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August 14, 2009

**VIA ELECTRONIC FILING**

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, PA 17120

**RE: Verizon Pennsylvania Inc., Verizon North Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, Verizon Select Services Inc., Verizon Global Networks, Inc., MCI metro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc.**

**v.**

**CTC Communications Corporation, FiberNet Telecommunications of Pennsylvania, LLC, and Choice One Communications of Pennsylvania, Inc.,  
Docket Nos. C-20077672, C-20077674 and C-20077676**

Dear Secretary McNulty:

Enclosed please find the Supplemental Prehearing Memorandum of the Verizon Companies, in the above referenced matter.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

  
Suzan D. Paiva

SDP/slb  
Enclosure

**VIA E-MAIL and UPS DELIVERY**  
cc: The Honorable Louis G. Cocheres

**VIA E-MAIL and FIRST CLASS MAIL**  
cc: Attached Service List

**CERTIFICATE OF SERVICE**

I, Suzan D. Paiva, hereby certify that I have this day served a copy of the Supplemental Prehearing Memorandum of the Verizon Companies, upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

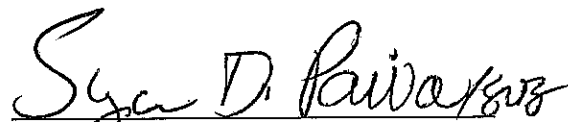
Dated at Philadelphia, Pennsylvania, this 14<sup>th</sup> day of August, 2009.

**VIA E-MAIL and FIRST CLASS U.S. MAIL**

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Verizon Pennsylvania Inc., Verizon North	:	
Inc., Bell Atlantic Communications, Inc.	:	
d/b/a Verizon Long Distance, Verizon	:	
Select Services Inc., Verizon Global	:	
Networks, Inc., MCImetro Access	:	
Transmission Services, LLC d/b/a Verizon	:	
Access Transmission Services, and MCI	:	
Communications Services Inc.,	:	
 Complainants,	:	
 v.	:	Docket No. C-20077672
	:	Docket No. C-20077674
	:	Docket No. C-20077676
Choice One Communications of	:	
Pennsylvania, Inc., CTC Communications	:	
Corp., and FiberNet Telecommunications	:	
of Pennsylvania, LLC,	:	
 Respondents.	:	

**SUPPLEMENTAL PREHEARING MEMORANDUM  
OF THE VERIZON COMPANIES**

Verizon Pennsylvania Inc., Verizon North Inc., Verizon Select Services Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, Verizon Global Networks, Inc., MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services, and MCI Communications Services Inc. (collectively "Verizon"), pursuant to 52 Pa. Code § 5.222, respectfully submit this Supplemental Prehearing Memorandum for purposes of the telephonic prehearing conference scheduled for August 17, 2009.

## I. INTRODUCTION

With the enactment of Act 183 in November of 2004, the Legislature established a cap on the intrastate switched access rates of competitive local exchange telecommunications carriers (“CLECs”), limiting those rates to a level no higher than those charged by the incumbent local exchange telecommunications company (“ILEC”) in the same service territory, unless the CLEC can demonstrate that higher rates are “cost justified.” 66 Pa. C.S. § 3017(c).

One Communications<sup>1</sup> is the *only* CLEC in Pennsylvania continuing to defy compliance with this statute by litigating the claim that it is entitled to charge access rates higher than Verizon and other CLEC’s under this “cost justified” exception. Verizon’s complaint against One Communications has been pending before the Commission for nearly two and one half years, during which time One Communications has continued to charge Verizon rates higher than the statute permits. The amount of these overcharges has grown to over \$4 million (without accounting for interest) – and continues to grow.<sup>2</sup>

There is no reason to delay resolution of this case. The Commission has a statutory “duty” pursuant to 66 Pa. C.S. § 703 not only to “fix a time and place for a hearing” on a formal complaint, but also to “make and file its findings and order” resolving the claim. The Commission should bring this case to closure as expeditiously as possible based on the existing record and briefing, and should direct One Communications to cease overcharging Verizon in violation of this statute and to refund past overcharges.

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<sup>1</sup> The Respondents are Choice One Communications of Pennsylvania, Inc. (“Choice One”), FiberNet Telecommunications of Pennsylvania, LLC (“FiberNet”), and CTC Communications Corp. (“CTC”) (collectively “One Communications”).

<sup>2</sup> These overcharges are calculated from the effective date of the statute as described in Verizon’s Main Brief, presuming that the overcharges continued to accrue at the same rate through July of 2009.

## II. HISTORY OF PROCEEDING

On April 25, 2007, Verizon filed a Complaint against One Communications alleging violation of 66 Pa. C.S. § 3017(c) and requesting that the Commission order One Communications to reduce its tariffed intrastate switched access rates to comply with 66 Pa. C.S. § 3017(c) and refund or credit to Verizon all amounts illegally charged to Verizon in violation of 66 Pa. C.S. § 3017(c) from its effective date of November 30, 2004 to the present, with interest. On January 16, 2008, the Commission held hearings in this proceeding, during which the parties submitted testimony and cross examined witnesses. One Communications admitted that its tariffed switched access rates are higher than the ILEC's rates, and so the only issue in dispute regarding compliance with the statute was whether One Communications' higher rates are "cost justified."

On March 6, 2008 the parties filed their Main Briefs and on April 7, 2008, they filed their Reply Briefs. Among other significant flaws in One Communications' case, Verizon demonstrated that One Communications had failed to present admissible evidence regarding its alleged "costs" because it had submitted only the testimony of an outside expert presenting studies of One Communications' alleged "revenue requirement" for switched access. This expert testified as to his opinion that *if* the One Communications companies had the specific expenses, investments, revenues and traffic volumes that he assumed as inputs to his cost studies, then the revenue requirement would be as he has calculated. But he could not and did not testify that the companies did in fact have the expenses, investments, revenues and traffic volumes that he assumed as inputs to his studies. Not only did One Communications fail to present a witness to support these factual assertions but the company's own inconsistent discovery responses showed that those "facts" were not what

the expert assumed when he rendered his opinion. Therefore, One Communications' cost study was without evidentiary foundation and could not be accepted as substantial evidence of the company's actual costs or revenue requirements.

In a desperate attempt to restore some credibility to its flawed studies, One Communications in its Main Brief included the extra-record results of a purported re-run of the revenue requirement studies using the information from the inconsistent discovery responses that had been addressed in cross-examination. But this attempted re-run does not cure the fundamental unreliability and lack of foundation of One Communications' case. Simply changing a few discrete inputs that failed to match the information contained in discovery responses does not convert this flawed study into a reliable study or create an evidentiary foundation that was previously lacking. One Communications' expert – and only – witness, Mr. Parrish, made it quite clear on cross-examination that he did not personally verify or have any independent knowledge of *any* of the inputs to the studies. Just changing those inputs for which Verizon was able to unearth inconsistent discovery responses reduced the results of the study for Choice One by 30%, but Mr. Parrish was not able to vouch for the correctness of any of the *other* study inputs that remain unchanged in the re-runs. In short, the results of the re-run studies are just as unreliable as the originals, for the same reasons.

In addition to this fatal flaw in One Communications evidentiary presentation, Verizon pointed out that One Communications had improperly inflated its claimed “cost justification” for its *intrastate* access rates by including alleged *interstate* costs that it contended the FCC would not allow it to collect from interstate access rates, but Verizon showed that One Communications should and in fact does already collect these costs

through its retail rates and cannot include them as “justification” to inflate intrastate access rates.

In addition to the open issues discussed in the parties’ briefing, there are several undecided motions pending. On April 7, 2008, Verizon moved to strike certain extra-record evidence from One Communications’ Main Brief, including the purported re-run results. On April 18, 2008, One Communications responded to this motion to strike and filed a petition to reopen the record to admit the extra-record evidence. Verizon opposed the reopening of the record because, among other reasons, the re-runs were based on information fully available to One Communications before the close of the record and further, as discussed above, these few input changes do not cure the fundamental and fatal flaw in One Communications’ case – its failure to prove that it actually experienced the specific expenses, investments, revenues and traffic volumes that were assumed as inputs to the cost studies.

On April 28, 2008, Verizon moved to strike extra-record evidence from One Communications’ Reply Brief. Also on April 28, 2008 Verizon filed a motion to strike arguments relating to the issue of a refund – which One Communications had failed to address in its testimony or Main Brief and raised for the first time in the One Communications Companies’ Reply Brief, depriving Verizon of the opportunity to respond. Alternatively, Verizon sought leave to file a Surreply Brief responding to the refund arguments, which was attached to that motion.

On August 7, 2008, confirmed by orders entered August 29, 2008, the Commission referred to mediation Verizon’s complaints against CTSI and Penn Telecom seeking to enforce compliance with the same statute. Although this proceeding against

One Communications was not one of the cases sent to mediation, the presiding officer by August 27, 2008 e-mail asked the parties to consent voluntarily to mediation and the parties did so. However, the mediation in this case was short-lived and unsuccessful and counsel for One Communications notified the mediator by November 11, 2008 e-mail that “[a]fter further consultation, the parties are in agreement that further mediation would be unproductive,” and the case should return to the presiding ALJ, where it remains today.

Meanwhile, Verizon’s mediations with CTSI and PTI have been successful and resulted in the settlement of those two cases, so this is the only active case before the Commission seeking enforcement of Section 3017(c).

### **III. ISSUES TO BE ADDRESSED**

At this point, the presiding officer should expeditiously decide the open issues in this case, including:

- (1) Ruling on Verizon’s three outstanding motions to strike various items from One Communications’ Main and Reply Briefs and One Communications’ motion to reopen the record to admit additional evidence.
- (2) Ruling on the case-dispositive issue raised in Verizon’s Main Brief as to whether One Communications has failed to present admissible evidence to establish the expenses, investments, revenues and traffic volumes assumed as inputs to its cost studies, and therefore failed to submit any competent evidence to establish its claims regarding its alleged costs.
- (3) If needed following disposition of issue two, above, ruling on the merits of One Communications’ claim that its higher access rates are “cost justified,” based on the testimony and briefs submitted by the parties.
- (4) Ruling on the issue of whether One Communications should be required to refund Verizon for all overcharges from the effective date of 66 Pa. C.S. § 3017(c) pursuant to the Commission’s authority under 66 Pa. C.S. § 1312, based on the testimony and briefs submitted by the parties.

Verizon respectfully submits that the foregoing issues can and should be addressed on the existing record. At most, if it would be helpful to the presiding officer, the parties could be permitted to provide supplemental briefs based on the existing record.

A handwritten signature in cursive script that reads "Suzan D. Paiva" followed by a stylized flourish.

Suzan D. Paiva (Atty No. 53853)

Verizon

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Date: August 14, 2009

Attorney for Verizon