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' REPLY BRIEF

I. Introduction.

The Competitive Carriers' comprehensive initial brief,[1] as well as those of Sprint,[2] XO,[3] and Cox and Charter,[4] demonstrate that the Settlement Agreement,[5] Traffic Exchange Agreement,[6] and VoIP-to-VoIP Agreement[7] (the "Agreements") are "interconnection agreements" that Verizon is required, but has refused, to file for Department review under Section 252 of the Communications Act (the "Act").[8] Throughout this proceeding, Verizon has failed to demonstrate that the Agreements do not "pertain to" or "relate to" obligations under

[1] Competitive Carriers' Initial Brief (May 30, 2014) ("Competitive Carriers' Brief"). 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 referred to both in the Initial Brief and in this Reply Brief as the "Competitive Carriers."

[2] Sprint's Initial Post-Hearing Brief (May 30, 2014) ("Sprint Brief").

[3] Initial Brief of XO Communication Services, LLC (May 30, 2014) ("XO Brief").

[4] Post Hearing Brief of Cox Rhode Island Telecom LLC and Charter Fiberlink MA-CCO, LLC (May 30, 2014) ("Cox/Charter Brief").

[5] DTC Exhibit (Ex.) 1.

[6] DTC Ex. 2.

[7] DTC Ex. 3.

[8] 47 U.S.C. § 252.

Section 251(b) or (c), including but not limited to interconnection — the physical linking of networks — and **[Begin Highly Sensitive Confidential]** [redacted] **[End Highly Sensitive Confidential]** with a requesting telecommunications carrier. Its initial brief is no exception. Instead, Verizon raises irrelevant arguments, quotes cases out of context, tries to point the finger at others, and makes numerous misstatements of fact and law. In this reply brief, the Competitive Carriers focus on correcting just some of those incorrect and/or irrelevant arguments and statements.

II. Discussion.

A. The Department Must Not Be Distracted by Verizon's Irrelevant Claims and Evidence.

The Department should not allow itself to be distracted by evidence or claims that are not germane to the issue of whether the Agreements must be filed pursuant to Section 252.[9] The Competitive Carriers and XO have emphasized this point.[10]

Most of Verizon's arguments are just smoke, designed to obscure and distract from the simple truth that under the Act and FCC orders and court decisions interpreting it, the Agreements must be filed for Department review. The Department should disregard most of Verizon's evidence and arguments because they simply do not address the question at hand and/or are baseless.

Among the Verizon arguments that are both irrelevant *and* baseless are its accusations of recalcitrance on the part of others, including the Competitive Carriers and Sprint. Verizon devoted a great deal of time at the hearing and large parts of its brief to accusing others of

[9] 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, at 1-2 (May 13, 2013); *see* Hearing Officer's Ruling on Petitions for Intervention, Request for Limited Participant Status, Motion for Admission Pro Hac Vice, Motion for Confidential Treatment, and the Other Party to the Agreement, DTC 13-6, at 2 (June 28, 2013).

[10] XO Brief at 10; Competitive Carriers' Motion for Summary Judgment at 2 (March 28, 2014).

various offenses, such as declining to enter IP interconnection agreements on Verizon's dictated terms, which include waiving important legal rights under Sections 251 and 252. But, what is at issue in this case is not the behavior of others, but *Verizon's* failure to file the Agreements for review. The acts of entities that are not parties to the Agreements do not affect the nature of Verizon's duties or its obligation to perform them.[11]

Nevertheless, the Department has not yet ruled that Verizon has introduced irrelevant evidence and made impertinent arguments. Accordingly, the Competitive Carriers are compelled to respond to these arguments and evidence, while reserving all rights.

B. Verizon Presents A Warped View of the Facts.

Verizon paints an extremely distorted and inaccurate factual picture that casts doubt upon its credibility throughout the case. It is a commonplace that if a statement is repeated often enough, people will come to believe it, regardless of its truth. Or so Verizon must hope, when it touts again and again its willingness to enter into IP interconnection agreements. But Verizon's self-congratulatory statements about its enthusiasm for IP interconnection simply do not stand up to scrutiny. The truth is pretty much the opposite of how Verizon describes it.

While competitive LECs have been interconnecting in IP (other than with incumbent LECs) for over a decade, Verizon's first public announcement that it had entered into an IP interconnection agreement was in its FCC comments filed on February 24, 2012. In those comments to the FCC, Verizon stated: "Verizon currently has one agreement in place covering its FiOS Digital Voice VoIP traffic, and we are negotiating others."[12] It cannot be a coincidence that Verizon entered the Settlement Agreement and Traffic Exchange Agreement on **[Begin**

[11] In any event, Verizon's accusations are among the many instances of its factual misstatements. See part II.E.4 below.

[12] VZ FCC Comments at 12.

Highly Sensitive Confidential] [redacted] **[End Highly Sensitive Confidential]**, a scant **[Begin Highly Sensitive Confidential]** [redacted] **[End Highly Sensitive Confidential]** comments were due in the FCC rulemaking proceeding.[13] The comment deadline of February 24, 2012 was announced in the *ICC Reform Order* on November 18, 2011.[14] Presumably fearful that regulatory pressure was building toward a mandate for IP interconnection, it appears that Verizon rushed to get one deal done before the comment deadline so that it could publicly say that it had an IP interconnection agreement and thereby alleviate some of that pressure. Verizon chose Comcast, another very large carrier with which Verizon had an ongoing dispute over, **[Begin Highly Sensitive Confidential]** [redacted] **[End Highly Sensitive Confidential]**.

Verizon's lack of genuine interest in interconnecting in IP with other carriers is apparent by the fact that despite its statement to the FCC that it was negotiating such agreements, it was nearly **[Begin Highly Sensitive Confidential]** [redacted] **[End Highly Sensitive Confidential]** before Verizon entered into another IP interconnection agreement.[16] It is not apparent that during the sixteen months or so following its announcement to the FCC, Verizon was doing much of anything to negotiate and enter any other IP-interconnection agreement. In FCC comments filed in February 2013 (one year after the initial

[13] Verizon's statement on page 25 that the FCC issued the *ICC Reform Order* shortly after **[Begin Confidential]** [redacted] **[End Confidential]**, while technically true, is deliberately misleading, given the dates that Comcast and Verizon actually signed the document. Again, Verizon portrays itself as ahead of the curve, when it actually was responding to regulatory actions.

[14] *In the Matter of Connect America Fund,* Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd. 17663 (released Nov. 18, 2011) ("*ICC Reform Order*") (http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-11-161A1_Rcd.pdf).

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

[16] That is the earliest effective date listed on the three IP interconnection agreements that Verizon produced in response to CC-VZ 2-6.

announcement), the best that Verizon could say was: "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."[17]

Finally, in June 2013, Verizon sent letters to some of the Competitive Carriers inquiring as to their interest in entering into "commercial interconnection arrangements" for the exchange of VoIP traffic in IP format.[18] Much like Verizon's February 2012 announcement, however, the timing of those letters is suspect. The letters were issued a month after the Department denied Verizon's motion to dismiss or indefinitely stay the predecessor case, DTC 13-2, and opened this investigation. Again as it had sixteen months earlier, when regulatory pressure upon its IP interconnection practices (or lack thereof) increased, Verizon took a modicum of action upon which to base an argument that it is doing all it can to encourage and facilitate IP interconnection.

Not unexpectedly, Verizon's meager efforts have borne little fruit. Despite claiming to be "the leader over the past decade in deploying network facilities that can deliver to consumers the benefits of IP-based broadband services,"[19] Verizon currently can claim only eight IP interconnection agreements in the entire country.[20] Yet, the FCC Local Competition Report states that, as of December 2012, there were 913 reporting non-incumbent LECs and 591

[17] Competitive Carriers' Opposition to Verizon's Motion for Abeyance, DTC 13-6, at 2 n. 3 (Aug. 29, 2013) (quoting *In re AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket No. 12-353, Reply Comments of Verizon and Verizon Wireless, at 8 (filed Feb. 25, 2013) (http://apps fcc.gov/ecfs/document/view?id=7022124909)).

[18] VZ Ex. 5.

[19] VZ Brief at 1.

[20] Hearing Tr., Vol. I, at 21, 75.

providers of interconnected VoIP service nationally.[21] Compared with these numbers, Verizon's eight IP interconnection agreements are insignificant.

So, when the facts are examined, Verizon's "leadership" in the area of IP interconnection has consisted entirely of its efforts to stay one step in front of the regulators. Beyond that, however, Verizon not only has failed to embrace IP interconnection, but also has actively discouraged it by delay and obstruction. It is these facts, rather than Verizon's rosy self-assessment, that the Department should have in mind when assessing Verizon's credibility, the merits of its legal and policy arguments, and its criticisms of the Competitive Carriers and others.

C. The Department May Act When the FCC Has Not Ruled.

Verizon asserts that the Department is precluded from finding that the Agreements are "interconnection agreements" because the FCC has not expressly held that Section 251(c)(2) requires interconnection in IP format.[22] The Department may make short work rejecting that contention. As the Department itself recognized, "where a state commission is not preempted or guided by FCC precedent, it may interpret a federal statute and apply its dictates."[23] The Department may apply the interconnection provisions of Section 251(c) so long as such application does not violate federal law and until the FCC rules otherwise.[24] Faced with this reality, Verizon resorts to kludging together[25] out-of-context quotations and other mischaracterizations of FCC and DTC orders and other precedent to support its claim that the Department cannot act here. These mischaracterizations are discussed in more detail below.

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[21] CC Ex. 4.

[22] *See, e.g.,* VZ Brief at 38-39 ("[T]he FCC has never interpreted § 251(c)(2) to include a duty to establish VoIP interconnection arrangements . . . .").

[23] Order Opening Investigation at 12.

[24] *Southern New England Tel. Co. v. Comcast Phone of Conn.*, 718 F.3d 53, 58 (2d Cir. 2013).

[25] *See* Hearing Tr., Vol. I, at 164.

D. Verizon Repeatedly Mischaracterizes FCC and Department Orders.

1. Broad Statements of Principle Derived from Small, Out of Context Excerpts.

One example of Verizon's misplaced reliance on out-of-context or impertinent quotations is its discussion of the Department's *TRO/TRRO Arbitration Order* in DTE 04-33.[26] Verizon's reliance on this order is puzzling, because the *Arbitration Order* correctly states that agreements containing an ongoing obligation relating to Section 251(b) or (c) must be filed for review under Section 252(a)(1). Moreover, the *Arbitration Order* addressed a very different situation from the one here. In the *Arbitration Order*, the Department was ruling on network elements that the FCC affirmatively found no longer had to be provided on an unbundled basis under Section 251(c)(3). In this case, the FCC has not ruled on the issue of whether interconnection in IP format is required by Section 251(c)(2). Accordingly, under the *Qwest Declaratory Ruling,*[27] *Qwest NAL Order,*[28] Second Circuit *SNET* opinion,[29] and the other authorities cited in the Competitive Carriers' Initial Brief, the Department has authority to determine whether the Agreements must be filed under Section 252(a)(1). Any statement by the Department regarding network elements or services that the FCC has affirmatively *excluded* from the scope of Section 251(b) or (c) has no bearing on the Department's ability to determine that an agreement to provide a service on

[26] VZ Brief at 22.

[27] *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, FCC 02-276, 17 FCC Rcd. 19337 (2002) ("*Qwest Declaratory Ruling*") (http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-02-276A1.pdf).

[28] *Qwest Corporation Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, FCC 04-57, ¶ 46 (2004) ("*Qwest NAL Order*") (http://fjallfoss fcc.gov/edocs_public/attachmatch/FCC-04-57A1.pdf).

[29] *Southern New England Tel. Co. v. Comcast Phone of Conn.*, 718 F.3d 53 (2d Cir. 2013).

which the FCC has been *silent* (such as IP interconnection) is an interconnection agreement under Section 252(a)(1).

Verizon takes similar liberties with the 2002 order in which the FCC granted Qwest Section 271 authority in nine Western states.[30] According to Verizon, the FCC's *Qwest Nine-State 271 Order* "confirms that an agreement that imposes obligations beyond what § 251(b) and (c) require does not 'create[] or 'contain' an ongoing obligation 'pertaining to' or 'relating to' those substantive duties."[31] But the FCC never expressly made this finding in the *Qwest Nine-State 271 Order*. In fact, the FCC provided no rationale for why the directory assistance agreement referenced in Verizon's brief was "not 251-related."[32] If it was because the agreement in question was entered into after the FCC had discontinued the requirement that incumbent LECs provide directory assistance on an unbundled basis under Section 251(c)(3),[33] then Verizon's reliance on the *Order* is misplaced for the same reason that its reliance on the DTE's *Arbitration Order* is misplaced. That is, an agency statement regarding agreements to provide services that the FCC has affirmatively excluded from an incumbent LEC's Section 251(b) or (c) duty has no bearing on whether an agreement to provide a service about which the FCC has not spoken (such as IP interconnection) is an interconnection agreement under Section 252(a)(1).

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[30] *In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, 17 FCC Rcd. 26303, FCC 02-332 (Dec. 23, 2002) ("*Qwest Nine-State 271 Order*") (.https://apps.fcc.gov/edocs_public/attachmatch/FCC-02-332A1.pdf).

[31] VZ Brief at 22.

[32] *Qwest Nine-State 271 Order* n.1746.

[33] The directory assistance agreement at issue was entered December 20, 1999. *Qwest Nine-State 271 Order*, n. 1746. Six weeks earlier, on November 5, 1999, the FCC released the *UNE Remand Order*, in which the obligation to provide directory assistance as an unbundled network element was affirmatively discontinued. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (Nov. 5, 1999) ("*UNE Remand Order*") (https://apps.fcc.gov/edocs_public/attachmatch/FCC-99-238A1.pdf).

In all events, the FCC never held in the *Qwest Nine-State 271 Order* that only agreements containing the specific duties in Section 251(b) or (c) are interconnection agreements, and it did not otherwise narrow the scope of the *Qwest Declaratory Ruling*. In fact, two years later, in the *Qwest NAL Order*, the FCC reiterated that "broadly constru[ing] section 252's use of the term 'interconnection agreement'" is entirely consistent with both the terms and the purpose of the Act.[34] There, the FCC repeated its holding in the *Qwest Declaratory Ruling* that "any '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).'"[35]

2. The FCC Did Not "Endorse" Commercial Agreements Outside the Scope of Section 252.

Verizon continues its practice of misquoting FCC orders with its statement that "the FCC made clear . . . that carriers are 'free to negotiate *commercial agreements* that may depart from the default regime' for that category of traffic [interexchange VoIP traffic exchanged in TDM format]."[36] According to Verizon, "The FCC's endorsement of such commercial agreements in the *ICC Reform Order* necessarily means that such agreements are not subject to the § 252 regime, including public disclosure and filing, state commission approval, and the ability of non-parties to the agreements unilaterally to adopt them as their own."[37] As the Competitive Carriers explained in their initial brief,[38] the FCC said no such thing. The FCC merely held that the intercarrier compensation rate reduction transition it was adopting "sets a default framework,

[34] *Qwest NAL Order* ¶ 11.

[35] *Id.*(quoting *Qwest Declaratory Ruling*, ¶ 8).

[36] VZ Brief at 27-28.

[37] *Id.*

[38] Competitive Carriers' Brief at n.107.

leaving carriers free to enter into negotiated agreements that allow for different terms."[39] That statement is by no means an FCC ruling removing negotiated agreements from the requirements of Section 252. Quite the opposite — the FCC merely reflected Section 252's provision that a negotiated agreement need not comply with Section 251(b) or (c).[40] And under Section 252(a)(1), such negotiated agreements still must be filed.[41] Thus, there is nothing exceptional about the FCC's statement. In particular, the FCC certainly did not say that a negotiated agreement that departs from the FCC's default provisions is exempted from the filing and other requirements under Section 252. Indeed, to have held that a party to a negotiated agreement did not need to comply with the statutory filing obligation would have required the FCC to exercise Section 10 forbearance authority.[42] Needless to say, that did not occur in the *ICC Reform Order*.

Moreover, if the FCC were making an affirmative statement that states were prohibited from reviewing agreements that departed from the strict requirements of Section 251(b) or (c), it would have explained its decision in more than one sentence in one paragraph (out of over 1400) in the over 750-page *ICC Reform Order*. But the reference is contained only in that one sentence. It simply does not have the profound and far-reaching implications that Verizon claims for it.

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[39] *ICC Reform Order* ¶ 739. The FCC did not use the term "commercial agreement" in the text of paragraph 739. In fact, the FCC's only references to "commercial agreements" were in two footnotes quoting from comments filed by *Verizon*. *See id.* nn. 1290 & 1433. Verizon's transmutation of its own comments into a legal holding by the FCC stretches legal interpretation past the breaking point.

[40] 47 U.S.C. § 252(a)(1); *see In re FCC 11-161*, No. 11-9900, slip op. at 36, 2014 WL 2142106, *90 (10th Cir. May 23, 2014) (noting that, under Section 252(a)(1) of the Act, "voluntarily negotiated terms can contradict the statutory requirements" of Section 251(b) or (c)).

[41] *Id.* Contrary to Verizon's claim, what the FCC endorsed in the *ICC Reform Order* was negotiated agreements *within* the Section 252 framework. *See ICC Reform Order* ¶ 965 (noting that "the interconnection and intercarrier compensation framework adopted in sections 251 and 252 of the 1996 Act reflect a policy favoring negotiated agreements, where possible").

[42] *See Ass'n of Communications Enterprises. v. FCC*, 235 F.3d 662, 665-67 (D.C. Cir. 2001) (holding that the Act requires the FCC to meet the forbearance standard under Section 10 where the agency seeks to not apply the plain terms of the statute).

Further, the Tenth Circuit's affirmance of the *ICC Reform Order*[43] does not offer the support that Verizon suggests.[44] The Tenth Circuit affirmed the rulings that the FCC *did* make. It did not step into the FCC's shoes to make a ruling that the FCC *did not* make — that an incumbent LEC could escape the requirements of Section 252 by negotiating an agreement that departed from the FCC's default rate reduction transition. The Tenth Circuit affirmance did not create such a ruling where none previously existed.

It also is absurd for Verizon to suggest that the FCC would cede to incumbent LECs unilateral control of the decisionmaking as to whether a negotiated agreement must be filed. Under Verizon's construct, any agreement in which there was the slightest departure from the mandatory requirements of the Act and regulations would automatically make the agreement an unregulated "commercial agreement" and take it out of the purview of Section 252. The FCC has never said this. Verizon is free to negotiate agreements that do not comply in all respects with Section 251, but that does not exempt such agreements from the requirement to file them with the Department for review.

E. Verizon's Remaining Arguments Lack Merit.

1. VoIP Service Is A Telecommunications Service.

In its initial brief, Verizon repeats its arguments that VoIP service is an information service, but none of its arguments has merit. *First*, the VoIP service provided by Comcast IP is a telecommunications service, and Comcast IP, the party to the VoIP-to-VoIP Agreement, is therefore a requesting "telecommunications carrier" under Sections 252(a)(1) and 251(c)(2).[45] This is for several reasons. To begin with, the mere packaging of purported "information

[43] *In re: FCC 11-291,* No. 11-9900 (10th Cir. May 23, 2014).

[44] *See* VZ Brief at 4-5.

[45] *See* Competitive Carriers' Initial Brief at 30-40.

processing" features and capabilities with voice service does not render VoIP service an "integrated" information service.[46] As discussed in the Competitive Carriers' initial brief,[47] the record evidence presented by both the Competitive Carriers' witness and Verizon's witness demonstrates that the packaging of an account management function with voice transmission functionality does not make such functionalities "sufficiently integrated" from the end user's perspective such that it would be "reasonable to describe the two as a single, integrated offering" under the Supreme Court's *Brand X* standard.[48] Indeed, Verizon's witness has conceded that customers can use Verizon's VoIP service only to make voice calls without invoking any of the other features.[49] The same is true of Comcast's VoIP service.[50] As the Competitive Carriers have also explained, the availability of features besides an account management function does not cause VoIP service to be classified as an information service either. Many of these features are so-called "adjunct-to-basic" telecommunications services under FCC precedent.[51]

Nor does the fact that Comcast's and Verizon's VoIP services "offer the capability for a 'net protocol conversion'"[52] from TDM-to-IP or IP-to-TDM render them information services. As the Competitive Carriers have discussed, under longstanding FCC precedent, such protocol

[46] *See id.* at 33-37.

[47] *See id.* at 33-35.

[48] *See National Cable & Telecommunications. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 990 (2005) ("*Brand X*"). The Verizon witness' opinion that customers "'value'" the advanced features available with Verizon's VoIP service (*see* VZ Brief at 9, n.31) says nothing about whether the telecommunications service capabilities and any information service capabilities of VoIP service are "integrated" under *Brand X*. As discussed above, it is hard to imagine how Verizon's VoIP service could be considered an "integrated" information service when Verizon has conceded that the service can be used only to make voice calls.

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

[50] *See* Competitive Carriers' Initial Brief at 35.

[51] *See* Competitive Carriers' Initial Brief at 35-37.

[52] VZ Brief at 36.

conversions constitute telecommunications services because they occur simply to accommodate the piecemeal introduction of new technology into the telephone network.[53]

Second, Verizon asserts that the VoIP-to-VoIP Agreement need not be filed because the VoIP traffic exchanged between Verizon and Comcast IP under the Agreement is not "telephone exchange service" or "exchange access" within the meaning of Section 251(c)(2).[54] The Competitive Carriers have explained in detail, however, that VoIP service falls within the statutory definitions of telephone exchange service and exchange access, and therefore, the VoIP-to-VoIP Agreement contains a Section 251(c)(2) obligation.[55]

Verizon's only new claims are that (1) two services provided over "'one integrated server architecture'" or a "single, integrated network" constitute an integrated information service;[56] and (2) Comcast IP is not a requesting telecommunications carrier because "Comcast IP is not registered as a CLEC in Massachusetts."[57] Verizon offers no support for the first claim. Indeed, given that the question of regulatory classification turns on the functions being offered to the *end user*,[58] the fact that VoIP service may be provided over a single and purportedly "integrated" network architecture is irrelevant. Nor does Verizon offer any support for its second claim. Just because Comcast IP has elected not to register (or may not be required under state law to register) as a CLEC in Massachusetts does not mean that Comcast IP is not a telecommunications carrier under the Act.

[53] *See* Competitive Carriers' Initial Brief at 37-40.

[54] VZ Brief at 36.

[55] *See* Competitive Carriers' Initial Brief at 45-48.

[56] VZ Brief at 35-36 & n.167.

[57] VZ Brief at 33.

[58] *See Brand X*, 545 U.S. at 986-99.

2. The Department Should Reject Verizon's Speculative "Patchwork Quilt" Argument.

Another theme of Verizon's throughout this proceeding, which it continues in its initial brief, is that a Department order requiring the filing of the Agreements will lead to a patchwork quilt of inconsistent state regulation of IP interconnection.[59] But the evidence, particularly the testimony of the Competitive Carriers' witness David Malfara, shows that carriers will interconnect on the basis of industry practices and technical standards. There is no reason to assume that state regulators will second-guess the interconnecting parties' agreed-upon choices.[60] That is the fatal flaw in Verizon's "patchwork quilt" argument. State commissions will only get involved in technical details if the parties fail to agree and the commission is called upon to arbitrate the dispute (which rarely occurs due to the time and expense involved).[61] Otherwise, state commissions have little motive or opportunity to "separately adjudicate[e] the terms on which IP VoIP interconnection is established," as Verizon alleges.[62]

3. The Department Should Reject Verizon's Other Arguments.

Verizon's claim that the Competitive Carriers' insistence on their legal rights somehow harms Massachusetts consumers has no basis in fact. Indeed, the opposite is true. By requiring Verizon to interconnect in IP format, millions of dollars potentially could be saved in Massachusetts alone by eliminating unnecessary equipment; simplifying business processes; and

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[59] VZ Brief at 41-42.

[60] Malfara Rebuttal Testimony (CC Ex. 3) at 9-11; *see* Competitive Carriers' Brief at 60-61; XO Brief at 8.

[61] It is noteworthy that four of the five decisions cited by Verizon in footnote 198 are the result of an arbitration, and not unsolicited intervention by the state commission. The one exception is the Illinois Order on Investigation decision, which was the Illinois Commission's report on Ameritech's Section 271 application. In that case, the incumbent LEC brought upon itself the state commission's scrutiny of its interconnection practices. In any event, the paragraph of the report cited by Verizon (¶ 235) does not contain any decision by the Illinois Commission, but only the Commission's description of a party's argument. *See Investigation concerning Illinois Bell Telephone Company's compliance with Section 271 of the Telecommunications Act of 1996, Dkt. 01-0662*, Order on Investigation, ¶ 235 (May 13, 2003) (http://www.icc.illinois.gov/downloads/public/edocket/88191.pdf).

[62] VZ Brief at 41.

reducing the number of interconnection trunks that other carriers obtain from Verizon, with all their attendant costs.[63] Increasing efficiency and reducing costs in this manner will aid consumers by freeing up funds to be used to lower rates or make network improvements.

Similarly baseless is Verizon's claim that by ruling in the Competitive Carriers' favor, the Department would be picking winners and losers in the marketplace. Verizon's argument fails to take into account that Congress made certain choices in the Act, which the Department is charged with implementing. Verizon also ignores the fact that requesting telecommunications carriers also have responsibilities under Section 251 (such as a duty to interconnect, and if they are LECs, duties regarding resale, number portability, and reciprocal compensation) that go along with their right to interconnect with incumbent LECs.

4. Verizon Makes Irrelevant, Baseless Criticisms of the Competitive Carriers.

Verizon spends considerable energy and ink criticizing the Competitive Carriers and Sprint for asserting legal rights that Verizon disputes, claiming that because the other parties will not agree to waive those legal rights, they are not negotiating in good faith. Given the grudging and disingenuous way that Verizon has engaged in IP interconnection, Verizon is in no position to complain about anyone else's behavior. Verizon's efforts to deflect scrutiny of its own actions by, in essence, blaming the victims is as unseemly as it is inaccurate.[64]

Verizon's initial brief reiterates its unrelenting position that IP interconnection is not a Section 251/252 obligation and should be handled solely through unregulated commercial agreements. In its template interconnection agreement, Verizon requires that the other party

[63] Malfara Rebuttal Testimony (CC Ex. 3) at 9 (lines 14-25) and 10 (lines 1-16); Hearing Tr., Vol. 2, at 125, lines 15-23; RR DTC-Spr 1; Competitive Carriers' Brief at 6-7; Sprint Brief at 43-45.

[64] In their May 27, 2014 Opposition to Verizon's Motion to Abate, the Competitive Carriers refuted similar Verizon arguments. The Competitive Carriers respectfully refer the Hearing Officer to that Opposition and incorporate it by reference here.

agree **[Begin Confidential]** [redacted] **[End Confidential]** That being the case, it is unclear what redress the other party would have to seek interpretation or enforcement of the agreement. Verizon certainly had no explanation to give the Department on this issue. When pressed at the hearing, Verizon consistently refused to specify what forum would be available to either party in the event the other party refused to negotiate in good faith or if no agreement were reached.[67]

Verizon repeatedly asserts that the Competitive Carriers are not negotiating in good faith and are seeking "to further their regulatory agenda"[68] by requesting that the negotiations take place within the context of Section 252. But the Competitive Carriers should not have to give up their rights to assert that the Section 251/252 framework is applicable to IP interconnection agreements with incumbent local exchange carriers like Verizon MA in order to obtain interconnection with Verizon in IP format. Good-faith negotiating does not include surrendering important principles or relinquishing important legal rights just to reach agreement. Verizon did not suggest to Cbeyond and PAETEC that it would continue negotiating after those parties suggested that the negotiations be conducted under Section 252. That is because Verizon has a

[65] VZ Ex. 3, § 23.1

[66] *See* Sprint Brief at 46. Here is an obvious area where, contrary to Verizon's claim (VZ Brief at 3), the template agreement "contains unjust and unreasonable terms."

[67] Hearing Tr., Vol. I, at 63-71; *see* Cox/Charter Brief at 8.

[68] VZ Brief at 2.

"regulatory agenda" of its own: Verizon will not concede that Sections 251 and 252 apply to IP interconnection or IP interconnection negotiations.[69] Verizon fails to explain why the Competitive Carriers' insistence on their rights is an act of bad faith while its insistence on its own position is acceptable. Thus, Verizon cannot credibly criticize other parties when they tell Verizon that agreeing to the non-applicability of Sections 251 and 252 is a deal-breaker.

Whether or not other entities have signed what Verizon claims are commercial, non-252 agreements for IP interconnection also has no bearing on this case.[70] Neither does Verizon's claim that there has been no showing that its template agreement is unfair or unreasonable[71] (although the template's requirement that the signatory **[Begin Confidential]** [redacted] **[End Confidential]** *is* unfair and unreasonable). The Competitive Carriers have a legal right to seek the establishment of a regulatory backstop behind their efforts to interconnect in IP, and a legal right to be free from discriminatory behavior by Verizon in IP interconnection. Under the regime of unregulated commercial agreements that Verizon advocates, there would be nothing to stop Verizon from offering IP interconnection on more favorable terms now and worsening those terms as time goes on, either for new agreements or when signed agreements are up for renewal.[72] In this manner, Verizon could accumulate a few agreements to build a case for its argument that regulation is unnecessary. The probability that it has done exactly this in the agreements it has entered to date impugns Verizon's argument that none of the parties to the seven other agreements has complained about the terms of its agreements (though their silence should be no surprise; they are muzzled by the confidentiality

[69] *See* XO Brief at 9.

[70] *See id.* at 6.

[71] *See* VZ Brief at 3.

[72] The template agreement has an initial term of **[Begin Confidential]** [redacted] **[End Confidential]**, after which time **[Begin Confidential]** [redacted] **[End Confidential]** Template Agreement (part of VZ Ex. 3), § 34.1, .2.

provisions of the agreement and cannot complain if they wanted to).[73] Absent review and potential arbitration and enforcement by the Department under Section 252 and the opt-in rights granted by Section 252(i), there is no obvious mechanism that would prevent Verizon from discriminating in later agreements by offering less favorable terms.

Such behavior would serve Verizon's goal of discriminating in the IP interconnection arrangements that it enters. Verizon makes no bones about its desire to enter discriminatory agreements.[74] According to Verizon, secret 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."[75] This kind of discrimination by an incumbent LEC is exactly what the Section 252(a)(1) filing requirement was designed to prevent.

[73] *See* VZ Ex. 3, § 6.11 **[Begin Confidential]** [redacted] **[End Confidential]**. Even if they could complain, it is unclear what forum is available for them to do so. *See* Hearing Tr., Vol. I, at 63-71.

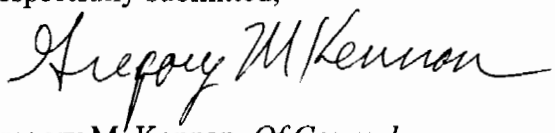
[74] And, there is evidence in this case of actual discrimination by Verizon. One such area concerns which entity performs (and pays for) the conversion from TDM to IP, or vice versa, when the parties are exchanging PSTN-VoIP traffic, such as between a VoIP provider and Verizon's PSTN customers. Verizon says: "Currently, the VoIP provider is responsible for performing that conversion, and may do so itself or by contracting with one of the many companies in the marketplace offering IP-to-TDM conversion services." VZ Direct (VZ Ex. 1) at 11. However, when a Comcast customer **[Begin Confidential]** [redacted] **[End Confidential]** Verizon Direct (VZ Ex. 1) at 26. Sprint also set forth a detailed discussion of discrimination by Verizon in favor of Comcast by **[Begin Highly Sensitive Confidential]** [redacted] **[End Highly Sensitive Confidential]** Sprint Brief at 37-40.

[75] Gillan Direct Testimony (CC Ex. 1) at 8-9; Verizon MA Motion for Confidential Treatment, D.T.C. 13-6, at 3 (Dec. 23, 2013).

III. Conclusion.

The filing and review procedures of Section 252 are "the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors."[76] All the parties to this proceeding except Verizon and Comcast (the parties to the Agreements) urge the Department to find that the Agreements must be filed for Department review. The reasons for Verizon's resistance are easily discerned. Verizon's attempt to escape regulatory oversight, if successful, will allow it to force competitors into discriminatory and unjust or unreasonable agreements requiring them, among other things, to forego legal rights in order to obtain the indisputable technical and financial benefits of IP interconnection. The public interest would suffer as a result. The facts and law are clear that the Department should require Verizon, without further delay or obstruction, to file the Agreements for Department review under Section 252.

Respectfully submitted,



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[76] *Qwest NAL Order*, ¶ 46; *see* Cox/Charter Brief at 4-5.