BROWN
RUDNICK
BERLACK
ISRAELS LLP
WILLIAM M. DOLAN III
COUNSELOR AT LAW

DIRECT DIAL: 401-276-2611
INTERNET ADDRESS: wdolan@brbilaw.com

COPY

September 22, 2003

VIA HAND DELIVERY

Luly E. Massaro, 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:

On behalf of AT&T Communications of New England, Inc., enclosed please find an original and nine (9) copies of AT&T's Comments Regarding the Scope, Nature, and Timing of the Commission's Inquiry in this Proceeding.

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

#50202687 v\1 - medeird - w0n3011.doc - 23663/4

121 South Main Street
Providence, Rhode Island 02903
401.276.2600
fax 401.276.2601
www.brownrudnick.com

Boston | Dublin | Hartford | London | New York

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PUBLIC UTILITIES COMMISSION

Implementation of the Requirements of the Federal Communications Commission's Triennial Review Order	Docket 3550

AT&T'S COMMENTS REGARDING THE SCOPE, NATURE, AND TIMING OF THE COMMISSION'S INQUIRY IN THIS PROCEEDING

William M. Dolan III, Esq.
Brown Rudnick Berlack Israels LLP
121 South Main Street
Providence, RI 02903
(401) 276-2600
(401) 276-2601 (fax)
wmdolan@brbilaw.com

Kenneth W. Salinger
Ruth Dowling
PALMER & DODGE LLP
111 Huntington Avenue
Boston, MA 02199
617.239.0561
617.227.4420 (fax)
ksalinger@palmerdodge.com

Jay E. Gruber
Harry M. Davidow
Jeffrey Fialky
AT&T Communications of New England, Inc.
99 Bedford Street, 4th Floor
Boston, MA 02111
617.574.3149
jegruber@lga.att.com

September 22, 2003

Table of Contents

Page

I. INTRODUCTION.

The Federal Communications Commission (the "FCC") has asked the Public Utilities Commission (the "Commission") to determine whether residential and small business customers in Rhode Island will be able to experience the benefits of robust local exchange competition.[1] The FCC has determined on a national level that competitive local exchange carriers ("CLECs") would be impaired from entering and serving the local mass market without retaining access to local switching as an unbundled network element ("UNE").[2] The Commission has been charged with the duty of determining, no later than nine months after the effective date of the FCC's Triennial Review order ("TRO"), whether there is any basis for overturning that national finding of impairment in Rhode Island. AT&T Communications of New England, Inc., ("AT&T") strongly urges the Commission to undertake this charge with a keen and constant focus on the Commission's commitment to furthering local competition.

During the recent procedural conference, Verizon agreed that the most efficient way to frame the case is for Verizon to present its *prima facie* case first. Verizon agreed that, in addition to identifying the specific proposed markets (or, for dedicated transport and enterprise market loops, specific routes or customer locations) as to which it intends to challenge the national finding of impairment, Verizon should also include in its initial filing the basic evidence that it proffers to support that challenge. Verizon agreed that only after the scope of Verizon's

---

[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, "Report And Order And Order On Remand And Further Notice Of Proposed Rulemaking," No. FCC 03-36, released August 21, 2003 ("TRO"), ¶ 459.

[2] *TRO*, ¶ 459.

challenge to the FCC's nationwide finding of non-impairment is clear would a CLEC be able to present a meaningful rebuttal case.

AT&T agrees that is a sound way to proceed. These comments take this initial procedural framework as given, and provide further observations regarding the scope and nature of the Commission's inquiry in this proceeding. They are intended to assist the Commission in identifying areas of inquiry, generating procedural options, and establishing mechanisms for the exchange of relevant information.[3]

II. UNBUNDLED LOCAL SWITCHING FOR MASS MARKET CUSTOMERS.

The FCC has made a national finding that CLECs are impaired in the offering of service to mass market customers without access to unbundled switching for mass market customers.[4] If no carrier intends to challenge the applicability of the FCC's finding to any market in Rhode Island, there is of course no need to proceed any further with an investigation regarding impairment without access to unbundled local switching. Otherwise, the Commission will need to adjudicate any claim by an ILEC that it can rebut the national finding.

In such an investigation, the operative question will be whether a CLEC seeking to enter and serve the mass market could do so without access to unbundled local circuit switching and

---

[3] In addition, parties were asked to comment regarding whether, in addition to setting new rates for batch hot cuts after a new batch hot cut process is established, the Commission should also complete its work in setting other TELRIC-compliant UNE rates. AT&T respectfully urges the Commission to do just that. New entrants cannot economically offer Rhode Island consumers true competitive choice without access to UNEs priced at forward-looking economic cost, based on appropriate model inputs and assumptions. The Commission has recognized the importance of finalizing UNE rates, and in Docket 2681 previously announced plans to do so. That proceeding was temporarily stayed at the request of Verizon, but only until the FCC released its Triennial Review Order. Now that the *TRO* has been issued, it is appropriate for the Commission to move forward with its UNE rate investigation and to lower the UNE rates charged by Verizon-RI to pro-competitive levels.

[4] *TRO*, ¶ 459.

UNE-P. To adjudicate any challenge by Verizon to the FCC's national finding of impairment, the Commission will have to define the relevant geographic markets, address issues of operational and economic impairment, and determine the appropriate dividing line between the mass market and the enterprise market.

A. As Agreed During the Initial Procedural Conference, Verizon Should Be Required to Specify Where It Intends to Challenge the FCC's Nationwide Finding of Non-Impairment, and to Present Its *Prima Facie* Case.

As noted above, Verizon has agreed that it should present its *prima facie* case first. What follows is a brief discussion regarding the appropriate scope of that *prima facie* case.

1. Need for Notification of Intent to Invoke Local Circuit Switching Triggers.

Even where Verizon intends to challenge the national finding, it may or may not elect to do so by asserting that the "triggers" have been met. The FCC has established two "triggers" which, if met with respect to a particular geographic market, would refute the national finding of impairment in that market. First, under the "Self-Provisioning Trigger," the FCC has "determine[d] that a state must find 'no impairment' when three or more unaffiliated competing carriers each is serving mass market customers in a particular market with the use of their own switches."[5] Second, under the "Competitive Wholesale Trigger," it has also determined that "competitors are not impaired if they are able to obtain switching from third parties offering access to their own switches on a wholesale basis."[6]

Nonetheless, if there are specific proposed geographic markets in which Verizon intends to claim that either trigger is satisfied, then it should be required to identify the carriers that

---

[5] *TRO*, ¶ 501 (footnote omitted).
[6] *TRO*, ¶ 504.

Verizon claims meet the requirements of the rule and the geographic areas as to which Verizon claims such carriers satisfy the trigger, disclose the reasons why such carriers and geographic areas satisfy the trigger, and produce the evidence it intends to rely upon to support those assertions. Verizon is, of course, uniquely situated to know whether it has any chance of satisfying the triggers. If the carriers that it asserts satisfy a trigger are using Verizon loops and their own switches, then Verizon would know where those particular carriers are collocated, how many loops they have leased as UNEs, when those loops were leased, and the type of loops (DS0, DS1) Based on its interconnection agreements and the planning and grooming arrangements thereunder, Verizon would also know how many CLEC switches are being used for UNE-L and where they are located. No other carrier has access to such comprehensive sources of information. If Verizon chooses to assert that the "triggers" can be satisfied in particular markets, then this investigation can turn to investigating that claim, focusing on the firms that Verizon asserts may satisfy the trigger requirements. If, by contrast, Verizon does not assert that the triggers can be met but still seeks to overcome the national impairment finding, then the Commission can bypass the trigger stage and move on to whatever argument and evidentiary basis Verizon seeks to offer. In either case, this proceeding will benefit by requiring a relatively early evidentiary filing by Verizon that states the particular nature of its claims and presents its supporting evidence.[7]

[7] Requiring Verizon to identify potential candidates for the triggers solves the potential problem of the "missing CLEC" – the CLEC that does not appear as a party to this proceeding. It is always possible to speak in broad generalizations about the number of CLECs certificated in the state. But the FCC's requirements to satisfy the triggers are much more detailed than mere certification. Rather than asking the Commission and the parties to search the field, it is both more efficient and more fruitful for Verizon in the first instance to identify which carriers, it believes, should be examined to demonstrate that the triggers have been met.

Placing the burden of production on Verizon simply requires the party with the interest in challenging the national finding of impairment and the most direct access to information relevant to that challenge to come forward in the first instance. In this manner, it expedites and focuses the proceeding on the issues that are contested and requires the production of information that supports the challenge.

If the Commission determines that evidence that the challenging party proposes to offer would satisfy a *prima facie* showing, procedures can be established early to address this threshold issue, as a finding that either trigger has been met would obviate the need for further inquiry as to the market at issue. On the other hand, if no carrier intends to claim that the triggers have been met in some or all of Rhode Island, then the Commission and the parties can move to determining whether Verizon wishes to make other claims to overcome the impairment finding and, if so, to specify what arguments it intends to make. The Commission can then structure the proceeding to address those issues.

2. Need for Notification of Intent to Challenge National Finding of Impairment Without Unbundled Local Switching.

If, separate and apart from the triggers, Verizon wishes to challenge the FCC's nationwide finding of impairment without unbundled local switching for the mass market on the theory that potential competition is both operationally and economically viable, Verizon will need to define – at least at the outset – the specific and properly defined geographic areas within Rhode Island that will be the subject of the proceeding. Accordingly, if Verizon wishes to challenge the FCC's finding as it pertains to any portion of Rhode Island it should be required to file a summary pleading stating whether it intends to contest the national finding of impairment without local switching, identifying the proposed markets, and explaining the basis for its position. In explaining its basis, Verizon should provide a summary of the grounds upon which

it will seek to challenge the national finding of impairment. In this manner, the scope of the proceeding can be defined at the outset.

Verizon should also be required to specify the geographic areas in which it does not intend to challenge the national finding of impairment so that the parties and the Commission can focus on the areas where an attempt to show non-impairment is to be made. There is no reason to make the impairment proceedings any more difficult than they need to be by allowing discovery and requiring the submission of evidence with respect to geographic areas that will not be the subject of any serious contention that unbundled switching can be eliminated without causing impairment.

In connection with these impairment proceedings, Verizon should be limited to the grounds and evidence so presented at the outset. Indeed, should Verizon's summary pleading indicate an intention to challenge the national finding of impairment, Verizon should be required to present the grounds and evidence upon which it intends to rely. Given the restrictive timeframe imposed by the FCC Order, Verizon should not be allowed to raise entirely new grounds for challenging the national finding of impairment after the proceeding enters its evidentiary phase. This is similar to the very sensible ground rules imposed by the FCC for its time-limited reviews of Section 271 applications.

Following Verizon's initial pleading and evidence regarding its intentions as to triggers and operational and economic viability, the other parties should be permitted to respond. The nature of the responses will, of course, be determined by Verizon's initial pleading. It is possible that one or more parties may contend that Verizon's initial pleading does not make out a *prima facie* case with respect to one or more issue, market or geographic area and that no factual proceeding is required to reach resolution with respect to such matter. The Commission may thereupon be asked to rule on the matter in the nature of a motion for summary judgment. In any

event, the initial pleading by Verizon, and the responses by the other parties, will perform the important function of joining and narrowing the issues for litigation.

B. Defining the Relevant Geographic Markets for Mass Market Services.

A threshold issue for the Commission's investigation of all other factual questions regarding local switching for mass market customers will be the definition of the relevant geographic markets within the Commonwealth of Rhode Island.[8] "State commissions have discretion to determine the contours of each market, but they may not define the market as encompassing the entire state."[9] Furthermore, states may not define geographic markets "so narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market."[10] The same geographic market definitions must be used as a key input both to the states' "trigger" (actual competition) analysis and their economic and operational impairment (potential competition) analysis.

Only after the nature of Verizon's case is known will it be possible to determine whether the geographic market issue should be resolved prior to further proceedings or whether the evidence on this issue is so integral to consideration of the operational and economic impairment issues that it must be determined as part of the larger analysis. Regardless of when it is addressed, the issue is of critical importance, and requires a thorough vetting based on evidence and argument that has been tested through adjudication.

---

[8] *See, e.g., TRO*, ¶¶ 131, 419, 425, 495-497.
[9] *TRO*, ¶ 495.
[10] *TRO*, ¶ 495.

C. Scope of the Commission's Impairment Inquiry Regarding Unbundled Local Switching for the Mass Market.

If an ILEC does intend to challenge the FCC's national finding of impairment without unbundled local switching for the mass market, the Commission will have to address a wide variety of issues. Some of the key ones are summarized below.

1. Operational Impairment Issues.

If Verizon wishes to challenge the national finding of impairment with respect to any geographic market, it must demonstrate that it has successfully operationalized a "seamless, low cost" migration process that would permit CLECs to use UNE-L to serve both residential and small business mass-market customers throughout the relevant market.[11] The FCC has already found that current hot cut processes are inadequate. It "conclude[d] that the operational and economic barriers arising from the hot cut process create an ***insurmountable disadvantage*** to carriers seeking to serve the mass market, demonstrating that competitive carriers are impaired without local circuit switching as a UNE."[12] The FCC explained "that the hot cut problem would be particularly great for transferring existing mass market customers in a cost-effective and operationally seamless manner."[13] Furthermore, "[c]ompetition in the absence of unbundled local circuit switching [would] require[] seamless and timely migration not only to and from the incumbent's facilities, but also to and from [and thus among] the facilities other competitive carriers."[14] In recognition of the fact that current hot cut processes are inadequate to handle the volumes that would be required if CLECs could enter or remain in the local exchange mass market in the absence of unbundled switching, the FCC has ordered state commissions to

---

[11] *TRO*, ¶ 423.
[12] *TRO*, ¶ 475 (emphasis added).
[13] *TRO*, ¶ 467.
[14] *TRO*, ¶ 478.

"approve and implement a batch cut migration process – a seamless, low-cost process for transferring large volumes of mass market customers."[15]

Approval and implementation of a batch hot cut process, however, would not by itself permit a finding that the hot cut process does not constitute an operational impairment. [16] At the end of this proceeding, the Commission must be in a position to determine whether Verizon has eliminated all operational barriers to such mass market use of UNE-L. These barriers include, at a minimum, impediments that may arise through unbundled loop provisioning, collocation, or the carrying out of CLEC-to-CLEC cross connects, cross connects involving DSL services, and the treatment of IDLC loops.[17]

This means, among other things, that the Commission's determination of what is the most efficient batch hot cut process and what CLECs will have to pay for that process will be necessary inputs to the Commission's operational impairment analysis. *See* Section 0, beginning at page 15.

The FCC found that Verizon provided "no evidence" to support its allegations that Verizon's processes could perform the volume of hot cuts required in a mass market without UNE-P,[18] and the NY PSC submitted evidence to the FCC that flatly contradicted Verizon's assertion that it could handle hot cuts at volumes that would be required if UNE-P were not available.[19] Those processes are essentially identical to the ones that Verizon employs in Rhode Island. The FCC has also determined that the Commission may not rely merely on findings of adequacy made in Section 271 proceedings with respect to the hot cut process, because the

---

[15] *TRO*, ¶ 423.

[16] *TRO*, ¶ 423 ("the institution of such processes ***could*** significantly reduce or eliminate the causes of impairment we identify") (emphasis added).

[17] *See TRO*, ¶¶ 512-514.

[18] *TRO* ¶468, fn.1432

[19] *TRO* ¶ 469.

facilities-based competition relied upon in Section 271 proceedings included competition from competitors using UNE-P.[20] In part, this is because the hot cut volumes considered during the section-271 approval process were not comparable to the volume of hot cuts that would need to be performed in a mass market without UNE-P.[21]

Moreover, the granular analysis required by the FCC cannot be based merely on assertions by Verizon that it can and will perform adequately: to the contrary, any mass-market migration processes must be proved to be reliable and sustainable -- at commercially reasonable volumes and at commercially reasonable levels of performance -- before CLECs are forced to rely on them.[22] This requires that Verizon reach agreement with its CLEC customers on detailed operational procedures for performing all types of loop migrations, seamlessly, at the lowest possible cost, and at high volumes. Once designed, Verizon must "prove out" its processes, much as it was required to prove out its OSS capabilities on the record prior to receiving interexchange relief. The FCC is explicit on this point: mere "promises of future hot cut performance," even when based on testimony submitted by Verizon or another ILEC "attesting to their willingness and ability to handle any requested volume of hot cuts," will not be sufficient evidence to establish that the operational impairments currently inherent in the hot cut process have been overcome.[23]

---

[20] *TRO* ¶469, fn.1435.

[21] *Id.*

[22] *TRO*, ¶469, fn.1437 ("We find, however, incumbent LECs' promises of future hot cut performance insufficient to support a Commission finding that the hot cut process does not impair the ability of a requesting carrier to provide the service it seeks to offer with at least some sort of unbundled circuit switching.").

[23] *TRO*, fn. 1437.

In view of the foregoing FCC requirements, Verizon must provide proof that demonstrates the extent to which Verizon can scale its operations to meet mass market demand in a geographic area.

This also means that Verizon must demonstrate continuing satisfaction of identified and commercially reasonable performance standards and metrics over a commercially reasonable period of time. These performance standards and metrics will perforce be different from existing or prior metrics, because they must account not only for the volumes of migrations that will be generated by the embedded base of UNE-Platform customers, but also increased volumes of UNE-L migrations for newly acquired customers due to any proposed discontinuation of the UNE-Platform. They must also account for an increased range of migration types, including CLEC-to-CLEC migrations and migrations involving DSL services. As the Commission well knows, actual and continuing satisfaction of a sufficiently broad range of performance standards and metrics is the only means to ensure that the Verizon process is in fact stable and sustainable (as opposed to temporarily improved for the purpose of obtaining regulatory relief) and to allow CLECs sufficient opportunity to ramp up to the unprecedented levels of UNE-L migrations that will assuredly take place if unbundled switching is no longer available. Satisfaction of a broad range of performance metrics for hot cuts serves both the specific purposes of the Telecommunications Act by promoting sustainable competition and encouraging sustainable investment in infrastructure, and the public interest by ensuring reliability and continuity of service.

The Commission will well remember that, shortly after Verizon received its Section 271 authorization in New York, its OSS systems designed to effectuate UNE-P orders, collapsed under the strain of commercial volumes. Tens of thousands of orders were lost entirely. The consequence of that collapse was serious for customers and for competition, but because the

transactions were largely UNE-P transactions, few customers actually lost service. A similar collapse associated with an attempt to perform hot cuts at mass market volumes could have far more devastating consequences. For this reason, the Commission may wish to engage a third-party consultant to observe, test, and validate or invalidate the Verizon mass-market migration processes. In all events, the Commission must build into its procedural framework time for this evaluation.

The requirement that Verizon demonstrate that its processes are commercially reasonable extend not only to the physical processes for migrations, but also to the operations support systems ("OSSs") that would be necessary for the migration process to function in the mass-market context. Verizon must show that its OSSs are capable of supporting flow-through processes for pre-ordering, ordering, provisioning, maintenance, repair, and billing for migrations of mass-market customers. The Commission must also consider the adequacy of OSS support to be relied upon by CLECs if they are required to obtain local switching from a source other than Verizon. In particular, where alternatives to ILEC switching are nominally available, CLECs still must have access to adequate OSSs that make delivery, maintenance, and billing of local exchange services to mass-market customers possible. These inquiries must be included in the Commission's broader inquiry into the sufficiency and commercial reasonableness of migration processes.

The requirement that Verizon demonstrate that its processes are commercially reasonable extend to line-splitting, line-sharing,[24] and other DSL-related arrangements affecting the provision of voice service to "mass-market" customers. Verizon must, at a minimum, show that its processes for line splitting are adequate to allow CLECs to scale their businesses by offering

[24] Hot cut processes must be able to work with line-sharing so long as line-sharing remains available.

customers a package of both voice and data services. Until the processes and systems that enable line splitting are as seamless and customer friendly as Verizon's, CLECs' ability to compete in offering packages of voice and data service will be severely restricted. Systems and processes that require multiple orders, manual orders, or a combination of both, or that threaten significant service interruption to the end user customer, show that existing processes are discriminatory and impair CLECs' ability to compete in the provision of bundled services -- and, consequently, individual services as well.

2. Economic Impairment Issues.

In addition to issues of operational impairment, the Commission must consider whether it would make economic sense for a CLEC to enter the local exchange mass market in the absence of unbundled local switching.[25] This inquiry will require a "broad business case analysis that examines all likely potential costs and revenues."[26]

As Verizon recognizes, the FCC's order requires an economic impairment analysis that is based "not on the experience of any actual entrant, but 'on the most efficient business model for entry.'"[27] The Commission will have to look broadly at all of the costs that a CLEC would have to incur in deciding whether it would be economical to enter the mass market in the hypothetical absence of unbundled switching.[28] We will not attempt to list here the broad panoply of possible costs faced by potential new entrants, but note that they must be evaluated comprehensively, and include everything from the cost of purchasing and installing switching, to the cost of backhauling the local traffic to the competitor's switch and all other capital costs, to all costs of

---

[25] *TRO* ¶ 517.
[26] *TRO* n.1581.
[27] See *United States Telecom. Ass'n v. FCC*, D.C. Circuit Case Nos. 00-1012 and 00-1015, "Petition for a Writ of Mandamus," filed by Verizon on August 28, 2003, at 9 (quoting *TRO*, ¶ 519) (emphasis in original).
[28] *TRO*, ¶ 520.

migration and operation.[29] Issues of scale, scope, anticipated "sunk costs" of a new entrant, first mover advantages, and absolute cost advantages must all be taken into consideration.[30]

In order to determine whether the "likely potential ... revenues" outweigh the "potential costs,"[31] the Commission will not be able to assume that existing retail rate levels would necessarily continue in the future. Indeed all the evidence in states where local competition based on UNE-P has begun to flourish shows that local rates will decline to meet the new competitive conditions. If the evidence shows that competition is likely to drive rates down to incremental cost, and that this would be the reasonable expectation of a potential entrant, then the "likely potential revenues" could not be assumed to exceed incremental cost.[32]

3. Defining the Boundary Between the Mass Market and the Enterprise Market.

As part of the analysis of operational and economic impairment discussed above, the Commission will also have to decide which multi-line DS0 customers will be included within the mass market, and which larger customers are to be treated as part of the enterprise market.[33] The FCC suggests that "[t]his cross over point may be the point where it makes economic sense for a multi-line customer to be served via a DS1 loop."[34]

---

[29] *TRO*, ¶ 520.

[30] *TRO*, ¶¶ 85-90. In the context of analyzing economic impairment under the TRO, what the FCC means by "sunk costs" are future investments that a new entrant would have to make in "costs that are unrecoverable upon exit from the market." *TRO*, ¶ 75 & fn. 244. *See also TRO* fns. 922 & 1173, noting that electronics needed to activate dark fiber are not sunk costs because they "can be moved from one location to another location upon exit from a particular location." In other words, what will be at issue are the anticipated sunk costs that a new entrant would face, as defined by the FCC. *See, e.g., TRO* ¶ 88 & fn. 369. The FCC distinguishes between the anticipated "sunk costs" of a new entrant, and the "substantial sunk capacity" already installed by ILECs that gives the ILECs a "first mover advantage." *TRO* ¶ 89.

[31] *TRO* n.1581.

[32] *See, e.g., TRO* ¶ 7 (re sunk costs), n.244 ("Significant sunk costs by the incumbent can increase an entrant's concern that an incumbent will lower prices in the face of vigorous competition."), ¶¶ 77, 80, 88.

[33] *TRO* ¶ 497 & n.1376.

[34] *TRO* ¶ 497.

The Commission will have to make this determination for each geographic market, or identifiable categories of geographic markets, that it defines. The FCC previously decided to assume that such a cutoff exists at the level of customers in density zone 1 of the top 50 MSA who are seeking at least four DS0 lines. Though the FCC left its presumptive rule for density zone 1 in the largest MSAs in place, it indicated that state commissions could establish a higher cutoff based upon evidence presented in the state impairment proceedings.[35] Thus, the Commission will need to address this issue for all geographic markets, including any which contain the four central offices contained in density zone 1.

III. BATCH HOT CUT PROCESS

As noted above, the Commission has been charged with the duty to approve and implement a batch hot-cut process that will make hot-cuts more efficient and reduce per line hot-cut costs.[36] Concurrently, the Commission must analyze and propose recommendations to address the operational limitations inherent in the hot-cut process.[37] This is required because the FCC has determined that there is national impairment in the mass market for switching due, in part, to the "combined effect of all aspects of the hot-cut process," resulting in increased costs to competitors, lower quality of service and delays in service provisioning.[38] The Commission must, therefore, take steps to overcome the economic and operational barriers associated with manual hot-cuts in an effort to remove such impairment, or at a minimum mitigate the impairment.

The FCC has "conclude[d] that the operational and economic barriers arising from the hot cut process create an insurmountable disadvantage to carriers seeking to serve the mass

---

[35] *TRO* ¶ 497.
[36] *TRO* ¶ 460.
[37] *TRO* ¶ 489.
[38] *TRO* ¶ 473.

market, demonstrating that competitive carriers are impaired without local circuit switching as a UNE."[39] The extent to which this "insurmountable disadvantage" can be resolved by the batch hot cut process ultimately adopted by the Commission will be an input into the Commission's broader analysis of any claim by Verizon that CLECs would not be operationally or economically impaired without unbundled switching. The Commission will need to know what specific hot cut processes will be available, and specifically what they will cost CLECs, before it can evaluate the totality of evidence regarding operational and economic impairment.

The proposed procedural guidelines described below provide a framework within which to address the breadth and depth of the Commission's review of the hot cut process.

A. Scope of Batch Hot Cut Investigation.

The procedural mechanism necessary to accomplish the Commission's objectives must address the transfer of all forms of loops between and among all carriers, including Verizon-to-CLEC, CLEC-to-Verizon and CLEC-to-CLEC loop migrations, as well as the associated exchange of customer and network data among carriers.[40] Ultimately, CLEC loop migrations of any type should be as prompt and efficient as Verizon's transfer of customers using UNE-P.[41] To these ends, a batch hot-cut proceeding should be required to:

1. Determine the appropriate volumes of loops to be included in a batch and the timeframe within which the loops must be provisioned.[42]

2. Determine the specific hot cut processes to be implemented for each type of loop migration in a manner that ensures that optimal efficiency is realized.[43] This includes the requirement that a process be implemented to give CLECs a technically feasible method

---

[39] *TRO* ¶ 475.
[40] *TRO* ¶ 478.
[41] To the extent meaningful data are available, timeliness and quality as well as maintenance and repair performance data should be reviewed as one source in a determination of whether Verizon is consistently reliable in its hot cut performance. *TRO* fn.1574
[42] *TRO* ¶ 489
[43] *Id.*

of unbundled access to all loop types and architectures, including specifically when neither UDLC or copper loops are available replacements for a customer's IDLC loop.[44]

3. Determine a timetable for implementing the new procedures.

4. Establish a set of performance metrics that define non-discriminatory, efficient performance levels.[45]

5. Establish mechanisms or processes to determine that Verizon can execute the new procedures at the performance levels specified in the metrics.[46]

6. Implement a TELRIC-based, reduced per-line rate or volume discounts, with appropriate performance metrics.[47]

7. Rule on whether, or to what extent, the improved, manual, bulk hot-cut process that results from this proceeding is also scalable to meet required mass-market volumes for hot-cuts in a geographic area, if UNE-P were not available.[48]

8. Direct the manner in which customer-churn generally, and the churn that occurs shortly after a customer switches to a new carrier specifically, are incorporated into the analysis of hot cut volumes and associated operational issues.[49]

9. Ascertain whether the adopted manual bulk hot-cut process, as implemented, combined with the rolling availability of unbundled switching as an acquisition tool would cure the operational impairment in the mass-market for switching within a geographic area when UNE-P is no longer available.[50]

10. Put into place a transition plan, including but not limited to a timeline, for the conversion of the embedded base of UNE-P customers to UNE-L with CLEC switching, if the

---

[44] *TRO* ¶ 297.

[45] *TRO* ¶ 512.

[46] See, *TRO* ¶ 469, n. 1437 ("We find, however, that incumbent LECs' promises of future hot cut performance insufficient to support a Commission finding that the hot cut process does not impair the ability of a requesting carrier to provide the service it seeks to offer without at least some sort of unbundled circuit switching.")

[47] *Id.*

[48] Scalability should be considered on a going-forward basis, and also in light of whether the improved batch hot-cut process could transition the embedded base of UNE-P customers in New York within the timeframes allotted by the FCC's order for transitioning the base should the Commission find that impairment in the mass market does not exist in a geographic area. *TRO* ¶532.

[49] *TRO* ¶ 471.

[50] As indicated by the FCC, when making determinations regarding a transition plan, the Commission should consider a CLEC's need for a reasonable period of time to, among other things, deploy their facilities, hire, train and equip technicians, customer service and maintenance personnel and develop call related data base capabilities, subsequent to a finding that impairment no longer exists. *TRO* ¶529

Commission finds that impairment in the mass market is cured under (6) above and also finds that CLECs are not economically impaired.[51]

The Commission's procedural framework should also ensure that a timeframe is established to accomplish two critical tasks. First, there must be a timeframe identified to implement, test and determine the adequacy of the improved manual batch hot-cut process, such that the anticipated benefits can be assessed against real world performance. Second, time should be allotted to modify the batch hot cut process if performance does not meet expectations. Both of these events are essential elements in the procedural timeline in order to avoid significant customer service disruption. As a result, any final determination of the adequacy of the batch hot cut process for determining impairment must necessarily be deferred until sufficient real world experience has been developed.

B. It Is Critical that the Commission Ensure that Any New Hot Cut Process Is Capable of Handling Required Volumes.

The inquiry into the viability of a manual batch hot-cut process as a means to sustain local competition in a mass market without UNE-P is familiar in significant respects: a substantial part of the essential work will have to be done by Verizon, and all of the essential information needed to evaluate the procedures adopted is in the exclusive possession and control of Verizon.

In April, 1998, Verizon (then NYNEX) and the New York Public Service Commission ('NY PSC") entered into an agreement called the "Pre-Filed Statement" ("PFS") as part of the NY PSC's investigation of Verizon's ability to demonstrate that it could satisfy its obligations under section 271 of the Telecommunications Act. Part of the PFS involved agreement by Verizon and the NY PSC to subject Verizon's OSSs to a third party test of their functionalities and viability under commercial conditions. Immediately after the PFS was agreed to, Verizon

---

[51] *TRO* ¶ 531.

began to announce, both publicly and privately, that its OSSs would be quickly completed and that it expected to pass the third party verification in as little as four to six weeks. Wall Street analysts left meetings with Verizon senior executives predicting that Verizon would quickly demonstrate the viability of its systems and receive NY PSC support for its Section 271 application before the end of calendar year 1998.

In fact, nothing of the kind happened. Instead, just days before testing by Hewlett-Packard and KPMG was to begin, Verizon announced a "temporary delay" in the testing process. The delay was caused by Verizon's admission, either self-discovered or compelled, that it could not electronically process UNE orders at all, much less across the range of transaction types and at the volumes that competitive conditions required.

It took Verizon nearly two years to develop systems that would function well enough to perform the range of transactions necessary to permit local competition based on UNEs. Even then, however, CLECs that were beginning to actually use the Verizon OSSs started reporting that, as commercial volumes increased, Verizon's OSSs showed significant signs of instability. Verizon responded predictably. It asserted that there was no instability in its systems, that CLECs where misinformed or were misrepresenting the data for their own anti-competitive reasons, and that the NY PSC should quickly announce its support for Verizon's Section 271 application. In September 1999, Verizon received that support and, Verizon received its FCC authorization to enter the long distance market before year end.

By February 2000, it was clear that Verizon's systems were, in fact, on the brink of collapse. Verizon's OSSs were crashing repeatedly under pressure of persistent commercial order volumes and were losing literally tens of thousands of UNE orders a month. The FCC would ultimately intervene, confirming precisely these failures. Verizon consented to a $10 million fine and the threat of greater fines if it did not immediately correct the systems

problems. The Chairman of the NY PSC required daily reports from senior Verizon executives on numbers of orders lost. FCC Commissioner Tristani issued a separate statement suggesting that the FCC consider revoking Verizon's section 271 authorization.

The work that needs to be done in this proceeding rivals, and in many respects exceeds, the work that needed to be done in the New York PSC's initial OSS investigation. By definition, the volume of transactions that a batch hot cut process would have to handle in the theoretical absence of UNE-P will be comparable to the total number of UNE-L and UNE-P orders that must be handled in a mature, predominantly UNE-P world. The range of transaction types is equally varied. Here, however, the industry faces complexities and risks that did not attend the OSS development process. Most obviously, the OSSs were almost entirely electronic. Hence, once Verizon found the electronic solutions to its systems problems, it was able to correct the flaws that had caused the system collapse. In this case, a substantial portion of the work to be performed by both sides in a "hot cut" will remain manual. And, of course, the risk to customers in a failed hot cut is far greater than the risk to customers when Verizon lost customer orders.

Essentially, the Commission is charged with three tasks in this case. First, it must work with the industry to devise the best possible manual batch hot cut process that can be devised. Second, it must determine whether and to what extent Verizon is able to implement that process at mass market volumes, to execute it at such volumes on a daily basis in all central offices across the state, and to do so at acceptable performance levels. Finally, it must determine if those processes function at a level of performance sufficient to sustain a conclusion that CLECs are no longer operationally impaired. All of this requires evidence that is and will continue to be largely in the exclusive possession of Verizon.

Based on the on-going exchange of information, the parties should also be developing the TELRIC-based costs for the improved batch hot cut process. Verizon has been ordered to

propose a date by which it will file both a description of a proposed batch hot cut process and proposed new rates for the proposed batch hot cut process as well as a more efficient, streamlined individual hot cut process.

The Commission should also investigate the upgraded network architecture that Verizon is deploying that will packetize Verizon's voice and data traffic in its network. That is prudent for three reasons. First, although the FCC declined to require electronic loop provisioning, it did leave the door open if the batch hot cut process that is developed as a result of the TRO is not sufficient to handle mass-market volumes.[52] Second, the electronic loop provisioning technology depends on packetizing voice and data signals. Third, in the first quarter of this year, Verizon announced that it has begun, and will continue to deploy, network upgrades that will result in packetization of voice as well as data traffic on its network - a change from its previous position that it would only packetize data traffic.[53] In sum, the proposed network upgrade information will provide a starting point for the Commission's analysis should there be a determination that batch hot cut processes are insufficient to support the requirements of a mass market without UNE-P.

IV. ENTERPRISE MARKET LOOPS AND DEDICATED TRANSPORT

A. National Finding of Impairment, and Scope of Inquiry on Verizon Challenge.

In its Triennial Review order, the FCC made an affirmative nationwide finding of impairment for dark fiber loops, DS3 loops, and DS1 loops. Specifically, the FCC made a nationwide determination that requesting carriers are impaired at most customer locations

---

[52] *TRO* ¶ 491.

[53] BUSINESS WEEK, *Verizon's Bold Broadband Upgrade*, by Steve Rosenbush, March 18, 2003. "Instead of using traditional phone technology, which sends sound waves over copper circuits, the new system will break voice calls into tiny bits of computer data called packets, which share circuits."

without access to dark fiber,[54] are impaired on a customer-location-specific basis without access to unbundled DS3 loops,[55] and are generally impaired without access to unbundled DS1 loops.[56]

Enterprise Market Loops: The FCC delegated to the states a "fact-finding role" to adjudicate claims by an ILEC that competing carriers are not impaired without access to enterprise market loops to specifically identified customer locations.[57] The FCC established two different triggers which the ILEC may satisfy to identify specific customer locations where there may be no impairment: (1) a "Self –Provisioning Trigger," i.e., "where a specific customer location is identified as being currently served by two or more unaffiliated [CLECs] with their own loop transmission facilities at the relevant loop capacity level," and (2) a "Competitive Wholesale Facilities Trigger," i.e., where two or more unaffiliated competitive providers have deployed transmission facilities to the location and are offering alternative loop facilities to [CLECs] on a wholesale basis at the same capacity level."[58]

Dedicated Transport: The FCC also found that requesting carriers are impaired on a nationwide basis without access to unbundled dark fiber, DS3, and DS1 transport facilities.[59] It recognized that competing carriers face substantial sunk costs and other barriers to the deployment of facilities, and that competitive facilities are not available in a majority of locations.[60] As with enterprise loops, the FCC determined that given the nature of transport facilities, a granular impairment examination is warranted with respect to the dedicated transport analysis.[61] Indeed, the FCC delegated to states the authority to make findings on a route-

---

[54] *TRO*, ¶ 311.
[55] *TRO*, ¶ 320.
[56] *TRO*, ¶ 325.
[57] *TRO*, ¶ 328.
[58] *TRO*, ¶ 329.
[59] *TRO*, ¶ 359.
[60] *TRO*, ¶ 360.
[61] *TRO*, ¶ 360.

specific basis, and established Self-Provisioning and Wholesale Facilities Triggers.[62] Like the enterprise loop triggers discussed herein, the LEC may demonstrate that a particular route meets the Self-Provisioning and Wholesale Facilities Triggers to demonstrate that a specific transport route is not impaired.

B. Requirement for Initial Pleadings With Proffer of *Prima Facie* Evidence.

Once again, as with the triggers for local circuit switching in the mass market, it is highly unlikely that the Commission will in fact have to address these issues. After all, Verizon has taken the position that the conditions set forth in the enterprise market loop and dedicated transport triggers are "unachievable in the real world."[63] Nonetheless, the Commission should define procedures for handling challenges to these national findings, just in case they are made with respect to particular customer locations or routes.

The Commission is under no obligation to entertain global challenges to these national findings, which could only be adjudicated by examining every customer location and every current or potential route for dedicated transport. To the contrary:

> States that conduct this review need only address locations for which there is relevant evidence in the proceeding that the customer location satisfies one of the triggers or the potential deployment analysis specified in this Part.[64]

Thus, if Verizon wishes to challenge the national finding of impairment for specific customer locations or transport routes, it must first proffer a *prima facie* case that it can rebut that finding

---

[62] The FCC specifically delegated to the states the authority to apply: the self-provisioning or wholesale alternative transport triggers for Dark Fiber Transport, *TRO* ¶ 381; the wholesale alternative transport trigger for DS1 Capacity Transport, *TRO* ¶¶ 391-392; and the self-provisioning or wholesale alternative transport trigger for DS3 Capacity Transport, *TRO* ¶ 387.

[63] See *United States Telecom. Ass'n v. FCC*, D.C. Circuit Case Nos. 00-1012 and 00-1015, "Petition for a Writ of Mandamus," filed by Verizon on August 28, 2003, at 3.

[64] *TRO*, ¶ 339; *see also* ¶ 417.

for each such location. To do so, Verizon would have to set forth evidence sufficient to demonstrate customer locations or routes where competitive carriers are not impaired without access to the ILEC's unbundled loops or transport. Without such a threshold showing, there is no need for the Commission to do anything further with respect to enterprise market loops or dedicated transport.

Given the condensed period for review by the Commission, and the resultant abbreviated period of time by which parties will be required to conduct and complete discovery, it is not enough for Verizon to simply provide mere allegations in support for its claimed challenge to the presumption of impairment. The onus is on Verizon to provide *prima facie* evidence on a route-specific basis, sufficient to support its claims.

V. DISCOVERY PROCEDURES SHOULD ALLOW FOR REASONABLE DISCOVERY WITH APPROPRIATE SAFEGUARDS FOR SENSITIVE INFORMATION, BALANCED AGAINST THE REAL-WORLD NEED TO COMPLETE THE PROCEEDING WITHIN THE NINE MONTHS SPECIFIED BY THE FCC.

There are two critical aspects of discovery that must be managed carefully: (i) the collection and aggregation of competitively sensitive data from each of the parties of the proceeding; and (2) the potential for discovery to be misused as a litigation tool. We discuss below procedures to address each of these concerns.

A. Procedures for Ensuring Adequate Information While Limiting the Scope and Burden of Discovery.

There is simply not enough time, nor enough resources among the participating parties, to permit unfettered discovery regarding every minor factual issue that could possibly have some potential relevance to the broad-ranging issues that the Commission must decide. We therefore recommend that parties seeking discovery propose specific requests to Commission Staff, which will then issue only that discovery which is most critical and most likely to be probative.

Discovery needs will arise as issues are raised and joined by the initial pleadings of carriers seeking to challenge the national finding of impairment and by subsequent filings of testimony. AT&T recommends that the Commission determine the appropriate discovery for each phase of the case at the appropriate time for that phase. The Commission's determination should be based on recommended discovery from each of the parties. Its determination should reflect its assessment of the information that it will find probative as to each issue balanced against the burdensomeness of producing such information. Parties should be given an opportunity to explain their reasons for requesting the information and should be given an opportunity to object to the production of such information on grounds of burdensomeness, relevance or other standard grounds.

B. Procedures for Handling Competitively Sensitive Data.

1. Certain Competitively Sensitive Information Should Not Be Distributed to the Parties Before It Is Aggregated, Unless Information in its Disaggregated Form Is Necessary to Make a Finding.

There will likely be the need to collect competitively sensitive data from the participating parties. Certain data may be so sensitive that it should not be distributed to parties in a disaggregated form. For example, the FCC has called for a "business case" type of analysis that includes a comparison of potential revenues to costs.[65] As a result, certain types of revenue data from carriers may be required. AT&T recommends that revenue data, and any other such competitively sensitive data, be provided to a neutral third party for purposes of aggregation. In those situations, the Commission may properly rely on the aggregated data. The underlying, disaggregated data that is not shared with the parties should not be part of the record and should

[65] *TRO*, ¶ 84 ("we ask whether all potential revenues from entering a market exceed the costs of entry, taking into consideration any countervailing advantages that a new entrant may have.").

not form the basis of the Commission's decision regarding impairment. If certain disaggregated information is necessary for the Commission to make its decision, such information should be shared with the parties pursuant to the provisions of a protective order along the lines discussed below and placed on a sealed record.

2. Competitively Sensitive Information that Is Distributed to the Parties Should Be Subject to Appropriate Protective Safeguards.

For information that may be distributed to the parties in disaggregated form, an appropriate protective order should enter. While the specific form of the protective order should be left for informal discussions and agreement, if possible, there should be no more than two levels of protection. The lower level of protection would bar all recipients from using the information for any purpose other than the litigation in the instant (or related) proceeding and require that the information not be placed on the public record. The higher level of protection would prevent disclosure to any individual representative of a party with responsibility for marketing, product development or business strategy.

VI. THE EVIDENTIARY PHASE SHOULD INCLUDE WRITTEN PRE-FILED TESTIMONY AND EVIDENTIARY HEARINGS

Ultimately, each of the issues to be resolved by the Commission in this proceeding will have to be decided on an adequate factual record, comprised of evidence that has been appropriately tested through the adversary process. The FCC has asked the states to perform a "granular analysis" of impairment by taking into account considerations related to customer classes, geography, and services, as well as the types and capacity of the facilities involved. Such an analysis is necessarily fact intensive.[66] Moreover, the determination that the states must

[66] *See, e.g., TRO*, ¶ 186 ("Thus, to ensure that the proper degree of unbundling occurs, we rely, in certain instances when such analysis is necessary, on market-by-market fact-finding determinations made by the states.").

make on the basis of the facts will have significant far reaching consequences for all parties involved. Given the fact intensive inquiry and the consequences to the participants, the instant proceeding should incorporate all the safeguards and due process protections of a full adjudicatory proceeding.

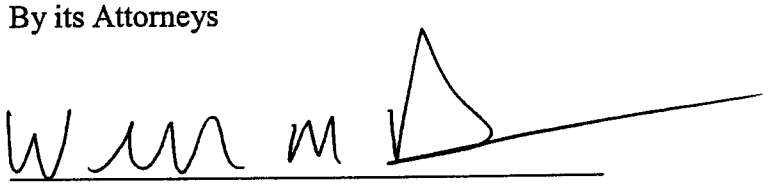
Accordingly, we recommend that, following the initial round of pleadings, a procedural conference, and any rulings necessary to resolve the issues that remain for full factual adjudication, the Commission establish a schedule for the filing of pre-filed direct testimony and pre-filed rebuttal testimony. The Commission should permit discovery with respect to both sets of written testimony in accordance with the discovery procedures outlined above. The Commission should leave open the possibility of filing surrebuttal testimony if such testimony appears appropriate with respect to one or more issues. Based on the pre-filed testimony and discovery responses, the Commission should hold evidentiary hearings at which the proponents of testimony and discovery responses can be subject to cross examination. Following evidentiary hearings, the parties should be given an opportunity to file both initial and reply briefs. The Commission's decision should be based on the facts in the record and reasonable inferences there from. Finally, given the complexity of the issues and the potential for ambiguity

in the Commission's initial decision, the Commission should be willing to entertain motions for clarification.

Dated: September 22, 2003

AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

By its Attorneys



William M. Dolan III, Esq.
Brown Rudnick Berlack Israels LLP
121 South Main Street
Providence, RI 02903
(401) 276-2600
(401) 276-2601 (fax)
wmdolan@brbilaw.com

Jay Gruber, Esq.
Harry Davidow, Esq.
Jeffrey Fialky, Esq.
AT&T Communications of
New England, Inc.
99 Bedford Street, 4th Floor
Boston, Massachusetts 02111
(617) 574-3149
(617) 574-3274 (fax)
jegruber@lga.att.com
Seeking Motion for Admission Pro Hac Vice

Kenneth W. Salinger, Esq.
Palmer & Dodge LLP
111 Huntington Avenue at Prudential Center
Boston, MA 02199-7613
(617) 239-0100
(617) 227-4420 (fax)
ksalinger@palmerdodge.com
Seeking Motion for Admission Pro Hac Vice

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September 2003, I served a true copy of the within Motion to Intervene of AT&T Communications of New England, Inc. by electronic mail and first class mail, postage prepaid, upon the parties identified in Docket 3550's Interim Service List.

William M. Dolan III