



August 11, 2008

***VIA HAND DELIVERY AND E-MAIL***

Catrice C. Williams  
Secretary of the Department  
Department of Telecommunications and Cable  
One South Station  
Boston, MA 02110

**Re: DTC 07-9 – RNK’s Motion to Compel and Motion to Stay the Proceeding**

Dear Secretary Williams:

Enclosed please find an original and five (5) copies of RNK’s Motion to Compel and Motion to Stay the Proceeding (“Motion”) for the proceeding docketed as DTC 07-9. RNK files this Motion pursuant to the procedural schedule established by the Department in this Docket. In addition, an electronic copy of RNK’s Motion and this cover letter are being sent via electronic mail to [dte.efiling@massmail.state.ma.us](mailto:dte.efiling@massmail.state.ma.us), [catrice.williams@state.ma.us](mailto:catrice.williams@state.ma.us) and [Lindsay.Deroche@state.ma.us](mailto:Lindsay.Deroche@state.ma.us), contemporaneously with the hard copies of the document.

In addition, please date-stamp the duplicate copy of this cover letter upon receipt and return it in the enclosed postage-paid envelope.

Sincerely,



Kerri J. DeYoung  
Counsel and Regulatory Analyst

Enclosures (6)

Cc: Verizon and Department staff listed on Service List (by hand delivery, electronic mail)  
Service List, DTC 07-9 (by UPS Next Day, electronic mail)

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

**In the Matter of the 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 Distance, and Verizon  
Select Services, Inc. for Investigation by the  
Department of Telecommunications and Cable of  
the Intrastate Switched Access Rates of Competitive  
Local Exchange Carriers that Provide Service in  
Massachusetts**

**D.T.C. 07-9**

**RNK MOTION TO COMPEL DISCOVERY AND  
MOTION TO STAY THE PROCEEDING**

**I. INTRODUCTION**

Pursuant to 220 C.M.R. 1.04(5) and 1.06(6)(c)(4), RNK Inc. d/b/a RNK Communications (“RNK”), hereby moves that the Department of Telecommunications and Cable (“Department”) issue an Order to compel 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 Distance, and Verizon Select Services, Inc. (collectively, “Verizon”) to answer RNK’s following Discovery Requests: RNK-VZ 2-6; RNK-VZ 2-15; and RNK-VZ 2-18 (“RNK’s Second Set of Discovery Requests”). Without full and complete answers to discovery, RNK is denied the ability to prepare for its August 20, 2008, pre-filed testimony, and RNK is prejudiced in its preparation of this proceeding.

On July 17, 2008, RNK issued its First Set of Discovery Requests on Verizon's Pre-Filed Testimony of Paul Vasington which consisted of twenty two (22) Discovery Requests. After close of business on July 24, 2008, Verizon provided untimely responses to RNK's First Set of Discovery Requests.<sup>1</sup> These responses were incomplete and fragmentary at best and, oftentimes, failed to respond to the questions asked with unsupported objections. In an effort to flesh out these responses and clarify its initial set of discovery requests, and the responses that Verizon provided to XO's First Set of Discovery Requests, RNK issued its Second Set of Discovery Requests on Verizon's Pre-Filed Testimony of Paul Vasington on July 28, 2008.<sup>2</sup> Verizon provided its response to RNK on August 4, 2008, and, again Verizon failed to respond with unsubstantiated objections to several of the requests. On August 7, 2008, in accordance with the Ground Rules specified by the Hearing Officer in the Procedural Notice issued on July 1, 2008, RNK's counsel initiated a conference with Verizon's counsel in a good faith effort to narrow areas of disagreement on Verizon's responses to RNK's Second Set of Discovery Requests.<sup>3</sup> Unfortunately, both parties failed to arrive at a consensus and narrow all areas of disagreement.

For the reasons stated herein, the information requested in this Motion is relevant to this proceeding (in fact, it is critical to RNK's ability to rebut the case presented by Verizon) and meets the Department's discovery standards. Therefore, RNK respectfully

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<sup>1</sup> In fact, RNK's Douglas Denny-Brown did not receive Verizon's responses until July 25, 2008.

<sup>2</sup> This was timely filed under DTC 07-9's Hearing Officer Order Extending Discovery Period, issued July 25, 2008, extending the discovery period on Verizon's pre-filed testimony to 5:00 p.m. on Monday, July 28, 2008. The Hearing Officer subsequently extended Verizon's deadline to answer pre-filed discovery to 5:00 p.m. on Monday, August 4, 2008.

<sup>3</sup> The requisite certification is accompanied with this Motion. (Procedural Notice, D.T.C. 07-9, July 1, 2008).

urges the Department to issue an Order to compel Verizon to provide full and complete responses to RNK's Discovery Requests, and, in addition, moves that the Department stay the proceeding until it rules on this Motion. A stay and amendment of the procedural schedule will allow RNK and all Intervenors to more fully prepare their pre-filed testimony with all available facts.

## **II. STANDARD OF REVIEW**

It is well-settled that the Department will require discovery of relevant information:

The purpose for discovery is to facilitate the hearing process by permitting the parties and the Department to gain access to all relevant information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of the issues, protect the rights of the parties, and ensure that a complete and accurate record is compiled.

220 C.M.R. § 1.06(6)(c)(1). *Verizon*, D.T.E. 01-31 (Phase I), Hearing Officer Ruling on Motion to Compel or in the Alternative, to Strike Portions of Verizon's Testimony, p. 1 (2002). Hearing Officers have discretion in establishing discovery procedures and are guided in this regard by the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26, et seq. 220 C.M.R. § 1.06(6)(c)(2). Mass. R. Civ. P. 26(b)(1) provides that:

Parties may obtain discovery regarding any matter, not privileged, relevant to the subject matter involved in the pending action. . . . It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Furthermore, the Department has established a stringent standard for parties that object to discovery based on burden. Specifically:

The Department evaluates a burdensomeness claim in the context of the case, including the procedural schedule and the importance of the information sought to the issues being litigated. Parties face a heavy burden to establish that relevant information should be blocked from discovery. The objecting party must make a sufficient showing of undue burden, providing details on such matters as the availability and location of materials and personnel needed to research and develop a response. Merely because compliance would be costly or time consuming is not ordinarily a sufficient reason to avoid discovery where the requested information is relevant and necessary to discovery of evidence. The Department may protect parties against the undue burden of responding to discovery requests that seek irrelevant or marginally relevant information. Thus, the Department may determine that a request is burdensome if the level of detail sought would not further the analysis of the issues or if the impact of the response on the case is expected to be minimal.

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts, Interlocutory Order on AT&T's Motion for Relief, Motions to Compel Verizon Responses To AT&T Information Requests, and Conditional Motion to Strike Verizon's Recurring Cost Model, ("01-20 Interlocutory Order") D.T.E. 01-20, 2001 Mass. PUC LEXIS 63 at \*36-\*38, (Mass. D.T.E., October 18, 2001). (*internal citations omitted*).

The Department's power to compel is derived from G. L. c. 30A, § 12(1) which provides agencies with the power to require the testimony of witnesses and the production of evidence. Chapter 30A, states, in part, that any party to an adjudicatory proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding. G. L. c. 30A, §12(3). The Department's rule, 220

C.M.R. § 1.10(9), embodies the statutory authority to compel the appearance of witnesses and production of documents by subpoena.

### **III. ARGUMENT**

#### **A. Discovery Request RNK-VZ 2-15**

##### **1. Text of RNK's Request**

*In response to RNK-VZ-1-11(d), Verizon objects to the use of "actual costs." Please answer that question, with the understanding that the phrase "actual costs," for the purposes of this question, has the same meaning as Verizon understands the meaning of the phrase "costs for providing switched access only" as stated in its response to RNK-VZ-1-3.*

##### **2. Verizon's Response**

*RNK's characterization of Verizon's objection to RNK-VZ 1-11(d) is incorrect and incomplete.*

*Verizon objects to this request on the grounds that it is not relevant to the issues in this proceeding and would require a burdensome special study*

##### **3. RNK's Specific Legal and Factual Argument**

###### **Text of RNK-VZ-1-11(a) and (d)**

*Also referring to the states cited on page 10, lines 10-16 and page 11, lines 1-3, please identify the following:*

- a. Whether or not Verizon (or any of its affiliates) operates as an ILEC in the jurisdiction;*
- d. If the answer to "a" is in the affirmative, does Verizon's switched access rate only allow it to recover its actual costs of providing the service.*

###### **Verizon's Response to RNK-VZ-1-11(a) and (d)**

- a. Of the states identified in the referenced portion of Mr. Vasington's testimony, Verizon is an ILEC in Maryland, Pennsylvania, New York, Connecticut, Illinois, and Texas.*

*d. Verizon objects to this request on the grounds that it is not relevant to the issues in this proceeding, vague (“actual costs” is not defined), and would require a burdensome special study.*

Despite Verizon’s claims to the contrary, RNK’s request is clearly relevant and calculated to lead to the discovery of admissible evidence. First, Verizon itself has chosen twice thus far in this proceeding to utilize these dockets as examples to show how other states have handled intrastate access rates.<sup>4</sup> As such, Verizon made these matters and related issues, including but not limited to recovery of ILEC and CLEC actual costs and the rates at which CLECs are capped, directly relevant to this proceeding and should be known to both the Department and all intervenors in this proceeding. Second, this information would likely show that higher intrastate access rates are charged, above the actual costs incurred, outside of Massachusetts by both ILECs and CLECs, and that those rates are considered by other states to be “just and reasonable.”<sup>5</sup>

Furthermore, despite the fact that RNK does not even request that any study be performed, Verizon fails to specify how and why a “special study” would need to be performed, nor does Verizon allege “undue burden.” Verizon’s objection appears only to claim an inconvenience; that, essentially, it would be “burdensome” to provide the requested information, without any requisite detailed showing at all on how responding to

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<sup>4</sup> See D.T.C. 07-9 – “Verizon Petition,” pages 9-10, filed October 11, 2007; *see also* D.T.C. 07-9 – “Testimony of Paul B. Vasington on behalf of Verizon,” pages 10-11, filed July 7, 2008.

<sup>5</sup> For argument’s sake, one need only point to Verizon’s responses to RNK’s Second Set of Requests in this proceeding, namely RNK – VZ 2-16, that Verizon’s “just and reasonable” rates intrastate access rates charged before January 1, 2004, included recovery above the “actual costs” incurred in providing intrastate switched access services.

the request would be burdensome.<sup>6</sup> As an objecting party, Verizon faces “a heavy burden to establish that relevant information should be blocked from discovery.”<sup>7</sup> As argued above, this information is clearly relevant. A blanket “burden” objection, absent any justification or explanation of that “burden,” is in direct contravention to the Department’s “burden” requirements, as summarized in the *01-20 Interlocutory Order* set forth above.<sup>8</sup>

**B. Discovery Request RNK-VZ 2-18**

**1. Text of RNK’s Request**

*With reference to Verizon’s response to RNK-VZ-1-22(a), please provide the total revenue on an annual basis resulting from the \$2.44 increase in Verizon’s dial-tone line charge resulting from D.T.E. 01-31? If exact figures are not available, please estimate to the nearest thousand dollars.*

**2. Verizon’s Response**

*Verizon objects to this request on the ground that it is requests information that is not relevant to the issues in this proceeding, and seeks information that would require a burdensome special study.*

**3. RNK’s Specific Legal and Factual Argument**

Despite Verizon’s claims to the contrary, RNK’s request is clearly relevant and calculated to lead to the discovery of admissible evidence. Verizon is seeking a rule created by the Department whereby “CLEC intrastate access rates may not exceed the

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<sup>6</sup> It does not seem unreasonable to assume that a sophisticated business entity such as Verizon would maintain on file even a rough estimate of the profits accrued and costs incurred, by category and by state, during its ordinary course of business of providing telecommunications services, especially in regards to various state and federal filing requirements.

<sup>7</sup> *01-20 Interlocutory Order*, 2001 Mass. PUC LEXIS 63 at \*36-\*38.

<sup>8</sup> “The objecting party must make a sufficient showing of undue burden, providing details on such matters as the availability and location of materials and personnel needed to research and develop a response.” *Id.* at \*37.



access rates charges by the competing...[ILEC] in the same service area.”<sup>9</sup> If the Department decides to impose a cap and is going to make any accurate determination about the appropriate level of CLEC access rates, and how those rates relate to the charges imposed by Verizon, then revenues from the \$2.44 increase in Verizon’s dial-tone line charge resulting from D.T.E. 01-31, would need to be taken into account, since the increase in part represents revenues that otherwise would have been recovered via switched access rates, and that were an important consideration in the decision to reduce Verizon’s switched access rates to their current levels in the D.T.E. 01-31 Phase I Order.<sup>10</sup> RNK has a right to this information in order to build its case, since its intrastate access rates are at issue.

In regards to Verizon’s “burdensome” objection, please refer to RNK’s argument for RNK’s Discovery Request, RNK-VZ 2-15, above.

**C. Discovery Request RNK-VZ 2-6**

**1. Text of RNK’s Request**

*With reference to Verizon’s response to RNK-VZ 1-17, please provide tariff pages reflecting Verizon’s intrastate switched access rates in Massachusetts for the preceding fifteen (15) years.*

**2. Verizon’s Response**

*Verizon objects to this request on the grounds that it is overly broad and unduly burdensome. Notwithstanding this objection, Verizon states as follows:*

*Please see Attachments (a) and (b) which contain Verizon’s tariff pages for intrastate switched access rates from 1997 and 1999. Current tariff rates can be found on Verizon’s tariff website, [www.verizon.com/tariffs](http://www.verizon.com/tariffs).*

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<sup>9</sup> D.T.C. 07-9, “Verizon Petition,” page 2.

<sup>10</sup> D.T.E. 01-Phase II Order, issued April 11, 2003, pages 86-87.

### **3. RNK's Specific Legal and Factual Argument**

Despite responding to RNK's interrogatory in a limited fashion, by providing Verizon's switched access tariff pages from 1997 and 1999, Verizon failed to provide its tariff pages providing its Carrier Common Line Access rates from 1997. Although RNK believes that this may be the result of an administrative oversight, RNK is still entitled to the production of such information in a timely fashion. It is worth noting that Verizon has not claimed that the requested information is not relevant, but rather has instead made a blanket assertion that the request is "overly broad and unduly burdensome."<sup>11</sup> However, as discussed earlier, the Department discourages "blanket" objections of burdensomeness.<sup>12</sup> Here, since Verizon has produced its 1999 tariff pages for Carrier Common Line, and its other switched access service rates for the same time period, any additional burden would be minimal.

### **IV. MOTION TO STAY PROCEEDINGS**

Moreover, pursuant to 220 C.M.R. 1.04(5)(a) RNK ("RNK"), hereby moves to stay the procedural schedule until the later of (1) the date when the Hearing Officer rules on RNK's Motion to Compel or (2) in the event that the Hearing Officer grants RNK's Motion to Compel in full or in part, when Verizon fully complies with the Hearing Officer's ruling.

Ordinarily, under the Department's procedural rules, "the filing of a motion . . . and any action thereon shall not delay the conduct" of an adjudicatory proceeding. 220

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<sup>11</sup> Verizon Response to RNK-VZ-2-6, August 4, 2008.

<sup>12</sup> See *supra*, III.A.3., p. 7.

C.M.R. 1.04(5)(b). However, the Hearing Officer or the Commission may “otherwise direct” that a proceeding may be delayed while the Hearing Officer or Commission considers a motion. *Id.* Notwithstanding that provision, the Hearing Officer may deviate from the strict requirements of the Department’s procedural rules “[w]here good cause appears.” 220 C.M.R. 1.01(4).

Here, good cause exists to stay the procedural schedule until the later of such time as there has been a dispositive order on RNK’s motion or, should the Hearing Officer grant any part of RNK’s Motion to Compel, until Verizon has complied fully with its discovery obligations. The Department’s procedural rules recognize the role discovery plays in protecting the due process rights of parties in an adjudicatory proceeding. 220 C.M.R. § 1.06(6)(c)(1). However, even if RNK’s motion were granted at the earliest possible moment, and if Verizon complied with the resulting order in an expeditious manner, RNK will have lost the benefit of the information that it has sought from Verizon – its expert witness<sup>13</sup> will not have sufficient time to examine and/or analyze the information resulting from the subject requests before the August 20, 2008, deadline for the submission of pre-filed testimony.<sup>14</sup> Verizon should not be rewarded—and RNK punished—because of its deliberate decision to withhold relevant information during the discovery process. Therefore, the procedural schedule should be stayed—at least—until

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<sup>13</sup> RNK and several other of the CLEC parties whose tariffs are being challenged in this proceeding intend to jointly sponsor an expert witness who will be offering pre-filed testimony.

<sup>14</sup> Since this Motion is being filed on August 11, 2008, Verizon, pursuant to Ground Rule C., has until close of business on August 18, 2008 to oppose RNK’s Motion to Compel. Even if the Hearing Officer granted RNK’s motion by opening of business on August 19<sup>th</sup>, and Verizon was able to comply fully within a couple of hours, RNK would only have the benefit of that information for little more than one (1) business day, before its witness’s pre-filed testimony was due.

the Hearing Officer has ruled on its Motion, and if granted, until Verizon has fully complied with the Hearing Officer's order.

**V. CONCLUSION**

For all of the above reasons, the Department should issue an Order to compel Verizon to provide complete responses to RNK's Second Set of Discovery Requests: RNK-VZ 2-6; RNK-VZ 2-15; and RNK-VZ 2-18. Furthermore, pending release of Verizon's complete responses and the Department's ruling on this Motion, the Department should stay these proceedings.

Respectfully submitted,

RNK Inc.

By its Attorneys,

A handwritten signature in black ink, appearing to read "Mike Tenore", followed by a horizontal line and a circled "R" or similar mark.

Michael S. Tenore  
Douglas Denny-Brown  
RNK Communications  
333 Elm Street, Suite 310  
Dedham, MA 02026  
(781) 613-6000

Dated August 11, 2008

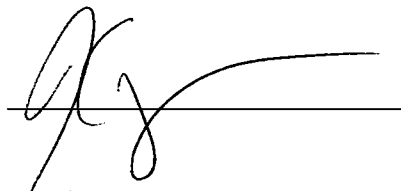
**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

**DTC 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 Dedham, Massachusetts this 11<sup>th</sup> day of August, 2008.

A handwritten signature in black ink, appearing to read 'KJ DeYoung', is written over a horizontal line.

Kerri J. DeYoung  
Counsel and Regulatory Analyst  
RNK Communications  
333 Elm Street, Suite 310  
Dedham, MA 02026  
(781) 613-6000

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

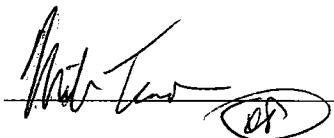
**Petition of Verizon New England, Inc.,  
MCI metro Access Transmission Services of  
Massachusetts, Inc., d/b/a Verizon Access  
Transmission Services, MCI Communications  
Services, Inc., d/b/a Verizon Business Services,  
Bell Atlantic Communications, Inc., d/b/a  
Verizon Long Distance, and Verizon 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**

**CERTIFICATE PURSUANT TO GROUND RULE D.3**

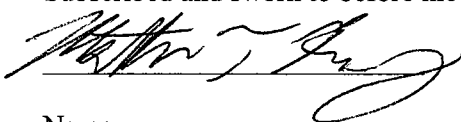
In accordance with Ground Rule D.3, as issued by the Hearing Officer in the above-captioned proceeding on July 1, 2008, I, Michael S. Tenore, Esq., counsel for RNK Inc. d/b/a RNK Communications, hereby state and certify the following:

- (1) I conferred with Richard C. Fipphen, counsel for Verizon, in anticipation of filing a Motion to Compel with the Department with respect to certain of Verizon's objections or responses to interrogatories issued by RNK to Verizon in the instant proceeding;
- (2) There was an initial discussion that occurred on Thursday, August 7, 2008, at approximately 10:00 a.m. via telephone. A follow-up telephone conversation occurred at approximately 4:00 p.m. on the same day.
- (3) Attorney Fipphen and I were the only participants in these conversations.

  
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Michael S. Tenore  
Asst. General Counsel/V.P.-Regulatory Affairs  
Counsel for RNK Inc. d/b/a RNK Communications

Subscribed and sworn to before me this 11<sup>th</sup> day of August, 2008.

  
\_\_\_\_\_

Name:

Notary Public

My commission expires:



**MATTHEW T. KINNEY**  
Notary Public  
Commonwealth of Massachusetts  
My Commission Expires  
December 31, 2010