

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

On October 1, 1998, Global NAPs, Inc. ("GNAPs") 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 transmitted to an Internet Service Provider ("ISP") connected to the other party's network ("ISP Traffic").

On July 7, 1999, GNAPs filed a Complaint and Request for Emergency Relief ("Complaint") against BA-RI with the Rhode Island Public Utilities Commission ("Commission"). The Complaint alleged that BA-RI failed to pay an invoice dated May 1, 1999 for reciprocal compensation payments due to GNAPs for April 1999. On July 23, 1999, BA-RI filed an Answer ("Answer") to the Complaint denying GNAPs allegations, and a motion to dismiss the Complaint. In a subsequent memorandum filed on September 29, 1999, GNAPs alleged that BA-RI had to date failed to pay GNAPs invoices in the amount of \$829,070 (exclusive of September usage), and asked the Commission to require BA-RI to make immediate payment to GNAPs of all outstanding invoices for reciprocal compensation.

On September 22, 1999, a pre-hearing conference was conducted at the offices of the Commission at which attorneys for BA-RI and GNAPs

participated. The parties were directed to address whether the FCC's February 26, 1999 *Internet Traffic Order* resolved the issue of whether ISP Traffic constitutes "local traffic" for which reciprocal compensation must be paid under the ICA. Between September 29 and October 5, 1999, the parties filed various memoranda and correspondence on this issue with the Commission. It was 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.

The parties disagree over the interpretation of Section 5.7.2.3 of the 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 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, or reversed. [Emphasis added].

GNAPs contends that according to the language emphasized in this provision of the ICA, GNAPs is entitled under the ICA to reciprocal compensation for ISP Traffic until the issue of whether ISP Traffic constitutes Local Traffic is resolved by the FCC or a court of competent jurisdiction. Complaint at Par. 24.

BA-RI argues that the Federal Communications Commission (“FCC”) has effectively decided this issue. The ICA expressly recognized that the parties disagreed as to whether ISP Traffic is Local Traffic, noting that the issue was before the FCC. BA-RI contends that pursuant to the FCC’s February 26, 1999 *Internet Traffic Order* (“ITO”), the FCC held that ISP-bound traffic is non-local interstate traffic and, therefore, is not subject to the reciprocal compensation requirements of the Telecommunications Act of 1996 (the “Act”). BA-RI Answer at Par. 17, *citing* ITO at Par. 18 n. 87. On this basis, BA-RI concludes that 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.

In contrast, GNAPs argues that the ITO did not fully decide the issue of whether ISP Traffic is subject to reciprocal compensation. Rather, GNAPs contends, the ITO expressly left to state commissions the authority to determine whether reciprocal compensation payments are due under an interconnection agreement, pending the adoption of a federal rule governing the subject. GNAPs Sept. 29, 1999 Memorandum

at pp. 4-5. Pursuant to this authority, GNAPs points out, this Commission held in Docket No.2935 that NEVD of Rhode Island, LLC (“NEVD”) was due reciprocal compensation under its interconnection agreement with BA-RI pending the adoption of a federal rule establishing an appropriate interstate compensation mechanism. GNAPs Sept. 29, 1999 Memorandum at p.6, *citing* Order No.15915 (July 21, 1999)(“NEVD Order”) at p.12. GNAPs contends in its Sept. 29, 1999 Memorandum that the fact that the Commission has also opened a generic inquiry into the issue of whether ISP Traffic is subject to reciprocal compensation (Docket No. 2960) further demonstrates that this issue has not been resolved. GNAPs maintains that until the issue is resolved, BA-RI is required to pay reciprocal compensation to GNAPs under the terms of the ICA.

### FINDINGS

The Commission agrees with GNAPs that the issue of whether ISP Traffic constitutes “local traffic” for which reciprocal compensation must be paid under the ICA was not resolved by the FCC’s ITO. Furthermore, based upon the principles enunciated in the FCC’s ITO, we affirm our holding in the NEVD Order that, in the absence of a federal rule establishing an appropriate interstate compensation mechanism, this Commission has the authority to resolve disputes concerning reciprocal compensation provisions contained in the ICA. NEVD Order at p.12.

The undisputed fact that GNAPs has filed a complaint against BA-RI regarding reciprocal compensation for ISP Traffic creates a

presumption that the “issue” has not been resolved. In order to rebut this presumption, BA-RI must show that GNAPs’ Complaint does not have a good faith basis. BA-RI has failed to do so. Consequently, the Commission finds that the clause “[u]ntil resolution of this issue, BA-RI agrees to pay GNAPs reciprocal compensation for ISP Traffic,” contained in Section 5.7.2.3 of the ICA, clearly and unambiguously requires BA-RI to make reciprocal compensation payments to GNAPs pending the outcome of this Docket.

Accordingly, it is

(16056) ORDERED:

1. The issue of whether ISP Traffic constitutes “local traffic” subject to reciprocal compensation has not been resolved according to the terms of Section 5.7.2.3 of the parties’ Interconnection Agreement.
2. BA-RI shall immediately pay to GNAPs all outstanding invoices for reciprocal compensation for ISP Traffic which have been, or in the future may be, submitted to BA-RI by GNAPs until this Docket is ultimately resolved by this Commission.

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EFFECTIVE AT PROVIDENCE, RHODE ISLAND PURSUANT TO AN  
OPEN MEETING DECISION ON OCTOBER 5, 1999. WRITTEN ORDER  
ISSUED NOVEMBER 16, 1999.

PUBLIC UTILITIES COMMISSION

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James J. Malachowski, Chairman

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Kate F. Racine, Commissioner

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Brenda K. Gaynor, Commissioner

Chairman Malachowski concurs with this decision, but is unavailable for signature.