COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of MCI WorldCom, Inc. Against New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts	D.T.E. 97-116
Complaint of Global NAPs, Inc. Against New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts	D.T.E. 99-39

OPPOSITION OF GLOBAL NAPS, INC. TO
VERIZON MASSACHUSETTS MOTION TO RE-OPEN DOCKETS

The Department should reject Verizon's motion to reopen Docket Nos. 97-116 and 99-39. While the Department's orders in these dockets are indeed erroneous and in need of correction, for the Department itself to reopen these matters at this time would contravene federal and state law because the matters are on appeal and are well on the way to being decided by the federal district court.

If the Department believes that it has committed error in the decisions under challenge there (as Verizon implicitly suggests has occurred), then its proper course is to confess error in court with respect to the challenged orders and accept the issuance of an injunction against enforcing them. By operation of law, this would reinstate the legal effectiveness of the Department's unchallenged order (from October 1998).

In this regard, recent decisions by the Federal Communications Commission ("FCC") that have found contractual obligations to pay for ISP-bound calls — even in the face of the FCC's policy preference against such payments — show that the Department's unchallenged October 1998 order followed the correct process by interpreting the parties' contract language, and reached the right result. This further

supports the conclusion that the Department should confess error in federal court with respect to the orders under challenge there.

1. THE DEPARTMENT INTERPRETED THE INTERCONNECTION AGREEMENTS IN OCTOBER 1998.

A key role of state regulators under the 1996 Act is to interpret interconnection agreements when parties to those contracts do not agree what they mean. Arguably, if a particular contract term was forced on the parties as a result of an arbitration, the state regulator that actually imposed the arbitrated term might have some special, policy-based insights as to what it means. But when the disputed term was arrived at through negotiation — as here — the state regulator sits essentially as a common law court adjudicating a contract dispute. What matters is not the regulator's view of good policy or ideal relationships between carriers. What matters is only what the parties agreed to. This is because federal law gives primacy to parties' agreements, even when those agreements do not conform to otherwise clear and applicable federal requirements. *See* 47 U.S.C. § 252(a)(1).

Just such a dispute was brought to the Department's attention by MCI WorldCom in 1997. Verizon and MCI disagreed about whether their interconnection agreement and those containing similar language required an originating carrier to pay compensation for ISP-bound calls. Under federal law — as it existed then, and as it has existed at all times relevant to this dispute — the answer to that question depends not on what the FCC's rules say about compensation for ISP-bound calls, and not on what the FCC or anyone else thinks that the statute says about compensation for ISP-bound calls. The answer depends only and entirely on what the contract language says about that issue.

In October 1998 the Department issued its first order in Docket 97-116.[1] That order framed the issue as follows:

> The plain language of the Agreement indicates that Bell Atlantic and MCI WorldCom agreed to compensate each other for termination of all local calls. The Agreement does not make an exception for calls terminated to ISPs. Thus, the question becomes: Is a call made by a Bell Atlantic customer to an ISP, but terminated by MCI WorldCom, and then connected by the ISP to the Internet, a "local call" ***under the Agreement's definition of local traffic?*** For the reasons cited below, we find it is

1998 DTE Order at 10-11. In other words, in the *1998 DTE Order* the Department knew what its job was — interpret the language of the agreement — and did that job. It did so by examining a number of different factors informing the parties' understanding of these terms at the time the contract was formed. These included how the calls are dialed; how they are priced, and under which tariffs; the location of the ISPs' premises; the functional aspects of the services provided by telephone companies and ISPs; as well as FCC statements applicable when the contract was formed. *1998 DTE Order* at 11-12.

The fact that the Department interpreted the language of the contract in this order is critical, because it reveals that what Verizon is asking the Department to do is to ***do the same job over again.*** In Verizon's words, it seeks to re-open the record here for the purpose of taking comments on "*whether the language contained in particular agreements provides for reciprocal compensation for Internet-bound traffic.*" Verizon Motion at 1. But, in October 1998, the Department answered that very question in the affirmative.

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[1] DTE 97-116, Complaint of MCI WorldCom, Inc. against New England Tel. & Tel. Co. d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996 (October 1998) ("*1998 DTE Order*").

2. VERIZON IS SEEKING UNJUSTIFIED RECONSIDERATION OF THE DEPARTMENT'S OCTOBER 1998 ORDER.

Given that the Department plainly and without question interpreted the meaning of the contract language in October 1998, the only rational way to interpret Verizon's current request is as one seeking reconsideration of the October 1998 ruling. But as the Department itself has observed in one of its orders in this case, reconsideration may be granted only in limited circumstances:

> [R]econsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after reviewing deliberation.... A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case.

DTE 97-116-D. Verizon's motion offers absolutely nothing by way of "extraordinary circumstances" or "previously unknown or undisclosed facts that would have a significant impact." To the contrary, it is plainly nothing more than an attempt to "reargue issues" already decided. It would therefore violate Massachusetts law and reasoned consistency with Department standards for the Department to reconsider its October 1998 order in response to Verizon's motion.

3. THE DEPARTMENT MAY NOT RE-OPEN ITS ORDERS IN 97-116 WITHOUT EXPRESS LEAVE OF THE FEDERAL COURT REVIEWING THOSE ORDERS.

Verizon recognizes that its motion presents a conflict with federal court jurisdiction to review the orders Verizon wants reopened. Verizon gamely cites two inapplicable precedents, *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532 (1970), and *United States v. Benmar Transportation & Leasing Corp.*, 444 U.S. 4 (1979), for the view that the DTE may re-open these matters notwithstanding the pendency of the matter in district court. The problem is that both Verizon's cited cases relate to action by

the Interstate Commerce Commission ("ICC"). That body acts under a specific grant of authority from Congress to "***at any time*** … grant rehearings as to ***any*** decision, order, or requirement and to reverse, change, or modify the same." *American Farm Lines, supra*, 397 U.S. at 540-41 & n.8. Nothing in either the federal law that provides the Department's authority to interpret federally-mandated interconnection agreements (47 U.S.C. § 252) or its authority under state law provides such a wide grant.[2]

Federal telecommunications law says nothing at all about reconsideration; to the contrary, various provisions of federal law indicate that a state regulator should promptly resolve disputes about interconnection agreements and get the matter to federal court for review. *See, e.g.,* 47 U.S.C. § 252(b)(4)(c); § 252(e)(6). State law on reconsideration is as noted above: it is only to be granted in extraordinary circumstances and, once the matter is before the court on appeal, it up to the court to decide whether to call for additional proceedings at the agency. *See* M.G.L. c. 25, § 5 (the court may "order such additional evidence as it deems necessary to be taken before the commission and to be adduced at the hearing in such manner and upon such terms as the court may deem proper").

Moreover, both the cases cited by Verizon note that an agency may not act on a matter that is under review in court when such an action would "collide" or cause

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[2] Courts have noted that the wide latitude given to the ICC arises by virtue of its organic statute, and, indeed, have expressly refused to permit ICC reconsideration pending appeal when in specific situations that general grant of authority does not apply. *See Central Power and Light Co. v. United States*, 634 F.2d 137, 152-55 (5th Cir. 1980) (where specific statute limits reconsideration to situations of "material error, new evidence, or substantially changed circumstances," remand at request of the agency denied). The similarity between the statute at issue in *Central Power and Light* and the Department's standard for reconsideration, *see supra*, indicates that further action by the Department at this time would be inappropriate.

"interference" with the process of judicial review. For example, in sustaining the ICC's ability to act in *Benmar, supra,* Justice Scalia noted that the ICC's action:

> did not interfere in any manner with the proceedings in the Court of Appeals, and the Commission acted ***before that court was ready to hear arguments on the merits and before it received the record.*** All parties concurred in the Commission's decision to reopen the proceedings and to hold judicial review in abeyance pending the Commission's final disposition of Benmar's petition for administrative review.

Benmar, supra, 444 U.S. at 5 (emphasis added). The contrast with the situation here could not be more obvious. The Department's orders have been under review in federal court for more than two years. The issues have been briefed and briefed again. The Magistrate Judge has issued recommended findings. The Department and Verizon have objected to them, and other parties' responses to those objections will be filed within days, if they have not been already. All that remains is for the District Court to act. Suddenly re-opening the case at this late stage would plainly collide and interfere with ongoing judicial review; indeed, it is not unduly cynical to suggest that such collision and interference is precisely what Verizon has in mind in making its motion. To prevent such a result, federal courts may protect their jurisdiction by enjoining the agency from acting. *Zenith Electronics Corp. v. United States*, 699 F. Supp. 296, 297 (C.I.T, 1988) ("alteration of an administrative result while it is under review cannot be done without approval of the Court"), *aff'd* 884 F.2d 556 (Fed. Cir. 1989).

Recognizing this problem, Verizon suggests that the Department "could reasonably request that the District Court stay its review proceedings." Verizon Motion at 4. Global NAPs suggests that the Department has no further power to act in this matter at all — other than to deny Verizon's motion — without an affirmative grant of such

authority from the District Court. If anything should be stayed here, it is action on Verizon's motion.

In this regard, Verizon's precedents are misplaced for another reason as well. When the Department interprets an interconnection agreement, it is not acting in its role as a policy-making body with discretionary authority to either act or not act, or to act in ways that it prefers for policy reasons while avoiding taking steps that its policies disfavor. To the contrary, as the Magistrate's Finding and Recommendations made clear and Verizon's motion accepts, under federal law the Department has a straightforward job: to sit as what amounts to a common law court interpreting a contract. As a result, the relevant legal analogy to consult regarding the Department's ability to act on a matter under appellate review in federal court is not agency/ICC cases such as those cited by Verizon, but instead cases under Fed. R. Civ. P. 60(b) (post-judgment motions to provide relief from a judgment) and Fed. R. App. P. 4(a)(4) (noting matters on which lower court may act when a matter is under review). Under those precedents, the lower court may take limited steps ***in aid of*** the higher court's exercise of its review function, but may not in any substantive way ***change*** what it did in the orders under review — at least without the express consent of the court where the matter is pending. *See Puerto Rico v. S.S. Zoe Colocotroni***,** 601 F.2d 39 (1st Cir. 1979).[3]

[3] In this regard, note that a proper motion to modify or obtain relief from a judgment of a lower court while the matter is on appeal must necessarily relate to new facts or developments, not merely to a re-hashing of matters before the lower court originally and therefore of necessity included in the scope of appellate review of the original decisions. *Id.*, 601 F.2d at 41 n.2, *citing Standard Oil Co. v. United States*, 429 U.S. 17 (1976). As the 1st Circuit noted, "a proper 60(b) motion raises new matters not included or includable in the first appeal and the mandate of an affirming court is not a bar to considering properly presented new matters affecting the judgment." *Zoe Colocotroni, supra*, 601 F. 2d at 41 n.2. This is in complete harmony with the Department's own stated standard for granting reconsideration — and it is quite clear that Verizon's motion fails under this standard.

State law is to the same effect. M.G.L. c. 30A, §11(8) makes clear that the Department's orders are, in effect, just what they say they are, and nothing more. In relevant part the statute says (emphasis added):

> Every agency decision shall be in writing or stated in the record. The decision shall be accompanied by a statement of reasons for the decision, including ***determination of each issue of fact or law necessary to the decision,*** unless the General Laws provide that the agency need not prepare such statement in the absence of a timely request to do so.

The purpose of this law is precisely to enable a court to review what the Department has done. *Massachusetts Inst. of Tech. v. Dep. Of Pub. Util.*, 425 Mass. 856, 868; 684 N.E.2d 585 (1997) (purpose of law is to require the Department "to give a "'guide to its reasons' so that this court may 'exercise . . . [its] function of appellate review.'"). The notion that there might be unstated reasons for a decision that can be added later, or that *post hoc* reasoning can be added to bolster or modify an already-issued order (other than proper reconsideration in cases that warrant it), therefore, is simply not sustainable as a matter of state law even if federal law permitted it — which it does not.

4. THE DEPARTMENT SHOULD CONFESS ERROR IN THE DISTRICT COURT.

As noted above, M.G.L. c. 30A §11(8) means that the Department's orders must stand or fall on their own. The Magistrate's recommendation, and now Verizon's tacit admission as well, show that the May 1999 Order and its progeny are defective. The intellectually honest response in this situation is not to re-open the proceedings to try to get a "do-over" and fashion an order that achieves the Department's preferred policy result in a garb more likely to withstand judicial review. It is instead to confess error in the District Court forthrightly and voluntarily accept an order that (a) vacates its May 1999 and subsequent orders in this matter and (b) immediately reinstates the effectiveness of its October 1998 order, *nunc pro tunc.*

Taking this step would require both intellectual honesty and a certain degree of courage for the Department. But on its face, the Department's October 1998 Order did what the Department was supposed to do: interpret the parties' contract in light of its language and the circumstances of its formation — including the state of federal law ***at that time,*** which (as opposed to later twists and turns in federal doctrine) actually does have some bearing on what the contract language means.[4] Also on their face, the Department's later orders, for various reasons, do not hew to the straight and narrow path of enforcing the parties' contract. Instead, they rely on various judicially-discredited misreadings of federal law to allow the Department to impose on the parties, not the terms of their actual deal, but, instead, the Department's own plain policy preference that compensation for ISP-bound calls be either strictly limited or non-existent.

It is no surprise that Global NAPs disagrees with the Department on what constitutes good telecommunications policy on this issue. But at this juncture, this disagreement is moot: the FCC has rules in effect governing this issue, and — unlike its previous efforts in this regard — the rules take precedence over parties' right to make contrary deals in their contracts (but only on a prospective basis). Moreover — also unlike the FCC's initial efforts — its rules (as opposed to its rationale for them) have been allowed to stand by the courts. No one questions that at this point forward, for good or ill, the policy issues here are in the hands of the FCC.

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[4] This is the same "state of federal law" to which the FCC referred in February 1999 when it said that its longstanding policy "of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd 3689 (1999) at ¶ 26, *vacated on other grounds, Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

That said, Global NAPs commends to the Department the example of the FCC, when that body has been called upon to do the job of a state commission in deciding disputes regarding compensation for ISP-bound calling under particular interconnection agreements in effect prior to the FCC's prospective-only rules. There can be no doubt that the FCC is at least as hostile to compensation for ISP-bound calls as is the Department — it has labeled such compensation a form of "regulatory arbitrage;" it has suggested that the right result is bill-and-keep; and its rules put significant caps on the amount of compensation for such calls that will be available going forward, both in terms of rates and in terms of the number of minutes on which compensation must be paid.

Despite these views, when the FCC was confronted with a set of pre-existing interconnection agreements that call for compensation for "local" traffic, the FCC did not shy away from taking a neutral, clear-eyed look at what the contracts said (viewed in light of the circumstances of their formation, not the FCC's policy views), and then either requiring compensation or not, based on their specific language. In both *Cox*[5] and *Starpower*,[6] the FCC was unwavering in its views that ISP-bound traffic was jurisdictionally interstate, and that — left to its own devices — it would not regard jurisdictionally interstate traffic of this sort as truly "local" in nature. But it understood that the question was not what ***it thought*** about compensation for ISP-bound calls; the question was what ***the parties said*** about compensation for ISP-bound calls when the contract was formed.

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[5] Memorandum Opinion and Order, *Cox Virginia Telecom, Inc. vs. Verizon South, Inc.*, No. EB-01-MD-006, FCC 02-133 (rel. May 10, 2002) ("*Cox*").

[6] Memorandum Opinion and Order *Starpower Communications, LLC vs. Verizon South, Inc.*, Nos. EB-00-MD-19-20, FCC 02-105 (rel. Apr. 8, 2002) ("*Starpower*").

Holding fast to this critical distinction between its own policy preferences and the parties' contracts, where it found that the parties intended compensation to track the ***jurisdiction*** of the traffic (with interstate calls not subject to compensation), it ruled that compensation was not required.[7] But where it found instead that the parties intended compensation to track ***dialing*** and ***billing*** of the traffic (with locally-dialed and -billed calls subject to compensation), it required compensation — perhaps holding its nose while doing its job, but doing that job nonetheless.[8]

Viewing *Starpower* and *Cox* as instructive precedent, the language at issue in the matters before the Department indeed requires such compensation, as the Department properly found in 1998. The FCC found that no compensation was due when the contracts expressly defined traffic as "local" or not on the basis of the "end-to-end" nature of the traffic; but where the references were to Verizon's tariffs and to how the traffic was billed, the FCC found that compensation was due. In the contracts at issue here, there is no use of the term "end-to-end;" instead, the reference is plainly to Verizon's tariffs and to how the traffic is billed.[9] The only reasonable conclusion, under the *Starpower* and *Cox* cases, is that the Department got it right in 1998. Recent precedent, therefore, does not support the view that the Department's earlier interpretation of the contracts was sufficiently wrong to warrant reconsideration. To the

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[7] *Starpower* at ¶¶ 26, 28.

[8] *Starpower* at ¶¶ 42, 45; *Cox* at ¶ 23.

[9] For example, Global NAPs' 1997 agreement with Verizon states: "Reciprocal compensation only applies to the transport and termination of Local Traffic ***billable*** by NYNEX or GNAPs which a Telephone Exchange Service Customer originates on NYNEX's or GNAPs's network for termination on the other Party's network," and that "the parties shall compensate each other for transport and termination of Local Traffic in an equal and symmetrical manner." It defines "Local Traffic" as, "'a call which is originated and terminated within a given LATA, in the Commonwealth of Massachusetts, ***as defined in DPU Tariff 10,*** section 6. Intra LATA calls originated on a 1+ presubscription basis when available or a casual dialed (10XXX/101XXXX) basis are not considered local traffic." Note that the exception refers to how calls are dialed.

contrary, recent precedent shows that the original 1998 determination on this point was correct, and that the error lay in subsequent decisions departing from that determination.

The Department, therefore, stands at a critical juncture. It can forthrightly and honestly admit that it was led astray by the FCC's less than pellucid shifting positions on this question (as well as by the Department's own policy preferences); or it can stand by its position. What it cannot do is attempt to change the record now in the final stages of federal court review to strengthen its position on appeal.

Respectfully submitted,

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Dated: August 1, 2002

LIT 1350351v1