COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATION AND ENERGY

Complaint of WorldCom Technologies, 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

INITIAL BRIEF OF XO MASSACHUSETTS, INC.

I. INTRODUCTION

XO Massachusetts, Inc. ("XO") is a competitive local exchange carrier, licensed and providing service in Massachusetts. XO entered an interconnection agreement with the corporate predecessor of Verizon on June 22, 2000 by "opting into" the interconnection agreement of MCI-Metro. Exchange of traffic and other actions and compensation therefor between XO and Verizon is currently covered by the interconnection agreement.

This Initial Brief of XO is filed pursuant to the Hearing Officer's Memoranda dated October 24, 2002 and November 7, 2002. As the Department is attempting to comply with the remand order of the Federal District Court, this brief discusses the following points.

First, the Federal District Court correctly: (i) found the Department's rulings denying terminating compensation for ISP bound calls illegal under Federal law and (ii) found the

Department's original order in these proceedings (the "October 1998 Order") proper under Federal law. Indeed, the Federal District Court's ruling is consistent with a very many courts' decisions that have found that CLECs are entitled to such compensation. *See* Section III. D., *infra*.

Second, it is procedurally improper and inefficient for the Department to conduct hearings on remand at the same time as it is appealing the very same decision. Additionally, in practical terms, it makes little sense for the parties to file briefs that largely involve the finding of the Federal District Court before the Department files its Motion for a Stay that presumably will address the problems the Department sees with the Federal Court's findings.

Next, the Department's original October 1998 Order has largely addressed the Federal Court concerns. Given the Federal Court's decision that the October 1998 Order was proper and that all subsequent orders on the subject were in violation of Federal Law, the October 1998 Order remains in full force and effect and the obligations for ILECs to pay reciprocal compensation for ISP-bound calls have been reinstated back to the time of the October 1998 Order. With minor elaboration and no major changes, an adoption of the October 1998 Order on remand will fulfill the Federal District Court's remand requirements.

Finally, where the Department's October 1998 Order was correct and, at the least, went far in the direction of addressing concerns expressed by the Court, any significant change in direction would have to be supported by an extremely extensive record. XO submits that such an approach would require full discovery rights and testimony to address matters such as the various technical aspects of calls to ISPs, industry practices and common understanding of the treatment of ISP bound calls, and even various legislative proposals and history. As this

Court and many others have noted, such matters are critical components in determining the contractual intent and the contract rights under state law.

This brief does not seek to describe in detail either the extensive procedural history of the litigation resulting in the Federal District Court Order or the series of decisions by the Federal Communication Commission ("FCC") on this issue generally. Rather, it is sufficient to note that the Federal District Court has ruled that all the Department's orders that remove Verizon's obligation to pay reciprocal compensation to CLECs for ISP bound traffic were improper and that the October 1998 Order (that required such payments) properly considered many of factors it should have considered. At this point, if acting on the remand is procedurally proper, then the Department must consider the parties' contractual intent at the time of contracting.[1]

II. PROCEDURAL ISSUES

A. The October 1998 Order Remains in Full Force and Effect and Must Be Applied to Support An Obligation for Verizon to Pay Reciprocal Compensation From the Date of the Order.

The Federal District Court Order clearly stated that the October 1998 Order did not violate Federal Law, while all subsequent orders did. Thus, the only currently effective order of the Department applicable to the issue of reciprocal compensation is the October 1998 Order, which must be considered to be in full force and effect since all subsequent orders which superceded the October 1998 Order have been declared in violation of Federal Law. Since this is the case, Verizon has an obligation to (i) pay all reciprocal compensation due

[1] Where various CLECs entered contracts that essentially adopted earlier and more extensive contracts, the proper determination remains what was the contractual intent at the time of the formation of the underlying contract. In XO's case that would have been September 29, 1998 for the MCI-Metro contract, except to the extent that the incorporating contract specifically modified provisions of the underlying contract.

since the date of the October 1998 Order (but withheld by Verizon pursuant to the now vacated illegal orders) and (ii) pay reciprocal compensation on a going forward basis pursuant to the terms of the October 1998 Order.

B. Conduct of Remand Proceedings Is Improper During the Pendency of An Appeal

As the Department apparently recognizes itself since it will shortly file a Motion to Stay the Effect of the Federal Court Order pending resolution of the Appeal, proceeding simultaneously with the Appeal process and the remanded Department proceedings would be improper and inefficient. First, simultaneous proceedings would waste the resources of all involved parties (including the Department) since the outcome of the Appeal could conceivably render the Department proceedings unnecessary. Second, any Department proceedings must wait until the Appeal has been decided to ensure that the Department applies the proper standards in any such review.

III. IMPLICATIONS OF THE FEDERAL COURT ORDER

A. A Remand Decision Must Based Upon State Not Federal Law And the October 1998 Order Essentially Constitutes the Required Review

The Federal Court decision is clear – the basis for a ruling on the requirement of payment of reciprocal compensation on ISP bound traffic must be contractual intent as determined under state law. Additionally, it is improper to determine such contractual rights by reference to FCC rulings. Further, the Court significantly endorsed the analysis the Department conducted in the October 1998 Order.

In the October 1998 Order the Department correctly began its analysis with a review of the specific contract language.[2] There the Department relied heavily on the plain language and found the parties agreed to pay each other for termination of local calls. Regarding the ultimate question of whether calls to ISPs constitute local traffic, the Department specifically found that the contract contained no exception for calls to ISPs.[3] Further, the Department considered the operational and technical aspects of such calls and determined on that basis that such calls were local for purposes of the contract.[4]

As the Federal District Court Magistrate's Findings and Recommendations (*see* footnote 20 therein) states, the Department was taking the right approach in that October 1998 Order. From XO's perspective, the Department's October 1998 Order did exactly what the Federal Court said is necessary – determine the meaning of the contract language under state contract law. The Department conducted analysis of the factors called for by standard contract interpretation principles under Massachusetts state law. Specifically, the Department considered (i) the plain meaning of the contract language (*i.e.* that the agreement provided for compensation for termination of all local calls, without an exception for calls terminated at an ISP), (ii) customary usage in the industry (*i.e.* what were similar forms of traffic considered local) as well as (iii) the relevant actions of the contract parties (*i.e.* Verizon's tariffing similar traffic as local and tariffing ISP bound traffic to ISPs on its own network as local). Thus, all

[2] The underlying proceedings each related only to a single CLEC's contract with Verizon, but the Department's orders have been treated as applying to all CLECs for purposes of Verizon's obligations to pay reciprocal compensation. XO's participation here is with a reservation of rights to argue that a ruling does not apply to it.
[3] That later contracts included a provision "agreeing to disagree" on payment of reciprocal compensation on ISP bound traffic effectively leaves resolution of the issue in the hands of a reviewing court.
[4] As further support, but not sole support, for this conclusion, the Department reviewed contemporaneous views of the FCC regarding such traffic. Such reliance is not material because the Department had already reached the correct conclusion and because the Federal Court has ruled that the determination must be made on state contract law.

that is missing from the October 1998 Order is the mere technicality of the Department stating that it did indeed consider those factors as a means of interpreting the contract under Massachusetts law. Such a statement laying out the path of the Department's analysis in the October 1998 Order is unnecessary however, especially where the Federal District Court has specifically found the analysis to be the correct one.

B. The Department is Bound by the Principles of Reasoned Consistency with the October 1998 Order.

To the extent that the Department believes it needs to do something more on remand than simply clarify that the October 1998 Order was seeking to determine contract meaning under state law, it must comply with the reasoned consistency standard. *Boston Gas Company v. Department of Public Utilities*, 367 Mass. 92, 104 (1975). XO urges that the Department cannot change the conclusion of the October 1998 Order without some truly compelling reason – which reason must have existed as of the time of that decision.[5] CLEC's have the right to have relied upon the October 1998 Order. Specifically, the Department, having established a procedure for contract interpretation (which has now been approved by the Federal District

[5] No matter how appealing the Department may find the result of denying CLECs' collection of reciprocal compensation on ISO bound calls due to a perceived windfall to one of more parties, that is not a valid ground for a ruling against CLEC recovery of such reciprocal compensation. Indeed, it is a matter of contract law and the parties are bound to their agreement. This correct perspective has resulted in a variety of CLECs collecting tens of millions of dollars across the United States under numerous court orders. See Section III.D. infra. Further, it must be remembered both that in the absence of payment, Verizon is receiving a windfall of some magnitude because Verizon is getting significant traffic terminated on other carriers' networks without payment in large part and that in general the parties had contracted to pay the other for efforts of the one that provide benefits to the other. Clearly termination of Verizon's call anywhere is a significant benefit because Verizon's customer would have no tolerance for Verizon if they could not access their ISP of choice. Further, execution of these various interconnection agreements alone was a big benefit to Verizon because it used such contract entry as significant support for its Section 271 filings.

Court) and rights to reciprocal compensation in the October 1998 Order, must not reconsider or alter its decision so that the parties are subject to the "whim or caprice" of the Department.[6]

C. Should the Department Be Inclined To Take Action Other Than Supplementing and Adopting the October 1998 Order, A Full Evidentiary Review Is Required

The Federal Court has required some additional effort by the Department to provide analysis of the proper contract interpretation under state law. Nevertheless, it is clear from the Court's approving citation of some of the many other court decisions that have found reciprocal compensation due, that the Department's adoption of the October 1998 Order would be consistent with the Federal Court Order. Similarly, such a result would be allowed under the reasoned consistency standard discussed in the previous section and Verizon already had full due process in such regard.[7]

However, it is hard to see how a ruling contrary to the October 1998 Order would be consistent with the Federal District Court's decision. Indeed, were the Department to change the result of the October 1998 Order (notably the only order of the Department compliant with Federal law), the Department must allow full evidentiary hearings, including discovery. This is necessary both to ensure CLECs' due process and because the "reasoned consistency" precedent requires more substantial support for a divergent decision. Further, many of the bases upon which the Department might interpret the contract (industry custom, course of dealing/performance between the parties, the parties' intent, etc.) in this context would require factual development. *See, CTC Communications Corp.*, D.T.E. 98-18-A (1998). Indeed, some of these factual bases were explored in the proceedings leading to the October 1998 Order.

[6] *Boston Gas, supra,* 367 Mass at 194.
[7] Notably, the October 1998 Order was a final order that was not appealed.

Adoption of the October 1998 Order would not require that parties be able to explore and develop a more extensive record because the parties consented to that process (likely for reasons of expedience) and no parties appealed. Additional matters of fact that would have to be developed were the Department to take a path contrary to affirmation of the October 1998 Order, include tariff (or other) treatment of similar services, technical/operational nature of ISP bound calls, ILEC rating of such calls, positions of the parties on legislation, etc.

Where contract law has substantial similarities from state to state, the Department would also be benefited from review of the decisions in other forums on this issue. The following section briefly discusses such decisions.

D. The Majority of Decisions on This Issue Support Affirmation of the October 1998 Order

While the contract interpretation in this case must be done under Massachusetts law by a Massachusetts decision maker, the extensive backdrop of decisions in other jurisdictions provides considerable and persuasive guidance. In determining virtually the same question that is at issue here, those courts and commissions have looked at the same issues as the Department did in the October 1998 Order and others.

Specifically, it is clear that the proper treatment for reciprocal compensation purposes of ISP-bound traffic as local, is based upon the several factors relied upon by the Department in October 1998 Order in D.T.E. 97-116. These factors include (1) whether incumbent LECs service enhanced service providers, including ISPs, have done so out of intrastate or interstate tariffs; (2) whether the revenues associated with these services were counted as intrastate or interstate revenue; (3) whether there is evidence that incumbent LECs and CLECs made any effort to meter this traffic or otherwise segregate it from local traffic (*i.e.*, billing for

reciprocal compensation); and (4) whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for the traffic. These and other factors remain a basis for the continuing viability (or renewed effectiveness) of the Department's October 1998 Order in D.T.E. 97-116. The Department should find, as nearly all of state commissions and courts ruling on this issue have found, that in the absence of language in applicable interconnection agreements where the parties specifically agree to treat ISP-bound traffic as something other than local traffic, such traffic must be considered local for compensation purposes. *See e.g., New England Voice and Date Request for Declaratory Judgement*, RIPUC Dkt. No. 2935, Order dated June 29, 1999. These and similar factors, noted in the FCC Ruling, have led virtually every state that has reviewed the issue to treat ISP-bound traffic as local. *See e.g., Illinois Bell Tel. Co. v. Worldcom Technologies, Inc.*, 1998 U.S. Dist. Lexis 11344 (N.D. Ill. 1998); *In re Emergency Petition of ICG Telecom Group Inc. and ITC Deltacom Communications, Inc. for a declaratory ruling*, Alabama Public Service Comm'n, Docket No. 26619 (March 4, 1999); *In the Matter of the Petition of Global NAPs South, Inc. for Arbitration of Unresolved Issues from the Interconnection Negotiation with Bell Atlantic-Delaware, Inc.* Delaware Public Service Comm'n, Docket No. 98-540 (March 9, 1999); *In the Matter of the Petition of Pacific Bell (U 1001 C) for Arbitration of an Interconnection Agreement with Pac-West Telecomm, Inc. (U 5266 C) pursuant to Section 252(b) of the Telecommunications Act of 1996*, California Public Utilities Comm's App. 98-11-024 (March 30, 1999); *In re Petition of Pac-West Telecomm, Inc. for arbitration pursuant to Section 252 of the Telecommunications Act of 1996 to establish an Interconnection Agreement with Nevada Bell*, Nevada Public Utilities Commission, Docket

No. 98-10015 (April 12, 1999); *Electric Lightwave, Inc. v. U S West Communications, Inc.*, Public Utility Commission of Oregon, UC-377 (April 26, 1999); *Worldcom, Inc. f\k\a MFS Intelenet of Washington, Inc. v. GTE Northwest Incorporated*, Washington Utilities and Transportation Commission, Docket No. UT-980338 (May 12, 1999).

CONCLUSION

For all the reasons set forth herein, the Department should refrain from taking any action until resolution of its appeal and then, if these proceedings resume after the appeal, the Department should reaffirm its October 1998 Order.

Respectfully submitted
XO Massachusetts, Inc.

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