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' OPPOSITION TO VERIZON'S MOTION TO COMPEL

The Competitive Carriers[1] oppose the motion of Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon MA") to compel responses to its information requests VZ-I 1-1 & VZ-I 1-2 ("Motion"). Verizon MA has not shown that the information it seeks is relevant to the Department's investigation or that Verizon MA otherwise is entitled to obtain information beyond that which the Competitive Carriers already have provided. The Department should deny the Motion.

BACKGROUND

On March 7, 2014, the last day to serve information requests under the November 29, 2013 Procedural Schedule and Notice ("Procedural Order"), Verizon MA served its first set of information requests upon the Competitive Carriers. The Competitive Carriers timely responded on March 21st. Apparently dissatisfied with two of the Competitive Carriers' responses, Verizon MA filed the instant Motion on March 28th.

[1] CTC Communications Corp. d/b/a EarthLink Business; Lightship Telecom LLC d/b/a EarthLink Business; Choice One Communications of Massachusetts, Inc. d/b/a EarthLink Business; Conversent Communications of Massachusetts, Inc. d/b/a EarthLink Business; EarthLink Business, LLC (formerly New Edge Network, Inc. d/b/a EarthLink Business); Cbeyond Communications, LLC; tw data services llc; Level 3 Communications, LLC; and PAETEC Communications, Inc.

Verizon MA's information request VZ-I 1-1 sought the identification, "by title, effective date and the names of all parties," of every agreement between each Competitive Carrier and any "service provider other than an affiliate concerning, providing for or governing the exchange in IP format of voice traffic going from you to the other party as well as voice traffic coming from the other party to you."[2] The Competitive Carriers objected on several specific grounds and responded, subject to their objections, that "each of the Competitive Carriers states that it has not entered any agreement 'concerning, providing for, or governing the exchange in IP format of voice traffic' with an incumbent local exchange carrier (ILEC)." Verizon MA's information request VZ-I 1-2 sought copies of all agreements identified in response to VZ-I 1-1. The Competitive Carriers responded to VZ-I 1-2 by incorporating by reference their objections and their response to VZ-I 1-1.

DISCUSSION

I. Legal Standard.

Discovery is governed by the Department's procedural rules. Those rules provide that the touchstone for discovery is relevance:

> The purpose of discovery is to facilitate the hearing process by permitting the parties and the Department to gain access to all *relevant* information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of issues, protect the rights of the parties, and ensure that a complete and accurate record is compiled.

220 C.M.R. § 1.06(6)(c)(1) (emphasis added). In making determinations regarding discovery, the Hearing Officer "must exercise his or her discretion to balance the interests of the parties and ensure that the information *necessary to complete the record* is obtained." *Id.* § 1.06(6)(c)(2) (emphasis added). In so doing, the Hearing Officer may look for instruction to, but is not bound

[2] Verizon MA's Motion violates § II.D.3 of the Procedural Order by, among other things, failing to set forth the text of the Competitive Carriers' responses to the two information requests at issue. For the convenience of the Hearing Officer, those responses are attached.

by, the Massachusetts Rules of Civil Procedure. *Id.*; *see also In re Petition of Choice One Communications of Massachusetts Inc., Conversent Communications of Massachusetts Inc., CTC Communications Corp. and Lightship Telecom LLC for Exemption from Price Cap on Intrastate Switched Access Rates as Established in D.T.C. 07-9*, DTC 10-2, Hearing Officer's Ruling Regarding AT&T's Motion to Compel Responses to Discovery, at 2 (Nov. 10, 2010) ("*DTC 10-2 Order*"). The Massachusetts Rules of Civil Procedure also provide that a party may only obtain discovery of *relevant* information: "Parties may obtain discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending action." Mass. R. Civ. P. 26(b)(1). While the Department's rules and the Massachusetts Rules of Civil Procedure permit discovery of relevant evidence, the converse also is true. That is, if information is irrelevant, unnecessary to complete the record, or of no probative value, it may not be discovered. *See DTC 10-2 Order* at 4.

Moreover, under the civil procedure rules, a court "may make any order which justice requires to protect a party or person from . . . undue burden or expense." Mass. R. Civ. P. 26(c). Such an order may direct that the discovery not be had, or may modify or limit the discovery obligation. *Id.*; *see also In re Petition Of Verizon New England Inc., et al., for Investigation under Chapter 159, Section 14 of the Intrastate Access Rates of Competitive Local Exchange Carriers*, DTC 07-9, Hearing Officer Ruling on Motion of XO Communications Services, Inc., to Compel Further Response to Discovery Requests XO-VZ 2-3 and XO-VZ 2-4, at 1-2 (Aug. 21, 2008). The Department evaluates a burdensomeness claim in the context of the particular case, including the procedural schedule and the importance of the information sought to the issues being litigated. In particular, the Department may protect parties against the undue burden of responding to discovery requests that seek irrelevant or marginally relevant information. A

request is burdensome if the level of detail sought would not further the analysis of the issues or if the impact of the response on the case would be minimal. *See In re Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts*, DTC 02-10, Interlocutory Order on AT&T's Motion for Relief, Motions to Compel Verizon Responses to AT&T Information Requests, and Conditional Motion to Strike Verizon's Recurring Cost Model, at 23 (Oct. 18, 2001).

II. Verizon MA's Arguments Lack Merit

In response to VZ-I 1-1, the Competitive Carriers stated that none of them has entered into an agreement providing for the exchange in IP format of voice traffic with an incumbent LEC. Thus, what Verizon seeks to compel are the Competitive Carriers' agreements providing for the exchange in IP format of voice traffic with other non-incumbent LECs (hereinafter, the "non-incumbent LEC agreements"). The Department should deny Verizon's Motion to compel these non-incumbent LEC agreements for several reasons.

First, the requested information is not relevant to this proceeding. The non-incumbent LEC agreements are not between the two parties that are the subject of the instant investigation (*i.e.*, Verizon MA and Comcast). Importantly, the non-incumbent LEC agreements that Verizon MA seeks also do not involve the type of carrier — an incumbent LEC — whose statutory duties are under review in the investigation. Indeed, the sole issue before the Department is whether the Agreements between Verizon MA, an incumbent LEC, and Comcast are interconnection agreements that must be filed with the Department pursuant to Section 252 of the

Telecommunications Act ("Act"), 47 U.S.C. § 252. Section 252 requires interconnection agreements in which an incumbent LEC is a party to be filed with the relevant state commission. *See* 47 U.S.C. § 252(a)(1). But neither Section 252 nor any other provision of the Act imposes a filing obligation on interconnection agreements between non-incumbent LECs (*e.g.*, agreements between two competitive LECs or a competitive LEC and an IXC). The information that Verizon seeks — information on and copies of the non-incumbent LEC agreements — is thus entirely irrelevant to the question of whether Verizon has an obligation under Section 252 to file its Agreements with Comcast for review and approval by the Department. Stated differently, VoIP interconnection agreements between non-incumbent LECs, for which there is no statutory filing obligation, have no probative value regarding the statutory obligation of an incumbent LEC to file its VoIP interconnection agreements with a state commission. *See DTC 10-2 Order* at 5 (holding that, given the different rules governing intercarrier compensation between CLECs and wireless carriers on the one hand, and CLECs and IXCs on the other hand, information on CLECs' intercarrier compensation revenues from wireless carriers had no probative value regarding the CLECs' costs of providing switched access to IXCs).

Verizon is well aware of the fact that the requested information is neither relevant nor reasonably likely to lead to admissible evidence. In its three-paragraph argument in its Motion, Verizon fails to provide *any* explanation as to why it or the Department needs to review (1) the titles, (2) the effective dates, (3) the names of the parties to, or (4) the specific terms of the non-incumbent LEC agreements requested in VZ-I 1-1 and 1-2.

Second, Verizon MA's Motion rests on the false premise that because "the relevant provisions of § 251 and § 252 are ambiguous, [the Department] must look to considerations of public policy" in interpreting those statutory provisions. Motion at 5. Those provisions are not

"'imprecise' or 'ambiguous.'" *See id.* n.11 (internal citation omitted). The terms of Section 251 require incumbent LECs to provide interconnection and negotiate interconnection agreements in good faith without regard to the technology used. 47 U.S.C. § 251(c). Indeed, the FCC has already found that the "interconnection requirements [of Section 251] are technology neutral—they do not vary based on whether one or both of the interconnecting providers is using TDM, IP, or another technology in their underlying networks." *In re Connect America Fund*, WC Dkt. No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd. 17663, ¶ 1342 (Nov. 18, 2011); *see also id.* ¶ 1011.[3] Thus, an agreement between an incumbent LEC, such as Verizon, to provide interconnection in IP format to a requesting carrier, such as Comcast, is an interconnection agreement that must be filed with the Department pursuant to the Section 251/252 framework. The Department can readily make this legal finding without having to make any public policy determinations to support its statutory interpretation.

Third, even if Verizon were correct that Sections 251 and 252 are ambiguous and the Department must look to considerations of public policy, the Competitive Carriers have already provided information on such policy issues. In its Motion, Verizon misstates the Competitive Carriers' prefiled rebuttal testimony in an attempt to expand the scope of discovery beyond that which is relevant. Verizon argues, "Part of [the Competitive Carriers'] narrative is their claim that 'competitive carriers have been exchanging voice traffic in IP on a large scale for, at least, the better part of a decade' and that they could 'do the same with ILECs,' but that ILECs are not 'willing participants in such negotiation.'" *See id.* (quoting Rebuttal Testimony of David J. Malfara, Sr. on behalf of the Competitive Intervenors). Verizon further contends that the Competitive Carriers "should not be permitted to make those claims while withholding evidence

[3] (http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-11-161A1_Rcd.pdf.

in their possession that will either support or undermine them." Motion at 4-5. But Verizon misconstrues the statements of the Competitive Carriers' expert witness, Mr. Malfara. And the Competitive Carriers have produced evidence in their possession supporting the statements that Mr. Malfara *actually made*.

More specifically, in his prefiled rebuttal testimony, Mr. Malfara directly responded to "policy testimony" by Verizon MA that "if IP interconnection for VoIP were handled through the Section 252 agreement process," the result would be "more than fifty different state public utility commissions applying their own views" of the technical details associated with IP interconnection. Malfara Rebuttal Testimony at 9 (quoting Verizon Direct Testimony at 37). Mr. Malfara's testimony, *not* quoted out of context, stated as follows:

> I disagree. Carriers negotiating IP interconnection agreements should have little difficulty resolving the technical details comprising such interconnection. I have been involved in several such negotiations between competitive carriers and these issues have proven rudimentary and negotiations are concise. This is for several reasons.
>
> *For instance, competitive carriers have been exchanging voice traffic in IP on a large scale for, at least, the better part of a decade.* These competitive carriers have been proven successful in working out the technical details of IP interconnection arrangements with each other. *There is no reason to believe that competitive carriers could not do the same with ILECs, to the extent ILECs are willing participants in such negotiation.*

Id. (emphasis added). Verizon MA's information requests VZ-I 1-3 and 1-4 specifically probed these statements made by Mr. Malfara. In particular, Verizon MA requested that Mr. Malfara provide information on the IP interconnection negotiations in which he has been involved. Mr. Malfara provided such information in his responses to VZ-I 1-3 and 1-4. Verizon MA does not explain in its Motion why the information requested in VZ-I 1-1 and 1-2 — *i.e.*, the titles, the effective dates, the names of the parties to, and copies of the non-incumbent LEC agreements — also is necessary to substantiate those statements.

Moreover, Verizon MA fails to explain why the requested information is relevant to its own public policy claims. In particular, Verizon MA does not explain why the non-incumbent LEC agreements have any bearing on its claims that "*Verizon* is at the forefront" of negotiating VoIP interconnection agreements and that *Verizon* has "significant business incentives" to enter into VoIP interconnection agreements similar to its Agreements with Comcast. Motion at 4 (emphasis added). The Competitive Carriers have already produced information within their possession that is relevant to those claims — the fact that the Competitive Carriers have reached zero VoIP interconnection agreements with Verizon or any other incumbent LEC.

Finally, given that the requested information would have no probative value, production of that information would impose an undue burden on the Competitive Carriers. Indeed, Verizon MA has failed to explain how the Department's analysis of whether *Verizon's* Agreements with Comcast must be filed under Section 252 will be furthered by forcing each of the Competitive Carriers to expend time and resources (1) reviewing each non-incumbent LEC agreement to determine if it contains confidentiality provisions (most if not all do) and what those provisions say; (2) contacting each of those non-incumbent LECs to request authorization to disclose the agreement; (3) allowing for the time period, if any, set in each individual agreement for each of those non-incumbent LECs to object to such disclosure; and (4) preparing each agreement for which the Competitive Carrier has obtained authorization and producing it to Verizon, the Department, and the other parties. The balance of undue burden and paucity of probative value falls squarely on the side of denying Verizon MA's motion.[4]

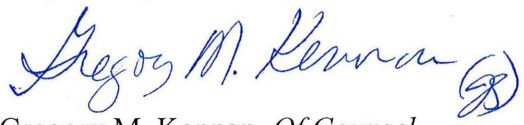
[4] The Department also should take into account that Verizon waited until the last possible moment in the procedural schedule to serve its information requests, even though all testimony by all parties had been filed for more than one month at that point. Verizon's delayed action further demonstrates that the requested information has no probative value to the instant investigation.

CONCLUSION

Verizon MA has not shown that the information it seeks is relevant or reasonably calculated to lead to the discovery of admissible evidence in this investigation, or that it otherwise is entitled to obtain information beyond that which the Competitive Carriers already have provided. Therefore, the Department should deny the Motion.

April 4, 2014

Respectfully submitted,



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DTC 13-6
Competitive Carriers' Responses
to Verizon MA's First Set of Information Requests

Respondent: See response below.
Title:
Objection by: Gregory M. Kennan
Title: Counsel
Response Dated: March 21, 2014

REQUEST NO: VZ-I 1-1

REQUEST : Please identify, by title, effective date and the names of all parties, each agreement that each Intervenor has entered into with a service provider other than an affiliate concerning, providing for or governing the exchange in IP format of voice traffic going from you to the other party as well as voice traffic coming from the other party to you.

OBJECTION:

The Competitive Carriers specifically object to this request on the ground that it is immaterial, irrelevant, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The request is not germane to the legal question whether the Verizon/Comcast agreements submitted to the Department must be filed for review under § 252. In particular, and without limiting the generality of the foregoing, evidence of agreements between the Competitive Carriers and non-ILECs (including non-ILEC affiliates of ILECs) is not pertinent to the legal issue before the Department.

The Competitive Carriers further object to the request to the extent it calls for a response by non-party affiliates of any of the Competitive Carriers.

The Competitive Carriers further object to providing any information that is confidential, proprietary, or a trade secret.

RESPONSE: Subject to and without waiving these objections, each of the Competitive Carriers states that it has not entered any agreement "concerning, providing for, or governing the exchange in IP format of voice traffic" with an incumbent local exchange carrier (ILEC).

PERSON RESPONSIBLE FOR RESPONSE: For 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): Jerry Watts

REDACTED

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Competitive Carriers' Responses
to Verizon MA's First Set of Information Requests

For Cbeyond Communications, LLC: Greg Darnell

For tw data services llc: Rochelle D. Jones

For Level 3 Communications, LLC: Andrea L. Pierantozzi

For PAETEC Communications, Inc.: S. Lynn Hughes

DTC 13-6
Competitive Carriers' Responses
to Verizon MA's First Set of Information Requests

Respondent: See VZ-I 1-1
Title:
Objection by: Gregory M. Kennan
Title: Counsel
Response Dated: March 21,2014

REQUEST NO: VZ-I 1-2
REQUEST : Please produce all agreements identified in response to VZ-I 1-1, including all attachments, exhibits and schedules.

OBJECTION: The Competitive Carriers incorporate by reference their objections to VZ-I 1-2 above.

RESPONSE: The Competitive Carriers incorporate by reference their response to VZ-I 1-2 above.