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**

MOTION TO DISMISS OF RNK INC. D/B/A RNK COMMUNICATIONS

I. INTRODUCTION

Pursuant to 220 C.M.R. 1.04(5)(a) and 1.06(6)(e), RNK Inc. d/b/a RNK Communications ("RNK"), hereby moves to dismiss 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. (collectively, "Verizon") dated October 11, 2007 ("Petition"), and filed with the Department of Telecommunications and Cable ("Department"). For the reasons stated herein, RNK urges the Department to dismiss Verizon's Petition or, in the alternative, stay the proceeding until the Federal Communications Commission acts on unified intercarrier compensation reform.

RNK Inc. is a small, privately-held company, based in Dedham, Massachusetts. It was founded in 1992, has grown from its initial niche of local resale into an integrated communications provider, marketing local and interexchange ("IXC") telecommunications

services to prominently small and medium size businesses. RNK employs approximately 150 people in the Commonwealth of Massachusetts, serving a variety of customers via its own facilities with a broad range of telecommunications and non-telecommunications services.

II. STANDARD OF REVIEW

The Department's procedural rule, 220 C.M.R. 1.06(6)(e), authorizes a party to move for dismissal as to all issues or any issue in a case at any time after the filing of an initial pleading. In determining whether to grant a motion to dismiss, the Department takes the assertion of fact as true and construes them in favor of the non-moving party.[1] Dismissal will be granted by the Department if it appears that the non-moving party would be entitled to no relief under any statement of facts that could be proven in support of its claim.[2]

III. ARGUMENT

A. THE PETITION SHOULD BE DISMISSED SINCE, PROCEDURALLY, THE RELIEF REQUESTED BY VERIZON HAS ALREADY BEEN DENIED.

Verizon's Petition has been denied, so the Petition must be dismissed. In its Petition, Verizon requested only "that the Department open an investigation into CLEC intrastate access rates in Massachusetts" with the recommendation that the Department adopt rule changes Verizon suggested, principally among them, lower all competitive local exchange carrier ("CLEC") intrastate access rates to Verizon's current level.[3] As a result of Verizon's Petition, the Department conducted a Public Hearing and a Procedural Conference (collectively

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[1] D.P.U. 88-123, at 26-27.

[2] Although the Department has not adopted the Massachusetts Rules of Civil Procedure, these rules, including Rule 12(b) (6), provide "useful dispositive models." S*ee e.g., Riverside Steam & Electric Company,* D.P.U. 88-123, at 26-27 (1988); *see also Massachusetts Institute of Technology,* D.P.U. 94-101/95-36, at 11 n.5 (1995) (rules of court may provide instructive guidance); *see also Attorney General v. Department of Public Utilities,* 390 Mass. 208, 212-

"Hearing") on February 12, 2008, to solicit public statements and collect comments on Verizon's petition and suggestions.[4] Several interested parties attended and made public statements and comments, including many CLECs, such as RNK, that are concerned about the propriety and competitive impact of Verizon's Petition and suggestions, should they be carried out. In response to such statements and comments, and Verizon's petition, the Presiding Officer at the Hearing ruled that the Department "declined to open its own investigation on its own motion in this matter," thus denying the only relief requested by Verizon in its Petition.[5] The Hearing Officer apparently did not preclude Verizon from bringing its own case, but simply declined to accept Verizon's suggestion that the Department open its own investigation on the Department's authority under M.G.L. c. 159 s. 14.

M.G.L. c. 159 s. 14, provides for two distinct means for a common carrier's rates to be challenged as unjust and unreasonable. The first method would be that "the department . . . after a hearing had upon its own motion" would make a finding on whether a carrier's rates were just and reasonable.[6] The other principal procedural path that could provide a "plaintiff" such as Verizon means of achieving its desired result would be a Department investigation "upon complaint" of a third party, such as Verizon.[7] In this case, however, Verizon's Petition requests only that the "Department open an investigation."[8] Accordingly, the Petition, on its face, does

213 (1983) (rules of court do not govern procedure in executive department).
[3] Verizon Petition at 2.
[4] D.T.C. Public Hearing Notice, D.T.C. 07-9. January 14, 2008.
[5] D.T.C. Public Hearing and Procedural Conference Transcript ("Hearing Transcript"), February 12, 2008, at page 32, lines 1-3.
[6] M.G.L. c. 159 s. 14.
[7] *Id.*
[8] Verizon Petition at 2.

not seek to undertake a complaint against any particular CLEC, or CLECs as a group, with an assertion that any of their rates are unjust or unreasonable.[9]

In addition to its written petition, the statements of Verizon's counsel at the Procedural Conference demonstrate that Verizon deliberately chose not to seek an adversarial proceeding on Verizon's own motion. In fact, Verizon expressly disclaimed any desire for a complaint under Section 14, as Verizon's counsel stated: "We're not asking the Department to set specific rates for specific carriers. We're asking the Department to establish a pricing rule that would be applied across the Commonwealth of Massachusetts."[10] Thus, the Department should respect Verizon's decision not to challenge particular carrier's rates and not force Verizon into a rate case that it did not ask for, and, having denied the form of proceeding sought by Verizon, dismiss this Petition.

In addition, lest there be any doubt regarding the finality of the Hearing Officer's ruling declining to open a proceeding, under 220 C.M.R. 1.06(6)(d)(2), this ruling remains "in full force and effect unless and until set aside or modified" by the Department, although it "may be appealed" to the full Department. Along these lines, to date, the Department has not set aside or modified the Hearing Officer's ruling, nor has there been any indication that Verizon has filed a written appeal of the ruling, pursuant to the terms of 220 C.M.R. 1.06(6)(d)(3).[11] Neither did

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[9] Verizon's counsel stated that "the issue presented Verizon position is very discrete and is a legal policy question in nature." (Hearing Transcript at 13, lines 17-22).

[10] (Hearing Transcript at 13, lines 17-22). *See also* (Hearing Transcript at 15, lines 3-8).

[11] 220 C.M.R. 1.06(6)(d)(3) states:

> If a party wishes to appeal a ruling or decision of the presiding officer, the party should immediately notify the presiding officer, on the record if possible. The presiding officer shall prescribe a reasonable time period for the submittal of the appeal and any response to be filed by other parties. The appeal must be filed in writing with supporting documentation, and served on all parties to the proceeding.

Verizon immediately notify the Presiding Officer of its intent to appeal,[12] nor has it filed a written appeal to the Department that has been "served on all parties to the proceeding."[13] In summary, because the Presiding Officer denied the only relief requested by Verizon, and there has been no successful appeal of the Presiding Officer's ruling, its Petition should be dismissed.

B. THE PETITION SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED.

In addition to having the Department already having denied its requested relief in the procedural conference, Verizon's Petition fails to state a claim for which relief can be granted and, consequently, should be dismissed. Verizon references M.G.L. c. 159 s. 14 as the statute under which it seeks relief, but fails to allege any set of facts that, if taken as true, would entitle it to any relief under the statute. In particular, Verizon does not allege that any CLEC's rates in Massachusetts are unjust, unreasonable, unjustly discriminatory, unduly preferential, or in anyway violates any provision of law, nor does it file a complaint against any specific CLEC under the provisions of M.G.L. c. 159 s. 14. Verizon, instead, decided to file a petition for a generic investigation of all carrier's rates that were above its own, which is simply a veiled petition for rulemaking that does not adhere to the terms of 220 C.M.R. 2.02.

[12] Nothing in the current record, namely the Hearing Transcript, indicates that Verizon appealed the Hearing Officer's ruling.
[13] 220 C.M.R. 1.06(6)(d)(3).

1. By not alleging that any CLEC rates are "unjust or unreasonable," Verizon fails to adhere to the requirements set forth in M.G.L. c. 159 s. 14.

Before the Department shall determine "just and reasonable" rates under M.G.L. c. 159 s. 14, the statute first requires that the Department "be of the opinion, after a hearing had upon its own motion *or upon complaint*" that a carrier's rates are "unjust, unreasonable ...[or] in violation of any provision of law" (emphasis added). Verizon has failed to meet this statutory requirement. Verizon never expressly asserts, nor makes the complaint against ***any specific*** Massachusetts CLEC's intrastate access rates that the rates are "unjust and unreasonable." Instead, Verizon provides samples and examples of CLEC rates and implies that such is the case "on average" for all CLECs providing service in Massachusetts, and makes groundless assertions that such rates provide CLECs a "competitive advantage" over Verizon.[14] Nowhere has Verizon cited any supporting evidence or law that greater traffic-sensitive switched access rates charged by competitors in the switched access market provides the competitor with the higher rates with a "competitive advantage," or that if such a "competitive advantage" exists, that as a matter of law, the higher rates are "unjust" or "unreasonable." Verizon claims that "absent justification,"[15] CLEC intrastate access rates "substantially higher" than Verizon's "cannot be considered just

[14] Verizon Petition at 2.

[15] Of course, if a CLEC's combined traffic sensitive rate "justifiably" exceeds Verizon's, then in what situations would such a "competitive advantage" be just or reasonable? Verizon does not propose any criteria on which the Department should make this judgment, since Verizon believes that no traffic-sensitive rates in excess of its own are just or reasonable. See fn. 11, *infra*.

and reasonable."[16] Of course, Verizon does not (and cannot) provide any legal basis to support its self-serving proposition that, because its current rate may be "just and reasonable," any rate higher is necessarily "unjust or unreasonable," or that the Department must accept Verizon's rates for all carriers.[17] Accordingly, by not alleging specifically or in any other meaningful way that any CLEC rates are "unjust or unreasonable," or articulating any legally cognizable reason why such rates are such, Verizon fails to meet the threshold requirements of M.G.L. c. 159 s. 14, and, thereby, fails to state a claim upon which relief can be granted. Therefore, RNK respectfully asks that Verizon's Petition be dismissed.

2. By not naming a specific carrier in its Petition, Verizon fails to adhere to the requirements set forth in M.G.L. c. 159 s. 14.

Not only does Verizon fail to expressly allege that certain CLEC rates are "unjust and unreasonable," Verizon also fails to name in its Petition any *specific* carriers that have "unjust and unreasonable" rates. This is also in contravention of M.G.L. c. 159 s. 14, which requires that complaints to the Department allege that rates of "*any* common carrier" be "unjust, unreasonable ...[or] in violation of any provision of law" (emphasis added).[18] Rather than making claims against specific carriers, Verizon, instead, chooses to make assertions via implication and

[16] Verizon Petition at 7. Verizon's implication that all higher CLEC intrastate access rates are "unjust and unreasonable" are also contrary to the Department's own finding that "rates charged by non-dominant carriers for all services and by dominant carriers for sufficiently competitive services are presumed to be just and reasonable due to the disciplining effects of competitive forces. D.T.E. 01-31-Phase I at 19 (2002), citing IntraLATA Competition Order, D.P.U. 1731, at 64-70 (1985). Further, Verizon's arguments against all CLEC rates exceeding its own current rate ignores the fact that a mere four years, ago, in 2003, Verizon's "just and reasonable" rates that it fought exceedingly hard to keep, were around $.0039 cents/mou. (See Testimony of Paula Brown, April 12, 2001, DTE 01-31, at 11-12). This rate is likely close to many CLEC access rates today.

[17] This determination arguably runs afoul of M.G.L. c. 159 s. 14 which, in part states that rates should not be "insufficient to yield reasonable compensation for the service rendered..."

[18] The statute does not state "most" or "all" common carriers, but the word "any" appears to imply a requirement of specific allegations against a specific common carrier.

inference against Massachusetts CLECs as a generic group, especially those that happen to charge intrastate access rates higher than Verizon's current rates, that any rates charged above Verizon's rates are "unjust and unreasonable."[19] Of the companies that Verizon specifically mentions, namely Conversent, XO, and Level 3, Verizon never expressly asserts that their intrastate access rates are "unjust and unreasonable," but merely uses these carriers for illustrative purposes to show that some CLECs have rates above Verizon's.[20] Accordingly, because of its failure to name any specific carriers that allegedly charge "unjust and unreasonable" rates, RNK respectfully requests that Verizon's Petition should be dismissed for failure to comply with the statute.

3. Verizon violates the requirements of 220 C.M.R. 1.04(b)(7).

By requesting, emphatically, that the Department adopt a regulation that caps CLEC intrastate switched access rates at those of the incumbent local exchange carrier ("ILEC"), and by failing to adhere to the requirements set forth in M.G.L. c. 159 s. 14, Verizon's Petition is a veiled Petition for Rulemaking that would be more appropriately filed under 220 C.M.R. 2.02.[21] 220 C.M.R. 1.04(1)(b)(7) requires that a petition or complaint reference the statute "under which relief is sought." As has been shown above, Verizon misstates, or misuses the application of M.G.L. c. 159 s. 14. The relief sought by Verizon, that the Department place a ceiling on intrastate access rates that CLECs may charge, is not possible under M.G.L. c. 159 s. 14 under the circumstances.[22] In reality, as stated above, it is a request for rulemaking. For such a

[19] For Verizon, the only rates that would be "more reasonable" would be those "at or just below Verizon's current rates." See Verizon Petition at 6, fn. 14.
[20] Verizon Petition at 4.
[21] Rulemaking requests are the bulk of Verizon's Petition. See pages 2 and 6-10, Verizon Petition.
[22] Verizon Petition at 6.

request, the correct statute under which relief is sought is 220 C.M.R. 2.02, which Verizon fails to reference. This failure to reference violates the requirements of 220 C.M.R. 104(1)(b)(7), and, therefore, Verizon's Petition should be dismissed.

Moreover, assuming, for sake of argument, that Verizon's Petition--despite being procedurally deficient as a petition for rulemaking--was accepted as such by the Department, it would be inappropriate under these circumstances. In *Cambridge Elec. Light Co. v. Department of Public Utilities*, the Supreme Judicial Court examined the circumstances under which an adjudicatory proceeding was appropriate, as compared to a rulemaking proceeding.[23] In particular, the Court held that an adjudicatory proceeding was appropriate when "specific facts concerning . . . [a party's] business or property, their motives, their relations to a given transaction-- so called "adjudicative facts" . . . which needed untangling by trial methods."[24] The lowering of CLECs' access rates, given the legal standard for setting "just and reasonable" rates, is necessarily fact-specific both to the situation of the CLECs whose rates are being challenged.[25] That said, since Verizon did not ask for such a proceeding and the Department denied Verizon the only form of proceeding it requested, the Petition should be dismissed.

C. IF THE DEPARTMENT CHOOSES NOT TO DISMISS VERIZON'S PETITION, IT SHOULD ABEY ACTION ON THIS MATTER AS SUCH ACTION MAY IMPACT REMEDIES AVAILABLE UNDER PENDING PROPOSALS FOR UNIFORM INTERCARRIER COMPENSATION REFORM.

For the reasons stated above, dismissal is the most appropriate disposition of Verizon's petition. However, should the Department not dismiss the proceeding as argued above, it should

[23] 363 Mass. 474, 295 N.E.2d 876 (Mass.1973)
[24] *Cambridge Elec. Light Co.* 363 Mass. at 487, 295 N.E.2d. at 884.
[25] RNK is not aware of any case where the Department articulated a "just and reasonable" standard for non-

place the case in abeyance because the issues in the instant proceeding are materially similar and possibly prejudge issues under consideration in the Federal Communications Commission's (FCC) own *Intercarrier Compensation* case. [26] As further described below, the Department should decline to open any proceeding on this matter until the FCC renders its decision in the *Intercarrier Compensation.* The Department has taken similar action under similar circumstances in the past, and such prudent actions led to a more timely, efficient, and sound decisions by the Department at a later date as a result. For example, in DTE 01-20 Part B, the Department held in abeyance the part of the proceeding concerning the development of a new avoided-cost discount was subsequently pending establishment of new resale discount rules by the FCC.[27]

Department action on Verizon's Petition at this time would not take into account the potential impact of the FCC *Intercarrier Compensation* proceeding, as FCC action could affect *both* interstate *and intrastate* access charge reform, or encourage it as a critical component. A failure to coordinate intrastate intercarrier compensation reform with the FCC's proceeding could have unintended consequences of depriving Massachusetts carriers of remedies available under the current proposals for comprehensive federal intercarrier reform. For example, the so-called the Missoula Plan[28] would have allowed carriers to recover the cost of access charge reductions via a Subscriber Line Charge increase as well as other cost recovery mechanisms that

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dominant carriers.

[26] *See generally In re Developing a Unified Intercarrier Compensation Regime – Missoula Intercarrier Compensation Reform Plan*, FCC CC Docket No.01-92, DA 06-1510.

[27] See Interlocutory Order on Part B Motions at 12-14, D.T.E. 01-20, April 4, 2001.

[28] While RNK has not fully supported the Missoula Plan, it does support sensible intercarrier compensation reform that is economically efficient, preserves universal service, achieves competitive neutrality, and is technologically neutral and consistent. Further, given the Missoula Plan's treatment of CLECs as an after thought, it seems that the Department may have an important role in supporting competition after the approval of such a plan.

potentially would not be available if the Department acted in a disjointed manner.[29] Further, RNK notes that other state public utility commissions have recognized the need for caution with comprehensive federal reform pending and have similarly acted with restraint in order to better coordinate state activities with federal initiatives.[30]

An untimely action at the state level without insight into how the FCC would act could be a "one-two" punch to CLECs in Massachusetts necessitating rate increases to not only their residential customers, but more importantly, to the small to medium size businesses that currently constitute a substantial portion of CLECs' customer bases, and/or may force some CLECs to stop providing such services altogether. A rate increase now could also potentially cost the Commonwealth hundreds of jobs, both in terms of a less business-friendly environment for the small, medium, and large business customers of CLECs that depend on CLECs for innovative and competitive services, and for Massachusetts-based CLECs, like RNK, that would be placed at a competitive disadvantage.

Thus, should the Department determine that Verizon's petition should survive RNK's and potentially others' motions to dismiss, at the very least, RNK urges the Department to wait until the FCC reaches a ruling in its *Intercarrier Compensation* proceeding to address this matter.[31] In this way, the Department can act in a unified and manner with the FCC, address specific Massachusetts competitive concerns that may be raised by federal action, and spend its resources on matters of a larger value to the consumers and citizens of Commonwealth of Massachusetts.

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[29] Missoula Plan at II(c).

[30] *AT&T Communications of Pennsylvania, LLC v. Verizon North Inc. and Verizon Pennsylvania Inc.*, C-20027195 (January 8, 2007).

[31] Should the Department have concerns that the FCC will not have a decision in the near future, it could set a date

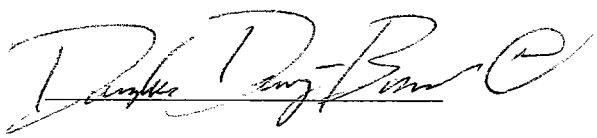
IV. CONCLUSION

For all of the above reasons, the Department should decline to grant Verizon the relief requested in its Petition and grant RNK's Motion to Dismiss.

Respectfully submitted,

RNK Inc.

By its Attorneys,



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Dated 2/27/08

of perhaps one year by which it will investigate rates on its own motion if the FCC fails to act.

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 27th day of February, 2008.

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