COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of MCI WorldCom, Inc. Against)

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

Company, d/b/a Bell Atlantic Massachusetts)

REPLY COMMENTS OF WORLDCOM, INC.

REGARDING GLOBAL NAPS' MOTION TO VACATE

WorldCom, Inc., as successor-in-interest to MFS Intelenet of Massachusetts, Inc. ("WorldCom"),(1) by and through its attorneys, submits these reply comments in opposition to the comments filed by Bell Atlantic-Massachusetts ("Bell Atlantic") concerning the motion of Global NAPs, Inc. ("Global NAPs") to vacate the Department's orders dated May 19, 1999 (D.T.E. 97-116-C) ("May 1999 Order") and February 25, 2000 (D.T.E. 97-116-D and D.T.E. 99-39) ("February 2000 Order"), and to reinstate the order dated October 21, 1998 (D.T.E. 97-116) ("October 1998 Order").

INTRODUCTION

Bell Atlantic admits that the D.C. Circuit rejected the FCC's reliance in the ISP Order(2) on a jurisdictional "end-to-end" analysis to support its finding that the Telecommunications Act of 1996 (the "Act") does not require payment of reciprocal compensation for calls to ISPs. (BA Opp. at 4-6.) But rather than acknowledge that the D.C. Circuit's decision requires the Department to vacate its May 1999 and February 2000 Orders, which were based on the very parts of the ISP Order the D.C. Circuit rejected, Bell Atlantic asks the Department to deny Global NAPs' motion, and take no further action until the FCC issues an order on remand from the D.C. Circuit. (BA Opp. at 1-2.) The effect of granting Bell Atlantic's request would be that orders which no longer comply with governing federal law, as announced by the D.C. Circuit, would remain in full force and effect indefinitely. Alternatively, Bell Atlantic makes the remarkable claim that the Department did not vacate its original October 1998 Order

because of the ISP Order, but rather because of other FCC precedent which Bell Atlantic says made clear prior to the ISP Order that calls to ISPs are not subject to reciprocal compensation. Finally, Bell Atlantic argues that the Department should not reinstate its October 1998 Order because requiring Bell Atlantic to pay reciprocal compensation for calls to ISPs would be unfair.

The Department should reject Bell Atlantic's arguments. Bell Atlantic wants the Department take no action in this proceeding because the D.C. Circuit's decision, which provides the controlling federal law in this case, is fatal to the May 1999 and February 2000 Orders. Bell Atlantic apparently hopes that at some indefinite point in the future when the FCC issues a remand decision, the legal climate may be more favorable to its position. The Department cannot simply ignore the D.C. Circuit's decision and await some future FCC ruling, as Bell Atlantic suggests, but should instead follow the D.C. Circuit's decision to vacate the ISP Order, and vacate the May 1999 and February 2000 Orders, which were squarely predicated on the ISP Order.

Moreover, as WorldCom made clear in its opening comments, Bell Atlantic's claim that FCC precedent other than the ISP Order showed that calls to ISPs are not eligible for reciprocal compensation has been rejected by every federal court to have considered it, including the Fifth and Seventh Circuits. These courts have found that the FCC's decisions prior to the ISP Order, as well as the prevailing treatment of calls to ISPs in the telecommunications industry, would have led parties to treat calls to ISPs as local in their interconnection agreements, as WorldCom and Bell Atlantic did here.

Finally, Bell Atlantic's claim that it is "unfair" to make Bell Atlantic live up to its contractual commitment to pay reciprocal compensation for calls to ISPs misunderstands the nature of the October 1998 Order, which found that Bell Atlantic *agreed* to pay reciprocal compensation to WorldCom for calls to ISPs under their interconnection agreement. What would be unfair is to allow Bell Atlantic to avoid living up to its contractual obligations simply because those obligations do not work out as Bell Atlantic hoped.

ARGUMENT

I. THE DTE SHOULD REJECT BELL ATLANTIC'S REQUEST THAT IT TAKE NO ACTION INDEFINITELY.

The Department should reject Bell Atlantic's request that the Department take no action in response to the D.C. Circuit's decision until the FCC issues an order on remand. The reason Bell Atlantic wants the Department to take no action now is clear - the recent decisions of the D.C. and Fifth Circuits obliterate Bell Atlantic's position in this matter, and necessitate that the Department vacate the May 1999 and February 2000 Orders. See Bell Atlantic Tel. Co. v. FCC, 206 F.3d 1 (D.C. Cir. 2000); Southwestern Bell Tel. Co. v. Public Utils. Comm'n, __ F.3d __, 2000 WL 332062 (5th Cir. March 30, 2000). Having convinced the Department to vacate its October 1998 Order based on an FCC decision that has now been overturned, Bell Atlantic knows that the Department must now follow the controlling decision of the D.

C. Circuit, and Bell Atlantic would rather have the Department hold this proceeding in abeyance indefinitely than have the Department determine the validity of its May 1999 and February 2000 orders in light of the decisions of the D.C. and Fifth Circuits.(3)

No party can purport to tell the Department how long the FCC will take to issue a decision on remand, or what that decision will be. The only thing that can be predicted as likely is that, whatever the FCC's eventual decision proves to be, one or more parties will challenge it in the D.C. Circuit once again. Does Bell Atlantic propose that the Department stay these proceedings until the next appeal is decided? And if there is another remand, should the Department again wait for the FCC's response? Some FCC proceedings span a decade. This issue has been litigated at dozens of state commissions, at the FCC, and in the federal courts for years already. Unnecessarily waiting for potentially interminable proceedings would allow Bell Atlantic to thwart Congress' desire to "shift monopoly [telephone] markets to competition *as quickly as possible*." H.R. 104-104, at 89 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 55 (emphasis added).(4) There is no justification for the Department to simply take no action in these proceedings, as Bell Atlantic suggests.

II. BELL ATLANTIC'S CLAIM THAT FCC PRECEDENT OTHER THAN THE ISP ORDER SHOW THAT CALLS TO ISPS ARE NOT ELIGIBLE FOR RECIPROCAL COMPENSATION IS WRONG.

Apparently recognizing that the ISP Order no longer provides a basis to sustain the Department's decision in the May 1999 and February 2000 Orders, Bell Atlantic falls back on a claim that FCC decisions other than the ISP Order made clear that calls to ISPs cannot be subject to reciprocal compensation. (BA Opp. at 4-6.) This argument has been rejected by every court to have considered it. The Department should do the same.

As WorldCom noted in its opening comments, the Fifth Circuit in Southwestern Bell rejected the claim that calls to ISPs are not local under prior FCC precedent. (WorldCom Comments at 13-14.) Like the Department did in its original October 1998 Order, the Fifth Circuit found that prior FCC precedent supported a conclusion that parties to interconnection agreements agreed to treat calls to ISPs as local traffic, because at the time those agreements were negotiated the FCC had "embraced a custom of treating calls to ISPs as though they were local, terminating within the same local exchange network." Southwestern Bell, 2000 WL 332062, at *10. The Fifth Circuit explained that the FCC itself in the ISP Order "noted that its historic '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 compensation is due for that traffic.'" Id., 2000 WL 332062, at *10, quoting ISP Order ¶ 25.

Most recently, a district court in Georgia echoed the Fifth Circuit's conclusion that neither prior FCC precedent nor industry treatment suggested that calls to ISPs are not local calls for reciprocal compensation purposes. The court affirmed a decision by the Georgia state commission interpreting an interconnection agreement which, like the agreement between Bell Atlantic and WorldCom, required payment of reciprocal compensation for "local" traffic that "terminates" locally. In so doing, the court

rejected BellSouth's reliance on the same argument Bell Atlantic makes here, namely that "decades of federal precedent establish that ISP-bound traffic is non-local." BellSouth Telecommunications v. MCImetro Access Transmission Servs., et al., Nos. 1:99-CV-0248-JOF, et al., Order at 31 (N.D. Ga. May 4, 2000) (Ex. 1). Instead, the court found that "at the time the interconnection agreements were executed, the parties, including BellSouth, viewed ISP-bound traffic to be local and intended that traffic to be covered by the reciprocal compensation provision of the agreements." Id. As these decisions show, FCC precedent and industry practice prior to the ISP Order did not make clear that calls to ISPs would not be subject to reciprocal compensation as Bell Atlantic argues; if anything, they suggested the opposite.

Finally, Bell Atlantic suggests in a footnote that an FCC order issued after the ISP Order also shows that calls to ISPs are not local. (BA Opp., at 5 n.5, citing Order on Remand, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 99-413 (rel. Dec. 23, 1999) ("DSL Order")). The DSL Order has nothing to do with any of the questions presented to the Department here. The DSL Order had nothing to do with reciprocal compensation, with how calls to ISPs should be treated for reciprocal compensation purposes, or with state commission authority concerning reciprocal compensation provisions of interconnection agreements. Rather, the DSL Order concerns the proper statutory classification of "digital subscriber line services,"(5) as well as carriers' obligations to make elements used to provide those services available in interconnection proceedings under the Act.

Thus, as the Seventh Circuit recognized in Illinois Bell, the FCC itself has held in other decisions that its analysis of the nature of DSL connections to ISPs has no bearing on whether reciprocal compensation is owed for regular dial-up calls to ISPs. Illinois Bell Tel. Co. v. WorldCom Technologies, 179 F.3d 566, 573-74 (7th Cir. 1999) (citing and quoting GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79 (rel. Oct. 30, 1998)). The DSL Order simply does not support Bell Atlantic's argument here.

III. REQUIRING BELL ATLANTIC TO LIVE UP TO ITS AGREEMENT TO PAY RECIPROCAL COMPENSATION FOR CALLS TO ISPs IS NOT UNFAIR.

Finally, Bell Atlantic's claim that requiring it to pay reciprocal compensation for calls to ISPs is "unfair" misunderstands the nature of the Department's October 1998 Order. The October 1998 Order interpreted the reciprocal compensation provisions in the interconnection agreement between WorldCom and Bell Atlantic, which were freely negotiated between the parties. All the Department found in the October 1998 Order was that, at the time they entered into the interconnection agreement in 1996, WorldCom and Bell Atlantic *agreed* to treat calls to ISPs as local for reciprocal compensation purposes. (See, e.g., 10/21/98 Order, at 14 (concluding that Bell Atlantic must pay reciprocal compensation to WorldCom for calls to ISPs "consistent with the terms of their existing agreement").

As shown above, several courts have found that industry practice at the time these interconnection agreements were negotiated was to treat calls to ISPs as local for compensation purposes. Likewise, Bell

Atlantic's own statements in 1996 FCC proceedings bear out that Bell Atlantic knew that calls to ISPs would be subject to the reciprocal compensation provisions in its interconnection agreements under the Act. Specifically, in its reply comments in the Local Competition docket, Bell Atlantic argued against adoption of "bill and keep" by noting that, if reciprocal compensation rates were set too high, "new entrants . . . will sign up customers whose calls are predominantly inbound, such as credit card authorization centers *and internet access providers*." (Ex. 3, Reply Comments of Bell Atlantic, CC Docket No. 96-98 (May 30, 1996)). Bell Atlantic thus was obviously aware in 1996, at the time it entered into the interconnection agreement with WorldCom, that calls to ISPs would be subject to reciprocal compensation provisions in interconnection agreements. What would be unfair would be for the Department to allow Bell Atlantic escape its contractual obligation simply because the contract has not worked the way Bell Atlantic hoped.

CONCLUSION

For the reasons set forth above, and in WorldCom's initial comments, the Department should reinstate its October 1998 Order, which correctly interpreted the Agreement according to its terms and in compliance with federal law.

Respectfully submitted,

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1. MCI WorldCom, Inc. is now known simply as WorldCom, Inc..

2. In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (rel. Feb. 26, 1999) ("ISP Order").

3. On May 4, 2000, the Northern District of Georgia found, like the Fifth Circuit, that the D.C. Circuit's decision eliminates the basis for an incumbent (there BellSouth) to argue that what the FCC may or may not do in remand proceedings affects the fact that the D.C. Circuit rejected the parts of ISP Order relied

on by incumbents. The court found that "despite BellSouth's arguments that the FCC thinks it can maintain its conclusion in a matter that satisfies the Bell Atlantic court, the fact remains that the [ISP Order] has been vacated *on the very grounds that BellSouth uses for support*." BellSouth Telecommunications v. MCImetro Access Transmission Servs., et al., Nos. 1:99-CV-0248-JOF, et al., Order (N.D. Ga. May 4, 2000) (Ex. 1) (emphasis added).

4. The Rhode Island federal district court has already rejected Bell Atlantic's request that it stay proceedings under section 252(e)(6) until the FCC releases a decision on remand, and a district court in Georgia has rejected the same request made by BellSouth. (See Ex. 2.)

5. Digital subscriber line services are advanced communications services that - among other things - can be used by subscribers to obtain direct high speed access to an ISP. Digital subscriber line communications do not involve regular dial-up telephone calls to ISPs like those at issue in this case, and do not involve situations where two carriers are collaborating to complete a routine dial-up call to an ISP.

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