

**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

D.T.C. 13-6

**OPPOSITION OF VERIZON MA
TO INTERVENORS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION AND SUMMARY

Providers have been exchanging and terminating VoIP traffic for more than a decade. There is no Internet protocol (“IP”) interconnection problem in Massachusetts (or elsewhere) for the Department to address. Verizon has demonstrated its willingness to negotiate IP VoIP interconnection terms with any provider and has successfully done so in more than a half-dozen cases already. Instead, this case and the instant motion for summary judgment are simply part of an effort to obtain leverage and special regulatory benefits unavailable to other marketplace participants. The Department should not be party to such efforts, should deny summary judgment, and should ultimately find that the contracts at issue are not § 252 interconnection agreements and terminate this proceeding.

Verizon is at the forefront of commercial efforts among VoIP providers to enter contracts for the exchange of VoIP traffic in IP format. Verizon has entered into seven contracts — including most recently with Brightlink Communications, LLC — for IP VoIP interconnection with VoIP providers with a variety of business plans and continues to negotiate with many other providers. Those IP VoIP interconnection arrangements allow for the exchange of VoIP traffic among VoIP customers across the nation without the traffic ever touching the public switched telephone network (“PSTN”). No state commission — or the Federal Communications Commission (“FCC”) — has required Verizon or the VoIP providers to file any of these contracts as § 252 interconnection agreements. Nonetheless, the Intervenors assert that, unless filing under § 252 is required, they cannot obtain IP VoIP interconnection with Verizon. That is false. In fact, two of the Intervenors have refused even to try to negotiate with Verizon. And Sprint’s recent actions — abandoning its efforts in three states to include IP interconnection terms in § 252 interconnection agreements after prevailing on that issue in one of those states — confirm that even those invoking § 252 do not actually want to exchange VoIP traffic through

inefficient legacy interconnection agreements with incumbent local exchange carriers (“ILECs” or “incumbent LECs”). That is unsurprising because it would make no sense to force VoIP providers into historical LATA-by-LATA and state-by-state interconnection arrangements for VoIP traffic. One of the primary benefits of the IP transition is that very few points of interconnection are required to exchange VoIP traffic nationwide, as Verizon’s existing IP VoIP interconnection agreements demonstrate.

Moreover, through their present motion for summary judgment, the Competitive Carrier Intervenor¹ — alone among the parties — seek to terminate this proceeding before the Department even conducts the hearing in this case, which is scheduled to occur at the end of this month. The Department should deny the motion and 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.

The Intervenor is also wrong in claiming that there are no material factual disputes in this case, and they misstate and misapply the law. The Department should deny the motion because the Intervenor has not established either the absence of a genuine dispute of material fact or entitlement to the relief they seek as a matter of law. As demonstrated below, there are substantial disagreements about the obligations that the Traffic Exchange Agreement and the VoIP-to-VoIP Agreement establish, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]**

[REDACTED]

[REDACTED]

¹ The self-described Competitive Carriers that have intervened in this proceeding are 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 Communications, Inc.

[END HIGHLY SENSITIVE CONFIDENTIAL] In

addition, the Intervenors do not address — much less demonstrate the absence of disputes about — whether VoIP is an information service and VoIP providers, like Comcast IP, are information service providers.

The Intervenors also propose a legal standard for determining which agreements are interconnection agreements that must be filed with state commissions under § 252 that conflicts with the text of the statute, and the FCC's and the Department's own prior decisions. Under the correct legal standard, only agreements between an incumbent LEC and another telecommunications carrier that implement one or more of the § 251(b) or (c) duties can qualify as a § 252 interconnection agreement. In light of the numerous genuine disputes of material fact, the Department need not resolve that legal issue — or the others addressed below — to deny the Intervenors' motion for summary judgment. Furthermore, to the extent the Department finds any of the statutory provisions at issue to be ambiguous, the Department must develop a full record on which to adjudicate the parties' policy disputes so that it can resolve any statutory ambiguities consistent with sound public policy

BACKGROUND

On May 15, 2013, the Department opened this proceeding on its own motion to consider whether three agreements between various Verizon and Comcast entities are § 252 interconnection agreements that must be filed with the Department.² The Intervenors have filed a motion for summary judgment that two of those agreements — the Traffic Exchange

² See 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. 13-2 & 13-6 (May 13, 2013).

Agreement (“TEA”) and the VoIP-to-VoIP Agreement (“V2V”) — are § 252 interconnection agreements.³

The Traffic Exchange Agreement [BEGIN HIGHLY SENSITIVE CONFIDENTIAL]

[REDACTED]

[REDACTED]⁴ [END HIGHLY SENSITIVE

CONFIDENTIAL] The contract contains terms that address the intercarrier compensation rules

and rates that will apply to their exchange of VoIP Traffic. [BEGIN HIGHLY SENSITIVE

CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷

[END HIGHLY SENSITIVE CONFIDENTIAL]

³ The Intervenors have not sought summary judgment on the question whether the third agreement — [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] — must be filed as a § 252 interconnection agreement.

⁴ [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL]

⁵ See TEA §§ 1.26, 2.2.

⁶ *Id.* §§ 1.6, 1.11, 1.20.

⁷ See *id.* §§ 1.14, 2.3.

The VoIP-to-VoIP Agreement [BEGIN HIGHLY SENSITIVE CONFIDENTIAL]

[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL] Comcast IP is *not* a LEC or a telecommunications carrier of any kind. Instead, Comcast IP is an information service provider that “offers retail interconnected voice over internet protocol (“VoIP”) services not subject to regulation by the Department of Telecommunications and Cable (“Department”) pursuant to M.G.L. c. 25C, § 6A.”⁹

The VoIP-to-VoIP Agreement [BEGIN HIGHLY SENSITIVE CONFIDENTIAL]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁸ See V2V Preface; Verizon MA Panel Testimony at 19. A copy of the V2V is Exhibit B to the Moore Declaration.

⁹ Comcast’s Response to Competitive Carriers’ First Set of Information Requests to Comcast at 1 (Jan. 10, 2014) (Moore Decl. Ex. C).

¹⁰ V2V IP Interconnection Attach. §§ 1, 3.1; V2V Glossary § 2.50; see Verizon MA Panel Testimony at 20-21.

¹¹ V2V IP Interconnection Attach. § 3.2.14; see Verizon MA Panel Testimony at 20-21 (Moore Decl. Ex. D). [BEGIN CONFIDENTIAL]

[REDACTED]

[END CONFIDENTIAL]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL]

ARGUMENT

A. Only Agreements Between Incumbent LECs and Requesting Telecommunications Carriers That Implement Duties Imposed in § 251(b) or (c) Are § 252 Interconnection Agreements That Must Be Filed with State Commissions

1. As the FCC recognized in the *Qwest Declaratory Ruling*,¹⁴ identifying those incumbent LEC agreements that must be filed with state commissions under § 252 “begin[s] . . . with the statutory language” — specifically § 251(c)(1) and § 252(a)(1).¹⁵ The former section imposes on both the incumbent LEC and the “requesting telecommunications carrier” the duty “to negotiate in good faith” the terms and conditions of an agreement “to fulfill the duties” set forth in § 251(b) and (c).¹⁶ The latter section makes clear that the start of the § 252 process is “a request for interconnection, services, or network elements pursuant to section 251” that is made by a “requesting telecommunications carrier.”¹⁷

Two relevant conclusions follow from these provisions. First, *only* an agreement between an incumbent LEC and a requesting telecommunications carrier can qualify as a § 252 interconnection agreement. An agreement between an incumbent LEC and a *non*-telecommunications carrier — [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

¹² See V2V IP Interconnection Attach. §§ 2, 4-7; Verizon MA Panel Testimony at 19-20, 21-27.

¹³ V2V § 12; V2V IP Interconnection Attach. § 9.

¹⁴ See Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, 17 FCC Rcd 19337 (2002) (“*Qwest Declaratory Ruling*”).

¹⁵ *Id.* ¶ 8.

¹⁶ 47 U.S.C. § 251(c)(1).

¹⁷ *Id.* § 252(a)(1).

[REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL] — is *not* a § 252 interconnection agreement.

Second, the category of § 252 interconnection agreements is “inextricably tied to the duties imposed under Section 251.”¹⁸ The Second Circuit recognized this link when it upheld the Connecticut commission’s ruling that a transit service agreement between AT&T Connecticut and a CLEC (Pocket Communications) is a § 252 interconnection agreement. The court agreed with the Connecticut commission that “state commissions do not have . . . authority” over agreements for “services that are not subject to § 252.”¹⁹ But the court upheld the Connecticut commission’s ruling that the AT&T-Pocket agreement is a § 252 interconnection agreement because that commission had found that “transit service should be regulated under § 251.”²⁰ Therefore, agreements that do not implement any § 251(b) or (c) duty are *not* § 252 interconnection agreements, even if they are between an incumbent LEC and another telecommunications carrier.

2. The *Qwest Declaratory Ruling*, in which the FCC provided “guidance” that “flows directly from the statute,” confirms these two conclusions.²¹

First, the FCC noted throughout the *Qwest Declaratory Ruling* that the agreements it was addressing were those between an incumbent LEC and a requesting telecommunications carrier. The FCC started by recognizing that § 252(a)(1) pertains only to an “agreement between the incumbent LEC and the requesting competitive LEC.”²² The FCC also stated that the standard for determining which contracts are § 252 interconnection agreements identifies those

¹⁸ *Qwest Corp. v. Arizona Corp. Comm’n*, 567 F.3d 1109, 1117 (9th Cir. 2009).

¹⁹ *Southern New England Tel. Co. v. Comcast Phone of Connecticut, Inc.*, 718 F.3d 53, 61 (2d Cir. 2013).

²⁰ *Id.* at 60-61; *see id.* at 62-63 (upholding the Connecticut commission’s finding that § 251(c)(2) requires incumbent LECs to provide transit service).

²¹ *Qwest Declaratory Ruling* ¶ 10.

²² *Id.* ¶ 8.

“agreements between an incumbent LEC and a requesting carrier” that “must be filed under 252(a)(1).”²³ And the FCC noted that state commissions, in applying the FCC’s standard, would “provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for their approval.”²⁴

Second, the FCC made clear that only an “agreement that creates an ongoing obligation pertaining to” one of the duties in § 251(b) or (c) “is an interconnection agreement that must be filed pursuant to section 252(a)(1).”²⁵ Further emphasizing the link between the substantive duties in § 251(b) and (c) and the class of agreements that qualify as interconnection agreements, the FCC reiterated its standard in a footnote, stating that “only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1).”²⁶ Although the FCC used slightly different language in its two formulations — “create[.]” and “contain,” and “pertaining to” and “relating to” — the common thread in both formulations is the requirement that the obligations be those from § 251(b) or (c).

The FCC applied that standard two months later, when it “reviewed twelve [Qwest] agreements that AT&T allege[d] should have been filed with the state commissions under section 252.”²⁷ The FCC found that 11 of the 12 “need not be filed with state commissions under the standards enunciated” in the *Qwest Declaratory Ruling*.²⁸ One of those 11 agreements

²³ *Id.* ¶ 8 n.26.

²⁴ *Id.* ¶ 10.

²⁵ *Id.* ¶ 8 (emphasis omitted); see Notice of Apparent Liability for Forfeiture, *Qwest Corporation Apparent Liability for Forfeiture*, 19 FCC Rcd 5169, ¶ 22 n.70 (2004) (“*Qwest NAL*”) (explaining that the list of duties in paragraph 8 of the *Qwest Declaratory Ruling* “is a summary of the interconnection obligations listed in section 251 of the Act”).

²⁶ *Qwest Declaratory Ruling* ¶ 8 n.26.

²⁷ Memorandum Opinion and Order, *Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, 17 FCC Rcd 26303, ¶ 478 n.1746 (2002) (“*Qwest Nine-State Order*”).

²⁸ *Id.*

was a “Directory Assistance Agreement” between Qwest and a CLEC, which the FCC found did not need to be filed because it was “not 251-related” — that is, it “did not contain ongoing section 251(b) or (c) obligations.”²⁹ The FCC reached this conclusion even though it previously had found that § 251(c)(3) requires incumbent LECs to provide directory assistance as an unbundled network element — an obligation that it eliminated in 1999.³⁰ The FCC’s decision in the *Qwest Nine-State Order* thus confirms that an agreement that imposes obligations beyond what § 251(b) and (c) require does not “create[]” or “contain” an ongoing obligation “pertaining to” or “relating to” those substantive duties.³¹

The Department reached a similar result when it rejected arguments that Verizon MA’s interconnection agreements should include provisions that address Verizon MA’s rates, terms, and conditions for network elements that the FCC formerly — but no longer — required to be unbundled under § 251(c)(3).³² As the Department explained, terms for “discontinued” unbundled network elements do not belong in the interconnection agreements “because ‘only those agreements that contain an ongoing obligation relating to § 251(b) or (c) must be filed

²⁹ *Id.* ¶ 478 & n.1746.

³⁰ See First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 536 (1996) (“*Local Competition Order*”) (requiring “unbundling” of “directory assistance”); Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 661 (2003) (“*Triennial Review Order*”) (noting that directory assistance was “removed . . . from the list” of unbundled network elements in 1999).

³¹ *Qwest Declaratory Ruling* ¶ 8 & n.26. The one agreement that the FCC, in the *Qwest Nine-State Order*, held that Qwest should have filed was an “Internetwork Calling Name Delivery Service Agreement.” *Qwest Nine-State Order* ¶ 478 n.1746. At the time of that order, the FCC required incumbent LECs to provide unbundled access to the Calling Name database. See Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 416 (1999). The FCC eliminated that obligation in 2003. See *Triennial Review Order* ¶ 554.

³² See Arbitration Order at 85, *Petition of Verizon New England Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order*, D.T.E. 04-33 (July 14, 2005) (“*Department Arbitration Order*”), available at <http://www.mass.gov/ocabr/docs/dtc/dockets/04-33/714arborder.pdf>.

under 252(a)(1).’ ”³³ The Department held further that, with respect to network elements that “need not be unbundled under § 251(c)(3),” the terms on which Verizon MA provides access to that element are “no longer subject to compulsory negotiation and arbitration” under § 252.³⁴ Instead, such “non-section 251 negotiations” may occur “separate[] from . . . interconnection agreements,” and “[o]rdinary contract law” — not § 251 or § 252 — “provides the backdrop of any such arrangement.”³⁵

3. In arguing that both the Traffic Exchange Agreement and the VoIP-to-VoIP Agreement are § 252 interconnection agreements, the Intervenors offer a legal standard that cannot be squared with the text of the statute or the FCC and Department orders discussed above.

First, the Intervenors assert that an agreement between an incumbent LEC and a provider that is not a telecommunications carrier can still qualify as an interconnection agreement.³⁶ But they say nothing about the provisions of § 251(c)(1) and § 252(a)(1) that limit the duty to enter into interconnection agreements to incumbent LECs and “requesting telecommunications carrier[s].” Congress specifically chose to use “telecommunications carrier” in each of these provisions — a defined statutory term³⁷ — and therefore must be understood to have intended to limit the category of § 252 interconnection agreements to contracts between an incumbent LEC and another telecommunications carrier.³⁸ XO recently agreed that “[s]ection 251(c) and 252

³³ *Id.* (quoting *Qwest Declaratory Ruling* ¶ 8 n.26).

³⁴ *Id.*

³⁵ *Id.* at 86.

³⁶ See Intervenors Br. 13-15.

³⁷ See 47 U.S.C. § 153(51).

³⁸ See *Florida Dep’t of Banking & Fin. v. Board of Governors of Fed. Reserve Sys.*, 800 F.2d 1534, 1536 (11th Cir. 1986) (“It is an elementary precept of statutory construction that the definition of a term in the definitional section of a statute controls the construction of that term wherever it appears throughout the statute.”).

explicitly and unambiguously apply **only** to agreements between an ILEC and a requesting telecommunications carrier.”³⁹

The Intervenor also do not address the FCC’s multiple statements in the *Qwest Declaratory Ruling* that it was addressing only agreements between incumbent LECs and requesting telecommunications carriers.⁴⁰ Instead, the Intervenor assert — citing no authority — that an agreement can qualify as an interconnection agreement if the non-telecommunications carrier party, to fulfill its duties under the agreement, obtains services from a telecommunications carrier.⁴¹ That assertion has no basis in the statute or any FCC order, and it conflicts with basic principles of contract law, under which a party’s use of a subcontractor to fulfill its contractual duties does not alter the identity of the parties to the contract.⁴²

Second, the Intervenor argue that any agreement that creates an obligation “relating to the physical linking of networks” is an interconnection agreement that must be filed with state commissions.⁴³ Therefore, on the Intervenor’s view, it is irrelevant whether § 251(c)(2) requires incumbent LECs to allow requesting carriers to interconnect in IP format for the exchange of traffic between two VoIP customers. Indeed, the Intervenor never once argue — or even assert — in their summary judgment motion that § 251(c)(2) requires IP VoIP interconnection.⁴⁴

As explained in greater detail below, the Intervenor’s argument fails because § 251(c)(2) does not impose an open-ended obligation to provide interconnection in all situations and for all purposes. Instead, Congress expressly limited the interconnection duty in § 251(c)(2) to

³⁹ XO Communications Services, LLC’s Opposition to Verizon-MA’s Motion to Compel at 3, D.T.C. 13-6 (Apr. 4, 2014) (Moore Decl. Ex. E).

⁴⁰ See *supra* pages 7-8.

⁴¹ See Intervenor Br. 14-15.

⁴² See, e.g., *Fireman’s Fund Ins. Co. v. Falco Constr. Corp.*, 493 F. Supp. 2d 143, 145-46 (D. Mass. 2007).

⁴³ Intervenor Br. 5.

⁴⁴ The Intervenor have submitted testimony from non-lawyer witnesses who claim that § 251(c)(2) so requires, but the Intervenor do not present those arguments in their brief.

interconnection with a “requesting telecommunications carrier” that is “for the transmission and routing of telephone exchange service and exchange access” — for telecommunications services.⁴⁵ A contract that provides for the physical linking of an incumbent LEC’s network with the network of an information service provider solely for the exchange of information service traffic — [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED] [REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL] — does not create or contain an ongoing obligation that pertains or relates to the § 251(c)(2) interconnection duty. Such a contract does not need to be filed with a state commission pursuant to § 252, under the standard set out in the *Qwest Declaratory Ruling* and as applied by the FCC.

The Intervenors give little more than lip service to the standard the FCC established in the *Qwest Declaratory Ruling*, and then proceed to ignore the FCC’s limitation to agreements that address the “obligations listed in section 251 of the Act”⁴⁶ on the ground that others have interpreted the FCC’s standard “broadly.”⁴⁷ But each of the cases the Intervenors cite addressed the question whether a contract to provide, on a commercial basis, a service comparable to the previously required UNE Platform must be filed under § 252. None addressed the question whether a contract with an information services provider to interconnect networks for the exchange of information services traffic either pertains or relates to the § 251(c)(2) interconnection duty.⁴⁸ Furthermore, when the Department considered Verizon MA’s use

⁴⁵ 47 U.S.C. § 251(c)(2)(A).

⁴⁶ *Qwest NAL* ¶ 22 n.70 (discussing *Qwest Declaratory Ruling* ¶ 8).

⁴⁷ Intervenors Br. 4.

⁴⁸ To the extent the Tenth Circuit concluded, in *dicta*, that a commercial contract replacing the UNE Platform — which allowed a CLEC to provide service entirely over the incumbent LEC’s network, without using (let alone interconnecting) its own network facilities — “is unmistakably related to the physical connection of two networks,” that court clearly erred. *Qwest Corp. v. Public Utils. Comm’n of Colorado*, 479 F.3d 1184, 1193 (10th Cir. 2007). The Seventh Circuit recognized that the actual, limited holding of *Qwest Corp.* is that “an agreement on the terms of access required by section 251 must be filed with the state commission under section 252 even if the agreement also sets terms for access under section 271.” *Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 613 (7th Cir.

of commercial offerings to replace formerly required unbundled network elements — including the UNE Platform — it rejected claims that such terms must be included in interconnection agreements.⁴⁹

B. The Traffic Exchange Agreement and the VoIP-to-VoIP Agreement Are Not “Interconnection Agreements” Under 47 U.S.C. § 252(a)

Under the standards set forth in the statute and the *Qwest Declaratory Ruling*, neither the Traffic Exchange Agreement nor the VoIP-to-VoIP Agreement is an interconnection agreement that must be filed under § 252. At this stage in the proceedings, however, the Department need not find that Verizon MA has proven that neither agreement is a § 252 interconnection agreement to deny the Intervenor’s motion for summary judgment. That is because, as detailed below, the Intervenor fails to demonstrate both the absence of any genuine dispute of a material fact and an entitlement to judgment as a matter of law. Therefore, the Department should proceed with the hearing in this case, so that it can develop a complete record on which to base its decision.

1. The Traffic Exchange Agreement Is Not a § 252 Interconnection Agreement

a. [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED]

2008). There is no argument here — nor could there be — that either the Traffic Exchange Agreement or the VoIP-to-VoIP Agreement implements a § 271 duty.

⁴⁹ See *Department Arbitration Order* at 85-86; see also Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17, at 56-57, *Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission’s Triennial Review Order Regarding Switching for Mass Market Customers*, D.T.E. 03-60 & 04-73 (Dec. 15, 2004) (rejecting claims that the Department “should assert jurisdiction over Verizon’s network elements” offered on a commercial basis to replace formerly required unbundled network elements), available at <http://www.mass.gov/ocabr/docs/dtc/dockets/03-60/1215conord.pdf>; Order Denying Motion of Verizon Massachusetts for Partial Reconsideration at 9, *Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission’s Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops*, D.T.E. 03-59-B (Dec. 15, 2004) (recognizing that Verizon MA could offer such replacement elements “through individually negotiated contracts” on a private carriage basis), available at <http://www.mass.gov/ocabr/docs/dtc/dockets/03-59/1215ordden.pdf>.

[REDACTED]

[REDACTED] **[END HIGHLY SENSITIVE CONFIDENTIAL]** In the *ICC Reform Order*,⁵⁰ the FCC explicitly held that § 251(b)(5) applies only to VoIP traffic that is “exchanged over PSTN facilities” — that is, in TDM format “and not in IP format.”⁵¹ The FCC’s regulation governing intercarrier compensation for VoIP-PSTN traffic is similarly limited to traffic “exchanged . . . in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format.”⁵² Therefore, the provisions of the Traffic Exchange Agreement

[BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED] **[END HIGHLY SENSITIVE CONFIDENTIAL]** do not create or contain an obligation that relates or pertains to § 251(b)(5).

Although the Traffic Exchange Agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [REDACTED]

[REDACTED] **[END HIGHLY SENSITIVE CONFIDENTIAL]** the FCC made clear that carriers are “free to negotiate *commercial agreements* that may depart from the default regime” for that category of VoIP traffic.⁵⁵ Such “commercial agreements” are

⁵⁰ See Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663 (2011) (“*ICC Reform Order*”), *petitions for review pending, In re FCC 11-161*, Nos. 11-9900, *et al.* (10th Cir. argued Nov. 19, 2013).

⁵¹ *Id.* ¶ 940 (internal quotation marks omitted); *see id.* ¶ 969 (reiterating that its “VoIP-PSTN intercarrier compensation rules focus specifically on whether the exchange of traffic occurs in TDM format (and not in IP format”).

⁵² 47 C.F.R. § 51.913.

⁵³ See TEA § 1.11, 2.2.

⁵⁴ See *id.* §§ 1.20, 2.3; Verizon MA Panel Testimony at 16-17. **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [REDACTED]

[REDACTED] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

⁵⁵ *ICC Reform Order* ¶ 739 n.1290 (emphasis added; internal quotation marks omitted); *see also id.* ¶ 784 n.1443 (noting that Verizon had “entered into a *commercial agreement* with Bandwidth.com for the exchange of VoIP traffic”) (emphasis added).

not § 252 interconnection agreements. Indeed, the FCC drew a distinction in the *Qwest Declaratory Ruling* between the interconnection agreements that are subject to § 252 and “commercial relations between incumbent and competitive LECs” that are free from the “regulatory impediments” that § 252 creates for entering into normal commercial contracts.⁵⁶ The FCC’s endorsement of such commercial agreements in the *ICC Reform Order* necessarily means that such agreements are not subject to the § 252 regime, including public disclosure and filing, state commission approval, and the ability of non-parties to the agreements unilaterally to adopt them as their own.

[BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED] **[END HIGHLY SENSITIVE CONFIDENTIAL]** For example, under that regime, the default rates for terminating “toll” VoIP-PSTN traffic are the terminating switched access rates found in a carrier’s federal tariff.⁵⁸ **[BEGIN HIGHLY SENSITIVE**

CONFIDENTIAL] [REDACTED]

[REDACTED] **[END HIGHLY**

⁵⁶ *Qwest Declaratory Ruling* ¶ 8; see Hearing Officer Ruling on Motion To Comply with Hearing Officer Ruling and Protective Order at 7, D.T.C. 13-6 (Jan. 31, 2014) (noting that “many contracts between commercial entities are kept confidential in their entirety” and that, unless the contracts at issue are § 252 interconnection agreements, there is “no . . . basis” for mandating “public disclosure” of those contracts).

⁵⁷ See Verizon MA Panel Testimony at 17.

⁵⁸ See *ICC Reform Order* ¶ 944 & n.1902.

⁵⁹ See TEA § 2.2.1. **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [REDACTED]

[END HIGHLY SENSITIVE CONFIDENTIAL]

2. [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[END HIGHLY SENSITIVE CONFIDENTIAL]

3. [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁶⁴ *Id.* at 9.

⁶⁵ *See id.* (citing TEA §§ 1.11, 2.1; TEA Amend. 1, at 1).

⁶⁶ TEA § 1.11.

⁶⁷ [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED]

[END HIGHLY SENSITIVE CONFIDENTIAL]

⁶⁸ *See* Intervenors Br. 10.

[REDACTED]
[REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL]

4. [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED]
[REDACTED]
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[REDACTED]
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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [END HIGHLY

SENSITIVE CONFIDENTIAL]

2. *The VoIP-to-VoIP Agreement Is Not a § 252 Interconnection Agreement*

a. The VoIP-to-VoIP Agreement is not a § 252 interconnection because it is between [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL] Comcast IP’s retail VoIP services offer customers a single, integrated suite of features and capabilities that allow them to “generat[e], acquir[e], stor[e], transform[], process[], retriev[e], utiliz[e], or mak[e] available information via telecommunications.”⁷⁸ Under the test the United States Supreme Court applied in *National Cable & Telecommunications Association v. Brand X Internet Services*,⁷⁹ Comcast IP’s VoIP

⁷⁵ Intervenors Br. 10-11.

⁷⁶ *Qwest Declaratory Ruling* ¶ 9.

⁷⁷ TEA § 18.

⁷⁸ 47 U.S.C. § 153(24); see Comcast’s Response to Verizon’s First Set of Information Requests to Comcast at 5-7 (Feb. 6, 2014) (Moore Decl. Ex. F) (detailing the numerous information processing functions that are tightly integrated into Comcast IP’s retail VoIP offerings).

⁷⁹ 545 U.S. 967 (2005).

service is an information service and Comcast IP is therefore an information service provider, not a telecommunications carrier.⁸⁰ [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL]

The VoIP-to-VoIP Agreement is also not a § 252 interconnection agreement because the contractual obligation [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL] The duty in § 251(c)(2) is limited to interconnection with a “requesting telecommunications carrier” that is “for the transmission and routing of telephone exchange service and exchange access” — for telecommunications services.⁸¹ Although the FCC has identified “ensuring the transition to IP-to-IP interconnection” as an important policy,⁸² it has never interpreted § 251(c)(2) to require interconnection in IP format for the exchange of traffic between two VoIP customers. Indeed, the FCC has never interpreted § 251(c)(2) to require interconnection for traffic that never touches the PSTN.

The FCC has not even settled on § 251(c)(2) — or any specific provision of the Communications Act — as the source of the duty on “all carriers to negotiate in good faith in

⁸⁰ A telecommunications carrier is a provider of telecommunications services. *See* 47 U.S.C. § 153(51). Information services and telecommunications services are mutually exclusive categories under the Communications Act. *See Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 219-20 (3d Cir. 2007); 47 U.S.C. § 153(24), (53).

⁸¹ 47 U.S.C. § 251(c)(2)(A).

⁸² *ICC Reform Order* ¶ 1335.

response to requests for IP-to-IP interconnection for the exchange of voice traffic.”⁸³ The FCC is currently seeking comments on which of “one or more of various provisions of the Communications law” is the source of that duty.⁸⁴ With respect to § 251(c)(2) specifically, the FCC noted that this section “appl[ies] only to incumbent LECs,” while “good faith negotiations . . . are expected of all carriers, not just incumbent LECs.”⁸⁵ The FCC noted further that § 251(c)(2) is not service neutral, as it applies only to “interconnection obtained . . . ‘for the transmission and routing of telephone exchange service and exchange access.’”⁸⁶ The FCC sought “comment on the policy merits” of interpreting § 251(c)(2) to “require incumbent LECs to directly interconnect on an IP-to-IP basis.”⁸⁷ The FCC is also considering whether it should interpret the Communications Act to “leave IP-to-IP interconnection to unregulated commercial agreements.”⁸⁸

Not only has the FCC never interpreted § 251(c)(2) to require IP VoIP interconnection, but also that section cannot be interpreted to impose that duty. For example, § 251(c)(2)(A) limits the interconnection duty to interconnection “for the transmission and routing of telephone

⁸³ *Id.* ¶ 1011.

⁸⁴ *Id.* ¶ 1335; *see also id.* ¶ 1351 (noting that “sections 251(a)(1), 251(c)(2), and other provisions of the Act; section 706 of the 1996 Act; as well as the Commission’s ancillary authority under Title I” are all sources of “possible legal authority” for that duty); *id.* ¶ 1354 (identifying § 201, “in conjunction with other provisions of the [Communications] Act and the Clayton Act,” as a possible source of legal authority); *id.* ¶ 1356 (identifying § 256 as another possible source of legal authority).

⁸⁵ *Id.* ¶ 1353.

⁸⁶ *Id.* ¶ 1389 (quoting 47 U.S.C. § 251(c)(2)(A)).

⁸⁷ *Id.* ¶ 1369; *see also id.* ¶¶ 1385-1393 (posing numerous questions about whether § 251(c)(2) can (and, if so, should) be interpreted to impose an IP-to-IP interconnection duty on incumbent LECs). In other filings in this docket, the Intervenor and their witnesses have relied on the FCC’s “observ[ation]” that “section 251” imposes “interconnection requirements” that are “technology neutral.” *Id.* ¶ 1342. But, as the FCC later made clear, it was referring there to the general requirement in § 251(a) that all telecommunications carriers be interconnected, directly or indirectly, with other telecommunications carriers. *See id.* ¶ 1352 (describing § 251(a)(1) as imposing requirements that “are technology neutral on their face with respect to the transmission protocol used for purposes of interconnection”). In all events, the FCC’s numerous questions about whether it can and should interpret § 251(c)(2) to require IP VoIP interconnection confirms that the FCC’s observation in paragraph 1342 is not a finding in favor of the Intervenor’s position here.

⁸⁸ *Id.* ¶ 1343; *see id.* ¶¶ 1375-1377.

exchange service and exchange access,” both of which are telecommunications services.⁸⁹

As shown above, Comcast IP’s VoIP services are information services. Verizon MA’s VoIP services are also information services, as FiOS Digital Voice similarly offers consumers a single, integrated suite of features and capabilities that allow them to “generat[e], acquir[e], stor[e], transform[], process[], retriev[e], utiliz[e], or mak[e] available information via telecommunications.”⁹⁰ An agreement to interconnect in IP format *solely* for the exchange of calls between Comcast IP’s VoIP customers and Verizon’s VoIP customers — [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED] [REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL] — therefore is *not* an agreement for the “transmission and routing of telephone exchange service and exchange access.”

Furthermore, the rules the FCC promulgated to implement § 251(c)(2) were designed for TDM interconnection between PSTN carriers and would be inefficient and costly if extended to IP VoIP interconnection. For example, the FCC’s rules require TDM interconnection to occur at one point per LATA.⁹¹ But LATA boundaries — and state boundaries, for that matter — are irrelevant to VoIP service, and enforcing those boundaries would preclude efficient IP VoIP

⁸⁹ 47 U.S.C. § 251(c)(2)(A); *see ICC Reform Order* ¶ 1389 (recognizing this limitation on the duty § 251(c)(2) imposes).

⁹⁰ 47 U.S.C. § 153(24); *see Verizon MA Panel Testimony* at 5-9 (detailing the numerous information processing functions that are tightly integrated into Verizon MA’s retail VoIP offerings). Both Verizon MA’s and Comcast IP’s VoIP services are information services for the additional reason that they offer the capability for a “net protocol conversion” from IP to TDM or from TDM to IP. *See Verizon MA Panel Testimony* at 11, 27; *see, e.g., Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm’n*, 461 F. Supp. 2d 1055, 1082 (E.D. Mo. 2006) (relying on this “net protocol conversion from the digitized packets of the IP protocol to the TDM technology used on the PSTN” to find that VoIP service “is an information service”), *aff’d*, 530 F.3d 676 (8th Cir. 2008). Although no net protocol conversion occurs when traffic between two VoIP customers is exchanged in IP format, the relevant fact for classification purposes is that the VoIP services that Verizon MA and Comcast IP offer consumers includes that capability — it is how VoIP customers can communicate with customers still served on the PSTN.

⁹¹ *See, e.g., Notice of Proposed Rulemaking, Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, ¶ 72 (2001) (“[I]nterconnecting CLECs are obligated to provide one [point of interconnection (“POI”)] per LATA.”).

interconnection.⁹² [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL] Interpreting § 251(c)(2)

to require IP VoIP interconnection would therefore impose an inefficient POI-per-LATA mandate on such interconnection arrangements. Doing so would also authorize every state commission to arbitrate the terms of interconnection at a handful of points — which in most cases will be outside the state’s borders — creating a serious risk of inconsistent decisions governing interconnection at those points.⁹⁴

b. The Intervenors offer numerous arguments to support their claim that the VoIP-to-VoIP Agreement is a § 252 interconnection agreement. None has merit. In addition, the Intervenors’ arguments again reveal a genuine dispute about the material fact of what obligations the VoIP-to-VoIP Agreement creates or contains.

1. First, as noted above, the Intervenors claim that it does not matter that [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL] is Verizon’s counterparty in the VoIP-to-VoIP Agreement.⁹⁵ But they never acknowledge — much less dispute — that both the statute and the FCC’s orders clearly limit the category of § 252 interconnection agreements to agreements between incumbent LECs and other telecommunications carriers.

⁹² See Verizon MA Panel Testimony at 11-12, 38.

⁹³ See *id.* at 12.

⁹⁴ See *id.* at 37-38.

⁹⁵ See Intervenors Br. 13-15.

Indeed, the Intervenor never address Comcast IP's classification as an information service provider.⁹⁶ They simply note that Comcast IP's VoIP service is "telecommunications."⁹⁷ But, under federal law, a telecommunications carrier is "any provider of telecommunications services," not merely of telecommunications.⁹⁸ A provider that offers information services "via telecommunications" — like Comcast IP — is an information service provider.⁹⁹

Nor does it matter, as the Intervenor claim, that Comcast IP has historically relied on its CLEC affiliates to obtain numbering resources so that its VoIP customers can be reached using telephone numbers rather than the IP addresses that Comcast IP uses to route traffic to and from its VoIP customers.¹⁰⁰ The Intervenor cite no authority — and there is none — for their claim that such a subcontract with a LEC, whether affiliated or unaffiliated, transforms an agreement between an information service provider and an incumbent LEC into an interconnection agreement for purposes of § 252. As explained above, that claim conflicts with basic principles of contract law, which recognize that subcontracts do not alter the identities of parties to the master contract.¹⁰¹

The Department also should reject the Intervenor's policy argument that a VoIP provider that is affiliated with a CLEC should be treated as though it were a CLEC for purposes of

⁹⁶ The Intervenor sponsored testimony that appears designed to dispute that Verizon MA's and Comcast IP's VoIP services are information services and, therefore, Comcast IP's status as an information service provider. See Malfara Rebuttal Testimony at 12-23 (Moore Decl. Ex. G); Gillan Rebuttal Testimony at 21-25 (Moore Decl. Ex. H).

⁹⁷ Intervenor Br. 13. The Intervenor are wrong in asserting further that all VoIP traffic is "subject to § 251(b)(5)." *Id.* As demonstrated above, the FCC was clear that it has interpreted § 251(b)(5) to include only VoIP traffic that is exchanged in *TDM format*. See *ICC Reform Order* ¶¶ 940, 969; 47 C.F.R. § 51.913.

⁹⁸ 47 U.S.C. § 153(51).

⁹⁹ *Id.* § 153(24).

¹⁰⁰ See Intervenor Br. 14-15. The FCC has only recently started the process of allowing VoIP providers to obtain their own numbering resources directly from the North American Numbering Plan Administrator. See, e.g., Notice of Proposed Rulemaking, Order and Notice of Inquiry, *Numbering Policies for Modern Communications*, 28 FCC Rcd 5842, ¶ 1 (2013). As a result, VoIP providers have long had to obtain numbering resources from a LEC, whether affiliated or unaffiliated.

¹⁰¹ See *supra* note 42.

determining whether a contract is a § 252 interconnection agreement.¹⁰² As the Intervenors themselves acknowledge, where Congress has made its intent clear — as it did here, by referring repeatedly and exclusively in § 251 and § 252 to requesting telecommunications carriers — policy arguments cannot trump the statutory text.¹⁰³ In addition, the Intervenors cite no evidence to support their assertion that Comcast established Comcast IP in order “to enter into an interconnection agreement with an ILEC for the exchange of voice traffic in IP format.”¹⁰⁴ At best for the Intervenors, therefore, this claim raises another disputed issue of material fact that precludes entry of summary judgment.

2. Second, the Intervenors argue that the VoIP-to-VoIP Agreement contains ongoing obligations related to interconnection.¹⁰⁵ But they never once argue — or even assert — that the interconnection duty in § 251(c)(2) includes a duty to establish IP VoIP interconnection arrangements. As shown above, the FCC has never interpreted § 251(c)(2) in this manner, and such an interpretation cannot be squared with the text of the statute or the FCC’s existing interconnection rules. Tellingly, in claiming that it is irrelevant that VoIP is an information service, the Intervenors argue only that the FCC has brought some VoIP traffic within the scope of § 251(b)(5) and say nothing about § 251(c)(2).¹⁰⁶

In contrast, in pre-filed testimony — which was largely a legal brief — the Intervenors’ witness, Joseph Gillan, noted that the Michigan Public Service Commission has held that

¹⁰² See Intervenors Br. 15.

¹⁰³ See *id.* at 17-18.

¹⁰⁴ *Id.* at 15.

¹⁰⁵ See *id.* at 11-12.

¹⁰⁶ See *id.* at 15-17. The Intervenors again overstate the extent of the FCC’s decision, which brought within § 251(b)(5) only VoIP traffic that is exchanged in TDM format. See *ICC Reform Order* ¶¶ 940, 969; 47 C.F.R. § 51.913.

§ 251(c)(2) requires IP VoIP interconnection.¹⁰⁷ The Intervenors do not defend the Michigan commission’s reasoning — and for good reason, as it is patently erroneous. In finding that VoIP service is a telecommunications service, and therefore that IP VoIP interconnection is required by § 251(c)(2)(A), the Michigan commission asserted that IP VoIP interconnection — where traffic is originated, exchanged, and terminated in IP format — is “factual[ly] . . . similar” to the IP-in-the-middle traffic that the FCC had held is a telecommunications service.¹⁰⁸ But the FCC’s *IP-in-the-Middle Order* addressed traffic that originated and terminated in *TDM format*, and that a long-distance carrier converted from TDM to IP — and then back from IP to TDM — for its own convenience in routing the traffic through its network.¹⁰⁹ The Michigan commission’s order, therefore, is based on an asserted factual similarity between two scenarios that could not be more factually dissimilar.

3. Third, the Intervenors argue that the VoIP-to-VoIP Agreement contains obligations related to reciprocal compensation.¹¹⁰ [BEGIN HIGHLY SENSITIVE

CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁰⁷ See Gillan Testimony at 17-18 (Moore Decl. Ex. I).

¹⁰⁸ Order at 7, *Petition of Sprint Spectrum L.P. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 To Establish Interconnection Agreements with Michigan Bell Telephone Company, d/b/a AT&T Michigan*, Case No. U-17349 (Mich. Pub. Serv. Comm’n Dec. 6, 2013), available at <http://efile.mpsec.state.mi.us/efile/docs/17349/0027.pdf>.

¹⁰⁹ See Order, *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rd 7457, ¶¶ 1, 11-12 (2004).

¹¹⁰ See Intervenors Br. 12.

¹¹¹ See V2V § 12; V2V IP Interconnection Attach. § 9.

[REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL] As shown above, the FCC was clear in the *ICC Reform Order* that § 251(b)(5) applies only when “the exchange of [VoIP-PSTN] traffic occurs in TDM format (and not in IP format).”¹¹³ That express decision to include VoIP traffic exchanged in TDM format and exclude VoIP traffic exchanged in IP format is binding on the Department.¹¹⁴

[BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [END HIGHLY

SENSITIVE CONFIDENTIAL]

4. [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[END HIGHLY SENSITIVE CONFIDENTIAL]

¹¹² See V2V IP Interconnection Attach. §§ 3.1-3.2; Verizon MA Panel Testimony at 20-21.

¹¹³ *ICC Reform Order* ¶ 969; accord *id.* ¶ 940; see 47 C.F.R. § 51.913.

¹¹⁴ See, e.g., *Verizon New England Inc. v. Maine Pub. Utils. Comm’n*, 509 F.3d 1, 8-9 (1st Cir. 2007) (holding that state commissions are preempted from adopting rules that conflict with FCC determinations implementing the Telecommunications Act of 1996).

¹¹⁵ *Intervenors Br.* 13.

¹¹⁶ See *id.* at 12.

¹¹⁷ *Qwest Declaratory Ruling* ¶ 9.

5. Finally, the Intervenor deny that requiring the filing of the VoIP-to-VoIP Agreement would result in a patchwork quilt of inconsistent regulations.¹¹⁸ They attempt to minimize the relief they seek here, arguing that it is merely whether the agreement “must be filed for review,” and that, if such agreements must be filed, “there is no reason for state commissions to become involved in the technical details of parties’ IP interconnection arrangements.”¹¹⁹ On the latter point, they are correct — given the ability to establish IP VoIP interconnection arrangements that allow for the nationwide exchange of VoIP traffic in IP format at a handful of points, individual state commissions should not be separately adjudicating the terms on which IP VoIP interconnection is established at those few points.¹²⁰ The Intervenor and Verizon thus agree that such terms are better established through commercial negotiations, outside of the § 252 process.

But the Intervenor recognize that, if the Department concludes that the VoIP-to-VoIP Agreement must be filed, that ruling will open the door to § 252 arbitration about the terms that should be included in future IP interconnection agreements.¹²¹ Furthermore, each state commission in which the incumbent LEC party to an IP VoIP interconnection contract operates would have authority to conduct such an arbitration. State commissions have often reached different results in applying the FCC’s § 251(c)(2) interconnection rules to TDM interconnection arrangements. There is every reason to believe the same would occur if multiple state commissions were petitioned to arbitrate a dispute about IP VoIP interconnection. Indeed, in 2013, two of the Intervenor flatly refused to negotiate with Verizon about IP VoIP interconnection unless Verizon “agreed that the negotiations . . . would be covered by Sections

¹¹⁸ See Intervenor Br. 18-21.

¹¹⁹ *Id.* at 18.

¹²⁰ See Verizon MA Panel Testimony at 37-38.

¹²¹ See Intervenor Br. 20.

251(c) and 252,” thereby giving them the right to petition multiple state commissions to arbitrate any disputes that might arise.¹²²

C. To the Extent the Statute and FCC Orders Are Ambiguous, Sound Public Policy Supports Interpreting § 252 To Exclude Commercial Agreements for Intercarrier Compensation for VoIP-PSTN Traffic and IP VoIP Interconnection

The Department held long ago that, in interpreting the Telecommunication Act of 1996, it should construe ambiguous provisions to be consistent with sound public policy.¹²³ As the Department explained, its “role is to put in place the structural conditions necessary for an efficient competitive process.”¹²⁴ The “[f]ailure by an economic regulatory agency to insist on true competition and economic efficiency in the use of society’s resources is tantamount to countenancing and, to some degree, encouraging waste of those resources.”¹²⁵

Therefore, if the Department concludes that any of the statutory provisions at issue here is ambiguous, the Department should consider the parties’ competing arguments about which interpretation of those provisions is more consistent with the agreed-upon public policy goal of encouraging IP VoIP interconnection. The FCC itself stressed that it is “important that any IP-to-IP interconnection policy framework . . . avoid intervention in areas where the marketplace will operate efficiently.”¹²⁶ The Intervenors are thus wrong to contend that the Department should ignore public policy because “the law is the law.”¹²⁷ Where the law is ambiguous, it is entirely appropriate for the Department to consider whether it would further — or undermine — sound public policy to adopt one interpretation of an ambiguous statute or another.

¹²² Verizon MA Panel Rebuttal Testimony at 6 (Moore Decl. Ex. J).

¹²³ See *MCI WorldCom, Inc. v. New England Tel. & Tel. Co.*, D.T.E. 97-116-C, 1999 WL 634357, at *15-18 (Mass. Dep’t Telecomms. & Energy May 26, 1999).

¹²⁴ *Id.* at *16.

¹²⁵ *Id.*

¹²⁶ *ICC Reform Order* ¶ 1344.

¹²⁷ Intervenors Br. 17-18.

The record reveals a genuine dispute about the material facts underlying the parties' policy arguments regarding the proper interpretation of the statute. Verizon MA's witnesses have testified that the special burdens on incumbent LECs in § 251 and § 252 were developed for a marketplace in which incumbent LECs offering PSTN service were the predominant providers of telephone service; CLECs were brand new entrants; cable telephony and VoIP did not exist; wireless service was still in its infancy; and a host of new IP-based communications options — such as Twitter, iMessage, and Facebook — were still over the horizon.¹²⁸ Incumbent LECs are one of a multitude of players in this communications marketplace, with no special historical advantages in the provision of VoIP services.¹²⁹

Moreover, Verizon is at the forefront of efforts among VoIP providers to enter contracts for the exchange of VoIP traffic in IP format. Verizon has entered into seven contracts for IP VoIP interconnection with VoIP providers with a variety of business plans and continues to negotiate with many other providers.¹³⁰ None of the seven companies with which Verizon has entered these commercial agreements has suggested that the agreements favor Verizon in a manner that disadvantages them in competing with Verizon and others to provide VoIP services.¹³¹ Verizon's efforts confirm that *all* VoIP providers will move to IP VoIP interconnection without regulatory intervention and, in particular, without the inapposite legacy rules developed for PSTN interconnection and agreements between incumbent LECs and new market entrants.¹³²

¹²⁸ See Verizon MA Panel Testimony at 28-31.

¹²⁹ See *id.* at 31-34.

¹³⁰ See Verizon MA Panel Rebuttal Testimony at 4, 6. Verizon MA will be updating its discovery responses in light of the recently signed contract with Brightlink Communications, LLC.

¹³¹ See *id.* at 4.

¹³² See Verizon MA Panel Testimony at 34-35, 37-40; Verizon MA Panel Rebuttal Testimony at 4-5.

The Intervenors tell a different story. Part of their narrative is their claim that “competitive carriers have been exchanging voice traffic in IP on a large scale for, at least, the better part of a decade” and that they could “do the same with ILECs,” but that incumbent LECs are not “willing participants in such negotiation.”¹³³ They contend that treating both the Traffic Exchange Agreement and the VoIP-to-VoIP Agreement as § 252 interconnection agreements is therefore necessary to promote competition and the further development of IP VoIP interconnection.¹³⁴ But that is hogwash. As Verizon’s actions and those of the Intervenors make clear, what is required is not regulation, but willing parties. Verizon has demonstrated that it is willing to enter contracts for IP VoIP interconnection — it has entered seven such agreements and is negotiating many more. Two of the Intervenors, in contrast, have flatly refused to engage in such negotiations unless Verizon first agrees with their contention that those negotiations are subject to § 252. The Intervenors’ position is an effort to tilt the regulatory playing field in their favor, so they can extract better terms than are available through arm’s-length bargaining.

Indeed, Sprint’s recent actions in its ongoing negotiations with AT&T demonstrate this clearly. Sprint arbitrated before three state commissions — Michigan, Illinois, and Indiana — the question whether § 251(c)(2) requires IP VoIP interconnection. After Sprint prevailed in Michigan, it reached a “contingent resolution” with AT&T of this issue, which led it to remove the IP VoIP interconnection language from its Michigan interconnection agreement,¹³⁵ to dismiss

¹³³ Malfara Rebuttal Testimony at 9-10.

¹³⁴ See Intervenors Br. 23-25.

¹³⁵ Joint Submission at 1-2, *Request for Commission Approval of an Interconnection Agreement Between Sprint Spectrum L.P. and AT&T Michigan*, Case No. U-17569 (Mich. Pub. Serv. Comm’n filed Feb. 25, 2014) (Moore Decl. Ex. K). After the Michigan commission objected to Sprint’s actions, Sprint and AT&T filed an agreement that contained the language the commission had ordered. See Sprint Supplemental Response to D.T.C. 1-2 (Apr. 3, 2014).

with prejudice its appeal of the Illinois commission's decision in favor of AT&T on this issue,¹³⁶ and to delay further proceedings in the arbitration before the Indiana commission.¹³⁷ Sprint's actions show that it, like the Intervenor, is seeking to use § 252 and the resources of state commissions for leverage and to obtain special regulatory benefits unavailable to other marketplace participants, such as VoIP providers unaffiliated with any LEC. The Department should refuse to be a party to such efforts.

A hearing is required to develop further facts and to resolve the genuine disputes of material fact underlying the parties' competing policy arguments. Indeed, the record is not even complete yet, as the Intervenor (and XO) have refused to produce any agreements they have entered into for the exchange of voice traffic in IP format. Verizon MA has a pending motion to compel that information.¹³⁸

¹³⁶ See Stipulation of Dismissal of Count V of Plaintiffs' Complaint, *SprintCom, Inc. v. Scott*, No. 1:13-cv-06565 (N.D. Ill. filed Feb. 28, 2014) (Moore Decl. Ex. L).

¹³⁷ See Joint Motion for New Hearing Dates and Suspension of Prehearing Activity, *Sprint Spectrum, L.P.'s Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable Laws for Rates, Terms and Conditions of Interconnection with Indiana Bell Telephone Company d/b/a AT&T Indiana*, Cause No. 44409-INT 01 (Ind. Util. Reg. Comm'n filed Feb. 28, 2014) (Moore Decl. Ex. M).

¹³⁸ See Motion To Compel Responses by the Intervenor to Verizon MA's First Set of Information Requests, D.T.C. 13-6 (Mar. 28, 2014).

CONCLUSION

For these reasons, the Department should deny the motion for summary judgment and proceed to the hearing.

Respectfully submitted,

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