December 20, 2002

D.T.E. 97-116-G

Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic– Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996

ORDER ON REMAND

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ORDER ON REMAND

I. INTRODUCTION AND PROCEDURAL HISTORY

In this Order, the Department of Telecommunications and Energy ("Department") will address the remand to the Department by the United States District Court for the District of Massachusetts ("District Court") of a series of Department Orders dealing with the issue of reciprocal compensation for telecommunications traffic bound for Internet service providers ("ISP-bound traffic").[1] In the Orders remanded to the Department by the District Court, the Department concluded that interconnection agreements entered into between Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon" or "VZ")[2] and other carriers did not require the payment of reciprocal compensation for ISP-bound traffic. We begin with a brief history of the treatment of the issue by the FCC and the efforts of the Department to implement in Massachusetts the evolving requirements imposed by the FCC and reviewing courts. We then proceed to address the specific issues on remand as set forth by the District Court.

A. The FCC's Orders

1. The FCC's Internet Traffic Order

Prior to February 1999, the FCC had not directly addressed the issue of whether ISP-bound traffic is subject to payments of reciprocal compensation pursuant to 47 U.S.C.

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[1] There are several ways to refer to dial-up Internet calling. For consistency, we adopt the Federal Communications Commission ("FCC") term "ISP-bound traffic" throughout this Order.

[2] Verizon is the successor-in-interest to New England Telephone and Telegraph Company d/b/a NYNEX.

§ 251(b)(5).[3] On February 26, 1999, the FCC issued Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling; Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Notice of Proposed Rulemaking, FCC 99-38 (rel. February 26, 1999) ("Internet Traffic Order"). In the Internet Traffic Order, the FCC determined that telecommunications traffic bound for ISPs was jurisdictionally mixed and interstate in nature because a substantial portion of that traffic would continue on, as a single communication, to Internet websites often located in other states or countries. Internet Traffic Order at ¶¶ 2, 12. The FCC did not explicitly overturn state commissions that had previously determined that such traffic was jurisdictionally local based on a "two-call" analysis, but did note that decisions resting on other bases (such as state contract law or other legal or equitable considerations) might still be valid until the FCC issued a final rule establishing a method of inter-carrier compensation for such traffic. Id. at ¶ 27. The FCC stated, "We conclude in this Declaratory Ruling, however, that ISP-bound traffic is non-local interstate traffic. Thus, the reciprocal compensation requirements of section 251(b)(5) of the Act . . . do not govern inter-carrier compensation for this traffic." Id. at ¶ 26 n.87.

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[3] Section 251(b)(5) of the Telecommunications Act of 1996 (the "Act") states that local exchange carriers must "establish reciprocal compensation arrangements for the transport and termination of telecommunications." The FCC has construed the scope of the reciprocal compensation obligation to apply to the transport and termination of "traffic exchanged between a [local exchange carrier] and a telecommunications carrier . . . except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access." 47 C.F.R. § 51.701(a).

In March 2000, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit Court") vacated and remanded the FCC's Internet Traffic Order, finding that the FCC failed to explain adequately the basis for its use of an "end-to-end" analysis within the context of reciprocal compensation. Bell Atlantic Telephone Cos. v. Federal Communications Comm., 206 F.3d 1, 3 (D.C. Cir. 2000).

2. The FCC's Order on Remand

In response to the D.C. Circuit Court's remand, in April 2001, the FCC issued Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. April 27, 2001) ("Order on Remand"). In the Order on Remand, the FCC affirmed its conclusion in the Internet Traffic Order that ISP-bound traffic was not subject to reciprocal compensation, but re-examined the analysis it used to reach that conclusion. The FCC determined that ISP-bound traffic was "information access," a type of telecommunications traffic specifically excluded from the reciprocal compensation obligations contained in section 251(b)(5) by section 251(g). Order on Remand at ¶ 30. However, rather than completely eliminate compensation for this type of traffic, the FCC established a transitional, cost-recovery mechanism consisting of a series of rate and growth caps over a period of thirty-six months (the "interim period") following the effective date of the Order on Remand. Id. at ¶¶ 77-88.[4] The FCC also reiterated its

[4] The FCC stated that the transitional, cost recovery mechanism only "applies as carriers renegotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions." Order on Remand at ¶ 82.

conclusion from the Internet Traffic Order that payments of reciprocal compensation for ISP-bound traffic distort the developing competitive market and emphasized that the transitional inter-carrier compensation mechanism was designed to counterbalance this market distortion by reducing the opportunities for regulatory arbitrage. Id. at ¶ 29.

In May 2002, the D.C. Circuit Court remanded the FCC's Order on Remand, holding that section 251(g) did not support the FCC's conclusion that ISP-bound traffic fell outside of the section 251(b)(5) reciprocal compensation obligation. WorldCom, Inc. v. Federal Communications Comm., 288 F.3d 429, 433-34 (D.C. Cir. 2002). However, the D.C. Circuit Court did not vacate the inter-carrier compensation regime that the FCC established in the Order on Remand, nor did the D.C. Circuit Court stay or reverse the FCC's conclusion that ISP-bound traffic is not subject to section 251(b)(5). Id. at 434. Therefore, the FCC's legal conclusion that ISP-bound traffic is not subject to the reciprocal compensation requirements in section 251(b)(5) remains valid.[5]

B. The Department's Reciprocal Compensation Orders

This Order marks at least the sixth time that the Department has had to rule on the question of reciprocal compensation. We review our previous encounters with this issue.

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[5] See In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporations Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration, et al., CC Docket No. 00-218, et al., Memorandum Opinion and Order, DA 02-1731, at ¶ 245 (rel. July 17, 2002) (concluding that the D.C. Circuit Court did not reverse the FCC's holding in the Order on Remand that ISP-bound traffic is not subject to section 251(b)(5) and applying the requirements of the Order on Remand to the Virginia arbitration as "existing law").

On October 21, 1998 (prior to the issuance of the FCC's Internet Traffic Order), the Department ruled that ISP-bound traffic was "local traffic" because it was functionally two separate services (i.e., "two calls:" 1) a local call to an ISP; and 2) an information service provided by an ISP when the ISP connects the caller to the Internet). Complaint of WorldCom Technologies, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic Massachusetts for alleged breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996, D.T.E. 97-116, at 11 (October 21, 1998) ("D.T.E. 97-116 Order").[6] The Department noted that the FCC was at that time considering the very same issue and that the Department may need to modify its findings based upon the pending FCC investigation. D.T.E. 97-116 Order at 5 n.11.

After the FCC issued its Internet Traffic Order, the Department concluded in May 1999, that the FCC's rejection of the "two-call" approach to ISP-bound traffic superseded the Department's D.T.E. 97-116 Order by striking down the sole and express basis for the Department's holding there that the parties' interconnection agreements required reciprocal compensation for terminating ISP-bound traffic. WorldCom, D.T.E. 97-116-C at 21-22 (May 19, 1999) ("D.T.E. 97-116-C Order"). Without an order requiring Verizon to pay interconnecting carriers for their transport and termination of ISP-bound traffic, the Department noted that, pursuant to the FCC's Internet Traffic Order, no compensation payments for this "non-local" traffic were required. D.T.E. 97-116-C Order at 25.

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[6] WorldCom, Inc.'s ("WorldCom") complaint asserted that Verizon was in breach of its interconnection agreement with WorldCom (as the successor-in-interest to MFS Intelnet of Massachusetts, Inc.) when Verizon notified WorldCom that Verizon intended to stop paying reciprocal compensation for ISP-bound calls.

In February 2000, the Department issued WorldCom, D.T.E. 97-116-D/99-39 (February 25, 2000) ("D.T.E. 97-116-D/99-39 Order"), in which the Department denied on procedural grounds parties' motions for reconsideration of the D.T.E. 97-116-C Order, and dismissed as moot a related complaint for declaratory relief by Global NAPs, Inc. ("GNAPs") concerning its interconnection agreement with Verizon.

After the D.C. Circuit Court vacated and remanded the FCC's Internet Traffic Order, the Department considered a motion by GNAPs to vacate the Department's D.T.E. 97-116-C Order. The Department concluded that the Department and parties should wait for the FCC's action on remand before taking any further action in this docket because "the Department and parties will be bound when the FCC acts on remand [and] it is impractical for the Department to career back and forth with alternating decisions on the very issue even now under review by the FCC." WorldCom, D.T.E. 97-116-E (July 11, 2000) ("D.T.E. 97-116-E Order").

After the FCC issued its Order on Remand, the Department again addressed the issue of reciprocal compensation for ISP-bound traffic, implementing in Massachusetts the requirements contained within the FCC's Order on Remand, and discussing the effect of the FCC's order on the interconnection agreements that have formed the basis of this proceeding. WorldCom, D.T.E. 97-116-F (August 29, 2001) ("D.T.E. 97-116-F Order").

C. Judicial Review and Remand

GNAPs and WorldCom have sought judicial review of the Department's Orders in this docket in both state and Federal court.[7] In the Federal proceeding, WorldCom and GNAPs

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[7] The state court proceedings have been stayed pending the outcome of the proceeding in Federal court.

filed motions for summary judgment, and the Department and Verizon filed cross-motions for summary judgment. The District Court referred all motions to a Magistrate Judge for a report and recommendation.

On July 5, 2002, the Magistrate Judge issued Findings and Recommendations ("F&R") recommending that the District Court declare that the Department's D.T.E. 97-116-C Order, D.T.E. 97-116-E Order, and D.T.E. 97-116-F Order violate Federal law and that the Department's D.T.E. 97-116 Order does not violate Federal law. F&R at 27. In addition, the Magistrate Judge recommended that the District Court issue a preliminary injunction that (1) directs the Department to undertake an analysis of the parties' interconnection agreements to determine whether those agreements give rise to reciprocal compensation for ISP-bound traffic and (2) bars the Department's enforcing the D.T.E. 97-116-C Order, D.T.E. 97-116-E Order, and D.T.E. 97-116-F Order. Id. at 30.

In August 2002, the District Court partially adopted the Magistrate Judge's recommended decision. Global NAPs, Inc. v. Verizon, Case Nos. 00-10407-RCL, 00-11513-RCL (D. Mass. August 27, 2002) ("District Court Order"). The District Court granted the motions for summary judgment of WorldCom and GNAPs to the extent that they sought a declaration under 47 U.S.C. § 252(e)(6) that the Department's D.T.E. 97-116 Order complied with Federal law and the D.T.E. 97-116-C Order, D.T.E. 97-116-E Order, and D.T.E. 97-116-F Order did not comply with Federal law. District Court Order at 2.[8] The District Court

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[8] Neither the Magistrate Judge's F&R nor the District Court Order explicitly concluded that the Department's D.T.E. 97-116-D/99-39 Order (in which the Department dismissed a related complaint for declaratory relief by GNAPs concerning its interconnection agreement with Verizon) violated Federal law. The District Court

(continued…)

declined to adopt the Magistrate Judge's recommendation that the District Court issue a preliminary injunction, concluding that WorldCom and GNAPs had not made the requisite showing of irreparable harm. Id. at 3. The District Court remanded the cases to the Department for further proceedings consistent with those parts of the Magistrate Judge's recommended decision that explicated the reasons for granting summary judgment to WorldCom and GNAPs. Id.

On October 15, 2002, the Department filed a notice of appeal of the District Court Order to the United States Court of Appeals for the First Circuit ("First Circuit"), and, on November 12, 2002, the Department filed a motion for stay of the remand with the District Court. The Department determined that, pending the District Court's ruling on the motion for stay, the District Court's remand instructions could be appropriately addressed through legal argument presented in briefs by the parties, and established a briefing schedule.[9] Briefs were

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[8](…continued)
confined its remand to the Department's D.T.E. 97-116-C Order, D.T.E. 97-116-E Order, and D.T.E. 97-116-F Order. Therefore, the Department Order on the GNAPs interconnection agreement is not directly before us on remand. However, there is no dispute that the interconnection agreement between WorldCom and Verizon and the interconnection agreement between GNAPs and Verizon (addressed in the D.T.E. 97-116-D/99-39 Order) are substantially identical, at least as they pertain to the subjects at issue in this case. See F&R at 18. Moreover, it is uncontested that, prior to the execution of the Verizon-GNAPs interconnection agreement, GNAPs and Verizon agreed to treat the Verizon-GNAPs agreement as one that is identical to the Verizon-WorldCom agreement for the purposes of reciprocal compensation. See Letter from Bruce P. Beausejour to William J. Rooney (dated April 14, 1997). Therefore, as this remand pertains to the Verizon-WorldCom interconnection agreement, the Verizon-GNAPs agreement addressed in the D.T.E. 97-116-D/99-39 Order is likewise affected.

[9] See Hearing Officer Memorandum Establishing Briefing Schedule, D.T.E. 97-116-G (October 24, 2002); Hearing Officer Memorandum Denying GNAPs/WorldCom Joint Motion to Amend the Procedural Schedule and Extend Time for Filing Briefs, D.T.E.
(continued…)

filed by GNAPs, Verizon, WorldCom, RNK, Inc. d/b/a RNK Telecom ("RNK"), XO Massachusetts, Inc. ("XO"), RCN-BecoCom, L.L.C. ("RCN"), and NCI Telecom, f/k/a North County Internet ("NCI Telecom").[10] Reply briefs were filed by GNAPs, Verizon, WorldCom, RNK, and XO.

On December 2, 2002, the District Court denied the Department's motion for stay of the District Court's remand, although the District Court did not preclude the Department from staying its own remand proceedings during the pendency of its appeal. On December 6, 2002, the First Circuit determined that it did not have jurisdiction to hear the Department's appeal because the District Court Order remanded the matter to the Department, and, the appeal was therefore not from a final judgment. On December 20, 2002, the Department moved for voluntary dismissal of its appeal with the First Circuit and proceeded with its deliberations of the parties' positions on the issues under consideration in the remand proceeding.

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[9](…continued)
97-116-G at 3 (November 7, 2002).

[10] Although NCI Telecom's brief was sent via email to the Department one day late (and without a motion requesting permission to do so), the importance of full participation in this case by affected carriers, especially small companies that might not otherwise be able to participate, leads the Department to permit NCI Telecom's transmission to be part of the record of the remand proceeding, but only as an ad hoc exception to our filing requirements.

II. POSITIONS OF THE PARTIES AND COMMENTERS[11]

A. WorldCom

WorldCom argues that the District Court Order confirms what WorldCom has consistently maintained: that the Department must affirm its D.T.E. 97-116 Order requiring Verizon to pay WorldCom reciprocal compensation when WorldCom delivers calls from Verizon's customers to ISPs that are WorldCom's customers (WorldCom Brief at 1). According to WorldCom, the District Court "expressly affirmed" the Department's contractual analysis in the D.T.E. 97-116 Order, and determined that the D.T.E. 97-116 Order properly interpreted the parties' interconnection agreement in compliance with Federal law, while the subsequent D.T.E. 97-116-C Order, D.T.E. 97-116-E Order, and D.T.E. 97-116-F Order "violate [F]ederal law" (id. at 10-11; WorldCom Reply Brief at 1, 4). Further, WorldCom states that the District Court did not, as Verizon argues, invalidate all four of the Department Orders in this docket, and, thus, did not leave the Department free to conduct a de novo analysis of the parties' agreement on remand (WorldCom Reply Brief at 1-2; 4-6).

Because the F&R and the District Court Order both found that the Department properly interpreted the parties' interconnection agreement in its D.T.E. 97-116 Order, WorldCom states that in order to comply with the District Court Order to conduct remand proceedings "not inconsistent with" its decision, the Department, in re-examining the agreement, must affirm its D.T.E. 97-116 Order, or, at minimum, allow discovery and extrinsic evidence on

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[11] As with the prior Orders in the D.T.E. 97-116 docket, the Department allowed comments from all service list members. As distinct from parties, non-party commenters have no right to appeal as to matters of law from final Orders issued by the Department. See G.L. c. 25, § 5; G.L. c. 30A, § 1(3); 220 C.M.R. § 1.03.

the parties' intent in order to address any ambiguity (WorldCom Brief at 2, 14; WorldCom Reply Brief at 5-6). Moreover, WorldCom asserts that with the Department's appeal of the District Court Order pending, proceeding with the remand interferes with the First Circuit's jurisdiction and deprives WorldCom of an impartial forum on remand, which interference and deprivation constitute a violation of due process (WorldCom Brief at 2, 11-13). WorldCom argues that, where regulations do not specify agency authority to reopen adjudications, Massachusetts case law allows such reopening only "sparingly" on the basis of procedural defect or extraordinary circumstances, and no such reopening is justified here (id. at 13-14; WorldCom Reply Brief at 2).

WorldCom argues that the D.T.E. 97-116 Order correctly found that the parties agreed to pay reciprocal compensation for calls to ISPs "in light of [the agreement's] plain language, the characteristics of calls to ISPs, and common industry understanding" (WorldCom Brief at 14). WorldCom notes that the parties' intent was further evident when Verizon and WorldCom initially paid each other reciprocal compensation for such calls (id. at 16).

WorldCom asserts that a consensus of several circuit courts, district courts, more than 30 state commissions, and the FCC – as well as the Department's original D.T.E. 97-116 Order – refutes Verizon's argument that the parties' agreement merely tracks the minimum requirements of the Act (id. at 19-24; WorldCom Reply Brief at 2-3). WorldCom notes that the District Court Order also rejected this argument, finding that the Department and Verizon did not establish that the contractual language in the Agreement "implicates [F]ederal law as a source of reciprocal compensation" (WorldCom Brief at 20, citing F&R at 26 n.19). WorldCom argues that, had the parties "merely intended to codify the minimum requirements

of [F]ederal law" there would have been no need to negotiate detailed provisions in their agreement addressing reciprocal compensation (WorldCom Reply Brief at 9). WorldCom contends that the parties' agreement here, rather than resembling the Verizon Virginia agreements at issue in the FCC's Starpower Order[12] as Verizon contends, more closely resembles the Verizon South agreement at issue in the Starpower Order and the agreement at issue in the FCC's Cox Telecom decision,[13] both of which the FCC found did require reciprocal compensation for ISP-bound calls (id. at 15).

WorldCom asserts that "[w]hether an interconnection agreement provides for reciprocal compensation must be determined from provisions addressing when reciprocal compensation must be paid," and that the interconnection agreement's "Definitions" sections, as relied on by Verizon, are not relevant because they "merely describe what reciprocal compensation is" (WorldCom Brief at 22, emphasis in original). Further, WorldCom argues that the Federal law relevant to determining the parties' intent is the law in place at the time of the interconnection agreement, "not new rules that the FCC subsequently promulgates," and in this case the Federal law in place directed that calls to ISPs be treated as local for reciprocal compensation purposes (WorldCom Brief at 22-23; WorldCom Reply Brief at 12 n.7). WorldCom contends that the Department cannot conclude that the parties' agreement does not require reciprocal compensation for calls to ISPs even if the Department "reasserts the

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12 Starpower Communications, LLC v. Verizon South, Inc., File No. EB-00-MD-19, Starpower Communications, LLC v. Verizon Virginia, Inc., File No. EB-00-MD-20, Memorandum Opinion and Order, FCC 02-105 (rel. April 8, 2002) ("Starpower Order").

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

erroneous conclusion that the [a]greement's reciprocal compensation provisions incorporate the minimum requirements of [F]ederal law" (WorldCom Brief at 27). WorldCom asserts that the FCC's most recent statements indicate that the Act does require reciprocal compensation for ISP-bound calls, because the D.C. Circuit Court invalidated the sole basis in the FCC's Order on Remand for exempting ISP-bound traffic (id. at 27-29). WorldCom argues that in applying a new, prospective-only compensation regime, the FCC "did not hold that carriers like Verizon should be released from their contractual obligations," nor did the FCC find that carriers should receive no compensation at all for terminating calls to ISPs (id. at 29). To the contrary, WorldCom concludes that the FCC has found that carriers incur a cost for "delivering traffic to an ISP that originates on another carrier's network," and carriers are entitled to compensation for that cost (id.).

Finally, WorldCom asserts that if the Department finds that a conclusion on whether the interconnection agreement requires reciprocal compensation for calls to ISPs depends on FCC precedent, the Department should "decline to adjudicate this dispute and allow the FCC to resolve it" (WorldCom Reply Brief at 3, 17-18).

B. GNAPs

GNAPs argues that there is no basis for reconsidering the Department's D.T.E. 97-116 Order in the remand proceeding (GNAPs Brief at 4-11; GNAPs Reply Brief at 1-8). According to GNAPs, the District Court invalidated the Department's subsequent orders which vacated the D.T.E. 97-116 Order, and consequently that initial order "remains in full force and effect" (GNAPs Brief at 11-12). The District Court affirmed that the D.T.E. 97-116 Order complies with Federal law, and it declined to vacate it or order the Department to

reexamine the parties' Agreement; therefore, GNAPs asserts, "there is nothing further the Department needs to do here other than the ministerial act of giving force to its final and lawful [D.T.E. 97-116 Order]" (id. at 4). Moreover, GNAPs contends that "the entire proceeding contemplated" by the Department's October 24, 2002 Procedural Order is "unlawful" because it misreads the District Court Order as having "wiped the slate clean" (GNAPs Reply Brief at 1, 5-6). However, GNAPs asserts that the District Court Order, the Department's procedural rules, and state law require "compelling" circumstances to set aside the final D.T.E. 97-116 Order and undertake further proceedings, and according to GNAPs there are no such compelling circumstances here (GNAPs Brief at 7-10, GNAPs Reply Brief at 4-8). GNAPs contends that Verizon is now raising the same arguments it raised in the D.T.E. 97-116 Order, and Verizon should be precluded from relitigating those arguments (GNAPs Reply Brief at 1). Further, GNAPs argues that the Department may not reopen the D.T.E. 97-116 Order to apply any changed regulatory policies to the issues; such corrections may only be applied prospectively (GNAPs Brief at 10-11). In addition, GNAPs argues that, if the Department is to reconsider the D.T.E. 97-116 Order, it must allow the parties to present evidence on their intent and the meaning of the interconnection agreement at issue (id. at 26).

In addition, GNAPs argues that if the Department re-examines the parties' interconnection agreement, the Department must reach the same conclusions that it reached in the D.T.E. 97-116 Order (id. at 13-26). GNAPS asserts that only arbitrated portions of interconnection agreements must conform to Federal requirements; the relevant portions of the interconnection agreement at issue are not arbitrated; and, therefore, "the logical presumption is not that the terms of the agreement would precisely track Federal law, but rather, that they

would not" (GNAPs Reply Brief at 8). Moreover, GNAPs argues that the contractual language of the agreement does not support the claim that the parties' compensation obligation is "no more and no less" than what Federal law requires (id. at 8-9). GNAPs argues that, according to the terms of the agreement, reciprocal compensation is due for calls meeting the agreement's definition of local traffic (GNAPs Brief at 14). GNAPS states that ISP-bound calls were not separately identified or treated as a distinct category in the agreement, and that they otherwise meet the definition of local traffic (id. at 14-15). GNAPs asserts that the contracts at issue were drafted and negotiated by "sophisticated parties" aware of how to tie provisions to Federal law if they intended to do so; yet the term "local traffic" is not tied to the Act or Federal regulations, but rather to Verizon's local calling areas (GNAPs Reply Brief at 10-12).

Furthermore, GNAPs argues that Federal law – both during the term of the agreement and at present – not only does not exclude reciprocal compensation for ISP-bound calls; it requires such compensation under the circumstances of this case (id. at 2-3, 14, emphasis added). Contrary to Verizon's position, GNAPs contends that Federal law generally includes ISP-bound calls within the scope of traffic subject to reciprocal compensation under section 251(b)(5) (id. at 14-19). According to GNAPS, the conclusion that reciprocal compensation is due for calls to ISPs is further supported by the FCC's statements on interpreting interconnection agreements (GNAPs Brief at 15). GNAPs asserts, "[o]ver and over again, the FCC has made clear . . . that compensation for ISP-bound traffic depends on the terms of the contract at issue" (id. at 13). GNAPs argues that FCC rulings – including the FCC's "seven

factor test" established in the FCC's Internet Traffic Order[14] – compel the conclusion that ISP-bound traffic is "local" under the parties' agreement (id. at 16; GNAPs Reply Brief at 20-21). Further, according to GNAPs, the parties' agreement is similar to those the FCC found in the Starpower Order and Cox Telecom to require compensation (GNAPs Brief at 21; GNAPs Reply Brief at 21).

In the Department's D.T.E. 97-116 Order, the Department "understood . . . that its basic task was contract interpretation," GNAPs states, and the Department's analysis tying the definition of local traffic to Verizon's tariff and concluding that calls to ISPs were local was consistent with the FCC's later rulings (GNAPs Brief at 22-24). GNAPs asserts that, having construed the contractual language and ordered reciprocal compensation be paid for ISP-bound calls, the Department cannot now change these never-appealed factual findings (id. at 24).

C. RNK

RNK argues that the Department retains the discretion to make its decision on remand on the basis of the existing record, and that the Department has been expressly permitted by the District Court Order to do so (RNK Brief at 5). According to RNK, the District Court Order leaves only the Department's D.T.E. 97-116 Order in effect (id.). Therefore, argues

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[14] GNAPs reviews at length the "seven factors" that the FCC identified in the Internet Traffic Order to aid state commissions in interpreting interconnection agreements (see GNAPs Brief at 16-19). These factors include, inter alia, whether incumbent local exchange carriers ("LECs") serve ISPs out of intrastate tariffs; whether revenues associated with those services are counted as intrastate revenue; and whether incumbent LECs make any effort to segregate ISP-bound traffic from local traffic. Internet Traffic Order at ¶ 24. GNAPs argues that an analysis using the "seven factor test" requires a conclusion that the parties intended to treat ISP-bound traffic as subject to the reciprocal compensation provisions of the interconnection agreements at issue (GNAPs Brief at 16-19).

RNK, the intent of the parties and the plain language of the interconnection agreements, as interpreted in the D.T.E. 97-116 Order, are sufficient for the Department to find that ISP-bound traffic is local traffic and compensable under the agreements (id. at 5-6). RNK argues that fluctuating Federal law, post-the effective date of the agreements through the FCC's Order on Remand (in which the FCC prospectively preempted the Department's authority), is inapplicable to the agreements at issue (id. at 6-7). RNK argues that the District Court's conclusion that the Department's D.T.E. 97-116 Order complied with Federal law creates a logical implication that the D.T.E. 97-116 Order constitutes a lawful resolution to the matter, and, even if the Department chooses to build on the D.T.E. 97-116 Order, that Order's substance must form the basis of any further inquiry (RNK Reply Brief at 3).

RNK further argues that, if the Department were to find that additional proceedings are required, these proceedings must provide for a full adjudication on the merits of the contract claims (RNK Brief at 8). RNK argues that an inquiry pursuant to Massachusetts contract law and the intent of the parties can only comport with due process if a full adjudicatory hearing is held (id.). RNK argues that now that the attempts by the Department to determine the obligations of the parties under the agreements based on Federal law have been overturned, only a determination of fact as to the operation of Massachusetts contract law remains (id. at 9-10).

RNK argues that, even if elements of Federal law were applied to the contracts in dispute, it is the Federal law as discussed in the D.T.E. 97-116 Order (in which the Department determined that reciprocal compensation was due for ISP-bound traffic) that should be applied (id. at 10). RNK agues that the Department, in its attempts over the years

to apply Federal law to the issue of reciprocal compensation, has deprived competitive local exchange carriers ("CLECs") from any payments due for the traffic at issue, and has confounded the very negotiated settlements the Department has claimed to propound (id. at 11).

D. RCN

RCN agrees with the positions advanced by WorldCom (RCN Brief at 1). In particular, RCN argues that, pursuant to the remand instructions in the District Court Order, the Department should affirm its D.T.E. 97-116 Order requiring Verizon to pay reciprocal compensation for ISP-bound traffic (id.).

E. XO

XO argues that it is procedurally improper for the Department to undertake this remand proceeding at the same time it is appealing the remand (XO Brief at 2, 4; XO Reply Brief at 1). However, XO argues that, if the Department acts on remand, the Department must consider the parties' intent at the time of contracting, and because the District Court Order determined that the D.T.E. 97-116 Order did not violate Federal law, any significant change in direction would have to have a compelling basis, be supported by an extensive record, and comply with principles of "reasoned consistency" (XO Brief at 2-3, 6-8; XO Reply Brief at 5-6).

According to XO, the proper action for the Department in this remand proceeding is to affirm the D.T.E. 97-116 Order as binding precedent and as the proper interpretation under Massachusetts law of the contractual issues involved (XO Reply Brief at 1). XO contends that a remand decision must be based on contractual intent under state law, not Federal law, and

the D.T.E. 97-116 Order contains such an analysis (XO Brief at 4-6, XO Reply Brief at 2-4). XO states that the District Court Order upheld the D.T.E. 97-116 Order, while declaring that the Department's subsequent Orders violated Federal law (XO Brief at 3). Consequently, XO argues that the D.T.E. 97-116 Order remains in full force and effect and must be applied to support Verizon's obligation to pay reciprocal compensation due since October 1998 (i.e., the issuance of the D.T.E. 97-116 Order) and going forward (id. at 3-4).

XO argues that whether reciprocal compensation must be paid pursuant to the terms of an agreement must be determined by the contract language itself (XO Reply Brief at 3). XO asserts that the interconnection agreement's references to the Act merely establish a "vague general framework for what constitutes reciprocal compensation," and do not indicate that the Act and Federal law interpreting the Act should alone apply to determine the outcome of this controversy (id. at 2-4). Furthermore, XO argues that the District Court Order and the Department's contract interpretation in the D.T.E. 97-116 Order are consistent with the "extensive backdrop of decisions" in other jurisdictions finding that calls to ISPs are local traffic and that CLECs are entitled to reciprocal compensation for such calls (XO Brief at 2, 8-10). XO concurs with WorldCom's position outlining Federal court, FCC, and state commission authority that looked to a number of factors to interpret nearly identical interconnection agreements and determined that reciprocal compensation was due (XO Reply Brief at 2).

F. NCI Telecom

NCI Telecom argues that CLECs have a right to receive compensation for "terminating/switching local modem-to-modem data calls, whether ISP-bound or not," and that

the technical issues governing Interpret protocol ("IP") administration and the Domain Naming System ("DNS") have been overlooked in this argument (NCI Telecom Brief at 1). NCI Telecom argues that a local call to an ISP that continues on to the Internet should be considered an additional call, internal to the local ISP network, Intranet, and Internet serving the caller (id.). NCI Telecom argues that there are a number of technical processes involved when a local call comes in to the CLEC and ISP server, and NCI Telecom provides a detailed explanation of the technical considerations (id. at 1-2). NCI Telecom argues that the ISP is actually acting as a new carrier, originating a new call to a new IP address on the public Internet, and sending the call outside its local area network (id. at 2).

G. Verizon

Verizon argues that it has no obligation, pursuant to the interconnection agreements under consideration in this remand proceeding, to pay reciprocal compensation for ISP-bound traffic (VZ Brief at 13). Verizon argues that Massachusetts contract law requires that the Department must adhere to the plain meaning of the agreements, and that the agreements unambiguously exclude ISP-bound traffic from the requirement to pay reciprocal compensation (id.). Verizon asserts that the provisions of the agreements dealing with reciprocal compensation make clear that they are coextensive with the requirements of Federal law (id. at 16-19).[15]

Verizon argues that the Department is obligated to conduct a substantive review of the agreements pursuant to the District Court Order, and that the Department is not obligated to

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[15] Verizon provides a detailed breakdown of the provisions of the agreements relating to reciprocal compensation and the language within those provisions that, according to Verizon, "track [F]ederal law" (VZ Brief at 13-16; VZ Reply Brief at 13-14).

adhere to its D.T.E. 97-116 Order when it undertakes its contract law analysis (VZ Reply Brief at 5-9). In addition, Verizon argues that the Department must conduct its contract analysis while the Department's appeal to the First Circuit is pending, because it is "hornbook law" that the taking of an appeal does not suspend operation of a District Court judgment during the pendency of the appeal (id. at 9-12).

Moreover, Verizon argues that the FCC's recent decision concerning Verizon Virginia's reciprocal compensation obligations in the Starpower Order confirms that the parties' agreements should be understood to impose reciprocal compensation obligations coextensive with Federal law (VZ Brief at 19). Verizon asserts that the pivotal provisions of the agreements at issue here closely parallel two of the three interconnection agreements that the FCC analyzed in the Starpower Order (id.). Because of the "tight connection" between the language in the Starpower Order and the text of the agreements at issue here, the FCC's conclusion that the agreements in the Starpower Order impose the same reciprocal compensation duties as does Federal law, "provides powerful evidence" that both the Department and Verizon have been long correct in their understanding of the parties' obligations under the interconnection agreements under review here (id. at 21).

Further, Verizon argues that, because the FCC has consistently ruled that ISP-bound traffic is not compensable under section 251(b)(5), the agreements at issue in this remand must be understood to exclude such traffic from their reciprocal compensation requirements (id. at 22). Verizon argues that even before the Act became law (and prior to the issuance of the Internet Traffic Order), the FCC has held that the type of traffic at issue is interstate and interexchange traffic, not local traffic (id. at 23). Therefore, Verizon argues that because the

parties agreed to pay reciprocal compensation only for traffic that the FCC determines to be compensable under section 251(b)(5), and the FCC has consistently ruled ISP-bound traffic is not compensable under that statute, the Department must conclude that the agreements do not require reciprocal compensation for ISP-bound calls (id. at 24).

Finally, Verizon argues that, even if the Department were to conclude that the agreements at issue in the remand were ambiguous, the Department should address the District Court's remand instructions on the briefs, and should not permit discovery or require evidentiary hearings (VZ Reply Brief at 26). Verizon argues that WorldCom "voluntarily relinquished its right to an evidentiary hearing" with regard to the proper interpretation of its interconnection agreement with Verizon, as indicated by the Department in its D.T.E. 97-116-D/99-39 Order at 18 n.12 (id.). Moreover, Verizon argues that the Department issued its D.T.E. 97-116 Order based solely on the briefs and arguments of the parties, and any evidence WorldCom claims that it would offer now regarding interpretation of the parties' agreement could have been presented to the Department before issuance of the D.T.E. 97-116 Order (id.).

III. THE AGREEMENT

The Verizon-WorldCom interconnection agreement at issue in this remand proceeding (the "Agreement") was entered into by the parties on June 26, 1996, and approved by the Department on October 7, 1996. The reciprocal compensation provision of the Agreement states in pertinent part:

> 5.8 Reciprocal Compensation Arrangements – Section 251(b)(5)
>
> 5.8.1 Reciprocal Compensation only applies to the transport and termination of Local Traffic billable by NYNEX or MFS which a

> Telephone Exchange Service Customer originates on NYNEX's or MFS' network for termination on the other party's network . . .

Under the Agreement, the definition of "Reciprocal Compensation" is "As Described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Telecommunications originating on one Party's network and terminating on the other Party's network." Agreement, § 1.53. "As Described in the Act" is defined 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." Agreement, § 1.6. Pursuant to the Agreement at § 1.38, "Local Traffic" is defined 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, except for those calls that are specified to be terminated through switched access arrangements. IntraLATA calls originated on a 1+ presubscription basis when available or a casual dialed (10XXX/101XXXX) basis are not considered local traffic.

IV. ANALYSIS AND FINDINGS

A. The District Court's Remand Instructions

As an initial matter, there is substantial disagreement among the parties as to what the District Court's remand instructions actually require the Department to do in its remand proceeding. Several parties argue that the District Court Order does not require the Department to conduct any additional substantive proceedings on remand, but rather requires the Department to conduct only the "ministerial" task of affirming the Department's D.T.E. 97-116 Order in which the Department concluded that reciprocal compensation was due for ISP-bound traffic (WorldCom Brief at 10-14; GNAPs Brief at 4-12; XO Brief at 3-4; RNK Brief at 5-6). In addition, several parties argue that any proceedings undertaken by the

Department on remand while it seeks appellate review of the District Court Order would be procedurally unfair and would strip the First Circuit of its jurisdiction over the Department's appeal (WorldCom Brief at 12-13; XO Brief at 4). Several parties further argue that, if the Department does conduct proceedings on remand, these proceedings must be evidentiary in nature, and cannot be conducted solely on brief (WorldCom Brief at 2, 13-14; GNAPs Brief at 26; RNK Brief at 8).

For the following reasons, the Department disagrees with the above arguments. First, the Department is not "required" by the District Court Order to affirm the D.T.E. 97-116 Order. In the F&R, the Magistrate Judge specifically indicated that, on remand, the Department "is not required to reach the same result it reached" in the D.T.E. 97-116 Order. F&R at 26 (emphasis added). Further, both the Magistrate Judge and the District Court indicated that they were not addressing the question of whether the Department had or had not correctly interpreted the Agreement in its D.T.E. 97-116 Order, as such a determination would exceed their jurisdictional authority. See F&R at 27 n.21; District Court Order at 3.

In addition, now that the First Circuit has declined jurisdiction over the Department's appeal of the District Court Order, the parties' opposition to proceeding with the remand during the pendency of the Department's appeal is moot. The Department and the parties have no alternative but to address the remand instructions as required by the District Court Order.

Further, the District Court Order requires the Department to undertake "proceedings or deliberations" consistent with that Order. The requirement may encompass, but does not, in fact, require the Department to hold evidentiary hearings as part of our remand proceeding. In addition, no party appealed to the full Commission, pursuant to 220 C.M.R. § 1.06(d)(2)-(3),

the hearing officer's determinations that the District Court's remand instructions could be appropriately addressed through legal argument presented in briefs by the parties (see Hearing Officer Memorandum Establishing Briefing Schedule, D.T.E. 97-116-G at 2 (October 24, 2002); Hearing Officer Memorandum Denying GNAPs/WorldCom Joint Motion to Amend the Procedural Schedule and Extend Time for Filing Briefs, D.T.E. 97-116-G at 3 (November 7, 2002)). In the absence of an appeal to the full Commission, these determinations remain in full force and effect. Moreover, the record and briefing in the Department cases at issue was extensive and provides an ample basis, particularly as supplemented by the recently received briefs, for Department deliberations on remand.

In the F&R, the Magistrate Judge repeatedly explained the reasons for recommending that summary judgment be granted to WorldCom and GNAPs, rather than to the Department.[16] The District Court, in adopting the Magistrate Judge's F&R, directed the Department to conduct "proceedings or deliberations not inconsistent with the rulings herein and with those parts of the [F&R] that explicate the reasons for granting summary judgment to [WorldCom and GNAPs] and denying summary judgment to the [Department and Verizon]." District

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[16] In the F&R, the Magistrate Judge stated the following: 1) that the Department "declin[ed] to consider whether the express contractual language in the interconnection agreements give rise to reciprocal compensation" (F&R at 25); 2) that the Department "only looked to [F]ederal law as the source of reciprocal compensation [and] has not looked to whether the interconnection agreements give rise to reciprocal compensation as a matter of Massachusetts contract law" (id. at 26); 3) that the Department "violated [F]ederal law by issuing orders in which it refused to consider whether, pursuant to Massachusetts law and other legal and equitable principles, the parties contracted in their interconnection agreements for reciprocal compensation for calls bound to ISPs" (id. at 27); and 4) that the Department "simply ignore[d] the fact that there is a contractual agreement between carriers that purportedly governs the issue of reciprocal compensation for calls to ISPs" (id. at 26).

Court Order at 3. In sum, the District Court concluded that the Department violated Federal law in its review of the Agreement by not conducting the analysis in the D.T.E. 97-116-C Order (and subsequent Orders) pursuant to Massachusetts contract law and other legal and equitable principles, and it is this analysis the Department is directed to undertake on remand.

B. Contract Analysis

For the reasons discussed below, in reviewing the Agreement between Verizon and WorldCom at issue in this remand, the Department concludes that the Agreement itself instructs the Department to follow Federal law – both the terms of the Act and the construction of the Act by the FCC – to resolve questions arising from or not expressly addressed in the Agreement. This conclusion is required by the language contained in the Agreement, and, pursuant to Massachusetts contract law principles, the Department must give effect to the plain language of the Agreement and give terms their usual and ordinary meaning. See, e.g., 116 Commonwealth Condominium Trust v. Aetna Casualty & Surety Co., 433 Mass. 373, 376, 742 N.E.2d 76, 78 (2001), and cases cited therein.[17] Because the Department is able to conduct a "plain language" analysis of the parties' Agreement, it is not necessary or legally warranted for the Department to look for "other legal or equitable considerations" that either support or oppose a result obtained by interpreting the intent of the parties as expressed

[17] See Department's Objection to Entry of Recommended Decision with Respect to Parties' Cross-Motions for Summary Judgment at 6, Case Nos. 00-CV-10407, et al. (D. Mass.) ("Department's Objection to F&R").

by language of their own choosing and used in the Agreement itself. This is the primary directive of Massachusetts contractual interpretation law.[18, 19]

Under the terms of the Agreement, the parties must pay reciprocal compensation for the transport and termination of "local traffic" only. Agreement, § 5.8.1. The Agreement

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[18] "[O]ther legal or equitable considerations" is an undefined and broad phrase used in the FCC's Internet Traffic Order at ¶ 27. In that Order, the FCC provided some guidance as to what factors may be relevant in aiding state commissions in interpreting interconnection agreements (i.e., the FCC's "seven factors" referred to by GNAPs in its Brief). Id. at ¶ 24. However, the FCC stated that, "[S]tate commissions, not [the FCC], are the arbiters of what factors are relevant in ascertaining the parties' intentions." Id. Because the Agreement in this case made plain the parties' intentions to look to Federal law to assign their reciprocal compensation obligations, the Department does not need to look further, as plain language is the most relevant factor. See also, Starpower Order at ¶¶ 33-38 (concluding that when the terms of an interconnection agreement are susceptible to a plain language analysis, a further analysis is not required). Because the words used by the parties are clear on their face, there is no need to consult extrinsic evidence or course of performance under the contract as WorldCom urges us to do (WorldCom Brief at 2, 14, 16; WorldCom Reply Brief at 5-6).

[19] Parties' reliance on the interpretations of other state utility commissions and the subsequent judicial review of those interpretations is overdrawn. As we stated in our D.T.E. 97-116-C Order at 25 n.27:

> The parties to this docket have diligently provided the Department with other states' decisions on reciprocal compensation rendered since Internet Traffic Order was issued. We have reviewed those filings. Other state commissions have considered the effects of the FCC's ruling on *their* situations, on the interconnection agreements before them, and on prior decisions rendered. . . . Useful as it has been to know what other states have made of the FCC's ruling, it is equally useful to recall Commissioner [now FCC Chairman] Powell's observation about the effects of that ruling: "Furthermore, having reviewed a number of state decisions in this area, I am persuaded that the underlying facts, analytical underpinnings and applicable law vary enormously from state to state." Internet Traffic Order, Concurrence of Commissioner Powell, at 2.

does not state expressly whether ISP-bound traffic is or is not "local traffic." The Agreement generally defines "local traffic" according to whether a call which originates on one party's network terminates on the other party's network within a local service area.[20] Id. at § 1.38. For a definition of "reciprocal compensation," the Agreement refers to the Act and the construction of the Act "as from time to time interpreted" by the FCC and the Department. Id. at §§ 1.53, 1.6. Further, the section of the Agreement establishing the parties' reciprocal compensation obligations is entitled "Reciprocal Compensation Arrangements – Section 251(b)(5)." Id. at § 5.8.

The Department interprets the language of these provisions of the Agreement as manifesting a clear intent to track the FCC's interpretation of the scope of section 251(b)(5) of the Act. The contract provisions inextricably link reciprocal compensation to the FCC's construction of section 251(b)(5). In other words, what the FCC determines is compensable under section 251(b)(5) will be what is compensable under the Agreement.[21] The parties could have (but in fact did not) departed from the requirements of Federal law and provided

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[20] This language is similar to the then-applicable FCC regulations implementing section 251(b)(5). See 47 C.F.R. § 51.701(b) (superseded 2001).

[21] See Starpower Order at ¶ 31. In the FCC's Starpower Order, the FCC interpreted certain interconnection agreements as tracking and adopting Federal law to determine that reciprocal compensation provisions do not apply to ISP-bound traffic. We agree with Verizon that the language in the Agreement at issue in this remand is similar, although it is not identical, to the first and second interconnection agreements discussed in the Starpower Order because both this Agreement and the first two agreements in the Starpower Order contain similar definitions of the relevant terms. However, the Agreement at issue in this remand is unlike the third interconnection agreement discussed in the FCC's Starpower Order, upon which WorldCom relies to support its position that reciprocal compensation does apply to ISP-bound traffic under the Agreement, because the definitions of the relevant terms in the two agreements are dissimilar.

for their own customized terms of agreement. See Global NAPs, D.T.E. 02-45, at 52 n.39 (2002). The FCC's analysis has evolved over time in response to judicial review (see discussion in Section I.A, above), but since the Internet Traffic Order, the FCC has been consistent and explicit in its holding that ISP-bound traffic does not fall within the scope of traffic compensable under section 251(b)(5), and is not "local traffic" for the purposes of reciprocal compensation. It is only the designation of "local traffic" that allows the reciprocal compensation provisions of the parties' Agreement to apply. Therefore, applying Federal law and the FCC's construction of that law to the Agreement leads the Department to the conclusion that the parties' obligations under the Agreement exclude the requirement to pay reciprocal compensation for ISP-bound traffic post-Internet Traffic Order.[22]

The Department's conclusion that the language in the Agreement evidences an intent to track the FCC's interpretation of the scope of section 251(b)(5) of the Act is not at odds with the Department's determination in the D.T.E. 97-116 Order. In that Order, the Department also looked to Federal law to define the relevant terms and concluded that the Act did not address the question in detail, and that the FCC had not (as yet) issued its expected decision implementing the Act in detail. D.T.E. 97-116 Order at 5, 13. Therefore, the Department looked to then-extant FCC precedents, which we believed treated ISP calls as two separate consecutive calls, not as unified transactions. Id. at 11-12. Even at that time, however, the Department acknowledged that the parties' sovereign decision (as expressed in the

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[22] See Athol Memorial Hosp. v. Commissioner of the Div. of Medical Assistance, 437 Mass. 417, 420, 421, 772 N.E. 2d 569 (2002) (holding that provider contracts incorporate by reference claims review regulations promulgated by the Division requiring hospitals to pursue administrative remedies before seeking judicial review, and that hospitals may not "sidestep that scheme" by arguing breach of contract).

Agreement) to link their obligations to the FCC's interpretation of the Act, introduced an element of contingency into the Department's decision, and stated "[i]f modifications to this Order are necessary based on the results of the FCC's [Internet Traffic Order] proceedings, then the Department can make such changes at the appropriate time." Id. at 6 n.12.[23]

The Department's conclusion remains, notwithstanding the FCC's related determinations that ISP traffic does have some characteristics of local traffic. For example, ISPs may purchase their links to the public switched telephone network through local business tariffs rather than through interstate access tariffs, and for recording costs as either interstate or intrastate, incumbent LECs must characterize expenses and revenues associated with ISP-bound traffic as intrastate. See Order on Remand at ¶¶ 11, 55. However, although the FCC treats ISP-bound traffic as local traffic for certain regulatory purposes,[24] since issuance of the Internet Traffic Order, the FCC has consistently and explicitly held that ISP-bound traffic is not traffic compensable under section 251(b)(5)'s reciprocal compensation obligations as such a classification permits distortion of competitive markets and unintended opportunities for inefficient entry and regulatory arbitrage.[25]

Finally, several parties assert that, if Federal law does control the Agreement with regard to reciprocal compensation obligations, then only the Federal law in effect at the time

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[23] See Department's Objection to F&R at 6-7.

[24] The FCC's rationale for its disparate regulatory treatment of ISPs (which are a type of enhanced service provider or "ESP") is explained by the FCC's policy to nurture the growth of innovative communications. As the FCC stated in the Order on Remand at ¶ 29, "the ESP exemption [to the interstate access charge requirements] is important in order to facilitate the growth of Internet services."

[25] This view was strongly shared by the Department in its D.T.E. 97-116-C Order at 31-37.

of contracting (i.e., June 1996) should govern the Agreement (WorldCom Brief at 12; XO Reply Brief at 5-6; RNK Reply Brief at 7-8). The Department disagrees to the extent that the Agreement defines reciprocal compensation as "Described in the Act" and as "from time to time interpreted [by] the FCC or the Department." Agreement, §§ 1.53, 1.6. As discussed above, this language evidences an unmistakable intent to track the FCC's construction of the requirements of section 251(b)(5) on an ongoing basis.[26, 27]

In sum, using a plain language analysis pursuant to Massachusetts contract law, the Department concludes that the Agreement excludes ISP-bound traffic from the scope of the Agreement's reciprocal compensation provisions. The language of the Agreement demonstrates an intent to track the FCC's construction of the scope of compensable traffic under section 251(b)(5), and, since the issuance of the Internet Traffic Order, the FCC has authoritatively interpreted the Act as explicitly excluding ISP-bound traffic from the requirements of section 251(b)(5). Thus, the Agreement – grounded as it is in the Act as interpreted by the authorized regulatory agencies – does not require parties to compensate each other for the delivery of ISP-bound traffic as local traffic post-Internet Traffic Order. It

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[26] This requirement is similar to a "change in law" provision, in which parties agree to renegotiate in response to, or otherwise comply with, changes in applicable law. See, e.g., Verizon-AT&T Broadband Phone Interconnection Agreement, § 27.0 (approved July 12, 2001). "Change in law" provisions are commonly included in interconnection agreements (GNAPs Reply Brief at 19).

[27] See also, National Ass'n of Gov't Employees v. Commonwealth, et al., 419 Mass. 448, 452-454, 646 N.E. 2d 106 (1995) (holding that agreements at issue set Commonwealth's percentage contribution to employees' health insurance premiums within relevant statutory provisions, and under statute, subsequent appropriation acts apply to set percentage contribution).

is not local traffic within the meaning of the Act, and, thus, not local traffic under the terms of the Agreement.

V. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That all parties shall comply with all directives contained herein.

By Order of the Department,

_____/s/_____
Paul B. Vasington, Chairman

_____/s/_____
James Connelly, Commissioner

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Deirdre K. Manning, Commissioner

Appeal of this Order shall be taken in accordance with applicable law. Timing of the filing of such an appeal is governed by the applicable rules of the appellate body to which the appeal is made.