

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

Investigation by the Department on its Own Motion to Determine whether an Agreement entered into by Verizon New England Inc., d/b/a Verizon Massachusetts is an Interconnection Agreement under 47 U.S.C. § 251 Requiring the Agreement to be filed with the Department for Approval in Accordance with 47 U.S.C. § 252

DTC 13-6

**COMPETITIVE CARRIERS' OPPOSITION  
TO VERIZON'S MOTION TO ABATE**

The Department should . . . rule only after it has a full evidentiary record *and has received post-hearing briefs*. A complete record not only will assist the Department in resolving the disputed issues of fact and policy in this proceeding, but also will ensure that the court that reviews the Department's decision has the benefit of that record.<sup>1</sup>

These were Verizon MA's words just a month ago when the Competitive Carriers<sup>2</sup> sought a streamlined and efficient resolution of this case through summary judgment. The hearing that Verizon sought has been concluded and the evidentiary record upon which Verizon has insisted now exists. But, in an abrupt and desperate about-face, Verizon MA seeks to avoid a potentially adverse Department decision by, in essence, moving for dismissal of this proceeding. The Department should deny the motion.

**The Motion is another Verizon attempt at delay.** Verizon MA's motion is just the latest in a long series of tactical maneuvers designed to delay or derail a Department decision in

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<sup>1</sup> Opposition of Verizon MA to Intervenors' Motion for Summary Judgment, at 2 (filed April 11, 2014) (emphasis added).

<sup>2</sup> CTC Communications Corp. d/b/a EarthLink Business; Lightship Telecom LLC d/b/a EarthLink Business; Choice One Communications of Massachusetts, Inc. d/b/a EarthLink Business; Conversent Communications of Massachusetts, Inc. d/b/a EarthLink Business; EarthLink Business, LLC (formerly New Edge Network, Inc. d/b/a EarthLink Business); Cbeyond Communications, LLC; tw telecom data services llc; Level 3 Communications, LLC; and PAETEC Communications, Inc.

this case. Verizon MA moved to stay the predecessor case, DTC 13-2, indefinitely.<sup>3</sup> The Department correctly denied that motion and opened this investigation on May 13, 2013.<sup>4</sup> Just over a month later, Verizon again moved for an indefinite-duration abeyance.<sup>5</sup> The Department correctly denied that motion as well, and ordered the parties to submit scheduling proposals.<sup>6</sup>

In response, the Competitive Carriers proposed that this matter could be decided straightforwardly and inexpensively on briefs, as the case involves only the legal issue whether the Verizon/Comcast interconnection agreements had to be filed for Department review under 47 U.S.C. § 252.<sup>7</sup> In marked contrast, Verizon MA proposed on November 21, 2013 a lengthy and expensive proceeding involving testimony, discovery, a hearing, initial briefs, and, finally on July 28, 2014, reply briefs.<sup>8</sup> The Department set a procedural schedule somewhat shorter than what Verizon proposed, but still including what Verizon wanted — a hearing, simultaneous initial briefs, and simultaneous reply briefs.<sup>9</sup> In response to the Competitive Carriers' motion for summary judgment (filed in accordance with the Department's procedural schedule), Verizon MA again emphasized the need for post-hearing briefs in the quotation reproduced above.

The Department has undertaken the full development of the record that Verizon sought. The Department should complete the process by accepting post-hearing briefs and proceeding to a decision. Of course, if Verizon has changed its mind and no longer cares to file briefs, it can simply choose to forego them.

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<sup>3</sup> Petition for a Determination that Verizon IP-to-IP Interconnection Agreements Must Be Filed for Review and Approval and for Associated Relief, D.T.C. 13-2 (Jan. 31, 2013).

<sup>4</sup> Order Opening an Investigation, Declining to Issue an Advisory Ruling, and Denying Verizon MA's Motion to Dismiss or Stay the Proceeding, D.T.C. 13-6 (May 13, 2013).

<sup>5</sup> Motion for Abeyance, D.T.C. 13-6 (June 26, 2013).

<sup>6</sup> Hearing Officer Ruling on Verizon MA Motion for Abeyance, at 11 (Nov. 4, 2013).

<sup>7</sup> Competitive Carriers' Scheduling Proposal, (Nov. 22, 2013).

<sup>8</sup> Letter Dated November 22, 2013 from Alexander W. Moore, Esq. to Catrice Williams, Secretary; Letter Dated November 26, 2013 from Alexander W. Moore, Esq. to Catrice Williams, Secretary.

<sup>9</sup> Procedural Schedule and Notice (Nov. 29, 2013).

**Verizon's Motion is too late.** Verizon's motion is a procedurally improper attempt to obtain summary judgment or similar dispositive relief after the deadline for seeking such relief long has passed. The Department should deny the motion on that ground alone.

The procedural schedule set March 28, 2104 as the deadline for summary judgment motions. The Competitive Carriers filed such a motion, while Verizon MA did not. But few if any of the facts that support Verizon's instant motion were unknown to it on March 28<sup>th</sup>. Verizon expressly admits that its letters to the Competitive Carriers were sent in June 2013.<sup>10</sup> All of the correspondence reproduced by Verizon in its Exhibits 5 and 6 is dated October 2013 or earlier. Verizon's statements that it has been trying to negotiate agreements for months or years, even if true, clearly show that Verizon knew of the facts on which it relies for its motion for those same months or years, and certainly by March 28<sup>th</sup>. Nothing prevented Verizon from seeking to terminate or "abate" this proceeding by that date. But Verizon did not. Only now, after the Department and parties went through the time, effort, and expense to conduct the hearing that Verizon sought, has Verizon brought its dispositive motion to "abate" the proceeding.

Verizon's motion is a blatant attempt to circumvent the procedural deadline for a dispositive summary judgment motion. Having intentionally foregone that opportunity, Verizon should not be permitted a back-door attempt at the same relief. The Department should deny Verizon's motion on that ground alone.

**Verizon seeks to distract the Department from the real issue.** Verizon raises irrelevant arguments to distract the Department from the pertinent issue in this case: whether the

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<sup>10</sup> Motion at 4. In fact, Verizon's letter to PAETEC was sent in October 2013. VZ Ex. 5.

Verizon/Comcast agreements must be filed for Department review under § 252.<sup>11</sup> As discussed below, whether entities other than Verizon and Comcast are asserting their rights to claim that section 252 applies to IP-interconnection agreements for voice traffic, or are waiving those rights, does not and should not affect the Department's duty under the Act to determine if the Verizon/Comcast agreements are subject to review. This is a question for the Department to determine in the exercise of its statutory duty under § 252. The actions of one, or two, or a half-dozen other entities in the context of other, unrelated agreements or negotiations do not dictate the Department's ability to decide this case.

**Verizon's criticisms of the Competitive Carriers are unfounded.** Verizon basically criticizes the Competitive Carriers for asserting legal rights with which Verizon disagrees. Verizon has made clear that it believes that IP interconnection is not a section 251/252 obligation and should be handled solely through unregulated commercial agreements. Its template interconnection agreement specifically requires the other party to agree as follows: **[Begin Confidential]**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>11</sup> Order Opening an Investigation, Declining to Issue an Advisory Ruling, and Denying Verizon MA's Motion to Dismiss or Stay the Proceeding, DTC 13-6 (May 13, 2013).

<sup>12</sup> VZ Ex. 3, § 23.1

■ **End Confidential]**<sup>13</sup> What redress the other party would have to obtain interpretation or enforcement of the agreement is unclear. When pressed at the hearing, Verizon consistently refused to specify what forum would be available to a party in the event the other party refused to negotiate in good faith or if no agreement were reached.<sup>14</sup>

The Competitive Carriers believe that sections 251 and 252 are applicable to IP interconnection agreements for voice traffic with incumbent local exchange carriers like Verizon MA. They also believe that they are not required to give up the right to assert that section 252 applies as a condition to obtain IP interconnection. However, when Competitive Carriers Cbeyond and PAETEC informed Verizon that negotiations must take place in a section 252 context, Verizon broke off discussions and made no further effort toward agreement.

Verizon's position, in essence, is that if the other party in negotiations informs Verizon that it will not give up legal rights in order to obtain agreement, that party is not acting in good faith. If Verizon believes that, it should take a good look in the mirror. Negotiating in good faith does not require a party to accept offensive positions that Verizon tries to force on it or to give up its ability to assert important legal rights. It is the other way around — requiring a party to attest that an agreement satisfies the law, when it does not, violates the good-faith negotiation duty.<sup>15</sup> Verizon has made very clear that it will not concede the applicability of sections 251 and 252 to IP interconnection or IP interconnection negotiations; this entire proceeding is proof of that. It cannot credibly criticize other parties when they tell Verizon that agreeing to the non-applicability of sections 251 and 252 is a deal-breaker.

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<sup>13</sup> The Competitive Carriers have marked the foregoing passage as Confidential because Verizon has claimed confidential treatment for its Template Agreement. In so doing, the Competitive Carriers do not signify agreement with or endorsement of Verizon's confidentiality claim.

<sup>14</sup> 4/30 Tr. at 63-71.

<sup>15</sup> 47 C.F.R. § 51.301(c)(2).

Verizon claims that other entities have signed commercial, non-252 agreements for IP interconnection, but the acts of other providers have no bearing on this issue. For any number of reasons, those other entities have chosen not to pursue their legal rights under sections 251 and 252 (or their legal right to test the applicability of those provisions). The Competitive Carriers do not think that course of action appropriate. The Competitive Carriers have a legal right to seek the establishment of a regulatory backstop behind their efforts to interconnect in IP, and a legal right to be free from discriminatory behavior by Verizon in IP interconnection. Verizon's position, essentially, is that because the Competitive Carriers are seeking to enforce their rights under § 252, they have no right to a Department decision. That is untenable and absurd. Insistence upon their rights is not cause for retaliation or punishment by foreclosing them from a Department decision in this case.

**Verizon's hands are not clean.** Verizon portrays itself as above reproach, willing and able to bring the benefits of VoIP and IP interconnection to the citizens of Massachusetts, if only the Competitive Carriers would cooperate.<sup>16</sup> Verizon, however, lives in a glass house. The facts of this case show that Verizon's newfound zeal for IP interconnection arose only after the regulatory spotlights were turned on its longstanding failure to enter IP-interconnection agreements and its insistence on secret negotiations to facilitate the types of discriminatory behavior that the filing requirements of § 252 were designed to prevent.

First, Verizon's letters to the Competitive Carriers in VZ Ex. 5 were sent in June (and, in one case, October) 2013. This, of course, was months after the original, January 31, 2013 petition in DTC 13-2 in which some of the Competitive Carriers sought a declaration that the Verizon/Comcast agreements must be filed for review under § 252. And, it was years after IP-

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<sup>16</sup> Motion at 3-4.

interconnection had become the trend and then the rule among providers that are not incumbent LECs.<sup>17</sup> Worse, the letters were sent after the Department denied Verizon's first motion to stay the proceeding.<sup>18</sup> Verizon's interest in IP interconnection developed only after its attempt to derail this proceeding failed and it became apparent that the Department would investigate Verizon's IP interconnection activities and behavior.

Second, where negotiations over IP interconnection for purposes of exchanging voice traffic have occurred, as with Level 3, Verizon's participation has been grudging at best. It was Level 3, not Verizon, that initiated the negotiations to which Verizon refers in the Motion. (Verizon's Exhibit 5 does not include a letter to Level 3 because Level 3 had already initiated negotiations itself.) And, contrary to Verizon's assertion, these negotiations have not borne fruit and no longer are ongoing.

Third, Verizon's requirement of a far-reaching nondisclosure agreement as a condition to IP-interconnection negotiations is antithetical to the public disclosure provisions of section 252. Yet, when a Competitive Carrier protested, Verizon discontinued negotiations and now accuses that carrier of not acting in good faith.

In this regard, the experience of Cbeyond is telling. After expressing interest in response to Verizon's June 2013 letter, Verizon sent Cbeyond a standard template nondisclosure agreement (NDA). Verizon's NDA provided, among many other restrictions, that none of the statements made or information exchanged during negotiations shall be admissible in any proceeding before any court, administrative or regulatory body, or any arbitrator.

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<sup>17</sup> Malfara Rebuttal Testimony (CC Ex. 3), at 9-10.

<sup>18</sup> Order Opening an Investigation, Declining to Issue an Advisory Ruling, and Denying Verizon MA's Motion to Dismiss or Stay the Proceeding, D.T.C. 13-6 (May 13, 2013).

At the time it received Verizon's proposed NDA, of course, Cbeyond was engaged in this proceeding. Cbeyond counter-proposed language that would allow either party to use confidential information in proceedings before the FCC or state commissions (including the Department) for the purpose of advocating for or against a legal duty to interconnect in IP format for the exchange of voice traffic, subject to the entry of a suitable protective order in any such proceeding.

Verizon rejected Cbeyond's proposal. It reinserted its original language that none of the statements made or information exchanged during the discussions shall be admissible in any proceeding. Verizon did suggest language that would allow the parties to provide confidential information to the FCC or any state commission in a proceeding under 47 U.S.C. § 252(b)(2)(B), but only if such information were requested or ordered by the FCC or state commission. Restrictions of the type proposed by Verizon are just at, if they do not step over, the boundary of a *per se* violation of the duty to negotiate in good faith.<sup>19</sup> Cbeyond would not accept Verizon's proposal, as it would hamper Cbeyond's ability to assert its legal rights in this proceeding. Negotiations then ended.

So, Verizon reserves the right, as it has done in this proceeding, to trumpet to the Department, the FCC, and the public the fact that it has entered a handful of IP interconnection agreements, while prohibiting competitors from revealing the substance of those agreements (or how the agreements were arrived at) to regulators — unless the regulators ask. This begs the question, how will the regulators know to ask? Apparently, only if Verizon tells them.

Verizon's behavior serves its goal of discriminating in the IP interconnection arrangements that it enters. Verizon makes no bones about its desire to enter discriminatory

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<sup>19</sup> 47 C.F.R. § 51.301(c)(1); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325, 11 FCC Rcd. 15499, ¶ 151 (1996) ([http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/FCC-96-325A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-96-325A1.pdf)).

agreements. According to Verizon, secret negotiations are preferable because otherwise, “knowledge of specific terms on which Verizon is willing to exchange traffic with one carrier in IP format would confer a valuable business advantage on other carriers (Verizon MA’s competitors) who may also seek to exchange traffic in IP format – namely, a leg up in contract negotiations with Verizon MA.”<sup>20</sup> This kind of discrimination by an incumbent LEC is exactly what the Section 252(a)(1) filing requirement was designed to prevent. Verizon’s aggressive behavior regarding nondisclosure agreements provides another compelling reason why the Department should deny Verizon’s motion, should proceed to a decision, and find that the Verizon/Comcast agreements must be filed for review under § 252.

### Conclusion

For the foregoing reasons, Verizon MA’s motion should be denied, and the Department should proceed with briefing and to a decision in this case according to the existing procedural schedule.

Respectfully submitted,



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<sup>20</sup> Verizon MA Motion for Confidential Treatment, D.T.C. 13-6, at 3 (Dec. 23, 2013); *see* Verizon Rebuttal Testimony (Ex. VZ-2), at 9 (confidentiality agreements “preserve a level playing field *for Verizon* in future negotiations for IP VoIP interconnection agreements with other providers” [emphasis added]).