COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Global NAPs, Inc.'s Adoption Of The Terms Of An Interconnection Agreement Between Global NAPs, Inc. And Verizon Rhode Island Pursuant To The BA/GTE Merger Conditions	DTE 02-21

REPLY COMMENTS OF GLOBAL NAPS, INC.

The comments of Verizon Massachusetts ("Verizon") in this docket[1] make plain Verizon's wish to undo Section 5.7.2.3 of its Rhode Island agreement with Global NAPs, Inc. ("Global NAPs"). Verizon asks not only that the Department "clarify" Section 5.7.2.3 but also, not withstanding its promise to support adoption of the Rhode Island agreement without modification, explicitly asks the Department to "reject" it in its entirety.[2] Global NAPs submits these reply comments to respond to Verizon's arguments and demonstrate that Verizon is legally bound by the entire agreement.

BACKGROUND

The comments of Verizon and Global NAPs accord on the history of agreements and decisions that lead up to the present docket. The appended timeline summarizes this history (Attachment 1). It highlights that (1) when Verizon offered Paragraph 32 to obtain approval of its merger with GTE, the Rhode Island Public Utilities Commission ("RIPUC") already had issued its decision interpreting Section 5.7.2.3; (2) when Verizon agreed to adopt the Rhode Island agreement in Massachusetts, on November 15, 2000 effective July 24, 2000, the FCC's *Internet Traffic Order* had been vacated by the D. C.

[1] Comments of Verizon Massachusetts (May 6, 2002) ("*Verizon Comments*").

Circuit; (3) the latter dates precede the FCC's *Order on Remand* and its effective date; and (4) the Rhode Island agreement expired after the effective date of the *Order on Remand*, on October 1, 2001.

Consistent with this chronology, the parties also agree that this dispute does not involve intercarrier compensation either for the period up to July 24, 2000 (to which the DTE's *97-116-C*, *97-116-D*, and *97-116-E* orders apply) or the period from June 15, 2001 forward (to which the FCC's *Order on Remand* applies); but addresses only "a very narrow window of time" in between.[3] The Department has recognized that it can adjudicate payments of intercarrier compensation for ISP Traffic in this window. In *DTE 97-116-F*, the Department construed the *Order on Remand* as limiting it from establishing any compensation mechanism for ISP-bound traffic "for the period after the effective date of the Order on Remand …," but not from doing so "for 'first generation' agreements that have expired before June 14, 2001, or existing interconnection agreements that expire after the effective date of the Order on Remand."[4] The Rhode Island agreement is an existing agreement that has expired since then but that involves a compensation mechanism for the period prior to the effective date of the *Order on Remand*. Verizon does not argue otherwise.[5]

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[2] *Id.* at 15, 16.
[3] *See* Transcript of Public Hearing, D.T.E. 2-21 (May 16, 2002) ("*May 16 Tr.*") at p. 8, lines 16-23 (remarks of Cameron F. Kerry, counsel for Global NAPs); *Id.* at p. 20, lines 10-17 ("we're talking about a very narrow window of time …")(remarks of Keefe B. Clemons, counsel for Verizon).
[4] *DTE 97-116-F* at p. 17.
[5] Verizon could hardly do so given its undertaking that it "shall promptly file this letter agreement, along with the Rhode Island agreement, with the Massachusetts DTE." November 15, 2000 Letter Agreement at ¶ 5 (Exhibit H to Global NAPs initial comments). To hold that the agreement is an agreement after the effective date of the *Order on Remand* or otherwise disregard it because its expiration has passed would be to reward Verizon's delay in meeting this obligation.

COMMENTS

Verizon makes two principal arguments. First, Verizon asks the Department to construe the language of Section 5.7.2.3 agreeing that "[u]ntil resolution of this issue [whether ISP Traffic is Local Traffic or another scheme of compensation is required], BA agrees to pay GNAPs Reciprocal Compensation for ISP Traffic …." by finding in effect that "resolution of this issue" took place when the Department applied the FCC's *Internet Traffic Order* in *DTE 97-116-C*. Second, Verizon argues that if the Department interprets the Rhode Island agreement as requiring Verizon to pay reciprocal compensation for ISP Traffic after May 19, 1999, then the Department should find Section 5.7.2.3 violates public policy against "unqualified reciprocal compensation payments for ISP-bound traffic."[6]

Verizon has the heavy burden to demonstrate that the Rhode Island agreement is "not consistent with the public interest, convenience, and necessity"[7] notwithstanding the ability of carriers to enter into negotiated agreements "without regard to standards" in Section 252 (b) and (c);[8] the statutory "preference for negotiated interconnection agreements;"[9] the Department's repeated expressions of the same preference;[10] the policies of finality embodied in the collateral estoppel doctrine, of comity embodied in the Full Faith and Credit Clause, and of uniformity and certainty embodied in Paragraph 32; and Verizon's own undertaking to support adoption of the agreement. For the reasons demonstrated below and in Global NAPs' initial comments, Verizon cannot meet this burden.

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[6] *Verizon Comments* at 13
[7] 47 U.S.C. § 252 (e)(2).
[8] 47 U.S.C. § 252 (a)(1).
[9] *Iowa Utilities Board v. FCC*, 525 U.S. 366, 405 (Thomas, J., concurring in part and dissenting in part).

I. Verizon Is Precluded from Attacking The Existing Interpretation of Section 2.7.2.3.

The clause "[u]ntil resolution of this issue, BA agrees to pay GNAPs Reciprocal Compensation for ISP Traffic" (once again omitted in Verizon's quotation of Section 5.7.2.3)[11] unambiguously obligates Verizon to pay Global NAPs reciprocal compensation on the separately-identified class of "ISP Traffic" pending resolution of the issue whether such traffic can be treated as local. Verizon cannot point to ***any*** such provision in the contractual language the Department faced in *DTE 97-116*[12] and its progeny.

In Order No. 16056, *Complaint Of Global Naps, Inc. Against Bell Atlantic-Rhode Island Regarding Reciprocal Compensation*, Docket No. 2967, (R.I.P.U.C. Nov. 16, 1999)(*"Order No. 16056"*) (Attachment 2), the RIPUC ruled that the FCC's *Internet Traffic Order* had not resolved the issue because, notwithstanding its jurisdictional ruling, the FCC permitted parties and state commissions to treat ISP-bound traffic as local and continued a rulemaking on intercarrier compensation. The Rhode Island commission declared that the Rhode Island Agreement "clearly and unambiguously requires BA-RI to make reciprocal compensation payments to GNAPs pending the outcome of [the FCC's] Docket."[13] This order was in effect when Verizon agreed to Paragraph 32. Verizon never appealed this order, and has paid reciprocal compensation as provided until the FCC's *Order on Remand* took effect on June 14, 2001.

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[10] See discussion of *DTE 97-116-C* through *DTE 97-116-F* in Global NAPs' initial comments.
[11] *See Verizon Comments* at p. 3.
[12] *Complaint of WorldCom Technologies, Inc. (Successor In Interest To MFS Intelenet Service Of Massachusetts, 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 (1998) ("*DTE 97-116*").
[13] *Order No. 16056* at 5.

A. The Doctrine of Claim Preclusion Prevents Verizon from Relitigating The Rhode Island PUC's Interpretation.

Verizon argues, "[u]nfortunately, the Rhode Island Commission ultimately reached the erroneous conclusion" – in other words, the RIPUC got it wrong and the Department should set it right. This is an unvarnished collateral attack. Verizon is precluded from relitigating this issue by the doctrine of collateral estoppel, or claim preclusion. This doctrine makes a valid, final judgment conclusive on all parties and bars further litigation of all matters that were or could have been adjudicated in the earlier action. *E.g., Bagley v. Moxley*, 407 Mass. 633, 636-7 (1990). *Anderson v. Phoenix Investment Counsel of Boston, Inc*., 387 Mass. 444, 449 (1982).

The doctrine rests on considerations of fairness and efficient judicial administration, which dictate that an opposing party in a particular action, as well as the tribunal, is entitled to be free from continuing attempts to relitigate the same claim. *Bagley*, 407 Mass. at 638. In addition, by preventing inconsistent judgments, claim preclusion encourages reliance on adjudication. *Anderson*, 387 Mass. at 449. The doctrine applies to issues of law. *Id.* (important to avoid re-litigating questions of law or fact necessary to original judgment in the action); *Fidler v. E.M. Parker Co.*, 394 Mass. 534, 539 (1985)("fundamental principle … that 'a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit ...;'" *see also Keystone Supply Co. v. New England Power Co*., 109 F.3d 46, 51-52 (1st Cir. 1997)(giving preclusive effect to decision on arbitrability of contract).

Three elements are required for claim preclusion: (1) identity or privity of the parties to the present and prior actions; (2) identity of the causes of action are the same;

and (3) a prior final judgment on the merits. *Gloucester Marine Rwys. Corp. v. Charles Parisi, Inc.*, 36 Mass. App. Ct. 386, 390 (1994); *Franklin v. North Weymouth Coop. Bank*, 283 Mass. 275, 280 (1933). All three elements are present here. Precisely the same issue[14] was litigated fully by precisely the same parties[15] in an adversary proceeding before the RIPUC,[16] which resolved the issue on the merits.[17] Verizon did not appeal this order (otherwise "seek appropriate court review" as provided in Section 5.7.2.3). Accordingly, it is a final judgment between the parties. As such, it has preclusive effect. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it on which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966); *accord*, *Stowe v. Bologna*, 415 Mass. 20, 22 (1993).

B. The Rhode Island PUC Decision Is Entitled to Full Faith And Credit.

The bar against Verizon's attempt to relitigate the interpretation of Section 5.7.2.3 takes on additional weight where it attacks the decision of a tribunal in another sovereign state. The Full Faith and Credit Clause of the United States Constitution requires that full faith and credit be given "to the public Acts, Records, and judicial proceedings of every

[14] Verizon made exactly the same contention that it makes here, that the FCC's *Internet Traffic Order* resolved the issue whether ISP Traffic is Local Traffic for purposes of Section 5.7.2.3 *Order No. 16056* at 3.

[15] The parties were Global NAPs, Inc. and "Bell-Atlantic-Rhode Island." In Order No. 16921, *Complaint of Global NAPs, Inc*., Docket No, 2967 at p. 4 (R.I.P.U.C. Jan. 29, 2002) ("*Order No. 16921")* (Exhibit F to Global NAPs' initial comments), involving among things Verizon's offset of payments in Rhode Island by amounts Verizon claimed in Massachusetts, the RIPUC specifically found, at Verizon's urging, that Verizon New England, Inc. operates in both states, using different d/b/a's, and that Global NAPs was the same legal entity in both states.

[16] The RIPUC reached its decision after briefing by Verizon and Global NAPs, and based upon an agreement that the Rhode Island Commission could render a decision based on the parties written submissions. *Order No. 16056* at 2.

other State." U.S. Const. Art. IV, § 1. *See* 28 U.S.C. § 1738 (authenticated acts, records, and judicial proceedings "shall have the same full faith and credit in every court within the United States … as they have in the courts of such State … from which they are taken"). "The notions of comity demanded by our federal system require us to concede that the courts of our sister States even when they reach a different decision than we would have, are endowed with an equal measure of wisdom and sympathy." *Delk v. Gonzalez*, 421 Mass. 525, 530 (1995). Comity requires the same proper respect for the RIPUC's decision, even if the Department might reach a different result. *Cf. Zenghi v. Village of Old Brookville*, 752 F.2d 42, 46 (2d Cir. 1985)(giving full faith and credit to state administrative decision and quoting *Utah Construction, supra*).

C. Collateral Attack On Rhode Island PUC Interpretation Is Contrary To Paragraph 32 of The Merger Order.

As the *GTE Merger Order*[18] explains, the "Most-Favored Nation" arrangements included as part of the merger conditions are designed "to facilitate market entry throughout Bell Atlantic/GTE's region as well as the spread of best practices (as that term is understood by Bell Atlantic/GTE's competitors)."[19] This policy of certainty and uniformity would be thwarted if Verizon can collaterally challenge a contract construction already fully litigated and resolved in the state of initial filing.[20]

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[17] The RIPUC entered an order that, "the issue of whether ISP traffic constitutes 'local traffic' subject to reciprocal compensation has not been resolved according to the terms of Section 5.7.2.3 of the parties' Interconnection Agreement." *Order No. 16056* at 5.

[18] *See* Memorandum Opinion and Order, *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032, (2000) ("*GTE Merger Order*").

[19] *GTE Merger Order* ¶ 300.

[20] This does not mean that all interpretation of the Rhode Island agreement adopted in Massachusetts or elsewhere is committed to the Rhode Island PUC. The DTE, or other state commissions, are free to decide issues that are not already subject to preclusive interpretations in another state. The Department's decisions in turn could become preclusive elsewhere if they meet the elements of preclusion.

D. The Issue of The Status of ISP-bound Traffic for Purposes of Reciprocal Compe nsation Was And Is Unresolved.

Even if Verizon can re-open the interpretation of Section 5.7.2.3, there is no basis for concluding that "resolution of this issue" was reached – certainly not as of either the dates of adoption of the Rhode Island agreement (done November 15, 2000, effective July 24, 2000) or as of the present. When the agreement was adopted in Massachusetts, the *Internet Traffic Order* had been vacated and remanded the previous February 29. *Bell Atlantic Telephone Company vs. FCC*, 206 F. 3d 1 (D.C. Cir. 2000). To "vacate... means 'to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.'" *Action on Smoking And Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983)(per curium)(citations omitted). Thus, whether ISP-bound traffic is subject to reciprocal compensation was quite unresolved. Indeed, in the Department order closest in time to the adoption of the Rhode Island agreement, D.T.E. *97-116-E* (released July 11, 2000), the Department acknowledged that the vacatur and remand of the *Internet Traffic Order* left the status of ISP-bound traffic unresolved and chose to await further action in the FCC's docket specifically on the basis of this undetermined status. *DTE 97-116-E* at 12, 15.

It is back to the drawing board again in the wake of *WorldCom, Inc. v. FCC*, __ F.3d __, No. 01-1218 (D.C.Cir. May 3, 2002). In rejecting the FCC's conclusion that Section 251(g) of the Telecommunications Act provided a basis to limit the application of reciprocal compensation requirements of Section 251 (b)(5) to ISP Traffic, the D.C. Circuit remanded to the FCC once again. In the *Order on Remand* the FCC acknowledged that "[u]nless subject to further limitation, section 252(b)(5) requires

reciprocal compensation for all telecommunications traffic." *Remand Order* ¶ 32. Absent the limitation of Section 251(g), what basis is there to exclude ISP Traffic from "all telecommunications traffic?" At a minimum, in any event, the status of ISP traffic is once again unresolved. The Hearing Officer's question at the public hearing whether the Department is being asked to "clarify this provision according to the current regulatory conditions, or the conditions that existed on July 24, 2000"[21] therefore is moot because, at either time, the issue on which Section 5.7.2.3 turns was unresolved, and remains unresolved.

II. Payment of Reciprocal Compensation on ISP-Bound Traffic Under The Rhode Island Agreement Is Consistent with Department Policy.

In its effort to escape the Rhode Island agreement, Verizon strains the Department's prior rulings on reciprocal compensation for ISP Traffic. Global NAPs' original comments canvass at length the Department's numerous statements to the effect that intercarrier compensation for ISP-bound traffic should be left entirely to negotiation and free from government mandate. These make it clear that nothing in Department policy precludes the payment of intercarrier compensation on ISP traffic, that the Department encourages parties to address compensation for ISP-bound traffic through negotiated agreements, and that the Department will enforce such agreements.

Faced with this clear precedent, Verizon acknowledges that payment of reciprocal compensation on ISP-bound traffic "per se" does not violate Department policy, but argues payment of reciprocal compensation for ISP-bound traffic under Section 5.7.2.3

[21] *May 16 Tr.* at p. 19, lines 3-6.

represents "unqualified" payment contrary to public policy.[22] This conclusory assertion does not stand up to analysis.

First, when the Department used the term "unqualified payment of reciprocal compensation" in DTE 97-116-C, it was addressing a governmental mandate. *See* DTE 97-116-C at 32 n. 34. The language of Section 5.7.2.3 is not the product of such a new date but of an agreement, not just in Rhode Island, but also in six other states. It became available in Massachusetts by Verizon's voluntary offering of Paragraph 32.

Second, the payments Verizon agreed to in the Rhode Island agreement are no more "unqualified" than those it agreed to with Level 3 and PaeTec. There is a fixed, and defined term pursuant to the parties' November 15, 2000 Letter Agreement.[23] It begins on July 24, 2000 and expires October 1, 2001, with payments of reciprocal compensation controlled by the FCC's Order *on Remand* since June 14, 2001[24] – a "very narrow window" of approximately eleven months. There is nothing "unqualified" about an 11-month term.

There also is nothing "unqualified" about the rate. It is a reciprocal rate fixed by the agreement at $.008/minute.[25] In the end, the only distinction Verizon can draw between this agreement and the PaeTec and Level 3 agreements is that these set lower rates for ISP-bound traffic.[26] But the rate in the Rhode Island agreement is one agreed on in New York, Rhode Island, New Hampshire (until the parties subsequently agreed upon a different rate), and Massachusetts (under the parties original interconnection

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[22] *Verizon's Comments* at 16.
[23] Exhibit B to Global NAPs' initial comments.
[24] *See Order Number 16921* at 8.
[25] *Rhode Island Agreement*, Exhibit A to Global NAPs' initial comments, at 2 ("Blended Rate for Reciprocal Compensation Traffic delivered to a BA-RI IP or to a GNAPs-IP... $0.008/minutes of use (mou)")
[26] *May 16 Tr.* at p. 16, lines 19-21 (remarks of Keefe B. Clemons, counsel for Verizon).

agreement). It matches the rate Verizon charges for traffic it terminates. See Attachment 3, a copy of a portion of Verizon's April 22, 2002 invoice to Global NAPs applying the $.008/minute rate as its tandem rate. The FCC found in the *Order on Remand*, "[n]or does the record demonstrate that CLECs and ILECs incur different costs in delivering traffic that would justify disparate treatment of ISP-bound traffic and local voice traffic under section 252(b)(5)."[27] The Department found that reciprocal compensation is in the public interest as a general matter. *Consolidated Arbitrations*, D.P.U. 96-73/74, 96-75, 96-80/81, 96-85, 96-94, Phase 4 at 66-67 (1996). Verizon offers no principle or threshold to distinguish the Level 3/ PaeTec rates from those its asserts reach a level that is against public policy.

The FCC's recent *Starpower*[28] decision refutes rather than supports Verizon's arguments. In *Starpower*, as in the more recent *Cox Virginia* case,[29] the FCC decided whether reciprocal compensation was payable on ISP-bound traffic based on the agreements at issue, not on the basis of generalizations about public policy notwithstanding its classification of ISP-bound traffic and the policy concerns raised in its *Order on Remand*. Examining the terms of the agreements, the FCC found reciprocal compensation payable based on some specific terms and not on others. None contained language that specifically addressed ISP Traffic, as in Section 5.7.2.3. Payment of reciprocal compensation on ISP-bound traffic is quite consistent with public policy where agreements call for it.

[27] *Order on Remand* ¶92.
[28] *Starpower Communications, LLC v. Verizon South, Inc.*, Nos. EB-00-MD-19-20, FCC 02-105 (rel. Apr. 8, 2002).
[29] *Cox Virginia Telecom, Inc. v. Verizon South, Inc.*, No. EB-01-MD-006, FCC 02-133 (rel. May 10, 2002).

Enforcement of an express agreement to pay for termination of ISP-traffic for a limited time consistent with a sister commission's binding interpretation is not against public policy. At the public hearing, Verizon asserted that Section 5.7.2.3 allows payments for ISP-bound traffic "that the Department has recognized as problematic and contrary to public policy." Problematic perhaps, but not against public policy. Verizon accuses Global NAPs of "shopping for an agreement …,"[30] but the Act permits a CLEC to "pick and choose" and the *GTE Merger Order* expands that ability across state borders. It is Verizon's actions that the Department should find problematic and against public policy – dishonoring its agreement to submit the Rhode Island agreement "promptly" and to support its adoption without modification; undermining the effect of Paragraph 32. Verizon wants to have its cake and eat it too – to gain approval of its merger, but avoid the consequences of Paragraph 32. But "[i]t would not be the Department's role to save contracting parties from later-regretted commercial judgment."[31]

CONCLUSION

For the reasons set forth in the Global NAPs' initial comments and above, Verizon does not establish a basis to reject the Rhode Island agreement under the standards of 27 U.S.C. § 252 (e)(2). The Rhode Island Agreement should be approved and the Department should not grant declaratory relief to Verizon.

[30] *May 16 Tr.* at p. 20, lines 4-6 (remarks of Keefe B. Clemons, counsel for Verizon).
[31] *DTE 97-116-C* at 13 n. 29.

Respectfully submitted,

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