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

MCI WORLDCOM COMMUNICATIONS, INC.'S OPENING BRIEF ON REMAND

Of Counsel:
Darryl M. Bradford
John R. Harrington
Steven J. Winger
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Brian J. Leske
WorldCom, Inc.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6546

Richard Fipphen
MCI WorldCom Communications, Inc.
200 Park Avenue, 6th Floor
New York, NY 10166
(212) 519-4867
richard.fipphen@wcom.com

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Pursuant to the Department's October 24, 2002 Order ("Procedural Order"), MCI WorldCom Communications, Inc., as successor-in-interest to MFS Intelenet of Massachusetts, Inc. ("WorldCom"), respectfully submits its opening remand brief.

INTRODUCTION

The Department should reaffirm its October 21, 1998 Order requiring Verizon New England, d/b/a Verizon Massachusetts ("Verizon") to pay WorldCom reciprocal compensation when WorldCom delivers calls from Verizon's customers to Internet service providers ("ISPs") that are WorldCom's customers. The United States District Court for the District of Massachusetts has declared that the Department performed the proper contract analysis required by federal law in its October 1998 Order. The District Court has further declared that the Department's subsequent May 19, 1999, July 11, 2000, and August 29, 2001 Orders, in which the Department purported to vacate its October 1998 Order and to relieve Verizon of the obligation to pay WorldCom reciprocal compensation for calls to ISPs, are *illegal* and violate federal law. The District Court rejected the Department's repeated attempts to link whether reciprocal compensation is owed for ISP-bound traffic under the Agreement to the minimum requirements of federal law.

The District Court's decision confirms what WorldCom has consistently maintained. The Department correctly interpreted the interconnection agreement between WorldCom and Verizon (the "Agreement") in its October 1998 Order, and its repeated attempts to relieve Verizon of its obligation to pay WorldCom reciprocal compensation for ISP-bound traffic under the Agreement are illegal and indefensible. The Department should reaffirm its 1998 Order.

The Department, however, has indicated that it will not do so. The Procedural Order indicates that the Department will "re-examine," without considering any new evidence, whether the Agreement requires reciprocal compensation for calls to ISPs. At the same time, the Department has

appealed the District Court's decision to the First Circuit, arguing that it already properly interpreted the Agreement to exclude reciprocal compensation for calls to ISPs.

With due respect, the Department's proposed course of action is improper. The Department cannot argue in the First Circuit that it has already properly interpreted the Agreement to exclude reciprocal compensation for calls to ISPs, that the District Court was wrong, and that remand proceedings are unnecessary, and at the same time impartially consider on remand whether the Agreement does require reciprocal compensation for calls to ISPs. Doing so would impermissibly interfere with the First Circuit's jurisdiction and deprive WorldCom of due process.

If the Department nevertheless does reconsider its interpretation of the Agreement, it must reaffirm the interpretation from its October 1998 Order. That Order properly considered the Agreement's plain language, the characteristics of calls to ISPs, and other relevant factors in determining that calls to ISPs come within the Agreement's reciprocal compensation provisions. The numerous federal courts and agencies that have considered this issue uniformly have found that interconnection agreements materially indistinguishable from the Agreement here require reciprocal compensation for calls to ISPs. The District Court has held that the FCC's subsequent orders do not alter that result.

At a minimum, in light of this overwhelming authority, the Agreement cannot be found *unambiguously* to exclude reciprocal compensation for calls to ISPs. Thus, if the Department concludes (wrongly) that the Agreement does not unambiguously require reciprocal compensation for ISP-bound traffic, it must allow WorldCom to take discovery and present evidence regarding the Agreement's meaning, which the Procedural Order does not allow.

Finally, even if the Department erroneously finds that whether the Agreement requires reciprocal compensation for calls to ISPs depends solely upon the requirements of federal law, it

should find that the Agreement requires reciprocal compensation for calls to ISPs. The FCC has yet to explain, in an order that can survive appeal, why ISP-bound traffic is excluded from the reciprocal compensation requirements of the Telecommunications Act of 1996 (the "Act"). The reason for that failure is plain. The Act does require reciprocal compensation for calls to ISPs.

BACKGROUND

The issue of whether reciprocal compensation is owed for calls to ISPs has arisen across the country. Over 30 state commissions have interpreted interconnection agreements to require reciprocal compensation for calls to ISPs.[1] The Fifth, Seventh, and Tenth Circuits, and numerous federal district courts, have upheld state commission decisions finding calls to ISPs to be subject to reciprocal compensation provisions in interconnection agreements.[2]

Virtually all of those interconnection agreements, like the Agreement between Verizon and WorldCom, require reciprocal compensation for the termination of "local traffic."

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[1]The state commissions finding that reciprocal compensation is due for calls to ISPs under interconnection agreements are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, Nebraska, Nevada, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. WorldCom will provide copies of these decisions upon request.

[2]Southwestern Bell Tel. Co. v. Brooks Fiber Communications, 235 F.3d 493, 499 (10th Cir. 2000); Southwestern Bell Tel. Co. v. Public Util. Comm'n, 208 F.3d 475, 483 (5th Cir. 2000); Illinois Bell Tel. Co. v. WorldCom Technologies, 179 F.3d 566, 573-74 (7th Cir. 1999), cert. dismissed, 122 S. Ct. 1780 (2002); Verizon Northwest v. WorldCom, No. C99-912C, slip op. at 4-5 (W.D. Wash. Feb. 26, 2001) (Ex. 1); Verizon Cal. v. California Telecomms. Coalition, No. C 99-03973, slip op. at 19 (N.D. Cal. Sept. 27, 2001) (Ex. 2); BellSouth Telecomms. v. MCImetro Access Transmission Servs., 97 F. Supp. 2d 1363, 1378-80 (N.D. Ga. 2000), rev'd on other grounds, 278 F.3d 1223 (11th Cir. 2002), vacated and petitions for reh'g en banc granted, 297 F.3d 1276 (11th Cir. July 17, 2002); BellSouth Telecomms. v. ITC Deltacom Communications, 62 F. Supp. 2d 1302, 1314 (M.D. Ala. 1999); Michigan Bell Tel. Co. v. MFS Intelenet, No. 5:98-CV-18, 1999 U.S. Dist. LEXIS 12093 at *9, *11 (W.D. Mich. Aug. 2, 1999); see also Bell Atlantic Md. v. MCI WorldCom, 240 F.3d 279, 296-97 (4th Cir. 2001), rev'd on other grounds sub nom., Verizon Md. v. Public Serv. Comm'n, 122 S. Ct. 1753 (2002) (reaching same conclusion for jurisdictional purposes).

Verizon and WorldCom agreed to pay each other reciprocal compensation for "the transport and termination of Local Traffic billable by [Verizon] or [WorldCom] which a Telephone Exchange Service Customer originates on [Verizon's] or [WorldCom's] network for termination on the other Party's network." (Agreement § 5.8.1.) "Local Traffic" is defined in the Agreement by reference to whether a call is "local" under Verizon's tariffs; specifically "a call which is originated and terminated within a given LATA, in the Commonwealth of Massachusetts, *as defined in [Department] Tariff 10, Section 5* . . . ." (Id. § 1.38) (emphasis added).

When the Agreement became effective, Verizon and WorldCom charged and paid each other reciprocal compensation for calls by each other's customers to their local ISP customers. Verizon treated calls to ISPs as local under its own tariffs, charging its customers for local calls when they connected to ISPs, and charging its own ISP customers for local service when providing them with telephone service. However, in April 1997, Verizon "informed [] WorldCom . . . that it would unilaterally discontinue payments of reciprocal compensation for local exchange traffic that [] WorldCom *terminates* to [ISPs]." (October 1998 Order at 1-2.) (Emphasis added). WorldCom responded with a complaint to enforce the Agreement's reciprocal compensation provisions.

In its October 1998 Order, the Department granted the complaint and ordered Verizon to pay WorldCom reciprocal compensation under the Agreement. (Id. at 14-15.) The Department held that, under the Agreement's plain language, calls to ISPs fall within the Agreement's reciprocal compensation provisions. (Id. at 10-11.) The Department also found that the parties' conduct under the Agreement demonstrated that they agreed to pay reciprocal compensation for calls to ISPs. (Id. at 11.) Finally, the Department concluded that nothing in federal law demonstrated that calls to ISPs are not subject to the Agreement's reciprocal compensation obligations. (Id. at 11-12.)

The Initial ISP Order, the ISP Remand Order, and the D.C. Circuit's Decisions

Long after the parties negotiated the Agreement, and after the Department interpreted the Agreement in the October 1998 Order, the FCC considered whether § 251(b)(5) of the Act requires reciprocal compensation for calls to ISPs. In the 1999 Initial ISP Order,[3] the FCC concluded that § 251(b)(5) does not mandate reciprocal compensation for calls to ISPs because a substantial portion of ISP-bound traffic is interstate for jurisdictional purposes. Initial ISP Order ¶¶ 1, 10-20.

The FCC also held, however, that parties may have agreed to pay reciprocal compensation for calls to ISPs under existing interconnection agreements, regardless of the FCC's finding that such treatment was not statutorily required. The FCC confirmed that it has historically treated ISP-bound traffic as local. Id. ¶ 23. "Against this backdrop" of historically local treatment, and "in the absence of any contrary [FCC] rule," the FCC found:

> parties entering into interconnection agreements may reasonably have agreed for purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic.

Id. ¶ 24. The FCC thus held that, pending adoption of a new federal compensation regime, parties' rights to reciprocal compensation for ISP-bound traffic should be determined as a matter of contract, by the terms of their interconnection agreements. Id. The FCC found "no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic," and it set forth several factors relevant to determining whether parties had agreed to pay reciprocal compensation for calls to ISPs. Id. ¶¶ 21, 24.

WorldCom and other carriers appealed the FCC's determination that the Act does not require reciprocal compensation for ISP-bound traffic. The D.C. Circuit sustained WorldCom's

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[3] In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Comp. for ISP-Bound Traffic, 14 F.C.C.R. 3689 (1999) ("Initial ISP Order").

challenge. It vacated the Initial ISP Order, rejecting for "want of reasoned decisionmaking" the FCC's determination that the Act does not affirmatively require reciprocal compensation for calls to ISPs. Bell Atlantic Tel. Co. v. FCC, 206 F.3d 1, 3, 9 (D.C. Cir. 2000). The court found that the FCC had failed to explain why reciprocal compensation was not due for calls to ISPs under the Act, the FCC's own 1996 regulations, and the FCC's prior precedent. Id. at 6-9. Indeed, the Fifth Circuit has concluded that reciprocal compensation *is* due for calls to ISPs under the FCC's regulations. Southwestern Bell Tel. Co. v. Public Util. Comm'n, 208 F.3d 475, 486 (5th Cir. 2000).

In Bell Atlantic, no party challenged the FCC's conclusion that parties may agree in interconnection agreements to pay reciprocal compensation for calls to ISPs. The FCC reaffirmed after Bell Atlantic that state commissions should continue to determine whether parties contracted to pay reciprocal compensation for calls to ISPs by looking to the factors set forth in the Initial ISP Order. In re Starpower Communications, LLC, 15 F.C.C.R. 11,277, ¶ 9 (2000) ("Starpower I").

On April 27, 2001, the FCC issued its ISP Remand Order on remand from the D.C. Circuit's Bell Atlantic decision.[4] The FCC did not attempt to explain why calls to ISPs should not be treated as local calls under its existing regulations and precedent. Instead, it abandoned its prior approach to these issues and announced a new and prospective rule for addressing how local carriers are to be compensated when they exchange ISP-bound traffic. In sum, the FCC for the first time held that calls to ISPs are interstate "information access" that are "carved out" from § 251(b)(5)'s mandatory requirements by § 251(g). E.g., id. ¶¶ 8, 30, 36 n.64, 39, 42. Because carriers incur costs when they exchange calls to ISPs, the FCC concluded that a form of intercarrier compensation is necessary. Id. ¶¶ 80, 87 n.168, 89. The FCC therefore announced a new and interim rule to govern

[4]In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, Intercarrier Comp. for ISP-Bound Traffic, 16 F.C.C.R. 9151 (2001) ("ISP Remand Order").

such compensation on a prospective basis. E.g., id. ¶¶ 8, 77-94.

The ISP Remand Order contains multiple provisions holding that its new rules are prospective, do not alter existing interconnection agreements unless a change-of-law provision applies, and only apply as agreements requiring reciprocal compensation for calls to ISPs expire. Id. ¶ 82; see also id. ¶¶ 49, 54, 56, 77, 78. The FCC did not overrule its conclusion in Starpower I that the factors announced in the Initial ISP Order remained relevant to determining what parties intended under existing interconnection agreements.

WorldCom and other carriers again challenged the FCC's conclusions. On May 3, 2002, the D.C. Circuit remanded the ISP Remand Order. WorldCom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2002). The court rejected the FCC's determination that § 251(g) "carves out" ISP-bound traffic from the Act's reciprocal compensation obligations, holding that the FCC's reliance on § 251(g) was "precluded." Id. at 430. The court found that § 251(g) is merely a "transitional device, preserving various [carrier] duties that antedated the 1996 Act, but not enacting a limit on section 251(b)(5)." Id. The D.C. Circuit thus held unlawful the FCC's sole justification for excluding ISP-bound traffic from the Act's reciprocal compensation requirements. Id.

The D.C. Circuit left standing the FCC's new inter-carrier compensation rules for the time being, but confirmed that the rules apply only on a prospective basis. Id. at 431. The D.C. Circuit remanded the matter to the FCC so the agency could attempt to formulate a new legal basis for its prospective rate regime. Id. at 434.

The Department's Response to the FCC's and D.C. Circuit's Decisions

After the FCC issued the Initial ISP Order, Verizon filed a Motion for Modification of the Department's October 1998 Order, arguing that the Initial ISP Order relieved Verizon of its obligation to pay reciprocal compensation for calls to ISPs. (May 1999 Order at 4.) The Department

agreed with Verizon. The Department found that its October 1998 Order had been based on a "two-call" theory, which "cannot be squared with the FCC's 'one-call' [i.e. end-to-end] analysis'" in the Initial ISP Order. (Id. at 22.) The Department thus concluded that its October 1998 Order had been based on a "mistake of law." (Id. at 24.)

After the D.C. Circuit vacated the Initial ISP Order, Global NAPs asked the Department to vacate its May 1999 Order that had employed the same flawed analysis. In its July 2000 Order, the Department admitted that it had vacated its October 1998 Order based on the Initial ISP Order and that the D.C. Circuit had "[u]nquestionably" vacated the Initial ISP Order. (July 2000 Order at 2, 15.) The Department nonetheless declined to vacate the May 1999 Order. (Id. at 12.)

After the ISP Remand Order, the Department again reopened its reciprocal compensation docket. In its August 2001 Order, the Department admitted that the FCC had "re-examin[ed]" the rationale from its Initial ISP Order and that there were "differences" between the rationale of the ISP Remand Order and the Initial ISP Order. (August 2001 Order at 12, 13.) Nevertheless, the Department found that the ISP Remand Order "does not compel the Department to otherwise modify or change the conclusions reached in" its prior Orders. (Id. at 10-11.) The Department concluded that "[w]hat is determinative is that the FCC does not characterize ISP-bound traffic as 'local traffic'" because "[i]t is only the designation of 'local traffic' that permits the reciprocal compensation provisions of the parties' interconnection agreements to apply." (Id. at 12.) WorldCom and Global NAPs filed suit in the District Court challenging these Orders.

Proceedings Before the District Court and the Court's August 27, 2002 Decision

On July 5, 2002, a Magistrate Judge issued Findings and Recommendations urging that the District Court: (1) declare that the Department's May 1999, July 2000, and August 2001 Orders violate federal law; (2) declare that the Department's original October 1998 Order is

consistent with federal law; and (3) issue a preliminary injunction directing the Department "to undertake an analysis of the interconnection agreements to determine whether those agreements give rise to reciprocal compensation for ISP-bound traffic." (July 5, 2002 Findings and Recommendations ("F&R") at 27, 30.) The Magistrate Judge found that the Department "violated federal law" in its latter Orders by "refus[ing] to consider whether, pursuant to Massachusetts law and other equitable and legal principles, the parties contracted in their interconnection agreements for reciprocal compensation for calls bound for ISPs." (Id. at 27.) By contrast, the Magistrate Judge found that the Department "properly considered that question in the [October 1998] Order," and that the October 1998 Order therefore complied with federal law. (Id.)

On August 27, 2002, Judge Lindsay accepted the Findings and Recommendations in part and rejected them in part. (8/27/02 Memorandum Order.) The District Court accepted the Findings and Recommendations insofar as they concluded that the October 1998 Order interpreting the Agreement is consistent with federal law, and that the latter Orders that purported to vacate the October 1998 Order violate federal law. (Id. at 2.) The Court "expressly adopt[ed] the reasoning set forth . . . in the Findings and Recommendations" on these points. (Id.)

The District Court rejected the recommendation that it issue an injunction directing the Department to reinterpret the Agreement, finding an injunction unnecessary in light of its ruling. (Id. at 3.) Rather than directing the Department to reinterpret the Agreement, the Court entered summary judgment on the merits for WorldCom and Global NAPs, and "remand[ed] these cases 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 to the plaintiffs and denying summary judgment to the defendants." (Id.) Verizon and the Department have appealed the District Court's decision.

The Department's Procedural Order

On October 24, 2002, the Department issued the Procedural Order. The Department stated that it would "engage in 'proceedings or deliberations' that 'consider the contractual language in the parties' interconnection agreements' in accordance with the District Court's . . . decision." (Procedural Order at 2.) The Department also stated that it would reinterpret the Agreement without affording parties the opportunity to present evidence. (Id.)

ARGUMENT

I. IN LIGHT OF THE DISTRICT COURT'S DECISION, THE DEPARTMENT SHOULD REAFFIRM ITS OCTOBER 1998 ORDER.

Federal law requires the Department to determine whether reciprocal compensation is owed under the Agreement by interpreting the Agreement's terms, and the Department's failure to interpret the Agreement led the District Court to find that its latter Orders violate federal law. The Department "violated federal law" in those Orders by "refus[ing] to consider whether, pursuant to Massachusetts law and other equitable and legal principles, the parties contracted in their interconnection agreements for reciprocal compensation for calls bound for ISPs." (F&R at 27.)

By contrast, the District Court ruled that the Department conducted a proper interpretation of the Agreement, in compliance with federal law, in its October 1998 Order. The Magistrate Judge found that the Department "properly considered that question in the [October 1998] Order," and that the October 1998 Order therefore was consistent with federal law. (Id.) The October 1998 Order "examined the specific language in the [WorldCom]-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 contract formation" in reaching its decision. (Id. n.20.) Citing numerous federal court and FCC decisions, the Magistrate Judge noted that the October 1998 Order was "in accordance with a not insignificant amount of authority." (Id.)

Thus, while the Magistrate Judge found that the federal court could not interpret the Agreement on its own, (id. n.21), the Findings and Recommendations specifically *affirmed* the contractual analysis undertaken by the Department in its October 1998 Order. The District Court "expressly adopt[ed] the reasoning set forth . . . in the Findings and Recommendations" on this issue. (Mem. Op. at 2.) Thus, the District Court has expressly affirmed the contractual analysis employed by the Department in its October 1998 Order.

The District Court also expressly rejected the Department's and Verizon's argument that the FCC's subsequent orders required the Department to alter its contractual analysis in its October 1998 Order. As the Magistrate Judge ruled, "[t]he plain language of the FCC's rulings expressly stated that the rulings were not intended to be used as a foundation for overturning prior decisions by state regulatory commissions." (F&R at 25.) Moreover, the Initial ISP Order has now been vacated and cannot provide any basis to alter the October 1998 Order. Bell Atlantic, 206 F.3d at 3, 9. Nothing in the FCC's rulings permit the DTE to reconsider its October 1998 Order.

The District Court's decision requires the Department to conduct "proceedings or deliberations" that are "not inconsistent with" its decision and with "those parts of the Findings and Recommendations that explicate the reasons for granting summary judgment to the plaintiffs and denying summary judgment to the defendants." (Mem. Op. at 3.) Because the District Court has already found that the Department conducted a proper contract analysis in its October 1998 Order, and that the FCC's subsequent orders do not affect that analysis, the only remand proceeding "consistent with" the District Court's decision is to reaffirm its October 1998 Order.

II. THE DEPARTMENT CANNOT RECONSIDER ITS OCTOBER 1998 ORDER WHILE ITS APPEAL TO THE FIRST CIRCUIT IS PENDING.

If the Department declines to reaffirm its October 1998 Order, it cannot reconsider that Order while its appeal to the First Circuit is pending. Two fundamental principles prevent the

Department from doing so.

First, an agency may not undercut judicial review proceedings by reopening the administrative proceedings that are under review. See Exxon Corp. v. Train, 554 F.2d 1310, 1316 (5th Cir. 1977); Aubre v. United States, 40 Fed. Cl. 371, 376 (Ct. Cl. 1998); United States v. Benmar Trans. & Leasing Corp., 444 U.S. 4, 5 (1979). Once a reviewing court has undertaken review of a final agency order, the agency may not interfere with the court's jurisdiction by modifying or reconsidering the order under review. Zenith Electronics Corp. v. United States, 884 F.2d 556, 560-61 (Fed. Cir. 1989); accord American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 541 (1970); Inland Steel Co. v. United States, 306 U.S. 153, 160 (1939). It is inappropriate to proceed in two fora at once. See, e.g., BellSouth Corp. v. FCC, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994).

But the Department is doing just that. The Department has appealed the District Court's Order to the First Circuit, claiming that the Department already interpreted the Agreement in its latter Orders, and that remand proceedings are therefore inappropriate. Having invoked the First Circuit's jurisdiction, the DTE cannot at the same time lawfully conduct the very remand proceedings it claims it need not conduct.

Second, proceeding on remand while the Department's appeal is pending would deprive WorldCom of its right to an impartial forum on remand. "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955). Due process guarantees litigants the right to an "unbiased judge" or an "impartial decisionmaker." E.g. Johnson v. Mississippi, 403 U.S. 212, 216 (1971); Stivers v. Pierce, 71 F.3d 732, 744 (9th Cir. 1995). "[T]he requirement of impartiality is applied even more strictly to administrative adjudicators because of the absence of procedural safeguards normally available in a judicial proceeding." Barry v. Heckler, 620 F. Supp. 779, 782 (N.D. Cal. 1985).

These principles preclude the Department from reconsidering its interpretation of the Agreement while its appeal to the First Circuit is pending. Respectfully, given its litigation position in the District Court and the First Circuit, the Department cannot satisfy its indisputable obligations to maintain impartiality when re-interpreting the Agreement on remand. Because "the appearance of evenhanded justice . . . is at the core of due process," Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring), the Department should not even *appear* to be biased.

III. THE DEPARTMENT HAS NO GROUNDS TO RECONSIDER ITS INTERPRETATION OF THE AGREEMENT IN THE OCTOBER 1998 ORDER.

If the Department does proceed on remand, it has no basis to reconsider the October 1998 Order. The District Court has held that the Department's attempts to vacate the October 1998 Order were unlawful. Under the District Court's decision, the October 1998 Order was never validly vacated and therefore remains in full force and effect. See Rivers v. Roadway Express, 511 U.S. 298, 312-13 (1994); National Fuel Gas Supply Corp. v. FERC, 59 F.3d 1281, 1289 (D.C. Cir. 1995).

To be sure, the Magistrate Judge did not foreclose the Department from reconsidering its contract analysis on remand. (F&R at 26.) But the Department may only reconsider its October 1998 Order to the limited extent permitted by Massachusetts law. Where, as here, regulations do not clearly specify agency authority to reopen adjudications, an agency can only do so "sparingly," and only "on account of *procedural defect* such as fraud, misrepresentation, misconduct, or additional evidence." Cronin v. Commissioner of Div. of Med. Assistance, No. CV 992853H, 2000 WL 1299483, at *3 (Mass. Sup. Ct. Apr. 24, 2000) (emphasis in original). The Department itself recognized that:

> [R]econsideration 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 reviewing deliberation . . . . A motion for reconsideration should bring to light previously unknown or

> undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case.

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No procedural defect or extraordinary circumstance exists to justify reconsidering the October 1998 Order. Verizon has not claimed that new evidence has emerged, or that there has been an intervening change in the governing law since the Department issued its October 1998 Order.[5] Moreover, as noted, the District Court has held that the FCC's decisions provide no basis for reconsideration. Accordingly, there is no basis for the Department to reopen proceedings.

IV. IF THE DEPARTMENT DOES RECONSIDER ITS OCTOBER 1998 ORDER, IT SHOULD REAFFIRM THAT ORDER'S INTERPRETATION OF THE AGREEMENT.

If the Department does reconsider its October 1998 Order, it should reaffirm its conclusion that the Agreement requires reciprocal compensation for ISP-bound traffic. The October 1998 Order correctly interpreted the Agreement in light of its plain language, the characteristics of calls to ISPs, and common industry understanding. Verizon's contrary interpretation is wrong. At a minimum, the Agreement is ambiguous, and the Department should allow WorldCom to take discovery and present extrinsic evidence on the parties' intent.

A. The Department's Interpretation of the Agreement in its October 1998 Order is Correct.

In interpreting a contract, courts must "give effect to the parties' intentions and construe the language to give it reasonable meaning wherever possible." Brillante v. R.W Granger & Sons, 772 N.E.2d 74, 79 (Mass. App. 2002). To ascertain the parties' intent, Massachusetts courts

[5]Under the FCC's ISP Remand Order, if Verizon believes there has been a change of law under its interconnection agreements, it should seek to amend the agreements on a prospective basis as it has done in other states. See ISP Remand Order ¶ 82.

consider the words used in the agreement, the agreement taken as a whole, and surrounding facts and circumstances. Massachusetts Mun. Wholesale Elec. Co. v. Town of Danvers, 577 N.E.2d 283, 288 (Mass. 1991). "When the written agreement, as applied to the subject matter, is in any respect uncertain or equivocal in meaning," extrinsic evidence (including business usages and the parties' performance) is admissible to interpret the contract. Keating v. Stadium Management Corp., 508 N.E.2d 121, 123 (Mass. App. Ct. 1987); see also Bourgeois v. Hurley, 392 N.E.2d 1061, 1064 (Mass. App. Ct. 1979). A party's actions after entering into a contract are evidence of the party's understanding of the contract's legal effect. Keating, 508 N.E.2d at 123; Hubert v. Melrose-Wakefield Hosp. Ass'n, 661 N.E.2d 1347, 1351 (Mass. App. Ct. 1996).

Under these principles, the Department correctly found in its October 1998 Order that the Agreement requires reciprocal compensation for calls to ISPs. The Department first found that the "plain language" of the Agreement supported the conclusion that Verizon and WorldCom agreed to pay reciprocal compensation for calls to ISPs. (1998 Order at 10-11.) The Department analyzed the specific sections of the Agreement that provide that the parties will pay each other reciprocal compensation for "local traffic." (Id.) It also analyzed § 1.38 of the Agreement, which defines "local traffic" by reference to whether a call is local under Verizon's tariffs. (Id. at 10.) It found that the parties "agreed to compensate each other for termination of all local calls" as that term was defined in the Agreement. (Id.) It next noted that, while the Agreement listed several types of calls for which reciprocal compensation would not be paid, "[t]he Agreement does not make an exception for calls terminated to ISPs." (Id. at 10-11.) The Department repeatedly found that WorldCom does "terminate" calls to ISPs.

The Department then considered the relevant characteristics of calls to ISPs to determine whether calls to ISPs fall "under the Agreement's definition of local traffic." (Id. at 11.)

As the Department found, "the characteristics of calls to ISPs are identical to any other local call." (Id.) ISPs "have local telephone numbers; thus, callers reach them by dialing seven digits." (Id.) Calls to ISPs "are tariffed as local calls" by Verizon. (Id.) Local telephone carriers, "including [Verizon] and MCI WorldCom, charge their customers local rates for calls to ISPs." (Id.) ISPs "are located within the LATA, thus meeting the definition of local traffic in the Agreement." (Id.) After the Agreement became effective, Verizon and WorldCom initially paid each other reciprocal compensation for delivering calls to ISPs. (Id. at 1.) Thus, both the language of the Agreement and the circumstances surrounding its execution and performance make clear that the parties intended to exchange reciprocal compensation for ISP-bound traffic.

The Department's interpretation of the Agreement in its October 1998 Order is confirmed by the consensus among federal circuit courts of appeal, the FCC, and over 30 state commissions, each of which has interpreted indistinguishable interconnection agreements as requiring reciprocal compensation for calls to ISPs. For example, the Fifth Circuit concluded that calls to ISPs were subject to reciprocal compensation because they fit within the agreement's definition of "local traffic." Southwestern Bell, 208 F.3d at 483, 486, 87. The Fifth Circuit "found ample evidence that . . . the telecommunications industry as a whole . . . treated ISP-bound calls as terminating locally at the time that the interconnection agreements were being negotiated." Id. at 487. Further, the Fifth Circuit found that at the time the FCC itself "had embraced a custom of treating calls to ISPs as though they were local." Id. at 486.

The Tenth Circuit also held that a state commission decision properly interpreted an interconnection agreement similar to the Agreement here to require reciprocal compensation for calls to ISPs. Brooks Fiber, 235 F.3d at 499-501. As here, the agreement in that case required reciprocal compensation when the parties exchanged "local traffic," defined as "traffic which 'originates and

terminates within a [carrier's] exchange'" Id. at 499. The Tenth Circuit affirmed the state commission's decision to require reciprocal compensation under that language. Id. at 500-01. The court relied on, among other factors, the contract language and the FCC's regulatory treatment of ISP traffic at the time the parties' interconnection agreement was executed. Id. at 500. In addition, the court noted that the FCC has "historically directed states to treat ISP traffic as local." Id. at 500-01.

The Seventh Circuit has reached the same conclusion. See Illinois Bell, 179 F.3d at 573-74. The agreement in Illinois Bell provided that reciprocal compensation applied to "local traffic," which it defined as "traffic . . . that a Telephone Exchange Service Customer originates on [the incumbent's] or [the other carrier's] network for termination on the Other Party's network." Like Verizon, the incumbent in Illinois Bell argued that the FCC had long held that calls to ISPs are not local. Id. The Seventh Circuit reviewed the FCC's precedents and reached the opposite conclusion: "it seems clear that the FCC *would not agree* with [the incumbent] that it has had a long-standing policy against treating calls to ISPs as local calls" Id. (emphasis added). The Seventh Circuit therefore rejected the incumbent's challenge and approved the state commission's finding requiring reciprocal compensation calls to ISPs. Id. at 573-74.

The FCC's interpretation of the interconnection agreements in two recent cases further reinforce the Department's October 1998 interpretation of the Agreement. In both cases, the FCC interpreted interconnection agreements that, like the Agreement here, required reciprocal compensation for "local" calls that are "terminated" locally. Cox Virginia Telcom v. Verizon South, 17 F.C.C.R. 8540 ¶ 22 (2002) ("Cox Telcom"); Starpower Communications v. Verizon South, 17 F.C.C.R. 6873 ¶ 42 (2002) ("Starpower II"). Verizon argued that calls to ISPs cannot be "local traffic" and do not "terminate" locally with the ISP because federal law does not require reciprocal compensation for calls to ISPs. E.g., Cox Telcom ¶¶ 24-26. The FCC rejected that argument,

holding that the Verizon agreed to pay reciprocal compensation for ISP-bound calls. Id. ¶¶ 42-45; Starpower II ¶¶ 22-23. The FCC thus found it appropriate to interpret contracts, like the Agreement in this case, that turn on the terms "local traffic" and "termination," to require reciprocal compensation for calls to ISPs.

Moreover, the FCC held that its interpretation in Starpower II and Cox Telcom was bolstered by the agreements' definitions of "local" traffic, which, like the Agreement in this case, referred to Verizon's publicly-filed tariffs. The Cox Telcom agreement, for example, required reciprocal compensation for "Local Exchange Traffic," which was defined as calls within Verizon's "Local Calling Area." Cox Telcom ¶ 5. Verizon's "Local Calling Area," in turn, was set out in "[Verizon's] local tariff at the date of this agreement." Id. Likewise, in Starpower II, the definition of "local traffic" in the Verizon South agreement was derived from Verizon's publicly-filed tariff. Starpower II ¶¶ 42-43. Becasue Verizon treated calls to ISPs as local under the referenced tariffs, the FCC held that Verizon had agreed to treat calls to ISPs as local under its interconnection agreements. Cox Telcom ¶¶ 22-23; Starpower II ¶¶ 44-45.

The Agreement here closely resembles the agreements in Cox Telcom and Starpower II. It requires reciprocal compensation for "Local Traffic," which it defines as a "call which is originated and terminated within a given LATA, in the Commonwealth of Massachusetts, *as defined in [Department] Tariff 10, Section 5[.]*" (Agreement § 1.38) (emphasis added). Just as the Cox Telcom Agreement defined "local traffic" for reciprocal compensation purposes by reference to the state tariff's definition of local calling areas, the Agreement here similarly defines "local traffic" by reference to a state tariff. (Id.) Further, Verizon charges for ISP-bound traffic out of its local tariffs, just like Verizon South. Thus, as in Cox Telcom and Starpower II, Verizon's treatment of these calls under its state law tariffs defines its obligation to pay reciprocal compensation for calls to ISPs.

To be sure, the FCC also found in Starpower II that Verizon would not be required to pay reciprocal compensation for ISP-bound calls under two other interconnection agreements (the "Verizon Virginia agreements").[6] While WorldCom disagrees with the FCC's interpretation, those agreements contained language that the FCC construed as referring to the "end-to-end" jurisdictional nature of particular calls. Starpower II ¶¶ 26-27. Because the FCC purports to have considered ISP-bound traffic as jurisdictionally interstate as an "end-to-end" matter, it concluded that reciprocal compensation did not apply to that traffic under the Verizon Virginia agreements. Id. ¶ 30. No such "end-to-end" language, however, appears in the Agreement here.

As shown in the chart attached hereto as Ex. 3, the Agreement here is materially indistinguishable from agreements which the FCC and the federal courts have found require reciprocal compensation for calls to ISPs. The overwhelming weight of federal court authority, FCC decisions, and more than 30 state commissions around the country confirm that the Department's interpretation of the Agreement in its October 1998 Order is correct and should be affirmed.[7]

B. The Interpretation of the Agreement Proffered by Verizon and by the Department's Lawyers Is Wrong.

In their briefs to the District Court, Verizon and the Department's lawyers argued that §§ 1.53 and 1.6 of the Agreement demonstrate that the parties agreed to incorporate only the bare minimum requirements of federal law. Section 1.53 provides that "Reciprocal Compensation" is "As

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[6]On April 16, 2002, Starpower appealed the decision to the D.C. Circuit to challenge the FCC's construction of the Verizon Virginia agreements. Starpower Communications v. FCC, No. 02-1131 (D.C. Cir.).

[7]The relevant reciprocal compensation provisions in the interconnection agreements between Verizon and WorldCom's affiliates Brooks Fiber and MCI are the same or similar in all material respects to the Agreement. As such, reciprocal compensation is due under those contracts as well. (See October 1998 Order, at 14 (directing Verizon to apply the October 1998 Order to its other interconnection agreements).)

Described in the Act." Section 1.6 provides that "'As Described in the Act' means 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]." Relying solely on these provisions, Verizon and the Department maintained that the entire Agreement amounts to a simple mutual promise to do only what the Act mandates, nothing more and nothing less. The District Court rejected this argument, finding that the "[Department] and Verizon suggest, but do not establish, that the contractual language in the parties' interconnection agreement only implicates federal law as a source of reciprocal compensation." (F&R at 26 n.19.)

The District Court's rejection of this argument has overwhelming support from the Fourth, Fifth, Seventh, and Tenth Circuits, district courts, more than 30 state commissions, and the FCC itself. As these courts and commissions recognize, parties to interconnection agreements did not incorporate ever-evolving standards of federal law in their interconnection agreements, even when those agreements contain language virtually identical to §§ 1.53 and 1.6.

For example, like the Department and Verizon, Ameritech argued to the Seventh Circuit that interconnection agreements requiring reciprocal compensation for "local traffic" could not include calls to ISPs because they only implemented the minimum requirements of federal law. The agreements in those cases contained language, like §§ 1.53 and 1.6 here, providing that reciprocal compensation was "as described in the Act":

> Ameritech attacks the [state commission decision] primarily by stating that the Act does not require reciprocal compensation; the agreements precisely track the Act (reciprocal compensation is '*as described in the Act*'); therefore the agreements cannot require reciprocal compensation for calls to ISPs.

Illinois Bell, 179 F.3d at 573 (emphasis added). The Seventh Circuit rejected Ameritech's argument out-of-hand, concluding that "[t]his syllogism is an oversimplification." Id. Instead, the Seventh

Circuit found that the state commission properly determined that reciprocal compensation was owed for calls to ISPs by interpreting provisions of the agreements specifying that reciprocal compensation was owed for "local traffic." Id.

The Fifth Circuit also has rejected the argument. Southwestern Bell, 208 F.3d at 483. Southwestern Bell argued there that "the language in the agreements parallels the reciprocal compensation requirements" of the Act and that "as a matter of federal law, the calls [to ISPs] are not 'local' and reciprocal compensation is therefore not required." Id. at 484. The Fifth Circuit disagreed. It held that the reciprocal compensation provisions in interconnection agreements "would mean whatever the telecommunications industry took it to mean at the time they signed the agreements, i.e., in 1996 and 1997." Id. at 486. Because the Fifth Circuit found that at that time there was a "custom of treating calls to ISPs as though they were local[,]" it concluded that calls to ISPs were subject to reciprocal compensation because they fit within the agreement's definition of "local traffic." Id. at 486-87; see also Southwestern Bell, 235 F.3d at 499.

The Fourth Circuit also has rejected Verizon's argument that interconnection agreements with provisions virtually identical to §§1.53 and 1.6 adopted evolving standards of federal law. Bell Atlantic, 240 F.3d at 297. In that case, the Maryland commission (like almost every state commission in the country other than the Department) had interpreted an agreement requiring reciprocal compensation for "local" calls to require reciprocal compensation for calls to ISPs. In challenging that decision, Verizon argued, as the Department's lawyers and Verizon do here, that the parties "agreed to incorporate emerging standards of federal law, such that their reciprocal compensation obligations were subject to change if prevailing federal definitions of local and interstate traffic changed." Id. at 296-97. The Fourth Circuit rejected that argument, noting that treating calls to ISPs as local was "in conformance with the then-prevailing regulatory interpretation

and industry custom." Id. at 297.

The FCC has recently joined the chorus of authority dismissing Verizon's and the Department's argument. In Cox Telcom, the FCC rejected Verizon's argument that the parties' agreement required reciprocal compensation for calls to ISPs on the purported ground that the agreement merely "reflect[ed] Verizon South's adherence to the 'positive requirements of federal law.'" Id. ¶ 24 (quoting Verizon). The FCC found that "Verizon South voluntarily agreed to link the compensability of traffic under the Agreement to the classification of traffic in the tariff," id., and noted that at the time the agreement was negotiated, "there was no controlling federal law mandating a particular compensation arrangement for ISP-bound traffic." Id. ¶ 26; accord Starpower II ¶ 48.

The reason these courts uniformly have rejected this argument is simple: §§ 1.53 and 1.6 merely describe *what reciprocal compensation is*; they do not in any way purport to address *when reciprocal compensation will be paid*. Whether an interconnection agreement provides for reciprocal compensation must be determined by interpreting the provisions addressing when reciprocal compensation will be paid. Here, as noted, the Agreement provides that WorldCom and Verizon will pay each other reciprocal compensation for "local traffic," and specifically defines that term. (Agreement §§ 1.38, 5.8.1, 5.8.2.) As discussed above, the Department properly examined and interpreted the definition of "local traffic" at length in its October 1998 Order.

These courts also recognized that the law relevant to ascertaining the parties' intent is the law in place at the time of contracting – not new rules that the FCC subsequently promulgates. As the Seventh Circuit reasoned, it is "obvious" that decisions issued after WorldCom and Verizon negotiated and entered into the Agreement "are not relevant to what the parties had in mind at the time of the negotiations." Illinois Bell, 179 F.3d at 574; see also Mayor of Salem v. Warner Amex Cable Communications, 467 N.E.2d 208, 210 (Mass. 1984). The law in place when the parties

entered into the Agreement fully supported the conclusion that calls to ISPs should be treated like any other local calls. The FCC has found that agreements negotiated before the Initial ISP Order were negotiated "in the context of this Commission's longstanding policy of treating [calls to ISPs] as local." Initial ISP Order ¶ 24. The FCC further found that its policies in place at the time would "suggest that [reciprocal] compensation is due" for calls to ISPs. Id. ¶ 25. The FCC also noted that it had historically "directed states to treat ISP traffic as if it were local." Id. ¶ 9. The Fifth Circuit has also found that the FCC had "embraced a custom of treating calls to ISPs as though they were local" for reciprocal compensation purposes. Southwestern Bell, 208 F.3d at 486; see also Illinois Bell, 179 F.3d at 574 (noting that "the FCC would not agree . . . that it has had a long-standing policy against treating calls to ISPs as local calls").

The history of the FCC's rulings on reciprocal compensation, and the D.C. Circuit's consistent rejection of those rulings, demonstrates why attempts to reshape the Agreement to conform to the FCC's rulings fail. The Agreement's language and the FCC's evolving interpretation of federal law simply do not "track" each other. When WorldCom and Verizon entered into the Agreement, the FCC's regulations required reciprocal compensation for "local" telecommunications traffic, which is traffic "that originates and terminates within a local service area." 47 C.F.R. § 51.701(b) (superceded). The Fifth Circuit found that those FCC regulations required reciprocal compensation for calls to ISPs as a matter of federal law. The Fifth Circuit found that under the FCC's definition "'termination' occurs when [the competing carrier] switches the call at its facility and delivers the call to the 'called party's premises,' which is the ISP's local facility. Under this usage, the call indeed 'terminates' at the ISP's premises." Southwestern Bell, 208 F.3d at 486.

But the FCC then held in the ISP Remand Order that whether calls to ISPs are subject to reciprocal compensation under the Act does not depend on whether calls are "local." Rather, the

FCC found that it depends on whether those calls are "information access" under § 251(g) of the Act. ISP Remand Order ¶¶ 30, 36 n.64, 39, 42. The FCC repudiated its prior determination from the Initial ISP Order that whether federal law requires reciprocal compensation turns on whether a call is "local," concluding that in the ISP Order it had "*erred in focusing on the nature of the service (i.e. local or long distance)*." Id. ¶ 26 (emphasis added).

Thus, there is no connection whatsoever between the traffic subject to reciprocal compensation under the Agreement ("local traffic") and the FCC's new interpretation of federal law ("information access"). The term "information access" does not even appear in the Agreement.[8] Rather, as the Department correctly found in its October 1998 Order, the parties incorporated a specific definition of "local traffic" into their Agreement for reciprocal compensation purposes, and they made no exception for calls to ISPs. The FCC's interpretation of the Act in 2001 does not change the parties' intent under an Agreement they signed in 1996.

C. At a Minimum, the Agreement is Ambiguous.

At a minimum, the Agreement is ambiguous and the Department should allow WorldCom to take discovery and present evidence regarding the parties' intent. Massachusetts law provides that "[i]n conducting adjudicatory proceedings, . . . agencies shall afford all parties an opportunity for full and fair hearing." M.G.L. c. 30A § 10. Parties to adjudicatory proceedings before the Department thus are entitled to discovery. M.G.L. c. 25 § 5A; M.G.L. c. 30A § 12; 220 CMR § 1.10(9). Massachusetts agencies conducting adjudicatory proceedings may dispense with hearings only "when the papers or pleadings filed conclusively show on their face that the hearing can serve no useful purpose, because a hearing could not affect the decision." Massachusetts

[8]The disconnect between the requirements of federal law and the Agreement's reciprocal compensation provisions is more pronounced now that the D.C. Circuit has rejected the FCC's claim that the Act does not require reciprocal compensation for calls to ISPs because of § 251(g).

Outdoor Adver. Council v. Outdoor Adver. Bd., 405 N.E.2d 151, 156-57 (Mass. App. Ct. 1980).

Massachusetts law also guarantees a party's right to present evidence to explain or clarify the meaning of ambiguous contract terms. Sax v. Sax, 762 N.E.2d 888, 893 (Mass. App. Ct. 2002); Hubert, 661 N.E.2d at 1351. Contract language is "ambiguous" where "[its] phraseology can support reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken." Suffolk Constr. Co. v. Lanco Scaffolding Co., 716 N.E.2d 130, 133 (Mass. App. Ct. 1999). Types of admissible extrinsic evidence include evidence regarding established business usage of contract terms, and evidence of actions performed by a party after entering into the contract that shows his understanding of the contract's legal effect. See Keating, 508 N.E.2d at123; Bourgeois, 392 N.E.2d at 1064; accord Hubert, 661 N.E.2d at 1351.[9]

The Agreement certainly does not unambiguously exclude reciprocal compensation for calls to ISPs. In order to conclude that it does, the Department would have to conclude that four United States Courts of Appeals, several federal district courts, over 30 state commissions, and the FCC – all of which interpreted indistinguishable agreements to require reciprocal compensation for calls to ISPs – not only are wrong, but *unreasonable*. To exclude discovery and evidence, the Department would have to determine that the Agreement is so clear that no "reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken" is possible.

[9]Basic principles of due process also mandate that the Department not deprive WorldCom of the reciprocal compensation it is owed under the Agreement without allowing WorldCom to present evidence regarding the Agreement's meaning. Verizon itself successfully argued to a federal court that a state commission must conduct a hearing on the meaning of an interconnection agreement that satisfies the requirements of due process. New England Tel. v. Conversent Communications, 178 F. Supp. 2d 81, 94-95 (D.R.I. 2001). A state commission may not construe an interconnection agreement's terms, "perhaps erroneously depriving [a carrier] of a substantial property interest in that contract," without giving the carrier a "meaningful opportunity to be heard." Id. at 95; see also Doherty v. Retirement Bd. of Medford, 680 N.E.2d 45, 50 (Mass. 1997).

Suffolk, 716 N.E.2d at 133. Such a conclusion is simply absurd.[10]

While the Procedural Order prevents WorldCom from presenting evidence at this juncture, if given the opportunity WorldCom would present ample evidence showing that both parties understood that the Agreement requires reciprocal compensation for calls to ISPs. WorldCom would show that each of the relevant factors articulated by the FCC in the Initial ISP Order confirms that Verizon and WorldCom agreed to treat calls to ISPs as "local traffic" eligible for reciprocal compensation. See Initial ISP Order ¶ 24 (listing relevant factors). WorldCom would submit evidence to prove, without limitation:

- that under established industry usage "local traffic" terminates at the ISP, and that the parties negotiated the agreement in the context of the FCC's longstanding policy of treating ISP-bound traffic as local
- that Verizon has served its own ISP customers out of intrastate tariffs
- that Verizon counted revenues associated with those services as intrastate revenues in reports to the FCC
- that Verizon made no effort to meter ISP-bound traffic or otherwise segregate it from local traffic for the purpose of billing WorldCom for reciprocal compensation
- that Verizon included calls to ISPs in local telephone charges
- that if ISP-bound traffic were not treated as local traffic subject to reciprocal compensation, WorldCom would not be compensated for terminating calls to ISPs
- that for several months before and after WorldCom and Verizon executed the Agreement, Verizon treated calls to ISPs as local traffic subject to reciprocal compensation and paid reciprocal compensation for these calls

[10]The Procedural Order cites several Massachusetts cases for the proposition that "[w]hen a reviewing court does not give an agency explicit directions for the conduct of a remand proceeding, the agency retains the discretion to make its decision on the basis of the existing record." (Procedural Order at 2.) None of these cases involved the Department's interpretation of contracts, and certainly none purports to hold that the Department can interpret an ambiguous contract without affording the parties to the contract an opportunity to present evidence regarding the contract's meaning.

- that Verizon charged WorldCom reciprocal compensation when WorldCom customers called ISPs served by Verizon.

- that Verizon intended the Agreement to cover *all* types of traffic, yet did not establish a separate category of traffic for calls to ISPs, as it did in subsequent interconnection agreements

- that WorldCom and Verizon specifically discussed reciprocal compensation for calls to ISPs, that WorldCom stated that it expected to receive reciprocal compensation for such calls, and that Verizon did not object.

In addition, discovery would likely uncover additional evidence showing that Verizon knew it would pay reciprocal compensation for ISP-bound traffic. In Southwestern Bell, for example, discovery uncovered an "internal Southwestern Bell memorandum" which "acknowledged that, under then-current FCC rulings, it expected to pay reciprocal compensation" for calls to ISPs. 208 F.3d at 487. As the Fifth Circuit noted, Southwestern Bell acknowledged that "we can anticipate . . . that we will compensate other [local carriers] for traffic that they terminate to internet access providers." Id. In 1996, Verizon acknowledged to the FCC that it would have to pay reciprocal compensation for calls to ISPs.[11] Accordingly, WorldCom fully expects to uncover similar "smoking gun" documents in Verizon's files.

V. EVEN IF THE DEPARTMENT WRONGLY LOOKS TO FEDERAL LAW TO INTERPRET THE AGREEMENT, IT SHOULD FIND THAT THE AGREEMENT REQUIRES RECIPROCAL COMPENSATION FOR ISP-BOUND TRAFFIC.

Finally, even if the Department reasserts its erroneous conclusion that the Agreement's reciprocal compensation provisions incorporate the minimum requirements of federal law, there is no basis for the Department to conclude that the Agreement does not require reciprocal compensation for calls to ISPs. Both the FCC's regulations at the time of contracting and its most recent pronouncements indicate that the Act requires reciprocal compensation for calls to ISPs.

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[11] In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, Excerpts from Reply Comments of Bell Atlantic, CC Docket No. 96-98 (May 30, 1996) (Ex. 4).

The FCC's regulations in effect at the time of contracting required reciprocal compensation for calls to ISPs. Under the FCC's regulations interpreting § 251(b)(5) at the time of contracting, reciprocal compensation was to be paid for "local telecommunications traffic." 47 C.F.R. § 51.701(a) (superceded). "Local telecommunications traffic" is traffic "that originates and terminates within a local service area." Id. § 51.701(b)(1) (superceded). The FCC's regulations defined "termination" for reciprocal compensation purposes as "the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises." Id. §51.701(d). The Fifth Circuit correctly found that under the FCC's regulations "'termination' occurs when [the competing carrier] switches the call at its facility and delivers the calls to 'the called party's premises,' *which is the ISP's local facility. Under this usage, the call indeed 'terminates' at the ISP's premises*." Southwestern Bell, 208 F.3d at 483 (emphasis added); see also Bell Atlantic, 206 F.3d at 6; BellSouth Telecomms. v. MCImetro Access Transmission Servs., 97 F. Supp. 2d 1363, 1378-80 (N.D. Ga. 2000), rev'd on other grounds, 278 F.3d 1223, vacated & petitions for reh'g en banc granted, 297 F.3d 1276 (11th Cir. July 17, 2002).

Similarly, the ISP Remand Order when read in light of the D.C. Circuit's decision, also indicates that the Act's reciprocal compensation provisions apply to ISP-bound traffic. In the ISP Remand Order, the FCC made clear that "[u]nless subject to further limitation, section 251(b)(5) would require reciprocal compensation for transport and termination of *all* telecommunications traffic," including calls to ISPs. ISP Remand Order ¶ 32 (original emphasis); see also id. ¶ 31 ("On its face, local exchange carriers are required to establish reciprocal compensation arrangements for the transport and termination of all "telecommunications" they exchange with another telecommunications carrier, without exception"). As noted, however, the FCC found that §

251(b)(5) does not apply to calls to ISPs because § 251(g) purportedly "carved out" selected types of telecommunications from the reciprocal compensation obligation of § 251(b)(5), including calls to ISPs. Id. ¶ 3.

However, the D.C. Circuit invalidated the ISP Remand Order's conclusion that ISP-bound traffic is exempt from the reciprocal compensation requirements of § 251(b)(5), and specifically found the FCC's reading "precluded" by the Act. WorldCom, Inc., 288 F.3d at 430. The FCC's *sole* basis for exempting ISP-bound traffic from the Act's reciprocal compensation requirements was its claim that "section 251(g) . . . expressly limited the reach of section 251(b)(5) to exclude ISP-bound traffic." ISP Remand Order ¶ 3. This limitation is no longer good law. Indeed, the D.C. Circuit indicated that the FCC might justify prospective regulation of reciprocal compensation for calls to ISPs by applying rules "under" or "pursuant to" § 251(b)(5). Id. at 438. Thus, according to the reasoning adopted by both the FCC and the D.C. Circuit, federal law requires reciprocal compensation for calls to ISPs.[12]

CONCLUSION

WorldCom understands that the Department has policy concerns about compensation for calls to ISPs. But the FCC has resolved those concerns by applying a new, prospective-only compensation regime. The FCC did *not* hold that carriers like Verizon should be released from their contractual obligations. Nor did the FCC find, as Verizon has asked the Department to find, that WorldCom should receive no compensation for terminating calls to ISPs. To the contrary, the FCC found that carriers "incur a cost when delivering traffic to an ISP that originates on another carrier's network[,]" Initial ISP Order ¶ 29, and that carriers are entitled to compensation for that cost.

[12]The page limitation imposed by the Department precludes WorldCom from presenting its case in full. Therefore, WorldCom respectfully incorporates by reference all of its prior submissions to the Department and to the District Court.

For the foregoing reasons, the Department should affirm its October 1998 Order. It should not otherwise reconsider its October 1998 Order while its appeal to the First Circuit is pending. If the Department reconsiders its October 1998 Order, it should find that the Agreement requires reciprocal compensation for calls to ISPs. In the alternative, it should permit WorldCom to conduct discovery and to present evidence supporting its interpretation of the Agreement.

Respectfully submitted,
WorldCom, Inc.,

By:_____

Richard Fipphen
MCI WorldCom Communications, Inc.
200 Park Avenue, 6th Floor
New York, NY 10166
(212) 519-4867
richard.fipphen@wcom.com

Of Counsel:
Darryl M. Bradford
John R. Harrington
Steven J. Winger
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Brian J. Leske
WorldCom, Inc.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6546