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

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

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November 19, 2002.

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INTRODUCTION AND SUMMARY.

As Global NAPs explained in its initial brief, the entire proceeding contemplated by the Department's October 24, 2002 procedural order is unlawful because it misreads the federal court's August 27, 2002 ruling.[1] Global NAPs again urges the Department to simply terminate this proceeding and leave in force the now-effective *D.T.E. 97-116*.[2]

Verizon fails to address at all whether there is any lawful basis to re-open *D.T.E. 97-116*. Instead, Verizon proceeds to reargue its case as though that decision had never been rendered. Assuming that the Department will consider anew Verizon's arguments, whether the focus is on procedures or on the merits, the only lawful course for the Department is to deny Verizon's bid to undo the Department's lawful order and, again, affirm and enforce *D.T.E. 97-116*.

First, Verizon's arguments are identical to those it raised during the litigation leading up to *D.T.E. 97-116.* It is not appropriate to relitigate those same arguments that were made in the

[1] *See* Brief Of Global Naps, Inc. In Response To The Department Of Telecommunications And Energy's Procedural Order Of October 24, 2002 (November 12, 2002) ("*Global NAPs Brief*") at 4-7.

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

main litigation. As a result, it would be an abuse of discretion for the Department to now modify *D.T.E. 97-116* on the basis of these tired, 5-year-old Verizon claims.

Second, even considering Verizon's arguments anew, they are without merit. Specifically, Verizon asserts that the parties intended that their rights under the agreement[3] would be the same as the requirements of federal law, and that federal law does not require compensation for ISP-bound calls.[4] Both parts of this argument are wrong.

With respect to the relevance of federal law, the agreement is replete with specific language that links any number of contractual terms to their meaning under federal law. No such linkage exists, however, with respect to the crucial term "local traffic," which defines the traffic for which compensation will be due. Where the parties over and again specifically and expressly established links to federal law for some terms, it is irrational to conclude that they somehow ***meant*** to link the term "local traffic" to federal law when there is no contractual language to support that result.

Moreover — although Verizon tries to obscure this point — federal law does not exclude reciprocal compensation for ISP-bound calls, whether one focuses on the period that the agreement between Verizon and Global NAPs was in effect, or today. While the FCC has twice tried to construct a rationale that can exclude ISP-bound traffic from the scope of Section

3 Although there are some differences between Verizon's specific contract with WorldCom and its specific contract with Global NAPs, the parties agreed that on the issue of compensation for ISP-bound calls they would be interpreted the same way. *See Verizon Brief* at 6 (Global NAPs contract is "the same in all material respects as the Verizon-MA-WorldCom Agreement.") Moreover, as noted in Global NAPs' initial brief, and as the Magistrate Judge found, the parties agreed that Global NAPs' contract would be treated as identical to the WorldCom contract for purposes of reciprocal compensation. *See Global NAPs Brief* at note 2.

4 *See* Initial Brief of Verizon Massachusetts on Remand ("*Verizon Brief*") at 14-19 (contracts establish obligations in conformity with federal law); *id., passim* (discussing notion that federal law only requires compensation for calls "terminated" in a state-defined local area).

251(b)(5) traffic, in each case the courts have rejected the FCC's rationale. *See Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (rejecting conclusion that ISP-bound calls are not "local" and do not "terminate" at the ISP for purposes of Section 251(b)(5) and the FCC's rules); *WorldCom v. FCC,* 288 F.3d 429 (D.C. Cir. 2002) (rejecting conclusion that ISP-bound calls are excluded from Section 251(b)(5) because they are "carved out" by Section 251(g)). The only appellate court to consider the specific claim on which Verizon's entire argument depends — that ***for purposes of reciprocal compensation,*** ISP-bound calls do not "terminate" at the ISP's premises —rejected that contention. *Southwestern Bell Telegraph Co. v. Public Utilities Commission,* 208 F.3d 475 (5th Cir. 2000).

Finally, Verizon sidesteps federal law that exists to guide state regulators in deciding whether a contract requires compensation for ISP-bound calls under the "local" rubric. Verizon's asserted grounds for ignoring the FCC's seven-factor test is that those factors do not apply to an agreement that unequivocally excludes ISP-bound traffic from its scope. *Verizon Brief* at 21. Yet it would be absurd to conclude that the agreement here unambiguously denies compensation for ISP-bound calls. Unless the Department in *D.T.E. 97-116,* dozens of other state regulators interpreting similar agreements to require compensation for ISP-bound calls as "local," and the FCC in *Starpower Communications, LLC vs. Verizon South, Inc., Memorandum Opinion and Order*, Nos. EB-00-MD-19-20, FCC 02-105 (Apr. 8, 2002) ("*Starpower II*"), and *Cox Virginia Telecom, Inc. vs. Verizon South, Inc., Memorandum Opinion and Order,* No. EB-01-MD-006, FCC 02-133 (May 10, 2002) ("*Cox*"), are so wrong as to be completely unreasonable, Verizon's argument on this point ***must*** be wrong — as, indeed, it is.

The Department now stands at a critical juncture. It has spent almost four years of futile regulatory effort — and imposed delays in any payment to Global NAPs, WorldCom, and others

— in a quixotic effort to uphold what appears to be its preferred policy result. Without speculating at length on what might have led the Department down this path, there is no sensible basis for following it now. The Department is an outlier on this issue. Rather than contort its policies or federal law in a further effort to avoid the effect of the Court's declaration concerning *D.T.E. 97-116* and to impose the Department's policy preference, the Department should promptly reaffirm its one decision upheld by the federal court.[5]

II. RECONSIDERATION OF *D.T.E. 97-116* IS BARRED BECAUSE VERIZON RAISES NO NEW ARGUMENTS.

The federal court left *D.T.E. 97-116* undisturbed, but vacated all the Department's subsequent orders in this matter because they violated federal law. It would, therefore, be consistent with the federal court's order — with no further ado — to enforce that ruling.[6] To the extent, however, that the Department now wishes to ***change*** the outcome of *D.T.E. 97-116* — that is, to set aside the only order it has issued in this matterthat survived court review — it must, at a minimum, meet the normal standards governing reconsideration or new proceedings.[7] As

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5 The situation here calls for application of the common-sense maxim, "if it ain't broke, don't fix it." The federal court has made clear that of all of the Department's efforts on this matter, *D.T.E. 97-116* is the only one that "ain't broke."

6 *See Global NAPs Brief* at 4-7 for an explanation of why such a course is, indeed, the ***only*** one consistent with the federal court's ruling.

7 Although Global NAPs cannot find a formal order to this effect, Global NAPs assumes for purposes of this filing that the Department indeed granted Verizon's motion to extend the time to seek reconsideration of *D.T.E. 97-116* "until 20 days after the FCC issues its decision regarding the classification of ISP traffic." *See D.T.E. 97-116B* (noting without citation that Verizon's motion had been granted). Under any way of counting the days, that period has long ago expired. Verizon's original motion for reconsideration was filed on March 2, 1999 — 6 days after the FCC ruled and within the extended time. But no further extension of time was ever granted. It follows that when the federal court ruled that *D.T.E. 97-116* conformed with federal law, but all subsequent rulings did not, the time period within which Verizon was required to seek reconsideration of that ruling began running (again). This is because, as the Department itself noted in federal court, a ruling vacating *D.T.E. 97-116C* and subsequent orders would have the effect of reinstating *D.T.E. 97-116*. *See* Massachusetts Department of Telecommunications and Energy's Objection to Entry of Recommended Decision With Respect to

(note continued)…

Global NAPs pointed out in its opening brief, those standards bar reconsideration here. To do otherwise would lack the reasoned consistency required of Department decisions.

> Verizon's brief makes it clear that Verizon has not raised any new matters that might conceivably support such reconsideration. Instead, Verizon simply restates arguments it made in the litigation leading up to *D.T.E. 97-116*. The Department in this very proceeding has stated that a request for reconsideration "*should not attempt to reargue issues considered and decided in the main case.*" *D.T.E. 97-116D* (emphasis added). That, however, is precisely what Verizon is trying to do.

On the merits, Verizon makes a two-part argument: (a) that its contracts require payment only to the extent required by federal law; and (b) that federal law does not require payment for ISP-bound traffic. Both parts of this argument are wrong, as described in more detail below. But the Department may not properly even consider this claim, because Verizon advanced it in the "main case" that Verizon now wants the Department to reconsider.[8]

…(note continued)
Parties' Cross-Motions for Summary Judgment at 16. This is why Verizon and the Department asked the court to vacate *D.T.E. 97-116* along with the later, erroneous rulings — a step the court refused to take. As the Department's procedural order notes, the court's order was issued on August 27, 2002. Even giving Verizon a full 20 days from that date (*i.e.*, assuming that Verizon should not be charged with the six days from back in 1999), the time for Verizon to file for reconsideration of *D.T.E. 97-116* ran no later than September 16, 2002. Of course, if the 20 days is taken to run from the date of the FCC's order on remand from the D.C. Circuit — that is, the most recent "FCC … decision regarding the classification of ISP traffic" — then Verizon's time for filing reconsideration ran more than a year ago. Under any reading of the relevant events, therefore, reconsideration of *D.T.E. 97-116* is untimely.

[8] As a procedural matter, Verizon concedes that its prior request for the Department to revisit *D.T.E. 97-116* was "reconsideration." *See* Verizon Brief at 8 (Argument heading reads "The Department's Reconsideration;" text states that "Verizon asked the Department to reconsider" *D.T.E. 97-116*). Given that all of the Department's actions in response to Verizon's earlier reconsideration request have been vacated, if any further proceedings are appropriate at all (and they are not), any modification of *D.T.E. 97-116* — the only currently effective Department order on the subject — would, again, have to meet the substantive and procedural requirements applicable to reconsideration of a final Department order. *See Global NAPs Brief* at, Section I(B). Note, in this regard, that the Department specifically ***rejected*** a Verizon request to make *D.T.E. 97-116* in some sense an "interim" order. *D.T.E. 97-116* at 6 n.12. As a result, *D.T.E. 97-116* is not subject to any special or lesser standard for modification than normally applies to a request for reconsideration. If anything, since *D.T.E. 97-116* has been specifically upheld by the federal court, a higher more stringent standard for modification should apply.

This case began on June 26, 1997, when WorldCom (then MFS Intelenet) brought a complaint against Verizon (then NYNEX). WorldCom explained in its complaint that the parties' contract required compensation for ISP-bound traffic and that Verizon was wrongfully withholding such payment. Verizon denied this, claiming that its contractual compensation obligation was coterminous with the obligation under federal law, and that federal law did not require payment. In its July 11, 1997 Answer, Verizon stated:

> The Agreement between MFS and NYNEX intended that the reciprocal compensation obligation imposed by the provisions of the Agreement would be consistent with the obligation imposed by the Act. Section 1.53 of the Agreement states that "reciprocal compensation" is as defined in the Act. Section 5.8.1 of the Agreement provides that the parties will pay reciprocal compensation on "Local Traffic." Section 1.38 of the Agreement defines "Local Traffic" as "a call which is originated and terminated within a given LATA, in the Commonwealth of Massachusetts, as defined in DPU Tariff 10, Section 5…" — the Exchange Services section of the Company's tariff. Since the ISP traffic does not terminate at the local POP, there simply is no reciprocal compensation due on this traffic.

Answer of New England Telephone and Telegraph Company (July 11, 1997) at 8 (second emphasis in original).[9] This position is indistinguishable from the arguments Verizon is pressing now.

With respect to the "agreement conforms to federal law" claim, in its July 1997 Answer, Verizon cites ***exactly the same sections*** of its agreement with WorldCom as it cites in its November 2002 brief, and argues that ***those exact same sections*** mean ***exactly the same thing*** that it argues now, *viz.*, that the parties intended that compensation under the agreement would

[9] Obviously, the arguments advanced in Verizon's answer are part of the record of decision in this case, as the Department clearly recognized. *See D.T.E. 97-116* at 2.

track the requirements of federal law. The Department did not accept that assertion in *D.T.E. 97-116*, and so it cannot properly be raised as a basis for reconsideration now.[10]

Verizon here also resurrects its longstanding claim that for purposes of federal law, ISP-bound calls do not "terminate" at the ISP's location, but, instead, continue on to distant web sites. *Verizon Brief* at 7-8, 23. Regardless of its merits, Verizon made this same claim in its July 1997 Answer.[11] As the Department noted in *D.T.E. 97-116*:

> Bell Atlantic argues that calls to ISPs are different from voice grade calls because calls to ISPs do not terminate on the ISPs' networks. … Bell Atlantic also claims that ISP calls do not terminate in the same local calling area as the calling party but rather are redirected by the ISP to the Internet and terminate outside the calling party's local calling area.

D.T.E. 97-116 at 9 (citations to Verizon pleadings omitted).

In other words, in the "main case" on which the Department decided *D.T.E. 97-116*, Verizon argued: (a) that compensation under the agreement was not due because the contract only required what federal law required; and (b) federal law does not require compensation for such calls because they do not really "terminate" at the ISP's bcation. In *D.T.E. 97-116*, the Department rejected both these claims. Reconsideration is not permitted simply to reargue these

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10 Had the Department agreed that the parties' contract simply tracked federal law, *D.T.E. 97-116* would have been devoted to examining what federal rules (the then-effective version of 47 C.F.R. § 51.701) required. Instead, the analysis in *D.T.E. 97-116* focused exclusively on whether calls to ISPs fit within the ***agreement's*** definition of "Local Traffic," based on the application of normal contract principles. In other words, the Department plainly and properly found Verizon's "conform with federal law" argument to be unconvincing. It would be arbitrary, capricious, irrational, and contrary to law for the Department to now declare, four years later, that the previously rejected argument had suddenly, somehow, acquired new merit.

11 Answer at 2 ("Internet traffic is not local traffic — traffic which "terminates" within a local calling areas on another carrier's network for which local termination compensation is due"); *id.* at 6-7 (argument section headed "ISP Traffic Does Not 'Terminate' at the ISP's Local POP;" text arguing for that conclusion).

same issues.[12] For the Department to entertain arguments already rejected in a final decision would be an arbitrary and capricious contradiction of the Department's own standards and procedures.

III. COMPENSATION UNDER THE CONTRACT IS NOT COTERMINOUS WITH THE REQUIREMENTS OF FEDERAL LAW.

Verizon's key claim is that the compensation obligation in the agreement is the same as what federal law requires, no more and no less. As described below, even if this claim is correct, compensation is still due. But the agreement does not say that.

All parties concur that under Section 252(a)(1) an ILEC and a CLEC can agree to terms and conditions that depart from those required by federal law and regulation. *See Verizon Brief* at 17. It is only ***arbitrated*** portions of such agreements that must conform to federal requirements. *See* 47 U.S.C. §§ 252(b)(4)(C); 252(c)(1), (2). Here, the relevant portions of the agreements in question were negotiated, not arbitrated; so the logical presumption is not that the terms of the agreement would precisely track federal law, but rather, that they would not.[13]

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[12] In this same vein, Verizon in 1997 relied on the FCC's 1983 order establishing access charges and the so-called "ESP Exemption" for the proposition that calls to ISPs are a form of interstate access service. *See* Verizon Answer at 3-6. It makes the same claim today. *See Verizon Brief* at 4-5 (claiming that ISP-bound traffic is "Switched Exchange Access" under the terms of the agreement); *id.* at 10; *id.* at 16-17; *id.* at 23 (citing and relying on the same 1983 FCC access charge ruling, for the same point, as cited and relied upon in its 1997 Answer (at 4 n.3)).

[13] *AT&T Communications of Southern States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000), relied upon by Verizon, is not applicable here. That case involved the peculiar situation of interrelated provisions of an agreement, some arbitrated, some negotiated, and in which the negotiated provision was expressly "subject to" the arbitrated provision. *See* 229 F.3d at 462. As the federal law that unquestionably governed the ***arbitrated*** provision changed during the progress of the case through arbitration and the courts, the district court-based on federal law at the time of the decision-struck the negotiated provision. By the time the case reached the 4th Circuit, however, the law had changed yet again, and AT&T asked the court for an order directing the district court, on remand, to reinstate the originally negotiated provision. The 4th Circuit rejected that request in favor of a general remand. In the context of that ruling, it made the observation Verizon notes in its brief. In this context, all the 4th Circuit is saying is that governing law at the time of contract formation provides part of the context in which a

(note continued)…

But, presumptions aside, the contractual language does not support Verizon's "track federal law" claim. The contracts at issue were drafted and negotiated by sophisticated parties that plainly understood how to tie the meaning and interpretation of a particular provision to federal law when they wanted to. The agreements have specific definitions for the "Act;"[14] for the phrase "As Defined in the Act;"[15] and for the less specific "As Described in the Act."[16].

Armed with these terms, in the remaining definitions the parties repeatedly referred to them. In some cases the parties defined terms for contractual purposes entirely by the phrase "As Defined in the Act."[17] In other cases, the parties defined terms for contractual purposes entirely by the phrase "As Described in the Act."[18] In still other cases, the parties defined terms for contractual purposes using one of the phrases, but supplemented with additional, explanatory

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…(note continued)
contract should be interpreted — hardly a controversial viewpoint. Verizon would elevate that general observation into some hard-and-fast rule of construction applicable to interconnection agreements, a proposition the 4th Circuit itself did not endorse and that is, in any case, inappropriate. Moreover, here the agreements in question were fully negotiated, so the problem of harmonizing an arbitrated provision (that ***must*** comply with federal law) and a negotiated provision made expressly "subject to" the arbitrated one - that is, the problem the 4th Circuit was confronting in *AT&T of the Southern States*- simply does not arise.

14 Verizon-Global NAPs Agreement, § 1.1

15 *Id.*, § 1.5. The definition reads: "'As Defined in the Act' means as ***specifically defined*** by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Department" (emphasis added).

16 *Id.*, § 1.6. This intriguingly looser definition reads: "'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." The only reasonable explanation for the different usage is that, when the Act does not "specifically define" a particular term, the reference to "descriptions in" or "requirements of" the Act is necessarily more general and illustrative than a "specific definition."

17 Terms whose sole definition is "As Defined in the Act" include "Affiliate" (§ 1.3); "Exchange Access" (§1.25); "InterLATA Service" (§ 1.34); "LATA" (§ 1.37); "LEC" (§ 1.39); "Network Element" (§ 1.45); "Number Portability" (§ 1.48); "Telecommunications" (§ 1.63); "Telecommunications Carrier" (§ 1.65); "Telecommunications Service" (§ 1.66); "Telephone Exchange Service" (§ 1.67); and "Telephone Toll Service" (§ 1.68).

18 Only three terms are defined using the slightly fuzzier reference to "As Described in the Act": "Interim Telecommunications Number Portability" (§ 1.33); "Reciprocal Compensation" (§ 1.54); and "Technically Feasible Point" (§ 1.62).

material.[19] These parties plainly knew not only how to tie the definition of specific terms to federal law when they wanted to, but also to establish "ties" of varying degrees of strictness.

Yet, in conspicuous contrast to such explicit references to federal law or policy, the crucial term "Local Traffic" makes ***no reference to the Act or to FCC rules or regulations at all.*** It defies reason — and the evidence — to think that the parties somehow really meant to tie that term to federal law all along, but just somehow forgot to do so. The parties plainly did ***not*** mean for the term "Local Traffic" to be identical to what federal law requires. They meant for compensable "Local Traffic" to mean something else.

An examination of the actual definition of the term, as well as how it is used, shows both what they meant and why. As explained in *D.T.E. 97-116* and in Global NAPs' initial brief, what the parties plainly meant was that calls that were dialed and billed as local calls would be "Local Traffic" under the agreement, whereas calls that were dialed and billed as toll calls (either 1+ or 101XXXX) would not. *See Global NAPs Brief* at 14.

Why the parties would have taken this approach is evident from the Verizon tariff referenced in the definition of "Local Traffic." Verizon Tariff No. 10, Section 6, refers to Verizon's varied local calling plans available within Massachusetts. Some plans allow for a very limited local calling area.[20] But Verizon also has a local calling plan that allows for unlimited, LATA-wide local calling.[21] Different customers in any given area could subscribe to different

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[19] Two terms have additional material in their definitions: "Dialing Parity" (§ 1.18; "As Defined in the Act," plus additional material); "Interconnection" (§ 1.31; "As Described in the Act," plus additional material);

[20] See, e.g., Verizon Massachusetts, Tariff No. 10, Section 6.1.2, Exhibit 6.1.2-1, page 19 (base calling area for Barnstable encompasses only Dennis, Hyannis, Osterville and Sagamore).

[21] *See id.,* Sections 6.2.6 and 6.2.7 (describing LATA-wide local calling plans for Massachusetts LATAs).

local calling plans with different local calling areas. A call across the LATA could be a local call for one customer and a toll call for his next-door neighbor.

Given this checkerboard of local calling plans in Massachusetts, the parties could not simply follow the general FCC approach, which was generally to tie a call's status as "local" to geography, *i.e.,* whether the call originates and terminates within a particular local calling area.[22] Under Verizon's calling plans, one customer's call from Cape Cod to Cambridge would be a toll call, while a neighbor's call to the same number in Cambridge would be a local call.

Instead, the parties logically looked to criteria other than geography to determine the status of a call as compensable "local traffic" — specifically, they looked to how the call is ***dialed*** and how the call is ***billed.*** Whether at the time or in retrospect this was a wise choice, this decision to look to the dialing and billing characteristics of calls to determine whether they are "local" or not for compensation purposes is not the same, contractually, as saying "we'll do whatever federal law says we have to do and nothing more."[23]

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[22] As discussed *infra,* within the LATA-wide area relevant for "Local Traffic" under the agreements, and using the FCC's definition of "termination," ISP-bound calls do indeed "terminate" within the LATA.

[23] Of course, for any number of reasons contracting carriers may well choose to rely on the dialing and billing characteristics of calls as a means of distinguishing "local" traffic (i.e., in this context, traffic to which reciprocal compensation applies) from "toll" traffic (i.e., in this context, traffic to which access charges apply), irrespective of the scope of particular local calling plans available in a given state or LATA. Most prominent among these is ease of administration: carriers will often not know where particular customers are physically located, but (as long as normal billing and recording systems are functional) they will know the numbers of the calling and called party and will know, therefore, whether the call was dialed, billed and routed on a "local" (*i.e.,* here, non-toll) basis or not. But in the case of Massachusetts, where there is no unambiguous "local calling area" that can be applied to all traffic, focusing on dialing and billing, rather than geography, was probably essential. In addition, this approach makes simple economic sense, as suggested above: calls dialed on a 1+ or 101XXXX basis will be routed to IXCs, who will pay access charges, making LEC-to-LEC compensation unnecessary. Calls dialed on a local basis will be routed directly LEC-to-LEC, so no IXC will be involved, and access charges will not apply, so intercarrier compensation makes sense.

Given that these parties knew how to tie the definition of a particular term to federal law whenever they wanted to, that they did not do so in the case of the definition of "local traffic" reflects a conscious choice to tie this definition to Verizon's local calling areas and not to federal law. Verizon's claim that the contractual language ties the definition to federal law, therefore is plainly wrong.[24]

Other aspects of the contractual language confirm that the parties intended payment of compensation to follow the contractual definition of "local traffic" — focused on dialing and billing — and not to some overarching, generic federal requirement. For example, while the parties' opening briefs focus on Section 5.7.1, other contractual language confirms that what controls is the definition of "local traffic," not federal rules. First, Section 5.7.2 of the Global NAPs agreement states:

> 5.7.2 The Parties ***shall compensate each other*** for transport and termination of Local Traffic in an equal and symmetrical manner at the rate provided in the Pricing Schedule. This rate is to be applied at the BF-IP [an agreed-up location] for traffic delivered by NYNEX, and at the N-IP [an agreed-upon location] for traffic delivered by GNAPs. No additional charges, including port or transport charges, shall apply for the termination of Local Traffic delivered to the BF-IP or the N-IP. When Local Traffic is terminated over the same trunks as intraLATA toll or interLATA toll, any port or transport or other applicable access charges related to the toll traffic shall be prorated to be applied only to the toll traffic.

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24 The need to craft a definition of "local traffic" that reflects the specific situation of intraLATA calling in Massachusetts, noted above, also explains why substantially identical language is used in the WorldCom and Global NAPs agreements. The WorldCom agreement was negotiated before the FCC even promulgated 47 C.F.R. § 51.701. *See* Complaint of MFS Intelenet of Massachusetts, Inc. (filed June 26, 1997) at 1 (negotiated agreement filed by parties for approval on June 26, 1996). At least arguably, in that agreement the parties could conceivably have chosen not to refer to the FCC's definition of "Local Traffic" since it had not yet been finally promulgated. (Note in this regard, however, that ***Verizon*** places reliance on the then-pending FCC rulemaking notice. *See Verizon Brief* at 3, 5, 16.) But the Global NAPs agreement was entered into in April 1997, more than six months after the FCC's Rule 51.701 had been promulgated. Yet the agreement-specific definition of "Local Traffic," as opposed to a reference to "the Act," remain. This makes perfect sense in light of the reasons for establishing a contract-specific definition of this term for use in Massachusetts, as discussed above.

(emphasis added). This provision unequivocally requires "compensation" for "Local Traffic" exchanged between the parties. It does so with no reference at all to the defined term "Reciprocal Compensation" to which Verizon looks for its link to federal law. So even if the term "Reciprocal Compensation" is tied to its meaning under federal law, *see Verizon Brief* at 15, the parties plainly arranged to pay each other for the exchange of all "Local Traffic" without reference to that term.

Section 5.7.3 provides further confirmation that the parties intended their contractual definition of "Local Traffic" to control in the case of any divergence between that definition and federal law. That section provides:

> 5.7.3 The Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Traffic or to any other IntraLATA calls originated on a third party carrier's network on a 1+ presubscribed basis or a casual dialed (10XXX or 101XXXX) basis. All Switched Exchange Access Service and all IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs.

First, this section refers to "the Reciprocal Compensation arrangements set forth in this Agreement." That is superfluity if the parties simply intended "Reciprocal Compensation" as defined in federal law to govern. By instead referring to the specific compensation "arrangements set forth in this Agreement," the parties acknowledged that such agreement-specific "arrangements" existed — precisely the kind of arrangements Verizon disavows with its claim that the parties were simply and slavishly following federal law. Second, this section once again relies on how calls are ***dialed*** as a way to distinguish traffic subject to compensation from traffic not subject to compensation.[25]

Clearly, therefore, the scope of compensation for "Local Traffic" required under the parties' agreement is not coextensive with the requirements of federal law — it is broader. And, because it is based plainly, explicitly and directly on how calls are dialed and billed, the compensation obligation clearly encompasses calls to ISPs.

IV. FEDERAL LAW NOT ONLY DOES NOT FORBID COMPENSATION FOR ISP-BOUND CALLS, IT REQUIRES SUCH COMPENSATION UNDER THE CIRCUMSTANCES OF THIS CASE.

Verizon blatantly misreads federal law as it applies to compensation for ISP-bound calls, and invites the Department to accompany Verizon in that misreading and compound the errors articulated by the federal court. To the contrary, under federal law relevant to this case, ISP-bound traffic is within the scope of the reciprocal compensation requirement of Section 251(b)(5).

A. Federal Law Generally Includes ISP-Bound Calls Within The Scope Of Traffic Subject To Compensation Under Section 251(b)(5).

Section 251(b)(5) calls for compensation for the transport and termination of all "telecommunications" exchanged between LECs, without qualification or exception. Although

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[25] The "Pricing Schedule" referred to in Section 5.7.2 further confirms that the parties did not intend the "Reciprocal Compensation arrangements" in the agreement to be identical with the requirements of federal law. Section 1 of the Pricing Schedule in the Verizon-Global NAPs agreement states that "Reciprocal Compensation for local traffic shall equal the rate set forth below" (then specified $0.008 per minute, but then, a paragraph later, states that "***Reciprocal Compensation for IntraLATA Toll traffic*** shall equal each Party's effective tariffed IntraLATA switched access rates." Substantively, this is logical enough: if Party A delivers an incoming toll call to Party B, then Party A pays a terminating access charge. But there is no conceivable way to reconcile the contractual notion that "Reciprocal Compensation" would apply to toll traffic with the then-current federal-law notion that Section 251(b)(5) extended only to "local" traffic as specified in FCC regulations. Clearly, the parties were not troubled by the fact that the "Reciprocal Compensation arrangements set forth in this agreement" were broader than — and certainly not coextensive with — the requirements of federal law.

ISPs may offer information services, the transmissions between the end user and the ISP are "without change in form or content" (*see* 47 U.S.C. § 153(43)) and so constitute "telecommunications." So on the face of it there is no particular reason to conclude that federal law would not require compensation between LECs when one LEC serves an end user, and that end user calls an ISP served by another LEC.

In its original August 1996 order implementing the 1996 Act, the FCC found a distinction between access services, where a call goes from end user to LEC_1 to IXC to LEC_2 to end user (*i.e.*, where three carriers are involved) and reciprocal compensation, where the call goes from end user to LEC_1 to LEC_2 to end user (where only two carriers are involved). Where an IXC is involved, access charges apply; where only two LECs are involved, reciprocal compensation applied. *See Local Competition Order* at ¶ 1033-35. The FCC explained that this meant that only "local traffic" was subject to reciprocal compensation, and that in the case of landline LECs, a call is deemed "local" if it originates and terminates within a state-defined local calling area. *Id.*[26] *See also* 47 C.F.R. § 51.701(b) (superceded). Here, as noted above, Verizon (under the Department's supervision) has defined at least one local calling service that provides LATA-wide local calling. It follows that the entire LATA is a relevant state-defined local calling area for purposes of federal law.[27]

The FCC provided a specific definition of "termination" for purposes of reciprocal compensation:

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[26] The FCC eventually concluded that this reliance on the term "local" in construing Section 251(b)(5) had been an error. *See ISP Remand Order* at ¶ 42.

[27] From this perspective, the fact that the agreements at issue here seem to carve out from reciprocal compensation intraLATA traffic that is dialed and billed as a toll call actually constitutes a concession ***from*** the CLECs ***to*** Verizon, since at least arguably ***all*** calls where the calling and called party are within the LATA are is "local" for purposes of the FCC's rule.

> For purposes of this subpart, termination is the switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

47 C.F.R. § 51.701(d). In a call from an end user to an ISP's modem, the originating end user is clearly the calling party, and, as the D.C. Circuit found, "[c]alls to ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.'" *Bell Atlantic v. FCC,* 206 F.3d at 6. Since the CLEC serving the ISP switches the traffic and delivers it to the ISP's premises, for purposes of this rule, calls delivered by a CLEC to an ISP constitute traffic "terminated" by the CLEC.

The FCC initially ruled that calls to ISPs were not "local" within the meaning of its rules (leading to the confusion and delay in this proceeding). It did so on the ground that it had traditionally determined its jurisdiction over traffic on the basis of an "end-to-end" test, and, since the end user was plainly, in some sense, communicating with distant web sites, the communication was interstate and the transmission did not "end" at the ISP. *In re Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, 14 F.C.C.R. 3689 (1999) ("1999 FCC Order") at ¶ 12.

The D.C. Circuit found this analysis gravely flawed and vacated it "for want of reasoned decisionmaking." *Bell Atlantic v. FCC,* 206 F.3d 1 (D.C. Cir. 2000). In its decision, the court criticized the FCC for assuming that the end-to-end analysis — which the court accepted as a reasonable approach for jurisdictional purposes — had any real role to play in assessing the scope of Section 251(b)(5). 206 F.3d at 7. The Court also criticized the FCC for failing to discuss or explain why, in light of the definition of "termination" in the FCC's regulations, calls to ISPs did not, indeed "terminate" at the ISPs' premises. *Id.*

The D.C. Circuit's vacatur of the FCC's initial order rendered that order a legal nullity."[28] Verizon therefore cannot rely on the FCC's reasoning[29] — particularly the reasoning that the D.C. Circuit specifically found to be wanting — and nor can the Department. Whatever appeared true in May 1999, today it would be a blatant error of federal law to conclude that calls to ISPs do not "terminate" at the ISPs' premises, for purposes of reciprocal compensation, under the terms of the then-effective FCC rules.

As WorldCom points out in its brief, the 5th Circuit ruled that, given the definition of "termination" applicable to reciprocal compensation, ISP-bound calls do indeed "terminate" at the ISP. *Southwestern Bell Telegraph Co. v. Public Utilities Commission,* 208 F.3d 475 (5th Cir. 2000).[30]

In other words, under the FCC's original rules governing reciprocal compensation, calls to ISPs do indeed "terminate" at the ISPs' premises. So, even if the parties' agreement ties compensation to all and only that traffic for which compensation was required under federal law in effect at the time — which it does not — ISP-bound traffic is, indeed, covered, and compensation is due.

As far as Global NAPs' agreement with Verizon is concerned, the analysis can probably stop here. The FCC's rule regarding "termination" of "local" traffic was in effect from 1996 (prior to the effectiveness of the Global NAPs agreement) until 2001 (after the Global NAPs

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28 *Bell Atlantic Telephone Companies v. FCC*, 206 F.3rd 1, 9 (D.C.Cir. 2000)

29 Verizon Brief at 16-17.

30 In this regard, the FCC carefully noted that it was defining "termination" as it did only "for purposes of this subpart" — *i.e.*, for reciprocal compensation purposes, not for jurisdictional or other purposes. As a result, there is nothing inconsistent about applying the end-to-end test for purposes of jurisdiction, while at the same time applying the "end office switching/customer premises" test for purposes of reciprocal compensation.

agreement had been superceded by one that expressly states how to deal with ISP-bound traffic). What the FCC did subsequently to change its rules (discussed below) cannot retroactively govern an agreement that had expired and been superseded before such changes. But even if subsequent developments of federal law are considered, they lead to the same conclusion.

Rather than answer the question whether ISP-bound calling was "local" or not within the meaning of its rules, on remand the FCC concluded that it had been a mistake to limit the scope of Section 251(b)(5)'s compensation obligation to "local" traffic at all. Instead, Section 251(b)(5) applies to all "telecommunications," just as its language says. But, according to the FCC at the time, Section 251(g), which preserves certain ILEC obligations regarding exchange access and "information access," acts as an implicit "carve out" from Section 251(b)(5), so that Section 251(b)(5) does not apply to traffic that falls into the categories mentioned in Section 251(g). Since (in the FCC's view) calls to ISPs are a form of "information access," they are not subject to Section 251(b)(5) either. *ISP Remand Order* at ¶¶ 42-47.

At the same time that it made this ruling, the FCC also established rules, purportedly under its authority under Section 201 of the Act, that effectively link compensation for ISP-bound calls precisely to compensation for "normal" traffic to which Section 251(b)(5) does apply. Specifically, the FCC required ILECs to choose either to pay and receive the same state-established local termination rates for all non-access traffic (whether ISP-bound or not), or to pay and receive certain FCC-established (often lower) rates for all such traffic. *ISP Remand Order* at ¶¶ 77-88. In other words, while (in the FCC's view) ISP- bound calls were legally distinctive, in practical terms they were to be treated essentially like the old "local" traffic category that the FCC had abandoned.

The FCC recognized that this was a sufficiently dramatic change in its analysis that it should be applied only prospectively, either as new agreements between carriers were negotiated, or in accordance with the "change in law" provisions that are common in interconnection agreements. *Id.* at ¶82. The logic of applying this new analysis retroactively, therefore, is, to put it mildly, highly questionable.

That said, this FCC effort to carve out a legally distinctive niche for ISP-bound traffic, outside the bounds of Section 251(b)(5), was even less successful than its first effort. While the D.C. Circuit remanded the FCC's initial order for further consideration, it expressly and unequivocally rejected — found to be wrong — the FCC's view that Section 251(g) in any way "carves out" certain classes of traffic from the operation of Section 251(b)(5). *WorldCom v. FCC*, 288 F.3d 429(D.C.Cir. 2002*)* The court, however, did not disturb the FCC's conclusion that all telecommunications is subject to Section 251(b)(5) regardless of whether it is local and left the FCC amendment of 47 C.F.R. §51.701 in place. The only logical conclusion is that those classes of traffic — including ISP-bound calls — are not, in fact, subject to any such "carve out " and therefore are "telecommunications" subject to compensation under Section 251(b)(5)[31]

As a result, if one were to apply the current state of federal law to the contracts at issue here (which, as noted above, would not seem to make sense in the case of Global NAPs' agreement), then ISP-bound calls are, indeed, subject to compensation under Section 251(b)(5).

[31] In this regard, the D.C. Circuit let the FCC's ***rules*** remain in effect, but — as noted above — under those rules, for the most part, ISP-bound traffic must be treated just like any other compensable traffic under Section 251(b)(5). It would therefore be error to conclude anything from the fact that the FCC's latest rules were sustained, other than that the D.C. Circuit believes that it comports with federal law to treat ISP-bound traffic like any other locally-dialed traffic.

B. Relevant Federal Law Includes The Seven-Factor Test And The FCC's Decisions In *Starpower I I* And *Cox.*

Global NAPs explained in its opening brief that relevant "federal law" includes the FCC's guidance to states regarding how to decide whether a contract that does not mention ISP-bound calls explicitly should be construed to determine whether compensation for such calls is due under the rubric of "local traffic." *See Global NAPs Brief* at15-19. Verizon evidently recognizes that under the application of that seven-factor test, it will have to pay compensation for ISP-bound traffic to Global NAPs and other CLECs. Rather than address these factors, Verizon therefore tries to show that the seven-factor test does not apply.

Specifically, Verizon's asserted grounds for ignoring the FCC's seven-factor test is that those factors do not apply to an agreement that unequivocally excludes ISP-bound traffic from its scope. *Verizon Brief* at 21. Even if this is true as a general proposition, it bears no relation to the case at hand. Under a proper reading of the contract, as noted above, compensation is literally and unequivocally due for all traffic dialed and billed as local, which plainly ***includes*** ISP-bound calls. One can imagine strained, erroneous mis-readings of the contract that could lead to a contrary conclusion — indeed, Verizon tries to supply some. But under no stretch of the imagination could it be said that the agreements at issue here clearly or unambiguously ***deny*** compensation for ISP-bound calls. Indeed, unless the Department itself in *D.T.E. 97-116* — and dozens of other state regulators interpreting similar agreements to require compensation for ISP-bound calls as "local," and the FCC in *Starpower II*[32] and *Cox*[33] — have somehow collectively

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[32] *Starpower Communications, LLC v. Verizon South, Inc., Memorandum Opinion and Order,* Nos. EB-00-MD-19-20, FCC 02-105 (Apr. 8, 2002) ("*Starpower II*").

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

shown a level of legal incompetence that would have kept them from passing the first-year course in contracts, Verizon's argument on this point ***must*** be wrong. How can dozens of state regulators and federal courts (including several courts of appeals), as well as the FCC, somehow have missed the supposed "unambiguous" meaning of contracts calling for compensation for "local" traffic

Even Verizon concedes, implicitly, that if any sort of "construction" of the contract is called for, the seven-factor test applies. Verizon's silence on how these factors apply to the contracts at issue speaks volumes.[34]

Verizon grossly misreads *Starpower II* and *Cox*. *See Verizon Brief* at 19-22. As Global NAPs pointed out in its brief, the determinative distinguishing feature between the agreements the FCC found to require compensation for ISP-bound calls and those that did not was that the former defined "local traffic" by reference to the incumbent's tariffs, while the latter defined "local traffic" using the explicitly "jurisdictional" end-to-end test, expressed using explicit "end-to-end" language. *Global NAPs Brief* at 20-21.

Only where such "end-to-end" language is found does federal law applying to interconnection agreements take ISP-bound calls out of traffic compensible under Section 251(b)(5). There is no question that the parties' agreement here does ***not*** include any such "end-to-end" language, but ***does*** define "local traffic" by reference to Verizon's tariffs. The agreement therefore does not meet the FCC's "end to end" test, and it would be a plain error of federal law for the Department to accept Verizon's reading of *Starpower II* and *Cox*.

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[34] Verizon's reference to the seven-factor test in its brief shows that it was fully aware that this test exists and (at the least) might apply to the agreements here. If Verizon suddenly decides that it ought to try to address that test for the first time in its reply brief, then Global NAPs reserves the right to file a supplemental pleading to respond to Verizon's discussion of that test.

V. CONCLUSION.

The federal court found that *D.T.E. 97-116* was lawful because it "properly considered" the contract interpretation issues required by federal law. Verizon fails to establish any basis to undo that decision. The arguments it raises now were raised and rejected in the proceedings leading up to *D.T.E. 97-116.* These arguments are also wrong on the merits, because the language of the agreements refers to how calls are dialed and billed to identify which traffic is subject to compensation and which is not,and even if the agreements are construed to tie compensation to what is required under federal law, ISP-bound calls are still compensable because the FCC's efforts to exclude such calls from the scope of Section 251(b)(5) have not survived court review, and under the plain terms of the FCC's rules, precedent from other circuits, the FCC's seven-factor test, and the FCC's rulings in *Cox* and *Starpower II*, shows that such calls are compensable.are unavailing.

For these reasons and for the reasons set forth in Global NAPs' initial brief, Global NAPs respectfully urges the Department to terminate this proceeding with an order reaffirming *D.T.E. 97-116* and directing Verizon to comply with that order.

Respectfully submitted,

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November 19, 2002.

LIT 1369971v3