185 Franklin Street, 13th Floor
Boston, MA 02110
Tel (617) 743-2445
Fax (617) 737-0648
bruce.p.beausejour@verizon.com

Bruce P. Beausejour
Vice President & Associate General Counsel

March 5, 2008

Catrice Williams, Secretary
Department of Telecommunications and Cable
One South Station, 2nd Floor
Boston, Massachusetts 02110

Re: D.T.C. 07-9 — Verizon Petition for Investigation into the Intrastate Access Rates of Competitive Local Exchange Carriers

Dear Secretary Williams:

Enclosed for filing is Verizon's Response to Motions to Dismiss. Thank you for your assistance in this matter.

Respectfully submitted,

Bruce P. Beausejour

Bruce P. Beausejour

cc: Service List

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 into the Intrastate Access Rates of Competitive Local Exchange Carriers	)	**D.T.C. 07-9**

VERIZON'S RESPONSE TO MOTIONS TO DISMISS

Verizon New England Inc., d/b/a Verizon Massachusetts, 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. (collectively "Verizon") hereby respond to the motions to dismiss filed by XO Communications, Inc., One Communications, PAETEC Communications, Inc. and RNK Inc. ("CLEC Movants").

Verizon respectfully submits that the motions filed by the CLEC Movants clearly ignore the precedents and practices of the Department of Telecommunications and Cable (the "Department"), are not well grounded in Massachusetts law, and are interposed solely for the purpose of stalling the successful efforts of federal and state policy makers and other carriers,

including Verizon, to ensure that CLEC intrastate switched access rates are reasonable.[1] Accordingly, the motions should be denied.

Argument

I. Verizon's Petition Provides an Appropriate Vehicle for Resolution of the Issue Presented

Verizon has proposed that the Department adopt a policy that is consistent with the policies adopted by the Department in like cases in the past, and that also follows the approach taken by the Federal Communications Commission ("FCC") and all the other state commissions that have addressed this issue to date, namely that ILEC access rates should be the benchmark for determining whether CLEC access rates are just and reasonable. No regulatory body that has considered this issue has reached a different result and for good reason. Permitting CLECs to impose access charges in excess of the competing ILEC, absent a carrier-specific justification, is contrary to the public interest because inflated CLEC rates distort the competitive market and conflict with statutory requirements that rates be just and reasonable. Adopting the generic policy proposed by Verizon would help to eliminate the significant rate disparities resulting from the current asymmetric regulatory scheme for pricing of switched access service.

Verizon's Petition has presented information that clearly warrants investigation by the Department. Verizon demonstrated that several CLECs in Massachusetts have tariffed local switching rates that are more than ***fifteen*** times higher than Verizon MA's rate. In addition, Verizon stated that ***forty*** CLECs are billing Verizon at an average revenue per minute ("ARPM") that is higher than Verizon MA's ARPM for its usage-sensitive rate elements, and that 33 of

[1] Some of the CLEC Movants have stated the number of their employees in the Commonwealth (*see, e.g.*, RNK Motion to Dismiss at 2, "RNK employs approximately 150 people in the Commonwealth of Massachusetts;" One Communications Motion to Dismiss at 2, "One Communications … employs more than 500 people in Massachusetts."). This information is not relevant to this proceeding, but we note that Verizon has more than 13,000 employees working in Massachusetts.

those carriers have ARPMs that are at least 150% above the Verizon MA ARPM.[2] Given the lack of a Department policy on CLEC access rates and the enormous rate disparities evident in the CLEC tariffs on file with the Department and in the ARPM data presented by Verizon, Verizon has presented sufficient evidence to justify an investigation of CLEC access rates in Massachusetts.

The CLEC Movants contend that Verizon has not appropriately presented this issue to the Department, arguing that Verizon should have either filed a petition for rulemaking or complaints against individual CLECs.[3] The CLEC Movants are ignoring many years of past practice by the agency. The Department has *routinely and consistently* addressed policy issues, whether on its own motion or upon petition, through generic investigations that afforded all interested parties an opportunity to participate. Indeed, the Department's customary method of addressing new issues has been to open a generic investigation rather than conduct a formal rulemaking proceeding.[4] Verizon framed the Petition as it did on the basis of this long-standing Department practice. That the Department, through the hearing officer, indicated at the procedural conference that the Department was not proceeding on its own motion in conducting this proceeding is of no consequence;[5] the Department has in the past conducted generic investigations upon the petition of a party as well as upon its own motion.[6] In light of the

---

2 Petition at 4-6.

3 *See* RNK Motion at 5-9; PAETEC Motion at 2; One Communications Motion at 7.

4 *See, e.g.*, D.P.U. 1731 (intraLATA competition); D.P.U. 93-98 (telecommunications carrier regulation); D.P.U. 94-158 (incentive regulation for electric and gas companies); D.P.U. 94-185 (intraLATA and local competition); D.P.U./D.T.E. 97-88/97-18 (payphones); D.T.E. 97-103 (eligible telecommunications carriers/Lifeline); D.T.E. 98-34 (public interest payphones); and D.T.E. 98-58 (expedited collocation requests).

5 Transcript at 31-32.

6 *See, e.g.*, D.T.E. 98-58 (Petition of Teleport Communications Group Inc. requesting the Department to establish rules regarding collocation requests).

pending motions, the question before the Department is how best, procedurally, to answer the question as to whether Massachusetts law imposes any limits on access pricing by CLECs.

Under well established principles of administrative law, the Department has broad discretion to determine rules of general applicability through adjudicatory proceedings, including generic investigations, or, alternatively, through rulemaking proceedings. *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board*, 448 Mass. 45 (2006); *Massachusetts Electric Company v. Department of Public Utilities*, 383 Mass. 675 (1981). Further, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery Corp*., 332 U.S. 194, 203 (1947). As the Supreme Judicial Court has recognized, the Department has the flexibility to address Verizon's Petition through a generic investigation, an approach that it has consistently followed to implement rules or policies of general applicability.

CLEC Movants allege that Verizon's Petition is a petition for rulemaking in disguise.[7] Verizon, and most, if not all, of the CLEC Movants are well aware that the Department has rarely, if ever, used the rulemaking procedures prescribed by the Code of Massachusetts Regulations[8] to address telecommunications policy issues. Verizon's Petition was accordingly framed as a request for a generic investigation, as opposed to a request for a formal rulemaking, on the basis of long-standing past practice by the Department.

CLEC Movants also allege that the Verizon Petition is deficient as a complaint under section 14 of chapter 159 because it does not complain about the rates of specific carriers.[9] Surely, the formal complaint option was and is available to Verizon; indeed, Verizon will

---

7 One Communications Motion at 7; RNK Motion at 8.

8 220 C.M.R. 2.00 (Adoption of Regulations).

9 *See, e.g.*, RNK Motion at 6-8, PAETEC Motion at 2, and One Communications Motion at 7-8.

promptly file a formal complaint against one, some or all CLECs who have inflated access rates if the Department grants the pending motions. However, conducting multiple individual proceedings would also be more time-consuming, inefficient and would constitute a waste of Department and industry resources. The FCC and every other state commission that has considered CLEC access charge reform has proceeded through a generic process, rather than through serial *ad hoc* adjudications. Such a move should also not be necessary because filing individual complaints and opening separate dockets will inevitably result in requests to the Department for consolidation of the several complaints and motions to intervene from CLECs that are not the subject of a complaint. The result will be exactly what we have today: a generic, multi-party proceeding with all the affected parties before the Department, litigating the legal and policy issues in dispute.

Verizon's proposed relief is consistent with the past practices of the Department. If the Department, despite this long history, prefers that Verizon file formal complaints against individual CLECs, we can and will do that. The Department should, however, look past the CLECs' "smokescreens" and address the substance of Verizon's Petition. We urge the Department to realize that filing individual complaints is neither necessary nor efficient and that proceeding as Verizon proposes is consistent with the Department's past practice of conducting generic investigations to establish rules or policies of general applicability.

II. The Department Has Previously Addressed the Issue of Assuring Just and Reasonable Rates Offered by Non-Dominant Carriers Where the Service at Issue Is Not Subject to Competition and Has Adopted Those Policies Without Resort to Formal Complaint Proceedings or Formal Rulemaking Proceedings

The Department has several times addressed the appropriate regulatory framework for rates of non-dominant carriers where a specific service is not subject to market forces. In each

case, the Department promulgated its policy without resorting to formal rulemaking or complaint proceedings.

In 1985, the Department, as part of a generic proceeding on intraLATA competition, determined that competition "in certain segments of the market will provide the necessary assurance that rates are fair and reasonable…."[10] The Department also determined that interexchange carriers other than AT&T could be regulated as non-dominant carriers because they lack the market power to sustain rates that are significantly above or below costs.[11] In its International Telecharge decision three years later, the Department, in connection with that company's application for certification in Massachusetts, determined that dominant carrier regulation, even for otherwise non-dominant carriers, is necessary where the company provides service to captive customers. In that case, the Department required alternative operator services providers to either provide cost justification or base their rates on AT&T's intrastate rates and/or New England Telephone's intrastate intraLATA rates for similar services, because these rates have been found to be just and reasonable.[12]

Ten years later, after concluding that consumers are sufficiently aware of competitive alternatives, the Department lifted dominant carrier rate regulation and allowed operator services providers to charge market-based rates. However, the Department retained dominant carrier regulation for inmate calling and required that usage rates not exceed those of Bell Atlantic (*i.e.*, Verizon), finding that inmates do not have a choice of long-distance provider at a prison

---

10 D.P.U. 1731 at 33.

11 *Id.* at 63-64.

12 D.P.U. 87-72/88-72 at 16-17.

payphone.[13] This policy was adopted by the Department in a generic investigation to examine structural issues in the pay telephone market.[14]

Similarly, in D.P.U. 94-185, a generic investigation into intraLATA and local exchange competition in Massachusetts, the Department determined that a CLEC may not charge higher rates for terminating local calls (*i.e.*, reciprocal compensation rates) than what NYNEX (*i.e.*, Verizon) charges the CLEC, absent a showing of higher costs.[15] None of the policy statements described above was implemented by the Department in either a formal rulemaking proceeding under 220 C.M.R. 2.00 or a formal complaint proceeding under section 14 of chapter 159, the two approaches that the CLEC Movants incorrectly identify as the only lawful means to address Verizon's Petition.

III. CLEC Arguments That Massachusetts Law Imposes No Limit on CLEC Access Rates or That the Department Has "Deregulated" CLEC Rates Are Simply Wrong

One Communications argues that Verizon's Petition fails to state a claim upon which relief can be granted because "Massachusetts CLECs' access rates are deregulated as a matter of law."[16] One Communications has misstated applicable law: Massachusetts General Laws chapter 159, section 14 requires all intrastate common carrier rates to be "just and reasonable," and section 19 requires that those rates be tariffed. The Department has recently noted that this statutory requirement applies to *all* common carriers: "G.L. c. 159 does not differentiate between dominant and non-dominant carriers, CLECs and ILECs, LECs and interexchange carriers, etc. Our obligations under chapter 159 apply equally to every common carrier."[17]

---

13 D.P.U./D.T.E. 97-88/97-18, Phase II, at 8-10.

14 *Id.* at 1.

15 D.P.U. 94-185 at 48.

16 One Communications Motion at 9.

17 D.T.E. 01-31, Phase II (2003) at 71.

Although most CLEC services are classified as non-dominant by the Department, they are not beyond regulatory scrutiny or statutory requirements, as One Communications contends. Tellingly, One Communications cites no legal authority in support of its argument, because there is none. As noted, One Communications and all other common carriers in Massachusetts are subject to identical statutory requirements, but the Department has chosen to rely on market forces to ensure that rates and services meet statutory requirements, where it has found that market forces are sufficient. The Department has not made such a determination for CLEC switched access services. Although One Communications is correct that the "plain language" of section 14 does not contain a requirement that CLEC rates mirror Verizon's access rates,[18] One Communications dodges the question of how the statutory requirement of "just and reasonable" should be applied to CLEC access rates.

The CLECs' switched access rates were filed with little or no Department review. As a result, no CLEC has been required to provide appropriate cost justification for its switched access rates. Verizon and other carriers have no choice but to pay these rates — there are no alternatives available to terminate our customers' calls to the CLECs' customers. Market forces are not currently sufficient to ensure that these rates are just and reasonable. If "just and reasonable" means anything, it means that the rates must be subject to some disciplining agent — competition or regulation. The Department has the authority, indeed the responsibility under section 14, to determine an appropriate regulatory control for CLEC switched access rates in light of: (1) its precedents, and (2) the inability of existing market forces to assure just and reasonable rates for switched access charges. That is the substantive question that is presented by the Verizon Petition. Verizon believes that its proposed approach — a generic investigation

[18] One Communications Motion at 9.

— is the most fair and efficient way to address the issue and is well grounded in the past practices of the Department and should be adopted for this proceeding. Accordingly, the motions to dismiss should be denied in all respects.

Respectfully submitted,

VERIZON NEW ENGLAND INC., MCIMETRO ACCESS TRANSMISSION SERVICES OF MASSACHUSETTS, INC., MCI COMMUNICATIONS SERVICES, INC., BELL ATLANTIC COMMUNICATIONS, INC., and VERIZON SELECT SERVICES, INC.

By their attorneys,

Bruce P. Beausejour
185 Franklin St. – 13th Floor
Boston, Massachusetts 02110-1585
(617) 743-2445

Richard C. Fipphen
140 West Street – 27th Floor
New York, New York 10007
(212) 321-8115

Dated: March 5, 2008