PUBLIC VERSION

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	DTC 13-6

COMPETITIVE CARRIERS' INITIAL BRIEF

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COMPETITIVE CARRIERS'[1] INITIAL BRIEF

The Department should find that the "Settlement Agreement,"[2] "Traffic Exchange Agreement,"[3] and "VoIP-to-VoIP Agreement"[4] (collectively, the "Agreements") submitted by Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon") in this proceeding are interconnection agreements that must be filed pursuant to Section 252(a)(1) of the Communications Act (the "Act")[5] for Department review and approval.

I. INTRODUCTION AND SUMMARY

This investigation essentially concerns one simple question: does the use of Internet protocol ("IP") technology to provide basic voice service allow incumbent local exchange carriers ("LECs") like Verizon to circumvent the bedrock anti-discrimination protections of Section 252 of the Communications Act? The answer, of course, is no.

[1] Cbeyond Communications, LLC; CTC Communications Corp. d/b/a EarthLink Business, Lightship Telecom LLC d/b/a EarthLink Business, Choice One Communications of Massachusetts, Inc. d/b/a EarthLink Business, Conversent Communications of Massachusetts, Inc. d/b/a EarthLink Business, EarthLink Business, LLC (formerly New Edge Network, Inc. d/b/a EarthLink Business); Level 3 Communications, LLC; PAETEC Communications, Inc.; and tw telecom data services llc are collectively referred to herein as "the Competitive Carriers."

[2] DTC Exhibit ("Ex.") 1.

[3] DTC Ex. 2.

[4] DTC Ex. 3.

[5] 47 U.S.C. § 252(a)(1).

The FCC has appropriately described the protections in Section 252, including the Section 252(a)(1) requirement that incumbent LECs submit interconnection agreements for review by state regulatory commissions, as "the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors" in the provision of voice service.[6] State commission review under Section 252(e) ensures that incumbent LECs like Verizon may not exploit their market power by entering into preferential agreements with a select subset of competitors to the detriment of competition and consumers. Granting competitors opt-in rights under Section 252(i) further diminishes the potential for harmful discrimination and lowers the costs associated with, among other things, establishing interconnection.

As the Department has correctly observed, allowing incumbent LECs to circumvent the requirements of Section 252 for IP interconnection would be "ill-conceived."[7] This is because Verizon would be given free rein to engage in harmful discrimination by imposing onerous and anticompetitive rates, terms, and conditions on IP interconnection on all but a select few competitors. Such discrimination would weaken competition in the provision of voice services and would therefore harm end users in the Commonwealth. In contrast, applying the protections of Section 252 would yield substantial benefits for those Massachusetts end users. This is especially true of the opt-in provision, which, if applied to IP interconnection agreements, would allow competitors to quickly and efficiently interconnect in IP with Verizon, thereby enabling competitors to offer VoIP service more efficiently and to more end users. Increased adoption of VoIP service would in turn increase demand for broadband services and promote the goals of

[6] *Qwest Corporation Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd. 5169, ¶ 46 (2004) ("*Qwest NAL Order*").

[7] Reply Comments of the Massachusetts Department of Telecommunications and Cable, WC Dkt. No. 10-90, at 10 (filed Feb. 17, 2012) ("Department Feb. 17, 2012 Comments to FCC").

Section 706 of the 1996 Act. It is for this reason that the Department has appropriately expressed its support for "IP-IP interconnection as a means to promote competitive entry and aid in the development of additional broadband networks."[8]

Department action is especially appropriate given that the relevant legal issues are easily resolved. In the *Qwest Declaratory Ruling*, the FCC held that an agreement containing or creating an ongoing obligation "pertaining to" or "relating to" Section 251(b) or (c) of the Act is subject to the Section 252(a)(1) filing requirement.[9] Under this standard, the Agreements at issue here must be filed and subjected to Department review and competitive carrier opt-in. Verizon's argument that it should be allowed to circumvent these protections reduces to the assertion that a change in technology means that the Act does not apply. But this is flatly wrong. All of the provisions at issue in Section 251(b) and (c) are technology-neutral, and the FCC has recently reiterated that the interconnection requirements of the Act in particular are technology-neutral.[10] Congress did not draft the Communications Act so that the benefits of competition and increased investment would cease when technology changes. On the contrary, the plain terms of Section 251(b) and (c) as well as Section 252 reveal a clear intent that those provisions would continue to apply regardless of the technology used in the network. The Department now has the opportunity to ensure that this is the case in Massachusetts by finding that the Agreements between Verizon and Comcast individually and collectively are interconnection agreements that must be filed under Section 252(a)(1).

[8] Letter from Paul Abbott, General Counsel, Massachusetts Department of Telecommunications and Cable, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 10-90, at 2 (filed May 4, 2012) ("Department May 4, 2012 Comments to FCC").

[9] *See 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)*, Memorandum Opinion and Order, 17 FCC Rcd. 19337, ¶ 8 & n.26 (2002) ("*Qwest Declaratory Ruling*").

[10] *See Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, ¶ 1381 (2011) ("*ICC Reform Order and FNPRM*").

The Settlement Agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** IP interconnection qualifies as "interconnection" under Section 251(c)(2) of the Act. Accordingly, the Settlement Agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** and it must be filed pursuant to Section 252(a)(1).

The Traffic Exchange Agreement between Verizon and **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** Accordingly, the Traffic Exchange Agreement must be filed pursuant to Section 252(a)(1).

The VoIP-to-VoIP Agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** is a requesting "telecommunications carrier" within the meaning of Section 251(c)(2) because the interconnected VoIP service it provides is a telecommunications service. Even if the Department were to find that **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** is not a telecommunications carrier, the VoIP-to-VoIP Agreement should be treated as if it were **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY**

SENSITIVE CONFIDENTIAL] Under the D.C. Circuit's holding in *ASCENT v. FCC*, an incumbent LEC may not circumvent statutory requirements (in this case, the Section 252(a)(1) filing requirement) by **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

Second, Section 251(c)(2) requires incumbent LECs to provide IP interconnection for the exchange of interconnected VoIP traffic. IP interconnection is "interconnection" under Section 251(c)(2) and interconnected VoIP traffic exchanged via IP interconnection constitutes "telephone exchange service" traffic and "exchange access" traffic under Section 251(c)(2). The VoIP-to-VoIP Agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** and it must be filed pursuant to Section 252(a)(1).

Moreover, even if the Department were to somehow find that Section 251(c)(2) does not require incumbent LECs to provide IP interconnection, the Department should at a minimum find that **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** the FCC would not have sought comment on whether Section 251(c)(2) *requires* incumbent LECs to enter into such agreements.

The VoIP-to-VoIP Agreement must be filed for another independent reason: it is an integrated part of a larger interconnection agreement consisting of the Settlement Agreement, the

Traffic Exchange Agreement, and the VoIP-to-VoIP Agreement. The three Agreements are an integrated set of rights and obligations that must be examined together in order for the Department and third-party competitive carriers to understand the bargain reached by Verizon and Comcast regarding **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

Finally, the Department should find that the Agreements must be filed because doing so will advance the policy goals of Section 706 of the 1996 Act and promote the transition to all-IP networks. Allowing competitive LECs to opt-in to the Agreements and obtain IP interconnection with Verizon will undoubtedly promote the use and deployment of VoIP services, and in turn, the deployment of broadband. Nor is there any legitimate concern that filing of the Agreements will result in a patchwork of inconsistent state regulation or otherwise hinder the IP transition. This is because, among other reasons, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

II. BACKGROUND

A. Factual and Procedural Background

For years now, providers of voice services throughout the U.S. have been interconnecting in IP format for the purpose of exchanging voice traffic.[11] The efficiencies of these arrangements are widely recognized by competitive LECs and incumbent LECs alike.[12] Moreover, technical issues do not prevent or impede IP interconnection.[13] In fact, the business

[11] Malfara Rebuttal Testimony (Competitive Carriers Ex. 3) at 9, lines 20-21.

[12] *Id.* at 6-7; Hearing Transcript ("Hearing Tr."), Vol. I at 23 (lines 18-24) and 24 (lines 1-15).

[13] *See, e.g.*, Malfara Rebuttal Testimony (Competitive Carriers Ex. 3) at 9 (lines 14-25) and 10 (lines 1-16).

and technology advantages of establishing IP interconnection for voice traffic exchange are so compelling that the decision to switch from TDM to IP interconnection is a "no brainer." Competitive carriers therefore have powerful incentives to transition from TDM to IP interconnection, and they have been doing so "for, at least, the better part of a decade."[14]

But there is one big obstacle to this transition: incumbent LECs. Verizon and other large incumbent LECs have not been willing to establish IP interconnection with a number of their much smaller competitors.[15] So, while the Competitive Carriers in this proceeding have successfully established IP interconnection with other competitors, they have not been able to do so with Verizon. As a matter of economics, this is not surprising. Incumbent LECs, especially those like Verizon, have many more voice subscribers than competitive LECs.[16] As a result of this disparity in size and the incumbent LECs' resulting market power, incumbent LECs have far less incentive to establish interconnection in IP format with smaller competitors than *vice versa*. Absent regulatory oversight, Verizon is therefore unlikely to interconnect in IP format with smaller competitors on "just, reasonable, and nondiscriminatory" rates, terms, and conditions, as required under Section 251(c)(2) of the Act.

The FCC has therefore undertaken an extensive investigation of incumbent LECs' duties to interconnect with smaller competitors in IP format. On November 18, 2011, the FCC released an Order and Further Notice of Proposed Rulemaking in which it affirmed that the terms of

[14] *Id.* at 9, lines 20-21.

[15] *See, e.g.*, Competitive Carriers' Responses to VZ-I 1-1, at 1 (Mar. 21, 2014) (stating that none of the Competitive Carriers has entered into an IP interconnection agreement with an incumbent LEC); Sprint Response to DTC 1-2, at 2 (Mar. 18, 2014) ("Sprint states that it does not have an IP interconnection agreement with an ILEC."); XO Supplemental Response to VZ-I 1-1, at 1 (Apr. 4, 2014) (stating that XO has not entered into an IP interconnection agreement with an incumbent LEC).

[16] *See, e.g.*, Gillan Rebuttal Testimony (Competitive Carriers Ex. 2) at 19, lines 4-10 (citing FCC, "Local Competition: Status as of December 31, 2012," at Table 17 (rel. Nov. 2013) (Competitive Carriers Ex. 4)).

Section 251(c)(2) are technology-neutral,[17] and stated its expectation that incumbent LECs and other voice providers will henceforth negotiate IP interconnection in good faith.[18] The FCC stopped short of affirming that incumbent LECs have a specific duty under Section 251(c)(2) to establish IP interconnection with a requesting carrier. It instead sought comment on this issue.[19]

1. *The Agreements*

The FCC's activism appears to have had some effect on Verizon's conduct. Soon after the release of the FCC's *ICC Reform Order and FNPRM*, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted]

[17] *ICC Reform Order and FNPRM* ¶ 1342.

[18] *Id.* ¶ 1011.

[19] *See id.* ¶¶ 1385-1393.

[20] Settlement Agreement at 13.

[21] Verizon Direct Testimony (Verizon Ex. 1) at 14, lines 15-19.

[22] Hearing Tr., Vol. I at 172, lines 13-16.

[23] Verizon Direct Testimony (Verizon Ex. 1) at 19, lines 14-19; *see also* Settlement Agreement, Ex. 2 **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** Verizon, as an incumbent LEC, had not established IP interconnection with any other party. Verizon's choice of Comcast was entirely predictable. Comcast serves millions of voice subscribers.[27] This means that Verizon benefits significantly from interconnecting in IP format with Comcast, far more than is the case with the much smaller Competitive Carriers.

[BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [redacted]

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[24] Verizon Direct Testimony (Verizon Ex. 1) at 15, lines 1-4.

[25] *See id.* at 15, lines 5-9; Settlement Agreement ¶ 5(d)(i).

[26] Verizon Direct Testimony (Verizon Ex. 1) at 15, lines 14-16; Settlement Agreement ¶ 5(d)(ii).

[27] *See, e.g.*, Verizon Direct Testimony (Verizon Ex. 1) at 33, lines 2-3 (stating that the cable industry serves "26.7 million cable phone customers" in the U.S.).

[28] *Id.* at 15, lines 19-21.

[redacted]

[redacted]

[redacted]

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[29] *Id.* at 16, lines 8-12.

[30] *Compare* Traffic Exchange Agreement at 19 & Attachment B, *with* Settlement Agreement at 13 & Ex. 2.

[31] *See* Traffic Exchange Agreement §§ 1.20-1.20.3.

[32] *See id.* § 1.20; *see also* Interconnection Agreement by and between Verizon New England Inc. d/b/a Verizon Massachusetts and Comcast Phone of Massachusetts, Inc., effective June 26, 2001 (part of Verizon Ex. 3).

[33] *See* Traffic Exchange Agreement §§ 1.26, 2.1-2.2.2.

[34] *See id.* §§ 1.11, 2.1–2.2.2.

[redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** Verizon established the factual predicate for its (incorrect) assertion that the Agreement is not subject to the filing, state commission review, and opt-in requirements of Section 252.[37]

2. *Other Developments*

Meanwhile, the FCC proceeded with its rulemaking proceeding. In comments filed on February 24, 2012, Verizon argued that companies have "natural incentives" to voluntarily establish IP interconnection agreements, and as evidence, it announced that "Verizon currently has one [IP interconnection] agreement in place covering its FiOS Digital Voice VoIP traffic,"[38] **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** Apparently eager to avoid an FCC affirmation of incumbent LECs' duty to interconnect in IP under Section 251(c)(2), Verizon expressed a newfound zeal for entering into

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[35] *See* Verizon Direct Testimony (Verizon Ex. 1) at 19 (lines 21-22) and 20 (lines 1-19).

[36] *Id.* at 19, lines 15-16 (citation omitted).

[37] If successful, this argument would allow Verizon to enter into secret IP interconnection agreements with the voice providers of its choice, free of any regulatory check on unreasonable discrimination or outright refusals to deal with certain parties.

[38] Comments of Verizon, WC Dkt. No. 10-90, at 14 (filed Feb. 24, 2012).

IP interconnection arrangements with other parties. Verizon stated that "we are negotiating other[]" such agreements in addition to the Comcast agreement.[39] One year later, Verizon still had not entered into any additional IP interconnection agreements.[40]

After some of the Competitive Carriers learned that Verizon had not complied with its duty to file the announced agreement with the Department, they filed a petition with the Department on January 31, 2013 seeking to compel Verizon to comply with Section 252(a).[41] The Department commenced the instant investigation on May 13, 2013.[42]

This further expression of interest by regulators appears to have once again spurred Verizon to act. On June 11 and 12, 2013, Verizon sent letters to most of the Competitive Carriers in which it stated that it was interested in negotiating a commercial IP interconnection arrangement.[43] When some of the Competitive Carriers responded that they would like such negotiations to be subject to the provisions of Section 252,[44] Verizon refused. Rather, Verizon has stated that it is "in favor of facilitating . . . interconnection" by using private, "commercial negotiations" to "customize[]" the terms and conditions it offers.[45] According to Verizon, secret

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[39] *Id.*

[40] *See* Competitive Carriers' Opposition to Verizon's Motion for Abeyance, DTC 13-6, at 2 n.3 (Aug. 29, 2013) (quoting Reply Comments of Verizon and Verizon Wireless, GN Dkt. 12-353, at 8 (filed Feb. 25, 2013)) ("Verizon currently has one agreement in place covering its FiOS Digital Voice VoIP traffic, and Verizon will continue to negotiate IP voice interconnection agreements in good faith and hopes to enter into more agreements for this traffic going forward.").

[41] *See* Petition for a Determination that Verizon IP-to-IP Interconnection Agreements Must Be Filed for Review and Approval and for Associated Relief, DTC 13-2 (Jan. 31, 2013).

[42] Order Opening an Investigation, Declining to Issue an Advisory Ruling, and Denying Verizon MA's Motion to Dismiss or Stay the Proceeding, DTC 13-6 (May 13, 2013) ("Order Opening Investigation"). The Department declined to issue the declaratory ruling requested in DTC 13-2, but opened this investigation on its own motion.

[43] *See* Verizon Ex. 5. There was one exception to the June mailing, PAETEC, to which Verizon sent a letter in October 2013. *See id*.

[44] *See* Verizon Ex. 6 (letters from Windstream and Cbeyond to Verizon).

[45] Hearing Tr., Vol. I at 162, lines 11-17.

negotiations are preferable because otherwise, "knowledge of specific terms on which Verizon is willing to exchange traffic with one carrier in IP format would confer a valuable business advantage on other carriers (Verizon MA's competitors) who may also seek to exchange traffic in IP format – namely, a leg up in contract negotiations with Verizon MA."[46] As explained below, however, this kind of discrimination by an incumbent LEC is exactly what the Section 252(a)(1) filing requirement was designed to prevent. In any event, Verizon has found at least some service providers willing to acquiesce to its terms. Verizon states that it has now entered into seven additional IP interconnection agreements.[47]

B. Statutory Background

Section 251 establishes a number of duties for incumbent LECs, like Verizon, that are intended to facilitate competitive entry. Section 251(b) imposes on all LECs, including incumbent LECs, the duties to provide, among other things, number portability and reciprocal compensation for "the transport and termination of telecommunications."[48] Section 251(c) requires incumbent LECs to provide, among other things, interconnection.[49] Section 251(c)(2) in particular requires that incumbent LECs "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access."[50]

[46] Verizon MA Motion for Confidential Treatment, DTC 13-6, at 3 (Dec. 23, 2013).

[47] Hearing Tr., Vol. I at 75, lines 7-8.

[48] 47 U.S.C. § 251(b).

[49] *Id.* § 251(c).

[50] *Id.* § 251(c)(2).

Under Section 251(c)(2)(D), incumbent LECs must provide this interconnection on "just, reasonable, and nondiscriminatory" rates, terms, and conditions.[51]

Section 252, in turn, sets forth the procedures by which incumbent LECs must comply with their Section 251 duties. Section 252(a)(1) states that an incumbent LEC may voluntarily negotiate an agreement to provide interconnection, services, or access to network elements without regard to the specific requirements set forth in Section 251(b) or (c). The incumbent must file such negotiated agreements with the relevant state commission.[52] Once filed, a negotiated interconnection agreement must be reviewed by the state commission to ensure that it does not "discriminate[] against a telecommunications carrier not a party to the agreement" and that it is "consistent with the public interest, convenience, and necessity."[53] Finally, under Section 252(i), a competitive LEC may opt into any interconnection agreement that has been filed and approved by the state commission under Section 252(a)(1) and (e)(1).[54]

The FCC has explained that the filing, review, approval, and opt-in requirements for negotiated agreements under Section 252 constitute "the first and strongest protection under the

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[51] *Id.* § 251(c)(2)(D).

[52] Section 252(a)(1) provides in relevant part as follows:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. . . . The agreement . . . shall be submitted to the State commission under subsection (e) of this section.

Id. § 252(a)(1). Section 252(e)(1), in turn, provides that "[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." *Id.* § 252(e)(1).

[53] *Id.* § 252(e)(2).

[54] Section 252(i) provides that an incumbent LEC "shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." *Id.* § 252(i).

Act against discrimination by the incumbent LEC against its competitors."[55] In the first instance, the state commissions review negotiated agreements to ensure that they are not discriminatory. In addition, the third-party carriers have their own opportunity to avoid the harmful effects of discrimination because they can evaluate all of the relevant agreements to which the incumbent LEC is a party and can assess which agreement to opt into under Section 252(i).[56]

If an incumbent LEC were permitted to withhold an agreement from the public, it could exploit its market power by providing more favorable rates, terms, and conditions to a small number of competitors while keeping those better rates, terms, and conditions "a secret" from the other competitors.[57] The FCC has found that, by discriminating in this manner, the incumbent LEC can permanently skew the market in favor of certain competitors.[58]

In addition, the Section 252 filing and opt-in requirements lower the barriers to competitive entry by enabling third-party carriers to obtain interconnection on the same terms and conditions as in a previously approved interconnection agreement without undergoing a lengthy negotiation and approval process.[59] Without the filing and opt-in requirements, an incumbent LEC could exploit its market power by slow-rolling interconnection negotiations, thereby raising their rivals' costs and weakening competition.

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[55] *Qwest NAL Order* ¶ 46.

[56] *See id.* n.12.

[57] *Id.* ¶ 47 (internal citation and quotation marks omitted).

[58] *See id.* ¶ 43.

[59] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd. 15499, ¶ 1321 (1996) ("*Local Competition Order*") (subsequent history omitted) (finding that permitting requesting carriers to obtain interconnection "on an expedited basis" will "ensure competition occurs as quickly and efficiently as possible"); *Qwest NAL Order* ¶ 20 ("Through this mechanism, competitive carriers avoid the delay and expense of negotiating new agreements with the incumbent LEC and then awaiting state commission approval.").

III. DISCUSSION

A. The Department has Broad Discretion to Determine That the Agreements at Issue are Interconnection Agreements That Must Be Filed Pursuant to Section 252(a)(1).

1. *The FCC's Qwest Declaratory Ruling Standard is a General Guideline to Be Implemented By State Commissions in Specific Cases.*

As the Department has correctly observed, "Congress gives state commissions, such as the Department, direct authority to determine whether an agreement is an interconnection agreement" which is subject to the filing, review, and opt-in regime established in Section 252.[60] The FCC has established the standard for states to follow in carrying out this responsibility in the *Qwest Declaratory Ruling*. There, the FCC held that "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)."[61] Stated slightly differently, the FCC held that "agreements that contain an ongoing obligation *relating to* section 251(b) or (c) must be filed under [section] 252(a)(1)."[62] The filing obligation logically extends to "an amendment" or an agreement associated with an agreement that must be filed.[63]

In establishing this standard, the FCC emphasized that "[b]ased on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed" under

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[60] Order Opening Investigation at 10 (citing 47 U.S.C. § 252(e)).

[61] *Qwest Declaratory Ruling* ¶ 8 (emphasis added).

[62] *Id.* n.26 (emphasis added).

[63] *Id.* ¶ 13 (indicating that "an amendment" to a filed interconnection agreement must also be filed under Section 252(a)(1)).

Section 252(a)(1).[64] In order to ensure that state commissions retain broad discretion in making this case-by-case assessment, the FCC "decline[d] to establish an exhaustive all-encompassing 'interconnection agreement' standard"[65] and provided only a few examples of how the standard should be applied. Among these, the FCC stated that an agreement consisting of "dispute resolution and escalation provisions" is not "*per se* outside the scope of section 252(a)(1),"[66] and that a "settlement agreement that contains an ongoing obligation relating to section 251(b) or (c)" must be filed under section 252(a)(1).[67] The FCC left to the state commissions all other issues associated with applying the standard. Accordingly, under the Act and the *Qwest Declaratory Ruling*, the Department has significant discretion to determine that each of the Agreements is subject to the filing, review, and opt-in regime of Section 252.

2. *The Department has Broad Discretion to Interpret the Terms "Telecommunications Service," "Telephone Exchange Service," "Exchange Access," and "Interconnection."*

In determining that an agreement must be filed under Section 252(a)(1), state commissions are expected to interpret the meaning of the terms in Sections 251 and 252. That is, as the Department has correctly observed in this proceeding, "where a state commission is not preempted or guided by FCC precedent, it may interpret a federal statute and apply its dictates."[68] Here, the FCC has not preempted states from exercising interpretative discretion

[64] *Id.* ¶ 10.

[65] *Id.*

[66] *Id.* ¶ 9.

[67] *Id.* ¶ 12.

[68] Order Opening Investigation at 12 (citing *Comcast IP Phone of Mo., LLC v. Mo. Pub. Serv. Comm'n*, No. 06-4233, 2007 WL 172359, at *4 (W.D. Mo. Jan. 18, 2007)); *see also S. New Eng. Tel. Co. v. Comcast Phone of Conn.*, 718 F.3d 53, 58 (2d Cir. 2013) (stating that state commissions may apply the interconnection provisions of Section 251 as long as such application does "'not violate federal law and until the FCC rules otherwise'") (quoting *Iowa Network Servs., Inc. v. Qwest Corp.*, 466 F.3d 1091, 1097 (8th Cir. 2006)).

with respect to the provisions of Section 251(b) and (c) that are central to this proceeding.[69] For example, the FCC has not determined (1) whether a provider of interconnected VoIP service is a provider of "telecommunications services" and is therefore a requesting "telecommunications carrier" for purposes of Section 251(c)(2);[70] (2) whether a provider of interconnected VoIP service is a provider of "telephone exchange service" or "exchange access" under Section 251(c)(2);[71] or (3) whether interconnection in IP format (*i.e.*, the physical linking of two networks for the mutual exchange of traffic[72] in IP format) qualifies as "interconnection" under Section 251(c)(2). As a result, the Department has the discretion to decide that the duty to provide interconnection under Section 251(c)(2) includes the duty to provide interconnection in IP format for the mutual exchange of voice traffic.[73]

3. *The Department has Broad Discretion to Determine That an Agreement Establishes an Ongoing Obligation "Relating To" or "Pertaining To" Section 251(b) or (c).*

The responsibility under the *Qwest Declaratory Ruling* to determine whether an agreement contains an ongoing obligation "relating to" or "pertaining to" Section 251(b) or (c) leaves the Department with significant discretion. This is because the terms "relating to" and

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[69] Nor does the State statute curbing the Department's authority over VoIP service (*see* MASS. GEN. LAWS ch. 25C, § 6(A)(b)) preclude the Department from determining the extent to which Sections 251 and 252 apply to interconnection agreements that concern interconnected VoIP traffic. That statute contains a savings clause that expressly provides that it "shall not be construed to modify or affect the rights or obligations of any carrier under sections 47 USC 251 and 47 USC 252." *Id.* ch. 25C, § 6(A)(e).

[70] *See ICC Reform Order and FNPRM* ¶ 1387. As a result, the Department has broad discretion to determine that a provider of interconnected VoIP services qualifies as a requesting "telecommunications carrier" under Sections 252(a)(1) and 251(c)(2).

[71] *See id*.

[72] *Local Competition Order* ¶ 176.

[73] Lest there be any doubt about the matter, the Second Circuit has held that a state commission has the authority to extend the scope of Section 251(c)(2) interconnection obligations to situations not addressed by the FCC. *S. New Eng. Tel.*, 718 F.3d at 56-59. In fact, the court found that numerous other state commissions had exercised their regulatory authority under the Act to make a similar determination, and that the existence of a pending FCC proceeding concerning the matter did not preclude the state from acting. *Id.* at 58-59 & n.3.

"pertaining to" are broad. Their ordinary meaning is to have a connection to something[74] (in this case, to have a connection to Section 251(b) or (c)).

The FCC's choice of such broad language in the *Qwest Declaratory Ruling* was intentional. As the FCC explained when adopting and applying that standard, "broadly constru[ing] section 252's use of the term 'interconnection agreement'"[75] is consistent with the plain language of the Act because "on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions."[76]

Courts and state commissions have repeatedly held that the Section 252(a)(1) filing requirement is not limited solely to agreements involving the specific mandates in Section 251(b) and (c). They have rejected incumbent LECs' arguments that Section 252(a)(1) "covers only the filing of agreements that addressed compelled terms required under Section 251(b) and (c)" as "contrary to the Act's plain language and purpose."[77] This is because Section 252(a)(1) provides that even those agreements the incumbent LEC voluntarily negotiates "*without regard to the*

[74] *See, e.g.*, Merriam-Webster Online, "Pertain," http://www.merriam-webster.com/dictionary/pertaining; Merriam-Webster Online, "Relate," http://www.merriam-webster.com/dictionary/relate; Cambridge Dictionaries Online, "Pertain to something," http://dictionary.cambridge.org/us/dictionary/american-english/pertain-to-something?q=pertaining; Cambridge Dictionaries Online, "Relate," http://dictionary.cambridge.org/us/dictionary/american-english/relate_1?q=relating. The Supreme Court has defined the phrase "relating to" in statutes broadly to mean "having a connection with or reference to" something. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992). As the First Circuit has explained, "[t]he Supreme Court has noted the breadth of the 'relating to' language [in the Airline Deregulation Act] and the broad interpretation it has afforded the phrase in cases interpreting the similarly-worded Employee Retirement Income Security Act." *Bower v. EgyptAir Airlines*, 731 F.3d 85, 95 (1st Cir. 2013).

[75] *Qwest NAL Order* ¶ 11.

[76] *Qwest Declaratory Ruling* ¶ 8.

[77] *Qwest Corp. v. Pub. Serv. Comm'n of Utah*, No. 04-1136, 2005 WL 3534301, at *7 (D. Utah Dec. 21, 2005); *see also Qwest Corp.*, No. 04-2245-01, 2004 WL 2567420, at *3 (Utah P.S.C. Sept. 30, 2004) ("[I]n wording § 252, Congress did not restrict the need to file agreements with state commissions to only those agreements whose terms address interconnection, services, or network element matters by compulsory mandate related to § 251(b) or (c). Congress created a wider ambit."); *MCImetro Access Transmission Servs., LLC*, No. 70027-TK-04-38 *et al.*, 2004 WL 3159281, at *4 (Wyo. P.S.C. Dec. 17, 2004) (finding that the plain language of Section 252, "as well as the FCC's view of the role and authority of state commissions, vis-a-vis, the determination and review of interconnection agreements, . . . conflict[s] with the limiting interpretation . . . that Qwest would have this Commission adopt.").

standards set forth in subsections (b) or (c) of section 251 . . . shall be submitted to the State commission" for approval.[78]

Moreover, where a negotiated interconnection agreement contains an ongoing obligation relating to or pertaining to Section 251(b) or (c) as well as obligations unrelated to those provisions, the entire agreement must be filed, reviewed by the state commission, and made available for opt-in by other competitive carriers. This is because a state commission can only assess whether an agreement is discriminatory if it can analyze the entire agreement, including any associated sub-agreements or amendments.[79] Also, a competitive carrier can only assess which agreement it would like to opt into if the entire agreement (again, including any associated sub-agreements and/or amendments) between the incumbent LEC and the other competitive carrier is available for inspection. As the FCC explained, "[o]ne of the key purposes of the section 252(a) filing requirement is that carriers will know which interconnection agreements . . . are available [for opt-in] under section 252(i)."[80] And under the FCC's so-called "all-or-nothing" rule, "a requesting carrier may only adopt an effective interconnection agreement in its entirety, taking all rates, terms, and conditions of the adopted agreement."[81]

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[78] 47 U.S.C. § 252(a)(1) (emphasis added).

[79] *See, e.g.*, *Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Administrative Law Judge's Findings of Fact, Conclusions, Recommendation and Memorandum, Minn. Office of Administrative Hearings Dkt. No. 6-2500-14782-2, ¶ 12 (Sept. 20, 2002), https://www.edockets.state mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId={E554DCE9-270C-4058-989F-F8F0105BBD5C}&documentTitle=330289 ("If the parties negotiate an amendment to an earlier, approved agreement, whether it is characterized as a contractual amendment or settlement of a dispute, the amendment should also be filed so that the Commission may perform its function of ensuring that, as amended, the agreements do not discriminate, are not contrary to the public interest, and are available to other telecommunications carriers under § 252(i)."); *MCImetro Access Transmission Servs., LLC*, Order Approving Negotiated Interconnection Agreement In Its Entirety, Wash. UTC Dkt. Nos. UT-960310 & UT-043084, 2004 WL 2656551, at *6 (Oct. 20, 2004) ("*MCImetro*").

[80] *Qwest NAL Order* n.12.

[81] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report and Order, 19 FCC Rcd. 13494, ¶ 10 (2004).

It follows that sub-agreements, amendments, and subsequent agreements implementing pre-existing interconnection agreements must be filed in order for the state commission and competitive carriers to evaluate the total arrangement between the parties.[82] This is so even if the sub-agreement, amendment, or subsequent agreement does not, by itself, contain an ongoing obligation related to Section 251(b) or (c). For example, the Colorado Public Utilities Commission found that a two-page "Business Escalation Agreement" that amended an existing interconnection agreement between Qwest and WorldCom and "relat[ed] to services under Section 251(b) or (c)" is an interconnection agreement that must be filed with the PUC even though the Business Escalation Agreement itself apparently did not contain any mention of Section 251(b) or (c) services and would not have otherwise been subject to state commission jurisdiction.[83]

Furthermore, incumbent LECs may not circumvent the requirements in Section 252 by splitting an integrated agreement into separate agreements, sub-agreements, and/or amendments so that the ongoing requirements that do not relate to Section 251(b) or (c) are contained in separate agreements or amendments which the parties assert are not subject to Section 252. For

[82] *See MCImetro*, 2004 WL 2656551, at *4-7.

[83] *Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms and Conditions with U S West Communications, Inc.; The Application for Approval of Interconnection Agreement Between U S West Communications, Inc. and Global Crossing Local Services, Inc. f/k/a Frontier Local Services, Inc. et al.*, Decision No. C02-1183, Phase I Order, Colo. PUC Dkt. Nos. 96A-287T, 97T-507 *et al.*, ¶¶ A.2, B.7 (Oct. 18, 2002), https://www.dora.state.co.us/pls/efi/EFI_Liberty_API.View_Liberty_Image?p_doc_id=3025203. The "Business Escalation Agreement" at issue in the Colorado PUC decision is not available on the agency's website, but may be found on the Arizona Corporation Commission's website, http://images.edocket.azcc.gov/docketpdf/0000094019.pdf. *See also Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms and Conditions with U S West Communications, Inc.; The Application for Approval of Interconnection Agreement Between U S West Communications, Inc. and Global Crossing Local Services, Inc. f/k/a Frontier Local Services, Inc. et al.*, Decision No. C02-1295, Order Denying Certain Amendments to Interconnection Agreements and Granting Certain Amendments, Colo. PUC Dkt. Nos. 96A-287T, 97T-507 *et al.*, ¶ I.C.1 (Nov. 19, 2002), https://www.dora.state.co.us/pls/efi/EFI_Liberty_API.View_Liberty_Image?p_doc_id=3026547 (describing the Business Escalation Agreement).

example, the Washington Utilities and Transportation Commission ("UTC") held that regardless of whether a sub-agreement that "pertained solely to the provision of a network element that was [no longer] required to be unbundled" would by itself be subject to the Section 252 filing requirement, the Qwest Platform Plus ("QPP") agreement at issue must be filed because its purpose was to provide other network elements "in combination with the local loop element, which is provided under Qwest's existing interconnection agreement with MCI."[84] The UTC held that the QPP agreement was part of one integrated agreement "pertaining to matters that indisputably are subject to the Section 252 filing and approval requirements for negotiated interconnection agreements."[85]

Similarly, a federal district court upheld the Texas Public Utility Commission's decision that it was impermissible for an incumbent LEC to file with the state commission only an amendment containing the portions of an agreement that established ongoing requirements relating to Section 251(b) or (c).[86] The court held that the parties must also file the underlying agreement, which contained both ongoing requirements that related to Section 251(b) and (c) and ongoing obligations that did not relate to those sections.[87] As the court explained, discrimination could only be policed if the parties are required to file all components of their agreement:

> Without access to all terms and conditions, the PUC could make no adequate determination of whether the provisions fulfilling [Section] 251 duties are discriminatory or otherwise not in the public interest. For example, while the stated terms of a publicly filed sub-agreement might make it appear that a CLEC is getting a merely average deal from an ILEC, an undisclosed balloon payment to the CLEC might make the deal substantially superior to the deals made available

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[84] *MCImetro*, 2004 WL 2656551, at *4-5.

[85] *Id.* at *4.

[86] *See Sage Telecom, LP v. Pub. Util. Comm'n of Tex.*, No. 04-364, 2004 WL 2428672, at *5-8 (W.D. Tex. Oct. 7, 2004) ("*Sage Telecom*").

[87] *See id.*

> to other CLECs. Lacking knowledge of the balloon payment, neither the State commission nor the other CLECs would have any hope of taking enforcement action to prevent such discrimination.[88]

Consistent with this logic, some state commissions require all modifications to existing interconnection agreements to be filed without regard to whether the amendments by themselves would constitute interconnection agreements subject to the filing requirement under Section 252(a)(1).[89]

B. The Settlement Agreement is an Interconnection Agreement That Must Be Filed Pursuant to Section 252(a)(1).

[BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [redacted]

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[88] *Id.* at *7.

[89] *See, e.g.*, Public Utility Commission of Texas, Telecom Interconnection Rules, § 21.101 ("Any amendments, including modifications, to a previously approved interconnection agreement shall be submitted to the commission for review and approval."); *AT&T Corporation v. Qwest Corporation*, Order Making Tentative Findings, Giving Notice for Purposes of Civil Penalties, and Granting Opportunity to Request Hearing, Iowa UB Dkt. No. FCU-02-2, at 8-9 (May 29, 2002), http://www.state.ia.us/government/com/util/docs/orders/2002/0529_fcu022.pdf ("This definition [of interconnection agreement] includes any agreement modifying or amending any part of an existing interconnection agreement."); *see also* IOWA ADMIN. CODE r. 199-38.7(4).

[90] *See* Verizon Direct Testimony (Verizon Ex. 1) at 14, lines 15-18; *id.* at 19, lines 14-19 **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[91] *See id.* at 14, lines 18-20 (emphasis added); *id.* at 15, line 4.

[redacted]

[redacted]

> [redacted]

[redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** The Settlement

[92] *Id.* at 15, lines 1-4 (citation omitted).

[93] *Id.* at 15, lines 21-22.

[94] *See* Settlement Agreement ¶ 5(d)(i); Verizon Direct Testimony (Verizon Ex. 1) at 15, lines 13-14.

[95] Settlement Agreement ¶ 5(d)(ii).

[96] Verizon Direct Testimony (Verizon Ex. 1) at 15, lines 14-16.

Agreement must therefore be filed with the Department pursuant to Section 252(a)(1) of the Act.[97]

C. The Traffic Exchange Agreement is an Interconnection Agreement That Must Be Filed Pursuant to Section 252(a)(1).

The Traffic Exchange Agreement is an agreement between Verizon and **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**.[98] It is equally clear that the Traffic Exchange Agreement contains several ongoing obligations relating to Section 251(b) and (c).

First, the Traffic Exchange Agreement contains ongoing obligations **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** As the Department knows, Verizon has a duty under Section 251(c)(2) to provide interconnection in TDM format for the exchange of voice traffic. **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted]

[97] *See* Sprint-VZ Record Request #1 (Apr. 30, 2014) **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[98] Verizon Direct Testimony (Verizon Ex. 1) at 19, lines 14-19.

[99] *See* Traffic Exchange Agreement §§ 2.2–2.2.2 **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[redacted]

> [redacted]

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[100] *Id.* § 1.20.1.1.

[101] *Id.* § 1.20.1.2.

[102] *See, e.g.*, Agreement by and Between AccessPlus Communications, Inc. and Verizon New England Inc., d/b/a Verizon Massachusetts for the Commonwealth of Massachusetts, Interconnection Attach. §§ 2.2.4-2.2.5 (dated Feb. 19, 2003) ("Verizon-AccessPlus ICA") (requiring AccessPlus to establish facilities connecting to Verizon end offices rather than Verizon tandem offices if the volume of traffic exchanged exceeds a specified level).

> [redacted]

[redacted]

[redacted]

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[103] *Id.* § 1.20.2.

[104] Opposition of Verizon MA to Intervenors' Motion for Summary Judgment, DTC 13-6, at 16 (Apr. 11, 2014) ("Verizon Opposition").

[105] Traffic Exchange Agreement § 1.20 (emphasis added).

[redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** Section 251(b)(5) governs "reciprocal compensation arrangements for the transport and termination of telecommunications,"[108] including "bill-and-keep arrangement[s]" or "arrangement[s] in which each carrier receives intercarrier compensation for the transport and termination" of local telecommunications traffic.[109] **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted]

[redacted]

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[106] *See, e.g.*, Verizon-AccessPlus ICA, Glossary § 2.71 & Interconnection Attach. § 2.1.1 (addressing points of interconnection and financial responsibility for establishing facilities to points of interconnection).

[107] **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** established in the *ICC Reform Order* is a "commercial agreement[]" that is not subject to Section 252. *See* Verizon Opposition at 14-15. But the FCC never stated that such agreements are excluded from Section 252. It merely held that "[t]he transition we adopt sets a default framework, leaving carriers free to enter into negotiated agreements that allow for different terms," and the FCC did not address whether such agreements must be filed pursuant to Section 252. *ICC Reform Order and FNPRM* ¶ 739.

[108] 47 U.S.C. § 251(b)(5).

[109] 47 C.F.R. § 51.701(e).

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[110] Traffic Exchange Agreement §§ 2.2–2.2.2.

[111] *See* Verizon Opposition at 18.

[112] Traffic Exchange Agreement § 2.2.2.

[113] *Id.* § 2.2 (emphasis added).

[redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** Accordingly, under the *Qwest Declaratory Ruling* standard,[115] the Traffic Exchange Agreement must be filed with the Department.

D. The VoIP-to-VoIP Agreement is an Interconnection Agreement That Must Be Filed Pursuant to Section 252(a)(1).

1. *The VoIP-to-VoIP Agreement is an Interconnection Agreement Between an Incumbent LEC [BEGIN HIGHLY SENSITIVE CONFIDENTIAL]* [redacted] *[END HIGHLY SENSITIVE CONFIDENTIAL]*

As discussed herein, the VoIP-to-VoIP Agreement is an agreement between Verizon, an incumbent LEC, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

a. [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [redacted] [END HIGHLY SENSITIVE CONFIDENTIAL] is a Requesting Telecommunications Carrier Because the VoIP Service it Provides is a Telecommunications Service.

[BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** is a "telecommunications carrier" because the VoIP service it provides is a "telecommunications

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[114] Traffic Exchange Agreement § 18.

[115] *See Qwest Declaratory Ruling* ¶ 9.

[116] *See* VoIP-to-VoIP Agreement at 1.

service" as that term is defined in the Act.[117] This conclusion is supported by the terms of the Act, FCC precedent, and the characteristics of interconnected VoIP service.

The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used."[118] "Telecommunications," in turn, is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[119] When assessing whether an entity offers a service that falls within a regulatory classification such as "telecommunication service," the key inquiry is whether end users perceive the service as offering the features and functionalities that meet the statutory definition.[120]

End users of interconnected VoIP service unquestionably perceive the service as offering the features and functionalities of a telecommunications service. The FCC has long held that TDM-based telephone service is a telecommunications service. The Competitive Carriers' expert witness David Malfara has explained that, "[f]rom the perspective of a user making or receiving a call, [Verizon's VoIP] service is functionally indistinguishable from traditional TDM-based telephone service."[121] Mr. Malfara has also explained that, "[t]hough provided over new network technology, this two-way voice communications service provides the same basic functionality as traditional TDM-based telephone service – the transmission of voice signals

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[117] *See* 47 U.S.C. § 153(51) (defining "telecommunications carrier" as "any provider of telecommunications services").

[118] *Id.* § 153(53).

[119] *Id.* § 153(50).

[120] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986-99 (2005) ("*Brand X*") (upholding the FCC's determination that whether cable modem service providers "offer" telecommunications turns on the nature of the functions the *end user* is offered).

[121] *See* Malfara Rebuttal Testimony (Competitive Carriers Ex. 3) at 14, lines 9-11.

without any fundamental alteration of the voice signals, as sent and received by the customer."[122] It follows that interconnected VoIP services are telecommunications services and that, when providing those services, Verizon and Comcast are telecommunications carriers.

FCC precedent further confirms that this is the case. The FCC has already held that providers of interconnected VoIP service provide "telecommunications" to their customers.[123] The FCC has also repeatedly held that end-user customers view interconnected VoIP services (including both "facilities-based" or "managed" VoIP services, such as those offered by Comcast and Verizon, and "over-the-top" VoIP services such as those offered by Vonage) as functionally equivalent to TDM-based telephone service.[124] And the FCC has used this fact as the basis for imposing numerous regulations applicable to providers of telecommunications services (*e.g.*, discontinuance obligations, CPNI requirements, universal service obligations, CALEA requirements, and E911 obligations) on providers of interconnected VoIP services.[125]

The FCC has also consistently held that facilities-based or managed VoIP services such as those offered by Comcast and Verizon belong in the same product market as traditional TDM-

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[122] *Id.* at 14, lines 1-4.

[123] *See Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518, ¶ 39 (2006) ("[U]sing the Act's definitions, we find that interconnected VoIP providers 'provide' 'the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.'") (internal citation omitted); *see also id.* ¶¶ 40-41.

[124] *See, e.g.*, *IP-Enabled Services*, Report and Order, 24 FCC Rcd. 6039, ¶ 12 (2009) ("From the perspective of a customer making an ordinary telephone call, we believe that interconnected VoIP service is functionally indistinguishable from traditional telephone service."); *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 6927, ¶ 56 (2007) (finding that "these services, from the perspective of a customer making an ordinary telephone call, are virtually indistinguishable").

[125] *See id.*; *see also Universal Service Contribution Methodology et al.*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518, ¶ 43 (2006); *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 14989, ¶ 42 (2005); *IP-Enabled Services; E-911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 10245, ¶ 23 (2005).

based telephone service on the basis that consumers view facilities-based VoIP services as a substitute for TDM-based telephone service.[126] Similarly, at least one incumbent LEC (AT&T) has found that, based on its market research, customers subscribing to facilities-based VoIP services such as those offered by cable companies and incumbent LECs "may not even realize that they no longer have the plain old telephone service (POTS) that was so common during the last century."[127]

Notwithstanding the fact that VoIP service is functionally indistinguishable from TDM-based telephone service, Verizon has insisted in this proceeding that Comcast's VoIP service and its own VoIP service are not "telecommunications services."[128] In so doing, Verizon makes several arguments, none of which have merit.

First, Verizon contends that its VoIP service and Comcast's VoIP service are "information services" under the Act[129] because they "tightly integrate[]" voice communications with "numerous information processing" features and capabilities.[130] These features include, among others, "online account configuration and management" through Verizon's FiOS Digital

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[126] *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, ¶ 54 (2010) ("As in the past, we find that mass market consumers view facilities-based VoIP services, such as those offered by cable providers, as sufficiently close substitutes for local service to include them in the relevant product market."); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18290, ¶¶ 86-87 (2005); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18433, ¶¶ 87-88 (2005).

[127] *See* Gillan Rebuttal Testimony (Competitive Carriers Ex. 2), Exhibit JPG-3.

[128] *See* Verizon Opposition at 19, 22.

[129] An "information service" is defined under the Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, . . . but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(24).

[130] *See* Verizon Opposition n.90 (describing Verizon's VoIP service); *id.* n.78 (describing Comcast's VoIP service) (citing Comcast's Response to Verizon's First Set of Information Requests to Comcast (Verizon Ex. 4), at 5-7 (Feb. 6, 2014)).

Voice "Account Manager"[131] and Comcast's "XFINITY CONNECT Communications Center."[132] The Department must reject this argument in light of FCC and Supreme Court precedent. As the FCC explained in 2006, "merely packaging" or bundling information service capabilities with a telecommunications service does not render the combined offering an "integrated" information service:

> [T]he key question in classifying offerings with both telecommunications and information service capabilities is whether the telecommunications transmission capability is "sufficiently integrated" with the information service component "to make it reasonable to describe the two as a single, integrated offering." Both the Commission and the [Supreme] Court made clear that merely packaging two services together does not create a single integrated service. In the *Universal Service Report to Congress*, for example, the Commission found that a packaged offering of local telephone service and voice mail should be treated as separate services. Expanding upon this reasoning, the Court in *Brand X* made clear that a telephone company that packages residential local exchange service with voice mail is offering a "transparent transmission path – telephone service – that transmits information independent of the information-storage capabilities provided by voice mail. . . . [W]hen a person makes a telephone call, his ability to convey and receive information using the call is only trivially affected by the additional voice-mail capability."[133]

By contrast, in *Brand X*, the Supreme Court upheld the FCC's determination that broadband Internet access service is an integrated information service.[134] The Court found reasonable the Commission's conclusion that the transmission and information processing components of the service were "sufficiently integrated" given that "'[a] consumer uses the high-speed wire always

[131] *See* Verizon Direct Testimony (Verizon Ex. 1) at 6, lines 5-7, 12-13.

[132] *See* Comcast's Response to Verizon's First Set of Information Requests to Comcast (Verizon Ex. 4), at 5 (Feb. 6, 2014).

[133] *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 21 FCC Rcd. 7290, ¶ 14 (2006).

[134] *See generally Brand X*, 545 U.S. 967 (2005).

in connection with the information-processing capabilities provided by Internet access'" and "'the transmission is a necessary component of Internet access.'"[135]

Here, the packaging of an account configuration and management function or other "information processing" features with Verizon's or Comcast's VoIP service does not render the service an integrated information service. As Mr. Malfara explained when asked about Verizon's VoIP service, "[t]hese features are not at all integrated or required for the 'two-way real-time voice communications' service that is [the] primary function" of Verizon's VoIP service.[136] That is, the voice transmission service is not used "always in connection with the information-processing capabilities"[137] provided by the account configuration and management function or the other features offered. For example, "users can place or receive telephone calls over the [Verizon FiOS Digital Voice VoIP] service without ever accessing the Account Manager" feature.[138] Indeed, Verizon's witness conceded at the hearing that a customer "could use [Verizon's FiOS Digital Voice VoIP service] just for voice" and if customers "only want to make voice calls, they could [do] that" with Verizon's VoIP service.[139] The same is true of Comcast's VoIP service; Comcast states that the additional features and functions of its VoIP service "may be used *at the customer's discretion* when placing or receiving calls."[140]

Moreover, under the Act and FCC precedent, a functionality that allows users to configure or manage their voice service is not an "information service" but rather a

[135] *See id.* at 990 (internal citations omitted).

[136] Malfara Rebuttal Testimony (Competitive Carriers Ex. 3) at 16, lines 1-3.

[137] *Brand X*, 545 U.S. at 990.

[138] Malfara Rebuttal Testimony (Competitive Carriers Ex. 3) at 16, lines 8-9.

[139] Hearing Tr. Vol. I at 165 (lines 13-14 and 24) and 166 (line 1).

[140] Comcast's Responses to CC-C-2-5 (Competitive Carriers Ex. 6) (emphasis added).

telecommunications service. The statutory definition of "information service" provides that a functionality that meets the literal definition of information service does not qualify as such if it is used for "the management of a telecommunications service."[141] This "'telecommunications management exception'" codifies the FCC's so-called "'adjunct-to-basic'" doctrine.[142] That doctrine provides that "[a]djunct-to-basic services are services that are 'incidental' to an underlying telecommunications service and do not 'alter[] their fundamental character' even if they may meet the literal definition of an information service or enhanced service."[143] Under this doctrine, the FCC has held that offering users the ability to set up their own voice service features does not cause telephone service to be classified as an information service.[144] Likewise, here, the fact that Comcast's XFINITY CONNECT "allows users to configure their account settings"[145] or that Verizon's "Account Manager allows the customer to configure and manage her services using a computer or a wireless device"[146] by "setting up and customizing many other functions"[147] does not render their VoIP services information services.[148]

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[141] 47 U.S.C. § 153(24).

[142] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, ¶ 107 (1996) ("*Non-Accounting Safeguards Order*").

[143] *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 4826, ¶ 16 (2005) (internal citations omitted).

[144] *See North American Telecommunications Association; Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, Memorandum Opinion and Order, 101 FCC 2d 349, ¶ 35 (1985) ("*NATA Order*") ("The customer's interaction with the information in the central office computer serves no purpose beyond facilitating use of basic telephone services. Moreover, the ability of the customer to add or remove various basic service features does not change the kind of telephone service he will get when he places a call.").

[145] Comcast's Response to Verizon's First Set of Information Requests to Comcast (Feb. 6, 2014) (Verizon Ex. 4), at 5.

[146] Verizon Direct Testimony (Verizon Ex. 1) at 6, lines 12-13.

[147] *Id.* at 6, lines 15-16.

Nor does the availability of any of the other features offered with these VoIP services[149] cause them to be classified as information services. For example, the FCC has already found that call forwarding, call blocking, distinctive ringing, accessing incoming and outgoing call information, and speed dialing are telecommunications services under the adjunct-to-basic doctrine.[150] This is because these features simply facilitate the use of, and do not change the fundamental nature of, the voice service being provided.[151] Similarly, while voicemail is an information service, as discussed above, the offering of voicemail with telephone service "only trivially affect[s]" the ability to make and receive calls[152] and does not render the telephone service an information service.

It is also worth pointing out that many of the features available with Verizon and Comcast's VoIP services are either features or "evolutionary improvements on features that have been offered with TDM-based voice service for years."[153] As Mr. Malfara detailed in his testimony, these features include voicemail with email notification, attachment of voicemail messages to email, call scheduling, and simultaneous ringing.[154] Thus, the availability of these features does not change the classification of VoIP service as a telecommunications service.

Second, Verizon has asserted that both its and Comcast's VoIP services are information

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[148] *See also* Malfara Rebuttal Testimony (Competitive Carriers Ex. 3) at 14, lines 19-21 (explaining that "the Account Manager merely acts as a graphical user interface (GUI) that allows users to set up their own voice service features and that facilitates use of the voice communications service").

[149] *See* Verizon Direct Testimony (Verizon Ex. 1), Ex. 1; Comcast's Response to Verizon's First Set of Information Requests to Comcast (Verizon Ex. 4), at 5-7.

[150] *See NATA Order* ¶¶ 25-26, 36, 46.

[151] *See, e.g., id.* ¶¶ 25-26; *see also* Malfara Rebuttal Testimony (Competitive Carriers Ex. 3) at 15, lines 11-13.

[152] *See Brand X*, 545 U.S. at 998.

[153] Malfara Rebuttal Testimony (Competitive Carriers Ex. 3) at 17 (lines 23-24) and 18 (line 1).

[154] *See id.* at 17 (lines 8-16) and 18 (lines 1-13).

services because "they offer the capability for a 'net protocol conversion' from IP to TDM or from TDM to IP."[155] As a threshold matter, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** no net protocol conversion from IP to TDM or *vice versa* occurs.[156] Moreover, the Department must reject Verizon's argument with respect to the "capability for a 'net protocol conversion'" offered by its and Comcast's VoIP services (*e.g.*, when a Verizon or Comcast VoIP subscriber calls a subscriber of TDM-based telephone service or *vice versa*). The FCC has long held that the definition of information service does not cover protocol conversions that occur to accommodate the piecemeal introduction of new technology into the telephone network.[157] Rather, such conversions constitute telecommunications services.[158]

In adopting this rule, the FCC explained that, during the transition of telephone service from analog to digital, there would be a need for telephone companies to provide a net protocol conversion between subscribers using analog service and digital service.[159] The FCC found that although such protocol conversions fall within the literal definition of information service, "in circumstances involving no change in an existing service, but merely a change in electrical

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[155] Verizon Opposition n.90.

[156] *See* Malfara Rebuttal Testimony (Competitive Carriers Ex. 3) at 21 (lines 1-4).

[157] *See Non-Accounting Safeguards Order* ¶ 107 (holding that protocol conversions "in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE)" constitute telecommunications services, not information services); *Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, Memorandum Opinion, Order and Statement of Principles, 95 FCC 2d 584, ¶ 16 (1983) ("*Protocols Order*").

[158] *See Non-Accounting Safeguards Order* ¶ 106.

[159] *Protocols Order* ¶ 16.

interface characteristics to facilitate transitional introduction of new technology," the FCC would view net protocol conversions as part of the telecommunications service.[160]

Net protocol conversions provided as part of facilities-based VoIP services (such as those offered by Comcast or Verizon) do not transform those services into information services because the VoIP services are merely the result of a transition to a new technology for providing voice service.[161] There is no change in the voice "service" at issue. As Mr. Malfara explained in his testimony, a "TDM-to-IP or IP-to-TDM protocol conversion . . . does not alter the basic nature of the voice communications service that is being provided to the user (*i.e.*, the user does not perceive any change in the form or content of the voice message being transmitted)."[162] "The protocol conversions occur merely to allow the incremental introduction of IP technology into the PSTN as carriers transition from TDM technology to IP."[163] Moreover, as discussed above, the features and functionalities offered with VoIP service are merely incremental upgrades to functionalities that have long been offered as part of TDM-based voice service.

Furthermore, net protocol conversions have been necessary for years to exchange traffic between and among TDM-based and IP-based wireline as well as GSM-based and CDMA-based mobile wireless telephone services.[164] If each of these voice services were somehow viewed as new and different services solely because of net protocol conversions, then every telephone service offering in the country would be classified as an information service. The FCC could not have intended such a result.

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[160] *Id.* ¶ 17.

[161] *See* Malfara Rebuttal Testimony (Competitive Carriers Ex. 3) at 21, lines 17-19.

[162] *Id.* at 21, lines 14-17.

[163] *Id.* at 21, lines 17-19.

[164] *See id.* at 23, lines 3-13.

Thus, the Department must treat the transition from TDM technology to IP technology as a means of providing telephone service as merely a transition to a new technology to provide the same service. Net protocol conversions employed to provide facilities-based VoIP service (*e.g.*, Comcast's or Verizon's VoIP service) and to ensure the delivery of calls between end users using TDM and IP technologies should be treated as part of a telecommunications service.

b. At a Minimum, the Department Should Treat the VoIP-to-VoIP Agreement as If It Were [BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [redacted] [END HIGHLY SENSITIVE CONFIDENTIAL]

Even if the Department finds that **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** as a means of circumventing the filing, review, and opt-in requirements of Section 252. As the Department has told the FCC, "competitive providers' use of affiliates" that utilize IP technology to provide service should not enable the competitor and incumbent LEC to circumvent the requirements of the Act.[165] Preventing this outcome by requiring Verizon to comply with the requirements of Section 252 for purposes of the VoIP-to-VoIP Agreement is consistent with both established precedent and the nature of the Comcast-Verizon relationship.

In *ASCENT v FCC*, the D.C. Circuit held that "to allow an ILEC to sideslip § 251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate seems to us a circumvention of the statutory scheme."[166] That scheme, the court held, permitted

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[165] Department May 4, 2012 Comments to FCC at 11.

[166] *Ass'n of Commc'ns Enters. v. FCC*, 235 F.3d 662, 666 (D.C. Cir. 2001).

the elimination of Section 251(c) obligations where the standard for forbearance in Section 10 of the Act is met, but not by simply creating a separate affiliate.[167] The instant case **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** but the same principle applies here. To "allow an ILEC to sideslip" section 252's requirements by simply **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** is a "circumvention of the statutory scheme."

Such a circumvention of the statutory scheme would undermine the purpose of the filing, review, and opt-in requirements in Section 252 in multiple ways. It would obviously deprive the Department of the ability to review the VoIP-to-VoIP Agreement to ensure that it is not discriminatory, and it would deprive competitors of the ability to avoid the consequences of discrimination because they would not have the right to opt into the Agreement under Section 252(i). This is inappropriate because, as explained in Parts III.D.1.c and III.D.2-.3 below, there is little question that the VoIP-to-VoIP Agreement would otherwise qualify as an interconnection agreement that must be filed, reviewed, and subject to opt-in under Section 252.

But the circumvention would also prevent the full application of Section 252 to the **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted]

[167] *See id.* at 665-67.

[redacted]

[redacted]

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[redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** Comcast has explained that its CLEC affiliates provide "underlying transport" to its VoIP affiliates.[170] In addition, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** As Comcast has explained, its CLEC wholesale affiliates provide telephone numbering resources to its VoIP affiliates.[172] In all of these cases, therefore, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted]

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[168] VoIP-to-VoIP Agreement § 31 **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[169] *See, e.g.*, VoIP-to-VoIP Agreement, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[170] Comments of Comcast Corporation, WC Dkt. No. 08-56, at 2 (filed May 19, 2008) (Competitive Carriers Ex. 7) ("Comcast May 19, 2008 Comments").

[171] VoIP-to-VoIP Agreement, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[172] *See* Comcast May 19, 2008 Comments at 2 (Competitive Carriers Ex. 7); Comcast Response to Competitive Carriers' Information Requests Set 1, No. 1 (Competitive Carriers Ex. 6).

[redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

c. IP Interconnection for the Exchange of Voice Traffic, Including Interconnected VoIP Traffic, is Governed By and Related to Section 251(c)(2).

The Department should find that the VoIP-to-VoIP Agreement is an interconnection agreement because Section 251(c)(2) of the Act requires incumbent LECs to provide IP interconnection for the exchange of interconnected VoIP traffic, and **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** That conclusion comports with the terms of the statute, FCC precedent, and **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

Section 251(c)(2) requires incumbent LECs to provide "interconnection . . . for the transmission and routing of telephone exchange service and exchange access."[173] **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

First, IP interconnection qualifies as "interconnection" for purposes of Section 251(c)(2). As the FCC has held, "the interconnection requirements [of Section 251 of the Act] are technology neutral."[174] That is, "they do not vary based on whether one or both of the interconnecting providers is using TDM, IP, or another technology in their underlying

[173] 47 U.S.C. § 251(c)(2)(A).

[174] *ICC Reform Order and FNPRM* ¶ 1342.

networks."[175] Moreover, the FCC has gone further and affirmatively held that "the interconnection obligations set forth in section 251(c)(2)" in particular "apply to packet-switched services as well as circuit-switched services."[176] Similarly, the Department has recognized that "the use of a particular underlying technology does not alter the provider's regulatory classification or its statutory rights and obligations."[177] **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted]

[redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** constitute "telephone exchange service" traffic and "exchange access" traffic under Section 251(c)(2) of the Act. **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** And interconnected VoIP service such as that provided by Comcast and Verizon is a "telephone exchange service" and an "exchange access" service.

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[175] *Id.*

[176] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 FCC Rcd. 385, ¶ 22 (1999) ("*Advanced Services Remand Order*"), *remanded on other grounds, WorldCom, Inc. v. FCC*, 246 F.3d 690 (D.C. Cir. 2001).

[177] Department May 4, 2012 Comments to FCC at 11.

[178] Verizon Opposition at 5 (citation omitted).

[179] *See* VoIP-to-VoIP Agreement, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

The statutory definition of "telephone exchange service" is as follows:

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or
>
> (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.[180]

Under subsection (A), "service within a telephone exchange" simply means that the "service must be 'local' in nature, as opposed to a 'toll' service."[181] And "a service satisfies the 'intercommunication' requirement of [subsection (A)] as long as it provides customers with the capability of intercommunicating with other subscribers."[182] In addition, the requirement that the service be "covered by the exchange service charge" "comes into play only for the purposes of distinguishing whether or not a service is a local" service, and this requirement is satisfied by any charges assessed for origination or termination within the equivalent of an exchange area.[183] Putting these pieces together, interconnected VoIP service clearly meets the definition of telephone exchange service because it allows subscribers to make and receive local calls,[184] and subscribers are typically charged for this service. Indeed, the FCC has held that the term

[180] 47 U.S.C. § 153(54).

[181] *BellSouth Telecomms., Inc. v. Finley*, No. 09-517, 2010 U.S. Dist. LEXIS 131839, at *25 (E.D.N.C. Dec. 10, 2010).

[182] *Advanced Services Remand Order* ¶ 23.

[183] *See id.* ¶ 27.

[184] *See* Malfara Rebuttal Testimony (Competitive Carriers Ex. 3) at 14, lines 4-7 ("Like the telephone exchange service provided by traditional TDM-based service providers, [Verizon's VoIP service] gives users the ability to make and receive local calls (*i.e.*, to communicate with each other within a defined area similar to a local exchange).").

"telephone exchange service" is not limited to services that employ circuit-switched technology and applies to packet-switched services.[185]

Interconnected VoIP service also meets the alternate definition of telephone exchange service under subsection (B) of the definition. The FCC has held that "the term 'comparable,' as used in [subsection (B)], . . . means that the services retain the key characteristics and qualities of the telephone exchange service definition under sub[section] (A)" and that they "permit 'intercommunication' among subscribers within a local exchange area."[186] As established in Part III.D.1.a above, interconnected VoIP service is clearly comparable to traditional TDM-based telephone service because it is functionally indistinguishable from traditional TDM-based telephone service. Indeed, the statutory definition of telephone exchange service, by its terms, contemplates successor services utilizing new technologies that provide the same basic functionality as traditional TDM-based telephone service.[187]

Additionally, interconnected VoIP service is an "exchange access" service as that term is defined in the Act. "Exchange access" means "the offering of access to telephone exchange services or facilities for the purpose of origination or termination of telephone toll services."[188] Interconnected VoIP service provides interexchange carriers with the ability to originate long distance calls from or terminate long distance calls to subscribers of the VoIP service. As Mr.

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[185] *Advanced Services Remand Order* ¶ 22.

[186] *Id.* ¶ 30.

[187] As members of Congress explained to the FCC in 1998, Congress' 1996 amendment of the "telephone exchange service" definition to include "comparable" service "would not have been necessary had Congress intended to limit telephone exchange service to traditional telephony." *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24011, n.71 (1998) (quoting Comments of Senators Stevens and Burns, *Federal-State Joint Board on Universal Service*, CC Dkt. No. 96-45, n.1 (Report to Congress) (filed Jan. 26, 1998)). That new definition "was intended to ensure that the definition of local exchange carrier, which hinges in large part on the definition of telephone exchange service, was not made useless by the replacement of circuit switched technology with other means . . . of communicating information within a local area." *See id.*

[188] 47 U.S.C. § 153(20).

Malfara has explained, "like the exchange access service provided by traditional TDM-based service providers, [Verizon's VoIP service] allows the origination and termination of long-distance calls."[189] It follows that interconnected VoIP service is an exchange access service.

Based on the foregoing, it is clear that Section 251(c)(2) requires IP interconnection for the exchange of VoIP traffic. Consequently, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** But even if the Department were to somehow find that Section 251(c)(2) does not require incumbent LECs to provide IP interconnection, it can readily find that **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** Interconnection under Section 251(c)(2) is "the physical linking of two networks for the mutual exchange of traffic."[190] **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted]

[189] Malfara Rebuttal Testimony (Competitive Carriers Ex. 3) at 14, lines 7-9.

[190] *Local Competition Order* ¶ 176.

[191] Verizon Opposition at 5 (citation omitted).

[192] Verizon Direct Testimony (Verizon Ex. 1) at 19 (lines 21-22) and 20 (lines 1-4).

[redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** the FCC would not have sought comment on the more specific question of whether Section 251(c)(2) *requires* incumbent LECs to enter into such agreements.[195]

2. ***The VoIP-to-VoIP Agreement is an Interconnection Agreement Between an Incumbent LEC [BEGIN HIGHLY SENSITIVE CONFIDENTIAL]*** [redacted] ***[END HIGHLY SENSITIVE CONFIDENTIAL]***

The VoIP-to-VoIP Agreement is also an interconnection agreement subject to the Section 252(a)(1) filing requirement because **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** Section 251(b)(2) states that "local exchange carriers" have a "duty to provide . . . number portability in accordance with requirements prescribed by the Commission."[196] A "local exchange carrier" is, in turn, defined as "any person that is engaged in the provision of telephone exchange service or exchange access."[197] **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted]

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[193] Verizon Opposition at 20.

[194] Verizon's claim that **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** is entirely irrelevant. Verizon Opposition at 20. There is no exception under the *Qwest Declaratory Ruling Standard* for agreements concerning a facility or traffic that purportedly **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[195] *See ICC Reform Order and FNPRM* ¶¶ 1385-1393.

[196] 47 U.S.C. § 251(b)(2).

[197] *Id.* § 153(32).

[redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[198] VoIP-to-VoIP Agreement, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** (emphasis added).

[199] *Id.* § 12.2.

[200] *Id.*

[201] *Id.*

[202] *Id.* § 12.3.

3. *The VoIP-to-VoIP Agreement is an Interconnection Agreement Between an Incumbent LEC and [BEGIN HIGHLY SENSITIVE CONFIDENTIAL]* [redacted] *[END HIGHLY SENSITIVE CONFIDENTIAL]*

The VoIP-to-VoIP Agreement is also an interconnection agreement subject to the Section 252(a)(1) filing requirement because **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** For this reason as well, the VoIP-to-VoIP Agreement is subject to the Section 252(a)(1) filing requirement.

4. *The VoIP-to-VoIP Agreement is a Sub-Part of an Interconnection Agreement Between Verizon and Comcast.*

The VoIP-to-VoIP Agreement is subject to the filing, review, and opt-in requirements of Section 252 for a further, independent reason: it is an integral part of a larger interconnection agreement consisting of both the Traffic Exchange Agreement and the VoIP-to-VoIP Agreement.

[203] VoIP-to-VoIP Agreement § 5.

Because the Traffic Exchange Agreement between Verizon and **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** is unquestionably an interconnection agreement subject to the filing and other requirements of Section 252, the VoIP-to-VoIP Agreement must also be subject to those requirements.

As explained in Part III.A.3 above, the parties to an agreement containing obligations related to Section 251(b) or (c) must file their entire agreement, not just the subparts that they would like to be subject to commission review and opt-in by competitors. This means that, where parties have subdivided an integrated set of rights and obligations into multiple amendments or agreements, the set of rights and obligations must be viewed as a single agreement.[204] Where one or more of the terms of the integrated set of agreements establishes an ongoing obligation related to Section 251(b) or (c), all of the contracts and documents comprising the agreement must be filed under Section 252(a)(1), even those that, if considered in isolation, would not be subject to the filing requirement.[205]

[BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [redacted]

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[204] *See supra* Part III.A.3.

[205] *See id.*

[206] Traffic Exchange Agreement § 2.2.

[redacted]

> [redacted]

[redacted]

> [redacted]

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[207] *See id.* § 1.26.

[208] *Id.* § 1.20 **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[209] *Id.* § 1.6 **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[210] *Id.* § 1.11.

[211] VoIP-to-VoIP Agreement § 12.

[redacted]

[redacted]

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212 VoIP-to-VoIP Agreement, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

213 VoIP-to-VoIP Agreement, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

214 *Id*. §§ 4.2, 4.4.

215 *Id*. § 4.6.

216 *Id*. §§ 5-6.

217 *Id*. § 7.

218 **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

219 VoIP-to-VoIP Agreement § 5.

[redacted]

[220] **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** *See supra* note 218.

[221] VoIP-to-VoIP Agreement, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** Given that the VoIP-to-VoIP Agreement is an integral part of the Traffic Exchange Agreement, it too must be filed under Section 252(a)(1).

E. Enforcing the Section 252(a)(1) Filing Requirement in This Proceeding Will Advance the Policy Goals of Section 706 and Promote the Transition to All-IP Networks.

A Department ruling that Section 252(a)(1) requires the filing of the Agreements at issue will further the congressional policy set forth in Section 706 of the 1996 Act. Section 706(a) provides that the "[Federal Communications] Commission and *each State commission* with regulatory jurisdiction over telecommunications services *shall* encourage the deployment . . . of advanced telecommunications capability [(*i.e.*, broadband)] to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[223] The FCC has repeatedly held that regulatory actions to promote the use and deployment of VoIP services advance the goals of Section 706.

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[222] It is worth noting that the Settlement Agreement must also be reviewed with the Traffic Exchange Agreement and the VoIP-to-VoIP Agreement. For example, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[223] 47 U.S.C. § 1302(a) (emphasis added).

In particular, the FCC has found that extending certain obligations to interconnected VoIP providers (*e.g.*, E911, CPNI, local number portability, and discontinuance requirements) "may spur consumer demand for interconnected VoIP services, in turn driving demand for broadband connections, and consequently encouraging more broadband investment and deployment consistent with the goals of section 706."[224] The Department has also recognized that IP interconnection in particular "will aid in the development of additional broadband networks."[225]

The Department is clearly correct. Allowing competitive carriers to opt-in to the Agreements and obtain IP interconnection with Verizon will undoubtedly promote the use and deployment of VoIP services, and in turn, the deployment of broadband. For example, removing obstacles to IP interconnection with Verizon would enable competitive LECs to deploy services, such as High Definition voice, that they would otherwise be unable to provide without IP interconnection.[226] In addition, the numerous efficiencies associated with IP interconnection would allow competitive carriers (as well as Verizon) to provide VoIP services more cost-effectively[227] and to provide those services to more end-user customers. Making VoIP services available at lower costs and to more end-user customers would spur demand for more broadband

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[224] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, Report and Order, 22 FCC Rcd. 6927, ¶ 59 (2007); *IP-Enabled Services: E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 10245, ¶ 31 (2005); *see also IP-Enabled Services*, Report and Order, 24 FCC Rcd. 6039, ¶ 13 (2009); *Telephone Number Requirements for IP-Enabled Services Providers*, Report & Order, 22 FCC Rcd. 19531, ¶ 29 (2007).

[225] Department May 4, 2012 Comments to FCC at 7.

[226] *See* Sprint Direct Testimony (Sprint Ex. 1) at 27, lines 7-9; *see also* Comments of COMPTEL, GN Dkt. No. 13-5, Attachment B, n.9 (filed July 8, 2013) ("COMPTEL July 8, 2013 Comments").

[227] *See, e.g.*, COMPTEL July 8, 2013 Comments, Attachment B, at 1-6 (describing the operational and economic efficiencies that interconnected carriers can gain from IP interconnection, including "a significant reduction" in facilities and equipment and more simplified network design); *see id.* at 3 (stating that "the cost of interconnection could be reduced by more than 90% through the use of VoIP interconnection (in comparison to TDM)," and that figure does not account for "the additional benefits possible *once the VoIP interconnection [i]s established*") (emphasis in original); Sprint Direct Testimony (Sprint Ex. 1) at 26, lines 10-21.

and, as a result, would encourage investment in broadband networks. As Sprint has explained, "IP interconnection almost certainly will accelerate consumer adoption of broadband services because, between the sizable reduction in the cost of providing voice services and the enabling of new features altogether, consumers will have added incentives to subscribe to broadband services."[228]

The D.C. Circuit's interpretation of Section 706 also supports a Department ruling that the Agreements in this proceeding must be filed. In interpreting Section 706(a), the D.C. Circuit recently held that "by preventing broadband providers from blocking or discriminating against edge providers," open internet regulations would "protect and promote edge-provider investment and development, which in turn drives end-user demand for more and better broadband technologies, which in turn stimulates competition among broadband providers to further invest in broadband."[229] Similarly, here, a Department finding that the Agreements must be filed and made available for opt-in would help constrain Verizon's market power over interconnection, spur the use and deployment of VoIP services, and in turn, drive broadband deployment.

Nor is there any question that Verizon possesses market power over interconnection. Verizon has substantially more voice customers (*i.e.*, both circuit-switched voice and VoIP customers) than any competitive LEC.[230] As a result, Verizon does not need to interconnect with competitors nearly as much as competitors need to interconnect with it. As the FCC found in the *Local Competition Order*, "incumbent LECs have no economic incentive . . . to provide potential

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[228] Comments of Sprint Nextel Corporation, WC Dkt. No. 10-90, at 3 (filed Feb. 24, 2012).

[229] *See Verizon v. FCC*, 740 F.3d 623, 642 (D.C. Cir. 2014).

[230] *See, e.g.*, Gillan Rebuttal Testimony (Competitive Carriers Ex. 2) at 19, lines 4-10 (explaining that Verizon's share of the market for switched access lines and VoIP subscriptions in Massachusetts "is effectively consolidated in a *single* provider, while the CLEC share is spread among *133 competitors*") (emphasis in original) (citing FCC, "Local Competition: Status as of December 31, 2012," at Table 17 (rel. Nov. 2013)).

competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services."[231] That is, "[n]egotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires."[232] The Competitive Carriers' witness Joseph Gillan explained at the hearing that "most of the other participants in the marketplace are significantly smaller than Verizon and would suffer severe negotiating disadvantages dealing with Verizon because of its incumbent advantages."[233] And as Sprint has explained, "[e]ven while agreeing that IP interconnection is more efficient, a competitor like Sprint cannot force an ILEC into IP interconnection."[234] This reality is demonstrated by the fact that none of the Competitive Carriers nor Sprint nor XO has been able to reach an IP interconnection agreement with Verizon's incumbent LEC operations.[235] Indeed, it appears that the only way for Comcast to enter into an IP interconnection agreement with Verizon was **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**[237] and only after the FCC began looking more closely at IP interconnection issues.

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[231] *Local Competition Order* ¶ 55.

[232] *Id.*

[233] Hearing Tr., Vol. II at 13, lines 5-8.

[234] Sprint Rebuttal Testimony (Sprint Ex. 2) at 8, lines 4-5.

[235] *See supra* note 15.

[236] Verizon Direct Testimony (Verizon Ex. 1) at 14, lines 18-21.

[237] Hearing Tr., Vol. I at 172, lines 13-16.

Verizon's conduct confirms not only that it has little or no economic incentive to voluntarily negotiate IP interconnection agreements on just, reasonable, and nondiscriminatory rates, terms, and conditions, but also that it will enter into IP interconnection agreements with select competitors only in response to regulatory pressure.[238] And so far, this regulatory pressure has only yielded agreements that Verizon has refused to make publicly available, which is obviously a formula for unchecked discrimination. Thus, as the Department has already recognized, Verizon's claim that marketplace solutions alone will result in widespread IP interconnection is "ill-conceived."[239] Only applying and enforcing the Section 251/252 framework will promote IP interconnection and the transition to all-IP networks.

There is also no danger that requiring the filing of the Agreements in this proceeding will result in a "patchwork of potentially inconsistent state regulation" of IP interconnection arrangements[240] or otherwise impede the transition to IP networks.[241] Allowing other competitors to opt-in to the Agreements at issue would promote consistency, not inconsistency, among IP interconnection arrangements across different states because, as Verizon has pointed out, the Traffic Exchange Agreement is multi-state in scope[242] and **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted]

[238] *See supra* Part II.A.2.

[239] *See* Department Feb. 17, 2012 Comments to FCC at 10; Department May 4, 2012 Comments to FCC at 12.

[240] *See* Verizon Direct Testimony (Verizon Ex. 1) at 38, lines 5-6; *see also id.* at 4 (lines 20-21) and 5 (lines 1-7).

[241] It is worth pointing out that state commissions' application and enforcement of Section 252 requirements to date "'ha[s] not hindered the growth in VoIP in the least.'" *See* Gillan Rebuttal Testimony (Competitive Carriers Ex. 2) at 15, lines 21-24 (citing Verizon Direct Testimony (Verizon Ex. 1) at 37, line 17).

[242] Reply of Verizon MA In Support Of Motion For Abeyance, DTC 13-6, at 1 (Sept. 11, 2013).

[243] *See, e.g.*, Verizon Direct Testimony (Verizon Ex. 1) at 21, lines 3-4.

[redacted]

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Furthermore, if the Department were to find that Section 251(c)(2) of the Act requires incumbent LECs to provide IP interconnection, there is no reason to believe that the negotiating carriers will be unable to work out the technical details of IP interconnection using the industry standards that have been developed and are continuing to be developed for IP interconnection.[244] Competitive carriers have been successful in working out the technical details of IP interconnection with other competitive LECs and IXCs for years.[245] Based on state commissions' experience with arbitration of TDM interconnection agreements, there is also no reason to believe that state commissions would depart from the relevant industry standards in the event of an IP interconnection agreement arbitration.[246] And if a standard does not currently exist, the parties can develop a test plan and conduct testing.[247] In fact, **[BEGIN HIGHLY**

[244] *See* Malfara Rebuttal Testimony (Competitive Carriers Ex. 3) at 9 (lines 20-25) and 10 (lines 1-2). Nor would a Department finding that Section 251(c)(2) requires IP interconnection automatically "impose an inefficient POI-per-LATA mandate on such interconnection arrangements," as Verizon claims. *See* Verizon Opposition at 23. Verizon fails to cite any FCC order or codified rule for its claim that "the FCC's rules *require* TDM interconnection to occur at one point per LATA." *Id.* at 22 (emphasis added). Rather, the FCC's rules merely give a competitive LEC the *right* to interconnect with the incumbent LEC at only one POI per LATA if the competitive LEC chooses to do so. *See Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance*, Memorandum Opinion and Order, 15 FCC Rcd. 18354, ¶ 78 (2000) ("Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. This means that a competitive LEC has the *option* to interconnect at only one technically feasible point in each LATA.") (emphasis added). And it would be irrational for a competitive LEC to choose to interconnect in IP at one POI per LATA if doing so would be inefficient. Verizon's fears are therefore unfounded.

[245] *See* Malfara Rebuttal Testimony (Competitive Carriers Ex. 3) at 9 (lines 20-25) and 10 (lines 1-2).

[246] *See id.* at 10, lines 9-16. To the extent it is necessary for a state commission to become involved in the technical issues associated with IP interconnection in an IP interconnection agreement arbitration, there would likely be fewer technical issues to resolve than has been the case with arbitration of TDM interconnection agreements. This is because the use of IP technology simplifies network operations for the interconnecting carriers by, among other things, eliminating layers of switches and transport and reducing the number of necessary interconnection points. *See, e.g., id.* at 6 (lines 7-22) and 7 (lines 1-20); Hearing Tr., Vol. I at 23 (lines 18-24) and 24 (lines 1-15).

[247] *See* Malfara Rebuttal Testimony (Competitive Carriers Ex. 3) at 10, lines 4-7.

SENSITIVE CONFIDENTIAL] [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

It is not the Section 251/252 framework but instead Verizon's own approach to establishing IP interconnection that will result in a "patchwork" of inconsistent IP interconnection arrangements. Verizon's testimony makes clear that it is "in favor of facilitating . . . interconnection" through private, "commercial negotiations" that yield "customized" interconnection arrangements with Verizon.[249] This approach enables Verizon to give certain competitors more favorable terms and conditions than other competitors and keep those better terms and conditions a secret from the other competitors. In other words, Verizon is in favor of exactly the type of discriminatory approach to interconnection that the Section 251/252 framework was designed to prevent.[250]

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[248] *See* VoIP-to-VoIP Agreement, **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[249] Hearing Tr., Vol. I at 162, lines 11-17.

[250] *See Qwest NAL Order* ¶ 47.

IV. CONCLUSION.

For all of the foregoing reasons, the Department should find that the Agreements are interconnection agreements that must be filed pursuant to Section 252(a)(1) of the Act.

Respectfully submitted,

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