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November 10, 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 Reply 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:83558.1/COM270-250883

**COMMONWEALTH OF MASSCHUSETTS**
**DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

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

# REPLY BRIEF OF COMCAST PHONE OF MASSACHUSETTS, INC.


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Date: November 10, 2008

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# I. INTRODUCTION

All the parties in this proceeding generally agree that the intrastate switched access market in Massachusetts is not functioning properly.[1] The disagreement is over what to do about it. Comcast Phone of Massachusetts, Inc. ("Comcast") would prefer rapid adoption of a comprehensive reform of all components of intercarrier compensation to move to a bill-an-keep regime or a unitary rate for all traffic.[2] Short of such comprehensive reform, Comcast supports Verizon's recommended a cap on CLEC access rates at Verizon's rate. While not Comcast's preferred approach, adopting Verizon's proposal would be taking action where action is needed and setting some constraint on a market where none exists now.

At the other extreme, the Joint CLECs[3] ask the Massachusetts Department of Telecommunications and Cable ("Department") to maintain the status quo or, in the alternative, engage in a very long drawn out process that may someday result in some type of rate cap (which is essentially the same as maintaining the status quo).[4] As discussed below, the Joint CLECs' arguments regarding "costs," alleged market constraints, mandated flow-through requirements, and precedent must be rejected. They are simply attempts to distract and confuse the Department

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1 Attorney General Initial Brief at 3 ("Verizon has identified a market failure where direct regulation may be required"); PAETEC Initial Brief at 16 ("Admittedly there may be concerns presented by the case of terminating access"); XO and One Comm Joint Initial Brief at 4 ("... some CLEC access rates exceed the switched access rates of Verizon... [n]o one denies that fact. . ."); RNK Initial Brief at 21 ("it is reasonable for CLECs to charge higher switched access rates than Verizon.")

2 Comcast Main Brief at 3.

3 The Joint CLECs refer to One Communications, PAETEC Communications, Inc., RNK Communications, and XO Communications Services, Inc.

4 XO and One Comm asked the Department to maintain the status quo and initiate a second phase of this proceeding to address CLEC costs. XO and One Comm Joint Initial Brief at 6. PAETEC and RNK request at least a two-year transition period before any cap is implemented. PAETEC Initial Brief at 19; RNK Initial Brief at 30.

so that those CLECs who are currently lining their pockets with revenues from excessive access charges can continue to collect from the captive interexchange carriers ("IXCs"). Where, as here, a clear problem exists and an acceptable interim solution has been presented to address the problem, the Department must act. By adopting Verizon's proposal in this case, the highest access rates will decrease and the effect of these decreased costs should flow through to decrease prices, benefiting consumers in the Commonwealth with some long overdue relief.

## II. THE DEPARTMENT MUST REMAIN FOCUSED ON THE LONG RUN INCREMENTAL COSTS ("LRIC") OF CALL TERMINATION WHEN DECIDING THE APPROPRIATE RATE FOR CAPPING CLEC ACCESS CHARGES

The Joint CLECs claim that, through access rates, they are entitled to recover their expenses to enter and operate in a market and that all of these costs are high. These expenses, according to the Joint CLECs, include:

(a) company specific costs of providing call termination; [5]
(b) an "overall cost recovery for entering and operating in any state market;"[6] and,
(c) "a reasonable return on capital."[7]

According to the Joint CLECs, the Department must allow them to recover all of these "costs" through the access charges IXCs (and their customers) pay. The Joint CLECs, however, have not presented any empirical evidence specifically quantifying these costs.[8] Moreover, they

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5 Joint Initial Brief of XO and One Comm at 11 ("rates should be based upon the costs of the specific carrier"); Initial Brief of RNK at 16 ("rates are intended to allow carriers to recover their costs of providing service").

6 PAETEC at 17; RNK Initial Brief at 20.

7 XO and One Comm. Initial Brief at 24.

8 XO and One Comm Initial Brief at 12 ("One Comm and XO have not provided cost studies. . .")

have made clear that they could not easily provide such information in the future even if they were required to do so.[9] Essentially, the Joint CLECs are asking the Department to "trust them" and "leave things alone."[10] The purpose of this advocacy is obviously an attempt to inject confusion into this proceeding in the hopes of delaying an unfavorable outcome. Since, as the Joint CLECs acknowledge, there are no other potential revenue sources to recover these costs,[11] inaction from the Department ensures that they can continue to use access charges as a way to recover any and all expenses they incur – whether reasonable or not.

The self-interest of the Joint CLECs notwithstanding, permitting an all-encompassing list of items that may be recovered from access charges and accepting the unsupported theory that all CLECs have high costs is not reasonable nor is it aligned with long established rate setting principles. As explained by AT&T, "[j]ust because costs are incurred does not mean that they can be recovered in rates. Under long established Department precedent, not all costs can be recovered from ratepayers. For costs to be recovered in rates, the expenditures must be prudently incurred."[12] Moreover, as stated by the Attorney General, "[t]he Department has long

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9 RNK Initial Brief at 31.

10 XO and One Comm Initial Brief at 28 ("it makes no sense to move forward"); PAETEC Initial Brief at 1 ("PAETEC does not believe that any rule capping the intrastate carrier access rates of CLECs in Massachusetts is necessary or in the public interest."); RNK Initial Brief at 1 ("the Department should deny Verizon's request and find that CLEC access rates are just and reasonable.")

11 The Joint CLECs acknowledge this fact when they make clear that they cannot recoup lost access revenue from any other source. XO and One Comm. Initial Brief at 27 ("The record shows that neither One Comm nor XO will be able to recover any reduction in switched access revenues from another source.") Paetec Initial Brief at 16 ("there is no group of CLEC customers with inelastic demand characteristics. . . from whom any access charge revenue reduction can be automatically recovered by an offsetting rate increase.")

12 AT&T Initial Brief at 4-6.

held that a primary ratemaking goal is economic efficiency, meaning that rates should be cost-based." [13]

As explained by Dr. Pelcovits, the only appropriate "costs" that should be recovered from access charges from an economic efficiency standpoint are the long run incremental costs (LRIC) of call termination.[14] LRIC is consistent with general market principles which provide that a company entering into a market should be able to have sufficient capital to invest in the market and recover any start-up losses, and then recover from its own customers the long run cost of operating, without subsidies from either the government or other businesses' customers.[15] In accordance with the FCC's long-standing view, LRIC involves only current or future costs, not historical costs.[16] Therefore, the Joint CLECs' arguments that company-specific cost study proceedings are required before setting access rates is simply a stall tactic and must be rejected.

Moreover, the record in this proceeding provides ample evidence that Verizon's current access rates are above the appropriate LRIC for call termination. Using LRIC as his guiding principle, Dr. Pelcovits presented undisputed evidence (including an analysis of the costs of local switching and a comparison of originating to terminating rates) to show that the entire traffic sensitive costs of call termination do not exceed Verizon's current access rates.[17] This

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13 Attorney General Initial Brief at 2.

14 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. Comcast Main Brief at 14-16.

15 Comcast-Exh-1 at 18.

16 *In the Matter of High-Cost Universal Service Support, et. al.*, WC Docket No. 05-337, et. al., Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, Appendix A at A-110, released November 5, 2008 at available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-262A1.pdf.

17 Comcast Main Brief at 16-21.

conclusion is further supported by data detailed in the FCC's recently released FNPRM[18] and is undisputed by any empirical evidence in this record. Because the proposed cap will not exceed LRIC (but will still be less than the current access rates of some CLECs), Verizon's access rates can serve as an interim benchmark for CLEC access rates without concern that the benchmark would be improperly depriving CLECs of reasonable cost recovery. Rejecting an LRIC focused approach in favor of the Joint CLECs' proposal to recover all costs from access charges will only allow CLECs charging excessive access rates to continue to reap unreasonable and unchecked revenues from captive IXCs to the ultimate detriment of consumers.[19]

## III. CLAIMS OF MARKET CONSTRAINTS ON ACCESS CHARGES HAVE NOT BEEN PROVEN ON THE RECORD

PAETEC advocates that IXCs have the ability to challenge CLEC access charges through negotiating agreements with the CLEC or challenging the level of the charges directly with the CLEC.[20] Implicit in this argument is the idea that an IXC has some real bargaining power by being able to decide not to use the CLEC's terminating access service if the negotiations are unsuccessful. This, however, is not true. There is no substitutability for a CLEC's terminating access service. Moreover, IXCs are required by federal law to send traffic to the called party's

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18 In Appendix A, the FCC discusses recent estimates of switching costs including: (1) Sprint's analysis of UNE rates for unbundled switching and local transport; (2) a declaration filed by three economists which suggests that the incremental cost of termination is zero; and, (3) AT&T's analysis that the incremental traffic-sensitive costs of modern softswitches are likely to be lower than those of traditional circuit switches and possibly zero. *In the Matter of High-Cost Universal Service Support, et. al.*, WC Docket No. 05-337, et. al., Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, Appendix A at A-114-116, released November 5, 2008 at available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-262A1.pdf.

19 Likewise, RNK's request that the Department maintain the status quo while moving into a second phase to analyze costs or implement a 21/2 year transition plan would lead to the same result and must also be rejected

20 PAETEC Initial Brief at 10.

CLEC for call termination and cannot block such traffic to dispute the cost.[21] Therefore, in theory an IXC can attempt to negotiate or challenge bills as much as it wants but without any power to do something differently (i.e. direct their customers' call termination to another CLEC), such negotiations are useless. On the contrary, establishing a CLEC cap for access charges would equalize the parties' bargaining positions giving the CLEC incentive to negotiate. PAETEC's attempt to imply that any similar type of market constraint exists now has no record, legal or factual support and must be rejected.

## IV. THE RECORD SHOWS THAT CONSUMERS WOULD BENEFIT FROM DEPARTMENT ACTION TO CAP CLEC ACCESS RATES WITHOUT THE NEED FOR ANY ADDITIONAL REGULATORY MANDATES

RNK suggests that the Department require IXCs to flow-through to their end users any savings they receive as a result of imposition of a rate cap.[22] Likewise, PAETEC, XO and One Comm take the position that the record is devoid of evidence regarding such savings.[23] Further, PAETEC seems to take the position that there is no harm to consumers as a result of the current structure.[24] All of these assertions are inaccurate.

First, a majority of the experts testifying in this proceeding agreed that the cost savings resulting from reduced access charges would flow-through to consumers.[25] Second, the harm to

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21 Comcast Main Brief at 5.

22 RNK Initial Brief at 36.

23 PAETEC Initial Brief at 12. XO and One Comm Joint Initial Brief at 1.

24 "Importantly, there also is no concrete evidence that underlying long distance rates of any IXC has been perturbed by the alleged market distortion caused by CLEC terminating access rates being allegedly excessive, and there is no evidence of end-user long distance rates being raised due to the level of CLEC access charges." PAETEC Initial Brief at 13.

25 Tr. at 385 (According to Dr. Pelcovits, "in a competitive market the prices are driven to cost; so to the extent cost goes down, the prices should go down."); Tr. at 263 (Mr. Nurse stated, "in a competitive market lower costs flow through to lower prices. That is beyond question."); Tr. at

consumers has been well established. As illustrated by numerous parties, the only way for IXCs to bear the burden of excessive access charges is to pass on their cost to their retail end users. For this reason, the rates charged by IXCs for long-distance calls are more expensive then their wireless competitors who do not have to recover similar costs.[26] Not only are these customers being required to pay "above market" rates for long distance service but they are also being forced to subsidize other consumers and inefficient market participants.[27]

Finally, mandating that IXCs carry through dollar-for-dollar the savings that are realized from decreased access charges is not practical. Toll rate averaging and the general structure of the access market would make compliance with such a mandate nearly impossible.[28] Further, as Sprint details in its Initial Brief, a focus on only the cost benefits of a rate cap "over-simplifies the benefits that can flow from rate reductions" as consumers "also realize benefits through innovation and improved services as well as through lower service costs."[29] Such benefits may not be quantifiable on a dollar-for-dollar basis.

## V. THE DEPARTMENT SHOULD REJECT THE JOINT CLECS' ATTEMPTS TO PICK AND CHOOSE WHICH PRECEDENT SHOULD BE APPLIED

The Joint CLECs positions regarding the applicability of precedent to this case should be rejected by the Department as they are simply attempts to delay action. For example, the Joint CLECs advocate that any cap the Department institutes should be based on Verizon's pre-2002

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97 (Mr. Vassington testified, "I believe that a competitive market will reflect the cost changes over time.")

26 AT&T Initial Brief at 33.

27 Comcast Main Brief at 12.

28 Comcast Main Brief at 6.

29 Initial Brief of Sprint Nextel Corporation at 14.

rate which is higher than Verizon's current access rates.[30] However, as Verizon details in its Initial Brief, these rates were found by the Department not to be just and reasonable.[31] Therefore, they cannot be an appropriate benchmark today particularly when the only cost evidence in this record supports access rates even lower than Verizon's current rates as the appropriate benchmark.[32]

Furthermore, the Joint CLECs advocate that the Department should not be influenced by federal guidance regarding interstate access charges[33] while at the same time advocating that the Department should do nothing pending federal action.[34] This advocacy must be rejected for two reasons. First, the FCC's actions in 2001 to cap the rates CLECs could charge for interstate access is instructive and directly relevant to this proceeding because the interstate and intrastate access markets are functionally the same.[35] As detailed at length by Sprint, the development of the CLEC interstate access cap and the experience of the FCC with "self-regulation" specifically illustrates how ineffectively the theoretical arguments of the Joint CLECs played out in reality at the federal level.[36] Recently, the FCC reiterated that its decision prior to 2001 to not regulate CLEC interstate access charges created a "regulatory arbitrage opportunity" because of the structure of the access market and the toll rate averaging requirements.[37] As demonstrated by the

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30 PAETEC Initial Brief at 18; RNK Initial Brief at 24.

31 Verizon Initial Brief at 27.

32 Comcast Main Brief at 19.

33 XO and One Comm Joint Initial Brief at 17 ("a 'wait and see' approach is most appropriate" regarding the FCC's benchmarking rule).

34 RNK Initial Brief at 32; XO and One Comm Joint Initial Brief at 16; PAETEC Initial Brief at 26.

35 Comcast Main Brief at 9.

36 Sprint Initial Brief at 3-9.

37 *In the Matter of High-Cost Universal Service Support, et. al.*, WC Docket No. 05-337, et. al., Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, Appendix

evidence in this proceeding, these conditions continue to exist in Massachusetts and some CLECs are exploiting the same arbitrage opportunity identified by the FCC. Applying the benefit of the federal experience to this case makes sense from a practical standpoint and will benefit consumers in the long-term.

Second, the Joint CLECs' advocacy that the Department should let the federal government solve this issue should be rejected since nobody can predict the timing of such reform or whether it would address intrastate issues. While global comprehensive reform is a desirable solution, the fact is that such reform has proved elusive at the federal level.[38] The FCC's recent attempt to address the intercarrier compensation rulemaking at its November 4, 2008 meeting illustrates this point as it was deleted from the agenda the day before the meeting with the FCC Commissioners issuing statements of discontent about the process.[39] Further there is no certainty about when or if the FCC's just released FNPRM will result in an adoptable order.

These arguments provide no basis for the Department to delay implementation of the interim proposal set forth by Verizon in this matter. On the contrary, the well-developed and directly relevant FCC experience with CLEC interstate access charges clearly illustrates why

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C at C-81, n. 475, released November 5, 2008 at available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-262A1.pdf.

38 As summarized by AT&T in federal pleadings, ". . . the industry has struggled to reach consensus and the [FCC] has become mired in an intercarrier compensation rulemaking proceeding that has now languished for more than seven years and shows no signs of resolution." Petition of AT&T Inc For Interim Declaratory Ruling and Limited Waivers, WC Docket No. 08-152, dated July 17, 2008.

39 *See* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-286537A1.pdf for Chairman Martin's statement and http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-286533A1.pdf for the Joint Statement of Commissioners Copps, Adelstein, Tate and McDowell.

action is needed now to fix the currently dysfunctional access market in Massachusetts, at least on an interim basis, until comprehensive intercarrier compensation reform is a reality.

## VI. CONCLUSION

Comcast urges the Department to reject the arguments proffered by the Joint CLECs as they are simply delay tactics intended to forestall any action that will jeopardize their current ability to unreasonably recover revenues from IXCs and their customers. Rather, the Department should remain focused on setting access charges at LRIC. This goal is consistent with rate-making principles and is necessary to correct a dysfunctional market that is currently enabling some CLECs to charge comparatively excessive access charges due to the lack of any market or competitive constraints. In this case, the record proves that Verizon's proposed benchmark (its own access charges) is above the LRIC of call termination and would serve as an acceptable interim solution. As the FCC and other states have found, implementing a benchmark is an appropriate remedy that should be implemented immediately as it will ultimately benefit Massachusetts' consumers.

Respectfully submitted,

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Dated: November 10, 2008

**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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Dated: November 10, 2008

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