COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

DEPARTMENT OF
TELECOMMUNICATIONS & ENERGY
ONE SOUTH STATION
BOSTON, MA 02110
(617) 305-3500

DOCKET FILE COPY ORIGINAL

ARGEO PAUL CELLUCCI
GOVERNOR

JANE SWIFT
LIEUTENANT GOVERNOR

JENNIFER DAVIS CAREY
DIRECTOR OF CONSUMER AFFAIRS
AND BUSINESS REGULATION

JAMES CONNELLY
CHAIRMAN
W. ROBERT KEATING
COMMISSIONER
EUGENE J. SULLIVAN, JR.
COMMISSIONER
PAUL B. VASINGTON
COMMISSIONER
DEIRDRE K. MANNING
COMMISSIONER

RECEIVED
JUL 21 2000
FCC MAIL ROOM

July 20, 2000

Magalie Roman Salas, Secretary
Federal Communications Commission
Portals II, 445 12th Street SW, Suite TW-A325
Washington, DC 20554

Re: CC Docket Nos. 96-98, 99-68

Dear Ms. Salas:

Enclosed for filing in the above matter please find one original and five copies of the Massachusetts Department of Telecommunications and Energy's Comments on Remand of the Commission's Reciprocal Compensation Declaratory Ruling By The U.S. Court of Appeals For The D.C. Circuit. I have filed a copy of these comments electronically with the Commission's ECFS service in the proceedings listed above.

Sincerely,

Paul G. Afonso, Esq.
General Counsel

No. of Copies rec'd 0+4
List A B C D E

RECEIVED
JUL 21 2000
FCC MAIL ROOM

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CC Docket Nos. 96-98, 99-68

MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY'S COMMENTS ON REMAND OF THE COMMISSION'S RECIPROCAL COMPENSATION DECLARATORY RULING BY THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT

Commonwealth of Massachusetts
Department of Telecommunications and Energy

James Connelly, Chairman
W. Robert Keating, Commissioner
Paul B. Vasington, Commissioner
Eugene J. Sullivan, Jr., Commissioner
Deirdre K. Manning, Commissioner

One South Station
Boston, MA 02110
617-305-3500

Dated: July 20, 2000

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
JUL 21 2000
FCC MAIL ROOM

In the Matter of	)	
	)	
Remand of the Commission's Reciprocal	)	
Compensation Declaratory Ruling	)	CC Docket Nos. 96-98, 99-68
By The U.S. Court of Appeals	)	
For The D.C. Circuit	)	
	)	

MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY'S COMMENTS ON REMAND OF THE COMMISSION'S RECIPROCAL COMPENSATION DECLARATORY RULING BY THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT

The Commonwealth of Massachusetts Department of Telecommunications and Energy ("MDTE") respectfully submits to the Federal Communications Commission ("FCC" or "Commission") the following comments on the Remand of the Commission's Reciprocal Compensation Declaratory Ruling by the U.S. Court of Appeals for the D.C. Circuit. These comments are in response to a Public Notice issued by the FCC on June 23, 2000.

The MDTE is the Massachusetts administrative agency with general supervisory jurisdiction and control over telecommunications common carrier services offered within the Commonwealth of Massachusetts, pursuant to Massachusetts General Laws c. 159, § 12. The MDTE's address is One South Station, Boston, Massachusetts 02110.

I. MDTE Comments

Ever since the Commission's initial determination in February of 1999 that Internet-bound calls are not local in nature, the MDTE has been entangled in challenging, burdensome, controversial, and seemingly never-ending proceedings to interpret and implement the findings of

the Commission. Visiting and revisiting this issue has been a drain on MDTE resources. For the Commission's consideration, we append hereto copies of the MDTE's decisions on the matter of whether or not reciprocal compensation should be paid for Internet-bound calls.[1]

In addition to calling the Commission's attention to our orders on the subject matter of the remand, we respectfully urge the Commission to be very direct, clear, and specific as to how its decision on remand affects the jurisdiction and scope for action of state utility commissions. We appreciate the Commission's endeavoring to be deferential to state rulings and to not directly preempt those rulings, even while it found that Internet-bound calls were not local. To its credit, this Commission continues to do everything it can to promote cooperative federal-state relationships in telecommunications regulation, and we sincerely commend the Commission for this effort. However, in the case of reciprocal compensation, our experience in Massachusetts demonstrates that clearer FCC direction – even if it means preemption – and less deference to states would be most helpful to us in resolving the controversial issues of reciprocal compensation for Internet-bound calls.

In our May 1999 decision interpreting and implementing the Commission's findings, we noted that the Commission's attempt to provide direction on this issue without direct preemption was cause for some confusion. "To be sure, the FCC evidenced discomfort in trumping states' authority under Section 251(b)(5) and spoke equivocally about the effects of its declaratory order

---

[1] As the Commission is aware, in addition to the state proceedings, the MDTE has been involved in defending itself against petitions for preemption filed with the Commission on this issue. Also, the MDTE's orders have been appealed to both state and federal courts. The MDTE's experience in this regard is probably not unique among the states.

on decisions already taken by state commissions such as the Department." MCI WorldCom Technologies, Inc., M.D.T.E. 97-116-C at 23-24 (1999) (citing 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, FCC 99-38, 14 FCC Rcd 3689, at ¶¶ 27 and 28 (1999) ("Internet Traffic Order")). We respectfully note that the D.C. Circuit Court seems to have been similarly unable to get a clear message from the Internet Traffic Order. This equivocation, while clearly well-intentioned, has created a heavy administrative burden, market uncertainty, judicial challenges, and political difficulties for many state and federal policymakers. Equivocation is not good for market participants, either. We therefore strongly urge the Commission to speak with one voice and to be as direct as it can be in its order on remand in terms of how its decisions

affect state commission findings on the applicability of reciprocal compensation to Internet-bound traffic.

Respectfully submitted,
Massachusetts Department of
Telecommunications and Energy

By:

James Connelly, Chairman

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Deirdre K. Manning, Commissioner

One South Station
Boston, MA 02110
617-305-3500

Dated: July 20, 2000

The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

October 21, 1998

D.T.E. 97-116

Complaint of WorldCom Technologies, Inc. (successor-in-interest to MFS Intelenet Service of Massachusetts, Inc.) against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for alleged breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996.

APPEARANCES: Richard M. Rindler, Esq.
Alisa H. Reff, Esq.
Swidler & Berlin
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116

-and-

Gary Ball, Esq.
Assistant Vice-President
33 Whitehall Street, 15th Floor
New York, New York 10064
FOR: WORLDCOM TECHNOLOGIES, INC.
Petitioner

Bruce P. Beausejour
185 Franklin Street
Boston, MA 02110
FOR: BELL ATLANTIC-MASSACHUSETTS
Respondent

Chérie R. Kiser, Esq.
Yaron Dori, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004-2608
FOR: AMERICA ONLINE, INC.
Intervenor

Chérie R. Kiser, Esq.
Gina Spade, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004

-and-

David Ellen, Esq.
Cablevision Lightpath-MA, Inc.
111 New South Road
Hicksville, NY 11801
FOR: CABLEVISION LIGHTPATH, INC.
Intervenor

Jonathan E. Canis, Esq.
Enrico C. Soriano, Esq.
Kelley, Drye & Warren
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
FOR: INTERMEDIA COMMUNICATIONS, INC.
Intervenor

Alan D. Mandl, Esq.
Ottenberg, Dunkless, Mandl & Mandl
260 Franklin Street
Boston, MA 02110

-and-

Hope Barbulescu, Esq.
MCI Telecommunications Corporation
5 International Drive
Rye Brook, NY 10573
FOR: MCI TELECOMMUNICATIONS CORPORATION
Intervenor

Richard M. Rindler, Esq.
Swidler & Berlin
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
FOR: RCN TELECOM SERVICES, INC.
Intervenor

Michael A. McRae
1133 21st Street, N.W., Suite 400
2 Lafayette Centre
Washington, D.C. 20036
FOR: TELEPORT COMMUNICATIONS GROUP, INC.
Intervenor

Russell M. Blau, Esq.
Michael Fleming, Esq.
Swidler & Berlin
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116

-and-

Emmett E. Lyne, Esq.
K. Jill Rizotti, Esq.
Rich, May, Bilodeau & Flaherty
294 Washington Street
Boston, MA 02108
FOR: XCOM TECHNOLOGIES, INC.
Intervenor

I. INTRODUCTION

On June 26, 1997, MCI WorldCom, Inc. ("MCI WorldCom")[1] petitioned the Department of Telecommunications and Energy ("Department") concerning New England Telephone and Telegraph Company's[2] alleged breach of the terms of an interconnection agreement ("Agreement")[3] entered into under §§ 251 and 252 of the Telecommunications Act of 1996 ("Act"). MCI WorldCom alleges that Bell Atlantic committed a breach of its Agreement with MCI WorldCom, when Bell Atlantic informed MCI WorldCom on April 16, 1997 that it would unilaterally discontinue payments of reciprocal compensation[4] for local exchange traffic that MCI WorldCom terminates to Internet Service Providers ("ISPs")[5]

---

1 WorldCom Technologies, Inc. ("WorldCom") is the successor-in-interest to MFS Intelenet Service of Massachusetts, Inc., which is the entity that filed the original Complaint (MCI WorldCom Brief at 1 n.1). Subsequently, WorldCom merged with MCI Telecommunications Inc. The new company is called MCI WorldCom, Inc. ("MCI WorldCom").

2 New England Telephone and Telegraph Company does business as Bell Atlantic-Massachusetts (hereinafter referred to as "Bell Atlantic").

3 The Agreement was approved by the Department on October 7, 1996 in D.P.U. 96-72.

4 Under the Act, all local exchange carriers -- whether incumbent carriers or CLECs -- have a mutual duty to compensate each other for the transport and termination of local traffic that originates on one carrier's network and terminates on another carrier's network. See 47 U.S.C. § 251(b)(5). This requirement for payment of "reciprocal compensation" was set forth in § 5.8 of the parties' negotiated interconnection agreement. D.P.U. 96-72

5 An ISP provides dial-up or dedicated access to the Internet for business and residential customers.

(Complaint at 1-2).[6] Bell Atlantic filed an Answer on July 11, 1997. The Department docketed the matter as D.T.E. 97-116.

A public hearing and procedural conference were held at the Department's offices on January 27, 1998. At that time, the Department granted the following Petitions to Intervene: America Online, Inc ("AOL"); Cablevision Lightpath, Inc. ("Cablevision"); Intermedia Communications, Inc. ("Intermedia"); MCI Telecommunications Corporation ("MCI"); RCN Telecom Services, Inc. ("RCN"); Teleport Communications Group, Inc. ("TCG"); and XCOM Technologies, Inc. ("XCOM"). The record in this case consists of MCI WorldCom's and Bell Atlantic's initial pleadings; initial briefs from MCI WorldCom, Bell Atlantic, AOL, Cablevision, Intermedia, MCI, RCN, TCG, and XCOM; and reply briefs from MCI WorldCom, Bell Atlantic, Intermedia, MCI, RCN, TCG and XCOM.[7,8]

---

[6] Bell Atlantic subsequently agreed to continue paying reciprocal compensation for the disputed calls during the pendency of this proceeding (MCI WorldCom Brief at 5 n.7).

[7] Although given the opportunity by the Department, no parties requested an evidentiary hearing.

[8] On August 4, 1998, MCI WorldCom filed a motion to supplement its Reply Brief with copies of state utility commission decisions and a federal district court decision favorable to its position. No parties opposed the motion. Because the Department is obligated to take administrative notice of relevant legal precedent from other jurisdictions, it is not necessary for us to rule on MCI WorldCom's motion. However, the Department will only take notice of the decisions themselves and not the arguments contained in MCI WorldCom's motion.

II. DEPARTMENT'S JURISDICTION TO DECIDE COMPLAINT

A. Positions of the Parties

1. CLEC Parties[9]

The CLEC Parties contend that the Department has jurisdiction under both state and federal law to review the complaint and provide the relief requested. They cite the Department's broad general supervisory authority over the provision of telecommunications services under G.L. c. 159, § 12 and its specific authority under §§ 13 and 14 to investigate the rates of telephone common carriers, and under § 16 to investigate issues concerning services (MCI WorldCom Brief at 6; Cablevision Brief at 1-2; Intermedia Reply Brief at 2-3; MCI Brief at 1-3; RCN Brief at 2-3; TCG Brief at 2-3; XCOM Brief at 3-4). In addition, the CLEC Parties contend that § 252(e)(1) of the Act gives a state utility commission the authority to interpret and enforce the terms of interconnection agreements that the commission has approved (MCI WorldCom Brief at 6; Cablevision Brief at 2; Intermedia Reply Brief at 2; RCN Brief at 2; TCG Brief at 3; XCOM Brief at 3). As support for this contention, the CLEC Parties cite Iowa Utilities Board v. FCC, 120 F. 3d 753, 804 (8th Cir. 1997), cert. granted 118 S. Ct. 879 (Jan. 26, 1998), wherein the United States Court of Appeals for the Eighth Circuit stated that:

> [S]tate commissions retain the primary authority to enforce the substantive terms of the agreements made pursuant to sections 251 and 252 [of the Act]. Subsection 252(e)(1) of the Act explicitly requires all agreements under the Act

---

[9] For ease of reference and because their positions are similar, we refer to MCI WorldCom, Cablevision, Intermedia, MCI, RCN, TCG, XCOM and AOL (which is not a competitive local exchange carrier ("CLEC")) collectively as the CLEC Parties.

> to be submitted for state commission approval. We believe that the state commissions' plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved.

According to Intermedia, it is not dispositive that the FCC has exclusive jurisdiction over Internet traffic, as Bell Atlantic claims, but rather that state commissions have jurisdiction for interpreting the terms governing compensation for terminating Internet traffic contained in interconnection agreements that they have approved (Intermedia Reply Brief at 2). TCG also claims that the Department need not determine "the interstate or intrastate character" of ISP calls but instead need only determine the appropriate treatment for local traffic under the terms of the Agreement (TCG Brief at 2). Moreover, RCN notes that the FCC has referred incumbent local exchange carriers ("ILECS")[10] to state commissions to resolve ISP reciprocal compensation disputes (RCN Brief at 2-3, citing In the Matter of Access Reform, First Report and Order, CC Docket No. 96-262 (rel. May 17, 1997)).

2. Bell Atlantic

Bell Atlantic argues that because of the FCC's exclusive jurisdiction over Internet traffic, only the FCC has authority to decide the question of whether traffic terminated by CLECs to ISPs is eligible for reciprocal compensation (Bell Atlantic Brief at 1). Bell Atlantic also contends that should the Department assert jurisdiction over this Complaint, it should only issue an interim decision, pending the outcome of an ongoing FCC proceeding, in which the same issue is being investigated (Bell Atlantic Reply Brief at 7).

---

[10] Bell Atlantic is the Bell Operating Company ILEC in Massachusetts.

B. Analysis and Findings

In this case, MCI WorldCom has petitioned the Department to enforce disputed terms of its Agreement with Bell Atlantic. Specifically, MCI WorldCom has asked the Department to decide that the definition of local traffic in its Agreement encompasses local calls that terminate to an ISP. Under § 252(e)(1) of the Act, state commissions have both the primary jurisdiction, and responsibility, for enforcing the terms of interconnection agreements.[11] See Iowa Utilities Board v. FCC, 120 F. 3d 753, 804. For the reasons discussed below, we find that local calls completed to ISPs are eligible for reciprocal compensation.

As this dispute involves the interpretation of a clause within an interconnection agreement, the Department has the authority pursuant to the Act to review this issue. Moreover, the Department's broad supervisory power over the provision of telecommunications services and rates in Massachusetts gives us jurisdiction to hear this Complaint. G.L. c. 159, §§ 12(d), 16, 19 and 20; see Penn Cent. Co. v. Department of Pub.

---

[11] We agree with Bell Atlantic that the FCC has jurisdiction over Internet traffic. Pursuant to that authority, the FCC may make a determination in proceedings pending before it that could require us to modify our findings in this Order. See FCC Comments on Request by ALTS for Clarification of the FCC's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, and Public Notice, CC Docket 97-30 (rel. July 2, 1998, 12 FCC Rcd 97 15) (FCC stated that it has not yet determined whether CLECs are entitled to reciprocal compensation for terminating Internet traffic); see also In the Matter of GTE Telephone Operators, GTOC Tariff No. 1 GTOC Transmittal No. 1148, CC Docket No. 98-79 (rel. August 20, 1998).

Utils., 356 Mass. 478 (1969); Donham v. Public Serv. Comm'rs, 232 Mass. 309, 313, 325 (1919). Accordingly, we find that we have authority to decide this issue.[12]

III. NATURE OF CALLS TO ISPs

A. Introduction

Although the CLEC Parties raised numerous issues related to such concerns as alleged anti-competitive conduct and disincentives for network investment in their pleadings and briefs, the Department need only address the question of whether a call terminated by MCI WorldCom to an ISP is local, thus qualifying it for reciprocal compensation under MCI WorldCom's interconnection agreement with Bell Atlantic.

B. Positions of the Parties

1. CLEC Parties

The CLEC Parties argue that the characteristics of calls that CLECs terminate for Bell Atlantic local exchange customers to ISPs demonstrate that these calls are local in nature and thus qualify for reciprocal compensation (MCI WorldCom Brief at 4-19; TCG Brief at 13-16; Intermedia Brief at 9-10; RCN Brief at 4; XCOM Brief at 12-13).

The CLEC Parties argue that a call to an ISP from a Bell Atlantic customer has the same characteristics as any local call (MCI WorldCom Brief at 4-19; TCG Brief at 13-16; Intermedia Brief at 9-10; RCN Brief at 4; XCOM Brief at 12-13). MCI WorldCom states that,

---

[12] Contrary to Bell Atlantic's contention, we do not believe it necessary or appropriate to issue an interim decision pending the outcome of the FCC's determination on this issue. As noted earlier, if modifications to this Order are necessary based on the results of the FCC's proceedings, then the Department can make such changes at the appropriate time.

as part of its local exchange service, it assigns telephone numbers to its ISP customers (MCI WorldCom Brief at 4). MCI WorldCom also states that the originating number and the terminating number of an ISP call meets the definition of local traffic as set forth in § 1.38 of its Agreement with Bell Atlantic (id.). Intermedia argues that calls placed to ISPs are dialed using seven-digit numbers and are provided out of local exchange carriers' local tariffs (Intermedia Brief at 9). AOL and Cablevision state that a call to an ISP is the same as a call to a bank or a corporation that is then routed to a secondary location (AOL Brief at 3; Cablevision Brief at 3). They indicate that the local nature of the calls is confirmed by the fact that the local exchange carriers charge their own customers local rates for calls to ISPs and treat the calls as local for purposes of interstate/intrastate separations in reports to the FCC (AOL Brief at 3; Cablevision Brief at 3-4).

In addition, MCI WorldCom claims these types of Internet calls have two separate and distinguishable components: (1) a local call from a Bell Atlantic customer that MCI WorldCom carries to the ISP; and (2) an information service provided by the ISP when the ISP connects the call to the Internet (MCI WorldCom Brief at 9). According to MCI WorldCom, the FCC affirmed the severability of these two components of the Internet service (id. at 10, citing Universal Service Order and Access Reform Order). TCG argues that because an ISP is not a carrier and does not have a tariffed service, the telecommunications service ends, and the enhanced (or information) service begins, when the call is delivered to the ISP (TCG Brief at 14).

The CLEC Parties argue that, contrary to Bell Atlantic's claims, there are sufficient differences between interexchange carrier ("IXC") traffic, which is non-local in nature, and ISP traffic, which is local in nature (MCI WorldCom Brief at 18-19; TCG Brief at 13-16). MCI WorldCom contends that when a call is terminated to an IXC's Point of Presence ("POP"), it passes *unchanged* through several switches from the calling party to the called party; whereas, a call from an ISP to the end user is completed only after a number of activities are taken (i.e., negotiation of protocols, validation of authorized uses, assignment of an Internet Protocol ("IP") address, etc.) (MCI WorldCom Brief at 19). TCG argues that ISP traffic is local because, unlike IXC traffic, it is not terminated through switched access arrangements (TCG Brief at 13). TCG also asserts that calls to an ISP terminate at the ISP's premises, which is located within the Local Access Transport Area ("LATA")[13] (id.). Intermedia contends that if calls to ISPs are inherently interstate in nature, as argued by Bell Atlantic, then Bell Atlantic is now providing interLATA service to its own ISP customers in direct violation of the Act (Intermedia Brief at 10).

TCG claims that, unlike IXC calls, which use dedicated circuit-switched transmission paths from end-to-end, Internet signals use a packet-switched network in which packets of information are sent from router to router (TCG Brief at 14). TCG argues that the only circuit connection that must be held open for the caller to access and retrieve data is the local

---

[13] A LATA is a contiguous geographic area that demarcates the boundaries between local and short-haul toll calling, and long distance calling. See 47 U.S.C. § 3(43). Massachusetts contains two LATAs: the 413 Western LATA; and the 617/781/508/978 Eastern LATA.

connection from the Internet user's terminal to the ISP's premise (id. at 15). TCG contends that once the end user data traffic is handed over to the ISP, the information is never again recognizable as an ordinary analog or digital circuit-switched message (id.). TCG claims that, unlike ISP traffic, traditional voice or data traffic between two computers with modems does not undergo permanent conversion of transmission signals into packets (id.). TCG indicates that this is consistent with the FCC's finding that voice grade access to the public-switched network is distinguishable from an ISP's offering (id. at 16).

2. Bell Atlantic

Bell Atlantic argues that calls terminated by CLECs to ISPs do not qualify for reciprocal compensation because those calls are not local in nature (Bell Atlantic Brief at 2). Bell Atlantic argues that calls to ISPs are different from voice grade calls because calls to ISPs do not terminate on the ISPs' networks (id.). Bell Atlantic states that the fact that ISP calls are dialed using a seven-digit local number is irrelevant because from a network perspective, Internet calls are indistinguishable from long-distance calls (id.). According to Bell Atlantic, in the early days of long-distance competition, customers reached their long-distance carrier by dialing a seven-digit number (id. at 2 n.3). Moreover, Bell Atlantic contends that § 271(b) of the Act and FCC orders recognize that Internet calls are not local calls (id. at 2-3).

Bell Atlantic also claims that ISP calls do not terminate in the same local calling area as the calling party but rather are redirected by the ISP to the Internet and terminate outside the calling party's local calling area (Bell Atlantic Reply Brief at 1). Bell Atlantic contends that it is now incurring substantial costs to transport calls to the CLEC/ISP which is outside the local

calling area (id. at 4). Bell Atlantic argues that, contrary to the CLEC Parties' arguments, it terminates calls to ISPs that are within the local calling area of the calling party because those ISPs are located within a Bell Atlantic central office or within a few miles of the receiving local office (id.). According to Bell Atlantic, if one of its ISP customers seeks to transport the call to a distant hub, then that customer would pay Bell Atlantic or another carrier to provide dedicated data transport to the distant location (id.).

Bell Atlantic also contends that modified access charges should be created and that those charges would more accurately reflect costs for both carrying and terminating Internet traffic (id.). If CLECs continue to receive reciprocal compensation for terminating calls to ISPs, CLECs will receive a "windfall" (id. at 8-9; Bell Atlantic Brief at 1). Furthermore, Bell Atlantic argues that the present reciprocal compensation structure creates incentives for CLECs to operate as terminators of calls only, rather than as providers of services to a cross-section of the public. (Bell Atlantic Brief at 11.)

C. Analysis and Findings

Section 5.8.2 of the Agreement states that "the parties shall compensate each other for transport and termination of Local Traffic in an equal and symmetrical manner at the rate provided in the Pricing Schedule." "Local Traffic" is defined in the Agreement as "a call which is originated and terminated within a given LATA, in the Commonwealth of Massachusetts, as defined in DPU Tariff 10, Section 5 . . ." D.P.U. 97-62, Agreement, § 1.38. The plain language of the Agreement indicates that Bell Atlantic and MCI WorldCom agreed to compensate each other for termination of all local calls. The Agreement does not

make an exception for calls terminated to ISPs. Thus, the question becomes: Is a call made by a Bell Atlantic customer to an ISP, but terminated by MCI WorldCom, and then connected by the ISP to the Internet, a "local call" under the Agreement's definition of local traffic? For the reasons cited below, we find it is.

As pointed out by the CLEC parties, the characteristics of calls to ISPs are identical to any other local call. ISPs have local telephone numbers; thus, callers reach them by dialing seven digits. Local exchange carriers, including Bell Atlantic and MCI WorldCom, charge their customers local rates for calls to ISPs. Moreover, ISPs' premises are located within the LATA, thus meeting the definition of local traffic in the Agreement. Even if Bell Atlantic is correct in claiming that calls to ISPs are indistinguishable for network purposes from long distance calls, the same can be said about local calls that terminate to ISPs that are customers of Bell Atlantic or that terminate into private networks, as are used by some banks and corporations. Such calls are tariffed as local calls by Bell Atlantic.

We are persuaded by the CLEC Parties' arguments that a call to an ISP is distinguishable from an IXC call. A call to an ISP is functionally two separate services: (1) a local call to the ISP, and (2) an information service provided by the ISP when the ISP connects the caller to the Internet. This is functionally indistinguishable from the manner in which Bell Atlantic currently treats its call forwarding or three-way calling services. For example, under Bell Atlantic's tariff No. 10, a calling customer is charged the appropriate local rate, and the called customer, subscribing to either call forwarding or three-way calling, is then responsible for the charges between his location and the location to which the call is forwarded or

connected. M.D.P.U. No. 10, Part A § 7.1.3.B. The FCC also has noted that a call to an ISP is actually two separate services. In its May 8, 1997, Universal Service Order, the FCC stated that "[w]hen a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the [ISP's] service offering." In the Matter of Federal-State Joint Board on Universal Service, Report Order, CC Docket No. 96-45 at ¶ 789. According to the FCC, an ISP alters the format of the information through computer processing applications, thereby disqualifying the information as a telecommunications service as defined by 47 U.S.C. § 153(44).[14] Id. This description of a call to an ISP clearly distinguishes such a call from a long distance call (i.e., a call that an IXC transmits to its destination without changing the form or content of the information). In addition, the Eighth Circuit Court of Appeals has supported the FCC's determination that ISP traffic is different from IXC traffic. Southwestern Bell Telephone Company, et al. v. FCC, No. 97-2618, at 38 (August 19, 1998). In that decision, the Court stated that "ISPs subscribe to LEC facilities in order to receive local calls from customers who want to access the ISP's data, which may or may not be stored in computers outside the state in which the call was placed. An IXC, in contrast, uses the LEC facilities as an element in an end-to-end long-distance call that the IXC sells as its product to its own customers." Id. at 38 n. 9. Accordingly, we find that a call from a Bell Atlantic customer that

---

[14] Notably, the Agreement contains the same definition of "telecommunications service." D.P.U. 97-62, Agreement, § 1.66.

is terminated by MCI WorldCom to an ISP is a "local call," for purposes of the definition of local traffic in the Agreement, and, as such, is eligible for reciprocal compensation.

However, this case does raise the concern that ISPs in Massachusetts may be identifying or nominally establishing themselves as CLECs solely to receive reciprocal compensation from Bell Atlantic for "terminating calls." Section 251(b)(5) of the Act provides that local exchange carriers have an obligation to, inter alia, "establish reciprocal compensation arrangements for the transport and termination of telecommunications," and the Act defines local exchange carriers as "any person that is engaged in the provision of telephone exchange service or exchange access . . ." (see § 3(a)(2)(44)). ISPs do not provide exchange service or exchange access, so if a CLEC has been or was to be established solely (or predominately) for the purpose of funneling traffic to an ISP (particularly if that ISP is an affiliate), that CLEC may jeopardize its regulatory status and entitlements as a local exchange carrier. To assist the Department in judging whether this potential is in fact a problem in Massachusetts, Bell Atlantic shall, within two weeks from the date of this Order, provide to the Department a list of all CLECs in Massachusetts to which it has paid reciprocal compensation. The Department then will ask each of these CLECs to identify the customers for whom they terminate calls. On the basis of that information, the Department will determine whether it should open an investigation into the regulatory status of particular CLECs.[15]

---

[15] The most decisive fact in this analysis will be the percentage of each CLEC's traffic that is terminated to ISPs. If all or a very significant majority of a CLEC's traffic is

(continued...)

IV. CONCLUSION

Therefore, for the above reasons, the Department finds that Bell Atlantic shall not discontinue payment of reciprocal compensation to MCI WorldCom for the termination of local exchange traffic to ISPs, consistent with the terms of their existing interconnection agreement.[16] In addition, because the Department has clarified the definition of local traffic found in the Agreement -- a definition uniformly used in all of Bell Atlantic's interconnection agreements -- we expect that Bell Atlantic will apply this finding to other CLEC interconnection agreements.

V. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That the Petition of MCI WorldCom, Inc. (successor-in-interest to MFS Intelenet Service of Massachusetts, Inc.) to enforce the terms of its interconnection agreement with New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts

---

[15](...continued)
routed to an ISP, that fact would suggest that the CLEC in question may not qualify as a local exchange carrier.

[16] The record is unclear on the question of whether Bell Atlantic did in fact breach its Agreement with MCI WorldCom (in part because Bell Atlantic agreed to continue to make payments during the pendency of this case). Moreover, it is not necessary for purposes of resolving this dispute to make a finding on breach. Therefore, we decline to do so.

governing payment of reciprocal compensation for terminating local exchange traffic to Internet Service Providers be and hereby is GRANTED; and it is

FURTHER ORDERED: That the parties shall comply with all other directives contained herein.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

A true copy
Attest:

MARY L. COTTRELL
Secretary

The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

February 25, 1999

D.T.E. 97-116-A

Complaint of WorldCom Technologies, Inc. (successor-in-interest to MFS Intelenet Service of Massachusetts, Inc.) against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for alleged breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996.

APPEARANCES: Richard M. Rindler, Esq.
Alisa H. Reff, Esq.
Swidler & Berlin
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116

-and-

Gary Ball, Esq.
Assistant Vice-President
33 Whitehall Street, 15th Floor
New York, New York 10064
FOR: WORLDCOM TECHNOLOGIES, INC.
Petitioner

Bruce P. Beausejour
185 Franklin Street
Boston, MA 02110
FOR: BELL ATLANTIC-MASSACHUSETTS
Respondent

Chérie R. Kiser, Esq.
Yaron Dori, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004-2608
FOR: AMERICA ONLINE, INC.
Intervenor

Chérie R. Kiser, Esq.
Gina Spade, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004

-and-

David Ellen, Esq.
Cablevision Lightpath-MA, Inc.
111 New South Road
Hicksville, NY 11801
FOR: CABLEVISION LIGHTPATH, INC.
Intervenor

Jonathan E. Canis, Esq.
Enrico C. Soriano, Esq.
Kelley, Drye & Warren
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
FOR: INTERMEDIA COMMUNICATIONS, INC.
Intervenor

Alan D. Mandl, Esq.
Ottenberg, Dunkless, Mandl & Mandl
260 Franklin Street
Boston, MA 02110

-and-

Hope Barbulescu, Esq.
MCI Telecommunications Corporation
5 International Drive
Rye Brook, NY 10573
FOR: MCI TELECOMMUNICATIONS CORPORATION
Intervenor

Richard M. Rindler, Esq.
Swidler & Berlin
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
FOR: RCN TELECOM SERVICES, INC.
Intervenor

Michael A. McRae
1133 21st Street, N.W., Suite 400
2 Lafayette Centre
Washington, D.C. 20036
FOR: TELEPORT COMMUNICATIONS GROUP, INC.
Intervenor

Russell M. Blau, Esq.
Michael Fleming, Esq.
Swidler & Berlin
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116

-and-

Emmett E. Lyne, Esq.
K. Jill Rizotti, Esq.
Rich, May, Bilodeau & Flaherty
294 Washington Street
Boston, MA 02108
FOR: XCOM TECHNOLOGIES, INC.
Intervenor

ORDER ON MOTION FOR RECONSIDERATION AND EXTENSION OF THE APPEAL PERIOD OF MCI TELECOMMUNICATIONS CORPORATION

I. INTRODUCTION

On October 21, 1998, the Department of Telecommunications and Energy ("Department") issued an Order finding local exchange traffic terminating to an Internet Service Provider ("ISP") to be local in nature, and, therefore, subject to the reciprocal compensation clauses contained within New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts' ("Bell Atlantic") interconnection agreements. MCI WorldCom, D.T.E. 97-116 (1998). On November 10, 1998, MCI Telecommunications Corporation ("MCI") filed with the Department a Motion for Reconsideration ("Motion"), stating that the Order contains several errors and inconsistencies that should be corrected. MCI's Motion also requested an extension of the time for filing an appeal from the final Order until ten days after our ruling on the Motion itself. No parties filed a response to MCI's Motion.

II. MOTION FOR RECONSIDERATION

A. Standard of Review

The Department's Procedural Rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within 20 days of service of a final Department Order. The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison

Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

B. MCI's Position

Although MCI agrees with the Department's determination that calls to ISPs are local in nature, it argues that the Department's decision to possibly carry out an investigation into the regulatory status of competitive local exchange carriers ("CLECs"), especially as it relates to reciprocal compensation, is not consistent with the Telecommunications Act of 1996 ("Act") (Complaint at 1-2). In support of its contention, MCI cites §§ 251 and 253 of the Act, which,

respectively, require that rates for interconnection are "just, reasonable, and non-discriminatory," and that those rates not be a "barrier to entry" into the local telecommunications market (id.). MCI also argues that because CLECs have interconnection agreements in place that address reciprocal compensation, the type of customer they serve should not change Bell Atlantic's responsibility for paying it (id. at 2, 4). Further, MCI argues that the Department's decision is arbitrary and capricious because it would have an "unjustifiable" financial impact on CLECs by depriving them of reciprocal compensation income, and burden the Department by forcing it to monitor customer databases to determine if companies were CLECs for purposes of collecting reciprocal compensation (id.).

C. ANALYSIS AND FINDINGS

In D.T.E. 97-116, the Department determined that calls terminated to ISPs were local in nature for the purposes of reciprocal compensation, thus allowing CLECs to receive reciprocal compensation for calls made to ISPs. Contrary to MCI's assertion, the Department made no findings concerning the regulatory status of CLECs whose sole revenue comes from ISP reciprocal compensation. The Department merely stated that it would be requesting information in order to determine whether to initiate an investigation. The Department's decision was neither arbitrary nor capricious, and MCI's claim that the Department's decision causes an "unjustifiable" financial impact on CLECs or creates barriers to entry is unfounded.

With respect to the status of CLECs in Massachusetts, the Department did request that Bell Atlantic provide the Department with a list of CLECs to whom it paid reciprocal compensation. D.T.E. 97-116, at 13. The Department stated that after it received the list, it

would then "ask each of these CLECs to identify the customers for whom they terminate calls." Id. The Department also stated that it would then "determine whether it should open an investigation into the regulatory status of particular CLECs." Id.

Under G.L. c. 159, § 12, the Department has general supervisory and regulatory jurisdiction and control over telecommunications carriers doing business in Massachusetts. This statute clearly provides the Department with authority to ask companies to provide information, and to use that information in determining whether to open an investigation.

MCI does not identify any extraordinary circumstances that require us to take a fresh look at the record in this case. MCI also has not brought to light previously unknown or undisclosed facts, nor does it identify errors that rise to the level of mistake or inadvertence. MCI's arguments, while possibly relevant in the proper proceeding, are premature with regard to D.T.E. 97-116. Therefore, MCI's Motion for Reconsideration is denied.

III. MOTION FOR EXTENSION OF THE JUDICIAL APPEAL PERIOD

A. STANDARD OF REVIEW

G.L. c. 25, § 5, provides in pertinent part that an appeal of a Department final order must be filed with the Department no later than 20 days after service of the order "or within such further time as the Commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said . . . decision or ruling." See also 220 C.M.R. § 1.11(11).

The twenty-day appeal deadline indicates a clear intention on the part of the legislature and the Department to ensure that the decision of an aggrieved party to appeal a final order of

the Department be made expeditiously. Swift judicial review benefits both the appealing party and other parties, and serves the public interest by promoting the finality of Department orders. Nunnally, D.P.U. 92-34-A at 4 (1993).

The Department's procedural rules state that reasonable extensions of the appeal period shall be granted upon a showing of good cause. 220 C.M.R. § 1.11(11). In regards to determining what constitutes good cause, the Department has stated:

> Good cause is a relative term and it depends on the circumstances of an individual case. Good cause is determined in the context of any underlying statutory or regulatory requirement, and is based on a balancing of the public interest, the interest of the party seeking an exception, and the interests of any other affected party.

Boston Edison Company, D.P.U. 90-355-A at 4 (1992).

B. ANALYSIS AND FINDINGS

With regard to MCI's request for additional time to appeal D.T.E. 97-116, on November 21, 1998, the Department granted Bell Atlantic's motion to extend the appeal period for all parties to D.T.E. 97-116 until 20 days after the Federal Communications Commission issues its order on the nature of calls to ISPs. Accordingly, because the Department has already extended the appeal period for MCI as a result of its granting of Bell Atlantic's Motion, the Department finds that MCI's Motion is moot.

IV. ORDER

Accordingly, after due consideration, it is

ORDERED: That the Motion for Reconsideration of MCI Telecommunications Corporation, filed with the Department on November 10, 1998, be and is hereby DENIED; and it is

FURTHER ORDERED: That the Motion for Extension of the Judicial Appeal Period of MCI Telecommunications Corporation, filed with the Department on November 10, 1998, be and is hereby DENIED.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene Sullivan, Commissioner

A true copy
Attest:

MARY L. COTTRELL
Secretary