



COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 13-6

April 17, 2014

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

HEARING OFFICER RULING ON MOTION TO COMPEL RESPONSES TO VERIZON MA'S FIRST SET OF INFORMATION REQUESTS

I. INTRODUCTION

In this ruling, the Department of Telecommunications and Cable ("Department") addresses Verizon New England Inc., d/b/a Verizon Massachusetts' ("Verizon MA") motion to compel 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 data services llc; Level 3 Communications, LLC; and PAETEC Communication, LLC (collectively, "Competitive Intervenors") and XO Communications Services, LLC ("XO") to provide more detailed responses to Verizon MA's information requests VZ-I 1-1, VZ-I 1-2, VZ-XO 1-1, and VZ-XO 1-2. For the reasons discussed below, the Department grants in part and denies in part Verizon MA's motion. While Verizon MA is correct that it is entitled to much of the information it seeks to compel, the Department does impose some limitation on the Competitive Intervenors' and XO's obligation to

respond to VZ-I 1-1 and VZ-XO 1-1 to the extent those requests impose an undue burden.

Verizon MA's motion is granted in full to the extent it is directed at the responses to VZ-I 1-2 and VZ-XO 1-2.

II. BACKGROUND

On March 7, 2014, Verizon MA served information requests on Competitive Intervenor ("March 7 IRs to Competitive Intervenor") and XO (March 7 IRs to XO). Verizon MA in its information request VZ-I 1-1, asked that Competitive Intervenor, "identify, by title, effective date and the names of all parties, each agreement that each Intervenor has entered into with a service provider other than an affiliate concerning, providing for or governing the exchange in IP format of voice traffic coming from the other party to you." March 7 IRs to Competitive Intervenor at 2. In VZ-I 1-2 directly, Verizon MA asked that Competitive Intervenor, "produce all agreements identified in response to VZ-I 1-1, including all attachments, exhibits and schedules." *Id.* Verizon MA requested the same information from XO. *See* March 7 IRs to XO at 2.

On March 21, 2014, Competitive Intervenor and XO responded to Verizon MA's information requests ("Competitive Intervenor Responses"). They objected to VZ-I 1-1 and VZ-XO 1-1, but without waiving their objections, the parties responded that each of them had not entered any agreement "concerning, providing for, or governing the exchange in IP format of voice traffic" with an incumbent local exchange carrier (ILEC).¹ Competitive Intervenor Responses at 1; XO Responses at 6. In response to VZ-I 1-2 and VZ-XO 1-2, Competitive Intervenor and XO incorporated by reference their objections and response to VZ-I 1-1. Competitive Intervenor Responses at 3; XO Responses at 7.

¹ XO initial response stated it had not entered into any agreement with an ILEC in Massachusetts, but in its supplemental response filed on April 4, 2014 ("XO Supplemental Responses"), XO removed the "in Massachusetts" phrase. *See* XO Supplemental Responses at 4.

On March 28, 2014, Verizon MA filed its motion to compel more complete responses to information requests VZ-I 1-1, VZ-I 1-2, VZ-XO 1-1, and VZ-XO 1-2 (“Motion to Compel”). Specifically, Verizon MA seeks information concerning agreements governing the exchange of voice traffic in IP format between non-incumbent local exchange carriers and, respectively, Competitive Intervenors and XO. Motion to Compel at 1. On April 4, 2014, Competitive Intervenors filed their opposition to Verizon MA’s Motion to Compel (“Competitive Intervenors’ Opposition”) and XO filed its opposition to Verizon MA’s Motion to Compel (“XO’s Opposition”).

III. ANALYSIS AND FINDINGS

A party may move for an order to compel a response to discovery requests pursuant to 220 C.M.R. 1.06(6)(c)(4). Discovery is meant to facilitate the hearing process by granting access to all relevant information in an efficient and timely manner and ensure that a complete and accurate record is compiled. 220 C.M.R. 1.06(6)(c)(1). In establishing discovery procedures, the Department is instructed but not bound by the principles and procedures underlying the Massachusetts Rules of Civil Procedure. 220 C.M.R. 1.06(6)(c)(2). “Under the Massachusetts Rules of Civil Procedure, ‘parties may obtain discovery regarding any matter, not privileged, relevant to the subject matter involved in the pending action . . .if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.’” *In re Petition of Choice One Commc’ns of Mass. Inc., Conversent Commc’ns of Mass. Inc., CTC Commc’ns Corp. & Lightship Telecom LLC for Exemption from Price Cap on Intrastate Switched Access Rates as Established in D.T.C. 07-9, D.T.C. 10-2, Hearing Officer Ruling Regarding One Commc’ns’ Motion to Compel Responses to One Comm-AT&T-2-1* at 2 (Dec. 30,

2010) (“*Switched Access Rates Exemption Petition*”) (citing Mass. R. Civ. P. 26(b)(1)). The Department has broad discretion in considering the relevance of and admitting evidence. *Id.* (citing *Rate Setting Comm’n v. Baystate Med. Ctr.*, 422 Mass. 744, 752 (1996); PAUL J. LIACOS ET AL, HANDBOOK OF MASSACHUSETTS EVIDENCE § 4.1.2 (7th ed. 1999)). The Department will evaluate a claim of undue burden in responding to discovery in the context of the case and may protect parties against the undue burden of responding if the level of detail sought would not further the analysis of the issue or if the affect of the responses on the case is expected to be minimal. *See Investigation by the Dep’t of Telecomm. & 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 Discount for Verizon New England, Inc. d/b/a Verizon Mass.’ Resale Servs. in the Commw. of Mass. (“TELRIC Pricing Investigation”), D.T.E. 01-20, Interlocutory Order on Verizon’s AT&T’s Motion for Relief, Motions to Compel Verizon Responses to AT&T Information Requests, & Conditional Motion to Strike Verizon’s Recurring Cost Model (“October 18 Order”)* at 23 (Oct. 18, 2001).

A. The Department Grants in Part and Denies in Part the Motion to Compel Responses to VZ-I 1-1 and VZ-XO 1-1.

In its motion to compel, Verizon MA asserts that the parties have made competing claims concerning the extent to which VoIP providers are entering into agreements to exchange VoIP traffic in IP format and that the Department may need to resolve that claim. Motion to Compel at 4-5. The Department finds that Verizon MA has established that its information requests VZ-I 1-1, and VZ-XO 1-1 are in part relevant and reasonably calculated to lead to the discovery of admissible evidence, but that as written, they are still overly broad and unduly burdensome in some respects. Verizon MA’s asserted goal is to discern the extent to which VoIP providers are

entering into agreements to exchange VoIP traffic in IP format. Motion to Compel at 4. The Department therefore grants Verizon MA's motion, but limits the Competitive Carriers' and XO's obligation to respond to VZ-I 1-1 and VZ-XO 1-1 to only the number of agreements per-type of provider including, but not limited to ILECs, Competitive LECs, interexchange carriers ("IXCs"), non-ILEC affiliates of ILECs, and affiliates of the Intervenor, that each Intervenor has entered into concerning, providing for, or governing the exchange in IP format of voice traffic..

The Department is persuaded by Verizon MA's argument that the extent to which VoIP providers are entering into agreements for the exchange of voice traffic in IP format is relevant to the investigation, could lead to admissible evidence, and may facilitate the development of a complete record through the inclusion of evidence that may support testimony or provide a basis for arguments made in briefing. *See Switched Access Rates Exemption Petition* at 3. The test for discovery is not whether the information proves ultimately useful, but whether it is relevant and could lead to admissible evidence. *Id.* at 4. The information sought is relevant to Verizon MA's arguments and Verizon MA should have the opportunity to develop its position. *See TELRIC Pricing Investigation*, D.T.E. 01-20, *Interlocutory Order on Verizon's Appeal of Hearing Officer's August 8, 2001 Ruling on Motions to Compel* ("August 31 Order") at 12-13 (Aug. 31, 2001) (Granting Verizon MA's motion to compel responses to information request where the information sought was relevant to Verizon MA's ability to present its arguments in the investigation.).

However, the Department also finds persuasive Competitive Intervenors' assertions that Verizon MA's request for the titles, the effective dates, and names of the parties to the agreement is unduly burdensome and unnecessary to determine the extent to which VoIP providers are entering into agreements for the exchange of voice traffic in IP format. *See*

Competitive Intervenor Opposition at 7-8. In balancing the burden with the probative value of the information, the Department concludes that reducing the burden is appropriate. *See TELRIC Pricing Investigation*, D.T.E. 01-20, *October 18 Order* at 25.

Accordingly, the Department directs the Competitive Intervenor and XO to supplement their responses to VZ-I 1-1 and VZ-XO 1-1, respectively, to provide only the number of agreements per-type of provider including, but not limited to ILECs, Competitive LECs, interexchange carriers (“IXCs”), non-ILEC affiliates of ILECs, and affiliates of the Intervenor, that each Intervenor has entered into concerning, providing for, or governing the exchange in IP format of voice traffic. Competitive Intervenor and XO are directed to serve their supplement responses on or before April 28, 2014.

B. The Department Grants the Motion to Compel Responses to VZ-I 1-2 and VZ-XO 1-2.

The Department finds Verizon MA’s information requests VZ-I 1-2 and VZ-XO 1-2 to be relevant and reasonably calculated to provide admissible evidence. *See Switched Access Rates Exemption Petition* at 3. In granting Verizon MA’s motion to compel responses, the Department is persuaded that the production of the agreements identified in response to VZ-I 1-1 and VZ-XO 1-1, as limited by the Department above, will ensure the development of a complete and accurate record. Motion to Compel at 4. While the Department is not convinced that production of the agreements is necessary to understand the extent of agreements between VoIP providers to exchange VoIP traffic in IP format (*see id.*) production of the agreement will inform the Department of the structure and content of IP Interconnection Agreements, which in turn, will assist the Department in evaluating whether the Verizon MA agreements under investigation are subject to 47 U.S.C. §§ 251 and 252. While IP Interconnection Agreements that do not have an ILEC as a party are not subject to 47 U.S.C. 251 and 252 (Competitive

Intervenors Opposition at 4-5; XO Opposition at 5), this does not diminish the probative value to the Department of comparing IP Interconnection Agreement between entities to further its understanding of IP Interconnection Agreements and the applicability of 47 U.S.C. §§ 251 and 252 to IP Interconnection Agreements.

The Department is not persuaded that production of these agreements will be unduly burdensome as alleged by Competitive Intervenors and XO. Competitive Intervenors Opposition at 8; XO Opposition at 5-6. The fact that compliance may be time consuming or require confidential treatment is not ordinarily a sufficient reason to avoid production of relevant information, and the probative value of the information to be produced outweighs the burden of production. *TELRIC Pricing Investigation*, D.T.E. 01-20, *October 18 Order* at 23. The Department therefore grants Verizon MA's motion to compel Competitive Intervenors and XO to more fully respond to VZ-I 1-2 and VZ-XO 1-2, respectively. Competitive Intervenors and XO are directed to serve their supplement responses on or before April 28, 2014.

IV. CONCLUSION

According the Department GRANTS in part and DENIES in part Verizon MA's motion to compel responses to its information requests VZ-I 1-1, VZ-I 1-2, VZ-XO 1-1, and VZ-XO 1-2. The Department DIRECTS Competitive Intervenors to respond fully to VZ-I 1-1, as modified, and VZ-I 1-2. And the Department DIRECTS XO to respond fully to VZ-XO 1-1, as modified, and VZ-XO 1-2. The Competitive Intervenors and XO are directed to serve their supplemental responses on or before Monday, April 28, 2014.

/s/ Michael Scott
Michael Scott
Hearing Officer

NOTICE OF RIGHT TO APPEAL

Under the provisions of 220 C.M.R. § 1.06(d)(3), any aggrieved party may appeal this Ruling to the Commissioner by filing a written appeal with supporting documentation within five (5) days of this Ruling. A copy of this Ruling must accompany any appeal. A written response to any appeal must be filed within two (2) days of the appeal.