THE COMMONWEALTH OF MASSACHUSETTS
BEFORE THE DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

Petition for Investigation under Chapter 159, Section 14 of the Intrastate Switched Access Rates of Competitive Local Exchange Carriers	Docket No.07-9

OPPOSITION OF AT&T CORP. TO MOTIONS TO DISMISS

Introduction

AT&T Corp. ("AT&T") hereby opposes the motions to dismiss Verizon's October 11, 2007, petition initiating this proceeding that were filed on February 27, 2008, by XO Communications, Inc., One Communications, PAETEC Communications, Inc. and RNK Inc. ("Movants"). For the reasons set forth below, the Department of Telecommunications and Cable ("Department" or "DTC") must deny the Movants' motions.

Argument

I. CONTRARY TO MOVANTS CLAIMS, VERIZON MAY SEEK THE RELIEF IT REQUESTS IN THIS PROCEEDING UNDER C. 159, § 14.

Most of the Movants argue that, in filing under c. 159, § 14, Verizon was not entitled to seek a generic rule for capping CLEC access rates, because that statute provides for an adjudicatory process for challenging the rate or rates of named carriers. Movants are wrong. Verizon appropriately initiated this adjudicatory proceeding under c. 159, § 14.

Although the effect and one of the intents of Verizon's petition was to establish a general rule, Verizon specifically named several CLECs whose access rates exceed

Verizon's[1] and asked the Department to find such rates unjust and unreasonable, and to establish, pursuant to c. 159, § 14, just and reasonable rates in accordance with a proposed criterion. Such pleading and relief comport with c. 159, § 14, which states in pertinent part:

> Whenever the department shall be of opinion, after a hearing had upon its own motion or upon complaint, that any of the rates, fares or charges of any common carrier for any services to be performed within the commonwealth, . . . are unjust, unreasonable, unjustly discriminatory, unduly preferential, . . . the department shall determine the just and reasonable rates, fares and charges to be charged[.]

Clearly, the Department has broad authority under c. 159, § 14 to investigate whether rates of *any carrier*, which by necessary implication extends to any group of similarly situated carriers, satisfy the just and reasonable standard. Equally clear is that Verizon's petition states a claim under c. 159, § 14, against the specifically named carriers and, as to those carriers at a minimum, cannot be dismissed. *See*, *Nader v. Citron*, 372 Mass. 96, 98 (1977) (a motion to dismiss cannot be granted for failure to state a claim "unless it appears beyond doubt that the [petitioner] can prove no set of facts in support of his claim which would entitle him to relief").

Moreover, since Verizon can proceed against the named carriers under c. 159, § 14, and since a finding granting Verizon's requested relief in such a proceeding would be binding upon similarly situated carriers as a matter of precedent, especially where – as in the present case – all such carriers have received actual notice of this proceeding, this case must be treated as the generic, adjudicatory proceeding that it is. Indeed, that is the reasoning behind the well recognized principle that an administrative "agency may adopt

[1] Conversent Communications, XO Massachusetts, and Level 3 Communications. *See*, October 11, 2007 VZ Petition, at 4.

policies through adjudication as well as through rulemaking." *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board*, 448 Mass. 45, 51 (2006). *See also*, *Town of Brookline v. Commissioner of Dept. of Environmental Quality Engineering*, 387 Mass. 372, 379-380 (1982) ("Like any administrative agency, the DEQE may, at its discretion, announce and apply new rules and standards in an adjudicatory proceeding[.]").

The Department has a long history of announcing new policies and establishing new rules of general application in adjudicatory proceedings. *See*, *e.g.*, D.P.U. 1731 (intraLATA competition); D.P.U. 93-98 (telecommunications carrier regulation); D.P.U. 94-158 (incentive regulation for electric and gas companies); D.P.U. 94-185 (intraLATA and local competition); D.P.U./D.T.E. 97-88/97-18 (payphones); D.T.E. 97-103 (eligible telecommunications carriers/Lifeline); D.T.E. 98-34 (public interest payphones); and D.T.E. 98-58 (expedited collocation requests). Such adjudicatory proceedings are frequently, though not always, "generic" in nature. They are "adjudicatory" in the sense that they affect the rights of specific companies, and they are "generic" in the sense that the affected companies represent all companies in a class, such as all gas distribution companies. There is nothing unusual, and certainly nothing inappropriate, in the procedural mechanism the Department is using here to examine CLEC access rates.

Indeed, the generic adjudication of CLEC terminating access rates that Verizon has initiated in this proceeding is fully consistent with the language of c. 159, § 14 and with a long history of Department practice and precedent. The Movants' claims to the contrary should be rejected.

II. THE MOVANTS' CLAIM THAT THEIR "NON-DOMINANT" STATUS PRECLUDES THE DEPARTMENT'S REGULATION OF THEIR CONDUCT IN MARKETS WHERE THEY EXERT MONOPOLY POWER IS CONTRADICTED BY CLEAR AND CONSISTENT DEPARTMENT PRECEDENT.

Movants also claimed that the Department has determined them to be "non-dominant" and – as a result – has eliminated regulation over their rates. The Movants, however, over simplify the Department's principles. The Department, in fact, has long abandoned the notion that carriers are "dominant" or "non-dominant" in some abstract sense.

Rather, the Department has focused on whether a carrier is dominant, *i.e.*, exercises monopoly power, in some markets, even though the same carrier may be non-dominant, in many other markets. *See, Re International Telecharge, Inc.*, D.P.U. 87-72/88-72 at 16-17 (otherwise non-dominant carrier required to cost justify its rates or base its rates on the incumbent's when it provides service to captive customers). *See also, Re AT&T Communications of New England, Inc.*, D.P.U. 91-79 (June 22, 1992) (dominant carrier entitled to "non-dominant" treatment in markets that the Department determines are competitive).

Indeed, the Movants' services and rates are subject to the same statutory requirements of "just and reasonable" as Verizon's or any other incumbent carrier, whether dominant or not. It is only where the Department has determined that competition is sufficient to ensure "just and reasonable" rates that it has eliminated regulatory methods for determining what is just and reasonable (*e.g.*, cost support). Verizon claims in its petition, and AT&T agrees, that there is no competition in the market for terminating access services, and – as a result – the Department should establish just and reasonable rates by regulation. It is fully consistent with the

Department's long established principle of relaxing regulation only where competition is adequate to ensure just and reasonable rates that Verizon be allowed to demonstrate that competition is not sufficient in the terminating access market to ensure just and reasonable rates, and that the law requires that the Department do so instead.

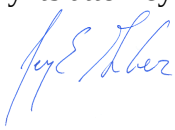
Conclusion

For the foregoing reasons, the Department should deny the Movants' motions to dismiss.

Respectfully Submitted,

AT&T CORP.

By its attorneys,



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