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

RNK, INC. D/B/A RNK TELECOM REPLY BRIEF

I. INTRODUCTION

In reply to the Initial Briefs in this proceeding, RNK, Inc. d/b/a RNK Telecom ("RNK") concurs with the conclusions set forth by each Competitive Local Exchange Carrier ("CLEC"). In their briefs, each CLEC state persuasive arguments why the Department of Telecommunications and Energy ("Department" or "DTE") must reinstate DTE 97-116 (1998) ("1998 Order") and require Verizon New England d/b/a Verizon – Massachusetts ("Verizon") to pay reciprocal compensation for ISP-bound traffic as required by the individual interconnection agreements at issue.

For the reasons that follow, RNK respectfully urges the Department to reinstate the 1998 Order, the only valid order left standing by the Magistrate's Decision[1] and District Court Order, and to order Verizon to pay the disputed amounts owed to the CLECs that it is unilaterally withholding.

II. INITIAL BRIEFS

Verizon contends that "by their plain terms" the agreements in question do not require compensation.[2] In its Brief, Verizon boldly phrases the question before the Department as whether "the agreements, when interoperated in accordance with principles of Massachusetts contract law, require the payment of reciprocal compensation for Internet-bound traffic."[3] It seems that in asking this question, Verizon has completely misunderstood the meaning and impact of the District Court's decision. Verizon put the carriage before the horse and failed to ask the base question: should the Department open further hearings?

Even if the Department were to accept Verizon's premature question, the Department should still find that the agreements at issue require the payment of reciprocal compensation. For the reasons below, RNK respectfully disagrees with Verizon and asks that the Department reinstate the 1998 Order.

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1 *D.T.E. 97-116-G, Initial Brief of Verizon Massachusetts on Remand* (November 8, 2002) at 14. ("Verizon Brief").

2 *Id* at 3.

3 *Id* at 2.

II. REPLY ARGUMENTS

A. Verizon Misconstrues The Effect of The 1998 Order in Light of the District Court Order.

Verizon states that the Magistrate Judge took "no position" on whether the Department had concluded that the terms of the agreements required reciprocal compensation only to the extent required by the Telecommunications Act of 1996 ("1996 Act" or "Act").[4] Verizon states that the "Magistrate Judge held merely that, whatever conclusion it may reach on remand, 'the [Department] must set forth a clear analysis of the issue based upon all relevant language in the interconnection agreements[,]"[5] as if this directive, for contract analysis alone to be dispositive of this matter, implies such analysis does not yet exist. This induction is merely a Verizon inference, not the holding of the Court. The Court ordered that the Department institute a regime based on the plain language of the contracts, and held that the 1998 Order complied with federal law. The logical implication is that the 1998 Order constitutes a lawful resolution to this whole matter and, even if the Department chooses now to build on the 1998 Order, that Order's substance stands and must form the basis of any further inquiry.

The Magistrate, commenting on the proper analytical framework to review the Agreements, in fact stated "the DTE properly considered [the] question" of "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."[6] The Magistrates' footnote to that statement goes on: "In so finding, the

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4 *Id*.

5 *Id*.

6 *Findings and Recommendations*, July 5, 2002 ("Magistrate's Findings") at 27.

Court notes that the DTE seemed to understand such obligations in the 1998 Order, where it examined the specific language in the MCI-Verizon agreement, the industry custom, the parties' intent, and the state of federal telecommunications law on reciprocal compensation for ISP-bound calls at the time of contract formation."[7] This level of specificity by the Magistrate really leaves Verizon reaching, way out on a limb of its own imagination, to now assert that the Department has not already properly considered the contracts. Despite the obvious legal skill and extensive resources of Verizon's authors, the Department – under the binding guidance of the District Court – should not be bamboozled today by complex Massachusetts contracts arguments that simply no longer bear on the matter.

According to Verizon, the Magistrate's Decision found "that the Department had failed, in its prior orders, to consider the language of the interconnection agreements at issue" and as such, the District Court ordered "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."[8] Verizon lifts this phrasing, properly explained herein above, out of context, and inserts it own spin on its ramifications here. To the contrary these exact words from the Magistrate's Decision, precisely where (and precisely *as*) cited by Verizon, described how the post-1998 Orders *violated* federal law, as she went on to say that this is precisely how the 1998 Order *complied* with federal law.

Further, if the Department were to accept Verizon's reading of the Magistrate's Decision, the Department would have to ignore its own finding – in the 1998 Order that

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7 *Magistrate's Findings* at 27, FN 20.

8 *Verizon Brief,* at 12-13.

examined the contracts, as opposed to subsequent Orders based on FCC developments -- that the "plain language of the Agreement indicates that [Verizon] and MCI WorldCom agreed to compensate each other for termination of all local calls"[9] and that a call terminated "to an ISP is a 'local call [within the meaning of the agreements] . . .eligible for reciprocal compensation."[10] Ignoring the contract analysis in the 1998 Order would, again, leave the Department reacting to the FCC's rulings ***subsequent*** to contract formation, an approach plainly disallowed by the Magistrate's Decision.[11]

B. Even If the Department Entertains, Today or in Continuing Proceedings, Further Factual Inquiry into Contract Formation, Verizon, Representing the "Facts," Glosses Over the Time of Contract Formation, Circularly Relying Instead on the Subsequent Dispute Period to Evidence a Dispute.

Verizon would have the Department to believe that upon execution of these Agreements disputes arose regarding compensation for ISP bound traffic.[12] Verizon would also have the Department believe that, from the beginning, Verizon interpreted the language in these agreements as they do today.[13] However, the undisputable facts do not substantiate this position.

Verizon did indeed pay reciprocal compensation for ISP-bound traffic to CLECs, including RNK, without objection, in RNK's case from the time RNK acquired facilities. After paying RNK reciprocal compensation consistently for five months including local

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9 *MCI WorldCom Technologies, Inc., D.T.E. 07-116*, at 10. ("1998 Order")

10 *Id*, at 12.

11 The relevant inquiry time is when the contracts were formed. *Southwestern Bell Telephone Co. v. Public Utility Com'n of Texas*, 208 F.3d 483 at 486. (C.A.5 2000).("construed in accordance with their end user usage in the telecommunications industry as of the effective date of [these] Agreement[s]."). At contract formation, the FCC required compensation for this type of traffic and the Department, taking into account the plain language of the agreements, correctly decided that Verizon had to compensate CLECs.

12 "After these agreements were executed, disputes arose concerning whether, under the agreements, Verizon MA must pay reciprocal compensation for calls originated by Verizon MA customers, handed off to WorldCom or GNAPs, and from there routed to an Internet service provider ("ISP") for termination to Internet destinations throughout the world." *Verizon Brief*, at 6.

13 "Verizon MA refused to pay reciprocal compensation for such Internet-bound calls on the ground that they are outside the scope of the agreements' reciprocal compensation provisions." *Id*.

traffic that included ISP traffic, Verizon, unilaterally, decided not to remit to RNK any further payment, not based upon any post-formation or hindsight revelation about the contract, but upon its interpretation of an FCC order in a manner that substantially benefited Verizon.[14] Though taken in good faith, by Verizon and the Depart, at the time, the District Court has now declared that these valiant interim (1999 forward) attempts to follow the rocky road of FCC rulings and remands are irrelevant to this dispute.

C. Verizon Has Failed To Apply Proper Contract Analysis.

Verizon would have the Department reject the intent of the parties and replace it with Verizon hindsight. Verizon correctly quotes the MCI Agreement to show that the parties intended the agreement to "set forth … *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."[15] Verizon cites this, as well as other language in the agreements, as indicative of the intent of the parties, more specifically, an intention of the parties to follow federal law through each subsequent metamorphosis.

In response, RNK points out, first, that Verizon's selected reference to the Act in the agreements operated not to potentially mutate or continually morph the plain language of every provision in the agreement, but rather, set out the proper context for the agreement as a whole at the time of contract formation: that it was intended to fulfill Verizon's obligation under the Act simply to interconnect. Second, as made clear by the District Court on precisely this issue (that of the effect of post-contract federal law on the

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[14] *See MCI WorldCom Technologies, Inc., DTE 97-116-C,* at 8, now stricken by the District Court, attempting to validate Verizon's reliance on the then-effective FCC ruling. ("Bell Atlantic claims that the Department's Order in MCI WorldCom must be modified because its conclusion that ISP-bound traffic was local was based on mistakes of both fact and law regarding jurisdiction over ISP-bound traffic

[15] *Verizon Brief,* at 14, *quoting Verizon MA-WorldCom Agreement,* Whereas Recital, at 1; *Verizon MA-GNAPs Agreement*, Whereas Recital, at 1, *emphasis added (by Verizon on Brief).*

matter at hand), where the contract speaks for itself, FCC policy going forward does not affect it. Here, not only has the District Court found that the contracts contain unambiguous and relevant language but, not coincidentally, the FCC – not that it matters – has most recently decided that it will not revisit existing state-approved agreements and impose any particular regime on them.

RNK concurs with MCI in urging the Department to reject finally this federal road to nowhere[16] and to stay on the Massachusetts contract analysis path established by the 1998 Order. In concurring with MCI's analysis, RNK would particularly emphasize the importance of the Fourth Circuit's Ruling in *Bell Atlantic MD, Inc. v. MCI WorldCom, Inc.*, where the court upheld the state Commission's finding that, under state law, interconnection agreement language similar to that at issue did not invoke an ever-evolving standard, rather , it attached to the regulatory interpretation and industry custom prevailing at the time of contract.[17]

Massachusetts contract interpretation also incorporates only the law at the time of formation, rendering the Fourth Circuit ruling both directly on point and sure to bear directly on any consideration of this matter in the First Circuit.[18] At the time the parties

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[16] D.T.E. 97-116-G, *MCI WorldCom Communications, Inc.'s Opening Brief on Remand* (November 8, 2002) at 20. ("MCI Brief")

[17] 240 F.3d 279, 297 (C.A.4 2001) (emphasis added). "The State commission found no indication in the contract that the parties wished to incorporate evolving federal standards into their agreement, finding instead that Bell Atlantic agreed to treat ISP-bound calls as local, in conformance with the then-prevailing regulatory interpretation and industry custom. In short, it does not appear that Bell Atlantic can allege an ongoing violation of federal law when the State commission determines as a matter of State contract law that the parties agreed to treat ISP-bound calls as local for purposes of reciprocal compensation."

[18] *See Feakes v. Bozyczko*, 369 N.E.2d 978, 980 (Mass. 1977) ("As a general rule, the law existing at the time an agreement is made necessarily enters into and becomes part of the agreement"); *See Also Mayor of Salem v. Warner Amex Cable Communications Inc.*, 467 N.E.2d 208 (Mass. 1984).

entered into these contracts, the FCC undisputedly treated ISP-bound traffic "in the context of this Commission's longstanding policy of treating [calls to ISPs] as local."[19]

D. The DTE's Motion for Stay of Execution Correctly Asserts that the Department Has Already Considered the Language of the Agreements.

In its brief, MCI points out that the Department has appealed the District Court's Decision, arguing that it already interpreted the agreements properly to exclude ISP reciprocal compensation.[20] The Department's Motion for Stay, however, in its own words the Department confirms that:

> this Court has ordered the Department to re-analyze the interconnection agreements by applying an analytical regimen that, in the Court's reckoning, the Department failed to apply in its ***initial*** review. ***The Department disputes this conclusion, and will argue to the Court of Appeals that it has, indeed, already undertaken the form of analysis that this Court deems required.***

Motion Of The Defendants, Massachusetts Department Of Telecommunications And Energy And Its Named Commissioners, To Stay Effect Of Judgment Pending Appeal, ¶ 4 (emphasis added)

As expounded above, and presumed by all parties to this proceeding, including Verizon, the only Order in this docket analyzing the contract language itself – undisputedly the thrust of the Magistrate's Decision adopted in the Court Order -- is the 1998 Order. It would be disingenuous now for the Department, contrary to its plea for a stay, either to reopen the contract analysis, or to attempt to revert to its subsequent federal law interpretations squarely rejected by the Court.

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[19] *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") ¶ 24; *See also Southwestern Bell,* 208 F.3d at 486.

[20] *MCI Brief,* at 2.

CONCLUSION

In sum, RNK urges the Department to stay on its present course, let the 1998 Order stand as it is. At best, reopening the contract inquiry, which would only be on the shoulders of that same 1998 Order, may flesh out the record, but the result must invariably be the same. All the parties, and the Department have expended untold resources on this matter already. Both the Court and FCC have at last set temporal parameters that facilitate final closure of this festering dispute. RNK urges the Department to order final restitution for amounts due and owing since 1999, and permit all concerned to go forward and provide competitive services to the Massachusetts consuming public, without any inequitable handicaps from the past.

Respectfully submitted,

RNK, Inc. d/b/a RNK Telecom

By its attorney,

Yvette Bigelow
Deputy General Counsel
Senior Regulatory Analyst

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