COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

GLOBAL NAPS, INC.,

Petitioner-Appellant,

v.

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY, VERIZON NEW ENGLAND, INC. D/B/A VERIZON MASSACHUSETTS,

Respondents-Appellees.

Appeal No. _____

PETITION OF GLOBAL NAPS, INC.
FOR APPEAL PURSUANT TO G.L. c. 25 SECTION 5

Introduction

1. Pursuant to M.G.L, c. 25 §5, Global NAPs, Inc. ("Global NAPs") petitions for appeal, praying that the Supreme Judicial Court set aside or modify an order of the Department of Telecommunications and Energy (the "DTE") in D.T.E. 97-116-G dated December 20, 2002 ("*the 2002 DTE Order*," a copy of which is appended as Exhibit A). In this order, the DTE interpreted a contract known under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), as an Interconnection Agreement. The DTE concluded that the Interconnection Agreement (the "Agreement") between Verizon New England d/b/a Verizon, Massachusetts ("Verizon") and WorldCom, Inc. ("WorldCom") did not require payment of "reciprocal compensation" for telephone calls dialed to Internet Service Providers ("ISP-bound traffic") on Global NAPs'

network. (A true and accurate copy of the relevant portion of the Agreement is appended as Exhibit B.) Global NAPs was a party to the proceeding before the DTE and to litigation in federal court overturning related DTE decisions, and the order at issue applies to the relevant Global NAPs-Verizon Interconnection Agreement.

2. The *2002 DTE Order* is the latest in a series of orders that address the underlying contractual dispute whether calls to ISPs for dial-up Internet access were subject to reciprocal compensation as "Local Traffic" within the meaning of the Agreement. The DTE resolved this dispute in a 1998 order in which it concluded that "ISP-bound calls are 'local calls' for purposes of the definition of local traffic in the Agreement and, as such, eligible for reciprocal compensation." The DTE then did an about-face and vacated the latter decision in 1999, based ostensibly on an intervening and later-vacated FCC decision in 1999. The DTE stood by this position through reconsideration, following vacatur and remand of the 1999 FCC decision "for want of reasoned decision-making," re-analysis by the FCC establishing a transitional – and prospective-only – regime for intercarrier compensation for ISP-bound calls to take effect as pre-existing contracts expire, and reversal of the FCC's re-analysis and further remand by the D.C. Circuit.

3. Global NAPs and WorldCom appealed the DTE's 1999 order and its progeny to the United States District Court for the District of Massachusetts and, on August 27, 2002, that court issued a decision in their favor. As more fully set out below, the federal court found that the DTE was required under federal law to "consider the contractual language in the parties' interconnection agreements to determine whether the parties contracted for reciprocal compensation." The court ruled that the DTE "properly considered that question" in the 1998 order, finding that the DTE had "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 the contract." The federal court further ruled that the DTE failed to consider the same question properly in its 1999 Order and later, but instead erroneously adopted the view that the FCC's 1999 Order compelled it to vacate its 1998 Order, rather than to examine the language of the contract as it had done before (though now guided by factors the FCC had identified). The court therefore entered its declaratory judgment that "the October 1998 DTE Order complied with federal law and the May 1999, July 2000, and August 2001 orders did not." The federal court then remanded to the DTE for "proceedings or deliberations not inconsistent with the rulings herein."

4. In the *DTE 2002 Order*, the DTE reinstated the result of its 1999 order. Without regard to the federal court's declaration that the "October 1998 Order complied with federal law," the DTE purported to find that the federal court decision "directed" the agency to reanalyze the language of the Agreement from scratch and that such analysis led it to change the contract interpretation in its 1998 order. It is this contract interpretation that Global NAPs challenges in this case as legally erroneous, unsupported by substantial evidence, arrived at by unlawful procedures in violation of Due Process, and arbitrary and capricious.

Parties and Jurisdiction

5. Petitioner Global NAPs is a Delaware corporation with its principal place of business at 10 Merrymount Road, Quincy, Massachusetts. Global NAPs is a competitive local exchange carrier ("CLEC") providing local telephone service in Massachusetts, and is also a local exchange carrier ("LEC") under 47 U.S.C. § 153(26).

6. Respondent DTE is a regulatory agency created and existing under the laws of the Commonwealth of Massachusetts and has jurisdiction over the intrastate activities of telecommunications companies operating in Massachusetts. It is a "State commission" under 47 U.S.C. § 153 (41). The DTE is located at One South Station, Boston, Massachusetts.

7. Defendant, Verizon, is a New York corporation with a usual place of business at 185 High Street, Boston, Massachusetts. Verizon is, and has been at all material times, an Incumbent Local Exchange Carrier ("ILEC") in the Commonwealth of Massachusetts as defined by 47 U.S.C. § 251(h).

8. This court has jurisdiction over the action pursuant to G.L. c.25 §5. Under the Telecommunications Act of 1996 ("the Telecommunications Act" or "1996 Act") as interpreted by the First Circuit, federal courts review state agency decisions involving interconnection agreements for compliance with federal law, and state courts retain jurisdiction to review such decisions for compliance with state law.

Background

The Regulatory Scheme

9. The 1996 Act "fundamentally restructures local telephone markets" by ending the "long-standing regime of state-sanctioned monopolies." *A.T.&T. Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 372 (1999) ("*Iowa Utilities Board*"). In place of this old regime, the 1996 Act creates a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." Sen. Conf. Rep. No. 104-458, 10th Cong. 2d Sess., at 1 (1996) (Joint Explanatory Statement of the Committee on Conference). To achieve these goals, the Telecommunications Act

establishes rules by which regional telephone monopolies such as Verizon have to open up their networks so that competing telephone companies such as Global NAPs can interconnect, and obligates all interconnecting carriers to provide reciprocal compensation for traffic that they terminate on another carrier's network.

10. State commissions such as the DTE administer the provisions of the Act and Federal Communications Commission rules and regulations governing interconnection. The 1996 Act establishes a system of negotiation and arbitration to facilitate voluntary agreements between ILECs and CLECs. Agreements, whether negotiated voluntarily or arbitrated, are subject to review and approval by state commissions. *Id.* § 252 (e)(2).

11. Global NAPs is a CLEC that entered the marketplace in the wake of the 1996 Act. On April 15, 1997, Global NAPs and Verizon executed their first interconnection agreement, covering Massachusetts. This agreement is substantially identical to WorldCom's agreement and, prior to execution of this agreement, Global NAPs and Verizon agreed to treat it the same as the WorldCom-Verizon agreement for purposes of reciprocal compensation

The *1998 DTE Order*

12. After Verizon stopped paying reciprocal compensation for ISP-bound calls, MCI WorldCom, Inc. (now WorldCom) brought a complaint before the DTE against Bell Atlantic (now Verizon) for breach of the interconnection agreement. In October, 1998, the Department ruled in WorldCom's favor in its order in *Complaint of MCI WorldCom, Inc. against New England Tel. & Tel. Co. d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996,* Docket No.

D.T.E. 97-116 (October 21, 1998) ("*1998 DTE Order*") (A true and accurate copy is appended hereto as Exhibit C).

13. The issue, as framed by the DTE, was the proper interpretation of Section 5.8.2 of the Agreement, dealing with compensation for traffic one party delivers to another. The DTE explained:

> Section 5.8.2 of the Agreement states that "the parties shall compensate each other for transport and termination of Local Traffic in an equal and symmetrical manner at the rate provided in the Pricing Schedule." "Local Traffic" defined in the Agreement 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..." D.P.U. 97-62, Agreement, § 1.38. The plain language of the Agreement indicates that Bell Atlantic and MCI WorldCom agreed to compensate each other for termination of all local calls. The Agreement does not make an exception for calls terminated to ISPs. Thus, the question becomes: Is a call made by a Bell Atlantic customer to an ISP, but terminated by MCI WorldCom, and then connected by the ISP to the Internet, a "local call" under the Agreement's definition of local traffic? For the reasons cited below, we find it is.

1998 DTE Order at 10-11.

14. The Department concluded that an ISP-bound call was a "local call" under the Agreement because:

- [T]he characteristics of calls to ISPs are identical to any other local call. ISPs have local telephone numbers; thus, callers reach them by dialing seven digits. Local exchange carriers, including Bell Atlantic and MCI WorldCom, charge their customers local rates for calls to ISPs. Moreover, ISPs' premises are located within the LATA, thus meeting the definition of local traffic in the Interconnection Agreement.
- Even if [Verizon] is correct in claiming that calls to ISPs are indistinguishable for network purposes from long distance calls, the same can be said about local calls that terminate to ISPs that are customers of Bell Atlantic or that terminate into private networks, as are used by some banks and corporations. Such calls are tariffed as local calls by [Verizon].
- A call to an ISP is distinguishable from an IXC call. A call to an ISP is functionally two separate services: (1) a local call to the ISP, and (2) an information service provided by the ISP when the ISP connects the caller to the Internet. This is

functionally indistinguishable from the manner in which [Verizon] currently treats its call forwarding or three-way calling services.

?? The FCC also has noted that a call to an ISP is actually two separate services. In its May 8, 1997, Universal Service Order, the FCC stated that "[w]hen a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the [ISP's] service offering."

1998 DTE Order at 11. The DTE therefore concluded, "a call from a Bell Atlantic customer that is terminated by MCI WorldCom to an ISP is a 'local call' for purposes of the definition of local traffic in the Agreement, and as such, is eligible for reciprocal compensation." *Id*. at 13. No appeal was ever taken from this order.

The *1999 DTE Order* And Its Progeny

15. On February 26, 1999, the FCC issued an order in *In The Matter of lmplementation of the Local Competition Provisions of the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket 96-98 (Feb. 26, 1999) (*"Internet Traffic Order").* This order provided that ISP-bound calls were not "local" under the ***FCC's rules*** establishing when reciprocal compensation was ***required*** — a holding later vacated by the D.C. Circuit. Even so, the FCC expressly directed state regulators such as the DTE to consider, based on a series of logical factors, whether ***particular agreements*** might call for compensation for ISP-bound calls as "local" under parties' ***contractual language***, interpreted in light of the circumstances existing when the contracts were executed.

16. Following the FCC's issuance of its *Internet Traffic Order*, Verizon on March 2, 1999 filed a motion for modification of the *1998 DTE Order.* The DTE permitted additional parties to respond to Verizon's motion for modification. Effective February 26, 1999, the date of the FCC order (or earlier if it had not yet made payments), Verizon withheld reciprocal

compensation for ISP-bound traffic and placed such payments in escrow. The DTE later granted Verizon authority to do so in an order dated March 23, 1999.

17. Global NAPs intervened on March 4, 1999 and, along with numerous other parties, submitted comments in opposition to Verizon's motion for modification.

18. On May 19, 1999, the Department issued an order, D.T.E. 97-116-C (the "*1999 DTE Order*"), granting Verizon's motion for modification and vacating the *1998 DTE Order*. This order was issued after canceling a scheduled hearing for argument and without permitting opponents of the motion to submit evidence or argument or conduct cross-examination in response to Verizon's affidavits. The DTE issued this order on the basis that the *1998 DTE Order* was invalidated and nullified by the *Internet Traffic Order*. The DTE purported only to vacate the grounds of the *1998 DTE Order* and to leave "a now-unresolved dispute." Nevertheless, the DTE ordered that Verizon was no longer required to pay reciprocal compensation in excess of a 2-1 ratio of terminating traffic to originating traffic, retroactive to February 26, 1999.

19. On April 16, 1999, while the Verizon motion for modification was pending, Global NAPs filed a complaint against Verizon with the DTE, seeking a declaratory ruling that under the terms of the specific interconnection agreement between Verizon and Global NAPs, Verizon is obligated to pay Global NAPs reciprocal compensation for termination of ISP-bound traffic. The *1999 DTE Order* did not rule on this claim. Global NAPs also joined other parties in motions for reconsideration.

20. On February 25, 2000, the Department issued an order denying these motions for reconsideration (the "*2000 DTE Order*"). The Department also dismissed Global NAPs' petition for declaratory ruling as moot on the sole ground that the reciprocal compensation

provisions of Global NAPs' interconnection agreement are "in all material respects the same as the provision in the MCI WorldCom agreement."

21. On March 3, 2000, Global NAPs filed a petition pursuant to G.L. c. 25 § 5 appealing both the *1999 DTE Order* and the *2000 DTE Order*. Global NAPs (as well as WorldCom) also filed an appeal pursuant to 47 U.S.C. §252(e) in federal district court, docketed as *Global NAPs, Inc. v. New England Telephone and Telegraph Co.,* Nos. 00-10407-RCL and 00-11513-RCL (D.Mass.).

22. While the appeals were pending, on March 24, 2000, the United States Court of Appeals for the District of Columbia Circuit vacated the FCC's *Internet Traffic Order* "for want of reasoned decision making." *Bell Atlantic v. FCC,* 201 F.3d 1, 3 (D.C. Cir. 2000). The D.C. Circuit noted that calls to ISPs appear to fit the definition of "local" calls under 47 C.F.R. 51.701 (b)(1). *Id.* at 6. Under this definition, the ISP is the "called party" when an end user calls an ISP to establish a connection to the Internet.

23. In light of the vacatur of the *Internet Traffic Order* on which the DTE based the *1999 DTE Order* and the *2000 DTE Order*, Global NAPs and other parties sought reconsideration by the DTE. In August 2000, the DTE declined to vacate the *1999 DTE Order* and the *2000 DTE Order*. Instead, the DTE decided to leave matters unresolved until the FCC acted on remand from the D.C. Circuit.

The FCC's *ISP Remand Order*

24. On April 17, 2001, the FCC issued its order on the remand from the D.C. Circuit – *In the Matter of Implementation of the Local Competition Provision in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic,*

Order on Remand Report and Order, CC Docket No. 96-98 (rel. April 27, 2001) ("*ISP Remand Order*").

25. In the *ISP Remand Order*, the FCC addressed reciprocal compensation without reference to whether the traffic involved is "local" traffic. Instead, the FCC concluded that its original focus on "local" traffic "created unnecessary ambiguities" and was a "mistake," and held that the telecommunications subject to reciprocal compensation "are all such telecommunications not excluded by section 251(g)." *Id.* ¶ 46. The FCC concluded that a reasonable reading of the statute is that Congress intended to exclude the traffic listed in § 251(g) from the reciprocal compensation requirements of § 251(b) (5): "[t]hus, the statute does not mandate reciprocal compensation for 'exchange access, information access, and exchange service for such access' provided to IXCs and information service providers." *Id*. ¶ 34. In turn, the FCC newly classified ISP-bound traffic as "information access" subject to Section 251 (g) for the purposes of an interim, prospective-only reciprocal compensation regime applicable to ISP-bound traffic, but emphasized that this regime did not apply to existing interconnection agreements. *Id*. ¶ 85.

26. In August 2001, the DTE issued a further order (the "*2001 DTE Order*") concluding that nothing in the *ISP Remand Order* required it to vacate or modify the *1999 DTE Order* or *2000 DTE Order*. Notwithstanding the "unresolved" dispute acknowledged in the *1999 DTE Order*, the DTE treated its prior orders as conclusive of "the definition of local traffic contained in these agreements." It nevertheless recognized that the reciprocal compensation regime adopted in the *ISP Remand Order* did not apply to existing agreements.

27. On May 3, 2002, in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), the

United States Court of Appeals for the District of Columbia Circuit rejected the FCC's conclusion in the *ISP Remand Order* that Section 251(g) provided a basis to "carve out" ISP-bound traffic from reciprocal compensation obligations. The Court of Appeals reasoned that Section 251 (g) is only "a transitional device, preserving various LEC duties that antedated the 1996 Act." *Id.* at 430. Because the court found there might be other legal bases for the rules prospectively established by the *ISP Remand Order*, it declined to vacate the rules but remanded the case to the FCC. The FCC has taken no further action to date.

The Federal District Court's Reversal of The DTE's Decisions

28. On August 27, 2002, the United States District Court for the District of Massachusetts granted summary judgment in favor of WorldCom and Global NAPs in their appeals of the *1999 DTE Order* and its progeny. The court issued a declaration that "the October 1998 DTE Order complied with federal law and the May 1999, July 2000 and August 2001 orders did not." *Global NAPs, Inc. v. New England Telephone and Telegraph Co.*, Nos. 00-10407-RCL and 00-11513-RCL, Memorandum Order on Magistrate Judge's Report and Recommendation on Defendants' Motions for Summary Judgment at 2 (D. Mass. August 27, 2002) ("*Federal Court Order*") (A copy is appended as Exhibit D).

29. In issuing this ruling, the court adopted the "very thorough" findings and conclusions in the Findings and Recommendations issued by a United States Magistrate Judge on July 5, 2002, ("*F&R*") (a copy of which is appended as Exhibit E). The Magistrate Judge determined that federal law required the DTE to "consider the contractual language in the parties' interconnection agreements to determine whether the parties

contracted for reciprocal compensation." *F&R* at 26. The Magistrate Judge recommended that the district court declare that "the orders issued by the DTE in May 1999, July 2000, and August 2001 violate federal law" because these orders did not meet this requirement. On the other hand, "the DTE properly considered the question in the 1998 DTE Order," so the Magistrate Judge recommended that the federal district court declare that "the 1998 DTE Order did not violate federal law." *F&R* at 27.

30. The federal court did not adopt a second recommendation "that the District Court issue a preliminary injunction that directs the DTE to undertake an analysis of the interconnection agreement to determine whether those agreements give rise to reciprocal compensation for ISP-bound traffic, and that proscribes the DTE from enforcing the 1999 DTE Order, the 2000 DTE Order and the 2001 DTE Order until such time as that analysis is complete." *F&R* at 30. The court declined to issue such an injunction stating, "in light of my disposition of this matter, as set forth in the following paragraph, no injunction, as such, is necessary." *Federal Court Order* at 3. The order then concluded,

> A District Court's jurisdiction under § 252(e)(6) extends only to a determination of whether orders of the state utility commission like those at issue in this case comply with federal law. Accordingly, having made such a determination in this case, I remand these cases to the DTE for proceedings or deliberations not inconsistent with the rulings herein and with those parts of the Findings and Recommendations that explicate the reasons for granting summary judgment to the plaintiffs and denying summary judgment to the defendants.

Id. (citations omitted).

31. Even before the adoption of the Magistrate Judge's Findings and Recommendations by the federal district court, the DTE, at Verizon's motion and over the objections of Global NAPs and other CLECs, entertained re-opening its docket to issue a new order that could moot the Findings and Recommendations. On October 24, 2002,

after the filing of its Notice of Appeal, the DTE issued a Procedural Order calling for accelerated briefing, with initial briefs due November 8, 2002 (subsequently extended by one working day to November 12, 2002), and reply briefs seven days later.

32. The DTE also initially appealed the *Federal Court Order* to the United States Court of Appeals for the First Circuit. The DTE also sought a stay in District Court on the basis it had an "obligation" to conduct remand proceedings that could moot its appeal. The federal district court denied the stay motion, clarifying that its judgment did not prevent the DTE from staying its own proceeding. (A copy of this ruling is attached as Exhibit F.)

33. The First Circuit directed the DTE either to show cause why the Court of Appeals had jurisdiction over the case as a final judgment of the district court or to dismiss its appeal voluntarily by December 20, 2002. On that date, the DTE withdrew its appeal and issued the order appealed from in this case.

The *2002 DTE Order*

34. The order that is the subject of this appeal is the 2002 DTE Order, D.T.E. 97-116-G (Dec. 20, 2002). The order first concluded – without explanation as to the basis in the *Federal Court Order* or as to any other basis for reconsidering the *1998 DTE Order* that the federal court declared complied with federal law – that it was "directed to undertake on remand" the analysis pursuant to Massachusetts contract law and other legal and equitable principles that federal law requires. *2002 DTE Order* at 26.

35. The DTE then proceeded to redo the analysis that it had done in the *1998 DTE Order*. The *2002 DTE Order* then opined that under the Agreement ISP-bound traffic is not subject to reciprocal compensation. The DTE constructed its analysis of the contract as follows:

> 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 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. 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, this section of the agreement is 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. The parties could have (but in fact did not) departed from the requirements of federal law and provided for their own customized terms of agreement... The FCC's analysis has evolved overtime response judicial review... 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 purposes of reciprocal compensation. It is only the designation of "local traffic" that allows 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.

2002 DTE Order at 28-29 (citations and footnotes omitted).

36. As explained in detail below, the *2002 DTE Order* is based on legal error, arrived at through unlawful procedure and in violation of Due Process, unsupported by substantial evidence, arbitrary and capricious, an abuse of discretion, and otherwise in violation of the law. The order should be set aside and the DTE should be ordered to enforce the 1*998 DTE Order* because:

a. The *2002 DTE Order* presents no lawful grounds for reconsidering the lawful and final *1998 DTE Order*;

b. The *2002 DTE Order* is inconsistent with the plain language of the Agreement;

c. The *2002 DTE Order* is based on the vacated *Internet Traffic Order;*

d. The *2002 DTE Order* is inconsistent with the *Federal Court Order*;

e. The *2002 DTE Order* wrongly assumes that ISP-bound traffic is not reciprocal compensation traffic;

f. The *2002 DTE Order* wrongly concludes that the Agreement unambiguously excludes the requirement to pay reciprocal compensation on ISP-bound traffic;

g. The *2002 DTE Order* adjudicated contract rights without affording the parties an adjudicatory hearing;

h. The *2002 DTE Order* is arbitrary and capricious because it forces CLECs to perform work for free.

Claims

Count I – The DTE had no lawful grounds to reconsider the *1998 DTE Order*

37. The foregoing is reiterated and incorporated herein by reference.

38. The sole basis offered by the DTE in the *2002 DTE Order* for reconsidering its *1998 DTE Order* is the following: "The District Court concluded that the Department violated Federal law in its review of the Agreement by not conducting the analysis in the DTE 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." *2002 DTE Order* at 26.

39. The DTE misconstrues the *Federal Court Order*. In entering its declaratory judgment that "the October 1998 DTE Order complied with federal law" while "the May 1999, July 2000, and August 2001 orders did not," the federal district court made a

conscious decision not to wipe the slate clean. The court made this declaration in the face of arguments by the DTE and Verizon that the effect of declaring the *1998 DTE Order* lawful would be to "reinstate" that order and that the Court therefore should also declare that order unlawful and "make explicit" that the DTE "could consider the reciprocal compensation question *de novo*," while Global NAPs and WorldCom urged the court to uphold the *1998 DTE Order*.[1] The Court remanded to the DTE for "proceedings or deliberations not inconsistent with the rulings herein," against this background. *Federal Court Order* at 3. Moreover, although the Magistrate Judge recommended that the Court issue an injunction directing the DTE to undertake an analysis of the interconnection agreement, the *Federal Court Order* rejected this as "unnecessary" in light of the declaratory judgment. The court further explained, "A District Court's jurisdiction under § 252(e)(6) extends only to a determination of whether orders of the state utility commission like those at issue in this case comply with federal law." *Id*. at 3. On this basis, having determined that the *1998 DTE Order* complied with federal law, the federal district court had no jurisdiction to "direct" that the DTE reconsider it. In its denial of the DTE's stay application, the court made clear that its order did not compel remand proceedings to redo the *1998 DTE Order*.

40. Under the DTE's rules of practice and procedure in 220 CMR 1.00 *et seq*., reconsideration of the 1998 DTE Order is untimely and unfounded. Section 1.11(8) makes it clear that the Department may reopen a hearing on its own initiative only ***prior to*** rendering its decision. Once the decision is rendered, Section 1.11 (9) requires filing of a

[1] Global NAPs agreed with Verizon and the DTE that the effect of granting Global NAPs' and WorldCom's summary judgment motions would indeed be to reinstate the *1998 DTE Order*. *See* Global NAPs' Response to Objections to Magistrate's Recommendations at 17-18.

motion for reconsideration "[w]ithin 20 days of service of a final Department Order …." This time passed long ago.

41. The DTE's "well settled" policy on reconsideration requires a showing of extraordinary circumstances. As the DTE itself explained in the *2000 DTE Order*:

> Reconsideration of previously decided issues is granted only when ***extraordinary circumstances*** dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. … A motion for reconsideration should bring to light ***previously unknown or undisclosed facts*** that would have a significant impact on the decision already rendered. ***It should not attempt to reargue issues considered and decided in the main case***. … The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration.

2000 DTE Order at 7-8 (emphasis added).

42. As stated above, the 2002 DTE Order claims no extraordinary circumstances. Its sole basis for reconsidering the 1998 DTE Order is the claim that the *Federal Court Order* requires reconsideration.

43. Reconsideration of the *1998 DTE Order* was arbitrary and capricious, an abuse of discretion, and in violation of the law.

Count II - The *2002 DTE Order* is inconsistent with the plain language of the Agreement.

44. The foregoing is reiterated and incorporated herein by reference.

45. Section 5.8.2 of the Agreement states "the parties shall compensate each other for transport and termination of Local Traffic in an equal and symmetrical manner at the rate provided in the pricing schedule."

46. The *1998 DTE Order* concluded that the parties intended ISP-bound traffic to be considered "Local Traffic" under § 5.8.2 of the Agreement. *1998 DTE Order* at 11.

The federal district court found that, in considering the meaning of this contract term, the DTE "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 the contract." *F&R* at 27 n. 20.

47. The *2002 DTE Order* construed the Agreement so as simply to track of the FCC's interpretation of the scope of § 251(b)(5) of the Act, rendering meaningless the specific language of § 5.8.2 of the Agreement and the DTE's earlier conclusion that this language encompasses ISP-bound traffic, in violation of well-established rules of contract construction.

48. The DTE's decision to ignore the language of §5.8.2 is particularly material where the Agreement's definition of local traffic was broader than the FCC's definition of local traffic in effect when the Agreement was executed. "Local Traffic" is defined in §1.38 of the Agreement 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..." Agreement, § 1.38. (emphasis added). The FCC's definition of "Local Telecommunications Traffic," in effect when the Agreement was executed, was "Telecommunications traffic … which originates and terminates within ***a local service area*** established by the state commission." 47 CFR § 51.701(b)(1)(emphasis added)(this regulation was substantially revised on May 15, 2001).

49. The *2002 DTE Order* disregards the language of §1.38 of the Agreement and instead reads in the FCC's definition, stating that this section "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***." *2002 DTE Order* at 28. A LATA (a

Local Access and Transport Area (*see* 47 U.S.C. §153(25), corresponding roughly to the area codes in place at the time of the break-up of the Bell System), is much larger than a local service area; Massachusetts has two LATAs but more than 300 local service areas.

50. By treating the language of §5.8.2 of the Agreement as surplusage and misreading the definition of "Local Traffic" in §1.38 of the Agreement, the *2002 DTE Order* is inconsistent with the clear language of the Agreement and as such is in violation of the law, is not based on substantial evidence in the contract or elsewhere in the record, and is arbitrary and capricious.

Count III - The *2002 DTE Order* is based on the vacated *Internet Traffic Order*.

51. The foregoing is reiterated and incorporated herein by reference.

52. The *2002 DTE Order* interprets the Agreement as a moving target that tracks the FCC's interpretation of the scope of § 251(b)(5) of the Act. The DTE explained "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 concluded, "the parties' obligations under the Agreement exclude the requirement to pay reciprocal compensation for ISP-bound traffic ***post-Internet Traffic Order***." *2002 DTE Order* at 29 (emphasis added).

53. Even assuming, *arguendo,* that the parties' rights and obligations under the Agreement were intended to change as federal law changes, the *Internet Traffic Order* would have no affect on these rights and obligations as it was vacated for want of reasoned decisionmaking and therefore is a nullity with no legal effect.

54. The DTE's reliance upon the *Internet Traffic Order* to interpret the agreement is arbitrary and capricious and in violation of the law.

Count IV - The 2002 DTE Order is inconsistent with the *Federal Court Order*.

55. The foregoing is reiterated and incorporated herein by reference.

56. As stated above, the *2001 DTE Order* interprets the Agreement as a moving target that tracks the FCC's interpretation of the scope of § 251(b)(5) of the Act and concludes the parties' obligations under the Agreement exclude the requirement to pay reciprocal compensation for ISP-bound traffic post-Internet Traffic Order.

57. Even assuming, *arguendo*, that the parties' rights and obligations under the Agreement did change as federal law changes, under the DTE's analysis the *1998 DTE Order* was in compliance with federal law until February 26, 1999 when the FCC issued the now vacated *Internet Traffic Order*. Thereafter, under this logic, the *1998 DTE Order* was inconsistent with Federal law. Such a conclusion, however, is in direct conflict with the *Federal Court Order*, issued on August 27, 2002, which expressly ruled that the 1998 DTE Order complied with federal law.

58. As such, the *2002 DTE Order* is arbitrary and capricious and in violation of law.

Count V - The *2002 DTE Order* wrongly assumes that ISP-bound traffic is not reciprocal compensation traffic.

59. The foregoing is reiterated and incorporated herein by reference.

60. The 2*002 DTE Order* states: "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 purposes of reciprocal compensation." *2002 DTE Order* at 29. The DTE offered no basis,

other than its reliance on federal authority, for the conclusion that ISP-bound traffic is not reciprocal compensation traffic. The DTE's interpretation of federal authority is wrong.

61. The FCC has twice ruled on the nature of ISP-bound traffic. The first order was the *Internet Traffic Order,* which was vacated for want of reasoned decisionmaking and thus a legal nullity.

62. The second FCC ruling on the nature of ISP-bound traffic was the *ISP Remand Order*, in which the FCC held that under § 251(g) of the Act it was authorized to "carve out" from § 251(b) (5) calls made to ISPs located within the caller's local calling area. The D.C. Circuit rejected this analysis and ruled the Commission's reliance entirely on § 251(g) was "precluded." *WorldCom v. FCC*, 288 F.3d at 430. Although the D.C. Circuit permitted the FCC's specific rules for reciprocal compensation for ISP-bound calls to remain in place, these rules are prospective only and do not affect existing contracts. There presently exists no legally effective federal authority for the proposition that ISP-bound traffic – either as a general matter or under the existing Agreement – is not reciprocal compensation traffic under § 251(b)(5).

63. The *2002 DTE Order* therefore was based on error of law, unsupported by substantial evidence in the record, and arbitrary and capricious and otherwise in violation of law.

Count VI - The *2002 DTE Order* wrongly concluded that the Agreement unambiguously excludes the requirement to pay reciprocal compensation on ISP-bound traffic.

64. The foregoing is reiterated and incorporated herein by reference.

65. More than 30 state commissions and three federal circuits as well as numerous federal district courts have found that contract language actually or materially identical to

that in the Agreement plainly calls for the payment of reciprocal compensation on ISP-bound traffic.

66. The DTE nevertheless holds as a matter of plain language that does not require further analysis or evidence that the Agreement is "manifesting a clear intent to track the FCC's interpretation of the scope of section 251 (b) (5) of the Act." *2002 DTE Order* at 28. Nothing in the Agreement says this, and it is completely at odds with the DTE's own interpretation of the Agreement in the *1998 DTE Order* as well as that of the vast majority of other bodies that have construed such language. The DTE's "plain language" ruling amounts to a ruling that all such other decisions are unreasonable as a matter of law.

67. The DTE's interpretation is also at odds with the public position taken by Verizon before executing the Agreement. In May 1996, Verizon itself affirmatively argued that the FCC need not adopt "bill and keep," arguing that ILECs would never set the reciprocal compensation rate too high because, if they did, new entrants would target ISPs as customers and the ILECs would be writing large monthly checks to these new entrants. Verizon stated:

> The notion that bill and keep is necessary to prevent LECs from demanding too high a rate reflects a fundamental misunderstanding of the market. If these rates are set too high, the result will be that new entrants, who are in a much better position to selectively market their services, will sign up customers whose calls are predominantly inbound, such as credit card authorization centers and ***Internet access providers***. The LEC would find itself writing large monthly checks to the new entrant.

Reply Comments of Bell Atlantic, CC Docket No. 96-98 (filed May 30, 1996) (emphasis added). In the proceeding before the DTE, Global NAPs made an offer of proof to the DTE to demonstrate express statements Verizon made to the same effect.

68. The DTE's interpretation of the contract is at odds with the plain language of the Agreement and the intent of the parties, and therefore based on error of law, unsupported by substantial evidence, and arbitrary and capricious.

69. The *2002 DTE Order*, erroneous as a matter of law, not based on substantial evidence in the Agreement or the Record, was arbitrary and capricious, and based on unlawful procedure in refusing to take evidence on the parties' intent in entering into the Agreement.

Count VII - The DTE adjudicated the parties' contract rights in the *2002 DTE Order* without affording an adjudicatory hearing as required by G.L. c. 30A, § 11.

70. The foregoing is reiterated and incorporated herein by reference.

71. At a minimum, there is ambiguity regarding the DTE's conclusion that the parties had a clear intent to track the FCC's interpretation of the scope of § 251 (b) (5) of the Act, and the parties should have been permitted to introduce evidence on this issue. The DTE, however, refused to re-open the record to permit evidence of industry custom, course of dealing, or other evidence of the parties' intent.

72. The *2002 DTE Order* therefore was based on unlawful procedure in violation of G.L. c. 30A §11 and Due Process, arbitrary and capricious, and in violation of law. If the *2002 DTE Order* is not set aside and the *1998 DTE Order* enforced, at a minimum the matter should be remanded to the DTE for evidentiary hearings.

Count VII - The *2002 DTE Order* is arbitrary and capricious because it forces CLECs to perform work for free.

73. The foregoing is reiterated and incorporated herein by reference.

74. As explained above, the sole basis offered by the DTE in the *2002 DTE Order* for reconsidering the *1998 DTE Order* is that it interpreted the *Federal Court Order* as

mandating that it review the *1998 DTE Order* "pursuant to Massachusetts contract law and other legal and equitable principles." *2002 DTE Order* at 26. Assuming, *arguendo*, there was such a mandate, the DTE disregarded it as it expressly declined to consider "other legal and equitable principles."

75. Specifically, the *2002 DTE Order* states:

> 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 by language of their own choosing and used in the Agreement itself. This is the primary directive of Massachusetts contractual interpretation law.

2002 DTE Order at 26-27.

76. "Carriers incur costs in delivering traffic to ISPs." *ISP Remand Order* ¶80. The *2002 DTE Order* bars CLECs from receiving any compensation for terminating ISP-bound calls for Verizon. If, as the DTE concludes, the Agreement does not require payment for these calls, it certainly does not forbid it. The DTE was arbitrary and capricious and acted in violation of law in failing to consider whether payment should be made for terminating ISP-bound calls under *quantum meruit* or "other legal or equitable principles."

Wherefore, Global NAPs NAPs prays that the Supreme Judicial Court:

(1) Set aside the *2002 DTE Order*;

(2) Declare that the *1998 DTE Order* correctly interprets the Agreement as a matter of law;

(3) Order the DTE to enforce the *1998 DTE Order*;

(4) In the alternative, remand the case to the DTE with instructions to re-open the record to receive evidence of the intention of the parties; and,

(5) Grant such other relief as the Court deems just and appropriate.

Respectfully submitted,

Cameron F. Kerry BBO# 269660
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
One Financial Center
Boston, Massachusetts 02111
617/542-6000

William J. Rooney, Jr.
Global NAPs, Inc.
89 Access Road
Norwood, Massachusetts 02062
781/551-9707

Christopher W. Savage
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W.
Washington, District Of Columbia 20006
202/659-9750

Attorneys for Global NAPs, Inc.

Date: _____

LIT 1376621v2