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MEMORANDUM

TO: Massachusetts Telecommunications Carriers and Interested Persons

FROM: Michael Isenberg, Director, Telecommunications Division
Jesse S. Reyes, Counsel

DATE: August 12, 2003

SUBJECT: Clarification of Wholesale Tariffing Requirements

CC: DTE Telecommunications Division General Distribution List
Paul G. Afonso, General Counsel
April Mulqueen, Assistant Director, Telecommunications Division

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I. INTRODUCTION

On July 1, 2003, the Telecommunications Division of the Department of Telecommunications and Energy ("Department") requested comments from registered telecommunications carriers and other interested persons about a tentative policy statement that G.L. c. 159, §§ 19 and 20 and precedent regarding common carriage "require that all common carriers, including so-called 'carrier's carriers,' tariff their wholesale services subject to Department jurisdiction." Notice of Proposed Change in Wholesale Tariffing Requirements and Solicitation of Comments (July 1, 2003) ("Notice"). The Notice further indicated that the policy would apply only to "intrastate wholesale services that are being provided on a common carrier basis, not to wholesale services that a carrier offers where it makes 'individualized decisions in particular cases whether and on what terms to serve.' " Id. (quoting National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608-09 (D.C. Cir. 1976) ("NARUC II")).

The Department received comments from AT&T Communications of New England, Inc. ("AT&T"), Level 3 Communications, LLC ("Level 3"), WorldCom, Inc. ("MCI"), and Verizon Massachusetts ("Verizon MA"). The Department received reply comments from Verizon MA. In response to the comments, the Department clarifies its policy regarding wholesale common carrier tariffing requirements as set forth in this memorandum.

II. POSITIONS OF THE COMMENTERS

A. AT&T

AT&T argues that the Department's current policy of not requiring nondominant carriers to tariff wholesale services is consistent with G.L. c. 159, §§ 19 and 20 (AT&T Comments at 1). AT&T argues that at the time that G.L. c. 159, §§ 19 and 20 were adopted, the retail versus wholesale distinction was not germane, because the regulatory, competitive, and technical environment differed significantly from the environment today (id.). AT&T also argues that the notion of "common carriage" obligations arose out of service to the public, which AT&T claims has always meant "retail service" (id.). Moreover, AT&T argues that G.L. c. 159 was intended to protect the public from monopoly abuses by dominant carriers, and therefore, the justification for the statute does not apply to nondominant carrier wholesale services (id.). While AT&T maintains that nothing in G.L. c. 159 requires nondominant wholesale carriers to file a tariff in order to offer such services, AT&T states that it takes no position as to whether the Department has the authority to require it (id. at 2).

AT&T suggests that the Department should consider the following issues before implementing the policy set forth in the Notice:

1. How the Department would define "common carrier" for purposes of any such new tariff obligation;

2. How the Department would define "intrastate" for purposes of any such new tariff obligation; and

3. The extent to which, and under what circumstances, would services offered under individual or special contracts, be exempt from any such new tariff obligation.

(AT&T Comments at 2).

B. Level 3

Level 3 urges the Department to "forbear from creating new and unnecessary administrative burdens for wholesale carriers in Massachusetts" (Level 3 Comments at 1). Level 3 argues that a wholesale tariff filing requirement would increase the costs of providing wholesale telecommunications service in Massachusetts, with little corresponding benefit to the public (id.). Level 3 maintains that imposing the filing requirement would contravene the Department's goal of ensuring the most reliable telecommunications resources at the lowest possible cost (id. at 2).

Level 3 also argues that wholesale telecommunications services offered by nondominant carriers, such as Level 3, are already compelled by competitive pressures, rather than by regulatory oversight, to provide high quality, reliable service at reasonable prices in order to attract customers (id.) Level 3 notes that although G.L. c. 159, § 19 requires "[e]very common carrier" to file tariffs, "the Department has a long standing policy of streamlined regulatory treatment of common carriers when competitive forces are in play" (id. (citing AT&T Communications of New England, Inc., D.P.U. 95-131 (1996) (reclassifying AT&T as a nondominant carrier); Entry Regulation, D.P.U. 93-98 (1994); Intra-LATA Competition, D.P.U. 1731 (1985))). Level 3 notes that in considering the dominant/nondominant regulatory framework in D.P.U. 1731, the Department stated that

> as competitive forces begin to take hold in a market, the Department should begin to reduce the degree of regulation in the market, so that the benefits of competition may be enjoyed by the public. Such a reduction of regulation is consistent with our goal of economic efficiency, since we have found that competitive markets provide economic incentives without traditional regulatory review.

(Level 3 Comments at 3 (citing D.P.U. 1731, at 55)).

Level 3 suggests that should the Department decide to adopt a wholesale tariffing requirement, the filing requirement should meet only minimum statutory standards (Level 3 Comments at 3). Further, Level 3 suggests that the Department's historical adoption of a dominant/nondominant regulatory framework and policy objective of economic efficiency should be applied to the review of wholesale tariffs (id.). Specifically, Level 3 proposes that the review of wholesale tariffs could be "perfunctory" and tariff revisions could be executed without a hearing (id.).

C. MCI

MCI argues that proper "administrative rulemaking" requires the Department to provide adequate justification for changes in policy (MCI Comments at 1). MCI argues that the Notice does not provide any legal analysis to support the conclusion that the Department's policy of not requiring nondominant carriers to file tariffs is contrary to law (id.). Further, MCI adds that no court has ruled that the current policy is unlawful and that MCI is unaware of any complaints to the Department about the lawfulness of the policy (id.).

Moreover, MCI argues that continuing the current policy would be consistent with the "evolution of competitive telecommunications markets in the Commonwealth" (id.). MCI maintains that there would be no public benefit to imposing "new requirements" on lightly regulated carriers and that the additional regulatory costs are unnecessary (id.). Further, MCI states that the wholesale interexchange market is highly competitive and that "wholesale purchasers of interexchange services do not need the protection of the Department to ensure that they secure the most competitive rates, terms, and conditions from suppliers of wholesale service" (id.). Finally, MCI notes that wholesale services are not tariffed at the federal level for interstate interexchange services (id.).

D. Verizon MA

Verizon MA states that it concurs with the Department's proposed policy. (Verizon MA Comments at 1). Verizon MA argues that the Department has consistently held that both dominant and nondominant common carriers must file tariffs for intrastate telecommunications services (id. (citing D.P.U. 95-131, at 9; D.P.U. 93-98, at 12; D.P.U. 1731, at 62-64)). Verizon MA notes that the Department has never issued an order exempting nondominant carriers from tariffing their retail or wholesale common carrier services (Verizon MA Reply Comments at 1). Rather, Verizon MA states that the Department's current practice is the result of informal opinions issued by Department staff advising carriers that, based on the facts presented to staff, the services offered were not common carriage, but rather were provided on a private carriage basis, and therefore need not be tariffed (id. (citing NET Tariff Revisions, D.P.U. 86-124-D, at 12-16 (1986); D.P.U. 1731, at 86)). Verizon MA therefore argues that the proposed policy statement is not new (Verizon MA Comments at 2; Verizon MA Reply Comments at 2).

Verizon MA states that since the Department issued D.P.U. 1731, "the Department has distinguished between common carrier services and telecommunications offered for private use and has required common carrier services to be tariffed, regardless of whether they are retail or wholesale telecommunications services" (Verizon MA Comments at 2). Verizon MA states that it, as well as a number of other carriers, currently file tariffs for wholesale services provided to other carriers (id.). Verizon MA adds that the FCC not only distinguishes between

retail and wholesale services, but also applies a different regulatory treatment for the different types of services (id. (citing Virgin Islands Telephone Corp. v. FCC, 198 F.3d 921, 929-30 (D.C. Cir. 1999); National Ass'n of Regulatory Util. Comm'rs. v. FCC, 525 F.2d 630 (D.C. Cir. 1976)("NARUC I"))).

Verizon MA acknowledges that the Department historically has treated dominant and nondominant carriers differently in the required showing that they must make to support a tariff filing and in the level of Department review of those tariffs, but argues that the Department has not issued an order relieving carriers of the tariff filing requirement (Verizon MA Reply Comments at 2). Verizon MA notes that in AT&T Communications of New England, Inc., D.P.U. 90-24 (1990), the Department upheld customer-specific pricing in response to competitive situations for all carriers, whether dominant or nondominant, and although the standard of review of such tariffs would differ based on their dominant or nondominant status, the Department required all common carriers to file such tariffs (Verizon MA Reply Comments at 2).

Finally, Verizon MA agrees with MCI and Level 3 that there is extensive competition in the telecommunications market in Massachusetts and suggests that this may warrant a re-examination of the manner in which the tariffing requirement is applied for all carriers (id. at 2). Verizon MA argues, however, that MCI and Level 3 have not provided grounds for the Department to change its precedent requiring all carriers to file tariffs for common carrier services (id.).

III. ANALYSIS

A. Common Carrier

The Department has regulatory authority over telecommunications services pursuant to G.L. c. 159, § 12. This statute provides that the Department has the power of "general supervision and regulation of, and jurisdiction and control" over the "transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication . . . ." G.L. c. 159, § 12(d). This jurisdiction extends to services "when furnished or rendered for public use within the commonwealth" by "common carriers." G.L. c. 159, § 12.[1] Further, G.L. c. 159, § 19 provides that "[e]very common carrier shall file with the department [tariffs] . . . for any service, of every kind rendered or furnished, or to be rendered or furnished, by it within the commonwealth . . . in such form and with such detail as the department may order . . . ." The

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[1] The Department has jurisdiction over such intrastate telecommunications services, i.e., furnished within the commonwealth, to the extent not preempted by federal law.

Department may upon complaint or upon its own motion make an investigation into the propriety of filed tariff changes. G.L. c. 159, § 20. The statutes do not explicitly define the terms "common carrier" or "public use."

AT&T is correct that when G.L. c. 159, §§ 19 and 20 were enacted, there was no applicable wholesale versus retail distinction. As Verizon MA points out, however, the Department also has never issued an order distinguishing between wholesale and retail telecommunications services with respect to the obligation to file tariffs.[2] The Department is not convinced that service to the public necessarily means "retail" service, as AT&T suggests, or that common carriage should be limited to dominant carriers where the plain language of the tariffing statute requires "every" common carrier to file tariffs. G.L. c. 159, § 19.

In searching for a clearer statement of what common carriage is and what service to the public means, the Department believes that the common carrier test applied in the NARUC I line of cases provides a rational analysis that is consistent with Massachusetts common law[3] and with the Department's enabling statute, G.L. c. 159, § 12. Under this test derived from common law, common carrier status turns on "(1) whether the carrier holds himself out to service indifferently all potential users; and (2) whether the carrier allows customers to transmit intelligence of their own design and choosing." U.S. Telecom Ass'n v. FCC, 295 F.3d 1326, 1329 (D.C. Cir. 2002)(quotations omitted); cf. Iowa v. FCC, 218 F.3d 756, 759 (D.C. Cir. 2000) (quoting NARUC I, 525 F.2d 630, 642 ("The key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use")).

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[2] The Department's current practice of not requiring certain carriers to file wholesale tariffs arose out of informal opinions by staff, not out of any Department order. It is because this has resulted in some carriers, both dominant and nondominant, having been required to file wholesale tariffs, while others have not, that the Department seeks to clarify tariffing obligations today.

[3] While there are no Massachusetts court cases on point specific to telecommunications, for an analogous analysis regarding common carriage of goods or persons, see First Nat'l. Stores v. H.P. Welch Co., 316 Mass. 147, 149 (1944) ("A common carrier is one who holds himself out to the public as one willing to furnish his facilities for the transportation of goods or persons indiscriminately to all who apply to him for the rendition of such services, up to the extent of his facilities, upon the payment of reasonable compensation, . . . while a private carrier is one who holds himself out as ready to furnish transportation for hire only to those with whom he chooses to deal in accordance with such contracts as he makes with them.")(citations omitted).

In offering service indiscriminately to the "public," a common carrier need not serve the "entire public." NARUC I, 525 F.2d at 641; NARUC II, 533 F.2d at 608-09. "[A] specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users." NARUC II, 533 F.2d at 608-09; see also NARUC I, 525 F.2d at 641. A carrier is not a common carrier "where its practice is to make individualized decisions, in particular cases, whether and on what terms to serve." NARUC I, 525 F.2d at 641; NARUC II, 533 F.2d at 609.

The core of this analysis is not whether services are being offered directly to end-users, but whether the carrier has taken on a quasi-public character by undertaking to transmit intelligence for all applicants indiscriminately. See NARUC I, 525 F.2d at 641. Therefore, a wholesale telecommunications carrier may take on a quasi-public character by offering services indiscriminately to all other carriers who may make use of the carrier's services, without offering those services to all end-users, to whom the wholesale carrier's services may not be legally or practically of use.

B. Economic Arguments Against Regulation

Most of the commenters have remarked that wholesale carriers are subject to significant market competition such that the Department should either "forbear" from tariff regulation or minimize the level of regulation. The Department has long recognized the competitive markets rationale that the level of regulation should be reduced as competitive forces take hold in a market, because competition can provide more efficient economic incentives without regulatory review. See D.P.U. 1731, at 55; see also Alternative Regulation, D.T.E. 01-31-Phase I, at 25 (2002); D.P.U. 93-98, at 10. Under this principle, the Department has applied a less stringent standard of review of tariffs filed by nondominant carriers. This review is not "perfunctory," as Level 3 suggests, but it does involve a reduced level of oversight than that applied to dominant carrier tariffs.

The economic justifications for applying a reduced level of regulatory scrutiny to nondominant wholesale common carrier tariffs are sound, and indeed, as MCI states, wholesale services are not tariffed at the federal level for interstate interexchange services. These arguments, however, provide no basis for exercising "forbearance" in requiring common carriers of wholesale telecommunications services to file tariffs, because the plain

language of G.L. c. 159, § 19 requires "every common carrier" to file tariffs and does not give the Department the discretion to waive that requirement.[4]

Although the Department is clarifying that nondominant carriers must file wholesale common carrier tariffs, the current dominant/nondominant regulatory framework will be applied to review of such tariffs. Wholesale common carrier tariffs filed by nondominant carriers will be reviewed with the same level of scrutiny as are retail tariffs filed by nondominant carriers. Whether the state of competition may warrant re-examining this framework and the manner in which the tariffing requirement is applied for all carriers, at this time, however, is beyond the scope of the policy statement announced in the Notice.

IV. DIRECTIVES AND POLICIES

After consideration of the comments filed in response to the Department's Notice regarding the policy that nondominant wholesale carriers must tariff their common carrier services, the Department instructs all carriers as follows:

1. Except where the Department's jurisdiction is pre-empted by federal law, all carriers must file tariffs, within 90 days, for all intrastate, i.e., rendered or furnished within the commonwealth, wholesale telecommunications services that they are offering as common carriage, i.e. (1) offered indiscriminately to all potential users of the service and (2) allowing customers to transmit intelligence of their own design and choosing. See NARUC I, 525 F.2d 630 (D.C. Cir. 1976).

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[4] The FCC has the discretion to forbear its regulations when competitive markets may justify forbearance. See Telecommunications Act, § 10 (codified as amended at 47 U.S.C. § 160); see, e.g. MCI Worldcom, Inc., 209 F.3d. 760 (D.C. Cir. 2000). The Department lacks authority to forbear from statutory tariffing requirements. We note that some of the commenters opposed legislation that would have granted the Department such discretion.

2. All carriers must withdraw tariffs for all wholesale telecommunications services, within 90 days, for which they are making individualized decisions in particular cases whether and on what terms to serve the public. Such services are considered to be offered as private carriage, not subject to the Department's regulation.[5]

3. All intrastate wholesale telecommunications services that a carrier tariffs with the Department will be presumed to be offered as common carriage, and the carrier will be obligated to comply with all duties of common carriers, unless the Department otherwise finds that the carrier is not providing those services as common carriage.

4. Carriers may file wholesale tariffs if the offering of the service on generally available terms is either currently available, available within a specified time frame, or available subject to specific regulatory approvals. Carriers must indicate their plans for offering such service in their transmittal letters and initial statements of business operations ("SOBOs"), and in timely amendments to their SOBOs. Tariffs for such services will be rejected where no time frame or specific regulatory milestones for the offering of such services are indicated.

These directives and policies are intended to clarify that the tariff filing obligation for wholesale services depends upon the individual carrier's business plans to offer services indiscriminately, not upon whether the service is wholesale or retail or upon the carrier's dominant or nondominant status. These directives and policies are not intended to preclude the Department from reviewing in the future whether certain classes of carriers should be exempted from common carrier status, or whether certain types of telecommunications services presumptively should or should not be considered to be offered on a common carriage basis.

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[5] This directive, however, shall not be construed to affect the requirement to file tariffs for customer-specific pricing, unless the Department, after notice and hearing, issues an order modifying that requirement. Cf. AT&T Communications of New England, Inc., D.P.U. 90-24 (1990).