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

REPLY BRIEF OF XO MASSACHUSETTS, INC.

I. INTRODUCTION

In its Initial Brief, XO Massachusetts, Inc. ("XO") showed that the Department's October 1998 Order is now the sole governing decision which has been upheld by the Federal District Court as not violating federal law. Thus, the October 1998 Order remains in full effect and should govern the matters involved in this dispute. Specifically, Verizon has no basis for refusing to pay reciprocal compensation on ISP-bound traffic. Further, it would be procedurally improper and a violation of due process for the Department to proceed on remand at the same time it has an appeal pending. However, should the Department decide otherwise, (or once the appeal is decided and the Federal District Court decision is upheld), the proper action for the Department would be to simply re-affirm its October 1998 Order as binding

precedent and the proper interpretation under Massachusetts law of the contractual issues involved.

This Reply Brief elaborates on the following limited points: (i) the position taken by Verizon that federal law under the Telecommunications Act of 1996 (the "1996 Act") governs the outcome of the dispute is incorrect; and (ii) under standard contract interpretation principles under Massachusetts law, the interpretation of the contract in question involves the circumstances and law *at the time the contract was executed*, not a review of subsequent developments in the law.

II. DISCUSSION

A. The Argument Presented by Verizon (and the Department in the Federal Court Case) that Federal Law Controls the Outcome of the Dispute is Incorrect.

Verizon's principal argument is that the provisions of the Act and federal law interpreting the Act should apply to determine the outcome of this controversy. This argument ignores the plain language of the agreements in issue and goes against extensive state and federal precedent. In its Opening Brief on Remand, MCI Worldcom has outlined the extensive authority from the federal courts, the FCC and state commissions, each of which properly interpreted nearly identical interconnection agreements and found that reciprocal compensation was due for calls to ISPs.[1] Indeed, a number of these decisions (like the Department's October 1998 Order) looked to a number of factors to interpret the contract. Such factors are very instructive here: how Verizon tariffed calls to ISPs on its own network (local), how it billed such calls for its own customers and CLECs (local), how customers dialed such calls (local),

[1] See also XO's Initial Brief, Section III.D. for further authority.

etc. Further citation to authority is unnecessary and XO agrees completely with the position stated by MCI Worldcom.

While it is true that the agreement at issue makes various references to the 1996 Act, that is expected: the 1996 Act is what requires entry into interconnection agreements, so most of the language reaffirms that point. Even for the language providing that "Reciprocal Compensation" is "As described in the Act", the point is that this language establishes only the vague general framework for what constitutes "Reciprocal Compensation" under the agreement, *i.e.* the obligation of the parties to pay for the use of the other's network -- not that an exception exists for traffic to ISPs. However, the analysis does not stop there. When such reciprocal compensation must be paid pursuant to the terms of the agreement must be determined by the contract language itself. For example, in a very similar case, the fifth circuit noted that whether or not the 1996 Act requires reciprocal compensation for calls to ISPs under its definitions does not decide the issue since the 1996 Act clearly leaves the details of reciprocal compensation to the contracting parties who may voluntarily include ISP-bound traffic in the terms of their interconnection agreements.[2] In this case, the agreement provides specifically that reciprocal compensation must be paid for "local traffic", which under the terms of the agreement refers to the state tariff and was correctly interpreted by the Department in its October 1998 Order.

Simply stated, in its October 1998 Order, the Department applied the proper analysis of the agreement under state law, found that the parties had agreed to compensate each other for

[2] Southwestern Bell Telegraph Co. v. Public Util. Comm'n, 208 F.3d 475, 484-85 (5th Cir. 2000), *citing* Illinois Bell Tel. v. Worldcom, 179 F.3d 566 (Amended Opinion at 1999 U.S. App. LEXIS 20828) (7th Cir. 1999)

local traffic and that calls to ISPs fell within that definition.[3] Even if the parties' agreement was to rely on applicable law or interpretation thereof by an appropriate forum, the law is clear that (in the absence of definite contract language) such interpretation is a matter of state contract law. While the October 1998 Order does discuss FCC proceedings in its analysis, that was only part of the analysis and the analysis stood on its own.[4]

In essence, Verizon is attempting to usher federal law in through the back door contrary to the Federal District Court order and use FCC rulings as the sole tool of interpretation of the interconnection agreement at issue. However, the Federal District Court order was clear in its mandate that the Department must interpret the agreement as a matter of state contract law, even noting that Verizon and the Department failed to establish that federal law was the sole source for interpretation of the agreement and its definitions.[5] The point is that the Department must ascertain the intention of the parties at the time of contract (and has already done so in the October 1998 Order), not engage in a wide ranging examination of the state of changing federal law since that time.[6] This is all the more clear where the subsequent FCC authority

[3] Verizon seeks to change the issue by asserting that the traffic in question (reframed as "internet-bound" rather than ISP-bound) is all terminating in a remote location. That, however, is a false assumption. ISP based chat rooms, VPNs and numerous content destinations are indeed local such as state government, community and local internet websites. Even if many site destinations are not local, the most realistic view, effective at the time of contracting (1996-1998) (see Section B following) was that the internet is not a single destination accessible through a long distance call, but that the call terminates at the ISP locally, thus the ISP provides access via a separate mechanism to many sites some of which may be local, some of which may be at a great distance.

[4] Further, the Department's reference to FCC rulings was only recognizing the possibility that FCC determinations might govern. As we see from the Federal District Court decision, the FCC determination does not govern the specific question of interpretation.

[5] Federal District Court Magistrate's Findings and Recommendations, p. 26, adopted by Federal District Court Order, 2002 U.S. Dist. LEXIS 18467.

[6] That the Federal Court Magistrate stated that the Department need not reach the same result as the October 1998 Order does not imply a clean slate for a new contrary decision. Rather, it reflects the Federal Court's view of its lack of jurisdiction to make that decision. There is no "clean slate" here however, because the Federal Court was clear what sort of analysis by the Department complies with Federal law (the October 1998 Order, but not the later orders). Further, state law requires both reasoned consistency between one order and a later order and due process in the event of any change of governing rules. See XO Initial Brief Sections III B. and C.

relied upon by the Department and Verizon specifically states that carriers should be bound by existing interconnection agreements despite the changes in interpretation of federal law.[7]

B. The Interpretation of the Agreement Must be Made as of the Time the Agreement was Executed to Determine the Intent of the Parties.

As has been previously stated, the Federal District Court found that the Department's October 1998 Order properly considered the essential question to be determined: "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"[8] The key point that Verizon seeks to avoid is that this analysis must be made in light of the circumstances as they existed at the time of contract.[9] Massachusetts law is clear that the law existing "at the time an agreement is made necessarily enters into and becomes part of the agreement" and that "laws enacted after the execution of an agreement are not commonly considered to become part of the agreement unless its provisions clearly establish that the parties intended to incorporate subsequent enactments into their agreement." Feakes v. Bozyczko, 369 N.E.2d 978, 980 (Mass. 1977).

For the Department to consider events and interpretations subsequent to the time of contracting would be akin to allowing a tenant to break a lease and renegotiate simply because rents have dropped precipitously in the area. The state of the law and the circumstances at the time of contract set the obligations of the parties where interpretation of a contract is necessary. It does not become a sliding scale of interpretation where contracting parties are

[7] Id.
[8] Id. at 27.
[9] See e.g., Southwestern Bell, 208 F.3d at 486.

continually shooting at a moving target of definitions contained within their agreement. When parties execute an agreement, they intend to be bound by its terms as such terms would be interpreted at the time of contracting. In this case, perhaps the greatest indication of the intent of the parties (and necessarily of their interpretation of the state of the law at the time) at the time of contract is the course of dealing between them. It is undisputed that until about March 1999 (*i.e.* some time subsequent to the execution of the interconnection agreement at issue) Verizon paid reciprocal compensation for ISP bound calls pursuant to the "local traffic" portion of the agreement.[10] Like the tenant who stops paying rent because it later becomes aware that its rent could be lower elsewhere and that it had entered into what it perceived to be a "bad deal", Verizon halted payment of reciprocal compensation for ISP bound traffic and argued in subsequent proceedings to escape the provisions and clear intention of the contract it had executed.[11] Further, the parties' briefs here show very clearly that Verizon's view of the interconnection compensation structure contemplated payment of reciprocal compensation on ISP-bound traffic, to the point of stating precisely that in comments to the FCC. *See* Global NAPS Initial Brief Section III. That was evidently the ILEC's calculated risk that it was better off making such payments than being subject to a "bill and keep" compensation structure. Of course, now Verizon wants to avoid that clearly undertaken obligation to pay for CLECs terminating traffic (including to ISPs), but it is not the Department's role to protect utilities from the downside of their bargains.

[10] Federal District Court Magistrate's Findings and Recommendations, p. 17, adopted by Federal District Court Order, 2002 U.S. Dist. LEXIS 18467.

[11] Further, because of the requirement in the 1996 Act allowing other CLECs to "opt-into" an existing interconnection agreement and have the rights as established in the underlying contract, the relevant time and intent to consider are those of the original, underlying interconnection agreements.

CONCLUSION

For all the reasons set forth herein and in XO's Initial Brief, the Department's October 1998 Order is in effect and cannot be changed, either during the pendency of the Department's appeal or without a significantly expanded and different record than that developed in the original proceedings here. Either way, it is up to the Federal Court to direct the Department – not the reverse. At this point, the Department must refrain from taking any action contrary to the October 1998 Order because that ruling alone was found by the Federal Court to comply with Federal law. If the Department were to take any action at this time, it should simply clarify that its October 1998 Order did conduct the required state law contract interpretation and thereby adopt that Order. Of course, it should take the same approach when (assuming no ruling to the contrary) the Federal Court acts on the Department's appeal and/or the request for stay. If the Department does not simply reaffirm its October 1998 Order, it should apply state contract law principles to ascertain the intentions of the parties at the time of contract. To whatever extent the Department seeks to apply federal law to the interpretation of the agreements (which XO maintains is limited), it must use the state of federal law as it existed at the time the agreement was executed.

Respectfully submitted
XO Massachusetts, Inc.

_____

By its Counsel
Eric J. Krathwohl, Esq.
Scott A. Stokes, Esq.
Rich May, A Professional Corporation
176 Federal Street, 6th Floor
Boston, MA 02110

November 19, 2002

K:\EJK\xo\DTE97-116-G.comments.XO Reply v3.doc