

**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) D.T.C. Docket No. 13-6
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)
_____)

**INITIAL BRIEF OF
XO COMMUNICATION SERVICES, LLC**

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Dated: May 30, 2014

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I. INTRODUCTION/PROCEDURAL HISTORY

XO Communications Services, LLC ("XO") hereby respectfully files this Initial Brief in accordance with the established procedural schedule. The Department of Telecommunications and Cable ("Department") described well the genesis of this proceeding in its May 13, 2013 order opening this investigation (the "May 13, 2013 Order"). Since that time Verizon has issued a near constant stream of motions¹ for relief that would have the effect of delaying or avoiding the Department's timely consideration of the issues in this case which are of critical importance as the public switched telephone network continues to transition to an all-internet protocol ("IP") public communications network. Appropriately,

¹ Verizon June 26, 2013 Motion for Abeyance (seeking to freeze the proceeding until all negotiations on the Agreements concluded), Verizon November 19, 2013 Motion for Reconsideration and Clarification (seeking to bar all discovery on central issue of nature of the Agreements until all negotiations on the Agreements concluded) to Stay, Verizon May 19, 2014 Motion to Abate (seeking essentially to close the proceeding)

the Department has remained steadfast and has pushed forward deliberately toward a resolution of the issue of whether Verizon's three existing contracts with Comcast (labeled the "Settlement Agreement," the "Traffic Exchange Agreement" and the "VoIP-to-VoIP Agreement") (collectively herein the "Agreements") are interconnection agreements under 47 U.S.C. § 251 that must be filed with the Department for approval pursuant to 47 U.S.C. § 252.

Also, in addition to Verizon's barrage of motions and the numerous and more typical discovery disputes and an extended procedural dispute about the confidential treatment of and access to confidential materials, the Competitive Carriers filed a Motion for Summary Judgment at the completion of the discovery phase of the proceeding. The Department denied such Motion through a Hearing Officer ruling dated April 24, 2014 (the "April 24th Ruling") on the narrow basis that further development of a factual record through the hearing process would be helpful. However, the April 24th Ruling did not make any determination as to the only legal issue raised by the Motion for Summary Judgment and this case as a whole of whether the Agreements are interconnection agreements under 47 U.S.C. § 251 that must be filed with the Department for approval pursuant to 47 U.S.C. § 252.

II. REVIEW OF THE TERMS OF THE AGREEMENTS SHOWS THAT THESE ARE INTERCONNECTION AGREEMENTS THAT MUST BE FILED WITH THE DEPARTMENT UNDER SECTION 252 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED.

A. The Standard for Determining Whether an Agreement Is a Section 252 Agreement Is Broad

As the Department correctly recognized in the May 13, 2013 Order: "an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to

section 252(a)(1)” (emphasis added), the May 13, 2013 Order at 4 quoting *Qwest Communications Int’l Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Agreements under Section 252(a)(1)*, WC Dkt. 02-89, Memorandum Opinion and Order, FCC 02-276, 17 FCC Rcd. 19337, ¶ 8 (2002) (emphasis omitted) (“2002 *Qwest Order*”).” May 13, 2013 Order at 4. Therefore, agreements are “interconnection agreements” under 47 U.S.C. § 252 when they govern the interconnection of two telecommunications carriers in order to exchange traffic (in IP format) as well as the pricing thereof. *See* Tr. 62, line 21. *See also* 47 U.S.C. §§ 251(a), 251(c)(2). Indeed, the FCC has been clear that agreements concerning the physical linking of two parties’ networks for mutual traffic exchange is “interconnection.” *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and CMRS Providers*, CC Docket No. 96-98, First Report and Order, FCC 96-325, 11 FCC Rcd. 15499, ¶ 176 (1996) (“*Local Competition Order*”).

The FCC also has unequivocally stated that state commissions may determine, using their own expertise, what is an interconnection agreement that falls under Section 251 and, therefore, must be filed with the state commission. *2002 Qwest Order* ¶ 10. In fact, states and reviewing courts have established a broad standard that agreements containing an ongoing obligation *relating to* section 251(a), (b) or (c) must be filed under 252(a)(1). *2002 Qwest Order* n.26. *See, e.g., Qwest Corp. v. Pub. Utils. Comm’n of Colo.*, 479 F.3d 1184, 1192- 97 (10th Cir. 2007), *affirming Qwest Corp. v. Pub. Utils. Comm’n of Colo.*, 2006 WL 771223, at*4 (D. Colo. Mar. 24, 2006) and *Qwest Corp. v. Pub. Serv. Comm’n of Utah*, 2005 WL 3534301, at *7-*9 (D. Utah Dec. 21, 2005). Section 251(a) interconnection requests are

subject to Section 252 arbitration, and at least by implication must be filed for state commission review. See the Intrado/AT&T decision from the United States Court of Appeals, 6th Circuit, found at <http://www.telecomlawmonitor.com/wp-content/uploads/sites/158/2013/04/Appellate-Decision.pdf>. In the present case, as detailed in Sections II and III, the Agreements govern ongoing obligations for interconnection for the mutual exchange of traffic and compensation therefor and accordingly should be filed pursuant to 252(a)(1).

B. Another State Commission’s Finding IP Interconnection Agreements Must Be Filed under Section 252 Provides Useful Guidance to the Department.

The Department has acknowledged that this is one of first impression for it. April 24th Ruling at page 2. Nonetheless, at least one other state commission has faced the issue and persuasively found that contracts for the exchange of IP traffic are subject to Sections 251 and 252 of the Telecommunications Act. As discussed by witness Gillan (Exh. CC-1, pp. 17-18), on December 6, 2013, the Michigan Public Service Commission correctly concluded that the interconnection provisions of the Act apply to IP interconnection because the traffic being exchanged (or at least some of it) is qualifying traffic:

[T]he Commission finds that pursuant to Section 251(c)(2)(A), an ILEC, such as AT&T Michigan, not only must provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection, but also IP interconnection, with the local exchange carrier’s network – for the transmission and routing of telephone exchange service and exchange access.

In reaching its decision,² the Michigan Commission observed that the FCC had not yet ruled definitively on the issue, but astutely took note of the fact that the FCC had clearly said that

² *In the Matter of the 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 order at 7 (Dec. 6, 2013) (“Michigan IP Order”) http://www.dleg.state.mi.us/mpsc/orders/comm/2013/u-17349_12-6-2013.pdf.

Section 251 interconnection requirements were technology neutral and did not vary based on the technology, TDM, IP or otherwise, being used. In its well-reasoned order, the Michigan Commission stated:

This legal question is currently pending before the FCC in a rulemaking proceeding. However, in its further notice of proposed rulemaking, the FCC observed that, “section 251 of the Act is one of the key provisions specifying interconnection requirements, and that its interconnection requirements are technology neutral – *they do not vary based on whether one or both of the interconnecting providers is using TDM, IP, or another technology in their underlying networks.*” [ICC Reform Order] ¶ 1342 (emphasis added)...

Michigan IP Order at page 5

Whether the traffic is in IP format or another format does not matter because, as recognized by the Michigan Commission and FCC, the governing statute is technology neutral. All that matters when interconnection is the qualifying obligation created by an agreement is whether two telecommunications carriers are exchanging qualifying traffic through the interconnection.

While the decisions of other state commissions are not binding on the Department, it is certainly reasonable for the Department to look to and draw guidance from decisions by other state commissions such as the well reasoned decision by the Michigan Commission. Indeed, the Department (or its predecessor agencies) has done exactly that in prior proceedings. Again, the Department should find, as the Michigan Commission did, that IP interconnection agreements like the Agreements that are the subject of this proceeding are subject to Sections 251 and 252 of the Telecommunications Act and, therefore, must be filed with the Department.

C. The Record in this Proceeding Strongly Supports a Finding that the Agreements are Subject to Sections 251 and 252 of the Telecommunications Act

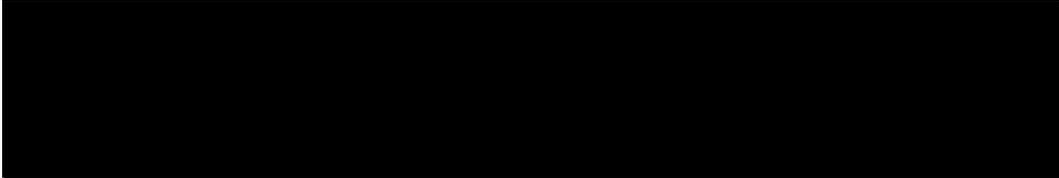
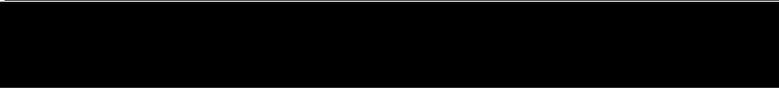
While the Department allowed a full record to be developed on a number of issues, in the end there is only a small portion of the evidence that is relevant to deciding the *only issue in this case*, i.e., whether the Agreements are subject to Sections 251 and 252 of the Telecommunications Act. But that small portion of the total record is more than enough for the Department to conclude that the Agreements involve the exchange of qualifying traffic and must be filed for Department approval under Section 252. To reach that decision, the Department need not consider a number of extraneous issues that were developed in the testimony and hearing such as whether a few carriers have decided for their own business reasons to enter IP interconnection agreements with Verizon, or whether certain features are newly available in the IP context, or how much VoIP traffic Verizon carries.

It is clear that IP interconnection among carriers and IP transmission of traffic is considerably more efficient for carriers and provides benefits to consumers. Tr. 95-98. The record is equally clear that for some reason, Verizon (like other incumbent carriers) is not entering into interconnection agreements with the vast majority of carriers (less than 10%) and has not signed interconnection agreements with a number of significant competitive carriers. Tr. 74-75. Though the CLEC parties, on the one hand, and Verizon, on the other hand, contest who is at fault for the absence of more IP interconnection agreements, the Department need not dive into that morass which is irrelevant to the only issue in this case (i.e. whether the Agreements are subject to Sections 251 and 252 of the Telecommunications Act). Further, whether some CLECs may have declined to engage in negotiations or whether some CLEC's may have entered such agreements is wholly irrelevant as to the applicability of Section 252 to the Agreements. The same is true with respect to whether IP makes possible features and functions to consumers that

are not otherwise available. Compare Exhibit Verizon MA Exhibit 1 vs. Sprint Exhibit 2, pages 14-20. It is also not relevant what percentage of VoIP customers/traffic Verizon controls. Exhibit CC-2, pages 18-19. Instead, the Department certainly can (and should) make a determination based on the law and the record that these Agreements are indeed subject to Sections 251 and 252.

Rather, the Department can and should rely on the evidence that establishes that:

- At least some of the IP traffic exchanged is a two way voice communication [**that originates or terminates on the PSTN, or both**], so state commission review of the Agreements is consistent with the existing Section 251/252 process for filing and reviewing interconnection agreements for TDM based traffic (Tr. I, page 28);
- Verizon controls the vast majority of customers in Massachusetts, so the need for the protections set forth in the Telecommunications Act of 1996 remains critical (see Transcript II, page 150, line7);
- There is no meaningful difference to Verizon whether an interconnected party's traffic starts as IP, or is converted to IP, before the exchange with Verizon (Tr. I, pages 97-98,141); ***START HIGHLY CONFIDENTIAL

- 
 *****END HIGHLY

CONFIDENTIAL; and

- Having a regulatory backstop for unsuccessful negotiations of interconnection agreements can help ensure good faith negotiations between the parties. Tr. I, pages 55, 131, 136-137.

These facts all support the application of Sections 251 and 252 to the Agreements.

In contrast, the purported evidence presented by Verizon to the effect that application of potential regulation will hinder IP interconnection, simply does not hold water. Tr. II., page 34 lines 12-22. Verizon suggests that such regulation will result in a plethora of conflicting standards that will slow the evolution toward IP networks, if not derail such evolution, which is clearly not true. Considerable time was spent in the hearing on this point. It seems clear that state regulatory commissions have always been careful to avoid getting into the level of operational detail and standards that could be a hindrance. Indeed, the evidence shows that the industry (even through different standard setting groups) tends to gravitate to a common standard that allows efficient implementation of new technology, such as IP interconnection and transmission. Tr. II, page 34, lines 12-22; Exhibit CC-3, pages 9-11.

III. STRONG POLICY REASONS SUPPORT A FINDING BY THE DEPARTMENT THAT THE AGREEMENTS ARE SUBJECT TO SECTIONS 251 AND 252

The issue of whether the Agreements are subject to Sections 251 and 252 of the Telecommunications Act remains the only issue in this proceeding. As described herein, the pertinent evidence produced at the hearing clearly supports the correct *legal* conclusion that the Agreements are subject to Sections 251 and 252 and should be filed with the Department. But the record also shows that the legal conclusion is the right outcome from a policy perspective as well.

All of the parties agree on the fact that the ongoing transition to IP services and networks is very important for carriers and customers. Exhibit CC-3 (Malfara), page 28. Though Verizon seeks to use that agreed-upon fact as a reason that the Agreements NOT be filed with the Department, this agreed-upon fact provides no support for such a policy argument. (Moreover, even if it did, the policy argument cannot trump a federal statutory requirement.) In contrast, the record facts show that there is a problem that goes far beyond the inability of two willing parties to reach agreement on contract terms. **** START HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] END HIGHLY CONFIDENTIAL**** Whether Verizon's approach itself is contrary to law or policy (which XO submits it is), Verizon's position, by itself, makes clear that the proper policy outcome supporting a regulatory framework that compels a final resolution of issues remaining open after negotiations are attempted corroborates the legal conclusion that these Agreements are subject to Section 251 and 252 and must be filed. There is certainly no harm in reaching this conclusion. On the contrary, there is significant benefit to the public interest by requiring that the Agreements be filed with the Department, formally, as required by Section 252.

Simply put, having a regulatory backstop that requires IP interconnection agreements be filed and subject to state regulatory review, including arbitration as necessary, provides a means for the relatively smaller (than Verizon in terms of total customers, etc.) CLECs to have a fair determination if an IP interconnection agreement negotiation is not proceeding on a reasonable, or good faith, basis. Recognizing and treating the Agreements as Section 251/252

interconnection agreements still allows the Department to check any party that may be gaming the system without any harm to Verizon. And, if both parties to an IP interconnection contract negotiation are acting in good faith and no arbitration is required, there is certainly no harm but almost certainly significant public interest benefit in having an unused “backstop” in place. (Of course, even where there is no arbitration, the IP interconnection agreements would still have to be submitted to the state commission for approval.)

Further, it is important that the Department not be distracted by irrelevant claims or evidence that are not germane to the threshold issue of whether the Agreements are “jurisdictional” under Section 252. It is important to distinguish the threshold issue of whether the Agreements must be filed for review and approval under Section 252 from issues not before the Commission in this matter, namely whether the Agreements should be approved and, if not, why not, and what are the substantive standards applicable in an arbitration of an IP traffic interconnection agreement where negotiations fail. Requiring the filing with the Department will allow the Department to make these determinations under Section 252(e)(2) either upon filing of a negotiated agreement or during an arbitration of open terms. Specifically, a question that will be important in the future but is not pertinent at this stage of the proceeding is whether the Agreements or future IP interconnection agreements filed with the Department satisfy the substantive criteria of § 252(e)(2), such as whether the Agreements are nondiscriminatory and in the public interest. The Department will conduct its substantive review of the reasonableness of the terms of the Agreements only after finding that the Agreements must be filed with the Department for review and approval and the interested parties can address problems they perceive with that review, if any, once it occurs.

IV. CONCLUSION

For all the reasons set forth in this Initial Brief, XO respectfully requests that the Department rule that the Agreements are interconnection agreements under 47 U.S.C. § 251 that must be filed with the Department for approval pursuant to 47 U.S.C. § 252. Not only is this the right legal outcome, but it advances sound public policy. By ruling that that the Agreements must be filed under Section 252, the Department will take a clear step in stemming a continuation of the existing problem of Verizon and CLECs not being able to agree on a form of IP interconnection agreement with the critical adverse result that a substantial number of customers will be unable to benefit from the advantages of the industry's transition to an all IP public communications network.

Respectfully submitted,

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Dated: May 30, 2014