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June 20, 2014

VIA E-FILING AND HAND DELIVERY
Catrice C. Williams, 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/or Approval in Accordance with 47 U.S.C. § 252,* Dkt. No. D.T.C 13-6

Dear Ms. Williams:

Enclosed on behalf of XO Communication Services, LLC ("XO"), please find one original and five copies of the public redacted version of XO's Reply Brief. A Highly Confidential version is being provided under seal to the Hearing Officer (and served only to those persons having signed the Protective Agreement) to protect it from public disclosure.

Any questions on this matter should be directed to the undersigned.

Very truly yours,

Eric J. Krathwohl, Esq.

Encl.

cc: Michael Scott, Esq., Hearing Officer
Service List

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 13-6

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the attached document upon all parties of record in this proceeding.

Dated at Boston, Massachusetts this 20th day of June, 2014.

Eric J. Krathwohl, Esq.
Counsel

Of Counsel for
XO Communications Services LLC

REDACTED

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. Docket No. 13-6

REPLY BRIEF OF XO COMMUNICATION SERVICES, LLC

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Dated: June 20, 2014

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REPLY BRIEF OF XO COMMUNICATION SERVICES, LLC

I. INTRODUCTION

XO Communications Services, LLC ("XO") hereby respectfully files this Reply Brief[1] and urges the Department of Telecommunications and Cable ("Department") to take expeditious action to ensure that the unquestioned benefits of IP interconnection are enjoyed promptly and broadly by end users within Massachusetts. Specifically, the Department should find that Verizon's Settlement Agreement, Traffic Exchange Agreement and VoIP-to-VoIP Agreement (together, the "Agreements" and each, individually, an "Agreement") are "interconnection agreements" and should be filed with the Department under Section 252 of the Telecommunications Act of 1996 (the "Act").

Whether contracts such as the Agreements must be filed with the Department and are subject to the review and opt-in requirements of Section 252 has been a matter of critical concern

[1] To the extent this Reply Brief does not answer every argument or issue raised by Verizon, no assent to unaddressed positions taken by Verizon is intended or should be construed.

to the competitive local exchange carrier ("CLEC") community for a long time[2]. XO commends the Department for its deliberative approach to this important issue, but urges a prompt resolution now that the hearings and briefing are concluded, which will allow the benefits of IP interconnection to be realized expeditiously on a broader basis within Massachusetts. The Initial Briefs of the Intervenors present a consensus that there is an obligation on all carriers to negotiate interconnection agreements, including for IP interconnection, in good faith.[3] However, XO submits that the record demonstrates that Verizon has not met this standard in negotiations with competitive local exchange carriers ("CLECs"). As described below, Verizon has taken a doctrinaire approach to negotiating such IP interconnection agreements, insisting on provisions that are fundamentally improper and unacceptable to CLECs. Consequently, Verizon has signed such agreements with only 8 parties, of which only three are local exchange or wireless retail voice carriers, leaving the vast majority of the 133 registered CLECs without agreements[4]. XO In. Brf. pp. 6, 9; Sprint In. Brf. p. 46.

Indeed, Verizon's approach in formulating the Agreements and its arguments against application of Sections 251 and 252 are suggestive of a shell game. The record shows (both by the interrelation of the subject matter coverage and allocation among the three agreements, as well as the simultaneous execution of two of the agreements) that the three Agreements should be reviewed as an integrated single set of rights and obligations relating to interconnection, exchange of traffic and compensation therefor. Sprint In. Brf. pp. 19-35; Competitive Carriers In. Brf. pp. 23-56.

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[2] While the Department opened this proceeding in May of 2013, the issue was before it via the Petition of the Competitive Carriers for a declaratory ruling filed in January 2013.

[3] In fact, this position is strongly suggested in the Department's comments to the FCC in WC Dkt. No. 10-90. See Competitive Carriers In. Brf. pp. 2-3.

[4] These numbers seriously undermine the claim of Verizon that the market is operating efficiently to stimulate interconnection agreements without a regulatory backstop.

Verizon admits one Agreement covers reciprocal compensation and is between a telecommunications carrier and an ILEC[5], but contends that it need not be filed because the subject matter relates mostly to traffic exchanged in IP format, not in Time Division Multiplexing ("TDM") format. As to the portion that relates to TDM traffic, Verizon asserts that it is a "commercial agreement" that need not be filed. However, that argument ignores the fact that other agreements with similar provisions are filed under sections 251 and 252. See Competitive Carriers In. Brf. pp. 27-28. Another Agreement admittedly covers interconnection, but because one of the parties is allegedly not a telecommunications carrier, Verizon argues the Agreement need not be filed. As to the third Agreement BEGIN HIGHLY SENSITIVE CONFIDENTIAL [redacted] END HIGHLY SENSITIVE CONFIDENTIAL

XO respectfully submits that the welfare of the Commonwealth in terms of access to IP Interconnection and the efficiency of the Massachusetts telecommunications system should not be constrained by a single party whose competitive interests are not served by laying all the cards face up on the table within a single document. Therefore, the Department, not Verizon, should decide what Agreements are subject to the filing, review and opt-in requirements of section 252. Based on the evidence presented, the Department should find that the three Agreements before it in this case operate together as an integrated whole. Further, the Department should conclude as a matter of law that the obligations set forth in Sections 251 and 252 of the Act are technology

[5] Exh. Verizon-1, pg. 19, lines 14-19.

neutral[6] and that the Agreements are interconnection agreements subject to the provisions of Sections 251 and 252. The Department should thereby establish a regulatory backstop for IP interconnection, which will help assure that carriers can obtain reasonable and non-discriminatory terms and conditions for IP interconnection agreements as is required by the Act. Such a determination will allow advantages of IP interconnection to proliferate to more end users in Massachusetts more quickly.[7]

II. THE AGREEMENTS ARE INTERCONNECTION AGREEMENTS UNDER THE ACT

A. The Department Has Broad Authority to Find the Agreements Are Subject to Sections 251 and 252.

The Intervenors' Initial Briefs unequivocally show that the Department has clear and broad authority to determine whether the Agreements are interconnection agreements that must be filed with the Commonwealth pursuant to Section 252(a)(1). This authority is based on the very language of the Telecommunications Act. Consistent with FCC precedent, the Department has correctly recognized[8] its authority to make case-by-case determinations as to what agreements fall within the ambit of Sections 251 and 252. *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 FCC Rcd. 19337, ¶ 8 (2002) (emphasis omitted) (*"2002*

[6] This technology neutral concept has strong support in FCC orders. *See Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 1381 (2011) (*"CAF Order"*). See XO In. Brf. p. 6.

[7] At the end of the day, an interconnection arrangement exists between Verizon and Comcast that covers both the exchange of telecommunications traffic and reciprocal compensation arrangements, even if it is the net result of multiple agreements. While each agreement at issue here may deal relate to only limited aspects of the overall arrangement, that fact makes them no less agreements that need to be filed pursuant to Section 252.

[8] 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, D.T.C. 13-6 (May 13, 2013), p. 11. (the "May 13 Order")

Qwest Order")." Thus, it is up to the Department to rule decisively and promptly that the Agreements must be filed, subject to review and opt-in under Section 252.[9] Indeed, it is the duty of the Department to decide this issue pursuant to the Act, and the general guidance provided by the FCC about what constitutes an interconnection agreement. The Department does not have the authority, as Verizon and even Comcast imply, to forbear from doing so on policy grounds.

B. The Agreements Should Be Considered As a Collective Whole

The Initial Briefs of each of Verizon, the Competitive Carriers and Sprint show how the Settlement Agreement, the Traffic Exchange Agreement and the VoIP-to-VoIP Agreement are interdependent with BEGIN HIGHLY SENSITIVE CONFIDENTIAL [redacted] END HIGHLY SENSITIVE CONFIDENTIAL Sprint Brf. pp. 23-35; Competitive Carriers In. Brf. pp. 51-56. The details of the provisions of each of the three Agreements need not be reiterated here, but it is clear that the review of the Agreements together is necessary to understand how the contract parties will operate with each other with respect to their IP networks and exchanging IP traffic. XO agrees with Sprint and the Competitive Carriers that each of the Agreements alone is an interconnection agreement subject to the filing, review and opt-in requirements of Section 252. Should any doubt remain on the issue, however, it is eminently clear that the Agreements should be viewed together and on that basis, the applicability of Sections 251 and 252 is even more evident. Further, to the extent that

[9] In the FCC's November 2011 *Connect America Fund Order,* the FCC did not expressly rule on the issue of whether IP-IP interconnection agreements were subject to Section 251 and 252 requirements, but left this matter open so that state commissions can exercise their broad authority to review whether individual interconnection agreements are subject to Sections 251 and 252. In the absence of a ruling by the FCC, it is incumbent upon the Department to make the determination. *See* Sprint Br. pp. 7-11. Indeed, the Department affirmatively concluded earlier in this proceeding that the FCC has not preempted from determining that the exchange of voice traffic in IP format is subject to Sections 251 and 252. *May 13 Order* at 10, fn. 6. Moreover, the FCC based its "expectation" that carriers would negotiate IP-IP interconnection agreements in good faith on the Section 251(c) requirement that requesting carriers and ILECs negotiate Section 251 interconnection agreements in good faith. *CAF Order*, ¶1011; *see also* 47 U.S.C. §251(c)(1).

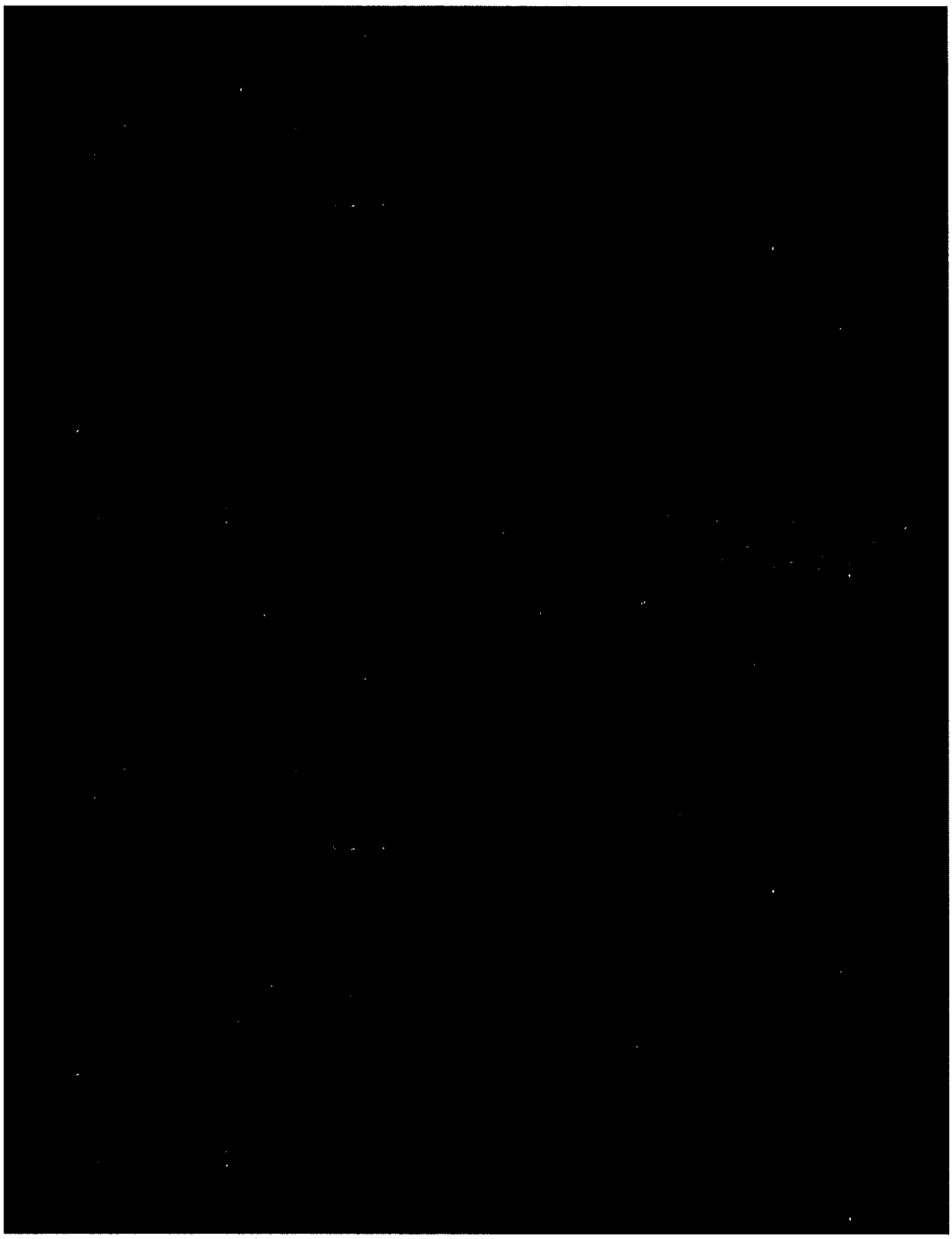
the arguments of Verizon rely on certain aspects of the Section 251 rights or obligations being addressed in one agreement or the other, the Department should look at the complete, integrated substance of the parties' dealings (which undisputedly resulted in an interconnection arrangement) to determine whether the Agreements as a whole constitute an "interconnection agreement".

There may have been legitimate contract reasons for the splitting of the deal into separate contracts, but Verizon has failed to present evidence of any such reasons on the record. Those reasons (even if shown) should not trump the Department's review of the import of such contracts taken as a whole, however. Regardless of whether any reasons exist for papering the interconnection arrangement through separate documents, or whether the contract structuring was more driven by less straightforward strategic regulatory objectives, the Department should (as it has in the past) look through the legal formalities to its substance. *Massachusetts Electric Company*, D.T.E. 98-122 (2002). Indeed, in that case, the Department cautioned against designing legal transactions (there "creative conveyancing") for what could be construed as a stratagem to artificially defeat legislative purposes. The Department warned that in such cases it would impose a very heavy burden on the party seeking to avoid the purposes of the relevant legislation. *Id.* at 11.

C. Each of The Agreements Clearly Is an Interconnection Agreement Subject to the Filing, Review and Opt-in Requirements of Section 252.

The Initial Briefs of Verizon, the Competitive Carriers and Sprint each set forth an analysis of many provisions of each of the Agreements in the context of the scope of Section 251 obligations. While Verizon's presentation comes off like a shell game, Sprint in particular presents a compelling and methodical analysis showing how each of the Agreements is indeed an interconnection agreement addressing matters arising under Sections 251(b) and 251(c) of the

Act. To briefly summarize, among other things: BEGIN HIGHLY SENSITIVE CONFIDENTIAL

- 

[10] Nor should parties – if, indeed, this has what has occurred here – be allowed to avoid their statutory duties by running certain rights and obligations through a separate contract party when the ultimate benefits are enjoyed by actual telecommunications carrier affiliate. See *Massachusetts Electric Company*, D.T.E. 98-122 (2002).

- [redacted]

END HIGHLY SENSITIVE CONFIDENTIAL

Sprint In. Brf. pp. 19-35.

It is also very important that in interpreting the relevant statutory requirements, the FCC stated that an interconnection agreement is one that has obligations "relating to" or "pertaining to" the rights and obligations set forth in Section 251 (b) and (c). 2002 Qwest Order; Competitive Carriers In. Brf. pp. 18-23.[11] Verizon's only response to the applicability of this language in the 2002 Qwest Order to the Agreements is essentially to ignore such language and urge a narrow, technical reading of the statute. However, that is inconsistent with the FCC's specific language and should be rejected, as the utility regulatory commissions in Michigan, Ohio and Puerto Rico have done. Exh. Sprint-1, Attachments 1-3.

III. STRONG POLICY REASONS EXIST FOR REQUIRING FILING OF THE AGREEMENTS

A. The Parties Agree That Significant Policy Goals Are Advanced by IP Interconnection Agreements for All Carriers.

The FCC, the Department, and certainly the CLEC parties here seek ever increasing efficiency in the interconnected public telecommunications network and the exchange of all types of traffic, improved broadband availability and capability, and vibrant and fair competition.

[11] Even were the Agreements limited to Section 251(a) interconnection obligations applicable to all telecommunications carriers, they would still fall within the purview of state commission authority to review and arbitrate ILEC-requesting carrier agreements under Section 252. *See The Ohio Bell Telephone Company v. The Public Utilities Commission of Ohio* et al., No. 12-3145 (6th Cir. Mar 28, 2013)(ILECs interconnection obligations under Section 251(a) may be arbitrated by a state commission).

The record in this proceeding shows that significant benefits result from IP interconnection, including avoidance of expensive and unnecessary TDM interconnection facilities and conversion costs, fewer points of interconnection, progress in movement toward the common goal of all IP networks, support for advanced features and the more robust competition that results from all the previously listed benefits. XO In. Brf. p.. 6; Sprint In. Brf. pp. 41-45; Competitive Carriers In. Brf. pp. 6-7. 57-58; Cox Rhode Island Telcom LLC and Charter Fiberlink MA-CC), LLC In. Brf. p. 7; Exh. Verizon-1 The Department's confirmation that the Agreements are subject to Section 252 filing, review and opt-in requirements would be a vital step in preventing discrimination as the transition to an all-IP public communication network ("PCN") proceeds and in ensuring that the benefits mentioned above are attained as broadly and quickly as possible.

B. The Department Must Act to Even the Playing Field for IP Interconnection and Exchange of Traffic

As clearly described by Sprint in its Initial Brief (pp. 18, 43-49) (despite Verizon's execution of a few isolated IP interconnection agreements), the Intervenors and other CLECs have been unable to obtain an IP Interconnection with Verizon on any reasonable basis. Without IP Interconnection, CLECs must remain interconnected with Verizon at more locations and on a more expensive and less efficient basis. Sprint In. Brf. pp. 41-45. In addition, Sprint (Init. Brf. pp. 37-38) shows how BEGIN HIGHLY SENSITIVE CONFIDENTIAL [redacted] END HIGHLY SENSITIVE CONFIDENTIAL. Such conditions certainly harm the CLECs' ability to compete- especially when their predominant competitor, Verizon, is the entity to whom they pay the higher charge for both interconnection facilities and traffic exchange. Accordingly, the Act requires that the

Agreements be treated as and filed as Section 252 interconnection agreements.

C. No Harm Will Result from a Ruling that the Agreements Must Be Filed Pursuant to Section 252(a)(1)

Seeking to counterbalance the very real detriments of that *status quo* for the Intervenors compared to the position of the competitor with whom Verizon has entered IP Interconnection agreements, Verizon raises a couple of make-weight arguments. None of these has merit.

First, Verizon argues that, should the Department find that the Agreements must be filed with the Department under Section 252, thereby creating a regulatory backstop, that ruling alone will hinder adoption of IP Interconnection. According to Verizon, CLECs will not negotiate in good faith and sign up IP interconnection agreements if the agreements must be filed with, and therefore may be arbitrated before, the Department. Supposedly CLECs will defer the benefits of IP Interconnection and opt for the more time-consuming and expensive approach of arbitration that has a far less certain result. Verizon's argument is simply illogical. On the contrary: CLECs want IP interconnection, so they have very significant incentives to sign agreements and avoid the gamesmanship (and its costs) that Verizon suggests CLECs will seek. While Verizon's approach to date[12] has not allowed CLECs to sign IP interconnection agreements without giving up their regulatory rights at this time, should Verizon take a more reasonable approach, CLECs can be expected to negotiate, sign up and obtain the benefits of IP interconnection sooner.[13] Moreover, if the agreements must be filed, it is quite possible that

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

[13] Verizon seeks to bolster this weak argument by focusing on selected actions by one of the ten Intervenors here in negotiations in other states. The record is incomplete about the circumstances of those negotiations/proceedings in other states, so there is really no basis to infer such gamesmanship by that single Intervenor. In any event, there is no basis for attributing actions of one Intervenor to all the others and as discussed in XO's Initial Brief (p. 6), this

many CLECs wanting managed IP interconnection will opt into existing agreements, which has occurred historically on a common basis with agreements offering TDM-based interconnection.

Simply put, Verizon's approach to date has not been reasonable. Otherwise, this lengthy proceeding would not have been necessary. These circumstances alone show the need for a regulatory backstop. Should the Department rule that the Agreements are subject to the filing and other requirements of Sections 251 and 252, presumably the check of potential regulatory review will "encourage" greater good faith and reasonableness and result in more widespread entry into IP interconnection agreements. Indeed, the opt-in right makes the entire process far more simple and expedited, as the Department is well aware from past experience.

Second, Verizon's argument that state commission review of IP interconnection agreements will lead to inconsistent rulings and different interconnection standards is pure speculation. Verizon's position is based upon the unwarranted assumption that negotiating parties and the regulators will not be capable of implementing technical standards set by industry groups that historically have developed interconnection standards. To the contrary, the record and history shows that despite the potential for inconsistent standards in the past, industry participants have worked together and determined and implemented standards on a broad and consistent basis nationwide. XO In. Brf. p. 8; Tr. II, p. 34; Exh. CC-3 pp. 9-11. Verizon was not clear about what inconsistencies could allegedly result from ensuring the existence of a state commission regulatory backstop on IP interconnection agreements. Verizon makes reference to a requirement for a point of interconnection in each LATA that has applied with traditional TDM interconnection. Verizon In. Brf. pp. 41-42. Verizon implies that regulators and CLECs will choose to ignore the nature of IP networks (which require few interconnection points) and impose inapplicable legacy network requirements on IP interconnection arrangements. This

argument is simply a distraction that is not instructive on the substantive issues at hand.

strains credulity as XO and other CLECs, no less than Verizon, have no incentive to urge adoption of, and state commissions have no reason to force parties into, such inefficient arrangements.

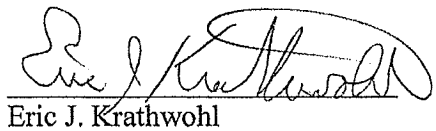
In sum, Verizon bases its arguments on unfounded speculation and the supposition that the Department and other regulators, when carrying out their Section 251 and 252 responsibilities, will not be up to the task of ensuring efficient interconnection in an all IP environment. XO, in contrast, believes that with a regulatory backstop in place, most contract negotiation and implementation will occur between the carriers and there will be a narrow range of issues in a limited number of contracts that will require regulatory involvement and that, in those cases, the regulators will indeed be able to "get it right." Further, confirmation of a right to "opt-into" previously signed interconnection agreements should lead to greater efficiencies and consistency across jurisdictional lines and actually reduce regulatory review requirements.

IV. CONCLUSION

For all the reasons set forth in this Reply Brief and those set forth in its Initial Brief, XO respectfully requests that the Department rule that the Agreements are interconnection agreements under 47 U.S.C. § 251 that must be filed with the Department for approval pursuant to 47 U.S.C. § 252 and be subject to review and opt-in under that section. The Department should so act as soon as possible to allow as many end users and carriers as possible within the Commonwealth to enjoy the advantages of the industry's transition to an all IP public communications network expeditiously.

Respectfully submitted,

XO COMMUNICATIONS SERVICES, LLC
By its attorneys,



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