

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
**PUBLIC UTILITIES COMMISSION**

IN RE: COX RHODE ISLAND TELECOM, L.L.C.  
PETITION FOR DECLARATORY RULING  
THAT ISP-BOUND TRAFFIC SHOULD BE  
SUBJECT TO RECIPROCAL  
COMPETITION PURSUANT TO  
THE INTERCONNECTION AGREEMENT  
BETWEEN COX RHODE ISLAND  
TELECOM, L.L.C. AND BELL ATLANTIC-  
RHODE ISLAND

DOCKET NO. 3018

REPORT AND ORDER

I. Introduction

On February 4, 1999, Cox Rhode Island Telecom, L.L.C. (“Cox”) executed an Interconnection Agreement (“ICA”) with Bell Atlantic–Rhode Island (“BA-RI”). The ICA provides reciprocal compensation for traffic that originates on one party’s network and is terminated on the other party’s network.<sup>1</sup>

On September 27, 1999, Cox filed a Petition for Declaratory Ruling (“Petition”) against BA-RI with the Rhode Island Public Utilities Commission (“Commission”). The Petition sought a declaration that Internet Service Provider-bound traffic (“ISP Traffic”) is subject to reciprocal compensation under Cox’s ICA with BA-RI. On October 19, 1999, BA-RI filed an Answer (“Answer”) to the Petition asserting that Cox is not entitled to reciprocal compensation for ISP Traffic under its ICA and thus Cox’s Petition should be denied.

Between November 5 and November 18, 1999, the parties filed briefs. In these briefs, the parties argued the effect of the FCC’s February 26, 1999

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<sup>1</sup> ICA of Cox and BA-RI, Section 5.7.1.

*Internet Traffic Order* (“ITO”) on Section 5.7.5.3 of the ICA.<sup>2</sup> This section states:

*If the FCC subsequently determines that Internet traffic is subject to reciprocal compensation (i.e., that Internet traffic is Local Traffic) no change will be required in the Cox/BA-RI arrangement. If the FCC determines that Internet traffic is not subject to reciprocal compensation (i.e., that Internet traffic is not local traffic) then parties will be compensated as determined by the FCC.*

## II. BA-RI’s Brief

In its brief filed with the Commission, BA-RI insists that the FCC’s ITO definitely settled the issue of whether Cox, under its ICA, is entitled to reciprocal compensation for ISP Traffic. BA-RI cites a footnote in the FCC’s ITO which states, “ISP-bound traffic is non-local interstate traffic.”<sup>3</sup> Based principally on this footnote, BA-RI interpreted Section 5.7.5.3 to deny Cox any reciprocal compensation for ISP Traffic.<sup>4</sup> The language in Section 5.7.5.3 emphasized by BA-RI is: “*if the FCC determines that Internet traffic is not subject to reciprocal compensation (i.e., that Internet traffic is not local traffic) then the parties will be compensated as determined by the FCC.*” BA-RI argues that the FCC’s determination that ISP Traffic is “non-local traffic” denies to Cox any reciprocal compensation for ISP Traffic under the terms of its ICA with BA-RI. Since reciprocal compensation is mandated for local traffic under Section 251 (b)(5) of the Telecommunication Act (“Act”), Cox’s ISP traffic, being non-local traffic, is not entitled to reciprocal compensation under its ICA or by statute.<sup>5</sup>

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<sup>2</sup> The parties consented to the Commission’s jurisdiction to interpret and enforce the ICA’s provision regarding reciprocal compensation. (Cox’s petition, paragraph 6 and BA-RI’s answer, paragraph 6).

<sup>3</sup> ITO at n. 87.

<sup>4</sup> BA-RI Brief at pp. 3-4.

<sup>5</sup> BA-RI Brief at pp. 3-4.

Noting that Section 5.7.5.3 is clear and unambiguous, BA-RI further argued that if the parties intended to pay each other reciprocal compensation until the FCC orders a rule for ISP Traffic compensation, then the parties would have explicitly included such language in the ICA.<sup>6</sup> BA-RI noted that extrinsic factors used to determine intent of the parties cannot be considered when interpreting Section 5.7.5.3, because the ICA's language is clear.<sup>7</sup> URI Cogeneration Partners, L.P. v. Board of Governors for Higher Education, 915 F. Supp. 1267, 1281 (R.I. 1996). Moreover, BA-RI argued that the clear and unambiguous language of Cox's ICA is distinguishable from the contract terms in NEVD's ICA interpreted by the Commission in Docket No. 2935; therefore, that decision does not bind the Commission in interpreting Cox's ICA.<sup>8</sup> Lastly, BA-RI pointed out its efforts to provide reasonable compensation for ISP traffic under a new category of compensation, Intercarrier Compensation, for locally-dialed Internet Traffic.<sup>9</sup>

### III. Cox's Brief

In its brief, Cox countered that the phrase "then the parties will be compensated as determined by the FCC" in Section 5.7.5.3 of the ICA clearly reflected an intent by the parties that Cox receive some sort of compensation for ISP Traffic.<sup>10</sup> Cox also argued that the FCC's ITO did not definitively resolve the issue of reciprocal compensation for ISP Traffic because the "FCC explicitly reserved ruling on this complex issue and issued a Notice of Proposed Rulemaking on the subject."<sup>11</sup> Consequently, Cox stated that in the absence of a definitive FCC rule regarding reciprocal compensation, BA-RI should make reciprocal compensation payments for ISP-bound traffic as

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<sup>6</sup> Ibid. at p. 6.

<sup>7</sup> Ibid. at p. 7.

<sup>8</sup> Ibid. at p. 5.

<sup>9</sup> Ibid. at pp. 8-9. BA-RI filed on October 29, 1999 an amendment to its ICA with Level 3 Communications providing for Intercarrier Compensation.

<sup>10</sup> Cox Brief at pp. 3-4.

<sup>11</sup> Cox Brief at p. 4.

required by the ICA.<sup>12</sup> Lastly, Cox relied on a recent Commission decision in Docket No. 2967 that the FCC's ITO did not resolve the issue of whether ISP Traffic is subject to reciprocal compensation.<sup>13</sup>

#### IV. Commission's Findings

When interpreting a contract provision, the Commission will review the disputed provision to determine if it is clear and unambiguous. The language of Section 5.7.5.3 of the Cox/BA-RI ICA is clear and unambiguous. Both parties agreed to bind themselves to the FCC's determination on the issue of reciprocal compensation for ISP Traffic.<sup>14</sup> The difficulty arises because the FCC's ITO was anything but clear and unambiguous.

BA-RI is correct in that Section 5.7.5.3 is clear and unambiguous and, therefore, the Commission need not consider extrinsic factors when interpreting this section of the ICA. BA-RI, however, errs in how it interprets the FCC's ITO in relation to Section 5.7.5.3. Section 5.7.5.3 indicates that if the FCC determined that "Internet traffic is subject to reciprocal compensation" then "no charge will be required." It is clearly the intent of this section that Cox receive reciprocal compensation for ISP-bound traffic until the FCC declares that ISP-bound traffic should not receive compensation. The issue squarely before the Commission is to determine what, exactly, the ITO decided. In its NEVD decision,<sup>15</sup> the Commission discussed the FCC's ITO extensively. In the ITO, the FCC stated "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate."<sup>16</sup> The FCC further directed, however, that because it currently "has no rule governing inter-carrier compensation for ISP-bound traffic. . . parties should be bound by their existing interconnection agreements, as interpreted by

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<sup>12</sup> Cox Brief at p. 4.

<sup>13</sup> Cox Brief at p. 4.

<sup>14</sup> Section 5.7.5.3 of the Cox/BA-RI is similar to Section 5.7.2.3 in the Interconnection Agreement between BA-RI and Global NAPS.

<sup>15</sup> Order No. 15915 (issued July 21, 1999) in Docket No. 2935 (hereafter, "NEVD").

state commissions.”<sup>17</sup> In reliance on this direction, the Commission interpreted the NEVD agreement to require reciprocal compensation for ISP Traffic.<sup>18</sup> Further, if the FCC has definitively resolved the issue of reciprocal compensation for ISP Traffic, it is inexplicable that it has issued an outstanding Notice of Proposed Rulemaking on the subject.<sup>19</sup> As the Commission has previously stated, “the issue of whether ISP Traffic constitutes local traffic for which reciprocal compensation must be paid ... was not resolved by the FCC’s ITO.”<sup>20</sup>

Although the FCC’s ITO did not decide the issue of reciprocal compensation, the Commission needs to resolve the issue of whether reciprocal compensation for ISP traffic is required under the Cox/BA-RI ICA pending a definitive ruling from the FCC. The language of Section 5.7.5.3 states that even “if the FCC determines that Internet Traffic is not subject to reciprocal compensation . . . the parties will be compensated as determined by the FCC.” The intent of this sentence is that Cox would receive some form of compensation for ISP Traffic. In light of the phrasing of this section, the Commission can only conclude the parties intended that compensation be paid for ISP Traffic.

Section 5.7.5.3 of the Cox/BA-RI ICA clearly binds the parties to a ruling from the FCC regarding reciprocal compensation for ISP Traffic. Unfortunately, the FCC’s ITO did not clearly resolve the issue of whether reciprocal compensation is required for ISP Traffic. Nevertheless, the Commission finds that the intent of Section 5.7.5.3 is that Cox would receive some form of compensation for ISP Traffic. Until the FCC definitively rules upon the issue and determines the appropriate form of compensation for ISP

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<sup>16</sup> ITO at para. 1.

<sup>17</sup> NEVD at pp. 4-5, citing para. 21 of the ITO.

<sup>18</sup> Id. at p. 19.

<sup>19</sup> Cox Brief at p. 4.

<sup>20</sup> Order No. 16056 (issued November 16, 1999) in Docket No. 2967, at p. 4.

Traffic, Cox is entitled to reciprocal compensation for ISP Traffic under the terms of its ICA with BA-RI.

Accordingly, it is

(16247) ORDERED:

1. That Cox Rhode Island Telecom, L.L.C.'s ISP-bound traffic is subject to reciprocal compensation under the terms and conditions of its Interconnection Agreement with Bell Atlantic-Rhode Island.
2. That Bell Atlantic-Rhode Island is required to pay Cox Rhode Island Telecom, L.L.C. reciprocal compensation for its ISP-bound traffic until the Commission determines that the FCC has definitively resolved the issue of reciprocal compensation for ISP-bound traffic.

EFFECTIVE AT PROVIDENCE, RHODE ISLAND PURSUANT TO AN OPEN MEETING DECISION ON FEBRUARY 22, 2000. WRITTEN ORDER ISSUED MAY 9, 2000.

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Commissioner Kate F. Racine

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Commissioner Brenda K. Gaynor