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-G

RNK, INC. D/B/A RNK TELECOM COMMENTS ON UNITED STATES DISTRICT COURT REMAND TO THE DEPARTMENT ON THE ISSUE OF RECIPROCAL COMPENSATION FOR THE TERMINATION OF ISP-BOUND TRAFFIC

I. INTRODUCTION

On October 24, 2002, the Department of Telecommunications and Energy ("DTE" or "Department") issued its "Procedural Schedule on Remand" ("Procedural Schedule"). In that request for legal arguments, the Department declared that, due to the United States District Court's recent order ("District Court Order") on August 27, 2002,1 it would be "appropriate for the Department to proceed with the remand while the appeal is pending." The Department offered an interpretation of the Decision to the effect that it might be required to "conduct[] a detailed analysis under Massachusetts law and other legal or equitable principles [as to] whether provisions within the parties' interconnection agreements provided for reciprocal compensation for the exchange of ISP-bound traffic."

The Department also stated that it intended to timely file a Motion for Stay of the Decision with the appellate court. Pending the disposition of Motion, the DTE averred that "when a

1 Global NAPs v. Verizon, Nos. 00-10407-RCL, 00-11513-RCL (D. Mass. August 27, 2002).

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

II. BACKGROUND

RNK is a registered Competitive Local Exchange Carrier ("CLEC") in the Commonwealth of Massachusetts offering residential and business telecommunications services via resale and its own facilities. Via its own facilities, RNK serves a variety of customers, including Internet Service Providers ("ISPs"), with a broad range of telecommunications and non-telecommunications services.

RNK, like most CLECs until relatively recently, has operated continuously under interconnection agreements ("ICAs") with Verizon pursuant to Section 252 of the Telecommunications Act of 1996 (the "Act").[2] Under these ICAs, RNK provides a variety of services to its own customers and to Verizon, including terminating Verizon's customers' originating traffic to RNK customers, some of which are ISPs. From the time RNK began billing Verizon for facilities-based services to Verizon and its customers, until February, 1999, RNK received compensation from Verizon for performing these services for Verizon and Verizon's customers. Since the release of DTE 97-116-C, [3] now declared unlawful by the District Court, however, RNK has continued to perform and bill for these services in Massachusetts, but has received no compensation for doing so. RNK has had a rational expectation that, once the Federal Communications Commission ("FCC") and/or the federal district court(s) had clarified appropriate intercarrier compensation schemes for ISP-bound traffic, RNK would eventually receive intercarrier compensation for these services under its Interconnection Agreements.

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2 The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151, et seq.).

3 MCI WorldCom Technologies, Inc., D.T.E. 97-116-C (1999) ("97-116-C").

RNK expects that, as relevant authorities of competent jurisdiction narrow the issues surrounding this controversy, the Department, sooner rather than later, would require compensation for the traffic at issue, and encourage the parties to move on to provide their various services to each other under a stable compensation regime and relevant interconnection agreements. In the interim period between the Department's D.T.E. 97-116 (1998) (the 1998 Order) and the District Court Order, the DTE has steadfastly taken the position that its treatment of this matter be, if not expressly governed by the FCC, driven in the shadow of federal law. Today, the Department's orders in this docket from 97-116-C forward, in reliance on its interpretation of federal law, has been declared erroneous.

As RNK has previously expounded in prior comments in this docket, RNK has continually hoped that the effects of changes in federal law would eventually trigger fair and final resolution of the matters at hand. The Department now has another fresh opportunity to end the period of limbo relative to amounts already in dispute by accepting responsibility re-delegated by the FCC regarding prior agreements.[4] The DTE's responsibility for issues related to future treatment of ISP traffic has been diminished as the FCC has accepted jurisdiction over ISP-bound traffic going forward.[5]

We are here today because further action or inaction by the Department in response to the FCC's interim *Order on Remand*[6] has been found by the United States District Court for the

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4 In this docket, the DTE stated that:
"the Department will be bound by the determinations made by the FCC on remand, whatever those determinations may be. …[and further] determines that stability during the *interim* by upholding the finality of D.T.E. 97-116-C … is the better course."
In "97-116-C," the Department had ruled that ISP-bound traffic was not subject to reciprocal compensation under section 252 of the Act, but stated that it should be subject to some form of compensation to be determined.

5 FCC *Order on Remand* at ¶82.

6 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, *Order on Remand and Report and Order* (April 27, 2001) ("*Order on Remand*").

District of Massachusetts ("District Court") to be unsatisfactory and contrary to federal law. Ultimately, as the Department acknowledges in the call for argument today,[7] the Act provides that in this case the District Court, will be the final arbiter, absent any finding of clear error of law on appeal.

Meantime, pending final resolution in the proper jurisdiction of the courts, the Department continues to have an opportunity and a role as mediator to facilitate the participants' efforts to craft an equitable resolution to this long-suffering matter. Clearly, none of the participants in this case intend to spontaneously abandon their respective good faith claims for equitable compensation for past services rendered and received. Under the current regulatory posture, the parties cannot settle unless the Department acts to enhance or create the necessary bilateral incentives to negotiate in good faith, e.g., escrowing disputed amounts. Currently, the CLECs are receiving no payment for their services, and Verizon is making no payments for using the CLEC's services. Verizon has continued to be compensated by its customers for usage, gained and continues to gain the benefit of this revenue, while the CLECs, performing "half" the work, receive nothing. Accordingly, barring significant actions by the Department, the designated independent expert agency, squarely endowed with the responsibility for resolving this dispute, Verizon has no incentive whatsoever to negotiate on equal terms, and as such, no truly fair negotiated resolutions have, or will result.[8]

7 Hearing Officer Memorandum, DTE 97-116-G (October 24, 2002).

8 A first step towards evening the playing field is provided by the DTE's 97-116-B, arguably still in effect, which required Verizon to put into escrow-bearing interest accounts all amounts in dispute. Regardless of whether that DTE decision is now in effect, the amounts in dispute are certainly still in dispute. Even if they are not deemed immediately due and payable, to move this whole matter toward resolution, the DTE should require Verizon to escrow the sums at issue.

Lastly, it nears mention, in light of very recent state court developments on these matters, of which the Department is aware, that acknowledging some payment obligation, requiring escrow and settlement resolution, will likely prompt GNAPs, AT&T, and others surely contemplating similar state court action to enforce their contracts, from pursuing what otherwise promises to be hailstorm of law suits .

III. ARGUMENT

A. The Department Retains The Discretion To Make Its Decision On The Basis Of The Existing Record, and Has Been Expressly Permitted by the District Court to Do So.

As a result of the District Court's order, further proceedings before the DTE are not required. The District Court, by declaring DTE 97-116-C and all subsequent Department orders in this docket unlawful, and by expressly declaring that D.T.E. 97-116 (1998) ("the 1998 Order") was lawful, leaves only DTE 97-116 in effect.[9] The District Court decision gives the Department two options: either leave the lawful 1998 Order in place, or conduct further proceedings not inconsistent with that Order, as evaluated by the Magistrate. As stated in the Magistrate's decision (footnote 20), the DTE based its 1998 decision on several appropriate factors and on the correct state of the law at that time – the only relevant time[10]. As such, no further clarification is necessary: the intent of the parties and plain language of the ICAs, inter alia, being sufficient for the Department to lawfully find, as it did, that ISP traffic was local, and compensable, under the ICAs themselves.[11]

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9 District Court Order, at 2.

10 "The Court notes that the DTE seemed to understand such obligations in the 1998 Order, where it examined the specific contract 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 contract formation." Magistrate Decision, at 27 n.20.

11 This conclusion is consistent with Massachusetts contract law, ordered now to control. *See Beatty v. NP*

Except only under the strict state contract law application of the Magistrate's recommendation, as ordered into effect by the Court, the Department is in effect enjoined from proceeding further. The Magistrate's contract lynch-pin, the intent of the parties, as evidenced by, among other things, the undisputed initial course of dealings under the ICAs (i.e., actual payment for the traffic), completely alleviates any further inquiry regarding federal internet regulatory policy going forward or its arguable applicability to the past transitional period at hand: from the DTE's approval of the relevant ICAs (and their going in effect) and the 1998 DTE 97-116 decision to the effective date of the FCC's May 2001 prospective order on future payment of reciprocal compensation for ISP traffic.12

It is not necessary to reexamine the plain language of the Agreements. Now that each authority, both FCC and District Court, examining this matter has reemphasized that the contract language itself is determinative, the inquiry into that language in 1998 is sufficient. In the 1998 DTE Order, the Department found that ISP-bound traffic was local, ***within the definition in the contracts***, not as it may have been tied to fluctuating federal law.[13] The District Court here has now ruled that the plain language of the specific Agreements at issue must govern; that language has not changed; thus, 1998

Corporation, 581 N.E.2d 1311, 1315 (Mass. App. 1991) ("contracts rest on objectively expressed manifestations of intent."); *Dickson v. Riverside Iron Works,* 372 N.E.2d 1302, 1304 (Mass. App. 1978) (Stating that the intent of the parties is determined by the general purpose of the contract and "the circumstances existing at the time the contract was executed."). *See Also Southwestern Bell Telephone Co. v. Brooks Fiber Communications,* 235 F.3d 493, 500 (C.A. 10 2000) (Where the 10th Circuit found that the agreement provided for reciprocal compensation for ISP traffic not because of federal law but because of the agreement allow such compensation under state law principals: "The Agreement itself and state law principles govern the questions of interpretation of the contract and enforcement of its provisions"); *Star power Communications, LLC v. Verizon South, Inc.,* 2002 WL 518062 (F.C.C. May 10, 2002).

12 FCC *Order on Remand* at ¶82.

13 "Local Traffic is defined in the Agreement as "a call which is originated and terminated within a given LATA, … as defined in DPU Tariff 10, Section 5 … " D.P.U. 97-62, Agreement, § 1.38 The plain language of the Agreement indicates that Bell Atlantic and MCI WorldCom agreed to comp ensate each other for the termination of all local calls. The Agreement does not make an exception for calls terminated to ISPs." D.T.E 97-116 (1998) at 10.

Order appropriately governs the time period until the FCC prospectively preempted the Department's authority over the traffic at issue.[14]

B. The Court Did, Contrary To The Department's Assertions, Provide Sufficient Guidance To The Department In Analyzing The Agreements in Question

The Department claims that the District Court did not provide adequate direction for the conduct of this remand.[15] As such, the Department maintains that it retains the ability to make decisions based on the existing record.[16] RNK contends that the District Court gave the Department sufficient direction in footnote [20] of the Magistrate's decision. The Magistrate stated that the Department "seemed" to understand its obligations in the 1998 Order.[17] The Magistrate implied that the Department would comply with federal law if it examined the "specific language" in the interconnection agreements, industry custom, the parties' intent, and the state of federal reciprocal compensation law at the time of formation.[18]

Now the Department seems to be ignoring the direction of the Court and contemplating "further deliberations" that "consider the contractual language in the parties' interconnection agreements", however, the Department has already done this in the 1998 Order.[19] The Court deferred to the Department as an expert agency in the field of telecommunications and found that the Department's analysis in the 1998 Order adhered to federal law, this guidance the Department should not ignore by reexamining an issue already decided in a decision expressly found to be

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14 *See* FCC *Order on Remand*, and remanding U.S. Court of Appeals for the District of Columbia order, existing ICAs at the effective date of the FCC order remain subject to state commission jurisdiction and state contract law.

15 *Procedural Schedule on Remand 97-116 Docket*, at 2, dated October 24, 2002. "When 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."

16 *Id.*

17 *Magistrate's Decision*, at 27 n.20.

18 *Magistrate's Decision*, at 27 & n.20.

lawful by the District Court.

C. In The Alternative, If The DTE Were Somehow To Find That Further Proceedings Are Required or Desirable, Such Proceedings Must Provide a Full Adjudication on the Merits of the Contract Claims

Even if the Department determines that the agreements at issue, for whatever reason, require further Department review, this cannot be accomplished, fairly or legally, solely in the context of "comments" or mere legal arguments.[20] Should the Department find that its prior determination of the plain meaning of the contract language and surrounding circumstances fell short of the examination now contemplated by the District Court, further inquiry into prongs of Massachusetts contract law, [21] i.e., the intent of the parties, could only be afforded due process by a full adjudicatory hearing.[22] The Department would have to hold full hearings (not held previously) to disclose the Magistrate's directions regarding contractual intent.[23]

Proper review or reconsideration (in the manner, e.g., of the Department's view of post-*FCC Remand Order* "mediation" contemplated in 97-116-F, together with the Department's acknowledgement that the 97-116 docket aims to address Massachusetts interconnection agreements generally; *see, e.g., 97-116-C*) of all of existing interconnection agreements sharing this issue in common is a fact-finding exercise.

Despite Verizon's most recent energetic attempt to argue that such contract determinations as

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19 *See* D.T.E 97-116 (1998) at 10.

20 *See Response of Worldcom, Inc.*, at 8, dated August 1, 2002.

21 In fact, in DTE 97-116-C, the Department itself indicated that it would not prejudge "any formal renewal or prosecution of the dispute before us last October, where such a renewal might rest 'on **contractual principles** or other legal or equitable considerations,' as distinct from general policy arguments."

22 *See supra* note 11. D.T.E 97-116 (1998) at 10, *See Also Magistrate's Decision*, at 27 & n.20.

23 *Magistrate's D*ecision, at 27 n.20. *See Also In Re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 F.C.C.R. 3689, at ¶24 (Where the FCC expounded seven factors to be taken

the Magistrate Judge contemplates have already been made, in Verizon's favor,[24] each reference in the Verizon laundry list of "contract" determinations is a series of equivocations as, previously, the Department found, unlawful in retrospect, in the Department's previous attempts to apply its interpretation of *federal law*. What Verizon has omitted is the fact that means *other than* federal law existed, and are now deemed exclusively operative, for determination of whether compensation is required. The key consideration remains whether compensation was required *by the interconnection agreements as Massachusetts contracts, as intended by the parties*.[25]

Post-1998, throughout the now-overturned examinations by the Department, federal law determinations did promise to be potentially dispositive of this matter. But, in the end, these attempts by the Department to apply evolving federal law have now been rejected by the District Court. By operation of the Act, interconnection agreements must require some compensation for these services (however they may be characterized); but the compensation mechanism in each case remains an issue of fact and the operation of Massachusetts contract law.[26]

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into account when analyzing interconnection agreement contract language).

24 "*See, e.g.*, D.T.E. 97-116-D at 18 (explaining that it looked to whether "[Internet]-bound calls were 'local' *within the meaning of that term as used in interconnection agreements*") (emphasis added); D.T.E. 97-116-E at 13 (explaining that Internet-bound traffic "is not subject to reciprocal compensation *pursuant to the . . . interconnection agreements*" at issue here) (emphasis added); DTE Summ J. Br. at 35 (Docket Entry 44) ("The Department has never disputed [the] premise" that "the eligibility of [Internet]-bound traffic for reciprocal compensation is an issue controlled by the terms of the parties' interconnection agreement."); DTE Supp. Br. at 1 (Docket Entry 109) (DTE interpretations were "pursuant to the terms of the Interconnection Agreement[s]"); *see also Global NAPs Inc.'s Adoption of the Terms of the Interconnection Agreement Between Global NAPs, Inc. and Verizon Rhode Island Pursuant to the Bell Atlantic/GTE Merger Conditions*, DTE 02-21, at 14 (rel. June 24, 2002) ("As we have done in our D.T.E. 97-116 series of orders, we begin with the language of the interconnection agreement at issue."). Verizon Motion to Reopen at 3, FN 3. All of these excerpted statements were made during the time when the Department, and frankly the parties, presumed that a federal determination defining "local" (as including or not including ISP-bound or Internet-bound traffic) would be dispositive of this matter, regardless what the contracts intended. In making such a federal determination, if any currently exists under remand, the FCC eventually declined to impose it on Agreements in effect prior to its assumption of jurisdiction. Therefore, to the extent the Department repeatedly felt subsequently compelled to alter course, it needn't.

25 *See D.T.E. 97-116-C.*

26 *See Magistrate's Decision,* at 26.

The District Court has made clearer the fact that the Department is now relieved of the seemingly impossible task of second-guessing federal law and its fluctuating evolutions to the finite past period at issue here. The FCC deliberately, as it assumed jurisdiction going forward, left the past in the capable hands of the state commissions.[27] Even if elements of federal law were applied to the contract period still in dispute, that federal influence must properly be subject to such law as was in effect during the relevant period: the law being in existence, and deemed properly applied by the Department contemporaneous to the contracts in operation, in 1997 and 1998.

As further support for the wisdom of the District Court approach, its internal consistency and self-containment offers a practical resolution to all outstanding issues in this matter. Especially given the universal application of the DTE's original 97-116 decision (in which the DTE asked Verizon to apply the decision to all ICAs – a process to which Verizon did not object, and from which it did not appeal administratively) the Department retains the authority, now to simply apply its original decision, and be done with it. In light of the Court's rationale vacating subsequent Department decisions, the sound rationale of the 1998 Order in interpreting the language of the contracts in dispute survives and applies on its own merits.

If the Department reopens the case on the merits, at the outset the plain language inquiry already applies: absent a far-fetched clear contradiction to these lawful findings within the four corners of the contracts and their formation, the Department cannot reach a different result anyway. The District Court has now strictly circumscribed any alternative routes that the Department may have considered. It should not follow the failed path again, but rather accept the authority of the District Court's review of

27 *Order on Remand* at ¶ 82.

this entire docket. When the DTE applies the 1998 Order, it will arrest almost four years of delay, and vastly over-expended resources of all parties, equitably putting to rest the instant case.

The DTE, in retrospect, in its now-rejected efforts to weave federal policy into the more recent decisions, has unfortunately played a major role in confounding the very negotiated settlements it has at the same time propounded. Relying on such hypothetical settlements, while refusing to impose affirmative obligations on the ILEC (contrary to the findings of the overwhelming majority of state commissions and state courts across the country), has ultimately deprived fledgling CLECs from ***any*** payments contractually due for the traffic at issue.

CONCLUSION

For the foregoing reasons, RNK urges the Department not to reopen this docket, but to enforce the lawful 1998 Order in effect, requiring payment by Verizon of the amounts thus far and still in dispute. In the alternative, although unnecessary given the existing precedent, should the Department allow further proceedings, RNK sees no other mechanism consistent with the District Court Order than a full adjudication under Massachusetts contract law. In any case absent an immediate enforcement of the Court Order and/or DTE 97-116 (1998), RNK implores the Department to require that the substantial amounts at issue be placed in escrow according to equitable principles, and the public interest in spurring equal bargaining to resolve this dispute as expeditiously as possible.

Further proceedings, which the Court expressly declined to require, will only serve to ultimately delay this matter, which continues to accrue in Verizon's favor to the detriment of competitive carriers.

Respectfully submitted,

For RNK,

Yvette Bigelow
Deputy General Counsel
Senior Regulatory Analyst