

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 for breach)	
of interconnection terms entered into under Sections 251)	
and 252 of the Telecommunications Act of 1996)	

**COMMENTS OF WORLDCOM, INC. IN RESPONSE TO THE
HEARING OFFICER'S MAY 23, 2001 CALL FOR COMMENTS**

WorldCom, Inc., as successor-in-interest to MFS Intelenet of Massachusetts, Inc. ("WorldCom"), submits these comments pursuant to the Hearing Officer's May 23, 2001 Call for Comments concerning the effect of the Federal Communications Commission's April 27, 2001, ISP Remand Order on reciprocal compensation for ISP-bound traffic in Massachusetts.¹

INTRODUCTION

The ISP Remand Order reconfirms that, as the Department originally found in its October 21, 1998 order (D.T.E. 97-116) ("October 1998 Order"), Verizon New England Inc. d/b/a Verizon Massachusetts ("Verizon") owes WorldCom reciprocal compensation for calls to ISPs under the terms of their interconnection agreement (the "Agreement"). Thus, the Department should vacate its subsequent orders dated May 19, 1999 (D.T.E. 97-116-C) ("May 1999 Order") and February 25, 2000 (D.T.E. 97-

¹ In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, FCC 01-131, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order (rel. Apr. 27, 2001) ("ISP Remand Order"). WorldCom, among others, has appealed the ISP Remand Order. Other parties have moved to stay portions of that Order and to vacate it as inconsistent with the D.C. Circuit's mandate in Bell Atlantic Tel. Cos. v. FCC, 206 F.3d 1 (D.C. Cir. 2000).

116-D and D.T.E. 99-39) ("February 2000 Order"), which erroneously concluded that the Department was required to vacate the October 1998 Order in light of the FCC's original ISP Order,² and reinstate the October 1998 Order.

In its October 1998 Order, the Department correctly interpreted the Agreement between WorldCom and Verizon as requiring payment of reciprocal compensation for calls to ISPs. The FCC then issued its initial ISP Order in February 1999. The FCC confirmed in the ISP Order that whether reciprocal compensation is owed under existing interconnection agreements should be determined, as the Department correctly did in its October 1998 Order, by examining whether parties agreed to pay reciprocal compensation for calls to ISPs. The FCC also found that calls to ISPs are not "local" under an "end-to-end" jurisdictional analysis, and that the Telecommunications Act of 1996 (the "Act" or "1996 Act")³ thus did not require that reciprocal compensation be paid for those calls.

The Department erroneously determined in its May 1999 and February 2000 Orders that, because the FCC found that the Act did not require reciprocal compensation for calls to ISPs, the Department was required to vacate its October 1998 Order interpreting the Agreement. After the D.C. Circuit vacated the ISP Order, the Department concluded that it would await further action from the FCC before deciding whether to vacate its May 1999 and February 2000 Orders. (D.T.E. 97-116-E) ("July 2000 Order").

² See In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689 (Feb. 25, 1999) ("ISP Order"), vacated and remanded, Bell Atlantic Tel. Cos. v. FCC, 206 F.3d 1 (D.C. Cir. 2000).

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

In the ISP Remand Order, the FCC has taken the further action that the Department said it would await. The FCC again confirmed that – as WorldCom consistently has argued – whether reciprocal compensation is owed for calls to ISPs under existing interconnection agreements is determined not by the minimum requirements of the Act, but rather by the terms of the agreements themselves. The FCC also repudiated its reliance in the original ISP Order on an "end-to-end" jurisdictional analysis to determine whether calls are subject to reciprocal compensation under the Act.

The FCC's repudiation of the "end-to-end" analysis for reciprocal compensation purposes removes any remaining doubt that the Department erred in relying on that flawed analysis in its May 1999 and February 2000 Orders. The ISP Remand Order thus requires the Department to vacate those orders and reinstate its original October 1998 Order interpreting the Agreement.

The FCC also asserted jurisdiction over inter-carrier compensation for calls to ISPs on a prospective basis, and announced a new interim nationwide rule that will govern how carriers compensate each other for delivering calls to ISPs under future interconnection agreements. With respect to future interconnection agreements, the Department must follow the FCC's new compensation rule unless and until the ISP Remand Order is stayed or vacated by a court of competent jurisdiction.

WorldCom recognizes the policy concerns that the Department has expressed over reciprocal compensation for calls to ISPs. The ISP Remand Order provides the FCC's judgment on those policy issues. The FCC has determined that incumbents, like Verizon, are bound by past contracts in which they agreed to pay reciprocal compensation for calls to ISPs. At the same time, the FCC has instituted a new prospective inter-carrier compensation regime that directly addresses the Department's policy

concerns. The Department should not therefore use policy concerns to relieve Verizon from its contract obligations.

There is, of course, nothing unfair about holding Verizon to its existing contract obligation. Verizon's own contemporaneous statements in 1996 FCC proceedings show that Verizon 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, Verizon 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. 1, Reply Comments of Bell Atlantic, CC Docket No. 96-98 (May 30, 1996)). Verizon 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.

Thus, the Department should enforce the parties' past agreements while recognizing that the FCC has now taken it upon itself to address the equities of this issue going forward.

BACKGROUND

Under the Agreement, reciprocal compensation obligations apply to "Local Traffic." Verizon and WorldCom agreed to pay each other reciprocal compensation for "the transport and termination of Local Traffic billable by [Verizon] or [WorldCom] which a Telephone Exchange Service Customer originates on [Verizon's] or [WorldCom's] network for termination on the other Party's network." (Ex. 2, Agreement § 5.8.1.) "Local Traffic" is defined as "a call which is originated and terminated within a given LATA, in the Commonwealth of Massachusetts." (Id. § 1.38.)

When the Agreement became effective in October 1996, Verizon and WorldCom charged each other reciprocal compensation for calls by each other's customers to their local ISP customers. However, in April 1997, Verizon "informed [] WorldCom . . . that it would unilaterally discontinue payments of reciprocal compensation for local exchange traffic that [] WorldCom terminates to [ISPs]." (October 1998 Order at 1-2.) In response, WorldCom filed a complaint with the Department to enforce the Agreement's reciprocal compensation provisions.

After accepting extensive submissions from the parties and several intervenors, and holding a public hearing, the Department issued its October 1998 Order ordering Verizon to pay WorldCom reciprocal compensation under the Agreement for calls to ISPs. (October 1998 Order at 14-15.) The Department held that, under the plain language of the Agreement, calls to ISPs fall within the Agreement's reciprocal compensation provisions. (*Id.* at 10-11.) The Department also found that the parties' conduct under the Agreement demonstrated that they agreed to pay reciprocal compensation for calls to ISPs. (*Id.* at 11.) Finally, the Department analyzed relevant precedent under the Act and FCC decisions, and concluded that nothing in that precedent demonstrated that calls to ISPs are not subject to the Agreement's reciprocal compensation obligations. (*Id.* at 11-12.)

The FCC Issues the February 1999 ISP Order

The FCC subsequently addressed the issue of reciprocal compensation for calls to ISPs in its February 1999 ISP Order. ISP Order ¶ 1. New entrants argued to the FCC that calls to ISPs were local traffic under the Act and therefore that section 251(b)(5) affirmatively required payment of reciprocal compensation for those calls. Incumbents like Verizon argued that calls to ISPs were interstate and therefore reciprocal compensation could not be required for those calls.

The FCC held that a party's interconnection agreement determines whether the party has the right to reciprocal compensation for calls to ISPs. The FCC held that parties are "bound by their existing interconnection agreements, as interpreted by state commissions," including those that require payment of reciprocal compensation for calls to ISPs. Id. The FCC further held that there is "no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic." Id. ¶ 21. The FCC described factors that state commissions might consider in determining whether parties had agreed to pay reciprocal compensation for calls to ISPs. Id. ¶ 24.

The FCC also concluded that calls to ISPs are "jurisdictionally mixed," that a substantial portion of ISP-bound traffic is interstate for jurisdictional purposes, and that the Act did not mandate that reciprocal compensation be paid for these calls. Id. ¶¶ 1, 10-20. Regardless, until a federal rule was promulgated, states remained free to continue to require reciprocal compensation for calls to ISPs. Id. ¶¶ 24-25.

The Department Vacates Its October 1998 Order in Response to the ISP Order

After the FCC issued the ISP Order, Verizon filed a Motion for Modification of the Department's October 1998 Order, arguing that the ISP Order relieved Verizon of its obligation under the Agreement to pay WorldCom reciprocal compensation for delivering calls to ISPs. (May 1999 Order at 4.) The Department agreed with Verizon and concluded in its May 1999 Order that the Department had "exceeded its grant of state regulatory authority under the 1996 Act" by its earlier finding that the Agreement's reciprocal compensation provisions applied to calls to ISPs. (Id. at 24.) As a result, the Department vacated its October 1998 Order.

The Department concluded that, in reaching its decision in the ISP Order that the Act does not require that reciprocal compensation be paid for calls to ISPs, "the FCC focused on the 'end-to-end' nature of the Internet communication," which the Department concluded was inconsistent with its analysis in the October 1998 Order. (Id. at 19.) The Department found that its October 1998 Order had been based on a "two-call" theory, which "cannot be squared with the FCC's 'one-call' [i.e. end-to-end] analysis." (Id. at 22.) The Department thus concluded that its October 1998 Order had been based on a "mistake of law." (Id. at 24.) On February 25, 2000, the Department denied WorldCom's petition for rehearing of the May 1999 Order, reiterating its conclusion that the ISP Order "demonstrated the unsoundness of" the October 1998 Order. (February 2000 Order at 18.)

**The Department Decides to Await Further Action from the FCC
After the D.C. Circuit Vacates the ISP Order**

On March 24, 2000, the U.S. Court of Appeals for the D.C. Circuit sustained WorldCom's challenge to the ISP Order. It vacated the ISP Order, rejecting for "want of reasoned decisionmaking" the FCC's determination that the 1996 Act does not affirmatively require reciprocal compensation for calls to ISPs. Bell Atlantic, 206 F.3d at 3, 9. The D.C. Circuit also found that the FCC's own regulations indicated that reciprocal compensation was required for calls to ISPs under the Act. Id. at 6-7. Shortly thereafter, the Fifth Circuit also concluded that the FCC's then-existing regulations required reciprocal compensation for calls to ISPs. Southwestern Bell Tel. Co. v. Public Util. Comm'n, 208 F.3d 475 (5th Cir. 2000).

In Bell Atlantic, no party challenged the FCC's conclusion that parties may agree in their interconnection agreements to pay reciprocal compensation for calls to ISPs. After Bell Atlantic, the FCC

reaffirmed that part of the ISP Order in which it found that state commissions should continue to determine whether parties agreed to pay reciprocal compensation for calls to ISPs under their interconnection agreements. Starpower ¶ 9.⁴ To date, state commissions in 31 states have concluded that reciprocal compensation applies to calls to ISPs under interconnection agreements.⁵ The Fifth, Seventh, and Tenth Circuits, as well as several federal district courts, uniformly have held that state commissions correctly interpreted interconnection agreements indistinguishable from the Agreement at issue here to require payment of reciprocal compensation for calls to ISPs.⁶

In light of the D.C. Circuit's decision vacating the FCC's end-to-end jurisdictional analysis, Global NAPs asked the Department to vacate its May 1999 Order that had employed the very same flawed analysis. In its July 2000 Order the Department admitted that its May 1999 Order was premised on the ISP Order and that the D.C. Circuit had "[u]nquestionably" vacated the ISP Order. The

⁴ In re Starpower Communications, LLC, Petition for Preemption of Jurisdiction of the Virginia State Corp. Comm'n Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, 15 F.C.C.R. 11277 (2000) ("Starpower").

⁵ The state commissions finding that reciprocal compensation is due for calls to ISPs under interconnection agreements are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, Nebraska, Nevada, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

⁶ Southwestern Bell Tel. Co. v. Brooks Fiber Communications, 235 F.3d 493, 499 (10th Cir. 2000), aff'g, Southwestern Bell Tel. Co. v. Brooks Fiber Communications, No. 98-CV-468-K (J), slip op. (N.D. Okla. Oct. 1, 1999); Southwestern Bell, 208 F.3d at 488, aff'g, 1998 U.S. Dist. LEXIS 12938 (W.D. Tex. June 16, 1998); Illinois Bell Tel. Co. v. WorldCom Technologies, 179 F.3d 566, 574 (7th Cir. 1999), aff'g, 1998 WL 419493, cert. granted sub nom. Mathias v. WorldCom Technologies, 121 sct 1224 (2001); BellSouth Telecomms. v. MCI Metro Access Transmission Servs., 97 F. Supp. 2d 1363, 1378-80 (N.D. Ga. 2000); BellSouth Telecomms. v. ITC DeltaCom Communications, 62 F. Supp. 2d 1302, 1310-15 (M.D. Ala. 1999); Michigan Bell Tel. Co. v. MFS Intelenet Communications, No. 5:98 CV 18, 1999 U.S. Dist. LEXIS 12093, at *16 (W.D. Mich. Aug. 2, 1999).

Department nonetheless declined to vacate the May 1999 Order at that time, stating instead that "the prudent course is to await the FCC's action" on remand from the D.C. Circuit. (Id. at 12.)

The FCC Issues the ISP Remand Order

On April 27, 2001, the FCC issued the ISP Remand Order. The FCC altogether abandoned its prior reliance in the ISP Order on an "end-to-end" jurisdictional analysis, and announced a new and prospective rule for addressing how local carriers are to be compensated when they exchange calls to ISPs. The FCC concluded that calls to ISPs are interstate "information access" services under section 251(g) of the Act that purportedly do not fall within section 251(b)(5)'s mandatory requirements. E.g., id. ¶¶ 8, 30, 36 n.64, 39, 42. However, because carriers incur costs when they exchange and deliver calls to ISPs, the FCC concluded that a form of inter-carrier compensation is necessary for the exchange of this traffic. Id. ¶¶ 80, 87 n.168, 89. The FCC therefore announced a new and interim rule to provide such compensation. E.g., id. ¶ 8.

Because "[i]n most states, reciprocal compensation [currently] governs the exchange of ISP-bound traffic," the FCC sought to avoid a "flash cut" transition to a new scheme. Id. ¶¶ 68, 68 n.127, 77. The FCC therefore announced an interim scheme that imposes rate and growth caps to govern the exchange of calls to ISPs, none of which begin until after the Order is published in the Federal Register and becomes effective. Id. ¶¶ 8, 77-94. The FCC revised its regulations to effectuate the changes of law.

Importantly, the ISP Remand Order contains multiple provisions holding that the rule it announces is prospective only and does not alter existing interconnection agreements. Id. ¶ 82; see also id. ¶¶ 49, 54, 56, 77, 78. The FCC expressly acknowledged that, under current law, most states require reciprocal compensation for the exchange of calls to ISPs. Id. ¶ 68. The FCC did not overrule its recent

conclusion in Starpower that the factors announced in the original ISP Order aid state commissions in determining what parties intended under existing interconnection agreements.⁷ Moreover, the FCC held that incumbent carriers (like Verizon) that seek to take advantage of the rate caps that the order prospectively imposes must apply those rates to *all* traffic that they exchange with other carriers, including any other local traffic that remains subject to mandatory reciprocal compensation obligations under section 251(b)(5). Id. ¶¶ 89-94.

ARGUMENT

The FCC's decision in the ISP Remand Order impacts the issue of reciprocal compensation for calls to ISPs in Massachusetts in three ways. First, the ISP Remand Order confirms that Verizon owes reciprocal compensation for calls to ISPs under its existing Agreement with WorldCom, as the Department correctly found in its October 1998 Order. Second, the ISP Remand Order repudiated the FCC's reliance in the original ISP Order on the "end-to-end" jurisdictional analysis for reciprocal compensation purposes. The Department relied on that same flawed analysis in its May 1999 and February 2000 Orders, and those orders therefore must be vacated. Third, for future interconnection agreements, the ISP Remand Order sets specific compensation rates for the exchange of calls to ISPs, and divests state commissions of jurisdiction to vary from those rates.

⁷ The parties to the Starpower proceeding are addressing whether particular the factors from the ISP Order are appropriate for determining whether parties agreed to pay reciprocal compensation for calls to ISPs at the FCC's request.

I. THE ISP REMAND ORDER CONFIRMS THAT VERIZON OWES WORLDCom RECIPROCAL COMPENSATION FOR CALLS TO ISPs UNDER THEIR EXISTING AGREEMENT.

The ISP Remand Order confirms that Verizon owes WorldCom reciprocal compensation for calls to ISPs under their existing Agreement. The FCC reaffirmed that whether reciprocal compensation is owed is determined by examining the terms of the Agreement as a matter of contract law, as the Department correctly did in its October 1998 Order, and not by examining the minimum requirements of federal law, as the Department erroneously did in its May 1999 and February 2000 Orders. The unanimous weight of federal court authority, including the decisions of three circuit courts of appeal, also confirms that the Department's October 1998 correctly interpreted the Agreement's reciprocal compensation provisions to include calls to ISPs. Finally, the FCC's regulations in existence at the time of contracting confirm that, at the time the parties entered into the Agreement, calls to ISPs were considered local calls subject to reciprocal compensation.

A. The ISP Remand Order Confirms That Whether Verizon Owes WorldCom Reciprocal Compensation Under The Agreement Must Be Determined By Interpreting The Agreement, Not The Requirements Of Federal Law.

The ISP Remand Order confirms that whether reciprocal compensation is owed under existing interconnection agreements like the Agreement between Verizon and WorldCom is determined by interpreting the Agreement, not the requirements of federal law. The ISP Remand Order expressly *reaffirmed* the FCC's prior conclusion in the ISP Order that its pronouncements regarding the scope of the 1996 Act's reciprocal compensation provisions do not affect existing obligations under interconnection agreements. See, e.g., ISP Remand Order ¶¶ 15, 68, 77, 82. The FCC in the ISP Remand Order

announced a new interim rule, based on a new rationale, that will govern the issue of reciprocal compensation for calls to ISPs *in the future*.

The FCC emphasized that its new rule does not alter existing obligations under interconnection agreements:

The interim compensation regime we establish here applies as carriers re-negotiate expired or expiring agreements. *It does not alter existing contractual obligations*, except to the extent that parties are entitled to invoke contractual change of law provisions.⁸

Id. ¶ 82 (emphasis added).⁹

The ISP Remand Order thus reconfirms that the Department's October 1998 Order correctly looked at the Agreement itself, not the minimum requirements of federal law, to determine that Verizon and WorldCom agreed to pay reciprocal compensation for calls to ISPs. The Department's October 1998 Order properly relied on the plain language of the Agreement and the characteristics of calls to ISPs to conclude that Verizon and WorldCom intended for calls to ISPs to come within the Agreement's reciprocal compensation provisions. The Department concluded that the "plain language of the Agreement indicates that [Verizon] and [] WorldCom agreed to compensate each other for termination of all local calls," and that "a call made by a [Verizon] customer to an ISP, but terminated by [] WorldCom," is "a 'local call' under the Agreement's definition of local traffic." (October 1998 Order at 10-11.)

⁸ The Agreement between WorldCom and Verizon at issue in the Department's October 1998, May 1999 and February 2000 Orders does not contain a change of law provision.

⁹ In the ISP Order, the FCC had ruled that "parties may voluntarily include [ISP-bound] traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law. Where parties have agreed to include this traffic . . . they are bound by those agreements, as interpreted and enforced by the state commissions." ISP Order ¶ 22.

The Department also looked to relevant evidence concerning the characteristics of calls to ISPs, and how the parties treated calls to ISPs, in interpreting the Agreement. It found that:

- "[T]he characteristics of calls to ISPs are identical to any other local call." (Id. at 11.)
- "ISPs have local telephone numbers; thus, callers reach them by dialing seven digits." (Id.)
- "Local exchange carriers, including [Verizon] and [] WorldCom, charge their customers local rates for calls to ISPs." (Id.)
- "ISPs' premises are located within the LATA, thus meeting the definition of local traffic in the Agreement." (Id.)
- "[L]ocal exchange carriers, including [Verizon] and [] WorldCom, charge their customers local rates for calls to ISPs." (Id.)

The Department thus correctly concluded that Verizon and WorldCom agreed to include calls to ISPs within the Agreement's definition of "local traffic," and to pay reciprocal compensation for calls to ISPs under the Agreement.

B. The Unanimous Weight Of Federal Court Authority Supports The Department's Interpretation Of The Agreement In Its October 1998 Order.

The unanimous decisions of federal courts requiring payment of reciprocal compensation for calls to ISPs under interconnection agreements indistinguishable from the Agreement at issue here also show that the Department correctly interpreted the Agreement in its October 1998 Order. These courts unanimously have rejected the claims of incumbents like Verizon that the FCC's pronouncements regarding the requirements of the 1996 Act require a finding that calls to ISPs are not "local traffic" under existing interconnection agreements. See n.6, supra.

For example, in Illinois Bell, the parties' interconnection agreement, like the one at issue here, provided for payment of reciprocal compensation for the "termination" of "local traffic." 179 F.3d at 572. The Seventh Circuit affirmed the Illinois Commerce Commission's determination that this language required reciprocal compensation for calls to ISPs. Id. at 572-73. Ameritech argued that the state commission's decision had to be reversed because the FCC found in the ISP Order that calls to ISPs were jurisdictionally interstate and that the Act did not require reciprocal compensation. Id. at 570. The Seventh Circuit disagreed:

That the Act does not *require* reciprocal compensation for calls to ISPs is not to say that it *prohibits* it. The Act simply sets out the obligation of all local exchange carriers to provide for reciprocal compensation . . . The Act clearly does not set out specific conditions which one party could enforce against the other. The details are left to the parties, or the commissions, to work out.

Id. at 573. The Seventh Circuit found that the parties had worked out those details in the interconnection agreement by requiring reciprocal compensation for calls to ISPs. Id.

The Seventh Circuit also rejected the argument the Department subsequently accepted in its May 1999 and February 2000 Orders – that calls to ISPs cannot be "local traffic" under interconnection agreements because the FCC found they were not local for jurisdictional purposes in the ISP Order. As the Seventh Circuit explained: "There is nothing in the [ISP Order] which would prohibit a call from being a local call for some, but not all, purposes." Illinois Bell, 179 F.3d at 574.

The Fifth Circuit also has found that an interconnection agreement indistinguishable from the Agreement here required reciprocal compensation for calls to ISPs. Southwestern Bell, 208 F.3d at 484. As in this case, the parties agreed to pay reciprocal compensation for "the exchange of local traffic."

Like the Agreement here, that agreement defined "local traffic" as traffic that "both 'originates' and 'terminates' in the same local calling area." Id. at 485. The Fifth Circuit held that reciprocal compensation is due for calls to ISPs under this contract language.

Southwestern Bell had claimed that "the language in the agreements parallels the reciprocal compensation requirement in section 251(b)(5) of the Act . . . the FCC has declared that [calls to ISPs are] not encompassed within section 251(b)(5) of the Act; ergo, as a matter of federal law, the calls are not 'local' and reciprocal compensation is therefore not required." Id. The Fifth Circuit disagreed. It noted that at the time these interconnection 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." Id. at 486. 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 [reciprocal] compensation is due for that traffic.'" Id. (quoting ISP Order ¶ 25).

Like the Seventh Circuit, the Fifth Circuit rejected the claim the Department accepted here – that under the ISP Order calls to ISPs cannot be "local" for reciprocal compensation purposes and interstate for jurisdictional purposes. As the Fifth Circuit explained:

Despite its recent Reciprocal Compensation Ruling that Internet traffic is a continuous transmission for jurisdictional purposes – not terminating at the ISP's local server – the FCC recognized that, for purposes other than jurisdiction, such calls can be treated in the same manner as local traffic. [ISP Order] ¶ 12, 24. Perceiving such calls as terminating locally *for compensation purposes* is clearly condoned by the FCC.

Id. at 487 (emphasis added).

Significantly, the Fifth Circuit also held that calls to ISPs do terminate at the ISP under the parties' interconnection agreement. It explained that the phrase "terminate" in an interconnection agreement means "whatever the telecommunications industry took it to mean at the time [the parties] signed the agreement, i.e., in 1996 and 1997." Id. at 486. There is "ample evidence that both the telecommunications industry as a whole and the parties to this dispute in particular treated ISP-bound calls as terminating locally at the time the interconnection agreements were being negotiated." Id. at 487.

Most recently, the Tenth Circuit held that the Oklahoma Corporation Commission ("OCC") properly interpreted an interconnection agreement similar to the one here to require reciprocal compensation for calls to ISPs. Brooks Fiber, 235 F.3d at 499. As in this case, the agreement required reciprocal compensation when the parties exchanged "local traffic." Id. at 494. "Local traffic," as is the case here, was defined as traffic which "originates and terminates" within a local exchange. Id. at 495.

The Tenth Circuit rejected the incumbent carrier's argument that the OCC's interpretation of federal law was erroneous because calls to ISPs are jurisdictionally interstate. Id. at 499-500. Instead, the court considered, among other factors, the contract language and the FCC's regulatory treatment of ISP traffic at the time the parties' interconnection agreement was executed. Id. Like the Fifth Circuit, it noted that the FCC has "historically directed states to treat ISP traffic as local." Id. Accordingly, it found the "OCC reasonably interpreted this Agreement to mean that calls to ISPs are terminating traffic subject to reciprocal compensation." Id. at 499.

Several other federal courts have also found, under contract language identical to the language here, that calls to ISPs are subject to reciprocal compensation. For example, the Georgia district court found that "the 'peculiar meaning' given to the term 'terminate' in the telecommunications industry"

supported the state commission order requiring reciprocal compensation for calls to ISPs under interconnection agreement terms indistinguishable from those in the Agreement. BellSouth, 97 F. Supp. 2d at 1379; see also BellSouth Telecommunications v. ITC DeltaCom Communications, 62 F. Supp. 2d 1302, 1314 (M.D. Ala. 1999) (approving state commission finding that interconnection agreement required reciprocal compensation for calls to ISPs in light of the "prevailing local treatment afforded to ISP traffic by industry participants").

Thus, every court to have considered the issue has embraced the contractual analysis employed by the Department in its October 1998 Order, and has rejected the Department's subsequent conclusion in the May 1999 and July 2000 Orders that the ISP Order establishes a federal rule that calls to ISPs must be treated as non-local for reciprocal compensation purposes. The Department should not cling to an analysis that federal courts uniformly are rejecting.¹⁰

C. The FCC's Regulations In Existence At The Time Of Contracting Required Reciprocal Compensation For Calls To ISPs.

Finally, even if the parties intended to incorporate into their Agreement the federal regulations on reciprocal compensation in effect at the time of contracting, reciprocal compensation is still owed. Federal courts have held that, under the FCC's own regulations in place at the time of contracting, calls to ISPs are local calls subject to reciprocal compensation.

¹⁰ WorldCom and Global NAPs are challenging the Department's May 1999 and February 2000 Orders in federal district court in Massachusetts. Global NAPs, et al. v. New England Tel. & Tel. Co., et al., Nos. 00-CV-10407, 10502, 10513 (D. Mass.). Those cases are fully briefed. In light of the Department's decision to seek comments concerning the ISP Remand Order, proceedings in the federal court are being deferred at least until July 10, 2001.

Under the FCC's then-current regulations interpreting section 251(b)(5) of the Act, reciprocal compensation was to be paid for "local telecommunications traffic." 47 C.F.R. § 51.701(a). "Local telecommunications traffic" is traffic "that originates and terminates within a local service area." Id. § 51.701(b)(1). The FCC's regulations define "termination" for reciprocal compensation purposes as "the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises." Id. §51.701(d). The Fifth Circuit found that under the FCC's regulations "'termination' occurs when [the competing carrier] switches the call at its facility and delivers the calls to 'the called party's premises,' *which is the ISP's local facility. Under this usage, the call indeed 'terminates' at the ISP's premises.*" Southwestern Bell, 208 F.3d at 486; see also BellSouth, 97 F. Supp. 2d at 1380. The D.C. Circuit also agrees: "Calls to ISPs appear to fit [the FCC's] definition [of termination]: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, *which is clearly the 'called party.'*" Bell Atlantic Tel. Co. v. FCC, 206 F.3d 1, 6 (D.C. Cir. 2000) (emphasis added).

Thus, even if the Department believes that the parties agreed to incorporate into the Agreement the FCC's regulation in effect at the time of contracting, those regulations also required reciprocal compensation for calls to ISPs. Certainly, the Department cannot retroactively alter the terms of the Agreement in light of the FCC's new regulations. The Seventh Circuit found it "obvious" that FCC decisions "issued after the agreements in this case . . . are not relevant to what the parties had in mind at the time of negotiations." Illinois Bell, 179 F.3d at 574. The Department should enforce the Agreement the parties reached, not the one Verizon wishes in retrospect it had negotiated.

In sum, the ISP Remand Order, along with the unanimous decisions of three circuit courts and six district courts, confirm that whether reciprocal compensation for calls to ISPs is owed under existing interconnection agreements is determined by construing the terms of the agreements themselves. They also confirm that the Department's interpretation of the Agreement in its October 1998 Order was correct, and that its subsequent May 1999 and February 2000 Orders were erroneous.

II. THE ISP REMAND ORDER REJECTS THE "END-TO-END" JURISDICTIONAL ANALYSIS FROM THE ISP ORDER ON WHICH THE DEPARTMENT RELIED IN ITS MAY 1999 AND FEBRUARY 2000 ORDERS.

The ISP Remand Order also repudiated the FCC's analysis of the Act in the ISP Order. The FCC had found in the ISP Order that the Act does not require reciprocal compensation for calls to ISPs because those calls are not "local" under an "end-to-end" jurisdictional analysis. The Department expressly relied in its May 1999 and February 2000 Orders on that "end-to-end" analysis from the ISP Order to justify vacating the October 1998 Order. The new ISP Remand Order thus requires the Department to vacate its May 1999 and February 2000 Orders, and to reinstate the Department's October 1998 Order, which (as set forth above) correctly interpreted the Agreement to require reciprocal compensation for calls to ISPs.

The Department repeatedly has acknowledged that it based its decision to vacate the October 1998 Order on the ISP Order's "end-to-end" jurisdictional analysis of calls to ISPs. The Department found in its May 1999 Order that the FCC "focused on the 'end-to-end' nature of the Internet communication" to determine whether reciprocal compensation is due. (May 1999 Order at 19.) It reasoned that, under the FCC's end-to-end jurisdictional analysis in the ISP Order, reciprocal compensation is not owed for calls to ISPs because those calls do not "terminate" at the ISP for reciprocal

compensation purposes. (Id. at 20-21.) The Department concluded that "the net effect of the FCC's ruling [in the ISP Order] is to nullify" the October 1998 Order. (Id. at summary.) The Department found that "[u]nless and until" that end-to-end analysis was "modified by the FCC itself or overturned by a court of competent jurisdiction, the FCC's view of the 1996 Act must govern" this dispute. (Id. at 20.) In its subsequent February 2000 Order the Department reiterated that its decision to vacate the October 1998 Order "was premised on the fact that the FCC's one-call analysis fatally undercut the two-call basis (the express and exclusive basis) of the Department's previous analysis." (February 2000 Order at 18.)

Even after the D.C. Circuit vacated the ISP Order, the Department clung to the "end-to-end" jurisdictional analysis, predicting that the FCC would reinstate that analysis on remand. In response to Global NAPs' motion to vacate its May 1999 and February 2000 Orders in light of the D.C. Circuit Court's decision, Verizon urged "the Department to wait until the FCC addresses the D.C. Circuit's concerns on remand" because the "Court did not find that the FCC's 'one-call' or 'end-to-end' analysis was wrong as a matter of law," and that "the Court left the FCC free on remand to reach the same result" (July 11, 2000 Order at 8-9.) The Department agreed, explaining that "although the Department cannot predict the FCC's conclusions on remand, the change in federal law asserted by GNAPs and the CLECs may well be temporary at best — especially considering the Advanced Services Remand Order."¹¹ (Id. at 15.)

¹¹ In re Deployment of Wireline Services Offering Advanced Telecomms. Capability, 15 F.C.C.R. 385 (Dec. 23, 1999) ("Advanced Services Remand Order"), vacated in part, WorldCom, Inc. v. FCC, 246 F.3d 690 (D.C. Cir. 2001).

The Department's prediction was wrong on both counts. First, the D.C. Circuit vacated in part the Advanced Services Remand Order for relying on the same "defective reasoning" that the FCC had employed in the ISP Order.¹² Second, the FCC did not on remand reinstate its jurisdictional end-to-end analysis for reciprocal compensation purposes. To the contrary, the FCC repudiated its previous analysis, stating that "the issue before us requires more than just a jurisdictional analysis." ISP Remand Order ¶ 35. Comparing the ISP Order and the ISP Remand Order, the FCC stated that "[t]he rationale underlying the two orders . . . differs substantially." Id. ¶ 30 n.56. The FCC "found . . . *for different reasons than before* . . . that the provisions of section 251(b)(5) do not extend to ISP-bound traffic." Id. ¶ 1 (emphasis added). More importantly, the FCC ruled "that the Commission [in the ISP Order] *erred in focusing on the nature of the service (i.e. local or long distance)*." Id. ¶ 26 (emphasis added). In sharp contrast to the ISP Order, the FCC "no longer construe[s] section 251(b)(5) using the dichotomy set forth in [the ISP Order] between 'local' traffic and interstate traffic." Id. ¶ 54. The FCC found that its "prior interpretation of section 251(b)(5) . . . focused on whether or not ISP-bound calls were local," which "implicated . . . the meaning of the term 'termination' in the specific context of section 251(b)" Id. ¶ 56. But, the FCC recognized that "neither of these issues is germane to our assertion of jurisdiction here." Id.

The ISP Remand Order removes the grounds on which the Department relied in the May 1999 and February 2000 Orders to justify vacating its October 1998 Order. Because the Department's

¹² See WorldCom, Inc. v. FCC, 246 F.3d 690, 696 (D.C. Cir. 2001).

May 1999 and February 2000 Orders are premised on an analysis that *twice* has been rejected by the D.C. Circuit, and now has been repudiated by the FCC itself, those Orders must be vacated.

Finally, the Department cannot now rely on the FCC's new interpretation of the Act in the ISP Remand Order that calls to ISPs are interstate and beyond the scope of section 251(b)(5). The parties agreed in 1997 to pay reciprocal compensation for "local traffic" *as that term is defined in the Agreement*. The FCC has now found that whether calls to ISPs are entitled to reciprocal compensation depends on the meaning of section 251(g) of the Act – not on whether the call is local or interstate. The FCC's new-found interpretation of section 251(g) demonstrates that there is no connection whatsoever between the language of this Agreement and the new requirements of federal law. Here, as the Department correctly found in October 1998 Order, the parties incorporated a specific definition of "local traffic" into their Agreement for reciprocal compensation purposes, and they made no exception for calls to ISPs. The FCC's interpretation of the Act in 2001 does not change the parties' contract.

III. THE ISP REMAND ORDER SETS SPECIFIC COMPENSATION RATES FOR THE EXCHANGE OF CALLS TO ISPs IN FUTURE INTERCONNECTION AGREEMENTS AND DIVESTS THE DEPARTMENT OF JURISDICTION TO VARY FROM THOSE RATES.

Finally, on a prospective basis for future interconnection agreements, the ISP Remand Order sets specific inter-carrier compensation rates for calls to ISPs, and divests the Department of jurisdiction to vary from those rates. The Department must follow the ISP Remand Order unless and until it is either stayed or overturned by a court of competent jurisdiction.

The ISP Remand Order preserves existing contractual obligations to pay reciprocal compensation. It also asserts jurisdiction over calls to ISPs pursuant to the FCC's authority over

jurisdictionally interstate communications, establishes a uniform national interim compensation rate for future interconnection agreements, and prospectively preempts state commissions' authority to address the issue of compensation for calls to ISPs:

The interim compensation regime we establish here applies as carriers renegotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here. *Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue.*

ISP Remand Order ¶ 82 (emphasis added). Thus, while the Department retains the authority under the ISP Remand Order to determine whether parties are bound by "existing contractual obligations" to provide reciprocal compensation for calls to ISPs, unless and until the ISP Remand Order is overturned by a court of competent jurisdiction, the Department will no longer have authority to set compensation rates for calls to ISPs.

CONCLUSION

For the reasons set forth above, the Department should: (1) conclude that, under the ISP Remand Order, determining whether reciprocal compensation is owed for calls to ISPs under existing interconnection agreements requires interpreting the agreements as matter of contract law, as the Department did in its October 1998 Order; (2) find that the ISP Remand Order has repudiated the jurisdictional "end-to-end" analysis from the ISP Order on which the Department relied in its May 1999 and February 2000 Orders, vacate those Orders, and reinstate the Department's October 1998 Order;

and (3) find that, on a prospective basis for future interconnection agreements, the ISP Remand Order sets specific compensation rates for the exchange of calls to ISPs, and divests the Department of jurisdiction to vary from those rates.

Respectfully submitted,

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By: _____

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Dated: New York, New York
June 13, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the accompanying service list by e-mail and by either hand-delivery, U.S. mail, overnight courier, or fax.

Dated: New York, New York
June 13, 2001
