COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In the Matter of Global NAPs, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England Inc. d/b/a Verizon Massachusetts	D.T.E. 02-45

OPPOSITION OF GLOBAL NAPS, INC. TO MOTION FOR APPROVAL OF FINAL ARBITRATION AGREEMENT OR, IN THE ALTERNATIVE FOR CLARIFICATION

1. INTRODUCTION AND SUMMARY.

Verizon Massachusetts has made a motion seeking an order from the Department that, at best, would be moot upon its issuance and, at worst, would lead to months of contentious litigation.[1] The Department should reject Verizon's motion and instead declare that for the remainder of its term, Global NAPs and Verizon will operate under the terms of Verizon's agreement with Sprint, which Global NAPs has adopted under 47 U.S.C. § 252(i).

Although Verizon lacks the temerity to actually say so, the point of its motion is that, by arbitrating certain issues with Verizon pursuant to 47 U.S.C. § 252(b), Global NAPs has somehow waived its right to adopt existing agreements under Section 252(i). Verizon does not say this outright because, on the merits, it is absurd. Nothing in Section 251(i) or any applicable FCC rule or regulation suggests that a CLEC may not opt into an existing agreement just because it has arbitrated a new one. Moreover, the very agreement that Verizon wants to require Global NAPs to sign — the one just arbitrated

[1] Motion for Approval of Final Arbitration Agreement or, in the Alternative, for Clarification (filed January 17, 2003) ("Motion").

— states unequivocally that "To the extent required by Applicable Law, each Party shall comply with Section 252(i) of the Act."[2]

The key, central purpose of Section 252(i) is to prevent discrimination against CLECs by allowing any CLEC to operate under the same terms and conditions that apply to any other CLEC. Here, Global NAPs has chosen to adopt the agreement between Verizon and Sprint, since on the whole the terms in that agreement are more appropriate to Global NAPs' business operations in Massachusetts than the terms in the recently arbitrated agreement. Global NAPs is plainly entitled to operate under the terms in the Sprint agreement if it so chooses — again, permitting CLECs to do so is precisely the point of Section 252(i).

2. SECTION 252(I) PERMITS GLOBAL NAPS TO ADOPT THE SPRINT AGREEMENT.

Section 252(i) permits any CLEC to elect to operate under the same terms and conditions contained in any effective interconnection agreement approved by the Department. It states that an ILEC "shall make available ***any*** interconnection, service, or network element provided under an agreement approved under this section to which it is a party to ***any*** other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i). Applicable FCC rules expand this already expansive statutory right in various ways. 47 C.F.R. § 51.809. An adoption of an agreement under Section 252(i) takes effect immediately, and is not subject to review by state regulators.[3]

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[2] Motion, Exhibit A (final contract language), Section 46.1.

[3] *See In the Matter of Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 12530 (1999) at n.25 ("a carrier should be able to notify the local exchange carrier that it is exercising this right by submitting a (note continued)...

Historically there has been some debate about the extent to which a requesting carrier may "pick and choose" from among the provisions of a complete approved agreement, but that debate is irrelevant here since Global NAPs has elected to adopt the entire Sprint agreement. Historically there has been some debate about whether a requesting carrier can adopt an agreement that has only a short time left to run before it expires, but that debate is irrelevant here since the Sprint agreement by its own terms continues in effect until at least July 2004. Nothing in Verizon's filing remotely suggests that Global NAPs' adoption of the Sprint agreement is inappropriate under these or any other grounds.

What is truly bizarre about Verizon's filing is that ***under the very agreement that Verizon wants Global NAPs to sign,*** Global NAPs would have a clear and unambiguous right to immediately substitute the terms of the Sprint agreement for the terms of the arbitrated agreement. Section 46.1 of that document states:

> To the extent required by Applicable Law, each Party shall comply with Section 252(i) of the Act...

So, Verizon certainly cannot claim that Global NAPs would not be entitled to choose to operate under the Sprint agreement if Global NAPs found that agreement, overall, to be preferable to the one just arbitrated. That type of consideration is, in fact, the essence of the nondiscrimination obligation embodied in Section 251(i): each and every CLEC always has the right to be treated just the same as any other CLEC, under the terms of any approved interconnection agreement.

...(note continued)
letter to the local exchange carrier identifying the agreement (or the portions of an agreement) it will be using and to whom invoices, notices regarding the agreement, and other communications should be sent").

Moreover, Section 46.2 of the arbitrated agreement is also relevant. That provision states:

> To the extent that the exercise by GNAPS of any rights it may have under Section 252(i) or the Merger Order MFN Provisions results in the rearrangement of Services by Verizon, GNAPS shall be solely liable for all costs associated therewith, as well as for any termination charges associated with the termination of existing Verizon Services

Here, depending on the scope and interpretation of the new agreement, Global NAPs would need to rearrange its interconnections with Verizon (as well as, perhaps, its customers' service arrangements) in order to avoid incurring some form of transport charges for ISP-bound calls where the ISP's facilities are located in the caller's LATA but not the caller's local calling area.[4] Such charges are not applicable under the Sprint agreement. As far as Global NAPs can tell, Verizon seems to want Global NAPs to incur the cost and inconvenience of arranging its services once — to avoid expenses that would supposedly accrue under the arbitrated agreement — then again incur the cost and expense of re-arranging its services — to re-establish its present method of operation, after adopting the Sprint agreement pursuant to Section 46.

The bottom line is simple: Section 252(i) gives every CLEC, including Global NAPs, a choice of what terms and conditions it wants to operate under. In particular, any CLEC may choose, under Section 252(i), to operate under the terms of any existing and approved interconnection agreement. Here, given the specifics of Global NAPs'

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[4] Global NAPs believes that such charges are utterly inappropriate in light of (a) the interstate nature of ISP-bound calling and (b) the FCC's preemptive prescription of rules for intercarrier compensation and interconnection arrangements for such calling. The letter that Global NAPs sent to Verizon (and that Verizon conveniently attached to its Motion) reflects an effort by Global NAPs to avoid a dispute with Verizon over this issue. Verizon, however, seems intent on escalating this dispute (about interstate traffic) rather than resolving it.

operations, Global NAPs would be better served by operating under the terms of the Sprint agreement. Verizon has provided no grounds for denying Global NAPs that right. It follows that there is no basis for the Department to grant Verizon's motion.

3. VERIZON'S RELIANCE ON THE FCC'S *LOCAL COMPETITION ORDER* IS MISPLACED.

Verizon cites an inapplicable provision of the FCC's 1996 *Local Competition Order* to suggest that Global NAPs should not be permitted to adopt the Sprint agreement in preference to the agreement just arbitrated by the Department. *See* Motion at 6-7. The cited material relates to the FCC's development of the rules that will apply when the FCC acts as an arbitrator, under 47 U.S.C. § 252(e)(5), where a state fails to perform its duty under Section 252(b).

In the course of developing those rules, SBC suggested that an ***ILEC*** should be free to walk away from the results of an FCC-conducted arbitration. The FCC sensibly rejected that that suggestion, stating that, in light of the specific obligations on ***ILECs*** to "provide interconnection, services, and unbundled network elements [and to] negotiate in good faith," it would make no sense to then "permit ***incumbent LECs*** to not be bound by an arbitrated determination." *Local Competition Order,* 11 FCC Rcd 15499 (1996) at ¶ 1293 (emphasis added).

In other words, if an ILEC refuses to reach agreement in negotiations, and forces a CLEC to incur the time and expense of arbitration, the ILEC cannot avoid the results of the arbitration if the CLEC chooses to enforce them. The FCC expressly noted that "***competing providers do not have an affirmative duty to enter into agreements under [Section] 252.***" *Id.* Instead, the FCC noted that there ***might*** be circumstances in which refusal to enter into an arbitrated agreement constitutes a failure to negotiate in good

faith. Here, however, there is no possible basis for reaching such a conclusion. Global NAPs and Verizon might disagree (Global NAPs still isn't sure) about the proper application of the FCC's rules regarding interconnection arrangements and compensation for ISP-bound traffic. Global NAPs and the Department might even disagree about that. But any such disagreement is certainly in "good faith" on Global NAPs' part and, it assumes (at least for now), on Verizon's part as well.

Again, what is going on here is that Verizon wants to force Global NAPs to operate on terms that are different from, and less favorable to Global NAPs than, the terms contained in the approved and effective agreement between Verizon and Sprint. In other words, Verizon wants to discriminate against Global NAPs as compared to the terms contained in the Sprint agreement. Such discrimination is expressly forbidden under Section 252(i), and Verizon knows it. To the extent that there is any lack of good faith in this matter, it lies entirely with Verizon.

4. CONCLUSION.

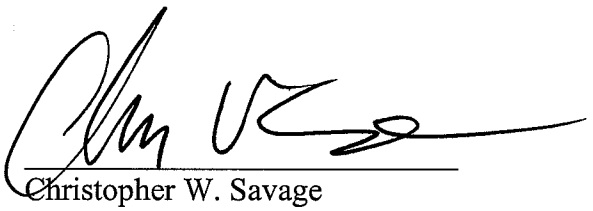
Verizon is not entitled to force Global NAPs to waive its Section 252(i) rights and operate under an agreement that is less favorable to Global NAPs than the existing, approved agreement between Verizon and Sprint. Not only is there no indication that Global NAPs has waived its rights, Section 46 of the arbitrated agreement — whose terms were never contested in the arbitration — expressly preserves Global NAPs' right to do just that. Verizon, therefore, has no right to prevent Global NAPs from adopting the Sprint agreement ***even if it is assumed that the arbitrated agreement is binding.***

In these circumstances, it would be senseless — and a violation of Section 252(i) to grant Verizon's motion. Instead, the Department should affirm that Global NAPs has a right, both under Section 252(i) and — to the extent the Department deems relevant —

under the terms of the arbitrated agreement itself, to adopt and operate under the Sprint agreement for the remainder of that agreement's term.

Respectfully submitted,

GLOBAL NAPS, INC.

By: 

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