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Gregory M. Kennan
Of Counsel
(Adm. MA)

February 27, 2013

Catrice C. Williams
Department Secretary
Department of Telecommunications & Cable
1000 Washington Street, 8th Floor, Suite 820
Boston, MA 02118-6500

Re: *Petition for a Determination that Verizon IP-to-IP Interconnection Agreements Must be Filed for Review and Approval and for Associated Relief,* Dkt. No. DTC 13-2

Dear Ms. Williams:

The Competitive Carriers' Opposition to Verizon's Motion to Dismiss is enclosed for filing.

Please feel free to contact me if you have any questions. Thank you.

Very truly yours,

Gregory M. Kennan

cc: Alexander W. Moore, Esq.

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COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

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

COMPETITIVE CARRIERS' OPPOSITION TO VERIZON'S MOTION TO DISMISS

The Competitive Carriers[1] oppose the motion of Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon MA") to dismiss or, alternatively, to stay proceedings ("Motion") upon the Competitive Carriers' petition for a determination that Verizon IP-to-IP interconnection agreements must be filed for review and approval and associated relief ("Petition").

Verizon MA's Motion admits two key facts — that Verizon MA has entered an IP-to-IP interconnection agreement, and that it has not filed such agreement with the Department or any other state commission. That should be cause to proceed with this case. From there, the Motion offers no good reason why the Department should defer action on the Competitive Carriers' Petition. Accordingly, the Department should deny Verizon MA's Motion and should proceed to consider the issues set forth in the Petition.

[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; and tw data services llc.

Discussion

I. Verizon MA Admitted Key Facts.

In its Motion, Verizon MA has admitted at least two key facts alleged in the Petition:

> Verizon MA has entered an interconnection agreement that provides for the exchange of VoIP traffic in IP format. Motion at 4, fn. 9; *see* Petition ¶ 16.
>
> Verizon MA has never filed such an agreement for approval by the Department or any other state commission. Motion at 4, fn. 9; *see* Petition ¶ 20.

With those facts established by Verizon MA's own statements, Verizon's Motion boils down to an argument that the Department should not proceed with the case because at some future date the Federal Communications Commission (FCC) *might* make a decision inconsistent with what the Department may decide. This argument lacks merit for many reasons, as set forth below.

II. There Is No Legal Impediment to the Department's Consideration of the Petition.

Verizon MA has raised no legal obstacle to the Department's consideration of the Petition. That is because no such obstacle exists.

The Department unquestionably has the authority (and responsibility) to review and approve interconnection agreements under 47 U.S.C. § 252. "A state commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies." *Id.* § 252(e)(1). For its part, Verizon MA is obligated to submit negotiated interconnection agreements to the Department for review. *Id.* § 252(a)(1), (e)(1).

Further, it is uniquely the state commission, like the Department, to which interconnection agreements must be submitted for review. *Id.* Only "[i]f a State commission fails to carry out its responsibility" regarding review of interconnection agreements may the FCC step in and assume the state commission's role. *Id.* § 252(e)(5). The state commission's responsibility includes not only examining the substantive provisions of filed agreements, but also determining, in the first instance, which agreements must be filed for state commission review. *In re 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),* WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276, ¶ 11 (Oct. 4, 2002).[2] "Based 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 as an 'interconnection agreement' and, if so, whether it should be approved or rejected." *Id.*, ¶ 10.

Verizon's suggestion that the FCC has not previously ruled on some of the legal issues in the case is not a reason to dismiss or stay this proceeding. While Verizon MA provided a list of the legal conclusions that the FCC has not made (*e.g.*, that § 251(c) applies to IP voice interconnection agreement; that VoIP is a telecommunications service; that VoIP is either telephone exchange service or exchange access), it omitted a critical fact — that the FCC has not ruled to the contrary on any of those issues. Indeed, in the section of the *Connect America Fund Order* that Verizon cites (Motion at 3) can be found numerous countervailing FCC statements with respect to the issues cited by Verizon MA.

[2] http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-02-276A1.pdf.

See 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. 4554, ¶ 1365-1398 (2011).[3]

While various issues regarding IP-interconnection may remain open, the FCC has imposed no legal impediment to the Department's adjudication of the Competitive Carriers' claims. The Department should proceed to consider the merits of the Petition.

III. Public Policy Favors Proceeding with this Case.

A. There Is No Policy Reason to Defer Action.

Having admitted key facts in the case, and lacking a legal ground why the Department should defer action on the Petition, Verizon MA claims that the Department should not act because the FCC is "actively considering" issues that the Petition raises. This argument, too, lacks merit.

The Department can and should decide the matter before it. A group of constituents has requested a determination from the Department on a confined set of issues set forth in the Petition — whether Verizon MA must file for Department review an interconnection agreement that Verizon MA admits it has entered. The issues are largely legal and the Department is quite capable of deciding them. To the extent

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

To cite just a few examples, the FCC specifically noted that nothing in the language of 47 U.S.C. § 251 limits the applicability of a carrier's interconnection obligation to circuit-switched voice traffic, and that the language in fact is technology neutral. *Id.* ¶ 1381. The FCC specifically suggested as one possibility governing development of IP-to-IP interconnection agreements that it could adopt a case-by-case adjudicatory framework analogous to the approach of section 251(c)(2) and 252, requiring IP-to-IP interconnection as a matter of principle but leaving particular issues to arbitration. *Id.* ¶ 1370. In addition, the FCC cited retail VoIP providers' assertions that regardless of the classification of retail VoIP services, their carrier partners are providing telephone exchange service and exchange access; while some of this traffic might be exchanged in TDM format, the FCC did not believe that those carriers' regulatory status should change if they simply provided the same service in another protocol, such as IP. *Id.* ¶ 1389.

regulatory uncertainty exists, the Department can clarify such uncertainty in Massachusetts with a ruling on the merits of the Petition.

Indeed, the Department has declined previous invitations to defer action while FCC dockets are pending. For example, in DTC 07-9, the Department's investigation of CLEC access charges, the Department rejected an argument that it should defer action while the FCC considered comprehensive intercarrier compensation reform. Commenting that it was unclear when the FCC would act, the Department determined that it had an obligation to avoid unnecessary delay and to remedy inequities before it as soon as practicable. *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, Final Order at 28 (June 22, 2009).

Notably in that case, when the shoe was on the other foot, it was Verizon MA that urged the Department to proceed despite pending FCC proceedings on the complex issue of intercarrier compensation reform. Verizon was quite direct on that point:

> The CLECs all urge the Department to defer consideration of the Verizon petition to see if the FCC does, "as expected, materially change the regulatory landscape governing intercarrier compensation as early as November, 2008." In light of recent developments, the CLECs' arguments on this point are moot. On November 5, the FCC initiated a Further Notice of Proposed Rulemaking, soliciting public comment on a series of proposals for reforming the current intercarrier compensation system and universal service programs. Given the breadth and complexity of the issues, it is unclear when the FCC will be prepared to address them. Given that uncertainty, it would be imprudent for the Department to delay consideration of the narrow issues presented in this proceeding.

Id., Verizon's Reply Brief at 19 (filed Nov. 10, 2008). The Department may note that Verizon MA was correct in its prediction: the FCC issued the *Connect America Fund Order* in November 2011, some three years later.

Verizon MA does not explain why the IP-to-IP interconnection issues currently under consideration by the FCC might have any less "breadth and complexity" or will be decided any more quickly than intercarrier compensation issues were decided from the vantage point of late 2008. Verizon MA's description of the FCC's "active consideration of the IP interconnection matters" — 50 sets of comments, an equivalent number of reply comments, comments by 70 parties on "two new petitions that again raised issues associated with IP voice interconnection" (Motion at 4) — does not portend an expedited process. To the contrary, the FCC's decisionmaking is likely to be extended[4] and in a time frame similar to those associated with other expansive national policy issues such as unbundling[5] and intercarrier compensation reform[6]. As the Department recently noted in its January 28, 2013 comments in FCC docket GN 12-353, at 11 (cited by Verizon in its Motion at 5, fn. 13), IP interconnection issues were raised in the March 2010 National Broadband Plan and remain under consideration today. Also, whatever decisions the FCC makes may be challenged on appeal, which would further delay final resolution of the issues.

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[4] That the FCC convened a Technology Transitions Task Force in December 2012 (Motion ¶ 5) indicates that the process will take time. That task force has barely gotten underway. On February 12th, the FCC announced that the task force's first workshop would be held on March 18th. Public Notice, FCC Announces First Technology Transitions Policy Task Force Workshop, DA 13-192, http://www.fcc.gov/document/fcc-announces-first-technology-transitions-policy-task-force-workshop.

[5] The FCC's efforts to promulgate unbunding rules began with the *First Report and Order* in 1996 and culminated with the *Triennial Review Remand Order* in 2005. *See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Dkt. No. 96-98, First Report and Order, FCC 96-325 (Aug. 8, 1996); *In re Unbundled Access to Network Elements,* WC Docket No. 04-313, Order on Remand, FCC 04-290 (Feb. 4, 2005).

[6] Comprehensive intercarrier compensation reform encompassed the 2001 Notice of Proposed Rulemaking, the 2005 Further Notice of Proposed Rulemaking, and the 2006 Missoula Plan, and achieved a milestone in the *Connect America Fund Order* in November 2011 (though the process is not finished yet). *See In re Developing a Unified Intercarrier Compensation Regime,* CC Dkt. No 01-92, Notice of Proposed Rulemaking, FCC 01-132 (Apr. 27, 2001); *id.,* Further Notice of Proposed Rulemaking, FCC 05-33 (Mar. 3, 2005); Press Release, NARUC Comments on Industry-Sponsored "Missoula Plan" Filed Today at the FCC (July 24, 2006); *In the Matter of Connect America Fund,* WC Dkt. No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (Nov. 18, 2011).

Moreover, Verizon MA's argument that a Department decision "will likely cause needless industry disruption" rests on a long series of assumptions: the FCC decides relevant issues after the Department issues its decision; the FCC's decision is inconsistent to such a degree as to be preemptive; the FCC's order survives legal challenge; and so many carriers have entered arrangements in accordance with the Department's decision that undoing such arrangements results in chaos. The likelihood that any or all of these assumptions will prove valid is unknown and should not form the basis of a decision here.

B. The Department Can Facilitate the Development of IP Networks by Proceeding with the Case and Ruling Favorably on the Merits.

Contrary to Verizon MA's assertion, a Department decision in this matter will have beneficial, not harmful, effects. Requiring Verizon MA to submit its IP-interconnection agreement for review and approval will permit the Department to discharge its ability to review the agreement to ensure that it is nondiscriminatory and consistent with the public interest, convenience, and necessity, pursuant to 47 U.S.C. § 252(e)(2)(A).

Once approved, other carriers, potentially including the Competitive Carriers, will be able to adopt or "opt in" to the agreement. As long ago as the *First Report and Order,* the FCC "conclude[d] that a carrier seeking interconnection, network elements, or services pursuant to section 252(i) . . . shall be permitted to obtain its statutory rights on an expedited basis." *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Dkt. No. 96-98, First Report and Order, FCC 96-325, ¶ 1321 (Aug. 8, 1996).[7] Contrary to Verizon MA's suggestion that the Department

[7] http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-96-325A1.pdf.

defer consideration of the Petition so as to allow the parties to negotiate a commercial agreement,[8] the FCC "conclude[d] that the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251 before being able to utilize the terms of a previously negotiated agreement." *Id.* For another carrier to be able to adopt the agreement, however, the agreement must be approved by the Department and available for inspection by carriers potentially interested in adopting it. Petition, ¶ 24.

As set forth in the Petition, Verizon has stated to the FCC that interconnecting networks in IP format is beneficial. Petition, ¶ 12. Requiring the Competitive Carriers and others to convert IP voice traffic to TDM format solely for purposes of interconnection imposes needless costs and inefficiencies. *Id.* ¶ 11. Absent the ability to interconnect and exchange traffic in IP format, the Competitive Carriers, other competitive facilities-based providers, and their customers will suffer higher costs, degraded service quality, and slower deployment of IP technology. Such an outcome will harm public welfare. *Id.* ¶ 13. The ability to adopt an IP-to-IP interconnection agreement potentially could provide an efficient, cost-effective way for carriers to realize the advantages of IP interconnection, with corresponding public interest benefits. Indeed, one of the reasons the Department should move expeditiously to require Verizon to file its agreement is so that other agreements may be put in place.

Verizon MA's failure to file its IP-interconnection agreement has both denied the Competitive Carriers their rights and frustrated the procompetitive policy goals of the

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[8] Importantly, Verizon MA acknowledges that an effort to negotiate an agreement is not a legal prerequisite to the Competitive Carriers' claims. Motion at 6, ¶ 8.

Telecommunications Act. The Department would serve the public good by proceeding to consider the issues raised by the Petition.

Conclusion

There is no compelling legal or policy reason to dismiss or stay this case, and many reasons to go forward. The Department should deny Verizon MA's motion to dismiss, schedule a procedural conference for the conduct of the case, and proceed to decide the merits of the Petition.

February 27, 2013

Respectfully submitted,

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Certificate of Service

I certify that on the date below I caused the foregoing document to be served by U.S. Mail upon:

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February 27, 2013

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