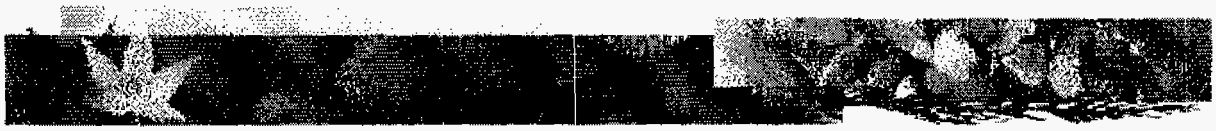
Ruth Nettles

090000-OT

From: Scobie, Teresa A (TERRY) [terry.scobie@verizon.com]
Sent: Monday, July 27, 2009 2:00 PM
To: Filings@psc.state.fl.us
Cc: O'Roark, Dulaney L; Kimberly Caswell; David Christian; Adam Teitzman
Subject: Undocketed 08-0000 - CLEC Intrastate Access Charges
Attachments: CLEC Intrastate Access Charges-MA Order-7-27-09.pdf



The attached is submitted for filing on behalf of Verizon Florida LLC by

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The attached document consists of a cover letter and attachment (Massachusetts DTC Final Order) for a total of 37 pages.

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July 27, 2009 – **VIA ELECTRONIC MAIL**

Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Undocketed 08-0000
CLEC Intrastate Access Charges Workshop

Dear Ms. Cole:

The Commission initiated this proceeding more than a year ago to investigate whether to constrain competitive local exchange carrier ("CLEC") switched access rates, as the FCC and more than a dozen other states have done. Yet another state, Massachusetts, recently joined those ranks. The Massachusetts Department of Telecommunications and Cable's decision to cap Massachusetts CLEC rates at the competing ILEC's (that is, Verizon's) rate is attached. This is the same action Verizon and others have recommended in this case, citing the same factors the Massachusetts Department of Telecommunications and Cable did. Market forces do not constrain CLEC access rates, as demonstrated by, among other things, the wide divergence among CLECs' access rates that Staff here has cited.

The comment cycle in this case closed last August. The presentations and comments provided by the parties amply demonstrate the need for the Commission to benchmark CLEC switched access rates to the rates of the competing ILEC. Verizon urges the Commission to open a docket to address this important issue.

Sincerely,

s/ Dulaney L. O'Roark III

Dulaney L. O'Roark III

Attachment

c: Adam Teitzman, Staff Counsel (w/a via electronic mail)

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 07-9 June 22, 2009

Petition of Verizon New England, Inc., MCImetro Access Transmission Services of Massachusetts, Inc., d/b/a Verizon Access Transmission Services, MCI Communications Services, Inc., d/b/a Verizon Business Services, Bell Atlantic Communications, Inc., d/b/a Verizon Long Distance, and Verizon Select Services, Inc. for Investigation under Chapter 159, Section 14, of the Intrastate Access Rates of Competitive Local Exchange Carriers.

FINAL ORDER

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FOR: RICHMOND NETWORX

I. Introduction

In this Order, the Department of Telecommunications and Cable ("Department")[1] adopts in large part the proposal of petitioner 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. (collectively "Verizon") to cap the originating and terminating intrastate switched access rates of competitive local exchange carriers ("CLECs") operating in the Commonwealth at the rate of Verizon, the prevailing incumbent local exchange carrier ("ILEC"). The Department finds that by capping these inter-carrier rates, a market distortion will be removed, thus furthering competition within the telecommunications industry. The Department also finds that this increased competition will result in lower long distance rates for consumers in the Commonwealth. The Department also adopts an exemption to this cap for rural CLECs. Finally, recognizing that this is a substantial change in the regulation of inter-carrier rates, and that time will be needed to adapt to this change, the Department grants all carriers one year to comply with this new requirement.

II. Procedural History

On October 11, 2007, Verizon filed a petition with the Department seeking an investigation under G. L. c. 159, § 14, of the intrastate switched access rates of competitive local exchange carriers. *In re Verizon New England, Inc., MCImetro Access Transmission Servs. of Mass., Inc., d/b/a Verizon Access Transmission Servs., MCI Commc'ns Servs., Inc., d/b/a Verizon Bus. Servs., Bell Atlantic Commc'ns, Inc., d/b/a Verizon Long Distance, & Verizon*

[1] Pursuant to Chapter 19 of the Acts of 2007, the Department of Telecommunications and Energy was dissolved on April 11, 2007. 2007 Mass. Acts c. 19, §§ 1-54. Jurisdiction over telecommunications matters was placed in the newly-created Department of Telecommunications and Cable. *See* G. L. c. 25C, §§ 1-7. For administrative ease, "Department" as used herein refers to both Departments.

Select Servs., Inc. for Investigation under Chapter 159, Section 14, of the Intrastate Access Rates of Competitive Local Exchange Carriers, D.T.C. 07-9, Petition, 1 (Oct. 11, 2007) ("Verizon Petition"). On February 12, 2008, the Department held a duly noticed public hearing and procedural conference. *In Re Investigation under Chapter 259, Section 14, of the Intrastate Access Rates of Competitive Local Exchange Carriers*, D.T.C. 07-9, Docket, 1 (2007) ("Docket"). At that hearing, the Department "declined to open its own investigation on its own motion," and after taking oral comments from all Parties, including Verizon, granted leave for Parties to file "motions to dismiss based on lack of jurisdiction or improper filing under the statute." *See* Feb. 12, 2008 Evidentiary Hearing, Transcript[2] at 32. At the February 12 procedural conference, the Department also granted the petitions of XO Communications Services, Inc. ("XO"), AT&T Corporation and its affiliates ("AT&T"), and Comcast Phone of Massachusetts, Inc. ("Comcast") to intervene as full parties. *Id.* at 11-12; Docket at 1. The same day, the Massachusetts Attorney General ("Attorney General"), by notice to the Department, exercised her right to intervene in this case pursuant to G. L. c. 12, § 11E. Docket at 1. On February 26, 2008, the Department granted petitions to intervene by Choice One Communications of Massachusetts, Inc., Conversent Communications of Massachusetts, Inc., CTC Communications Corp., and Lightship Telecom, LLC (collectively, "One Communications"); RNK, Inc., d/b/a RNK Communications ("RNK"); PAETEC Communications, Inc. ("PAETEC"); Level 3 Communications, LLC ("Level 3"); Richmond Connections, Inc., d/b/a Richmond NetWorx and Richmond Telephone Company ("Richmond NetWorx"); Sprint Communications Company, L.P., Sprint Spectrum, L.P., and Nextel

[2] Hereinafter, citations to the Evidentiary Hearing Transcript shall be captioned "Tr. at [pg]."

Communications of the Mid-Atlantic, Inc. (collectively "Sprint Nextel"); and Qwest Communications Corporation ("Qwest").[3] *Id.*

On February 27, 2008, the Department received motions to dismiss from XO, RNK, PAETEC, and One Communications. *Id.* On March 5, 2008, the Department received Verizon's response to the motions to dismiss as well as motions in support of Verizon's petition from the Attorney General, AT&T, and Comcast. *Id.* On June 18, 2008, the Hearing Officer denied the motions to dismiss and indicated the Department's decision to proceed with a full evidentiary hearing on the merits. *Id.* The Parties conducted discovery from July 7, 2008 through September 22, 2008. Docket at 2-3. On July 7, 2008, Verizon submitted the pre-filed testimony of Paul Vasington ("Vasington"). *Id.* at 2. On August 21, 2008, the following intervenor testimony was submitted: pre-filed panel testimony of Dr. Ola Oyefusi ("Dr. Oyefusi") and E. Christopher Nurse ("Mr. Nurse"), submitted by AT&T; pre-filed testimony of Dr. Michael Pelcovits ("Dr. Pelcovits"), submitted by Comcast; pre-filed testimony of John Dullaghan, submitted by Richmond NetWorx; and pre-filed testimony of Michael Starkey ("Mr. Starkey"), submitted by the CLECs. *Id.* On September 5, 2008, the CLECs notified the Department that Dr. August H. Ankum ("Dr. Ankum") would replace Mr. Starkey as the CLECs' witness. *Id.* at 3. On September 22, 2008, the Department received the testimony of Dr. Ankum who adopted the pre-filed testimony of Mr. Starkey. *Id.*

The Department held a three-day evidentiary hearing at its offices in Boston from September 23 through 25, 2008. *Id.* At the hearing, the Parties presented witnesses and testimony. All witnesses were cross-examined at the hearing. The Parties filed initial briefs with

[3] Per its petition, the Department granted Qwest limited party status. As a result, Qwest's participation in these proceedings was limited to the right to file a brief after the evidentiary hearings.

the Department on October 30, 2008, and filed their final briefs on November 10, 2008. Docket at 4.

III. Background

As the dominant telecommunications carrier (or ILEC) in Massachusetts, Verizon petitioned the Department to investigate the way competitive carriers set their wholesale inter-carrier rates for exchanging long distance traffic. *See* Verizon Petition at 1. Inherent in the telephone system architecture is the need for different telephone carriers to interconnect with one another. *See* July 7, 2008 Pre-Filed Testimony of Mr. Vasington at 2-3 ("Vasington Testimony"). Interconnection is necessary because not everyone is a customer of the same telephone carrier. *See* Aug. 20, 2008 Pre-Filed Testimony of Dr. Pelcovits at 4-5 ("Pelcovits Testimony"). Consequently, carriers must connect their systems with other carriers to allow customers served by different carriers to communicate with each other. *Id.* Because interconnection carries a cost, carriers charge each other fees to gain access to their networks. *See* Vasington Testimony at 2-3. For purposes of exchanging long-distance calls over different carrier networks, these fees are called access charges, and they are the central point of contention in this case. *Id.*

In this Order, unless otherwise stated, the Department will be addressing intrastate switched access charges as they relate to toll calls originating and terminating within Massachusetts. Local calls are not included as they do not travel over interexchange carrier ("IXC") networks and are governed by reciprocal compensation. *Id.* at 2. To understand interconnection charges, it is instructive to consider a hypothetical call between two parties who are customers of two different telephone carriers. The event begins when a calling party dials the number of the called party. The call travels from the calling party's telephone over the

originating local exchange carrier ("LEC") network to a central hub. *Id.* At the central hub, the call is connected to an IXC network using a switch.[4] *Id.* At this point, the IXC pays an access charge to the originating carrier ("originating LEC") for routing the call to the IXC. *See* Aug. 20, 2008 Pre-Filed Testimony of Dr. Oyefusi & Mr. Nurse at 7 ("Oyefusi & Nurse Testimony"). The call then travels across the IXC's network to the local hub of the called party where it is switched again to the called party's LEC network. *Id.* Again, the IXC incurs an access charge to the called party's LEC for completing (or terminating) the call ("terminating LEC"). *See* Vasington Testimony at 2-3.

IXCs carrying calls are legally obligated to complete calls to any end user their customer wants to call.[5] *See* Initial Post-Hearing Brief of AT&T Corp. at 14 ("AT&T Brief"). Moreover, IXCs cannot decline to terminate calls to a LEC whose access charges they believe are too high. *See In re LEC Rates*, WC Docket No. 07-135, Declaratory Ruling & Order at ¶ 6. Because a person's telephone number is associated with a single LEC, the IXC is obligated to terminate a call with the LEC of the called party's choice at the LEC's price.

Switched access rates are regulated by both the Federal Communications Commission ("FCC") and the Department, depending on whether the call is interstate or intrastate. *See* 47 C.F.R. § 61.26(b). *See also Investigation by the Dep't of Telecomms. & Energy on Its Own Motion into the Appropriate Regulatory Plan to Succeed Price Cap Regulation for Verizon New England, Inc.*, D.T.E. 01-31 Phase I, Order, 63 (May 8, 2002) ("D.T.E. 01-31 Phase I"). In 2001, the FCC capped the interstate long-distance access charges of all CLECs at the rate of the

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[4] The actual connection between one network and another is accomplished by means of a call routing switch. Hence the term "switched access." JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 49 (Paperback ed. 2007).

[5] The FCC states that "no carriers, including interexchange carriers, may block, choke, reduce, or restrict traffic in any way[.]" *In re Establishing Just & Reasonable Rates for Local Exchange Carriers & Call Blocking by Carriers*, WC Docket No. 07-135, Declaratory Ruling & Order, ¶ 6 (FCC rel. June 28, 2007) ("*In re LEC Rates*").

dominant ILEC. *See* 47 C.F.R. § 61.26(b). In 2002, the Department capped Verizon's intrastate switched access rates at the interstate level.[6] *See* D.T.E. 01-31 Phase I, Order at 63. The intrastate switched access rates that non-dominant carriers (i.e., CLECs) charge have never been set by the Department but have instead been allowed to fluctuate according to market forces. Since the FCC capped the interstate rates of all carriers, about half of the states have moved to regulate CLEC intrastate switched access rates. *See infra* pp. 24-25.

In Massachusetts, because the FCC has capped all interstate access charges and the Department has capped the intrastate access charges of Verizon, the intrastate access rates of CLECs are the only access rates subject to market pricing. *See* 47 C.F.R. § 61.26(b); D.T.E. 01-31 Phase I, Order at 63. Effective market-based pricing would constrain these rates but, as discussed below, there is a market failure in the CLEC switched access market.

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[6] While effectively a cap, Verizon's switched access rate is a result of the Department's alternative regulation plan for Verizon. *See* D.T.E. 01-31 Phase I, Order at 99. Since 1989, the Department began a series of revenue-neutral rate rebalancing Orders to better align Verizon's rates with their costs. *Investigation by the Dep't on Its Own Motion as to the Propriety of the Rates & Charges Set Forth in the Following Tariffs: M.D.P.U.-Mass.-No. 10; Supplement No. 247; Master Table of Contents; Part A, Part B, and Part C; M.D.P.U.-Mass.-No. 13; and M.D.P.U. No. 15; Filed with the Dep't on Dec. 1, 1989 to become Effective Dec. 31, 1989 by New England Tel. & Tel. Co.*, D.P.U. 89-300, Order, 10 (June 29, 1990) ("*NET Tariff Order*"). The Orders culminated in *Investigation by the Dep't of Telecomms. & Energy on Its Own Motion into the Appropriate Regulatory Plan to Succeed Price Cap Regulation for Verizon New England, Inc.*, D.T.E. 01-31 Phase II (Apr. 11, 2003) ("D.T.E. 01-31 Phase II"), in which the Department directed Verizon to lower its intrastate switched access rate to the interstate level, and to raise basic exchange rates to offset the revenue loss. D.T.E. 01-31 Phase II, Order at 93.

As evidenced in the following chart, intrastate switched access rates vary greatly in Massachusetts:[7]

Per Minute Switched Access Rates	Carrier	Composite Originating Rate	Composite Terminating Rate
CLECs Opposed to Verizon's Proposal	CTC	$0.068470	$0.068470
	Conversent	$0.055000	$0.055000
	RNK	$0.039000	$0.039000
	PAETEC	$0.028887	$0.028887
	XO	$0.008919	$0.038092
	Choice One	$0.008118	$0.034429
CLECs Supporting Verizon's Proposal	AT&T (TCG)	$0.008495	$0.037578
	AT&T of NE	$0.008118	$0.036866
	Comcast Phone	$0.003752	$0.003752
ILEC	Verizon MA	$0.003752	$0.003752

The chart shows that composite rates for intrastate switched access run from less than four tenths of a cent to almost seven cents per minute. In addition, the chart indicates that Comcast mirrors Verizon's rate and that of the remaining CLECs, several charge differing originating and terminating rates. Not surprisingly, the chart also shows that the majority of CLECs which currently charge significantly higher originating and terminating access rates than Verizon oppose Verizon's proposal while those CLECs whose rates are closer to Verizon's rates predominantly support the proposal.

IV. Analysis and Findings

A. Competitiveness of CLEC switched access market.

Verizon contends that CLEC access rates are unreasonable because access services are not competitive and access rates are unjustifiably high. *See* Verizon Brief at 3. Verizon requested

[7] Data from this chart is provided by Verizon. The composite rates are calculated by adding up all usage-sensitive rate elements and assumes one mile of transport using peak period rates where rates are time-of-day sensitive. Tandem switching rates are excluded. Verizon's Brief at 6 ("Verizon Brief").

that the Department investigate the CLEC intrastate rates and now proposes that the Department cap the CLEC rates at the ILEC level. *Id.*

However, before addressing the question of whether CLEC rates are unjust or unreasonable, we must first determine if it is appropriate to continue market based regulation for CLEC intrastate switched access rates. *See In re Attorney Gen. for a Generic Adjudicatory Proceeding Concerning Intrastate Competition by Common Carriers in the Transmission of Intelligence by Elec., Specifically with Respect to Intra-LATA Competition, & Related Issues, Filed with the Dep't on Dec. 20, 1983*, D.P.U. 1731, Order, 45 (Oct. 18, 1985) ("*IntraLATA Order*"). Since 1985, the Department has preferred to allow competitive market forces to freely set prices for carriers that lack market power. *See id.* at 25-28 (ruling that while simulation of the results of a competitive market is a principal goal of regulation, actual competitive telecommunications markets are preferable to regulation as a surrogate for competition); *In re AT&T New England, Inc.*, D.P.U. 91-79, Order, 32 (June 22, 1992) (same); *Investigation by the Dep't on Its Own Motion as to the Propriety of the Rates & Charges Set Forth by the New England Tel. & Tel. Co.*, D.P.U. 88-18-A, Order, 7 (July 19, 1988) ("*NET Order*") (same). Indeed, the Department has determined 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. *See* D.T.E. 01-31 Phase I, Order at 19. *See also IntraLATA Order*, D.P.U. 1731, Order at 64-70. The Department has further clarified the market-based rate setting standard, finding "[c]ompetitiveness is the absence of market power which may exist where consumers are unable to switch suppliers in response to price changes or where no supplier is willing or able to meet the demand for services if prices are increased." *NET Order*, D.P.U. 88-18-A, Order at 7 (quoting *IntraLATA Order*, D.P.U. 1731,

Order at 55-56). *See also* D.T.E. 01-31 Phase I, Order at 33 ("We have permitted flexibility where we found that competition would adequately protect consumers' interests by ensuring just and reasonable rates[.]"). Therefore, the Department must address whether CLEC access rates are subject to competitive forces. If the switched access market is sufficiently competitive, then continued market-based pricing is appropriate. If the market is not sufficiently competitive, however, then the Department must explore alternative methods of rate regulation to ensure just and reasonable rates. *Investigation by the Dep't on the Application of Intn'l Telecharge, Inc. under the Provisions of c. 159 of the G.L., as Amended, for a Certificate of Public Convenience & Necessity to Operate as a Resale, Value-Added or Interexchange Common Carrier within the Commw. of Mass.*, D.P.U. 87-72/88-72, Order, 17 (Oct. 11, 1988) ("*Telecharge*").

Evidence strongly shows that CLECs have market power in providing intrastate switched access service. The unique market characteristics of switched access make it virtually impossible for competition to exist.[8] These same conditions prompted the FCC to cap CLEC rates for interstate switched access in 2001. *See In re Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, FCC 01-146, CC Docket No. 96-262, 7th Report & Order & Further Notice of Proposed Rulemaking, ¶¶ 26-33 (FCC rel. Apr. 27, 2001) ("*In re CLEC Reform*").

In order to analyze switched access, it is helpful, given their different market characteristics, to distinguish between originating access charges and terminating access charges. The Department will first address competition in terminating switched access, followed by a discussion of the originating access market.

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[8] For purposes of this analysis, we define each market as the market for switched access service provided by a single LEC, either originating or terminating.

1. Competitiveness of the market for terminating switched access.

The market for terminating switched access is not sufficiently competitive because a carrier's customers do not have competitive alternatives for terminating their calls. When an IXC transports a toll call to a LEC for termination, the called party has chosen the LEC. *See* AT&T Brief at 13. The called party's choice of LEC has a direct impact on the cost of switched access incurred by the IXC because the IXC has no choice but to pay the terminating LEC's switched access rates. *Id.* However, the called party has no relationship with the IXC even though the called party is the cost causer. *Id.* Moreover, because the called party has a unique number that is exclusively identified with a single LEC, the IXC has no option but to terminate the call with that LEC. *Id.* at 14. The FCC has forbidden IXCs from declining to connect with LECs whose charges they believe are too high. *See In re LEC Rates*, WC Docket No. 07-135, Declaratory Ruling & Order at ¶ 6 (ruling that "no carriers, including interexchange carriers, may block, choke, reduce, or restrict traffic in any way").

This regulatory structure, whereby the IXC has to pay the CLECs' switched access rates and has no ability to constrain the level of those charges, gives CLECs market power in providing terminating switched access services and prevents the market from being sufficiently competitive. *In re CLEC Reform*, CC Docket No. 96-262, 7th Report & Order at ¶ 31. For a service to be sufficiently competitive, there must be an absence of market power. *See NET Order*, D.P.U. 88-18-A, Order at 7-8 (finding that NET's Intellidial rates were subject to effective competition because customers were able to obtain similar services individually from unregulated equipment manufacturers functioning as competitors). The Department has found that market power is marked by the inability of customers to switch suppliers in response to changes in price, or by the inability of suppliers to meet the demand for services. *See id.* at 7.

In *NET Order*, New England Telephone and Telegraph ("NET") (a Verizon predecessor in Massachusetts) wanted to offer an Intellidial service which bundled together several features such as three-way calling, call holding, and call forwarding with multi-line Centrex call management features. *Id.* at 2. The Department held that the market for Intellidial was sufficiently competitive because all of the services being offered by NET were available for purchase and use from independent equipment manufacturers. *Id.* at 9. Of particular importance in the Department's reasoning was that NET's offering was not tied to a monopolistic basic tier service. *Id.* at 8. Despite being a bundled service, Intellidial was competitive because all of the individual elements were available to NET's customers by competitors on the open market. *See NET Order*, D.P.U. 88-18-A, Order at 7. *See also* D.T.E. 01-31 Phase I, Order at 89 (permitting upward pricing flexibility because "a competitor can easily enter a market in response to a price increase").

In contrast, the terminating switched access market is unlike the Intellidial market because IXCs do not have alternative service providers for switched access. *See* Pelcovits Testimony at 9. As explained above, the regulatory interconnection mandate is such that switched access customers—the IXCs—are required to connect with the LEC of the called party's choice and may not refuse to connect regardless of price. *See In re LEC Rates,* WC Docket No. 07-135, Declaratory Ruling & Order at ¶ 1. IXCs do not have the option of purchasing access from another vendor because customers can have only one LEC serving them. *See* Pelcovits Testimony at 7. Unlike the *NET Order*, where the service was not tied to a monopolistic basic service, in the present case switched access is inextricably tied to the called party's LEC. *Id.* at 7-8. The Department finds this lack of alternatives to be compelling evidence of the existence of market power.

The CLECs argue that they face competition in the switched access market because the "RBOCs [Regional Bell Operating Companies]/IXCs like Verizon own and operate the last mile loop facilities" and face no barrier "from entering the switched access market and competing away any alleged supernormal profits." Aug. 20, 2008 Pre-Filed Testimony of Dr. Ankum at 17-18 ("Ankum Testimony"). CLECs contend that "[i]f Verizon Long Distance believes CLEC's [sic] switched access rates are too high, its affiliate Verizon Massachusetts (the ILEC and owner of the loop over which a CLEC's end users are served) could attempt to win those customers away from the CLEC so that its long distance affiliate can avoid paying the CLEC access charges." *Id.* at 18. The Department is not persuaded by this argument because, even if price signals were received by the called party, the market structure would prevent any competitive pressure from forcing a reduction in rates. As the LEC charging higher access charges receives that additional revenue, it could use those funds to subsidize its retail offerings, making it harder for Verizon, or any other LEC, to win away customers. *See* Pelcovits Testimony at 8-9; AT&T Brief at 14. As explained by the FCC:

> The party that actually chooses the terminating access provider does not also pay the provider's access charges and therefore has no incentive to select a provider with low rates. Indeed, end users may have the incentive to choose a CLEC with the highest access rates because greater access revenues likely permit CLECs to offer lower rates to their end users.

In re CLEC Reform, CC Docket No. 96-262, 7th Report & Order at ¶ 28. In that case, the FCC was opining about the regulatory arbitrage opportunity that had been created by previously capping interstate IXC access rates and leaving interstate CLEC access rates unconstrained. *Id.* at ¶¶ 33, 34. The same regulatory conditions that prompted the FCC to cap CLEC rates for interstate switched access are present in the Massachusetts intrastate switched access market. *See* AT&T Brief at 18-19. Like the federal cap, the Department has capped Verizon's rates, the

dominant ILEC. *See* D.T.E. 01-31 Phase I, Order at 63. Additionally, the same rules that force IXCs to connect interstate calls apply to intrastate calls for IXCs in Massachusetts. *See In re LEC Rates*, WC Docket No. 07-135, Declaratory Ruling & Order at ¶ 6. Given the close similarities in the regulatory conditions, carriers have the same opportunities to use increased access revenues to subsidize retail offerings in the intrastate terminating switched access market as they had in the interstate terminating switched access market before the FCC acted to cap those interstate rates.

Indeed, with terminating access, the cost causer (the called party) does not receive accurate price signals. The Department has found that market power is characterized by the inability of customers to switch suppliers ***in response to changes in price***. *See NET Order*, D.P.U. 88-18-A, Order at 7. However, in the case of terminating access charges, only the cost causer (i.e., the called party) can select which LEC they will use, but the cost causer is insulated from changes in wholesale access prices because they are not the customer of the IXC paying the terminating access charges. *See* Vasington Testimony at 8; Oyefusi & Nurse Testimony at 11. If the party selecting the LEC has no exposure to the price its selected LEC is charging for terminating access, that party cannot be expected to react "in response to changes in [wholesale] price." *See NET Order*, D.P.U. 88-18-A, Order at 7. Because the cost causer cannot, and does not, respond to changes in price, terminating switched access is not a functional market. *Id.* Significant evidence exists that CLECs charge access rates that are substantially higher than Verizon's. Verizon testified that as many as forty different CLECs have access charges that are higher than Verizon's. *See* Vasington Testimony at 14. The fact that one CLEC (PAETEC) was able to raise access rates by 100% in a single year (2008) is suggestive of the market failure existing in the terminating access market. *See* Verizon's Reply Brief at 6 ("Verizon Reply").

Another CLEC (Conversent) was able to enter the Massachusetts switched access market in 1999 with rates over 500% higher than Verizon's rates and has sustained that price for over eight years. *See* Verizon Brief at 11. The Department finds such wide disparity in rates is further evidence that the market for terminating switched access is not subject to competitive market forces.[9]

2. Competitiveness of the market for originating switched access.

The characteristics of the originating switched access market are somewhat different from the terminating switched access market, and more favorable for competition. Nevertheless, for the reasons discussed below, the Department concludes that the originating switched access market also is not sufficiently competitive.

When an originating LEC transports its customer's call to an IXC's network, it charges the IXC an access fee, just as a terminating LEC charges an IXC an access fee to complete the call to the called party. *See* AT&T Brief at 7. The primary difference between the originating and terminating access markets is that with originating access charges the calling party is the cost causer and could, theoretically, react in response to high origination prices. *Id.* at 15. This is because IXCs could give the cost causer (i.e., the calling party) price signals about the cost of the access charges that their selected LEC imposes to originate outgoing toll calls. *Id.*

CLECs contend that the originating access market can be competitive if IXCs are required to de-average originating LEC access charges through their retail toll rates. *See* Ankum

[9] Another barrier to the efficient transmission of price signals for terminating access charges is the fact that IXCs geographically average access charges among all end users through their retail rates. *See* 47 U.S.C. § 254(g). *See In Re Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, FCC 01-193, CC Docket No. 96-262, 6th Report & Order/CC Docket No. 94-1, 11th Report & Order, ¶ 23 (FCC rel. May 21, 2000) ("Calls Order") ("the practice of averaging rates over large geographic areas, for both intrastate and interstate services, results in subscribers in low-cost areas subsidizing the rates of subscribers in higher cost areas"). Thus, the costs of access charges are spread over a large customer base, thereby hiding the true individual costs.

Testimony at 19-20. In their testimony, CLECs argue that "[b]y de-averaging, for example, IXCs could differentiate long-distance prices to reflect the relative cost of switched access, and as a result, end-users would be more apt to respond to the cost of switched access based on the associated price of long-distance services." *Id.* at 19. In other words, long-distance customers would receive price signals about the originating access charges they are paying and would use that information to choose a LEC that has lower originating access rates.

As mentioned earlier, for interstate calls, IXCs are required to geographically average their toll rates. *See* 47 U.S.C. § 254(g). The effect of such geographic averaging is that high access rates for interstate calls—both originating and terminating—are spread across all of an IXC's customers. *Id.* Geographic averaging, therefore, masks the price signals of high originating access charges from the callers causing them. *See In re CLEC Reform,* CC Docket No. 96-262, 7th Report & Order at ¶ 31. As explained by the CLECs, under the FCC's policies, IXCs are not allowed, in billing their end users, to pass through the actual cost of switched access.[10] *Id. See also* Ankum Testimony at 19-20. As a result, their end users do not receive accurate price signals. *See In re CLEC Reform,* CC Docket No. 96-262, 7th Report & Order at ¶ 31.

Though not required by the Department to do so, most ILECs, including Verizon, geographically average their intrastate toll rates in Massachusetts. *See* AT&T at 15. The record shows "IXCs are required by federal law to geographically average interstate [toll] rates and for all practical purposes are forced to do the same with intrastate rates." Ankum Testimony at 19 n.25 (quoting *Comments of AT&T in Support of Verizon's Petition for Investigation of CLEC*

[10] Geographic averaging serves the public policy goal of furthering universal service by keeping long distance rates in high cost (rural) areas at reasonable levels. *See* Ankum Testimony at 19.

Switched Access Rates & Motion to Consolidate with AT&T's Requested Investigation of Level 3's Proposed Terminating Access Rate Increases, 2 (Nov. 7, 2007)).

The Department finds that the CLECs' proposal to mandate de-averaged IXC retail rates in Massachusetts in order to stimulate competition in the originating access market, although theoretically possible, is not practicable. De-averaging intrastate toll rates would create an unnecessarily burdensome and confusing dual charge situation in which IXCs would be required to separately track and bill an individual customer's calls by LEC. *See* Testimony of Oyefusi & Nurse at 11. Moreover, because IXCs would still be required under federal law to geographically average rates for interstate calls, mandatory de-averaging for intrastate calls also would require IXCs to track and bill their customers' intrastate calls separately. *Id.* This would add undue expense and complication to carriers' billing systems. Further, end-users could face billing confusion if access charges appeared as a separate itemized charge on their bills. This would be a new concept for most customers, which would require a potentially cumbersome education effort by LECs to explain to their customers why the information now appears on their bills and how they can benefit from that information. Even for knowledgeable customers, this approach would add another factor to consider when selecting a LEC to provide local service. In today's world of bundled packages of voice, video, and Internet, where the price of voice service is generally discounted, many customers would unlikely consider this new factor in selecting a carrier. More importantly, IXCs are not currently prohibited from de-averaging toll rates in Massachusetts. Despite the ability to do so, most IXC's have not de-averaged their toll rates.

Furthermore, the FCC has stated that de-averaging is unlikely to have any impact on making the access market competitive. In its access reform investigation, the FCC found that the interstate originating access market is unlikely to respond to market forces. *See In re CLEC*

Reform, CC Docket No. 96-262, 7th Report & Order at ¶ 32. Specifically, the FCC noted that for originating access, IXCs could enter negotiated alliances with lower cost LECs or even begin to offer service directly to end-users in the hopes of exerting downward market pressures. *Id.* However, due to the structure of the access markets "neither of these eventualities has come to pass, at least not to an extent that has resulted in effective downward competitive pressure on CLEC access rates." *Id.* There is strong reason to conclude that the Massachusetts intrastate originating switched access market would experience the same result. The Department finds that the structural deficiencies the FCC identified as inhibiting market forces in the interstate switched access market, similarly inhibit competition in the intrastate originating switched access market among CLECs in Massachusetts. *See id.* at ¶ 31.

Given the clear structural failure of the access market with regard to terminating charges, the Department finds that the lack of competitive forces has given CLECs market power. *See id.* at ¶ 28. The Department similarly finds that in the originating market, the failure of existing competitive forces to discipline rates results in CLECs having market power. *In re CLEC Reform,* CC Docket No. 96-262, 7th Report & Order at ¶ 32. The presence of market power overcomes the presumption that CLEC rates are just and reasonable when determined by market forces. *See* D.T.E. 01-31 Phase I, Order at 19 ("the rates charged by non-dominant carriers for all services ... are ***presumed to be just and reasonable*** due to the disciplining effects of competitive forces") (emphasis added). *See also IntraLATA Order*, D.P.U. 1731, Order at 64-70. Since the presumption of just and reasonableness has been rebutted, the Department must examine Verizon's claim that CLEC access charges are in fact unjust and unreasonable. *See* G. L. c. 159, § 17.

In an examination relating to the reasonableness of rates, the Department first looks to G. L. c. 159, § 17 which states that rates filed with the Department "shall be deemed *prima facie* lawful until changed or modified by the department[.]" *Id.* The CLEC rates under review have been filed as tariffed rates with the Department. While the presence of market power removes the presumption that rates are constrained by market forces, as tariffed rates, the CLEC rates in question are still considered to be *prima facie* lawful under Section 17. *Id.* Therefore, the Department must determine whether the rates are in fact unreasonable. *Id.* Moreover, it is axiomatic that simply because a service is not sufficiently competitive does not necessarily lead to the conclusion that the rate for that service is unreasonable. *Id.* For example, in this matter, Verizon does not suggest that Comcast's access rates are unreasonable, even though Comcast established those rates through market-based pricing in a market that the Department has found is not sufficiently competitive. With this principle in mind, we next examine the reasonableness of CLEC rates.

B. <u>The reasonableness of CLEC rates.</u>

In the absence of sufficient competition, the Department must look to alternative methods to assess the reasonableness of a carrier's rates. *See New England Tel. & Tel. Co. for an Alternative Regulatory Plan for the Co.'s Mass. Intrastate Telecomms. Servs.*, D.P.U. 94-50, Interlocutory Order on Motion to Dismiss of the New England Cable Television Ass'n. Inc., 37-38 (Feb. 2, 1995) (comprehensive evaluation of the Department's authority to permit alternatives to the rate of return regulation model). The Department has wide latitude in determining the method by which just and reasonable rates will be achieved. *Id.* While the Department is not required to employ any particular method to determine reasonableness, the Department has generally evaluated the reasonableness of rates as they relate to "prudently incurred costs." *See*

Town of Hingham v. D.T.E., 433 Mass 198, 203 (2001); *New England Tel. & Tel. Co. v. D.P.U.*, 371 Mass. 67, 78 (1976); *IntraLATA Order*, D.P.U. 1731, Order at 37-38. The Department will first analyze whether a cost-based method is appropriate.

1. The appropriateness of a cost-based method.

The Department finds that it cannot rely on a traditional analysis of CLEC costs to determine the reasonableness of their rates because cost data is not available in this case. Despite the Department's attempts to obtain cost data from the CLECs, the CLECs did not submit any CLEC specific cost data. *See Joint Response of One Communications, PAETEC, RNK and XO to Department Record Request 5*, D.T.C.-RR-5 (Oct. 3, 2008) (declining to submit CLEC cost data in the instant case); AT&T Brief at 23-24 (noting that CLECs offer no serious proof of higher costs). Neither during discovery nor at the hearing did any CLEC provide an analysis of their costs. At the hearing, the CLECs' expert witness, Dr. Ankum, testified that he had not conducted any cost studies of any CLEC in preparation of his testimony. *See* Sept. 25, 2008 Evidentiary Hearing of Dr. Ankum, Tr. at 509 ("I have not done a profitability analysis of my four clients; that's correct—for the purposes of this proceeding."). Dr. Ankum later elaborated that he did not ask his clients for financial statements because he did not consider it important in this case. *Id.* at 509-10.

The CLECs argue that they have presented evidence of their costs in the form of a QSI Consulting, Inc. ("QSI") survey of switched access rates charged by carriers across the country. *See* Ankum Testimony at 33-38. The Department finds that this information is insufficient because it is not representative of Massachusetts CLEC costs. The premise of the QSI study is to provide an "apples to apples comparison" of the aggregate per-minute access charges of RBOCs, CLECs, and mid-sized and small ILECs on a national scale. *Id.* at 33. Dr. Ankum claimed that the QSI data demonstrates that "CLEC switched access rates are generally comparable to rates of

other carriers." *Id.* Dr. Ankum hypothesizes that "[b]ecause CLECs look more like small and mid-sized ILECs in terms of customer density and cost structure than they look like RBOCs, it is logical that CLEC switched access rates would, on average, fall somewhere between the RBOCs' rates and the small to mid-sized ILECs." *Id.* at 36. However, the data presented is that of carriers nationally and is not specific to CLECs operating in Massachusetts, and the CLECs failed to present any evidence that carriers in the QSI study have the same cost structures as the CLEC parties in this case. Moreover, Dr. Ankum's underlying assumption—that CLECs are comparable to small and mid-sized ILECs—is entirely unsupported. The CLECs have presented no evidence of the costs of small and mid-sized ILECs to justify this comparison. As Verizon notes in its brief, "given the nature of the markets that CLECs have entered (typically large urban areas) and the types of customers targeted (typically business customers), there is no reason to presume that CLECs look more like small and mid-sized ILECs than they look like RBOCs." Verizon Brief at 28. The Department also notes that small and mid-sized ILECs operate under numerous different conditions and regulatory obligations than do CLECs that would tend to differentiate their underlying costs from that of the CLECs. *See* Pelcovits Testimony at 5-6. Therefore, the Department finds the QSI data is not a reliable indicator of CLECs' costs and cannot be used to determine, on a cost basis, the reasonableness of CLEC switched access rates in Massachusetts.

The Department finds that the lack of CLEC-specific cost data prevents the Department from making any finding about the reasonableness of CLEC rates based on cost.[11]

[11] Since the parties did not submit any type of CLEC-specific cost data in this case, the Department does not need to address the question of what type of cost standard to apply—historical, marginal or long-run incremental.

Accordingly, the Department must employ another method to assess the reasonableness of the CLECs' rates.[12]

2. **Verizon's rate as an appropriate proxy.**

Because the Department cannot utilize a cost method to determine the reasonableness of the CLEC rates, the Department looks to Verizon's rate as a proxy for the reasonableness of the CLEC rates. In the past, the Department has evaluated the reasonableness of one carrier's rate by using the previously approved rate of another carrier as a proxy. *Telecharge*, D.P.U. 87-72/88-72, Order at 11-18. In *Telecharge*, the Department found that rates for alternative operator services providers must either be cost-justified or based on NET's IntraLATA rates. *Id.* The Department found that consumers were captive customers because they lacked the ability to select an alternative operator services provider when they were placing a call. *Id.* The Department remedied this inefficiency by requiring the providers either to justify their rates based on their costs or to set their rates at the level of the ILEC (in that case, NET). *Id.*

As in *Telecharge*, the present case involves rates charged to captive customers. As *Telecharge* customers lacked the ability to select another operator services provider, so too do called parties lack the ability to influence the terminating access rates charged by their LEC. *See* Vasington Testimony at 8. Moreover, in *Telecharge* as with the present case, the Parties have provided no cost justification for their rates. *Id.* at 16. In *Telecharge*, the Department "cognizant

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12 An alternative to relying on CLEC-specific costs to determine the reasonableness of their rates could be to use Verizon's costs as a proxy. *See Investigation by the Dep't of Telecomms. & Energy on Its Own Motion into the Appropriate Pricing, Based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements & Combinations of Unbundled Network Elements, & the Appropriate Avoided-Cost Discounts for Verizon New England, Inc. d/b/a Verizon Mass.' Resale Services in the Commw. of Mass.*, D.T.E. 01-20, Order, 338 (July 11, 2002) (setting the reciprocal compensation rates of CLECs based on Verizon's TELRIC costs). However, as Verizon witness Mr. Vasington pointed out, the Department has no ILEC cost data on Verizon's switched access services. *See* Sept. 23, 2008 Evidentiary Hearing of Mr. Vasington, Tr. at 106-107 (noting that the Department relied on the FCC's Calls Order to set ILEC intrastate rates and not on ILEC cost data). Therefore, as the Department does not have ILEC switched access cost data, this alternative cost method is not appropriate.

of the time, expense and administrative burden involved in presenting a rate case ... therefore, accept[s] in principle ITI's proposal to base its rates on the rates offered for similar intrastate services provided by NET and AT&T." *Id.* at 17. As the Department relied on the ILEC rate to establish a presumptively reasonable rate in *Telecharge*, in the present case, Verizon's rate could, if previously found to be just and reasonable, be used as a proxy. *See Telecharge,* D.P.U. 87-72/88-72, Order at 16-17 (requiring alternative operator service providers to either justify their rates based on their own cost or on the rates of AT&T or NET as those rates had previously been found to be just and reasonable).[13] In addition, the Department has used the ILEC rate to evaluate the reasonableness of a competitor's wholesale rates. *See In re Sprint Commc'ns Co. L.P., Pursuant to § 252(b) of the Telecomms. Act of 1996, for Arbitration of an Interconnection Agreement between Sprint & Verizon New England, Inc.*, D.T.E. 00-54-A, Order on Motion for Reconsideration, 21-22 (May 3, 2001) ("*In re Sprint*") (ruling that when the Department assesses the reasonableness of rates "CLEC [wholesale interconnection] rates must either be agreed-to through negotiation, be cost-justified, or CLECs may use Verizon's rates as a proxy").

In its D.T.E. 01-31 Phase I Order, the Department found that setting Verizon's intrastate switched access rate at the interstate rate level was just and reasonable. *See* D.T.E. 01-31 Phase I, Order at 63. Because Verizon's intrastate rate was set by the Department at a just and reasonable level, the rate serves as an appropriate proxy for a just and reasonable rate in this case. Thus, consistent with our past precedent, we find it is appropriate to use Verizon's intrastate switched access rates as the standard by which to evaluate the reasonableness of CLEC

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13 *See also Investigation by the Dep't of Pub. Utils. on Its Own Motion Regarding (1) Implementation of § 276 of the Telecomms. Act of 1996 Relative to Public Interest Payphones (2) Entry & Exit Barriers for the Payphone Marketplace, (3) New England Tel. & Tel. Co.'s Public Access Smart-Pay Line Serv. & (4) the Rate Policy for Operator Servs. Providers*, D.P.U./D.T.E. 97-88/97-18 Phase II, Order, 9 (Apr. 17, 1998) (Department capped other inmate calling services providers' rates at those of Bell Atlantic, which were previously determined reasonable).

intrastate switched access rates. To that end, Verizon has submitted evidence that the average CLEC access rates are six times higher than those of Verizon. *See* Verizon Reply at 3, and exhibits cited therein. Verizon has also demonstrated that several CLECs have rates that are at least 150% above the rates of Verizon. *Id.* For example, as displayed in the chart on page 7, CTC's access rates for both originating and terminating traffic are over six cents a minute ($0.068) and Conversent has rates at over five cents a minute ($0.055) for originating and terminating traffic. Meanwhile XO's terminating rate is almost four cents a minute ($0.038). In the face of all the evidence presented by proponents of Verizon's proposed cap, CLECs have not offered any reliable evidence that their costs are higher. Moreover, while CLECs have argued that Verizon's rate is not an appropriate proxy because it is not cost-based, we have already addressed why a proxy rate method is appropriate to use in the absence of CLEC-specific or Verizon-specific cost data. *See supra* p. 21. Further, as the Department articulated in *Telecharge,* "[e]ffective prices to [customers] equal to or less that those of the existing dominant carrier[] will provide protection to [customers] from unjust or unreasonable rates without need for further investigation." *Telecharge*, D.P.U. 87-72/88-72, Order at 17. Accordingly, the Department concludes that CLEC switched access rates that exceed Verizon's rates—which have previously been reviewed and approved by the Department—are unjust and unreasonable.

V. Remedy

A. Appropriateness of ILEC-based rate cap.

To correct the market failure regarding CLEC intrastate switched access rates, the Department is ordering that the rates shall be capped at Verizon's intrastate switched access rate effective one year from the date of this Order. A rate cap based on Verizon's intrastate switched access rates is an appropriate mechanism to ensure that CLEC switched access rates are just and reasonable, in the absence of sufficient competition, because, as stated above, Verizon's rates

have been found to be just and reasonable. *See* D.T.E. 01-31 Phase I, Order at 63. Specifically, the Department adopts the following requirement, based in part on proposed language from Verizon, to regulate intrastate CLEC switched access rates in Massachusetts:

> No competitive local exchange carrier ("CLEC") shall charge a rate for intrastate switched access services that is higher than the intrastate switched access rate of the incumbent local exchange carrier in whose area the CLEC operates. The rate for intrastate switched access service shall mean the composite, per-minute rate for the service, including all applicable rate elements for the functions actually performed by the CLEC in providing service.

A rate cap is a fairly typical response to this issue by other states. In fact, every state that has acted on CLEC switched access rates has implemented a cap, with the majority of those states setting a rate ceiling at the ILEC intrastate rate. *See* Verizon Brief at 35-36; Verizon Reply at 11. Maryland,[14] Pennsylvania,[15] New York,[16] Connecticut,[17] Louisiana,[18] Texas,[19] New Hampshire,[20] Ohio,[21] Virginia,[22] Delaware,[23] and Missouri[24] have all imposed requirements for CLECs to cap their intrastate rates at ILEC levels. More recently, an administrative law judge

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14 Md. Code Regs. 20.45.09 (2009).

15 66 Pa. Cons. Stat. § 3017(c) (2009).

16 *Opinion & Order Establishing Access Charges for N.Y. Tel. Co. & Instituting a Targeted Accessibility Fund*, Case Nos. 94-C-0095, 28425, Opinion No. 98-10, 25 (June 2, 1998) ("*New York Order*").

17 *DPUC Investigation of Intrastate Carrier Access Charges*, Docket No. 02-05-17, Decision, 16 (Feb. 18, 2004).

18 *In re Development of Regulatory Plan for S. Central Bell*, Docket No. U-17949, Order No. U-17949-TT (Corrected), 12 (May 3, 1996).

19 Tex. Pub. Util. Comm'n Substantive Rule § 26.223 (2009).

20 N.H. Pub. Util. Comm'n § 431.07 (2009).

21 *In re Establishment of Carrier-to-Carrier Rules*, Case. No. 06-1344-TP-ORD, Opinion & Order, 55-57 (Aug. 22, 2007).

22 *Amendment of Rules Governing the Certification & Regulation of Competitive Local Exchange Carriers*, Case No. PUC-2007-00033, Final Order, 2-3 (Va. State Corp. Comm'n Sept. 27, 2007).

23 Del. Code Ann., tit. 26, § 707(e) (2009).

24 *In re Investigation of the Actual Costs Incurred in Providing Exchange Access Serv. & Access Rates to be Charged by Competitive Local Exchange Telecomm. Cos. in the State of Mo.*, Case No. TR-2001-65, Report & Order, 20-21 (Sept. 5, 2003).

from the Public Service Commission of West Virginia recommended that it take the same action with regard to West Virginia's CLEC intrastate rates that the Department orders for Massachusetts. *In re Verizon W. Va. Inc.*, Case. No. 08-0656-T-GI, Recommended Decision, 13-14 (Pub. Serv. Comm'n of W. Va. Mar. 4, 2009). While the decisions of other state utility commissions are not determinative,[25] our approach is consistent with the actions of the above-mentioned states.

In no instance in which a state's utility commission is empowered to set telecommunication rates has that commission left the intrastate rate unchanged when addressing this issue. In fact, RNK concedes this point. Reply Brief of RNK Commc'ns at 17 ("Granted, other states have capped CLEC access rates, many at ILEC rates."). XO and One Communications identify Florida and Illinois as states that have not acted on intrastate rates. Joint Initial Brief of XO Commc'ns Servs., Inc. & One Commc'ns at 18-19 ("XO & One Brief"). As noted above, "decisions by out-of-state administrative agencies do not control Massachusetts law." *In re W. Elec. Co.*, D.P.U. 92-8C-A, Order on Appeal by W. Elec. Co. of Hearing Officer Ruling Granting Attorney General's Motion to Compel Discovery, 30 (June 25, 1993). Even if the Department were to consider Florida's and Illinois' approach to this issue, those states' approaches are of no import because Florida's utility commission has no rate-making authority over intrastate rates, which are set by Florida's legislature (*Switched Access Charges in Fla.*, 3 (Fla. Pub. Serv. Comm'n Sept. 2001)), and, while Illinois has not addressed the issue systematically, it has addressed this issue on a case-by-case basis (*see In re Arbitration of Interconnection Rates, Terms & Conditions & Related Arrangements with Ill. Bell Tel. Co. Pursuant to § 252(b) of the Telecomms. Act of 1966*, Docket No. 01-0338, Arbitration Decision,

[25] *E.g.*, D.T.E. 01-31 Phase II, Order at 99.

50-51 (Aug. 8, 2001) (capping the switched access rate that TDS Metrocom, Inc., a CLEC, is permitted to charge Illinois Bell Telephone Company, an ILEC, as part of the parties' interconnection agreement)).

With regard to the need for a 12-month transition period for the rate cap, Verizon, AT&T and Comcast have requested an immediate rate cap (Verizon Brief at 45; Reply Brief of AT&T Corp. at 21-22; Reply Brief of Comcast Phone of Mass., Inc. at 9-10), and the CLECs have requested that any rate cap be phased in over a period ranging from 24 months (XO & One Brief at 57; Initial Brief of Paetec Communications, Inc. at 19-20) to 36 months (Initial Brief of RNK Commc'ns at 26 ("RNK Brief")). The Department has wide latitude to craft an appropriate remedy and there is no requirement that the Department institute an immediate rate cap ("flash cut"). *See* D.T.E. 01-31 Phase I, Order at 17-18. *See generally* G. L. c. 15, §§ 12, 14, 17, 20.

Having determined that CLEC rates are unjust and unreasonable, the Department is obligated to institute a rate cap as quickly as possible, but may balance that requirement with other public policy considerations. According to CLECs, a flash cut would place stress on CLEC operations and may result in one or more CLECs going out of business. *See* RNK Brief at 30. One of the consequences of CLECs going out of business is the detrimental effect to functioning competitive markets in which CLECs participate and the customers that they serve. *See In re Access Charge Reform*, 16 FCC Rcd. 9923, ¶ 62 ("Avoiding unnecessary damage ... as likely would result from an immediate transition to the ILEC rate, is consistent with our approach in other proceedings[.]"). A flash cut could also cause CLECs to sharply increase end-user rates, resulting in rate shock. The Department has traditionally sought to promote rate continuity in its regulation of retail rates, although in this case the policy of rate continuity would apply to both wholesale and retail rates. *See Net Tariff Order*, D.P.U. 89-300, Order at 36

(finding that immediately equalizing rates of return would cause extreme rate shock to the retail market). Accordingly, prudence requires a transition period.

A transition period of 12 months is in line with the time period granted by other states and the FCC, and any lengthier transition period is excessive since the CLECs have presented no evidence to support their requested longer timeframes.[26] Accordingly, we find that 12 months will be an adequate transition period for CLECs to adjust their business models and minimize the impact of the rate cap generally.

The CLECs have argued that a rate cap should include the ability for a CLEC to obtain relief from the rate cap to the extent its reasonable costs exceed the cap. *See, e.g.*, RNK Brief at 26. No applicable cost studies, however, were presented during the hearing to support such a request at this time. On a going-forward basis, however, to the extent a CLEC is able to demonstrate justifiable costs in excess of the proposed rate cap with cost-specific data, the CLEC shall be granted an exemption. This approach is consistent with our policy with respect to other rate caps. *In re Sprint*, D.T.E. 00-54-A, Order on Motion for Reconsideration at 26-27.

B. Alternative remedies.

The Parties presented other possible remedies if the Department found CLEC rates to be unjust and unreasonable. These include: de-averaging IXC rates; capping CLECs' intrastate termination access rate to the long run incremental cost of terminating call usage (the "LRIC") (Main Brief of Comcast Phone Commc'ns at 14); capping CLECs' intrastate rates at the higher

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26 Other states have provided a transition period for intrastate rate caps: Connecticut provided for three years (*DPUC Investigation of Intrastate Carrier Access Charges*, Docket No. 02-05-17, Decision, 16 (Feb. 18, 2004)); California provided for 13 months (*Order Instituting Rulemaking to Review Policies Concerning Intrastate Carrier Access Charges*, Decision No. 07-12-020, slip op., 20-21 (Cal. Pub. Util. Comm'n Dec. 7, 2007)); West Virginia provided for 12 months (*In re Verizon W. Va.*, Case No. 08-0656-T-GI, Recommended Decision at 13); Texas provided for 125 days (*PUC Review of Chap. 26 Substantive Rules to Conform to SB5*, Project No. 32136, Order Adopting Amendments, 7 (Aug. 10, 2006)); and New York provided for 30 days (*New York Order*, Opinion No. 98-10 at 38). The FCC also provided for a three-year transition period when it capped the ILEC interstate rate. *In re CLEC Reform*, CC Docket No. 96-262, 5th Report & Order, ¶ 45 (FCC rel. Aug. 27, 1999).

Verizon rate in effect prior to the rate reduction in D.T.E. 01-31 (RNK Brief at 24); and staying this action pending the FCC's own inter-carrier compensation case (*id.* at 32). For the reasons discussed above, de-averaging IXC rates is not a workable solution to the market failure. *See supra* pp. 14-17. The other remedies suggested by the Parties are similarly unworkable and/or unsupported by the facts.

Capping the CLECs' intrastate rate at the LRIC may be appropriate ***if*** it would more accurately reflect their costs than the Verizon rate. However, no evidence was presented demonstrating that the LRIC is the more accurate cost standard. Indeed, as discussed above, no individual CLEC-specific cost studies were presented by any party during the instant hearing, despite the Department's request. *See supra* p. 19-20.

As to fixing CLEC rates to the Verizon pre-D.T.E. 01-31 intrastate rate, the CLECs presented no facts to support this remedy. Moreover, because the current Verizon rate has been approved by the Department as being reasonable, capping CLEC rates at the higher pre-D.T.E. 01-31 rate is an inappropriate remedy, since the pre-D.T.E. 01-31 rate has been superseded and thus is no longer *prima facie* lawful.

Finally, it is unclear when the FCC will address comprehensive inter-carrier compensation reform. Having determined that CLEC rates are unjust and unreasonable, the Department has an obligation to avoid unnecessary delay and remedy the inequity as soon as practicable. *Telecharge*, D.P.U. 87-72/88-72, Order at 17.

C. <u>Rural CLECs exemption.</u>

Richmond NetWorx, a rural CLEC under FCC regulations, requested an exemption to charge a rate equal to the NECA tariff rate if the Department adopted a rate cap. Richmond's Initial Brief at 3. For the reasons discussed below, the Department grants Richmond NetWorx's request.

Under FCC regulations, a rural CLEC that is competing with a non-rural ILEC is permitted to charge interstate access rates equal to the rate contained in the NECA tariff, assuming the highest rate band for local switching. 47 C.F.R. § 61.26(e). The policy behind the federal rule is that the cost of serving rural areas (relative to urban areas) is higher and ILEC's serving both rural and urban areas have the ability to geographically average their rates and cross-subsidize. The rural exemption requested by Richmond NetWorx mimics the FCC rule. A CLEC like Richmond NetWorx that serves only a rural market is not able to geographically average its rates and thus cross subsidize its high cost service area. Richmond NetWorx contends that, absent a rural exemption, it would unfairly suffer harm if it operated under the Verizon rate. Richmond NetWorx's position was not contested by any of the Parties. The Department finds Richmond NetWorx's argument persuasive, and accordingly, the Department shall grant it an exemption to charge a rate equal to the NECA tariff rate.

VI. ORDER

After notice, hearing, and consideration, it is hereby:

ORDERED: That the petition filed with the Department by Verizon New England, Inc., MCImetro Access Transmission Services of Massachusetts, Inc., Bell Atlantic Communications, Inc., and Verizon Select Services, Inc. on October 11, 2007, is GRANTED in part and DENIED in part;

FURTHER ORDERED: That effective one year from the date of this Order, all CLEC intrastate switched access rates shall be at or below Verizon's intrastate switched access rate; and it is

FURTHER ORDERED: That Richmond NetWorx shall be granted an exemption to be allowed to charge a rate equal to the National Exchange Carrier Association tariff rate; and it is

FURTHER ORDERED: That the Parties shall comply with all other directives contained herein.

By Order of the Department,

/s/ Geoffrey G. Why
Geoffrey G. Why, Commissioner