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October 30, 2008

VIA FEDERAL EXPRESS & EMAIL

Catrice C. Williams
Secretary
Department of Telecommunications and Cable
Two South Station, Fourth Fl.
Boston, MA 02110

Re: D.T.C. 07-9 - Petition for Investigation under Chapter 159, Section 14 of the Intrastate Access Rates of Competitive Local Exchange Carriers

Dear Ms. Williams:

On behalf of Comcast Phone of Massachusetts, Inc., enclosed for filing please find an original and nine copies of its Main Brief with regard to the above-referenced matter.

Copies have been served in accordance with the Certificate of Service. In addition, an electronic copy of the above Main Brief is being sent via electronic mail to dtc.efiling@masssmail.state.ma.us, catrice.williams@state.ma.us and Lindsay.Deroche@stae.ma.us.

Sincerely,

Deanne M. O'Dell

Deanne M. O'Dell
For WolfBlock LLP

DMO/lww
Enclosures

cc: Certificate of Service w/enc.

HAR:83039.1/COM270-250883

COMMONWEALTH OF MASSCHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

Petition for Investigation under Chapter 159, Section 14 of the Intrastate Access Rates of Competitive Local Exchange Carriers	:	D.T.C. 07-9

MAIN BRIEF OF COMCAST PHONE OF MASSACHUSETTS, INC.

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I. INTRODUCTION

Comcast of Massachusetts, Inc. ("Comcast") is a competitive local exchange carrier ("CLEC") in the Commonwealth of Massachusetts. As such, Comcast is well aware of the issues facing CLECs, particularly in dealing with the incumbent local exchange carrier ("ILEC"), Verizon. Verizon's historic monopoly and dominant share of the local telephone market along with its ubiquitous network give Verizon the incentive and ability to disadvantage its rivals in many ways – most significantly in the arena of interconnection. "Interconnection" refers to the ability of a carrier to interconnect its network to another carrier's network to enable phone conversations among subscribers. Without interconnection, the phones will go silent. Therefore, "[t]he issue of interconnection is very possibly one of the most important issues left for regulatory telecommunications agencies to deal with."[1]

This case involves a discrete component of interconnection – the ability of one carrier (the interexchange carrier or "IXC") to send the telephone calls of its retail end user customers to the network of a local exchange carrier ("LEC") for call completion (or "termination"). When a call is made, the IXC has only one choice of LEC for termination – the LEC that the called party has selected. The IXC must then compensate the LEC whose customer is receiving the call. The amount the IXC must pay to the LEC depends on the jurisdiction of the call.[2] This case involves intrastate long distance calls which require IXCs to pay LECs terminating intrastate switched access charges.

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1 Tr. at 357.

2 Local calls require payment of the local termination charges established under interconnection agreements and interstate calls require payment of terminating interstate switched access charges.

When Verizon, pursuant to its status as the ILEC terminates an intrastate long distance call for an IXC, the rate it can charge the IXC is constrained through regulatory action. Specifically in Massachusetts, the Massachusetts Department of Telecommunications and Cable ("Department") requires Verizon to charge the same rate as it does for interstate switched access. No similar regulatory constraint exists when an IXC sends an intrastate long distance call to a CLEC for termination. Additionally, there are no market or competitive constraints on what CLECs can charge for intrastate access because of the structure of the access market where the IXC has no choice but to direct the call to the called party's LEC. This monopoly on termination harms consumers of IXC services who must pay higher retail rates to make long distance calls. These higher retail rates – which are not based on the cost of service but on recouping excessive access charge payments – lead to IXC customers subsidizing CLEC customers (who pay below market retail rates to the CLEC) and less efficient CLECs (who depend on access revenues to cover a large portion of their costs rather than depending on revenues from their retail end users). As clearly evidenced in this proceeding, the structure of the access market will not correct itself and, therefore, rate regulation (which is already imposed on Verizon) is the only way to force switched access rates down to provide consumers with the benefits of a properly functioning access market.

In this proceeding, Verizon recommends that this rate regulation take the form of capping the CLECs' switched access rates at Verizon's switched access rates. While still above the incremental costs of call termination, Verizon's switched access rates (developed through various regulatory proceedings) are significantly lower than the access charges assessed by many CLECs and, therefore, the cap would provide control

over the CLECs' current unconstrained pricing of access. In the long-term, however, the real only solution is to reform all the components of intercarrier compensation (including interstate access, intrastate access, and reciprocal compensation) to move to a bill-and-keep regime or a unitary rate for all traffic.[3]

Pending more comprehensive reform, the Department can take important steps now for the benefit of consumers. This proceeding has illustrated a very vivid picture of the highly-distorted rates for intrastate switched access that exist in Massachusetts and how they detrimentally impact consumers in the Commonwealth. These problems will only exacerbate over time unless the Department intervenes now to remedy the most egregious distortions that currently exist. In this clear case of market failure, action by the Department can correct a situation that benefits only those carriers who exploit the system. Verizon's proposal to benchmark CLEC access rates at its rate is an acceptable interim solution that would bring much needed rationality into this market and will begin to drive access rates closer to cost. As IXCs are relieved of paying excessive charges in the form of access, these savings will be passed through to their end user customers over time. Further, all carriers in the market would be given a fair and equal opportunity to compete which will ultimately benefit all consumers.

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[3] As explained by Dr. Pelcovits, in a bill-and-keep regime, carriers recover all of their costs only from their own customers in contrast to the current "calling-party-network-pays" regime. Comcast-Exh-1 at 13. A "unitary" rate for all forms of traffic would eliminate the current situation where carriers have incentives to disguise the origin of traffic in an attempt to receive higher rates and all carriers would be paying the same rate for all types of traffic. These issues are being considered at the federal level. *See, e.g., Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Further Notice of Proposed Rulemaking*, 20 FCC Rcd 4685 (2005); *IP-Enabled Services*, WC Docket No. 04-35, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863 (2004); *Petition of Embarq Local Operating Companies for Limited Forbearance*, WC Docket No. 08-08; *Petition for Forbearance of Feature Group IP*, WC Docket No. 070256.

II. THERE ARE NO MARKET OR COMPETITIVE CONSTRAINTS ON LEC TERMINATING ACCESS CHARGES

The Department has jurisdiction to regulate intrastate telecommunications carriers pursuant to G.L. c. 159. In exercising this power, the Department has broad general supervisory power over the provision of telecommunications services and, pursuant to Section 17 of G.L. c. 159, the Department has a mandate to ensure that the rates charged by telecommunications carriers are just and reasonable. In 1985, the Department established telecommunications policy goals that included simulation of the results of a competitive market when necessary.[4] Therefore, when rates for services are not appropriately disciplined by competitive forces, the Department has the obligation to determine that the rates are not just and reasonable and take action to set the rate at an appropriate level.[5]

In the case of terminating switched access rates, there are no competitive constraints on the access market[6] because there is only one LEC that must be used to terminate a call to that LEC's customer. There is no substitute. Further, the structure of the access market is such that there is no relationship between the end-user customer who makes the decision to subscribe to a

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4 *IntraLATA Competition Order*, D.P.U. 1731, at 64-70 (1985), *cited in Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts*, D.T.C. 01-31-Phase I at 19 (2002).

5 According to the Joint CLECs' witness Dr. Ankum, the Department "should implement policies that promote and encourage competition in the telecommunications market." Tr. at 460. The Joint CLECs refer to One Communications, PAETEC Communications, Inc., RNK Communications, and XO Communications Services Inc. who jointly sponsored the testimony of Dr. Ankum.

6 The FCC has identified interstate switched access services as an appropriate "market" for purposes of forbearance analysis. *In The Matter Of Petition Of Qwest Corporation For Forbearance Pursuant To 47 U.S.C. § 160(C) In The Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 04-223, released December 5, 2005 at ¶ 22. Since the interstate switched access market has been used by the FCC for purposes of interstate telecommunications, the intrastate switched access market is the appropriate focus for this proceeding. The Joint CLECs appear to agree with this market definition. Comcast 1-2.

particular CLEC and the terminating access rates charged by the CLEC to the IXC. The end result is that there is no market check on access rates. The lack of substitutability and the fact that there is no relationship between access charges and the customer making the choice to subscribe to that CLEC creates a nonfunctioning system with no competitive constraints on access charge rates. Without Department intervention, the current structure will not self-correct and the problems identified in this proceeding will continue to the detriment of the consumers of Massachusetts.

A. There Is No Substitutability For A LEC's Terminating Access Charges

There is no dispute that an IXC delivering an intrastate long distance call from its customer must send that call to the called party's LEC for termination and pay whatever that LEC charges to terminate the call.[7] The IXC cannot select a different LEC to terminate the call because only that one LEC is serving the called party (at the telephone number being called) at the moment the call needs to be delivered. There is no substitutability. The IXC is prohibited by law from refusing to deliver the call because it wishes to challenge the access charges being assessed by the LEC.[8] The IXC cannot influence who the calling party calls or what LEC the called party has selected to terminate the call. In short, the called party exclusively determines what LEC he or she will utilize and the IXC must pay – in the form of switched access charges to the LEC – the cost of that decision. Without substitutability (i.e. the ability to choose LEC-A versus LEC-B to terminate a call), there is and can be no market constraint on the LEC's access pricing.[9]

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7 Comcast-Exh-1 at 8. As stated by Dr. Ankum, "[t]here is no alternative in the flash moment that the call is being made." Tr. at 589.

8 *Declaratory Ruling and Order*, WC Docket No. 07-135, (released June 28, 2007).

9 Tr. at 391, 404.

A lack of market constraint enables CLECs to price access in any way that they desire. This is because an IXC could choose to substitute one CLEC's switched access service for another CLEC's switched access service. When, for example, XO's switched access service can be substituted with RNK's switched access service, then XO has no choice but to lower its access rates to the market level. This substitutability is missing in Massachusetts as evidenced by the extreme rate disparities present among various CLECs. Comcast, for example, charges the same access rates as Verizon. XO, however, charges approximately 716% more for terminating switched access than Comcast.[10] In fact, it is striking that of 27 CLECs in Massachusetts, charges for terminating access vary by up to 1277% of Comcast's terminating access rates.[11] In a market where the CLEC would be subject to a competitive constraint, even relatively small rate disparities would not persist because IXCs would simply substitute one CLEC with another to terminate calls and no carrier would be able to charge a rate that is 1277% higher than a competitor. That carriers in the Massachusetts market are charging such extremely different rates makes clear that the competitive market is not functioning properly; the Department needs to take action to set an appropriate rate to act as the constraint that is currently missing in the CLEC switched access market.

B. There Is No Relation Between Competitive Market Forces In Retail Markets And The Market For Terminating Access Charges

Another way CLEC access rates could be constrained in a properly functioning market is through competitive forces in the retail market, i.e. the customer that bears the direct impact of high access rates could choose whether or not to make calls that terminate to the CLEC. In other

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10 CLEC-ATT 1-15(a), Modified Exhibit A.

11 *Id.*

words, if a retail end user (either the one calling a higher-priced CLEC or the one selecting the higher-priced CLEC to provide local service) has to pay the cost of that choice, then that end user customer would feel the direct financial impact of his or her choice. Upon receipt of this proper price signal, that retail end user could forgo or reduce his use of the service, which would pressure the CLEC to lower its rates. In a properly functioning market, this relationship between retail end user and CLEC would supply the appropriate market pressure on the CLEC to keep its access rates aligned with the market without the need for regulatory intervention. In the reality of the current access market, however, there is no retail customer in the access charge relationship because neither the calling party nor the called party is positioned to feel the costs of changes in access rates.

The called party is the one who chooses the CLEC which charges the IXC terminating access rates when the called party receives an intrastate long distance call.[12] The called party is not the IXC's customer but rather is the customer of the terminating CLEC.[13] Because of this structure, there is no practical way for the IXC to pass through the impact of higher terminating access charges onto the called party who has caused the IXC to bear a higher expense by choosing a CLEC that charges higher terminating access rates.

The calling party, who is the IXC's customer, similarly does not directly pay the costs of the decision to call someone who has selected a higher-priced CLEC because the rates charged to

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12 Advocates of a bill-and-keep regime whereby carriers recover all of their costs only from their own customers generally advocate that the called party is in a better position to constrain his or her own CLEC from imposing excessive prices for call termination on the IXC. Comcast-Exh-1 at 13.

13 When the LEC's customer makes intrastate long distance calls, he may be presubscribed to another IXC and that IXC pays LEC's originating switched access charges. When, however, the customer uses the long distance service from the LEC that provides him or her local service, the level of originating switched access is of no importance. CLEC-Com-1-17.

calling parties by their selected IXCs are geographically averaged.[14] IXCs, therefore, generally charge their retail end user customers (i.e. the calling parties) a uniform price (or flat rate) intended to reflect the access charges IXCs pay on average for terminating calls, not the specific cost of terminating calls to the CLEC serving the called party.[15] Therefore, while IXC customers will – as a class – pay the costs of higher access rates charged to IXCs,[16] they do not directly or immediately know that the higher rates they pay are based on customers selecting higher priced CLECs. Further, as Dr. Pelcovits testified, there is no reason to believe that IXCs could even devise a system to shift the costs of terminating access of specific CLECs to their retail customers who are calling subscribers to those CLECs:

> I have not seen anything that would lead me to believe it's practical to do that, because you would need to be able to actually identify the CLEC serving the called party on a sort of instantaneous basis and let the customer [calling party] know that. And given that there's number portability and you can't associate a number with a carrier on a sort of ongoing basis. . . from my knowledge of billing and telecommunications and what I've seen, I've never seen anything on that detailed a basis.[17]

When there is no relationship between retail rates and the cost of terminating access and no practical way to create such a relationship, there is no market check on the access rates that are imposed. The absence of such a market check results in the price distortions discussed above which, as Dr. Ankum agrees, leads to economic inefficiencies.[18] In situations such as this where

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14 *See* 47 U.S.C. § 254(g). IXCs are required by federal law to geographically average their interstate toll rates and generally do the same with intrastate toll rates. ATT-Exh-1 at 11.

15 Comcast-Exh-1 at 9.

16 *See infra*, Section III, B discussing the subsidies IXC customers are required to pay because of the structure of the current system.

17 Tr. at 360. Likewise, Dr. Ankum admits that he has not analyzed how such a billing system would be devised. Comcast 1-3.

18 Tr. at 461.

the market is not functioning properly to ensure market-based rates, the Department must step in to restore reasonableness.

C. The FCC Has Already Determined That The Interstate Terminating Access Market Is Broken

Based on the structural issues discussed above, the Federal Communications Commission ("FCC") has already concluded that the switched access market for interstate calls is broken, specifically when the CLEC is providing the terminating access service.[19] For this reason, the FCC promulgated federal rules that require CLECs to match their interstate access rates with the ILEC in the same service territory.[20] Recognizing the potential differences in rate structures, the rules do not require the CLECs to use any particular rate element or rate structure so long as the CLEC's composite rate does not exceed the benchmark based on a per-minute cap for all interstate switched access service charges.[21]

From a functional perspective, the interstate and intrastate access markets are the same. Whether a call received at the LEC switch for termination is from down the street, the next town or across the county, the LEC switch still has to process the call in the same way for termination to the LEC's end user.[22] There is also no difference between the interstate and intrastate switched access market with respect to the lack of market rate-controlling forces. No such forces

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19 "CLECs' ability to charge rates above the incumbent's appears to be due largely to the configuration of the access-service market and the geographical rate averaging required of the IXCs both of which prevent market forces from disciplining rates." *In the Matter of Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, released April 27, 2001 at ¶¶ 28, 59 ("*CLEC Access Reform Order*").

20 47 C.F.R. § 61.26(c).

21 *CLEC Access Reform Order* at ¶ 55.

22 Tr. at 405 (As explained by Dr. Pelcovits, "the actual function of the switch is exactly the same regardless of where the call originated.")

exist in either market. From a market power standpoint, the terminating carrier has the ability to raise terminating access rates well above cost, so long as the calling party's carrier has the obligation to complete all calls.

The significant difference between the two markets, however, is the fact that federal regulators identified the problem, realized market forces were not going to correct it, and took proactive measures to resolve it. These measures have been in place since 2001 and all of the Joint CLECs in this case were impacted by the change and adjusted their business plans accordingly.[23] The Department, like the FCC and other states,[24] must likewise act to adopt Verizon's proposal so that the access market can begin functioning properly.

D. The Joint CLECs' "Long View" Of Competitive Forces Should Be Rejected

While the Joint CLECs seem to agree that none of the "traditional" market or competitive forces discussed above constrain access rates, they argue that a "long view" of the situation shows that competition in the local exchange market will act as a restraint on access charges (even though strong regulatory oversight would still be required).[25] According to the reasoning of the Joint CLECs, the presence of these "guardians of the market" (i.e. competitors for local service), prevent CLECs from inflating the price of access because they know that if they "go too

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23 DTC -MCLEC 1-23. PAETEC, for example, continued geographic expansion and growth in business notwithstanding interstate access rate reductions. XO, likewise, stated that it did not make up the lost revenue.

24 *See,* VZ-Exh-2 at 10-12 identifying actions taken in the following states to address intrastate switched access charges: Maryland, Pennsylvania, New York, Connecticut, Louisiana, Illinois, Texas, New Hampshire, Ohio, Virginia, Missouri, Iowa, Michigan, California and Washington. *See also* ATT-Exh-1 att.

25 Tr. at 595-597. According to Dr. Ankum, the competitive pressure of the "guardians of the market" is not enough to drive down the rates for switched access services in the long run. Tr. at 569.

far" they will be "raising a red flag" to competitors and the Department.[26] These arguments are red herrings. First, even if another carrier was able to obtain the "profitable" customer of the CLEC (i.e. one who terminates a significant amount of incoming calls at inflated access rates), that still fails to create any incentive for the acquiring CLEC to lower the terminating charges assessed to the IXCs[27] which is the problem that the Joint CLECs argue the "guardians of the market" theory remedies.

Second, the "red flag" identified by the Joint CLECs has been raised. IXCs forced to bear the burden of excessive intrastate switched access rates in Massachusetts have turned to the Department for resolution in this proceeding. Abandoning the opportunity presented now in favor of embarking upon the "moral suasion" advocated by Dr. Ankum is a needless waste of time and resources.[28] The record in this proceeding shows that the intrastate switched access market is not functioning properly and regulatory intervention (such as applied to the ILEC and on the interstate side for CLECs) is needed.

III. PROACTIVELY ADDRESSING THIS SITUATION IS WITHIN THE MANDATE OF THE DEPARTMENT AND GOOD PUBLIC POLICY

A. Since The Market For Access Is Not Disciplined By Competitive Forces, The Department Must Take Action

Where the market for the service is sufficiently disciplined by competitive forces, the Department's inclination is to presume that the rates are just and reasonable and, therefore, there

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26 Tr. 495-497, 513.

27 Verizon would be the only acquiring LEC forced to lower its access rates because its access rates are regulated.

28 Tr. at 545.

is no need for rate regulation.[29] Where, however, no such competitive discipline exists, the Department has taken proactive measures to set rates that emulate the competitive market.[30] In this case, as discussed above, the market for terminating switched access is broken. The current market structure does not constrain the rates CLECs charge IXCs. And, unlike the intrastate rates of the ILEC and the interstate rates of the CLECs, there are no rate regulations that constrain the rates Massachusetts CLECs charge to IXCs for call termination.

On the other hand, regulators have acted in the switched access market to mandate that IXCs must send traffic to LECs for termination.[31] This regulatory mandate takes away one tool that could be used by the IXCs to demand lower terminating access rates, i.e. not sending calls to the LEC's customers. Obviously, if LECs were forced to deal with the possibility that their customers would not receive long-distance calls, they would be more inclined to negotiate lower access rates. In essence, regulators have given CLECs the advantage of mandated interconnection but must now complete the job by setting a rate for that privilege that does not distort the market.[32]

B. Consumers Should Not Be Forced To Subsidize Other Consumers Or Inefficient Market Participants

The broken switched access market directly harms customers by forcing them to subsidize other customers and inefficient CLECs. Regarding subsidization of other customers, as admitted by Dr. Ankum, the current access market creates an incentive for LECs to offer retail

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29 D.T.C. 01-31 – Phase I (2002) at 19.

30 VZ-Exh-2 at 5-17.

31 *Declaratory Ruling and Order*, WC Docket No. 07-135, (released June 28, 2007).

32 Tr. at 399, 408.

customers (the called party) lower retail rates and recover revenue from the IXC that delivers calls to the called party.[33] By doing this, the called party may be paying way below market rates to the LEC for retail service.[34] On the other hand, the customer of the IXC (the calling party) will be paying higher retail rates to make intrastate long distance calls as the IXC attempts to recover from its customer the excessive terminating switched access charges it pays to the LEC. The practical effect of this was described as follows by Dr. Pelcovits:

> [T]he high call terminating rates are more than anything else a subsidy for people that want to be on chat lines. It's not so much a subsidy to the CLECs; it's a subsidy to porn. . . Millie Smith in Bedford is paying more to call her sister across state and her son is being subsidized in his time spent on adult chat rooms.[35]

That same IXC customer also subsidizes a less efficient CLEC who has to charge excessive switched access rates to generate necessary revenue. In a properly functioning market, a business is required to recover its necessary revenue from its customers – customers who have other alternatives. If that business cannot recover enough revenues from its customers, then it will not succeed. In the access market, the CLEC which cannot otherwise generate sufficient revenues from its end user customers has the opportunity to make up the shortfall through charges assessed on the IXCs carrying calls to the CLEC's retail subscribers. IXCs are then forced to pass on the excess charges to their retail end user customers. This results in the customers of the IXCs subsidizing the less efficient CLECs.[36] As Dr. Pelcovits testified:

> Competitors in the telecommunications markets must stand on their own and not rely on terminating access rates as a continuing source of revenue and profits. A CLEC must achieve profitability

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33 Tr. at 503.

34 DTC-ATT 1-5.

35 Tr. at 373.

36 Tr. at 365.

> from free market transactions with its own customers. There is no benefit from subsidizing competition and circumventing free market forces by imposing rates above cost. This will distort competition and lead to inefficient market outcomes just as surely as allowing the ILECs to exercise market power by setting above-cost termination rates on their competitors.[37]

On the interstate side, the FCC has recognized the principle that carriers must recover their costs from their own retail customers for the access market to function efficiently.[38] Unfortunately, however, the lack of rate regulation for CLEC intrastate access charges coupled with the failure of the market to constrain access pricing has resulted in another revenue pool for CLECs looking to avoid charging higher rates to their customers. While additional telecommunications service providers do contribute to a competitive local telecommunications market place, new entrants into a market should not be subsidized by the government or other business' customers and, in fact, competitive markets have developed in telecommunications and other industries without such subsidies to new entrants.[39]

IV. CAPPING CLEC SWITCHED ACCESS RATES AT VERIZON'S RATES IS AN ACCEPTABLE INTERIM SOLUTION

The goal of the Department should be to price terminating access no higher than the long run incremental cost ("LRIC") of terminating call usage. The LRIC costs of call termination are the additional costs incurred over the long run by a network provider that must have capacity to handle a small increment in busy hour traffic. As explained by Dr. Pelcovits, "pricing in excess of LRIC introduces distortions in the market by repressing

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37 Comcast-Exh-1 at 18-19.

38 *CLEC Access Charge Reform* at ¶ 82.

39 CLEC-COM-1-18; RNK-COM-1-7.

demand for a service below efficient levels."[40] Likewise, pricing below LRIC may lead to an inefficient allocation of resources by increasing production of the service even though the costs of production exceed the consumer's willingness to pay.[41] The network used for an LRIC assessment, similar to that used in total element long run incremental cost ("TELRIC") studies, is an efficient, least cost network – not any company's specific network or actual costs.[42] Therefore, determining the LRIC of call termination does not require an individual, company-specific analysis of costs. For purposes of this proceeding, the proper analysis is whether any proposed benchmark captures the LRIC of call termination.

Verizon proposes capping CLEC switched access rates at its switched access rates. The record in this proceeding, however, shows that Verizon's switched access rates exceed the LRIC of call termination but that Verizon's switched access rates are still significantly lower than the rates of some of the Joint CLECs. Short of implementing a bill and keep regime or a unitary rate, which is Comcast's preference, using Verizon's switched access rates as a benchmark is an acceptable interim solution for several reasons. First, the cap would provide the CLECs with a generous upper bound for their switched access rates since Verizon's rates exceed the LRIC of call termination. While any cap above LRIC does not comprehensively fix the problem, a cap that places some restraint on the rates is preferable to none. Second, the proposed cap would

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40 Comcast-Exh-1 at 10; CLEC-COM-1-4.

41 RNK-COM-1-3.

42 Tr. at 414-415. As explained by Dr. Pelcovits, a LRIC analysis is more appropriate in this case rather than the TELRIC used for pricing unbundled network elements, or UNEs. LRIC more appropriately captures the nature of the costs imposed by the increased terminating usage and avoids the need to disaggregate the total cost of the switch into the different "elements" used in TELRIC studies. In any event there is very little practical difference which cost methodology is used. The cost studies cited by Dr. Pelcovits are TELRIC studies, which yield higher estimates of cost that would be produced by an LRIC study.

mirror Verizon's interstate rates which all CLECs are already required to mirror. Therefore, from an administrative perspective, using Verizon's switched access rates as a benchmark should be easily implemented.

While Comcast supports capping CLEC access rates to Verizon's rates, Comcast does not support some of the other alternative proposals that were identified in this proceeding including CLEC self-benchmarking based on the CLEC's originating access rates and undertaking a study of each CLEC's actual cost or attempting a full analysis of CLEC retail rates to determine the appropriate LRIC for call termination. Self-benchmarking does not provide any constraints on pricing. Analysis of CLEC-specific costs would be cumbersome and would require an analysis of embedded cost pricing which is not necessary to ascertain the LRIC of call termination. Finally, an analysis of CLEC retail rates, while presenting an interesting analysis that would theoretically yield a true market rate, would be difficult to undertake.

A. Verizon's Rates Exceed The Incremental Cost Of Call Termination And Provide A Generous Upper Bound For CLEC Rates

1. The Cost of Switching Is Minimal

Access charges are composed of different rate elements, including rate elements for transport.[43] In this case, Verizon's proposal is tailored to the usage-sensitive elements of switched access and proposes that – regardless of the rate elements/structure used – all usage-sensitive elements related to switched access be capped at the rate of Verizon's usage-sensitive elements related to switched access.[44] In analyzing the various usage-sensitive rate elements that comprise the access rates of Verizon and the CLECs, the charge for switching is the highest rated

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[43] Comcast-Exh-1 at 11.

[44] VZ-Exh-2 at 14.

element. For example, Verizon charges .21¢ for local switching while all usage sensitive elements combined equals .482¢.[45] The CLECs also rate their switching elements higher than the other usage sensitive elements that comprise switched access.[46] As the rate for switching is the most highly rated element in the overall package of switched access rates, an analysis of the true cost of switching is appropriate to help determine whether Verizon's overall switched access rates are set at LRIC.

The cost of switching has been the subject of many cost studies that have been reviewed by Dr. Pelcovits over the years.[47] These cost studies do not distinguish the cost of switching based on the origin of the call and a comparison of Verizon's current switching rate to these costs studies shows that Verizon's rate is set generously above cost.[48] In the HAI study offered by Comcast in this proceeding and adopted by other states, the cost of switching (which includes the cost of the trunk port since there is no way to terminate traffic on the switch without paying both elements) is calculated at .0295¢/minute.[49] After adding Verizon's trunk port rate to its switching rate,[50] Verizon's "HAI equivalent" switching rate is .37¢. This makes the relationship

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45 *See* XO-VZ 1-5(d) comparing average terminating rates across carriers.

46 Conversent, for example, charges a single rate of 5.5¢ for switching. RNK charges 2.25¢ for switching while its next highest rated element (local transport) is .83¢. XO charges 3.13¢ for switching and its next highest rated element (tandem switched transport) is 6.76¢. *See* XO-VZ 1-5(d).

47 These cost studies are generally TELRIC studies which employ the same analysis as supported by Comcast to determine the LRIC of call termination. Tr. at 414.

48 DTC-COM 1-4.

49 Comcast Exh. 1 at 11; RNK-Comcast-1-1(a). As explained by Dr. Pelcovits, "any carrier that uses a switch in a similar way [to the assumptions in the HAI model] is going to . . . generate reasonably similar costs." Tr. at 370.

50 Several CLECs (and even Verizon) impose other usage sensitive rate elements that accrue on every minute that their switch terminates, e.g. Verizon's shared end office trunk port and Choice One's carrier common line charge. These fees should be added to the local switching rate element to get a proper picture of the actual terminating switching cost imposed on terminating carriers, regardless of the method used to transport traffic to the CLEC's switch.

of Verizon's rate to the cost determined by the HAI study approximately 12-to-1 (.37/.0295).[51] Other jurisdictions have set rates for the use of local switches at less than .001¢.[52] Verizon's Massachusetts switching rate in comparison with these studies is approximately 370-to-1 (.37/.001). Therefore, even if the LRIC of call termination for CLECs to provide switching were 370 times greater than Verizon's costs, adopting Verizon's rates as the benchmark still permits the CLEC more than adequate recovery of its costs.

Additionally, there is no dispute that the switch does not incur costs on a usage basis even though that is how the switch is rated for switched access charges.[53] Therefore, whether an IXC sends 500 minutes of traffic or 200 minutes of traffic, the costs to the CLEC of the switch do not change because the switch is purchased on a capacity basis.[54] Based on all of this, Dr. Pelcovits estimates that "the cost of switching on a per-minute basis is very, very low, if not zero, on an incremental basis" and, based on his experience in looking at costing models and time spent with telecom engineers, there is no reason why the CLECs' costs of switching should be higher than the ILECs' switching costs.[55] Therefore, Verizon's currently effective intrastate switched access rate "is generous both with respect to Verizon and with respect to the CLECs and presents an appropriate interim benchmark for CLEC access rates pending longer term reform which moves intercarrier compensation to a bill-and-keep regime or unitary rates.[56]

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51 CLEC-COM 1-18.

52 Tr. at 398; Comcast-Exh-1 at 12.

53 Tr. at 577. Dr. Ankum agrees that usage, as a matter of economic principle, is not a cost driver for switches.

54 Tr. at 398 (Dr. Pelcovits, "there's a reasonable case to be made that the switch is not sensitive to the amount of usage.") Tr. at 579 (Dr. Ankum, "the switch is generally purchased on a capacity basis.")

55 Comcast-Exh-1 at 11; Tr. 384-385.

56 Tr. at 384.

2. The Cost of the Loop and "Competitive" Pressures Do Not Justify CLEC Access Rates Higher Than Verizon's Access Rates

In response to this persuasive evidence about the near non-existent incremental cost of call termination, the Joint CLECs claim that their usage sensitive loop costs (i.e. the cost to transmit a call from the CLEC switch to the called party) are greater than the ILEC's cost to perform the same function.[57] The Joint CLECs have not provided any cost studies (either TELRIC based or company specific) in this case and Dr. Ankum has not reviewed any information concerning the costs for the four CLECs he represents.[58] In fact, while Dr. Ankum argues that his experience in other jurisdictions have shaped his opinion in this matter, the Joint CLECs also assert that cost studies concerning CLECs in other jurisdictions are "irrelevant" to the issues in this proceeding.[59] On the contrary, Dr. Pelcovits presented compelling evidence based on his experience and analysis of TELRIC cost studies that he would not expect the entire traffic sensitive costs of call termination to exceed Verizon's current rate.[60]

In addition to these loop costs, the Joint CLECs also argue that their switched access rates include "the twin considerations of their costs and . . . the competitive pressures."[61] However, items beyond the LRIC should not be considered in setting the rate for terminating switched access. To do otherwise will only result in a loss of economic efficiency and exacerbate the

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57 CLEC Exh-1 at 55-59.

58 DTC-RR-5; VZ-CLEC-1-4.

59 VZ-CLECs-1-16 ("Dr. Ankum's testimony is also based on the cost studies that QSI has performed for a number of CLECs in support of their access tariffs or other switching related products."); Comcast 1-1 ("A cost study concerning the operations in Texas of an entity that is not a party to this proceeding is irrelevant to any issue in this proceeding.")

60 Tr. at 399.

61 Tr. at 472.

marketplace distortions that currently exist.[62] For all of the reasons discussed previously, capping CLEC access rates to Verizon's current intrastate access charges is an acceptable interim solution to begin the process of moving access rates to LRIC.

3. The Current Rates of CLEC Originating Access Provide Evidence of the True Costs of Access

As Dr. Ankum testified, the costs of originating and terminating access are "somewhat comparable" and an analysis of them is "worthwhile" when considering the true costs of access.[63] As has already been established, the function of the switch is basically the same whether the switch is passing the calling party's call to the IXC for delivery (i.e. origination) or whether the IXC is passing the call to the LEC for call termination. Since rates should be reflecting costs, one would expect to see the same rates for originating and terminating access.[64] However, this is not the case currently in Massachusetts; instead, three of the four Joint CLECs have terminating access rates that are significantly higher than their originating access rates. RNK, for example, charges terminating access rates that are approximately 460% higher than its terminating access rates.[65] XO charges terminating access rates that are 427% higher than its originating access rates, and Choice One's terminating access rates are approximately 415% higher than its originating access rates.[66] If, as the Joint CLECs advocate, their costs of switched

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62 Comcast-Exh-1 at 11 and 18-19.

63 Tr. at 623.

64 In fact to the extent there may be any small difference between the two rates, one would expect the rate for origination to be higher than termination because the switch needs to perform some set up functions for originating calls.

65 RNK charges .0084600 for originating access and .039000 for terminating access. XO-VZ-1-5(d).

66 XO charges .0089190 for originating access and .0380920 for terminating access. Choice One charges .0083510 for originating access and .0346870 for terminating access. *Id.*

access (both originating and terminating) are sufficiently high to justify their terminating rates, they would not be able to offer originating rates significantly lower than their terminating rates absent some ability to recover revenues from another source. Since the only potential source for this revenue "make-up" is terminating switched access because local compensation rates and interstate rates are both set by regulation, this variance is further evidence that higher terminating rates are not based on cost.

B. CLECs Are Already Required To Match Verizon's Interstate Access Rates Which Are The Same As Verizon's Intrastate Access Rates

The Department requires Verizon's intrastate switched access rates to match Verizon's interstate switched access rates.[67] While CLECs do not have similar regulatory requirements regarding intrastate switched access, they are required by federal law to match their interstate switched access rates with Verizon's interstate switched access rates.[68] The Joint CLECs in this case have explained how they monitor Verizon's interstate rate and comply with the matching requirement.[69] From an administrative perspective, then, requiring Massachusetts CLECs to match Verizon's interstate rates for intrastate switched access is simple. All CLECs in Massachusetts have already developed rate structures for their interstate switched access services that could be immediately implemented in Massachusetts for their intrastate switched access rates upon adoption of Verizon's proposal. Further, adopting Verizon's proposal creates consistency with federal law. This will create reciprocity so that every carrier sending and receiving traffic will pay and receive the same rate thus eliminating opportunities to game the

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67 VZ-Exh-2 at 16.

68 47 C.F.R. § 61.26(c).

69 VZ-CLECs-1-23.

system.[70] Finally, action at the FCC and other states has provided the Joint CLECs with ample notice of the desire of policymakers to bring interconnection rates more in line with cost and, more specifically, to ILEC levels.[71] In fact, other CLECs in Massachusetts, including Comcast, already mirror Verizon's intrastate access rates.[72] Adopting a similar approach in Massachusetts is the right course of action and consistent with the current direction of intercarrier compensation reform.

C. The Department Should Not Implement CLEC Self-Benchmarking Based On A CLEC's Originating Access Rates

As discussed above, the fact that some current originating rates are lower than that CLEC's terminating rates provides compelling evidence that the terminating access rates are not based on cost. However, Comcast does not support benchmarking a CLEC's terminating access rates against that CLEC's originating access on a going-forward basis for the following reasons. First, some of the CLECs' current originating access charges are just as high as their terminating access charges. As AT&T Witness Nurse testified, "equalizing a high rate at a high rate doesn't make the rates right, it makes them the same."[73]

Second, as Dr. Ankum testified, "[y]ou don't want to benchmark a company against itself, because that defeats the purpose of the benchmark."[74] To the extent CLECs are able to change their originating access charges on a going-forward basis, using them as a benchmark does not create any constraints.

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70 Tr. at 416.

71 DTC-COM 1-3.

72 DTC-COM 1-9. Other CLECs that mirror Verizon's current rates include Charter Fiberlink and Level 3 Communications. XO-VZ 1-5(d).

73 Tr. at 279.

74 Tr. at 590.

Finally, the use of bundled packages today intertwines the CLEC and the IXC for purposes of call origination because the same carrier may be offering local and long distance services.[75] In this situation there is no third-party IXC to pay the originating charges, rather the LEC is acting as its own IXC for call origination. Therefore, as Dr. Pelcovits has observed, "[t]he level of originating switched access rates is of no importance to any customer that buys long distance service from the same company that provides him/her with local exchange service because it does not affect the toll rates charged."[76] Since the CLEC is effectively paying itself as the IXC originating charges (moving money from one pocket to another) there is no barrier on the ability of the CLEC to raise originating rates so it can get a higher rate at which to set its terminating rates. For all of these reasons, Comcast does not recommend that the Commission implement a going-forward policy to benchmark CLEC terminating access rates based on their originating access rates.

D. A Retail Rate Could Theoretically Serve As A Market-Based Benchmark For CLEC Access Rates

As discussed above, switched access rates – whether for Verizon or CLECs – must be set at the LRIC to ensure that the market is functioning properly. LRIC is calculated by determining the costs of call termination for an efficient, least cost network – not any company's specific network or actual costs. An alternative to setting switched access rates at LRIC is Verizon's proposal to benchmark CLEC access rates at Verizon's rates. While Verizon's current switched access rates are above LRIC, a cap of CLEC switched access rates at the Verizon level provides some constraints on a market that currently has none and is an acceptable interim solution.

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75 Joint CLEC Response to DTC-RR-6(a).

76 CLEC-COM-1-17.

The only other alternative to basing CLEC switched access rates on LRIC or benchmarking to Verizon's rates is to undertake an analysis of each CLEC's retail rates.[77] The purpose of the analysis would be to identify a market-based rate upon which to set switched access rates. The rates a CLEC's end-user is willing to pay for service is a market-based rate. Therefore, a retail rate analysis would need to quantify this end user rate on a per minute basis (which is how switched access charges are assessed). Since CLECs only charge their retail customers to make outgoing long-distance calls (i.e. they do not charge their retail customers to terminate the calls received), the analysis would need to determine what the CLEC is charging the retail customer on a per minute basis for outgoing calls (outgoing calling which makes use of the switch). This number would be the market test because it would show what retail customers are willing to pay for outgoing calling (i.e. use of the switch). With a market-based rate for use of the switch to make outgoing calling and the fact that the function of the switch is the same regardless of whether it is originating or terminating, a reasonable argument could be made that this market rate would be an appropriate benchmark for setting terminating switched access rates.

As the Joint CLECs explain, however, implementing this proposal would be difficult because of the various retail pricing structures used by each carrier.[78] Nonetheless, if the Department rejects an LRIC assessment of call termination and the use of Verizon's switched access rates as benchmarks, then retail rates are the only other source that could provide an appropriate market rate to use as a benchmark. The resistance of the Joint CLECs to this approach, as well as to accepting an LRIC-based or Verizon-based switched access cap,

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77 Tr. 412-413.

78 DTC-RR-6(a).

demonstrates their resistance to any type of constraints on their ability to price switched access charges. Admittedly, such caps could force some CLECs to forgo a lucrative source of revenue but the current unfettered pricing structure does nothing but harm all consumers at the end of the day. While a full analysis of CLEC retail rates is another theoretical way to tackle the problem of finding a market-based benchmark to cap switched access rates, it would be a cumbersome undertaking and is not Comcast's recommended approach.

V. CONCLUSION

One does not need to look any further than recent financial headlines to understand the importance of government intervention when there is market failure.[79] The record in this proceeding provides ample evidence of how the intrastate switched access market is broken resulting in the ability of CLECs to charge access rates without any constraint. This unconstrained pricing harms consumers who are forced to subsidize other consumers and less efficient telecommunications carriers. Structurally, the access market is not designed in a way that will lead to self-correction. For these reasons, regulatory intervention is needed. This fact has been recognized by the FCC as well as other state jurisdictions which have undertaken proactive regulatory steps to fix the problems. Verizon's recommendation to the Department that it cap CLEC intrastate switched access rates at the ILEC level is reasonable. By adopting this approach, the Department will be driving access prices closer to cost which better simulates a competitive market that what currently exists. Once the costs of these high access rates are

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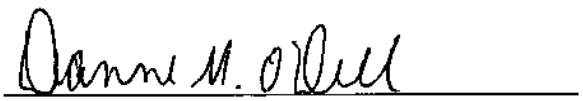
[79] According to CNN.com on October 14, 2008, "President Bush today announced an extraordinary investment in the nation's banks -- the biggest bet ever made with taxpayer dollars on the U.S. financial system. 'These efforts are designed to directly benefit the American people by stabilizing the financial system and helping the economy recover,' he said. Sources said the banks will get about $250 billion."

decreased, the effect should follow through to prices and this will provide some long overdue relief for consumers in the Commonwealth.[80]

Respectfully submitted,



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[80] Tr. at 385.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 07-9

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of 220 CMR 1.05(a) (Department's Rules of Practice and Procedure).

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