

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6566

Petition of Adelpia Business Solutions of)
Vermont, Inc., and Adelpia Business)
Solutions, Inc., for an Interpretation and)
Enforcement of Interconnection Agreements)
with Verizon New England Inc., d/b/a Verizon)
Vermont)

Hearing at
Montpelier, Vermont
February 26, 2002

Order entered: 7/16/2003

PRESENT: George E. Young, Esq., Hearing Officer

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I. INTRODUCTION

As competitors entered the telecommunications marketplace, it became necessary for them to reach agreements with incumbent local exchange carriers ("ILECs") on the terms and conditions under which they would interconnect their networks and exchange traffic. Many of the understandings and agreements that had worked well when local exchange carriers had separate service territories simply did not apply to competitive local exchange carriers ("CLECs"). The federal telecommunications Act of 1996 (the "Act") formalized the process by which CLECs and ILECs set out these terms and conditions. Specifically, Section 252(a) of the Act requires ILECs to negotiate interconnection agreements with CLECs on request, which are then submitted to the Public Service Board ("Board") for approval under Section 252(e).

In this proceeding, the Board is called upon to interpret two Interconnection Agreements involving the largest local telecommunications carrier in Vermont — Verizon New England Inc., d/b/a Verizon Vermont ("Verizon") — and Adelphia Business Solutions of Vermont, Inc., and Adelphia Business Solutions, Inc. (jointly referred to as "ABS"). These Interconnection Agreements govern the means by which Verizon and ABS interconnect their networks, exchange traffic, and compensate each other for the services provided. One of the terms of interconnection agreements delineates the compensation a carrier pays its competitor to complete calls originated on the carrier's network. For toll traffic, interexchange carriers pay access charges to both the originating and terminating carrier under a system that predates local competition. For other traffic, the Act provides for "reciprocal compensation,"¹ although those carriers are also free to agree to other mechanisms.² Reciprocal compensation is a charge paid by the originating carrier to the terminating carrier — generally applicable to local traffic — although the interconnection agreements define the scope of those payments. In the case of Verizon and ABS, the originating

1. See 47 U.S.C. §§ 251(b)(5) and 252(d)(2)(A).

2. For example, mutual traffic exchange (also known as "bill-and-keep") has been adopted in certain circumstances. Under bill-and-keep, neither carrier pays the other compensation for termination of local traffic. Instead, each obtains compensation from its own customers, generally through the basic service charge.

carrier pays the terminating carrier 0.8 cents per minute to complete "Local Traffic."³ Here, the parties disagree on whether reciprocal compensation — the charge that the company in which a local telephone call originates pays its competitor for completing the call — applies to local calls terminated to internet service providers ("ISPs") within the caller's local calling area.

In this Proposal for Decision, I recommend that the Board find that reciprocal compensation applies to ISP-bound local traffic.⁴ Thus, if a Verizon customer places a call to an ISP (served by ABS) located within the customer's local calling area, Verizon must pay ABS reciprocal compensation to terminate the call at the rates specified in the Interconnection Agreements. This conclusion is based upon the plain language of the Interconnection Agreements. The parties to the interconnection clearly intended to include ISP-bound traffic within the definition of local traffic, thus requiring the payment of reciprocal compensation for termination of that traffic.

II. PROCEDURAL HISTORY

ABS initiated this proceeding when it filed a Complaint and Petition on October 5, 2001. ABS requested that the Board enter an order "interpreting the Agreements as requiring Verizon to treat all local traffic originated by Verizon and terminating to ABS's end user customers, *including ISP customers*, as eligible for reciprocal compensation pursuant to Section 5.7 of the Agreements." A prehearing conference took place on October 22, 2001.

I conducted a technical hearing on February 26, 2002, at which time witnesses for ABS and Verizon presented testimony. Parties filed briefs in April and May of 2002.

3. Exh. ABS-1, Pricing Schedule; exh. ABS-2, KMC Agreement, Pricing Schedule at 8. The Pricing Schedules were amended to differentiate the reciprocal compensation rates based upon time of day. These time-of-day rates are included in the Interconnection Agreements entered into the record as exhibits ABS-1 and ABS-2.

4. This proceeding involves interpretation of the Interconnection Agreements entered into by Verizon and ABS in 1996 and 1999. As discussed below, it is unaffected by subsequent actions of the Federal Communications Commission ("FCC") related to future treatment of reciprocal compensation for internet-bound traffic.

III. DEPARTMENT MOTION TO STRIKE

On December 14, 2001, the Vermont Department of Public Service ("Department") filed an objection to the written testimony of Douglas G. Bonner and portions of the testimony of Robert Frost, both of whom are witnesses for ABS. On January 31, 2002, the Department filed a similar objection to portions of the testimony of Verizon witness Louise McCarren. The Department also objected to portions of the rebuttal testimony filed by ABS. The Department's objection is based upon the Vermont Supreme Court's rulings that extrinsic evidence may not be used to interpret a contract unless an ambiguity exists in that contract.⁵

At the hearing, I overruled the Department's objection. I noted that Vermont law permitted extrinsic evidence for the purpose of determining whether an ambiguity exists⁶ and that the prefiled testimony to which the Department objected was relevant on this point. I also stated that if I ultimately concluded that the contract was unambiguous, I would strike the testimony. The Department renewed its objection in the brief, stating that the Interconnection Agreements were unambiguous and that, therefore, the testimony should be stricken.

As the Department argues, under Vermont law of contract interpretation, the basic rule is:

[T]o give effect to the intent of the parties as that intent is expressed in their writing. When the contract language is clear, the intent of the parties is taken to be what the agreement declares.⁷

A reviewing body must accept the plain meaning of the language if that language is unambiguous.⁸ Extrinsic evidence is not admissible to show the intent of the parties unless the language of the document is ambiguous.⁹ The question of whether an ambiguity exists is one of law.¹⁰

5. Citing *Isbrandtsen v. North Branch Corp.*, 150 Vt. 575, 577-81 (1988).

6. Tr. at 6.

7. *Hamelin v. Simpson Paper Co.*, 167 Vt. 17, 19 (1997) (citations omitted).

8. *Kipp v. Chips Estate*, 169 Vt. 102, 105 (1999).

9. *Isbrandtsen*, 150 Vt. at 577; *Kipp*, 169 Vt. at 107.

10. *Id.* Ambiguity exists if language is "reasonably or fairly susceptible to different interpretations." *Towns v. Vermont Mutual Insurance Company*, 169 Vt. 545 (1999).

However, the Supreme Court has also ruled that extrinsic evidence as to the circumstances surrounding the making of the agreement may be admitted to show whether an ambiguity exists.¹¹

We allow limited extrinsic evidence of "circumstances surrounding the making of the agreement" in determining whether the writing is ambiguous. This evidence is relevant, however, only when, in combination with the writing, it supports an interpretation that is different from that reached on the basis of the writing alone, and both are reasonable. It may not be used to vary the terms of an unambiguous writing.¹²

If this evidence helps to identify an ambiguity, the court may rely upon subordinate rules of construction in order to interpret the meaning of the disputed terms.¹³

After considering the Department's arguments, I again conclude that the evidence to which the Department objects should be admitted. First, the evidence is admissible for the purpose of showing that an ambiguity may exist. Second, and more importantly, although most of the agreement is clear and unambiguous, some ambiguity remains. The term "Local Traffic" as used in the Interconnection Agreements and, in particular, the question of when a call is "terminated" are not explicitly and unambiguously outlined in the Interconnection Agreements. Therefore, the evidence is relevant to the interpretations of the agreement in pursuit of the Board's obligation to interpret the Agreements consistent with the parties' intent.

IV. FINDINGS

Pursuant to 30 V.S.A. § 8, and based on the record and evidence before me, I present the following findings of fact and conclusions of law to the Board. All findings requested by the parties that are not adopted herein are hereby denied.

1. Adelfia Business Solutions of Vermont, Inc. (formerly known as Hyperion Communications of Vermont, Inc.) is a subsidiary of Adelfia Business Solutions, Inc. (formerly known as Hyperion Telecommunications, Inc.). ABS is a facilities-based local exchange carrier ("LEC") providing local exchange telecommunications services in Vermont and

11. *Isbrandtsen*, 150 Vt. at 579.

12. *Kipp*, 169 Vt. at 107.

13. *Isbrandtsen*, 150 Vt. at 579

competes with Verizon to do so. In Vermont, ABS provides switch-based local exchange services and has a network of fiber optic telecommunications facilities, as well as co-location facilities with Verizon at all seven of Verizon's "host" switches. ABS has over 900 customers in Vermont and operates over 19,000 access lines. ABS currently has 18 customers who are ISPs; these customers account for less than half of ABS's access lines. Frost pf. at 2-3.

2. Verizon is Vermont's largest incumbent local exchange carrier ("ILEC").¹⁴

3. Verizon interconnects with ABS so that Verizon Vermont's customers can communicate with ABS customers and vice versa. Verizon passes traffic from its own customers to ABS, which transports and terminates that traffic to customers served by ABS. Thus, a Verizon customer may place a local call to a customer served by ABS. ABS's facilities are used by Verizon's customers for as long as Verizon's customers remain connected to ABS' customers, including an ISP served by ABS. Frost pf. at 4.

4. Reciprocal compensation is a requirement established in Section 251(b)(5) of the Telecommunications Act of 1996 (the "Act") which provides that all LECs, including ILECs, have the duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." McCarren pf. at 3.

A. The Interconnection Agreements

5. On July 26, 1996, New England Telephone and Telegraph Company d/b/a NYNEX signed an "Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996" with Hyperion Telecommunications, Inc. and Hyperion Telecommunications of Vermont, Inc.¹⁵ Exh. ABS-1. The Board approved the 1996 Agreement in November 1996. Docket 5905, Order of 11/4/96; Frost pf. at 3.

14. At the time of the first interconnection agreement, Verizon operated in Vermont under the name New England Telephone and Telegraph Company, d/b/a NYNEX ("NYNEX"). In 1997, NYNEX merged with Bell Atlantic changing its name in Vermont to New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Vermont ("Bell Atlantic"). *In re Joint Petition of New England Telephone & Telegraph Co. d/b/a NYNEX, et al.*, Docket No. 5900, Order of February 26, 1997, at 5, 10, 26, 31. In 2000, Bell Atlantic changed its corporate name to the present title: Verizon New England, Inc., which does business in Vermont as Verizon Vermont.

15. This agreement is referred to in this Proposal for Decision as the "1996 Agreement."

6. On February 14, 1997, New England Telephone and Telegraph Company d/b/a NYNEX signed an "Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996" with KMC Telecom, Inc. ("KMC").¹⁶ Exh. ABS-2. The Board approved the KMC Agreement in 1997. Docket 5963, Order of 6/17/97.

7. On March 16, 1999, New England Telephone and Telegraph Company d/b/a Bell Atlantic-Vermont signed an "Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996" with Hyperion Communications of Vermont, Inc., which attached and incorporated the KMC Agreement as an appendix and incorporated the terms and conditions of the KMC Agreement.¹⁷ Exh. ABS-2. The Board approved the Interconnection Agreement in 1999. Docket 6229, Order of 7/6/99; Frost pf. at 3.

B. Relevant Provisions of the Agreements

8. The 1996 Agreement defines "Reciprocal Compensation" as follows:

"Reciprocal Compensation" is As Described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Telecommunications originating on one Party's network and terminating on the other Party's network.

Exh. ABS-1 at 6, ¶ 1.53.

9. The KMC Agreement defines "Reciprocal Compensation" to be "As Described in the Act." Exh. ABS-2, KMC Agreement at 6, ¶ 1.54.

10. The 1996 Agreement delineates the application of Reciprocal Compensation to certain traffic:

5.7.1 Reciprocal Compensation only applies to the transport and termination of Local Traffic billable by NYNEX or HYPERION, which a Telephone Exchange Service Customer originates on NYNEX's or HYPERION's network for termination on the other Party's network except as provided in Section 5.7.6 below.

16. This agreement is referred to in this Proposal for Decision as the "KMC Agreement."

17. This agreement is referred to in this Proposal for Decision as the "1999 Agreement." The 1999 Agreement (Exh. ABS-2) has two components. The first is an "Adoption Agreement," in which the parties agree to adopt the KMC Agreement, with certain limitations. The second component is the KMC Agreement, which the parties adopt as permitted by Section 252(i) of the Act.

5.7.2 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. This rate is to be applied at the H-IP [Hyperion Interconnection Point] for traffic delivered by NYNEX, and at the N-IP [NYNEX Interconnection Point} for traffic delivered by HYPERION. No additional charges, including port or transport charges, shall apply for the termination of Local Traffic delivered to the H-IP or the N-IP. When Local Traffic is terminated over the same trunks as intraLATA or interLATA toll, any port or transport or other applicable charges related to the toll traffic shall be prorated to be applied only to the toll traffic.¹⁸

Exh. ABS-1 at 13. Sections 5.7.1 and 5.7.2 of the KMC Agreement are identical to the same numbered provisions of the 1996 Agreement, except that references to Hyperion are changed to KMC. Exh. ABS-2, KMC Agreement at 13.

11. The 1996 Agreement defines "Local Traffic" as follows:

"Local Traffic" means a call which is originated and terminated within a local calling area, as defined in P.S.B. VT No. 20 Tariff, effective at the time this agreement is signed. IntraLATA calls originated on a 1+ presubscription basis when available or a casual dialed (10XXX/101XXXX) basis are not considered local traffic.

Ex. ABS-1 at 5, ¶ 1.38.

12. The KMC Agreement defines "Local Traffic" as follows:

"Local Traffic" means a call which is originated and terminated within a given LATA, in the State of Vermont, as defined in PSB Tariff 10, Section 6. IntraLATA calls originated on a 1+ presubscription basis when available or a casual dialed (10XXX/101XXXX) basis are not considered local traffic.

Exh. ABS-2, KMC Agreement at 5, ¶ 1.38.

18. A "LATA" or "Local Access and Transport Area:"

[M]eans a contiguous geographic area: (a) established before the date of enactment of the Act by a Bell operating company such that no Exchange Area includes points within more than one (1) metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (b) established or modified by a Bell operating company after such date of enactment and approved by the FCC.

Exh. ABS-2, KMC Agreement, Schedule 1.0; *see also* exh. ABS-1 at 5, ¶ 1.37; exh. ABS-2, KMC Agreement at 5, ¶ 1.37. Vermont is a single LATA state which means that intraLATA refers to intrastate calls and interLATA refers to interstate calls.

13. Neither the 1996 nor the KMC Agreement defines "terminate." Exh. ABS-1; exh. ABS-2, KMC Agreement.

14. The 1996 Agreement contains the following provision regarding local calling areas:

Local Calling Area. There is no consensus between the parties on the definition of a local calling area. To facilitate the immediate exchange of traffic between Hyperion and NYNEX, local calling areas as defined in PSB Vt. No. 20 shall apply, until modified by the Board. Nothing herein shall limit Hyperion's ability to offer calling areas/plans for retail purposes that define calling areas different from NYNEX's existing local calling areas, nor shall Hyperion be prohibited from petitioning the Board to adopt different definition(s) of a local calling area from that described in PSB Vt. No. 20.

Exh. ABS-1 at 46, ¶ 29.19. The KMC Agreement (incorporated into the 1999 Agreement) contains an identical provision, except that references to Hyperion are changed to KMC. Exh. ABS-2 at 46, ¶ 29.19.

15. The 1996 and KMC Agreements define "As Described in the Act" to mean "as described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Board." Exh. ABS-1 at 2, ¶ 1.6; exh. ABS-2, KMC Agreement at 2, ¶ 1.6.

16. The 1996 and KMC Agreements define "As Defined in the Act" to mean "as specifically defined by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Board." Exh. ABS-1 at 2, ¶ 1.5; exh. ABS-2, KMC Agreement at 2, ¶ 1.5. The 1996 and KMC Agreements each attach a Schedule 1.0 which sets out, for convenience, "Certain Terms As Defined in the Act."

17. The 1996 and KMC Agreements define the "Act" to mean "the Communications Act of 1934 (47 U.S.C. 153(R)), as amended by the Telecommunications Act of 1996, and as from time to time interpreted in the duly authorized rules and regulations of the FCC or a state regulatory agency within its state of jurisdiction." Exh. ABS-1 at 1, ¶ 1.1; exh. ABS-2, KMC Agreement at 1, ¶ 1.1.

18. The 1996 and KMC Agreements each contain the following provision concerning "Governing Law":

For all claims under this Agreement that are based upon issues within the jurisdiction (primary or otherwise) of the FCC, the exclusive jurisdiction and remedy for all such claims shall be as provided for by the FCC and the Act. For all claims under this Agreement that are based upon issues within the jurisdiction (primary or otherwise) of the Board, the exclusive jurisdiction for all such claims shall be with the Board, and the exclusive remedy for such claims shall be as provided for by such Board. In all other respects, this Agreement shall be governed by the domestic laws of the State of Vermont without reference to conflict of law provisions.

Exh. ABS-1 at 43, ¶ 29.7; exh. ABS-2, KMC Agreement at 43, ¶ 29.7.

19. In relevant part, the 1999 Adoption Agreement states the following concerning the KMC Agreement:

BA [Bell Atlantic] has entered into this Agreement in accordance with the requirements of 47 U.S.C. § 252(i), but has advised Hyperion that BA disputes the applicability of the Separate Agreement's Reciprocal Compensation arrangements to Internet traffic (herein the "Disputed Issue"). Hyperion believes that the Separate Agreement's Reciprocal Compensation arrangements apply to Internet traffic, but acknowledges that Hyperion and BA disagree as to the meaning of the Separate Agreement with respect to the Disputed Issue, and that BA's execution of this Agreement does not constitute a voluntary adoption or affirmation of the Separate Agreement, an admission that any provision of the Separate Agreement (or Hyperion's interpretation thereof) is lawful or reasonable, or a release or waiver of BA's claims and defenses pertaining to the Disputed Issue. The entry into, filing and performance by the Parties of this Agreement does not in any way constitute a waiver by either Party of any of the rights and remedies it may have to seek review of any of the provisions of this Agreement or the Separate Agreement, or to petition the Commission, other administrative body or court for reconsideration or reversal of any determination made by any of them, or to seek enforcement or review in any way of any portion of this Agreement or the Separate Agreement in connection with the Disputed Issue or Hyperion's election under 47 U.S.C. § 252(i).

Exh. ABS-2, 1999 Adoption Agreement at 3, ¶ 2.2.¹⁹

19. In the 1999 Adoption Agreement, the term "Separate Agreement" means the KMC Agreement, and "BA" means New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Vermont. Exh. ABS-2, 1999 Adoption Agreement at 1.

C. Routing and Termination of Calls

20. Verizon Vermont customers have called and continue to call ISPs who are within the customers' own local calling areas and are ABS customers. Exh. VLM-1; Frost pf. at 4.

21. Customers reach other customers, including ISPs, by dialing a seven-digit local number. A call to an ISP originates in one exchange and for switching purposes terminates in either the same exchange, or in another exchange within the local calling area. The call is routed through the local network based on the called telephone number and when the call reaches the ISP, it is "answered" and answer supervision is returned. This switching, routing, and answer supervision occur regardless of whether the ISP is served by Verizon or ABS. Frost pf. at 13.

22. For both Verizon and ABS, the manner in which calls to ISPs using local numbers are switched and routed is no different from the manner which other calls using local numbers are switched and routed. Verizon Vermont does not switch traffic bound for an ISP served by ABS any differently from any other traffic originated on Verizon's network for delivery to a non-ISP customer served by ABS. ABS performs the same functions and uses the same trunk transport and switching network to complete a call to an end user who is an ISP as it does calls to any other of its end users; the ABS network and underlying functionality used to transport and terminate a "traditional" local call are no different from those used to terminate an ISP call. Frost pf. at 13; Frost reb. pf. at 2.

23. The telecommunications industry has generally understood the term "termination" to mean that a call is considered to be terminated when it is handed off at the terminating carrier's switch and delivered to the called party's premises, establishing a connection with the called party, with answer supervision returned and a call record generated. Frost pf. at 8; Frost reb. pf. at 3; exh. ABS-5 at 21.

24. When a call to an ISP reaches the telephone exchange service purchased by the ISP, the call is terminated. Frost pf. at 9.

25. Following receipt of a telephone call by an ISP, the ISP converts the call from a voice frequency call into a digital packet that is then transmitted through the Internet to the desired address. McCarren pf. at 10.

26. Verizon's switching system cannot distinguish between Internet-bound traffic and other local calls. McCarren pf. at 15.

27. Under its Vermont tariff, Verizon Vermont treats calls from its end users to ISPs as local calls for billing purposes. Verizon has charged its customers local measured service ("LMS") for calls to ISPs located within the caller's local calling area. Frost pf. at 10; tr. at 135 (McCarren).

28. The parties exchange all Local Traffic, including both voice calls and calls to ISPs, over trunk groups carrying Local Traffic. Frost pf. at 8.

29. ABS has billed Verizon monthly for reciprocal compensation payments (i.e., for ABS's termination of local calls placed by Verizon customers to ABS customers) under the 1996 and 1999 Agreements. From the inception of the 1996 Agreement through July 31, 2001, ABS billed Verizon approximately \$31.7 million, including intraLATA toll traffic of approximately \$8 million, Local Traffic of \$20 million, and late fees and other charges totaling \$3.7 million. Verizon has paid approximately \$6.5 million and has disputed the remaining charges. Frost pf. at 5-6.

30. During the period from 1996 through 1999, Verizon paid a substantial amount of reciprocal compensation for traffic terminated at ISPs. Tr. at 49 (Frost), 107–108 (McCarren).

31. In 1999, Verizon stopped paying ABS reciprocal compensation for ISP-bound traffic and began disputing the applicability of reciprocal compensation. Tr. at 50 (Frost).

V. DISCUSSION

The issue presented here is whether reciprocal compensation applies to traffic that would otherwise be local, except that it is placed to an ISP and ultimately connects to the internet. This requires the Board to interpret language in the two Interconnection Agreements between Verizon and ABS.

A. Board Authority to Require Payment of Reciprocal Compensation

As a preliminary matter, Verizon challenges the Board's authority to order payment of reciprocal compensation for ISP-bound traffic, arguing, in essence, that the FCC has preempted

the state. In support of this assertion, Verizon cites to the FCC's most recent ruling concerning reciprocal compensation for ISP-bound traffic,²⁰ in particular, ¶ 82 of that order, which states as follows:

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.

Both the Department and ABS assert that the *ISP Remand Order* applies on a going-forward basis only, and does not limit the Board's authority to interpret pre-existing interconnection agreements to require reciprocal compensation for ISP-bound traffic.

I find Verizon's argument, which appears to be based upon a misreading of ¶ 82, unpersuasive. Verizon suggests that the FCC has now ruled that federal preemption applies if the state has not ruled in reciprocal compensation for ISP-bound traffic by the date of the *ISP Remand Order*, even if the period in question predates that order. However, the plain language of ¶ 82 is that the preemption applies not to the date of the state commission decisions, but rather to whether the *traffic* occurred subsequent to the effective date of the *ISP Remand Order*. Thus, the FCC states that it is not preempting state commission decisions regarding compensation for ISP-bound traffic "*for the period prior to the effective date of the interim regime we adopt here*" (emphasis added).

This interpretation is also consistent with the first two sentences of ¶ 82 (to which Verizon did not refer). In those sentences, the FCC made clear in the *ISP Remand Order* that its ruling applied on a prospective basis only.

The interim compensation regime we establish here applies as carriers re-negotiate 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.

20. *In re Implementation of the Local Competition Provision in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-bound Traffic*, Order on Remand and Report & Order, CC Docket No. 96-98, FCC No. 01-131 (rel Apr. 27, 2001)(the *ISP Remand Order*).

Read in light of the FCC's intent to set out a compensation regime for the future, it is clear that the sentences cited by Verizon do not preempt state decision-making in the manner that Verizon asserts.

The last sentence quoted by Verizon does not support a different result. Read in the context of the first two sentences of ¶ 82, the FCC's statement that "state commissions will no longer have the authority to address this issue" obviously refers to the compensation for ISP-bound traffic on a foregoing basis, not to the question of whether reciprocal compensation is owed for terminating such traffic under preexisting arrangements.

Thus, I find that the Board is not preempted from interpreting the two Interconnection Agreements.

B. The Relevant Agreements

The Board authorized ABS (then Hyperion) to provide competitive telecommunications services within the state of Vermont in 1995.²¹ Since the provision of such service required ABS to interconnect with Verizon (the largest ILEC), ABS negotiated an Interconnection Agreement with Verizon. This Agreement set out the basic terms and conditions under which the two telecommunications providers interconnect their networks and compensate each other for terminating traffic and purchasing facilities and services. The Board approved that Interconnection Agreement in 1996.²² This Agreement, referred to in this decision as the 1996 Agreement, governed the interconnection of the parties from the time of the Board's approval until the Board's approval of a successor agreement in 1999.

In 1999, Verizon and ABS entered into a second Interconnection Agreement replacing the 1996 Agreement.²³ At that time, ABS exercised its right under Section 252(i) of the Act to "opt-in" to the existing Interconnection Agreement between Verizon and KMC, which the Board had approved in 1997. To memorialize ABS' agreement to adopt the KMC Agreement, the parties to the 1999 Agreement entered into an Adoption Agreement. In addition to making explicit that the terms and conditions of the KMC Agreement would apply between ABS and

21. Docket 5608, Order of 3/16/94.

22. Docket 5905, Order of 11/4/96.

23. Exh. ABS-2.

Verizon, the parties to the Adoption Agreement also added Paragraph 2.1, in which the parties essentially "agree to disagree" as to whether, under the KMC Agreement reciprocal compensation applies to ISP-bound traffic. Specifically, in that Paragraph, ABS states its belief that reciprocal compensation does apply, while Verizon disputes the applicability.

Verizon now argues that, in the 1999 Interconnection Agreement, the parties did not reach a meeting of the minds and that the parties did not agree to pay reciprocal compensation for ISP-bound traffic. Verizon relies upon Paragraph 2.1 of the Adoption Agreement to support this argument. Verizon further states that, because the parties disagreed as to the applicability of reciprocal compensation for ISP-bound traffic (one of the terms in the KMC Agreement), under Vermont contract law, the term should not be enforced.

ABS counters that general Vermont contract law should not apply to the adoption of KMC Agreement in 1999, since ABS's right to adopt that Agreement was governed by federal law — specifically, Section 252(i) of the Act. According to ABS, that section imposes an obligation upon Verizon to make available the same terms and conditions that it had previously agreed to with KMC, irrespective of Verizon's subsequent disagreement with those terms. The Department makes similar arguments.

Resolving the status of the 1999 Agreement requires an examination of Section 252(i) of the Act. That section requires Verizon to:

make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

The section is mandatory, providing an absolute right for a CLEC to obtain the same terms and conditions that Verizon has already granted another CLEC under a prior interconnection agreement. By opting into the KMC Agreement pursuant to Section 252(i), ABS acquired the same rights and duties that KMC had.²⁴ Because ABS had the right under federal law to opt-in

24. It is important to note that ABS and other companies opting-in to approved interconnection agreements acquire all the rights of the CLEC in the underlying agreement — but no more than those rights. For example, unless Verizon and a CLEC agree otherwise, an adopted agreement will terminate on the date that the underlying agreement actually terminates (which could be a set termination date or the result of one of the parties exercising rights to terminate the agreement).

to the KMC Agreement, Verizon did not have the discretion at the time of the 1999 Agreement to deny ABS the same terms and conditions that KMC had already obtained, even if it disputed how the KMC Agreement might apply to ABS.²⁵ I note that ABS and Verizon did have the discretion to mutually agree to modify the terms of the KMC Agreement when adopting it. Verizon and other CLECs have done so in other interconnection agreements. The Adoption Agreement does not, however, demonstrate such a mutual agreement to modify the terms; instead, the parties simply disagreed as to the proper interpretation of the terms that Verizon was obligated to make available to ABS.

My interpretation of Section 252(i) set out above is also guided by the fact that any other view would render that section meaningless, by eliminating the clear mandate that ILECs offer the same terms and conditions to other CLECs. If Verizon's position is accepted, Verizon could then avoid the requirement that it offer the same terms and conditions to other companies simply by taking a different position on the issue.

For purposes of the instant dispute, in determining the rights of the parties under the 1999 Agreement, the above conclusion means that the Board must interpret the KMC Agreement and ascertain the intent of the parties thereto.

C. Reciprocal Compensation Under the Agreements

Under both the 1996 and 1999 Agreements, each of the parties will pay the other reciprocal compensation to terminate Local Traffic (as that term is defined in the relevant Agreement). Specifically, the 1996 Agreement states the following:

5.7.1 Reciprocal Compensation only applies to the transport and termination of Local Traffic billable by NYNEX or HYPERION, which a Telephone Exchange Service Customer originates on NYNEX's or HYPERION's network for termination on the other Party's network except as provided in Section 5.7.6 below.²⁶

25. See *Complaint of US LEC of Georgia, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 9577-U, Order at 13 (Ga. PSC, 2000), *aff'd*, *BellSouth Telecommunications, Inc. V. US LEC of Georgia, Inc.*, Civil Action No. 1:00-cv-1781-GET (N.D. Ga. 2001).

26. Section 5.7.6 relates to compensation for traffic that has been subject to the performance of interim number portability. It has no relevance to the issues in this proceeding.

5.7.2 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. This rate is to be applied at the H-IP for traffic delivered by NYNEX, and at the N-IP for traffic delivered by HYPERION. No additional charges, including port or transport charges, shall apply for the termination of Local Traffic delivered to the H-IP or the N-IP. When Local Traffic is terminated over the same trunks as intraLATA or interLATA toll, any port or transport or other applicable charges related to the toll traffic shall be prorated to be applied only to the toll traffic.²⁷

No party contests the obligation to pay reciprocal compensation for local traffic. Rather, the dispute centers upon whether ISP-bound traffic falls within the definition of local traffic. More precisely, the issue is whether ISP-bound traffic "terminates" within the local calling area. "Local Traffic" is defined in the 1996 Interconnection Agreement as follows:

"Local Traffic" means a call which is originated and terminated within a local calling area, as defined in P.S.B. VT No. 20 Tariff, effective at the time this agreement is signed. IntraLATA calls originated on a 1+ presubscription basis when available or a casual dialed (10XXX/101XXXX) basis are not considered local traffic.²⁸

ABS argues that the 1996 and 1999 Agreements are clear on their face and that they encompass ISP-bound traffic within the definition of local traffic. As a result, ABS asserts, Verizon must pay reciprocal compensation for ISP-bound local traffic.

Verizon counters that the 1996 and 1999 Agreements "unambiguously" exclude ISP-bound traffic from the obligation to pay reciprocal compensation. According to Verizon, reciprocal compensation applies only to local traffic and, under the Agreements and FCC

27. Exh. ABS-1 at 13 (emphasis added). Sections 5.7.1 and 5.7.2 of the KMC Agreement are identical to the same numbered provisions of the 1996 Agreement, except that references to Hyperion are changed to KMC. Exh. ABS-2, KMC Agreement at 13.

28. Exh. ABS-1 at 5, ¶ 1.38. The definition in the KMC Agreement is largely the same, differing in two respects. First, the KMC Agreement refers to calling areas in Vermont, but cites a non-existent Vermont Tariff 10 (Tariff 10 appears to be a New York tariff that sets out basic services paralleling Verizon's Vermont tariff No. 20). This reference appears to be a typographical error and I interpret the KMC Agreement to refer to Vermont Tariff No. 20.

The second difference is that the KMC agreement appears to treat all calls completed within the LATA as local calls, rather than relying upon the local calling areas. This reference is inconsistent with various other parts of the Agreement, including Section 1.38 itself, as all toll traffic in Vermont would be considered local, subject to reciprocal compensation (notwithstanding the parties' agreement in ¶ 5.73 that access charges apply). Again, this reference appears to be an incorrect transposition from New York. In interpreting the KMC Agreement, I assume that ¶ 1.38 is intended to refer to calls completed within the local calling area.

interpretations of the Act, ISP-bound traffic is not local traffic. Verizon, therefore, argues that it should not have to pay reciprocal compensation for these calls.²⁹

The Department supports ABS, requesting that the Board find that local traffic includes calls to ISPs. The Department asserts that calls to ISPs within a local calling area are local under Vermont practice and precedent in effect at the time the parties negotiated the Interconnection Agreements. Also, the Department contends that at the time the parties negotiated the Agreements, the common understanding within the industry was that calls to ISPs terminate at the ISP.

D. Local Traffic Includes ISP-bound Traffic

As noted above, the Board's role in this dispute is to interpret the 1996 and 1999 Agreements. In so doing, the Board must ascertain the intent of the parties, as represented in the plain language of the Agreements. Since the Board is attempting to determine the parties' intent, it is necessary to interpret the language based upon the parties' understandings at the time they negotiated and signed the Agreements, not their present views. The primary inquiry thus becomes whether the parties intended in 1996 and 1997 (at the time the KMC Agreement was signed) to exclude ISP-bound traffic from the definition of "Local Traffic."

I recommend that the Board find that traffic bound for ISPs within the caller's local calling areas is subsumed within the definition of "Local Traffic" under the Agreements. Notwithstanding the FCC's recent pronouncements, I conclude that — at the time the parties entered into the 1996 and KMC Agreements — Verizon and ABS both understood that calls to ISPs "terminate" at the ISP (as the concept of call termination has been typically applied to the telecommunications network) and that the Agreements were based upon this understanding.

In reaching this conclusion, I look first to the common understanding from a network perspective. A call to an ISP is virtually the same as other calls completed to a customer located in the same exchange. The telecommunications network and underlying function used to transport and terminate the ISP-bound and other calls are the same. They use the same facilities

29. As a result of the dispute, Verizon has refused to pay approximately \$25 million dollars (including late fees) that ABS asserts constitutes reciprocal compensation owed to ABS. Tr. at 46-47 (Frost).

as well. The only difference is that, in the case of calls to ISPs, the ISP then transmits a digital signal to the Internet.³⁰ Moreover, the telecommunications network itself treats the call as terminated at the time it reaches the ISP. A call record is generated at that point and answer supervision (which indicates the successful completion of a call) is returned.³¹ At this point, the network treats the call as completed, even though the ISP directs the electronic transmission to the Internet.³²

The plain language of both the 1996 and 1999 Agreements also points to the conclusion that calls to ISPs were considered local traffic and subject to reciprocal compensation. Both Agreements define "Local Traffic" in terms of Verizon's Vermont intrastate tariffs.³³ For example, the 1996 Agreement states that "'Local Traffic' means a call which is originated and terminated within a local calling area, as defined in P.S.B. VT No. 20 Tariff, effective at the time this agreement is signed." By using this language, the parties clearly intended to encompass the existing definitions of local service embodied in these tariffs. Thus, if the call is considered local under Verizon's tariffs, it would also be considered local under the Interconnection Agreements and subject to reciprocal compensation.

Turning to the tariffs, they describe basic telecommunications service, which consists of exchange service and Extended Local Service. The tariffs also state that service is provided on a measured basis and provides dial tone and "calling on a usage basis within the *local service area* and within municipalities."³⁴ It is clear that, applying its own tariffs, Verizon has considered calls to ISPs as local. Verizon continued to charge LMS for calls to ISPs, charges that apply only to calls that are jurisdictionally intrastate and completed within the local calling area under the tariff.³⁵

30. Frost pf. at 13.

31. *Id.* at 9; tr. at 51-52 (Frost).

32. Tr. at 22-23 (Frost).

33. Exh. ABS-1, ¶ 1.38; exh ABS-2, KMC Agreement, ¶ 1.38; tr. at 69 (Frost).

34. Verizon Tariff PSB VT No. 20, Section 5.1.1.C (emphasis added). The tariff also defines the local service areas in Sections 5.1.1.D and 6.1.1. Moreover, calls to ISPs located within the local calling area continue to be dialed with seven digits. Under the Board's Order in Docket 5634, seven-digit dialing applies to local calls. Docket 5634, Order of Order of 7/14/93. This treatment is inconsistent with Verizon's present assertion that these calls are not local.

35. Tr. at 135 (McCarren).

I recognize that the FCC, in the *ISP Remand Order*, has concluded that calls are not terminated at the ISP, but actually terminate at some point on the Internet. The FCC's rationale for asserting jurisdiction, however, has been rejected by the Court of Appeals for the District of Columbia Circuit.³⁶ Thus, there is no FCC determination in effect holding that ISP-bound traffic is jurisdictionally interstate. Moreover, the FCC's decision occurred substantially after the parties to the Interconnection Agreements established the terms of those agreements. At the time of the negotiation, the FCC had not issued its broad determination and the commonly-held understanding was that calls terminated at ISPs. The relevant consideration in interpreting the Agreements is the parties' contemporaneous understanding of the nature of calls placed to ISPs, which I conclude was that the calls to ISPs terminated at the ISP.

The FCC itself acknowledged that it was possible that parties to interconnection agreements may not have intended to exclude ISP-bound traffic from the obligation to pay reciprocal compensation. In its 1999 *Reciprocal Compensation Order*, the FCC recognized that:

parties entering into interconnection agreements may reasonably have agreed, for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic. When construing the parties' agreements to determine whether the parties so agreed, state commissions have the opportunity to consider all the relevant facts, *including the negotiation of the agreements in the context of this Commission's longstanding policy of treating this traffic as local*, and the conduct of the parties pursuant to those agreements.³⁷

36. *Worldcom, Inc. v. FCC*, 288 F.3d 429 (2002). The decision represented the second time that the Circuit Court had rejected the FCC's assertion that such traffic did not terminate locally, each time with a different rationale being put forward by the FCC.

37. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-bound Traffic*, CC Docket Nos. 96-98 and 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689, 3703-3704, ¶ 24 (1999) (hereinafter referred to as the "*Reciprocal Compensation Order*"), *vacated and remanded*, *Bell Atlantic Telephone Co. v. Federal Communications Comm'n*, 206 F.3d 1 (D.C. Cir. 2000) (emphasis added). Although the *Reciprocal Compensation Order* was reversed and remanded, the FCC stated in two subsequent decisions that these principles continued to apply to state interpretation of interconnection agreements. *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 15 FCC Rcd 11277, 11278, ¶ 3 (2000); *In re Starpower Communications, LLC v. Verizon South Inc.*, 17 FCC Rcd 6873, 6889, ¶ 37 (2002) (the latter case is hereinafter referred to as "*Starpower*").

Thus, it is clear that although the FCC now views ISP-bound traffic as interstate, that ruling is both a change in policy and does not dictate the interpretation of interconnection agreements negotiated prior to the *ISP Remand Order*.

An additional reason that it would have been reasonable for ABS and Verizon to have agreed to reciprocal compensation for ISP-bound traffic is that the FCC's determination also represents a substantial change in the manner in which the telecommunications industry has generally treated calls that are carried from the public switched telephone network to private networks. Traditionally, calls that end on private networks have been rated as if they terminated at the point the call reached the private network, notwithstanding the ultimate location.³⁸ In this sense, the Internet is similar to a private network. Even though the ultimate termination point is at an unknown Internet destination, the call is no longer carried on the public switched network once it is terminated by the ISP. It is reasonable to conclude that the parties intended to incorporate this concept into the Agreements.

Other factors further support the conclusion that the expectation and intent of the parties was that reciprocal compensation would apply to ISP-bound traffic. Most telling is the fact that Verizon initially paid ABS reciprocal compensation for ISP-bound traffic. The evidence demonstrates that, during the period from 1996 through 1999, Verizon paid a substantial amount of reciprocal compensation for traffic terminated at ISPs.³⁹ Not until early in 1999 did Verizon stop paying ABS reciprocal compensation for ISP-bound traffic and begin disputing the applicability of reciprocal compensation.⁴⁰ This fact leads to the obvious conclusion that Verizon believed that the Interconnection Agreement obligated it to pay reciprocal compensation, notwithstanding Verizon's position commencing in 1999.⁴¹

The Board's Order in Docket 5906 also supports my conclusion that the common understanding at the time of the 1996 and KMC Interconnection Agreements was that reciprocal

38. Tr. at 131 (McCarren).

39. Tr. at 49 (Frost). In fact, Verizon acknowledged that it did not exclude minutes of use for calls terminated to Verizon's ISP customers from its reciprocal compensation invoices sent to ABS during this time. Tr. at 107–108 (McCarren). The record does not demonstrate the magnitude of those charges.

40. Tr. at 50 (Frost).

41. Verizon's view clearly changed by April of that year, when Verizon sent a letter to ABS (and all CLECs) stating that Verizon would no longer pay reciprocal compensation for ISP-bound traffic. Tr. at 118–120 (McCarren).

compensation applied to ISP-bound traffic. In that arbitration of an interconnection agreement between Verizon and AT&T communications of New England, Inc., the Board considered whether to adopt reciprocal compensation (as requested by Verizon) or bill-and-keep (advocated by AT&T) for termination of local traffic. The New Hampshire arbitrator⁴² had recommended reciprocal compensation, a conclusion that AT&T challenged before the Hearing Officer and the Board. The arbitrator found that traffic balance between the ILEC and CLEC (which he concluded was critical to a bill-and-keep regime) was unlikely to occur, at least in part due to the emergence of ISPs.⁴³ If, as Verizon states, the common understanding was that reciprocal compensation did not apply to ISP-bound traffic, such a finding by the arbitrator would have made no sense.⁴⁴ The arbitrator's conclusion and the fact that Verizon did not contest it thus support my conclusion that the parties intended to have reciprocal compensation apply to ISP-bound traffic.

Taken together, it is clear that the parties did not intend to exclude calls to ISPs located within the originating caller's local calling area from the definition of Local Traffic. Thus, such calls are subject to reciprocal compensation.⁴⁵

E. The FCC's Starpower Decision

Verizon also argues that the intent of the parties, as expressed in the 1996 and 1999 Agreements, was to track federal law. According to Verizon, federal law makes clear that ISP-bound traffic is interstate and not local. In support of these assertions, Verizon cites to the FCC's decision in *Starpower*, in which the FCC interpreted two interconnection agreements to not

42. The Board established a process in Docket 5906 in which the Board relied to a large degree on arbitration decisions reached by an arbitrator employed by the New Hampshire Public Utilities Commission. The Board granted the New Hampshire arbitrator's decision deference, but permitted parties to challenge that decision here. In the area of compensation for termination of local calls, AT&T objected and the Board resolved the dispute.

43. Docket 5906, Order of 12/4/96, Appendix 1 at 90.

44. The Board ultimately rejected the New Hampshire arbitrator's recommendation and adopted bill-and-keep.

45. The recommendations set out above are based upon the evidence in the record. I note that this conclusion is consistent with the findings of the vast majority of states considering the issue. To date, more than 30 states have found that similar reciprocal compensation provisions apply to ISP-bound traffic. Only five states have found that reciprocal compensation does not apply. Attachment A lists the relevant state interpretations. In addition, the FCC, acting in the place of the state of Virginia, interpreted one agreement to require reciprocal compensation for ISP-bound traffic, while reaching an opposite conclusion on two other agreements.

require payment of reciprocal compensation for ISP-bound traffic largely because the FCC found that the parties intended to mirror the FCC's interpretations. The Department and ABS argue that *Starpower* does not mandate the conclusion that Verizon seeks to draw.

In *Starpower*, the FCC was called upon to interpret three interconnection agreements between Starpower Communications and companies that eventually became Verizon subsidiaries located in Virginia.⁴⁶ The Virginia State Corporation Commission declined to rule on Starpower's request, at which point the FCC exercised its authority under section 252 of the Act to preempt Virginia.⁴⁷ As the FCC pointed out, because the FCC was standing in the place of Virginia, it applied Virginia law to the interpretation of the interconnection agreements. Upon review, the FCC found that for two of the agreements (those with Verizon Virginia), reciprocal compensation did not apply to ISP-bound traffic. The FCC concluded that the language of these agreements showed an intent to adopt what the FCC described as its traditional end-to-end analysis, under which the jurisdictional nature of traffic is based upon the actual originating and terminating points. In fact, the FCC focused on the use of the phrase "end-to-end" in the agreements, concluding that the parties' language encompassed the FCC's traditional means of determining the jurisdictional basis of traffic.⁴⁸ The FCC also found "striking similarities" between the language in the two interconnection agreements and the FCC's own definitions.

As to the third interconnection agreement, the FCC found that Verizon South owed reciprocal compensation to Starpower for ISP-bound traffic. Focusing on different language, the FCC concluded that the parties intended to base reciprocal compensation upon whether the traffic was local or not. The FCC found that because Verizon South rated and billed calls to ISPs as local calls, the language in the interconnection agreement meant that ISP-bound traffic was local within the meaning of the interconnection agreement, requiring payment of reciprocal compensation.

(Before examining the application of *Starpower* to the interpretation of the 1996 and 1999 Agreements, it is important to note that *Starpower* is not binding on the Board. The FCC

46. The FCC analyzed two agreements between Starpower and Verizon Virginia Inc. ("Verizon Virginia") and a third agreement between Starpower and Verizon South Inc. ("Verizon South").

47. 15 FCCR 11277.

48. *Starpower*, 17 FCCR 6873, 6884-6886, ¶¶ 26-30.

was interpreting the language of three specific agreements, none of which is identical to the Agreements before the Board. Moreover, it was acting in a limited capacity, applying Virginia law. By contrast, the Board is examining two agreements negotiated and approved in Vermont.)

Application of the FCC's *Starpower* analysis to the 1996 and 1999 Agreements supports the conclusion that reciprocal compensation applies to ISP-bound traffic under those agreements. In particular, like the Verizon South agreement, the 1996 and 1999 Agreements demonstrate an intent to base reciprocal compensation on whether the traffic is local or not. As explained above, the operative language of the Agreements states that reciprocal compensation shall be paid for the termination of local traffic. Moreover, the definition of local traffic in the Agreements is tied specifically to Verizon's local calling areas as delineated in the local tariffs. Thus, as the FCC concluded in *Starpower*, "whatever traffic is 'local' under the Tariff is compensable traffic" under the Agreements.⁴⁹

Furthermore, unlike the Verizon Virginia agreements in *Starpower*, I see no evidence that the parties here intended to track the FCC's "end-to-end" analysis. Verizon has not pointed to any language in the 1996 and 1999 Agreements referring to "end-to-end." It was this reference that was critical to the FCC. As the FCC stated, "the *Starpower*-Verizon South Agreement does not link a call's compensability to the Commission's traditional end-to-end jurisdictional analysis."⁵⁰ The same is true here.

Thus, I conclude that my recommendation set out herein is fully consistent with *Starpower*.

F. As Described in the Act

Verizon argues that, notwithstanding the other language in the definitions of Local Traffic and reciprocal compensation, the 1996 and 1999 Agreements intended to "incorporate and adopt the requirements of federal law," including later FCC pronouncements. Verizon bases this assertion on the fact that the definition of reciprocal compensation states that it is "As Described in the Act." The Interconnection Agreements define the latter term to mean "as

49. *Starpower*, 17 FCCR 6892, ¶ 44.

50. *Id.*, 17 FCCR 6893, ¶ 47.

described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Board."⁵¹ Verizon asserts that this shows an explicit understanding that the Interconnection Agreements would track the FCC's interpretation of reciprocal compensation. Verizon also states that the FCC has always considered ISP-bound traffic to be exempt from reciprocal compensation.

ABS and the Department claim that Verizon's arguments are flawed. The Department points out that the payment of reciprocal compensation is governed not by the definition of reciprocal compensation (upon which Verizon relies), but upon Sections 5.7.1 and 5.7.2 of the 1996 Agreement and their equivalent provisions in the KMC Agreement, which rely upon the definition of Local Traffic. The Department also contests Verizon's assertions as to the applicable federal law at the time the Interconnection Agreements were negotiated. ABS adds that no controlling federal mandate existed on reciprocal compensation, thus permitting the parties to reach any acceptable arrangement.

I find Verizon's arguments unconvincing. Verizon is correct that the Interconnection Agreements define reciprocal compensation with reference to the Act. However, as the Department points out, the payment of reciprocal compensation is governed by Sections 5.7.1 and 5.7.2 of the 1996 Agreement (which is repeated in essentially the same language in the KMC Agreement). These sections (quoted above) state simply that each party shall pay the other reciprocal compensation for Local Traffic (as discussed above, Local Traffic includes ISP-bound traffic). Neither these sections nor the definition of Local Traffic contain the "As Defined in the Act" language cited by Verizon. Thus, I find that the plain language of the Agreements does not show an intent to track the FCC's subsequent rulings concerning the payment of reciprocal compensation for ISP-bound traffic.

Furthermore, I cannot conclude, as Verizon would have me, that the reference to "As Defined in the Act" was intended to incorporate *retroactively* the FCC's determinations that ISP-bound traffic should not be subject to reciprocal compensation. In particular, the FCC has made clear that its ruling does not overturn existing Interconnection Agreements and that states retain

51. Exh. ABS-1 at 2, ¶ 1.6; exh. ABS-2, KMC Agreement at 2, ¶ 1.6.

the authority to interpret those Agreements.⁵² Thus, the FCC has not banned the payment of reciprocal compensation for ISP-bound traffic for periods prior to the issuance of the *ISP Remand Order*, but has rather left that determination to state commissions. Moreover, I would find it unreasonable to apply a change in the requirement to pay reciprocal compensation retroactively. This would severely disadvantage parties who may reasonably have relied upon the plain language of the interconnection agreements to expect that such payments would be forthcoming (especially after Verizon paid those charges for several years).

Even if I accepted Verizon's argument that the parties intended to rely upon the FCC's subsequent interpretations of reciprocal compensation, I cannot find that the FCC's actions to date represent interpretations that would void payment for ISP-bound traffic. In the *ISP Remand Order*, the FCC found that ISP-bound traffic was jurisdictionally interstate. The FCC also established a compensation mechanism for ISP-bound traffic that would otherwise be subject to reciprocal compensation. However, the FCC's rationale for this finding has been rejected by the Court of Appeals for the District of Columbia Circuit.⁵³ Thus, at the present time, the FCC does not have in place a legally valid determination that the traffic is not local. Thus, even if the Agreements incorporated subsequent FCC rulings concerning reciprocal compensation for ISP-bound traffic, none presently exists.

G. Public Policy

Finally, Verizon requests that the Board find that payment of reciprocal compensation for ISP-bound traffic represents poor public policy. Verizon states that reciprocal compensation for this traffic results in payments far out of proportion to costs and distorts the market. As a result, asserts Verizon, these payments distort the incentives for competitors entering the telecommunications marketplace. The Department and ABS respond that the Board's duty is to interpret the Interconnection Agreements and that whether that interpretation results in poor public policy is not the appropriate issue.

52. *ISP Remand Order*, ¶ 82.

53. *Worldcom, Inc. v. FCC*, 288 F.3d 429 (2002).

Verizon may well be correct that the payment of reciprocal compensation for ISP-bound traffic at a rate of 0.8 cents per minute is excessive⁵⁴ and reflects poor public policy. The Board has previously observed that reciprocal compensation in general is not the preferred policy; instead, the Board expressed a preference in Dockets 5713 and 5906 for bill-and-keep rather than reciprocal compensation.⁵⁵

The public policy of reciprocal compensation, however, is not the issue before the Board in this proceeding. Rather, the Board's duty is to interpret the 1996 and 1999 Interconnection Agreements. And, under Vermont law, the Board's first responsibility is to divine the intent of the parties as expressed in the language of the Agreements. As I discuss above, it is clear from the language of the Interconnection Agreements, and the parties' actions before and subsequent to the agreements, that the parties viewed ISP-bound traffic as Local Traffic, for which the originating carrier was obligated to pay the terminating carrier reciprocal compensation. The fact that the resulting payments under a Board-approved Interconnection Agreement may create market distortions does not permit the Board to overturn the plain language of the Agreements and the parties' intent in entering into those Agreements.

Verizon's present "public policy" argument is also untimely, considering that the Board has already approved both of the Interconnection Agreements. The Board could have rejected the Interconnection Agreements on the grounds that they were not in the public interest.⁵⁶ In addition, if Verizon did not want to agree to the terms of the Interconnection Agreement, it had the option to request that the Board arbitrate the dispute under § 252(b) of the Act. Having agreed to the terms for the payment of reciprocal compensation in an arms-length transaction, however, Verizon cannot now argue that the Board should reject the terms of those Interconnection Agreements because they represented poor public policy.

54. *See ISP Remand Order*, ¶ 76. As the FCC noted, reciprocal compensation rates are generally based upon average costs and may not reflect the fact that when terminating traffic to an ISP, an ILEC or CLEC may optimize use of facilities at a much lower cost.

55. Docket 5713, Order of 5/27/96; Docket 5906, Order of 12/4/96.

56. *See* 47 U.S.C. § 252(e)(2)(A)(ii).

VI. HEARING OFFICER'S RESPONSE TO COMMENTS ON THE PROPOSAL FOR DECISION

Verizon submitted extensive comments on the Proposal for Decision. These will be addressed by the Board.

ABS also submitted three "comments of clarification." First, ABS notes that Finding 1 of the Proposal for Decision states that ABS has 18 ISP customers, whereas the testimony on which the finding relies states that the number is 12. Second, the first full paragraph of page 15 of the Proposal for Decision refers to the effect of Paragraph 82 of the *ISP Remand Order* as applying on a "foregoing basis." ABS suggests that the statement would be more appropriately expressed as "going forward basis." Third, footnote 28 of the Proposal for Decision discusses apparent typographical errors contained in ¶ 1.38 of the KMC Agreement, and observes that the reference to Vermont Tariff 10 appeared to be a New York tariff. ABS states that the tariff is, in fact, a Massachusetts tariff.

I have modified the Proposal for Decision to clarify the discussion as requested by ABS. The changes are all non-substantive. Moreover, no party has opposed ABS's clarifications.⁵⁷

VII. CONCLUSION

For the foregoing reasons, I recommend that the Board find that the parties to the 1996 and 1999 Agreements must pay each other reciprocal compensation for terminating traffic bound for an ISP within the caller's local calling area.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 28th day of April, 2003.

s/George E. Young
George E. Young
Hearing Officer

⁵⁷. Consequently, the Proposal for Decision, as modified, has not been re-circulated to the parties for additional comment.

VIII. BOARD DISCUSSION

Verizon submitted extensive comments upon the Hearing Officer's Proposal for Decision. Verizon reiterated many of these comments at an Oral Argument on March 26, 2003. Verizon asserts that the Hearing Officer's interpretation of the Interconnection Agreements is erroneous. According to Verizon, the evidence demonstrates that the parties intended the application of Reciprocal Compensation in the agreements to track federal law. Verizon also argues that in the 1999 Interconnection Agreement, the parties did not reach a "meeting of the minds" on the issue of Reciprocal Compensation for ISP-Bound traffic and that, therefore, no such compensation is required. Finally, Verizon requests that, if the Board decides that parties must pay Reciprocal Compensation for ISP-Bound traffic under the two Interconnection Agreements, the Board limit that compensation to calls originated and terminated within the local calling area (which would exclude Virtual NXX calls).⁵⁸

A. Tracking Federal Law

The Proposal for Decision concludes that the plain language of the two Interconnection Agreements demonstrates that the parties intended to require the payment of Reciprocal Compensation for ISP-Bound traffic. Verizon contends that this conclusion failed to recognize the "overwhelming evidence" that the parties to the Interconnection Agreements intended to track federal law and, in particular, the reciprocal compensation provisions of federal law. In

58. Rating of telephone traffic is based upon location of the central offices in which the traffic originates and terminates. Because of difficulties in tracking all telecommunications traffic, telephone companies use the first three digits of the telephone number (the "NXX") assigned to a particular central office as the means to identify the points of origination and termination. Thus a call from Montpelier (229) to Burlington (862) is known by the network to be toll, whereas one to Waterbury (244) is local.

Each NXX is assigned to a rate center (exchange) and a switch. Historically, these have coincided. Under VNXX, the NXX is assigned to a rate center, but also to a switch that is located in a *different* location. For example, a company could seek the assignment of an NXX to Montpelier as a rate center, while having the NXX assigned to a switch in Brattleboro where that company interconnects with Verizon. If the competitor actually has customers in Montpelier, such an arrangement allows the CLEC to use a single switch to route traffic. In the above example, the company would receive the call Verizon delivered at the point of interconnection in Brattleboro and then terminate the call to Montpelier using the switch located in Brattleboro. Under VNXX, however, the CLEC may not deliver the call anywhere except the exchange in which its switch is located (i.e., Brattleboro). The effect of such a decision is to have the rating of a call originated in Montpelier based upon termination in Montpelier, when the call actually terminates (as that term is commonly used in the network) in Brattleboro.

this regard, Verizon argues that the Hearing Officer misapplied the FCC's decision in its *Starpower* arbitration and failed to consider a recent decision of the Massachusetts Department of Telecommunications and Energy ("Massachusetts DTE") interpreting what Verizon states is an identical agreement to those at issue here.⁵⁹ Correct application of these precedents, asserts Verizon, would have led to the conclusion that Reciprocal Compensation does not apply to Internet-Bound Traffic.

Before discussing the merits of Verizon's argument, it is important to stress that Verizon does not and could not argue that the Board is bound to follow the *Starpower* ruling. In *Starpower*, the FCC applied Virginia law, acting in the place of the Virginia State Corporation Commission.⁶⁰ As a result, the *Starpower* ruling in no way preempts state law or represents precedent that the Board must follow. Nonetheless, we agree with Verizon that *Starpower* and the Massachusetts DTE decision interpreting an interconnection agreement with the same terms, provide useful input to our determination of the intent of the parties (although, as we explain below, we do not find them persuasive).

Examining the *Starpower* decision, we concur with the Hearing Officer's conclusion that the FCC's rationale is not applicable here. As the Proposal for Decision states, the FCC found that Reciprocal Compensation applied to ISP-Bound traffic in one of the three interconnection agreements at issue there. In that agreement, the parties showed an intent to match the payment of Reciprocal Compensation to traffic that was considered local traffic under applicable tariffs. We find a similar intent here, with the explicit reference to Vermont tariffs as the benchmark for determining what constitutes local traffic. In this regard, it is highly probative that Verizon itself, while maintaining that ISP-Bound traffic is not local, allows it to be dialed as seven-digit numbers (which pursuant to Docket 5634 is limited to intrastate local calls) and bills local measured service for the calls under intrastate tariffs.

In addition, the critical element of the FCC's ruling was its finding that the parties intended to adopt an "end-to-end" analysis as the FCC did in the *ISP Remand Order*. The FCC said:

59. *Complaint of MCI WorldCom, Inc. Against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts*, D.T.E. 97-116-G, Order of 12/20/02.

60. *Starpower*, ¶ 24.

We believe that each agreement's use of the phrase "end-to-end" is an incorporation of the Commission's long-standing method of determining the jurisdictional nature of particular traffic. Specifically, the Commission traditionally has determined the jurisdictional nature of communications by the end points of the communications, rejecting attempts to divide communications at any intermediate points of switching or exchanges between carriers.⁶¹

The Verizon/ABS Interconnection Agreements do not contain the "end-to-end" language upon which the FCC relied.

Verizon nonetheless argues that the FCC had a second independent basis for *Starpower* that did not rely upon the end-to-end language, but instead looked to the overall agreement as showing an intent to track the FCC's jurisdictional analysis. This conclusion was based upon the numerous sections that were similar to FCC rules or deferred to FCC interpretations. Verizon argues that similar language in the Agreements compels the conclusion that the parties intended to track federal law and thereby excludes Reciprocal Compensation for ISP-Bound traffic. Verizon points to four sections that are relevant: (1) the definition of Reciprocal Compensation; (2) the definition of "As Described in the Act;" (3) Section 5.7.2, which states that Reciprocal Compensation applies to the transport of local traffic; and (4) the definition of "Local Traffic."

First, we do not find that *Starpower* contained two independent bases. The language cited by Verizon referred generally to an intent to track the FCC's jurisdictional analysis. However, closer examination demonstrates that *Starpower* rests exclusively upon what the FCC characterizes as its long-standing end-to-end jurisdictional analysis.⁶² And the key factor that

61. *Starpower*, ¶ 27. We note that the evidence in the record demonstrates that this end point analysis is not as absolute as the FCC asserts. For example, calls completed on private networks are considered to terminate at the point they enter the private network, not the ultimate destination. Tr. at 131 (McCarren). Similarly, calls to FX numbers are rated as if they terminate at the FX line.

62. Significantly, neither Verizon nor the FCC cites to the source of this long-standing jurisdictional assertion. The FCC points to its treatment of traffic to Enhanced Service Providers as establishing the basis for the assertion. *Starpower*, ¶ 30. However, the Court of Appeals for the District of Columbia Circuit, reviewing the FCC's assertions in the context of the *Reciprocal Compensation Order*, found that the FCC had provided no valid explanation for the end-to-end analysis. *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 8 (D.C.Cir. 2000). In fact, as a Federal District Court recently found, the FCC acknowledged itself that it had characterized ISP-Bound traffic as local. *Verizon Maryland Inc. v. RCN Telecom Services, Inc.*, 248 F.Supp.2d 468, 483 (D.Md. 2003) (citing to the *Reciprocal Compensation Order*, ¶23). Verizon's assertion of a consistent long-standing federal interpretation of the jurisdictional nature of ISP-Bound traffic is thus unpersuasive.

led the FCC to reach this conclusion was the reference to "end-to-end." For example, in ¶ 36, the FCC cites to its long-standing jurisdictional analysis "under an end-to-end analysis."

Even if we did not find the absence of a reference to "end-to-end" dispositive, the language of the agreements simply does not show a clear intent to track federal law prospectively, and then apply it retroactively. Verizon is correct that several of these provisions make reference to FCC interpretations of the Act over time and are similar to those considered by the FCC in *Starpower*. For example, the definitions of "Reciprocal Compensation" and "As described in the Act" convey the same basic concept as those reviewed in *Starpower*, containing language that ties the definitions of those terms to the Act as interpreted from time-to-time by the FCC. The definition of local traffic also has some similarities, with both the definitions in the FCC regulations and those in the Interconnection Agreements referring to traffic terminating within the "local calling area" as defined in applicable tariffs. These similarities led the Massachusetts DTE to find an intent to track the federal interpretations of Reciprocal Compensation, leading to the conclusion that Reciprocal Compensation did not apply to ISP-Bound traffic.

However, these factors are less significant than the fact that the Interconnection Agreements *unambiguously use the local tariffs as the defining factor in distinguishing local traffic from non-local*. And, as the Hearing Officer explains in detail and we reiterate above, under the local tariffs, Verizon has consistently treated ISP-Bound traffic terminated within the local calling area as local. We cannot find that the similarity of some of the language to federal rules so pervasive as to demonstrate an intent to track federal law or to overcome other indicia of the parties' intent explicitly stated.

Moreover, there is no suggestion that the parties also intended to apply those interpretations *retroactively*, thereby altering the parties' understanding in previous periods. Thus, if we accepted Verizon's argument that the parties intended to track federal law, it may be appropriate to apply this conclusion after the issuance of the *ISP Remand Order*, but not to prior time periods. Verizon suggests that retroactivity is irrelevant, however, asserting that the FCC had traditionally applied an end-to-end analysis to determine the jurisdictional nature of traffic and that the analysis set out in the 2001 *ISP Remand Order* was not a new interpretation. As we

explained above, the FCC itself has acknowledged that its treatment prior to 1999 had been different. In the *Reciprocal Compensation Order*, the FCC explicitly stated:

When construing the parties' agreements to determine whether the parties so agreed, state commissions have the opportunity to consider all the relevant facts, *including the negotiation of the agreements in the context of this Commission's longstanding policy of treating this traffic as local*, and the conduct of the parties pursuant to those agreements.⁶³

The FCC announced a different policy in 1999, but that decision was reversed.⁶⁴ As we do not conclude that the parties intended to track the FCC's interpretations, we do not need to decide at the precise point at which the FCC set down a binding interpretation that ISP-Bound traffic was jurisdictionally interstate.

Verizon also raises a number of specific comments on the Proposal for Decision that relate to the technical aspects of ISP-Bound traffic. In particular, Verizon challenges the Proposal for Decision's conclusion that ISP-Bound traffic "terminates" at the ISP, thus making it local. Verizon states that Feature Group A calls have the same dialing pattern and termination, but are treated as toll. Verizon is correct that in a Feature Group A call, the network returns the same indicia of call termination, yet the call is rated as toll. However, the critical distinction between Feature Group A calls and ISP-Bound traffic is that the former remain on the public switched network and are considered telecommunications services, whereas the latter leave the network. As the Hearing Officer found, calls have been traditionally considered as terminated at the point they leave the public switched network. As to Verizon's other comments on the question of termination, we find they do not alter our conclusions.

Verizon also states that the Hearing Officer mis-characterized the *ISP Remand Order* by stating that it had been vacated. We agree with Verizon that the Proposal for Decision's statement that "there is no FCC determination in effect holding that ISP-bound traffic is jurisdictionally interstate" is technically in error because the Order was not vacated. However, as the Hearing Officer found, a federal court has rejected the jurisdictional analysis that underlies that Order, so the jurisdictional analysis carries little weight.

63. *Reciprocal Compensation Order*, ¶ 24. See *Verizon Maryland Inc. v. RCN Telecom Services, Inc.*, 248 F.Supp.2d 468, 483 (D.Md. 2003) (citing to the *Reciprocal Compensation Order*, ¶23).

64. *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 8 (D.C.Cir. 2000).

In summary, we are not persuaded by Verizon's comments. Rather, we adopt the analysis of the Hearing Officer, which focuses on the plain language of the Interconnection Agreements and concludes that the parties intended to pay Reciprocal Compensation for any call that is rated as local pursuant to Verizon's Vermont tariff. Thus, if Verizon treated the call as local for dialing and rating purposes, and billed the caller under its intrastate tariff for local measured service, the call is considered local under Verizon's tariff and reciprocal compensation must apply. We recognize, as Verizon argues, that we have previously stated that retail practices do not govern intercarrier compensation. This decision does not change that position. Instead, we find that the intercarrier compensation agreement itself was plainly written to track the retail practices — i.e., the signatories substantively agreed that wholesale compensation would be linked to retail treatment. This is fully consistent with our previous decisions.

The parties' own actions are strongly probative of their intent. The record is clear: prior to 1999, Verizon paid Reciprocal Compensation to ABS (and vice versa) for ISP-Bound traffic. Only at that time, three years after the original agreement and two years after the KMC agreement, did Verizon discontinue payment. Verizon's actions in the period immediately after it signed the 1996 Interconnection Agreement is a clear indication of its contemporaneous understanding of the terms of that agreement (and the same language in the KMC Agreement).

B. 1999 Agreement

Verizon also contests the Hearing Officer's conclusion that Reciprocal Compensation applies to ISP-Bound traffic under the 1999 Agreement. In the Proposal for Decision, the Hearing Officer found that, pursuant to Section 252(i) of the Act, Verizon had to offer ABS the same terms and conditions that existed in the KMC Agreement, although the parties could vary those terms. The Proposal for Decision concluded that the inclusion of Paragraph 2.1 in the Adopting Agreement did not change this outcome, as Verizon could not alter the terms of the KMC Agreement.

Verizon argues that the Paragraph 2.1 was a provision, agreed to by both parties, that not only stated a difference in interpretation as to the applicability of Reciprocal Compensation under the KMC Agreement, but substantively modified the KMC Agreement. Verizon asserts

that, under Vermont law, a contractual term will not be enforced if, at the time of the execution, each party knew the other had a conflicting interpretation. The parties' memorialization of this disagreement in Paragraph 2.1, according to Verizon, represents a modification to the KMC Agreement and precludes enforcement of any obligation to pay reciprocal compensation on ISP-Bound Traffic.

We are not persuaded by Verizon's arguments, and we adopt the Proposal for Decision. Once Verizon entered into the agreement with KMC and the Board approved that agreement, Verizon and KMC were bound by the terms of the agreement. To the extent that questions arose concerning the proper interpretation of those terms and conditions, the Board retained jurisdiction to interpret that agreement. As the Proposal for Decision explains, pursuant to Section 252(i) of the Act, Verizon had an obligation to offer to ABS the same terms and conditions that it had agreed to in the KMC Agreement. Verizon did not have the right to recharacterize or otherwise modify those terms, without the affirmative agreement of ABS. Verizon itself appears to concede this point, instead focusing its argument on the claim that Paragraph 2.1 represents such a modification.

We do not conclude that Paragraph 2.1 is a modification to the Interconnection Agreement or that by agreeing to the language, ABS created a situation in which there was no meeting of the minds on the issue of Reciprocal Compensation for ISP-Bound traffic. The plain language of Paragraph 2.1 does not suggest that the parties intended that the paragraph would have substantive effect or that it represented anything more than to memorialize Verizon's interpretation — at that point in time — of the terms and conditions that it had previously agreed to with KMC. The language does not indicate that ABS agreed to Verizon's interpretation or in any way accepted Verizon's authority to modify or interpret a previous contractual arrangement. Thus our interpretation is also consistent with our understanding at the time we approved the 1999 Agreement.⁶⁵

65. Verizon also argues that unless we find that there was no meeting of the minds, we are effectively excising Paragraph 2.1 from the Adoption Agreement, contrary to traditional rules of contract interpretation. We disagree. Paragraph 2.1 is not a substantive agreement between the parties. It is only a statement of Verizon's then-current interpretation of a previous agreement. As such it remains in full effect.

C. Policy Considerations

In the Proposal for Decision, the Hearing Officer recommended that the Board reject Verizon's arguments that the Board should, on policy grounds, decline to order Reciprocal Compensation for ISP-Bound traffic. Verizon argues that the Hearing Officer is in error and that the policy arguments should help guide the Board in interpreting the Interconnection Agreements. In particular, Verizon points to previous statements by the Board disfavoring the payment of Reciprocal Compensation, asserting that the Board should apply that policy to the ISP-Bound traffic at issue here.

We agree with the Hearing Officer. The matter before the Board is a legal matter — the proper interpretation of two Interconnection Agreements. Our duty under Vermont law is to determine the intent of the parties to the agreements, relying upon the plain language to the extent possible and additional contemporaneous or near-term evidence to the extent that ambiguity exists. We can, as Verizon suggests, consider policy concerns, but only to the extent that they help us determine the parties' intent.

In the case of reciprocal compensation, the Board has previously stated a preference for bill-and-keep in lieu of reciprocal compensation in interconnection agreements, although we recognized that reciprocal compensation may be appropriate where traffic flows are imbalanced. Notwithstanding the Board's policy rationales, the parties elected to enter into two interconnection agreements that explicitly require payment of reciprocal compensation, clearly demonstrating their non-acceptance of the Board's preferred compensation. We approved these agreements. It would be inappropriate to now use policy rationales to overturn the parties' intent as embodied in the Interconnection Agreements.

Moreover, we note that Verizon's argument would result in the payment of reciprocal compensation for non-ISP-bound traffic, but no payment for ISP-bound traffic. Thus, parties would pay reciprocal compensation when flows were relatively balanced (normal traffic), but not for ISP-bound traffic where the traffic volumes are more likely to be imbalanced. This produces precisely the opposite result as the policy Verizon seeks to have us rely upon. Thus, we reject Verizon's argument.

D. VNXX

Verizon also requests that, if the Board accepts the Hearing Officer's conclusion that Reciprocal Compensation applies to ISP-Bound traffic, the Board also rule that such compensation does not apply to VNXX traffic. According to Verizon, this traffic is not local as defined by the Interconnection Agreement.

We note first that Verizon did not raise this issue before the Hearing Officer, so we do not have the benefit of testimony as to the intent of the parties or briefing from ABS. Therefore, we decline to rule on whether the reciprocal compensation applies to VNXX traffic under the Interconnection Agreement. Instead, the parties should attempt to reach a resolution of this issue in determining the appropriate compensation owing under the agreements. If Verizon and ABS cannot reach a resolution, they should raise the issue with the Hearing Officer.

To assist the parties, we can offer some guidance. First, VNXX calls do not actually physically terminate within the local calling area. Notwithstanding the fact that they may be rated as local calls due to the assignment of an NXX code to a switch, the physical characteristics of the calls suggest they are not local.

Second, it is our understanding that at the time the 1996 and KMC Agreements were negotiated, few if any carriers used VNXX arrangements. Instead, the common understanding in the industry was that the locations for rating and delivering traffic were the same. Thus, it appears likely that the parties would have viewed Local Traffic as being limited to calls that physically originated and terminated within a local calling area as defined by Verizon's tariffs (with the exception of calls completed to Foreign Exchange numbers).⁶⁶

Third, as Verizon has pointed out, the Board has recently ruled that Reciprocal Compensation does not apply to VNXX traffic that physically terminates outside of the local calling area. This ruling to date is limited to the Interconnection Agreement between Verizon and Global NAPS, so it is not binding on the ABS/Verizon arrangements. More importantly, it does not govern interpretations of the 1996 and KMC Agreements.

66. See Docket 6742, Order of 12/26/02 at 10-13.

Other factors may suggest that the parties intended to require Reciprocal Compensation payments for VNXX traffic. For example, Verizon actively encouraged ABS to deploy interconnection arrangements that reduced, but still permitted, VNXX traffic.

Considering the scant evidentiary record and the fact that this issue was raised for the first time in Verizon's comments on the Proposal for Decision, we decline to rule as Verizon requests.

IX. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The findings and recommendations of the Hearing Officer are accepted, except as noted above.
2. Verizon New England Inc., d/b/a Verizon Vermont ("Verizon"), Adelphia Business Solutions of Vermont, Inc., and Adelphia Business Solutions, Inc. (jointly referred to as "ABS") shall treat all traffic originated by Verizon and terminating to ABS's end user customers located within the local calling area of the caller, *including Internet Service Provider customers*, as eligible for reciprocal compensation pursuant to Section 5.7 of the 1996 and 1999 Interconnection Agreements between Verizon and ABS.
3. ABS and Verizon shall treat all traffic originated by ABS and terminating to Verizon's end user customers located within the local calling area of the caller, *including Internet Service Provider customers*, as eligible for reciprocal compensation pursuant to Section 5.7 of the 1996 and 1999 Interconnection Agreements between Verizon and ABS.

Dated at Montpelier, Vermont, this 16th day of July, 2003.

s/Michael H. Dworkin)

) PUBLIC SERVICE

s/David C. Coen)

) BOARD

s/John D. Burke)

) OF VERMONT

OFFICE OF THE CLERK

FILED: July 16, 2003

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.

Attachment A

I. State Decisions For Reciprocal Compensation

ALABAMA

Petition of ICG Telecom Group for Arbitration with BellSouth:

- Final Order, Docket 27609 (Ala.PSC. November 10, 1999)

ARIZONA

Petition of Electric Lightwave to Establish Interconnection Agreement with US West:

- Opinion and Order, Docket No.T-01051B-98-0689 (Az.Corp.Comm Nov. 2, 1999)

ARKANSAS

Connect Communications Corp. v. Southwestern Bell:

- Order No.6 Docket No. 98-167-C (Ark. PSC. Dec 31, 1988)

CALIFORNIA

Petition by Pac-West for Arbitration of an Interconnection Agreement with Citizens Telecommunications:

- Application No. 99-12-021 (Cal. PUC. Dec. 2, 1999)

Complaint of MFS Against Pacific Bell and Request for Temporary Restraining Order and Preliminary Injunction:

- Decision 00-04-034, Case 97-09—32 (Cal. PUC April 7, 2000)

CONNECTICUT

Petition of the Southern New England Telephone Co. for Declaratory Ruling Concerning ISP Traffic:

- Decision, Docket No.97-05-22 (Conn. DPUC Sept., 1997)

DELAWARE

Petition of Global Naps South, Inc for Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlantic-Delaware:

- Opinion, Docket No. 98-540 (Del. PSC June 22, 1999)

FLORIDA

In re Petition of BellSouth Telecommunications, Inc. for Arbitration of Interconnection Agreement with Intermedia Communications, Inc.:

- Order No. PSC-00-1519-FOF-TP, Docket No.991854-TP (Fla. PSC August 22, 2000)

GEORGIA

In re: Petition of BellSouth Telecommunications, Inc. for Arbitration of an Interconnection Agreement with Intermedia Communications, Inc.:

- Order, Docket No. 1164-U (Ga. PSC September 28, 2000)

HAWAII

Petition of GTE Hawaiian Telephone Company Inc. for a Declaratory Order that Traffic to Internet Service Providers is Interstate and Not Subject to Transport and Termination Compensation:

- Decision and Order No.16975 (H. PUC May 6, 1999)

ILLINOIS

Focal Communications Corporation of Illinois Petition for Arbitration to Establish an Interconnection Agreement with Illinois Bell Telephone Company, d/b/a Ameritech Illinois:

- Arbitration Decision, Docket 00-0027 (Ill. Commerce Comm. March 11, 1998)

INDIANA

Complaint of Time Warner Communications of Indiana, L.P. Against Indiana Bell Telephone Company, Inc. d/b/a/ Ameritech Indiana for Violation of the Terms of the Interconnection Agreement:

- Order on Reconsideration, Cause No. 41097 (Ind. PUC June 9, 1999)

KENTUCKY

American Communications Services of Louisville, Inc. d/b/a E.spire Communications Inc., American Communications Services of Lexington, Inc., etc v. BellSouth Telecommunications, Inc.:

- Order, Case No. 98-212 (Ky. PSC May 16, 2000)

MARYLAND

Petition of Approval of Agreements and Arbitration of Unresolved Issues Arising Under Section 252 of the Telecommunications Act of 1996:

- Letter Order, Case No. 8731 (Md. PSC June 25, 1999)

MICHIGAN

Petition of Level Three Communications, LLC for Arbitration to Establish an Interconnection Agreement with Ameritech Michigan:

- Notice of Decision of Arbitration Panel, Case No. U-12460 (Mich. PSC Sept. 25, 2000)

MINNESOTA

Petition of US West Communications, Inc. for a Determination that ISP Traffic Is Not Subject to Reciprocal Compensation Payments Under the MFS/US West Interconnection Agreement:

- Order Denying Petition, Docket No.P-3167, 421/CP-99-529 (Minn. PUC August 17, 1999)

NEBRASKA

In the Matter of the Application of the Nebraska Public Service Commission, on Its Own Motion, To Conduct an Investigation of the Interstate or Local Characteristics of ISP Traffic:

- Findings and Conclusions, Application No. C-1960/PI-25 (Neb. PSC Dec. 7, 1999)

NEVADA

In re Petition of Pac-West Telecomm, Inc. for Arbitration to Establish an Interconnection Agreement with Nevada Bell:

- Order Adopting Revised Arbitration Decision, Docket No. 98-10015 (Nev. PUC April 8, 1999)

NEW JERSEY

Petition of Global Naps, Inc. for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Bell Atlantic – New Jersey, Inc.:

- Decision and Order, Docket No. TO98070426 (N.J. PUB, July 12, 2000)

NEW YORK

Preceeding on Motion of the Commission to Reexamine Reciprocal Compensation:

- Case 99-C-0529 (NYPSC Aug. 26, 1999)

NORTH CAROLINA

Petition of ICG Telecom Group for Arbitration with BellSouth:

- Order, Docket No. P-582, SUB 6 (NC PUC March 1, 2000)

OKLAHOMA

Petition of Brooks Fiber for an Order Concerning Traffic Terminating to ISPs:

- Final Order, Case No. PUD 970000548, Order No. 42326 (Okla. Corp. Comm. June 3, 1998)

OREGON

Electric Lightwave, Inc. v. US West Communications, Inc. Motion to Dismiss Denied; Motion for Summary Judgment Granted in Part:

- Order, OR 99-285 (OPUC April 26, 1999)

PENNSYLVANIA

Joint Petition for Adoption of Partial Settlement Resolving Pending Telecommunications Issues and Global Telecommunications Proceedings:

- Opinion and Order, Docket Nos. P-00991648 and P-00991649 (Penn. PUC Sept. 30, 1999)

Petition of Focal Communications Corporation of Pennsylvania for Arbitration to Establish an Interconnection Agreement with Bell Atlantic – Pennsylvania, Inc.:

- Opinion and Order, Docket No. A-310630F0002 (Penn. PU C Aug. 17, 2000)

RHODE ISLAND

In re Complaint of Global Naps Against Bell Atlantic – Rhode Island Regarding Reciprocal Compensation:

- Report and Order, Docket No. 2967 (R.I. PUC Nov. 16, 1999)

TENNESSEE

In re: Petition of MCI WorldComm, Inc. to Enforce Interconnection Agreements with BellSouth Telecommunications, Inc.:

- Docket No. 99-00662 (TRA June 15, 2001)

TEXAS

Proceedings to Examine Reciprocal Compensation:

- Revised Arbitration Award, Docket No. 21982 (Tex. PUC Aug. 31, 2000)

UTAH

Complaint Against US West by Nextlink to Enforce Interconnection Agreement:

- Order, Docket No. 98-049-36 (Utah PSC April 28, 1998)

VIRGINIA⁶⁷

Petition of Cox Virginia Telecom for Enforcement of Interconnection Agreement with Bell Atlantic – Virginia and Arbitration Award for Reciprocal Compensation:

· Final Order, Case No. PUC 970069 (Va. State Corp. Comm. October 24, 1997)

WASHINGTON

WorldComm, Inc. f/k/a MFS Intelenet of Washington, Inc. v. GTE Northwest, Inc.:

· Third Supplemental Order Granting WorldComm's Complaint, Docket UT – 990338 (WUTC May 12, 1999)

WISCONSIN

Complaint of MCImetro Access to Compel Payment of Reciprocal Compensation from Wisconsin Bell:

· Order enforcing Interconnection Agreement, Docket No. 15-TD-100/6720-TD-102 (Wis. PSC January 19, 2000)

II. State Decisions Against Reciprocal Compensation

COLORADO

Petition by ICG Telecom for Arbitration of an Interconnection Agreement with US West:

· Initial Commission Decision, Docket No. C00-858 (CO. PUC August 1, 2000)

IOWA

In re: Arbitration of Sprint Communication Co., L.P., Petitioning Party and US West Communications, Inc. n/k/a Quest Corporation, Responding Party:

· Arbitration Order, Docket No. ARB-00-1 (Ia. DCUB Dec.21, 2000)

LOUISIANA

Petition of KMC Telecom Against BST to Enforce Reciprocal Compensation Provisions:

· Order No. U-23839, Docket No. U-23839 (La. PSC October 28, 1999)

MASSACHUSETTS

Complaint of MCI WorldCom Against New England Telephone and Telegraph Company d/b/a Bell Atlantic – Massachusetts for Breach of Interconnection Terms:

· Order, DTE 97-116-E (Ma. DTE July 11, 2000)

SOUTH CAROLINA

Petition of ITC DeltaCom For Arbitration with BellSouth:

· Order on Arbitration, Docket No. 1999-259-C, Order No. 1999-690 (S.C. PSC October 4, 1999)

67. See also, *Starpower*, cited in the text of the Order.

III. Other State Decisions⁶⁸

MISSOURI

Petition of Birch Telecom of Missouri, Inc. for Arbitration of the Rates, Terms, Conditions, and Related Arrangements for the Interconnection with Southwestern Bell Telephone Company:

- Order Clarifying Arbitration Order (MPSC April6, 1999)

OHIO

In the Matter of Allegiance Telecom of Ohio, Inc.'s Petition for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Ameritech Ohio:

- Arbitration Award, Case No. 01-724-TP-ARB (PUCO Oct. 4, 2001)

WEST VIRGINIA

Bell Atlantic – West Virginia Petition for Declaratory Ruling:

- Commission Order, Case No. 99-0462 (WVPSC Oct. 19, 1999)

68. Three states originally issued orders requiring the payment of reciprocal compensation for ISP-bound traffic. Two of these (Missouri and Ohio), subsequently suspended those payments (without reversing their earlier rulings) pending final FCC decisions. The third (West Virginia) requires reciprocal compensation for relatively balanced traffic flows (using a three-to-one ratio) and will develop an alternative compensation mechanism for traffic in excess of that ratio, to be applied retroactively.