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December 10, 2008

Sharon E. Gillett, Commissioner  
Competition Division  
Massachusetts Department of Telecommunications and Cable  
Two South Station  
Boston, Massachusetts 02110

***Re: Response to Department Staff's Letter of November 14, 2008***

Dear Commissioner Gillett:

On behalf of Comcast Phone of Massachusetts, Inc. ("Comcast Phone") and Comcast IP Phone II, LLC ("Comcast IP Phone"), I am writing in response to the letter of November 14, 2008 from Michael A. Isenberg to Stacey L. Parker (the "November 14 Letter").<sup>1</sup> That letter concludes "Comcast IP Phone's Digital Voice service is subject to the Department's jurisdiction under Chapter 159, and shall be regulated equivalently to Comcast's former Digital Phone service . . . ."<sup>2</sup>

Comcast appreciates that the Department of Telecommunications and Cable (the "Department") has taken the time to meet with Ms. Parker and Mark Reilly on December 5, 2008 to discuss this matter further. However, despite the useful discussion, Comcast continues to be concerned about this unexpected effort to exercise jurisdiction over Comcast Digital Voice. The Department staff reached its conclusion via letter correspondence and without the benefit of a docket and evidentiary record. VoIP classification is a complex area of national significance that is currently subject to Federal Communications Commission (FCC) proceedings that may preempt the field altogether. A decision of this complexity and magnitude should not be made without a fully developed factual record, thorough presentation of the legal issues, and careful consideration of the views of all stakeholders.

The November 14 Letter recognizes that it has industry-wide implications for "important consumer protections" and for "maintenance of a level playing field for telecommunications competition in the Commonwealth," and foresees "the day when all fixed telephone service in Massachusetts, including that provided by the major incumbent provider, Verizon, will be delivered using VoIP technology." By its own terms, therefore, the November 14 Letter involves wide ranging issues such as the jurisdiction of state and federal regulators over VoIP services, the scope of regulation over potentially

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<sup>1</sup> Letter from Michael A Isenberg, Director, Competition Division, Massachusetts Department of Telecommunications and Cable to Stacey L. Parker, Senior Director, Regulatory Affairs, Comcast at 4 (Nov. 14, 2008) ("November 14 Letter").

<sup>2</sup> *Id.* at 3, 4.

dominant fixed VoIP services, the relationship between cable companies and their wholesale CLEC partners, and the rights and obligations of these companies that the Department has properly represented to the FCC as “complex, inter-related industry-wide issues ... which have wide-ranging ramifications for the industry, state and federal regulators, and which are better addressed through the rulemaking process.”<sup>3</sup> Comcast agrees such issues are better addressed through a comprehensive rulemaking process. In contrast, the conclusion in the November 14 Letter was reached entirely on the basis of an exchange of letters regarding the discontinuance of retail phone service by Comcast Phone without notice of the full regulatory impact or full airing of the issues with Comcast, much less “due consideration of the full range of perspectives of the many stakeholders affected by this complex issue.”<sup>4</sup> Few state commissions have taken any steps toward broad regulation of VoIP services, and none have acted without a more deliberative process.

The broad conclusion in the November 14 Letter that Comcast IP Phone’s VoIP service is subject to the Department’s jurisdiction conflicts with current and prospective FCC policy and therefore invites prolonged dispute. The Department is aware that a proposal for explicit preemption of all state regulation of VoIP services is pending before the FCC.<sup>5</sup> As a participant in that proceeding, the Department argued that the FCC should revise the definition of “information services” so that interconnected VoIP services are considered “telecommunications services.”<sup>6</sup>

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<sup>3</sup> *Petition of AT&T Inc. for Declaratory Ruling and Limited Waivers*, WC Docket No. 08-0152, Letter from Sharon E. Gillett, Commissioner, Massachusetts Department of Telecommunications and Cable to Marlene H. Dortch, Secretary, Federal Communications Commission at 4 (Aug. 21, 2008). Similarly, the Commissioner of the DTC joined with other NECPUC commissioners in submitting to the FCC that it should not act on intercarrier compensation reform without a “transparent deliberative approach that includes a collaborative industry approach.” *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122; *IP-Enabled Services*, WC Docket No. 04-36; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ex Parte Comments of New England Conference of Public Utilities Commissioners at 10 (Oct. 17, 2008).

<sup>4</sup> *Id.* at 2.

<sup>5</sup> The DTC recently filed its latest comments opposing proposed language to “classify as ‘information services’ those services that originate calls on IP networks and terminate them on circuit-switched networks, or conversely that originate calls on circuit-switched networks and terminate them on IP networks (collectively “IP/PSTN” services)” and to “preempt any state efforts to impose ‘traditional ‘telephone company’ regulations’ as they relate to IP/PSTN information services ....” *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link Up*, WC Docket No. 03-109; *Universal Service Contribution Methodology*, WC Docket No. 06-122; *Numbering Resource Optimization*, CC Docket No. 99-200; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68; *IP-Enabled Services*, WC Docket No. 04-36, Order On Remand And Report And Order And Further Notice Of Proposed Rulemaking, Appendix A, Chairman’s Draft Proposal at ¶¶ 209-211 pp. A-92-93 & Appendix C, Draft Alternative Proposal at ¶¶ 204-206 pp. C-92-93 (Nov. 5, 2008) (“*FCC Intercarrier Compensation/ Universal Services/ IP-Enabled Services Further Notice*”). Reply comments are due on December 22, 2008. It is possible the FCC will rule on this proposal at its January 2009 meeting.

<sup>6</sup> *Id.*, Comments of the Massachusetts Department of Telecommunications and Cable at 13-15 (filed Nov. 26, 2008).

However, despite the current FCC consideration of this significant issue, the November 14 Letter asserts that the DTC has authority to regulate VoIP services as telecommunications services.<sup>7</sup> This conclusion is without foundation in the absence of a factual record or full presentation of the legal issues.

Rather, Comcast IP Phone's interconnected VoIP service is an information service subject to FCC jurisdiction as recognized in long-established FCC<sup>8</sup> and judicial precedent<sup>9</sup> under which services that include a net protocol conversion are classified as information services. Calls between the Comcast IP Phone VoIP service and the public switched telephone network (PSTN) undergo a net protocol conversion: calls are originated or terminated on the Comcast IP Phone VoIP service using Internet protocol and must be converted to or from the time division multiplexing (TDM) protocol used by the PSTN before the call can be handed off to or received from the PSTN. Comcast IP Phone's interconnected VoIP service also includes a tightly integrated offering that combines transmission of voice communications with IP-enabled capabilities through a web-based "Digital Voice Center" that offers "capabilit[ies] for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information."<sup>10</sup> Based on this precedent, Comcast saw no significant uncertainty that would cause it to seek a ruling from the Department.

Comcast Phone is sensitive to the public policy objectives for regulation of VoIP expressed in the November 14 Letter. Comcast understands and shares the Department's desire to preserve important consumer protections. Accordingly, Comcast delineated in its May 12 Letter a two-page list of consumer protections promulgated by the Department that Comcast IP Phone will continue to voluntarily apply in its VoIP offerings.<sup>11</sup> These protections address the concerns enumerated in the November 14 Letter.

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<sup>7</sup> November 14 Letter at 2-3.

<sup>8</sup> See *FCC Intercarrier Compensation/Universal Services/IP-Enabled Services Docket*, Appendix A, Chairman's Draft Proposal at ¶ 209 pp. A-93 & Appendix C, Draft Alternative Proposal at ¶¶ 204 p. C-92; *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, ¶¶ 11-14 (2004); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 15 (2005); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶¶ 104-106 (1996) ("*Non-Accounting Safeguards Order*"); *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 39 (1998) ("[W]hen an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' it does not offer telecommunications. Rather, it offers an 'information service' even though it uses telecommunications to do so.").

<sup>9</sup> *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *SW. Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, \*75 (E.D. Mo. 2006); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 994, 999 (D. Minn. 2003), *aff'd* 2004 U.S. App. LEXIS 26748 (8th Cir. 2004).

<sup>10</sup> *Cf.* 47 U.S.C. § 153(20) (defining "information services").

<sup>11</sup> Letter from Stacey L. Parker, Senior Director, Regulatory Affairs, Comcast to Michael A. Isenberg, Director, Competition Division, Massachusetts Department of Telecommunications and Cable at 3-4 (May 12, 2008)

For the reasons discussed above, Comcast respectfully submits that the Department staff's assertion in the November 14 Letter that Comcast IP Phone's VoIP service must be regulated as intrastate telecommunications service results from a lack of factual evidence and the appropriate application of law to such evidence. If the Department wishes to undertake a determination of the regulatory classification of VoIP services, it should commence a proceeding that provides all stakeholders the opportunity to develop a record and be heard. Absent such proper notice and opportunity to be heard on this complex issue of broad significance, Comcast respectfully submits that the Department staff is without authority to assert that Comcast IP Phone must submit a tariff and registration statement. In any event, given the potential for FCC action that may render the issues raised in the November 14 Letter moot, no further action is called for until the FCC has the opportunity over the next 60 days to act on its pending rulemaking on VoIP services.

Respectfully Submitted,



Brian A. Rankin  
Vice President, Deputy General Counsel  
Chief Telephony Counsel

cc: Mark Reilly (Comcast)  
Stacey L. Parker (Comcast)