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

COMMENTS OF VERIZON MASSACHUSETTS

Verizon Massachusetts ("Verizon MA") hereby responds to the Department's request for comments regarding GNAPs' proposed adoption in Massachusetts of an interconnection agreement entered into between GNAPs and Verizon Rhode Island on or about October 1, 1998 ("Rhode Island Agreement"), pursuant to the Bell Atlantic/GTE Merger Order.[1] *See Global NAPs, Inc.'s Adoption of the Terms of the Interconnection Agreement Between Global NAPs, Inc. and Verizon Rhode Island Pursuant to the BA/GTE Merger Conditions,* Legal Notice, D.T.E. 02-21 (April 25, 2002).[2]

I. INTRODUCTION

Verizon MA respectfully requests that the Department issue a decision clarifying that section 5.7.2.3 of the Rhode Island Agreement does not require Verizon MA to pay GNAPs 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,[3] 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 Telecommunications Act of 1996 ("Act"), FCC Orders interpreting the Act, and the Department's

[1] *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*, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14171-75, ¶¶ 300-05, 14310-11, App. D at ¶ 32 (June 16, 2000) ("Merger Order").

[2] Verizon MA filed the Rhode Island Agreement with the Department in compliance with the FCC's February 28, 2002 decision in *Global NAPs, Inc. v. Verizon Communications, Verizon New England, Inc. and Verizon Virginia, Inc.*, Memorandum Opinion and Order, File No. EB-01-MD-010 (rel. February 28, 2002) ("February 28, 2002 Order").

reciprocal compensation decisions in D.T.E. 97-116-C, D, E, and F. *See* Verizon MA's March 26, 2002 Letter, at 4. As discussed below, allowing GNAPs to obtain reciprocal compensation for ISP-bound traffic in Massachusetts under the Rhode Island Agreement would not only be inconsistent with the terms and conditions of that agreement, but also contrary to the Department's public policy against the "unqualified payment of reciprocal compensation for ISP-bound traffic" and the public interest. *See* May 1999 Order, at 32-40.

GNAPs' attempt to adopt the Rhode Island Agreement is a transparent attempt to circumvent the Department's reciprocal compensation rulings that expressly held that Verizon MA was not obligated to pay reciprocal compensation to GNAPs under their existing (now expired) interconnection agreement, because the definition of "local traffic" contained in both MCI WorldCom's and GNAPs' interconnection agreements with Verizon did not include ISP-bound traffic. *See* May 1999 Order, at 24-25; D.T.E. 97-116-D/99-39 (February 25, 2000) ("February 2000 Order"), at 20-21; 97-116-F (August 29, 2001) ("August 2001 Order"), at 10-15. By adopting the Rhode Island Agreement – in particular, section 5.7.2.3 of that agreement – GNAPs seeks to secure reciprocal compensation payments in Massachusetts that it is not entitled to. Moreover, GNAPs seeks to secure in Massachusetts precisely the type of unqualified and uneconomic reciprocal compensation payments for ISP-bound traffic that the Department has rejected as a matter of public policy.

II. BACKGROUND

A. Rhode Island Agreement and the Reciprocal Compensation Dispute.

On or about October 1, 1998, Verizon Rhode Island (then, Bell Atlantic-Rhode Island) and GNAPs (collectively referred to as "the Parties") executed an interconnection agreement – the Rhode Island Agreement – that provided for reciprocal compensation for the termination of "Local

[3] *Complaint of MCI WorldCom, Inc. Against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for Breach of Interconnection Terms Entered Into Under Sections 251 and 252 of the Telecommunications Act of 1996*, D.T.E. 97-116-C (May 19, 1999) ("May 1999 Order").

Traffic."[4] The Rhode Island Agreement defined "Reciprocal Compensation" as that term is "Described in the Act." *See* Rhode Island Agreement at §§1.9, 1.66. *See also* §§ 5.7.2, 5.7.4, 5.7.6.

The Parties expressly disagreed on whether traffic "that originates on one Party's network and is transmitted to an Internet Service Provider…connected to the other Party's network…constitutes Local Traffic" as defined in the Interconnection Agreement." *See id.* at §5.7.2.3. However, the Rhode Island Agreement affirms that the Parties intended to provide reciprocal compensation to each other only for Local Traffic and *only to the extent that such compensation is provided for under the Act. Id.* To deal with their dispute, the Parties agreed as follows:

> **The issue of whether such traffic constitutes Local Traffic on which reciprocal compensation mush (sic) be paid pursuant to the 1996 Act is presently before the FCC** in CCB/CPD 97-30 and may be before a court of competent jurisdiction. **The Parties agree that the decision of the FCC in that proceeding, or as such court, shall determine whether such traffic is Local Traffic (as defined herein) and the charges to be assessed in connection with ISP traffic.** If the FCC or such court determines that ISP Traffic is Local Traffic, as defined herein, or otherwise determines that ISP Traffic is subject to reciprocal compensation, it shall be compensated as Local Traffic under this Agreement unless another compensation scheme is required under such FCC or court determination. Until resolution of this issue [*i.e.*, the issue of whether traffic that terminates to ISPs is Local Traffic under the Act], [Verizon] agrees to pay GNAPS Reciprocal Compensation for ISP traffic (without conceding that ISP Traffic constitutes Local Traffic….

See Rhode Island Agreement at §5.7.2.3 (emphasis added). Thus, the Parties expressly agreed that resolution by the FCC of the jurisdictional nature of ISP-bound traffic would determine whether such traffic is "Local Traffic" under the terms of the Rhode Island Agreement. Verizon Rhode Island

[4] "Local Traffic" is defined in the Rhode Island Agreement as "traffic that is originated by a Customer of one party on that Party's network and terminates to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ("EAS") area, as defined in [Verizon]'s effective customer tariffs…." Rhode Island Agreement at §1.50. The Parties to the Rhode Island Agreement expressly agreed that "[t]he designation of Traffic as IntraLATA or non-IntraLATA for purposes of compensation shall be based on the actual originating and terminating points of the complete end-to-end call, regardless of the entities involved in carrying any segment of the call." *Id.* at §5.7.6.

agreed to pay GNAPs reciprocal compensation for ISP-bound traffic *only until the FCC resolved this issue.*

B. The FCC's *Internet Traffic Order*.

On February 26, 1999, in its *Internet Traffic Order*[5] the FCC held that traffic to ISPs is non-local interstate traffic and, therefore, is not local traffic eligible for reciprocal compensation under the Act and reasserted its long-standing view that the jurisdictional nature of telecommunications traffic is determined by the end-to-end points of the call. *See Internet Traffic Order*, at 18 n.87. The FCC ruled:

> We conclude in this Declaratory Ruling … that ISP-bound traffic is non-local interstate traffic. Thus the reciprocal compensation requirements of section 251(b)(5) of the Act and Section 51, Subpart H (Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic) of the Commission's rules do not govern inter-carrier compensation for this traffic.

The FCC found that Internet-bound calls are non-local because they "do not terminate at the ISP's local server, as CLECs and ISPs contended, but continue to the ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state." *Internet Traffic Order*, at ¶ 12. The FCC's *Internet Traffic Order* established that there is no severable "local" component of an Internet call and that this traffic is now, and always has been, non-local interstate traffic. In its ruling, the FCC rejected claims by CLECs and ISPs that a call associated with Internet traffic ends at the ISP's local premises because the end user dials a "local" number on the public switched network. On the contrary, the FCC found that "this argument is inconsistent with Commission precedent … holding that communications should be analyzed on an end-to-end basis, rather than by breaking the transmission into component parts." *Id.* at 15. In short, calls to ISPs over the public network are

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689 (1999) ("*Internet Traffic Order"), vacated and remanded, Bell Atlantic Telephone Companies v. Federal Communications Commission*, 206 F.3d 1, 3 (D.C. Cir. 2000) ("D.C. Circuit Decision").

interstate communications because they do not terminate at the ISP but, instead, continue as a single transmission to the remote website accessed by the end user.

C. Rhode Island Dispute.

Despite the FCC's clear resolution of the issue of whether ISP-bound traffic is "local traffic" eligible for reciprocal compensation under the terms of the Rhode Island Agreement, when Verizon Rhode Island attempted to stop paying reciprocal compensation to GNAPs for ISP-bound traffic pursuant to section 5.7.2.3 of the Rhode Island Agreement, GNAPs filed a petition with the Rhode Island Public Utilities Commission ("Rhode Island Commission") in an effort to force Verizon Rhode Island to continue such payments. Verizon Rhode Island vigorously opposed GNAPs' attempts to extend Verizon Rhode Island's payment obligations in Rhode Island beyond what was contemplated by the parties in the Rhode Island Agreement. Unfortunately, the Rhode Island Commission ultimately reached the erroneous conclusion that the FCC decision did not decide the issue as required by section 5.7.2.3 of the Rhode Island Agreement and required Verizon to continue making reciprocal compensation payments to GNAPs pursuant to its prior decision requiring the payment of reciprocal compensation for ISP-bound traffic in Rhode Island. *See In re: Complaint of Global NAPs Inc. Against Bell Atlantic-Rhode Island Regarding Reciprocal Compensation,* Report and Order, Docket No. 2967 (November 16, 1999), at 4-6.[6]

D. The Department Reconsiders Its Prior Decision In Light of the FCC Ruling.

In sharp contrast to the action taken by the Rhode Island Commission, following the release of the FCC's *Internet Traffic Order,* and in response to a motion for modification filed by Verizon

[6] The prior decision referenced by the Rhode Island Commission in its November 16, 1999 decision, Order No. 15915 (July 21, 1999), was subsequently *vacated* following an appeal by Verizon. *New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Rhode Island v. Conversent Communications, et al.*, C.A. No. 99-603-L, Opinion and Order (D. Mass. Nov. 8, 2001). In a more recent order, *In re: Complaint of Global NAPs Inc. Against Bell Atlantic-Rhode Island Regarding Reciprocal Compensation*, Report and Order, Docket No. 2967 (February 20, 2002), the Rhode Island Commission held that Verizon Rhode Island is not required to pay GNAPs reciprocal compensation after June 14, 2000, the effective date of the FCC's Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; *Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*Order on Remand*").

MA, the Department reexamined its prior decision in *MCI WorldCom Technologies, Inc.*, D.T.E. 97-116 (October 21, 1998) ("October 1998 Order").[7] *See* May 1999 Order. In its May 1999 Order, the Department expressly acknowledged that the FCC's clarification in its *Internet Traffic Order* of its longstanding policy of determining the jurisdictional status of telecommunications traffic based on the end-to-end points of that traffic "could not be squared" with the Department's October 1998 Order and held that as of February 26, 1999, carriers in Massachusetts were no longer required to pay reciprocal compensation for ISP-bound traffic in Massachusetts *on the grounds that it is local traffic*. May 1999 Order, at 28. Furthermore, in the absence of a precise mechanism for separating ISP-bound traffic from other traffic, the Department adopted a 2:1 ratio for purposes of determining whether traffic between parties was local (non-ISP-bound) traffic eligible for reciprocal compensation.[8]

At the same time, the Department strongly encouraged the parties prospectively to pursue the voluntary negotiation process set for in section 252 of the Act to address the issue of compensation for ISP-bound traffic. *Id.* at 30. To provide some framework in which these section 252 negotiations would take place, the Department issued it views regarding underlying policy and economic issues associated with the payment of reciprocal compensation. As a matter of public policy, the Department held that:

> The unqualified payment of reciprocal compensation for ISP-bound traffic, implicit in our October Order's construing of the 1996 Act, does not promote real competition in telecommunications. Rather, it enriches competitive local exchange carriers, Internet service providers, and Internet users at the expense

[7] In the October 1998 Order, the Department had ruled that ISP-bound traffic was "local traffic" under the terms of the interconnection agreements. *Id.* at 12, 14. The Department's decision was based solely on its conclusion (which at the time it believed was consistent with federal law) that ISP-bound traffic is functionally two separate services: (1) a local call to an ISP, and (2) an information service provided by the ISP when the ISP connects the caller to the Internet. *Id.* at 11, 12-13. *See also* May 1999 Order, at 1-2, 23 ("The Department based its [October 1998 Order] on the express *and exclusive* premise that "[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."(emphasis in original) (also known as the "two call theory").

[8] In adopting this presumption the Department expressed its view that the presumption – which Verizon continues to observe – "is generous to the point of likely including some ISP-bound traffic." May 1999 Order, at 28 n.31.

> of telephone customers or shareholders. This done under the guise of what purports to be competition, but is really just an unintended arbitrage opportunity derived from regulations that were designed to promote competition.[] A loophole, in a word.

May 1999 Order, at 32 (footnote omitted). The Department went on to recognize that such unqualified reciprocal compensation payments are inconsistent with the goal of real competition – economic efficiency. *See id.* at 33. The Department pointed out that by means of its May 1999 Order, it was taking steps to correct the "regulatory distortion" posed by having previously permitted reciprocal compensation payments for ISP-bound traffic:

> Where an increase in income results from regulatory anomaly, rather than from greater competitive efficiency in the marketplace, a regulator is well advise[d] to take his thumb off the scale. We do so today. Arguing that we should not correct the distortion created by reciprocal compensation payments because they benefit ISPs and their customers is much like saying that one should not encourage people to quit smoking, and so avoid adverse personal and public health consequences, merely because some members of society make a living growing tobacco. Decisions like this should be driven by concerns for overall societal welfare – and not by concern for preserving the hothouse environment of an artificial market niche.

Id. at 37. In response to CLEC claims that the FCC's *Internet Traffic Order* did not require the Department to modify its October 1998 decision the Department stated:

> Some commentators have argued that (sic) Internet Traffic Order does not require us to modify our October decision. We disagree for the reasons already stated, but that is not the point. The real question for us is *not* whether we should cast about for some reason, any reason, to sustain that questionable result.[] On the contrary, we view the FCC's decision as "liberating," in that it gives us the discretion to do what we would have liked to have been able to do back in October-namely, to get the parties to the interconnection agreement to set rationally based, economic bounds on reciprocal compensation payments for ISP-bound traffic. The negotiations we have directed should be able to accomplish just that.

Id. at 39 (citations omitted, emphasis in original).

E. The First D.C. Circuit Decision.

In March 2000, the D.C. Circuit vacated and remanded the *Internet Traffic Order. See* D.C. Circuit Decision. The Court did so, however, *not* because the FCC's decision was substantively

incorrect, but rather for lack of sufficient explanation. *Id.* at 7. In taking this action, the D.C. Circuit expressly stated that it was not addressing the merits of the complaint. *Id.* The Department has held that the D.C. Circuit Decision did not require the Department to set aside its May 1999 Order. D.T.E. 97-116-E (July 11, 2000) (July 2000 Order), at 14.

F. Order on Remand and Subsequent Department Determination.

Subsequently in its *Order on Remand*,[9] the FCC reaffirmed all of the key points of the *Internet Traffic Order* on which the Department relied in concluding that Internet-bound traffic is interstate traffic that is not "local traffic" subject to reciprocal compensation under the parties' agreements. Moreover, the FCC expressly agreed with the Department's conclusions about the profoundly anti-competitive consequences of reciprocal compensation for Internet-bound traffic. *See id.* at § 21. The FCC also expressly rejected WorldCom's argument – an attempt to resurrect the "two-call" theory – that only the specialized services that ISPs use are "information access," while the "basic telecommunications links" that subscribers use to connect to ISPs in order to access the Internet are not. *Id.* at ¶ 44 n.82. In sum, the *Order on Remand* reconfirmed that, for purposes of section 251(b)(5), Internet-bound traffic is a single communication that travels outside of a local exchange area, for which reciprocal compensation is not required. In addition, the FCC reconfirmed that, under its traditional end-to-end analysis, Internet-bound traffic is jurisdictionally interstate. *See Order On Remand*, at ¶¶ 52-65.[10]

Following the release of the *Order on Remand*, the Department correctly concluded that the *Order on Remand* "does not invalidate the Department's prior Orders" in this proceeding or "compel

[9] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; *Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*Order on Remand*").

[10] The FCC explained that "LEC-provided access to . . . ISPs" must be analyzed "on the basis of the end points of the communication, rather than intermediate points." *Id.* at ¶57. Applying that analysis, the FCC concluded that, when a subscriber seeks to access the Internet by dialing in to an ISP, the call "is not simply a local call from a consumer to a machine," nor is it "'really like a call to a local business' – such as a pizza delivery firm." *Id.* at ¶¶ 63, 64 (quoting *D.C. Circuit Decision*, at 8). Instead, such calls "permit the dial-up Internet user to communicate *directly* with some distant site or party (*other than the ISP*) that the caller has specified." *Id.* at ¶ 59 (emphases added). Internet-bound traffic, therefore,

the Department to otherwise modify or change the conclusions reached in those Orders." August 2001 Order, at 10-11. First, as the Department recognized, the *Order on Remand* expressly states that it "does not preempt any state commission decision regarding compensation for ISP-bound traffic." *Order on Remand,* at ¶ 82; *see* August 2001 Order, at 11. The Department further noted that the *Order on Remand* does not alter existing contractual obligations, except to the extent provided by "change of law" provisions within an interconnection agreement. *See* August 2001 Order, at 14 (citing *Order on Remand,* at ¶ 82). Therefore, the Department found that the *Order on Remand* does not require Verizon MA "to unilaterally commence reciprocal compensation payments" for Internet-bound traffic, because Verizon MA "is not governed by a Department Order which establishes obligations to pay compensation" for such traffic. *Id.* at 14-15.

Second, the Department concluded that the FCC's analysis in the *Order on Remand* "is *not* at odds with or unsupported by the conclusions reached in the Department's [previous] Orders." *Id.* at 11-12. As in every order that it has issued in the underlying proceeding, the Department began with the language of the interconnection agreements: "It is only the designation of 'local traffic' that permits the reciprocal compensation provisions *of the parties' interconnection agreements* to apply." *Id.* at 12 (emphasis added); *see* October 1998 Order at 6, 10 (based on the "plain language of the Agreement," the Department was required to determine only "whether a call terminated by MCI WorldCom to an ISP is local"). The Department then found that, in the *Order on Remand*, "the FCC does not characterize ISP-bound traffic as 'local traffic.'" August 2001 Order, at 12. Accordingly, it held that "there is no conflict between the analysis the FCC used" in the *Order on Remand* and "the Department's holding in its Orders that ISP-bound traffic is not subject to reciprocal compensation pursuant to the parties' interconnection agreements." *Id.* at 13. Accordingly, the Department upheld its pervious decisions in 97-116-C, D, and E. *See* August 2001 Order.

"is analogous, though not identical, to long distance calling service," in particular to Feature Group A service. *Id.* at ¶¶ 60-61. In sum, such traffic "is indisputably interstate in nature." *Order on Remand,* at ¶ 58.

G. FCC's Adoption Decision.

On February 28, 2002, the FCC released a decision addressing a complaint filed by GNAPs regarding its attempt to adopt in Massachusetts and Virginia the Rhode Island Agreement, pursuant to paragraph 32 of the Bell Atlantic/GTE *Merger Order*.[11] *Global NAPs, Inc. v. Verizon Communications, Verizon New England, Inc., and Verizon Virginia, Inc.,* Memorandum Opinion and Order, File No. EB-01-MD-010 (rel. Feb. 28, 2002) ("February 28th Order").

Paragraph 32 of the *Merger Order* permits requesting telecommunications carriers, under certain specified circumstances, to adopt in one state an interconnection agreement that was voluntarily negotiated in another state. *See* Verizon MA's Letter dated March 26, 2002, at 2 n.2. The subject of GNAPs' Complaint was a dispute with Verizon as to whether GNAPs adoption of the Rhode Island Agreement could include section 5.7.2.3 of that agreement. On November 15, 2000, Verizon and GNAPs entered into an agreement which provided that GNAPs, as of July 24, 2000, could opt into any provision of the Rhode Island Agreement to which paragraph 32 of the *Merger Order* applied. However, in that agreement, GNAPs and Verizon disagreed as to whether section 5.7.2.3 fell within the scope of that provision.

In the February 28th Order, the FCC ruled that paragraph 32 of the *Merger Order* enabled GNAPs to adopt the entire Rhode Island Agreement in Massachusetts and Virginia. *See* February 28th Order, at ¶¶ 20-21. However, the FCC expressly limited its decision to the determination that the Rhode Island Agreement was eligible for adoption in Massachusetts and Virginia and did not address the meaning or effect of that adoption in those states, pointing out that "only the relevant state commission may ultimately decide whether particular terms of the agreement should be adopted in that state, and if so, what those terms mean." February 28th Order, at ¶¶ 19-20. *See also, Merger*

[11] *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,* Memorandum Opinion and Order, 15 FCC Rcd 14032, 14171-75, ¶¶ 300-05, 14310-11, App. D at ¶ 32 (June 16, 2000) ("Merger Order").

Order, at ¶ 32 ("Bell/Atlantic shall not be obligated to provide pursuant to this Paragraph any interconnection arrangement or UNE unless it…is consistent with the laws and regulatory requirements of, the state for which the request is made and with applicable collective bargaining agreements."). In accordance with the February 28th Order, Verizon Massachusetts filed the Rhode Island Agreement for review by the Department on March 26, 2002. [12]

H. The Starpower Case.

The FCC's recent decision in *Starpower Communications, LLC v. Verizon South Inc.*, Nos. EB-00-MD-19-20, FCC 02-105 (released Apr. 8, 2002) ("*Starpower Case*") (attached Exhibit A), further supports the wisdom of the Department's currently effective reciprocal compensation decisions. In the *Starpower Case*, the FCC found that agreement terms very similar to those at issue in the Department's previous decisions "unambiguously" excluded reciprocal compensation for Internet-bound traffic. *Id.* at ¶ 36. The agreement terms upon which the FCC based that conclusion are nearly identical to relevant terms found in the Rhode Island Agreement. *Compare Starpower Case*, at ¶¶ 4-15 to Rhode Island Agreement, at §§ 1.50, 5.7.2, 5.7.4,5.7.6. [13]

H. The Second D.C. Circuit Decision.

On May 3, 2002, the D.C. Circuit released a second decision, this time remanding the *Order on Remand* to the FCC for further proceedings regarding the basis for its decision in the *UNE Remand Order* to adopt new inter-carrier compensation rules for carriers handling the origination and termination of ISP-bound traffic. *See WorldCom, Inc. v. Federal Communications Commission, et*

[12] The Rhode Island Agreement expired on October 1, 2001. On June 28, 2001, Verizon sent a notice of termination to GNAPs and requested that GNAPs submit a request to negotiate a new interconnection date prior to the expiration of the Rhode Island Agreement. *See* Attachment B to Verizon MA's March 26, 2002 Letter.

[13] The FCC also reaffirmed the fact that the FCC continues to view ISP-bound traffic as non-local and interstate traffic and that, therefore, the Rhode Island Agreement should not be construed to entitle GNAPs to receive such compensation. The FCC noted that the D.C. Circuit had expressly acknowledged that the *end-to-end* analysis applied by the FCC in that *Starpower* (the same analysis contained in its *Internet Traffic Order*) is "one that it has traditionally used to determine whether a call is within its interstate jurisdiction." *Starpower Case*, at ¶ 27 (citing D.C. Circuit Decision, at 3). The FCC also pointed out that in its March 2000 Decision, the D.C. Circuit had clearly acknowledged that "[t]here is no dispute that the [FCC] has historically been justified in relying on this [end-to-end] method when determining whether a particular communication is jurisdictionally interstate." *Starpower Case*, at ¶ 27 (citing D.C. Circuit Decision, at 5).

al., No. 01-1218 (D.C. Cir. May 3, 2002) (attached Exhibit B). While D.C. Circuit disagreed with the FCC's argument that 251(g) of the Act provided a basis the actions taken by the FCC in the *Order on Remand*, the Court expressly recognized that other legal bases for the FCC's action may exist and expressly declined to vacate the *Order on Remand*. *Id.* (Exhibit B, at 1). The D.C. Circuit did not take any action that in any way altered the FCC's "end to end" jurisdictional analysis that is relevant in this case, and the rules and obligations set forth in the *Order on Remand* remain in full force and effect.

III. ARGUMENT

A. The Department Should Resolve the Current Dispute Between GNAPs and Verizon Regarding the Meaning and Effect of Section 5.7.2.3 of the Rhode Island Agreement in Connection With its Review of the Rhode Island Agreement.

The substance of the dispute between GNAPs and Verizon MA is whether the language of section 5.7.2.3 of the Rhode Island Agreement would entitle GNAPs to 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 Massachusetts believes that the Commission's previous reciprocal compensation decisions directly address this issue and make clear that the adoption by GNAPs of the Rhode Island Agreement in Massachusetts does not entitle GNAPs to receive reciprocal compensation from Verizon for ISP-bound traffic. In its March 26, 2002 Letter to the Department, accompanying the Rhode Island Agreement, Verizon MA specifically requested 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 Massachusetts pay GNAPs reciprocal compensation for ISP-bound traffic in Massachusetts after May 19, 1999 and that Verizon Massachusetts' sole obligation to GNAPs under the adopted Rhode Island Agreement is to pay GNAPs reciprocal compensation in accordance with the Telecommunications Act of 1996 and the Department's reciprocal compensation decisions – Order Nos. D.T.E. 116-C, D, E, and F.

See Verizon MA's March 26, 2002 Letter, at 4. The resolution of this dispute is important because the Department's interpretation of this provision, and the Rhode Island Agreement's reciprocal

compensation provisions generally, will have a direct bearing on whether the Department should permit the adoption of the Rhode Island Agreement, or any portion thereof, pursuant to section 252(e) of the Act. As a threshold matter, if the Department determines that the Rhode Island Agreement does not entitle GNAPs to receive reciprocal compensation payments for ISP-bound traffic, then in light of the FCC's February 28, 2002 decision and the language of 252(e), there would arguably be no basis for rejecting the adoption of that agreement since the Department's clarification that no reciprocal compensation is due under the language of the Rhode Island Agreement would eliminate any potential that its adoption would violate Massachusetts public policy regarding reciprocal compensation. However, as discussed in greater detail below, if the Department were to reach a contrary conclusion (and it should not) the adoption of the Rhode Island Agreement would clearly violate the Department's public policy against unqualified reciprocal compensation payments for ISP-bound traffic and be contrary to competition and the public interest.

Verizon MA's request that the Department address this dispute is consistent with the FCC's February 28, 2002 Order, which expressly recognized that state commissions such as the Department retain the authority to decide the meaning and effect of adopted provisions such as 5.7.2.3 of the Rhode Island Agreement. *See* Verizon MA's March 26, 2002 Letter, at 2-3 (citing FCC February 28th Order, at ¶¶ 19-20 and Merger Order, at ¶ 32).[14]

In its April 8, 2002 letter to the Department, GNAPs does not challenge Department's authority to provide the clarification sought by Verizon MA, but instead argues that Verizon MA's request is "premature" and that the Department should simply approve the adoption of the Rhode Island Agreement without providing the requested clarification. *See* Letter from Cameron F. Kerry to Mary Cottrell dated April 8, 2002 ("GNAPs' Letter"), at 1-2. Unfortunately, if the Department

[14] The FCC has also ruled that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' 'responsibility' under section 252 [of the 1996 Act]." *In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996,* CC Docket No. 00-52, FCC 00-216 (rel. June 14, 2000), at ¶ 6.

were to pursue the course proposed by GNAPs it would only postpone the inevitable. Given the position taken by GNAPs in Rhode Island and before the FCC with respect to section 5.7.2.3 of the Rhode Island Agreement, it is clear that the adoption of that language in Massachusetts presents a dispute between GNAPs and Verizon Massachusetts regarding the meaning and effect of section 5.7.2.3 in Massachusetts.[15]

Absent the clarification sought by Verizon Massachusetts, this dispute will continue unresolved. Indeed, GNAPs cites no authority that would preclude the Department from providing the clarification sought by Verizon Massachusetts, nor articulates any reasonable basis why the Department should not provide the requested clarification prior to or coincident with its review of the Rhode Island Agreement. Providing the clarification sought by Verizon Massachusetts is reasonable, efficient, and consistent with the public interest. In addition, it will obviate the need for both parties to seek such an interpretation from the Department at some later date. The Department should resolve this matter now by ruling that section 5.7.2.3 of the Rhode Island Agreement does not entitle the parties to reciprocal compensation for ISP-bound traffic after May 19, 1999.

B. The Rhode Island Agreement Does Not Provide for Reciprocal Compensation for ISP-Bound Traffic in Massachusetts After May 19, 1999.

The language of the Rhode Island Agreement clearly provides that the Parties agreed to pay each other reciprocal compensation for ISP-bound traffic only until the FCC resolved the issue of whether ISP-bound traffic of the appropriate jurisdictional treatment of ISP-bound traffic (i.e., whether ISP-bound traffic is local or non-local). *See* Rhode Island Agreement, § 5.7.2.3. Since the Department's May 19, 1999 Order, the Department has expressly recognized that the FCC had determined that ISP-bound traffic was non-local and largely interstate in nature, that such traffic did

[15] In fact, in its complaint filed in the FCC proceeding resulting in the February 28, 2002 Order, GNAPs alleged that Verizon owes GNAPs "damages" in excess of $26 million for reciprocal compensation payments it claimed were due in Massachusetts and Virginia under the Rhode Island Agreement covering the period from July 24, 2000 to March 31, 2001. FCC Adoption Order, at ¶ 9. The FCC held that the issue would not be "ripe for the appropriate regulatory agency to adjudicate" (i.e., the Department) "only if and when the state commissions approve the interconnection agreements, pursuant to section 252(e)(2) of the Act." *Id.* at ¶ 23.

not fall within the definition of "local traffic" eligible for reciprocal compensation, and that the referenced language did not entitle GNAPs to reciprocal compensation payments for ISP-bound traffic in Massachusetts. In its review of the Rhode Island Agreement, the Department should reach the same conclusion since GNAPs cannot credibly claim that there is any outstanding dispute under section 5.7.2.3 of the Rhode Island Agreement that entitle GNAPs to receive reciprocal compensation in Massachusetts after May 19, 1999.[16]

The remaining operative terms of the Rhode Island Agreement (*i.e.*, the provisions defining "local traffic" and the obligation to pay reciprocal compensation) are substantially similar in all material respects to the language in the MCI WorldCom Agreement construed by the Department in D.T.E. 97-116-C, as well as the language in the GNAPs/New England Telephone and Telegraph Company dated April 15, 1997, which the Department interpreted in D.T.E. 97-116-D/99-39 (February 25, 2000), at 20-21.[17] The Department has repeatedly held that the referenced language did not give rise to an obligation on the part of Verizon Massachusetts to pay reciprocal compensation to GNAPs for ISP-bound traffic. *See* M.A. D.T.E. 116-C, D, E, and F. The Department should reject GNAPs latest effort to secure payments for ISP-bound traffic it is not entitled to.

C. Should the Department Determine That 5.7.2.3 Would Otherwise Entitle GNAPs to Receive Unrestricted Reciprocal Compensation After May 19, 1999, it Should Deny Such Compensation on Grounds That it Is Unreasonable, Uneconomic, and Contrary to Public Policy and the Public Interest.

As discussed above, the plain language of the Rhode Island Agreement does not entitle GNAPs to receive reciprocal compensation for ISP-bound traffic after May 19, 1999. However, should the Department conclude otherwise – and it should not, it should reject section 5.7.2.3 as

[16] Indeed, as noted above, the FCC's jurisdictionally-based conclusions in the *Starpower Case* and the DC Circuit's decision of May 3, 2002 support the continuation of this interpretation.

[17] *See* Rhode Island Agreement, at §§ 1.50, 1.66, 1.67; GNAPs/New England Telephone and Telegraph Company Interconnection Agreement (April 15, 1997), at §§ 1.38, 1.54; MCI WorldCom Agreement, at §§ 1.38; 1.53.

contrary to the Department's public policy against unqualified reciprocal compensation payments for ISP-bound traffic.

In its April 8, 2002 Letter to the Department, GNAPs argues that the Department has "never said that agreements to pay compensation for [ISP-bound] traffic are against public policy." GNAPs' Letter, at 6. Instead, GNAPs notes that the Department has adopted a policy of encouraging carriers to pursue voluntary negotiations regarding intercarrier compensation for ISP-bound traffic and pointed to several successful examples of carrier agreements providing for such compensation. *See* GNAPs' Letter, at 6. Unfortunately, GNAPs has chosen to continue pursuing regulatory loopholes, rather than enter into a similar agreement. While the Department has not held that compensation for ISP-bound traffic is not *per se* against public policy, the Department has clearly held that the unqualified payment of reciprocal compensation for ISP-bound traffic *is* contrary to public policy since it is inconsistent with the competitive goal of economic efficiency and is the product of a regulatory distortion. *See* May 1999 Order, at 32-39. Allowing GNAPs to recover reciprocal compensation for ISP-bound traffic under the terms of the Rhode Island Agreement would not only be inconsistent with the terms of that agreement, but would present precisely the type of unqualified and uneconomic payments for ISP-bound traffic that the Department has rejected as a matter of public policy. Such payments would clearly be inconsistent with the public interest.

IV. CONCLUSION

For all of the forgoing reasons, 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 Massachusetts 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 Telecommunications Act of 1996 and 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

By its attorneys,

/s/Keefe B. Clemons
Bruce P. Beausejour
Keefe B. Clemons
185 Franklin Street, 13th Floor
Boston, Massachusetts 02110-1585
(617) 743-2445

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