that the Commission "has authority under state law, including R.I. Gen. Laws §§ 39-1-1, 39-1-38, and 39-2-1, to order [Verizon] to provide CLECs with UNE combinations.).

UNE-L based competition in Rhode Island beyond its currently narrow confines. Solving these problems is the work of the hot cut portions of this proceeding and Docket 2681.

AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

By its Attorneys



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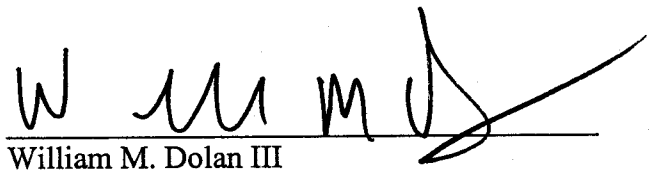
March 5, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2004, I served a true copy of the within AT&T Communications of New England, Inc.'s Opposition to Verizon's Motion to Stay by electronic mail and first class mail, postage prepaid, upon the parties identified in Docket 3550's Service List.



William M. Dolan III

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Attachments
to
AT&T's Opposition to Verizon's Motion to Stay

NEWS

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC. 515 F 2d 385 (D.C. Circ 1974).

FOR IMMEDIATE RELEASE:
March 3, 2004

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STATEMENT OF FCC COMMISSIONERS MICHAEL J. COPPS, KEVIN J. MARTIN, AND JONATHAN S. ADELSTEIN ON THE D.C. CIRCUIT'S DECISION TO ELIMINATE THE FCC'S RULES

We are disappointed in the Court's decision to eliminate the Commission's rules requiring incumbent carriers to open their legacy voice networks to competition. We believe that the rules preserve competition in a manner that is lawful, and recognize the important role that states have historically played.

Today over 50 million Americans benefit from the new local and long distance one-rate plans offered by both incumbents and competitors that are a result of our rules.

In the past, the Supreme Court has made clear that the FCC has significant discretion in ensuring that the local telephone markets are open to competition. We have instructed our General Counsel to seek a stay and to appeal the D.C. Circuit decision to the Supreme Court so that we can clarify tension with the Supreme Court's past decisions.

# # #

National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, NW, Washington, D.C. 20005

PRESS RELEASE

FOR IMMEDIATE RELEASE
March 2, 2003

Contact: Jaclyn Wintle
202.898.2200

NARUC EXPECTS TO SEEK CERTIORARI, CALLS FOR FCC TO FILE ITS OWN APPEAL

Washington, D.C. -- Today, the District of Columbia Circuit released its decision vacating several significant aspects of the FCC's Triennial Review Order. The Opinion, among other things, finds that the FCC unlawfully delegated authority to the States - focusing on two points: its effective finding that the FCC's findings were "provisional" and thus did not comport with its statutory duty to act; and its subsequent discussion of the "purported delegation of the Commission's own authority." The decision also vacates the FCC's finding of impairment with respect to mass market switching.

NARUC President Stan Wise said: "Of course we are still reviewing the Order, but, if for no other reason, the rationale presented for vacating the State delegation, certainly suggests the FCC should immediately seek certiorari of this decision. Assuming the FCC's national findings meet the requirements of the Act, the FCC's delegation is permissible but not required, to allow further State action under a plain reading of the Act. While we are still digesting the decision, at this point, NARUC expects to seek review of this decision."

Commissioner Robert Nelson of the Michigan PSC and Chair of the NARUC Telecommunications Committee indicated that "The state commissions throughout this country have spent considerable time and effort conducting hearings, reviewing documents and analyzing records because the D.C. Circuit two years ago called for a granular analysis of the state of local competition in each telephone market. We believe we have fulfilled the original mandate of the Court and are dismayed that that this opinion concludes that the States should not undertake this role. If appropriate, we will assist the FCC in the determinations they will have to make pursuant to today's ruling."

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The National Association of Regulatory Utility Commissioners is a non-profit organization founded in 1889. Its members include the governmental agencies that are engaged in the regulation of utilities and carriers in the fifty States, the District of Columbia, Puerto Rico and the Virgin Islands. NARUC's member agencies regulate telecommunications, energy, and water utilities. NARUC represents the interests of State public utility commissions before the three branches of the Federal government and the Independent Federal agencies.

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Contact: Judy Palnau (517) 241-3323

MPSC Supports Appeal of Local Phone Competition Court Ruling

March 3, 2004

The Michigan Public Service Commission (MPSC) today issued a statement in support of the majority of the Federal Communications Commission's (FCC) decision to instruct their General Counsel to seek a stay and to appeal to the Supreme Court a recent D.C. Circuit decision. The decision vacated the rules the FCC promulgated last year. The vacated FCC rules allowed states to determine when local telephone competition is sufficient in a given market to remove requirements on SBC and Verizon to make elements of their network available to competitors at certain prices.

"These requirements have allowed Michigan ratepayers to experience the benefits of one of the most competitive local telephone markets in the United Sates," said MPSC Chair J. Peter Lark. "We believe it is imperative that the states and the FCC seek a ruling from the highest court of the land on this important issue," said Chair Lark.

The MPSC will be working with the National Association of Regulatory Utility Commissioners (NARUC) on the appeal of the ruling.

NARUC is a non-profit organization founded in 1889 and its members include the governmental agencies that are engaged in the regulation of utilities and carriers in the fifty States, the District of Columbia, Puerto Rico and the Virgin Islands. NARUC's member agencies regulate the activities of telecommunications, energy, and water utilities.

The MPSC is an agency within the Department of Labor & Economic Growth.

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Today the United States Court of Appeals, District of Columbia Circuit, overturned the Federal Communications Commission (FCC) decision known as the Triennial Review Order. The following statement on the decision can be attributed to Timothy Hay, President of the National Association of State Utility Consumer Advocates (NASUCA) and Consumer Advocate for the State of Nevada:

"Given the D.C. Circuit's 2002 ruling in USTA v. FCC, it comes as no surprise that the Court has overturned the FCC's controversial Triennial Review Order. The Court's decision, however, once again throws consumers, the industry and regulators into a morass of uncertainty, and puts at risk the meager competitive gains in local telephone service seen by residential and small business consumers in the last two years. NASUCA strongly urges the FCC to appeal the Circuit Court decision to the United States Supreme Court for a final word on these crucial issues."

"The Circuit Court also found that NASUCA lacks standing to represent consumer interests in federal court. The grounds cited by the Court were not raised by any party to the appeal, contradict the very purpose for which NASUCA was created, and would deny consumers representation in federal court. NASUCA is reviewing its options on this specific issue crucial to consumers."

For more information or additional comment from NASUCA, please contact Charles Acquard, Executive Director of NASUCA at (301) 589-6313 or David Bergmann, Chair of the NASUCA Telecommunications Committee at (614) 466-8574.

About the National Association of State Utility Consumer Advocates (NASUCA):

The National Association of State Utility Consumer Advocates (NASUCA) is a non-profit, national association organized in 1979, whose members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. NASUCA members operate independently from state utility commissions, primarily as advocates for residential ratepayers, although some members also represent small business ratepayers.

STATE OF NEW YORK
Public Service Commission
William M. Flynn, Chairman

Three Empire State Plaza, Albany, NY 12223
Further Details: (518) 474-7080
http://www.dps.state.ny.us
FOR RELEASE: IMMEDIATELY 04017

March 3, 2004

Statement from NYPSC Chairman William M. Flynn

"Competition in New York's telecommunications market has delivered important benefits to millions of consumers, and this Commission has played a crucial role in promoting the goals of the Telecommunications Act of 1996.

"Yesterday's decision by the U.S. Court of Appeals for the District of Columbia reversed the decision-making authority of states delegated to them by the FCC in the Triennial Review Order (TRO). However, the Court recognized that the FCC may turn to states for factual information, advice and policy recommendations. The New York State Department of Public Service, industry representatives and other interested parties have already made significant progress in developing the underlying factual record that will be needed to analyze the issues set forth in the TRO and left standing by the Court.

"Therefore, we will continue to be actively engaged in gathering relevant data and factual information as part of our analysis of the state of the competitive market in New York. At the end of the day, no matter who makes the ultimate decision – whether it is the FCC or the states – this factual data and analysis will be a critical component of our efforts to advance the competitive market within the framework articulated by the FCC and the Court."

-30-