BEFORE THE MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In the Matter of Petition of Charter Fiberlink MA-CCO, LLC for Arbitration of an Amendment to the Interconnection Agreement Between Verizon-Massachusetts, Inc. and Charter Fiberlink MA-CCO, LLC Pursuant to Section 252 of the Communications Act of 1934, as Amended	D.T.E. No. 06-56

CHARTER FIBERLINK MA-CCO, LLC OPPOSITION TO
THE MOTION TO DISMISS OF VERIZON MASSACHUSETTS

Pursuant to the Hearing Officer's direction and 220 C.M.R. § 1.04(5)(c) Charter Fiberlink MA-CCO, LLC ("Charter") hereby files its opposition to Verizon Massachusetts' ("Verizon") Motion to Dismiss ("Motion"). Charter opposes the Motion and asks the Department to deny it because it is based upon erroneous assertions concerning the status of the parties' negotiations and is not supported by any legal authority.

I. INTRODUCTION

Verizon asks the Department to dismiss Charter's petition based upon Verizon's unsupported and demonstrably false claims that the parties had already resolved and "closed" the issues listed in Charter's petition. In its Motion, and in its Response to Charter's Petition for Arbitration, Verizon states that the Parties "reached agreement" on the issues identified in Charter's petition. *See* Verizon Motion to Dismiss at 5, and Verizon Response at 5-15. Based upon these false claims Verizon argues that Charter "reneged" on agreements reached during negotiations in order to create open issues.

Verizon also argues that Charter asks the Department to arbitrate issues that were never discussed.

The Department should deny Verizon's Motion because it rests upon allegations that are patently false and because the Motion is unsupported by any legal authority. Charter's specific responses to Verizon's arguments are set forth below in detail, but we take a moment to comment on the assumptions underlying Verizon's motion. Verizon seems to take the view that its "form" contract is deemed accepted in all respects unless the other party specifically and in writing opposes it. That is not what Section 251(c)(1)/252(a)(1) negotiations contemplate. It is quite common for some issues as to which there is no meeting of the minds to be set aside while more pressing issues are given attention. In such cases, the negotiation period may run out before they are addressed.

Similarly, it is quite common for some issues to be tentatively resolved, contingent on a complete accord being reached on all issues. Then if a complete accord is not reached, the issues are still open. So if Verizon has been operating under the assumption that an issue is not "open" simply because it has not been discussed recently or in detail, that assumption is simply not true to the realities of the negotiation process.[1]

Also, Verizon seems to confuse disputed ***issues*** with disputed contract ***language.*** An "issue" can be open even if one or both parties have not yet formulated specific language to embody their preferred position. For example, Charter and Verizon disagree about the "issue" of whether Charter can be required to have reached a traffic threshold before Verizon can be called on to establish a fiber meet point arrangement. The

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[1] Moreover, Section 252(b)(5) plainly contemplates that negotiations will continue even after an arbitration petition is filed. That cannot be squared with Verizon's view.

disagreement about that issue exists completely independently of whether Charter or Verizon has proposed specific language to the other embodying its position. And it is equally true that either party may alter or revise its proposed (and presumptively disputed) contract language relating to that disputed issue. Thus, where one party offers new contract language that does not mean that it raises a new "issue" in the negotiations.

As to the specific claims made by Verizon in its motion, Charter responds as follows.

II. VERIZON'S OWN STATEMENTS DEMONSTRATE THAT IT UNDERSTOOD THE ISSUES IDENTIFIED IN CHARTER'S PETITION TO BE "OPEN" AND UNRESOLVED ISSUES

First, Verizon's repeated assertions that Charter agreed to Verizon's proposed contract language are simply not true. Charter never finally agreed to Verizon's proposed contract language and the parties never finally resolved the issues identified in Charter's petition. Tellingly, Verizon offers ***no evidence*** that Charter did accept Verizon's proposed resolution of these issues (or its proposed contract language).

Surely if the Parties had agreed to resolve these issues, or had agreed to finalize disputed contract language, there would be some evidence of the alleged agreement. There would, presumably, be an e-mail, letter, or some other form of correspondence stating that one party or the other "accepts", "agrees to", "concedes to" or otherwise consents to the other Party's position or language. But Verizon offers no proof of any such agreement to support its Motion.

The reason that Verizon offers no such proof is, of course, that there never was an agreement or acceptance of the disputed issues identified in Charter's petition. Instead, the issues remained unresolved during the course of negotiations between the Parties.

Indeed, the issues remained unresolved all the way up to the time that the Department attempted to mediate unresolved issues on June 20, 2006 (just three days before Charter filed its request for arbitration). The fact that these issues remained unresolved is stated clearly in the e-mail correspondence attached as Exhibits 1 and 2 to Verizon's Response.

Notably, Verizon Exhibit 1 contains an e-mail from Charter's negotiator dated March 16, 2006 stating that the e-mail is transmitting Charter's "further ***proposed revisions***." *See* Verizon Exhibit 1 (5/16/06 e-mail from K. Halm to J. Pachulski) (emphasis added). This communication makes clear that as of March 16th there was no agreement on the unresolved issues because Charter was proposing further revisions to the draft contract.

The next substantive communication between the Parties came on April 14, 2006, when Verizon negotiator Jim Pachulski e-mailed Charter negotiator K.C. Halm to explain that Verizon "completed reviewing our [Verizon's] ***draft counterproposal***" and that the same was being sent to Verizon's legal department for review. *See* Verizon Exhibit 2 (4/14/06 e-mail from J. Pachulski to K. Halm) (emphasis added). Thus, as of April 14th there was no agreement on the unresolved issues because Verizon was proposing further revisions to the draft contract.

The next substantive communication between the Parties occurred approximately three weeks later on May 8, 2006, when Charter negotiator K.C. Halm e-mailed Verizon negotiator Jim Pachulski to inform Verizon that because the Parties had "made ***no progress***" (i.e. had not resolved the disputed issues) on the fiber meet negotiations Charter would be asking the Department to mediate the "***unresolved issues***." *See* Verizon Exhibit 2 (e-mail string between J. Pachulski and K. Halm) (emphasis added).

Verizon responded to that e-mail on the same day by sending Charter yet another "***revised draft***" of the fiber meet amendment. *See id.* Accordingly, as of May 8th there can be no doubt that there remained unresolved issues because Charter clearly stated so in its e-mail, and Verizon responded by offering a "revised draft" of the amendment. Clearly neither Party believed at that time that the issues were resolved.

Following this exchange, on May 8, 2006 Charter filed a request for mediation and asked the Department to mediate the "disputed issues" that had arisen in negotiations between Charter and Verizon. *See* Charter Mediation Request Letter at 1 and 2 (filed May 8, 2006) (attached hereto as Charter Exhibit 1) (Charter requests "mediation of disputed issues ..." and "Mediation is necessary here because the Parties cannot agree on several important questions.").

On May 22, 2006 Verizon filed a response to Charter's request for mediation. In its response Verizon informed the Department of several "principal issues ***in dispute***." *See* Verizon Response to Charter Mediation Request at 1 (filed May 22, 2006) (emphasis added). Moreover, Verizon discusses these issues in dispute under the heading of "Unresolved Issues." *See id.* at 3 (attached hereto as Charter Exhibit 2). Therefore, as of May 22nd Verizon clearly understood that unresolved issues remained pending between Charter and Verizon.

Following this filing, the next substantive communication between the Parties occurred on June 20, 2006, when a Department-designated mediator convened a mediation session to attempt to resolve the disputed issues raised by Charter (and affirmed by Verizon). Verizon's negotiator Jim Pachulski and in-house counsel Alex Moore both participated in the mediation session. During the mediation session Verizon

never claimed that the unresolved issues raised during mediation were closed, or that Charter had already agreed to those issues. Instead, Verizon offered repeated arguments in support of its proposed resolution to these unresolved issues. Nor did Verizon ever claim that Charter had "reneged" on its agreement by seeking to mediate those issues. In fact, Verizon's actions and statements during the mediation session demonstrate that Verizon understood the issues to be "open." Thus, at the time of the mediation session held on June 20, 2006, the Parties' own statements clearly demonstrate that there were open, unresolved issues pending in the draft fiber meet amendment.

Three days later, on June 23, 2006, Charter filed its petition for arbitration in this proceeding. There were no substantive communications between the Parties in those intervening three days, and Charter did not indicate in any way that it had agreed to Verizon's proposed resolution of these issues or proposed contract language. Given that the parties had no substantive communications between the mediation session and Charter's filing of the petition for arbitration, it is not clear how Verizon would come to the conclusion that such issues were somehow deemed "closed" during those three days.

It is certainly true, as Verizon's exhibits demonstrate, that Charter and Verizon exchanged proposed drafts with contract language that was similar in some respects. That alone, however, does not mean the parties finally resolved these issues, or that they agreed to "close" the issues during negotiations. During all of this time Charter considered, discussed, commented on, and offered revisions to Verizon's proposed

resolution and contract language. However, in the end, Charter did not agree or accept Verizon's proposals, either individually or in total.[2]

The fact that Charter considered Verizon's proposals (and even offered changes thereto) does not mean it finally agreed to Verizon's proposed language. Instead, it demonstrates that Charter was negotiating in good faith by trying to find some form of Verizon's proposal that Charter could accept. Contract negotiations of this kind are necessarily a give and take process. Charter repeatedly sought modifications to Verizon's proposals in an effort to find an acceptable version of the same.

However, when it became clear that Verizon would not move away from its demand that Charter pay for portions of Verizon's fiber meet point Charter decided that it could not accept the proposed language Verizon offered. At that point, Charter sought mediation of some of these issues and, when that proved unsuccessful, Charter petitioned the Department to arbitrate these unresolved issues. Throughout the time that this negotiation process continued Charter made clear to Verizon that it believed issues remained open. Verizon's own words and deeds —including its participation in the mediation process— indicate that it believed the same to be true.

Second, Verizon's claim that Charter identified issues that were never discussed during negotiations is simply not true. Several of the open issues in Charter's petition were discussed very early in the negotiations process, and others were discussed in concept later in the negotiations. As Verizon explained in its Response, those negotiations took place over a significant period of time and involved several negotiators on both sides. That may explain why Verizon seems to forget that the issues identified in

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[2] Indeed, if Charter had in fact accepted Verizon's proposals then the Department would have before it an executed amendment (rather than a petition for arbitration).

Charter's petition were discussed (even though those discussions may have occurred some time ago).

Moreover, during negotiations Charter made clear that it would consider individual issues, but reserved the right to agree or disagree on the entire draft amendment. This approach is quite common in negotiations of interconnection agreements, where both parties agree that no single issue is finally settled until the entire agreement is finally settled. Charter made that point to Verizon's negotiators on several occasions.

III. CHARTER'S PETITION COMPLIES WITH SECTION 252(B)(1)

Finally, Verizon offers no legal authority to support its claim that a State Commission should not arbitrate unresolved issues when one party mistakenly believes (or erroneously asserts) that the issues are in fact resolved. Verizon cites to 47 U.S.C. 252(b)(1) to suggest that a State Commission can only arbitrate "open" issues, and asserts that the issues in Charter's petition are not open because Verizon mistakenly believed that Charter had accepted Verizon's proposals.

Verizon's argument assumes what it is trying to prove. It stands only if one accepts Verizon's view of what issues are considered closed or resolved. As demonstrated above, Charter never finally accepted Verizon's proposed contract language, nor did the parties ever exchange a final draft. Therefore, the parties never resolved or closed the issues identified in Charter's petition, and those issues are in fact properly characterized as "open." For that reason Charter's actions are entirely consistent with Section 252(b)(1) and other provisions of law governing negotiations and arbitration of interconnection agreements.

IV. CONCLUSION

Accordingly, Charter requests that the Department deny Verizon's motion and continue this proceeding to arbitrate the open issues identified in Charter's petition.

Respectfully submitted,
Charter Fiberlink MA-CCO, LLC

By: _____

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Dated: July 26, 2006

CHARTER EXHIBIT 1

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May 8, 2006

VIA FEDERAL EXPRESS

Massachusetts Department of Telecommunications and Energy
Telecommunications Division
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Attn: Mr. Mike Isenberg

Re: Request for Mediation Pursuant to 47 U.S.C. § 252

Dear Mr. Isenberg:

Charter Fiberlink MA-CCO, LLC ("Charter") hereby requests mediation of disputed issues that have arisen in negotiations between Charter and Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon"). Charter makes this request pursuant to Section 252 of the Communications Act of 1934[1] ("Act") and asks the Department of Telecommunications and Energy ("DTE") to mediate the disputed issues that have arisen in negotiations between Charter and Verizon over the terms of an amendment to establish a fiber meet point interconnection arrangement in Massachusetts and other states in which Charter and Verizon interconnect.

I. Background

Charter and Verizon have been actively negotiating the terms of an amendment to their interconnection agreement since December of 2005.[2] The amendment at issue sets forth the terms and conditions of the establishment of a fiber meet point interconnection arrangement ("Fiber Meet") between Charter and Verizon ("the Parties"). A Fiber Meet point arrangement is a method of interconnection whereby two parties interconnect their network facilities via fiber optic equipment at a designated meet point. Once established, the Fiber Meet serves as the Parties' point of interconnection in each LATA.

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1 47 U.S.C. § 252.

2 Indeed, discussions between the two companies pre-dated that time but negotiations began in earnest on approximately December 14, 2005.

Negotiations to date have centered on a document proposed by Verizon as an amendment to the Parties' current interconnection agreement. Although the parties have agreed upon the majority of terms in Verizon's proposed amendment, there is one particular section that raises several disputed issues that remain unresolved. The section in question (Section 2.1) addresses the conditions under which Charter may request that Verizon enter into a Fiber Meet interconnection arrangement with Verizon.

To assist the DTE in its mediation efforts, and pursuant to 47 U.S.C. § 252(b), Charter sets forth below a summary of the disputed issues and each Party's current position with respect to those issues.[3] In addition, the Parties have been exchanging a draft document which the Parties have used to negotiate contract language. Charter will provide a copy of that document to the DTE, or if the DTE believes it will assist its mediation efforts Charter will prepare a matrix which reflects each party's proposed contract language on the issues described below.

Mediation is necessary here because the Parties cannot agree upon several important questions. Broadly speaking, those questions are whether Verizon can condition Charter's right to request a Fiber Meet arrangement and whether Charter should pay Verizon for Verizon's costs of building a Fiber Meet arrangement. Charter requests that the Commission mediate the disputed issues described herein, rule in favor of Charter with respect to such issues, and order the Parties to adopt Charter's proposed language.

II. The Parties

Charter is a Delaware Limited Liability Company, duly authorized to conduct business in Massachusetts, with its principal offices in St. Louis, Missouri at 12405 Powerscourt Drive, St. Louis, Missouri, 63131. Charter is authorized to provide competitive services within the State of Massachusetts pursuant to a CPCN issued on December 20, 2003.

Verizon is an incumbent provider of local exchange services in Massachusetts, operating as an incumbent local exchange carrier throughout the State. Verizon maintains offices within Massachusetts at the following address: 185 Franklin Street, 13th Floor, Boston, Massachusetts 02110-1585. Charter and Verizon are parties to an effective interconnection agreement in the State of Massachusetts, as filed with the DTE on April 4, 2004 and approved by the DTE on May 10, 2004.

Charter's representatives during negotiations and in this proceeding are Carrie L. Cox, and Paul Dunphy of Charter Communications, Inc., 12405 Powerscourt Drive, St. Louis, Missouri, 63131; and K.C. Halm of Cole, Raywid & Braverman, L.L.P. 1919 Pennsylvania Ave., N.W., Suite 200, Washington, D.C. 20006. Verizon's representatives during negotiations have been Steve Kanitra, Verizon Communications, Inc., 19845 US 31 North Westfield, IN 46074; and Jim Pachulski, TechNet Law Group. 1100 New York Ave., N.W., Suite 365 Washington, DC 20005.

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[3] The issues described below represent the major issues in dispute at this time. There may, in fact, be additional issues that arise as a result of continued negotiations and mediation between the Parties. Charter reserves the right to raise any additional issues during the pendancy of that process.

III. Jurisdiction and Applicable Legal Standard

The DTE has jurisdiction over Charter's request for mediation pursuant to Section 252 of the Act. Specifically, under 47 U.S.C. § 252(a)(2), any party negotiating an agreement may at any point in the negotiation ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

This mediation should be conducted under the standards established in 47 U.S.C. §§ 251 and 252, applicable rules and orders issued by the Federal Communications Commission ("FCC"), and applicable statutes, rules and orders of the DTE. Accordingly, the DTE should mediate the unresolved issues identified here (and any others identified by the Parties) and assist the Parties in establishing rates, terms, and conditions that meet the requirements of applicable federal and State law.

IV. Negotiations and Resolved Issues

Negotiations have continued for approximately four and a half months and have produced an apparent resolution of a significant number of issues in Verizon's proposed amendment. Specifically, the Parties have reached an agreement with respect to a number of provisions in the amendment including those governing: the use of spare capacity to implement Fiber Meet arrangements; physical limitations on the distance of such Fiber Meet arrangements from Verizon's Wire Centers; the types of traffic to be exchanged over a Fiber Meet arrangement; the inclusion of certain types of traffic in future forecasts; and, the definitions setting forth the meaning of certain terms used in the Amendment.

In addition, the parties have reached an apparent agreement on most of the technical specifications governing the use and deployment of these Fiber Meet arrangements including provisions governing the use of fiber network interface devices; transmission interfaces; power standards; multiplexing requirements; testing requirements; connecting facility assignments; slot assignment allocations and inventory, provisioning, maintenance, surveillance and restoration of the Fiber Meet arrangements.

V. Unresolved Issues and the Positions of the Parties

There are, broadly speaking, two major unresolved issues. The first concerns the circumstances by which Charter can request a Fiber Meet arrangement. The second concerns each Party's financial responsibilities for the cost of facilities on their respective side(s) of any future Fiber Meet arrangement.

With respect to the first unresolved issue, although the Parties' current interconnection agreement specifically provides that each Party will provide to the other "interconnection at ... a fiber meet point" Verizon has insisted that such an arrangement be established pursuant to an amendment to the Parties' agreement. Although Charter does not necessarily agree that an amendment is necessary to effectuate a Fiber Meet arrangement it has agreed to consider Verizon's proposed amendment in the interests of comity. However, as explained in greater

detail below, Verizon's amendment attempts to limit Charter's right to request a Fiber Meet arrangement to those circumstances where Charter is already exchanging a significant amount of traffic with Verizon. In the alternative, if Charter wishes to proceed to a Fiber Meet arrangement where no traffic is being exchanged Verizon expects Charter to provide Verizon a letter of credit (in an undisclosed amount) to cover *Verizon's costs* of building facilities on its side of the Fiber Meet arrangement. Charter objects to both of those limitations.

With respect to the second unresolved issue, Verizon has proposed that Charter pay for the installation and operation of Verizon's Fiber Meet arrangement facilities in a number of circumstances. Charter strenuously objects to this proposal as well. Summarized below are an explanation of each unresolved issue and a description of each Party's position on such issues.

A) Unresolved Issue 1: Can Verizon condition Charter's right to request a Fiber Meet arrangement to be used to interconnect and exchange traffic?

The issue here is whether Verizon can impose conditions on Charter's ability to request a Fiber Meet arrangement in a particular market.[4] Broadly speaking, Verizon proposes to condition Charter's right to establish a Fiber Meet arrangement upon certain criteria. Charter, in contrast, seeks the right to establish a Fiber Meet arrangement without such conditions and upon reasonable request.

Verizon's Position

Verizon takes the position that Charter may not establish a Fiber Meet arrangement unless certain conditions are first satisfied. Initially, Verizon proposed that Charter's right to establish a Fiber Meet arrangement be conditioned upon the existence of an aggregate amount of traffic between the two networks equivalent to that which is carried over a DS3 facility (i.e. a DS3's worth of traffic). In other words, Verizon would not agree to a new Fiber Meet arrangement unless Charter is already exchanging a DS3's worth of traffic with Verizon.

After Charter's strenuous objection to this limitation Verizon modified its proposal. Under its revised proposal Verizon would permit Charter to establish a Fiber Meet arrangement only if specific conditions, outlined below, are satisfied. Specifically, Verizon now proposes that Charter can request a Fiber Meet arrangement *only* if:

(1) Charter is already leasing special access facilities from Verizon in a particular market and exchanging traffic equal to seventy percent (70%) of a DS3's worth of traffic, and can demonstrate a traffic growth rate of eight percent (8%); or

(2) Charter enters a new market and seeks to lease special access facilities from Verizon for purposes of interconnection, but no such facilities are available; or

[4] For these purposes a market is equivalent to a LATA.

(3) Charter enters a new market and forecasts a DS3's worth of traffic within the next twelve (12) months, and Charter agrees to provide Verizon a letter of credit from which Verizon can draw from to cover Verizon's costs of building a Fiber Meet arrangement.

Charter's Position

Charter's position is that it should be able to establish a Fiber Meet arrangement with Verizon without having to first satisfy any of the conditions proposed by Verizon. Indeed, Charter believes it is entitled to obtain meet point interconnection under the current interconnection agreement with Verizon without *any* limitation as to capacity and timing. Nevertheless, Charter is willing to enter into an amendment with Verizon that establishes Charter's right to initiate a Fiber Meet arrangement under certain reasonable conditions. Specifically, Charter should be able to establish a Fiber Meet with Verizon upon entry into a new market if Charter forecasts that it expects to exchange a DS3 or more of traffic with Verizon over the next twelve (12) months in the affected market. Put more simply, Charter believes it is entitled to a Fiber Meet arrangement with Verizon in those markets where it expects to exchange a DS3's worth of traffic with Verizon within one year.

Charter's position is consistent with the terms of the parties' current interconnection agreement, and the material terms of agreements between Verizon and other similarly situated entities in Massachusetts. In contrast, there is *no* legal or contractual basis for Verizon's position that Charter's right to request a Fiber Meet arrangement should be limited in the manner that Verizon proposes. As such, Charter respectfully requests that the DTE mediate this disputed issue and order the Parties to establish an amendment that does not limit Charter's right to establish a Fiber Meet arrangement with Verizon.

B) Unresolved Issue 2: Should each party be responsible for the cost of network facilities and equipment on their respective side of the Fiber Meet arrangement?

The question here is whether each Party should be responsible for the cost of facilities on its respective side of the Fiber Meet arrangement. Verizon's position, generally, is that Charter should pay Verizon for certain network equipment on Verizon's side of the Fiber Meet arrangement if Charter requests a Fiber Meet arrangement at any time before the parties exchange a DS3's worth of traffic. Charter's position is that each party should always bear their own respective costs of network equipment necessary to establish a Fiber Meet arrangement. In other words, each party should be responsible for the cost of equipment on their own side of the Fiber Meet arrangement.

Verizon's Position

Verizon takes the position that Charter should compensate Verizon for the cost of certain network facilities deployed by Verizon to establish a Fiber Meet arrangement. Verizon proposes that Charter compensate Verizon for the cost of constructing a Fiber Meet arrangement if the Parties do not exchange an amount of traffic equivalent to a DS3. Specifically, Verizon proposes that Charter compensate Verizon for such costs by one of two methods:

(1) If Charter requests a Fiber Meet arrangement and the Parties have not exchanged any traffic then Charter must compensate Verizon by issuing a letter of credit, in an amount determined by Verizon, from which Verizon may draw to cover *Verizon's costs* of network equipment and facilities on *Verizon's side* of the Fiber Meet arrangement.

Or

(2) If Charter requests a Fiber Meet arrangement and the Parties are currently exchanging less than a DS3's worth of traffic then Charter must pay Verizon the equivalent of Verizon's tariff rates for multiplexing equipment, channel terminations, and "applicable" fiber mileage.[5] Charter must pay such charges until traffic between Verizon and Charter reaches an amount equivalent to a DS3 facility.

Charter's Position

Charter takes the position that each Party should be responsible for the cost of facilities on its side of the Fiber Meet arrangement. This principle of cost responsibility is consistent with, indeed required by, the Parties' current interconnection agreement and applicable law. The Fiber Meet arrangement will (upon completion) be designated as the Parties' single point of interconnection ("POI") within each LATA in Massachusetts. Under the relevant terms of the Parties' current interconnection agreement each party is responsible for the costs of the network facilities on its side of the POI. Therefore, once the Fiber Meet becomes the POI each Party should be responsible for the cost of network facilities on its side of the Fiber Meet.

Charter currently pays Verizon approximately $15,000 per month in network transport costs in Massachusetts due to the lack of a Fiber Meet arrangement. As such, Charter believes that Verizon has little incentive to reach agreement with Charter because these payments will be eliminated or significantly reduced once a Fiber Meet arrangement is in place. Accordingly, Charter requests that the DTE immediately initiate mediation of these and other disputed issues in the pending negotiations between Charter and Verizon over the terms of a Fiber Meet arrangement amendment.

Charter's counsel and representatives are ready to meet with the DTE's staff and Verizon representatives to resolve these issues. Please contact the undersigned counsel for Charter to arrange for such meetings. Thank you.

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[5] Verizon has not clearly specified what it deems to be "applicable" fiber mileage, and what portion of such fiber is subject to compensation. However, Charter assumes that Verizon will take the position that Verizon is entitled to make such determinations on an ad hoc basis.

Sincerely,

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CHARTER EXHIBIT 2

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May 22, 2006

Department of Telecommunications & Energy
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ATTN: Mr. Michael Isenberg

RE: Charter Request for Mediation Pursuant to 47 U.S.C. § 252

Dear Mr. Isenberg:

Verizon Massachusetts Inc. ("Verizon MA") hereby responds to the request of Charter Fiberlink MA-COO, LLC ("Charter") for mediation of disputed issues in negotiations for an amendment to the parties' interconnection agreement that would govern fiber meet arrangements in Massachusetts. Although the negotiations for a fiber meet amendment have involved other states in which the parties' affiliates have an interconnection agreement, Verizon's response to Charter's mediation request is limited to a fiber meet amendment for Massachusetts. Verizon objects to Charter's request that the Department mediate a fiber meet amendment for "other states in which Charter and Verizon interconnect."[1]

The principal issues in dispute concern the minimum traffic volume exchanged between the parties that would warrant the deployment of a fiber meet arrangement. The smallest fiber optic system that could be deployed in a fiber meet arrangement is an OC3 system, which could cost as much as $75,000. An OC3 fiber optic system has the capacity to handle approximately three (3) DS3's worth of traffic volume, or approximately 16,800,000 minutes of use per month. Consistent with sound engineering principles, Verizon MA would not deploy an OC3 in its own network unless it had at least one (1) DS3's worth of traffic volume. Verizon MA has therefore

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1 *See* Letter from KC Halm, attorney for Charter Fiberlink MA-COO, LLC, to Mr. Mike Isenberg, Massachusetts Department of Telecommunications and Energy, at 1 ("Charter Mediation Request").

proposed to Charter that the parties could deploy a fiber meet arrangement where they are already exchanging at least one DS3's worth of traffic.

Charter would like Verizon MA to deploy fiber meet arrangements even where the parties have not exchanged even a single minute of traffic. Although Verizon MA has no legal obligation to deploy a fiber meet arrangement in this situation, Verizon MA has proposed terms under which the parties could deploy a fiber meet arrangement prior to the parties exchanging a DS3's worth of traffic volume. Under these terms, if Charter's traffic volumes do not reach forecasted levels and Verizon MA's investment in fiber meet facilities is unused or underutilized, Charter would bear certain payment and financial assurance obligations. It is appropriate for Charter to bear these obligations because only Charter controls when and whether traffic volumes will reach a DS3 level. There is no reason why Verizon MA should bear the cost of unused or inefficiently utilized interconnection facilities.

Negotiation History.

Verizon has been negotiating fiber meet amendments with Charter since at least the middle of last year. In June 2005, Verizon provided to Charter's counsel, Leslie Genova, a draft fiber meet amendment for the state of South Carolina. Nearly six weeks later, Verizon received a voice message from Ms. Genova indicating that Charter would not sign a fiber meet amendment and that Charter intended to operate under the terms of its interconnection agreement.

In August 2005, Ms. Genova restarted negotiations for a fiber meet amendment with Verizon. She proposed language changes for Section 2.2 regarding distance limitations on new fiber construction. At that time, she did not raise any objections to the language in Section 2.1, including the DS3 traffic level threshold. In September 2005, Verizon provided a counterproposal to Charter that addressed Ms. Genova's proposed changes on the distance limitation.

In October 2005, Ms. Genova first proposed that Verizon agree to build a fiber meet arrangement based solely on Charter's forecast that traffic volumes would reach the DS3 level within 12 months. She also indicated that negotiations were for all states where the parties are interconnected and that Charter wanted to execute amendments quickly in Massachusetts and California.[2]

In November 2005, Ms. Carrie Cox replaced Ms. Genova as Charter's negotiator and the following month, Mr. Halm began assisting Ms. Cox in these negotiations. At their request,

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[2] Charter says that it "does not necessarily agree that an amendment is necessary to effectuate a Fiber Meet arrangement." Charter Mediation Request at 3. However, the parties interconnection agreement states that "the Parties may *agree* to establish a Fiber Meet arrangement" and that "[t]he establishment of any Fiber Meet arrangement is expressly conditioned upon the Parties' reaching *prior written agreement* on routing, appropriate sizing and forecasting, equipment, ordering, provisioning, maintenance, repair, testing, augment, and compensation, procedures and arrangements, reasonable distance limitations, and on any other arrangements necessary to implement the Fiber Meet arrangement." Interconnection Agreement between Charter and Verizon, Interconnection Attachment, Section 3.1, 3.2 (emphasis supplied).

Verizon provided, in December 2005, a counterproposal that would allow Charter to request a fiber meet arrangement based on Charter's good faith forecast showing at least one (1) DS3's worth of traffic volume within 12 months. Under Verizon's counterproposal, Charter would provide an assurance of payment to cover Verizon's cost of the fiber meet arrangement in the event traffic volumes did not reach the DS3 level within 12 months.

For the next several months, Verizon and Charter held conference calls and exchanged drafts of the fiber meet amendment. During these negotiations, Verizon (in response to Charter's request) revised its draft amendment to expand the circumstances under which the parties could establish a fiber meet arrangement before the traffic volumes exchanged between the parties have reached the DS3 level. Verizon understands that Charter has agreed to the other provisions of Verizon's most recent draft amendment.

Unresolved Issues.

The principal unresolved issues concern the minimum traffic volumes exchanged between the parties that would warrant the investment and expense of a fiber meet arrangement. As previously explained, the smallest fiber optic system that could be deployed in a fiber meet arrangement is an OC3 system. In order to deploy an OC3 fiber optic system in a fiber meet arrangement with Charter, Verizon MA must purchase OC3 equipment and install that equipment in one of its central offices. Verizon MA must then connect that equipment to spare fiber facilities that extend to or near the agreed-upon fiber meet point(s). Verizon MA then needs to purchase a fiber network interface device ("FNID") and install it at one of the meet points. If Verizon MA's spare fiber already extends to the meet point(s), Verizon MA will connect it to Verizon MA's side of the FNID(s). If Verizon MA's spare fiber does not extend to the meet point(s), Verizon MA will need to run additional fiber to connect its existing spare fiber facilities to the FNID(s). The cost of deploying an OC3 fiber meet in such a fiber meet arrangement could run as much as $75,000.

An OC3 fiber optic system has the capacity to handle approximately three (3) DS3's worth of traffic volume, or approximately 16,800,000 minutes of use per month. From a network engineering perspective, it is not efficient to use an OC3 fiber optic system for less than a DS3's worth of traffic volume (*i.e.*, one-third of the capacity of the OC3 system). In Verizon MA's own network planning, Verizon MA does not consider deploying an OC3 system until it has at least one (1) DS3's worth of traffic volume.

It would not be an efficient use of network resources to deploy an OC3 fiber optic system in a fiber meet arrangement where the traffic volumes are below a DS3 level. Therefore, consistent with sound network engineering principles and Verizon MA's own network planning, Verizon MA has proposed to Charter that the parties could deploy a fiber meet arrangement where they are already exchanging at least one (1) DS3's worth of traffic. In this situation, neither party would charge the other party for use of the fiber meet arrangement to exchange local traffic. The only charge that would be applied to the exchange of local traffic would be reciprocal compensation.

Charter does not want to be bound by sound network engineering principles in the deployment of fiber optic systems in fiber meet arrangements. Rather, Charter wants the ability to require Verizon MA to incur the cost of deploying fiber optic systems for fiber meet arrangements even where the parties have not exchanged even a single minute of traffic. And Charter wants Verizon MA to bear the cost of deploying an OC3 fiber optic system even if the parties ultimately exchange no traffic or only a trickle of traffic over that system.

It is Charter, not Verizon MA, that controls traffic volumes. If Verizon MA and Charter were to deploy an OC3 system for a fiber meet arrangement, Charter would be in complete control of the traffic volumes exchanged over that arrangement. The timing and success of Charter's efforts to market telephony services will determine the traffic volumes exchanged over the fiber meet arrangement. If Charter's marketing efforts are delayed or are not successful, there might be no traffic exchanged over the fiber meet arrangement or the traffic volumes might be only a fraction of a DS3 level. In this situation, an OC3 fiber optic system would be an inefficient method of exchanging traffic. It would be like using a fire hose to water house plants.

If Verizon MA were to deploy a fiber optic system in a fiber meet arrangement with Charter, those facilities would be dedicated to Charter's traffic. Verizon MA could not use those facilities to serve another customer or carrier. If Charter did not rapidly and successfully market its telephony services, there would be little or no traffic carried over those facilities. In this situation, traffic volumes would not produce sufficient reciprocal compensation revenues to warrant the cost of the fiber meet facilities. Nor would those facilities be used to complete calls from Verizon MA's customers to Charter's customers if Charter has no customers.

Although Verizon MA has no legal obligation to deploy an OC3 fiber optic system in a fiber meet arrangement where the parties are not already exchanging at least a DS3's worth of traffic volume, Verizon MA has proposed terms under which the parties could do so prior to exchanging that volume of traffic. Under these terms, Charter would bear certain payment and financial assurance obligations if the traffic volumes do not reach the DS3 level within a reasonable period of time. There is no reason why Verizon MA should bear the cost of unused or inefficiently utilized OC3 network interconnection facilities.

Verizon MA has proposed three scenarios under which the parties could deploy an OC3 fiber optic system in a fiber meet arrangement before traffic volumes have reached a DS3 level:

1. Where the parties are already exchanging at least 70 percent of a DS3's worth of traffic, the traffic volumes have grown at least 8 percent over the last three months, and Charter has provided a good faith forecast showing a DS3's worth of traffic within 12 months, Verizon MA would be willing to deploy a fiber meet system subject to certain payment obligations. Under Verizon MA's proposal, if the traffic volumes reach a DS3 level within a month after the fiber meet arrangement is turned up, neither party would charge the other party for use of the fiber meet arrangement to exchange local traffic. The only charge that would be applied to the exchange of local traffic would be reciprocal compensation. However, for any month in which the traffic volumes do not reach a DS3 level, Verizon MA could charge Charter its tariffed rate for a DS3 channel termination, multiplexing and associated transport mileage, in addition to

reciprocal compensation. This charge would serve as partial compensation for the inefficient utilization of Verizon MA's fiber optic facilities and equipment.

2. Where Charter has provided a good faith forecast showing a DS3's worth of traffic and ordered special access facilities for interconnection, but Verizon MA does not already have such facilities available, Verizon MA would be willing to deploy a fiber meet system subject to certain payment obligations. In this situation, interconnection facilities must be deployed in order for the parties to exchange traffic because there are no such facilities available. Under Verizon MA's proposal, if the traffic volumes reach a DS3 level within twelve (12) months after the fiber meet arrangement is turned up, neither party would charge the other party for use of the fiber meet arrangement to exchange local traffic. The only charge that would be applied to the exchange of local traffic would be reciprocal compensation. However, if the traffic volumes do not reach a DS3 level within a year after deploying the fiber meet arrangement, Verizon MA could charge Charter its tariffed monthly rate for a DS3 channel termination, multiplexing and associated transport mileage, in addition to reciprocal compensation. This charge would serve as partial compensation for the inefficient utilization of Verizon MA's fiber optic facilities and equipment.

3. Where Charter has provided a good faith forecast showing a DS3's worth of traffic and Verizon MA already has such facilities available, Verizon MA would be willing to deploy a fiber meet system only if Charter provided financial assurance in the form of a letter of credit or cash deposit. In this situation, there are existing interconnection facilities that could be used until traffic volumes reach a DS3 level. Under Verizon MA's proposal, if the traffic volumes reach a DS3 level as forecasted by Charter, neither party would charge the other party for use of the fiber meet arrangement to exchange local traffic. The only charge that would be applied to the exchange of local traffic would be reciprocal compensation. However, if the traffic volumes do not reach a DS3 level within twelve (12) months after deploying the fiber meet arrangement, Verizon MA could recover from Charter's financial assurance Verizon MA's expenses and investment in the fiber meet arrangement in addition to reciprocal compensation.

Verizon MA's proposals are fully consistent with the FCC's rules on interconnection. As a preliminary matter, the FCC's rules call for interconnection to occur "[a]t any technically feasible point within the incumbent LEC's network . . . ." 47 C.F.R. § 51.305. Verizon MA satisfies this requirement by making collocation arrangements and interconnection facilities and services available under the parties' interconnection agreement and Verizon MA's tariffs. These alternatives are available without minimum traffic volumes. In fact, Charter is currently using these arrangements to exchange traffic with Verizon MA.

The FCC has also indicated that incumbent local exchange carriers need only make a "reasonable accommodation of interconnection" for a meet point arrangement. In the *Local Competition Order*, the FCC said that "[i]n a meet point arrangement, the 'point' of interconnection for purposes of sections 251(c)(2) and 251(c)(3) remains on 'the local exchange carrier's network' . . . and the limited build-out of facilities from that point may then constitute

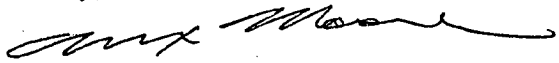
an accommodation of interconnection."[3] In this context, the FCC indicated that "the parties and state commissions are in a better position than the Commission to determine the appropriate distance that would constitute the required reasonable accommodation of interconnection." *Id.*

Here, Verizon MA's proposal to deploy an OC3 fiber optic system in a fiber meet arrangement where the parties are exchanging a DS3's worth of traffic is a "reasonable accommodation of interconnection" because it is consistent with sound network engineering principles and Verizon MA's own network planning practices. Verizon MA is not required to incur the cost of deploying an OC3 fiber optic system where the traffic volumes exchanged between the parties do not warrant the use of such a system.

In addition, Verizon MA's proposal to impose certain payment and financial assurance obligations on Charter where no or little traffic is exchanged between the parties is likewise a "reasonable accommodation of interconnection." Only Charter has control of the traffic volumes exchanged by the parties. It is therefore appropriate for Charter to bear at least some of the cost of choosing an expensive form of interconnection that is not justified by the traffic volumes generated by Charter.

Verizon MA is ready to meet with the Department and Charter to attempt in good faith to resolve these issues. Please contact me if the Department wishes to conduct such a meeting or would like other information on the issues raised by Charter's request.

Sincerely,



Alexander W. Moore

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Carrie Cox, Esquire, Charter Fiberlink, LLC
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[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 ¶553 (1996) (*Local Competition Order*) (subsequent history omitted).

CERTIFICATE OF SERVICE

I, Debra Sloan, hereby certify that on July 26, 2006, I served a true and correct copy of the foregoing *Charter Fiberlink MA-CCO, LLC Opposition to the Motion to Dismiss of Verizon Massachusetts* via Federal Express and electronic copy upon the following:

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