

The Importance of Section 252 to Competition and the Public Interest: The Continuing State Role in the Age of IP Networks

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Summary

The central purpose of the federal Telecommunications Act of 1996 (“Act”) is “to rapidly accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”² This is not a static goal, but a continuing commitment to open markets and assuring nondiscriminatory interconnection with incumbent networks.

Key elements of the Act can be found in the administrative provisions of Section 252 governing the review of, and opt-in rights to, publicly-filed interconnection agreements. Public filing is needed to ensure that such agreements – agreements that form the very *foundation* of local competition – are nondiscriminatory and in the public interest. As the FCC stated: “Compliance with section 252(a)(1) [the filing of voluntary agreements] is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors.”³

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The purpose of this paper is to remind state commissions that it is their *threshold responsibility* under federal law to determine which ILEC agreements are subject to Section 252; to require that these agreements be filed; and to ensure such ILEC agreements are nondiscriminatory, in the public interest, and available for opt-in by any competitors. Most importantly, Section 252 (and the state role it establishes) is *technology neutral*, and applies with equal force to the IP networks that will form the PSTN of the future as it has applied to the TDM architecture of the past.⁴ It is the availability of opt-in agreements that has enabled new entrants to successfully offer the

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² *Conference Report to Accompany S. 652*, Report 104-458, House of Representatives, January 31, 1996, page 1.

³ *In re Qwest Corp Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, FCC 04-57, File No. EB-03-IH-0263 (Mar. 12, 2004) at ¶ 46.

⁴ This paper addresses IP Interconnection used to exchange voice traffic in IP format and does not encompass arrangements addressing Internet traffic.

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services that compete directly with incumbents and other competitors.⁵

This reminder is particularly timely because Verizon has publically acknowledged that its ILEC affiliates *have* agreements addressing the exchange of voice service in IP format (*i.e.*, providing IP interconnection), but it has effectively evaded the requirements of Section 252 by shielding such contracts (with two notable exceptions) from state commission review. Most recently, Verizon California has revealed that it has (at least) eleven unfiled IP-to-IP agreements for the exchange of voice traffic with other CLECs and wireless carriers,⁶ as well as an agreement with its affiliate MCI Communications Services, Inc. (d/b/a Verizon Business Services).⁷ In addition, Verizon California has revealed that it exchanges its FiOS Digital Voice traffic with other Verizon ILECs *without* any written agreement at all.⁸

Although this issue is currently before state commissions in Massachusetts and California,⁹ the concern expressed here extends to all states where Verizon is an incumbent local exchange carrier (“ILEC”) because it is highly likely that its unfiled agreements exist in those states as well. Moreover, it should be the duty of *every* state to adopt procedures to review ILEC contracts as IP interconnection becomes more common, and to make clear its commitment to Section 252’s unambiguous requirement that it is the *state commission* (and not the ILEC) that decides which ILEC agreements are Section 252 Interconnection Agreements that must be filed. As the FCC noted when proposing to levy the largest fine (to date) on Qwest for failing to file agreements:

⁵ In addition to discrimination and higher interconnection costs, competitors and new entrants will face protracted and expensive negotiations with large ILECs for IP interconnection—interconnection that they must attain—if large ILECs do not adhere to the Act. Section 251 and 252’s provisions are intended to address these disadvantages.

⁶ *Response of Verizon California Inc. to First Set of Data Requests of The California Association of Competitive Telecommunications Companies*, Public Utilities Commission of the State Of California, Application 15-03-005, Item 15.

⁷ *Ibid.* Item 17.

⁸ Although not the subject of this paper, it is unclear as to how Verizon’s ILEC affiliates comply with affiliated transactions rules when interstate FiOS Digital Voice calls are being terminated on each other’s networks without any written agreement memorializing the terms of the arrangement.

⁹ See *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 and *In the Matter of the Joint Application of Frontier Communications Corporation, Frontier Communications of America, Inc. (U5429C), Verizon California, Inc. (U1002C), Verizon Long Distance LLC (U5732C), and Newco West Holdings LLC for Approval of Transfer of Control Over Verizon California, Inc. and Related Approval of Transfer of Assets and Certifications*, Public Utilities Commission of the State Of California, Application 15-03-005 (Filed March 18, 2015).

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Until an agreement is filed, however, the state commission would not be in a position to approve, reject, or determine whether a certain type of agreement does not require filing¹⁰

This same conclusion holds true today. So long as Verizon (and perhaps other unknown ILECs) are permitted to decide for themselves which contracts must be filed, state commissions will have no ability to ensure that the nondiscrimination provisions operate as Congress intended.

The Importance of Section 252 to Competition

There is nothing more fundamental to the Act than the provisions of Section 252 that require the filing of Interconnection Agreements for approval. The public filing of Interconnection Agreements is absolutely essential to achieving the Act's core requirement that such agreements be nondiscriminatory and in the public interest.

The importance of Section 252 in this regard was well explained by a Federal District Court in Utah (upholding a decision by the Utah Commission requiring that Qwest file certain agreements that had been withheld) when it stated:

Congress also set up mechanisms to prevent ILEC discrimination against less favored CLECs, including Section 252's filing and state commission approval requirement.

The filing and state commission approval requirement, which results in public disclosure of the terms of agreements between an ILEC and a CLEC, ensures that ILECs do not discriminate against CLECs that are not parties to the agreement. Similarly, it gives the CLECs that are not parties to the agreement the opportunity to resist discrimination by allowing them to fully evaluate and request the same terms given to the contracting CLEC.¹¹

State commissions are responsible for ensuring that ILEC interconnection agreements are nondiscriminatory and in the public interest.¹² Clearly such a role can

¹⁰ *In the Matter of Qwest Corporation Apparently Liable for Forfeiture*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 5169, ¶ 34 (2004).

¹¹ *Order and Memorandum Decision*, *Qwest Corporation v. Public Service Commission of Utah*, Case No. 2:04-CV-1136 TC, United States District Court, D. Utah, Central Division, November 14, 2005.

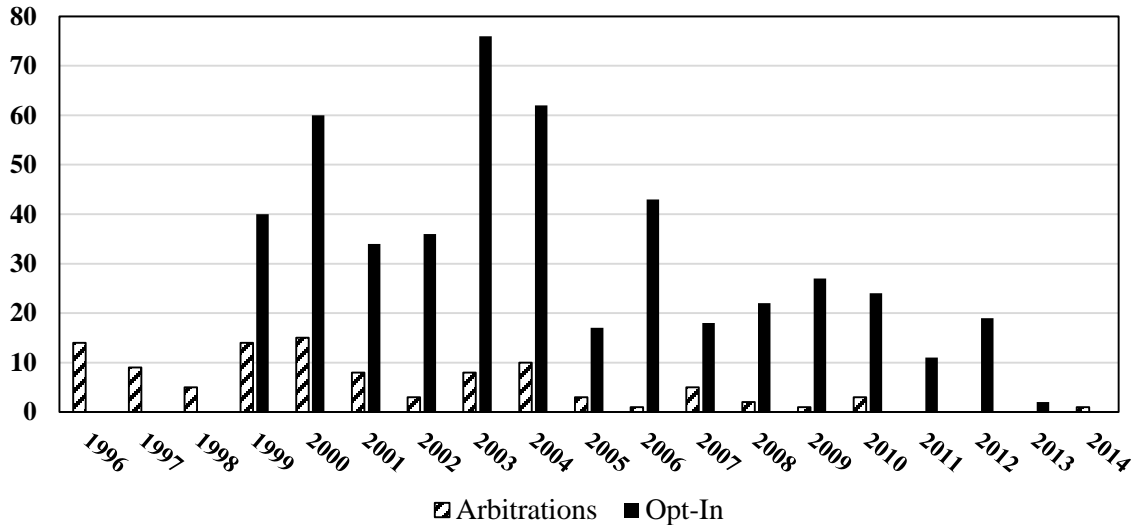
¹² Section 252(e)(2)(A) provides that a State commission may reject a voluntary agreement if (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.

only be fulfilled if these ILEC agreements are *filed* and made *public*. Interconnection is key to competition and, even more fundamentally, the seamless operation of networks upon which we all rely to not only connect with neighbors and businesses, but with doctors and emergency services.

Moreover, the opt-in protection for competitors afforded by Section 252(i) not only prevents discrimination, it provides the foundation of most competitive activity. For instance, since 1999 (once there *were* interconnection agreements for CLECs to opt-in), 87 percent of the agreements with ILECs in Florida have been implemented through the opt-in of an existing agreement without litigation or needless negotiation.

The fastest path to widespread IP interconnection (and the lower costs and more efficient service delivery it enables) is the public filing of the agreements that already exist.

Arbitrations vs. Opt-In Agreements
(Number of Agreements -Florida)



The central purpose of the Act is to accelerate the deployment of advanced technologies, an outcome that would be more rapidly achieved with the widespread interconnection of advanced IP-based networks providing PSTN-quality phone services.¹³ The public filing of Verizon’s confidential IP agreements would not only reveal (and thus end) any potential discrimination, as shown in the above Figure, offering CLECs the ability to opt-in can be expected to greatly increase the number of agreements with Verizon. The fastest path to widespread IP interconnection (and the lower costs and more efficient service delivery it enables) is the public filing of the agreements that already exist.

¹³ For a discussion of the importance of IP interconnection to the transition of the PSTN to an IP architecture see *The Transition to an All-IP Network: A Primer on the Architectural Components of IP Interconnection*” NRRI, May 2012.

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Verizon has made clear that it intends to maintain each of its agreements with interconnected VoIP providers in secret, so that *only* Verizon knows what terms, conditions and prices apply to each competitor.¹⁴ There is little to be gained from such secrecy, however, unless Verizon's goal is to provide one competitor terms, conditions and/or prices that it intends to deny another. Verizon even goes so far as to claim that its *generic* IP template interconnection agreement is confidential,¹⁵ a designation that can serve no purpose other than to hobble the public debate concerning its obligations.

The States Have the Threshold Responsibility to Determine Whether an Agreement is an Interconnection Agreement That Must Be Filed

The debate as to which ILEC agreements must be filed with state commissions is not new. In 2002, Qwest asked that the FCC provide guidance as to what types of its contractual arrangements should be subject to the filing requirements of Section 252. Importantly, in its Order addressing Qwest's request,¹⁶ the FCC provided guidance as to the analysis that should be applied and, just as importantly, specifically tasked the state commissions with the responsibility to make the initial determination:

[W]e believe that the state commissions should be responsible for applying, in the first instance, the statutory interpretation we set forth today to the terms and conditions of specific agreements. Indeed, we believe this is consistent with the structure of section 252, which vests in the states the authority to conduct fact-intensive determinations relating to interconnection agreements.¹⁷

Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an

¹⁴ *Response of Verizon California Inc. to Third Set of Data Requests of The California Association of Competitive Telecommunications Companies*, Public Utilities Commission of the State Of California, Application 15-03-005, Item 1B:

Other providers are not permitted to review the agreements with the carriers listed in response to CALTEL 1.15 [*i.e.*, the executed agreements], because those agreements are treated confidentially.

¹⁵ Confidential Attachment CALTEL_VZ1.15_Attachment 1, *Response of Verizon California Inc. to First Set of Data Requests of The California Association of Competitive Telecommunications Companies*, Public Utilities Commission of the State Of California, Application 15-03-005.

¹⁶ *In the Matter of 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)*, WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276, (Rel. October 4, 2002) ("*Qwest Declaratory Ruling*") (http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-02-276A1.pdf).

¹⁷ *Qwest Declaratory Ruling* at ¶7.

“interconnection agreement” and, if so, whether it should be approved or rejected.¹⁸

The *Qwest Declaratory Ruling* makes clear that the FCC looks to state commissions to make the initial determination as to whether particular ILEC agreements are Section 252 Interconnection Agreements. While some ILECs (such as Verizon) operate

State commissions will only prevent the evasion of their authority if they adopt procedures for the review of ILEC IP interconnection agreements to determine which must be filed.

as though *calling* an agreement a “commercial agreement” excuses it from the operation of Section 252, it is the state commission that is responsible for this determination.

Of course, Verizon’s behavior creates the ultimate “Catch 22.” By withholding its contracts from state commission review under claims of confidentiality and self-servingly labeling as a “commercial agreement,” it is Verizon (and perhaps other ILECs with unfiled agreements) that is deciding which of its agreements must be filed and not the state commission. State commissions will only prevent this evasion of their authority if they adopt procedures for the review of ILEC IP agreements to determine which must be filed.¹⁹

The Standards that Define a Section 252 Interconnection Agreement

In addition to making it clear that state commissions have responsibility to determine in the first instance which ILEC contracts must be filed, the *Qwest Declaratory Ruling* also provides state commissions guidance as to how they should determine whether an ILEC agreement is an Interconnection Agreement under Section 252. As the FCC explained, any ILEC agreement that:

... creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).²⁰

Notably, the FCC’s view of what types of provisions relate to an incumbent ILECs’ duties is broad, recognizing that “on its face, section 252(a)(1) does not ... limit the types of agreements that carriers must submit to state commissions.”²¹ As such, the FCC concluded that even “agreements addressing dispute resolution and escalation

¹⁸ *Ibid.* at ¶10.

¹⁹ This discussion addressing the state role is limited to those agreements that address the exchange of voice traffic.

²⁰ *Qwest Declaratory Ruling* at ¶ 8. Emphasis in the original.

²¹ *Ibid.*

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provisions relating to the obligations set forth in sections 251(b) and (c) are appropriately deemed interconnection agreements,”²² even though such arrangements may not directly address listed duties.

Beyond this guidance, the FCC determined that if additional direction to the industry was necessary, it would again look to state commissions first:

[W]e decline to establish an exhaustive, all-encompassing “interconnection agreement” standard. The guidance we articulate today flows directly from the statute and serves to define the basic class of agreements that should be filed. We encourage state commissions to take action to provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for their approval.²³

The Time for “Further Clarity” Has Arrived

With Verizon acknowledging that its ILEC operations have (at least) eleven unfiled IP-to-IP agreements for the exchange of certain voice traffic with other CLECs and wireless carriers, as well as its agreement with its affiliate Verizon Business Services, it is time for state commissions to assume their statutory duty and review these agreements to determine whether they are, in fact, Interconnection Agreements that must be filed.

This task should be relatively simple, for any ILEC agreement that “creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).”²⁴ Contracts are (generally) written so as to be *clear* as to what they address, so it should not be difficult to determine whether, for instance, a specific ILEC agreement addresses number portability or one of the other listed topics that require that the contract be filed as an Interconnection Agreement. Indeed, the answer may be no more difficult than reviewing the “Table of Contents” that lists where to find certain topics that are addressed by an agreement.

Verizon’s contracts remain confidential, but parties that have reviewed the agreements have concluded that they satisfy the analysis in the *Qwest Declaratory Ruling* and are, in fact, Section 252 Interconnection Agreements.²⁵ It is not the purpose of this

²² *Ibid.* at ¶ 9.

²³ *Ibid.* at ¶ 10. (Emphasis added)

²⁴ *Ibid.* at ¶ 8. Emphasis in the original.

²⁵ See Direct Testimony of Joseph Gillan on Behalf of the Competitive Intervenors, Massachusetts Department of Telecommunications and Cable, Docket TC 13-6 and Reply Testimony of Joseph Gillan on behalf of the Joint CLECs, California Public Utilities Commission, Application 15-03-005.

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paper, however, to argue the *merits* as to whether Verizon's agreements are required to be filed under Section 252. Rather the critical point is that it is not Verizon's *choice* to make. State commission's bear this responsibility and it is important to competition that state commissions fulfill their statutory responsibility and make it clear to all ILECs that they expect to review any such agreements to determine whether they should be filed and, if they have a Verizon ILEC in their state, to directly order Verizon to provide any such agreement (if it applies in that state) immediately.²⁶

Moreover, Verizon's claims of confidentiality prevent any meaningful public discussion (such as would be offered by this paper) of its contracts and arguments, because the terms and conditions of these agreements are secret. It is possible, however, to get a sense of what the contracts *may* cover by considering the credibility of the legal argument offered to justify their secrecy. Specifically, consider the following argument offered by Verizon as a justification for withholding at least one of its agreements from state commission review.

Verizon's claim that the FCC eliminated the statutory obligations of Section 252 through a footnote preemption should be a red flag warning to state commissions that these contracts deserve serious review.

As a critical background point, it is useful to recall that FCC unambiguously brought all IP-PSTN traffic under Section 252 (when exchanged in TDM) in the *ICC Transformation Order*, establishing a set of default rates that apply to the traffic's termination.²⁷ Consequently, there is no question that IP *calls* are subject to Section 252, the only open issue involves the method of exchange. Within that 759-page Order, however, appears the following sentence and footnote:

²⁶ Such direction would be particularly timely in states such as Texas and Florida where Verizon may be transferring its agreements to Frontier, effectively enlisting Frontier as an accomplice to its strategy. As referenced earlier, this issue has been raised before the California PUC, which must approve the transfer under California law.

²⁷ See *In the Matter of Connect America Fund*, WC Dkt. No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, ¶ 954 ("*ICC Transformation Order*") (released Nov. 18, 2011):

Although the Commission has not classified interconnected VoIP services or similar one-way services as "telecommunications services" or "information services," VoIP-PSTN traffic nevertheless can be encompassed by section 251(b)(5).

The term "VoIP-PSTN" is defined as traffic that either originates and/or terminates in IP format (but which is exchanged in TDM format) (47 U.S.C § 51.913) and thus applies to every combination of formats at the end-point of a call.

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The transition we adopt sets a default framework, leaving carriers free to enter into negotiated agreements that allow for different terms.¹²⁹⁰

FTN 1290 We agree with commenters that “[c]arriers should be free to negotiate commercial agreements that may depart from the default regime.” Verizon *USF/ICC Transformation NPRM* Comments at 7.

From this single sentence and footnote, Verizon claims that the FCC completely adopted – without further discussion or analysis – Verizon’s desire that all future agreements exist outside of the Act. According to Verizon, the “FCC’s endorsement [through the above citation] of Verizon’s proposal for commercial agreements was thus an endorsement of commercial agreements entered outside of § 252, with its requirements of state commission arbitration and tariff-like opt-in requirements.”²⁸ Moreover, Verizon claims that the state commissions are bound by this determination,²⁹ which also frees Verizon from “any regulatory mandate to negotiate ... in the first place.”³⁰

Clearly, this is absurd. The Act has *always* encouraged commercial negotiation by providing ILECs and CLECs the opportunity to reach voluntary agreements. Indeed, Section 252’s very *first* section addresses agreements reached with ILECs through voluntary negotiations. Importantly, however, the Act nevertheless requires that such agreements be filed for approval with state commissions to prevent discrimination.

Verizon argues the FCC engaged in this first-of-its-kind “footnote preemption,” despite the FCC stating in the very same Order that “we move traffic from the access charge regime to the section 251(b)(5) framework, where payment terms are agreed to pursuant to an interconnection agreement,”³¹ and that the “duty to negotiate in good faith has been a longstanding element of interconnection requirements under the Communications Act and does not depend upon the network technology underlying the interconnection, whether TDM, IP, or otherwise.”³²

It is simply implausible that the FCC cast aside the entire Section 252 regime and its *statutory* direction to state commissions by making a footnote reference to a Verizon pleading. Although the terms of Verizon’s agreements remain secret, the magnitude of an impropriety can be inferred by the absurdity of the legal argument used as justification. Verizon’s claim that the FCC eliminated the obligations of Section 252

²⁸ *Post-Hearing Reply Brief of Verizon MA*, Massachusetts Department of Telecommunications and Cable, D.T.C. 13-6, June 20, 2014, at 26-27.

²⁹ *Ibid.* at 25.

³⁰ *Ibid.* at 26.

³¹ *ICC Transformation Order* at ¶ 825. (Emphasis added)

³² *Ibid.* at ¶ 1101.

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through a footnote preemption should be a red flag warning to state commissions that these contracts deserve serious review.

Conclusion

The most fundamental protection against nondiscriminatory interconnection is the public filing, review and opt-in provisions of Section 252. FCC Orders make clear that a threshold duty of state commissions is to determine whether an ILEC contract is a 252 Interconnection Agreement, and thus subject to these protections. This duty is technology neutral and is just as important when voice calls are exchanged between an ILEC and its competitors in IP as it is when the traffic is exchanged in TDM (just as it was equally important when the traffic was analog, before the evolution to digital formatting occurred).

Verizon has publicly admitted that it has (at least) eleven such unfiled contracts, plus other arrangements with its affiliates. There is a point at which silence becomes acquiescence and inaction becomes acceptance. It is troubling that continued inaction by state commissions will be interpreted (by the ILECs) as an endorsement of Verizon's view.

There is a point at which silence becomes acquiescence and inaction becomes acceptance. Now is the time for state commissions to review the ILEC IP traffic exchange agreements that exist, and to adopt procedures to review those contracts that will come.

Now is the time for state commissions to review the ILEC traffic exchange agreements that exist, and to adopt procedures to review those contracts that will come in the future. There is no single act that will accelerate the transition to IP faster than the states enforcing Section 252, as is their role under the law and FCC Order.