Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The Verizon Telephone Companies	)	Transmittal No. 1187
Tariff F.C.C. No. 14	)	

PETITION TO REJECT OR SUSPEND AND INVESTIGATE PROPOSED TARIFF REVISIONS

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U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc. (all of whom d/b/a TelePacific Communications ("TelePacific")) by their attorneys, hereby petition the Federal Communications Commission ("FCC" or "Commission"), pursuant to Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, to reject the proposed tariff rate increases filed by Verizon Telephone Companies ("Verizon") and bearing Tariff FCC No. 14, Facilities for Interstate Access associated with Transmittal No. 1187.

I. INTRODUCTION AND SUMMARY

For the third time in less than two years (and the second time in less than one year), Verizon seeks to increase rates for special access services in Tariff FCC No. 14 in MSAs where it has received Phase II pricing flexibility.[1] With Transmittal No. 1187, Verizon proposes to increases the monthly recurring rates for most, if not all, of these services between approximately 6 to 8 percent. These repeated across-the board unsupported rate increases are certainly not consistent with the intent of the special access Phase II pricing flexibility that Verizon obtained.

[1] *See* Table 1 below.

Verizon's Transmittal is yet another prime example how the current pricing flexibility rules have utterly failed.

The Phase II pricing flexibility triggers were intended to identify those areas where competition was sufficiently-developed to replace price caps (under the theory that market competitive market forces would prevent price increases). The framework the Commission adopted in the *Pricing Flexibility Order* was to ensure that: "(1) price cap LECs do not use pricing flexibility to deter efficient entry or engage in exclusionary pricing behavior; and (2) price cap LECs do not increase rates to unreasonable levels for customers that lack competitive alternatives."[2] In addition, the reforms removed services from price cap regulation as competition develops in the marketplace.[3]

The Commission made clear in the *Pricing Flexibility Order* that rates should not, as a general matter, rise following the grant of Phase II pricing flexibility. Indeed, in its *Pricing Flexibility Order,* the Commission predicted that incumbent LECs would *reduce* special access rates in response to the new competitive pressures that ostensibly permitted the incumbents to receive pricing flexibility.[4] While the Commission did acknowledge that that a price increase may be necessary in certain instances, the Commission explained that any such rate increases would likely be limited to "some" customers in "certain areas" where Commission rules may have required incumbent LECs to price access services below cost.[5] Contrary to the Commission's expectation, the monthly rate increases proposed by Verizon in FCC Tariff No. 14 are not limited

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2 *Access Charge Reform,* Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 3 (1999) (subsequent history omitted) ("*Pricing Flexibility Order"*).

3 *Id*.

4 *See, e.g.*, *id*. ¶ 79.

5 *Id*., ¶ 155.

in scope or limited to particular rate bands. Rather, Verizon's proposed increases apply across all of its rate bands to all of its customers.

These new rates Verizon proposes impede TelePacific's ability to compete. TelePacific is a Competitive Local Exchange Carrier ("CLEC") that is one of the leading phone service providers in California and Nevada to small and medium sized businesses. It is the largest CLEC competitor to AT&T, Verizon, and CenturyLink in its major network areas. This strong position brings competitive advantages to TelePacific's more than 40,000 business customers who have over a million lines in service across the United States. TelePacific's DS-1 services offerings are one of its mainstays. Provisioning such DS-1 services to its retail end-user customers requires TelePacific to obtain special access DS-1 circuits of these ILECs where no viable competitive alternatives exist. TelePacific relies on Verizon and other ILECs for "last mile access" by purchasing special access or DS-1 UNEs, to combine with TelePacific's vast network that consists of nearly 40,000 fiber strand miles, 20 switches, and other customized services throughout California and Nevada, to meet its customer's needs.[6]

The Commission's special access proceeding, WC Docket No. 05-25, fully demonstrates that ILECs have a monopolistic stranglehold over these last mile facilities, despite receiving Phase II pricing flexibility, because competitors have been unable to economically to extend their own facilities to the overwhelming majority of buildings, particularly the critically important DS-level "channel termination" facilities (*i.e.*, the local loops) that connect these customers' premises to incumbents' central offices.[7] In fact, even in MSAs where rates were deregulated years ago,

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[6] For more information concerning TelePacific, *see* http://www.telepacific.com/.

[7] *See*, *e.g.*, Comments of PAETEC Holdings Inc., TDS Metrocom LLC; U.S. TelePacific Corp. and Mpower Communications Corp., both d/b/a TelePacific Communications; MasergyCommunications, Inc.; and New Edge Network, Inc., WC Docket No. 05-25 (filed Jan. 19, 2010).

special access purchasers hardly have alternatives to the DS1 circuits that account for the overwhelming bulk of the incumbents' special access services.

Consequently, Verizon has a monopoly over upstream inputs needed by TelePacific and other competitors in the downstream market. As a result, Verizon has powerful incentives to engage in anticompetitive price discrimination in the provision of those inputs to competitors[8] through price squeezes,[9] long term lock-up contracts that artificially reduce the size of

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[8] See Applications of Ameritech Corp., Transferor and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 202 (1999); Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order, 12 FCC Rcd 15756, ¶ 28 (1997) ("LEC Classification Order").

[9] The Commission has explained the problem of price squeezes in the context of the long distance market as follows:

> Absent appropriate regulation, an incumbent LEC and its interexchange affiliate could potentially implement a price squeeze once the incumbent LEC began offering in-region, interexchange toll services. . . . The incumbent LEC could do this by raising the price of interstate access services to all interexchange carriers, which would cause competing in-region carriers to either raise their retail rates to maintain their profit margins or to attempt to maintain their market share by not raising their prices to reflect the increase in access charges, thereby reducing their profit margins. If the competing in-region, interexchange providers raised their prices to recover the increased access charges, the incumbent LEC's interexchange affiliate could seek to expand its market share by not matching the price increase. The incumbent LEC affiliate could also set its in-region, interexchange prices at or below its access prices. Its competitors would then be faced with the choice of lowering their retail rates for interexchange services, thereby reducing their profit margins, or maintaining their retail rates at the higher price and risk losing market share.

Access Charge Reform Order, First Report and Order, 12 FCC Rcd 15982, ¶ 277 (1997) ("*Access Charge Reform Order*") (subsequent history omitted). ILECs have a tremendous incentive to engage in the same conduct especially where competitive providers of downstream special access services must purchase loops and transport from the ILEC in the upstream wholesale market (either in the form of special access or unbundled network elements). *See LEC Classification Order*, ¶ 134 (finding that ILECs have the incentive to engage in price squeezes).

competitors' addressable market,[10] strategic pricing to harm competitors with limited network footprints,[11] and to subsidize non-regulated services from revenues obtained from special access services that are subject to Phase II pricing flexibility.[12]

Because Verizon realizes that for the most part, its special access customers have nowhere else to turn for connectivity in these MSAs, Verizon is proposing to use the pricing flexibility it was granted not to *reduce* prices as a result of the *presence* of competition, but to *increase* prices as a result of the virtual *absence* of competition. The Commission should not allow Verizon to exploit its market power by permitting it to increase its special access prices. Such increases harm competition in the provision of the many voice, data, and Internet long distance services that depend upon special access.

As demonstrated below, the Commission should reject Verizon's proposed rates in FCC Tariff No.14 associated with Transmittal No. 1187 because they are unjust and unreasonable when compared to Verizon's price cap rates, NECA rates and Unbundled Network Element ("UNE") rates. Moreover, given the efficiencies Verizon experiences in provisioning special access circuits, its special access rates should be decreasing rather than increasing. For these reasons, Verizon's proposed rate increases are unlawful. In the alternative, the Commission

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[10] *Pricing Flexibility Order*, ¶ 79 ("An incumbent can forestall the entry of potential competitors by 'locking up' large customers by offering them volume and term discounts at or below cost"). *See also Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, ¶¶ 114-116 (rel. Jan. 31, 2005) ("*Special Access NPRM*").

[11] *See Southwestern Bell Telephone Company, Tariff FCC No. 73*, Order Concluding Investigation and Denying Application for Review, 12 FCC Rcd 19311, ¶¶ 51-53 (1997).

[12] *See* 47 U.S.C. § 254(k).

should suspend and investigate Verizon's proposed rate increases because there are substantial questions as to their lawfulness.

If the Commission, however, neither rejects nor suspends Verizon's proposed FCC Tariff No. 14 pages associated with Transmittal No. 1187 at this time, TelePacific will be forced to pay the excessive rates with no opportunity for refund, even if the Commission later determines, in WC Docket 05-25 or otherwise, that the rates are unjust and unreasonable.[13]

II. LEGAL STANDARD

A tariff is subject to rejection when it is prima facie unlawful, in that it demonstrably conflicts with the Communications Act or a Commission rule, regulation or order.[14] Under Section 201(b) of the Communications Act of 1934 (the "Act"),[15] as amended, a common carrier, such as Verizon, acts unlawfully if it assesses unjust and unreasonable rates in its tariffs. The elimination of price cap regulation in Phase II areas does not excuse Verizon from its obligation to comply with Section 201 of the Act and otherwise permit it to charge unjust and unreasonable rates in its tariffs. In determining if rates in a tariff are unjust and unreasonable and therefore, unlawful, the Commission has based such decisions on, among things, rate comparisons, benchmarks, and non-cost factors.[16] The Commission has "broad discretion in selecting methods

[13] 47 U.S.C. § 204(a)(3); *see also ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403 (D.C. Cir. 2002).

[14] *See e.g., American Broadcasting Companies, Inc. v. AT&T*, 663 F.2d 133, 138 (D.C. Cir. 1980); *MCI v. AT&T*, 94 F.C.C.2d 332, 340-341 (1983).

[15] 47 U.S.C. § 201(b).

[16] *See, e.g., AT&T Corp. v. Business Telecom, Inc.,* Memorandum Opinion and Order, 16 FCC Rcd 12312, ¶ 23 (2001)*; see also, e.g., Access Charge Reform Order,* 12 FCC Rcd at 16141-42, ¶ 364; *Expanded Interconnection Order,* 12 FCC Rcd at 18790-93; *Annual 1990 Access Tariff Filings,* Memorandum Opinion and Order, 5 FCC Rcd 7487 (1990) (rejecting rates 8 times higher than benchmark rate); *Beehive Telephone Co.,* Memorandum Opinion and Order, 13 FCC Rcd 12275 (1998) (rejecting rate above "industry averages" for comparable companies); *Operator Communications, Inc. d.b.a. Oncor Communications, Inc.*, Memorandum Opinion and Order and

to evaluate the reasonableness of rates."[17]

An alternative to rejecting a tariff outright for unlawfulness is suspending and investigating it when the tariff raises substantial issues of lawfulness.[18] Moreover, the Commission has the authority to reject a proposed tariff modification or suspend and investigate if substantial cause justifies doing so.[19]

III. THE COMMISSION SHOULD REJECT OR SUSPEND AND INVESTIGATE THE TRANSMITTAL BECAUSE VERIZON'S PROPOSED NEW RATES ARE UNJUST AND UNREASONABLE, AND THEREFORE VIOLATE SECTION 201 OF THE COMMUNICATIONS ACT

As demonstrated below, Verizon's proposed rate increases associated with FCC Tariff No. 14 in Transmittal No. 1187 are not just and reasonable as Section 201(b) of the Act requires because, among other things: (a) the rates exceed Verizon's price cap rates and far exceed rate of

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Order to Show Cause, DA-95-02, 1995 WL 248343 (Com. Car. Bur. Apr. 27, 1995) ("*Oncor Communications*") (finding that rates that "substantially exceed" rates charged by other service providers for comparable services in the same market to be unjust and unreasonable)*; Capital Network System, Inc.*, Memorandum Opinion and Order and Order to Show Cause, 10 FCC Rcd 13732 (1995) (same as *Oncor Communications*); *International Settlement Rates*, Report and Order, 12 FCC Rcd 19806, 19943 at ¶ 295 (1997), *aff'd*, *Cable & Wireless PLC v. Federal Communications Commission*, 166 F.3d 1224 (D.C. Cir. 1999) (establishing benchmark governing international settlement rates based, in part, upon non-cost factors). Cases decided under the Interstate Commerce Act, from which the Communications Act derived, also determine the reasonableness of a carrier's rates by comparing them to the rates of other carriers and other rates of the same carrier. *See, e.g., Railroad Comm'rs of Fla. v. Seaboard Air Line Ry.*, 16 ICC 1, 5 (1909) (examining charges by carrier's competitor for similar services to determine the reasonable rate); *Freight Bureau v. Cincinnati, N.O. & Tx. Pac. Ry. Co.,* 4 ICC 92 (1894) ("where the reasonableness of rates is in question, comparison may be made, not only with rates on another line of the same carrier, but also with those on the lines of other and distinct carriers").

[17] *See, e.g., Southwestern Bell v. FCC*, 168 F.3d at 1352; *MCI Telecommunications Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1228 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).

[18] *See AT&T, Transmittal No. 148,* Memorandum Opinion and Order, 56 RR2d 1503 (1984); *ITT (Transmittal No. 2191)*, 73 F.C.C.2d 709, 716, n.5 (1979) (*citing AT&T (Wide Area Telecommunications Service))*, 46 F.C.C.2d 81, 86 (1974).

[19] *RCA American Comms., Inc.*, Memorandum Opinion and Order, 86 FCC 2d 1197 at 1201 (1981).

return NECA rates and forward-looking cost-based UNE rates; (b) the rates do not reflect cost decreases resulting from increased demand or efficiencies in providing special access services.

A. Verizon's Proposed Rates Greatly Exceed NECA Rates, Verizon's Own Price Cap Rates, and Forward-Looking Cost-Based UNE Rates

A review of the stark differences between a sample of Verizon's proposed pricing flexibility rates in FCC Tariff No. 14 associated with Transmittal No. 1187 and key benchmarks, as shown in Tables 1-2, below, demonstrates that Verizon's proposed rates are unreasonable and that its proposed tariff revisions should be rejected. *First*, as shown in Table 1, Verizon's proposed 3-year term pricing flexibility rates for DS-1 channel terminations in the densest metropolitan areas are much higher than Verizon's comparable price cap rates. For example, Verizon's proposed 3-year term pricing flexibility rates, which are proposed in FCC Tariff No. 14 for California, are over 10 percent higher than the comparable price cap rates in California.[20] As noted above, the Commission envisioned pricing flexibility rates to be lower, generally, not higher than price cap rates. The only time the Commission thought rates may be higher was if "some" customers in "certain areas" where Commission rules may have required incumbent LECs to price access services below cost. That is certainly not the case in the densest metropolitan areas where Verizon operates and Verizon does not claim otherwise. Moreover, as shown in Table 2, Verizon's monthly pricing flexibility rates for DS-1 10 mile circuit is over 15 percent higher than Verizon's comparable price cap rates.

[20] *See* Table 1. All Percentages provided herein are determined from the basic rate information provided in the Tables herein.

Table 1			
CALIFORNIA DS-1 CHANNEL TERMINATION RATE COMPARISON			
Pricing Flexibility (Monthly Rate for a 3-Year Term Price Band A (1001-3000 threshold))	**Price Cap** (Monthly Rate for a 3-Year Term Zone 1 (1001-3000 threshold))	**NECA** (Monthly Rate for a 3-Year Term Rate Band 1)	**DS-1 UNE** (Monthly Zone 1 Rate)
$168.20	**$152.36**	**$82.67**	**$67.70**
Current rate: $158.68 (*) Prev. rate: $149.70 (**)	Current rate: $152.36 (*) Prev. rate: $152.36 (**)	Prev. 7/1/10 rate: $89.96 (*) Prev. 7/1/09 rate: $96.30 (**)	
Tariff FCC NO. 14 5-245 (Effective May 15, 2012) (*) Tariff FCC NO. 14 5-245 (Effective July 16, 2011) (**) Tariff FCC NO. 14 5-245 (Effective July 1, 2010)	Tariff FCC NO. 14 5-245 (Effective May 15, 2012) (*)Tariff FCC NO. 14 5-245 (Effective July 16, 2011) (**) Tariff FCC NO. 14 5-245 (Effective July 1, 2010)	NECA Tariff F.C.C. No. 5, 17-27 (Effective July 1, 2011) ($91.86 less 10%) (*) NECA Tariff F.C.C. No. 5, 17-27 (Effective July 1, 2010) ($99.96 less 10% discount) (**) NECA Tariff F.C.C. No. 5, 17-27 (Effective July 1, 2009) ($107.00 less 10 % discount)	R.93-04-003, I.93-04-002

TABLE 2			
CALIFORNIA DS-1 10-MILE CIRCUIT (CHANNEL TERMINATION, CHANNEL MILEAGE FIXED AND PER MILE RATE ELEMENTS) RATE COMPARISON			
Pricing Flexibility Monthly Rate for a 3-Year Term Price Band A (1001-3000 threshold)	**Price Cap Rates** Monthly Rate for a 3-Year Term Zone 1 (1001-3000 threshold)	**NECA DS-1** Monthly Rate for Rate Band 1	**CA UNE** Monthly Rate
$321.57	**$ 277.70**	**$168.68**	**$78.77**
Current rate: $303.41(*) Prev. rate: $286.20(**)	Current rate: $277.70 (*) Prev. rate: $277.70 (**)	Prev. 7/1/10 rate: $183.59 (*) Prev. 7/1/09 rate: $196.74 (**)	
Tariff FCC NO. 14 5-209 & 5-245 (Effective May 15, 2012) ($168.20 plus $34.27 plus 10 miles of Special Transport at $11.91 per mile) (*) Tariff FCC NO. 14 5-209 & 5-245 (Effective July 16, 2011) ($158.68 plus $32.33 plus 10 miles of Special Transport at $11.24 per mile) (**) Tariff FCC NO. 14 5-209 & 5-245(Effective July 1, 2010) ($149.70 plus $30.50 plus 10 miles of Special Transport at $10.60 per mile)	Tariff FCC NO. 14 5-209 & 5-245 (Effective May 15, 2012) ($152.36 plus $25.34 plus 10 miles of Special Transport at $10.00 per mile) (*) Tariff FCC NO. 14 5-209 & 5-245 (Effective July 16, 2011) (same) (**) Tariff FCC NO. 14 5-209 & 5-245 (Effective July 16, 2011) (same)	NECA Tariff F.C.C. No. 5, 17-26.1 and 17-27 (Effective July 1, 2011) ($91.86 plus $32.66 channel mileage term. plus 10 miles of channel mileage facility at $6.29 per mile) less 10% discount to total) (*) NECA Tariff F.C.C. No. 5, 17-26.1 and 17-27 (Effective July 1, 2010) ($99.96 plus $35.53 channel mileage term. plus 10 miles of channel mileage facility at $6.85 per mile) less 10% discount of total) (**) NECA Tariff F.C.C. No. 5, 17-26.1 and 17-27 (Effective July 1, 2009) (($107.00 plus $38.03 channel mileage term. plus 10 miles of channel mileage facility at $7.33 per mile) less 10% discount of total)	R.93-04-003, I.93-04-002 ($67.70 plus $9.77 plus 10 miles of transport at $.13 per mile)

Second, as shown in Table 1, Verizon's proposed 3-year term pricing flexibility rates in Tariff No. 14 associated with Transmittal 1187 for DS-1 facilities in the densest metropolitan areas are much higher than NECA's comparable rates. For example, Verizon's 3-year term pricing flexibility channel termination rate in California is over 103 percent higher than the comparable NECA rate.[21] In addition, Table 2 shows that Verizon's 3-year term pricing flexibility rates for a 10-mile DS-1 circuit in California are over 90 percent higher than the

[21] *See* Table 1.

comparable NECA rates.[22] These comparisons are particularly striking because companies that participate in the NECA tariff are rate-of-return companies that typically serve "small populations over large geographic areas."[23] "Covering these large areas requires extensive cable and wire facilities, additional transmission equipment and innovative technologies, which drive up the cost per subscriber to deliver voice and high speed broadband services," such as DS1 and other high capacity services to rural customers.[24] Unlike Verizon, NECA members "do not enjoy the economies of scale afforded their large, non-rural counterparts that operate in urban areas and serve many thousands of access lines per square mile."[25]

Given this, one would expect that NECA rates would be *higher than* Verizon's pricing flexibility rates. But the opposite is occurring. While the comparisons with NECA rates reveal there is no realistic possibility that Verizon is providing special access service below cost in these pricing flexibility areas, the fact that Verizon's pricing flexibility rates exceed the rates offered by rate-of-return carriers demonstrates that Verizon's rates are excessive and generating unreasonable profits. In addition, as Tables 1 and 2 illustrate, the comparable NECA rates have been decreasing over the past few years whereas Verizon's rates are increasing, which is inconsistent with the direction the rates should be heading in a so called "competitive" market that warrants Phase II pricing flexibility. Furthermore, because NECA tariff reflects a 11.25 percent rate of return of the companies that join it (which is Commission has indicated needs to be

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[22] *See* Table 1.

[23] NECA Trends 2010, "A report on rural telecom technology," at 3, *available at* https://www.neca.org/cms400min/NECA_Templates/PublicInterior.aspx?id=100.

[24] *Id*.

[25] NECA Trends 2009, "A report on rural telecom technology," at 4, *available at* https://www.neca.org/cms400min/NECA_Templates/PublicInterior.aspx?id=100.

lowered)[26] and given the rate disparity, Verizon is likely obtaining a rate of return on these special access services that far exceeds 11.25 percent. The United States Supreme Court and lower courts have consistently held that where "returns have greatly exceeded a fair percentage of return upon a fair base, it follows as a matter of law that the rates charged . . ., instead of being 'just and reasonable' …[are] excessive"[27] and therefore, unlawful.

Third, as shown in Tables 1 and 2, Verizon's proposed pricing flexibility rates in FCC Tariff No. 14 associated with Transmittal No. 1187 are much higher than Verizon's comparable UNE rates in California. For instance, Verizon's 3-year term pricing flexibility rate for a DS-1 channel termination in California is over 148 percent higher than Verizon's comparable UNE rate in California, which reflect Verizon's forward-looking TELRIC-based economic costs of provisioning comparable facilities, and is only available on a monthly basis.[28] In addition, Verizon's 3-year term pricing flexibility rates for a 10-mile DS1 circuit are ***over 308 percent higher*** than the comparable UNE rates.[29] Because monthly rates associated with term purchases shown in Table 1 and 2 are far lower than monthly rates without term purchases, the fact that

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[26] *See Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 27 (rel. Nov. 18, 2011) ("*USF/ICC Transformation Order*") (seeking comment on "reducing the interstate rate-of -return from its current level of 11.25 percent"), ¶ 63 (stating that "[b]ased on our preliminary analysis and record evidence, we believe the current rate of return of 11.25 percent is no longer consistent with the Act and today's financial conditions"), ¶ 1046 (explain that "[w]e believe fundamental changes in the cost of debt and equity since 1990 no longer allow us to conclude that a rate of return of 11.25 percent is necessarily 'just and reasonable' as required by section 201(b)."), *pets. for review pending*, *Direct Commc'ns Cedar Valley, LLC v. FCC*, No. 11-9581 (10th Cir. filed Dec. 18, 2011) (and consolidated cases).

[27] *Potomac Elec. Power Co. v. Public Utils. Comm'n of the District of Columbia*, 158 F.2d 521, 523 (D.C. Cir. 1947) (citing and quoting *Dayton-Goose Creek Co. v. United States*, 263 U.S. 456, 483 (1924) ("If the profit is fair, the sum of the rates is so. If the profit is excessive, the sum of the rates is so")).

[28] *See* Table 1.

[29] *See* Table 2.

Verizon's 3-year term pricing flexibility rates dramatically exceed monthly UNE rates demonstrates how unreasonable and unjust Verizon's rates are.

The above comparisons of Verizon's proposed special access rates to UNE rates are abundantly reasonable because special access services are provisioned over the same facilities and are functionally equivalent to high capacity loop and transport UNEs and UNE prices were set at forward-looking, economic costs, and include a *reasonable* profit to Verizon. The United States Supreme Court found that the TELRIC forward-looking cost estimation upon which UNE rates are derived is a valid and compensatory method of calculating an ILEC's true forward-looking costs.[30] Accordingly, UNE rates provide an excellent benchmark by which to assess whether the Verizon's special access rates are near forward-looking costs. Given the disparity between UNE rates and Verizon's proposed special access rates, it is beyond debate that Verizon's proposed special access rates are excessive.[31]

The fact that Verizon's proposed Phase II pricing flexibility special access rates vastly exceed Verizon's own price cap rates, NECA rates and forward-looking cost-based UNE rates for the same services shows that these proposed special access rates are unjust and unreasonable in violation of section 201(b) of the Act.[32]

B. Verizon's Proposed Rate Increases are Unjust and Unreasonable Because They do Not Reflect the Cost Reductions Resulting from Increased Demand and Efficiencies in Providing Special Access

The unreasonableness of Verizon's proposed rate increases is further demonstrated by the

[30] *See* Verizon Communications, Inc. v. FCC, 535 U.S. 467, 467-472 (2002).

[31] *See* Letter from Sprint Nextel Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 1 (filed Oct. 5, 2007) (noting that "special access prices are significantly higher than comparable unbundled network element prices and many times the prices for comparable services offered in broadband markets.").

[32] 47 U.S.C. § 201(b).

fact that the increases are counter to the cost reductions associated with increased demand and efficiencies in productivity that Verizon experiences in provisioning special access circuits. The price cap rates were originally set at levels based on the rates that existed when price caps were instituted in 1991.[33] These initial price cap rates were a product of "rate-of-return" regulation, under which incumbent LECs calculated their access rates using projected costs and projected demand for access services.[34] Over time, the demand for special access services has, however, increased dramatically, going from 4,035,297 lines in 1990 to 303,117,659 lines in 2007.[35] As a result, Verizon has "realized special access scale economies throughout the entire period of price cap regulation, including before and after…pricing flexibility w[as] implemented."[36] The fact that "special access line demand increased at a significantly higher rate than did operating expenses and investment throughout these periods," in itself suggests that Verizon "realized scale economies in both periods."[37] This remains the case. Data from the Bureau of Labor Statistics shows that for the period from 1999 through 2009, overall U.S. nonfarm business productivity growth averaged 2.4% per year,[38] while the wired telecommunications sector exceeded that by a

[33] See Special Access NPRM, ¶¶ 3 & 10-11.

[34] *Id*. ¶¶ 10-11. Since 1981, the Commission has permitted certain smaller incumbent LECs to base their access rates on historic, rather than projected, cost and demand. *See* 47 C.F.R. § 61.39.

[35] *See* Statistics of Communications Common Carriers 2006/2007 edition at Table 4.10, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-301505A1.pdf.

[36] Special Access NPRM, ¶ 29.

[37] *Id*.

[38] *See* United States Department of Labor, Bureau of Labor Statistics, Major Sector Productivity and Costs, Nonfarm Bus. Labor Productivity - PRS85006092, *available at* http://data.bls.gov/cgi-bin/surveymost. To arrive at this figure, the average percentage of the reported year-to-year index growth was calculated from 1999 to 2009.

significant margin – growing an average of 3.09%.[39] Despite experiencing all these efficiencies, Verizon has not reduced its pricing flexibility rates; rather it has increased them by approximately 6 percent over the past few years, as Tables 1 and 2 reveal, when its comparable price caps rates did not change.

The fact that Verizon is enjoying tremendous efficiency gains and is not sharing all the gains or excessive earnings with the ratepayers via rate reductions is yet another reason why Verizon's proposed rate increases are unreasonable and should be rejected.

C. If the Commission does Not Reject Verizon's Transmittal, the Commission Should Suspend and Investigate the Tariff Because There are Substantial Questions of Its Lawfulness

If the Commission does not reject Verizon's proposed rates, the Commission should suspend and investigate Verizon's tariff revisions because there are substantial questions of their lawfulness, thus meeting the Commission's standard for suspending and investigating such tariffs.[40] As demonstrated herein, there is an exceedingly high probability that these tariffs will be found to be unlawful after investigation. In addition, apart from Verizon's desire to engage in monopolistic price gouging, any tariff suspension will not substantially harm other interested parties. However, if the tariff filing is not suspended, customers such as TelePacific will be irreparably harmed because the rates will be deemed lawful and if they are later changed, the Commission can only change them on a prospective basis and cannot order refunds.[41] Nor would

[39] *See* United States Department of Labor, Bureau of Labor Statistics, Industry Productivity and Costs, Wired Telecommunications Carriers, *available at* http://data.bls.gov/cgi-bin/surveymost. To arrive at this figure, the average growth percentage of the reported year-to-year index was calculated from 1999 to 2009.

[40] *See* n.18, *supra.*

[41] *See July 1, 2004 Annual Access Charge Tariff Filings*, Memorandum Opinion and Order, 19 FCC Rcd. 23877, ¶ 7 (2004) ("Rates that are 'deemed lawful' are not subject to refund"). *See also*, *Virgin Islands Telephone Corporation v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006).

a suspension be contrary to the public interest because a suspension will prevent substantial overcharges that ultimately are borne by consumers.

1. A Commission investigation should require Verizon to provide its rate of return data, along with supporting cost and revenue accounting data, associated with the special access rates it seeks to increase that it committed to produce

If the Commission suspends and investigates Verizon's tariff, the Commission should require Verizon to provide the special access rate of return data, along with supporting accounting cost and revenue data, so that the Commission can evaluate and determine if Verizon's special access rates are just and reasonable.

Verizon has an ongoing duty to provide this information to the FCC upon request. When the Commission granted Verizon, AT&T and Qwest forbearance from the cost assignment rules in 2008, the Commission explained in the *AT&T Cost Assignment Forbearance Order* that it still retains the "tools, possibly including accounting data, to accomplish its statutory responsibilities" "under the Act to ensure that rates are just and reasonable, and not unjustly or unreasonably discriminatory."[42] The Commission "expressly condition[ed] the forbearance granted…on the provision…of accounting data on request by the Commission for its use in rulemakings, adjudications or for other regulatory purposes."[43] The Commission held that "[t]o the extent that

[42] Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160 from Enforcement of Certain of the Commission's Cost Assignment Rules, Memorandum Opinion and Order, 23 FCC Rcd 7302, ¶ 21 (2008) (citing 47 U.S.C. §§ 160(a)(1), 201, 202) ("AT&T Cost Assignment Forbearance Order"). The Commission noted that "[e]ven without the Cost Assignment Rules, the Act provides the Commission with ample authority – including section 220 – to require AT&T to produce any accounting data that the Commission needs for regulatory purposes, including rulemakings or adjudications, in the future." Id.

[43] *AT&T Cost Assignment Forbearance Order*, ¶ 21; *see also id.*, ¶ 45. *See also Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 23 FCC Rcd 13647, ¶ 27 (2008) ("*Verizon/Qwest Cost Assignment Forbearance Order*") (explaining that in the Commission "extend[s] to Verizon and Qwest forbearance from the Cost Assignment Rules to the same extent

the Commission requests such data," "useable information" must be provided "on a timely basis."[44] The Commission emphasized that a "method of preserving the integrity – for both costs and revenues – of [] accounting systems in the absence of the Cost Assignment Rules" be implemented "to ensure that accounting data requested by the Commission in the future will be available and reliable."[45] The Commission can and should therefore order Verizon to produce this special access accounting data.

2. The Commission should require Verizon to provide its special access revenue accounting data to demonstrate its rate increases are not designed to subsidize non-regulated endeavors

In addition, if the Commission suspends and investigates Verizon's tariff, the Commission should require Verizon to demonstrate that its rate increases are not subsidizing non-regulated endeavors. For instance, Verizon should not be permitted to justify higher special access rates, which remain regulated under Phase II pricing flexibility, to cover its costs of deploying non-regulated facilities for mass market broadband services.

Section 254(k) of the Act prohibits the Verizon, among others, from "us[ing] services that are not competitive to subsidize services that are subject to competition." Because the regulated special access services for Verizon and certain ILECs only include TDM-based services, the record in the Commission's special access proceeding, WC Docket No. 05-25, suggests that

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granted AT&T in the *AT&T Cost Assignment Forbearance Order* and subject to the same conditions") and *id*., ¶ 28 (holding "we condition this forbearance on, among other things, the provision by Verizon or Qwest of accounting data on request by the Commission for regulatory purposes, consistent with the Commission's statutory authority"). *See also Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c); Petition of Verizon for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain of the Commission's Recordkeeping and Reporting Requirements,* Memorandum Opinion and Order, 23 FCC Rcd 18483, ¶ 12. (2008).

[44] AT&T Cost Assignment Forbearance Order, ¶ 21.

[45] *Id*.

Verizon could be using its regulated TDM-based special access service revenues to subsidize its packet-based broadband network deployments and services.

Specifically, ETI has reported that "RBOC capital expenditures for unregulated broadband and video services are primarily assigned to regulated services investment categories – including the special access category – while the revenues generated by these services are primarily recorded to the unregulated category."[46] ETI explains that "[t]he resulting mismatch of understated broadband revenues and overstated broadband costs (two key components of the rate of return calculation) consistently and systematically understate the rates of return for regulated services – special access in particular."[47] ETI's analysis reveals that Verizon's "[i]nvestment made to provide unregulated services is inappropriately allocated to the interstate special access category – suppressing reported earnings"[48] and Verizon's "Increase[s] in 'Non-Regulated' Plant in Service as Reported in ARMIS Do[] Not Begin to Cover the Total Broadband Investment During the Comparable Period: 2003 – 2007."[49] ETI concludes that "[e]xcluding *FiOS* . . . outlays from Verizon . . . special access rate of return calculations would substantially increase the results."[50]

ETI's conclusions provides the Commission ample justification to require Verizon to provide its special access revenue accounting data to determine if Verizon is in fact violating Section 254(k) or otherwise using its excessive earnings associated with regulated special access

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[46] Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25, RM-10593 (filed Jan. 19, 2010), Attachment B - LONGSTANDING REGULATORY RULES CONFIRM BOC MARKET POWER: A defense of ARMIS, at 20 (italics removed).

[47] *Id*.

[48] *Id*. at 20 (bolding removed).

[49] *Id*. at 23-24 (bolding removed).

[50] *Id*. at 25 (bolding removed).

services to subsidize its unregulated broadband deployment and services. Accordingly, the Commission should require Verizon to provide all special access cost and revenue accounting data that is needed to determine if Verizon is violating Sections 254(k) and 201(b) of the Act.[51]

IV. THE COMMISSION SHOULD REJECT OR SUSPEND THE TRANSMITTAL BECAUSE IT FAILS TO MEET THE "SUBSTANTIAL CAUSE" TEST

Under the "substantial cause" test, the Commission measures the reasonableness of a tariff modification by weighing two principal considerations: the "carrier's explanation of the factors necessitating the desired changes at that particular time," and the "position of the relying customer."[52] Concerning the first leg of this test, Verizon has provided absolutely no explanation or rationale for its proposed rate increases. There simply is no reason for Verizon to have the right to increase rates on multiple occasions when the Commission expected rates would decrease. Regarding the second leg of this test, Verizon's customers, *i.e.*, CLECs, wireless carriers, business end users, and other access customers, will be adversely impacted by Verizon's proposed rate increases, as discussed above.

V. CONCLUSION

For the reasons discussed herein, TelePacific respectfully requests that the Commission

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[51] In granting the BOCs' request for forbearance from the cost assignment rules, the Commission expressly required the BOCs to provide cost accounting information necessary to show their compliance with Section 254(k). *AT&T Cost Assignment Forbearance Order*, ¶ 30; *see also Verizon/Qwest Cost Assignment Forbearance Order*, ¶ 27 (explaining that in the Commission "extend[s] to Verizon and Qwest forbearance from the Cost Assignment Rules to the same extent granted AT&T in the *AT&T Cost Assignment Forbearance Order* and subject to the same conditions"). Verizon has committed to providing this information upon request. *See* Letter from Ann Berkowitz, Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-273 (filed Sep. 18, 2009)) (attaching its annual 254(k) compliance certification that states, among other things, Verizon incumbent local exchange carriers will maintain and provide to the FCC any cost accounting information necessary to establish such compliance if appropriately requested to provide such information").

[52] *RCA American Comms., Inc.*, Memorandum Opinion and Order, 86 FCC 2d 1197 at 1201 (1981).

reject Verizon's proposed rate increases in Tariff FCC No. 14 associated with Transmittal 1187. If the Commission does not reject these tariff revisions, the Commission should, at a minimum, suspend and investigate the revisions proposed by Verizon.

Respectfully Submitted,

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Dated May 7, 2012

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition to Reject or Suspend and Investigate Proposed Tariff Revisions of Arrival Communications, Inc., Mpower Communications Corp., and U.S. TelePacific Corp. (all of whom d/b/a TelePacific Communications) was served to the parties below by hand-delivery electronic mail or by facsimile and U.S. first-class mail on this 7th day of May, 2012, to the following:

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