**COMMONWEALTH OF MASSACHUSETTS**
**DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

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| 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 STRIKE TESTIMONY OF JOSEPH GILLAN

The Competitive Carriers[1] oppose Verizon's January 21, 2014 motion to strike the testimony of Joseph Gillan. Verizon's motion, which complains about so-called "legal opinions" and allegedly "improper opinion testimony as to Verizon MA's intent," Motion at 1, lacks merit as a matter of law and policy. It is an obvious attempt to drive up the cost of litigation and take up the Department's valuable time to no good end. It should be denied.

## 1. So-called "legal opinions."

This is not a jury trial. It is an adversary case conducted under the Administrative Procedure Act, G.L. c. 30A. Order Opening an Investigation, Declining to Issue an Advisory Ruling, and Denying Verizon MA's Motion to Dismiss or Stay the Proceeding, at 13 (May 13, 2013). There is no danger that erroneous admission of evidence will irremediably taint a jury. Instead, the Hearing Officer and subsequently the Department can apply their expertise and judgment to sift through the evidence and assess its relevance and weight.

[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, LLC.

Therefore, legal cases deciding whether certain types of evidence are admissible in a jury trial have little or no bearing on whether testimony should or should not be admitted in this matter before the Hearing Officer and Department. Verizon's citations to cases containing rulings based on the rules of evidence applicable in judicial courts are beside the point. Those rules do not apply here. "[A]gencies need not observe the rules of evidence observed by courts . . . ." G.L. c. 30A, § 11. Certainly, the testimony of Mr. Gillan, who has been an expert in telecommunications economics and regulatory policy for over thirty years, "is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." *Id.* This is particularly true where, as here, the case involves primarily legal issues.[2] The Department, therefore, may and should receive and consider Mr. Gillan's testimony.

Second, the purported authority that Verizon cites often does not support its arguments or is otherwise improper. An egregious example of Verizon's improper and misleading citations of legal authority is *Horvath v. Adelson, Golden & Loria, P.C.*, 55 Mass. App. Ct. 1113 (2002), cited on p. 2, fn. 4 of Verizon's Motion. *Horvath* is an unpublished, 2002 opinion of the Massachusetts Appeals Court under Appeals Court Rule 1:28 (see Attachment 1). Appeals Court rules specifically forbid citations to unpublished Rule 1:28 opinions antedating 2008: "No such order issued before February 26, 2008, may be cited." Mass. App. Ct. R. 1:28.[3] Verizon's

[2] The Competitive Carriers had suggested that because this case involves primarily (if not exclusively) legal issues, it could be resolved without the need for an extensive, prolonged, and expensive adjudication involving testimony, discovery, and a hearing. *See* Competitive Carriers' Scheduling Proposal (Nov. 22, 2013). It was Verizon that insisted on testimony, claiming that it was entitled under G.L. c. 30A, § 11 to offer testimony on various matters, including "how a proper application of the law to the facts here results in good policy." Letter from Alexander W. Moore, Esq. to Secretary Catrice Williams, Nov. 26, 2013, at 1-2. If Verizon is "entitled" to offer testimony — not just argument — on the "application of the law to the facts here," the Competitive Carriers should have the same right.

[3] http://www.lawlib.state.ma.us/source/mass/rules/appeals/macr128.html.

citation of *Horvath*, therefore, was forbidden. The Hearing Officer should so note and should disregard the citation.

Another example of authority that does not help Verizon is *Commonwealth v. O'Connor*, 7 Mass. App. Ct. 314 (1979), also cited in fn. 4 of Verizon's motion. In that case, far from prohibiting experts from testifying on any "legal" matter, the Appeals Court held that the trial court properly allowed an expert "to frame his opinion . . . in terms of the relevant legal factors," and that was appropriate and useful to the factfinder in assessing the witness' testimony.

> We note that the judge allowed the witness to frame his opinion of the defendant's criminal responsibility in terms of the relevant legal factors. This gave the witness the opportunity to show the jury, in light of the judge's later instructions on criminal responsibility, that he had based his over-all opinion of the defendant's responsibility on the proper criteria.

*Id.* at 322 (citation and footnote omitted).

That is precisely what Mr. Gillan did in his testimony. He showed how Verizon's agreements satisfied the applicable criteria for "interconnection agreements" under the legal criteria and factors established by the FCC. For example, Mr. Gillan expressed his expert conclusion that the agreements at issue constituted "interconnection agreements" that had to be filed under § 252 (p. 10, line 22 – p. 11, line 10). He then set some background for his analysis by stating his understanding of the criteria for making this determination: that the agreement related to ongoing obligations under § 251, including, among others, interconnection and reciprocal compensation for the transport and termination of telecommunications (p. 11, line 12 – p. 13, l. 14). Then, he pointed out specific provisions in the agreements that establish or relate to specific obligations regarding interconnection and reciprocal compensation (p. 14, line 4 – p.

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Even if it were permissible to cite the unpublished *Horvath* opinion — which it is not — the very footnote cited by Verizon explicitly holds that admission of expert testimony is within the judge's "wide-ranging discretion."

14, line 30; p. 15, line 15 – p. 16, line 14). There is nothing inappropriate in such testimony by Mr. Gillan.

**2. Testimony concerning Verizon's intent.**

Verizon's objections to Mr. Gillan's testimony concerning Verizon's intent are equally unavailing. Verizon offers no supporting authority from the Department. Again, as with the issue above, the federal rules of evidence do not govern this proceeding. Further, Mr. Gillan's testimony is hardly "musing." It sets forth facts (Verizon's statements) and then draws a conclusion based on those identified facts.

More importantly, Verizon should not be heard to complain, for its own testimony also contains statements about intentions, both its own and those of other parties. For example:

> "Verizon expects to implement IP interconnection agreements for VoIP through negotiation of two principal documents." (p. 35, lines 10-11)
>
> "[W]e intend to use these documents as starting points . . . ." (p. 35, lines 19-20)
>
> "We can only surmise" as to why some providers are insisting on their right to IP interconnection under the Telecommunications Act's framework; Verizon conjectures that "it may be that the CLECs are looking to push" costs onto the ILECs. (p. 39, lines 13, 19-20)

The Hearing Officer should give no credence to any Verizon complaint about behavior in which Verizon itself engages. Verizon's motion on this issue should be denied.

**3. Delay and expense.**

Finally, there is no need for the Hearing Officer to spend valuable time parsing through the evidence now. Verizon's motion serves no purpose other than to delay and distract from the real issues in the case and drive up the cost of litigation. The Hearing Officer is capable of assessing Mr. Gillan's testimony and giving it the appropriate weight. Even in the context of a

jury trial, "the prudent course is to permit [the expert] to proffer her testimony at trial where it can be viewed in the context of all of the other evidence." *Jason Rudy C. v. City of New York,* No. 98CIV0130SHSJCF, 1999 WL 553772 at *1 (July 28, 1999).[4]

The foregoing is even more true in the context of administrative adjudication, where the rules of evidence do not apply and there is no jury. Faced with a similar motion, a Hearing Officer of the Maine Public Utilities Commission wrote:

> To engage in the sort of vivisection of the testimony now proposed by the parties would likely result in a truncated, incomplete, and confused record and would undermine the Commission's ability to accord fair weight to all meaningful evidence on the record. The Commission is capable of parsing out the relevant information offered by witnesses with regard to the independent factual inquiries that must be made as to individual parties in this case, and of ensuring that its consideration of the evidence in this case, as reflected in its eventual, written decision, comports with the requirements of due process.

*In re CRC Communications of Maine, Inc. — Investigation Pursuant to 47 U.S.C. § 251(f)(1) Regarding CRC Communication of Maine's Request of UniTel, Inc.*, Dkt. No. 2009-40, Procedural Order at 2 (Apr. 2, 2010).[5] And, while the issue of "legal argument" in testimony did give the Maine Hearing Officer "some pause," he went on quite sensibly to say:

> On the other hand, an adjudicatory body such as the Commission accepts as valid, or not, a legal argument upon consideration of its merits alone. A legal argument is entitled to no additional weight merely because it may be expressed within the testimony of an expert witness. This is true no matter how erudite or experienced that witness might be. *The Hearing Examiner finds that the opinions of the expert witnesses offered in this case, whether offered by lawyers or non-lawyers, to the extent that they advocate one interpretation or another of statute or legal precedent related to Section 251(f) of the Telecommunications Act of 1996 (TelAct), need not be excised from the testimony offered.* It is the Commission that will ultimately determine the legal issues in the case. Accordingly, the

[4] *Jason Rudy C.* distinguishes one of the cases cited by Verizon, *Taylor v. Evans*, No. 94 Civ. 8425, 1997 WL 154010 (S.D.N.Y. April 1, 1997).

[5] https://mpuc-cms.maine.gov/CQM.Public.WebUI/MatterManagement/MatterFilingItem.aspx?FilingSeq=53065&CaseNumber=2009-00040.

various motions to strike portions of testimony on the grounds that they constitute legal argument are denied.

*Id.* (emphasis added). The same result should obtain here.

* * * * *

For the foregoing reasons, the Hearing Officer should deny Verizon's motion.[6]

Respectfully submitted,

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[6] The legal principles set forth above are equally applicable to Verizon's Motion to Strike the Testimony of James Burt, which the hearing officer should also deny.

**PATRICIA HORVATH & others vs. ADELSON, GOLDEN & LORIA, P.C., & others**

**No. 00-P-1403**

**APPEALS COURT OF MASSACHUSETTS**

**55 Mass. App. Ct. 1113; 773 N.E.2d 478; 2002 Mass. App. LEXIS 1125**

**August 21, 2002, Decided**

**NOTICE: [*1]** UNPUBLISHED ORDER RENDERED UNDER RULE 1:28 OF THE RULES OF THE APPEALS COURT.

**OPINION**

Judgment affirmed.

**Attachment 1**