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 REPLY BRIEF ON REMAND

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Pursuant to the Department's October 24, 2002 Order ("Procedural Order"), as amended by the Hearing Officer's November 7, 2002 Memorandum, MCI WorldCom Communications, Inc., as successor-in-interest to MFS Intelenet of Massachusetts, Inc. ("WorldCom"), respectfully submits its reply brief on remand.

INTRODUCTION

As WorldCom showed in its opening brief, the United States District Court for the District of Massachusetts found that the Department's October 1998 Order interpreting the interconnection agreement (the "Agreement") between WorldCom and Verizon New England, d/b/a Verizon Massachusetts ("Verizon") is consistent with federal law. By contrast, the District Court found that the Department's subsequent May 1999, July 2000, and August 2001 Orders, which purported to vacate the October 1998 Order and to relieve Verizon of the obligation to pay WorldCom reciprocal compensation for delivering calls to Internet service providers ("ISPs") under the Agreement, violate federal law. The District Court remanded to the Department for proceedings "not inconsistent with" the District Court's decision and with those parts of the July 5, 2002 Findings and Recommendations (F&R) of the Magistrate Judge which the District Court adopted. (8/27/02 Memorandum Order, at 3.)

Verizon's initial brief completely ignores that the District Court affirmed the Department's contract analysis from the October 1998 Order. Instead, Verizon suggests that the District Court rejected the analysis from *all* of the Department's Orders, leaving the Department free to reinterpret the Agreement anew on remand. This is the same argument the District Court rejected. Verizon (and the Department's lawyers) argued that if the District Court declared that the DTE's latter Orders violate federal law, it also should declare the October 1998 Order unlawful and "make explicit" that the Department could "consider the reciprocal compensation question *de novo*" on remand. (Ex. 1, Department's Obj. to F&R, at 14; see

also Ex. 2, Verizon's Obj. to F&R, at 17.) The District Court not only refused to find that the October 1998 Order was unlawful, it specifically declared that Order to be consistent with federal law. It would therefore be inconsistent with the District Court's decision for the Department to try to reinterpret the Agreement *de novo* on remand, as Verizon asks. Moreover, as WorldCom showed in its opening brief, the Department cannot undertake remand proceedings at the same time it is appealing the District Court's decision to the First Circuit. (WorldCom's Br., at 11-13.)

Even if the Department could undertake those proceedings, as WorldCom also showed in its opening brief, Verizon must demonstrate that extraordinary circumstances, such as a procedural defect, fraud, misrepresentation, or the like, warrant altering the Department's October 1988 Order. (Id. at 13-14.) Verizon does not even acknowledge this burden, let alone satisfy it. The only "extraordinary circumstance" to which Verizon alludes is the FCC's (now vacated) Initial ISP Order.[1] But the District Court has already found that the Initial ISP Order cannot "be used as a foundation for overturning prior decisions by state regulatory commissions" like the Department's October 1998 Order. (F&R, at 25.) At bottom, Verizon is simply rehashing the same arguments which the Department rejected in its October 1998 Order. These old arguments have not improved with age. They provide no basis for the Department to reconsider its October 1998 Order.

Apart from being inconsistent with the District Court's decision, Verizon's argument that the Agreement does not require reciprocal compensation for calls to ISPs is wrong. Verizon claims that the Agreement merely tracks the minimum requirements of the Telecommunications Act of 1996 (the "Act"), and that because (according to Verizon) the Act does not require reciprocal compensation for calls

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[1] 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").

to ISPs, neither does the Agreement. Verizon does not even acknowledge the unanimous federal court decisions – including decisions from the Fourth, Fifth, Seventh, and Tenth Circuits – rejecting Verizon's interpretation of the Agreement. Instead, Verizon relies exclusively on the FCC's decision in Starpower II[2] interpreting interconnection agreements containing language materially different from the Agreement here. The agreements in Starpower II contained "end-to-end" language, which the FCC found manifested the parties' intent to base reciprocal compensation on whether calls to ISPs are local for jurisdictional purposes. The Agreement here does not contain that language, and despite Verizon's attempt to downplay that distinction, it was crucial to the FCC's conclusion that those agreements did not require reciprocal compensation for calls to ISPs. Notably, in both Starpower II and Cox Telcom,[3] the FCC interpreted agreements far more analogous to the Agreement here as requiring reciprocal compensation for calls to ISPs. In so doing, the FCC rejected Verizon's argument that the agreements merely track the requirements of federal law. The Department should do likewise.

Finally, if the Department concludes that whether the Agreement requires reciprocal compensation for calls to ISPs turns on the FCC's precedent, the Department should decline to adjudicate this dispute and allow the FCC to resolve it. In the past, the Department has tried to forecast how the FCC would resolve this type of dispute. That course has led to years of litigation, and ultimately to reversal of the Department's Orders. Rather than starting down that same path again, the Department should allow the FCC to interpret the Agreement, as it did in Starpower II and Cox Telcom.

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[2]Starpower Communications v. Verizon South, 17 F.C.C.R. 6873 ¶ 42 (2002) ("Starpower II").

[3]Cox Virginia Telcom v. Verizon South, 17 F.C.C.R. 8540 ¶ 22 (2002) ("Cox Telcom").

ARGUMENT

I. VERIZON'S CLAIM THAT THE DISTRICT COURT'S DECISION ALLOWS THE DEPARTMENT TO INTERPRET THE AGREEMENT ANEW IS WRONG.

Throughout its initial brief, Verizon suggests that the Department can reinterpret the Agreement anew on remand because the District Court rejected the Department's contract analysis in *all* prior Orders, including the October 1998 Order. For example, Verizon states that the District Court found that the Department "had failed, *in its prior orders*, to consider the language of the interconnection agreements at issue." (Verizon's Br., at 12 (emphasis added); see also id. at 1-2.) Verizon also claims that the District Court's remand order "permit[s] the Department to resolve the dispute on the basis of the language of the agreements in light of 'Massachusetts law and other equitable and legal principles.'" (Id. at 2 (quoting F&R, at 26, 27).) Both claims are false.

First, the District Court did not reject the analysis from the October 1998 Order. Rather, the District Court squarely held that the Department *properly* interpreted the Agreement in its October 1998 Order, just as it held that the Department *failed* to properly interpret the Agreement in its latter Orders. 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." (F&R, 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.) 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.)

Indeed, in their objections to the F&R, Verizon unsuccessfully made the same argument it advances here. Verizon argued that "the [Department's] mode of analysis in the October 1998 Order was the same as in its subsequent orders" and that there was "no basis to conclude" that the October 1998 Order "was consistent with federal law, but the others were not." (Ex. 2, at 17.) Similarly, the Department's lawyers argued that "the shortcoming that the [F&R] purports to have uncovered in the Department's 1999, 2000 and 2001 orders – namely, those orders' putatively excessive reliance on federal decisional law – applies with equal force to the Department's October 21, 1998 Order." (Ex. 1, at 15.) The District Court rejected these attempts to lump the October 1998 Order in with the erroneous Orders. The District Court "expressly adopt[ed] the reasoning set forth . . . in the Findings and Recommendations," including its conclusion that the October 1998 Order properly interpreted the Agreement consistent with federal law. (8/27/02 Memorandum Order, at 2.)

Moreover, the District Court's remand order does not "allow[] the Department to examine the terms of those agreements and to decide, in light of Massachusetts contract law and related equitable principles, whether the parties had agreed to pay reciprocal compensation for Internet-bound traffic," as Verizon claims. (Verizon's Br., at 12.) Rather, the District Court's decision states that it "remands 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." (Memorandum Order, at 3.) As shown above and in WorldCom's opening brief (at 10-14), the Magistrate Judge and District Court have found that the Department properly interpreted the Agreement in its October 1998 Order, and there are no new

extraordinary circumstances requiring reconsideration of the October 1998 Order. Thus, the only remand proceedings that would be "not inconsistent with" the District Court's decision would be for the Department to reaffirm its October 1998 Order.

II. VERIZON'S INTERPRETATION OF THE AGREEMENT IS WRONG.

Verizon argues that both the "plain language" of the Agreement and the FCC's decision in Starpower II support its claim that the Agreement requires reciprocal compensation only where required by federal law. (Verizon's Br., at 14-22.)[4] This argument fails. First, the plain language of the Agreement, as well as the overwhelming weight of decisions from federal courts and other state commissions interpreting virtually identical language (which Verizon completely ignores), show that the Agreement requires reciprocal compensation for calls to ISPs. At a minimum, the language is ambiguous and the DTE should allow discovery and hear evidence. Second, the FCC's construction of some of the interconnection agreements at issue in Starpower II does not support Verizon's argument that the Agreement does not require reciprocal compensation for calls to ISPs. Rather, Starpower II, along with the FCC's decision in Cox Telcom, refutes Verizon's flawed interpretation of the Agreement.

A. The Agreement Requires Reciprocal Compensation for Calls to ISPs.

Verizon and WorldCom agreed to pay 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,

[4]Verizon does not address whether the Department can conduct remand proceedings while its appeal to the First Circuit is pending. For the reasons set forth in WorldCom's opening brief, it cannot. (WorldCom's Br., at 11-14.)

in the Commonwealth of Massachusetts, *as defined in [Department] Tariff 10, Section 5 . . . .*" (Id. § 1.38) (emphasis added). As WorldCom showed in its opening brief, the plain language of the Agreement, the characteristics of calls to ISPs, and the common industry understanding, all show that calls to ISPs are "local traffic" under the Agreement, and therefore are covered by the Agreement's reciprocal compensation provisions. (WorldCom's Br., at 14-19.)

Verizon's argument to the contrary is based principally on two provisions in the Agreement's definitions section, which state that "Reciprocal Compensation" is "As Described in the Act" and 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]." Verizon contends that these sections show that "'reciprocal compensation' was to be understood in accordance with the requirements established by the FCC and, where appropriate, the Department." (Verizon's Br., at 15.)

As WorldCom showed in its opening brief, this interpretation has been uniformly rejected by federal courts, including the Fourth, Fifth, Seventh, and Tenth Circuit Courts of Appeal. These courts have found that interconnection agreements which, like the Agreement here, require reciprocal compensation for "local traffic" that both "originates" and "terminates" within a local calling area require reciprocal compensation for calls to ISPs. See 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); Southwestern Bell Tel. Co. v. Brooks Fiber Communications, 235 F.3d 493, 499 (10th Cir. 2000); accord 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). Moreover, the interconnection agreements before the Fourth, Fifth, and Seventh Circuits contained language just like the Agreement here providing that reciprocal compensation would be

"as described in" the Act, yet those courts squarely rejected the interpretation proffered by Verizon. Bell Atlantic, 240 F.3d at 296-97; Southwestern Bell, 208 F.3d at 484-86; Illinois Bell, 179 F.3d at 573; (WorldCom's Br., at 20-22). Astoundingly, Verizon does not even *acknowledge*, let alone try to distinguish, the array of federal cases that have rejected its argument.[5]

In fact, the Department joined this chorus of authority in its October 1998 Order. It held that "[t]he plain language of the Agreement indicates that [Verizon] and [] WorldCom agreed to compensate each other for the *termination* of all local calls. The Agreement does not make an exception for calls *terminated* to ISPs." (October 1998 Order, at 10-11 (emphasis added).) The Department was exactly right.

Recognizing that the Agreement's reciprocal compensation provisions do not support its oft-rejected interpretation, Verizon cites two other provisions of the Agreement completely unrelated to reciprocal compensation. First, Verizon cites one of the Agreement's prefatory "whereas" clauses, which merely states that the parties are "entering into this Agreement to set forth the respective obligations of the Parties and the terms and conditions under which the parties will interconnect their networks and provide other services as required by the Act . . . and additional services as set forth herein." (Verizon's Br., at 14 (quoting Agreement's "Whereas" Recital).) Second, Verizon cites section 3.0, which merely states that compliance with the terms of the Agreement "will satisfy the obligation of [Verizon] to provide Interconnection under Section 251 of the Act[.]" (Id. (citing Agreement § 3.0).)

Neither of these provisions supports Verizon's claim that the Agreement does not require

[5] As WorldCom also noted, the Magistrate Judge also rejected Verizon's 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.)

reciprocal compensation for calls to ISPs. The "whereas" clause simply recites the obvious – that the Act imposes certain requirements on Verizon and WorldCom with respect to interconnection, and that the parties are entering into the Agreement as a way to fulfill those requirements.[6] Likewise, section 3.0 merely provides that the Agreement satisfies the minimum requirements of federal law. Nowhere do either of these provisions say or even suggest that the parties are *limiting* their agreement to the minimum requirements of federal law. Had WorldCom and Verizon merely intended to codify the minimum requirements of federal law in the Agreement, there would have been no need for them to negotiate the specific and detailed provisions addressing reciprocal compensation. See 47 U.S.C. § 252(a) (parties may negotiate agreements "without regard" to the Act's minimum requirements).

Verizon also suggests that calls to ISPs are "Switched Exchange Access Service" under the Agreement, which excludes them from reciprocal compensation. (Verizon's Br., at 17.) This argument is defeated by the text of the Agreement, the Act, and the D.C. Circuit's decision in Bell Atlantic Tel. Cos. v. FCC, 206 F.3d 1 (D.C. Cir. 2000). The Agreement defines "Switched Exchange Access Service" as "the offering of transmission or switching services to Telecommunications Carriers for the purpose of the origination or termination of Telephone Toll Service. (Agreement § 1.60.) Similarly, the Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16). As the D.C. Circuit's decision in Bell Atlantic illustrates, calls to ISPs cannot be exchange access service under the terms of the Act or the Agreement. First, Verizon and WorldCom do not offer services to ISPs for the purpose of originating or terminating "telephone toll service." As the D.C. Circuit held:

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[6]In any event, a "lone reference" in a prefatory clause carries "minimal interpretive weight." Southex Exhibitions v. Rhode Island Builders Ass'n, 279 F.3d 94, 102 (1st Cir. 2002).

> As MCI WorldCom argued, ISPs provide information service rather than telecommunications; as such, "ISPs connect to the local network 'for the purpose of' providing information services, not originating or terminating telephone toll services."

Bell Atlantic, 206 F.3d at 9 (quoting Brief of WorldCom).

Even if, despite the D.C. Circuit's decision, the Department believed that ISPs provide telephone toll service, it still could not conclude that calls to ISPs are Switched Exchange Access Service, because ISPs are not "Telecommunications Carriers." A "Telecommunications Carrier" is a "provider of telecommunications services," 47 U.S.C. § 153(44), a description that ISPs do not fit because they provide information services, not telecommunications services. In re Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 F.C.C.2d 384, 430 (¶ 119) (1980), aff'd sub nom. Computer & Communications Indus. Ass'n v. FCC, 693 F.2d 198, 205, 220 (D.C. Cir. 1982); see also 47 C.F.R. § 69.2(m); Bell Atlantic, 206 F.3d at 6-7; Southwestern Bell Tel. Co. v. FCC, 143 F.3d 523, 542 (8th Cir. 1998). As ISPs are not Telecommunications Carriers, calls to ISPs cannot be "Switched Exchange Access Service" under the Agreement.

Finally, Verizon hints, but cannot bring itself to argue forthrightly, that calls to ISPs cannot be subject to reciprocal compensation under the Agreement because they do not "terminate" locally under the Agreement. (Verizon's Br., at 16.) There is a reason Verizon does not make the argument expressly – it utterly lacks merit. A plentitude of federal courts and state agencies interpreting the word "terminate" in interconnection agreements have found that calls to ISPs "terminate" locally under the common industry understanding of the term. For example, the Illinois commission found that according to industry understanding, calls to ISPs "terminate" locally for purposes of reciprocal compensation. Illinois Bell Tel. Co. v. WorldCom Technologies, 1998 WL 419493, at *14 (N.D. Ill. July 23, 1998). The federal district

court upheld the Illinois commission's decision to construe the term "termination" by reference to "industry practice, in which call termination occurs when a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned and answer supervision is returned." Id. at *7 (internal quotation omitted). The federal court affirmed the state commission's finding, holding that the industry "view of termination of the call leads to the conclusion that [ISP-bound] calls are correctly classified as local calls under the Agreements." Id. at *7. The Seventh Circuit affirmed. Illinois Bell, 179 F.3d at 574.

The Fifth Circuit similarly found "ample evidence that both the telecommunications industry as a whole and the parties to this dispute in particular treated ISP-bound calls as terminating locally at the time the interconnection agreements were being negotiated." Southwestern Bell, 208 F.3d at 487. The court explained that the phrase "terminate" in an interconnection agreement means what "the telecommunications industry took it to mean at the time [the parties] signed the Agreement, i.e., in 1996 and 1997." Id. at 486. The Fifth Circuit further held that at the time the agreements were negotiated, the FCC had "embraced a custom of treating calls to ISPs as though they were local, *terminating within the same local exchange network*." Id. (emphasis added). The Fifth Circuit also reviewed the FCC's then-existing regulations defining call termination and concluded that "[u]nder this usage, the call indeed 'terminates' at the ISP's premises." Id.; see also Bell Atlantic, 206 F.3d at 7 (finding that "the mere fact that ISPs originat[e] further telecommunications does not imply that the original communication does not 'terminate' at the ISP").[7]

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[7]Thus, Verizon's reference to the fact that parties are presumed to contract with reference to existing law actually supports WorldCom's interpretation of the Agreement. (Verizon's Br., at 18.) As WorldCom showed in its opening brief, federal courts and the FCC itself uniformly have found that, at the time of contracting, federal law directed parties to treat calls to ISPs as local for compensation purposes. (WorldCom's Br., at 22-23.)

Any remaining issue as to the meaning and industry treatment of calls to ISPs is resolved by the decisions of 30 other state utility commissions that have determined that reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic. Many of these agencies have expressly found that telecommunications industry practice and usage at the time the agreements were negotiated overwhelmingly indicated that calls to ISPs terminate locally and were understood to be local traffic. For example:

Arizona	"[I]t was typical in the industry at the time to consider ISP-bound traffic as terminating with the [ISP].'[8]
Maryland	"[T]he treatment of ISP traffic as local was so prevalent in the industry" that [the incumbent], "if it so intended, had an obligation to negate such local treatment in the interconnection agreements it entered into by specifically excluding ISP traffic from the definition of local traffic subject to the payment of reciprocal compensation.'[9]
Alabama	"[A]t the time the interconnection agreements in question were entered, ISP traffic was treated as local in virtually every respect by all industry participants including the F.C.C."[10]
Pennsylvania	"[T]he industry understanding and practice" concerning reciprocal compensation for calls to ISPs is "compelling" evidence that "Local Traffic, eligible for reciprocal compensation, included traffic from [incumbent's] end-user customers to ISPs."[11]
Nebraska	"At the time the agreements were entered into, ISP traffic was

[8] In re Petition of Electric Lightwave, No. T-01051B-98-0689, Op. & Order at 5 (Ariz. Corp. Comm'n Nov. 2, 1999).

[9] In re Complaint of MFS Intelenet, Order 75280 at 13.

[10] In re Petitions of ICG and ITC^DeltaCom Communications, No. 26619, Order at 24 (Ala. Pub. Serv. Comm'n, March 4, 1999).

[11] Petition for Declaratory Order of TCG Delaware Valley, P-00971256, Op. & Order at 23-24 (Pa. Pub. Util. Comm'n June 16, 1998).

	treated as local in virtually every respect by the industry and the FCC."[12]
Utah	"At the time the Initial Interconnection Agreement was entered into by the parties, the treatment of ISP bound traffic as local traffic was well established."[13]
California	"[G]eneral expertise and knowledge of telecommunications industry" indicates that "[t]he telecommunications network functions that are required to terminate ISP traffic are no different from the functions required to terminate local calls of any other end user."[14]

As this overwhelming authority confirms, Verizon's suggestion that calls to ISPs do not "terminate" locally as that term is used in the Agreement fails.

The heart of Verizon's argument is that four federal circuit courts, numerous district courts and over 30 other state commissions, are wrong and that the Department, in decisions that have already been held unlawful, was right. Verizon's position is untenable. Reciprocal compensation is required for calls to ISPs under the Agreement. But at a minimum, as WorldCom showed in its opening brief, the Department cannot find that this overwhelming precedent is all unreasonable and that the Agreement *unambiguously* excludes calls to ISPs from reciprocal compensation. (WorldCom's Br., at 24-27.) Therefore, if the Department doubts that the Agreement requires reciprocal compensation for calls to ISPs, it must allow WorldCom to take discovery and present evidence regarding the parties' intent. (Id.) Verizon refers to no evidence supporting its interpretation of the Agreement, because there is none.

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[12] In re Application of the NPSC, C-1960/PI-25, Findings & Conclusions at 6 (Neb. Pub. Serv. Comm'n Dec. 7, 1999).

[13] In re Complaint against US West by Nextlink, Docket No. 99-049-44, Order at 3 (Utah Pub. Serv. Comm'n Oct. 28, 1999).

[14] Order Instituting Rulemaking on the Commission's Own Motion, No. 99-07-047, Order at 15 (Cal. Pub. Utils. Comm'n July 26, 1999).

B. The FCC's Decision in Starpower II Does Not Support Verizon's Erroneous Interpretation of the Agreement.

The FCC's decision in Starpower II in no way supports Verizon's erroneous interpretation of the Agreement. In fact, it supports WorldCom's argument that the Agreement requires reciprocal compensation for calls to ISPs. As WorldCom showed in its opening brief, in Starpower II, the FCC stepped into the shoes of the Virginia State Corporation Commission to interpret three interconnection agreements. (WorldCom's Br., at 17-19.) The FCC found that one of the interconnection agreements (the "Verizon South Agreement") required reciprocal compensation for ISP-bound traffic because it linked the definition of local traffic subject to reciprocal compensation to the state tariff filed with the Commission. Id. ¶¶ 42-45. The FCC found that the other two interconnection agreements (the "Verizon Virginia Agreements") did not require reciprocal compensation because they included express language exempting from reciprocal compensation any traffic that could be deemed "jurisdictionally" interstate on an "end-to-end" basis. Id. ¶¶ 26-30, 32. The FCC concluded that, by including that specific "end-to-end" language, the parties contracted to pay reciprocal compensation only for traffic that is not jurisdictionally interstate. See id. ¶¶ 26-30, 32. Because the FCC purports to have traditionally construed ISP-bound traffic as jurisdictionally interstate, it concluded that reciprocal compensation did not apply to that traffic under the Verizon Virginia Agreements. Id. "Buttressing" the FCC's conclusions was its observation that the two agreements had language similar to the FCC's existing regulations construing the scope of section 251(b)(5). Id. ¶ 31.

Verizon wrongly contends that the FCC's analysis of the Verizon Virginia Agreements in Starpower II supports its claim that the Agreement "tracks" the reciprocal compensation requirements of the Act. (Verizon's Br., at 19-21.) Attempting to relegate the FCC's reliance on the "end-to-end" language

to a footnote, Verizon suggests that "each of the two grounds of [the FCC's] decision was independent and sufficient to support its ruling." (Id. at 21 n.18.) Verizon is wrong. The FCC's interpretation of the Verizon Virginia decision in Starpower II did not turn on the inclusion of language indicating that reciprocal compensation was to be "as described in the Act." Rather, the linchpin of the FCC's contractual holding was the inclusion in the Verizon Virginia Agreements of express language that (according to the FCC) excluded from reciprocal compensation obligations any traffic that is interstate on an "end-to-end" jurisdictional basis. See Starpower II ¶¶ 28-30, 38-39. To be sure, the FCC noted that its analysis of the "end-to-end" language in the Starpower agreements was "buttress[ed]" by provisions defining reciprocal compensation to be "as described in the Act" and resembling aspects of the FCC's regulations, but the FCC's holding turned on the express "end-to-end" language. Id. at ¶¶ 26-30, 32. The Agreement here contains no such "end-to-end" language, which materially differentiates the Agreement from the Verizon Virginia Agreements.

In fact, as WorldCom showed in its opening brief, the Agreement here much more closely resembles the Verizon South Agreement that the FCC found *did* require reciprocal compensation for calls to ISPs in Starpower II, as well as the Agreement the FCC also found required reciprocal compensation for calls to ISPs in Cox Telcom. (WorldCom's Br., at 18-19.) Importantly, in both cases, and consistent with the Fourth, Fifth, and Seventh Circuits, the FCC rejected Verizon's argument that the agreements merely "track the Act" and therefore do not require reciprocal compensation for calls to ISPs. E.g., Starpower II ¶ 48. As here, Verizon relied upon the Fourth Circuit's decision in AT&T Communications v. BellSouth Telecommunications, 229 F.2d 457 (4th Cir. 2000) for the claim that the negotiated reciprocal compensation provisions merely "track the Act." (Compare Verizon's Br. at 18 with Starpower II ¶ 48 and Cox Telecom ¶ 26.) The FCC rejected Verizon's reliance on AT&T Communications, finding it

"inapposite" because that case concerned agreement terms required by "then-controlling federal law." E.g., Cox Telecom ¶ 26. In contrast, with respect to reciprocal compensation for calls to ISPs, there was no federal rule to "track," because there has been "no controlling federal law mandating a particular compensation arrangement for ISP-bound traffic." Id. Like the FCC and the unanimous federal courts, the Department should reject Verizon's claim.[15]

In any event, the FCC's interpretation of the agreements in Starpower II and Cox Telcom is not entitled to special deference. Federal agencies are not entitled to deference where they conduct state law contract interpretations resting "solely on the words of the contract," or "where the central issue before the court is the Commission's application of state law." Nicor Exploration Co. v. FERC, 50 F.3d 1341, 1347-48 (5th Cir. 1995) (quotation omitted); accord Pennzoil Co. v. FERC, 789 F.2d 1128, 1135 (5th Cir. 1986).[16] As the FCC acted in place of the Virginia Commission, and applied Virginia state law to interpret the agreements there, its decision in Starpower II is owed no more deference than any other state commission decision. For more useful guidance, the Department should look to the overwhelming consensus of federal courts and state agencies that have properly interpreted interconnection agreements to require reciprocal compensation for ISP-bound traffic. Indeed, two state commissions, in Maryland and Pennsylvania, have construed nearly identical interconnection agreements to require reciprocal

[15]Verizon's reliance on AT&T Communications is particularly misplaced in light of the Fourth Circuit's subsequent Bell Atlantic decision, which expressly rejected Verizon's claim that the parties intended to "track" federal law regarding reciprocal compensation for calls to ISPs in an agreement. 240 F.3d at 297.

[16]By contrast, the cases from the D.C. Circuit on which Verizon relies did not involve federal agencies purporting to apply *state* contract law. (Verizon's Br., at 21-22.)

compensation for calls to ISPs.[17]

III. IF THE DEPARTMENT FINDS THAT FEDERAL LAW DETERMINES WHETHER VERIZON MUST PAY RECIPROCAL COMPENSATION FOR CALLS TO ISPs, IT SHOULD ALLOW THE FCC TO ADJUDICATE THIS DISPUTE.

Finally, if the Department continues to conclude that whether the Agreement requires reciprocal compensation turns on FCC precedent, it should decline to adjudicate this dispute and allow the FCC to resolve it. As WorldCom showed in its opening brief, the minimum requirements of federal law do not determine whether the Agreement requires reciprocal compensation for calls to ISPs, but even if they did, reciprocal compensation is required for calls to ISPs under federal law at the time of contracting and at present. (WorldCom's Br., at 27-29.) The Fifth Circuit concluded that the FCC's regulations in place at the time of contracting required reciprocal compensation for calls to ISPs. Southwestern Bell, 208 F.3d at 483; see also 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). Likewise, in the ISP Remand Order[18] the FCC found 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). While the FCC believed that § 251(g) provided such a "limitation,"the D.C. Circuit found this reading "precluded" by the Act, and found that the FCC could justify prospective regulation of reciprocal compensation for calls to ISPs by applying rules "under" or "pursuant to" § 251(b)(5). WorldCom, Inc. v. FCC, 288 F.3d 429, 430, 438 (D.C. Cir. 2002). Thus, under both

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[17]Complaint of MFS Intelenet, No. 8731 (Md. Pub. Utils. Comm'n June 11, 1999); Petition for Declaratory Order of TCG, No. P-00971256 (Penn. Pub. Utils. Comm'n June 15, 1998).

[18]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").

the FCC's and the D.C. Circuit's reasoning, federal law requires reciprocal compensation for calls to ISPs at present.

Verizon continues to maintain that, because the FCC "has found Internet-bound traffic not to be subject to reciprocal compensation," the Agreement does not require reciprocal compensation for calls to ISPs. (Verizon's Br., at 22-23.) Verizon is wrong for the reasons WorldCom has discussed. However, rather than attempting to speculate about whether the FCC will or will not find that the Act requires reciprocal compensation for calls to ISPs on remand, or whether the FCC would find the Agreement here akin to the agreement in Cox Telcom and the Verizon South agreement in Starpower II, WorldCom respectfully submits that the Department should decline to adjudicate this dispute, and instead allow the parties to seek relief at the FCC.

At least two other state commissions have opted not to adjudicate reciprocal compensation disputes because of perceived uncertainties created by the FCC's decisionmaking on the reciprocal compensation issue. For example, in January 2000 the Virginia State Corporation Commission decided not to adjudicate a dispute over reciprocal compensation for calls to ISPs because it found that the FCC's '"failure to act on either inter-carrier compensation or separations reform for ISP-traffic . . . has created great regulatory uncertainty"' and because '"any interpretation of the instant agreements we might reach may well be inconsistent with the FCC's final order in its rulemaking."' In re Starpower Communications, LLC, 15 F.C.C.R. 11,277 ¶ 5 n.7 (2000) ("Starpower I") (quoting Virginia Commission's 1/24/00 Order). The Virginia Commission "encouraged the parties to seek relief from" the FCC. Id. ¶ 4. More recently, on August 7, 2002, the New York Public Service Commission stated that it will not adjudicate a dispute between affiliates of WorldCom and Verizon over reciprocal compensation for calls to ISPs. (Ex. 3.) On September 6, 2002 WorldCom's affiliate filed a petition with the FCC asking it to pre-empt the New York

Commission and adjudicate the dispute. Rather than starting down the same path the Department took before, which has led to years of litigation and to reversal of its Orders, if the Department believes that FCC precedent controls the interpretation of the Agreement, it should allow the FCC to resolve this dispute.

CONCLUSION

For the reasons set forth herein and in WorldCom's opening brief, 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 either should permit WorldCom to conduct discovery and to present evidence supporting its interpretation of the Agreement, or decline to adjudicate this dispute and allow the FCC to resolve it.

Respectfully submitted,

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