COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of WorldCom Technologies, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts	D.T.E. 97-116

MOTION OF TCG AND AT&T FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CLARIFICATION OF D.T.E. 97-116-C

1. Introduction.

Teleport Communications-Boston, Inc., and Teleport Communications Group, as AT&T companies ("TCG"), and AT&T Communications of New England, Inc. (collectively "AT&T") respectfully urge the Department to reconsider its order in this docket dated May 19, 1999, and numbered D.T.E. 97-116-C (the "May ISP Order").

Even under the reasoning of the majority opinion, it was premature for the Department to grant the full relief requested by Bell Atlantic-Massachusetts ("BA-MA") in its Motion for Modification. At the very least, the Department should revise its May ISP Order to: (i) withdraw its decision on the merits holding that BA-MA has no legal obligation to continue paying reciprocal compensation for calls to Internet Service Providers ("ISPs"), and (ii) reinstate BA-MA's obligation to hold all disputed amounts regarding such payments in escrow pending either a negotiated or a fully litigated resolution of the contractual and important policy issues regarding such payments.

Despite the fact that the decision of the three-member majority indicated that the Department did not intend to make a decision on the merits, the May ISP Order went on to do just that, by ruling affirmatively that BA-MA no longer has any obligation to pay reciprocal compensation for ISP-bound traffic. *May ISP Order* at 28-29, 41. If the Department does not revise its May ISP Order in the manner requested by AT&T, the Department will have severely undercut the ability of carriers to negotiate a compromise solution with Bell Atlantic. Furthermore, it was error for the Department to allow BA-MA to obtain terminating services from other carriers on Internet bound calls without paying fair and symmetrical rates of compensation. This error was exacerbated by the fact that the Department entered its order after accepting and apparently considering evidence submitted by BA-MA in the form of affidavits and attached exhibits, but without giving other affected carriers the opportunity to subject BA-MA's witnesses to cross-examination or to present countervailing evidence and argument.

In addition, the FCC has issued new guidance on the jurisdictional definition of ISP-bound traffic, guidance that was not available to the Department when it issued its May ISP Order. In light of the May 18, 1999, directions of the Common Carrier Bureau of the Federal Communications Commission (the "FCC") – discussed in Section II of the Argument, below – the Department should reinstate the Department's order dated October 21, 1998, and numbered D.T.E. 97-116 (the "October ISP Order").

If the Department chooses not to reinstate its October ISP Order, however, it should at the very least reinstate the *status quo, ante* that ruling. It could do so by ordering BA-MA to continue paying reciprocal compensation for ISP-bound traffic into escrow, and urging all carriers to attempt to negotiate a full resolution of these issues before asking the Department to issue a final ruling on the merits. The Department should also make clear that no final ruling on the merits can be issued without proper notice, and without accepting and considering relevant evidence and argument from all interested parties. The premise of such a limited revision of the May ISP Order– i.e., the Department's conclusion that the October ISP Order was shown to be wrong as a matter of law by the FCC's February 26, 1999, jurisdictional ruling regarding ISP-bound traffic – is a conclusion that AT&T respectfully suggests is incorrect. At the very least, however, the Department should reconsider and reverse its decision to grant BA-MA the full relief it has sought, because it is improper to have granted such relief without first either: (i) considering the intent of the parties in entering into interconnection agreements with BA-MA; or (ii) even assuming that BA-MA has not voluntarily undertaken a contractual obligation to make such payments, considering how the costs of terminating ISP-bound calls should be recovered from other carriers; or (iii) considering other instances in which intercarrier compensation rates (such as for intrastate toll access) appear to exceed economic costs.

2. Standard of Review.

Although the Department's rules establish a party's right to seek reconsideration of a Department order, they do not set forth the standard by which the Department should evaluate a motion for reconsideration. *See* 220 C.M.R. 1.11(10). The Department has developed such standards over the years on a case-by-case basis.

"Reconsideration is appropriate when there are previously unknown or undisclosed facts that would have a significant impact on the Department's decision or if the Department's decision is arguably the result of mistake or inadvertence." *Commonwealth Electric Company*, D.P.U. 91-3B-1 at 5-6. The May ISP Order appears to have been the result of mistake or inadvertence. The three-member majority expressly stated that it did not intend to decide the merits of the dispute over ISP-bound traffic, but it then did exactly that by ruling that BA-MA has no legal obligation to pay reciprocal compensation to competitive local exchange carriers ("CLECs") that terminate such traffic originated by BA-MA's retail customers. Furthermore, new information regarding how the FCC

would apply its own jurisdictional ruling on ISP-bound traffic warrants reconsideration of the Department's conclusion that its October ISP Order was based on a mistake of law.

Recently, the Department recognized an additional ground for granting a motion for reconsideration: reconsideration is also appropriate where parties have not been "accorded a reasonable opportunity to prepare and present evidence and argument" on an issue decided by the Department. *Petition of CTC Communications Corp.*, D.T.E. 98-18-A at 2, 9. In that case, CTC Communications Corp. had filed a complaint with the Department claiming that Bell Atlantic had been wrongfully refusing to process its resale orders for the assignment of accounts of existing Bell Atlantic customers unless the customer pays a termination fee. *Id.* at 1. After conducting a procedural conference and receiving stipulated facts and the parties' answers and replies to briefing questions, the Department issued an order directing Bell Atlantic to process CTC orders that give effect to a valid assignment of rights from an end user in which the essential terms of the Bell Atlantic contract remain intact. *Id.* at 2. Bell Atlantic filed a motion for reconsideration on the grounds that the Department did not conduct an evidentiary hearing and did not give Bell Atlantic a full opportunity to present evidence and argument before issuing a final order. *See id.* at 5. Reasoning that "the requirement that parties be given notice of the issues involved and accorded a reasonable opportunity to prepare and present evidence and argument must be scrupulously respected," the Department granted Bell Atlantic's motion for reconsideration. *Id.* at 2, 9. Similarly, because the carriers affected by the Department's decision in this case were not provided with an opportunity to present evidence and argument on all of the issues decided, or to subject BA-MA's affiants to cross-examination, the Department should grant AT&T's motion for reconsideration.

3. Argument.

I. It Was Improper for the Department To Grant BA-MA the Full Relief Requested, Without Considering or Hearing Evidence or Argument From All Affected Carriers on All Relevant Contractual and Public Policy Issues.

A. The May ISP Order Grants BA-MA Full, Substantive Relief on the Merits, Even While Claiming Not To Do So.

In the May ISP Order, the Department concluded that its October ISP Order is now a "nullity," because it was ostensibly shown to be based on a fatal error by the FCC's February 1999 ruling. *May ISP Order* at 24. As discussed in Section II below, this conclusion was itself based on a mistaken reading of the FCC's ISP Jurisdictional Ruling. Even if this conclusion were correct, however, which it is not, it would at most support a Department order voiding the October ISP Order. Such a conclusion would not support any

Departmental finding that BA-MA no longer has any legal obligation to pay reciprocal compensation on ISP-bound traffic.

In several places in the May ISP Order, the Department suggests that it intended to go no further than this, and that it did not intend to resolve the merits of the dispute between Bell Atlantic and MCI WorldCom – never mind the related disputes between Bell Atlantic and virtually every other competitive local exchange carrier with which it had signed an interconnection agreement – regarding the obligation to pay reciprocal compensation on ISP-bound traffic. *May ISP Order* at 25-27 & n.29.

In fact, however, the Department leapt past a limited conclusion that its October ISP Order was based on flawed reasoning, all the way to an order granting Bell Atlantic all the relief that it sought. The Department declared that Bell Atlantic can stop paying reciprocal compensation for the termination of ISP-bound traffic, and that Bell Atlantic has no obligation under its interconnection agreement with MCI WorldCom, or under its agreements with any other carrier, to do so. *May ISP Order* at 28-29, 41. In the Department's own words, its Order amounts to complete "termination of the obligation for reciprocal compensation payments for ISP-bound traffic." *May ISP Order* at 30.

The Department entered this Order without ever taking evidence or considering argument regarding the merits of the parties' contract arguments or the contractual relationships between Bell Atlantic and carriers that were not parties to this proceeding, and without considering any substantive policy issues regarding the proper way to structure intercarrier compensation. The Department stated that it was considering "only *[its] own* October Order and the interconnection agreement construed by that Order," i.e. the interconnection agreement between Bell Atlantic and MFS. See *May ISP Order* at 25 n.27 (emphasis in original). Thus, the Department recognized that it was granting the relief sought by Bell Atlantic without ever looking at the interconnection agreements of the many other carriers directly affected by the Department's ruling, without taking additional evidence and argument regarding the intent of Bell Atlantic and the various other contracting parties at the times that they entered into their interconnection agreements, and without even considering the evidence that had already been presented to show that Bell Atlantic itself considered ISP-bound calls to be local traffic at the time that it entered into interconnection agreements obligating Bell Atlantic to pay reciprocal compensation on all local traffic. Similarly, the Department held that BA-MA could stop making any and all

reciprocal compensation for ISP-bound traffic, effectively setting the intercarrier compensation for terminating such calls at a rate of zero, without considering any evidence or argument regarding fair and efficient levels of intercarrier compensation.

This was error. To grant the relief sought by Bell Atlantic without considering these broader issues, without first determining whether the existing reciprocal compensation arrangements for ISP-bound traffic should or even legally must remain in place, was to act arbitrarily and capriciously. The Department should not let its May ISP Order stand. In the words of the Department, "[a] clean break with error is salutary." *May ISP Order* at 38 n.42.

B. By Granting the Full Relief Requested by BA-MA, the Department Has Severely Undercut the Ability of Other Carriers to Negotiate a Fair Resolution.

All five commissioners agreed on at least one thing in the May ISP Order: they would prefer that BA-MA negotiate with other carriers a fair resolution of the reciprocal compensation issues raised in this docket. See *May ISP Order* at 27, 29-30, 38-39; *Id., Dissenting Opinion* at 9. But the Department cannot have any reasonable expectation that such negotiations are feasible so long as the Department has already granted BA-MA everything it could have wished with respect to reciprocal compensation for ISP-bound traffic. The dissenting opinion, in respectful understatement, made this point well, observing that: (i) "the elimination of Bell Atlantic's obligation to pay reciprocal compensation into escrow for ISP-bound traffic provides a sure recipe for delay and non-settlement because Bell Atlantic now has little incentive to negotiate and the CLECs have reduced leverage;" and (ii) "[g]iven [the majority's] conclusion that Bell Atlantic has no obligation to pay reciprocal compensation for ISP-bound traffic, it is not clear … why the majority thinks Bell Atlantic would engage in negotiation." *May ISP Order, Dissenting Opinion* at 9. The Department cannot expect to see a negotiated resolution unless it reconsiders its decision that grants BA-MA complete relief from any contractual obligation to pay reciprocal compensation on ISP-bound traffic.

C. The Department Cannot Lawfully Absolve BA-MA Of Any Obligation To Pay Reciprocal Compensation on ISP-Bound Traffic Without Considering The Merits Of All Parties' Contract Claims.

1. **The Department Cannot Decide The Contracting Rights Of Carriers Not Party To This Proceeding, or Without**

Looking At The Interconnection Agreement Of Each Affected Carrier.

The Department says that it issued the May ISP Order without looking at any interconnection agreement other than the one between BA-MA and MFS WorldCom. See *May ISP Order* at 25 n.27. It was a mistake, therefore, to issue a ruling on the merits with respect to BA-MA's obligation to make reciprocal compensation payments to any other CLEC. The Department cannot lawfully decide contract claims that it has not even considered. Nor can the Department lawfully decide the rights of carriers (such as AT&T, or ACC National Telecommunications Corporation) that are not parties to this docket. See, e.g., *Petition of CTC Communications Corp.*, D.T.E. 98-18-A. The Department should reconsider and retract at least so much of its decision that addresses the merits of BA-MA's claim.

2. **The Undisputed Evidence Shows That BA-MA Understood ISP-Bound Traffic To Be Local When It Agreed By Contract To Pay Reciprocal Compensation On All Local Traffic.**

It was an especially grave error for the Department to rule that BA-MA is no longer obligated under any interconnection agreement to pay reciprocal compensation for ISP-bound traffic, where the undisputed evidence shows that Bell Atlantic understood that such traffic is treated as local and is subject to contractual obligations to pay reciprocal compensation.

As the Department observed, Bell Atlantic recognized in May 1996 (in comments filed by Bell Atlantic with the FCC) that – for the purposes of intercarrier compensation – calls to ISPs are local and are subject to reciprocal compensation. *May ISP Order* at 15. See also *Opposition By AT&T And TCG To Bell Atlantic's Motion For Modification Of Order And Motion For Stay*, Docket DTE 97-116 (March 23, 1999), at 5. Within Massachusetts, Bell Atlantic has treated ISP calls as local and has rated its own retail services accordingly. *May ISP Order* at 15.

In light of this undisputed evidence, there was no basis for the Department's conclusion that BA-MA no longer has

any obligation to pay reciprocal compensation for ISP-bound traffic.

3. The Department Improperly Disregarded BA-MA's Contractual Obligation to Negotiate *Before* Seeking Relief From the Department.

The Department noted in passing AT&T's argument that if BA-MA believes that its reciprocal compensation obligations under its interconnection agreements should change in light of the *FCC's ISP Jurisdictional Ruling*, then BA-MA is contractually obligated first to attempt to negotiate new terms before coming to the Department for relief. *May ISP Order* at 14. See also *Opposition By AT&T And TCG To Bell Atlantic's Motion For Modification Of Order And Motion For Stay*, Docket DTE 97-116 (March 23, 1999), at 6-7.

The Department then ignored this contractual obligation to negotiate, and proceeded to grant the relief sought by BA-MA even in the absence of any such negotiations. That was error. Because BA-MA is contractually obligated to negotiate first, the Department had no jurisdiction to grant the relief sought by BA-MA. The Department should retract its grant of that relief.

D. The Department Had No Basis For Setting The Reciprocal Compensation Rate for ISP-Bound Traffic To Zero, Especially Without Taking Evidence And Considering Argument About The Proper Levels Of Intercarrier Compensation Rates.

As the Department recognized, there are "numerous issues" raised by the dispute over payment of reciprocal compensation for ISP-bound traffic that the Department has not yet considered. *May ISP Order* at 21. Those important issues include "various substantive policy and economic reasons for paying reciprocal compensation," which the Department has "never explored … through hearings and discovery." Dissenting Opinion, *May ISP Order* at 1.

The Department accuses CLECs and ISPs of "'gaming' regulation … to use reciprocal compensation … as a revenue source for increased profits, lower Internet access costs, and maybe even improved Internet access." *May ISP Order* at 39. But there is no evidentiary basis for such a hostile reaction to carriers other than BA-MA. The Department cannot lawfully reach any conclusion regarding what would constitute "real competition" for ISP customers, see *May ISP Order* at 32-35, without hearing evidence and argument on this point. More fundamentally, even assuming

that BA-MA has no contractual obligation to pay reciprocal compensation on ISP-bound traffic, the Department must give all interested parties the opportunity to offer evidence and argument before implementing a wholly new pricing regime that allows BA-MA selectively to force CLECs to terminate some calls for free.

1. **In the Absence of Bill-and-Keep for All Local Traffic, the Cost of Terminating ISP-Bound Calls Must be Recoverable.**

   The Department recognizes that "there were and may still be costs incurred by local exchange carriers in terminating [ISP-bound] traffic." *May ISP Order* at 28-29.

   And yet, the Department has set at zero the price to be paid in order to have such traffic terminated.

   There is no policy or legal basis for such a result. The Department stresses that it envisions its role as one of putting "in place the structural conditions necessary for an efficient competitive process – one where marketplace decisions of both producers and consumers are made *on the basis of incremental costs*." *May ISP Order* at 35, quoting *Gas Unbundling*, D.T.E. 98-32-B at 30 (1999). Allowing BA-MA to have traffic from its retail customers terminated by CLECs free of charge does not advance this policy goal, and is not supported by any record evidence.

2. **Any Rebalancing of Intercarrier Compensation Rates Should Be Comprehensive, and Include the Setting of Intrastate Access Rates to Economic Cost.**

   The Department did not identify any principled basis for eliminating BA-MA's obligation to pay any compensation whatsoever to CLECs that terminate ISP-bound traffic originated by BA-MA retail customers, while at the same time continuing to require CLECs to pay to BA-MA intrastate access charges that are far in excess of economic cost. If the Department is going to rebalance intercarrier compensation, it must do so in a comprehensive manner. By eliminating BA-MA's obligation to pay reciprocal compensation while maintaining intrastate access rates at current levels, the May ISP Order results in "shifting dollars from one person's pocket to another's" with no economic basis, which is the very result that the

Department said it wishes to avoid. See *May ISP Order* at 33.

Indeed, it is ironic that Bell Atlantic, in its May 1996 comments to the FCC, emphasized that inclusion of ISP-bound traffic in reciprocal compensation schemes would serve to prevent it from gaming the reciprocal compensation to the disadvantage of its competitors by forcing Bell Atlantic to seek truly cost-based rates. By requiring Bell Atlantic's competitors to pay BA-MA full reciprocal compensation for traffic originated by a CLEC, while providing BA-MA a free ride for a significant portion of the intercarrier traffic that it originates, the Department's order hands Bell Atlantic an arbitrage bonanza. The Department should revise the May ISP Order to avoid this result.

3. The Department Improperly Relied Upon Evidence Presented by BA-MA, Without Giving Other Carriers a Fair Opportunity to Respond or to Cross-Examine BA-MA's Witnesses.

When BA-MA filed "Reply Comments" on March 29, 1999, it supported its arguments with evidence presented in and attached to signed affidavits of four people: Lawrence J. Chu; Paula L. Brown; Dr. William E. Taylor; and James J. Doyle. The Department specifically cited and relied upon several facts alleged in this evidentiary submission by BA-MA. See *May ISP Order* at 32 n.34, and at 36 n.39. Other conclusions by the Department echo arguments and even adopt some of the same language put forth by Bell Atlantic's witnesses. E.g., *May ISP Order* at 31-40.

This procedure was error, and violated the due process rights of all other carriers affected by the May ISP Order. None of BA-MA's witnesses were ever subjected to cross-examination. Furthermore, other carriers were not given any opportunity to present countervailing evidence and argument. This is improper, and requires that the Department set aside the May ISP Order. E.g., *Petition of CTC Communications Corp.*, D.T.E. 98-18-A at 9.

II. New Guidance From the FCC's Common Carrier Bureau Confirms That The Department Misapplied the FCC's ISP Jurisdictional Ruling.

The Department misconstrued and misapplied the FCC's jurisdictional ruling regarding Internet-bound traffic. See *May ISP Order* at 19-20. Proof comes in a letter from the FCC's Common Carrier Bureau to SBC Communications, Inc., dated May 18, 1999. (A copy of this letter is

attached hereto as Exhibit A.) That letter was not available to the Department at the time that it issued its order of May 19, 1999, and thus the letter falls into the category of unknown or undisclosed information that justifies, indeed requires, reconsideration by the Department.

In its ARMIS filings with the FCC, SBC had reclassified ISP-bound traffic and associated costs and revenues as interstate. In its May 18 letter, the Common Carrier Bureau said that this was incorrect, and it ordered SBC to make a corrected ARMIS filing. The Common Carrier Bureau explained that although the FCC had exercised jurisdiction over ISP-bound traffic in its February 26, 1999, ruling, the FCC continued to treat ISPs as end-users and to treat ISP-bound traffic as local for the purposes of intercarrier compensation, which is why such traffic is exempt from interstate access charges.

Since the costs of ISP-bound traffic continue to be classified as intrastate in nature, notwithstanding the FCC's exercise of jurisdiction over such traffic, there is no basis for the Department's conclusion that ISP-bound traffic must necessarily fall outside the scope of provisions in interconnection agreements that require BA-MA to pay reciprocal compensation for local traffic.

III. The Existence of an Imbalance in Traffic Flows Is Not Grounds For Doing Away With Reciprocal Compensation for ISP-Bound Traffic.

A. Reciprocal Compensation Presumes an Asymmetry of Traffic Flows, in Contrast to Bill and Keep, Which AT&T Proposed but BA-MA Resisted and the Department Rejected.

In the *Consolidated Arbitrations* proceeding, AT&T advocated a bill-and-keep arrangement under which there would be no intercarrier compensation for terminating a call that was originated by the customer of another carrier. BA-MA resisted, pushing instead for a system of reciprocal compensation, on the ground that bill-and-keep would be inappropriate because there was no guarantee that there would be a rough balance of traffic between carriers. See *Consolidated Arbitrations*, Dockets DPU 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Phase 4 Decision at 66-67 (December 4, 1996). The Department adopted the system of reciprocal compensation advocated by BA-MA. The Department explained that "if we could be assured that calling was roughly symmetrical, we would adopt the bill and keep arrangement. However, we cannot be so assured, and so we will not require it." *Id.* at 68.

In other words, the explicit premise of the system of reciprocal compensation put into place by the Department was that there

would *not* be balance of traffic between carriers. *Consolidated Arbitration*, Phase 4 Decision at 68. In light of the Department's 1996 order requiring reciprocal compensation rather than bill-and-keep, the Department cannot now reasonably conclude that the fact that traffic flows are not in balance – as expected from the start – is evidence that CLECs are "gaming" the regulatory system or taking advantage of a "regulatory distortion." See *May ISP Order* at 39-40. But that is exactly the conclusion to which the Department leapt.

The Department opined that the existence of asymmetrical traffic patterns and resulting asymmetries in reciprocal compensation amounted to an "unintended arbitrage opportunity," and were the antithesis of "real competition." *May ISP Order* at 32 & n.34. *See also id.* at 35. The Department found that the existence of an imbalance in reciprocal compensation payments constitutes a regulatory distortion that must be eliminated by Departmental fiat. *Id.* at 38-39. This conclusion is unfair, and without basis.

Bell Atlantic and the Department recognized from the start that adoption of a scheme of reciprocal compensation would necessarily mean that payments would flow in favor some carriers and out of the coffers of others. Bell Atlantic was perfectly happy with this arrangement at the outset, when (as the incumbent monopolist with near total market share) it expected the vast majority of reciprocal compensation payments for termination of traffic to flow in its direction. Only when circumstances changed, and certain high volume customers found that they could get better service and prices from BA-MA's competitors, did Bell Atlantic suddenly change its tune. Even then, however, BA-MA did not seek to change to a bill-and-keep system, or to make some other change that has the potential of being competitively neutral. Instead, BA-MA asked the Department to do away with intercarrier compensation on a particular kind of traffic that today is terminated in far greater proportion by BA-MA's competitors.

In areas where there is a similar imbalance of traffic flows but the reciprocal compensation imbalance favors Bell Atlantic, however, BA-MA is perfectly happy to reap those benefits. For example, wireless traffic is typically originated by the wireless customer, and thus far more wireless traffic is terminated to BA-MA's wireline customers than is originated by them for termination to a CLEC's wireless customer. This is an example, therefore, of an imbalance of reciprocal compensation payments that currently favors Bell Atlantic. BA-MA does not suggest that this constitutes an unfair distortion of "real competition," however.

B. Adoption of the 2:1 Ratio In Lieu of Actual Data Measuring ISP-Bound Traffic Was Arbitrary and Capricious, and Was Also Unclear.

The Department allowed BA-MA to stop making any reciprocal compensation payments for ISP-bound traffic, without any evidence that it is possible to identify which call volumes are ISP-bound and which are not. To the contrary, as the Department acknowledged, there is no "precise means to separate ISP-bound traffic from other traffic." *May ISP Order* at 28 n.31. BA-MA concedes that there is no way to measure ISP-bound traffic, and thus it proposed to treat as ISP-bound any traffic terminated to a CLEC that is in excess of a 2:1 ratio of terminating-to-originating traffic. *May ISP Order* at 4-5 n.6. BA-MA presented no evidence whatsoever to show that this ratio has any relevance or meaning, and thus no such evidence was tested by discovery, cross-examination, or rebuttal testimony. Despite the complete absence of any factual record whatsoever on this point, the Department asserted that "[t]his arrangement is reasonable for the nonce…." *May ISP Order* at 28. The Department chose to "believe that Bell Atlantic's 2:1 ratio as a proxy is generous to the point of likely including some ISP-bound traffic," *May ISP Order* at 28 n.31, but there was no record evidence upon which the Department could base that belief. The making of such a factual finding without any evidentiary basis is error.

The Department suggested that the lack of evidence to support the proposed 2:1 ratio was unimportant, because use of the ratio would be "rather like a rebuttable presumption, allowing any carrier to demonstrate adduce [sic] evidence in negotiations, or ultimately arbitration, that its terminating traffic is not ISP-bound, even if it is in excess of the 2:1 proxy." *May ISP Order* at 28 n.31. But given that current mechanisms for tracking terminating and originating traffic have no way to distinguish ISP-bound traffic from any other calls, CLECs will have no way of proving what volumes of its traffic is not ISP-bound.

Furthermore, the Department's order with respect to this 2:1 ratio is unclear. The Department stated that BA-MA "shall not be required to make reciprocal compensation payments, in excess of a 2:1 terminating-to-originating traffic ratio…." *May ISP Order* at 41. Although it appears that the Department intended for BA-MA to be required to continue making reciprocal compensation payments on all traffic up to and including the 2:1 ratio, and only to withhold such payments on traffic that exceeds this ratio, the ordering clause of the May ISP Order is not clear. It could also be read as meaning that BA-MA need not making any reciprocal compensation payments whatsoever to any CLEC with a terminating-to-originating traffic ratio in excess of 2:1. The Department should clarify what is meant by the second ordering clause of the May ISP Order.

4. Conclusion.

For the reasons stated above, the Department should reinstate the October ISP Order.

In the alternative, the Department should:

(i) Revise the May ISP Order to state that the Department is not deciding the merits of the dispute over reciprocal compensation for ISP-bound traffic, and to reverse its determination and order that BA-MA no longer has any obligation to pay such reciprocal compensation;

(ii) Order BA-MA to pay each other carrier all reciprocal compensation amounts except for traffic that BA-MA can identify as bound for ISPs without regard to the arbitrary 2:1 ratio of CLEC terminating to originating traffic or, alternatively, clarify that BA-MA must pay in full all reciprocal compensation for all traffic terminating at a CLEC up to and including that 2:1 ratio, and that the only amount of reciprocal compensation payments that BA-MA may withhold and pay into escrow (per paragraph (iii), below), is for traffic in excess of that 2:1 ratio; and

(iii) Order BA-MA to continue paying into escrow all disputed amounts for reciprocal compensation on ISP-bound traffic to each other carrier, maintaining separate escrow accounts for the amounts in dispute with each carrier pending a final resolution of the dispute with that carrier either by negotiation or by final order of the Department and resolution of any subsequent appeals.

Respectfully submitted,

_____

Jeffrey F. Jones

Kenneth W. Salinger

Jay E. Gruber

Palmer & Dodge llp

One Beacon Street

Boston, MA 02108-3190

(617) 573-0100

Robert Aurigema

AT&T Communications of New England, Inc.

32 Avenue of the Americas, Room 2700

New York, NY 10013

(212) 387-5627

Dated: June 8, 1999.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the above document to be served upon the attorney of record for each other party on June 8, 1999.