COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Global NAP, Inc.'s Adoption of the Interconnection Agreement Between Global NAPs, Inc. and Verizon Rhode Island Pursuant to the BA/GTE Merger Conditions	)	D.T.E. 02-21

REPLY COMMENTS OF VERIZON MASSACHUSETTS

Verizon Massachusetts ("Verizon MA") submits this reply to the Comments of Global NAPs, Inc. ("GNAPs") filed with the Department on May 6, 2002.[1]

I. The Construction of the Language of Section 5.7.2.3 Will Determine Whether the Rhode Island Agreement Violates the Department's Public Policy Against Unqualified Payments of Reciprocal Compensation

GNAPs mischaracterizes the relief Verizon MA seeks in this proceeding when it suggests that Verizon MA is asking the Department to alter the terms of the Rhode Island Agreement in its review under 252(e)(2) of the Telecommunications Act of 1996 ("Act"). Verizon MA has not generally opposed the adoption of the Rhode Island Agreement in Massachusetts. Instead, Verizon MA has requested that, in connection with its 252(e) review of the Rhode Island Agreement, that the Department interpret the language of section 5.7.2.3 in the context of its reciprocal compensation decisions and clarify that the language does not give rise to any obligation by the parties to pay reciprocal compensation for ISP-bound traffic in Massachusetts after May 19, 1999 – the date of the Department's decision in D.T.E. 97-116-C. Verizon Comments, at 1-2, 16-17. A firm

[1] At the bottom of page 11 of Verizon MA's comments filed with the Department on May 6, 2002, there is a reference to the "UNE Remand Order." The correct reference is the "Order on Remand."

understanding of how section 5.7.2.3 will be interpreted in Massachusetts is essential because the meaning and effect of that language will have a direct bearing on the Department's ability to determine whether the adoption of section 5.7.2.3 violates the Department's public policy against unqualified, uneconomic reciprocal compensation payments. If the Department concludes that section 5.7.2.3 does not entitle GNAPs to reciprocal compensation payments for ISP-bound traffic, it would avoid the public policy issues that would arise from a contrary ruling (*i.e.*, that section 5.7.2.3 does entitle parties to such payments after May 19, 1999). Only if the Department determines that the adoption of section 5.7.2.3 of the Rhode Island Agreement would otherwise entitle parties to receive reciprocal compensation for ISP-bound traffic after May 19, 1999, does Verizon MA propose that the Department deny approval of the Rhode Island Agreement if it includes section 5.7.2.3, since its adoption would violate the Department's public policy against unqualified reciprocal compensation payments. For the reasons set forth in Verizon MA's initial comments, the Department should not reach the conclusion that the Rhode Island Agreement provides for reciprocal compensation payments for ISP-bound traffic in Massachusetts after May 19, 1999.

II. Verizon MA Is Not Barred From Opposing the Adoption of Terms That Violate Massachusetts' Public Policy and Are Contrary to the Public Interest

Contrary to GNAPs' assertions, Verizon MA is not barred from opposing the adoption of terms and conditions of an interconnection agreement that would violate the public policy or the public interest of the state into which it is adopted. There is no basis for GNAPs' argument that the Rhode Island Commission's interpretation of the Rhode Island agreement is binding or *res judicata* in Massachusetts. *See* Tr. 5/16/02, at 78. The

Rhode Island Commission's interpretation of section 5.7.2.3 of the Rhode Island Agreement is only binding in Rhode Island. As the FCC recognized in its February 28, 2002 Order, once the agreement is presented to another state commission for adoption, it becomes subject to the jurisdiction of that commission in a *de novo* proceeding, and that commission alone has the right to interpret any provision of that agreement as it is to be applied in that state. *See* 47 U.S.C. § 252(e)(1) (requiring that agreement be submitted to the commission in the state where it is to become effective and providing that the commission must approve or disapprove the agreements); February 28, 2002 Order, at ¶ 19-20. If state commission decisions interpreting interconnection agreements were binding in other states in which those agreements are subsequently adopted, the second state could be bound to another state's decision that is unsound or in conflict with a clear public policy or decision rendered by the second state. Such a result would essentially render section 252(e) of the Act meaningless.

In addition, paragraph 32 of the Merger Order expressly provides that only provisions that are consistent with the laws and policies in the state of adoption are eligible for adoption. It further provides that disputes between the parties regarding adoption of any provision of an interconnection agreement is to be resolved "by the relevant state commission." Finally, paragraph 4 of the November 15, 2000 letter agreement executed by the parties after the Merger Order, expressly provides that:

> Nothing in this letter agreement shall be construed as an agreement by the Parties as to the proper interpretation of any particular provision, term or condition of the Rhode Island Agreement. Nothing in this letter agreement shall be construed as a waiver by either party of any claim or defense it may have as to the proper interpretation of any particular provision, term or condition of the Rhode Island Agreement in any appropriate forum.

In summary, there is simply no merit to GNAPs' claims that Verizon MA has "bound itself" or is any way prohibited from pursuing the relief it has sought in this proceeding.

Verizon MA's request that the Department interpret the Rhode Island Agreement now and deny its approval if it is found to violate public policy is not only consistent with Verizon MA's contractual obligations and merger commitments, it is reasonable and consistent with administrative efficiency and economy. In contrast, GNAPs' suggestion that the Department simply approve the adoption of the Rhode Island Agreement without issuing the requested clarification makes no sense in the face of the obvious dispute between the parties regarding the interpretation of section 5.7.2.3.

III. The Paetec and Level 3 Agreements Are Materially Different From the Rhode Island Agreement

GNAPs suggests in its comments that the Rhode Island Agreement is analogous to the voluntary agreements entered into between Verizon and Paetec and Level 3, which provide for compensation for ISP-bound traffic and were approved by the Department, and argues that if the Department were to reject the Rhode Island Agreement that it would violate principles of "reasoned consistency." *See* GNAPs Comments, at 11. There is no merit to this argument. There are material differences between the Paetec and Level 3 Agreements, and the Rhode Island Agreement. First, the Rhode Island Agreement was originally entered into (in Rhode Island) in October 1998, well in advance of the Department's May 19, 1999, decision establishing that "local traffic" in interconnection agreements does not include ISP-bound traffic and its policy with respect to compensation for ISP-bound traffic. As a result, the reciprocal compensation rates contained in the Rhode Island Agreement (which are intended in any event to apply only to traffic that is local and non-interstate) are extremely high when compared to the rates

for Compensable Internet Traffic contained in the Paetec and Level 3 Agreements.[2] The provisions of the Paetec and Level 3 Agreements addressing compensation for ISP-bound traffic were entered into after the Department's May 19, 1999 Order, and respond to the Department's directive that parties attempt to negotiate compensation terms for such traffic consistent with the policies established by the Department in that order and to the FCC's finding that ISP-bound traffic is not local traffic and not eligible for reciprocal compensation under the Act. *See, e.g.*, Letter and accompanying Interconnection Agreement Amendment No. 1 Between Bell Atlantic-Massachusetts and Paetec Communications (filed November 8, 1999) (attached Exhibit 1). In sharp contrast, if the Rhode Island Agreement were construed to provide for reciprocal compensation on ISP-bound traffic in Massachusetts, it would permit precisely the type of unqualified reciprocal compensation payments that the Department concluded violated public policy and economic efficiency.[3] Therefore, rejecting the Rhode Island Agreement on grounds that it violates Massachusetts public policy would not be discriminatory or inconsistent with the Department's approval of the Level 3 and Paetec Agreements and would be consistent with the public interest.

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[2] Under the Rhode Island Agreement, ISP-bound traffic would be subject to a rate of .008 per minute of use ("mou") if section 5.7.2.3 were construed to require reciprocal compensation payments for ISP-bound traffic. From June 30, 2000 until June 16, 2001, the rate applicable to ISP-bound traffic under the Paetec and Level 3 Agreements was .0015 per mou for traffic falling within a 10 to 1 ratio. Traffic out of balance by more than 10 to 1 was compensable at a rate of .0012 per mou.

[3] As it did with other carriers, Verizon MA offered to negotiate with GNAPs following the Department's D.T.E. 97-116-C order, as directed by the Department. Unlike every other carrier with whom Verizon MA negotiated, GNAPs initially refused Verizon MA's simple request to treat those settlement discussions as confidential settlement discussions. *See* Letter from Keefe B. Clemons to Quincy Vale, Re: D.T.E. 97-116-C – Complaint of MCI WorldCom/Status of Negotiations (August 5, 1999). Ultimately, GNAPs and Verizon MA were unable to reach a negotiated agreement. Instead, GNAPs has continued to litigate this issue before the Department, FCC, and the Federal Court.

IV. Conclusion

For all of the forgoing reasons, and those set forth in Verizon MA's May 6, 2002 Comments, Verizon MA respectfully requests that the Department issue a decision clarifying that section 5.7.2.3 of the Rhode Island Agreement shall not be construed to require that Verizon MA must pay GNAPs reciprocal compensation for ISP-bound traffic in Massachusetts after May 19, 1999 and that Verizon MA's sole obligation to GNAPs under the adopted Rhode Island Agreement is to pay GNAPs reciprocal compensation in accordance with the Department's reciprocal compensation decisions – Order Nos. D.T.E. 97-116-C, D, E, and F. Alternatively, Verizon MA requests that the Department reject section 5.7.2.3 on grounds that its adoption in Massachusetts is contrary to public policy and inconsistent with the public interest.

Respectfully submitted,

VERIZON NEW ENGLAND INC.,
d/b/a VERIZON MASSACHUSETTS

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