COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

CTC COMMUNICATIONS CORP.'S	)	
FORMAL COMPLAINT CONCERNING	)	
UNLAWFUL REFUSAL	)	
BY VERIZON MASSACHUSETTS	)	**DTE No. 04-87**
TO PROVIDE UNBUNDLED NETWORK	)	
ELEMENTS AT TARIFFED RATES	)	

CTC'S BRIEF IN SUPPORT OF THE DEPARTMENT'S DECISION ON CTC'S MOTION FOR RECONSIDERATION AND VERIZON'S UNTARIFFED SURCHARGES

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April 26, 2006

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INTRODUCTION

Verizon's Brief in Support of Default Rates For Carriers That Purchase UNE-P Replacement Services, and its related Motion For Reconsideration, merely reiterate arguments Verizon made in its two prior briefs in this proceeding, including assertions that are now precluded by the "rule of the case."[1] For example, Verizon continues to argue that it offered UNE-P replacement services only through individually-negotiated commercial agreements, even though the Department warned Verizon that these assertions were precluded by the "rule of the case" and the DTE's previous analysis of these issues in its Order on Motion for Reconsideration and other orders.[2]

The DTE correctly determined that "Verizon's characterization of the way" it offered its replacement services and associated surcharges to CLECs in Massachusetts was "misleading."[3] The DTE also correctly concluded that Verizon offered its replacement services and surcharges on a common carrier basis through a series of letters sent to all CLECs in Massachusetts and was required to, but did not, tariff these arrangements.[4]

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[1] Complaint of CTC Communications Corp. against Verizon Massachusetts regarding Provisioning of Unbundled Network Element Replacement Services at Tariffed Rates, DTE No. 04-87-A, Order on Motion for Reconsideration, at 19 (March 9, 2006) ("Reconsideration Order").

[2] Reconsideration Order, at 12-13, 16, 19. The DTE has stated that "the test of common carriage turns on the manner in which services are offered." Fiber Technologies, Inc., DTE 01-70, at 26-27 (Aug. 20, 2004); Memorandum, Michael Isenberg, Director Telecommunications Division, Clarification of Wholesale Tariffing Requirements, at 6 (Aug. 12, 2003) (quoting, U.S. Telecom Ass'n v. FCC, 295 F.3d 1326, 1329 (D.C. Cir. 2002) ("Wholesale Tariff Memorandum"); see, FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979); National Ass'n of Regulatory Utility Commissioners, et al, v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976). Verizon did not make an "individualized decision" in seeking to impose its surcharges through these letters; rather, Verizon sought to impose this self-help measure on most, if not all CLECs.

[3] Reconsideration Order, at 13.

[4] Reconsideration Order, at 13. Verizon's statement that subsequently CTC and Verizon were able to negotiate an agreement for replacement services, does not alter the fact that Verizon offered these services on a common carrier basis to all CLECs as early as May 18, 2004.

Verizon urges that the DTE's conclusion is mistaken because only four CLECs accepted its offer. Verizon is mistaken—whether a service is "offered" on a common carrier basis turns on how the offer was made, not on how few or how many ultimately accepted the offer, which is irrelevant to the analysis.[5]

In addition, Verizon repeats its argument that its so-called replacement services and surcharges are governed solely by the parties' interconnection agreement. The DTE dismissed this argument and correctly concluded that "the parties' [agreement] does not address the services which Verizon has been providing to CTC."[6]

The DTE should once again reject Verizon's arguments because reconsideration of previously decided issues is granted only in "*extraordinary circumstances*,"[7] and Verizon must do more than "attempt to reargue issues considered and decided in the main case."[8] Rather, Verizon must "bring to light previously unknown or undisclosed facts that would have a significant impact on the decision already rendered." Reconsideration Order, at 7; *Commonwealth Electric Company,* DPU 92-3C-1A, at 3-6 (1995); Boston Edison Company, DPU 90-270-A, at 3 (1991). The only new facts brought forward by Verizon in its pleadings are irrelevant and do not have any impact on the decision already

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[5] Complaint of CTC Communications Corp. against Verizon Massachusetts regarding Provisioning of Unbundled Network Element Replacement Services at Tariffed Rates, DTE No. 04-87-A, CTC Motion for Reconsideration, at 9 (March 22, 2005) ("CTC Motion for Reconsideration"); Fiber Technologies, Inc., DTE 01-70, at 26-27 (Aug. 20, 2004); Wholesale Tariff Memorandum, at 6; U.S. Telecom Ass'n v. FCC, 295 F.3d 1326, 1329 (D.C. Cir. 2002).

[6] Reconsideration Order, at 12.

[7] Reconsideration Order, at 7 (emphasis added); North Attleboro Gas Company, DPU 94-130-B, at 2 (1995); Boston Edison Company, DPU 90-270-A, at 3 (1991).

[8] Reconsideration Order, at 7.

rendered. Thus, the DTE should dismiss Verizon's Motions and grant CTC the relief it has sought.

STATEMENT OF FACTS

On August 23, 2003, the FCC released its *Triennial Review Order*[9] in which it determined CLECs were no longer impaired without access to certain unbundled network elements ("UNEs") and combinations of UNEs under Sections 251 and 252(d)(2) of the Telecommunications Act of 1996 ("Act"), including so-called "enterprise" UNE-P combinations.[10]

On May 18, 2004, Verizon sent two letters to all or nearly all CLECs in Massachusetts, including CTC, stating that after August 22, 2004, Verizon would no longer provide unbundled access under Section 251(c)(3) of the Act to "unbundled local switching subject to the Four Lines Carve-Out Rule, whether alone or in combination with any other network element[s],"[11] and that it would no longer provide unbundled access to "enterprise switching" pursuant to the FCC's *Triennial Review Order*.[12] Further, Verizon

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[9] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket Nos. 01-338, 96-98, 98-147, 18 FCC Rcd. 16,978, Report and Order and Order on Remand, FCC 03-36 (rel. Aug. 21, 2003) ("Triennial Review Order" or "TRO"), vacated and remanded in part, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

[10] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("Act or 1996 Act"). The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

[11] Complaint of CTC Communications Corp. against Verizon Massachusetts regarding Provisioning of Unbundled Network Element Replacement Services at Tariffed Rates, DTE No. 04-87-A, at Exhibit 3, (Sept. 24, 2003) ("CTC Complaint"), Letter from Verizon's Jeffrey A. Masoner, Vice President, Verizon Wholesale Marketing, dated June 18, 2004, Notice of Discontinuance of Unbundled Network Elements, at 1 and Attachment 1 ("Four Line UNE-P Letter").

[12] CTC Complaint, Exhibit 1, Letter from Verizon's Jeffry A. Masoner, Vice President, Verizon Wholesale Marketing, dated May 18, 2004, Notice of Discontinuance of Unbundled Network Elements, at 1.

stated that after August 22, 2004, it would "make local dialtone services available for resale" and begin "billing any Four Lines or More UNE-P arrangements that remain in place after August 22, 2004 at a rate equivalent to the Section 251(c)(4) resale rate for business services applicable in that jurisdiction."[13] Verizon's May 18 letters did not specify the amount of the surcharges it sought for its replacement services.

On June 23, 2004, Verizon submitted to the DTE a Transmittal Letter and proposed Amendments to its UNE tariff in Massachusetts (DTE MA Tariff No. 17) to discontinue provisioning enterprise switching, switching subject to the FCC's four line carve-out rule, and associated shared transport and related combinations of UNEs, purportedly to effectuate changes in law under the FCC's *Triennial Review Order*.[14]

On July 2, 2004, Verizon sent a follow-up letter to CTC and all or nearly all other CLECs regarding its intentions to impose a surcharge on the applicable rates for four lines or more UNE-P.[15] For the first time, this letter listed the surcharges that Verizon intended to add to the tariffed four lines UNE-P port monthly recurring rates. The surcharges imposed by Verizon in Massachusetts range from $12.45 at CLLI BSTNMABE to $7.85 for CLLI NTCKMAEC, above the tariffed rates for these services.[16] In many cases, the surcharge would result in a price that was nearly double the applicable UNE-P

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[13] Id. at 2.

[14] Transmittal Letter TT 04-49, from Verizon's John Conroy, Vice President Regulatory Massachusetts, to Mary Cottrell, Secretary Massachusetts DTE, June 23, 2004 ("Verizon Tariff Transmittal Letter").

[15] CTC Complaint, Exhibit 4, Letter from Verizon's Jeffry A. Masoner, Vice President, Verizon Wholesale Marketing, dated July 2, 2004, Notice of Discontinuance of Unbundled Network Elements, at 1 and Attachment 4 ("Four Lines UNE-P Rate Letter").

[16] Id. at Attachment 1.

rate. Verizon filed no tariff provisions setting forth the UNE-P replacement services and the surcharges that it sought to impose on CLECs in Massachusetts.

On July 2, 2004, Verizon sent a letter to all or nearly all CLECs in Massachusetts, including CTC, that listed other "surcharges" that Verizon intended to add to the tariffed UNE Port monthly recurring rate for high-capacity ports, allegedly to bring the rate for its replacement service for Enterprise UNE-P to a rate that Verizon viewed as "a rate equivalent to the Section 251(c)(4) resale rate for business service applicable in that jurisdiction."[17] In Massachusetts, Verizon declared that it intended to impose a DS1 Port Surcharge of $802.14 and an ISDN Primary Rate Interface ("PRI") Port Surcharge of $901.52 on top of the tariffed UNE rates for these services.[18]

On July 22, 2004, the Department on its own motion, "after review, consideration and study of" Verizon's proposed tariff amendments withdrawing "enterprise" UNE-P, "determined that further investigation is necessary" and ordered that "the operation of the rates and charges" in Verizon's proposed tariff amendments "be suspended and the use thereof deferred until January 23, 2005."[19]

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[17] CTC Complaint, Exhibit 2, Letter from Verizon's Jeffry A. Masoner, Vice President, Verizon Wholesale Marketing, dated July 2, 2004, Notice of Discontinuance of Unbundled Network Elements, at 1 and Attachment 1 ("Enterprise UNE-P Rate Letter").

[18] Id. at Attachment 1.

[19] Investigation by the Department of Telecommunications and Energy on its own Motion as to the Propriety of the Rates and Charges Set Forth in the Following Tariff: M.D.T.E No. 17, Filed With the Department on June 23, 2004 by Verizon New England, Inc. d/b/a Verizon Massachusetts, Suspension Order, DTE 04-73, at 1 (Issued July 22, 2004).

On August, 18, 2004, CTC sent Verizon a letter disputing Verizon's right to discontinue UNE-P services and unilaterally impose its untariffed replacement services and rates without negotiation of an amendment.[20]

On September 3, 2004, CTC sent Verizon a response letter indicating that Verizon had no right to discontinue providing UNE-P while its revisions to Verizon's UNE-P tariff were suspended, and had no right to impose its untariffed, unreasonable replacement services and surcharges on CTC.[21]

On September 17, 2004, Verizon sent CTC a letter stating that, in Verizon's view, it need not tariff and obtain the approval of the DTE for its proposed surcharges on UNE-P services.[22]

CTC filed its Complaint on September 24, 2004. CTC requested that the Department, among other items, prohibit Verizon from imposing any surcharge or rate element for its UNE-P services or UNE-P replacement services that is not contained in its applicable approved tariffs; and to require Verizon to credit CTC's account for any non-tariffed rates or surcharges billed to it.[23]

Verizon submitted an Answer on October 8, 2004. The DTE reviewed the pleadings and entered an order on March 3, 2005.

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[20] CTC Complaint, at Exhibit 5.

[21] CTC Complaint, at Exhibit 7 ("absent approval by the DTE of Verizon's proposed 'wholesale' rates for Enterprise UNE-P arrangements and the requisite tariff filing, any attempt by Verizon to invoke rate increases relative to Enterprise UNE-P in Massachusetts would be unlawful.").

[22] CTC Complaint, at Exhibit 8.

[23] CTC Complaint, at 15.

CTC filed its Motion for Reconsideration on March 22, 2005. In response, Verizon filed its Opposition to CTC's Motion for Reconsideration on April 11, 2005.

The DTE released its Order on Motion for Reconsideration on March 9, 2006.

ARGUMENT

A. The DTE Correctly Held That Verizon's Proposed Surcharges and Replacement Services Are Not Governed By the Parties' Interconnection Agreement

In its Brief, and as one of two principal arguments in its Motion for Reconsideration, Verizon repeats its prior contention, already rejected by the DTE, that the Parties' Interconnection Agreement includes and governs Verizon's proposed replacement services and surcharges.[24] Verizon offers no new facts to support its argument. Accordingly, consistent with the standard of review, the DTE should deny reconsideration and affirm its decision that the Agreement does not include language "imposing a default surcharge," and does not address the terms of any replacement services.[25]

Verizon's argument rests entirely on section 1.5 of Amendment 1 to the Agreement. Under the DTE's interpretation, section 1.5 permits Verizon to terminate its

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[24] Complaint of CTC Communications Corp. against Verizon Massachusetts regarding Provisioning of Unbundled Network Element Replacement Services at Tariffed Rates, DTE No. 04-87-A, Brief of Verizon Massachusetts in Support of Default Rates For Carriers That Purchase UNE-P Replacement Services, at 2 (March 29, 2006) ("Brief of Verizon In Support of Default Rates"); Complaint of CTC Communications Corp. against Verizon Massachusetts regarding Provisioning of Unbundled Network Element Replacement Services at Tariffed Rates, DTE No. 04-87-A, Motion of Verizon Massachusetts for Reconsideration, at 7 (March 29, 2006) ("Verizon Motion for Reconsideration").

[25] Reconsideration Order, at 12; The DTE should once again reject Verizon's arguments because reconsideration of previously decided issues is granted only in "extraordinary circumstances," and Verizon must do more than "attempt to reargue issues considered and decided in the main case." Id., 7. Rather, Verizon must "bring to light previously unknown or undisclosed facts that would have a significant impact on the decision already rendered." Reconsideration Order, at 7; Commonwealth Electric Company, DPU 92-3C-1A, at 3-6 (1995); Boston Edison Company, DPU 90-270-A, at 3 (1991).

provision of UNE-P services to CTC without a further amendment to the Parties' Interconnection Agreement.[26] Specifically, section 1.5 states that if the FCC determines that Verizon is not required to provide a UNE or combination of UNEs, then "Verizon may terminate its provision of such UNE or Combination to CTC." However, as the DTE correctly held, section 1.5 does not obligate Verizon to offer a replacement service, nor does it create "an obligation on CTC's part to purchase UNE replacement services from Verizon"[27] on the basis of unilaterally-imposed, unreasonable, untariffed rates and terms that had not been disclosed to CTC, and probably had not even been developed by Verizon, at the time Amendment 1 was executed.

Section 1.5 contemplates that Verizon will first terminate its UNE-P services to CTC, and only then, CTC may "elect to purchase other services offered by Verizon in place of such UNE[s]."[28] In fact, neither of these conditions occurred. Verizon by its own admission did not terminate the UNE-P services it provided to CTC. As Verizon puts it, Verizon continued to leave the existing UNE-P services it provided to CTC in place as an "voluntary accommodation" and "only out of courtesy" to CTC.[29] CTC did not request this "voluntary accommodation." No termination of existing services and installation of

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[26] CTC has consistently argued that Verizon could not terminate its UNE-P services without entering into an amendment to the interconnection agreement.

[27] Reconsideration Order, at 12.

[28] Amendment 1, at § 1.5; Reconsideration Order, at 11-12. Section 1.5 provides that: "*If Verizon terminates its provision of a UNE* or a Combination to CTC pursuant to this Section 1.5, and *CTC elects to purchase* other services offered by Verizon in place of such service," only then will the Parties cooperate to "coordinate the termination" and installation of replacement services. Neither of these conditions precedent occurred.

[29] Verizon Answer, at 9; Verizon Opposition to CTC's Motion for Reconsideration, at 3.

replacement services occurred. Rather, Verizon on its own initiative, elected to maintain the status quo by not disconnecting the UNE-P services it provided to CTC.

Moreover, CTC did not "elect" to purchase replacement services offered by Verizon. In fact, CTC expressly rejected Verizon's letter offer to all CLECs for the replacement services and their associated rates. It did so, first, by disputing Verizon's right to impose unilaterally its untariffed replacement services and rates in CTC's letters of August 18, 2004 and September 3, 2004. Most emphatically, CTC rejected Verizon's letter offer of replacement services and its surcharges by filing its Complaint in this proceeding on September 23, 2004, disputing, among other items, Verizon's right to impose untariffed surcharges. Incredibly, Verizon continues to argue that CTC somehow accepted Verizon's letter offers of replacement services and rates, when CTC not only rejected Verizon's offers in writing, but actually preemptively sued Verizon at the DTE prior to receiving the first bill for surcharges. Subsequently, CTC disputed surcharges billed by Verizon's that included surcharges allegedly for its replacement services, and as applicable, noted that the surcharges were billed during the time frame in which Verizon's tariff revisions to discontinue services were suspended.

Even assuming, *arguendo*, that CTC somehow received replacement services under section 1.5, the Agreement still does not address what the "applicable charges" for such services would be. Stated simply, there are no "applicable charges" for Verizon's replacement services because Verizon deliberately ignored the DTE's tariffing requirements, refused to follow the lawful procedure for establishing "applicable charges," and refused to negotiate an amendment to CTC's interconnection agreement to replace UNE-

P arrangements.[30] Instead, Verizon sought to exploit its market power and unilaterally impose replacement services and surcharges without complying with the DTE's tariffing requirements. Further, Verizon has repeatedly violated statues, rules, and orders requiring it to tariff these terms and charges, submit data supporting the reasonableness of its tariffed rates and terms, subject the rates and terms to DTE and public scrutiny, and obtain DTE approval of its the rates and terms for UNE-P replacement services.[31]

Verizon's obstinate avoidance of DTE scrutiny of its rates and terms, by defying repeated orders and well-established precedent, is the source of the present dispute.[32] Notwithstanding its disingenuous attempts to cast itself as the victim, Verizon created the dispute by blatantly ignoring the DTE's tariffing requirements, and engaging in aggressive self-help measures, knowing that it possessed the market power to bully most, if not

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[30] Verizon has stated in its Motion for Reconsideration, "*subsequent to their filing motion papers in this case*, CTC and Verizon entered into an individually negotiated" agreement addressing the terms on which Verizon "would provide post-UNE platform services to CTC." Verizon Motion for Reconsideration, at 6 (emphasis added). Contrary to Verizon's assertions, however, that new agreement does not render this case "moot." Any new agreement would only limit the amount in dispute to those untariffed surcharges Verizon unlawfully sought to impose on CTC up to the effective date of such new agreement. Tellingly, Verizon makes no effort to describe how the new agreement it refers to impacts this litigation and does not carry the burden needed to prevail on its Motion for Reconsideration.

[31] Reconsideration Order, at 19 ("Verizon must file tariffs for its default arrangement for enterprise and four-lines-or-more UNE-P replacement services within 20 days of the issuance of this Order"); See, e.g., Massachusetts G.L. Ch. 159, §§ 14, 19, 20; Wholesale Tariff Memorandum, at 6-9; Code of Massachusetts Regulations, 220 CMR 5.03 (1)(a)-(b); Re: New England Telephone and Telegraph Co. d/b/a NYNEX, DPU 96-73/74, 96-75, 96-80/81, 96-83, 96-94 Phase 2, 1996 WL 773774 (Dec. 03, 1996). The tariff must be submitted such that "sufficient time" is available for DTE review before the tariff becomes effective. 220 CMR 502(4)(a).

[32] If Verizon had tariffed its replacement services and surcharges and obtained DTE approval, it would not be in its present position of seeking relief under quasi-contract and equity principles. Rather, Verizon could argue that the filed rate doctrine required CTC to pay its surcharges and avoided this litigation. Unfortunately for both parties and the DTE, that is not the course Verizon chose to follow.

all of its CLEC customers into accepting the rates, and terms of its non-tariffed replacement services.

Moreover, a simple inspection of the Agreement demonstrates that there are no descriptions of Verizon's replacement services, no terms for the services, and no surcharge rates contained anywhere in CTC's Massachusetts interconnection agreement. Verizon's surcharges and terms appear only in Verizon's May 18 and July 2 letters. Accordingly, the terms and rates for Verizon's replacement services cannot be governed by the parties' agreement.

Finally, Verizon's present argument is inconsistent with its own prior admissions. Verizon states that its obligation to provide UNE-P replacement services arises only under Section 271 of the Act.[33] Verizon has also steadfastly maintained that it does not include section 271 terms and any non-Section 251 terms in its section 251/252 interconnection agreements.[34] Further, Verizon maintains that CTC no longer had any right to obtain UNE-P services under its interconnection agreement at Section 251 and 252(d) rates.[35] Thus, under Verizon's reading of its interconnection agreement, section 1.5 could not govern the terms and rates for Verizon's UNE-P replacement product because the

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[33] See, e.g., Verizon Answer, at 9 ("Any obligation Verizon MA may have to provision enterprise switching arises solely from Section 271 of the Act."). CTC does not concede through its arguments in this proceeding that Verizon's UNE-P replacement services are section 271 services or that Verizon is not required to include them in its section 251 interconnection agreements. CTC reserves its rights to argue these points in this and any other proceeding.

[34] See, e.g., Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers, DTE 04-33, Arbitration Order, at 260-261 (rel. July 14, 2005).

[35] See, e.g., Verizon Answer, at 1-2 ("Under, the ICA, CTC no longer has a right to enterprise switching because the FCC has determined that switching is not a network element that must be unbundled") ("Verizon MA's only obligation with respect to enterprise switching arises under Section 271").

agreement only encompasses section 251 obligations and, in Verizon's view, the relevant section 251 obligations are no longer in effect. Accordingly, Verizon should be estopped from arguing the contrary in this proceeding.

B. CTC Expressly Rejected Verizon's Surcharges and Did Not Enter Into an Implied-In-Fact or Any Other Contract with Verizon for UNE-P Replacement Services

Verizon incorrectly asserts in its Motion for Reconsideration and Brief that CTC somehow created a contract with Verizon by "accepting and using [Verizon's UNE-P replacement] services."[36] Verizon attempts to reinforce this erroneous argument by claiming that CTC "elected to purchase" UNE-P replacement services.[37] Contrary to Verizon's bald assertions, the actions of CTC and Verizon reflected in the record fail to evidence the mutual assent necessary to form an implied-in-fact contract or any other contract. Rather, as outlined in the preceding section, they clearly demonstrate that CTC expressly, unequivocally, and repeatedly rejected Verizon's offer to implement its UNE-P replacement services and surcharges without tariffing them or negotiating an agreement or amendment.

There is simply no factual basis for Verizon's claim that CTC accepted Verizon's offer by "failing to take any of the specified actions that would indicate rejection."[38] It is difficult to conceive how CTC could more clearly have rejected Verizon's offer than by suing Verizon even before receiving a bill for the disputed surcharges. While the offeror may determine the manner (fax, email, a signed writing) in which its offer is accepted,

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[36] Brief of Verizon in Support of Default Rates, at 2.

[37] Motion of Verizon Massachusetts for Reconsideration, at 8.

[38] Brief of Verizon In Support of Default Rates, at 2.

the offeror does not have the right to determine the manner of rejection. Simply stated, CTC cannot be bound to a contract it expressly rejected, simply because Verizon brazenly and unilaterally attempted to dictate how CTC must reject its offer (*i.e.*, by issuing termination and disconnect orders).[39] It is difficult to imagine a clearer method of rejecting an offer than filing a formal complaint.

Verizon does not state precisely the theory under which it believes a contract for replacement services at its surcharge rates was created, nor does it support such a theory. For example, Verizon does not set forth the elements of an implied-in-fact contract in its pleadings and makes no attempt to demonstrate each element of an implied-in-fact contract was satisfied, although it appears to argue generally that CTC's conduct, rather than assent, created a contract.[40] An implied-in-fact contract, however, requires a "meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."[41] In Massachusetts, a "contract implied-in-fact requires the same elements as an express contract and differs only in the method of expressing mutual assent.[42] However, where "the terms proposed by each side remain at odds, searching the actions of the parties for indicia of consent becomes a fruitless exercise."[43] "Without

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[39] Verizon Motion for Reconsideration, at 8 ("CTC failed to take any of the actions that *Verizon specifically stated would signal rejection* of Vreizon's offer, and thereby elected to purchase the replacement services at the offered rates.") (emphasis added).

[40] Id.

[41] Hercules Inc., v. United States, 516 U.S. 417, 424 (1996).

[42] Massachusetts Eye and Ear Infirmary v. OLT Phototherapeutics, Inc., 412 F.3d 215, 230 (1st Cir. 2005).

[43] Id.

agreement on the essential terms of the agreement, [an] implied contract claim gets no further than does [an] express contract claim."[44]

The behavior of the parties in this case plainly precludes any inference of a meeting of the minds, or of mutual assent to any set of promises, especially regarding rates. The fact that Verizon on its own initiative subsequently elected not to disconnect CTC's UNE-P services in what Verizon admits was a "courtesy to CTC" and "*voluntary* accommodation" to CTC does not establish assent by CTC, especially in light of CTC's express rejections of Verizon's offer in its correspondence and formal complaint.[45]

Correspondence exchanged between CTC and Verizon illustrates their polarized positions. For example, on September 3, 2004, CTC sent a letter to Verizon stating that "absent approval by the DTE of Verizon's proposed 'wholesale' rates for Enterprise UNE-P arrangements and the requisite tariff filing, any attempt by Verizon to invoke a rate increase relative to enterprise UNE-P in Massachusetts would be unlawful."[46] This hardly indicates assent to Verizon's offer. Instead of seeking an amicable resolution or filing tariffed UNE-P rates with the DTE at this juncture, Verizon reaffirmed its erroneous belief that it had the authority to unilaterally impose its untariffed, unapproved rates

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[44] Id.

[45] Verizon Answer, at 9; Opposition of Verizon Massachusetts to Motion for Reconsideration, at 3 (emphasis added). Verizon states that "[i]t is undisputed that Verizon notified CTC by letters dated May 18, 2004, that it would *terminate* unbundled access to enterprise switching as of August 22, 2004." Verizon Motion for Reconsideration, at 8. Thus, in light of Verizon's own admissions, CTC had grounds to expect that Verizon would "terminate" UNE-P services, not continue UNE-P services as "courtesy to CTC."

[46] CTC Complaint, Exhibit 7; Letter of Pamela L. Hintz, Vice President of Regulatory Affairs, CTC Communications Corp., at 1 (Sep. 3, 2004).

for common carrier services upon CTC and other CLECs.[47] In response, CTC filed a formal complaint seeking a DTE order requiring Verizon to continue providing UNE-P services at least until such time as new UNE-P tariffs were approved, and requesting the DTE to direct Verizon to tariff the terms and surcharges for its replacement services.[48]

A rejection is a manifestation of the offeree's intention not to accept an offer, and is "effective when dissatisfaction with [the offer's] material terms is communicated to the offeror."[49] In Massachusetts, a "conditional acceptance or one that varies from the offer in any substantial respect is in effect a rejection and is the equivalent of a new proposition."[50] "Rejection by the offeree terminates the power of acceptance."[51] Accordingly, by repeatedly expressly rejecting Verizon's surcharge rates, undeniably a material term, CTC rejected any offer from Verizon for such replacement services. Once rejected, Verizon's offer could not be revived either by Verizon's "voluntary accommodation," or by CTC's conduct.

Subsequent to the filing of CTC's original complaint, neither party had wavered in its position. In fact, CTC has disputed Verizon's right to impose its surcharges in response to Verizon's intentions to impose its charges in its monthly bills. Further, the Parties have engaged in vigorous litigation on these issues in this proceeding. Thus, the

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[47] Letter of Srinivasan Soundararajan, Assistant General Counsel – Interconnection Services, Verizon, at 1 (Sep. 17, 2004).

[48] CTC Complaint, at 1, 15.

[49] Glacier Park Foundation v. Watt, 663 F.2d 882, 886 (9th Cir. 1981).

[50] Moss v. Old Colony Trust Co., 246 Mass. 139, 148 (1923).

[51] E. Allan Farnsworth, Farnsworth on Contracts § 3.20 (3rd Ed. 2004); Peretz v. Watson, 3 Mass. App. Ct. 727, 728 (1975) (Furthermore, an "acceptance that varies from the terms of the offer in any material respect is in effect a rejection, and [such] an offer once rejected cannot thereafter be revived.").

record evidence demonstrates that the parties did not reach a tacit agreement nor meeting-of-minds, and, therefore, an implied-in-fact contract at no time existed between CTC and Verizon regarding Verizon's replacement services and surcharges.

Verizon erroneously implies that CTC admitted in its Complaint that CTC accepted Verizon's offer of replacement services by citing CTC's statement that it "continues to purchase" UNE combinations from Verizon. CTC made no such admission. At the time CTC filed its Complaint on September 23, 2004, the DTE's suspension of Verizon's proposed changes to its tariffs to remove UNE-P and Four-Lines or more UNE combinations was in effect. The tariff changes were suspended, and thus the original UNE-P provisions remained effective, until Jan. 23, 2005. Thus, CTC argued that even if Verizon somehow had the right to terminate provisioning of its UNE-P services at TELRIC rates without an amendment to the Parties' interconnection agreement, CTC could continue to purchase UNE-P services under the tariffs then in effect. CTC's statement simply expresses its intention to exercise these rights. Further, CTC contemporaneously rejected Verizon's offer of replacement services and surcharges by sending Verizon letters and filing a complaint with the DTE disputing Verizon's right to impose these untarrifed and unreasonable replacement services and surcharges.

CTC clearly did not engage in any conduct that a reasonable person could remotely construe as evidencing assent to Verizon's proposed surcharges. Verizon's purported claim of an obligation arising under an implied-in-fact contract must be rejected.

C. Verizon Offered UNE-P Replacement Services on a Common Carrier Basis to Nearly All CLECs, and Therefore Must Tariff Them

Verizon argues in its Motion for Reconsideration and Brief that because, "as of today, only four CLECs take enterprise UNE-P 'replacement' services from Verizon MA and are assessed the surcharge" these services and surcharges are not offered on a common carrier basis and need not be tariffed.[52] Contrary to Verizon's arguments, the fact that only four CLECs,[53] according to Verizon, accepted its offer to obtain UNE-P services at its unreasonable and untariffed rates, does not preclude a finding that Verizon offered these services on a common carrier basis.[54] The common carrier analysis centers on whether the offer was made on a common carrier basis and not on how many customers accepted it. Accordingly, as CTC set forth in both its Complaint and Motion for Reconsideration and as the Commission has confirmed, Verizon elected to *offer these services on a common carrier basis* and has been required to tariff them with the DTE since at least May 18, 2004, when Verizon, by its own admission, first made its offer to all Massachusetts CLECs regarding these services.[55]

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[52] Verizon Motion for Reconsideration, at 6-7; Brief of Verizon In Support of Default Rates, at 4.

[53] CTC repeatedly expressly rejected Verizon's offer to pay Verizon's untarrifed, unreasonable, unilateral surcharges in writing. In fact, CTC filed a complaint to and initiated this proceeding because it refused to accept these surcharges. Thus, by Verizon's count, no more than three CLECs, excluding CTC, accepted its offer for 'replacement services which was made to all, or nearly all CLECs in Massachusetts.

[54] Further, if true, the inability of these four CLECs to negotiate agreements for alternative services with Verizon merely demonstrates Verizon's market power and should not be construed as a voluntary acceptance of the replacement services.

[55] CTC Complaint, at ¶¶ 8-13; CTC Motion for Reconsideration, at ¶¶ 10-15, 19, 21-23.

Specifically, Verizon engaged in aggressive self-help and sent a series of four standard letters to nearly every, if not every, CLEC in Massachusetts,[56] including CTC, stating that after August 22, 2004, it would continue to make enterprise level and Four Lines or More service UNE-P-like arrangements available to CLECs only at rates that include "surcharges" above and beyond the tariffed rates for the services it formerly offered at TELRIC pursuant to Sections 251 and 252(d).[57]

By sending these letters to nearly every CLEC in Massachusetts, Verizon offered its UNE-P replacement service indiscriminately on uniform terms; that is, on a common carrier basis. As observed by the U.S. Supreme Court, the touchstone as to whether a service is private carriage or common carriage is whether the company makes "individualized decisions, in particular cases, whether and on what terms to deal" with potential customers for the service.[58] Moreover, the DTE has determined that "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.'"[59] Verizon did not make an "individualized decision" in seeking to impose its surcharges through these letters; rather, Verizon sought to impose this self-help measure on virtually all CLECs. Verizon clearly purported to offer a new, wholesale, intrastate, UNE-P replacement service on a common carrier basis by sending

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[56] Verizon appears to have sent this series of letter to every CLEC in Massachusetts.

[57] CTC Complaint, at ¶¶ 8-10, 12 and Exhibits 1, 2, 3, and 4 thereof.

[58] FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979); National Ass'n of Regulatory Utility Commissioners et al. v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976).

[59] Wholesale Tariff Memorandum, at 6 (quoting, U.S. Telecom Ass'n v. FCC, 295 F.3d 1326, 1329 (D.C. Cir. 2002)).

its series of letters to every CLEC in the state. The fact that, according to Verizon, only four CLECs "take" the replacement services does not change the indiscriminate nature of its offer.

D. Verizon Knowingly Violated Massachusetts Law by Not Tariffing Its UNE-P Replacement Product and Surcharges

Verizon complains that prior to "March 9, 2006, Verizon MA had no notice that the DTE expected it to tariff" the intrastate UNE-P replacement services and surcharges that it elected to offer through a series of letters to all CLECs in the state on a common carrier basis.[60] First, ignorance of the law is no excuse for failing to comply with the law, especially ignorance by a sophisticated and highly profitable company operating in a highly regulated industry with huge resources, such as Verizon. Moreover, it strains credulity to believe that Verizon, the incumbent LEC, did not know (or, more importantly, have reason to know) it had to tariff intrastate services that it offered on a common carrier basis such as the services at issue in the present dispute. Rather, Verizon ignored the DTE's tariffing requirements to avoid scrutiny of its unjust and unreasonable surcharges and to use its overwhelming market power to impose its preferred self-help measures.

As early as August 13, 2003, the DTE sent a letter to Verizon and others affirming, among other items, that all carriers, "including so-called 'carrier's carriers,'" must file tariffs with the DTE for all their intrastate services offered on a common carrier basis.[61] On December 15, 2004, in a proceeding involving Verizon, the DTE confirmed

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[60] Brief of Verizon In Support of Default Rates, at 5.

[61] Letter of Michael Isenberg, Director Telecommunications Division, Mass. DTE, at 1 (Aug. 12, 2003).

that Verizon must tariff any intrastate service that it offers on a common carrier basis, including an enterprise switching service. The DTE stated:

> It is important to reiterate that the Department continues to have jurisdiction over enterprise switching, if it is offered as common carriage. Far from being anomalous, requiring Verizon to file a wholesale tariff for enterprise switching merely recognizes that Verizon is to be treated just as any other carrier offering wholesale services as common carriage.[62]

The DTE underscored that it "has general regulatory authority over intrastate common carrier services to enforce the obligation of every common carrier to file tariffs under state law" including, but not limited to, G.L. c. 159, sections 12 and 19.[63] The requirement to tariff all rates for intrastate services offered on a common carrier basis in Massachusetts, does not depend "upon whether the service is wholesale or retail or upon the carrier's dominant or nondominant status."[64] Further, the DTE does not have discretion to waive the requirement to file tariffs for common carrier services.[65] Thus, Verizon violated well-established law by failing to tariff its UNE-P replacement product and surcharges.[66]

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[62] CTC Motion for Reconsideration, at 12-13; Wholesale Tariff Memorandum, at 5-6 (noting that all carriers offering services as "common carriage" are required to file tariffs pursuant to G.L. c. 159, section 19); Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops, D.T.E. 03-59-B, Order Denying Motion of Verizon Massachusetts for Partial Reconsideration, at 7-8 (Dec. 15, 2004) ("Reconsideration Order 2") ("Where Verizon offers enterprise switching on generally available terms pursuant to Section 271 and the FCC's rules, it offers the service as common carriage and therefore must file a tariff for the service with the Department.").

[63] Reconsideration Order 2, at 8.

[64] Wholesale Tariff Memorandum, at 9.

[65] Wholesale Tariff Memorandum, at 8.

[66] CTC Motion for Reconsideration, at ¶ 24; *see,* Massachusetts G.L. Ch. 159, §§ 14, 19, 20; Wholesale Tariff Memorandum, at 6-9; Code of Massachusetts Regulations, 220 CMR 5.03 (Cont'd)

E. The DTE Should Not Grant Verizon Equitable or Quasi-Contract Relief Because Verizon Has Unclean Hands, and the DTE Has No Authority to Grant Such Relief

Without citing any cases in support of its claim, Verizon maintains that the DTE is not precluded from awarding equitable relief and should allow Verizon to collect its untariffed, unreasonable, surcharges "under doctrines of quasi-contract and unjust enrichment."[67] The DTE has no authority to grant such relief, and in any event would be precluded under long-standing equity principles from rewarding Verizon for its unlawful conduct. Moreover, Verizon has been fully compensation at TELRIC rates for any such services, thus an extraordinary award in equity is unnecessary.

First, the DTE does not have the authority to award equitable relief such as an award based on quasi-contract or quantum meruit,[68] as the DTE itself appeared to acknowledge in its Reconsideration Order. The DTE has limited jurisdiction derived from its governing statutes, and is not a court of general jurisdiction. We have found no statutory provision that provides the DTE with jurisdiction to award equitable relief. In fact, in limited situations in which the General Laws anticipated that equitable remedies might be required in matters related to the Department's jurisdiction, it provided that the "supreme judicial or superior court shall have jurisdiction in equity to enforce this

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(1)(a)-(b); 220 CMR 502(4)(a); Re: New England Telephone and Telegraph Co. d/b/a NYNEX, DPU 96-73/74, 96-75, 96-80/81, 96-83, 96-94 Phase 2, 1996 WL 773774 (Dec. 03, 1996).

[67] Brief of Verizon in Support of Default Rates, at 2.

[68] Quantum meruit is an equitable doctrine. The phrase means "as much as he deserves," and is an expression of the maximum recovery on a contract implied in law. Black's Law Dictionary 1119 (5th ed. 1979).

section."[69] As the DTE acknowledged, equitable remedies are "not characteristic of administrative law and economic regulation" under the DTE's statutory scheme and are beyond the scope of the DTE's jurisdiction.[70]

Second, even if the DTE had the requisite authority to award quantum meruit or make an award under quasi-contract or some other theory of equitable relief, it would be precluded from doing so because Verizon acted in bad faith and with unclean hands.[71] All equitable relief requires that "one who comes into equity must come with clean hands,"[72] which is defined as "[t]he principle that a party cannot seek equitable relief or assert an equitable defense if that party has violated an equitable principle, such as good faith,"[73] or engaged in a violation of law.[74] The clean hands doctrine "expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair,

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[69] See, e.g., Massachusetts, G.L. c. 159, § 1; G.L. c. 159, § 40 ("the department shall direct its counsel to begin ... an action or proceeding in the supreme judicial court in the name of the department for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction.").

[70] Reconsideration Order, at 18.

[71] J. A. Sullivan Corporation v. Commonwealth, 397 Mass. 789, 796 (1986) (citing Andre v. Maguire, 505 Mass. 515, 516 (1940) (recovery limited to good faith actors)); Snow v. Inhabitants of Ware, 54 Mass. 42(1847) (must show good faith to obtain equitable relief); see also, Hayeck Building & Realty Co . Inc. v. Francis E. Turcotte et. al., 361 Mass. 785 (1972).

[72] E. Allen Farnsworth, Farnsworth on Contracts §12.4 (3rd ed. 2004) (Clean hands rooted in the withholding of relief if "considerations of fairness or morality dictated").

[73] Black's Law Dictionary 104 (2nd pocket ed. 2001). See also, Arthur Linton Corbin, Corbin on Contracts § 1167 (Interim ed. 2002).

[74] Snow v. Inhabitants of Ware, 54 Mass. 42 (1847) (must show good faith to obtain equitable relief); see also, Hayeck Building & Realty Co. Inc. v. Francis E. Turcotte et. al., 361 Mass. 785 (1972) (one who acts "willfully and in bad faith" is precluded from recovering in quantum meruit). See E. Allen Farnsworth, Farnsworth on Contracts §7.17 (3rd ed. 2004) (good faith is an implied duty based on fundamental notions of fairness).

equitable and honest."[75] The Commonwealth's highest court has declared that one "should not be allowed to ... [recover], in securing which he resorted to inequitable conduct and adopted means which are not approved in equity, ... [because] [b]y his own conduct he has forfeited the right to have a court of equity aid him [and] "[h]e does not come into court with clean hands."[76] Verizon's egregious self-help measures and unlawful refusal to tariff its intrastate surcharges are the principal sources of the present dispute. Verizon has unclean hands and cannot be rewarded in equity for its direct violation of DTE orders, Massachusetts statues and well-established principles of law requiring tariffing.

In equity actions that also concern the public interest, such as the present case, the doctrine of unclean hands "assumes even wider and more significant proportions," and must be rigorously enforced.[77] Here, Verizon's conduct undermined the public interest concerns underlying the Massachusetts regulatory scheme. Instead of tariffing its surcharges, Verizon adopted its own means and engaged in aggressive self-help by sending letters that purported to default the arrangement into one where Verizon imposed exorbitant surcharges upon CLECs for continued enterprise level or Four Lines or More service. Verizon should not be allowed to seek equitable relief for the consequences of its own

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[75] Nusbaum and Parrino v. Harrick et. al., LEXIS 185 at *12 (Conn. Super. 2002) (recovery precluded by unclean hands where plaintiff violated norms of professional conduct).

[76] Shikes v. Gabelnick, 273 Mass. 201 (1930). See also, Banaghan v. Malaney, 200 Mass. 46 (1908) (malfeasance preventing equitable remedy); Arthur Linton Corbin, Corbin on Contracts § 1167 (Interim ed. 2002).

[77] S&E Contractors, Inc. v. U.S., 406 U.S. 1, 15 (1972); Nusbaum, Lexis 185 at *14.

malfeasance in defying the DTE and nonfeasance in failing to file a tariff as required under Massachusetts law.[78]

Moreover, even if a quantum meruit theory could be entertained, the measure of the award would not be Verizon's untariffed and unreasonable surcharges. Under Commonwealth law, a party entitled to quantum meruit can recover only the amount of benefit bestowed, stated otherwise as the fair value of the services rendered.[79] The only fair measure of any award to Verizon is the DTE-approved TELRIC UNE-P rates which have been tariffed and determined by the DTE to be just and reasonable. These rates fully recover Verizon's costs and allow it a robust rate of return.[80]

Finally, a gratuitous award to Verizon under a quasi-contract theory would reward Verizon for violating DTE rules and orders and is unnecessary because CTC has fully compensated Verizon for any services rendered. Upon reading Verizon's Brief and Motions, one could get the mistaken impression that CTC has obtained or seeks services from Verizon for free. That is clearly not the case. *CTC has paid Verizon for the services* that Verizon chose not to terminate and disconnect, at the UNE-P rates that were in effect under Verizon's tariffs on the date CTC filed its Complaint.[81]

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[78] See CTC Motion for Reconsideration, Docket 04-87, March 22, 2005.

[79] Roger J. Dines v. Liberty Mutual Insurance Company, 28 Mass. App. Ct. 195, 199 (1990); see also Peabody N.E., Inc. v. Town of Marshfield, 426 Mass. 436, 443 (1998).

[80] Id.

[81] These UNE-P rates were in effect at least until the DTE withdrew its suspension of Verizon's changes to its UNE tariffs on January 23, 2005. CTC paid the TELRIC UNE-P rates for the services Verizon chose not to terminate from August 22, 2004, the date Verizon first sought to impose its unlawful surcharges and during the period affected by this dispute.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, CTC requests that the Department affirm its Reconsideration Order, determine that CTC is entitled to relief, and enter an Order granting the following relief:

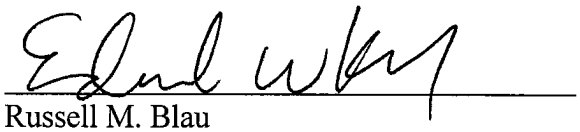
(a) prohibiting Verizon from back billing CTC for any UNE-P or functionally equivalent surcharge or rate element that is not contained in the aforementioned tariff;

(b) requiring Verizon to credit CTC's account for any non-tariffed rates or surcharges billed by it to date, or during the pendency of this Complaint that exceed the approved TELRIC rates for UNE-P services;

(c) prohibiting Verizon from terminating, disconnecting, or in any way impairing its service to CTC due to CTC's refusal to pay the disputed unlawful and unreasonable surcharges that are the subject of this Complaint; and

(d) granting such other and further relief as may be just and equitable in the circumstances.

Respectfully submitted,



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April 26, 2006