

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES COMMISSION

IN RE: COMPLAINT OF GLOBAL NAPs INC. :
AGAINST BELL ATLANTIC - RHODE ISLAND :
REGARDING RECIPROCAL COMPENSATION : DOCKET NO. 2967

REPORT AND ORDER

I. FACTS/TRAVEL

On October 1, 1998, Global NAPs, Inc. (“GNAPs”) executed an Interconnection Agreement (“ICA”) with Bell Atlantic-Rhode Island (“BA-RI”), n/k/a Verizon-Rhode Island (“VZ-RI”). The ICA provided that Local Traffic would be subject to reciprocal compensation payments.¹ The parties stated that they could not agree as to whether ISP-bound traffic constituted Local Traffic for which reciprocal compensation must be paid.² However, the parties agreed that until the FCC or a court resolved the issue, reciprocal compensation would be paid for ISP-bound traffic.³

On June 19, 2001, GNAPs filed a Petition against VZ-RI with the Rhode Island Public Utilities Commission (“Commission”) requesting enforcement of the parties’ ICA. The Petition alleged that VZ-RI refused to comply with the terms of the ICA, specifically failing to pay \$.008 per minute for reciprocal compensation payments due to GNAPs for ISP-bound traffic. Rather, according to GNAPs, VZ-RI had asserted that it would only pay according to the terms of the ISP Remand Order released by the FCC on April 27,

¹ Local Traffic is “traffic that is originated by a Customer of one Party on that Party’s network and terminates to a Customer of the other Party on that other Party’s network, within a given local calling area....” Interconnection Agreement between BA-RI and Global NAPs, Inc., 10/1/98, p. 7. Reciprocal Compensation “...refers to the payment arrangements that recover costs incurred for the transport and termination of Reciprocal Compensation Traffic originating on one Party’s network and terminating on the other Party’s network. Id. at 9.

² ISP-bound traffic is that which originates on one party’s network and is transmitted to an Internet Service Provider (“ISP”) connected to the other party’s network.

³ Interconnection Agreement between Global NAPs, Inc. and BA-RI, 10/1/98, Section 5.7.2.3, p. 22.

2001, effective June 14, 2001.⁴ It was GNAPs' position that the ISP Remand Order had not fully resolved the issue of whether ISP-bound traffic was subject to reciprocal compensation payments because interested parties had not been able to complete the entire appeals process. Furthermore, GNAPs argued that this Commission had previously found that a similar FCC order had not fully resolved the issue regarding reciprocal compensation for ISP-bound traffic. The Petition also alleged that VZ-RI was improperly off-setting amounts GNAPs owed Verizon against amounts Verizon owed to GNAPs because some of the accounts being offset were accounts in states other than Rhode Island. The Petition further alleged that Verizon was inaccurately calculating the amounts due between the parties. However, GNAPs indicated that the parties were attempting to settle that issue.

On July 12, 2001, VZ-RI filed a Response and Motion to Dismiss the Petition. VZ-RI argued that the ISP Remand Order had settled the issue of whether ISP-bound traffic was Local Traffic subject to Reciprocal Compensation payments. VZ-RI argued that the language of the ICA required reciprocal compensation payments only until the FCC or a court resolved the issue of whether ISP-bound traffic was subject to such payments. VZ-RI argued that nothing in the ICA required exhaustion of all appeals before the issue was resolved. Therefore, it was VZ-RI's position that the ISP Remand Order, as a final order for which a stay had been denied on appeal,⁵ had resolved the issue. Second, VZ-RI argued that Rhode Island law allowed VZ-RI to offset amounts owed against amounts due between the two parties, despite the fact that some of the

⁴ See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-bound Traffic, Order on Remand and Report and Order, FCC No. 01-131 (released April 27, 2001) ("ISP Remand Order").

accounts were attributable to activity in states other than Rhode Island. VZ-RI also argued that regardless of the legitimacy of its claim, the issue was one for the courts to decide. Third, VZ-RI agreed that the Parties were attempting to settle the dispute regarding the calculation of the amounts due between the Parties.

On August 1, 2001, GNAPs filed a Reply Memorandum, arguing that the ISP Remand Order did not alter existing contractual obligations unless there was a change of law provision contained therein. GNAPs argued that the FCC did not intend for the interim compensation scheme established in the ISP Remand Order to be put into effect until the Parties renegotiated their ICA. GNAPs also argued that the language of the ICA indicated that because the FCC or a court would likely resolve the issue, only a court could resolve the issue. It was GNAPs' position that whether the FCC's ISP Remand Order was legally effective was irrelevant to the question of whether VZ-RI had to pay reciprocal compensation for ISP-bound traffic to GNAPs under the terms of the ICA between the Parties. Furthermore, GNAPs argued that VZ-RI was unilaterally overriding a prior Commission Order addressing a similar dispute between the Parties.⁶

On August 15, 2001, a pre-hearing conference was conducted at the offices of the Commission at which attorneys for VZ-RI and GNAPs participated. The parties were directed to address whether the FCC's ISP Remand Order was effective and whether the Commission had jurisdiction to resolve the "setoff issue." The parties agreed that the FCC ISP Remand Order was in effect because a Motion to Stay the Order was denied by

⁵ See WorldCom, Inc., et al. v. F.C.C. and the United States of America, Order, Docket Nos. 01-1218, 01-1256 (and Consolidated Cases) (D.C. Cir., June 14, 2001).

⁶ GNAPs was referring to Order No. 16056 (issued November 16, 1999), finding that the FCC's Internet Traffic Order (released February 26, 1999) was not clear enough to resolve the issue as contemplated by the parties in the ICA.

the D.C. Circuit Court.⁷ The Parties also agreed that the Commission had the authority to determine whether VZ-RI had acted appropriately in setting off amounts due between the parties even though the accounts in question were in different states.

In order to address the set-off issue, the Parties were asked to describe their respective business structures and billing systems. Verizon indicated that Verizon New England, Inc is the legal entity that provides landline telephone services in the New England states. Within each state Verizon does business under a d/b/a applicable to each state. For example, in Rhode Island, it is Verizon New England d/b/a Verizon Rhode Island. GNAPs explained that it is a Delaware corporation authorized to do business in Rhode Island, and that the GNAPs operating in Rhode Island is not a separate legal entity. GNAPs indicated that it bills reciprocal compensation and tracks the amounts due by individual state. However, GNAPs does not have separate accounts for each state. Verizon provided a detailed description of its billing system, not specifically addressing whether it had separate billing accounts for each state for purposes of reciprocal compensation.

II. ICA SECTION 5.7.2.3

The Parties disagree over the interpretation of Section 5.7.2.3 of their ICA. This section states:

The parties stipulate that they disagree as to whether traffic that originates on one Party's network and is transmitted to an Internet Servicer (ISP) connected to the other party's network (ISP Traffic) constitutes Local Traffic as defined herein, and the charges to be assessed in connection with such traffic. The issue of whether such traffic constitutes Local Traffic on which reciprocal compensation must be paid pursuant to the 1996 Act is presently before the FCC in CCB/CPD 97-30 and may before a court of competent jurisdiction. The Parties agree that the decision of

⁷ See WorldCom, Inc., et al. v. F.C.C. and the United States of America, Order, Docket Nos. 01-1218, 01-1256 (and Consolidated Cases) (D.C. Cir., June 14, 2001).

the FCC in that proceeding, or as such court, shall determine whether such traffic is Local Traffic (as defined herein) and the charges to be assessed in connection with ISP Traffic. If the FCC or such court determines that ISP Traffic is Local Traffic, as defined herein, or otherwise determines that ISP Traffic is subject to reciprocal compensation, it shall be compensated as Local Traffic under this Agreement unless another compensation scheme is required under such FCC or court determination. Until resolution of this issue, BA-RI agrees to pay GNAPs reciprocal compensation for ISP Traffic (without conceding that ISP Traffic constitutes Local Traffic or precluding BA-RI's ability to seek appropriate court review of this issue), pursuant to the commission's Order in Case 97-C-1275, dated March 19, 1998, as such Order may be modified, changed,⁸ or reversed.

GNAPs contends that according to the language in this provision of the ICA, GNAPs is entitled to reciprocal compensation for ISP Traffic under the terms of the ICA until the issue of whether ISP Traffic constitutes Local Traffic is resolved by a court of competent jurisdiction and all appeals are exhausted.⁹ VZ-RI argues that the language in this provision of the ICA expressly recognized that the Parties disagreed as to whether ISP Traffic is Local Traffic until the FCC or a court resolved the issue. VZ-RI contends that pursuant to the FCC's ISP Remand Order, the issue of whether ISP traffic is subject to reciprocal compensation has been resolved and thus, GNAPs is not entitled under the ICA to any reciprocal compensation payments for ISP Traffic.

III. COMMISSION FINDINGS

The Parties agreed that the Commission could render a decision in this matter on the basis of the Parties' written submissions, without the need for a public hearing. At an open meeting on January 29, 2002, the Commission unanimously voted to grant Verizon's Motion to Dismiss GNAPs' Petition, for the reasons set forth below.

⁸ Interconnection Agreement between Global NAPs, Inc. and BA-RI, 10/1/98, Section 5.7.2.3, p. 22 (emphasis added).

⁹ Reply of Global NAPs, Inc., p. 13; Memorandum of Global NAPs, Inc. Regarding FCC Order 01-131 and Set-off Authority, pp. 1, 4.

A. Section 5.7.2.3 and ISP Remand Order

On April 27, 2001, the FCC issued its ISP Remand Order. The FCC determined ISP traffic to be exempt from reciprocal compensation. Specifically, the FCC found that the provisions of section 251(b)(5) of the 1996 Telecommunications Act do not extend to ISP-bound traffic. Furthermore, the FCC established a cost recovery mechanism for the exchange of ISP-bound traffic and an interim recovery mechanism to avoid shock to the market. Finally, the FCC noted that its recovery mechanism could not interfere with then-existing contract clauses unless there was a change of law provision. The effective date of the Order was June 14, 2001. The Order was appealed in the D.C. Circuit Court and a request for a stay of the effectiveness of the Order was denied.¹⁰ Therefore, until such time as the D.C. Circuit Court rules, the Order is enforceable.

When interpreting a contract provision, the Commission will review the disputed provision to determine if it is clear and unambiguous. After a review of the disputed section of the ICA, the Commission has determined that the Parties agreed to disagree as to whether ISP-bound traffic was subject to reciprocal compensation *until* the FCC *or* a court of competent jurisdiction ruled. We find nothing in the disputed language or in GNAPs' previous claims in this docket¹¹ to suggest that the Parties really meant until the FCC *and* a court of competent jurisdiction ruled *and* all appeals were exhausted.

The Commission now turns to GNAPs' argument that the ISP Remand Order was only intended for effect when the Parties renegotiate their ICA. The Commission finds that when the FCC indicated that it was not intending to impair the rights and obligations

¹⁰ See WorldCom, Inc., et al. v. F.C.C. and the United States of America, Order, Docket Nos. 01-1218, 01-1256 (and Consolidated Cases) (D.C. Cir., June 14, 2001).

¹¹ See Order No. 16056 (issued November 16, 1999) citing GNAPs' July 7, 1999 Complaint against BA-RI, contending that GNAPs "is entitled under the ICA to reciprocal compensation for ISP Traffic until the

of the parties under their existing ICAs, the FCC was referring to ICAs in which the language called for reciprocal compensation payments for ISP-bound traffic. That is very different from a provision indicating that the parties agreed to disagree until the FCC or a court decided. Therefore, because the D.C. Circuit denied the request for a stay of the ISP Remand Order, it has been in full force and effect since June 14, 2001. Therefore, VZ-RI must comply with the terms of the FCC's ISP Remand Order.¹² If it is reversed on appeal, VZ-RI will be required to reconcile with Global NAPs at that time.

GNAPs argued that under the Commission's previous Orders in this docket and in Docket No. 3018, the FCC's decision is not dispositive until there is a final non-appealable order entered by a court.¹³ Prior Commission Orders can be distinguished and, to some extent, have been pre-empted by the FCC in its ISP Remand Order. In its prior Orders, the Commission concluded that the FCC's February 26, 1999 Internet Traffic Order regarding ISP traffic was *not* dispositive of the reciprocal compensation issue because: (1) the FCC did not definitively resolve whether ISP-bound traffic was subject to reciprocal compensation, (2) the FCC left jurisdiction with the state commissions to determine whether reciprocal compensation payments were due for ISP-bound traffic, and (3) the FCC had not established a recovery mechanism or interim recovery mechanism for ISP-bound traffic, but rather, had indicated the parties should be bound by their ICAs.¹⁴

issue of whether ISP Traffic constitutes Local Traffic is resolved by the FCC or a court of competent jurisdiction.”

¹² GNAPs requested the Commission order VZ-RI to place all amounts that would be due under the ICA in excess of those payable under the FCC Order to be placed in escrow until exhaustion of all appeals. To do so would be contrary to the legal principle that absent a stay, an order is effective during the appeals process. In addition, GNAPs has not argued or presented any evidence that VZ-RI is in jeopardy of not being able to meet its financial obligations.

¹³ See Order No. 16056, (issued November 16, 1999) and Order No. 16247, (issued May 9, 2000).

¹⁴ Id.

In the ISP Remand Order, however, the FCC determined ISP traffic to be exempt from reciprocal compensation. Specifically, the FCC found that the provisions of section 251(b)(5) of the 1996 Telecommunications Act do not extend to ISP-bound traffic. Second, the FCC stated that “[b]ecause we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, state commissions will no longer have authority to address this issue.” Third, the FCC established a mechanism by which to determine whether traffic is ISP-bound traffic and to recover compensation for ISP-bound traffic. Finally, the FCC established an interim intercarrier compensation regime for ISP-bound traffic. Therefore, the ISP Remand Order, unlike the early Internet Traffic Order, has addressed the concerns raised in the Commission in its previous orders.¹⁵ We conclude that because in the ISP Remand Order, the FCC has ruled in a manner that satisfies the concerns previously raised by this Commission and the FCC’s Order has not been stayed, as a result, the ICA contract provision requiring “a resolution of this issue by the FCC or a court of competent jurisdiction” has been satisfied.

B. Accounts Set-off

Given the overall structure of the parties’ businesses and the fact that GNAPs does not even keep separate accounts for each state, Verizon could be seen to have acted reasonably in setting off accounts between different states. However, the duty of the Commission is to interpret provisions of the ICA between VZ-RI and GNAPs rather than settling this breach of contract action that extends to practices that cross state lines. Therefore, it may be more appropriate for GNAPs to file suit in court for breach of

¹⁵ See Order No. 16056 and Order No. 16247.

contract if it believes VZ-RI is improperly setting off amounts due between the Parties. Accordingly, we decline to rule on GNAPs claim and grant VZ-RI's Motion to Dismiss.

C. Calculation Dispute

GNAPs has argued that even if the set-off practice was proper, Verizon was not calculating the amounts correctly. The Parties have continued to indicate they are working toward a resolution of this issue. Therefore, because the Parties have indicated that they are working toward resolution of this issue we decline to rule and we dismiss GNAPs' claim at this time, finding it not to be ripe for Commission review.

Accordingly, it is

(16921) ORDERED:

1. That Verizon's Motion to Dismiss the Petition of Global NAPs, Inc. is hereby granted.

EFFECTIVE AT WARWICK, RHODE ISLAND PURSUANT TO AN OPEN MEETING DECISION ON JANUARY 29, 2002. WRITTEN ORDER ISSUED FEBRUARY 20, 2002.

PUBLIC UTILITIES COMMISSION

Elia Germani, Chairman

Kate F. Racine, Commissioner

Brenda K. Gaynor, Commissioner