

PUBLIC VERSION

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

PETITION OF CHOICE ONE	:	D.T.C. 10-2
COMMUNICATIONS OF	:	
MASSACHUSETTS, INC., CTC	:	
COMMUNICATIONS CORP. AND	:	
LIGHTSHIP TELECOM LLC FOR	:	
EXEMPTION FROM PRICE CAP	:	
ON INTRASTATE SWITCHED ACCESS	:	
RATES AS ESTABLISHED IN D.T.C. 07-9	:	

**INITIAL BRIEF OF
COMCAST PHONE OF MASSACHUSETTS, INC.**

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Dated: February 18, 2011

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I. INTRODUCTION

Comcast Phone of Massachusetts, Inc. (“Comcast Phone”) hereby submits this Initial Brief to the Department of Telecommunications and Cable (“Department”) in connection with the above-captioned proceeding. The Department opened this docket to review the Petition of Choice One Communications of Massachusetts, Inc., CTC Communications Corp., and Lightship Telecom LLC (collectively, “One Communications” or “OneComm”) dated June 21, 2010 for an exemption from the cap on intrastate switched access rates established by the Department pursuant to its Order dated June 22, 2009 (“CLEC Access Order”) in D.T.C. 07-9, *Petition of Verizon New England, Inc., MCI metro Access Transmission Services of Massachusetts, Inc., d/b/a Verizon Access Transmission Services, MCI Communications Services, Inc., d/b/a Verizon Business Services, Bell Atlantic Communications, Inc., d/b/a Verizon Long*

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*Distance, and Verizon Select Services, Inc. for Investigation under Chapter 159, Section 14 of the Intrastate Access Rates of Competitive Local Exchange Carriers.*¹

In D.T.C. 07-9, the Department addressed Verizon New England Inc.'s ("Verizon") request to cap competitive local exchange carriers' ("CLEC") intrastate switched access rates at the level of Verizon's intrastate switched access rate.² The Department in D.T.C. 07-9 sought to remove a "market distortion" in the intrastate switched access market,³ which was attributable at least in part to the way in which switched access service functions. As a form of interconnection service, switched access is vital to the successful operation of the telecommunications industry. Since not every person is a customer of the same local exchange carrier ("LEC"), when calling parties call persons who are customers of different LECs, calls must be sent to and from the different LECs' networks for call termination. The LECs charge interexchange carriers ("IXCs"), the carriers that send non-local calls to LECs' networks for call termination – that charge is the switched access rate.

The market distortion found by the Department in D.T.C. 07-9 arises out of the requirement imposed upon IXCs to perform this function, regardless of the charges they incur from LECs.⁴ With regard to switched access service, IXCs are captive customers⁵ – IXCs have no choice but to send calls to the networks of called parties' LECs, and IXCs

¹ See also D.T.C. 07-9, Order on Motion for Reconsideration and Clarification (Dec. 7, 2009) ("Reconsideration Order").

² Verizon's intrastate switched access rate had previously been regulated by the Department and limited to the level of Verizon's interstate switched access rate. See Order, D.T.E. 01-31-Phase I, *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* (May 8, 2002).

³ CLEC Access Order at 1.

⁴ See Federal Communications Commission ("FCC") *In re Establishing Just and Reasonable Rates for Local Exchange Carriers and Call Blocking by Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, DA 07-2863, ¶ 6 (rel. June 28, 2007); see also CLEC Access Order at 5.

⁵ See CLEC Access Order at 21; Reconsideration Order at 20.

do not have any say as to which LEC the called party uses. What is certain is that IXCs must pay switched access charges to the LEC that terminates the call. Thus, the “unique market characteristics of switched access make it virtually impossible for competition to exist.”⁶ Accordingly, in D.T.C. 07-9, the Department found that the record “strongly shows that CLECs have market power in providing intrastate switched access service.”⁷

Ultimately, in order to remedy this market distortion and to “further[] competition within the telecommunications industry,”⁸ the Department limited intrastate switched access rates charged by CLECs to the level charged by Verizon, the incumbent local exchange carrier (“ILEC”).⁹ However, under the Department’s Order, individual CLECs may petition the Department for an exemption from the rate cap.¹⁰

On June 21, 2010, OneComm submitted its Petition requesting an exemption from the intrastate switched access rate cap, which triggered the commencement of this proceeding.¹¹ On July 7, 2010, OneComm submitted its Network Usage Cost Assessment (“NUCA”) Model – Massachusetts, to support its Petition.¹² The NUCA cost study was prepared by QSI Consulting, Inc. (“QSI”).¹³ As originally developed, the NUCA yielded a Massachusetts switched access rate per minute of use (“MOU”) of

*****BEGIN CONFIDENTIAL** **END CONFIDENTIAL*****.¹⁴ In stark

⁶ CLEC Access Order at 9.

⁷ *Id.*

⁸ *Id.* at 1.

⁹ *See generally id.*

¹⁰ *Id.* at 27.

¹¹ In its Petition, OneComm also requested a “true-up” period beginning on June 22, 2010. Should the Department grant OneComm an exemption from the rate cap, it should not grant OneComm any true-up. *See* Section II.C., below.

¹² OneComm also submitted a motion for confidential treatment regarding its cost study, to which Comcast Phone objected, and a ruling upon which is pending.

¹³ *See* NUCA Model.

¹⁴ *See* NUCA Model, Results Tab.

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contrast, the current rate cap is set at only \$0.003752 per MOU.¹⁵ Incredibly, six months later, OneComm revised its proposed switching rate to **** **BEGIN CONFIDENTIAL**

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For the reasons set out below, the Department should deny OneComm's Petition. The record evidence in this proceeding shows that OneComm has produced a cost study that is fatally flawed, and does not support its request for an exemption from the rate cap. Specifically, the methodology used in OneComm's NUCA cost study is not in accord with industry standards, and the study does not show that OneComm's costs of providing intrastate switched access service are justified and prudent, as required by the Department. Rather, the record shows that OneComm is simply attempting to shift responsibility for a significant portion of the cost of its network away from its retail customers, and onto other carriers and their customers. To allow this would create another market distortion, even more harmful than the one originally identified in D.T.C. 07-9, since it would negate the Department's previous efforts to foster a competitive marketplace. Moreover, it would frustrate the reason for the rate cap in the first place, and reverse what D.T.C. 07-9 was meant to accomplish. Accordingly, the Department should deny OneComm's Petition.

¹⁵ See Pre-Filed Rebuttal Testimony of James D. Webber (Dec. 15, 2010) at 13:8 ("Webber Rebuttal").

¹⁶ Webber Rebuttal at 13, Table 2.

II. ARGUMENT

A. Standard for Granting an Exemption

In D.T.C. 07-9, the Department investigated the originating and terminating intrastate switched access rates of CLECs and Verizon, and sought to remedy a “market distortion.”¹⁷ In order to cure this imbalance and further competition in the telecommunications marketplace, the Department set the cap on CLEC intrastate switching rates. Under the Department’s Order in D.T.C. 07-9, CLECs may request an exemption from the cap; however, given the fact that the cap was imposed in order to fulfill a key objective, i.e., fostering a competitive marketplace, the burden of showing that an exemption should be granted is, appropriately, very high.

A party seeking an exemption from the rate cap must show that it incurs justifiable and prudent costs in excess of the rate cap with cost-specific data.¹⁸ In other words, a CLEC requesting an exemption must show service-specific costs, i.e., its specific cost of providing switched access service, and that those costs are justifiable and incurred prudently. With regard to “prudently incurred costs,” the Department has “broad latitude to analyze carrier rates and is not required to abide by any particular method.”¹⁹ “While the Department is not required to employ any particular method to determine reasonableness, the Department has generally evaluated the reasonableness of rates as they relate to ‘prudently incurred costs.’”²⁰ “The prudence test . . . [is] based on how a reasonable company would have responded to the particular circumstances and

¹⁷ CLEC Access Order at 1.

¹⁸ See *id.* at 18-19, 27 (emphasis added) (citing *Town of Hingham v. D.T.E.*, 433 Mass. 198, 203 (2001); *New England Tel. & Tel. Co. v. D.P.U.*, 371 Mass. 67, 78 (1976); *IntraLATA Order*, D.P.U. 1731, Order at 37-38); see also Reconsideration Order at 14.

¹⁹ Reconsideration Order at 14; see also CLEC Access Order at 18-19.

²⁰ CLEC Access Order at 18 (citing *Town of Hingham v. D.T.E.*, 433 Mass. 198, 203 (2001); *New England Tel. & Tel. Co. v. D.P.U.*, 371 Mass. 67, 78 (1976); *IntraLATA Order*, D.P.U. 1731, Order at 37-38).

whether the company's actions were prudent in light of all circumstances known or reasonably known at the time.”²¹

The way to present justifiable and prudent costs through cost-specific data is by developing and submitting a cost study for intrastate switched access service. Thus, CLECs seeking an exemption from the rate cap are required to make a very specific showing of its costs, and indeed, the Department has made clear that the “act of filing a cost study alone will not trigger an exemption” from the rate cap.²² However, the cost study that OneComm has produced is so fundamentally flawed as to suggest that OneComm attempted to do just that – simply file a cost study in the hope that the Department will grant an exemption from the rate cap. This cannot stand.

The Department in D.T.C. 07-9 did not prescribe any particular cost study methodology that CLECs must use to support requests for rate cap exemptions, but cost studies must be “in accordance with industry standards.”²³ All parties in this proceeding agree that an incremental methodology is most appropriate.²⁴ Although OneComm and the intervenors have advocated different methodologies to calculate the cost of providing switched access service, this is of no import. It does not matter whether a LRIC, TELRIC, or TSLRIC methodology is employed – the factor common to each of those

²¹ *Hingham*, 433 Mass. at 202.

²² Reconsideration Order at 20.

²³ *Id.*

²⁴ OneComm, Verizon, and AT&T Communications, Inc. (“AT&T”) suggest a total service long-run incremental cost (“TSLRIC”) methodology, while Comcast Phone advocates the use of a long-run incremental cost (“LRIC”) methodology. *Compare* Pre-Filed testimony of Dr. August H. Ankum at 22:11-17 (Aug. 13, 2010) (“Ankum PFT”) (OneComm); Direct Testimony of Ann Amalia Dean and Paul B. Vasington at 19:19-20, 20:1 (Nov. 1, 2010) (“Verizon PFT”), Jan. 25, 2011 Transcript (“Tr.”) at 320:13-14; (Verizon); Pre-Filed Rebuttal Panel Testimony of E. Christopher Nurse and Dr. Ola A. Oyefusi at 32 (Nov. 1, 2010) (“AT&T Panel Testimony”) *with* Pre-Filed Testimony of Michael D. Pelcovits, Ph.D. at 15:9 (“Pelcovits PFT”) (Comcast Phone).

methodologies is that each is designed to measure the *incremental cost* of providing some or all of the output of a service (or element). As Dr. Pelcovits explained:

from a practical standpoint, what I am proposing here and how it affects my opinion of the NUCA cost model does not depend on whether you use LRIC or whether you use TSLRIC, as Verizon has described it in their testimony, because in point of fact, Verizon discusses TSLRIC as the difference in cost for OneComm depending on whether it provides intrastate switched access or not. So the increment is the amount of usage that is put on the OneComm network by switched access.²⁵

The Department should not grant an exemption from the rate cap if OneComm has not made this required showing.

B. OneComm's Purported Costs of Providing Switched Access Service are not Justified or Prudent

The Department should not grant OneComm an exemption from the rate cap because OneComm has failed to show that the costs reported by the NUCA study are a correct measure of justified and prudent costs of providing switched access service. First, the record shows that OneComm's NUCA cost study is not an incremental cost study; therefore, OneComm has failed to provide cost-specific data, i.e., switched access-specific data, as required by the Department's Order in D.T.C. 07-9.²⁶ The Department would be justified in rejecting OneComm's petition on that basis alone.

However, even were the Department to entertain OneComm's cost study, the record shows that OneComm's cost study includes costs associated with retail and wholesale services – it is not limited to costs incurred in providing switched access service, a wholesale service. Thus, by mixing wholesale and retail costs, the NUCA study gives a false picture of OneComm's actual costs of providing switched access

²⁵ Jan. 25, 2011 Tr. at 364:16-24, 365:1.

²⁶ See CLEC Access Order at 27.

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service.²⁷ Specifically, the NUCA study includes non-traffic-sensitive costs, such as loop costs, which should not be included in an incremental cost study for switched access service. In practical terms, this means that OneComm seeks to improperly shift recovery of its network costs from itself and its retail customers onto other carriers and those carriers' retail customers. As a result, granting OneComm an exemption would have negative effects on the competitive telecommunications marketplace. Thus, the Department would be justified in rejecting OneComm's Petition for these reasons as well.

1. The NUCA is not an Incremental Cost Study

OneComm's NUCA cost study does not calculate the *incremental cost* of providing intrastate switched access service – this of itself reveals the NUCA study's fatal flaw. The Federal Communications Commission has stated that “Incremental costs are the additional costs . . . that a firm will incur as a result of expanding the output of a good or service by producing an additional quantity of the good or service.”²⁸ Dr. Pelcovits has offered a similar definition: “An incremental-cost study . . . should be comparing the total cost of the company, inclusive of . . . everything it's providing, and subtract from that the total cost to the company when it provides everything but that particular service”²⁹ Verizon's and AT&T's witnesses have also testified similarly.³⁰ In other words, the “definition of incremental cost in the economics literature

²⁷ This could be due to overstatements of the cost of certain components of OneComm's network or cost misallocations.

²⁸ First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, et al.*, FCC 96-325, CC Docket No. 96-98 *et al.* at ¶ 675 (Rel. Aug. 8, 1996) (“FCC Local Competition Order”).

²⁹ Jan. 25, 2011 Tr. at 367:13-18.

³⁰ *See id.* at 302:19-24.

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is the difference in total costs between two levels of output, i.e., with and without this increment.”³¹

Ironically, OneComm apparently agrees with this definition,³² and claims that the NUCA employs a TSLRIC methodology. But OneComm is simply incorrect – the NUCA is not a TSLRIC study – it does not provide a *service-specific* increment limited to switched access service.³³ Instead, the NUCA is an *average* cost study – its methodology simply takes the costs of OneComm’s *entire voice network*, and divides that number by the total number of switched access minutes of use.³⁴ As Dr. Pelcovits summarized:

There’s no analysis there that looks at what’s the cost of OneComm’s network when it does not provide intrastate switched access. There’s just simply what’s the cost of OneComm or of OneComm’s voice part of its network, and then divides it by the total number of minutes. And essentially it’s total cost or total cost of a very large portion of their full business divided by minutes, and that is simply an average. It’s not related to any increment in demand.³⁵

The FCC has not endorsed OneComm’s methodology for calculating the incremental cost of providing switched access service. Quoting the FCC’s *Local Competition Order*, Dr. Ankum has testified that the “FCC mandated that long run incremental unit costs be calculated by dividing *total costs by total units of demand*.”³⁶

This is only partly true. The *Local Competition Order* provides as follows:

Per-unit costs shall be derived from total costs using reasonably accurate ‘fill factors’ (estimates of the proportion of a facility that will be ‘filled’ with network usage); that is, the per-unit costs associated with a particular element must be derived by dividing the total cost associated with the

³¹ Pelcovits PFT at 26:8-10.

³² See Jan. 24, 2011 Tr. at 139:10-12.

³³ See Jan. 24, 2011 Tr. at 143:23-24, 144:1-2.

³⁴ Jan. 25, 2011 Tr. at 302:14-19.

³⁵ *Id.* at 368:7-17.

³⁶ Rebuttal Testimony of Dr. August H. Ankum at 42:1-2, 11-23 (Dec. 15, 2010) (“Ankum Rebuttal”).

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element by a reasonable projection of the actual total usage of the element.³⁷

The NUCA does not divide the *total cost associated with the element, such as switching* (or in this case, the service) by the total usage of the element (or service). Rather, the NUCA divides the total cost associated with *OneComm's entire voice network* by total minutes of usage on the network, under the presumption that all of OneComm's costs are caused by – and can be allocated to – minutes of use. Dr. Ankum refers to this as a “minute is a minute is a minute approach. Dr. Ankum has said the “increment” measure calculated by the NUCA is “the total volume of use on the network, and that volume reflects the use of access, toll, any kind of uses, voice traffic, that rides over the network.”³⁸ Dr. Ankum's approach reduces the concept of incremental costing to an absurd level, where the increment loses any real meaning. Incremental costing is not some abstract concept, as OneComm would have the Department believe. Rather, the “correct measure of incremental cost is the cost of additional usage on the network, and not some abstract concept of a ‘service,’ to which an arbitrary portion of the CLEC's total costs are allocated.”³⁹

Thus, the FCC has not endorsed OneComm's methodology of measuring long-run incremental cost by dividing *total network costs* by total units of demand. In fact, in a very recent Notice of Proposed Rule Making, the FCC stated that a

number of problems arise from intercarrier compensation rates set above incremental cost and predicated on the recovery of average costs on a

³⁷ FCC Local Competition Order, ¶ 682 (emphasis added); *see also* Ankum Rebuttal at 42:14-19.

³⁸ Jan. 24, 2011 Tr. at 141:22-24, 142:1.

³⁹ Pelcovits PFT at 10:6-9.

traffic sensitive, per-minute basis. Under average cost pricing, a network can invest in facilities to attract subscribers and recover some of those costs from subscribers of other, potentially competing, networks. As competition has increased, the ability to shift the recovery of costs to competitors through intercarrier charges increasingly distorts the competitive process.⁴⁰

As a result, OneComm's methodology of calculating all voice network costs in relation to usage is fundamentally flawed.

Indeed, OneComm's treatment of loop costs is an example of how not to develop an incremental cost study for switched access service. Although OneComm has argued that it can include loop costs due to the way its network is designed, and thus, because its network architecture differs from Verizon's network, OneComm's costing differs from Verizon's,⁴¹ OneComm's cost study must still be based in reality. As Mr. Vasington noted, "What you're not free to do is . . . conduct a cost study as if you made a different decision or as if you made different choices or as if your network looked like a different network."⁴²

It should come as no surprise that the intervenors find fault in OneComm for failing to assign an incremental cost of providing and not providing switched access service. Dr. Ankum is careful not to suggest outright that no increment should be set at all – it would be difficult to do so, given the wealth of authority from state commissions and the FCC on how to develop incremental cost studies and TSLRIC, the purported methodology used for the NUCA study. Instead, Dr. Ankum attempts to shift the focus

⁴⁰ *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, WC Docket No. 10-90 *et al.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 at ¶ 524 (rel. Feb. 9, 2011).

⁴¹ *See, e.g.*, Jan. 24, 2011 Tr. at 79:21-24, 80:1-5.

⁴² Jan. 25, 2011 Tr. at 329:1-4.

on a tangential, and uncontested, issue of the appropriate length of the run.⁴³ Dr. Ankum states the obvious, that there is a point at which if the run is too short, there is no cost at all – he relates this effect to getting a bag of peanuts for free on an airline flight, and essentially accuses the intervenors of attempting to obtain switched access for free.⁴⁴ Dr. Ankum’s argument, however, incorrectly implies that the intervenors propose a short-run incremental cost model. This is simply not true. None of the intervenors have argued that costing models should treat switches (or other network components) as fixed with respect to the output of switched access, because there is sufficient capacity to handle anticipated demand.

Indeed, there is no time element attached to any of the intervenors’ positions. To the extent that increased output would require a large or more expensive network starting from scratch, these costs should be treated as incremental, according to the intervenors. But using a long time horizon does not give OneComm license to ignore the fact that substantial portions of network costs are insensitive to the level of output. Thus, not only are Dr. Ankum’s conclusions unsupported, but the true issue is ignored – the NUCA model does not measure the cost of an increment.

2. The NUCA Contains Non-Switching Costs

When examining the cost to provide switched access service, costs incurred to provide other services cannot be considered prudent or justified. Otherwise, carriers would be free to include whatever costs they please and pass them off as switched access costs. This is inconsistent with the concept of an incremental cost study.

⁴³ See Jan. 24, 2011 Tr. at 139:12-14, 140:1-10; Ankum Rebuttal at 18:16-22, 19:1-5.

⁴⁴ See Jan. 24, 2011 Tr. at 171:7-13; Ankum Rebuttal at 18:16-22, 19:1-5.

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OneComm's NUCA cost study includes costs, such as loops costs, that are not incremental to switched access service. Loop costs should not be included in a switched access cost study because loop costs would be incurred whether or not the carrier provides switched access service. "In other words, whether the end user makes a lot of toll calls, a few toll calls or no toll calls, the cost of providing the loop to that end user will remain exactly the same."⁴⁵ Thus, loop costs are not incremental to switched access.⁴⁶ When measuring incremental costs, it "is entirely arbitrary to use an abstract allocation of a common cost, such as the loop, as a proxy for this correct definition of incremental cost. This is not how prices are set in a competitive market, and should not be the basis for setting prices when it is necessary to constrain a firm's market power."⁴⁷ This treatment of loop costs is in accord with Department precedent. As Mr. Vasington noted, "loop costs are a direct cost of basic network access . . ." consistent with the Department of Public Utility's ("D.P.U.") Order in D.P.U. 86-33-G.⁴⁸

In fact, Dr. Ankum has admitted that loop costs are not incremental to switched access. When asked by Ms. Lackey if there "were no switched access on the network, would the cost of the loop still be avoided,"⁴⁹ Dr. Ankum, after a lengthy and largely unresponsive answer, finally admitted: "So yes, the loop costs wouldn't totally go away . . ."⁵⁰ If the elimination of switched access does not likewise totally eliminate loop costs, the loop costs cannot be considered to be an incremental cost of switched access service.

⁴⁵ Verizon PFT at 32:2-4.

⁴⁶ See Jan. 25, 2011 Tr. at 304:14-18; Pelcovits PFT at 18:13-18, 19:13-18.

⁴⁷ Pelcovits PFT at 26:10-13.

⁴⁸ Jan. 25, 2011 Tr. at 304:22-23; see also Verizon PFT at 41 (citing Order, D.P.U. 86-33-G at 455 (1989)). "That finding was reaffirmed by the Department in D.T.E. 01-31-Phase II (2003)." *Id.* at n.69.

⁴⁹ Jan. 24, 2011 Tr. at 188:21-24.

⁵⁰ *Id.* at 189:24, 190:1.

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OneComm has attempted to justify its inclusion of loop costs based on the nature of OneComm's network architecture. OneComm claims that its network architecture differs from Verizon's to the extent that the distances between OneComm's switches to connection points are longer than on Verizon's network.⁵¹ OneComm's point is unavailing. It does not matter how network architectures differ, or if OneComm's network features longer switch to connection point distances. Ultimately, what matters is what costs are caused by additional usage on OneComm's network. At hearing. Mr. Mael asked Mr. Vasington: "why would One [Communications] not be entitled to recovery of these transport cost elements, if it's a much longer distance?"⁵² Mr. Vasington replied: "because they're not switched access costs; they're loop-related costs. Every carrier has a different network architecture, for various reasons."⁵³ Mr. Vasington continued:

Simply because two networks are designed in different ways doesn't relabel one company's network loop services as switching services or as switching functions. They're very different things. You can put a banana sticker on an apple, but it doesn't make it a banana; it's still an apple. You can't just relabel loop plant and line-side facilities as switching facilities because two different companies have different network architectures.⁵⁴

The record also shows that the NUCA study includes both costs incurred in providing wholesale services, like switched access, as well as retail services. It is inappropriate to include retail costs in a calculation of a wholesale service like switched access. Mr. Vasington testified: "To put it in terms of cost causation, essentially the retail costs aren't being caused by the provision of wholesale switched access service, they're being caused by the provision of retail services only. Therefore, they are

⁵¹ See *id.* at 79:21-24, 80:1-5.

⁵² Jan. 25, 2011 Tr. at 311:11-13.

⁵³ *Id.* at 311:14-17.

⁵⁴ *Id.* at 327:13-22.

incremental costs to the retail service, not to the wholesale service.”⁵⁵ Additionally, as Dr. Pelcovits explained, “if you want the market to work efficiently, the absolute best way to do that is that you should price terminating traffic at long-run incremental cost and don’t add in anything else, because all the other ‘else’ -- all the other fixed costs, all the other common costs and loop costs and shared costs -- are most efficiently recovered from that carrier’s customers that choose to use that carrier.”⁵⁶ As Ms. Dean testified, “One Communications didn’t do a service-specific cost study – they looked at all their investments, all their experiences -- so in their study they have included retail costs, and we think it’s inappropriate, that switched access is a wholesale service and the retail costs should not be part of a switched access cost study.”⁵⁷ The fact that these costs are included in the NUCA study is further evidence that OneComm did not present an incremental cost study in accordance with industry standard, and accordingly, the costs reflected cannot be considered prudent or justified.

3. Granting OneComm An Exemption Will Distort the Telecommunications Marketplace

If the Department were to grant OneComm an exemption from the switched access rate cap, OneComm’s responsibility to shoulder its own costs of providing switched access service will be shifted away from it onto other carriers and in turn, those carriers’ retail customers. As a result, other carriers and their customers will subsidize OneComm and its retail customers in its provision of switched access service.⁵⁸ Such an outcome is anti-competitive and should not be permitted.

⁵⁵ *Id.* at 308:19-24, 309:1.

⁵⁶ *Id.* at 376:21-24, 377:1-4.

⁵⁷ Jan. 25, 2011 Tr. at 308:11-18.

⁵⁸ Pelcovits PFT at 11:10-19, 16:12-15, 16:18-19, 31:4-6; Verizon PFT at 4:9-11; AT&T Panel Testimony at 2, 4.

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The purpose of the rate cap was to correct an imbalance in the switched access market in the furtherance of “competition within the telecommunications industry,”⁵⁹ thus, it is axiomatic that any exemption granted by the Department must not frustrate that intent, or reverse the practical effect of the cap. Therefore, implicit in the Department’s decision whether to grant an exemption from the rate cap is the question of what effect such an exemption will have on the telecommunications marketplace. This does not require the Department to revisit the question of whether switched access, a *wholesale* service, is a competitive service. The Department’s finding in D.T.C. 07-9, that switched access was not competitive,⁶⁰ remains undisturbed. However, given the primary purpose of the rate cap in furthering competition, the Department must nevertheless ensure that the granting of an exemption from the cap will not have negative effects on the telecommunications marketplace.

Dr. Ankum claims that the intervenors have raised questions as to “the degree of competition with respect to *switched access services*,”⁶¹ which fall outside the scope of this proceeding, having been addressed in D.T.C. 07-9.⁶² While it may be true that the Department considered the degree of competition with respect to switched access service in the *wholesale* marketplace in D.T.C. 07-9, what the Department did not consider, and what is critically important in this proceeding, is the following question: if OneComm is granted an exemption from the rate cap and is allowed to charge rates **** **BEGIN**

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⁵⁹ CLEC Access Order at 1.

⁶⁰ See CLEC Access Order at 14.

⁶¹ Jan. 24, 2011 Tr. at 89:15-17 (emphasis added).

⁶² See Ankum Rebuttal at 25:10.

carriers, what effect will this have on the *retail competitive marketplace*? OneComm misses, misunderstands or conveniently ignores this point.

Moreover, if, according to OneComm, a “minute is a minute,” whereby all calls are treated the same for costing purposes,⁶³ it necessarily follows that if OneComm’s switching rate is **** **BEGIN CONFIDENTIAL** **END**

CONFIDENTIAL **** than, for example, Verizon’s, then OneComm’s other retail services, like toll and local, should generate **** **BEGIN CONFIDENTIAL**

END CONFIDENTIAL **** revenue per minute than Verizon’s retail minutes, like toll and local.⁶⁴ Dr. Ankum’s claim to the contrary that “we are actually comparably efficient in comparable circumstances”⁶⁵ helps him escape from this inevitable conclusion. It leaves open the question, however, of why two carriers that are comparably efficient should be paid different amounts for providing the same service.⁶⁶

Having shown why OneComm’s NUCA study is not in accord with industry standards, and that its results do not reflect prudent or justifiable costs in the provision of switched access service, it becomes clear why OneComm seeks to charge such an unreasonable rate. OneComm has admitted that with the rate cap in place, there is a shortfall in the costs it incurs in providing switched access service.⁶⁷ In order to recover this shortfall, OneComm would have two possible choices: either charge retail rates that are sufficient to recover these costs, or charge switched access rates that are ****

BEGIN CONFIDENTIAL **END CONFIDENTIAL** **** than the cap. However, OneComm has not produced any evidence as to where its retail rates are

⁶³ See Ankum PFT at 25, 26:1-6; Jan. 24, 2011 Tr. at 100:5-9.

⁶⁴ See Jan. 24, 2011 Tr. at 100:22-24, 101:1-18.

⁶⁵ Jan. 24, 2011 Tr. at 101:20-21.

⁶⁶ See Jan. 24, 2011 Tr. at 103-105.

⁶⁷ *Id.* at 121:19-21.

set. In fact, Dr. Ankum never even compared OneComm's retail rates to the NUCA results.⁶⁸ Therefore, the only reasonable conclusion is that OneComm set out to recover this shortfall by imposing inflated switched access charges, and has never intended or even considered recovering the shortfall from its own retail customers.

OneComm claims that it will suffer if it has to absorb this shortfall.⁶⁹ However, a question remains: if OneComm is unable and unwilling to absorb this shortfall, since it will "suffocate One Communications' ability to be viable,"⁷⁰ then who should absorb it? Apparently, OneComm believes other carriers and other carriers' customers should subsidize OneComm and its customers. However, this would create a market distortion. Indeed, if the Department granted OneComm an exemption from the rate cap, then a domino effect would result. First, there are IXC's, which are already mandated to switch traffic. Next, IXC's would not only be required to switch traffic, but also pay for the cost of OneComm's network, including parts of the network that have nothing to do with switching. Third, IXC's will be forced to subsidize OneComm and its customers. Finally, IXC's and their retail customers will suffer for this subsidy.

To grant OneComm an exemption would give OneComm an unfair competitive advantage, and reward OneComm for not being able to effectively compete in the marketplace, all to the detriment of other carriers that are forced to pay OneComm's exorbitant rate, and ultimately and most importantly, to the detriment of consumers of these services who will be forced to pay higher prices. In essence, OneComm is proposing that consumers should be taxed to subsidize OneComm's less efficient operations. The Department cannot allow this result to occur if it seeks to maintain a

⁶⁸ Response to Comcast-One Comm 1-9 (Sept. 27, 2010).

⁶⁹ See Jan. 24, 2011 Tr. at 21-23.

⁷⁰ Jan. 24, 2011 Tr. at 21-23.

balanced and truly competitive marketplace. OneComm should recover its costs from its own retail customers. Otherwise, “the effect of allowing OneComm to charge higher rates would be to shield OneComm’s retail customers from appropriate price signals in a competitive marketplace.”⁷¹ This will distort retail competition in the marketplace.⁷²

C. OneComm is Not Entitled to a True-Up

The record sufficiently demonstrates that OneComm should not be granted an exemption from the rate cap. However, to the extent that the Department grants an exemption, it should not allow for any true-up. In its Petition, OneComm also requested that the Department allow recovery of under collections in OneComm’s costs, operating retroactively to June 22, 2010.⁷³ OneComm claims that this true-up is “necessary to avoid significant harm to One Communications and potential resultant harm to the competitiveness of the market.”⁷⁴

OneComm is not entitled to a true-up. First, by making this request in its Petition, OneComm merely restates a similar claim it had unsuccessfully advanced in connection with D.T.C. 07-9. Specifically, in its Motion for Reconsideration and in the Alternative for Clarification dated July 13, 2009 (“Motion for Reconsideration”), OneComm⁷⁵ sought “clarification that, if [a] CLEC submits its cost justification prior to the effective date of the rate cap, the CLEC’s rates will not be subject to the cap while the Department concludes its review of the cost justification.”⁷⁶ This is tantamount to asking for a true-up in the event that a cost justification is accepted and an exemption granted. The

⁷¹ Verizon PFT at 8:11-12.

⁷² See Pelcovits PFT at 8:18-21.

⁷³ See Petition at 5.

⁷⁴ Petition at 5.

⁷⁵ The Motion for Consideration was submitted jointly by OneComm, PAETEC Communications, Inc., RNK, Inc., and XO Communications Services, Inc.

⁷⁶ Motion for Reconsideration at 16.

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Department rejected this concept, ruling that “a CLEC will be subject to the rate cap (once effective) unless and until the Department determines, based on a cost filing, that it is reasonable for the CLEC to charge switched access rates above the rate cap.”⁷⁷ Thus, the Department clarified that the rate cap is in effect until the Department issues an order to grant an exemption from the cap. The Department did not leave open the possibility of a true-up.

OneComm’s request in its Petition is merely a retread of the claim that was teed up in the Motion for Reconsideration. OneComm has not offered any new reasons or other justification as to why the Department should retreat from its prior ruling. Indeed, the only authority OneComm cited in the Petition relates to true-ups that were permitted in connection with unrelated matters.⁷⁸ Finally, except for its original claim in the Petition, OneComm has not offered any justification for its request throughout the course of this proceeding. As a result, the record does not support granting the request, and it should otherwise be considered abandoned.

III. CONCLUSION

The Department in D.T.C. 07-9 made very clear that a CLEC seeking an exemption from the rate cap on intrastate switched access service must show that the costs incurred in providing the service are justifiable and prudently incurred using cost-specific data. The record in this proceeding shows that OneComm has failed to make this required showing. Instead, the record shows that OneComm’s cost study does not even calculate the cost of providing switched access service. What OneComm’s cost study

⁷⁷ Reconsideration Order at 21. The Department also stated that CLECs “must abide by the established rate cap until the Department issues an exemptive Order.” *Id.*

⁷⁸ See Motion for Reconsideration at 5-6; *see also* Verizon’s Opposition to Request for Temporary Rates dated July 19, 2010.

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calculates is the average cost per minute on its voice network. By employing this methodology, OneComm includes costs that are unrelated to its provision of switched access service and also includes large cost categories that are insensitive to the volume of usage. It is therefore no surprise that OneComm's switched access rates were orders of magnitude higher than the rate cap before the cap was imposed.

To allow OneComm to charge an unjustified rate that reflects imprudently incurred costs would distort the retail telecommunications market by forcing other carriers and their retail customers to subsidize OneComm and OneComm's retail customers. This anti-competitive result was not what the Department envisioned when it imposed the rate cap, even given the possibility that CLECs could be exempted. Therefore, the Department should deny OneComm's request for an exemption from the rate cap.

Respectfully submitted,

COMCAST PHONE OF
MASSACHUSETTS, INC.

By: _____

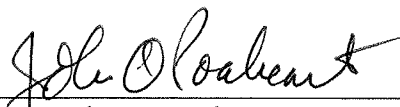


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CERTIFICATE OF SERVICE

I certify that a copy hereof has been sent on this 18th day of February 2011 to all parties, intervenors, and participants of record as reflected on the Department's service list as of this date, via first class mail, postage prepaid.



John A. Poakeart