COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts – Section 271 of the Telecommunications Act of 1996 Compliance Filing	)))	D.T.E. 99-271

REPLY COMMENTS OF RCN-BECOCOM, LLC

RCN-BecoCom, LLC ("RCN"), a participant in the above-described proceeding, herewith submits, by the undersigned counsel, its Reply Comments to submissions filed on April 25, 2000, in response to an invitation issued by the Hearing Officer on March 28, 2000 concerning the development of a Performance Assurance Plan ("PAP") for Bell Atlantic-Massachusetts ("BA-MA"). Like other CLEC parties to this proceeding, RCN has already suffered from the inadequacy both of Bell Atlantic's post-section 271 performance and of the New York PAP, and strongly urges the Department to adopt a PAP which in certain material respects goes beyond the minimal and inadequate proposals set forth by BA-MA. For simplicity of presentation, RCN has organized its Reply Comments into three parts: (1) the Hearing Officer's Memorandum of May 10, 2000 ("the Memorandum"), (2) comments on MCI's proposals, and (3) comments on AT&T's proposals.

BA-MA's proposed PAP is a useful starting point. However, in the Department's consideration of the various plans to assure that BA-MA establishes fair and reasonable market-opening practices, and adheres to those requirements, it is important to emphasize that a performance assurance plan must be clear, comprehensive, reasonably simple to implement, and based on the imposition of immediate, targeted, and substantial financial penalties for failure to perform. Overall the scheme must consider both the general, albeit abstract, public interest in the development of a vibrant CLEC industry, but also the specific injuries which an inadequate plan or an inadequate implementation of such a plan by BA-

MA would inflict on individual CLECs, since the public interest in these circumstances is derivative of, and based upon fair treatment of the CLECs. Above and beyond specifics, however, RCN is pleased that the Department recognizes the essentiality of a regulatory scheme to assure that, if section 271 authority is ultimately granted to BA-MA, its natural incentives and motivations to handicap the CLEC industry are constrained so far as is reasonably feasible.

I. THE MEMORANDUM

The Memorandum seeks comment on the specific alterations proposed in the BA-MA PAP as compared to that adopted in New York and approved by the FCC. In the New York plan the FCC accepted a cap on the penalties payable for inadequate performance at $269 million whereas BA-MA proposes a cap of $100 million, based on the relative differences in the size of the Massachusetts access line market compared to that in New York.[1] But, as RCN has had occasion to note previously in this docket, history teaches that the regulatory constraints imposed on Bell Atlantic in New York were grossly inadequate. Apparently the Massachusetts Attorney General (the "AG") thinks so as well, since that office has proposed to cap the inadequate performance liability in Massachusetts at $ 278 million, with a maximum of $394 million, representing 100% of BA-MA's 1999 Total Net Return for local exchange service.[2] According to the AG, anything less than $278 million "will not deter BA-MA substandard conduct, encourage prompt resolution of PAP-compliance problems, or provide adequate coverage for CLEC compensation if BA-MA is unable to meet its PAP obligations."[3]

RCN believes no cap on BA-MA's financial exposure for poor or inadequate performance is justified. If BA-MA wins section 271 authority based on certain commitments to the facilitation of a competitive market, the logic of limiting its exposure for inadequate performance of such commitments is not clear. This faulty logic lies at the heart of BA-MA's PAP proposal and should be rejected based only on the simple proposition that enterprises should be expected to fulfill their commitments or pay a

[1] BA-MA PAP Proposal, at 6.

[2] Comments of AG, at 3.

[3] *Id*., at 4.

fully-adequate penalty to the party injured by their failure to do so. Hence, apart from other specific considerations mentioned below, no stop-loss is appropriate or should be permitted.

In addition, BA-MA and its parent, Bell Atlantic, taken as a whole, is a multi-billion dollar corporation. The Department should never allow BA-MA or its parent to occupy a position in which it pays what are essentially trivial financial penalties for failing to keep its commitments. While the calculation of specific numbers would necessarily involve a great deal of debatable judgment, the principal is clear that for BA-MA, postponing or crippling competitive entry by failing to adequately fulfill its market-opening obligations in exchange for paying relatively minor financial penalties is in the company's interest. Simply put, BA-MA should not be allowed to buy its way out of poor performance. The larger CLECs may be able to survive in a situation where BA-MA is offering interstate services pursuant to section 271 authority while they are improperly denied the opportunity to improve their local market penetration because BA-MA is not fulfilling its commitments. But the cost to them in slower growth and market penetration is difficult to calculate and ultimately cannot be adequately compensated in money damages.[4] Equally or more troubling is the damage which might be done to the less well financed or established CLECs, for whom an unfairly hostile environment can mean not financial difficulties but potential financial disaster. The true strength of BA-MA's commitment to any PAP is difficult for any outsider to assess. But human nature and the desire to be competitively successful are sufficient factors in the PAP context so that BA-MA and its managers must never be allowed to trade off poor market-opening performance for the payment of relatively limited sums of money. [5]

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[4] For example, if poorer than projected market penetration is taken by investors to mean that a CLEC's stock is overpriced, the damage to the CLEC could be profound. The mitigation of this damage by the payment of money – even if money can mitigate such damage – is not likely to impress investors or financial analysts.

[5] The Department should require BA-MA to produce the work papers underlying its proposed Massachusetts PAP to determine if any such trade-offs have been calculated or considered by BA-MA, *i.e.*, whether the company considered whether it would be better off by delaying competition through poor performance in exchange for the payment of regulatory penalties. Alternatively the Department should search in the workpapers for suggestions that the penalties proposed by BA-MA

However, if the DTE is inclined to impose a cap, it should be set at $394 million, representing 100% of BA-MA's Total Net Return from local exchange service in Massachusetts.[6] Given recent history in New York, and the well-known proclivity of incumbents to drag their feet and require CLECs to battle over virtually every step of the market-opening process, RCN sees no reason to limit BA-MA's responsibility for the consequences of its own behavior. If it performs according to regulatory standards, it should not be at risk of making any payments. If its performance is only immaterially deficient, its exposure will be trivial. But if the market is not fully open, there is no reason to allow BA-MA to get away with delaying or burdening the new entrants.

RCN also believes that penalty assessments should be made monthly. BA-MA's proposed PAP includes monthly performance reporting but bill credits are to appear only two months after the end of the calendar quarter in which the unsatisfactory performance occurred.[7] There is no reason to delay making CLECs whole for poor performance by BA-MA, especially since many CLECs do not have the benefit of the multibillion cushion BA-MA enjoys in its own operation. In the same vein, and in response to the Memorandum, RCN urges the Department to require BA-MA to make cash payments, rather than to issue billing credits, for any inadequate performance. The reasons for this are numerous. Most importantly, as in the case of the extent of exposure, BA-MA must feel the sting of poor performance, and there is no question that out-of-pocket cash hurts more than issuing credits. The potential for having to write checks to CLECs will undoubtedly motivate BA-MA's managers to pay closer attention to their market-opening obligations. Similarly, sending cash out of the company is also far more likely to attract the attention of investors and financial analysts – attention which, in turn, would help to focus managerial attention and the allocation of resources to the substantive matters in issue. Apart from these considerations, the obverse is also true: for a CLEC damaged by BA-MA's poor

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are easily absorbed by the company, or consistent with its business plan, or any comparable such formula.

[6] *See* n.2, *supra*.

[7] BA-MA PAP proposal, at 5.

performance, a future billing credit is better than nothing at all but is not nearly as useful as having cash which can be used either to meet financial obligations to BA-MA, if that is the CLEC's preference, or for any other purpose, such as advertising, hiring of new staff, purchase of additional equipment, or advancing the competitive fortunes of the CLEC as its management sees fit.

In its question 5 the Memorandum seeks views on whether there is a difference between bill credits or direct payments in the degree of administrative burden imposed on the Department. While this is an issue as to which the Department is itself the best judge, RCN would expect that cash payments would minimize the administrative burden on the Department. The issuance or non-issuance of a check is a fairly straightforward matter, readily reflected in cash accounts and generally not something which requires administrative oversight. On the other hand, the issuance of credits is more complicated, may involve disputes about whether the credits have been allocated properly, and conceivably may necessitate administrative oversight. Disputes about the appropriateness of BA-MA's issuance of checks or billing credits would also appear to be more easily reviewed administratively in the former than the latter circumstances.

Question 6 of the Memorandum addresses the issue of the period of time before a CLEC receives a bill credit, and whether that period may be reduced from BA-MA's proposed two months after the calendar quarter in which the unsatisfactory performance occurred. Of course, such lags are nothing but efforts to delay the loss of revenue which bill credits entail and in the absence of compelling justifications, which BA-MA has not offered, should be disallowed. Question 7 asks whether BA-MA's so-called "Individual Rule" adequately compensates a CLEC for sub-standard performance. The answer is no. While statistical processes are undoubtedly appropriate for broad performance measures, and should be tied to financial penalties which are payable to the Department or to some sort of fund which is established to broadly advance competition, each CLEC should be treated as a separate performance center for purposes of the PAP. Aggregating and averaging over a number of CLECS, while it may save BA-MA some administrative burden, and may even reduce its aggregate financial obligations to CLECs, is a second-best solution and ignores the reality that, while each CLEC in a gross sense is very much in the same position vis-a-vis BA-MA, each in fact is different in respect

to the services it offers, the way in which it provisions them, the kinds of customers it seeks to serve, the size and sophistication of its operations, and in other similar ways. Substandard performance should be calculated on an individual CLEC basis, and compensated on an individual basis as well. Indeed, in general the metrics should preclude balancing poor performance in one respect or one time frame with adequate or even superior performance in another. Customers do not allow that degree of latitude to CLECs and CLECs should not have to tolerate that degree of latitude from BA-MA.

RCN therefore supports the need for additional PAP metrics proposed by MCI, AT&T, Teligent, RNK, and Nextlink. The additional metrics assure that BA-MA's performance is measured as carefully as circumstances demand. Both BA-MA and the CLECs should welcome a detailed review process so that, to the extent BA-MA is performing poorly it is held to account and to the extent it is performing well it is not improperly penalized.

RCN would also like to suggest that, as part of any approved PAP, BA-MA be required to designate by name a senior executive who bears personal and administrative responsibility for the company's performance. Of course the actual execution of BA-MA's PAP will require the efforts of hundreds of individuals within the company. But it is a basic tenet of sound administration that one individual should have ultimate responsibility within the company for a particular segment of its operations. Moreover, the company should be asked to certify to the Department through the signature of its Chief Executive Officer that the named individual will be expected to see that BA-MA meets whatever requirements are imposed on it, and that such an individual's personal performance will be assessed by BA-MA on how effectively and efficiently he or she facilitates the development of competition within the Commonwealth.

II. MCI WORLDCOM'S PROPOSALS

RCN has reviewed the comments of MCI WorldCom in which it proposes a variety of changes to the New York PAP and suggests incorporating many provisions and approaches from the Pennsylvania PAP. RCN agrees with each of the proposals set forth by MCI as well as with the suggestion that, rather than accepting and modifying the New York PAP, the Department should seriously consider adopting the approach set forth in MCI's own SiMPL plan, which minimizes

statistical manipulation and emphasizes historical data. Indeed, MCIWorldcom's PAP submission expresses many of the same concerns set forth above.

III. AT&T'S PROPOSALS

RCN fully supports virtually all of AT&T's comments. It particularly agrees with AT&T's suggestion that, in assessing poor performance penalties, repeated instances of such poor performance should lead to increasingly greater penalties, rather than merely the addition of one penalty to another.[8] AT&T is also correct in urging the Department to adopt a policy of continual review and revision of whatever plan is initially adopted, so that changing circumstances and accumulating data about BA-MA's performance – good or bad – can be taken into account.[9]

RCN regrets the Department's recent decision not to require Peat Marwick to switch its OSS testing to LSOG 4 and to forego the imposition of a 90 day commercial trial on BA-MA's OSS systems.[10] RCN respectfully believes that decision erroneously and unnecessarily enhances the potential exposure of the CLEC industry in Massachusetts to a repeat of Bell Atlantic's grossly inadequate performance in New York. The Department's Order in the OSS testing matter contains a hint that BA-MA will have to live with the consequences of a poor market-opening performance in the period following grant of section 271 authority.[11] There is no more appropriate proceeding in which to put teeth in that hint than the present context in which the Department has yet another opportunity to make clear to BA-MA that it fully intends to hold BA-MA to a high standard of performance.

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[8] Proposal of AT&T Communications of New England, Inc. for a Performance Monitoring and Enforcement Plan, at 19.

[9] *Id*., at 24.

[10] DTE *Letter Order on AT&T's Motion to Adjust the Master Test Plan and to Clarify the D.T.E. 99-271 Procedural Schedule*, May 12, 2000.

[11] *Id.*, at 3-4.

Respectfully submitted,

RCN-BECOCOM, LLC

By:_____

William L. Fishman
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
Telephone: 202-945-6986
Facsimile: 202-424-7645

Counsel to RCN-BeCoCom, LLC

May 22, 2000

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May, 2000, a copy of the foregoing REPLY COMMENTS OF RCN-BECOCOM, LLC was served on the following parties via first-class postage paid U.S. mail and Electronic mail.

Cathy Carpino, Hearing Officer
Massachusetts Department of
Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110
phone: 617-305-3622
fax: 617-345-9103
e-mail: cathy.carpino@state.ma.us

Tina Chin, Hearing Officer
Massachusetts Department of
Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110
phone: 617-305-3578
fax: 617-345-9103
e-mail: tina.chin@state.ma.us

Paul Vasington, Commissioner
Massachusetts Department of
Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110
phone: 617-305-3500
fax: 617-345-9102
e-mail: paul.vasington@state.ma.us

Michael Isenberg, Director
Telecom Division
Massachusetts Department of
Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110
phone: 617-305-3744
fax: 617-478-2588
e-mail: mike.isenberg@state.ma.us

Berhane Adhanom, Analyst, Telecom Division
Massachusetts Department of
Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110
phone: 617-305-3500
fax: 617-478-2588
e-mail: berhane.adhanom@state.ma.us

Sharon Ballard, Analyst, Telecom Division
Massachusetts Department of
Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110
phone: 617-305-3500
fax: 617-478-2588
e-mail: sharon.ballard@state.ma.us

Michael DeYoung, Analyst, Telecom Division
Massachusetts Department of
Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110
phone: 617-305-3500
fax: 617-478-2588
e-mail: michael.deyoung@state.ma.us

Jeesoo Hong, Analyst, Telecom Division
Massachusetts Department of
Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110
phone: 617-305-3500
fax: 617-478-2588
e-mail: jee.soo.hong@state.ma.us

April Mulqueen, Analyst, Telecom Division
Massachusetts Department of
Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110
phone: 617-305-3500
fax: 617-478-2588
e-mail: april.mulqueen@state.ma.us

Sarah Schick, Analyst, Telecom Division
Massachusetts Department of
Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110
phone: 617-305-3500
fax: 617-478-2588
e-mail: sarah.schick@state.ma.us

Scott Simon, Analyst, Telecom Division
Massachusetts Department of Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110
phone: 617-305-3500
fax: 617-478-2588
e-mail: scott.simon@state.ma.us

Ron Wheatley, Analyst, Telecom Division
Massachusetts Department of Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110
phone: 617-305-3500
fax: 617-478-2588
e-mail: ron.wheatley@state.ma.us

Lynn McKnight, Administrative Assistant, Telecom Division
Massachusetts Department of Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110
phone: 617-305-3500
fax: 617-478-2588
e-mail: lynn.mcknight@state.ma.us

Robert Howley, Hearing Officer
Massachusetts Department of Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110
phone: 617-305-3652
fax: 617-345-9103
e-mail: robert.howley@state.ma.us

Mary Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station, Second Floor
Boston, MA 02110
phone: 617-305-3500
fax: 617-345-9101
Frances Marshall, Esq.
U.S. Department of Justice
Antitrust Division
1401 H Street, N.W., Suite 8000
Washington, DC 20530
phone: 202-307-2130
fax: 202-514-6381
e-mail: frances.marshall@usdoj.gov

Thomas Reilly
Attorney General
By: Karlen Reed, Assistant Attorney General
Regulated Industries Division
200 Portland Street, 4th Floor
Boston, MA 02114
phone: 617-727-2200 ext. 3436
fax: 617-727-1047
e-mail: karlen.reed@ago.state.ma.us

The Honorable Daniel E. Bosley
Chairman, Joint Committee on Government Regulations
Room 472, State House
Boston, MA 02133
phone: 617-722-2120
fax: 617-722-2239
e-mail: kevin.grant@state.ma.us

Bruce P. Beausejour, Esq.
Bell Atlantic-Massachusetts
185 Franklin Street
Boston, MA 02110-1585
phone: 617-743-2445
fax: 617-737-0648
e-mail: bruce.p.beausejour@bellatlantic.com
-and-
Robert N. Werlin, Esq.
Keegan, Werlin & Pabian LLP
21 Custom House Street
Boston, MA 02110
phone: 617-951-1400
fax: 617-951-1354
e-mail: rwerlin@kwplaw.com
FOR: BELL ATLANTIC-MASSACHUSETTS

Robert Aurigema, Esq.
AT&T Communications, Inc.
32 Avenue of the Americas, Room 2700
New York, NY 10013
phone: 212-387-5627
fax: 212-387-5613
-and-
Patricia Jacobs, Ph.D.
Manager for Government Affairs
AT&T Communications of New England, Inc.
99 Bedford Street
Boston, MA 02111
phone: 617-574-3256
fax: 617-574-3274
e-mail: pjacobs@lga.att.com
-and-

Jeffrey F. Jones, Esq.
Kenneth W. Salinger, Esq.
Laurie S. Gill, Esq.
Jay E. Gruber, Esq.
Palmer & Dodge, LLP
One Beacon Street
Boston, MA 02108-3190
phone: 617-573-0100
fax: 617-227-4420
e-mail: jjones@palmerdodge.com, ksalinger@palmerdodge.com, lgill@palmerdodge.com, jgruber@palmerdodge.com
FOR: AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

Christopher Moore, Esq.
Sprint Communications Company L.P.
401 9th Street, NW, Suite 400
Washington, DC 20004
phone: 202-585-1938
fax: 202-585-1894
e-mail: christopher.d.moore@mail.sprint.com
-and-
Mark Hagen, Esq.
Sprint Communications Company L.P.
7301 College Boulevard
Overland Park, KS 66210
phone: 913-534-6590
fax: 913-534-6303
e-mail: mark.hagen@mail.sprint.com

Ellen W. Schmidt, Esq.
Stacey L. Parker, Esq.
James G. White, Jr., Esq.
MediaOne Telecommunications of Massachusetts, Inc.
6 Campanelli Drive
Andover, MA 01810
phone: 978-683-5500 x2044
fax: 978-683-7057
e-mail: eschmidt@mediaone.com, sparker@mediaone.com, jgwhite@mediaone.com

Hope H. Barbulescu, Esq.
Christopher J. McDonald, Esq.
Evlyn Tsimis, Senior Manager, Government Affairs
WorldCom, Inc.

200 Park Avenue, 6th Floor
New York, NY 10166
phone: 212-519-4093 (Barbulescu)
212-519-4164 (McDonald)
914-312-6285 (Tsimis)
fax: 212-519-4569
e-mail: hope.h.barbulescu@wcom.com, christopher.mcdonald@wcom.com,
evlyn.tsimis@wcom.com
-and-
Alan D. Mandl, Esq.
Mandl & Mandl, LLP
10 Post Office Square, Suite 630
Boston, MA 02109
phone: 617-556-1998
fax: 617-422-0946
e-mail: amandl@earthlink.net
- and
Mark D. Schneider, Esq.
Jenner & Block
601 Thirteenth Street, NW, Suite 1200
Washington, DC 20005
phone: 202-639-6000
fax: 202-639-6066
e-mail: mschneider@jenner.com
FOR: WORLDCOM, INC.

Joe Kahl
Director of Regulatory Affairs
RCN Telecom Service
105 Carnegie Center
Princeton, NJ 08540
phone: 609-734-3827
fax: 609-734-6167
e-mail: joseph.kahl@rcn.net

John C. Ottenberg, Esq.
Ottenberg & Dunkless LLP
155 Federal Street, Suite 1700
Boston, MA 02110
phone: 617-357-0220
fax: 617-357-0215
e-mail: ottenberg@ottenbergdunkless.com
-and-

Christy C. Kunin, Esq.
Elise P.W. Kiely, Esq.
Helene Courard, Esq.
Blumenfeld & Cohen
1625 Massachusetts Avenue, NW, Suite 300
Washington, DC 20036
phone: 202-955-6300
fax: 202-955-6460
e-mail: Christy@technologylaw.com, Elise@technologylaw.com, Helene@technologylaw.com
FOR: RHYTHMS LINKS, INC. (formerly ACI CORP.)

William D. Durand, Esq.
Robert J. Munnelly, Jr., Esq.
Director of Legal & Regulatory Affairs
New England Cable TV Assoc.
100 Grandview Road, Suite 201
Braintree, MA 02184
phone: 781-843-3418
fax: 781-849-6267
e-mail: wdurand@worldnet.att.net, rmunnelly@worldnet.att.net

Meabh Purcell, Esq.
LeBoeuf, Lamb, Greene & MacRae, LLP
260 Franklin Street
Boston, MA 02110-3173
phone: 617-439-9500
fax: 617-439-0341
e-mail: mpurcell@llgm.com
-and-
Terri B. Natoli, Esq.
Senior Counsel
Teligent, Inc.
8065 Leesburg Pike, Suite 400
Vienna, VA 22182
phone: 703-762-5183
fax: 703-762-5584
FOR: TELIGENT

Richard M. Rindler, Esq.
Russell M. Blau, Esq.
Kathleen L. Greenan, Esq.
Andrew D. Lipman, Esq.
Swidler Berlin Shereff Friedman, LLP

3000 K Street, NW Suite 300
Washington, DC 20007
phone: 202-424-7500
fax: 202-424-7645
e-mail: rmblau@swidlaw.com, klgreenan@swidlaw.com, rmrindler@swidlaw.com,
FOR: LEVEL 3 COMMUNICATIONS, INC.
FOR: RCN-BECOCOM, LLC
FOR: NETWORK PLUS, INC.
FOR: CHOICE ONE COMMUNICATIONS OF MASSACHUSETTS, INC.
FOR: HYPERION COMMUNICATIONS OF MASSACHUSETTS, INC.
FOR: DSLNET COMMUNICATIONS, LLC
FOR: NORTHPOINT COMMUNICATIONS, INC.

William P. Hunt, III, Esq.
Level 3 Communications, Inc.
1450 Infinite Drive
Louisville, CO 80027

John O. Postl, Esq.
William J. Rooney, Jr., Esq.
Global NAPs, Inc.
10 Merrymount Road
Quincy, MA 02169
phone: 617-507-5121
fax: 617-507-5221
e-mail: jpostl@gnaps.com, wrooney@gnaps.com
-and-
Christopher W. Savage, Esq.
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue
Washington, DC 20006
phone: 202-828-9811
fax: 202-452-0067
e-mail: csavage@crblaw.com
FOR: GLOBAL NAPS, INC.

Scott A. Sawyer, Esq.
Conversent Communications of Massachusetts, LLC (formerly NEVD of Massachusetts, LLC)
222 Richmond Street, Suite 206
Providence, RI 02903
phone: 401-490-6377
fax: 401-272-9751
e-mail: ssawyer@nevd.net

Eric J. Krathwohl, Esq.
Edward E. Madden, Jr., Esq.
Emmett E. Lyne, Esq.
K. Jill Rizzotti, Esq.
Rich, May, Bilodeau & Flaherty, P.C.
294 Washington Street
Boston, MA 02108
phone: 617-482-1360
fax: 617-556-3889
e-mail: ekrathwohl@richmaylaw.com, tmadden@richmaylaw.com, elyne@richmaylaw.com
jrizzotti@richmaylaw.com
FOR: CTC COMMUNICATIONS CORP.
FOR: NORFOLK COUNTY INTERNET, INC.
FOR: TELECOMMUNICATIONS RESELLERS ASSOCIATION

Andrew O. Isar
Telecommunications Resellers Association
4312 92nd Avenue, NW
Gig Harbor, WA 98335
phone: (253)265-3910
fax: (253)265-3912
e-mail: aisar@harbor-group.com

Jordan Michael, Esq.
CTC Communications Corp.
360 Second Avenue
Waltham, MA 02154
phone: 781-466-1372
fax: 781-890-1613
e-mail: michaj@ctcnet.com

Cameron F. Kerry, Esq.
Scott A. Samuels, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo P.C.
One Financial Center
Boston, MA 02111
phone: 617-542-6000
617-348-1798 (Samuels)
fax: 617-542-2241
e-mail: cfkerry@mintz.com, ssamuels@mintz.com
-and-

Cherie R. Kiser
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, NW
Washington, DC 20004-2608
phone: 202-434-7300
fax: 202-434-7400
e-mail ckiser@mintz.com
FOR: ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES
FOR: CABLEVISION LIGHTPATH - MA, INC.
FOR: CORECOMM MASSACHUSETTS, INC.
FOR: GLOBAL NAPS, INC.

David Ellen, Esq.
Cablevision Lightpath - MA, Inc.
1111 Stewart Avenue
Bethpage, NY 11714-3581

Christopher A. Holt, Esq.
CoreComm Massachusetts, Inc.
110 E. 59th Street
New York, NY 10022
phone: 212-906-8440
fax: 212-906-8497
e-mail: holt@corecommltd.com

Glenn A. Harris, Esq.
NorthPoint Communications
222 Sutter Street, 7th Fl.
San Francisco, CA 94108
phone: 415-365-6095
fax: 415-403-4004
e-mail: gharris@northpointcom.com

Christopher Gregory
Executive Director
Breakthrough Massachusetts
One Beacon Street, 30th Floor
Boston, MA 02108
phone: 617-371-1010
fax: 617-742-4359
e-mail: chris.gregory@neec.org

Terry Monroe

Vice President, Industry and Government Relations
Competitive Telecommunications Association (CompTel)
1900 M Street, NW, Suite 800
Washington, DC 20036
phone: 202-296-6650
fax: 202-296-7585
e-mail: tmonroe@comptel.org
-and-
Linda L. Oliver, Esq.
Jennifer A. Purvis, Esq.
Marshall D. Fitz, Esq.
Hogan & Hartson LLP
555 13th Street, NW
Washington, DC 20004
phone: 202-637-5600
fax: 202-637-5910
e-mail: lloliver@hhlaw.com, jpurvis@hhlaw.com, mdfitz@hhlaw.com
FOR: COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

Susan Jin Davis, Esq.
Antony Petrilla, Esq.
Jason D. Oxman, Esq.
Covad Communications Company
600 14th Street, NW
Suite 750
Washington, DC 20005
phone: 202-220-0408 (Jin Davis)
202-220-0418 (Petrilla)
fax: 202-434-8932
e-mail: sjdavis@covad.com; apetrilla@covad.com; joxman@covad.com

J. Scott Nicholls, Sr. Manager - State Affairs
Qwest Communications Corporation
4250 N. Fairfax Drive
Arlington, VA 22203
phone: 703-363-4443
fax: 703-363-4404
-and-
Linda L. Oliver, Esq.
Yaron Dori, Esq.
Jennifer A. Purvis, Esq.
Margaret E. Kane, Esq.
Hogan & Hartson LLP

555 13th Street, NW
Washington, DC 20004
phone: 202-637-5600
fax: 202-637-5910
e-mail: lloliver@hhlaw.com, jpurvis@hhlaw.com, mekmiddleton@hhlaw.com
FOR: QWEST COMMUNICATIONS CORPORATION

Douglas Denny-Brown, Esq.
RNK Telecom, Inc.
1044 Central Street
Stoughton, MA 02072
phone: 781-297-9831
fax: 781-297-9836
e-mail: dougdb@rnktel.com

Robert L. Dewees, Jr., Esq.
Nixon Peabody LLP
101 Federal Street
Boston, MA 02110-1832
phone: 617-345-1000
fax 617-345-1300
e-mail: rdewees@nixonpeabody.com
FOR: SBC NATIONAL, INC.

Christopher J. McKeown, President
TelEnergy, Incorporated
288 Walnut Street
Newton, MA 02460
phone: 617-243-3074
fax: 617-243-3947
e-mail: cmckeown@servisense.com, rwheeler@servisense.com

Jonathan E. Canis, Esq.
Enrico C. Soriano, Esq.
Kelley Drye & Warren LLP
1200 19th Street, NW, Suite 500
Washington, DC 20036
phone: 202-955-9600
fax: 202-955-9792
e-mail: esoriano@kelleydrye.com
FOR: INTERMEDIA COMMUNICATIONS, INC.

Michael D'Angelo, Esq.

Nextlink
45 Eisenhower Drive
Paramus, New Jersey 07652
phone: 201-226-3675
fax: 201-226-0254
e-mail: mdangelo@nextlink.com
-and-
Paul B. Dexter, Esq.
LeBoeuf, Lamb, Greene & MacRae
260 Franklin Street
Boston, Massachusetts 02110
phone: 617-439-9500
fax: 617-439-0341
e-mail: pdexter@llgm.com
-and-
Ross A. Buntrock, Esq.
Kelley, Drye & Warren, LLP
1200 19th Street, N.W.,
Suite 500
Washington, D.C. 20036
phone: 202-887-1248
fax: 202-955-9792
e-mail: rbuntrock@kelleydrye.com
FOR: NEXTLINK

Thomas S. Lyle
Regulatory Affairs Manager
Vitts Networks
77 Sundial Avenue
Manchester, NH 03103
phone: 603-656-8017
fax: 603-656-8100
e-mail: tlyle@vitts.com

Matthew H. Berns, Esq.
Focal Communications Corporation
200 North LaSalle Street
Chicago, IL 60601
phone: 312-895-8400
fax: 3120895-8403
e-mail: mberns@focal.com

Kim Robert Scovill, Esq.

Terry J. Romine, Esq.
Choice One Communications, Inc.
100 Chestnut Street, Suite 700
Rochester, NY 14534
phone: 716-530-2781
fax: 716-530-2734
e-mail: kscovill@choiceonecom.com, tromine@choiceonecom.com

Donald C. Davis
Vice President - Strategy and Industry Policy
Z-Tel Communications, Inc.
601 South Harbor Island Boulevard
Suite 220
Tampa, FL 33602
phone: 813-233-4615
fax: 813-233-4620
e-mail: ddavis@z-tel.com
-and-
Michael B. Hazzard, Esq.
Lawler, Metzger & Milkman, LLC
1909 K Street, NW
Suite 820
Washington, D.C. 20006
phone: 202-777-7728
fax: 202-777-7763
e-mail: lmm-law.com
FOR: Z-TEL COMMUNICATIONS, INC.

Richard S. Hahn, President
Neven Rabadjija, Esq.
BecoCom, Inc.
800 Boylston Street, 17th Floor
Boston, MA 02199
phone: 617-424-2461 (Hahn)
617-424-2223 (Rabadjija)
fax: 617-424-2110 (Hahn)
617-424-2733 (Rabadjija)
e-mail: Richard_Hahn@bedison.com, Neven_Rabadjija@bedison.com

E. Ashton Johnston, Esq.
J. Todd Metcalf, Esq.
Vincent Paladini, Esq.
Piper Marbury Rudnick & Wolfe LLP

1200 19th Street, N.W.
Washington, D.C. 20036
phone: 202-861-3900
fax: 202-223-2085
e-mail: ashton.johnston@piperrudnick.com, todd.metcalf@piperrudnick.com;
vincent.paladini@piperrudnick.com
FOR: DIGITAL BROADBAND COMMUNICATIONS, INC.

Christopher Kallaher, Esq.
essential.com, inc.
3 Burlington Woods Drive, 4th Fl.
Burlington, MA 01803
phone: 781-229-9599
fax: 781-229-9499
-and-
Eric J. Krathwohl, Esq.
Rich, May, Bilodeau & Flaherty, P.C.
176 Federal Street, 6th Fl.
Boston, MA 02110
phone: 617-556-3857
fax: 617-556-3890
e-mail: ekrathwohl@richmaylaw.com
FOR: ESSENTIAL.COM, INC.

Sharon A. Gantt