

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Complaint of WorldCom Technologies, Inc.)

Against New England Telephone and Telegraph) D.T.E. 97-116-D

Company, d/b/a Bell Atlantic-Massachusetts)

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MOTION FOR RECONSIDERATION OF

NEVD OF MASSACHUSETTS, LLC

I. Introduction

NEVD of Massachusetts, LLC ("NEVD" or the "Company"), through its attorney, files this Motion For Reconsideration of the Department's Order in DTE 97-116-C, dated May 19, 1999 (the "May 19th Order"). At the outset, NEVD states that it supports AT&T's Motion for Reconsideration and will not repeat the arguments set forth therein. In addition to the arguments set forth by AT&T, NEVD states as follows:

II. The Department's Order Is Harmful To Competition And Harmful To Small Companies That Are Investing In Massachusetts

NEVD is a small local exchange company, with 57 employees in the state of Massachusetts. However, NEVD has big plans and is aggressively implementing them. The Company has already invested over \$4 million in capital expenditures to prepare for its entry into the Massachusetts local exchange market, and has plans to invest several million more. Specifically, NEVD has purchased and installed a switch in Worcester, is completing the installation of an extensive SONET ring network, and has hired a top quality sales and marketing staff that will offer a broader array of voice and data services to telecommunications customers, including Internet Service Providers ("ISPs").

When NEVD opens its doors and begins providing local exchange service later this summer in competition with Bell Atlantic-Massachusetts ("BA-MA"), it will begin doing

so with no customers, no revenue, and with sunk capital costs of over \$4 million. As a result of the Department's May 19th Order, to the extent NEVD is successful in attracting ISP customers, it will be in the position of terminating calls that originate on BA-MA's own network for free. What this means is that small companies like NEVD, which have invested substantial sums of money in order to compete with the incumbent monopoly, will in fact be subsidizing the incumbent's local exchange operations in Massachusetts! As an alternative to subsidizing BA-MA, NEVD and other CLECs could simply decide not to contest the market for ISP customers. Both results, of course, stand the Telecommunications Act of 1996 squarely on its head and demonstrate that the Department has made a mistake. NEVD respectfully urges the Department to fix this injustice by reconsidering its May 19th Order, vacating it, and reinstating its Order of October 21, 1998 (the "October 21st Order").

III. The Department Should Construe The Parties' Interconnection Agreements And Apply

The Internet Traffic Order To Determine The Intention Of The Parties

Just two weeks ago, in an Open Meeting, the Rhode Island Public Utilities Commission ("Rhode Island PUC") agreed with NEVD that under the *Internet Traffic Order* and NEVD's interconnection agreement, the parties to such Agreement had intended to treat internet traffic as local and subject to reciprocal compensation. The Rhode Island PUC rejected essentially the same argument that Bell Atlantic made to the Department. BA-RI argued that since the FCC had ruled that internet traffic was non-local, interstate traffic, any state commission ruling that such traffic was "local" impermissibly contradicts the FCC's *Internet Traffic Order*. Importantly, the Rhode Island PUC rejected BA-RI's argument and ruled that under NEVD's interconnection agreement and the *Internet Traffic Order*, the parties intended internet traffic to be treated as local traffic, subject to reciprocal compensation.

A recent Seventh Circuit Court decision demonstrates that the Rhode Island PUC was on firm ground when it concluded that the FCC's jurisdictional ruling in its *Internet Traffic Order* does not

necessarily contradict a state commission's ruling that internet traffic is local and subject to reciprocal compensation. The Seventh Circuit upheld an order by the Illinois Commerce Commission (the "ICC") that required Ameritech to pay reciprocal compensation for ISP-bound calls. The ICC found that Ameritech was bound under its interconnection agreements to pay reciprocal compensation for ISP-bound calls, and that Ameritech's refusal to do so was anti-competitive. *See, Ameritech ISP Decision*, slip op. at 4.

The Seventh Circuit found that the ICC's decision was completely consistent with the FCC's jurisdictional ruling regarding ISP-bound traffic. The Court correctly noted that by declining to separate ISP-bound traffic into two components, the FCC was merely determining its jurisdiction and that the FCC had left it up to state commissions to

enforce existing interconnection agreements. Importantly, the Seventh Circuit emphasized that "[t]here is nothing in the FCC ruling on reciprocal compensation which would prohibit a call from being a local call for some, but not all, purposes." *Id.* slip op. at 14. For the same reasons, the FCC's *Internet Traffic Order* did not render the Department's October 21st Order a "nullity" as a matter of law. *See, May 19th Order* at 24. As stated in NEVD's Comments, although the FCC rejected the two-call theory for jurisdictional purposes, it certainly did not retroactively invalidate state commission decisions that may have relied on it for the purposes of construing a contract and determining whether the parties agreed to bill each other for terminating internet traffic. At the very least, the two-call theory remains an accurate representation of the historical treatment of ISP-bound traffic at the time that the parties entered into their interconnection agreements. Accordingly, the Department should vacate its May 19th Order and reinstate its October 21st Order.

Even if this Department is not willing to vacate its May 19th Order and reinstate its October 21st Order, it should at the very least undertake proceedings to resolve the dispute between the parties by applying the criteria in paragraph 24 of the *Internet Traffic Order* to the parties' interconnection agreements. Paragraph 24 sets forth guidelines that state commissions should follow to determine the intention of the parties with respect to reciprocal compensation for internet traffic:

Against [the FCC's historical treatment of ISP-bound traffic as local], and in the absence of any contrary Commission rule, parties entering into interconnection agreements may reasonably have agreed, for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic. *When construing the parties' agreements to determine whether the parties so agreed, state commissions have the opportunity to consider all the relevant facts, including the negotiation of the agreements in the context of this Commission's longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements.* For example, it may be appropriate for state commissions to consider such factors as whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate or interstate tariffs; whether revenues associated with those services were counted as intrastate or interstate revenues; whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation; whether, in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs in local telephone charges; and whether, if ISP

traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic. These factors are illustrative only; *state commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties' intentions* (emphasis added).

It is clear from the above that state commissions have primary responsibility for construing

interconnection agreements and for resolving disputes concerning reciprocal compensation for ISP-bound traffic. NEVD respectfully suggests that this Department has not only the authority but the responsibility to determine whether under the parties' interconnection agreements (including NEVD's Agreement) and the criteria provided in paragraph 24 of the *Internet Traffic Order*, the parties agreed to treat internet traffic as local and subject to reciprocal compensation.

IV. CONCLUSION

For all the above reasons, NEVD of Massachusetts respectfully requests the Department to vacate its May 19th Order and reinstate its October 21st Order. In the alternative, NEVD respectfully requests the Commission open a proceeding to construe the interconnection agreements between the parties and determine the parties' intentions by applying the criteria from paragraph 24 of the FCC's *Internet Traffic Order*.

Respectfully submitted,

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