COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In the Matter of	)	
	)	
Global NAPs, Inc.	)	
	)	
Petition for Arbitration Pursuant to Section 252(b)	)	
of the Telecommunications Act of 1996 to	)	D.T.E. 02-45
Establish an Interconnection Agreement with	)	
Verizon New England Inc. d/b/a Verizon	)	
Massachusetts f/k/a New England Telephone and	)	
Telegraph Company d/b/a Bell Atlantic-Massachusetts	)	
	)	

DIRECT TESTIMONY
OF JONATHAN B. SMITH ON BEHALF OF
VERIZON MASSACHUSETTS

September 10, 2002

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I. WITNESS BACKGROUND AND OVERVIEW

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Jonathan B. Smith. My business address is 1095 Avenue of the Americas, New York, New York 10036.

Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?

A. I am employed by Verizon Services Corp. as Executive Director – Local Interconnection Billing and Wholesale Billing Support. In that position, I am responsible for the review and payment of invoices received for local interconnection traffic and facilities, as well as for support of the Wholesale Billing and Collections Organization.

Q. PLEASE SUMMARIZE YOUR EDUCATIONAL BACKGROUND AND EXPERIENCE IN THE TELECOMMUNICATIONS INDUSTRY.

A. I have more than 20 years of experience in the telecommunications industry as an employee of Verizon and its predecessor companies. Prior to assuming my present position in August 2001, I have held positions of increasing responsibility in billing and collection services, resale services marketing, customer services, and outside plant engineering. I received a Bachelor of Science degree in Engineering from Northeastern University in 1979 and a Masters of Business Administration from Babson College in 1992.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to address Issue 9 (Audit Rights) that Global NAPs Inc. ("GNAPs") identified in its Petition for Arbitration, including the disputed contract language associated with this issue:

Issue No.	Statement of Issue	Contract Sections Identified by GNAPs as Related to Issue
Issue 9	Should the Interconnection Agreement Include Language That Allows Verizon to Audit GNAPs' "Books, Records, Documents, Facilities And Systems"?	Verizon Redline Interconnection Agreement GT&C § 7; Additional Services § 8.5.4; Interconnection Attachment §§ 6.3, 10.13.

Q. PLEASE SUMMARIZE YOUR TESTIMONY.

A. There are four sections in the Verizon Massachusetts ("Verizon") proposed interconnection agreement that address audit rights.

?? Verizon's Redline Interconnection Agreement General Terms and Conditions § 7 provides audits for the purpose of evaluating the accuracy of the audited party's bills. The proposed language is as follows:

> 7.1 Except as may be otherwise specifically provided in this Agreement, either Party ("Auditing Party") may audit the other Party's ("Audited Party") books, records, documents, facilities and systems for the purpose of evaluating the accuracy of the Audited Party's bills. Such audits may be performed once in each Calendar Year; provided, however, that audits may be conducted more frequently (but no more frequently than once in each Calendar Quarter) if the immediately preceding audit found previously uncorrected net inaccuracies in billing in favor of the Audited Party having an aggregate value of at least $1,000,000.
>
> 7.2 The audit shall be performed by independent certified public accountants selected and paid by the Auditing Party. The accountants shall be reasonably acceptable to the Audited Party. Prior to commencing the audit, the accountants shall execute an agreement with the Audited Party in a form reasonably acceptable to the Audited Party that protects the confidentiality of the information disclosed by the Audited Party to the

accountants. The audit shall take place at a time and place agreed upon by the Parties; provided, that the Auditing Party may require that the audit commence no later than sixty (60) days after the Auditing Party has given notice of the audit to the Audited Party.

7.3 Each Party shall cooperate fully in any such audit, providing reasonable access to any and all employees, books, records, documents, facilities and systems, reasonably necessary to assess the accuracy of the Audited Party's bills.

7.4 Audits shall be performed at the Auditing Party's expense, provided that there shall be no charge for reasonable access to the Audited Party's employees, books, records, documents, facilities and systems necessary to assess the accuracy of the Audited Party's bills.

?? Verizon's Redline Interconnection Agreement Additional Services § 8.5.4 provides for audits to ensure that GNAPs complies with legal requirements for access to and use of Verizon Operations Support Systems ("OSS").

8.5.4 <u>Audits</u>:

8.5.4.1 Verizon shall have the right (but not the obligation) to audit GNAPs to ascertain whether GNAPs is complying with the requirements of Applicable Law and this Agreement with regard to GNAPs 's access to, and use and disclosure of, Verizon OSS Information.

8.5.4.2 Without in any way limiting any other rights Verizon may have under this Agreement or Applicable Law, Verizon shall have the right (but not the obligation) to monitor GNAPs 's access to and use of Verizon OSS Information which is made available by Verizon to GNAPs pursuant to this Agreement, to ascertain whether GNAPs is complying with the requirements of Applicable Law and this Agreement, with regard to GNAPs 's access to, and use and disclosure of, such Verizon OSS Information. The foregoing right shall include, but not be limited to, the right (but not the obligation) to electronically monitor GNAPs 's access to and use of Verizon OSS Information which is made available by Verizon to GNAPs through Verizon OSS Facilities.

8.5.4.3 Information obtained by Verizon pursuant to this Section 8.5.4 shall be treated by Verizon as Confidential Information of GNAPs pursuant to Section 10 of the General Terms and Conditions; provided that, Verizon shall have the right (but not the obligation) to use and disclose information obtained by Verizon pursuant to this Section 8.5.4 to enforce Verizon's rights under this Agreement or Applicable Law.

?? Verizon's Redline Interconnection Agreement Interconnection Attachment § 6.3 provides for audits of traffic data for interconnection trunks.

6.3 Each Party reserves the right to audit all Traffic, up to a maximum of two audits per calendar year, to ensure that rates are being applied appropriately; provided, however, that either Party shall have the right to conduct additional audit(s) if the preceding audit disclosed material errors or discrepancies. Each Party agrees to provide the necessary Traffic data in conjunction with any such audit in a timely manner.

?? Verizon's Redline Interconnection Agreement Interconnection Attachment § 10.13 provides for audits of access recording in the context of meet-point billing arrangements.

10.13 Either Party may request a review or audit of the various components of access recording up to a maximum of two (2) audits per calendar year. All costs associated with each review and audit shall be borne by the requesting Party. Such review or audit shall be conducted subject to Section 7 of the General Terms and Conditions and during regular business hours. A Party may conduct additional audits, at its expense, upon the other Party's consent, which consent shall not be unreasonably withheld.

It is standard practice to include audit requirements in interconnection agreements. Moreover, Verizon's proposed audit provisions are reasonably tailored to their respective purposes, with provisions that protect confidential business information and prevent needless intrusion on each party's business.

II. ISSUE 9: AUDIT RIGHTS

Q. WHY ARE THESE BILLING AUDIT PROVISIONS NECESSARY?

A. Verizon does not seek the billing audit rights as a competitor of GNAPs, but as a customer. Without audit rights, Verizon would be required to accept GNAPs' charges without the ability to verify their accuracy or appropriateness. This is unacceptable from a business perspective. The supplier (billing party) reasonably should be expected to carry the burden to justify its charges to the customer (the billed party).

Verizon has a history with GNAPs that gives Verizon further incentive to require an audit provision in the interconnection agreement. In New York, Verizon uncovered what it believed to be an apparent illegal billing scheme GNAPs implemented to overcharge Verizon millions of dollars under the guise of reciprocal compensation. *See* Verizon's Complaint filed in *New York Telephone Company, et al. v. Global NAPs, Inc., et al.,* No. 00 Civ. 2650 (FB) (RL) (E.D.N.Y.). Moreover, a California federal court found that a GNAPs' principal "acted in bad faith, vexatiously, wantonly and for oppressive reasons" and "perpetrated a fraud on the [California Federal] Court" in the context of a civil breach of contract lawsuit. *See* August 31, 1995 Order of the United States District Court for the Central District of California in *CINEF/X, INC. v. Digital Equipment Corporation,* No. CV 94-4443 (SVW (JRx)) at 31. It is not reasonable to expect Verizon to simply trust that GNAPs will always act reasonably under the parties' agreement.

Q. PLEASE EXPLAIN HOW VERIZON'S PROPOSED AUDIT PROVISIONS ALLOW EACH PARTY TO VERIFY THE ACCURACY OF BILLING INFORMATION.

A. Verizon's proposed General Terms and Conditions § 7 provides a mechanism for Verizon and GNAPs to ensure the accuracy of each other's bills. The highlights of Verizon's audit provisions include:

- ?? The right to audit books, records, facilities and systems ***for the purpose of evaluating the accuracy of the audited party's bills.***
- ?? No more than annual audits generally, with an exception if previous audit found uncorrected net billing inaccuracies of at least $1,000,000 in favor of the audited party.
- ?? Audit performed by independent certified public accountants selected and paid by the auditing party, but acceptable to the audited party.

?? Confidentiality agreement to protect the confidentiality of the information disclosed by the audited party to the accountants.

?? Audits at the auditing party's expense.

Q. DOES VERIZON PROPOSE UNLIMITED ACCESS TO RECORDS?

A. No. Verizon's audit provisions are not the "unreasonably broad" mechanism that would disclose GNAPs' "proprietary business records to Verizon," as GNAPs complains on page 31 of its Petition. Rather, Verizon's proposed § 7.1 defines the purpose of the audit as evaluating the "accuracy of the Audited Party's bills," and this purpose circumscribes the parties' rights and obligations in this section of the contract. Section 7.3 provides that the auditing ***accountant*** – not Verizon's personnel – would have access only to records, documents, employees, books, facilities and systems "necessary to assess the accuracy of the Audited Party's bills," not all business records maintained by GNAPs.

Q. GNAPS CLAIMS THAT VERIZON'S AUDIT PROVISIONS COMPROMISE GNAPS' CONFIDENTIAL BUSINESS INFORMATION. DO YOU AGREE?

A. No. Verizon's proposal applies equally to both parties, not just GNAPs. Thus, if GNAPs' purported concern was legitimate, Verizon would have the same concern. Neither party, however, is obligated to provide records directly to the other. Rather, pursuant to § 7.2, the "audit shall be performed by independent certified public accountants" selected and paid by the Auditing Party who are also acceptable to the Audited Party. The auditor is required to execute a confidentiality agreement to protect the audited party's confidential information.

Q. ARE THERE OTHER SAFEGUARDS AGAINST ABUSE UNDER VERIZON'S PROPOSED AUDIT PROVISIONS?

A. Yes. Verizon's proposed § 7.4 requires the auditing party to bear the expense of the audit, thus ensuring that audits will not be requested without reasonable cause. In addition, § 7.1 limits the frequency of audits to one per calendar year.

Q. ARE VERIZON'S AUDIT PROVISIONS TYPICAL IN THE INDUSTRY?

A. Yes. Audit provisions that allow the parties to audit each other's books and records pertaining to the services provided under the interconnection agreement are typical in Massachusetts.[1] These kinds of provisions are common business practice to safeguard the right to an accurate bill.

Q. VERIZON ALSO PROPOSES THAT THE PARTIES BE ABLE TO AUDIT ONE ANOTHER'S TRAFFIC DATA. WHY ARE THESE PROVISIONS REASONABLE?

A. The ability to audit one another's traffic data is a crucial component in assessing the accuracy of the other party's bill. For example, assume that GNAPs sends Verizon a bill for reciprocal compensation based upon the amount of traffic that GNAPs terminates from Verizon. In order to accurately assess these bills, it is necessary for Verizon to audit the traffic data GNAPs uses to create these bills. Not only would ***Verizon*** have the right to audit GNAPs' traffic data at least once a year, but Verizon's proposed §§ 6.3 and

[1]Agreement between Verizon New England and Lightwave Communications Inc., dated as of August 7, 2002, General Terms and Conditions ("GT&C") §§ 7.1 - 7.4; Agreement between Verizon New England and Amerivision Communications Inc., dated as of May 8, 2002, General Terms and Conditions ("GT&C") §§ 7.1 - 7.4;

10.13 of the Interconnection Attachment provide ***GNAPs*** with the same ability to audit Verizon's traffic data.

Q. HAS GNAPS PROPOSED LANGUAGE FOR SECTIONS 6.3 AND 10.13 OF THE INTERCONNECTION ATTACHMENT?

A. No. Although GNAPs' Petition indicates that § 6.3 of the Interconnection Attachment is disputed, it has not proposed any modifications to the language appearing in § 6.3 of the Interconnection Attachment. Section 6.3 appears in unmarked agreed text in both the draft interconnection agreement submitted with its Petition and the draft interconnection agreement submitted with Verizon's Response.

With respect to § 10.13, GNAPs apparently proposes to delete the section in its entirety but it offers no language in the alternative. For the reasons I mentioned above, § 10.13 is a crucial audit section that must appear in the final agreement as proposed by Verizon.

Q. **HAS GNAPS PROPOSED LANGUAGE FOR SECTION 8.5.4 OF THE ADDITIONAL SERVICES ATTACHMENT?**

A. No. Similar to § 6.3 of the Interconnection Attachment, GNAPs' Petition identifies §8.5.4 of the Additional Services Attachment as related to Issue 9 but the Section appears as undisputed in both the interconnection agreement draft attached to GNAPs' Petition and the draft attached to Verizon's Response.

Agreement between Verizon New England and Access Point Inc, dated as of August 29, 2001, General Terms and Conditions ("GT&C") §§ 7.1 - 7.4.

Q. WHY IS § 8.5.4 NECESSARY?

A. Hundreds of CLECs, CMRS providers, and IXCs rely on access to Verizon's OSS to serve their customers. Section 8.5.4 provides Verizon with the right to monitor ***its*** OSS so that all carriers, not just GNAPs, receive access to this system. This is essential to Verizon because a CLEC could establish a program to repetitively access Verizon's OSS to mine proprietary information. By engaging in such conduct, a CLEC could impair Verizon's OSS. Verizon's proposed § 8.5.4 thus not only protects Verizon's interest in ensuring GNAPs uses OSS in the intended manner, but ensures reliable OSS access for all CLECs.

In addition, Verizon's OSS contains customer proprietary network information ("CPNI"). Verizon is obligated to protect CPNI and to release it only to authorized parties. *See* 47 U.S.C. §§ 222, 251. To fulfill that obligation, Verizon must be able to audit GNAPs' use of Verizon's database.

Q. HAVE ANY OTHER STATE COMMISSIONS RULED ON THIS ARBITRATION ISSUE BETWEEN VERIZON AND GNAPS?

A. Yes. On May 24, 2002, the State of New York Public Service Commission ruled in Verizon's favor on this issue, stating, "We adopt the Verizon position. Audit provisions are, of course, standard language in contracts of this type. GNAPs appears to have misconstrued the breadth of the audit provisions; reasonable protections are built in."[2] Previously, on May 15, 2002, the Public Utilities Commission of the State of California

reached the same result, ruling, "It is a standard practice in ICAs to include audit requirements. This does not mean that a carrier has limitless opportunities to make intrusive audits of its competitor's records. However, given the nature of the agreement between the parties, there is a need to be able to audit the traffic exchanged between the parties."[3] With one minor edit to Verizon's proposed audit terms, the California Commission – like the New York Commission – adopted Verizon's language *in toto*.[4]

Finally, the Public Utilities Commission of Ohio adopted without modification,[5] an arbitration panel report dismissing GNAPs' objections to Verizon's audit proposals. The *Ohio Verizon/GNAPs Arbitration Panel Report*[6] provided:

> The panel expressly rejects Global's suggestion that Verizon's proposed provisions are unreasonable simply because the terms "books, records, documents, facilities, and systems" as found within those provisions, are not identified within the agreement. Global has never explained why attributing to these commonly understood terms their ordinary meaning should bring into question the reasonableness of Verizon's proposed auditing provisions. Verizon has, in the panel's opinion, demonstrated several valid reasons why

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[2] *Petition of Global NAPs, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York Inc.*, Order Resolving Arbitration Issues, New York Public Service Commission Case No. 02-C-0006 (May 24, 2002) at 19.

[3] *In the Matter of Global NAPs, Inc. (U-6449-C) Petition for Arbitration of an Interconnection Agreement with Verizon California Inc. f/k/a GTE California Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Final Arbitrator's Report, Public Utilities Commission of the State of California, Application No. 01-12-026, Decision 02-06-076 (May 15, 2002) at 100 (adopting Verizon's language with modification, allowing one audit per year rather than two, and leaving door open for more audits "if the preceding audit disclosed material errors or discrepancies.") The California Commission reaffirmed this Order in its final decision in the Verizon/GNAPs proceeding. *See In the Matter of Global NAPs, Inc. (U-6449-C) Petition for Arbitration of an Interconnection Agreement with Verizon California Inc. f/k/a GTE California Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Opinion Adopting Final Arbitrator's Report with Modification, Public Utilities Commission of the State of California, Application No. 01-12-026, Decision 02-06-076 (June 27, 2002) at 36.

[4] *Id.*

[5] *In the Matter of the Petition of Global NAPs Inc. for Arbitration Pursuant to Section 252(b) Of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon North Inc.*, Public Utilities Commission of Ohio Case No. 02-876-TP-ARB, Arbitration Award (Sep. 5, 2002) at 11 (adopting arbitration panel's recommendation).

[6] *In the Matter of the Petition of Global NAPs Inc. for Arbitration Pursuant to Section 252(b) Of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon North Inc.*, Public Utilities Commission of Ohio Case No. 02-876-TP-ARB, Arbitration Panel Report (July 22, 2002) ("*Ohio Verizon/GNAPs Arbitration Panel Report*").

> it should, as both a customer of Global and a nondiscriminatory supplier of its OSS to all carriers who wish to use it, be entitled to certain audit rights under the parties agreement: (1) to verify the accuracy of Global's bills; (2) to ensure that rates are being applied appropriately; and (3) to maintain the integrity of Verizon's OSS for the nondiscriminatory benefit of all carriers who use it, including Global. Moreover, in the panel's opinion, Verizon has also demonstrated that the auditing procedures it has proposed are reasonable and, by design, offer Global an adequate opportunity to seek to protect the confidentiality of any competitively sensitive information that Global believes should be entitled to such protection.[7]

Q. ARE YOU FAMILIAR WITH THE DEPARTMENT'S DECISION WITH RESPECT TO AUDIT PROVISIONS IN THE MEDIAONE ARBITRATION (D.T.E 99-42/43)?

A. Yes, I am. In that case, the Department rejected MediaOne's proposal to include an audit provision that was much too broad and instead adopted Bell Atlantic's proposal which was nearly identical to the audit language Verizon proposes in this case:

> We find that Bell Atlantic's proposal is reasonable. Broad audit rights to examine a party's general compliance with the terms of the interconnection agreement do not appear to be necessary at this time. As noted by Bell Atlantic, audit provisions already exist for those issues where audits are necessary and appropriate, and we encourage the parties to take advantage of those existing audit provisions. If MediaOne believes that additional specific audit provisions are necessary, it should negotiate such provisions with Bell Atlantic.[8]

Q. ON WHAT BASIS DO YOU CONCLUDE THAT THE AUDIT LANGUAGE THE DEPARTMENT ADOPTED IN MEDIAONE WAS SIMILAR TO THE LANGUAGE VERIZON PROPOSES IN THIS CASE?

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[7] *Id*. at 22-23.

[8] *Petitions of MediaOne Telecommunications of Massachusetts, Inc. and New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for arbitration, pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement*, D.T.E. 99-42/43, 99-52, order issued August 25, 1999 at 140.

A. The audit language ultimately included in the MediaOne interconnection agreement addressed the same issues as Verizon's proposed audit language in this case. For example, § 6.3.13 of the interconnection agreement between Verizon and MediaOne's successor corporation, AT&T Broadband, on file with the Department resulting from Docket No. 99-42/43 (the "AT&T Broadband Agreement") provides that: "Either Party may request a review or audit of the various components of access recording up to a maximum of two (2) audits per calendar year."[9] Verizon's proposed § 10.13 of the Interconnection Attachment contains identical language. Similarly, § 5.7.5 of the AT&T Broadband Agreement states: "Each Party reserves the right to audit all Traffic, up to a maximum of two audits per calendar year, to ensure that rates are being applied appropriately; provided however, that either Party shall have the right to conduct additional audit(s) if the preceding audit disclosed material errors or discrepancies." Section 6.3 of the Interconnection Attachment to Verizon's Redlined Agreement is identical. Finally, both agreements contain nearly identical audit provision with regard to disclosure of Verizon OSS Information.[10] In sum, the language and rationale adopted by the Department in the MediaOne case is either identical or substantially similar to the language and rationale applicable in this case.

Q DOES THIS CONCLUDE YOUR TESTIMONY?

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[9] AT&T Broadband Agreement, § 6.3.13.

[10] Both agreements state the following: "Verizon shall have the right (but not the obligation) to audit AT&T Broadband [GNAPs] to ascertain whether AT&T Broadband [GNAPs] is complying with the requirements of Applicable Law and this Agreement with regard to AT&T Broadband's [GNAPs'] access to, and use and disclosure of, Verizon OSS Information." See AT&T Broadband Agreement, Schedule 12.3, § 1.6.5.1; Verizon's Redlined Agreement, Additional Services Attachment, § 8.5.4.1. The only difference in the language between the two agreements is that the AT&T Broadband Agreement contains a reference to an additional section concerning customer authorizations. Customer authorizations in the Verizon Redlined Agreement are addressed in a different section and need not be incorporated into the OSS audit provision.

A. Yes, it does.