

**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

POST-HEARING REPLY BRIEF OF VERIZON MA

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Dated: June 20, 2014

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INTRODUCTION AND SUMMARY

The Intervenors are still living in 1996. They are urging the Department to extend § 251 and § 252 to agreements for IP VoIP interconnection — in conflict with the FCC’s reliance on an expectation of good faith negotiations and its endorsement of commercial agreements — based on a marketplace that no longer exists. The Department must act in accordance with federal law and today’s facts. The record here shows that, since 1996, Massachusetts consumers have overwhelmingly shifted to advanced services and wireless services. Extending legacy regulations designed for the 1996 marketplace to IP VoIP interconnection would unlawfully frustrate continued IP VoIP interconnection development and the FCC’s expectation of good faith negotiations that applies to all providers, not just ILECs. Allowing IP VoIP interconnection to continue to develop in accordance with the FCC’s endorsement of good-faith negotiations and commercial agreements and free from the proscriptive requirements of § 251 and § 252 would bring to Massachusetts consumers the significant benefits of IP VoIP interconnection, including new features that all-IP transmission makes possible, like high-definition voice and presence.

For its part, Verizon MA is just one of many providers of the advanced services that enable consumers in Massachusetts to communicate with each other and with people around the world. As of December 2012, more landline customers (VoIP and TDM) in Massachusetts had chosen providers other than Verizon MA than customers still with Verizon MA. Furthermore, as of December 2012, Verizon MA’s VoIP customers accounted for only *19 percent* of all VoIP customers in Massachusetts. Wireless providers had *millions more* subscribers in Massachusetts than all non-wireless providers, including Verizon MA, *combined*. The trend lines show continued growth in wireless and non-ILEC lines and declines in Verizon MA’s lines.¹

¹ See Verizon MA Panel Direct at 32-33 (providing data from the FCC’s Local Competition Reports).

Verizon MA is already interconnected directly or indirectly with these other service providers. There is no concern, as there was in 1996, about consumers that switch providers losing the ability to communicate with those who have not switched. Verizon has also signed agreements for IP VoIP interconnection with VoIP providers large and small, and with different business models, providing hard evidence that refutes the Intervenors' unsupported assertions that Verizon is uninterested in IP interconnection or is demanding unjust and unreasonable terms and conditions.

Verizon is thus doing exactly what the FCC required when it announced in the *ICC Reform Order* its expectation that all providers will negotiate IP VoIP interconnection in good faith in response to a request and endorsed the use of commercial agreements for the exchange of traffic in IP format.² Indeed, the FCC in that order expressly considered arguments that it should extend § 251 and § 252 to IP VoIP interconnection, but it did not do so. Instead, the FCC announced its expectation that *all* providers — not just ILECs — would negotiate IP VoIP interconnection in good faith while it considered whether *any* provision of the Communications Act requires IP interconnection, or whether the Act instead is best interpreted to continue to “leave IP-to-IP interconnection to unregulated commercial agreements.”³ It would therefore unlawfully frustrate federal policy for the Department to now on its own extend § 251 and § 252 obligations to IP VoIP interconnection agreements – particularly the nationwide agreements at issue in this case, agreements that do not even provide for a point of physical interconnection in Massachusetts.

² See Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663, ¶¶ 739 n.1290, 1011 (2011) (“*ICC Reform Order*”), *petitions for review denied, In re FCC 11-161*, Nos. 11-9900 *et al.*, 2014 WL 2142106 (10th Cir. May 23, 2014).

³ *Id.* ¶¶ 1342-1343.

Moreover, although Verizon is abiding by the FCC’s expectation, the same is not true of many of the Intervenors here, who have made little to no effort to establish IP VoIP interconnection arrangements with Verizon despite clamoring for regulatory action from the Department.⁴ When Verizon affirmatively approached those Intervenors, two of them — Cbeyond and PAETEC — flatly refused to negotiate.⁵ Others have been more interested in obtaining “evidence” for use in this proceeding, giving them an incentive *not* to reach an agreement with Verizon. For example, Sprint and Verizon had agreed [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL] Level 3 announced in a filing in this docket — rather than in business-to-business discussions — that it had broken off negotiations for IP VoIP interconnection with Verizon.⁸ These actions are inconsistent with the FCC’s expectation that these providers will negotiate in good faith and, moreover, are evidence that they are abusing the regulatory process.

Furthermore, the FCC’s reliance on its expectation of good faith negotiations, as well as its endorsement of commercial agreements for the exchange of traffic in IP format, is consistent

⁴ See Verizon MA Post-Hearing Br. 14.
⁵ See Verizon MA Hearing Ex. 6.
⁶ See Apr. 30 Hg. Tr. at 181:20-182:3 (Schlabs).
⁷ *Id.* at 178:13-179:9; 182:3-7 (Schlabs).
⁸ Intervenors Opp. to Mot. To Abate at 7 (May 27, 2014).

with the manner in which IP VoIP interconnection occurs. Unlike TDM interconnection, which FCC rules require to occur at one point in every LATA in which a provider operates, efficient and reliable IP VoIP interconnection to handle traffic nationwide can occur at as few as two points of interconnection. Sprint agrees that LATA boundaries — and state boundaries, for that matter — are irrelevant to VoIP service.⁹ Instead, the “natural place [for] IP interconnection [to] occur” is at the carrier hotels where “IP network[] operators currently exchange non-VoIP IP traffic.”¹⁰ Those points will be outside the boundaries of most states in which the two parties to an IP VoIP interconnection arrangement operate. The state-by-state § 252 process is particularly ill-suited to such agreements, which are inherently national and have no severable intrastate component.

For all of these reasons, Verizon MA urged the Department to abate this proceeding. The record compiled at the hearing confirms that it would be an inefficient use of the Department’s and the parties’ resources to proceed through the conclusion of this docket and federal court appeals of any decision. However, if the Department does reach the questions presented, it should find that none of the three agreements is a § 252 interconnection agreement that must be filed for the Department’s review and approval. The Intervenors’ arguments to the contrary fail. They advocate a legal standard for identifying § 252 interconnection agreements that conflicts with the FCC’s own application of that standard, as well as the Department’s. The Intervenors make no effort to address that precedent, even though Verizon MA relied on it in opposing the motion for summary judgment that some of the Intervenors filed. Indeed, most of the arguments

⁹ See Verizon MA Panel Direct at 11-12, 38; Sprint FCC Comments at 17-19, 21-23; May 1 Hg. Tr. at 46:1-24, 49:15-19 (Burt).

¹⁰ See May 1 Hg. Tr. at 46:1-24, 49:15-19 (Burt); see also Sprint FCC Comments at 17-19, 21-23.

[BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] See Verizon Post-

Hearing Br. 12 & n.48.

pressed in the Intervenor's post-hearing briefs simply repeat claims raised in the motion for summary judgment that some of the Intervenor's filed. Verizon MA has already responded to those arguments in its post-hearing brief. As shown below, those arguments fare no better this time around, and the few new arguments equally lack merit.

ARGUMENT

A. **Interpreting § 252 To Require the Filing of Agreements for IP VoIP Interconnection Would Harm Massachusetts Consumers By Frustrating the Development of IP VoIP Interconnection Arrangements**

1. *The Marketplace Has Changed Dramatically Since 1996*

In 1996, incumbent LECs offering PSTN service were the predominant providers of local 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.¹¹ Today, incumbent LECs are just one of many players in the communications marketplace, with no special historical advantages in the provision of VoIP services.¹² Indeed, Sprint “agrees with Verizon that every IP network operator is a ‘new entrant,’ at least relative to the provision of VoIP services.”¹³ According to the latest FCC data, only 19 percent of all VoIP customers in Massachusetts subscribe to FiOS Digital Voice.¹⁴ More broadly, Verizon MA has only about 17 percent of all customers subscribing to voice services in Massachusetts, with the rest subscribing to a non-ILEC wireline service or VoIP service, or to wireless service.¹⁵

¹¹ See Verizon MA Panel Direct at 28-31.

¹² See *id.* at 31-34.

¹³ Reply of Sprint Nextel Corporation at 17, *Connect America Fund*, WC Dkt. Nos. 10-90 *et al.* (FCC filed Mar. 30, 2012).

¹⁴ See Verizon MA Panel Direct at 33 (providing data from the FCC's Local Competition Reports).

¹⁵ See *id.* at 32 (same). Although some of the wireless subscribers are customers of Verizon MA's affiliate, Verizon Wireless, the record shows that Verizon Wireless has also negotiated agreements for IP VoIP

Yet, to listen to the Intervenors, *nothing* has changed since 1996. XO asserts that Verizon MA “controls the vast majority of customers in Massachusetts,” ignoring the actual record evidence refuting that statement.¹⁶ Sprint asserts that Verizon MA has “monopoly control over the termination of traffic to its customers.”¹⁷ But that is true of *all providers*, as Sprint’s witness conceded at the hearing.¹⁸ Indeed, the FCC long ago recognized “the monopoly power *that CLECs wield* over access to their end users,”¹⁹ and the Department similarly concluded that “CLECs have market power” over access to their customers.²⁰ In Massachusetts, providers other than Verizon MA control access to many times more customers than have subscribed to any of Verizon MA’s services.

The Intervenors assert that Verizon “does not need to interconnect with competitors nearly as much as competitors need to interconnect with it.”²¹ The Intervenors ignore that Verizon MA is already interconnected with those other providers, including for the exchange of VoIP traffic.²² They ignore further that Verizon has entered agreements for IP VoIP interconnection with providers large and small, including with Comcast, Vonage, Bandwidth.com, Broadvox, Intermetro, Millicorp, 365 Wireless, and BrightLink. Moreover, as Vonage recently told the FCC, its agreement for IP VoIP interconnection with Verizon “will

interconnection, including with both Sprint and T-Mobile. *See* Verizon MA Post-Hearing Br. 8. Verizon Wireless is not an ILEC, and those agreements are undisputedly not subject to § 252.

¹⁶ XO Post-Hearing Br. 7.

¹⁷ Sprint Post-Hearing Br. 3 n.3.

¹⁸ *See* May 1 Hg. Tr. at 71:20-22 (“Mr. Groves: . . . Isn’t it true that Sprint has the only connection to Sprint’s customers? Mr. Burt: Yes.”).

¹⁹ Seventh Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 16 FCC Rcd 9923, ¶ 38 (2001) (emphasis added).

²⁰ *See* Final Order at 9, *Petition of Verizon New England Inc. et al. for Investigation under Chapter 159, Section 14, of the Intrastate Access Rates of Competitive Local Exchange Carriers*, D.T.C. 07-9 (June 22, 2009), available at <http://www.mass.gov/ocabr/docs/dtc/dockets/07-9/079finalorder.pdf>.

²¹ Intervenors Post-Hearing Br. 58.

²² *See* May 1 Hg. Tr. at 72:3-18 (Burt).

allow both Verizon and Vonage customers to enjoy the quality of service and cost benefits that come from the IP exchange of traffic, including the potential to offer subscribers services that rely on end-to-end IP networks — such as high-definition voice.”²³ The record here confirms that both parties to IP VoIP interconnection arrangements obtain enormous efficiencies and can provide significant benefits to their consumers.²⁴ Verizon has every incentive to enter agreements for IP VoIP interconnection on just and reasonable terms with all VoIP providers; it needs only willing counterparties.

Verizon’s success at entering agreements for IP VoIP interconnection refutes Sprint’s bare assertion that Verizon is unwilling to do so to preserve the revenues it currently receives for TDM interconnection.²⁵ In addition, Sprint’s response to the Department’s record request shows that (even on Sprint’s count) those revenues are modest at best — **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [REDACTED] **[END HIGHLY SENSITIVE CONFIDENTIAL]** — and Sprint’s witness conceded that Verizon’s own savings from IP interconnection “certainly could . . . offset those revenues” from TDM interconnection.²⁶ Indeed, Sprint’s incomplete analysis ignores Verizon MA’s own costs of maintaining TDM interconnection with Sprint.

Sprint also continues to assert that Verizon “is not negotiating any agreements that involve both TDM and IP traffic.”²⁷ Yet the record showed that **[BEGIN HIGHLY**

²³ Comments of Vonage Holdings Corp. at 2-3, *Numbering Policies for Modern Communications*, WC Dkt. Nos. 13-97 *et al.* (FCC filed Mar. 4, 2014) (“Vonage FCC Comments”).

²⁴ See May 1 Hg. Tr. at 46:5-11 (Burt); *id.* at 46:16-21, 48:11-17, 59:4-22 (Burt); Comments of Sprint Nextel Corporation at 12, *Connect America Fund*, WC Dkt. Nos. 10-90 *et al.* (FCC filed Feb. 24, 2012) (“Sprint FCC Comments”) (noting the “dramatic cost efficiencies [ILECs] could achieve” from IP interconnection).

²⁵ See Sprint Post-Hearing Br. 43-44.

²⁶ May 1 Hg. Tr. at 59:11-22 (Burt); see Sprint Response to DTC – Sprint Record Request #1 (May 9, 2014).

²⁷ Sprint Post-Hearing Br. 43-44; see *id.* at 44-45.

HIGHLY SENSITIVE CONFIDENTIAL] Sprint ignores this record evidence in repeating this claim.

2. *Regulating IP VoIP Interconnection Would Frustrate the Federal Regime And Would Harm Massachusetts Consumers*

In the *ICC Reform Order*, the FCC heard — but did not accept — arguments that IP VoIP interconnection is subject to § 251(c)(2) and § 252. Instead, the FCC announced its expectation that *all* providers would negotiate IP VoIP interconnection arrangements in good faith and endorsed the use of commercial agreements for the exchange of traffic in IP format.²⁹ Those FCC findings are binding on the Department. As the First Circuit has held, state commissions are preempted from “seek[ing] to dictate” outcomes that “are in direct conflict with specific FCC policies adopted pursuant to its authority under the 1996 Act.”³⁰ Furthermore, to the extent state commissions have a role in implementing the 1996 Act, “the scope of that role is measured by federal, not state law,”³¹ because state “participation in the administration of [this] *federal* regime is to be guided by federal-agency regulations.”³²

Despite the FCC’s actions in the *ICC Reform Order*, the Intervenors urge the Department to extend the legacy provisions in § 251(c)(2) and § 252 to IP VoIP interconnection arrangements. Such an unlawful ruling would conflict with the approach the FCC

²⁸ See Apr. 30 Hg. Tr. at 178:13-179:13, 181:1-182:7 (Schlabs).

²⁹ See *ICC Reform Order* ¶¶ 739 n.1290, 1011, 1342-1343.

³⁰ *Verizon New England Inc. v. Maine Pub. Utils. Comm’n*, 509 F.3d 1, 8-9 (1st Cir. 2007).

³¹ *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000).

³² *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

adopted while it considers the matter further. Notably, at least one of the Intervenors here has urged the FCC *not* to extend its § 251(c)(2) regulations and the § 252 regime to IP VoIP interconnection. Sprint told the FCC *not* to “adopt detailed rules” for IP VoIP interconnection “like those adopted in 1996” for TDM interconnection.³³ Yet here it urges the Department to act in conflict with the FCC’s actions and to find that IP VoIP interconnection is subject to the full panoply of legacy TDM interconnection rules.

In addition, as Verizon MA has shown, the TDM interconnection rules contain requirements, such as the requirement to interconnect at one point per LATA, that are sensible for TDM interconnection but would be profoundly inefficient if extended to IP VoIP interconnection, thereby depriving Massachusetts consumers of some of the benefits of such interconnection.³⁴ Although the FCC has the authority to amend the federal TDM interconnection rules — if it were to find that any of them should be extended in modified form to IP VoIP interconnection arrangements — the Department has no such authority. Furthermore, even with nearly two decades of experience applying § 251(c)(2) and the FCC’s rules to TDM interconnection, state commissions continue to reach different results when arbitrating disputes about the terms of interconnection agreements.³⁵ Such conflicting rulings would be especially harmful to national IP VoIP interconnection arrangements, which can use as few as two points of interconnection to exchange VoIP traffic nationwide.

Indeed, the very pendency of this proceeding harms Massachusetts consumers, as it gives the Intervenors a reason *not* to reach an agreement with Verizon for IP VoIP interconnection, to avoid undermining their regulatory position here. As the record shows, Sprint and Verizon

³³ Sprint FCC Comments at 12; *see* May 1 Hg. Tr. at 60:4-21 (Burt).

³⁴ *See* Verizon MA Post-Hearing Br. 36-37.

³⁵ *See id.* at 42 & n.198.

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[REDACTED]

[REDACTED]

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Furthermore, Level 3 used a filing in this docket to assert that it had broken off negotiations for IP VoIP interconnection with Verizon,³⁷ [BEGIN HIGHLY SENSITIVE CONFIDENTIAL]

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3. *The Marketplace Is Operating Efficiently To Establish IP VoIP Interconnection Arrangements Between Willing Parties*

The record here shows that the marketplace is operating efficiently to establish IP VoIP interconnection arrangements, consistent with the FCC's expectation of good faith negotiations and its endorsement of commercial agreements. Verizon has entered into agreements for IP VoIP interconnection with eight VoIP providers of a variety of sizes and with a variety of business plans, and continues to negotiate with many others.³⁸ As noted above, these eight companies are Comcast, Vonage, Bandwidth.com, Broadvox, Intermetro, Millicorp, 365 Wireless, and BrightLink. None of them has suggested that the agreements favor Verizon in a manner that disadvantages them in competing with Verizon and others to provide VoIP services.³⁹ On the contrary, one of those companies, 365 Wireless, returned to sign a second

³⁶ Apr. 30 Hg. Tr. at 178:13-179:9, 181:1-182:7 (Schlabs).

³⁷ Intervenors Opp. to Mot. To Abate at 7 (May 27, 2014).

³⁸ See Apr. 30 Hg. Tr. at 21:7-14 (Schlabs); *id.* at 63:23-64:1 (Vasington); *id.* at 65:13-14 (Spinelli); Verizon MA Panel Rebuttal at 4, 6.

³⁹ See Verizon MA Panel Rebuttal at 4.

agreement for IP VoIP interconnection with Verizon.⁴⁰ And Vonage told the FCC that its agreement with Verizon is “groundbreaking” and, as noted above, provides customers of both parties with the “benefits that come from the IP exchange of traffic” over “end-to-end IP networks — such as high-definition voice.”⁴¹

These agreements have been established outside of the 1996-era process for creating § 252 interconnection agreements, which as shown above was enacted for a communications marketplace that looks very different from today’s marketplace, with the multitude of new communications options available to consumers. Moreover, these agreements have been established in accordance with the FCC’s expectation that companies will negotiate IP VoIP interconnection in good faith in response to a request and its endorsement of the use of commercial agreements for the exchange of traffic in IP format.⁴² The record is clear that Verizon is negotiating in good faith, which is all that the FCC requires. There is no contrary record evidence. Indeed, Verizon has affirmatively sought to negotiate with the Intervenors, even though most of them had not made an effort to establish such interconnection arrangements with Verizon despite clamoring for regulatory intervention by the Department.

In fact, Verizon has continued negotiating with **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** **[END HIGHLY SENSITIVE CONFIDENTIAL]** notwithstanding the parties’ disagreement about whether agreements for IP VoIP interconnection must be filed as § 252 interconnection agreements.⁴³ The *only* record

⁴⁰ See Verizon MA Post-Hearing Br. 13.

⁴¹ Vonage FCC Comments at 2-3; see May 1 Hg. Tr. at 43:13-45:13 (Burt) (identifying high-definition voice and “presence” as benefits available where VoIP traffic is routed in IP format on an end-to-end basis); see also Apr. 30 Hg. Tr. at 171:13-21 (Spinelli) (testifying that “there are new codecs that can only be supported on IP, that would allow for high-definition voice”).

⁴² See ICC Reform Order ¶¶ 739 n.1290, 1011.

⁴³ See Verizon MA Post-Hearing Br. 14.

evidence of any provider refusing to negotiate in good faith is Cbeyond's and PAETEC's flat refusals to negotiate with Verizon.⁴⁴ Verizon's continued negotiations with other Intervenors that contend that agreements for IP VoIP interconnection are subject to § 251 and § 252 make clear that Cbeyond's and PAETEC's categorical refusal to negotiate unless Verizon accepted their regulatory position was the roadblock to negotiations between Verizon and those companies.⁴⁵

4. *The Intervenors' Contrary Claims Have No Basis in the Record and Conflict with Their Own Actions*

Although the Intervenors argue stridently that the Department should act now, notwithstanding the FCC's unwillingness to accept arguments that the legacy § 251 and § 252 regime applies to national IP VoIP interconnection, their own actions stand in stark contrast with their claims here.

For example, the Intervenors claim that requiring the filing of the agreements between Verizon and Comcast as § 252 interconnection agreements is necessary so that other providers could opt into those agreements under § 252(i).⁴⁶ But not a single Intervenor has stated to the Department that it would adopt the Comcast agreements if the Department required them to be filed as § 252 interconnection agreements. Nor has any Intervenor even claimed, much less shown, that any of the substantive terms on which Verizon offers to negotiate IP VoIP interconnection — which the Intervenors obtained in discovery (or in their own negotiations with Verizon) — are unjust and unreasonable in any respect. Similarly, the Intervenors obtained in

⁴⁴ See Verizon MA Hearing Ex. 6.

⁴⁵ Sprint, for example, asserts that Verizon's position that such agreements are not subject to § 251 and § 252 "has had a chilling effect" on negotiations. Sprint Post-Hearing Br. 46-47. But the evidence here — **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** **[END HIGHLY SENSITIVE CONFIDENTIAL]** — confirms that Verizon does not refuse to pursue negotiations with other VoIP providers that disagree with Verizon's regulatory position.

⁴⁶ See, e.g., Intervenors Post-Hearing Br. 14-15, 60.

discovery a number of the agreements for IP VoIP interconnection that Verizon has entered, yet raise no complaints about any of the terms of those “groundbreaking” agreements.⁴⁷ In addition, no Intervenor disputes that any rights found to exist under § 251(c)(2) could be invoked only by those VoIP providers that are, or are affiliated with, a telecommunications carrier, nor does any explain why the Department should adopt a rule that would thus pick winners and losers in the VoIP marketplace.

Sprint’s actions in particular demonstrate that, despite its position before the Department, it does not, in fact, want to exchange VoIP traffic through inefficient legacy § 252 interconnection agreements. 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 on this issue, which led it to file an interconnection agreement in Michigan that omitted the IP VoIP interconnection language that the state commission had approved,⁴⁸ to dismiss with prejudice its appeal of the Illinois commission’s decision in favor of AT&T on this issue,⁴⁹ and twice to delay further proceedings in the arbitration before the Indiana commission.⁵⁰ Sprint makes no attempt

⁴⁷ Vonage FCC Comments at 3.

⁴⁸ 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. P.S.C. filed Feb. 25, 2014), available at <http://efile.mpsc.state.mi.us/efile/docs/17569/0001.pdf>. Only after the Michigan commission rejected Sprint’s and AT&T’s attempt to file an interconnection agreement that omitted the arbitrated language did Sprint and AT&T file an agreement that contained the language the commission had ordered. See Sprint Supplemental Response to D.T.C. 1-2 (Apr. 3, 2014).

⁴⁹ 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).

⁵⁰ 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), available at https://myweb.in.gov/IURC/eds/Modules/Ecms/Cases/Docketed_Cases/ViewDocument.aspx?DocID=0900b631801b06a9; Joint Status Report and Motion To Reschedule Evidentiary Hearing, *Sprint Spectrum L.P.’s Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the*

in its post-hearing brief to square these actions with its position here. Instead, Sprint complains that Verizon's negotiations for IP VoIP interconnection occur pursuant to non-disclosure agreements.⁵¹ But the Department has already found that it is common for "contracts between commercial entities [to be] kept confidential in their entirety" and that there is "no . . . basis" for mandating "public disclosure" of contracts that are not § 252 interconnection agreements.⁵² Moreover, Sprint itself insisted at hearing that its own commercial negotiations with AT&T should be shielded from disclosures, including pursuant to the confidentiality order here.⁵³

More generally, the Intervenors cannot point to facts that support their assertions about a need for Department action in advance of action by the FCC. Part of that emptiness in the record results from the Intervenors' conscious decisions not to put forward a single fact witness with knowledge of their efforts at negotiating and entering IP VoIP interconnection arrangements with Verizon or any other provider. Sprint was the only Intervenor to put forward a fact witness at all, yet Sprint kept its witness in the dark about its negotiations with Verizon. He only learned about those negotiations from Verizon MA's witnesses during the hearing.⁵⁴

But the other reason that there are no facts in the record to support the Intervenors' assertions is that there is no marketplace failure that requires regulatory intervention. Where two providers are serious about IP VoIP interconnection, the deals are getting done. Providers that are not serious — or are interested in manufacturing "evidence" of a need for regulatory action

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 May 28, 2014), available at https://myweb.in.gov/IURC/eds/Modules/Ecms/Cases/Docketed_Cases/ViewDocument.aspx?DocID=0900b631801b6198.

⁵¹ See Sprint Post-Hearing Br. 45-47.

⁵² Hearing Officer Ruling on Motion To Comply with Hearing Officer Ruling and Protective Order at 7 (Jan. 31, 2014).

⁵³ See May 1 Hg. Tr. at 82:11-83:5, 91:22-93:24 (Aron).

⁵⁴ See Verizon MA Post-Hearing Br. 9 & n.32, 10-11 & nn.39-42.

— do not have those agreements or are refusing to negotiate them. Imposing the legacy § 252 regulatory requirements that were designed for TDM networks and a very different communications marketplace would only hinder the further development of IP VoIP interconnection, harming Massachusetts consumers.⁵⁵

5. *If There Is To Be a “Regulatory Backstop,” It Must Be National, Not State-by-State*

The record evidence detailed above shows that, if there is a need for a “regulatory backstop” to negotiations between providers over IP VoIP interconnection, it must be federal. As Sprint agrees, LATA boundaries — and state boundaries, for that matter — are irrelevant to VoIP service.⁵⁶ The “natural place [for] IP interconnection [to] occur” is at the carrier hotels where “IP network[] operators currently exchange non-VoIP IP traffic,” and not in each LATA or each state where two VoIP providers operate.⁵⁷ Because VoIP providers can use just a handful of IP interconnection points to exchange traffic nationwide, agreements for IP VoIP interconnection are national agreements, and therefore any “regulatory backstop” if one party were not to negotiate in good faith must be national in nature as well. The FCC is therefore better positioned than any state commission — let alone *every* state commission — to serve as a regulatory backstop if one were necessary.

⁵⁵ For these reasons, § 706(a) provides no basis for extending the requirements of § 251 and § 252 to IP VoIP interconnection, particularly in the face of the FCC’s own determination that § 251(b)(5) does not extend to VoIP traffic exchanged in IP format. *See infra* pages 28-29; *but see* Intervenor Post-Hearing Br. 56-58 (urging the Department to rely on § 706(a) in interpreting § 251 and § 252).

⁵⁶ *See* Verizon MA Panel Direct at 11-12, 38; Sprint FCC Comments at 17-19, 21-23; May 1 Hg. Tr. at 46:1-24, 49:15-19 (Burt).

⁵⁷ *See* May 1 Hg. Tr. at 46:1-24, 49:15-19 (Burt); *see also* Sprint FCC Comments at 17-19, 21-23.

[BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] *See* Verizon Post-

Hearing Br. 12 & n.48.

Furthermore, the FCC is in the process of assessing the “policy merits” of interpreting various provisions of the Communications Act to require IP interconnection, as well as whether to interpret the Communications Act to “leave IP-to-IP interconnection to unregulated commercial agreements.”⁵⁸ The FCC stressed that, in deciding among the various policy options, it is “important that any IP-to-IP interconnection policy framework . . . avoid intervention in areas where the marketplace will operate efficiently.”⁵⁹ If legacy regulations are to be extended to IP VoIP interconnection arrangements — which are national in scope and permit the nationwide exchange of traffic at as few as two points of interconnection — the FCC should make that determination on a national basis. In light of the FCC’s decision in the *ICC Reform Order* to rely on an expectation of good faith negotiations by all providers, state commissions cannot extend those regulations to IP VoIP interconnection in the interim. In all events, the record here gives the Department no reason to press forward and impose regulatory requirements while the FCC has chosen to rely on an expectation of good faith negotiations. Instead, the record confirms that it would be an inefficient use of the Department’s and the parties’ resources to proceed through the conclusion of this docket and federal court appeals of any decision, as Verizon MA showed in its motion to abate the proceeding.

⁵⁸ *ICC Reform Order* ¶¶ 1342-1343; *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).

⁵⁹ *Id.* ¶ 1344.

B. 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

As the FCC found, under the plain text of the 1996 Act, only contracts that are between an incumbent LEC and another telecommunications carrier and implement one or more of the duties in § 251(b) or (c) qualify as § 252 interconnection agreements.⁶⁰

There can be no dispute about the first point. Indeed, XO agreed that “[s]ections 251(c) and 252 explicitly and unambiguously apply **only** to agreements between an ILEC and a requesting telecommunications carrier.”⁶¹ None of the other Intervenors contends otherwise. Instead, as discussed below, some of them argue erroneously that Comcast IP — Verizon’s counterparty to the VoIP-to-VoIP Agreement — is (or should be treated for these purposes as though it were) a telecommunications carrier.⁶²

On the second point, however, the Intervenors continue to argue that a contract between an ILEC and another telecommunications carrier that does not implement a § 251(b) or (c) duty can still be a § 252 interconnection agreement as long as it is loosely related to interconnection or intercarrier compensation in some way, however tangential.⁶³ Indeed, certain Intervenors

⁶⁰ 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, ¶¶ 8 & n.26, 10 (2002) (“*Qwest Declaratory Ruling*”); Verizon MA Post-Hearing Br. 19-22.

⁶¹ XO Communications Services, LLC’s Opp. to Verizon-MA’s Mot. To Compel at 3 (Apr. 4, 2014) (“XO Opp. Mot. Compel”).

⁶² See, e.g., Intervenors Post-Hearing Br. 30-44; see *infra* Part C.4 (refuting those arguments).

⁶³ See, e.g., Sprint Post-Hearing Br. 9-10; XO Post-Hearing Br. 3; Intervenors Post-Hearing Br. 16-21. XO also contends that a contract that simply implements the interconnection duty imposed on all telecommunications carriers in § 251(a) can also be an interconnection agreement. See XO Post-Hearing Br. 3-4. But the FCC unambiguously referred in the *Qwest Declaratory Ruling* to contracts that implement the § 251(b) and (c) duties — excluding § 251(a). See *Qwest Declaratory Ruling* ¶ 8 n.26. The Sixth Circuit decision XO cites is not to the contrary. In that case, the court rejected AT&T’s argument that an ILEC is subject only to the § 251(c)(2) interconnection duty and not also to the duties in § 251(a). See *Ohio Bell Tel. Co. v. Public Utils. Comm’n of Ohio*, 711 F.3d 637, 641-43 (6th Cir. 2013). That court did not consider the *Qwest Declaratory Ruling* or whether a contract that implements § 251(a) must be filed with a state commission for its review and approval under § 252(e).

contend that the mere fact that the FCC *has posed the question* whether § 251(c)(2) requires IP VoIP interconnection is sufficient to make an agreement for IP VoIP interconnection a § 252 interconnection agreement.⁶⁴

In making these arguments, the Intervenors ignore authority from the FCC, the federal courts, and the Department itself that rejects this overly expansive definition of agreements that qualify as § 252 interconnection agreements. Indeed, none of the Intervenors addresses the FCC’s own application of the *Qwest Declaratory Ruling* standard in the *Qwest Nine-State Order*.⁶⁵ In that order, which was issued just two months after the *Qwest Declaratory Ruling*, the FCC held that a “Directory Assistance Agreement” between Qwest and a CLEC did not need to be filed under § 252 because that agreement was “not 251-related” — that is, it “did not contain ongoing section 251(b) or (c) obligations.”⁶⁶ Because directory assistance had been an unbundled network element required by § 251(c)(3) from 1996 to 1999, the FCC’s decision confirms that only those agreements that implement *existing* § 251(b) or (c) duties qualify as § 252 interconnection agreements.⁶⁷

The Intervenors’ position also conflicts with the Second Circuit’s decision in *Southern New England Telephone Co. v. Comcast Phone of Connecticut, Inc.*⁶⁸ In that case, the court recognized that “state commissions do not have . . . authority” over agreements for “services that are not subject to § 252.”⁶⁹ It was only because the Second Circuit affirmed the state

⁶⁴ See Intervenors Post-Hearing Br. 49.

⁶⁵ 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 (2002) (“*Qwest Nine-State Order*”).

⁶⁶ *Id.* ¶ 478 & n.1746.

⁶⁷ See Verizon MA Post-Hearing Br. 21-22.

⁶⁸ 718 F.3d 53 (2d Cir. 2013) (“*SNET*”).

⁶⁹ *Id.* at 61.

commission's conclusion that § 251(c)(2) requires transit service that the court upheld the commission's further ruling that a transit service agreement between an ILEC and a CLEC is a § 252 interconnection agreement.⁷⁰ Because § 251(c)(2) does not require IP VoIP interconnection, the *SNET* decision confirms that an agreement governing the establishing of such interconnection arrangements is *not* a § 252 interconnection agreement.

Finally, the Intervenors' position ignores the Department's own rulings on this question. In 2005, the Department considered whether Verizon MA's § 252 interconnection agreements should include provisions that address network elements that no longer were required to be unbundled under § 251(c)(3).⁷¹ Applying the *Qwest Declaratory Ruling*, the Department held that terms for those "discontinued" unbundled network elements do not belong in § 252 interconnection agreements.⁷² The Department held further that "non-section 251 negotiations" regarding those discontinued UNEs will occur "separate[] from . . . interconnection agreements," and that "[o]rdinary contract law" — not § 251 or § 252 — "provides the backdrop of any such arrangement."⁷³

Ignoring all of this authority, the Intervenors instead cite cases that addressed the question whether a contract to provide, on a commercial basis, a service that replaced the UNE Platform must be filed under § 252.⁷⁴ None of those cases addressed the question whether a

⁷⁰ See *id.* at 60-61; see also *id.* at 62-63 (upholding the Connecticut commission's finding that § 251(c)(2) requires incumbent LECs to provide transit service).

⁷¹ 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>.

⁷² See *id.* (citing *Qwest Declaratory Ruling* ¶ 8 n.26).

⁷³ *Id.* at 85-86.

⁷⁴ See Intervenors Post-Hearing Br. 19-22; XO Post-Hearing Br. 3-4.

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.⁷⁵

Furthermore, when the Department considered Verizon MA's use 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.⁷⁶

C. None of the Three Agreements Is an “Interconnection Agreement” Under 47 U.S.C. § 252(a)

1. The Three Agreements Must Be Considered Separately

The Settlement Agreement, the Traffic Exchange Agreement, and the VoIP-to-VoIP Agreement are distinct agreements between different groups of Verizon and Comcast companies that cover different subject matters, and that each operate on a stand-alone basis. The Department, therefore, must consider each agreement separately in determining whether any is a § 252 interconnection agreement.

⁷⁵ To the extent the Tenth Circuit concluded, in *dicta*, that a commercial contract replacing the UNE Platform “is unmistakably related to the physical connection of two networks,” that court clearly erred. *Qwest Corp. v. Public Utils. Comm'n of Colo.*, 479 F.3d 1184, 1193 (10th Cir. 2007). That commercial contract allowed a CLEC to provide service entirely over the incumbent LEC's network, without using (let alone interconnecting) its own network facilities to the incumbent's network. Furthermore, 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. 2008). There is no argument here — nor could there be — that any of the agreements at issue implements a § 271 duty.

⁷⁶ 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>.

The Intervenors assert that the Department should instead treat the three agreements as though they were parts of a single contract, so that if any one agreement is found to be a § 252 interconnection agreement, all three contracts must be filed with the Department under § 252.⁷⁷ The Intervenors' attempt at bootstrapping fails.

First, the Intervenors assert that two companies cannot avoid the filing requirement in § 252 by “splitting an integrated agreement” into multiple contracts.⁷⁸ But there is no evidence in the record that any of the three agreements was ever initially part of a single, integrated agreement — or that Verizon and Comcast “split” their agreements into three separate contracts to avoid the § 252 filing requirement. On the contrary, the record shows that the VoIP-to-VoIP Agreement took effect *26 months* after the effective date of the Settlement Agreement and Traffic Exchange Agreement. The record shows further that the VoIP-to-VoIP Agreement could not have been executed with the other agreements because the parties had not then developed the means of interconnecting in IP format for the exchange of VoIP traffic.⁷⁹ The VoIP-to-VoIP Agreement plainly was not “split” from an integrated contract that initially contained all three agreements.

Second, the Intervenors cite cases in which state commissions have found that amendments to § 252 interconnection agreements must be filed, even though part of the amendment did not implement any § 251(b) or (c) duty.⁸⁰ But in those cases the ILEC and CLEC had agreed to amend a § 252 interconnection agreement, and the amendment contained

⁷⁷ See, e.g., Sprint Post-Hearing Br. 29, 33-34; Intervenors Post-Hearing Br. 21-23, 51-56.

⁷⁸ Intervenors Post-Hearing Br. 21.

⁷⁹ See Verizon MA Panel Direct at 15.

⁸⁰ See Intervenors Post-Hearing Br. 22-23.

terms that implemented undisputed § 251(c)(3) unbundling duties.⁸¹ Neither is true of any of the three agreements before the Department.

Third, the Intervenor asserts that the agreements are “inter-related to and inter-dependent on each other.”⁸² They note, for example, that the Traffic Exchange Agreement [BEGIN

HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED]

[END HIGHLY SENSITIVE CONFIDENTIAL] But those provisions undermine, rather than

support, the Intervenor’s position. As noted above, the Traffic Exchange Agreement was in

place for years before the VoIP-to-VoIP Agreement took effect, governing [BEGIN HIGHLY

SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[END HIGHLY SENSITIVE CONFIDENTIAL]

For the foregoing reasons, the Department must address each agreement independently and cannot rely on a conclusion that one agreement is a § 252 interconnection agreement to require the filing of the other two agreements. In any event, as shown below, none of the agreements is a § 252 interconnection agreement.

⁸¹ See Order Approving Negotiated Interconnection Agreement in Its Entirety, *MCImetro Access Transmission Services, LLC*, Dkt. Nos. UT-960310 *et al.*, 2004 WL 2656551, at *4 (Wash. Utils. & Transp. Comm’n Oct. 20, 2004) (noting that Qwest had “concede[d]” that the amendment was, itself, a “fully negotiated interconnection agreement” and finding that it implemented the batch hot cut process for service provided using UNE loops, which § 251(c)(3) still requires); Order, *Sage Telecom, LP v. Public Util. Comm’n of Tex.*, No. A-04-CA-364-SS, 2004 WL 2428672, at *4 (W.D. Tex. June 21, 2004) (noting that SBC did “not dispute” that the amendment fulfilled “at least two of SBC’s duties under § 251,” including the obligation under § 251(c)(3) to unbundle local loops).

⁸² Sprint Post-Hearing Br. 29; *see also* Intervenor Post-Hearing Br. 51-56.

2. *The Settlement Agreement Is Not a § 252 Interconnection Agreement*

The Settlement Agreement [BEGIN HIGHLY SENSITIVE CONFIDENTIAL]

[REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL] As Verizon MA demonstrated, the Settlement Agreement does not contain substantive, ongoing obligations that implement a § 251(b) or (c) duty.⁸⁴ The Intervenors acknowledge that the only “ongoing” obligation in the Settlement Agreement [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

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

In all events, the FCC has announced that it “expect[s] all carriers to negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic.”⁸⁸

Therefore, the good faith negotiations [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

⁸³ Apr. 30 Hg. Tr. at 62:20-21 (Schlabs).
⁸⁴ See Verizon MA Post-Hearing Br. 24-25.
⁸⁵ See Intevenors Post-Hearing Br. 23-25; Sprint Post-Hearing Br. 33-35.
⁸⁶ Sprint Post-Hearing Br. 34.
⁸⁷ See May 1 Hg. Tr. at 83:14-21 (Burt).
⁸⁸ *ICC Reform Order* ¶ 1011. Although Sprint asserts that the FCC “plainly invoked” § 251 in announcing this expectation, the FCC did no such thing. Sprint Post-Hearing Br. 14. The FCC identified a half-dozen provisions in the Communications Act that might support a duty to negotiate in good faith IP VoIP interconnection arrangements, and it is seeking comment on those provisions. See *id.* ¶¶ 1335, 1351, 1354, 1356.

[REDACTED]

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

3. *The Traffic Exchange Agreement Is Not a § 252 Interconnection Agreement*

As Verizon MA demonstrated, the Traffic Exchange Agreement is not a § 252 interconnection agreement at least for two reasons.⁹⁰ First, to the extent that it **[BEGIN**

HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED] **[END HIGHLY SENSITIVE CONFIDENTIAL]** those obligations do not implement the reciprocal compensation duty in § 251(b)(5). In the *ICC Reform Order*, the FCC explicitly limited § 251(b)(5) to traffic, including VoIP traffic, that is “exchanged over PSTN facilities” — that is, in TDM format “and not in IP format.”⁹¹

Second, to the extent that the Traffic Exchange Agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [REDACTED]

[REDACTED] **[END HIGHLY SENSITIVE CONFIDENTIAL]** it is precisely the

⁸⁹ Sprint notes that the Settlement Agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [REDACTED]

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

⁹⁰ *See id.* at 27-29.

⁹¹ *ICC Reform Order* ¶ 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)”; 47 C.F.R. § 51.913 (limiting the rule for VoIP-PSTN traffic to traffic “exchanged . . . in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format”).

⁹² As Verizon MA has shown, the bill-and-keep arrangement in the § 252 interconnection agreement between Verizon MA and Comcast Phone of Massachusetts, Inc. **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [REDACTED]

type of “commercial agreement[.]” that the FCC held in the *ICC Reform Order* that carriers are “free to negotiate” and that may “depart from the default regime” established in that order.⁹³

Such “commercial agreements” are, by definition, *not* “regulated agreements” subject to § 252.⁹⁴

The Department is bound by both of those FCC determinations. The Department can neither expand the scope of § 251(b)(5) to include traffic exchanged in IP format in conflict with the FCC’s decision to exclude such traffic nor eliminate the right of ILECs and CLECs to negotiate *commercial* agreements that depart from the default regime for traffic exchanged in TDM format by transforming those agreements into § 252 interconnection agreements. As the First Circuit has held, state commissions are preempted from “seek[ing] to dictate” outcomes that “are in direct conflict with specific FCC policies adopted pursuant to its authority under the 1996 Act.”⁹⁵

Furthermore, the various Intervenors are wrong in contending that courts would defer to the Department’s interpretation of federal law. In *Global NAPs, Inc. v. Verizon New England Inc.*,⁹⁶ the First Circuit expressly held that it does “not afford deference to the DT[C]’s interpretation of the [federal] statute.”⁹⁷ Sprint cites a later First Circuit decision,⁹⁸ but that

[REDACTED] [END]

HIGHLY SENSITIVE CONFIDENTIAL

⁹³ *ICC Reform Order* ¶ 739 n.1290 (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; internal quotation marks omitted).

⁹⁴ *See Verizon MA Post-Hearing Br.* 27-29.

⁹⁵ *Verizon New England*, 509 F.3d at 8-9.

⁹⁶ 396 F.3d 16 (1st Cir. 2005).

⁹⁷ *Id.* at 23 n.7.

⁹⁸ *See Sprint Post-Hearing Br.* 7.

decision merely notes that state commissions get “‘some deference’” in their interpretation of *state law*.⁹⁹

a. *The Traffic Exchange Agreement Is a Commercial Agreement That Does Not Implement § 251(b)(5)*

The Intervenors have no persuasive response to either of the above points. Indeed, in discussing the Traffic Exchange Agreement, *none* of the Intervenors even acknowledges that the FCC excluded the exchange of VoIP traffic in IP format from the scope of § 251(b)(5).¹⁰⁰ Sprint, XO, and Cox/Charter also do not acknowledge the FCC’s express affirmance of the right to enter into commercial agreements. The other Intervenors simply assert in a footnote that the “FCC never stated that such [commercial] agreements are excluded from Section 252.”¹⁰¹

These Intervenors are wrong. In the *ICC Reform Order*, the FCC expressly “agree[d] with” Verizon’s position in its comments that carriers should be permitted to “‘negotiate commercial agreements’” that depart from any default regime the FCC established.¹⁰² In those comments, Verizon made clear that the commercial agreements it envisioned would be free from “regulatory prescriptions” and would be like other agreements between network providers where there is an “absence of any regulatory mandate to negotiate . . . in the first place.”¹⁰³ The FCC’s endorsement of Verizon’s proposal for commercial agreements was thus an endorsement of commercial agreements entered into outside of § 252, with its requirements of state commission

⁹⁹ *Centennial Puerto Rico License Corp. v. Telecommunications Regulatory Board of P.R.*, 634 F.3d 17, 26 (1st Cir. 2011) (quoting *Worldnet Telecomms., Inc. v. Puerto Rico Tel. Co.*, 497 F.3d 1, 11 (1st Cir. 2007) (holding that the Puerto Rico commission gets “some deference” in its interpretation of Puerto Rico law)).

¹⁰⁰ See Sprint Post-Hearing Br. 29-33; Intervenors Post-Hearing Br. 25-30. Neither XO nor Cox/Charter discusses the Traffic Exchange Agreement specifically; but also, neither acknowledges the FCC’s express limitation on the scope of § 251(b)(5).

¹⁰¹ Intervenors Post-Hearing Br. 28 n.107.

¹⁰² *ICC Reform Order* ¶ 739 n.1290 (quoting Verizon Comments at 7, *Connect America Fund*, WC Dkt. Nos. 10-90 *et al.* (FCC filed Apr. 18, 2011) (“Verizon Comments”)).

¹⁰³ Verizon Comments at 7-8.

arbitration and tariff-like opt-in requirements. The FCC, moreover, had drawn the same distinction between § 252 interconnection agreements and commercial agreements in the *Qwest Declaratory Ruling*, explaining that “commercial” agreements between ILECs and CLECs are not § 252 interconnection agreements and, instead, are free from the “regulatory impediments” that § 252 creates for entering into normal commercial contracts.¹⁰⁴

b. *The Traffic Exchange Agreement Does Not Implement § 251(c)(2)*

The Intervenors also continue to rely on the *definitions* in the Traffic Exchange Agreement to claim that it imposes interconnection obligations and, therefore, that the Traffic Exchange Agreement is a § 252 interconnection agreement.¹⁰⁵ The Traffic Exchange Agreement does not create or impose any *interconnection* obligations. Instead, it states unambiguously that

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

¹⁰⁴ *Qwest Declaratory Ruling* ¶ 8.

¹⁰⁵ See Intervenors Post-Hearing Br. 25-28; Sprint Post-Hearing Br. 30-32.

¹⁰⁶ TEA §§ 1.11, 1.20.

¹⁰⁷ Sprint Post-Hearing Br. 30-31; see Intervenors Post-Hearing Br. 27 (noting that Comcast can “take advantage of” the rates in the Traffic Exchange Agreement if it **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [REDACTED] **[END HIGHLY SENSITIVE CONFIDENTIAL]**).

[END HIGHLY SENSITIVE CONFIDENTIAL] The Traffic Exchange Agreement does not impose an interconnection obligation, under § 251(c)(2) or otherwise.

- c. *Because the Traffic Exchange Agreement Does Not Implement § 251(b) or (c) the Dispute Resolution Provisions Do Not Make the Agreement a § 252 Interconnection Agreement*

The Intervenors point to the existence of [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL] But they effectively (and correctly) concede that such provisions — standing alone — are insufficient to render a contract a § 252 interconnection agreement where, as here, the substantive provisions of the contract do not implement the § 251(b) or (c) duties.¹⁰⁹

- d. *Sprint's Complaints About the Rates in the Traffic Exchange Agreement Lack Merit*

Sprint complains that the rates in the Traffic Exchange Agreement [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED] [REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL] Sprint does not contend that rates available under the FCC's default regime or in Verizon's template agreement for IP VoIP interconnection are unjust and unreasonable. Sprint's contention that the rates in the Traffic Exchange Agreement violate § 251(c)(2) is flawed on multiple grounds.

First, § 251(c)(2)(D) simply does not apply to intercarrier compensation. That subsection governs the rates for the "facilities and equipment" used for the interconnection required under

¹⁰⁸ See Intervenors Post-Hearing Br. 29-30.

¹⁰⁹ See *id.*

¹¹⁰ See Sprint Post-Hearing Br. 37-41.

§ 251(c)(2),¹¹¹ not the per minute rates for interexchange traffic that is exchanged in TDM format over those interconnection facilities. The FCC made this clear in 1996, rejecting claims that § 251(c)(2) governs the rates for switched access traffic.¹¹² The Eighth Circuit upheld the FCC’s conclusion.¹¹³ Therefore, the rates in the Traffic Exchange Agreement — which, as shown above, [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL] — cannot violate § 251(c)(2)(D).

Second, § 251(c)(2)(C) not only does not address intercarrier compensation rates, but is limited to the “quality” of the interconnection that *an ILEC* provides to comply with § 251(c)(2).¹¹⁴ As Verizon has explained, to the extent that [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹¹¹ 47 U.S.C. § 251(c)(2)(D); *see also id.* § 252(d)(1) (setting the pricing standard for determining the “rate for the interconnection of facilities and equipment of purposes of subsection (c)(2) of section 251”).

¹¹² *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 176 (1996) (“*Local Competition Order*”).

¹¹³ *See Competitive Telecomms. Ass’n v. FCC*, 117 F.3d 1068, 1071-73 (8th Cir. 1997).

¹¹⁴ 47 U.S.C. § 251(c)(2)(C).

¹¹⁵ *See* Verizon MA Post-Hearing Br. 7 n.19.

¹¹⁶ *See* Sprint Post-Hearing Br. 39 n.22.

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

As Verizon MA demonstrated, the VoIP-to-VoIP Agreement is not a § 252 interconnection agreement for two reasons.¹²¹ First, it is between Verizon and Comcast IP, which is not a telecommunications carrier and is not registered as a LEC in Massachusetts or any other state. Because a contract must be between an incumbent LEC and a requesting telecommunications carrier to qualify as a § 252 interconnection agreement,¹²² the VoIP-to-VoIP Agreement is categorically not an interconnection agreement, regardless of its terms.

Second, the contractual obligation in the VoIP-to-VoIP Agreement is [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL] That obligation is not established by, nor does it pertain or relate to, the interconnection obligation in § 251(c)(2). The FCC has never interpreted § 251(c)(2) either to allow a CLEC to demand interconnection in any particular format (IP or otherwise) or to require interconnection for the exchange of traffic that *never touches the PSTN*. Interconnection for the exchange of such VoIP traffic in IP format is not interconnection “for the transmission and routing of telephone exchange service and exchange access,”¹²³ because VoIP services are information services and both telephone exchange service and exchange access are types of telecommunications service.

¹²¹ See Verizon MA Post-Hearing Br. 33-37.

¹²² See, e.g., 47 U.S.C. §§ 251(c)(1), 252(a).

¹²³ *Id.* § 251(c)(2)(A).

a. *Comcast IP Is Not a Telecommunications Carrier and Cannot Be Treated as Though It Were One for Purposes of § 252*

Despite XO's prior (and correct) agreement that "[s]ections 251(c) and 252 explicitly and unambiguously apply **only** to agreements between an ILEC and a requesting telecommunications carrier,"¹²⁴ XO ignores that Comcast IP is *not* a telecommunications carrier and that the Department has never regulated it as such. Cox/Charter and Sprint also do not acknowledge that. Only the other Intervenors address this point, asserting that Comcast IP either is a telecommunications carrier or that it should be treated as if it were one.¹²⁵ They are wrong on both counts.

i. *Comcast IP Is Not a Telecommunications Carrier*

The Intervenors urge the Department to find that Comcast IP's retail VoIP service is a telecommunications service and, therefore, that Comcast IP is a telecommunications carrier.¹²⁶ Comcast IP is instead an information service provider for two reasons.

First, Comcast IP's retail VoIP service offers 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."¹²⁷ Indeed, the FCC expressly found in the *Vonage Order*¹²⁸ that *all* VoIP services — including those offered by facilities-based providers, such as cable companies — offer consumers a "tightly integrated"

¹²⁴ XO Opp. Mot. To Compel at 3.

¹²⁵ See Intervenors Post-Hearing Br. 30-44.

¹²⁶ See *id.* at 30-40.

¹²⁷ 47 U.S.C. § 153(24); see Verizon MA Hearing Ex. 4 (Comcast's Response to Verizon's First Set of Information Requests to Comcast at 5-7 (Feb. 6, 2014) (detailing the numerous information processing functions that are tightly integrated into Comcast IP's retail VoIP offerings)).

¹²⁸ Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) ("*Vonage Order*"), *petitions for review denied, Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007)

package of “communications capabilities” and that these “integrated capabilities and features, able to be invoked sequentially or simultaneously, . . . allow[] customers to manage personal communications dynamically.”¹²⁹ Although the FCC did not need in the *Vonage Order* to classify VoIP services as information services in order to preempt the state regulations at issue there, the FCC’s conclusion that VoIP services “tightly integrate[]” information processing and telecommunications into a single offering leads inexorably to the conclusion — reached by every federal court to consider the question¹³⁰ — that all VoIP services are information services under federal law and the test the Supreme Court applied in *National Cable & Telecommunications Association v. Brand X Internet Services*.¹³¹

The Intervenor misread *Brand X* in claiming that the relevant question is how “end users perceive the service.”¹³² On the contrary, the question under the Communications Act and *Brand X* turns on an objective review of the finished service and functions the provider *offers* to end users, not the end user’s subjective perceptions.¹³³ That is why the Court focused on the information processing, such as the conversion from web site names (e.g., “http://www.mass.gov”) to IP addresses (e.g., “170.63.206.54”) that is an inherent function of the service at issue there, without discussing how consumers subjectively perceive that

¹²⁹ *Id.* ¶ 32; *see id.* ¶ 25 n.93 (recognizing that “these integrated capabilities and features” are “inherent features” in VoIP services offered “by facilities-based providers,” as well as by providers such as Vonage).

¹³⁰ *See PAETEC Communications, Inc. v. CommPartners, LLC*, No. 08-Civ.-0397 (JR), 2010 WL 1767193, at *3 (D.D.C. Feb. 18, 2010); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm’n*, 461 F. Supp. 2d 1055, 1081-82 (E.D. Mo. 2006), *aff’d on other grounds*, 530 F.3d 676 (8th Cir. 2008); *Vonage Holdings Corp. v. New York Pub. Serv. Comm’n*, No. 04-Civ.-4306 (DFE), 2004 WL 3398572, at *1 (S.D.N.Y. July 16, 2004); *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 999 (D. Minn. 2003).

¹³¹ 545 U.S. 967 (2005) (“*Brand X*”).

¹³² Intervenor Post-Hearing Br. 31.

¹³³ *See* 47 U.S.C. § 153(53); *Brand X*, 545 U.S. at 988.

functionality.¹³⁴ In any event, the record here shows that, with respect to Verizon’s similar FiOS Digital Voice offering, Verizon’s customers do subjectively “perceive [FiOS Digital Voice] as more than just voice” and “have shown with their . . . purchasing decisions . . . that they value these more advanced features and services” that are integrated into Verizon’s VoIP offering.¹³⁵ The Intervenors ignore this evidence.

The Intervenors are equally wrong in relying on the FCC’s decision requiring providers of interconnected VoIP service to contribute to the federal Universal Service Fund.¹³⁶ As an initial matter, the FCC did not find in that order that VoIP providers offer telecommunications services to their customers or are telecommunications carriers, which is the question at issue here.¹³⁷ Instead, the FCC found that it was sufficient under the universal service statute¹³⁸ to conclude that “VoIP providers ‘provide’ telecommunications” because “an input into the finished service ‘offered’ to the [VoIP] customer” is telecommunications — that is, “transmission.”¹³⁹ Under the definitions in the Communications Act, telecommunications is an input to both telecommunications services *and* information services.¹⁴⁰ The FCC’s order thus does not answer the question here, which is whether the finished service that VoIP providers offer to their customers is a telecommunications service or an information service.

¹³⁴ See *Brand X*, 545 U.S. at 998-99.

¹³⁵ Apr. 30 Hg. Tr. at 166:6-16 (Vasington), 169:12-170:1 (Spinelli). Nor does it matter that consumers view VoIP services as a substitute for PSTN services. See Intervenors Post-Hearing Br. 31-32. The statutory definitions of telecommunications service and information service turn on the nature of the service offered, not whether one service can be substituted for another.

¹³⁶ See Intervenors Post-Hearing Br. 32. Sprint cites the same FCC order, without contending that Comcast IP provides a telecommunications service. See Sprint Post-Hearing Br. 32.

¹³⁷ See Report and Order and Notice of Proposed Rulemaking, *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, ¶ 35 (2006) (“*VoIP USF Order*”).

¹³⁸ See 47 U.S.C. § 254.

¹³⁹ See *VoIP USF Order* ¶¶ 40-41 (explaining that a “provider ‘provides’ more than just [the] finished service” that it offers to its customers).

¹⁴⁰ See 47 U.S.C. § 153(24), (53).

The Intervenors also contend that the information processing features offered to VoIP customers are merely packaged with that service, rather than tightly integrated.¹⁴¹ As noted above, the FCC in the *Vonage Order* expressly held otherwise, finding those features to be “tightly integrated.”¹⁴² The Intervenors did not introduce any evidence about how Comcast IP’s VoIP service was built or designed that would permit the Department to reach a conclusion at odds with the FCC’s. And the record evidence about Verizon’s FiOS Digital Voice service, which the Intervenors’ ignore almost entirely, demonstrates that it was built with “one integrated server architecture” that “takes advantage of the IP infrastructure.”¹⁴³ The “networks and the infrastructure” used to provide the FiOS Digital Voice suite of services “couldn’t be more different” from those used to provide PSTN services.¹⁴⁴ Furthermore, while there had “been attempts to bundle services over the years” — that is, PSTN services and information services — those earlier efforts were “really kludging together a lot of elements” from separate networks rather than, as with FiOS Digital Voice, a purpose-built integrated system.¹⁴⁵

Second, Comcast IP’s retail VoIP service is an information service for the independent reason that it offers customers the *capability* of a net protocol conversion from IP to TDM or

¹⁴¹ See Intervenors Post-Hearing Br. 33-37.

¹⁴² *Vonage Order* ¶ 32.

¹⁴³ Apr. 30 Hg. Tr. at 163:11-164:3 (Spinelli); see *id.* at 164:6-11 (Spinelli) (“[A]ll of the features that are enabled reside in an application server . . . and . . . are provisioned in that application server.”).

¹⁴⁴ *Id.* at 166:17-167:10 (Vasington and Spinelli). In quoting Mr. Spinelli’s statement that a customer could use FiOS Digital Voice (“FDV”) “just for voice,” the Intervenors (at 35) ignore his testimony that such a customer would “still[] use[] th[e] same integrated architecture” and “applications server” built for Verizon’s VoIP service, and that “all” FDV customers “use some of the features beyond just the voice call.” Apr. 30 Hg. Tr. at 165:10-166:6

¹⁴⁵ Apr. 30 Hg. Tr. at 164:12-165:9 (Spinelli). The FCC findings on which the Intervenors rely (at 35-36) that such “kludges” do not convert a stand-alone telecommunications service into an information service have no application to a purpose-built system where — as the FCC has already found and the record here confirms — information processing features are “tightly integrated” into the finished service offered to consumers. *Vonage Order* ¶ 32.

from TDM to IP.¹⁴⁶ 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 service that Comcast IP (and Verizon MA) offers consumers includes that capability: it is how VoIP customers can communicate with customers still served on the PSTN. A Missouri federal court relied on this very “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.”¹⁴⁷

To avoid this clear federal precedent, the Intervenors contend that the net protocol conversion that occurs when a Comcast VoIP customer and a PSTN customer communicate falls within an exception the FCC established in the *Non-Accounting Safeguards Order*.¹⁴⁸ But the exception they cite applies only where a protocol conversion occurs “to maintain compatibility with existing CPE.”¹⁴⁹ With VoIP services the relevant net protocol conversion from IP to TDM or *vice versa* is one that enables communication between users of VoIP and PSTN services offered by different providers, not to enable a customer to use existing customer premises equipment (“CPE”) with its VoIP service.

ii. *Comcast IP Cannot Be Treated as if It Were a Telecommunications Carrier for Purposes of § 252*

Unable to demonstrate that the Department erred in not regulating Comcast IP as a telecommunications carrier, the Intervenors next argue that Comcast IP should be treated as if it

¹⁴⁶ See Verizon MA Panel Direct at 11, 27.

¹⁴⁷ See, e.g., *Southwestern Bell*, 461 F. Supp. 2d at 1082.

¹⁴⁸ See Intervenors Post-Hearing Br. 37-40 (citing First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, ¶¶ 106-107 (1996) (“*Non-Accounting Safeguards Order*”) (subsequent history omitted)).

¹⁴⁹ *Non-Accounting Safeguards Order* ¶ 106.

were one for purposes of determining whether the VoIP-to-VoIP Agreement is a § 252 interconnection agreement.¹⁵⁰

The Intervenors first suggest that either Comcast's decision to establish Comcast IP to provide its retail VoIP services or the parties' decision that the VoIP-to-VoIP Agreement should be between Verizon and Comcast IP is an effort to evade the requirements of § 252.¹⁵¹ But there is no record evidence to support the Intervenors' claims. In fact, as Comcast has noted, the FCC "has long approved the use of VoIP affiliates by CLECs."¹⁵² Furthermore, the record shows that Verizon has signed all of its agreements for IP VoIP interconnection with another provider of retail VoIP service, whether that provider is affiliated with a CLEC (such as Comcast IP) or not (such as Vonage). That Comcast IP is Verizon's counterparty to the VoIP-to-VoIP Agreement is thus a natural consequence of Comcast IP's business of providing VoIP service to customers, rather than any kind of evidence of a purpose to evade (inapplicable) statutory requirements. The Intervenors offer no explanation why either Verizon or Comcast IP would have had reason to involve Comcast Phone, or any other intermediary, in an interconnection arrangement designed to permit the direct exchange of traffic between two VoIP customers in IP format.

Second, the D.C. Circuit's decision in *ASCENT v. FCC*¹⁵³ provides no support for treating Comcast IP as though it were a telecommunications carrier for purposes of determining whether a contract is a § 252 interconnection agreement. In *ASCENT*, the question before the

¹⁵⁰ See Intervenors Post-Hearing Br. 40-44.

¹⁵¹ See *id.* at 40, 42. In the Department's May 4, 2012 *ex parte* letter to the FCC that the Intervenors cite, *see id.* at 40, the Department did not state (as the Intervenors claim) that a VoIP provider affiliate of a CLEC should be treated as a CLEC for purposes of § 252, but rather urged the FCC to adopt rules regarding an ILEC's use of affiliates to provide VoIP service (which is not at issue here). See Department May 4, 2012 *Ex Parte* to FCC at 11, *Connect America Fund*, WC Dkt. Nos. 10-90 *et al.*, available at <http://apps.fcc.gov/ecfs/document/view?id=7021916063>. In all events, the Department must base its decision on the record here, rather than its prior advocacy.

¹⁵² Comcast Opp. to Mot. for Summ. J. at 2 (Apr. 11, 2014).

¹⁵³ 235 F.3d 662 (D.C. Cir. 2001).

D.C. Circuit was whether an affiliate of an ILEC, which was offering advanced services that were then classified as telecommunications services, was the ILEC's "successor or assign" under 47 U.S.C. § 251(h)(1)(B)(ii) and therefore an ILEC itself subject to the duties in § 251(c).¹⁵⁴ There is no comparable statutory definition that would allow a VoIP provider affiliated with a CLEC to be treated as a CLEC merely by virtue of its affiliation. Nor have the Intervenors made any showing that Comcast IP is a successor or assign of Comcast's CLEC entities. ASCENT did not adopt a general rule that would permit the Department to ignore the express statutory provisions that exclude from the category of § 252 interconnection agreements those contracts between an incumbent LEC and a non-telecommunications carrier like Comcast IP.

Finally, the Intervenors again point to Comcast IP's [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [REDACTED] [REDACTED] [END HIGHLY SENSITIVE CONFIDENTIAL] But the Intervenors still cite no authority supporting this claim that the regulatory status of a subcontractor is relevant to whether a contract is a § 252 interconnection agreement. That claim 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.¹⁵⁶

b. Section 251(c)(2) Does Not Require IP VoIP Interconnection

The VoIP-to-VoIP Agreement is not a § 252 interconnection agreement for the additional and independent reason that a contractual obligation [BEGIN HIGHLY SENSITIVE

¹⁵⁴ See *id.* at 665-68.

¹⁵⁵ Intervenors Post-Hearing Br. 43 & n.168 (quoting V2V § 31).

¹⁵⁶ See, e.g., *Fireman's Fund Ins. Co. v. Falco Constr. Corp.*, 493 F. Supp. 2d 143, 145-46 (D. Mass. 2007).

CONFIDENTIAL] [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” — that is, for telecommunications services.¹⁵⁷ As shown above, retail VoIP services like Comcast IP’s and Verizon’s FiOS Digital Voice are information services, not telecommunications services. Therefore, an agreement to interconnect in IP format solely for the exchange of VoIP traffic between two VoIP providers is *not* an agreement for the “transmission and routing of telephone exchange service and exchange access.”¹⁵⁸

The FCC’s interpretation of § 251(b)(5) supports this conclusion. As shown above, in concluding in the *ICC Reform Order* that § 251(b)(5) includes VoIP-PSTN traffic, the FCC expressly limited the § 251(b)(5) duty to the establishment of reciprocal compensation arrangements for VoIP-PSTN traffic that is exchanged in TDM format.¹⁵⁹ The FCC has long held, and the courts of appeals have affirmed, that § 251(b)(5) is the provision that governs the exchange of traffic over the interconnection arrangements that § 251(c)(2) requires ILECs to establish.¹⁶⁰ The Supreme Court, moreover, relied on this understanding of the statute in *Talk America, Inc. v. Michigan Bell Telephone Co.*¹⁶¹ And in the *ICC Reform Order*, which the Tenth Circuit upheld against all challenges, the FCC reaffirmed the relationship between § 251(b)(5)

¹⁵⁷ 47 U.S.C. § 251(c)(2)(A).

¹⁵⁸ See Verizon MA Post-Hearing Br. 33-37 (internal quotation marks omitted).

¹⁵⁹ See *ICC Reform Order* ¶¶ 940, 969; 47 C.F.R. § 51.913.

¹⁶⁰ See *Local Competition Order* ¶ 176; *Competitive Telecomms. Ass’n*, 117 F.3d at 1071-73; see also *AT&T Corp. v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir. 2003).

¹⁶¹ 131 S. Ct. 2254, 2263 (2011).

and § 251(c)(2) when it held that “existing section 251(c)(2) interconnection facilities” can be used to exchange the VoIP-PSTN traffic that the FCC “br[ought] . . . within section 251(b)(5)” in that order.¹⁶² Because the FCC only brought VoIP-PSTN traffic exchanged in TDM format within § 251(b)(5) — and expressly excluded VoIP traffic exchange in IP format — it follows that there is no obligation under § 251(c)(2) to interconnect for the exchange of VoIP traffic in IP format.

In arguing that the Department should nonetheless conclude that § 251(c)(2) requires ILECs to interconnect in IP format for the exchange of traffic between two VoIP customers, the Intervenor raises a variety of erroneous arguments.

First, the Intervenor relies heavily on the FCC’s statement in the *ICC Reform Order* that the “interconnection requirements [of Section 251 of the Act] are technology neutral.”¹⁶³ But the FCC was referring to § 251 as a whole, and § 251 contains two interconnection duties: one, in § 251(a), that applies to all telecommunications carriers and that is not implemented through § 252 interconnection agreements, and one, in § 251(c)(2), that applies only to ILECs and is implemented through § 252 interconnection agreements. When the FCC later discussed § 251(a) specifically, it made clear that this is the interconnection requirement that is “technology neutral.”¹⁶⁴ The FCC made no comparable statement about § 251(c)(2) and expressly recognized that § 251(c)(2) is not service neutral, is “circumscribed in various ways,” and applies only to

¹⁶² *ICC Reform Order* ¶ 972.

¹⁶³ Intervenor Post-Hearing Br. 44-45 (quoting *ICC Reform Order* ¶ 1342) (alteration in original); see also XO Post-Hearing Br. 4-5 (citing *ICC Reform Order* ¶ 1342); Sprint Post-Hearing Br. 13-14 (same). Sprint also cites two additional paragraphs in the *ICC Reform Order* — ¶¶ 1011 and 1335 — but those go to the FCC’s expectation that all carriers — not just ILECs — will negotiate IP interconnection in good faith. As shown above, the FCC did not ground that expectation of good faith negotiation in § 251(c)(2) and has identified a half-dozen provisions as a possible basis for a duty to negotiate IP interconnection in good faith. See *supra* note 88.

¹⁶⁴ *ICC Reform Order* ¶ 1352.

“interconnection obtained . . . ‘for the transmission and routing of telephone exchange service and exchange access.’”¹⁶⁵

Second, the Intervenor note that the FCC has held that § 251(c)(2) is not limited to circuit switched services.¹⁶⁶ But the FCC has relied on those holdings — most recently in the *ICC Reform Order* itself — to explain why carriers can use their *TDM interconnection arrangements* to exchange VoIP traffic in TDM format.¹⁶⁷ Those holdings provide no support for claims that § 251(c)(2) requires ILECs to interconnect with CLECs in IP format.

Third, Sprint claims that an existing FCC rule, § 51.305(c), shows that § 251(c)(2) includes interconnection in IP format because it refers to “interface[s]” and “protocol standards.”¹⁶⁸ Sprint misreads this rule. Section 51.305(c) says nothing about interconnection in IP format, and instead is a rule for determining when prior interconnection is evidence that “interconnection is technically feasible at [a] point.”¹⁶⁹ The rule states that prior interconnection is “substantial evidence that interconnection is [also] technically feasible . . . at substantially similar points, in networks employing substantially similar facilities.”¹⁷⁰ The language on which Sprint focuses then states that “evidence of the substantial similarity of network facilities” is the “[a]dherence to the same interface or protocol standards.”¹⁷¹ Thus, under § 51.305(c), different facilities that use the same interface and TDM protocol will be considered “substantially

¹⁶⁵ *Id.* ¶¶ 1381, 1389 (quoting 47 U.S.C. § 251(c)(2)(A)).

¹⁶⁶ *See* Intervenor Post-Hearing Br. 45; *see also* Sprint Post-Hearing Br. 13 (citing *ICC Reform Order* ¶ 1381).

¹⁶⁷ *See ICC Reform Order* ¶ 972.

¹⁶⁸ *See* Sprint Post-Hearing Br. 13 (mis-citing the rule as 47 C.F.R. § 51.505(c)).

¹⁶⁹ 47 C.F.R. § 51.305(c).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

similar.” TDM and IP facilities, of course, use *different* “interface[s] [and] protocol standards” and are not substantially similar under the FCC’s rule.

Fourth, the Intervenor arguments that VoIP service is either telephone exchange service or exchange access.¹⁷² But both “telephone exchange service” and “exchange access” are types of telecommunications services.¹⁷³ As shown above, VoIP is an information service and, therefore, cannot be a telecommunications service, as the two categories are mutually exclusive.¹⁷⁴

Furthermore, the Intervenor arguments are wrong in claiming that VoIP service qualifies as telephone exchange service under the “comparable service” clause that Congress added as § 153(54)(B) in 1996. The FCC has explained that Congress did not “intend[] to extend the telephone exchange definition to encompass carriers that historically have been excluded from common carrier regulation,” such as information service providers.¹⁷⁵ Moreover, § 153(54)(B) makes clear that the “comparable service” must, itself, be “a telecommunications service.”¹⁷⁶

Fifth, Sprint, XO, and Cox/Charter — but *not* the other Intervenor arguments — urge the Department to follow a decision of the Michigan commission.¹⁷⁷ The Michigan commission

¹⁷² See Intervenor Post-Hearing Br. 45-48.

¹⁷³ See Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, ¶ 10 (1999) (“*Advanced Services Remand Order*”) (describing telephone exchange service and exchange access as types of telecommunications services).

¹⁷⁴ See *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 219-20 (3d Cir. 2007); 47 U.S.C. § 153(24), (51).

¹⁷⁵ *Advanced Services Remand Order* ¶ 30 n.72.

¹⁷⁶ 47 U.S.C. § 153(54)(B).

¹⁷⁷ See Sprint Post-Hearing Br. 14-15; XO Post-Hearing Br. 4-5; Cox/Charter Post-Hearing Br. 5-6. Sprint — but not any other Intervenor — also points to decisions by the commissions in Ohio and Puerto Rico. See Sprint Post-Hearing Br. 15-16. But neither state commission addressed whether VoIP is an information service or a telecommunications service. Indeed, the Puerto Rico commission expressly refused to address that question. See Report and Order at 11, *Liberty Cablevision of Puerto Rico, LLC*, JRT-2012-AR-0001 (Puerto Rico Telecomms. Reg. Bd. Sept. 25, 2012) [Burt Exh. JRB-1]; see also Finding and Order at 4-5, *Commission’s Review of Chapter 4901:1-7, of the Ohio Administrative Code, Local Exchange Carrier-to-Carrier Rules*, Case No. 12-922-TP-ORD (Ohio Pub. Utils. Comm’n Oct. 31, 2012) (relying solely on the FCC’s expectation that all carriers will negotiate IP interconnection in good faith), available at <http://dis.puc.state.oh.us/TiffToPDF/A1001001A12J31B40910C21140.pdf>.

would preclude efficient IP VoIP interconnection, as Sprint itself has agreed.¹⁸⁸ Instead, the Intervenor deny that the POI per LATA rule exists and claim that a CLEC can choose not to interconnect at any point within a LATA in which it provides service.¹⁸⁹ The FCC, however, has stated expressly that, under its “current rules, interconnecting CLECs are *obligated* to provide one POI per LATA.”¹⁹⁰ Although a CLEC can choose to interconnect at multiple points within a LATA, it cannot refuse under the FCC’s rules to interconnect at any point in a LATA.

Furthermore, as Verizon MA showed, interpreting § 251(c)(2) to require IP VoIP interconnection would 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. This risk is not speculative. Even today, with nearly two decades of experience implementing the 1996 Act, state commissions continue to reach different results in applying the FCC’s § 251(c)(2) interconnection rules to TDM interconnection arrangements.¹⁹¹ There is no reason to believe that such conflicting rulings would not arise if multiple state commissions were petitioned to arbitrate a dispute about IP VoIP interconnection, particularly given the absence of any FCC guidance. In arguing to the contrary, the Intervenor simply assume that such arbitrations will rarely occur because carriers will instead opt into existing agreements or negotiate resolutions.¹⁹² The Intervenor thus ignore the history of arbitrations and divergent state commission results in implementing § 251(c)(2) for TDM interconnection, as well as the increased risk of inconsistent

¹⁸⁸ See Verizon MA Post-Hearing Br. 36-37.

¹⁸⁹ See Intervenor Post-Hearing Br. 61 n.244

¹⁹⁰ Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, ¶ 72 (2001) (emphasis added).

¹⁹¹ See Verizon MA Post-Hearing Br. 42 & n.198.

¹⁹² See Intervenor Post-Hearing Br. 60-62.

decisions if multiple state commissions could adjudicate disputes about a single agreement establishing out-of-state interconnection points.

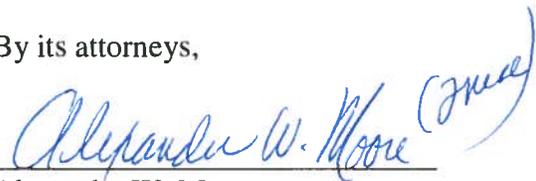
CONCLUSION

For these reasons and those set forth in Verizon MA's post-hearing brief, the Department should hold that none of the agreements at issue is a § 252 interconnection agreement and should terminate this proceeding.

Respectfully submitted,

VERIZON NEW ENGLAND INC.

By its attorneys,

A handwritten signature in blue ink that reads "Alexander W. Moore" with a circled "mae" to the right of the name.

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Dated: June 20, 2014