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July 13, 2009

BY HAND AND E-FILING

Catrice C. Williams, Secretary
Department of Telecommunications and Cable
Two South Station, 4th Floor
Boston, Massachusetts 02110-2212

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:

We respectfully file herewith on behalf of One Communications, PAETEC Communications, Inc., RNK Inc., and XO Communications Services, Inc. (the "Joint CLECs"), the Joint CLECs' MOTION FOR RECONSIDERATION AND IN THE ALTERNATIVE FOR CLARIFICATION in accordance with 220 C.M.R. § 1.11 (10) and the Hearing Officer's instructions of July 6, 2009. Also filed herewith in accordance with 220 C.M.R. § 1.11 (11) is the Joint CLECs' MOTION FOR EXTENSION OF JUDICIAL APPEAL PERIOD.

Should there be any questions regarding this filing, please call the undersigned.

Respectfully submitted,

Eric J. Krathwohl
Counsel for One Communications and
XO Communications, Inc.

Encl

cc: Lindsey DeRoches, Esq., Hearing Officer
Service List (By Email and Regular Mail)

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

Petition of Verizon New England, Inc., MCImetro 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 Distance and Verizon Select Services, Inc. for Investigation under Chapter 159, Section 14, of the Intrastate Access Rates of Competitive Local Exchange Carriers.	)	D.T.C. 07-9

ONE COMMUNICATIONS, PAETEC COMMUNICATIONS, INC., RNK, INC. AND XO COMMUNICATIONS SERVICES, INC. MOTION FOR EXTENSION OF JUDICIAL APPEAL PERIOD

Pursuant to 220 C.M.R. § 1.11(11), One Communications, Paetec Communications, Inc., RNK Inc., and XO Communications Services, Inc. (the "Joint CLECs") hereby move to extend the judicial appeal period in this proceeding to twenty (20) days following final action by the Department of Telecommunications and Cable (the "Department") on the Joint CLEC's Motion for Reconsideration or in the Alternative, Motion for Clarification (the "Motion") filed in this proceeding today. This relief is necessary in order to preserve the Joint CLECs' right to appeal the Department's June 22, 2009 order in this proceeding, pending the final resolution of the Motion and to avoid needless burden on the Joint CLECs, the Department, and the courts for there to be an appeal prior to the disposition of the Motion.

WHEREFORE, for the reasons stated herein, the Joint CLECs request that the Department grant its Motion for Extension of Judicial Appeal Period to allow twenty (20) days after the date of final action on the separate Motion filed in this proceeding on this date.

Respectfully submitted,

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July 13, 2009

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

Petition of Verizon New England, Inc., MCImetro 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 Distance and Verizon Select Services, Inc. for Investigation under Chapter 159, Section 14, of the Intrastate Access Rates of Competitive Local Exchange Carriers.	D.T.C. 07-9

ONE COMMUNICATIONS, PAETEC COMMUNICATIONS, INC., RNK, INC. AND XO COMMUNICATIONS SERVICES, INC. MOTION FOR RECONSIDERATION AND IN THE ALTERNATIVE FOR CLARIFICATION

One Communications[1], PAETEC Communications, Inc., RNK Inc., and XO Communications Services, Inc. (the "Joint CLECs") hereby petition the Department of Telecommunications and Cable ("DTC" or "Department") for reconsideration of the order issued June 22, 2009 ("Order") based on mistake or inadvertence. The Department's conclusions in the Order largely depended on the erroneous placement of the burden of proof on the CLECs rather than on Verizon, as required by Massachusetts Supreme Judicial Court and Department precedent. Therefore, the Department's mistake in that regard is critical and mandates reconsideration. In the alternative, the Joint CLECs move for clarification of the process for exemption from CLEC access charge reductions discussed in the Order at 27.

[1] Choice One Communications of Massachusetts Inc., Conversent Communications of Massachusetts Inc., CTC Communications Corp. and Lightship Telecom LLC all do business as and are referred to herein as "One Communications."

I. STANDARD OF REVIEW

The Department's procedural rules, 220 C.M.R. § 1.11 (10), authorize a party to file a motion for reconsideration within twenty days of service of a final Department Order. The Department's standards for reconsideration are well established.

The Department will grant reconsideration of previously decided issues when extraordinary circumstances dictate that the Department take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. Fitchburg Gas and Electric Light Company, D.T.E. 98-51-A, at 5-6; North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electrical Company, D.P.U. 588-A at 2 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company; D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983). A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electrical Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987).

The Department grants clarification of orders "when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is sufficiently ambiguous so as to leave doubt as to its meaning." Boston Gas Company, D.P.U. 93-60-D at 1 (1994); Boston Edison Company, 90-270-A at 3-4 (1992).

II. THE ERRONEOUS IMPOSITION OF THE BURDEN OF PROOF ON THE JOINT CLECS WARRANTS RECONSIDERATION

The entire rationale of the Department's Order rests upon the improper imposition on the Joint CLECs of a burden of showing a company-specific cost basis for their access rates. Because the imposition of the burden of proof on the Joint CLECs is clearly contrary to governing case law[2] the Order is the result of mistake or inadvertence and warrants reconsideration. In the Order at 23-24, the DTC found that it had to use the approved Verizon[3] access rate as a proxy for what would be a reasonable access charge for the competitive local exchange carriers. The reason for this conclusion was DTC's assertion that the Joint CLECs had an obligation[4] to present company-specific cost of providing access service failed to make that showing. The Joint CLECs maintain, however, that the burden of proof was not the Joint CLECs', but Verizon's, and that Verizon failed to meet it. Massachusetts Supreme Judicial Court (SJC) and Department precedent require a complainant (here, Verizon) to prove its case, but the Order did not follow such precedent and consequently came to the wrong conclusion. This is clear mistake and reconsideration is required.

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[2] Metro Dist. Comm'n v. Dep't of Pub. Utils. 352 Mass. 18, 25 (1967); New England Tel. & Tel. Co. v. Dep't of Pub. Utils., 371 Mass. 67, 75 (1976);.

[3] The Company uses the name Verizon, consistently with usage throughout this proceeding, to refer to the various affiliates of Verizon New England Inc. and its corporate predecessors.

[4] Though the CLEC's failure to present company-specific cost data is apparently central to the DTC's findings against the CLEC's, at no time were the CLEC's required to perform cost studies and even the inquiry about such costs cited in the Order, only occurred on the last day of hearings. Also, the CLECs did not refuse to provide company- specific cost data. Rather, they stated that they could not in the circumstances. DTC-RR-5.

A. Verizon Failed to Carry Its Burden, So the DTC's Finding of Unreasonableness of the Joint CLECs' Access Charges is a Mistake.

This proceeding was initiated upon the complaint of Verizon and the DTC specifically ruled that the proceeding was **not** an investigation on the DTC's own initiative. The June 18, 2008 ruling of the Hearing Officer on the several Motions to Dismiss stated as follows:

> In my bench ruling at the February 12, 2008 procedural conference, I clarified that this investigation into CLEC access rates would be based *on Verizon's petition, not pursuant to the Department's own motion.* Tr. at 32. Specifically, I stated the Department "envisions this process as a full evidentiary hearing, with Verizon as the petitioner...So, I find that Verizon correctly addressed its petition as a generic complaint against all CLECs charging access rates in Massachusetts, and may properly pursue its allegation under G.L.c. 159 section 14....Verizon has asserted that CLEC access charges are significantly higher than their own, and alleged that there is no justifiable reason for such a disparity, and Verizon argues that this disparity is causing market distortions which are affecting competition. See Verizon Petition at 2, 5. While I draw no conclusions about the merits of these allegations, *if the allegations are proven*, the rates could constitute unjust rates under G.L. c. 159, section 14.

Verizon Massachusetts, D.T.C. 07-9, at 5-7, Hearing Officer Ruling (June 18, 2008) (emphasis added). The import of that ruling is clear: that "the rates could constitute unjust rates [...] if the allegations are proven" *by Verizon.* That ruling correctly followed the clear rule for administrative proceedings in Massachusetts – i.e., the complainant bears the burden of proving its case. See New England Tel. & Tel. Co. v. Dep't of Pub. Utils., 371 Mass. 67, 75 (1976); Metro Dist. Comm'n v. Dep't of Pub. Utils. 352 Mass. 18, 25 (1967). Therefore, Verizon clearly had the burden of showing the unreasonableness of the CLEC access charges.

There is no dispute that Verizon showed the fact that CLEC access charges (including those of its own affiliate MCI Metro)[5] exceeded the access charges in effect for Verizon. However, as the Hearing Officer Ruling makes clear, that differential is not all that Verizon had to prove. Verizon also had to prove that there was "no justifiable reason for such a disparity."

[5] Exh. IR-RNK-VZ-1-2; Exh. XO-VZ-1-11.

Hearing Officer Ruling at 7. Indeed, to ignore the question of whether there is justification for a rate difference is to ignore the clear basis of the Department's rate review: *whether rates stand in a reasonable relationship to prudently incurred costs*. As the DTC found: "the Department has generally evaluated the reasonableness of rates as they relate to '*prudently incurred costs*.'"[6] (Emphasis added.). However, Verizon made *no* showing on this point. In fact, as the DTC notes: "The Department finds that it cannot rely on a traditional analysis of CLEC costs to determine the reasonableness of their rates because cost data is *not* available in this case."[7] Moreover, as the Order notes, Verizon's costs are also unknown:

> However, as Verizon witness Mr. Vasington pointed out, the Department has no ILEC cost data on Verizon's switched access services. See Sept. 23, 2008 Evidentiary Hearing of Mr. Vasington, Tr. at 106-107 (noting that the Department relied on the FCC's Calls Order to set ILEC intrastate rates and not on ILEC cost data). Therefore, as the Department does not have ILEC switched access cost data, this alternative cost method is not appropriate.[8]

(Emphasis added.) So of course, having no information on either the CLECs' or Verizon's costs, the Order could not possibly discuss the reasons for the disparity, much less find that there was no basis for the disparity. Thus, the Order failed to consider a key piece of the analysis that was required to make an affirmative finding that CLEC rates were unjust and unreasonable. Even the Department, through the above-referenced ruling on the Motions to Dismiss, found the issue of whether there is justification for a difference between ILEC and CLEC access rates to be critical to the Department's investigation. This inconsistency between the Department's own ruling and Order is clearly the result of mistake or inadvertence.

As noted by the Department, CLEC access charges are presumptively lawful (Order at 18) and even the lack of competitiveness for a given service "does not lead to the conclusion that

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[6] Order at 18.
[7] Order at 19.
[8] Order at 21.

the rate for that service is unreasonable." Id. The Joint CLECs maintain that the lack of company-specific cost data should not cut against the Joint CLECs, as the Department concluded in the Order, but, instead, against the Complainant, Verizon, *who under Massachusetts Supreme Judicial Court and Department precedent has the burden of proof.* There is no reason to undo either the well-accepted administrative procedure as recognized by Hearing Officer in the ruling on the motions to dismiss, or the well-established precedent (see footnote 2 above), that the Complainant (Verizon) must carry the burden of proof. Indeed, where Verizon brought the Complaint, but then failed to prove unreasonableness, the DTC should not grant Verizon the significant relief requested. This is not just a matter of procedural fairness, but of failing to follow applicable judicial precedent.[9] There was no indication that the Joint CLECs had the burden of proving that their access charges were not unreasonable by means of company-specific cost studies. **Contrast,** Level 3 Communications, D.T.E. 07-1 Order of Notice dated May 21, 2007. In fact, given the complexities of constructing and reviewing CLEC specific cost studies, it is highly doubtful that such cost studies could have been constructed, submitted and reviewed by the Department and intervenors within the procedural timeline established in this case. DTC-RR-5.[10]

Further, there is no ground for a presumption[11] that all carriers have similar costs, let alone that CLECs would have similar costs to ILECs, such as Verizon. Indeed, there is ample evidence on the record that there are many justifiable reasons for a disparity between Verizon

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[9] Id.

[10] The Order makes much of the CLEC's having failed to "submit any CLEC specific cost data". Order p.27. This is not a fair criticism given the facts and it is even less a reasoned basis upon which the Department could justify an illegal and critical conclusion that the ILEC's access rate was a proper proxy. As is clear on the face of DPU-RR-5 (the document cited by the Department as showing the Joint CLEC's refusal to provide their own cost studies), the Joint CLECs, individually and together, never had either the mandate or reasonable opportunity to provide such cost studies. DTC-RR-5. This was Verizon's case from the start. Given the Department's ultimate ruling in the Order, the Department should have provided the Joint CLECs the most basic of due process rights and given them clear notice that company-specific cost data was required. See, CTC Communications, D.T.E. 98-18-A (1998) p.9.

[11] The use of the Verizon 01-31 access rates as a proxy for CLECs equates to such a presumption.

charges and costs on one hand and CLEC charges and costs on the other. For example, CLECs do not have the same economies of scale as Verizon, *i.e.*, they lack the sheer size necessary to produce average, per-unit costs as low as those enjoyed by Verizon. Exh. CLEC-1, at 51-52. CLECs have different network architectures with proportionally more traffic-sensitive costs and are not able to achieve similar levels of facility utilization as Verizon. Id. at 59-60. CLECs have a more limited customer base than Verizon thereby limiting their ability to spread costs among customers. Id. at 61-69. In sum, the record shows that Verizon is *not* a good or even a reasonable proxy for CLECs. As a result the Order will almost certainly not allow most CLECs to recover their expected higher but prudently incurred costs. Exh. CLEC-1, at 51-52. These are not just unsupported assertions on the part of the CLECs' witness[12], but thoroughly consistent with explicit findings made by the FCC.

> The Commission has recognized that the smaller telephone companies have higher local switching costs than the larger incumbent local exchange carriers (ILECs) because the smaller companies cannot take advantage of certain *economies of scale.* (Emphasis added)

National Exchange Carrier Assn., Inc. proposed Modifications to the 1998-1999 Interstate Average Schedule Formulas, Order, 13 FCC Rcd 24225, at n.6. The FCC recognized these differences further as follows:

> We find that incumbent LECs retain material scale advantages with regard to provisioning and operating local circuit switches. Requesting carriers therefore will encounter generally greater direct costs per subscriber when provisioning their own switches, particularly in the early stages of entry when requesting carriers [CLECs] may not have the large number of customers that is necessary to increase their switch utilization rates significantly. *When we examine the market as a whole, we find that requesting carriers incur higher costs due to their inability to realize economies of scale using circuit switching equipment.*

[12] This witness, Dr. Ankum, has "spent several years reviewing cost information for ILECs, CLECs, wireless carriers and a host of other telecommunications entities." Exh. CLEC-1, p. 51.

In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No.96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, Rel. November 5, 1999, ¶ 260. (Emphasis added).

Indeed, if the costs for ILECs were not materially different (lesser) than for CLECs, there would be no justification for the ILECs' network unbundling, collocation and resale provisions of the 1996 Telecommunications Act. Again, all of those provisions are predicated on the *presumption* that new entrants have significantly higher costs and could not enter and continue to compete in markets unless they shared in the economies of scope and scale of the incumbents. See D.T.E. 01-31, Phase I, at 59-60 (2002): "As Verizon pointed out, the ability to lease UNEs allows CLECs to enter the market without the high cost of building their own network facilities." Clearly, absent cost information to the contrary (to be shown by the complainant – Verizon), the only reasonable conclusion is that CLECs have *higher* costs than Verizon. That is, current regulatory policies and law support the perspective that CLECs have higher costs than ILECs. Indeed, as detailed above, the CLECs provided explicit evidence justifying that conclusion.

Verizon presented *no* evidence to contravene this assumption and as such, it did not meet its burden of proof. The Order overlooks Verizon's failure and thus clearly is the result of mistake sufficient for reconsideration. This mistake is compounded by the mistake of ignoring the evidence presented by the Joint CLECs. Dr. Ankum provided an extensive analysis that shows material differences in costs between CLECs and Verizon affecting the costs of providing access services: economies of scale (Exh. CLEC-1, at 52-59); network design necessary for new entrants (id.at 54-58); lower facility utilization (id. at 59-60); and sparser customer base/line

density (id. at 60-72). Instead of considering whether such evidence[13] supported the Joint CLECs' position, the Department determined that such evidence was not specific to the Joint CLECs and effectively disregarded it without any in-depth analysis, *as if each CLEC had the burden of proof instead of Verizon.*

Further, the Department dismissed the CLECs' evidence in significant part on the grounds that it was not specific to Massachusetts. This again is an inappropriate shifting of the burden of proof onto the CLECs. To be sure, Verizon provided no information whatsoever to demonstrate that CLECs in Massachusetts are unique and that CLEC cost information from other states would, therefore, be irrelevant. Surely, in the absence of evidence to the contrary – *which Verizon had the burden of providing* – the reasonable conclusion, established by common sense, economic theory, and FCC orders, is that the significant differences in cost characteristics between Verizon and CLECs in Massachusetts are comparable to those differences universally acknowledged nationally and in other states, particularly where it concerns the same CLECs. Surely, the CLECs' evidence in this regard is more persuasive than no evidence at all, which is what Verizon provided.

In any event, even if such showing does not *per se* demonstrate the reasonableness of each individual Joint CLEC's specific levels of switched access rates, Verizon offered no credible evidence that diminishes the fact that each and every CLEC has higher costs than Verizon because all of these undisputed factors materially impact the cost of providing switched access services. The only arguable debate from the record evidence is the degree to which each CLEC has higher costs than Verizon. Yet, even apart from its general burden as the complainant discussed above, the fact that CLECs have higher costs than Verizon (for several reasons) even

[13] Despite extensive rambling testimony and cross examination, the most the IXCs put forth or elicited was what Dr. Ankum volunteered – that CLECs can install more efficient equipment, but even that employed by a new entrant yields higher costs when compared against entrenched dominant duopolists.

more clearly shows that in the case of a complaint brought by Verizon, the burden of proof that a particular CLEC's rates are excessive is clearly on Verizon. Again, Verizon did nothing to satisfy its burden.

Thus, the DTC's first mistake that is a ground for granting reconsideration is as follows. By the terms of its own orders, the DTC's analysis should have considered whether Verizon demonstrated that there is no good reason for a disparity between CLEC and ILEC access charges. The Department should have stopped when it found the inescapable answer that Verizon failed to make that showing. Instead, the DTC shifted the burden of proof on the Joint CLECs; this was contrary to the earlier order, impermissible and led to untenable conclusions and the wrong result. Moreover, the DTC's belatedly shifting of the burden of proof on CLECs is a clear violation of each CLEC's due process rights in that they had not been advised in advance by the DTC that they individually had the burden to prove the reasonableness of their respective rates. Again, the June 18, 2008, Hearing Officer Ruling expressed exactly the opposite of the Department's Order and confirms the Joint CLECs' view of which party has the burden of proof. To be sure, the first time CLECs were informed that the burden had been shifted to them to provide CLEC specific cost data was in the Department's Order, thus denying the Joint CLECs their due process rights.

Had the DTC properly held Verizon to carrying the burden that the SJC requires of complainants, the DTC could only have found that there was an insufficient record to prove that CLEC rates were unreasonable. In essence, despite its statement that the effective CLEC rates were reasonable presumptively, the DTC found that those rates were unreasonable because the CLECs had failed to provide company-specific cost data supporting their rates. This error in

assigning burden of proof and the denial of due process rights constitute mistake and warrant reconsideration.

B. Use of Verizon's Access Rates to Cap CLEC Access Rates is a Clear Mistake

The DTC's second mistake was its finding that a reasonable proxy for CLEC access rates is Verizon's D.T.E. 01-31 approved access rates. While the Joint CLECs are not contesting in this brief the DTC's reasoning that, in the absence of cost information, the use of a proxy may be reasonable, the Joint CLECs do not believe that just *any* proxy is reasonable: before a proxy is adopted, it must be established that the proxy is in fact a reasonable substitute for the missing data or observations. Because Verizon did not meet its burden of proof and in light of the CLEC provided evidence, justifying a differential in costs (between CLECs and IECs), it has not been established that Verizon's DTE 01-31 approved access rates are such a "reasonable proxy". In fact, all credible evidence suggests that they are not.

Even if a rate deemed reasonable for a large ILEC with significant market power could conceptually be reasonable for much smaller CLECs without market power, the Verizon access rate is not even reflective of the costs of Verizon. Exh. XO-VZ-1-4; Exh. RNK-VZ-1-11. Where the fundamental basis of rates approved by the Department is the cost of provision of the relevant service, the D.T.E. 01-31 approved access rates might have been reasonable for Verizon in the grand scheme of things considering all other revenue sources and requirements. However, in no way can that be translated into a proxy cost basis for setting other carriers' access charges. That Verizon's access rates were not established on the basis of a cost study, and that Verizon is necessarily vastly different with very different costs, should be enough to show that the proxy concept does not work here. See Exh. XO-VZ-1-4; Exh. RNK-VZ-1-11 (There is no evidence that Verizon's access rates reflect Verizon costs); Exh. XO-VZ-2-3

(Verizon refused to provide cost support for its access rates). The Department mistakenly overlooked these facts in reaching its decision in the Order. The Department further failed to address another important point.

Specifically, the D.T.E. 01-31 approved access charges were part of a larger revenue neutral rate rebalancing. Exh CLEC-1, at 75-79. To reduce the potential that IXCs would charge higher rates to consumers to place intrastate toll calls than interstate toll calls, the Department substantially reduced Verizon's intrastate access charges, but did so on a revenue neutral basis.[14] The significance is that even for Verizon, that level of intrastate access charges was deemed reasonable only in the context of a huge Department-mandated revenue addition to Verizon on non-price sensitive rates. Indeed, there is ample evidence on the record that, taking into consideration the revenue-neutral pass-through and fixed rates elements, Verizon's actual intrastate access rate is much higher than the rates that would be mandated for CLECs if Verizon's "below-cost" intrastate access rates are used as a proxy for CLECs. However the Department did not address these arguments by CLECs. RNK Brief at 7-11; PAETEC Brief at 21-23. At the least, when a rate is deemed reasonable within the context of a specific set of circumstances, that rate cannot be used as a proxy basis to set other carriers' charges outside of that specific context; or, if Verizon's access rate is to be used as a proxy, the Department must add in for the Joint CLECs' charges an amount equal to these other revenues Verizon indirectly receives for access, so that CLECs and Verizon are similarly situated with respect to cost recovery for switched access services. Otherwise, the DTC is placing CLECs at a significant competitive disadvantage and that constitutes an unlawful barrier to entry for CLECs.

[14] Dr. Ankum's testimony also clearly shows that even Verizon's interstate access rates were not adequately cost-based. Id. at 77-79.

In any event, there has been no demonstration that Verizon's D.T.E. 01-31 approved switched access rates are in fact a reasonable proxy for rates to be charged by CLECs. Thus, the Department's finding is mistake warranting reconsideration.

Further, while the Order makes an attempt at establishing that Verizon's D.T.E. 01-31 approved rates are a reasonable proxy for CLEC rates, there is no discussion *at all* about the reasonableness of other ILECs' switched access rates. Yet, the Order summarily mandates that:

> No competitive local exchange carrier ("CLEC") shall charge a rate for intrastate switched access services that is higher than the intrastate switched access rate of the incumbent local exchange carrier in whose area the CLEC operates.[15]

Clearly, where it concerns the switched access rates of other ILECs, this finding is *entirely* unsupported and as such constitutes mistake warranting reconsideration.

C. The Department Mistakenly Concluded IXCs Lack Alternatives to Paying CLEC Access Charges.

The Department's third mistake in concluding that it was reasonable to use the Verizon access charges as a proxy for a reasonable level of charges for CLECs is the Department's misplaced reliance on the AOS and Inmate-calling cases[16]. The Department analysis is incorrect because the CLECs' access customers are not "captive" customers like those in the AOS and Inmate-calling cases who were inmates at hotels or state correctional facilities with only the choice of using a specific carrier when making a call. Rather, the IXCs can compete and win the customers in question and self provision access. This is surely true for originating access for larger customers. For those types of customers, for example Verizon (the complainant) is

[15] Order at 24.

[16] Telecharge, D.P.U. 87-72/88-72; Department Investigation re (1) Implementaiton of Section 276 of the Telecomms. Act of 1996 Relative to Public Interest Payphones (2) Entry & Exit Barriers for the Payphone Marketplace, (3) New England Tel. & Tel. Co.'s Public Access Smart-Pay Line Serv. & (4) Rate Policy for Operator Servs. Providers, D.P.U./D.T.E.. 97-88/97-18 Phase II. Hereinafter, these cases are referred to as the "AOS and Inmate-calling cases".

uniquely positioned to self provision access because (a) it already has all necessary facilities in place to serve the customer, (b) it has an existing relationship with the customer (since CLEC originating access rates are only relevant to Verizon where it concerns customers to which it provides long distance services), and (c) it has a sufficiently large economic incentive (since it concerns a large customer.)[17] The same is very much true for terminating access for larger customers (such as call centers, etc.) There too, Verizon has facilities in place and it has a sufficiently large economic incentive to self provision access. Thus, where it matters (for large customers representing significant access charges), Verizon and others clearly do have alternatives and cannot reasonably be viewed as captive in the manner that the customers in the AOS and Inmate-calling cases were.

The DTC facially addressed this point, concluding that IXC efforts to win CLEC-served customers would be futile because the CLECs could fend off any such efforts. Order at 12. There is simply no basis to assume an attempt by Verizon, AT&T and Comcast, with their global reach and nearly unlimited resources, to win the limited base of CLEC customers could not be successful. Simply stated, the DTC has confused the basis of protecting hotel, hospital and prison inmate customers in the AOS and Inmate-calling cases with the requested protection of the multi-billion dollar IXCs in this case. The Department states that it is acceptable to use a proxy rate because that would protect customers of the carrier with a cap on rates equal to that of the dominant carrier. Here the CLECs' customers do not need such protection unlike the situation of a guest of a hotel or the state's correctional system. As discussed above, at a minimum, the CLECs' customers, the IXCs, have the ability to self provision in virtually *all*

[17] By contrast, when CLECs -- as new entrants -- compete for customers, they have none of these advantages and start from scratch. Remarkably, the CLECs are found to have market power while Verizon is supposed to be a "captive" customer without alternatives, like the customers in the AOS and Inmate-calling cases ; this finding is simply at odds with market place realities.

instances in which it matters (i.e., for larger volume customers causing significant access charges), *which is an option, an alternative, that the customers in the AOS and Inmate-calling cases clearly did not have.*

The Order only addresses whether market forces are sufficient to discipline CLEC access rates. While the Joint CLECs disagree with the Department's conclusion that market forces are not sufficient, at issue here is a different question: do well-financed carriers with ubiquitous facilities, such as Verizon, have alternatives? Clearly, the answer to that question is yes. Indeed, Verizon can and often does self provision access.[18] Thus, the Department's conclusion that access markets are dysfunctional is different from an assertion that there are no alternatives to the CLECs' switched access services. In sum, the facts in the AOS and Inmate-calling cases case do not match those in the current proceeding, and, as such, the DTC's use of the in the AOS and Inmate-calling cases here is incorrect.

III. IN THE ALTERNATIVE, THE CLECS REQUEST CLARIFICATION OF THE DEPARTMENT'S EXEMPTION PROCESS

In the Order at 27, the Department states

> [T]o the extent a CLEC is able to demonstrate justifiable costs in excess of the proposed rate cap with cost-specific data, the CLEC shall be granted an exemption.

Although the CLECs believe, as discussed above, that reconsideration is merited so that no rate cap should be imposed, should the Department deny the CLECs' request on reconsideration, the exemption process will be very important to the viability of CLECs and to the competitive market in Massachusetts. See Exh DTC-MCLEC-1-22; Exh. DTC-MCLEC-1-24.

[18] It can do so through special access or simply by making a deal with the end user customer and self provision access.

However, in the Order, the Department did not provide any details regarding the available exemption process. Therefore, the CLECs request clarification from the Department that the "demonstration of justifiable costs in excess of the proposed rate cap" anticipated by the Department will be satisfied by the filing of a cost study performed in accordance with industry standards, where the results show company-specific costs at a level greater than the proposed cap.

Further, as the Department is aware, the development of a cost study is a complex, time-consuming, and expensive undertaking for CLECs. As the Department is also aware, regulatory review of completed cost studies is also a time-consuming and resource-intensive process for both the Department and the parties to the proceeding. Therefore, CLECs request clarification from the Department on whether CLECs who seek the exemption option may submit their cost justifications at any time.

In addition, the Department must be extremely sensitive to the CLECs' concerns about confiscation. If a CLEC has made, or is in the process of making, a reasonable showing that its costs justify access charges above the proposed cap, but that CLEC's charges are capped, even for some period, there is a very serious confiscation issue. Confiscation, of course is a basis for reversal on appeal. New England Tel. & Tel. Co. v. Dep't of Pub. Utils., 371 Mass. 67, 78 (1976); New England Tel. & Tel. Co. v. Dep't of Pub. Utils., 360 Mass. 443, 478 (1971). Therefore, CLECs also seek clarification that, if the 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 completes its review of the cost justification. This approach would avoid the confiscatory revenue deprivation to CLECs, and would avoid rates bouncing down, then

bouncing back up at the conclusion of the proceeding which would hurt competition and be confusing for customers.

IV. CONCLUSION

For the reasons stated above, the Department should reconsider the Order by finding that Verizon legally had the burden of demonstrating a sufficient evidentiary basis to determine that CLEC access rates are unreasonable, but that Verizon failed to carry such burden. Also, the Department should rule that there was no other sufficient record basis to find CLEC access rates unreasonable, and the Department should deny Verizon's complaint and order that the existing rates may continue to be applied. In the alternative, the Department should grant the requests for clarification regarding the available exemption process, all as set forth in Section III. above.

Respectfully submitted,

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July 13, 2009

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 07-9

CERTIFICATE OF SERVICE

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(1) (Department's Rules of Practice and Procedure).

Dated at Boston, Massachusetts this 13th day of July, 2009.

Eric J. Krathwohl
Counsel

Of Counsel for
One Communications and XO Communications Services, Inc.