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September 16, 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 Communications Services, LLC ("XO"), please find one original and five copies of XO's Opposition to Verizon's Motion to Dismiss.

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 16th day of September, 2014.

Eric J. Krathwohl, Esq.
Counsel

Of Counsel for
XO Communications Services LLC

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

Investigation by the Department on Its Own Motion to Determine Whether an Agreement Entered into by Verizon New England Inc., d/b/a Verizon Massachusetts is an Interconnection Agreement under 47 U.S.C. § 251 Requiring the Agreement to Be Filed with the Department for Approval in Accordance with 47 U.S.C. § 252	)	DTC 13-6

XO COMMUNICATIONS SERVICES, LLC'S OPPOSITION TO VERIZON-MA'S MOTION TO DISMISS

Pursuant to 220 C.M.R. § 1.04(5)(c), XO Communications Services, LLC ("XO") submits this Opposition to Verizon's MA's[1] Motion to Dismiss or in the Alternative, Renewed Motion to Abate This Proceeding ("Alternative Renewed Motion"). Verizon's Motion to Dismiss satisfies none of the grounds for a motion to dismiss and its alternative pleading adds nothing -- the grounds offered for dismissal are simply not germane to the issue the Department must decide. Specifically, again, that issue is whether the IP interconnection agreements in question are Section 251 agreements under the Communications Act of 1934, as amended, that must be filed with the Department under Section 252.[2] Therefore, XO strongly urges the Department, and for the reasons set forth herein and in XO's Opposition to the previous Verizon Motion to Abate, to deny the Motion to Dismiss and the Alternative Renewed Motion.

[1] Verizon New England Inc.,d/b/a Verizon MA is hereinafter referred to as Verizon

[2] *See* 47 U.S.C. §§ 251, 252.

I. Verizon's Motion to Dismiss Does Not Satisfy the Required Standards and Is Without Merit

Verizon's latest iteration of a Motion to Dismiss[3] comes after months of discovery, pre-filed testimony of several parties, full hearings, and several months after all briefs of all parties were submitted. XO (through counsel) is unaware of any case before this Department, or historically before the predecessor to the Department (i.e. the Department of Public Utilities) where the agency gave credence to a motion to dismiss, after several parties had presented evidence through witnesses, which testimony was subject to full cross-examination and after full briefing by all parties. Indeed, apart from any other considerations, it makes no sense to dismiss such a fully developed case simply because one of several parties may be bowing out because Verizon reached an accommodation with it. Further, if there were any merit to Verizon's Motion to Dismiss (which there is not), it is far too late to consider now.

The standard for dismissal is clearly stated as follows:

> The Department considers the dismissal of a case to be a serious sanction, and one which is not lightly granted. In determining whether a case should be dismissed, the Department must not merely consider whether a company has failed to comply with the

[3] Contemporaneously with the Motion to Dismiss and Alternative Renewed Motion, Verizon filed a Motion to Reopen to allow for consideration and inclusion in the record of the new agreement with Sprint. XO does not want to detract from the substance and make a procedural fight about admission of the Sprint agreement. However, XO does note that precedent on motions to reopen, requires that the evidence be new and previously unknown and, more importantly, that the evidence would have a significant impact on the decision. *Bay State Gas Company*, D.T.E. 01-81 (2002) at p. 20. Though the actual signed agreement is relatively recent, the negotiations and the form of contract under negotiation have certainly been known for some time, perhaps as long ago as the hearings, so there may well be a timeliness basis for rejection. More importantly however, as this Opposition argues throughout, the existence of the Sprint agreement is not significant to the decision in this matter on the legal issue presented, so there is no reason to reopen and consider this single additional IP interconnection agreement. (Indeed, while the Verizon-Sprint IP interconnection agreement will be affected *by* the decision in this case, i.e., must it be filed as a section 251 agreement?, its existence will not itself affect the decision on the issues addressed at hearing and in briefs.) In sum, though XO does not file a separate Opposition to the Motion to Reopen, it does urge the Department to reject such Motion for the reasons set forth above.

> letter of a filing request, but also weigh the degree of prejudice to the Department and intervenors resulting from the deficiency. [Citations omitted]
>
> *Colonial Gas Company*, D.P.U.85-160-A (1985) at page 8-9.

In that case and the cases cited therein, the Department granted motions to dismiss only when the petitioning party had failed to conform to some filing requirement in a timeframe that allowed for parties to fully explore and litigate the issue. Specifically, these were utility-initiated cases within set statutory suspension periods, where the Department viewed the utility's actions as restricting the ability of the Department and the intervenors in the context of a full investigation of a given proposal.

Here, the case is a Department-initiated proceeding with no statutory timeframe and all allowable discovery, hearings, and briefings have afforded all parties the process that they have sought. Thus, Verizon is not even in the right "ballpark" much less the right "seat." Dismissal is clearly not proper in this case.

As to Verizon's Alternative Renewed Motion , XO and other parties have already fully addressed that Motion and rest on those filings. To the extent that Verizon seeks another means to the same end, now relying additionally on the fact of the Sprint agreement, all the same arguments set forth herein apply equally to Verizon's ill-conceived, late, redundant, and meritless motion practice. The Alternative Renewed Motion must be rejected.

II. The Existence of the Sprint Agreement Simply Does Not Matter to the Department's Decision upon the Legal Issue of Whether the Agreements in Question are Section 251 Agreements That Must Be Filed Under Section 252

The sole basis for Verizon's Motion to Dismiss seems to be that now, *four* months after its last motion to dismiss (or abate) and almost four months after all briefs were submitted, Verizon has managed to sign *one* more IP interconnection agreement. Motion to Dismiss page 1.

One could easily be tempted to say: "so what" and leave it at that. Unfortunately, important issues are at stake and with them the direction that competitive telecommunications takes in the Commonwealth.

The critical point however, is that the issue for the Department to decide in this proceeding is a legal issue under the Communications Act of 1934, as amended: Are the agreements submitted in this proceeding Section 251 agreements that must be filed with the Department under Section 252 and, importantly, as a result, are they contracts that other carriers can then choose to opt into? As noted in testimony, in hearings and in briefs and responses to Verizon's prior motions, whether or not some carriers have decided to enter into an IP Interconnection agreement with Verizon is simply not dispositive of whether existing and applicable legal standards require filing and review of such agreements, including the specific agreements at issue in this proceeding, with the Department under sections 251 and 252 of the Telecommunications Act. [4]

Verizon attempts to make much of the fact that it has now signed up an IP interconnection agreement with Sprint, one of the intervenors in this case[5]. The identity of what carrier signs such an agreement does not matter to a decision on the legal issue. Further, that Verizon has only signed up *one* more IP interconnection agreement in the last four months almost seems to be a more important fact than the Sprint signing such an agreement. If four months later, with the significant operational benefits of IP interconnection available to all parties, Verizon has only managed to sign up only one more IP interconnection agreements, this

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[4] *See, e.g.*, XO Initial Brief, p. 6; Competitive Carriers' Reply Brief, p. 17; Sprint Initial Brief, p. 46.

[5] Much of its Motion is devoted to a diatribe against Sprint and suggesting that Sprint is playing regulatory games and should be sanctioned. Obviously, none of that is pertinent to the ultimate decision in this proceeding and even to Verizon's misconceived Motion to Dismiss.

strongly suggests that it is indeed very difficult to sign up IP interconnection agreements on reasonable terms and underscores the need for a Department decision in this matter on the scope of Verizon's statutory obligations to file the IP interconnections that are the subject of this proceeding with the Department. To the extent that Verizon is seeking to recast the evidentiary record upon which the Department will base its decision (both by inclusion of the Sprint agreement and by recitation and assertion of the pendency of other negotiations and of the recalcitrance of some of the other parties to this proceeding), that is clearly far too little and far too late. Indeed, the existence of any additional contracts or negotiations not only is immaterial, but it is incomplete as a basis even for consideration by the Department. Specifically, for the Department to determine any relevance of a particular contract or negotiation to the issue of whether *the Comcast agreements* are Section 251 contracts, there would have to be considerably more evidence about the circumstances of each negotiating party and their reasons for signing an agreement and indeed the details of what provisions were under consideration.

But focusing on the Verizon Motions at hand, Verizon itself seems to acknowledge that this solitary additional signing is not the basis for a dismissal of the case. Indeed, Verizon spends much of its Motion to Dismiss disparaging Sprint and suggesting that the Sprint testimony can now be rejected, i.e., Verizon continues to argue the merits of the case which was to be addressed in post-hearing briefs. Of course, if the Sprint signing now months after the conclusion of hearings and briefing is worthy of any consideration (and certainly not sufficient as a grounds for dismissing the case), at the very most, the Department should follow its consistent precedent and simply consider the proper weight to be accorded the Sprint testimony (already in the record) in light of the Sprint contract signing. *New England Telephone*, D.P.U. 86-33-F, pp. 11-15 (1988). In the end, however, whatever weight is given to the Sprint testimony is not really

important to the decision on the legal issue discussed herein and throughout this proceeding. The existence of the Sprint agreement does not counterbalance the weight of Sprint's arguments – or those of XO or any other intervenor – on the legal question.

It is significant from a procedural perspective that this case is an investigation initiated by the Department. The proceeding was not initiated by Sprint, so the fact of Sprint and Verizon reaching an agreement in no way makes this proceeding moot. Indeed, there is a live controversy, the resolution of which is important to several competitive carriers that have been active in this proceeding and potentially to others. Verizon's latest Motions in its redundant allegations of gamesmanship raises the interesting (though irrelevant) question of who is guilty of gamesmanship. If it is so easy to sign up an acceptable IP interconnection agreement with Verizon, one can only assume that the competitive carriers, being rational businesses, would sign up such agreements now, obtain the significant benefits of such contracts that is clear on the record[6], and save their limited resources for other more beneficial purposes.[7] Indeed, it defies logic to suggest that the competitive carriers are playing games in this proceeding because they will benefit from signing the agreements and the asserted "gamesmanship" will only hurt their cause. In contrast, there is evidence that Verizon may well have immediate financial and competitive reasons for making it difficult for competitive carriers to sign IP interconnection

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[6] See XO Initial Brief, p. 6; Tr.1, pp. 74-75, 95-98.

[7] Even if all carriers that participated in this proceeding except one signed IP interconnection agreements with Verizon today, the legal issue raised in this proceeding would still remain and should be addressed by the Department, for the benefit of that one carrier and any carriers not participating in this proceeding. In other words, the Commission should consider whether, say fifteen years ago, there would have been any relevance to the signing of a negotiated non-IP interconnection agreement between Verizon and Sprint in the context of a Section 252 interconnection agreement arbitration between Verizon and another carrier. Would there have been any merit to a Verizon argument that the arbitration was improper because Sprint (and other carriers, for that matter) had negotiated agreements rather than arbitrating them?

agreements.[8] Further, if Verizon's assertions were true that it is the party making IP interconnection agreements happen, then if it is not playing games, Verizon should simply make public the few IP interconnection agreements that have been signed and announce that it will allow interested carriers to sign up on the same terms, as required by Sections 251 and 252 of the Communications Act, *i.e.* in the regulatory context to "opt-in" under Section 252(i). Indeed, if Verizon is not interested in discriminating between carriers and if Verizon truly wants to avoid the burdens on all of the current proceeding, then the simple filing of the existing agreements and the "opt-in" process is the solution. More significantly, this is the result that Congress required in the 1996 pro-competition amendments to the Communications Act adopting Sections 251 and 252.

While not germane to the legal issue presented under Section 252, the Department may take note of the total lack of evidence that there will be harm to the competitive telecommunications marketplace, or to Massachusetts end-users, of a Department ruling that the agreements in question are Section 251 agreements that parties can opt-into if they choose. Indeed, if IP interconnection agreements are Section 251 agreements, two results are possible. Either most carriers will opt into one or another IP interconnection agreement (which has become common with non-IP interconnection Section 251 agreements), resources will not be wasted in arbitration and litigation, and all parties will benefit from more widespread IP interconnection; or parties will choose to negotiate and, potentially, arbitrate issues. If the latter occurs, the Department can certainly control the timing and resolution of such proceedings, so that waste and inefficiencies can be minimized, if not avoided altogether.

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[8] See XO Reply Brief, p. 9; Tr.1, pp. 132-133; Tr. 2, p. 125; Sprint Exh. 1, p. 28; Exh CC-1, pp. 8-9.

The only proper approach for the Department at this juncture is to continue its review of the record and the briefs and determine the central issue of the case -- whether the IP agreements in question in this case are subject to sections 251 and 252. The Department should not permit itself to be distracted by the Motion to Dismiss or Alternative Renewed Motion or the signing of the Sprint-Verizon agreement.

III. Important Legal Issues Should Be Decided Now

The Department, in its ruling on the Motion for Summary Judgment filed by the Competitive Carriers in March, essentially decided not to grant the Summary Judgment because of the importance of the issues at hand and because this was a significant case of first impression. That same theory supports a denial of the Verizon Motion to Dismiss now. Simply too much work has been done at this point by carriers participating in this proceeding as intervenors with whom Verizon has not entered into an IP interconnection agreement, and important competitive issues remain that are unaffected by the signing of the Sprint agreement and that must be resolved. If those issues regarding statutory rights and obligations are not resolved here and now, they will simply arise again and require significant re-litigation of the same issues.

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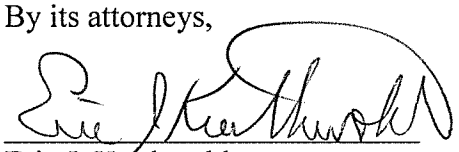
CONCLUSION

In sum, the Department must deny Verizon's meritless Motion to Dismiss and the Alternative Renewed Motion. It provides no reasoned basis to throw away considerable work by the parties and the Department and to ignore the important issue, i.e. whether Verizon's IP interconnection agreements with Comcast are subject to Sections 251 and 252 of the Telecommunications Act. The Department should restrict its consideration to that issue, free from the diversion of whether one or another carrier participant has signed an agreement with Verizon, and decide promptly that the Verizon-Comcast IP interconnection agreements at issue in this proceeding are Section 251 contracts and that they must be filed with the Department pursuant to Section 252 and be available for review and opt-in by all.

Respectfully submitted,

XO COMMUNICATIONS
By its attorneys,



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