**COMMONWEALTH OF MASSACHUSETTS**
**Department of Telecommunications and Energy**

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| **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** |

# COMMENTS OF GLOBAL NAPS, INC.


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**COMMENTS OF GLOBAL NAPS, INC.**

On March 26, 2002, Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") filed for review with the Department of Telecommunications and Energy ("Department") pursuant to §252(e) of the Telecommunications Act of 1996 ("Act") a final negotiated interconnection agreement ("Agreement" or "Rhode Island Agreement") between Verizon Rhode Island and Global NAPs, Inc. ("Global NAPs"). Verizon's agreement with Global NAPs binds it to support the Department's adoption of the agreement, the Rhode Island Agreement binds Verizon to support its adoption without modification, and the FCC has ruled that the entire Rhode Island Agreement includes Section 5.7.2.3. Verizon nevertheless has asked the Department to approve the Rhode Island Agreement without applying Section 5.7.2.3.

The Department issued a Legal Notice[1] on April 25, 2002 asking for comment on the Agreement and Verizon's position. Global NAPs submits these comments to demonstrate that, under the Department's standard review, the Agreement must be

[1] *Legal Notice*, D.T.E. 02-21 (April 25, 2002), attached as Exhibit A.

approved, and that Verizon's attempt to avoid Section 5.7.2.3 is out of order and overreaching.

## BACKGROUND

### A. The Revised Form Interconnection Agreement.

On April 15, 1997, Global NAPs and Verizon executed their first interconnection agreement, covering Massachusetts. By 1998, Global NAPs was ready to expand into other states. After Global NAPs and Verizon initially were unable to come to an agreement regarding the terms of interconnection agreements for New York and other northern Verizon states, Global NAPs began the arbitration process in New York under Section 252(b) of the Act. Finally, on July 2, 1998, Global NAPs and Verizon reached an agreement covering the northern Verizon states.

In their revised form interconnection agreement, Global NAPs and Verizon agreed "to execute interconnection agreements and grooming process documents consistent with terms of this memorandum agreement and the appended revised form interconnection agreement for the states of New York, Rhode Island, Maine, New Hampshire and Vermont with only such modifications as are necessary to comply with the law and standard operational procedures of each state."[2] This agreement included Section 5.7.2.3, which acknowledged the ongoing dispute regarding payment of reciprocal compensation for ISP-bound traffic, but required that until resolution of the issue Verizon would pay Global NAPs reciprocal compensation for such traffic.

In accordance with the terms of the parties' July 2, 1998 agreement, Verizon submitted the revised form interconnection agreement for approval in Maine, New

[2] *Memorandum Agreement* (July 2, 1998), attached as Exhibit B.

Hampshire, Rhode Island, Vermont, and New York. It was approved by the Maine Public Utilities Commission on September 6, 1998,[3] the New Hampshire Public Utilities Commission on February 1, 1999,[4] the New York Public Service Commission on November 17, 1998,[5] the Rhode Island Public Utilities Commission on October 1, 1998,[6] and the Vermont Public Service Board on January 6, 1999.[7]

**B. The Rhode Island Proceedings.**

As a result of approval by the Rhode Island Public Utilities Commission, the Rhode Island Agreement became effective on October 1, 1998. Section 5.7.2.3 of this agreement provides in full (emphasis added):

> The parties stipulate that they disagree as to whether traffic that originates on one Party's network and is transmitted to an Internet Service Provider ("ISP") connected to the other Party's network ("ISP Traffic") constitutes Local Traffic as defined herein, and the charges to be assessed in connection with such traffic. The issue of whether such traffic constitutes Local Traffic on which reciprocal compensation must 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**

[3] Order Approving Interconnection Agreement, *Bell Atlantic- Maine Interconnection Agreement with Global NAPs, Inc.*, Docket No. 98-662 (Sept. 16, 1998), attached as Exhibit C.

[4] Order Nisi Approving Interconnection Agreement, New Hampshire Public Utility Commission, Docket DE 98-220 (Feb. 1, 1999), attached as Exhibit D.

[5] Order Approving Interconnection Agreement, *Petition of Global NAPs, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement between Global NAPs and New York Telephone Company d/b/a Bell Atlantic- New York*, Case 98-C-1014 (Nov. 17, 1998), attached as Exhibit E.

[6] *See* Order No. 16921, *In re: Complaint of Global NAPs, Inc.*, Docket No. 2967 (Report and Order released Jan. 29, 2002) ("*Order No. 16921")* at 1, attached as Exhibit F.

[7] Order, *Interconnection Agreement between New England Telephone and Telegraph Company d/b/a Bell Atlantic-Vermont and Global NAPs, Inc.*, Docket No. 6151 (Jan. 6, 1999), attached as Exhibit G.

**this issue, BA agrees to pay GNAPs Reciprocal Compensation for ISP Traffic** (without conceding that ISP Traffic constitutes Local Traffic or precluding BA's ability to seek appropriate court review of this issue) pursuant to [a Rhode Island Public Utilities Commission's order requiring Verizon to pay reciprocal compensation on ISP Traffic until further order of the FCC] as such Order may be modified, changed or reversed.

Pursuant to the Rhode Island PUC's interpretation of this provision,[8] Verizon paid Global NAPs reciprocal compensation for ISP Traffic in Rhode Island, notwithstanding Verizon's position that such traffic was not "Local" within the meaning of the Agreement. Verizon continued to do so while an FCC determination was pending, until June 14, 2001, the effective date of the FCC's *Order on Remand*.[9] The Rhode Island PUC ruled on January 29, 2002 that the *Order on Remand* operated as a "determination" within the meaning of Section 5.7.2.3, and therefore that Verizon was not obligated to pay reciprocal compensation on ISP Traffic after June 14, 2001. [10] Subsequent to June 14, 2001, Verizon has paid intercarrier compensation for ISP-bound traffic pursuant to the terms of the *Order on Remand.*

### C. The Bell Atlantic/GTE Merger.

On October 2, 1998, Bell Atlantic Corporation and GTE Corporation filed an application for approval to transfer control of licenses and lines from GTE to Bell Atlantic in connection with their proposed merger.[11] The FCC approved this application,

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[8] Order No. 16056, *In re Complaint of Global NAPs, Inc.*, Docket No. 2967 (Report and Order released Nov. 16, 1994).

[9] Order on Remand Report and Order, *In re Implementation of the Local Competition Provision in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, FCC No. 01-131 (released April 27, 2001) ("*Order on Remand*").

[10] *Order No. 16921* at 9.

[11] *See 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, ¶ 1 n. 3 (2000) (*"Merger Order")*.

but did so only because the parties voluntarily agreed to conditions that would mitigate harm the merger otherwise would cause to the public interest. The FCC explained that, absent conditions, the merger of Bell Atlantic and GTE "will harm consumers of telecommunications services" and that "the asserted public interest benefits of the proposed merger will not outweigh these public interest harms." It was persuaded to approve the merger because "***the Applicants, however, have proposed*** conditions that will alter the public interest balance. . .[and] mitigate the potential public interest harms of the Applicant's transaction … ."[12]

One of the conditions Verizon offered to gain FCC approval of its merger obligates Verizon to permit requesting carriers to adopt in one state an interconnection agreement that was voluntarily negotiated in another state. Paragraph 32 of the *Merger Order* provides:

> 32. In-Region Pre-Merger Agreements. Subject to the Conditions specified in this Paragraph, Bell Atlantic/GTE shall make available: (1) in the Bell Atlantic Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement) subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions that was voluntarily negotiated by a Bell Atlantic incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date and (2) in the GTE Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement subject to 47 U.S.C. § 251(c) that was voluntarily negotiated by a GTE incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date, provided that no interconnection arrangement or UNE from an agreement negotiated prior to the Merger Closing Date in the Bell Atlantic Area can be extended into the GTE Service Area and vice versa.[13]

This condition became effective with the release of the *Merger Order* on June 16, 2000.

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[12] *Id.*, ¶¶ 3 and 4 (emphasis added).

[13] *Id.*, App. D. and ¶ 32 ("¶ 32").

### D. Adoption of The Rhode Island Agreement in Delaware, Massachusetts, Virginia, New Jersey And Pennsylvania Under Paragraph 32.

Soon after the *Merger Order* took effect, Global NAPs exercised the right Verizon voluntarily extended to requesting carriers to adopt any negotiated interconnection agreement in the Bell Atlantic Service Area. On July 24, 2000, Global NAPs notified Verizon that, pursuant to Paragraph 32, it wished to adopt the Rhode Island agreement in Massachusetts and Virginia. By letter agreement dated November 15, 2000,[14] Global NAPs and Verizon agreed that, effective July 24, 2000, Global NAPs could adopt in Massachusetts "such of the terms and conditions of the Rhode Island Agreement as are subject to adoption in Massachusetts under the terms of said paragraph 32." Notwithstanding the language of Paragraph 32 providing that a carrier may adopt "an entire agreement," Verizon argued that it could except certain portions of the agreement from adoption. Specifically, Verizon proposed excising Section 5.7.2.3 of the Rhode Island Agreement from the Massachusetts and Virginia interconnection agreements.

Subsequently, Global NAPs elected to opt in to the Rhode Island Agreement in Delaware, New Jersey, and Pennsylvania. By letter agreements dated December 22, 2000, substantially identical to the November 15, 2000 agreement in Massachusetts, the parties agreed that in these states the terms and conditions of the Rhode Island Agreement subject to adoption under Paragraph 32 would take effect. The Rhode Island Agreement

[14] *November 15, 2000 Agreement*, a copy of which is attached as Exhibit H.

was submitted to and approved by the Delaware Commission on January 8, 2002.[15]f It was submitted to and approved by the Pennsylvania Commission on June 6, 2001.[16] It was submitted to and approved by the New Jersey Commission on June 6, 2001.[17]

**E. The Paragraph 32 Litigation.**

For about nine months, the parties attempted to settle their disagreement as to whether Paragraph 32 of the merger conditions entitled Global NAPs to adopt Section 5.7.2.3 of the Rhode Island Agreement. Throughout the course of this dispute, Verizon continued to send ISP-bound traffic to Global NAPs, but did not pay Global NAPs intercarrier compensation for such traffic. On April 27, 2001, Global NAPs filed a complaint with the FCC alleging, in part, that Paragraph 32 of the *Merger Order* required Verizon to allow Global NAPs to opt into Section 5.7.2.3 of the Rhode Island Agreement in Massachusetts and Virginia.

The FCC ruled in favor of Global NAPs in the *FCC Paragraph 32 Order*. [18] The FCC stated "[w]e grant Global NAPs' claim that Verizon violated section 201(b) of the Act by refusing to permit Global NAPs to opt into certain provisions of an interconnection agreement that are eligible for adoption across state lines," and "we conclude that [Paragraph 32 of the *Merger Order*] is best read as requiring Verizon to

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[15] Order Approving Interconnection Agreement Between Verizon Delaware, Inc. and Global NAPs South, Inc., Public Service Commission of the State of Delaware, PSC Docket No. 01-438, Order No. 5859 (Jan. 8, 2002).

[16] Opinion and Order, *Joint Petition of Verizon Pennsylvania, Inc., and Global NAPs, Inc. For Approval of an Interconnection Agreement Under Section 252(i) of the Telecommunications Act of 1996, by Means of Adoption of an Interconnection Agreement between Global NAPs, Inc. and Verizon New England, Inc.*, Docket No. A-310771 (June 6, 2001), attached as Exhibit I.

[17] *Order Approving Interconnection Agreement Between Verizon New Jersey, Inc. and Global NAPs, Inc.*, New Jersey Board of Public Utilities, No. TO01040245 (June 6, 2001) (http:///www.bpu.state.nj.us/wwwroot/telco/telcoorders.htm), attached as Exhibit J.

make available for adoption in other states the entire Rhode Island Agreement, including section 5.7.2.3, or any discrete provision thereof."[19] The FCC explained what should happen next:

> Because paragraph 32 concerns voluntarily negotiated agreements, we expect Verizon and Global NAPs to submit the Rhode Island Agreement to the Virginia and Massachusetts commissions for approval pursuant to section 252(e)(1) of the Act. The parties should follow the procedures that the Massachusetts and Virginia commissions have established for submitting such voluntarily negotiated agreements. We also expect that these agreements will contain section 5.7.2.3 of the Rhode Island Agreement, if Global NAPs chooses to include it. As specified by the Act, each state commission will then determine the acceptability of specific provisions under section 252(e)(2).

*FCC Paragraph 32 Order* at ¶ 20 (footnotes omitted). Almost a month later, on March 26, 2002, Verizon submitted the Rhode Island Agreement to the Department.

**F. Verizon's Submission to The Department.**

Verizon finally submitted the Rhode Island Agreement to the Department with its letter of March 26, 2002, even though the November 15, 2000 letter agreement obligated Verizon to file "promptly."[20] In its letter, Verizon claimed that Section 5.7.2.3 of the Rhode Island Agreement is "clearly inconsistent with laws and regulatory policies expressed in the Department's multiple rulings in 97-116, which were adopted in

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[18] *See Global NAPs, Inc. v. Verizon Communications,* File No. EB-01-MD-101, Memorandum Opinion and Order, FCC 02-59 (released February 28, 2002) ("*FCC Paragraph 32 Order*").

[19] *Id.* at ¶¶ 1, 10.

[20] The *November 15, 2000 Agreement*, as well as a substantially identical agreement also dated November 15, 2000 covering Virginia, stated: "5. Verizon shall promptly file this letter agreement along with the Rhode Island Agreement with the Massachusetts DTE. Both parties shall support the approval of this letter agreement before the Massachusetts DTE as the terms and conditions and shall govern the Parties relations in Massachusetts for the remainder of the term of the Rhode Island Agreement." Verizon "promptly" filed the Rhode Island Agreement with the DTE more than one year and four months later. Rather than "support approval" of the letter agreement, Verizon is seeking a declaratory judgment to eliminate one of its provisions. In Virginia, Verizon "promptly" filed the Rhode Island Agreement with the Virginia Commission even later, on April 18, 2002 and, rather than support approval, argued against adoption of the agreement in its entirety – in part on the basis that too much time has passed.

furtherance of the public interest of this Commonwealth" and sought a ruling that it need not pay compensation for ISP-bound traffic despite the language of the Rhode Island Agreement. In placing the Rhode Island Agreement on public notice, the Department explained:

> In the FCC Order, the FCC ruled that the Bell Atlantic/GTE Merger Order[21] enabled GNAPs to adopt the entire Rhode Island Agreement in Massachusetts and Virginia. FCC Order at ¶ ¶ 20-21. In submitting the Agreement to the Department for its review, Verizon seeks a declaration that Section 5.7.2.3 of the Rhode Island Agreement shall not be construed to require that Verizon pay GNAPs reciprocal compensation for ISP-bound traffic in Massachusetts after May 19, 1999. GNAPs disagrees, asking the Department to approve the agreement in its entirety

On this basis, the Department sought comments from interested persons as to whether it should approve or reject the Agreement. For the reasons demonstrated below, the Department should approve "the entire Rhode Island Agreement, including Section 5.7.2.3 …" that the FCC has ruled Verizon must make available in Massachusetts.

## COMMENTS

### I. The Agreement Meets the Standard for Approval Under 47 U.S.C. §252(e)(2).

47 U.S.C. §252(e)(1) requires that any interconnection agreement adopted by negotiation or arbitration be submitted for approval to a state commission. As the Department's Legal Notice recognized,[22] 47 U.S.C. §252(e)(2) permits a state commission to reject an agreement only if:

> (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
> (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; …

[21] *Merger Order*, 14171–75, ¶¶ 300–05, 14310–11, App. D at ¶ 32.

[22] Legal Notice, D.T.E. 02-21 (April 25, 2002) at p. 1.

There is no basis for the Department to reject the Rhode Island Agreement because it is not discriminatory and it is consistent with the public interest, convenience, and necessity. Five other state commissions have approved opt-ins to the Rhode Island Agreement, as well as the revised form agreement on which it is based. In total, seven states now have determined that agreements containing Section 5.7.2.3 are consistent with the public interest, convenience and necessity. Not one state has rejected it. Likewise, the Department has approved amendments to interconnection agreements that Level 3 Communications and PaeTec, Inc. negotiated with Verizon; like the Rhode Island Agreement, these agreements identified Internet traffic as a separate class of traffic and established a compensation mechanism for this traffic.[23] Each of these decisions required a determination that these agreements materially similar to the Rhode Island opt-in are not discriminatory and are consistent with the public interest, convenience, and necessity.

Section 252(i) of the Act and 47 C.F.R. 51.809 permit a LEC to opt into the terms of any other approved interconnection agreement. Paragraph 32, as discussed, permits LECs to do so across state boundaries in Verizon's service area. Thus, just as any other carrier could have opted in to the Level 3 and PaeTec agreements, any LEC that wished to could have opted in to Global NAPs revised form agreement once it was approved in Maine, New Hampshire, New York, Rhode Island, and Vermont. Since adoption of the *Merger Order* on June 16, 2000, any carrier could have opted in to the Rhode Island Agreement anywhere in the Bell Atlantic/Verizon service area pursuant to Paragraph 32. *See MCI WorldCom, Inc. v. Bell* Atlantic; *see* D.T.E. 97-116-F (Aug. 29, 2001) at p. 16 (prior to May 15, 2001, any carrier could "opt in to the provisions relating to

[23] *Id.* at p. 19, n. 13.

compensation for ISP-bound traffic in other carriers' existing termination agreements"). Consequently, this agreement cannot be discriminatory. On the contrary, to allow the negotiated intercarrier compensation mechanisms for Internet traffic in the Level 3 and PaeTec agreements, but not the mechanism agreed to in the Rhode Island Agreement would be discriminatory and would not meet the "reasoned consistency" required of the Department. *See Boston Gas Co. v. Dept. of Public Utilities,* 367 Mass. 92, 104 (1985).

## II. Verizon Bound Itself to Support Approval of the Agreement.

In the November 15, 2000 Letter Agreement, Verizon agreed to "support the approval of this letter agreement before the Department as the terms and conditions that shall govern the Parties' relations in Massachusetts for the remainder of the term of the Rhode Island Agreement."[24] In turn, the Rhode Island Agreement states:

> This Agreement is an integrated package that reflects a balancing of interest critical to the Parties. It will be submitted to the Rhode Island Public Utilities Commission, and the parties will specifically request that the commission refrain from taking any action to change, suspend or otherwise delay implementation of the Agreement. So long as the Agreement remains in effect, neither party shall advocate before any legislative, regulatory, or other public forum that any of the terms of this Agreement be modified or eliminated, unless mutually agreed to by the parties.

Rhode Island Agreement at 1.

Verizon therefore is contractually bound to "support the approval" of "an integrated package" that includes section 5.7.2.3 as a term and condition the FCC has determined is "subject to adoption …" under Paragraph 32, and is bound not to "advocate … that any terms of this Agreement be modified or eliminated," and to "specifically request" that a state commission "refrain from taking any action to change" the Agreement. Instead, Verizon is doing precisely the opposite of all these commitments.

[24] *Id*. at ¶ 5.

Despite its undertaking to support approval of the entire agreement and not to seek changes, Verizon is asking the Department to approve something less and to change Section 5.7.2.3. Such bait-and-switch negotiation is antithetical to the obligation to negotiate in good faith at the heart of the Section 252 process. *See* 47 U.S.C. § 251 (c); *Local Competition Order* at ¶ 148 ("the duty to negotiate in good faith, at a minimum, prevents parties from intentionally misleading or coercing into reaching agreements they would not otherwise have made"). If Verizon can negotiate an agreement it promises to support, then turn around to oppose what it has negotiated, it frustrates the negotiations and undermines the certainty that interconnection agreements are supposed to provide.

With "an integrated package that reflects a balancing of interest," Verizon must accept the bitter with the sweet. Just as the Rhode Island Agreement includes Verizon's interim agreement to intercarrier compensation, it includes concessions by Global NAPs. For example, 47 U.S.C. § 251 (c)(2)(B) requires an ILEC to provide a CLEC with interconnection "at any technically feasible point" in the carrier's network, Global NAPs has opposed Verizon's "geographically relevant interconnection point" terms, and the Department has rejected such terms;[25] nevertheless Section 4.1.4 of the Rhode Island Agreement permits Verizon to request that Global NAPs establish multiple interconnection points. Even without submitting the Rhode Island Agreement for approval by the Virginia commission, and then opposing its adoption, Verizon is

[25] Order, *Investigation by the Department of Bell Atlantic Massachusetts Tariffs*, M.D.T.E. 14 and 17, D.T.E. 98-57 at pp. 114-129 (March 24, 2000).

invoking Section 4.1.4 in Virginia. See Exhibits K and L.[26] Verizon cannot have it both ways.

It was one thing for Verizon to preserve its position in the agreement as to whether Section 5.7.2.3 is "subject to adoption in Massachusetts under the terms of said Paragraph 32." But the FCC has now ruled that Section 5.7.2.3 is indeed subject to adoption under Paragraph 32. As the Department stated in its Legal Notice (emphasis added) , "the FCC ruled that the Bell Atlantic/GTE Merger Order enabled GNAPs to adopt the ***entire*** Rhode Island Agreement in Massachusetts and Virginia." It is entirely another thing for Verizon then to oppose adopting the entire agreement.

Just as in *MCI WorldCom vs. Bell Atlantic, D.T.E. 97-116-F* (August 29, 2001) at p. 15, the Department held Verizon to its pre-existing commitments to pay intercarrier compensation to Level 3 and PaeTec, here it should hold Verizon to its commitment to support adoption of the entire Rhode Island agreement by dismissing its request for declaratory ruling. This interconnection agreement should be reviewed no differently from any other.

## III. The Rhode Island Agreement is Consistent With the Department's Preference for Negotiated Agreements Driven by Market Forces.

Verizon seeks to make Massachusetts a haven from the effect of its federally approved, voluntary agreement to permit carriers to adopt in one state an interconnection agreement that was voluntarily negotiated in another state. To accomplish this, Verizon claims that its voluntary agreement in Section 5.7.2.3 to pay reciprocal compensation for ISP Traffic pending an FCC determination is "clearly inconsistent with laws and

[26] *See* Exhibit K, an email from Verizon to Global NAPs, reflects that, although Verizon did not submit the Rhode Island Agreement to the Virginia commission until April 18, 2002, it was already invoking Section 4.1.4 on April 23, 2002. Exhibit L is Verizon's submission to the Virginia Corporation Commission.

regulatory policies expressed in the Department's multiple rulings in DTE Docket 97-116, which were adopted in furtherance of the public interest of this Commonwealth."[27] In short, Verizon says that the Department should substitute its own regulation-imposed determination for voluntarily-negotiated, rationally-based agreements entered into with full awareness and acknowledgement of the issues and risks involved. It is Verizon's own position that is clearly inconsistent with the Department's policies and rulings.

### A. The Department Has Stated Repeatedly Its Preference For Negotiation.

Although the Department has ruled that Verizon is not obligated as a matter of law by 47 U.S.C. § 251(c) to pay intercarrier compensation for ISP-bound traffic, it has never said that agreements to pay compensation for such traffic are against public policy or law. And, even if the Department had codified its concerns about such compensation into a policy against any such compensation, 47 U.S.C. § 252 (a)(1) allows carriers to negotiate "binding" agreements "without regard to standards set forth in subsections (b) and (c) of Section 251."

Rather than adopting any such policy, however, the Department has recognized that "Section 252 sets up a preference for negotiated interconnection agreements." *AT&T Corp. v. Iowa Utilities* Board, 525 U.S. 404 (Thomas, J. concurring in part and dissenting in part), *quoted in MCI WorldCom v. Bell Atlantic*, D.T.E. 97-16-C (May 19, 1999) at p. 29. Thus, the Department has taken the position that intercarrier compensation for ISP-bound traffic should be left entirely to negotiation in the marketplace, and has repeatedly affirmed that CLECs and Verizon should negotiate the terms of intercarrier compensation

[27] Letter of Keefe Clemons, Verizon Regulatory Counsel to Department (March 26, 2002) at 3.

for ISP-bound traffic. As the Department expressed it, "[a]s a general rule, it is better – far better – for businesses, rather than regulators, to reach commercial decisions."[28]

In *MCI WorldCom vs. Bell Atlantic*, D.T.E. 97-116-C (May 19, 1999) ("*DTE 97-116-C*"), the Department stated:

> [W]e expect carriers to begin the voluntary negotiation process provided in section 252 of the 1996 Act, in order to establish, insofar as may be warranted, an intercarrier compensation mechanism that would apply to compensation for all ISP bound traffic that was not disbursed as of February 26, 1999, as well as all later-occurring ISP-bound traffic.[29]

The Department reiterated in *D.T.E. 97-116-D* its preference for "a negotiation process,"[30] and noted with approval that Level 3 and PaeTec had negotiated amendments to their interconnection agreements that established a compensation mechanism for Internet traffic.[31] To the United States District Court for the District of Massachusetts, the Department pointed to these agreements as examples of "a mutually acceptable rate of compensation for ISP-bound traffic" that supported its view that negotiation is a "better course" than mandates.[32] And, notwithstanding the FCC's prospective intercarrier compensation scheme for ISP-bound traffic, the Department referred to these agreements in ruling that "Verizon must continue payments to those carriers with whom Verizon is

[28] *MCI WorldCom v. Bell Atlantic*, D.T.E. 97-116-D at p. 19 (Feb. 25, 2000) ("*D.T.E. 97-116D*").

[29] *DTE 97-116-C* at 30.

[30] *D.T.E. 97-116-D* at p. 17 (Feb. 25, 2000).

[31] *Id.* at p. 19, n. 13.

[32] Department of Telecommunications And Energy's Memorandum in Support of Its Cross-Motion for Summary Judgment at pp. 47-48 n. 12, *Global NAPs, Inc. v. New England Telephone & Telegraph Co., et al*., C.A. Nos. 00-CV-10407-RCL, 00-CV-11513-RCL (filed Oct. 5, 2000).

contractually obligated to compensate for termination of ISP-bound traffic,"[33] again reminded that it had "directed the carriers to negotiate a resolution of the issue."

These decisions 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. Even if Verizon were not estopped by its agreement from asking the Department to modify the Rhode Island Agreement by eliminating § 5.7.2.3, its request is inconsistent with the Department's repeated statements of this policy. In *DTE 97-116-C*, the Department said it was taking its "thumb off the scale."[34] Verizon is asking the Department to put its thumb on the scale by overturning a contractual obligation.

### B. The Rhode Island Agreement Is the Different Kind of Agreement The Department Repeatedly Has Said It Would Entertain.

Verizon claims in its letter that "[t]he operative terms of the Rhode Island agreement … are substantially similar in all material respects" to the agreements addressed in *D.T.E. 97-116C* and *D.T.E. 97-116-D.* This claim disregards the language in section 5.7.2.3 and the Department's repeated expressions of willingness to entertain mechanisms for payment of intercarrier compensation for ISP-bound traffic that differ from those addressed in the *97-116* orders.

Verizon's comparison of the Massachusetts and Rhode Island agreements simply omits Verizon's explicit agreement "to pay GNAPs Reciprocal Compensation" pending

[33] *MCI WorldCom v. Bell Atlantic, D.T.E. 97-116-F* at p. 15, 3 (Aug. 29, 2001). The FCC similarly ruled that Verizon's and Global NAPs' "November 15, 2000 agreement qualifies as an 'existing contractual obligation' that remains unchanged by the *Order on Remand*." *FCC Paragraph 32 Order* at p. 8, ¶ 17.

[34] *DTE 97-116-C* at p. 37.

FCC resolution agreement of this issue. The former Massachusetts agreement contains no such language. As the Department has explained it, its decisions in *97-116* turned on its interpretation of the definition of "Local Traffic" in Section 5.8.1 of the MCI WorldCom and Global NAPs 1997 interconnection agreements. *See, e.g. D.T.E. 97-116-F* at p 12 . While resisting any effort to revisit this definition, the Department has expressed a willingness to apply "a different basis"[35] for reciprocal compensation on ISP-bound traffic; in *D.T.E. 97-116-F* it indicated it remains prepared to establish compensation mechanisms for ISP-bound traffic in pre-June-14- 2001 agreements "based on something other than the definition of local traffic contained in those agreements." *Id.* at p. 17.

The Rhode Island agreement is just such an agreement. It distinguishes "ISP Traffic," acknowledges the parties disagreement as to whether this traffic is "Local Traffic" and – in contrast to the "silent"[36]original Massachusetts agreement – specifically provides for payment of reciprocal compensation on this traffic pending the FCC's determination.

Like the Level 3 and PaeTec agreements, the Rhode Island Agreement is an instance where "negotiation has bourne [sic] commercial fruit."[37] By its terms, this agreement "reflects a balancing of interest critical to the parties … ."[38] It acknowledges the parties' disagreement as to whether "ISP Traffic" constitutes "Local Traffic" but, as part of the balancing of interest, provides in Section 5.7.2.3 that "[u]ntil resolution of this

[35] *D.T.E. 97-116-F* at p. 9; *D.T.E. 97-116-C* at p. 25.

[36] *D.T.E. 97-116-C* at p. 29.

[37] D.T.E. 97-116-D at p. 19.

[38] Rhode Island Agreement at p. 1.

issue, BA agrees to pay GNAPs Reciprocal Compensation for ISP Traffic." This interim resolution is an arrangement that Verizon agreed to – and did – abide by in Rhode Island and that Paragraph 32 obligates it to make available in other states.

Verizon has had its way on intercarrier compensation for ISP-bound traffic, avoiding such compensation in Massachusetts and now seeing such compensation being ultimately phased out pursuant to the FCC's *Order on Remand* (which remains in effect notwithstanding the D.C. Circuit's further remand). With its position on these issues well-developed, it entered into the Rhode Island Agreement, and then into the agreement adopted in the *Merger Order*, voluntarily.[39] In this instance, Global NAPs has played by Verizon's rules. Verizon cannot game the system by agreeing to these rules in one forum, for which it received a substantial benefit – merger approval – and then asking to be relieved of its agreements in another. It certainly cannot ask the Department to rescue it from its agreements by turning its own policies upside down. Here, it would not be the Department's role to save contracting parties from later-regretted commercial judgments." *D.T.E. 97-116-C* at p. 27, n. 29.

[39] Just prior to this filing, in *WorldCom, Inc. vs. FCC*, No. 01-1218 (D.C. Cir. May 3, 2002), the D.C. Circuit rejected the FCC's reasoning in the *Order on Remand*. The court held that 47 U.S.C. §251(g) does not provide a basis for the FCC's treatment of ISP-bound traffic. The D.C. Circuit made no further determinations, but simply remanded the matter to the FCC with no further instruction. This decision, however, calls into question the Department's determinations in *DTE 97-116-C*, *DTE 97-116-D*, *DTE 97-116-E*, and *DTE 97-116-F*. In those cases, the Department relied upon federal authority to reject its prior judgment in *MCI WorldCom vs. Bell Atlantic*, DTE 97-116 at 11 (October 21, 1998) that ISP-bound traffic is local traffic and subject to reciprocal compensation. Now, the federal jurisdictional analysis on which the Department explained its change of course in D.T.E. 97-116C is no longer in effect. The FCC's order in *Intercarrier Compensation for ISP-Bound Traffic*, CC docket No. 99-68, *Notice of Proposed Rulemaking*, FCC 99-38 (rel. February 26, 1999), was vacated, *Bell Atlantic Telephone Companies vs. FCC*, 206 F. 3rd 1,3 (2000), and the basis of the *Order on Remand* has just been ruled invalid. Presently, there is no dispositive federal authority as to the nature of ISP-bound traffic.

## IV. Verizon's Request for Declaratory Relief Regarding Interpretation of The Agreement Is Premature.

As explained above, approval of the Agreement, including Section 5.7.2.3, is consistent with the Department's policy of promoting negotiated settlements. However, the Department need not interpret this provision in the present proceeding. Verizon is bound to support the Rhode Island Agreement and its adoption in Massachusetts. It is unusual, to say the least, for the ILEC to challenge its own agreement and to seek an interpretation of the agreement at this stage.

Verizon may dispute Global NAPs's bill for payment for termination of ISP-bound traffic under § 29.8 of the Agreement. This section provides that the disputing party may, within 30 days of receipt of the invoice containing the disputed amount, give notice of its dispute and specific details and reasons for the dispute. If the parties are unable to resolve the dispute within 90 days, they appoint a designated representative with authority to settle the dispute and the representatives meet to engage in good faith negotiations. If good faith negotiations fail to resolve the issue within 45 days, the parties may file a complaint with the Department or seek other remedies pursuant to law or equity.

Even if the billing dispute provisions did not apply, § 29.9 of the Agreement requires that a dispute be addressed "by good faith negotiations between the Parties, in the first instance." Global NAPs submits that Verizon should pursue the contractual procedure for resolving billing disputes or, at least, the more general procedure of § 29.9 requiring good faith negotiations before seeking declaratory relief.[40] Negotiation is the

[40] Verizon, by its actions, has shown that it does not view adoption of the agreement alone as dispositive of its obligation to pay intercarrier compensation on ISP-bound traffic. As explained above, both New Jersey

"more promising and, in fact statutorily preferred route *before* initiating any complaint based on 'contractual principles or other legal or equitable considerations' with the Department." *D.T.E. 97-116-C* at p. 29 (emphasis in original).

## CONCLUSION

The Rhode Island Agreement should be approved under § 252(e)(2) of the Act and the Department should deny Verizon's request for declaratory relief.

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and Pennsylvania have approved the Rhode Island Agreement, but Verizon has refused to pay intercarrier compensation on ISP-bound traffic to Global NAPs in those states.