



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 MOTIONS TO STRIKE THE PRE-FILED DIRECT AND REBUTTAL TESTIMONY OF JOSEPH GILLAN AND JAMES R. BURT

I. INTRODUCTION

In this ruling, the Department of Telecommunications and Cable (“Department”) addresses the motions of Verizon New England Inc., d/b/a Verizon Massachusetts (“Verizon MA”) to strike the pre-filed direct and rebuttal testimonies of Joseph Gillan and James R. Burt to the extent the testimony offers legal opinions or opinion testimony as to Verizon MA’s motivations. For the reasons discussed below, the Department denies Verizon MA’s motions to strike.

II. BACKGROUND

On January 15, 2014, 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”)¹ filed the direct testimony of Joseph Gillan (“Gillan Direct Testimony”) in accordance with the November 29,

¹ Competitive Intervenors also refer to themselves as Competitive Carriers. Compare *Gillan Direct Testimony* and *Competitor Intervenors First Opposition*. The Department uses “Competitive Intervenors” in this ruling.

2013 Procedural Schedule and Notice. Procedural Schedule and Notice at 1. Sprint Spectrum L.P., Sprint Communications Company L.P., Nextel Communications of the Mid-Atlantic, Inc., and Virgin Mobile USA, Inc. (collectively “Sprint”), also on January 15, 2014, filed the direct testimony of James R. Burt (“Burt Direct Testimony”) in accordance with the November 29, 2013 Procedural Schedule and Notice. *Id.*

On January 21, 2014, Verizon MA filed its motion to strike the Gillan Direct Testimony and the Burt Direct Testimony (“First Motion to Strike”). On January 28, 2014, Competitive Intervenors filed their opposition to Verizon MA’s Motion to Strike (“Competitive Intervenors First Opposition”). Sprint, also on January 28, 2014, filed its opposition to Verizon MA’s Motion to Strike (“Sprint First Opposition”).

On February 5, 2014, Competitive Intervenors filed the rebuttal testimony of Joseph Gillan (“Gillan Rebuttal Testimony”) and the rebuttal testimony of David J. Malfara (“Malfara Rebuttal Testimony”). Sprint, also on February 5, 2014, filed the rebuttal testimony of James R. Burt (“Burt Rebuttal Testimony”). On February 11, 2014, Verizon MA filed its motion to strike the pre-filled rebuttal testimonies of Joseph Gillan and James R. Burt (“Second Motion to Strike”). Competitive Intervenors filed their opposition to Verizon MA’s Second Motion to Strike (“Competitive Intervenors Second Opposition”) on February 18, 2014. Sprint also filed its opposition to Verizon MA’s Second Motion to Strike (“Sprint Second Opposition”) on February 18, 2014.

III. ANALYSIS AND FINDINGS

The Department, as part of maintaining an orderly and efficient proceeding, generally admits the testimony of expert witnesses. *Investigation by the Dep’t of Telecomm. and Energy*

on its own motion as to the propriety of the rates and charges set forth in the following tariffs: Bay State Gas Co., M.D.T.E. Nos. 38 through 62, filed on Sept. 15, 2006, to become effective Nov. 1, 2006 (“Bay State”), D.T.E. 06-77, Order at 3 (Oct. 31, 2006) (“As a rule, the Department admits all testimony of experts and evaluates a witness’s qualifications as we weigh the evidence of the proceeding.”). The Department has wide latitude in the admission of evidence as long as it does not result in a denial of substantial justice. Western Mass. Bus Lines, Inc. v. Dep’t of Pub. Utils., 363 Mass. 61, 63 (Feb. 8, 1973). The Department need not adhere to the rules of evidence observed by courts, but may admit evidence and give testimony probative effect if it is the kind of evidence on which reasonable persons are accustomed to rely on in the conduct of serious affairs. G. L. c. 30A, § 11(2); 220 C.M.R. §1.10(1); Investigation by the Dep’t of Telecomm. & Energy on its own motion as to the propriety of the rates and charges set forth in the following tariffs: M.D.T.E. Nos. 280 through 305, filed with the Dep’t on July 17, 2001 by The Berkshire Gas Co. (“Berkshire”), D.T.E. 01-56, Order at 6-7 (Jan. 31, 2002).

Rather than pre-evaluate the testimony, the Department will accord the testimony appropriate evidentiary weight relying on factors such as credibility, reliability, corroboration, and validity. *Berkshire, D.T.E. 01-56, Order at 6; 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 Services in the Commw. of Mass. (“TELRIC Investigation”), D.T.E. 01-20 Part A-A, Order on Motions by Verizon Mass., AT&T Commc’n of New England, Inc., & CLEC Coalition for Partial Reconsideration & Clarification & on Motions by Worldcom, Inc. & Z-Tel Commc’n for Partial Reconsideration (“Order on Motions”), Commissioner Connelly,*

concurring in part and dissenting in part, at 168-169 (Jan. 14, 2003). Parties have the right to and are encouraged to cross-examine expert witnesses and submit rebuttal evidence. G. L. c. 30A, §11(3); *TELRIC Investigation*, D.T.E. 01-20 Part A-A, *Order on Motions*, Commissioner Connelly, concurring in part and dissenting in part at 169 (“Questions as to the reliability of expert opinion...can be addressed by close cross-questioning of an expert witness”). Parties also have full opportunity in their briefs to argue: the validity, credibility, and merit of the expert testimony presented; whether a party has submitted substantial evidence to establish their case; and the appropriate weight, if any, to afford testimony. *Bay State*, D.T.E. 06-77, *Order* at 3 (“The Department ... evaluates a witness’s qualifications as we weigh the evidence of the proceeding.”); *Investigation by the Dep’t into the propriety of the cost studies filed by the New England Tel. and Tel. Co. on April 18, 1986, pursuant to the Dep’t’s Orders in D.P.U. 1731*, D.P.U. 86-33-F, *Interlocutory Order on Procedural Motions and Appeals* at 15 (Jan. 19, 1988) (“As is our practice, we will hear argument from parties regarding the weigh such evidence should be accorded.”); *Berkshire*, D.T.E. 01-56, *Order* at 6 (The Department considers the credibility of expert testimony as part of a party’s presentation of its case, and parties have the opportunity on brief to argue that a party’s case is not supported by substantial evidence.); *TELRIC Investigation*, D.T.E. 01-20 Part A-A, *Order on Motions*, Commissioner Connelly, concurring in part and dissenting in part at 169 (Where expert testimony found wanting may be given little or no credence, while expert testimony that withstands cross-examination may be fairly relied upon.).

Verizon MA asserts that the Gillan Direct Testimony and Gillan Rebuttal Testimony and the Burt Direct Testimony and Burt Rebuttal Testimony is replete with legal opinion testimony and improper opinion testimony as to Verizon MA’s motivation and seeks to strike such

testimony. First Motion to Strike at 2-3; Second Motion to Strike at 1. Competitive Intervenors and Sprint assert the Department should accept the Gillan Direct Testimony and Gillan Rebuttal Testimony and the Burt Direct Testimony and Burt Rebuttal Testimony and exercise its discretion in determining the weight to give such testimony. Competitive Intervenors First Opposition at 1; Competitive Intervenors Second Opposition at 3; Sprint First Opposition at 2; Sprint Second Opposition at 1. The Department, in keeping with its precedent discussed above, finds it unnecessary to pre-evaluate the Direct and Rebuttal Testimonies of Joseph Gillan and James R. Burt. Rather, the Department will consider each testimony and its appropriate weight in the proceeding as a whole. The Department makes clear that this ruling is not a determination on the merit or weight afforded the testimonies. The Department reserves such determinations as a part of considering the proceeding as whole, in its process for reaching a final determination. Parties are encouraged to exercise their rights, including cross-examination and briefing, to assist the Department in assigning the appropriate weight to the evidence presented in light of the proceeding as a whole.

IV. CONCLUSION

Accordingly, the Department DENIES Verizon MA's motions to strikes the pre-filed Direct and Rebuttal Testimonies of Joseph Gillan and James R. Burt.

/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.