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	D.T.C. 13-6

POST-HEARING BRIEF OF VERIZON MA

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INTRODUCTION AND SUMMARY

The communications marketplace has changed profoundly since 1996. Where once there was monopoly, now there is robust competition and consumer choice. And consumers for a long time have been shifting from plain old telephone service to advanced communications services made possible by new technologies like Internet Protocol ("IP"). About 39 percent of U.S. telephone households have "cut the cord" entirely and rely on wireless for their voice service, and 28 percent of all residential customers use VoIP services from cable, fiber providers, or over-the-top VoIP providers as alternatives to traditional TDM-based voice services.[1]

Verizon has been the leader over the last decade in deploying network facilities that can deliver to consumers the benefits of IP-based broadband services. We have invested tens of billions of dollars to deploy fiber all the way to consumers' homes to provide services like FiOS Digital Voice, a VoIP service that could not be more different from legacy plain old telephone service. Customers have shown through their purchasing decisions that they value the advanced services and features that IP-based services and networks can provide. This consumer-driven technological advancement is facilitated when providers exchange VoIP traffic in IP format through IP interconnection arrangements. The record compiled in this proceeding makes clear that what is required to reach agreements for IP VoIP interconnection is not regulation, but willing parties. Verizon has demonstrated that it is willing to enter contracts for IP VoIP interconnection. But, ironically, the very existence of this proceeding is harming Massachusetts consumers, by providing Sprint and the other Intervenors with an incentive *not* to negotiate and reach agreements — despite the FCC's expectation that they will negotiate such agreements in good faith — in order to manufacture "evidence" of a need for regulatory action.

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[1] *See* Verizon MA Panel Direct at 31; Anna-Maria Kovacs, *Telecommunications Competition: the Infrastructure-Investment Race* at 11, *available at* http://apps.fcc.gov/ecfs/document/view?id=7520959850.

As Sprint's witness testified, without "all of the legal and regulatory baggage," engineers would choose to interconnect at "natural points," which would yield "enormous efficiencies" for all providers, including for incumbent LECs.[2] IP interconnection also promises considerable benefits to consumers in the form of new features that cannot be achieved on the PSTN, but that all-IP transmission makes possible, like high-definition voice and presence — the ability of a user to know whether another user is available to communicate before trying to connect with that person.

The record shows that there is no IP interconnection problem in Massachusetts (or elsewhere) for the Department to address. Verizon has demonstrated its willingness to negotiate in good faith IP VoIP interconnection terms with any provider — including Sprint and the other Intervenors here — and has successfully done so in more than eight cases already, with VoIP providers with a variety of business plans. In contrast, Sprint and the other Intervenors seek to use this proceeding to further their regulatory agenda instead of trying to reach agreements for IP VoIP interconnection that will enable new services and features that will benefit Massachusetts consumers. Those parties did not put forward a single witness with knowledge of their efforts at negotiating and entering IP VoIP interconnection arrangements with Verizon or any other provider. Sprint's witness testified that he learned from Verizon MA's witnesses' testimony *during the hearing* that Sprint and Verizon Wireless had entered such an agreement earlier this year and that he had no knowledge that **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]**

[2] *See* May 1 Hg. Tr. at 46:5-11 (Burt); *id.* at 46:16-21, 48:11-17, 59:4-22 (Burt); Comments of Sprint Nextel Corporation at 12, *Connect America Fund*, WC Dkt. Nos. 10-90 *et al.* (FCC filed Feb. 24, 2012) ("Sprint FCC Comments") (noting the "dramatic cost efficiencies [ILECs] could achieve" from IP interconnection).

[redacted]

[END HIGHLY SENSITIVE CONFIDENTIAL]

Requiring the filing of the agreements at issue here as § 252 interconnection agreements will harm Massachusetts consumers by hampering the continued development of IP VoIP interconnection and the consumer benefits that flow from those arrangements. Although Verizon has developed a standard template to serve as the starting point for negotiations — which no party here has claimed contains unjust or unreasonable terms — the record shows that IP VoIP interconnection arrangements must be customized to the needs of individual providers. Moreover, any decision to require the filing of these agreements would also open the Department to arbitrating the specific terms of IP VoIP interconnection arrangements in the event of disagreements. If other state commissions were to take the same approach, the result would be multiple state commissions asserting authority to determine the terms and conditions of IP VoIP interconnection at a handful of physical interconnection points outside the borders of most (if not all) of those states. That is a recipe for inconsistent decisions imposing conflicting interconnection obligations. Finally, any decision that IP VoIP interconnection is within the legacy § 251 and § 252 process picks winners and losers in the VoIP marketplace, as the many VoIP providers that are not telecommunications carriers cannot invoke that process, and the ones that can invoke it may do so only for interconnection with incumbent LECs.

Tellingly, the only party to this proceeding that has pursued IP VoIP interconnection through the § 252 process — Sprint — has demonstrated that it does not, in fact, want to exchange VoIP traffic through inefficient, legacy, § 252 interconnection agreements. Immediately after the Michigan commission sided with Sprint, it abandoned its efforts in that

[3] *See* May 1 Hg. Tr. at 74:2-14, 154:6-158:3 (Burt); *see also* Apr. 30 Hg. Tr. at 178:13-179:9, 181:1-182:7 (Schlabs).

state and two others to include IP VoIP interconnection terms in its § 252 interconnection agreements. Sprint dismissed — with prejudice — its federal court challenge to the Illinois commission decision rejecting Sprint's position. Sprint put on hold its effort to include IP interconnection language in an Indiana interconnection agreement and recently asked the Indiana commission to continue to abate its § 252 proceeding in that state. And Sprint submitted a § 252 interconnection agreement to the Michigan commission that *omitted* the IP interconnection language that Sprint proposed and the Michigan commission adopted.

In all events, the record shows that none of the agreements before the Department is a § 252 interconnection agreement that must be filed for the Department's review and approval. The Settlement Agreement merely contains **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** The Traffic Exchange Agreement establishes **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** To the extent the Traffic Exchange Agreement sets **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** it is a "commercial agreement[]" that the FCC held in the *ICC Reform Order* that carriers are "free to negotiate"[4] — not a § 252 interconnection agreement. The Tenth Circuit's recent decision affirming the *ICC Reform Order* in full — including the FCC's preemption of state authority

[4] Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663, ¶ 739 n.1290 (2011) ("*ICC Reform Order*") (internal quotation marks omitted), *petitions for review denied*, *In re FCC 11-161*, Nos. 11-9900 *et al.*, 2014 WL 2142106 (10th Cir. May 23, 2014).

over intrastate access charges[5] — confirms that the Department is preempted from treating such commercial agreements as § 252 interconnection agreements, in conflict with the FCC's determination. Finally, the VoIP-to-VoIP agreement establishes the terms on which Verizon and Comcast IP — which is not a LEC — will **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** That agreement is not a § 252 interconnection agreement because Verizon's counterparty is not a LEC and because § 251(c)(2) does not require interconnection in IP format for the exchange of VoIP-to-VoIP traffic.

BACKGROUND

A. In this proceeding, which the Department opened on its own motion on May 15, 2013, the Department is considering whether three agreements between various Verizon and Comcast entities — the Settlement Agreement, the Traffic Exchange Agreement, and the VoIP-to-VoIP Agreement[6] — are § 252 interconnection agreements that must be filed with the Department.[7]

The Settlement Agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** This

[5] *See In re FCC 11-161*, 2014 WL 2142106, at *83-*87.

[6] The three agreements are Hearing Exhibits 1, 2, and 3, respectively. *See* Apr. 30 Hg. Tr. at 9:17-10:1. Exhibits 1 and 2 to the Settlement Agreement were produced in response to CC-VZ RR #1.

[7] *See* Order Opening an Investigation, Declining To Issue an Advisory Ruling, and Denying Verizon MA's Motion To Dismiss or Stay the Proceeding, D.T.C. 13-2 & 13-6 (May 13, 2013).

[8] Verizon MA Panel Direct at 14.

[9] Settlement Agreement ¶ 5(d).

portion of the Settlement Agreement was "just an agreement to agree."[10] Verizon and Comcast **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

The Traffic Exchange Agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** The contract contains terms that address the intercarrier compensation rules and rates that will apply to their exchange of VoIP traffic.

[BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [redacted]

[10] Apr. 30 Hg. Tr. at 62:20-21 (Schlabs).

[11] Verizon MA Panel Direct at 15.

[12] **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[13] *See* TEA §§ 1.26, 2.2.

[14] *Id.* §§ 1.6, 1.11, 1.20.

[redacted]

[END HIGHLY SENSITIVE CONFIDENTIAL]

The VoIP-to-VoIP Agreement was entered into between Comcast IP Phone, LLC, on behalf of its VoIP operating subsidiaries and affiliates (collectively, "Comcast IP"), and Verizon Services Corp., on behalf of itself and the Verizon incumbent LECs.[16] Comcast IP is *not* a LEC or a telecommunications carrier. Instead, Comcast IP is an information service provider that "offers retail interconnected voice over internet protocol ('VoIP') services not subject to regulation by the Department of Telecommunications and Cable ('Department') pursuant to M.G.L. c. 25C, § 6A."[17]

The VoIP-to-VoIP Agreement obligates Verizon and Comcast IP **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted]

[15] *See id.* §§ 1.14, 2.3.

[16] *See* V2V Preface; Verizon MA Panel Direct at 19.

[17] Verizon Hearing Ex. 4 (Comcast's Response to Verizon's First Set of Information Requests to Comcast at 1-2 (Feb. 6, 2014)).

[18] V2V IP Interconnection Attach. §§ 1, 3.1; V2V Glossary § 2.50; *see* Verizon MA Panel Direct at 20-21.

[19] V2V IP Interconnection Attach. § 3.2.14; *see* Verizon MA Panel Direct at 20-21. **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

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

B. After denying the Intervenors' motion for summary judgment,[22] the Department held a two-day hearing on April 30 and May 1, 2014. Verizon MA presented three witnesses: Eugene Spinelli, Sherri Schlabs, and Paul Vasington. Verizon MA's witnesses testified that, since their pre-filed rebuttal testimony on February 5, 2014, Verizon had "completed two additional [IP VoIP] agreements with Brightlink Communications and 365 Wireless" — bringing the total to eight agreements.[23] The witnesses also testified that Verizon Wireless had signed an agreement for IP VoIP interconnection with Sprint — Verizon Wireless also has such an agreement with T-Mobile[24] — and that **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** Furthermore, although Sprint repeatedly sought to elicit testimony that Verizon refuses to negotiate an IP interconnection arrangement for TDM-originated traffic,[26] Verizon MA's witnesses testified that **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted]

[20] *See* V2V IP Interconnection Attach. §§ 2, 4-7; Verizon MA Panel Direct at 19-27.

[21] V2V § 12; V2V IP Interconnection Attach. § 9.

[22] *See* Hearing Officer Ruling on Competitive Carriers' Motion for Summary Judgment (Apr. 24, 2014).

[23] Apr. 30 Hg. Tr. at 21:7-14 (Schlabs). Since the hearing, Verizon has signed an agreement for IP VoIP interconnection with 365 Wireless's wireless business; the earlier agreement was with its CLEC wireline business.

[24] *See* Verizon Ex Parte Letter at 3, GN Dkt. Nos. 13-5 *et al.* (FCC filed May 27, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521152287.

[25] *See* Apr. 30 Hg. Tr. at 178:13-179:9, 181:15-182:7 (Schlabs).

[26] *See, e.g., id.* at 65:10-12, 65:22-66:1, 87:1-9, 87:12-13 (Aron).

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

In addition, Verizon MA's witnesses testified extensively about the ways in which the information processing and voice communication capabilities in Verizon's FiOS Digital Voice service are "an integrated suite of features" that are built with "one integrated server architecture" that "takes advantage of the IP infrastructure."[28] Those witnesses testified that, as compared to PSTN services, the "networks and the infrastructure" used to provide the FiOS Digital Voice suite of services "couldn't be more different."[29] Furthermore, while there had "been attempts to bundle services over the years" — that is, PSTN services and information services — those earlier efforts were "really kludging together a lot of elements" rather than, as with FiOS Digital Voice, a purpose-built integrated system.[30] Verizon's "customers perceive [FiOS Digital Voice] as more than just voice" and "have shown with their . . . purchasing decisions . . . that they value these more advanced features and services" that are integrated into Verizon's VoIP offering.[31]

The Intervenors put forward two expert witnesses (Joseph Gillan and David Malfara), neither of whom could testify about any efforts their clients had made to establish IP VoIP interconnection arrangements with Verizon or any other provider.[32] Mr. Malfara had asserted, in his pre-filed testimony, that he had "been involved in several . . . negotiations" for "IP

[27] *See id.* at 178:13-179:13 (Schlabs).

[28] *Id.* at 163:11-164:3 (Spinelli); *see id.* at 164:6-11 ("[A]ll of the features that are enabled reside in an application server . . . and . . . are provisioned in that application server.").

[29] *Id.* at 166:17-167:10 (Vasington and Spinelli).

[30] *Id.* at 164:12-165:9 (Spinelli).

[31] *Id.* at 166:6-16 (Vasington), 169:12-170:1 (Spinelli).

[32] *See* May 1 Hg. Tr. at 14:24-15:4 (Gillan) (testifying that he does not know if any Intervenor has either "signed [an] IP-to-IP agreement with Comcast" or is "in the process of negotiating [one]"); *id.* at 18:10-20:13 (Malfara) (testifying that he is not aware of any communications between Verizon and the Intervenors regarding IP VoIP interconnection).

interconnection agreements,"[33] but he conceded on cross-examination that those agreements were limited to interexchange and international traffic.[34] When the Intervenors were ordered to produce the agreements they entered into for the exchange of traffic in IP format,[35] many of the agreements they produced were **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

Although Sprint put forward a fact witness (James Burt), he, too, could not testify about Sprint's efforts to establish IP VoIP interconnection arrangements with Verizon or any other provider. As noted above, Mr. Burt learned for the first time at the hearing — from the

[33] Malfara Pre-Filed Rebuttal at 9.

[34] *See* May 1 Hg. Tr. at 22:1-24:16 (Malfara). The Intervenors ignore this hearing testimony in relying on Mr. Malfara's pre-filed testimony as support for their assertion that IP interconnection is "the rule among providers that are not incumbent LECs." Intervenor Opposition to Motion To Abate at 7-8 & n.17 (May 27, 2014) ("Intervenor Opp. to Mot. To Abate"). **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[35] *See* Hearing Officer Ruling on Motion To Compel Responses to Verizon MA's First Set of Information Requests (Apr. 17, 2014).

[36] *See*, *e.g.*, Cbeyond Agreement 1; PAETEC Agreement 1; tw telecom data services Agreement 1A; EarthLink Business Agreement 2.

[37] *See supra* note 19.

[38] *See*, *e.g.*, Cbeyond Agreement 1; PAETEC Agreement 2; tw telecom data services Agreement 5; EarthLink Business Agreement 1; Level 3 Agreement 5; *see generally* Intervenor Responses to Record Requests (regarding the produced agreements).

testimony of Verizon MA's witnesses — that Sprint and Verizon Wireless had reached an agreement for IP VoIP interconnection.[39] He also was not aware of the status of negotiations between Sprint and Verizon's wireline entities[40] and did not speak to the Sprint employees responsible for those negotiations before submitting his pre-filed testimony or appearing at the hearing.[41] Mr. Burt likewise testified that he was "not aware of the contents" of the "contingent resolution" regarding IP interconnection that Sprint reached with AT&T and that led Sprint to abandon its efforts in three states to include IP interconnection terms in § 252 interconnection agreements.[42] With respect to the purported IP interconnection agreements that Sprint produced in discovery in this proceeding, Mr. Burt could testify only that he was told by a Sprint employee that the agreements are for IP interconnection.[43] Most of the agreements produced, moreover, were **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

Mr. Burt testified that IP VoIP interconnection enables consumer benefits that cannot be achieved on the PSTN, such as high-definition voice and presence — the ability of a user to know whether another user is available to communicate before trying to connect with that

[39] *See* May 1 Hg. Tr. at 74:2-14 (Burt).

[40] *See id.* at 155:18-156:4 (Burt).

[41] *See id.* at 157:19-158:3 (Burt).

[42] *See id.* at 82:14-24 (Burt); *see id.* at 83:14-21 (Burt) (testifying that he "ha[d]n't seen" the contingent resolution).

[43] *See id.* at 109:11-18 (Burt); *see also id.* at 102:23-103-1 (Aron) (statement of Sprint's lawyer that "the custodian of the documents did tell [Sprint's witness] that these are the documents that were requested" in Verizon MA's discovery request).

[44] *E.g.*, Sprint Agreement 2, § 3.2; *see* May 1 Hg. Tr. at 105:8-20 (Burt).

person.[45] Mr. Burt also confirmed that Sprint's position is that the "natural place [for] IP interconnection [to] occur" is at the carrier hotels where "IP network[] operators currently exchange non-VoIP IP traffic," and not in each LATA where two VoIP providers operate.[46] As he testified, without "all of the legal and regulatory baggage of interconnection," the engineers would select these as the "natural place[s] where IP interconnection could occur."[47] Interconnection at those natural points — **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** — yields "enormous efficiencies," including for ILECs.[49]

ARGUMENT

A. Interpreting § 252 To Require the Filing of Agreements for IP VoIP Interconnection Would Harm Massachusetts Consumers By Frustrating the Development of IP VoIP Interconnection Arrangements

The Department long ago recognized that, in interpreting the Telecommunications Act of 1996, its "role is to put in place the structural conditions necessary for an efficient competitive process."[50] As the Department put it then, the "[f]ailure by an economic regulatory agency to insist on true competition and economic efficiency in the use of society's resources is tantamount to countenancing and, to some degree, encouraging waste of those resources."[51] In the context of

[45] *See* May 1 Hg. Tr. at 43:13-45:13 (Burt); *see also* Apr. 30 Hg. Tr. at 171:13-21 (Spinelli) (testifying that "there are new codecs that can only be supported on IP, that would allow for high-definition voice").

[46] *See* May 1 Hg. Tr. at 46:1-24, 49:15-19 (Burt); *see also* Sprint FCC Comments at 17-19, 21-23.

[47] May 1 Hg. Tr. at 46:5-11 (Burt).

[48] *Compare* Sprint FCC Comments at 18 (identifying 9 cities where Sprint's IP network has Internet exchange points that overlap with the IP networks of Verizon, AT&T, and CenturyLink), *with* **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

[49] *See* May 1 Hg. Tr. at 48:11-17, 59:4-22 (Burt); Sprint FCC Comments at 12 (noting the "dramatic cost efficiencies [ILECs] could achieve" from IP interconnection).

[50] *See MCI WorldCom, Inc. v. New England Tel. & Tel. Co.*, D.T.E. 97-116-C, 1999 WL 634357, at *16 (May 26, 1999).

[51] *Id.*

IP VoIP interconnection, sound public policy favors encouraging the proliferation of those arrangements, so that consumers — in Massachusetts and nationwide — can obtain the undisputed benefits that flow from IP VoIP interconnection. As the record here shows, those benefits include the deployment of features such as high-definition voice and presence, which cannot be provided with TDM service.[52]

The FCC has stressed that it is "important that any IP-to-IP interconnection policy framework . . . avoid intervention in areas where the marketplace will operate efficiently."[53] The record here shows that the marketplace is operating efficiently to establish IP VoIP interconnection arrangements. Verizon has entered into eight such arrangements with providers with a variety of business plans and continues to negotiate with many others.[54] None of the eight companies with which Verizon has entered these commercial agreements has suggested that the agreements favor Verizon in a manner that disadvantages them in competing with Verizon and others to provide VoIP services.[55] One of those companies, 365 Wireless, has returned to sign a second agreement for IP VoIP interconnection with Verizon.[56] Nor have any of the witnesses for Sprint or the other Intervenors claimed that the substantive terms on which Verizon offers to negotiate IP VoIP interconnection — which are set forth in a template agreement and SIP interconnection plan[57] — are unjust and unreasonable in any respect.[58]

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[52] *See* May 1 Hg. Tr. at 43:13-45:13 (Burt); *see also* Apr. 30 Hg. Tr. at 171:13-21 (Spinelli) (testifying that "there are new codecs that can only be supported on IP, that would allow for high-definition voice").

[53] *ICC Reform Order* ¶ 1344.

[54] *See* Apr. 30 Hg. Tr. at 21:7-14 (Schlabs); *id.* at 63:23-64:1 (Vasington); *id.* at 65:13-14 (Spinelli); Verizon MA Panel Rebuttal at 4, 6.

[55] *See* Verizon MA Panel Rebuttal at 4.

[56] *See supra* note 23.

[57] *See* Verizon Hearing Ex. 3. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

Indeed, there is no evidence of Verizon refusing to negotiate in good faith for IP VoIP interconnection with any provider. On the contrary, the record shows that Verizon has affirmatively sought to negotiate with the Intervenors. In June 2013, Verizon invited Cbeyond, EarthLink, tw telecom Data Services, XO, and PAETEC to negotiate commercial agreements for IP VoIP interconnection — because those companies had not already approached Verizon.[59] Cbeyond and PAETEC responded to Verizon's letters with flat refusals to negotiate unless Verizon first accepted their regulatory position.[60] In addition to **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** and active negotiations are also ongoing with Level 3.[61] But despite the FCC's expectation that companies like the Intervenors will negotiate IP VoIP interconnection in good faith in response to Verizon's

[58] Nor has any Intervenor or witness claimed that those terms are less favorable than those in the Traffic Exchange Agreement or VoIP-to-VoIP Agreement, as Sprint suggested might be the case in opposing Verizon MA's motion to abate this proceeding. *See* Sprint Opposition to Motion To Abate at 2 (May 27, 2014).

[59] *See* Verizon MA Hearing Ex. 5 (letters requesting negotiations). In opposing Verizon MA's motion to abate, the Intervenors assert that Verizon's willingness to negotiate agreements for IP VoIP interconnection is a response to this proceeding. *See* Intervenor Opp. to Mot. To Abate at 7-9. Verizon was engaged in such negotiations with numerous providers before the June 2013 letters. *See, e.g.*, Apr. 30 Hg. Tr. at 78:23-79:3, 85:2-5 (Spinelli) (testimony that Verizon reached out to Sprint in 2011 to begin negotiating IP VoIP interconnection). Verizon sent out the letters to the parties to this proceeding that — despite their regulatory position before the Department — had not yet made any effort to establish agreements for IP VoIP interconnection with Verizon.

[60] *See* Verizon MA Hearing Ex. 6. In opposing Verizon MA's motion to abate, Cbeyond suggested that its unwillingness to negotiate was due to a disagreement about the terms of the non-disclosure agreement. *See* Intervenor Opp. to Mot. To Abate at 7-9. But Cbeyond's refusal to negotiate was unambiguously linked to its insistence that Verizon first accept its regulatory position that § 252 applies to agreements for IP VoIP interconnection. *See* Verizon MA Hearing Ex. 6 (stating that "Cbeyond *is not interested in negotiations*" unless Verizon agrees that they will be "conducted under the auspices of Sections 251 and 252 of the 1996 Act") (emphasis added). In addition, Cbeyond misstates the negotiation of the non-disclosure agreement. Verizon did not insist upon its original language, but instead proposed compromise language that would allow for disclosure upon the request of a government agency (as compared with Cbeyond's language, which would permit unilateral disclosure in any court or regulatory proceeding in which a protective order of any type is in place).

[61] In opposing Verizon MA's motion to abate, Level 3 asserted that negotiations between the parties are no longer ongoing. *See* Intervenor Opp. to Mot. To Abate at 7. That is news to Verizon, which is **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

request,[62] very few of the Intervenors have done so, choosing instead to misuse the regulatory process.

In particular, although Sprint sought to intimate through repeated cross-examination questions that Verizon refuses to negotiate IP interconnection arrangements for TDM-originated traffic,[63] the record shows that **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** In fact, the *only* record evidence of a party refusing to negotiate are the letters in which Cbeyond and PAETEC flatly refused to negotiate with Verizon.[65] Sprint, moreover, has gone **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

Verizon's efforts to establish IP VoIP interconnection arrangements reflect the substantial and undisputed efficiencies that flow to VoIP providers from IP VoIP interconnection.[67] VoIP providers can exchange VoIP traffic in IP format nationwide at just a handful of mutually-agreed-upon interconnection points.[68] Because the routers and transmissions pathways used to route VoIP calls through those few interconnection points are not dedicated to any particular call,

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[62] *See ICC Reform Order* ¶ 1011.

[63] *See, e.g.*, Apr. 30 Hg. Tr. at 65:10-12, 65:22-66:1, 87:1-9, 87:12-13 (Aron).

[64] *See id.* at 178:13-179:13 (Schlabs).

[65] *See* Verizon MA Hearing Ex. 6.

[66] Apr. 30 Hg. Tr. at 178:13-179:9, 181:1-182:7 (Schlabs).

[67] *See* May 1 Hg. Tr. at 48:11-17, 59:4-22 (Burt) ("enormous efficiencies"); Sprint FCC Comments at 12 (noting the "dramatic cost efficiencies [ILECs] could achieve" from IP interconnection).

[68] *See* Verizon MA Panel Direct at 12.

as occurs in with TDM facilities, Verizon can efficiently route traffic to and from VoIP customers in Massachusetts through regional interconnection points in other states.[69] Those few points, moreover, provide the level of redundancy needed to ensure a high level of service quality and reliability.[70]

Yet the very pendency of this proceeding harms Massachusetts consumers, as it gives Sprint and the other Intervenors a reason *not* to reach an agreement with Verizon for IP VoIP interconnection, to avoid undermining their regulatory position here. As noted above, Sprint and Verizon **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** To further its position here, Sprint went so far as to keep its witness — who is responsible for developing state and federal regulatory policy for Sprint[72] — entirely in the dark about the agreement Sprint reached with Verizon Wireless for IP VoIP interconnection and the status of Sprint's negotiations with the Verizon wireline companies.[73] The other Intervenors did not even put forward a fact witness, and the witnesses who testified confirmed that they had no knowledge of the Intervenors' negotiations with Verizon or any other provider for IP VoIP interconnection.[74] In short, Sprint and the Intervenors have demonstrated that they are more interested in scoring regulatory points to tilt the playing field in their favor, than actually establishing IP VoIP interconnection arrangements.

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[69] *See id.*

[70] *See id.*

[71] Apr. 30 Hg. Tr. at 178:13-179:9, 181:1-182:7 (Schlabs).

[72] May 1 Hg. Tr. at 40:1-13 (Burt).

[73] *See id.* at 74:2-14, 155:18-156:4, 157:19-158:3 (Burt).

[74] *See id.* at 14:24-15:4 (Gillan); *id.* at 18:10-20:13 (Malfara).

Sprint's recent actions in its ongoing negotiations with AT&T demonstrate this clearly. Sprint arbitrated before three state commissions — Michigan, Illinois, and Indiana — the question whether § 251(c)(2) requires IP VoIP interconnection. After Sprint prevailed in Michigan, it reached a "contingent resolution" with AT&T on this issue, which led it to file an interconnection agreement in Michigan that omitted the IP VoIP interconnection language that the state commission had approved,[75] to dismiss with prejudice its appeal of the Illinois commission's decision in favor of AT&T on this issue,[76] and twice to delay further proceedings in the arbitration before the Indiana commission.[77] Sprint's actions show that it, like the other Intervenors here, is seeking to use § 252 and the resources of state commissions for leverage and to obtain special regulatory benefits unavailable to other marketplace participants, such as VoIP providers that are not telecommunications carriers.

Finally, the record shows that extending the § 251 and § 252 regime to IP VoIP interconnection ignores the current marketplace facts that differ materially from those in 1996. The special burdens on incumbent LECs in § 251 and § 252 were developed for a marketplace in which incumbent LECs offering PSTN service were the predominant providers of local

[75] Joint Submission at 1-2, *Request for Commission Approval of an Interconnection Agreement Between Sprint Spectrum L.P. and AT&T Michigan*, Case No. U-17569 (Mich. P.S.C. filed Feb. 25, 2014), *available at* http://efile.mpsc.state.mi.us/efile/docs/17569/0001.pdf. Only after the Michigan commission rejected Sprint's and AT&T's attempt to file an interconnection agreement that omitted the arbitrated language did Sprint and AT&T file an agreement that contained the language the commission had ordered. *See* Sprint Supplemental Response to D.T.C. 1-2 (Apr. 4, 2014).

[76] *See* Stipulation of Dismissal of Count V of Plaintiffs' Complaint, *SprintCom, Inc. v. Scott*, No. 1:13-cv-06565 (N.D. Ill. filed Feb. 28, 2014).

[77] *See* Joint Motion for New Hearing Dates and Suspension of Prehearing Activity, *Sprint Spectrum, L.P.'s Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable Laws for Rates, Terms and Conditions of Interconnection with Indiana Bell Telephone Company d/b/a AT&T Indiana*, Cause No. 44409-INT 01 (Ind. Util. Reg. Comm'n filed Feb. 28, 2014), *available at* https://myweb.in.gov/IURC/eds/Modules/Ecms/Cases/Docketed_Cases/ViewDocument.aspx?DocID=0900b631801b06a9; Joint Status Report and Motion To Reschedule Evidentiary Hearing, *Sprint Spectrum, L.P.'s Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable Laws for Rates, Terms and Conditions of Interconnection with Indiana Bell Telephone Company d/b/a AT&T Indiana*, Cause No. 44409-INT 01 (Ind. Util. Reg. Comm'n filed May 28, 2014), *available at* https://myweb.in.gov/IURC/eds/Modules/Ecms/Cases/Docketed_Cases/ViewDocument.aspx?DocID=0900b631801b6198.

telephone service; CLECs were brand new entrants; cable telephony and VoIP did not exist; wireless service was still in its infancy; and a host of new IP-based communications options — such as Twitter, iMessage, and Facebook — were still over the horizon.[78] Today, incumbent LECs are one of a multitude of players in the communications marketplace, with no special historical advantages in the provision of VoIP services.[79] Indeed, Sprint "agrees with Verizon that every IP network operator is a 'new entrant,' at least relative to the provision of VoIP services"[80] and that the FCC should *not* "adopt detailed rules" for IP VoIP interconnection "like those adopted in 1996" for TDM interconnection.[81] Applying § 251 and § 252 to IP VoIP interconnection, moreover, would pick winners and losers in the VoIP marketplace, because only VoIP providers that are — or are affiliated with — a telecommunications carrier could take advantage of such a decision.[82]

In sum, public policy considerations weigh heavily against finding that the agreements between Verizon and Comcast at issue in this proceeding are § 252 interconnection agreements. As shown below, such an interpretation cannot be squared with the text of the Communications Act or the relevant FCC orders interpreting and applying the Act's provisions.

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[78] *See* Verizon MA Panel Direct at 28-31.

[79] *See id.* at 31-34. VoIP traffic is already being exchanged over existing TDM interconnection arrangements established pursuant to interconnection agreements. Therefore, there is no concern today — as there was in 1996 when new entrants were offering PSTN service and seeking TDM interconnection — that customers of one provider may be unable to communicate with customers of all other providers.

[80] Reply of Sprint Nextel Corporation at 17, *Connect America Fund*, WC Dkt. Nos. 10-90 *et al.* (FCC filed Mar. 30, 2012) ("Sprint FCC Reply"). At the hearing, Mr. Burt tried to deny that this is Sprint's position, *see* May 1 Hg. Tr. at 61:2-6 (Burt), and then — when shown Sprint's filing agreeing with Verizon — suggested that the statement might be taken out of context, *see id.* at 62:5-6 (Burt). The context does nothing to help Sprint here. Indeed, to the extent Sprint asserted then that companies like Verizon "have every incentive to propose commercially unreasonable terms for IP voice interconnection with their much smaller competitors," Sprint FCC Reply at 17, the record facts here conclusively refute Sprint's speculation.

[81] Sprint FCC Comments at 12; *see* May 1 Hg. Tr. at 60:4-21 (Burt).

[82] Only requesting telecommunications carriers — a category the FCC has found includes LECs and CMRS providers — can request interconnection with an ILEC pursuant to § 251(c)(2) or opt into § 252 interconnection agreements under § 252(i). *See* 47 U.S.C. §§ 251(c)(2), 252(a)(1).

B. Only Agreements Between Incumbent LECs and Requesting Telecommunications Carriers That Implement Duties Imposed in § 251(b) or (c) Are § 252 Interconnection Agreements That Must Be Filed with State Commissions

1. As the FCC recognized in the *Qwest Declaratory Ruling*,[83] identifying the incumbent LEC agreements that must be filed with state commissions under § 252 "begin[s] . . . with the statutory language" — specifically § 251(c)(1) and § 252(a)(1).[84] The former section imposes on both the incumbent LEC and the "requesting telecommunications carrier" the duty "to negotiate in good faith" the terms and conditions of an agreement "to fulfill the duties" set forth in § 251(b) and (c).[85] The latter section makes clear that the start of the § 252 process is "a request for interconnection, services, or network elements pursuant to section 251" that is made by a "requesting telecommunications carrier."[86]

Two relevant conclusions follow from these provisions. First, *only* an agreement between an incumbent LEC and a requesting telecommunications carrier can qualify as a § 252 interconnection agreement. An agreement between an incumbent LEC and a *non*-telecommunications carrier — such as the VoIP-to-VoIP Agreement, where Comcast IP is Verizon's counterparty — is *not* a § 252 interconnection agreement.

Second, the category of § 252 interconnection agreements is "inextricably tied to the duties imposed under Section 251."[87] The Second Circuit recognized this link when it upheld the Connecticut commission's ruling that a transit service agreement between AT&T Connecticut and a CLEC (Pocket Communications) is a § 252 interconnection agreement. The court agreed

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[83] *See* Memorandum Opinion and Order, *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)*, 17 FCC Rcd 19337 (2002) ("*Qwest Declaratory Ruling*").

[84] *Id.* ¶ 8.

[85] 47 U.S.C. § 251(c)(1).

[86] *Id.* § 252(a)(1).

[87] *Qwest Corp. v. Arizona Corp. Comm'n*, 567 F.3d 1109, 1117 (9th Cir. 2009).

with the Connecticut commission that "state commissions do not have . . . authority" over agreements for "services that are not subject to § 252."[88] But the court upheld the Connecticut commission's ruling that the AT&T-Pocket agreement is a § 252 interconnection agreement because that commission had found that "transit service should be regulated under § 251."[89] Therefore, agreements that do not implement any § 251(b) or (c) duty are *not* § 252 interconnection agreements, even if they are between an incumbent LEC and another telecommunications carrier.

2. The *Qwest Declaratory Ruling* confirms these two conclusions. First, the FCC noted throughout that ruling that the agreements it was addressing were between an incumbent LEC and a requesting telecommunications carrier. The FCC started by recognizing that § 252(a)(1) pertains only to an "agreement between the incumbent LEC *and the requesting competitive LEC*."[90] The FCC also stated that the standard it announced for determining which contracts are § 252 interconnection agreements identifies those "agreements between an incumbent LEC *and a requesting carrier*" that "must be filed under 252(a)(1)."[91] And the FCC noted that state commissions, in applying the FCC's standard, would "provide further clarity to incumbent LECs *and requesting carriers* concerning which agreements should be filed for their approval."[92]

Second, the FCC made clear that only an "agreement that creates an ongoing obligation pertaining to" one of the duties in § 251(b) or (c) "is an interconnection agreement that must be

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[88] *Southern New England Tel. Co. v. Comcast Phone of Conn., Inc.*, 718 F.3d 53, 61 (2d Cir. 2013).

[89] *Id.* at 60-61; *see id.* at 62-63 (upholding the Connecticut commission's finding that § 251(c)(2) requires incumbent LECs to provide transit service).

[90] *Qwest Declaratory Ruling* ¶ 8 (emphasis added).

[91] *Id.* ¶ 8 n.26 (emphasis added).

[92] *Id.* ¶ 10 (emphasis added).

filed pursuant to section 252(a)(1)."[93] Further emphasizing the link between the substantive duties in § 251(b) and (c) and the class of agreements that qualify as interconnection agreements, the FCC reiterated its standard in a footnote, stating that "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)."[94] Although the FCC used slightly different language in its two formulations — "create[]" and "contain," and "pertaining to" and "relating to" — the common thread in both formulations is the requirement that the obligations be those from § 251(b) or (c).

The FCC applied that standard two months later, when it "reviewed twelve [Qwest] agreements that AT&T allege[d] should have been filed with the state commissions under section 252."[95] Of the 11 agreements that the FCC found "need not be filed with state commissions under the standards enunciated" in the *Qwest Declaratory Ruling*, one was a "Directory Assistance Agreement" between Qwest and a CLEC.[96] The FCC found that the agreement did not need to be filed because it was "not 251-related" — that is, it "did not contain ongoing section 251(b) or (c) obligations."[97] The FCC reached this conclusion even though it previously had found that § 251(c)(3) requires incumbent LECs to provide directory assistance as an unbundled network element — an obligation that it eliminated in 1999.[98] The FCC's

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[93] *Id.* ¶ 8 (emphasis omitted); *see* Notice of Apparent Liability for Forfeiture, *Qwest Corporation Apparent Liability for Forfeiture*, 19 FCC Rcd 5169, ¶ 22 n.70 (2004) (explaining that the list of duties in paragraph 8 of the *Qwest Declaratory Ruling* "is a summary of the interconnection obligations listed in section 251 of the Act").

[94] *Qwest Declaratory Ruling* ¶ 8 n.26.

[95] Memorandum Opinion and Order, *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, ¶ 478 n.1746 (2002) ("*Qwest Nine-State Order*").

[96] *Id.*

[97] *Id.* ¶ 478 & n.1746.

[98] *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 536 (1996) ("*Local Competition Order*") (requiring "unbundling" of "directory assistance"); Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC

decision in the *Qwest Nine-State Order* thus 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, even if the subject matter of the contract touches on an area that is — or was — covered to some extent by those provisions.[99]

The Department reached a similar result when it rejected arguments that Verizon MA's interconnection agreements should include provisions that address Verizon MA's rates, terms, and conditions for network elements that the FCC formerly — but no longer — required to be unbundled under § 251(c)(3).[100] As the Department explained, terms for "discontinued" unbundled network elements do not belong in § 252 interconnection agreements "because 'only those agreements that contain an ongoing obligation relating to § 251(b) or (c) must be filed under 252(a)(1).'"[101] The Department held further that "non-section 251 negotiations" will establish the terms on which Verizon MA provides network elements that "need not be unbundled under § 251(c)(3)"; that those negotiations will occur "separate[] from . . . interconnection agreements"; and that "[o]rdinary contract law" — not § 251 or § 252 — "provides the backdrop of any such arrangement."[102]

Rcd 16978, ¶ 661 (2003) ("*Triennial Review Order*") (noting that directory assistance was "removed . . . from the list" of unbundled network elements in 1999).

[99] *Qwest Declaratory Ruling* ¶ 8 & n.26. The 1 agreement of the 12 that the FCC held should have been filed was an "Internetwork Calling Name Delivery Service Agreement." *Qwest Nine-State Order* ¶ 478 n.1746. At the time of that order, the FCC required incumbent LECs to provide unbundled access to the Calling Name database. *See* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 416 (1999). The FCC eliminated that obligation in 2003. *See Triennial Review Order* ¶ 554.

[100] *See* Arbitration Order at 85, *Petition of Verizon New England Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order*, D.T.E. 04-33 (July 14, 2005), *available at* http://www.mass.gov/ocabr/docs/dtc/dockets/04-33/714arborder.pdf.

[101] *Id.* (quoting *Qwest Declaratory Ruling* ¶ 8 n.26).

[102] *Id.* at 85-86.

3. In their motion for summary judgment and the testimony of their witnesses, the Intervenors offer a legal standard that cannot be squared with the text of the statute or the FCC and Department orders discussed above.

First, the Intervenors (other than XO) assert that an agreement between an incumbent LEC and a provider that is not a telecommunications carrier can still qualify as an interconnection agreement.[103] But they say nothing about the provisions of § 251(c)(1) and § 252(a)(1) that limit the duty to enter into interconnection agreements to incumbent LECs and "requesting telecommunications carrier[s]." Congress specifically chose to use "telecommunications carrier" — a defined statutory term[104] — in each of these provisions and therefore intended to limit the category of § 252 interconnection agreements to contracts between an incumbent LEC and another telecommunications carrier.[105] In contrast to the other Intervenors, XO agrees with Verizon MA that "[s]ections 251(c) and 252 explicitly and unambiguously apply **only** to agreements between an ILEC and a requesting telecommunications carrier."[106]

The Intervenors also do not address the FCC's multiple statements in the *Qwest Declaratory Ruling* that it was addressing only agreements between incumbent LECs and requesting telecommunications carriers.[107] Instead, the Intervenors assert — citing no authority — that an agreement can qualify as an interconnection agreement if the non-telecommunications

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[103] *See* Intervenors Br. in Support of Mot. for Summ. J. at 13-15 ("Intervenors SJ Br."); Gillan Pre-Filed Rebuttal at 9.

[104] *See* 47 U.S.C. § 153(51).

[105] *See Florida Dep't of Banking & Fin. v. Board of Governors of Fed. Reserve Sys.*, 800 F.2d 1534, 1536 (11th Cir. 1986) ("It is an elementary precept of statutory construction that the definition of a term in the definitional section of a statute controls the construction of that term wherever it appears throughout the statute.").

[106] XO Communications Services, LLC's Opposition to Verizon-MA's Motion To Compel at 3 (Apr. 4, 2014).

[107] *See supra* pages 20-21.

carrier party, to fulfill its duties under the agreement, obtains services from a telecommunications carrier.[108] That assertion has no basis in the statute or any FCC order, and it conflicts with basic principles of contract law, under which a party's use of a subcontractor to fulfill its contractual duties does not alter the identity of the parties to the contract.[109]

Second, the Intervenors argue that any agreement that creates an obligation "relating to the physical linking of networks" is an interconnection agreement that must be filed with state commissions.[110] Therefore, on the Intervenors' view, an agreement that establishes obligations to interconnect for the exchange of traffic between VoIP customers in IP format is a § 252 interconnection agreement irrespective of whether § 251(c)(2) mandates such interconnection. That is wrong. As shown above, under both the text of the statute and the FCC's interpretation of it in the *Qwest Declaratory Ruling*, an agreement must implement one or more of the § 251(b) or (c) duties to qualify as a § 252 interconnection agreement.[111] Therefore, an agreement for IP VoIP interconnection between and ILEC and a CLEC can qualify as a § 252 interconnection agreement *only* if § 252(c)(2) requires IP VoIP interconnection, which it does not, as explained in Part C.3.a below.

C. None of the Three Agreements Is an "Interconnection Agreement" Under 47 U.S.C. § 252(a)

1. The Settlement Agreement Is Not a § 252 Interconnection Agreement

In the *Qwest Declaratory Ruling*, the FCC expressly found that settlement agreements that "provide for 'backward-looking consideration' " in order to "settle[] . . . a dispute . . . need

[108] *See* Intervenors SJ Br. at 14-15; Gillan Pre-Filed Rebuttal at 9.

[109] *See, e.g.*, *Fireman's Fund Ins. Co. v. Falco Constr. Corp.*, 493 F. Supp. 2d 143, 145-46 (D. Mass. 2007).

[110] Intervenors SJ Br. at 5; *see* Gillan Pre-Filed Direct at 11.

[111] *See supra* pages 21-23.

not be filed."[112] The overwhelming majority of the Settlement Agreement **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Insofar as the Settlement Agreement addressed those companies' *prospective* actions regarding IP VoIP interconnection, the agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** does not impose "an ongoing obligation relating to section 251(b) or (c)."[115] Indeed, the only testimony or argument from any party contending that the Settlement Agreement is a § 252 interconnection agreement is Mr. Gillan's passing assertion that the Settlement Agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** Only agreements that contain substantive, ongoing obligations — rather than an agreement to reach future agreements — could qualify as § 252 interconnection agreements.

In all events, shortly after **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**, the FCC announced that it "expect[s] all carriers to negotiate in good faith in response to requests for IP-to-IP interconnection for the

[112] *Qwest Declaratory Ruling* ¶ 12.

[113] Verizon MA Panel Direct at 14.

[114] Apr. 30 Hg. Tr. at 62:20-21 (Schlabs); *see* Settlement Agreement ¶ 5(d) (**[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**).

[115] *Qwest Declaratory Ruling* ¶ 12.

[116] Gillan Pre-Filed Direct at 13-14.

exchange of voice traffic."[117] As shown above, Verizon has negotiated in good faith in response to such requests; has reached eight agreements for IP VoIP interconnection; and has "not failed to reach agreement with anybody" for IP VoIP interconnection.[118] Verizon also has affirmatively requested that other providers — including Sprint and the other Intervenors here — establish IP VoIP interconnection arrangements.[119] Two of them — Cbeyond and PAETEC — flatly refused to negotiate with Verizon unless Verizon first accepted their regulatory position.[120] Sprint falsely told the Massachusetts Legislature in December 2013 that Verizon was refusing to enter into IP interconnection arrangements,[121] even though **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

In short, Verizon actively sought to negotiate in good faith with Sprint and the other Intervenors in this proceeding, just as it negotiated in good faith **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** and has negotiated in good faith with each of the seven other providers with which it has reached agreements for IP VoIP interconnection. The same cannot be said of Sprint and the other Intervenors, which have been more interested in

[117] *ICC Reform Order* ¶ 1011. Although Mr. Burt has asserted that this expectation "comes directly from Section 251(c)(1) of the Act," Burt Pre-Filed Direct at 20, the FCC has held no such thing. Instead, the FCC is currently seeking comments on which of "one or more of various provisions of the Communications law" would support a duty to negotiate in good faith IP VoIP interconnection arrangements. *ICC Reform Order* ¶ 1335; *see also id.* ¶ 1351 (noting that "sections 251(a)(1), 251(c)(2), and other provisions of the Act; section 706 of the 1996 Act; as well as the Commission's ancillary authority under Title I" are all sources of "possible legal authority"); *id.* ¶ 1354 (identifying § 201, "in conjunction with other provisions of the [Communications] Act and the Clayton Act," as a possible source of legal authority); *id.* ¶ 1356 (identifying § 256 as another possible source of legal authority).

[118] Apr. 30 Hg. Tr. at 72:4-13 (Schlabs).

[119] *See* Verizon MA Hearing Ex. 5.

[120] *See* Verizon MA Hearing Ex. 6.

[121] *See* Verizon MA Hearing Ex. 7.

[122] *See* Apr. 30 Hg. Tr. at 178:13-179:9 (Schlabs).

scoring regulatory and legislative victories than in establishing IP VoIP interconnection arrangements that would directly benefit consumers inside and outside Massachusetts.

2. The Traffic Exchange Agreement Is Not a § 252 Interconnection Agreement

a. Although the Traffic Exchange Agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** In the *ICC Reform Order*, the FCC explicitly held that § 251(b)(5) applies only to VoIP traffic that is "exchanged over PSTN facilities" — that is, in TDM format "and not in IP format."[123] The FCC's regulation governing intercarrier compensation for VoIP-PSTN traffic is similarly limited to traffic "exchanged . . . in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format."[124] Therefore, the provisions of the Traffic Exchange Agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** do not create or contain an obligation that relates or pertains to § 251(b)(5).

The Traffic Exchange Agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** But the FCC

[123] *ICC Reform Order* ¶ 940 (internal quotation marks omitted); *see id.* ¶ 969 (reiterating that its "VoIP-PSTN intercarrier compensation rules focus specifically on whether the exchange of traffic occurs in TDM format (and not in IP format)").

[124] 47 C.F.R. § 51.913.

[125] *See* TEA §§ 1.11, 2.2.

[126] *See id.* §§ 1.20, 2.3; Verizon MA Panel Direct at 16-17. The Traffic Exchange Agreement does not **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

made clear — in the *ICC Reform Order* that the Tenth Circuit recently upheld in full, including the FCC's preemption of state commission authority over intrastate access charges — that carriers are "free to negotiate *commercial agreements* that may depart from the default regime" for that category of VoIP traffic.[127] Such "commercial agreements" are, by definition, *not* "regulated agreements" subject to § 252, as the FCC recognized in the *Qwest Declaratory Ruling*. In that decision, the FCC distinguished between the interconnection agreements that are subject to § 252 and "commercial relations between incumbent and competitive LECs" that are free from the "regulatory impediments" that § 252 creates for entering into normal commercial contracts.[128] 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. State commissions are preempted from second-guessing the FCC's determinations under the 1996 Act.[129]

The Traffic Exchange Agreement is **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** For example, under that regime, the default rates for terminating "toll" VoIP-PSTN traffic are the

[127] *ICC Reform Order* ¶ 739 n.1290 (emphasis added; internal quotation marks omitted); *see also id.* ¶ 784 n.1443 (noting that Verizon had "entered into a *commercial agreement* with Bandwidth.com for the exchange of VoIP traffic") (emphasis added; internal quotation marks omitted).

[128] *Qwest Declaratory Ruling* ¶ 8; *see* Hearing Officer Ruling on Motion To Comply with Hearing Officer Ruling and Protective Order at 7 (Jan. 31, 2014) (noting that "many contracts between commercial entities are kept confidential in their entirety" and that, unless the contracts at issue are § 252 interconnection agreements, there is "no . . . basis" for mandating "public disclosure" of those contracts).

[129] *See, e.g., Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1, 8-9 (1st Cir. 2007) (finding that state commissions are preempted where the "specific outcomes that the state agencies seek to dictate are in direct conflict with specific FCC policies adopted pursuant to its authority under the 1996 Act").

[130] *See* Verizon MA Panel Direct at 17.

terminating switched access rates found in a carrier's federal tariff.[131] Under the Traffic Exchange Agreement, however, Verizon and Comcast **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** the Traffic Exchange Agreement is a commercial agreement that need not be filed under § 252.

b. In their summary judgment brief and the pre-filed testimony of Mr. Gillan — a legal brief in another guise from a non-lawyer — the Intervenors have offered a host of reasons to support their claim that the Traffic Exchange Agreement is a § 252 interconnection agreement. None has merit.

First, contrary to their claims, no provision of the Traffic Exchange Agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted]

[131] *See ICC Reform Order* ¶ 944 & n.1902.

[132] *See* TEA §§ 2.2.1, 2.2.2. **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[133] *Qwest Declaratory Ruling* ¶ 8 & n.26; *see* Intervenors SJ Br. at 8.

[134] *See* Intervenors SJ Br. at 8 (citing TEA § 1.20); *see also id.* at 9 (citing the same TEA provisions as "[a]dditional provisions" that purportedly support its argument); Gillan Pre-Filed Direct at 14.

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

Second, for similar reasons, the Intervenors are wrong in claiming that the Traffic Exchange Agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

[135] TEA § 1.20.

[136] Intervenors SJ Br. at 8.

[137] *Id.* at 9.

[138] *See id.* (citing TEA §§ 1.11, 2.1; TEA Amend. 1, at 1); Gillan Pre-Filed Direct at 14 (same).

[139] TEA § 1.11.

[140] **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted]

Third, turning finally to the substantive provisions of the Traffic Exchange Agreement, the Intervenors claim that the agreement is an interconnection agreement **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** As shown above, the FCC was explicit that its conclusion that § 251(b)(5) establishes a reciprocal compensation duty for VoIP traffic is limited to traffic that is exchanged "in TDM format (and not in IP format)."[142] The Intervenors briefly acknowledge that the FCC's rule implementing § 251(b)(5) is limited to VoIP-PSTN traffic that "is exchanged in TDM format," but then repeatedly ignore that limitation.[143]

[BEGIN HIGHLY SENSITIVE CONFIDENTIAL] [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** The Interconnection Agreement between Verizon MA and Comcast Phone of Massachusetts, Inc. applies bill-and-keep to local traffic exchanged in TDM

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

[141] *See* Intervenors SJ Br. at 10.

[142] *ICC Reform Order* ¶ 969; *accord id.* ¶ 940; *see* 47 C.F.R. § 51.913.

[143] Intervenors SJ Br. at 6 (citing 47 C.F.R. § 51.913); *see also* Gillan Pre-Filed Direct at 15.

[144] TEA § 2.2.

between the two companies.[145] **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]**

[redacted]

[END HIGHLY SENSITIVE CONFIDENTIAL]

Fourth, the Intervenors assert that the Traffic Exchange Agreement is an interconnection agreement because **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted]

[END HIGHLY SENSITIVE CONFIDENTIAL]

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[145] *See* Verizon MA Panel Direct at 18.

[146] *See id.*

[147] *ICC Reform Order* ¶ 944 n.1902

[148] *Id.* ¶ 739 n.1290 (emphasis added; internal quotation marks omitted).

[149] Intervenors SJ Br. at 10-11.

[150] *Qwest Declaratory Ruling* ¶ 9.

[151] TEA § 18.

3. The VoIP-to-VoIP Agreement Is Not a § 252 Interconnection Agreement

a. The VoIP-to-VoIP Agreement is not a § 252 interconnection agreement because it is between Verizon and Comcast IP. Comcast IP's retail VoIP services offer customers a single, integrated suite of features and capabilities that allow them to "generat[e], acquir[e], stor[e], transform[], process[], retriev[e], utiliz[e], or mak[e] available information via telecommunications."[152] Under the test the United States Supreme Court applied in *National Cable & Telecommunications Association v. Brand X Internet Services*,[153] Comcast IP's VoIP service is an information service and Comcast IP is therefore an information service provider, not a telecommunications carrier.[154] Comcast IP is not registered as a CLEC in Massachusetts.[155] For this reason alone, Comcast IP is not a "requesting telecommunications carrier" under § 251(c)(1) and § 252(a)(1), and the VoIP-to-VoIP Agreement cannot be an interconnection agreement under § 252.

The VoIP-to-VoIP Agreement is also not a § 252 interconnection agreement because the contractual obligation **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** The duty in § 251(c)(2) is limited to interconnection with a "requesting telecommunications carrier" that is

[152] 47 U.S.C. § 153(24); *see* Verizon MA Hearing Ex. 4 (Comcast's Response to Verizon's First Set of Information Requests to Comcast at 5-7 (Feb. 6, 2014) (detailing the numerous information processing functions that are tightly integrated into Comcast IP's retail VoIP offerings)).

[153] 545 U.S. 967 (2005).

[154] A telecommunications carrier is a provider of telecommunications services. *See* 47 U.S.C. § 153(51). Information services and telecommunications services are mutually exclusive categories under the Communications Act. *See Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 219-20 (3d Cir. 2007); 47 U.S.C. § 153(24), (51).

[155] *See* Massachusetts Licensed Telecommunications Operators, *available at* http://services.oca.state.ma.us/dtc/frmTelecomList.aspx.

"for the transmission and routing of telephone exchange service and exchange access" — for telecommunications services.[156] Although the FCC has identified "ensuring the transition to IP-to-IP interconnection" as an important policy,[157] it has never interpreted § 251(c)(2) to require interconnection in IP format for the exchange of traffic between two VoIP customers. Indeed, the FCC has never interpreted § 251(c)(2) to require interconnection for traffic that never touches the PSTN.

The FCC has not even settled on § 251(c)(2) — or any specific provision of the Communications Act — as the source of its expectation that "all carriers [will] negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic."[158] The FCC is currently seeking comments on which of "one or more of various provisions of the Communications law" is the source of that duty.[159] With respect to § 251(c)(2) specifically, the FCC noted that this section "appl[ies] only to incumbent LECs," while "good faith negotiations . . . are expected of all carriers, not just incumbent LECs."[160] The FCC noted further that § 251(c)(2) is not service neutral, as it applies only to "interconnection obtained . . . 'for the transmission and routing of telephone exchange service and exchange access.'"[161] The FCC sought "comment on the policy merits" of interpreting § 251(c)(2) to "require incumbent LECs

[156] 47 U.S.C. § 251(c)(2)(A).

[157] *ICC Reform Order* ¶ 1335.

[158] *Id.* ¶ 1011.

[159] *Id.* ¶ 1335; *see also id.* ¶ 1351 (noting that "sections 251(a)(1), 251(c)(2), and other provisions of the Act; section 706 of the 1996 Act; as well as the Commission's ancillary authority under Title I" are all sources of "possible legal authority"); *id.* ¶ 1354 (identifying § 201, "in conjunction with other provisions of the [Communications] Act and the Clayton Act," as a possible source of legal authority); *id.* ¶ 1356 (identifying § 256 as another possible source of legal authority).

[160] *Id.* ¶ 1353.

[161] *Id.* ¶ 1389 (quoting 47 U.S.C. § 251(c)(2)(A)).

to directly interconnect on an IP-to-IP basis."[162] The FCC is also considering whether it should interpret the Communications Act to "leave IP-to-IP interconnection to unregulated commercial agreements."[163]

Not only has the FCC never interpreted § 251(c)(2) to require IP VoIP interconnection, but also that section cannot be interpreted to impose that duty. For example, § 251(c)(2)(A) limits the interconnection duty to interconnection "for the transmission and routing of telephone exchange service and exchange access," both of which are telecommunications services.[164] As shown above, Comcast IP's VoIP services are information services. Verizon MA's VoIP services are also information services, as FiOS Digital Voice similarly offers consumers a single, integrated suite of features and capabilities that allow them to "generat[e], acquir[e], stor[e], transform[], process[], retriev[e], utiliz[e], or mak[e] available information via telecommunications."[165] As Verizon MA's witnesses testified, FiOS Digital Voice was built as "one integrated server architecture" that "takes advantage of the IP infrastructure," and that "couldn't be more different" from the network used to provide TDM service.[166] Unlike prior efforts "kludging together a lot of elements" to bundle PSTN services with information

[162] *Id.* ¶ 1369; *see also id.* ¶¶ 1385-1393 (posing numerous questions about whether § 251(c)(2) can (and, if so, should) be interpreted to impose an IP-to-IP interconnection duty on incumbent LECs). In other filings in this docket, the Intervenors and their witnesses have relied on the FCC's "observ[ation]" that "section 251" imposes "interconnection requirements" that are "technology neutral." *Id.* ¶ 1342. But, as the FCC later made clear, it was referring there to the general requirement in § 251(a) that all telecommunications carriers be interconnected, directly or indirectly, with other telecommunications carriers. *See id.* ¶ 1352 (describing § 251(a)(1) as imposing requirements that "are technology neutral on their face with respect to the transmission protocol used for purposes of interconnection"). In all events, the FCC's numerous questions about whether it can and should interpret § 251(c)(2) to require IP VoIP interconnection confirms that the FCC's observation in paragraph 1342 is not a finding in favor of the Intervenors' position here.

[163] *Id.* ¶ 1343; *see id.* ¶¶ 1375-1377.

[164] 47 U.S.C. § 251(c)(2)(A); *see ICC Reform Order* ¶ 1389 (recognizing this limitation on the duty § 251(c)(2) imposes).

[165] 47 U.S.C. § 153(24); *see* Verizon MA Panel Direct at 5-9 (detailing the numerous information processing functions that are tightly integrated into Verizon MA's retail VoIP offerings).

[166] Apr. 30 Hg. Tr. at 163:11-164:3 (Spinelli); *id.* at 166:17-167:10 (Vasington and Spinelli); *see id.* at 164:6-11 (Spinelli) ("[A]ll of the features that are enabled reside in an application server . . . and . . . are provisioned in that application server.").

processing — like the Z-Line service Mr. Malfara discussed[167] — FiOS Digital Voice is a single, integrated system that "customers perceive" as different from TDM service.[168]

Both Verizon MA's and Comcast IP's VoIP services are information services for the additional reason that they offer the capability for a "net protocol conversion" from IP to TDM or from TDM to IP.[169] Although no net protocol conversion occurs when traffic between two VoIP customers is exchanged in IP format, the relevant fact for classification purposes is that the VoIP services that Verizon MA and Comcast IP offer consumers includes that capability — it is how VoIP customers can communicate with customers still served on the PSTN.

For these reasons, an agreement to interconnect in IP format *solely* for the exchange of calls between Comcast IP's VoIP customers and Verizon's VoIP customers — that is, an agreement like the VoIP-to-VoIP Agreement — is *not* an agreement for the "transmission and routing of telephone exchange service and exchange access."

Finally, the rules the FCC promulgated to implement § 251(c)(2) were designed for TDM interconnection between PSTN carriers and would be inefficient and costly if extended to IP VoIP interconnection. For example, the FCC's rules require TDM interconnection to occur at one point per LATA.[170] But as Sprint agrees, LATA boundaries — and state boundaries, for that matter — are irrelevant to VoIP service, and enforcing those boundaries would preclude

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[167] *See* Malfara Pre-Filed Rebuttal at 17. As Mr. Malfara conceded at the hearing, the Z-Line service involved two entirely separate networks — the network of the relevant incumbent LEC (leased as UNE Platform and used to provide voice service) and "facilities that ZTel did not obtain from the ILEC" (used to provide the information service features) — rather than a single, integrated network, as with FiOS Digital Voice. May 1 Hg. Tr. at 24:20-25:17 (Malfara).

[168] Apr. 30 Hg. Tr. at 164:12-165:9, 169:12-170:1 (Spinelli); *id.* at 166:6-16 (Vasington).

[169] *See* Verizon MA Panel Direct at 11, 27; *see, e.g., Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1082 (E.D. Mo. 2006) (relying on this "net protocol conversion from the digitized packets of the IP protocol to the TDM technology used on the PSTN" to find that VoIP service "is an information service"), *aff'd*, 530 F.3d 676 (8th Cir. 2008).

[170] *See, e.g.*, Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, ¶ 72 (2001) ("[I]nterconnecting CLECs are obligated to provide one [point of interconnection ('POI')] per LATA.").

efficient IP VoIP interconnection.[171] Indeed, under the VoIP-to-VoIP Agreement, Comcast IP and Verizon are exchanging traffic **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]**

[redacted]

[END HIGHLY SENSITIVE CONFIDENTIAL]

Interpreting § 251(c)(2) to require IP VoIP interconnection would therefore impose an inefficient POI-per-LATA mandate on such interconnection arrangements. Doing so would also authorize every state commission to arbitrate the terms of interconnection at a handful of points — which in most cases will be outside the state's borders — creating a serious risk of inconsistent decisions governing interconnection at those points.[173]

b. In their summary judgment brief and the pre-filed testimony of Mr. Gillan and Mr. Malfara, the Intervenors have offered numerous arguments to support their claim that the VoIP-to-VoIP Agreement is a § 252 interconnection agreement. None has merit.

First, as noted above, the Intervenors claim that it does not matter that Comcast IP and not a CLEC is Verizon's counterparty in the VoIP-to-VoIP Agreement.[174] But they never acknowledge — much less dispute — that both the statute and the FCC's orders clearly limit the category of § 252 interconnection agreements to agreements between incumbent LECs and other telecommunications carriers.

Nor does it matter, as the Intervenors claim, that Comcast IP has historically relied on its CLEC affiliates to obtain numbering resources so that its VoIP customers can be reached using telephone numbers rather than the IP addresses that Comcast IP uses to route traffic to and from

[171] *See* Verizon MA Panel Direct at 11-12, 38; Sprint FCC Comments at 17-19, 21-23; May 1 Hg. Tr. at 46:1-24, 49:15-19 (Burt).

[172] *See* Verizon MA Panel Direct at 12.

[173] *See id.* at 37-38.

[174] *See* Intervenors SJ Br. at 13-15; Gillan Pre-Filed Rebuttal at 9.

its VoIP customers.[175] The Intervenors cite no authority — and there is none — for their claim that such a subcontract with a LEC, whether affiliated or unaffiliated, transforms an agreement between an information service provider and an incumbent LEC into an interconnection agreement for purposes of § 252. As explained above, that claim conflicts with basic principles of contract law, which recognize that subcontracts do not alter the identities of parties to the master contract.[176]

The Department also should reject the Intervenors' policy argument that a VoIP provider that is affiliated with a CLEC should be treated as though it were a CLEC for purposes of determining whether a contract is a § 252 interconnection agreement.[177] As the Intervenors themselves acknowledge, where Congress has made its intent clear — as it did here, by referring repeatedly and exclusively in § 251 and § 252 to requesting telecommunications carriers — policy arguments cannot trump the statutory text.[178] In addition, the Intervenors cite no evidence to support their assertion that Comcast established Comcast IP in order "to enter into an interconnection agreement with an ILEC for the exchange of voice traffic in IP format,"[179] nor did the Intervenors obtain such evidence at the hearing.

Second, the Intervenors argue that the VoIP-to-VoIP Agreement contains ongoing obligations related to interconnection.[180] But as shown above, the FCC has never interpreted § 251(c)(2) to include a duty to establish IP VoIP interconnection arrangements, and such an

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[175] *See* Intervenors SJ Br. at 14-15. The FCC has only recently started the process of allowing VoIP providers to obtain their own numbering resources directly from the North American Numbering Plan Administrator. *See, e.g.*, Notice of Proposed Rulemaking, Order and Notice of Inquiry, *Numbering Policies for Modern Communications*, 28 FCC Rcd 5842, ¶ 1 (2013). As a result, VoIP providers have long had to obtain numbering resources from a LEC, whether affiliated or unaffiliated.

[176] *See supra* note 109.

[177] *See* Intervenors SJ Br. at 15.

[178] *See id.* at 17-18.

[179] *Id.* at 15.

[180] *See id.* at 11-12; Gillan Pre-Filed Direct at 15-17.

interpretation cannot be squared with the text of the statute or the FCC's existing interconnection rules. Tellingly, in claiming that it is irrelevant that VoIP is an information service, the Intervenors argue only that the FCC has brought some VoIP traffic within the scope of § 251(b)(5) — although *not* VoIP traffic exchanged in IP format — not that it has brought IP VoIP interconnection within the scope of § 251(c)(2).[181]

Mr. Gillan did note in his pre-filed testimony that a state commission, the Michigan Public Service Commission, has held that § 251(c)(2) requires IP VoIP interconnection.[182] The Michigan commission's reasoning in that order is patently erroneous. In finding that VoIP service is a telecommunications service, and therefore that IP VoIP interconnection is required by § 251(c)(2)(A), the Michigan commission asserted that IP VoIP interconnection — where traffic is originated, exchanged, and terminated in IP format — is "factual[ly] . . . similar" to the IP-in-the-middle traffic that the FCC had held is a telecommunications service.[183] But the FCC's *IP-in-the-Middle Order*[184] addressed traffic that originated and terminated in *TDM format*, and that a long-distance carrier converted from TDM to IP — and then back from IP to TDM — for its own convenience in routing the traffic through its network.[185] In contrast, even with VoIP-PSTN traffic, the traffic originates (or terminates) in IP format. The Michigan commission's order, therefore, is based on an asserted factual similarity between two scenarios that could not be more factually dissimilar.

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[181] *See* Intervenors SJ Br. at 15-17.

[182] *See* Gillan Pre-Filed Direct at 17-18.

[183] Order at 7, *Petition of Sprint Spectrum L.P. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 To Establish Interconnection Agreements with Michigan Bell Telephone Company, d/b/a AT&T Michigan*, Case No. U-17349 (Mich. P.S.C. Dec. 6, 2013) ("Michigan Arbitration Order"), *available at* http://efile.mpsc.state.mi.us/efile/docs/17349/0027.pdf.

[184] Order, *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rd 7457 (2004) ("*IP-in-the-Middle Order*").

[185] *See id.* ¶¶ 1, 11-12.

Third, the Intervenors argue that the VoIP-to-VoIP Agreement contains obligations related to reciprocal compensation.[186] **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]** As shown above, the FCC was clear in the *ICC Reform Order* that § 251(b)(5) applies only when "the exchange of [VoIP-PSTN] traffic occurs in TDM format (and not in IP format)."[189] That express decision to exclude VoIP traffic exchanged in IP format is binding on the Department.[190] **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted] **[END HIGHLY SENSITIVE CONFIDENTIAL]**

Fourth, the Intervenors point to the existence of **[BEGIN HIGHLY SENSITIVE CONFIDENTIAL]** [redacted]

[186] *See* Intervenors SJ Br. at 12; Gillan Pre-Filed Direct at 13-15.

[187] *See* V2V § 12; V2V IP Interconnection Attach. § 9.

[188] *See* V2V IP Interconnection Attach. §§ 3.1-3.2; Verizon MA Panel Direct at 20-21.

[189] *ICC Reform Order* ¶ 969; *accord id.* ¶ 940; *see* 47 C.F.R. § 51.913.

[190] *See, e.g.*, *Verizon New England*, 509 F.3d at 8-9 (holding that state commissions are preempted from adopting rules that conflict with FCC determinations implementing the Telecommunications Act of 1996).

[191] Intervenors SJ Br. at 13.

[192] *See id.* at 12.

[redacted]

[END HIGHLY SENSITIVE CONFIDENTIAL]

Finally, the Intervenors deny that requiring the filing of the VoIP-to-VoIP Agreement would result in a patchwork quilt of inconsistent regulations.[194] They first attempt to minimize the relief they seek here, arguing that it is merely whether the agreement "must be filed for review," and that, if such agreements must be filed, "there is no reason for state commissions to become involved in the technical details of parties' IP interconnection arrangements."[195] On the latter point, they are correct — given the ability to establish IP VoIP interconnection arrangements that allow for the nationwide exchange of VoIP traffic in IP format at a handful of points, individual state commissions should not be separately adjudicating the terms on which IP VoIP interconnection is established at those few points.[196] The Intervenors and Verizon thus agree that such terms are better established through commercial negotiations, outside of the § 252 process.

But the Intervenors recognize that, if the Department concludes that the VoIP-to-VoIP Agreement must be filed, that ruling will open the door to § 252 arbitration about the terms

[193] *Qwest Declaratory Ruling* ¶ 9.

[194] *See* Intervenors SJ Br. at 18-21; May 1 Hg. Tr. at 32:12-33:3 (Malfara); Gillan Pre-Filed Rebuttal at 15-16.

[195] Intervenors SJ Br. at 18; *see* Gillan Pre-Filed Rebuttal at 16.

[196] *See* Verizon MA Panel Direct at 37-38.

that should be included in future IP interconnection agreements.[197] Furthermore, each state commission in which the incumbent LEC party to an IP VoIP interconnection contract operates would have authority to conduct such an arbitration. State commissions have often reached different results in applying the FCC's § 251(c)(2) interconnection rules to TDM interconnection arrangements.[198] There is every reason to believe the same would occur if multiple state commissions were petitioned to arbitrate a dispute about IP VoIP interconnection. And unlike the disagreements between state commissions about TDM interconnection — which resulted from those commissions' efforts to interpret and apply the FCC's TDM interconnection rules — arbitrations regarding IP VoIP interconnection would occur in the absence of any FCC rules governing that interconnection, increasing the prospect of disparate rulings.

[197] *See* Intervenors SJ Br. at 20.

[198] *See* Apr. 30 Hg. Tr. at 41:20-42:6 (Vasington). For example, state commissions reached numerous different results on the threshold for when a CLEC, having established TDM interconnection to an ILEC tandem, must establish direct trunks to a specific ILEC end office. *See, e.g.*, Order, *MediaOne Telecommunications of Massachusetts, Inc.*, D.T.E. 99-42/43 & 99-52, 1999 WL 1067508, Part V.C.3.c (Mass. D.T.E. Aug. 25, 1999) (3 DS1 threshold); Opinion and Order, *AT&T Communications of the Mountain States, Inc.*, Decision No. 66888, Dkt. Nos. T-02428A-03-0553 & T-01051B-03-0553, 2004 WL 1493948, at *9-*11 (Ariz. Corp. Comm'n Apr. 6, 2004) (1 DS1 threshold); Order on Investigation, *Illinois Bell Tel. Co.*, Dkt. No. 01-0662, 2003 WL 21537767, ¶ 235 (Ill. Commerce Comm'n May 13, 2003) (no threshold).

In addition, state commissions have disagreed about whether a CLEC may unilaterally eliminate a previously established point of interconnection, or whether existing points of interconnection can be eliminated only by mutual agreement. Michigan Arbitration Order at 18-20 (CLEC can act unilaterally); Arbitration Decision at 36-37, Dkt. No. 12-0550 (Ill. Commerce Comm'n June 26, 2013) (elimination by mutual agreement), *available at* http://www.icc.illinois.gov/downloads/public/edocket/352465.pdf.

CONCLUSION

For these reasons, the Department should hold that none of the agreements at issue is a § 252 interconnection agreement and should terminate this proceeding.

Respectfully submitted,

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