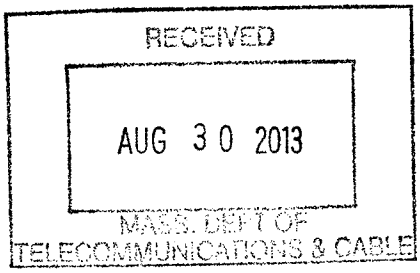
FAGELBAUM & HELLER LLP | ATTORNEYS AT LAW | LOS ANGELES NEW YORK BOSTON

20 North Main Street, Suite 125 ❖ P.O. Box 230 ❖ Sherborn, MA 01770 ❖ USA
Telephone 508-318-5611 ❖ Facsimile 508-318-5612 ❖ E-mail: gmk@fhllplaw.com

Gregory M. Kennan
Of Counsel
(Adm. MA)

August 29, 2013



By Federal Express

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

Re: *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

Dear Ms. Williams:

The Competitive Carriers' Opposition to Verizon's Motion for Abeyance is enclosed for filing. Both a redacted and a Highly Confidential version are enclosed, the latter in a sealed envelope. Also in the sealed envelope is a compact disk containing both versions. Please feel free to contact me if you have any questions. Thank you.

Very truly yours,

Gregory M. Kennan (CB)

Gregory M. Kennan

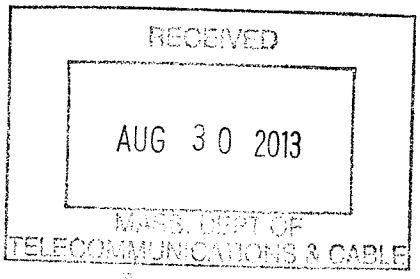
cc: Service List

HOME OFFICE
2029 Century Park East ❖ Suite 3550 ❖ Los Angeles, CA 90067 ❖ USA
Telephone (310) 286-7666 ❖ Facsimile (310) 286-7086 ❖ E-mail: office@fhllplaw.com

REDACTED 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' OPPOSITION TO VERIZON'S MOTION FOR ABEYANCE

The Competitive Carriers[1] oppose the motion of Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon") to hold this proceeding in abeyance ("Abeyance Motion"). As the Department has recognized, the purpose of this proceeding is to determine whether the agreement at issue is an "interconnection agreement" that must be filed with the Department for approval pursuant to 47 U.S.C. § 252. *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, at 2 (June 28, 2013).[2] Verizon has offered no reason why the Department should not make such a determination now. Accordingly, the Department should deny the Abeyance Motion and expeditiously move forward with its investigation.

[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; and Level 3 Communications, LLC.

[2] http://www.mass.gov/ocabr/docs/dtc/dockets/13-6/rulptninterconf.pdf.

I. PROCEEDING WITH THIS CASE WOULD NOT BE IMPRACTICAL OR WASTEFUL.

A. Verizon Has Submitted an Agreement That Is Reviewable by the Department.

Verizon urges the Department to "suspend action in this case in the interest of efficiency" because there is no agreement "currently in a form that is reviewable by the Department." Abeyance Motion at 1-2. In particular, Verizon claims that it has not yet signed an agreement with another party that "memorializes the terms and conditions on which [the parties] exchange voice traffic in IP format." *Id.* at 3.

But that is simply not true.[3] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[3] Verizon's claim that it has not yet signed an agreement that memorializes the terms and conditions on which it will exchange voice traffic in IP format also is inconsistent with several of its prior statements to the Department and the Federal Communications Commission ("FCC"):

> "Verizon currently has one [IP-to-IP interconnection] agreement in place covering its FiOS Digital Voice VoIP traffic, and we are negotiating others." *In re Connect America Fund,* WC Docket No. 10-90, Comments of Verizon, at 14 (filed Feb. 24, 2012) (http://apps.fcc.gov/ecfs/document/view?id=7021865697).

> "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." *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).

> "[U]ntil recently, Verizon MA had never even entered into such an agreement [that provides for the exchange of VoIP traffic in IP format]." *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, Verizon's Motion to Dismiss, at 4, n. 9 (filed Feb. 14, 2013) (http://www mass.gov/ocabr/docs/dtc/dockets/13-2/vrzmtndismiss.pdf).

[redacted] **[END HIGHLY CONFIDENTIAL]**[4]

As explained below, the Agreement contains provisions and obligations that make it an interconnection agreement that must be filed with and reviewed by the Department. And, the Agreement is hardly the abstract concept Verizon makes it out to be. As Verizon admits, it is exchanging traffic in IP format with the other party to the Agreement. Abeyance Motion at 1.

Given that Verizon has submitted an agreement in a form that is reviewable by the Department, moving ahead with this case would not be "impractical," "wasteful," or an "inefficient" use of Department resources as Verizon claims. *Id.* at 1, 3. To the contrary, proceeding with this investigation will enable the Department to provide exactly the type of guidance (*i.e.*, guidance on whether a given agreement constitutes an "interconnection agreement" under 47 U.S.C. § 252) that the FCC has encouraged state commissions to provide. The FCC has expressly stated that state commissions should "take action to provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for their approval." *Qwest Communications Int'l Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Agreements under Section 252(a)(1)*, WC Dkt. 02-89, Memorandum Opinion and Order, FCC 02-276, 17

[4] The Competitive Carriers have redacted and marked as Highly Confidential certain portions of this Opposition in light of Verizon's claim that the entire Agreement constitutes Highly Sensitive Confidential Information, viewable only by a limited set of individuals, mainly outside counsel and outside consultants. This does not signify that the Competitive Carriers agree that all or any part of the Agreement is properly so designated. The Competitive Carriers reserve all rights on this issue.

FCC Rcd. 19337, ¶ 10 (2002) ("*2002 Qwest Declaratory Ruling Order*").[5] This is because, "[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 as an 'interconnection agreement' and, if so, whether it should be approved or rejected." *Id.*

B. Contrary to Verizon's Claims, Granting the Abeyance Motion Will Not Promote Efficiency.

Verizon's claim that granting its motion will promote efficiency rings hollow, in that this is the second attempt by Verizon to suspend, stay, or delay progress of this proceeding. Within two weeks after the Competitive Carriers filed their petition for review of the FiOS Digital Voice Interconnection Agreement in DTC 13-2, Verizon filed a motion to dismiss or stay the proceeding. *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, Verizon's Motion to Dismiss, at 4 n. 9 (filed Feb. 14, 2013) ("Dismissal Motion").[6] At that point, Verizon argued that efficiency would be served by dismissing the proceeding or holding it in abeyance while the FCC examined the issues underlying the Competitive Carriers' claims. *Id.* at 2. The Department correctly rejected Verizon's arguments and commenced this proceeding. *See* Order Opening an Investigation, Declining to Issue an Advisory Ruling, and Denying Verizon MA's Motion to Dismiss or Stay the Proceeding (May 13, 2013).[7]

However, Verizon could have raised all of the matters in the instant Abeyance Motion in its earlier Dismissal Motion. No material circumstance has changed since it filed the Dismissal Motion. None of the claims Verizon raised in the Abeyance Motion were unknown to it at the

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

[6] http://www.mass.gov/ocabr/docs/dtc/dockets/13-2/vrzmtndismiss.pdf.

[7] http://www.mass.gov/ocabr/docs/dtc/dockets/13-2/end132open136.pdf.

time of the Dismissal Motion. Verizon merely seeks another bite at the apple of delay, suspension, or stay. The Department should not countenance Verizon's piecemeal, inefficient procedural tactics.

By analogy, under the Massachusetts Rules of Civil Procedure, when a party files a motion to dismiss, it generally is required to include all applicable grounds for such a motion in one consolidated filing. With limited exceptions, if a party omits a ground for dismissal, that ground is deemed waived. Mass. R. Civ. P. 12(g), (h)(1). The purpose of this requirement is to deter inefficiency and save judicial time by precluding serial defensive motions, particularly those that the plaintiff would likely be able to defeat. *See* Mass. R. Civ. P. 12, Reporter's Notes (1973).[8]

The same principles should govern here. Verizon should not be permitted to delay the proceedings by filing serial motions for abeyance or stay several months apart. It should not be rewarded for having caused the Department and intervenors to incur the time, effort, and expense of addressing multiple motions. On the contrary, the Department should discourage such behavior by denying the Motion.

II. THE AGREEMENT SUBMITTED BY VERIZON IS AN INTERCONNECTION AGREEMENT THAT MUST BE FILED WITH THE DEPARTMENT.

Nor should there be any dispute that the Agreement submitted by Verizon is an "interconnection agreement" under 47 U.S.C. § 252. The FCC has 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 that must be filed pursuant to section 252(a)(1)." *2002 Qwest Declaratory Ruling Order* ¶ 8 (emphasis omitted). The FCC has further stated that "agreements

[8] http://www.lawlib.state.ma.us/source/mass/rules/civil/mrcp12 html.

that contain an ongoing obligation *relating to* section 251(b) or (c) must be filed under 252(a)(1)." *Id.* n.26 (emphasis added). Importantly, courts and state commissions have interpreted the phrase "relating to" broadly and held that the § 252(a)(1) filing requirement is not limited solely to agreements involving the specific mandates in 47 U.S.C. §§ 251(b) and (c). *See, e.g., Qwest Corp. v. Pub. Utils. Comm'n of Colo.*, 479 F.3d 1184, 1192-97 (10th Cir. 2007), *affirming Qwest Corp. v. Pub. Utils. Comm'n of Colo.*, 2006 WL 771223, at *4 (D. Colo. Mar. 24, 2006) and *Qwest Corp. v. Pub. Serv. Comm'n of Utah*, 2005 WL 3534301, at *7-*9 (D. Utah Dec. 21, 2005). Rather, the plain language of 47 U.S.C. § 252(a)(1) provides that even those agreements the incumbent LEC voluntarily negotiates "*without regard to the standards set forth in subsection (b) or (c) of section 251* . . . shall be submitted to the State commission under subsection (e) of this section." 47 U.S.C. § 252(a)(1) (emphasis added); *see also Qwest Corp.*, 2005 WL 3534301, at *5; *In re Qwest Corp.*, 2004 WL 2567420, at *3 (Utah P.S.C. Sept. 30, 2004).

A. The Agreement Contains Numerous Obligations and Provisions That Make It an Interconnection Agreement Under 47 U.S.C. § 252.

The Agreement submitted by Verizon contains numerous obligations and provisions that make it an interconnection agreement under 47 U.S.C. § 252. Several examples follow.

[BEGIN HIGHLY CONFIDENTIAL] [redacted]

[redacted]

[redacted]

[redacted]

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

B. The Fact that Aspects of the Agreement Remain to be Developed is Not a Reason to Delay or Forego Review.

Contrary to Verizon's assertions (*see* Abeyance Motion at 1, 3), the fact that certain terms of the Agreement remain to be developed is not cause to delay review of the Agreement. Interconnection agreements typically contain provisions that require the parties to meet or negotiate further to implement the agreement. Importantly, numerous technical aspects of interconnection generally are not settled at the time the parties enter into an interconnection agreement, but remain to be resolved during the course of implementation. That is the case with many of the Verizon interconnection agreements that have been filed with and approved by the Department. Just a few of the many examples are discussed below.

First, Verizon's interconnection agreements contain a high-level, continuing requirement that the parties work together to install and maintain a reliable network. This requirement includes responsibility for following any network management standards that may be developed and agreed upon by the parties. *See, e.g.*, Verizon/Citrix ICA, §§ 26.1 - 26.2; Verizon/OpenCape ICA §§ 26.1 – 26.2; Agreement by and Between Intrado Communications, Inc. and Verizon New England Inc., d/b/a Verizon Massachusetts for the Commonwealth of Massachusetts, §§ 26.1 – 26.2 (approved May 31, 2012) ("Verizon/Intrado ICA").[12]

Second, Verizon's interconnection agreements require numerous technical details to be worked out when establishing two-way interconnection trunks. Prior to establishing such

[12] http://www.mass.gov/ocabr/docs/dtc/telecom/icas/effective/05-29-09-ma-08-9-intrado-interconnection-agreement.pdf.

facilities, the parties must conduct a joint planning meeting at which they will agree upon interface specifications and the initial number of interconnection trunks. *See, e.g.*, Verizon/Citrix ICA, Interconnection Attach., § 2.4.3 Verizon/OpenCape ICA, Interconnection Attach., § 2.4.3. The parties are also required to meet from time to time to review trunk usage and determine the need for augmentation or reconfiguration. *See, e.g.*, Verizon/Citrix ICA, Interconnection Attach., § 2.4.5; Verizon/OpenCape ICA, Interconnection Attach.,§ 2.4.5.

Third, Verizon interconnection agreements that have been filed with and approved by the Department provide that the parties may enter further negotiations and agreements for fiber meet point interconnection. To do so, numerous details have to be worked out and a further agreement expressly has to be reached. *See, e.g.*, Verizon/Citrix ICA, Interconnection Attach., § 3.1.1 (providing that the establishment of any fiber meet arrangement is "expressly conditioned upon the Parties mutually agreeing to . . . technical specifications and requirements" including "the location of the Fiber Meet points, routing, equipment . . ., software, ordering, provisioning, maintenance, repair, testing, augment and on any other technical specifications or requirements necessary"); Verizon/OpenCape ICA, Interconnection Attach., § 3.1.1. (same).

Fourth, Verizon's interconnection agreements provide that to the extent that Verizon has not previously offered a service, it reserves the right to negotiate with the competitive carrier the terms and conditions of a new service. If the parties are unable to agree, either party may invoke the agreement's dispute resolution mechanisms. *See, e.g.*, Verizon/Citrix ICA, § 18; Verizon/OpenCape ICA, §18; Verizon/Intrado ICA, § 18.

These examples make clear that interconnection agreements, by their nature, are not cast in concrete upon signing, but are fluid and subject to ongoing development and implementation. Some aspects of implementation require the parties to negotiate and enter further agreements. If

the Agreement submitted by Verizon in this proceeding requires the parties to negotiate and agree upon numerous technical implementation details, it is no different than other interconnection agreements already on file with and approved by the Department. Thus, there is no reason to delay review of the Agreement on the ground that technical implementation details remain to be settled.

III. A STAY OF THIS PROCEEDING WILL PREJUDICE THE RIGHTS OF INTERVENORS, IMPEDE COMPETITION, AND DELAY THE TRANSITION TO ALL-IP NETWORKS.

In its Abeyance Motion, Verizon incorrectly asserts that "[t]he proposed abeyance would not prejudice the rights of any would-be intervener." Abeyance Motion at 3. Other carriers have the right not to be discriminated against in interconnection agreements to which they are not a party. 47 U.S.C. § 252(e)(2)(A)(i). Once an interconnection agreement is filed with and approved by a state commission, other carriers have the right to review and, if appropriate, adopt or "opt in" to the agreement pursuant to 47 U.S.C. § 252(i). *See Qwest Corp. Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture*, FCC 04-57, 19 FCC Rcd. 5169, n.12 (2004) ("*2004 Qwest Notice of Apparent Liability Order*")[13] ("One of the key purposes of the section 252(a) filing requirement is that carriers will know which interconnection agreements (and terms) are available under section 252(i)."). If the Department ultimately finds, as it should, that the Agreement is an interconnection agreement under 47 U.S.C. § 252, then staying this proceeding will deprive the Competitive Carriers and other intervenors of their statutory right to evaluate and opt-in to the Agreement even longer than has already been the case. Such an outcome is contrary to the "nondiscriminatory, pro-competition" policy underlying 47 U.S.C. § 252(i), which permits requesting carriers to obtain interconnection "on an expedited basis."

[13] http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-04-57A1.pdf

Local Competition Order ¶ 1321. As the FCC has held, that policy "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 approved agreement." *Id.* Such an outcome is also contrary to the Department's and the FCC's goals of promoting an efficient transition to all-IP networks. *See, e.g.*, Letter from Commissioner Geoffrey G. Why to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 10-90, at 2 (filed May 4, 2012);[14] *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd. 17663, ¶ 1335 (2011).[15]

Finally, staying this proceeding will set a precedent that has anticompetitive effects. Indeed, any incumbent LEC could effectively prevent competitors from exercising their opt-in rights under 47 U.S.C. § 251(i) by delaying filing of its interconnection agreements on the basis that certain details had yet to be "memorialize[d]." Abeyance Motion at 1, 3. As the FCC has found, if an incumbent LEC can "delay filing for an indefinite period of time," or withhold its interconnection agreements altogether, it can provide more favorable rates, terms, and conditions to certain competitors over others and keep those better rates, terms, and conditions "a secret from the other CLECs." *2004 Qwest Notice of Apparent Liability Order* ¶¶ 43, 47. By discriminating in this manner, the incumbent LEC could permanently skew the market in favor of certain competitors. *See id.* ¶ 43. To prevent such a result here, and to facilitate an efficient transition to IP interconnection, the Department should move forward with this proceeding.

[14] http://apps.fcc.gov/ecfs/document/view?id=7021916063.

[15] http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-11-161A1.pdf.

IV. CONCLUSION.

For the foregoing reasons, the Department should deny Verizon's Motion and proceed with its investigation.

Respectfully submitted,

Gregory M. Kennan, *Of Counsel*
Fagelbaum & Heller LLP
20 N. Main St., Suite 125
Sherborn, MA 01770
508-318-5611 Tel.
gmk@fhllplaw.com

August 29, 2013