COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of MCI WorldCom, Inc. Against New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts	D.T.E. 97-116
Complaint of Global NAPs, Inc. Against New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts	D.T.E. 99-39

BRIEF OF GLOBAL NAPS, INC. IN RESPONSE TO THE DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY'S PROCEDURAL ORDER OF OCTOBER 24, 2002.

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INTRODUCTION AND BACKGROUND

This matter is before the Department on remand from the United States District Court for the District of Massachusetts.[1] After extensive proceedings, in October 1998 the Department construed the interconnection agreement ("Agreement") between MCI WorldCom, Inc. ("WorldCom") and Bell Atlantic-Massachusetts (now Verizon).[2] In *D.T.E. 97-116*, the Department held that the Agreement required payment of reciprocal compensation for ISP-bound calls.[3] The Department specifically concluded that "a call

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[1] *Global NAPs, Inc. v. New England Telephone and Telegraph*, Civil Actions 00-10407-RCL and 00-11513-RCL, *Memorandum Order on Magistrate Judge's Report and Recommendation on Defendants' Motions for Summary Judgment*, (D. Mass., August 27, 2002)("*District Court Order*"), adopting *Magistrate Judge's Findings and Recommendations on Defendants' Motions for Summary Judgment*, (D. Mass., July 5, 2002)("*F & R*").

[2] By letter agreement the parties agreed to treat the Global/Verizon Interconnection Agreement "as one that is identical to the MCI-Verizon agreement for purposes of reciprocal compensation." *See F & R* at 18. The term "Agreement" as used herein shall refer to the MCI WorldCom/Bell Atlantic Agreement but the arguments apply equally to the Global/Verizon agreement.

[3] *Complaint of MCI WorldCom, Inc. against New England Tel. & Tel. Co. d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996*, Docket No. DTE 97-116 (October 21, 1998) ("*D.T.E. 97-116*").

from a Bell Atlantic customer that is terminated by MCI WorldCom to an ISP is a 'local call' for purposes of the definition of local traffic in the [Interconnection] Agreement, and as such, is eligible for reciprocal compensation."[4] No appeal was ever taken from this order.

The district court expressly held that this ruling was consistent with the Department's responsibility under federal law to "consider the contractual language in the parties' interconnection agreements to determine whether the parties contracted for reciprocal compensation" and that the Department "properly considered that question" in *D.T.E. 97-116*. *F & R* at 26 - 27. In *D.T.E. 97-116*, the Department "examined the specific language in the MCI-Verizon agreement, the industry custom, the parties' intent and the state of federal telecommunications law on reciprocal compensation for ISP-bound calls at the time of the contract." *Id.* at 27 n. 20.

After meeting the requirements of federal law in *D.T.E. 97-116*, the Department was led astray by jurisdictional analysis included as part of later FCC orders. The FCC's jurisdictional analysis reaffirmed that ISP-bound calls are jurisdictionally "interstate" for purposes of federal law – a point the Department itself had acknowledged already in *D.T.E. 97-116*. The Department, however, apparently believed that this reaffirmation of the FCC's longstanding jurisdictional analysis had some bearing on what the parties had intended in their contract years earlier, or mandated the Department to substitute for the contractual obligations of the parties its own policy views on ISP-bound calling, or otherwise required re-examining *D.T.E. 97-116*. This misconception is embodied in *97-*

[4] *Id.* at 13.

116-C.[5] The Department stood by the latter ruling through reconsideration, [6] following vacatur and remand of the FCC 1999 order "for want of reasoned decision-making, "[7] re-analysis by the FCC establishing a transitional – and prospective-only – regime for intercarrier compensation for ISP-bound calls, to take effect as pre-existing contracts expire,[8] and reversal of the FCC's re-analysis and further remand by the D.C. Circuit.[9]

This was error, as the federal court now has found. The Department's substantive orders following its initial, lawful order have been nullified by the federal court as inconsistent with binding federal law.

In response to the court's remand to the Department for "proceedings or deliberations not inconsistent with the rulings herein and with those parts of the Findings and Recommendations that explicate the reasons for granting summary judgment,"[10] the Department on October 24, 2002, issued a Procedural Order that perceived "a continuing obligation to comply with the requirements to engage in 'proceedings or deliberations' that 'considered the contractual language in the parties' interconnection agreements' in accordance with the District Court's August 27, 2002 decision." This is a plainly erroneous reading of the district court's order. It disregards the court's express declaration that *D.T.E. 97-116* meets the Department's obligations under federal law and

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5 D.T.E. 97-116-C (May 19, 1999) ("*D.T.E. 97-116-C*").

6 D.T.E. 97-116-D (February 24, 2000) ("*D.T.E. 97-116-D*").

7 *Bell Atlantic v. FCC*, 206 F.3d 1,3 (D.C. Cir. 2000); D.T.E. 97-116-E (July 11, 2000) at 13.

8 In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, Inter-Carrier Comp. for ISP-Bound Traffic, FCC 01-131, CC Docket Nos. 96-98, 99-68 (April 27, 2001) ("2001 FCC Remand Order") at ¶¶ 77-94

9 *WorldCom v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002); D.T.E. 97-116-F (Aug. 29, 2001).

10 *Id.* at 3.

the court's express rejection of relief that affirmatively would require the Department to a re-examine the meaning of the agreements.

D.T.E. 97-116 is the Department's only substantive ruling in this matter for the last four years that has survived court review. The federal court took pains to nullify all of the Department's substantive rulings issued after *D.T.E. 97-116*, while leaving *D.T.E. 97-116* in place. Global NAPs respectfully suggests that it puts the cart before the horse to redo what the Department did in 1999 and later without establishing any basis to undo what it did in 1998. Federal law does not require revisiting this decision and there is no basis under state law for doing so.

ARGUMENT

I. There Is No Basis for Reconsidering The Lawful And Final *D.T.E. 97-116* Order.

The Department's Procedural Order relies on the district court's August 27, 2002 order and remand, as the exclusive basis for reopening *D.T.E. 97-116* for further proceedings and, potentially, a change in the Department's conclusion. Regardless of whether the Department can simultaneously pursue its appeal while redoing orders that are the subject of the appeal, the district court's order does not compel reopening the docket in question.[11] Instead, the district court, by affirming that *D.T.E. 97-116* complies with federal law, expressly declining to vacate it, and refusing to order the Department to re-examine the parties' contracts, confirmed that there is nothing further that the Department needs to do here other than the ministerial act of giving force to its final and lawful order.

[11] *American Farm Lines v. Black Ball Freight & Son*, 397 U.S. 532, 541 (1970) (agency may not reopen record under review); See also *Zenith Electronics Corp. v. United States*, 884 F.2d 556, 510-61 (Fed. Cir. 1989)(same); *Color v. Sec'y of Health and Human Services*, 877 F.2d 148, 151 (1st Cir. 1989)(same).

A. The Proceeding Initiated In The Department's Procedural Order Is Inconsistent With The Federal District Court Because The Court Did Not Direct The Department to Re-Interpret The Agreement.

The Department's actions on remand must be consistent with the federal district court declaration that "the October 1998 DTE Order complied with federal law." *District Court Order* at 2. This declaration establishes that *D.T.E. 97-116* meets the requirement of federal law "that the DTE consider the contractual language in the parties' interconnection agreements to determine whether the parties contracted for reciprocal compensation." *F & R* at 26. This case is therefore unlike the more common situation (like those cited in the Procedural Order at 2) where an appellate decision wipes the slate clean and directs the tribunal below to redo its decision.

D.T.E. 97-116 is a final order that was never appealed.[12] Therefore, *D.T.E. 97-116* became a final and binding adjudication of the merits. *Stowe* v. *Bologna*, 415 Mass. 20, 21 (1993)(citing *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-422 (1966)); *Yankee Microwave, Inc. v. Petricca Communications Systems, Inc.*, 53 Mass. App. Ct. 497, 508 (2002). As a result, the Department is not writing on a clean slate. Its discretion is limited by its obligation to act consistently with the court's ruling that *D.T.E. 97-116* meets the requirement of federal law to adjudicate the parties' contract. The Department must "conform its further proceedings in the case to the principles set forth in the judicial decision, unless there is a compelling reason to depart." *Youghiogheny and*

[12] The parties had 20 days after receiving service of the order to file a motion for reconsideration. 220 C.M.R. 1.11(10). Only MCI filed such a motion; the motion was denied on February 25, 1999. The parties had twenty days to file an appeal of the order or a motion to extend the time for filing an appeal. Bell Atlantic filed a motion for extension of the appeal period, which was allowed on November 10, 1998. However, Bell Atlantic never actually filed the appeal.

Oil Coal Co. v. Milliken, 200 F.3d 942, 950 (6th Cir. 1999)(quoting *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998)).

The Department's Procedural Order is inconsistent with the court's order because it treats that order as though it wiped the slate clean. The Procedural Order states, "the Department is under a continuing obligation to comply with the requirement to engage in 'proceedings or deliberations' that 'consider the contractual language in the parties' interconnection agreements in accordance with the district court's August 27, 2002 decision." Nothing in the court's decision imposes any such "continuing" obligation, and nowhere does the decision require the Department to reopen *D.T.E. 97-116*.

Had *D.T.E. 97-116-C* been the Department's initial ruling on the subject, the district court's application of federal law would require going back to consider the contractual language. But the Department has "properly considered" this language in *D.T.E. 97-116*. Federal law requires nothing more. Indeed, since the federal court expressly limited its decision to the Department's conformance with federal law, the court could not compel redoing the Department's decisionmaking where federal law does not.

The district court specifically rejected remedies that would have required a fresh consideration of the contractual language. The court found unnecessary the Magistrate Judge's recommendation (on Global NAPs' motion) that the court enter an injunction among other things "directing the DTE to undertake an analysis of the interconnection agreements to determine whether those agreements give rise to reciprocal compensation for ISP-bound traffic …." *District Court Order* at 2. The court also rejected the arguments by both the Department and Verizon that, if the court found the 1999 Order

and its progeny unlawful, it also should find that *D.T.E. 97-116* violated federal law (enabling the Department to start again from scratch). See Verizon Objections at 17; DTE Objections at 14-16. Instead, the court declared that *D.T.E. 97-116* fully complied with federal law. It did so in the face of the Department's argument that the result is to "reinstate the October 21, 1998 Order." *Id.* at 16.

Unless the Department has some compelling basis to set aside a lawful final order, therefore, further proceedings to re-interpret a contract that the Department "properly considered" in October, 1998 would be inconsistent with the court's rulings. As the Department has suggested no other basis for reopening *D.T.E. 97-116*, further substantive proceedings along the lines proposed by the Department would be unlawful as contrary to the district court's order and remand. Under the Order, the Department has no "continuing" obligation to do anything further with respect to *D.T.E. 97-116*.

B. The Record Does Not Establish Any Circumstances That Permit Reopening a Final Decision Under DTE Rules and Regulations And Applicable Law.

Having entered a final, lawful decision, the Department is not free simply to change its mind. Even if, upon proper review of an earlier decision, the Department "is not required to reach the same result,"[13] the Department first must have some lawful basis to entertain a different result. "The same considerations – finality, cessation of litigation, the ability to act in reliance that a dispute has been resolved – which inhere in giving preclusive effect to final judgments pertain … to final determinations of administrative agencies as they affect the rights and obligations of parties." *Stowe v. Bologna*, 32 Mass. App. Ct. 612, 618 (1992), *aff'd* 415 Mass. 20 (1993). The power of agencies to reopen

[13] *District Court Order* at 26.

their decisions "must be sparingly used if administrative decisions are to have resolving force upon which persons can rely." *Id.* at 616. Requests to reopen "can hardly be entertained without limit of time." *Covell v. Department of Social Services*, 42 Mass. App. Ct. 427, 433 (1997).

Accordingly, any reopening of the final determinations of the rights and obligations of the parties made in *D.T.E. 97-116* must be based either on the Department's "own procedural rules" or on the standards of Rule 60 (b) of the Massachusetts Rules of Civil Procedure. *Stowe v. Bologna*, 32 Mass. App. Ct. at 618-19.[14] Neither provides such a basis.

Under the Department's rules of practice and procedure in 220 C.M.R. 1.00 *et seq.*, such reopening is untimely and unfounded. Section 1.11(8) makes it clear that the Department may reopen a hearing on its own initiative only ***prior to*** rendering its decision.[15] Once the decision is rendered, Section 1.11 (9) requires filing of a motion for

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[14] *See Aronson* v. *Brookline Rent Control Bd.*, 19 Mass. App. Ct. 700, 708 (1985)(referring to rule 60(b)(1) in deciding to reopen hearing based on allegations of fraud); *Stowe*, 32 Mass. App. Ct. at 618-619(suggesting Rule 60(b) as the standard for reopening agency hearings); *Covell*, 42 Mass. App. Ct. at 433 (applying Rule 60(b)(6) to issue of whether Department of Social Services should reopen hearing in sexual abuse case).

[15] 220 C.M.R. 1.11(8)(emphasis added) states:

Reopening Hearings. No person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except on motion and showing of good cause. Such motions shall be filed in accordance with the provisions of 220 C.M.R. 1.04(5). The Department shall notify all parties of its action upon the motion. Notwithstanding the above, the Department may, at any time ***prior to*** the rendering of a decision, reopen the hearing on its own motion.

Although there is no Massachusetts case specifically on point which defines "good cause" for this context, cases from other jurisdictions in various regulatory contexts have, without exception, defined "good cause" for a rehearing as meaning a procedural defect in the original hearing, not a different opinion on the merits. See *Kay Construction Co. v. County Council for Montgomery County*, 227 Md. 479 (1962), and cases cited, *Merritt-Chapman & Scott Corp. v. Industrial Accident Commission*, 6 Cal.2d 314 (1936), *Hines v. Royal Indemnity Corsage.*, 253 F.2d 111 (6th Cir., 1958). *Svoboda v. Svoboda*, 245 Iowa 111 (1953), *Greely & Loveland Irr. Co. v. Handy Ditch Corsage.*, 77 Colo. 487 (1925): See also *State v. Estencion*, 63 Hawaii Reports 264 (1981) ("good cause" ground is provided to take care of unanticipated circumstances). The

reconsideration "[w]ithin 20 days of service of a final Department Order …." These times passed long ago.

Moreover, the Department restated its "well settled" policy on reconsideration in *D.T.E. 97-116-D*:

> Reconsideration of previously decided issues is granted only when ***extraordinary circumstances*** dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. … A motion for reconsideration should bring to light ***previously unknown or undisclosed facts*** that would have a significant impact on the decision already rendered. ***It should not attempt to reargue issues considered and decided in the main case.*** … The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration.[16]

In the present case, there are no extraordinary circumstances justifying reconsideration of *D.T.E. 97-116*. There are no previously unknown or undisclosed facts of any kind that significantly change what was presented in *D.T.E. 97-116*. The only thing that could happen in a rehearing would be a re-argument of the same issues considered four years ago. Under the Department's own standard, this is impermissible.

Once Verizon failed to appeal *D.T.E. 97-116*, that order "was no longer subject to attack except for those same reasons and within those time limits as are set forth in Mass. R. Civ. P. 60(b)." *Stowe v. Bologna*, 32 Mass. App. Ct. at 618. Rule 60(b) contains six separate grounds for relief similar to those under the Department's reconsideration policy: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the

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Court in Kay reasoned that it should be self-evident that if "good cause" is to mean anything, it cannot mean a mere different opinion on the correctness of the hearing decision. *Kay* at 487.

[16] D.T.E. 97-116-D (July 2000) at 7-8 (emphasis added).

judgment is void; (5) the judgment (or a judgment upon which it has been based) has been satisfied, released or discharged; and (6) any other reason justifying relief from the operation of the judgment.[17]

The Department entertained Verizon's request for "modification" of *D.T.E. 97-116* on the basis of a perceived "mistake of law." *D.T.E. 97-116-C* at p. 24. The federal district court decision vitiates this premise; not only was *D.T.E. 97-116* not mistaken but, as a matter of federal law, it is the only correct decision the Department has reached. Any further finding of mistake or any conclusion that the 1998 decision is void would fly in the face of the court's determination that *D.T.E. 97-116* complied with federal law. There has been no suggestion that the decision was based on surprise, neglect, fraud, misrepresentation, or any other extraordinary circumstances. The express and exclusive basis presented for changing the Department's 1998 contract analysis was the *1999 FCC Ruling*, and the court decision establishes that this ruling did not compel (or even support) vacatur of *D.T.E. 97-116*. *F & R* at 25.

The Department may not re-open *D.T.E. 97-116* to apply any changed regulatory policies to the issues. "To be sharply distinguished [from reopener pursuant to Mass. R. Civ. P. 60(b)] are questions of agency power to reconsider an adjudicatory decision in order to apply fresh judgment or an altered substantive policy to an otherwise closed

[17] The last subsection, 60(b)(6), is a catch-all subsection meant to include other legitimate grounds not covered by the first five subsections. It provides for reopening a proceeding due to "extraordinary circumstances." *Sahin* v. *Sahin*, 435 Mass. 396, 406 (2001); *Bromfield* v. *Commonwealth*, 400 Mass. 254, 257 (1987); *Pentucket Manor Chronic Hosp*. v. *Rate Setting Comm'n.*, 394 Mass. 233, 236-237 (1985). However, it may not include any of the grounds listed in subsections (1) through (5). Reporter's Notes – 1973 to Rule 60(b); *Sahin v. Sahin,* 415 Mass. at 406-407; *Bromfield v. Commonwealth,* 400 Mass. at 256. The grounds of mistake under subsection (1) and newly discovered evidence under subsection (2) may not be used under subsection (6).

proceeding."[18] Moreover, any discretion the Department might otherwise have to change its 1998 decision based on a change in policy it does not apply in this case because of the district court decision and the limits of the Department's review under Section 232 of the Telecommunications Act. In *D.T.E. 97-116-C*, the Department correctly recognized that "Section 252 sets up a preference for negotiated interconnection agreements." *D.T.E. 97-166-C* at p. 29 (quoting A.T. *&T. Corp. v. Iowa Utilities Board*, 525 U.S. 404 (Thomas, J. concurring in part and dissenting in part)). Thus, the 1996 Act allows parties to enter into agreements "without regard to the standards set forth in [47 U.S.C. § 251](b) and (c)]." 47 U.S.C. § 252(a)(1). The district court decision gives force to this preference in ruling that displacing a contractual agreement with "sovereign oversight" is "antithetical to the Act." *F &R* at 26.

In any event, even where agencies may change course based on changes in policy, such corrections can be made only prospectively, rather than upset prior adjudications. *Stowe*, 32 Mass. App. Ct. at 618.

C. *D.T.E. 97-116* Remains In Full Force And Effect.

In 1999, the Department concluded that, as a result of its vacatur of *D.T.E. 97-116*, "there presently is no Department order of continuing effect or validity in support of the proposition that such an obligation arises between MCI WorldCom and Bell Atlantic." *D.T.E. 97-116-C* at 20. As a result of the federal court decision, that is no longer the case. Instead, the opposite is true – "there is presently no order of continuing

[18] *Aronson* v. *Brookline Rent Control Bd.*, 19 Mass. App. Ct. at 704-705 (decision based on fraud rather than change of policy grounds). *See also American Trucking Assns*. v. *Frisco Co*., 358 U.S. 133, 146 ((1958)(considering ICC authority under the Interstate Commerce Act). ("the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in light of changing policies"); *United States* v. *Seatrain Lines*, 329 U.S. 424, 429, 432-433 (1947)(ICC not permitted to reopen proceedings to execute a subsequently adopted policy).

effect or validity" in support of the proposition that the obligations adjudicated in *D.T.E. 97-116* and validated by the federal court have no present effect.

D.T.E. 97-116 created for Verizon a present and immediate obligation to pay for such traffic, and Verizon in fact did so until the Department's subsequent, erroneous orders purported to relieve Verizon of this obligation. The federal court ruling has invalidated these subsequent, erroneous orders, but expressly validated *D.T.E. 97-116*. As the Department argued in federal court, the effect of such a ruling is "to reinstate" *D.T.E. 97-116*. The only logical conclusion is that Verizon has a present obligation to pay intercarrier compensation for ISP-bound calls for the period the Agreement was in effect, because the Department's subsequent orders relieving Verizon of that obligation are now legally invalid.

For the reasons described above, no further substantive proceedings by the Department on this issue are either required or appropriate. There is no call for the Department to do anything now other than confirm that *D.T.E. 97-116* remains in effect and that compensation for ISP-bound calls is therefore due for the periods that the Agreement was in effect.[19]

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[19] In Global NAPs' case, the Agreement governed the parties' relationship from April 1997 through July 2000, when it was replaced by an agreement from Rhode Island with materially different terms regarding compensation for ISP-bound traffic. Global NAPs' dispute with Verizon regarding the proper interpretation of that other agreement is presently before the Department on Global NAPs' request for reconsideration. *Global NAPs, Inc.'s Adoption Of The Terms Of An Interconnection Agreement Between Global NAPs, Inc. And Verizon Rhode Island Pursuant To The BA/GTE Merger Conditions*, D.T.E. 02-21, Petition for Reconsideration (Ma. D.T.E. (August 30, 2002). Although the underlying issues are obviously related, the contractual interpretation questions relevant to that second agreement differ in significant ways from the issues the Department is considering here because that contract contains different language explicitly providing for payment of reciprocal compensation for ISP-bound calls at least until the question was resolved by the FCC (not the Department), and the question was unresolved from the time the agreement was adopted at least until the *FCC Order on Remand*.

II. The Record Requires The Department To Reach The Same Conclusions That It Reached In *D.T.E. 97-116*

If the Department finds some basis to re-examine the question of whether ISP-bound calls are "local calls" under the Agreement, the answer is clearly the same in *D.T.E. 97-116*.

A. ISP-Bound Traffic Is "Local Traffic" Under The Agreement.

Over and again the FCC has made clear, as the federal court did in this case, that compensation for ISP-bound traffic depends on the terms of the contract at issue.[20] The answer does not hinge on FCC policy preferences, state regulators' policy preferences, or whether interstate or intrastate jurisdiction of the traffic involved.[21] So the analysis must begin with the contract itself.

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[20] In re Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689 (1999) ("1999 FCC Order") at pp. 22-24; 2001 Remand Order at p. 82; Cox; *Starpower Communications, LLC vs. Verizon South, Inc.*, Memorandum Opinion and Order Nos. EB-00-MD-19-20, FCC 02-105 (rel. Apr. 8, 2002) ("*Starpower II*").

[21] In this regard, the FCC has asserted since the 1980s that ISP-bound traffic is jurisdictionally interstate; that conclusion has been affirmed by the 8th Circuit (on appeal from the FCC's 1997 *Access Charge Reform Order*) *Southwestern Bell Telephone, Co. v. FCC*, 153 F.3d 523, 541-44 (8th Cir. 1998), and twice by the D.C. Circuit (in the course of that court's review of the FCC's efforts to establish a nationwide regulatory regime applicable to compensation for ISP-bound calls). *See Bell Atlantic v. FCC,* 206 F.3d 1 (D.C. Cir. 2000); *WorldCom v. FCC,* 288 F.3d 429 (D.C. Cir. 2002). The Department, for its part, has always noted and understood the interstate nature of this traffic. *D.T.E. 97-116* at n.12. In this regard, if the Department's problems with the federal court could be summarized in a sentence, it would be this: Beginning in early 1999, the Department erred by concluding that that the ***jurisdictionally*** interstate nature of the traffic has a bearing on whether the traffic is "Local Traffic" within the meaning of the Agreement. As described more fully below, such a conclusion is simply not consistent with the FCC's rulings on this question.

The Agreement does not separately identify ISP-bound traffic as a distinct category warranting distinct treatment for compensation. Instead, Section 5.7.1 of the Agreement[22] states:

> Reciprocal Compensation only applies to the transport and termination of Local Traffic billable by [Verizon] or GNAPs which a Telephone Exchange Service Customer originates on [Verizon's] or GNAPS's network for termination on the other Party's network except as provided in Section 5.7.6 below.

This seems clear enough, as it was to the Department in *D.T.E. 97-116*: if traffic meets the Agreement's definition of "Local Traffic," then compensation is due.[23]

The term "Local Traffic" in turn is defined with reference to Verizon's tariffs and to how the calls are dialed. Specifically, Section 1.38 of the Agreement (emphasis added) states that:

> "Local Traffic" means a call which is originated ***and terminated within a given LATA***, in the Commonwealth of Massachusetts, as defined in DPU Tariff 10, Section 6. IntraLATA calls originated on a 1+ presubscription basis when available or a casual dialed (10XXX/101XXXX) basis are not considered local traffic.

So, calls that are locally dialed – that is, calls that are not dialed with a "1+" or "10XXX" pattern – are "Local Traffic." Without question this applies to the ISP-bound calls

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[22] Interconnection Agreement Under Sections 251 And 252 Of The Telecommunications Act Of 1996 Dated As Of April 15, 1997 By And Between New England Telephone And Telegraph Company And Global Naps For Massachusetts § 5.7.1 ("Agreement").

[23] *D.T.E. 97-116* at 11. Note that the FCC's rules define "termination" of traffic (as relevant to reciprocal compensation) to be the provision of switching immediately prior to the delivery of traffic to the customer. *See* 47 C.F.R. § 51.701. Here, even though for jurisdictional purposes ISP-bound traffic is viewed as continuing on from the LEC serving the ISP, to the ISP, then onward to the Internet, for reciprocal compensation purposes – *i.e.*, when the question is whether "transport" and/or "termination" has occurred – what matters is switching by the delivering LEC, not where the traffic ultimately goes once it reaches the customer.

relevant here.[24] The language of the contract, therefore, compels the conclusion that ISP-bound traffic falls within the contractual definition of "Local Traffic."

B. If The Agreement Is Re-examined, The Department Must Apply The FCC's Rulings On How To Interpret Contracts To Determine If Compensation For ISP-Bound Traffic Is Due.

Although the provisions noted above establish that compensation for ISP-bound traffic is required under the Agreement, that conclusion is bolstered by the contractual definition of "Reciprocal Compensation." The Agreement states that "Reciprocal Compensation" is "As Described in the Act." *See* Section 1.54. "As Described in the Act" is itself a defined term, however, meaning "as described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Department."

The FCC from time to time has expressly ruled on the question how to figure out whether reciprocal compensation applies to ISP-bound traffic under particular agreements, including the specific question at issue here, *viz.*, whether ISP-bound traffic falls within a particular agreement's definition of "local traffic." As the federal district court found, "one consistency in all of the FCC's varied permutations on this issue has been the suggestion that states' commissions are to consider [contractual language] in formulating their orders." *F & R* at 25. It would contradict the Agreement as well as federal law not to consider and apply how the FCC has said to analyze this question.[25]

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[24] *See* immediately prior note regarding the term "termination." In its Answer in the federal court case, Verizon admitted that it treats ISP-bound calls as local. Answer of Defendant Bell Atlantic-Massachusetts (May 19, 2000) ¶ 5.

[25] After *Iowa Utilities Board v. AT&T*, 525 U.S. 366 (1999), it is clear that the final say as to how the 1996 Act is to be applied to interconnection issues rests with the FCC. Here, the FCC has said that the question is to be answered by looking at the parties' contract in light of seven specified factors. The Department is not free to disregard this FCC ruling, either as a matter of federal law or as a matter of contract interpretation. While there was never a need to re-examine

1. The FCC's Seven-Factor Test Shows That ISP-Bound Traffic Is "Local Traffic" Under The Agreement.

The FCC's first ruling on how to determine if particular interconnection agreements require compensation for ISP-bound traffic was the *1999 FCC Order*. There, the FCC found that, irrespective of the specific meaning of the FCC's general rules, compensation was due if contractual language requires it. *See 1999 FCC Order* at pp. 22-24. So, while the terms "Reciprocal Compensation" and "as described in the Act" look to the FCC for guidance, the FCC's first step was to look at to the other terms of the Agreement – which, as just discussed, show that ISP-bound traffic falls within the definition of "Local Traffic" and is therefore subject to compensation.

The FCC, however, went further in its *1999 FCC Order*: it identified seven specific factors that should be assessed in determining what a particular interconnection agreement requires. [26] Applying these factors compels the conclusion that ISP-bound traffic is "Local Traffic" for purposes of compensation under this agreement, as CLEC parties have repeatedly demonstrated and as the vast majority of other state commissions have found in applying these same factors. It is the Department's failure to consider such legal and equitable principles that court found violates federal law. *See F & R* at 27. These seven factors are reviewed again below.

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the conclusions the Department reached in October 1998 and there is no such need now, ***if*** such a re-examination is to occur, it must track the FCC's approach to determining whether a contract calls for compensation for ISP-bound traffic. Indeed, the Department's failure to hew to this requirement – and, instead, to substitute irrelevant jurisdictional and regulatory policy analyses for common law contractual analysis – is what led the federal court to reverse and vacate all of the Department's substantive rulings in this case (other than the one ruling in which it did the right thing by actually interpreting the contract.)

[26] *1999 FCC Ruling* at ¶ 24.

(1) *"the negotiation of the agreements in the context of this Commission's longstanding policy of treating this traffic as local."*

The FCC had a longstanding policy of "treating this traffic as local." This established expectations in the industry that ISP-bound traffic would be treated as local.[27] It was this treatment that the Department recognized in *D.T.E. 97-116* when it "also" looked to the FCC's treatment of dial-up calls to ISPs. *D.T.E. 97-116* at 12.

(2) *"the conduct of the parties pursuant to those agreements."*

There can be no question that the practice under the Agreement – until Verizon chose to challenge it – was to treat ISP-bound calls as included within the definition of "Local Traffic." As the federal magistrate judge hearing this case on appeal found, it is "undisputed that Verizon initially paid MCI WorldCom reciprocal compensation for calls to ISPs pursuant to the 'local traffic' portion of the [Interconnection] agreement."[28]

(3) *"whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate or interstate tariffs."*

In its Answer in federal court, Verizon acknowledged that "it treats calls from its subscribers to ISPs served by CLECs as 'local' for billing purposes pursuant to a federal mandate that it do so."[29] This indicates that Verizon serves ISPs out of its intrastate tariff. This conclusion also is effectively compelled by the FCC's traditional "ESP Exemption" from access charges, pursuant to which ISPs have a right to obtain interstate functionality by means of purchasing intrastate-tariffed business lines.[30] In *D.T.E. 97-*

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[27] Verizon fully understood this regulatory context and at the time relied on it in making arguments on this very topic to the FCC. *See infra* at pp. 27-28.

[28] *F & R* at 17.

[29] Answer of Defendant Bell Atlantic-Massachusetts to Complaint of Global NAPs, Inc., Civil Action Nos. 00-10407-RCL and 00-115B-RCL, at ¶ 5 (May 19, 2000).

[30] *See 1999 FCC Order* at ¶ 5 (describing history of ESP Exemption).

116, the Department found that Verizon tariffs calls to ISPs as local. *D.T.E. 97-116* at 11.

(4) ***"whether revenues associated with those services were counted as intrastate or interstate revenues".***

Verizon provides services to its end users that allowed those end users to reach ISPs out of Verizon's intrastate tariff. As a result, it counted the revenue as intrastate revenue. In this regard, the FCC specifically mandated that both the costs and revenues associated with such traffic continue to be separated to the intrastate jurisdiction.[31] A corollary of the Department's finding in *D.T.E. 97-116* that ISP-bound calls are tariffed as local is that they are assigned to intrastate jurisdiction for separations purposes.

(5) ***"whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation."***

Global NAPs is aware of no evidence on the record to suggest that Verizon has made any such efforts. Indeed, in *D.T.E. 97-116*, the Department found that ISP-bound calls are dialed identically to local calls and are "indistinguishable for network purposes." *D.T.E. 97-116* at 11. Moreover, if the Department were to hold hearings on this question, Global NAPs would expect to rebut any such claim that Verizon might put forth. Indeed, Verizon has admitted that for many years it made essentially no effort to monitor even the total amount of traffic it was sending to Global NAPs, much less any effort to classify that traffic into ISP-bound or other categories. Verizon provisions Global NAPs and other CLECs that serve ISPs with local trunks to do so.

[31] *1999 FCC Ruling* at ¶¶ 5, 23, 36.

(6) ***"whether, in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs in local telephone charges."***

As discussed above, Verizon bills its end users for local calls, as the Department already found in *D.T.E. 97-116*.

(7) ***"whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic"***

Since the Department allowed Verizon to stop paying reciprocal compensation on ISP bound traffic, there has been no compensation for it under the Agreement. Moreover, Verizon has objected strenuously to Global NAPs' efforts to obtain compensation for such traffic under alternative legal theories, precisely to ensure that "CLECs would [***not***] be compensated for this traffic."

*** * * * ***

In short, the only rational conclusion from applying the FCC's seven-factor test is that the Agreement should be construed to include ISP-bound traffic within compensable "Local Traffic."

2. Other FCC Rulings Show That ISP-Bound Traffic Is Compensable Here.

Following the *1999 FCC Order*, the FCC had occasion to apply its own analytical approach to specific interconnection agreements that came before it for interpretation.[32] The conclusion that ISP-bound traffic should be treated as "local traffic" here is significantly bolstered by the reasoning in these FCC adjudications.

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[32] The FCC found itself in this role because Virginia regulators concluded that they would not take on that function, based in federal law, since doing so would subject the Commonwealth of Virginia to suit in federal court. Those regulators, therefore, decline to arbitrate or interpret disputes, leaving those functions to the FCC under 47 U.S.C. § 252(e)(6).

In *Starpower*,[33] the FCC affirmed that the seven-factor test established in the *1999 FCC Order* remained applicable.[34] And in both the later *Starpower II*[35] and *Cox*,[36] the FCC conducted a careful analysis of the particular language used to define "local" traffic, twice finding that ISP-bound traffic was "local" within the meaning of an agreement, and twice finding that it was not.

These latter two cases are particularly instructive here. The two interconnection agreements in *Starpower II* that were held not to require reciprocal compensation for ISP-bound traffic looked to a specific language with legal and jurisdictional significance to define what traffic was "local" for compensation purposes – whether the traffic is local on an "***end-to-end***" basis (emphasis in original).[37] The FCC explained:

> [W]e believe that the phrase "end-to-end," used in the context of classifying communications traffic, had achieved a customary meaning in the telecommunications industry. Thus, the two agreements' use of the term of art "end-to-end" signifies that the determination whether certain traffic falls within the category of compensable "Local Traffic" turns on the ***jurisdictional nature*** of the traffic, as divined via the Commission's traditional mode of analysis. In other words, according to the agreements, a call constitutes compensable "Local Traffic" only if it is not jurisdictionally interstate under the Commissions end-to-end analysis.[38]

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[33] *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission, Memorandum Opinion and Order*, 15 FCC Rcd 11277 (2000).

[34] The question arose because the D.C. Circuit had vacated the statutory analysis the FCC had used for concluding that ISP-bound traffic was not "local" within the meaning of the FCC's then-effective rules (as opposed to the meaning of any particular contract). *See Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). By re-affirming the seven-factor test in *Starpower*, the FCC made clear that states should (or, in the case at hand, must) continue to do so as well.

[35] *Starpower II.*

[36] *Cox Virginia Telecom, Inc. vs. Verizon South, Inc., Memorandum Opinion and Order,* No. EB-01-MD-006, FCC 02-133 (rel. May 10, 2002) ("*Cox*").

[37] *Starpower II* at ¶ 26 (emphasis in original).

[38] *Id.* at ¶ 28.

The Agreement here ***does not include any such "end-to-end" language***,[39] so it does not turn on the jurisdictional nature of the traffic.

To the contrary, in the third *Starpower II* agreement and in the *Cox* agreement, the definition of "local traffic" for compensation purposes was based not on the "end-to-end" test, but on the application of Verizon's tariffs to the originating call.[40] In both these instances, Verizon billed a call from a Verizon end user to an ISP as a local call.[41] The FCC ruled that, because ISP-bound traffic is local under Verizon's tariffs and because the agreements at issue defined "local" traffic with reference to those tariffs, ISP-bound traffic is subject to reciprocal compensation under the agreements.[42]

The Agreement here is similar to the interconnection agreements in *Starpower II* and *Cox* found to require compensation. As noted above, Section 5.7.1 states (emphasis added) that "Reciprocal Compensation only applies to the transport and termination of Local Traffic ***billable*** by NYNEX or GNAPs which a Telephone Exchange Service

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39 Verizon's Notice of Supplemental Authority (April 16, 2002) at 5.

40 *Starpower II* at ¶ 42 ("It obligated to the parties to 'reciprocally terminate [Plain Old Telephone Service] calls originating on each other's' networks,' including 'local traffic... as defined in [Verizon South's] tariff.'"); *Cox* at ¶ 23 ("the parties agree that ISP-bound traffic is 'local exchange traffic' under the tariff.").

41 *Starpower II* at ¶ 45; *Cox* at ¶ 23.

42 In *Starpower II*, the FCC stated: "Specifically, the parties stipulate that, when a Verizon South customer places a call to the Internet through an ISP, using a telephone number associated with the caller's local calling area, Verizon South rates and bills that customer for a local call pursuant to the terms of the Tariffs. Consequently, ISP-bound traffic falls within the Tariff's definition of 'Local Service.' Accordingly, because the Starpower-Verizon South Agreement adopts the Tariff's conception of local traffic, we concluded that the Agreement plainly requires Verizon to pay reciprocal compensation for the delivery of ISP-bound traffic." *Starpower II* at ¶ 45. In *Cox*, the FCC stated: "Specifically, the parties stipulate that, when a Verizon South customer places a call to the Internet through an ISP, using a telephone number associated with the caller's local calling area, Verizon South rates and bills that customer for a local call pursuant to the terms of Verizon South's local tariff. Consequently, ISP-bound traffic must constitute traffic defined by the tariff's 'Local Calling Area.' Accordingly, because the Agreement adopts the tariff's conception of local exchange traffic, we concluded that the Agreement plainly requires Verizon South to pay reciprocal compensation before the delivery of ISP-bound traffic." *Cox* at ¶ 23.

Customer originates on NYNEX's or GNAPs's network for termination on the other Party's network."[43] Moreover, as noted above, Section 1.38 (emphasis added) defines "Local Traffic" as "'a call which is originated and terminated within a given LATA, in the Commonwealth of Massachusetts, ***as defined in DPU Tariff 10, section 6***. Intra LATA calls originated on a 1+ presubscription basis when available or a casual dialed (10XXX/101XXXX) basis are not considered local traffic."[44] So, as in *Starpower II* and *Cox*, traffic is "local" for compensation purposes if it is local under the applicable Verizon tariff, and/or if it is dialed on a "local" basis. Here, in its Answer in federal court, Verizon acknowledges that, "it treats calls from its subscribers to ISPs served by CLECs as 'local' for billing purposes pursuant to a federal mandate that it do so."[45] Because ISP-bound traffic is "local" under Verizon's end user tariffs, it is "Local Traffic" under the Agreement and, therefore, subject to reciprocal compensation.

The only rational conclusion from the language of the Agreement, from the application of the FCC's seven-factor test, and from consideration of the FCC's reasoning in analogous cases is that ISP-bound traffic falls within the Agreement's definition of "Local Traffic."

3. The Department's Analysis in *D.T.E. 97-116* Confirms That ISP-Bound Traffic Is Subject To Compensation.

When the Department construed the parties' contract in October 1998, it did not have the benefit of either the FCC's seven-factor test or the specific rulings in *Cox* and *Starpower*. Nonetheless, the Department understood at that time that its basic task was

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43 *See* note 23, *supra*, for the relevance, in this context, of the term "termination."

44 *See* immediately prior footnote.

45 Answer of Defendant Bell Atlantic-Massachusetts (May 19, 2000) ¶ 7.

contract interpretation. It therefore received evidence (in affidavit form) and argument on that question.

The analysis the Department used to resolve this question of contract interpretation was both cogent and, in retrospect, quite consistent with the FCC's later rulings.[46] Referring to Sections 1.38 and 5.8.2 of the Agreement, the Department framed the issue as follows:

> The plain language of the Agreement indicates that [Verizon] and MCI WorldCom agreed to compensate each other for termination of all local calls. The Agreement does not make an exception for calls terminated to ISPs. Thus, the question becomes: Is a call made by a [Verizon] customer to an ISP, but terminated by MCI WorldCom, and then connected by the ISP to the Internet, a "local call" under the Agreement's definition of local traffic? For the reasons cited below, we find it is.[47]

The Department concluded that an ISP-bound call was a "local call" under the Agreement because:

- [T]he characteristics of calls to ISPs are identical to any other local call. ISPs have local telephone numbers; thus, callers reach them by dialing seven digits. Local exchange carriers, including Bell Atlantic and MCI WorldCom, charge their customers local rates for calls to ISPs. Moreover, ISPs' premises are located within the LATA, thus meeting the definition of local traffic in the Interconnection Agreement.[48]
- Even if [Verizon] is correct in claiming that calls to ISPs are indistinguishable for network purposes from long distance calls, the same can be said about local calls that terminate to ISPs that are customers of Bell Atlantic or that terminate into private networks, as are used by some banks and corporations. Such calls are tariffed as local calls by [Verizon].[49]
- A call to an ISP is distinguishable from an IXC call. A call to an ISP is functionally two separate services: (1) a local call to the ISP, and (2) an

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[46] This is why the federal court ***rejected*** the request to vacate *D.T.E. 97-116* and thereby bring this matter back to the beginning. In October 1998, the Department did what it was supposed to do under federal law, and reached a result consistent both with the evidence and with the requirements of federal law — both at the time and as they have evolved over time.

[47] *Id.* at 10-11.

[48] *Id.* at 11.

[49] *Id.*

information service provided by the ISP when the ISP connects the caller to the Internet. This is functionally indistinguishable from the manner in which [Verizon] currently treats its call forwarding or three-way calling services.[50]

?? The FCC also has noted that a call to an ISP is actually two separate services. In its May 8, 1997, Universal Service Order, the FCC stated that "[w]hen a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the [ISP's] service offering."[51]

Having construed the contractual language, the Department ordered payment of reciprocal compensation on ISP-bound traffic. The Department cannot change these never-appealed factual findings, where it has not reopened the record on which *D.T.E. 97-116* was based.

Thus, in *D.T.E. 97-116* the Department, like the FCC in *Starpower II* and *Cox*, focused particularly on the language in the Agreement that ties the definition of "Local Traffic" to Verizon's tariff. In turn, the Department looked to the fact that Verizon tariffed ISP-bound calls as local calls, consistent with the factors in the *1997 FCC Order*[52] looking at whether ISP-bound service was provided "out of intrastate or interstate tariffs," whether the revenues "were counted as intrastate or interstate revenues," and whether message unites included "calls to ISPs in local telephone charges." The fact that ISP-bound calls are "indistinguishable for network purposes" from other calls makes it infeasible to "meter this traffic or otherwise segregate it from local traffic." The Department "also" looked to the FCC's "longstanding policy of treating [ISP-bound] traffic as local."

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50 *Id*. (emphasis added). Note that the Department did not state that a call to an ISP is ***legally*** "two calls," any more than call forwarding comprises two calls. *See* note 53, *infra*.

51 *Id.* at 12.

52 For these factors, see Section B(1), *supra*.

The Department conducted this analysis despite expressly noting that, for legal jurisdictional purposes, the FCC had long ruled that ISP-bound traffic was interstate. *D.T.E. 97-116* at n. 11. The Department specifically understood that, because the FCC had jurisdiction over ISP-bound traffic, "the FCC may make a determination in proceedings pending before it that could require us to modify our findings in this Order." *Id.* But, just as the FCC would repeatedly hold that compensation for jurisdictionally interstate ISP-bound traffic was governed by the language of particular contracts, so too did the Department recognize that the interstate nature of the traffic was not particularly relevant to what the parties had agreed to do.[53] The Department "properly considered"

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[53] It bears emphasis that the recognition in *D.T.E. 97-116* that one can functionally distinguish between a POTS call from an end user to an ISP and the information services provided by the ISP is ***not*** the type of reliance on a "two-call theory" that the FCC found unacceptable in the *1999 FCC Ruling.* The "two-call theory" is an argument designed to defeat the FCC's ***jurisdiction*** over ISP-bound traffic (or similar types of traffic) by claiming that such a call, for ***jurisdictional*** purposes, is actually composed of two segments: a jurisdictionally ***intrastate*** "call" from the end user to the ISP (provided by LECs), followed by a jurisdictionally ***interstate*** "information service" (provided by the ISP).

In the *1999 FCC Ruling,* the FCC made clear that it did not accept the two-call theory as a limitation on its ***jurisdiction.*** *1999 FCC Ruling* at ¶¶ 11, 13. To the extent that some states might have based earlier rulings about compensation for ISP-bound calling on the view that those states, as opposed to the FCC, had ***jurisdiction*** over the traffic, the FCC noted that some re-thinking might be in order. *1999 FCC Ruling* at ¶ 27. For example, the California PUC had expressly ruled that a call to an ISP involved a jurisdictionally interstate "information service" provided by the ISP, but that the calls ***to*** ISPs were simply jurisdictionally intrastate services within that regulator's exclusive jurisdiction. *See* Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service; Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service, Decision No. 98-10-057, Rulemaking No. 95-04-043 (Filed April 26, 1995), Investigation No. 95-04-044, 1998 Cal. PUC LEXIS 875, 82 CPUC2d 492 (Cal. P.U.C. October 22, 1998). It is impossible to square such a ruling with the FCC's view of its own authority; but such a ruling is quite different from the analysis contained in *D.T.E. 97-116.*

But here the Department plainly and unequivocally acknowledged that ISP-bound calls were ***jurisdictionally interstate*** *D.T.E. 97-116* at n. 11. This proves that the Department had not fallen prey to the "two-call" ***jurisdictional*** theory that the FCC found unacceptable. Instead, the Department simply noted that in functional terms, the services provided by one or two LECs in getting a call to an ISP's modem are plainly quite different from the services provided by the ISP itself, and other Internet entities "upstream" from the ISP, in (for example) retrieving an end user's email or delivering a particular web page. The Department properly recognized that these ***functional*** differences are relevant to the ***contractual*** question of how to classify calls to ISPs,

the issues in 1998 and, if it properly considers them again, its findings lead to the same conclusion as in *D.T.E. 97-116*.

III. If The Department Reconsiders *D.T.E. 97-116*, It Must Allow The Parties to Submit Additional Evidence of The Parties Intent And The Meaning of The Agreement.

As described above, Global NAPs believes (a) that the federal court order neither requires nor enables reconsideration or modification of *DTE 97-116;* (b) that any such reconsideration or modification is barred by applicable state law governing such actions by the Department; and (c) that reconsideration of that order, based on the existing record and applying all relevant guidance from the FCC, can only rationally lead to the conclusion that the Agreement unambiguously requires compensation for ISP-bound calls.

If the Department nonetheless finds otherwise, it cannot fairly or reasonably exclude from the record additional evidence that would be relevant to interpretation of the Agreement. The Department, however, has stated that it will not receive evidence. This is a separate and independent legal error in the course the Department apparently is taking. Accordingly, Global NAPs makes the following offer of proof regarding evidence it would introduce if the record were re-opened.

Global NAPs would introduce testimony of Frank T. Gangi, its CEO, and Robert Fox, its Vice-President of Industry Relations, regarding Verizon's understanding of their standard agreement already adopted in early 1997 by MCI-WorldCom and in force when it was adopted by Global NAPs. Mr. Gangi and Mr. Fox would testify to the following:

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even if they are not relevant to the ***statutory*** question of the scope of the FCC's jurisdiction over interstate communications.

- In January, 1997, Mr. Gangi, then President of Cable Internet Access, Inc. d/b/a WorldNET ("WorldNET"), and Barton Bruce, Vice-President of WorldNET, in White Plains, New York, met with Thomas Dreyer, Director of Account Managers for NYNEX; Amy Stern, Director of Product Management for NYNEX; Ed Rabua, Technical Assistant for NYNEX; and Robert Fox, then an account representative at NYNEX.

- During this meeting, the NYNEX representatives informed Mr. Gangi and Mr. Bruce that if WorldNET became a CLEC, NYNEX would have an obligation to pay it reciprocal compensation for Internet traffic at the rate of 8/10 of a cent per minute. The NYNEX representatives reaffirmed that NYNEX would pay WorldNET on this basis after Mr. Gangi explained that he initially expected to terminate calls to ISPs and not to originate traffic to Verizon.

Although, immediately prior to signing an interconnection agreement with Global NAPs, NYNEX disavowed an intention to pay reciprocal compensation on ISP-bound traffic to Global NAPs, the January 1997 meeting reflects the ILEC's understanding and course of dealing under the WorldCom agreement that Global NAPs adopted. This testimony thus establishes Verizon's understanding that the WorldCom agreement required payment of reciprocal compensation on ISP-bound traffic.

This conclusion and this evidence would be corroborated by material already in the record of this proceeding. Specifically, in May 1996, Verizon itself affirmatively argued that the FCC need not adopt "bill and keep," arguing that ILECs would never set the reciprocal compensation rate too high because, if they did, new entrants would target ISPs as customers and the ILECs would be writing large monthly checks to these new entrants. Verizon stated:

> The notion that bill and keep is necessary to prevent LECs from demanding to high a rate reflects a fundamental misunderstanding of the market. If these rates are set too high, the result will be that new entrants, who are in a much better position to selectively market their services, will sign up customers whose calls are predominantly in bound, such as credit card authorization centers and ***Internet***

> ***access providers*** The LEC would find itself writing large monthly checks to the new entrant.[54]

In other words, Verizon fully understood, from the inception of the entire reciprocal compensation regime, that calls to ISPs were subject to reciprocal compensation and negotiated its contracts with this understanding. This is underscored by the fact that in practice, Verizon paid reciprocal compensation on calls to ISPs until the now vacated *1999 FCC Decision* was issued. Thus, Verizon's own representation to the FCC, the FCC's long-standing policy of treating ISP bound traffic as local and Verizon's conduct compel a conclusion that ISP bound traffic is subject to reciprocal compensation under the Agreement.

CONCLUSION

Nothing in the federal court decision compels the Department to redo its decision-making in this matter. To the contrary, the court's ruling that the Department's final order in *D.T.E. 97-116* "properly considered" the question of contractual interpretation required by federal law and precludes the Department from undoing that decision where there are no compelling grounds for doing so. Because there are no such grounds, the only action not inconsistent with the district court's ruling (and not inconsistent with the Department's pursuit of its appeal from the ruling) is to close the docket.

If the Department does reconsider the order, whether on the existing record or allowing the parties to adduce additional evidence, it should conclude that *D.T.E. 97-116* correctly determined that an ISP-bound call is a "local" call under the Agreement's

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[54] *Reply Comments of Bell Atlantic*, CC Docket No. 96-98 (filed May 30, 1996) (emphasis added).

definition of local traffic based on the factors "properly considered" in 1998 and the criteria set out and applied by the FCC for construing interconnection agreements.

Respectfully submitted,

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