

DT 99-081
DT 99-085

GLOBAL NAPS, INC & NEW ENGLAND VOICE AND DATA

RECIPROCAL COMPENSATION

ORDER ON SCOPE AND DISCOVERY MATTERS

O R D E R N O. 23,444

April 21, 2000

APPEARANCES: John O. Postl, Esq. representing Global NAPS, Inc.; Scott Sawyer, Esq., on behalf of New England Voice & Data; Victor Del Vecchio, Esq., on behalf of Bell Atlantic; Alan Mandl, Esq., on behalf of New England Fiber Communications; Kathleen McMahon, Esq., on behalf of BayRing Communications; Robert A. Aurigema, Esq., on behalf of AT&T Communications; Jennifer A. Duane, Esq., on behalf of Sprint; Gent Cav, on behalf of Metro 2000 Internet Services; David Murray, on behalf of FCG Networks; Anne Ross, Esq., on behalf of the Office of Consumer Advocate; and Larry S. Eckhaus on behalf of the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY AND INTERVENTIONS THROUGH PREHEARING CONFERENCE

Global NAPS, Inc. (GNI), a competitive local exchange carrier (CLEC), filed a complaint on May 28, 1999 against Bell Atlantic (BA-NH) alleging that BA-NH violated terms of a September 1, 1998 interconnection agreement between the parties regarding reciprocal compensation. GNI averred that the agreement, and relevant state and federal law, provide for reciprocal compensation for all traffic that BA-NH end-users originate that is terminated to Internet Service Providers (ISPs) through a local number provided by GNI. GNI

further alleged that BA-NH refused to pay reciprocal compensation on ISP-bound traffic. As a result of this alleged breach GNI requested the Commission grant declaratory relief.

One week later, on June 4, 1999, New England Voice & Data (NEVD), another CLEC, filed a petition for declaratory judgment asking the Commission determine that Internet-bound traffic be treated as local traffic and subject to reciprocal compensation. NEVD asserted that the terms of its interconnection agreement and the FCC's Internet Traffic Order show that the parties intended that Internet-bound traffic would be local and subject to reciprocal compensation. Unlike GNI, NEVD had not been denied reciprocal compensation as it had yet to provide internet service. NEVD merely requested the Commission interpret the interconnection agreement. BA-NH responded on June 24, 1999, to both subject dockets opposing the petitions.

Given the similarities of the two petitions an Order of Notice was issued on July 8, 1999, combining both dockets. Also, Staff asked that the petitions be decided on a broader basis, given the potential for other CLECs that have been collecting or expect to collect reciprocal compensation to be affected by an Order emanating from this proceeding. As a result, all facilities-based CLECs were notified of the

proceeding. The Order of Notice also included a procedural schedule that was to be followed by the parties and interveners.

The prehearing conference was held on July 27, 1999. Parties intervening included Sprint, New England Fiber Communications (NEFC), AT&T, and BayRing Communications. The Office of Consumer Advocate did not file a motion to intervene pursuant to RSA 541-A:32, I; but appeared at the prehearing conference. There were no objections to any of the requested interventions.

At the prehearing conference the parties, interveners and Staff (Parties and Staff) presented preliminary positions and then recessed into a technical session to discuss the procedural schedule for the case. Before recessing the Commissioners asked the Parties and Staff to discuss during the technical session the feasibility of conducting the docket by paper filings alone.

The Parties and Staff agreed to revise the procedural schedule with testimony and discovery being completed by October 19, 1999 and concluding with hearings scheduled for November 2 - 4, 1999. The procedural schedule was adopted by Secretarial letter dated August 2, 1999.

II. POSITIONS OF THE PARTIES AT THE PREHEARING CONFERENCE

A. NEW ENGLAND VOICE AND DATA

NEVD argued that under the terms of its interconnection agreement with BA-NH the parties intended Internet-bound traffic to be local and subject to reciprocal compensation. In support of its position, NEVD relied on the Rhode Island DPUC's ruling which interpreted NEVD's interconnection agreement as "unambiguously reflect[ing] the parties' agreement that Internet traffic be treated as local traffic, subject to reciprocal compensation." NEVD further stated that the Rhode Island PUC was influenced by the failure of the agreement to exclude ISP traffic from the definition of local traffic. NEVD also pointed out that the interconnection agreement in contention here was identical to the Brooks Fiber Agreement, as NEVD adopted that agreement in its entirety.

NEVD urged the Commission to review and analyze the interconnection agreement, follow the FCC Internet Traffic Order of February, 1999¹, and the FCC guidelines associated with the Order to determine the intent of the parties.

¹ See, *In Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, FCC Dockets 96-98 and 99-68, FCC 99-38, released Feb. 26, 1999 (hereinafter, "Reciprocal Compensation Order").

B. GLOBAL NAPs INC.

Global NAPs maintained that its interconnection agreement, which was specifically negotiated, does not exclude reciprocal compensation for ISP-bound traffic and provides for such payment until a final decision by this Commission on the subject. GNI maintains that because ISPs fall under the Enhanced Service Provider (ESP) exemption, the FCC allows the traffic to be treated as if it were local despite its ruling that the traffic was "jurisdictionally interstate."

GNI continued that BA-NH violated the interconnection agreement and failed to follow the dispute resolution provisions that were set forth in the agreement.

C. NEW ENGLAND FIBER COMMUNICATIONS

At the time of the prehearing conference NEFC had not yet brought its Complaint against BA-NH. NEFC expressed its support of the NEVD petition, as it was based on the Brooks Fiber (NEFC) agreement dated July 17, 1997. NEFC argued that BA-NH ceased paying reciprocal compensation based on its unilateral interpretation of the February 26, 1999 FCC ruling regarding Inter-Carrier Compensation for ISP-Bound Traffic. NEFC elaborated that the performance of BA-NH with regard to reciprocal compensation up until the Reciprocal

Compensation Order is the best evidence of the parties' intentions and understandings.

NEFC also addressed orders from both Rhode Island and Massachusetts. NEFC contended that the Massachusetts DTE erred in its decision with regard to the treatment of ISP-bound traffic because it did not undertake the exercise of examining the particular state interconnection agreements as suggested by the FCC. Lastly, in response to a question from the bench NEFC argued that the way to analyze the issue was under contract interpretation and application and not necessarily giving consideration to policy implications.

D. AT&T

AT&T supported the position of NEVD. It argued that the mere finding by the FCC in the Reciprocal Compensation Order that ISP-bound calls are interstate is not by itself determinative of the issue before the Commission. The question of compensation, it was argued, is a question of contract interpretation. Moreover, AT&T pointed to the Rhode Island decision and also to a Maryland decision and suggested these were the more well-reasoned opinions on the issue, as they understood the pervasive nature of treating the traffic as local. AT&T agreed with the Rhode Island PUC that it was necessary for the incumbent local exchange carriers to

specifically exclude ISP traffic from the definition of "local traffic" in interconnection agreements in order not to pay reciprocal compensation.

E. BELL ATLANTIC-NEW HAMPSHIRE

Opposition to the positions of GNI and NEVD was raised by BA-NH, which argued local traffic does not include Internet-bound traffic. BA-NH contended that it has consistently maintained that the term "local traffic" in its interconnection agreements means precisely what the FCC says it means. It asserted that the Commission should reject the petitions before it because the ISPs and CLECs have profited at BA-NH's expense by creating and then exploiting a regulatory loophole. The Company further maintained that given the FCC's ruling on treating internet-bound calls as jurisdictionally interstate and not local, the parties are not entitled to phone numbers from the North American Numbering Plan.

BA-NH also stated that it rejected the false assertion that the Company intended or implicitly conceded that Internet traffic was eligible for reciprocal compensation. The Company went on to note that reciprocal compensation was never intended to be a revenue stream for new entrants. It argued that the Massachusetts DTE acknowledged

that the shifting of dollars from one pocket to another did not promote real competition and that requiring payment does not promote the general welfare. BA-NH also pointed out that the Maine and New Jersey public utility boards reached the same conclusion, that ISP traffic is not local under the terms of Bell Atlantic's interconnection agreements.

Lastly, BA-NH asserted that it has lived up to the interconnection agreements reached with GNI and NEVD and, furthermore, contended there was never an obligation to pay reciprocal compensation for Internet-bound traffic.

F. OFFICE OF THE CONSUMER ADVOCATE

OCA did not take a position on the interpretation of the contracts but merely stated it would monitor the docket for cost impact on customers and the development of the competitive market.

G. STAFF

Staff agreed that the FCC's Reciprocal Compensation Order left the state commissions the authority to interpret interconnection agreements with respect to reciprocal compensation despite the ruling that Internet traffic is largely interstate. Staff conveyed that it had not yet formulated a position about compensation for ISP-bound calls.

III. POST-PREHEARING-CONFERENCE PROCEDURAL HISTORY

Discovery commenced with BA-NH filing a first set of information requests, on July 30, 1999 against Sprint Communications, NEFC (now operating as MCI), GNI, BayRing, NEVD, and AT&T. By mutual agreement the Parties extended the response date to the requests by three days.

At the end of August 1999, NEFC brought a complaint similar to those pending against BA-NH, alleging an improper failure to pay reciprocal compensation. NEFC then moved to consolidate that docket with the above-captioned complaints. At the same time, BA-NH filed a Motion for Expedited Relief to Compel Discovery, To Clarify the Scope of the Proceeding and for Revision in the Procedural Schedule. The NEFC motion to consolidate was consented to by AT&T, GNI, NEVD and the OCA. Staff took no position on the motion.

As a result of the two motions, the Commission by secretarial letter dated September 1, 1999 suspended the procedural schedule and directed the Parties and Staff to file objections to the motions no later than September 8, 1999. Additionally, NEFC, NEVD, GNI, BayRing and Sprint were directed to address the requirements of PUC Rule 204.04(d) and (e) which mandate objections to data requests within four days of receipt of the discovery request. Opposition to BA-NH's

Motion for Expedited Relief was filed by NEVD, NEFC, Sprint, AT&T, Freedom Ring and GNI. Neither Staff nor the OCA filed a response. BA-NH filed a response to the Commission's September 1, 1999 letter, indicating that it did not oppose the NEFC motion to consolidate and reiterating its position that the scope of the docket should not be a generic inquiry regarding future interconnection agreements for ISP-bound traffic.

On December 29, 1999 NEFC filed a request with the Commission requesting a ruling on the motions and soliciting an expeditious resolution to its complaint against BA-NH for breach of contract.

GNI, on April 7, 2000, filed a Motion for Summary Disposition asserting that the recent decision in *Bell Atlantic v. FCC*, 2000 WL 27383 (March 24, 2000, D.C. Cir.) nullified the FCC order and BA's position and that according there is no legal basis for BA to refuse to pay reciprocal compensation.

IV. SUMMARY OF NEFC PETITION AND MOTION

NEFC alleges BA-NH has breached its contract with NEFC by the refusal to pay "reciprocal compensation" payments that are due under an interconnection agreement. NEFC

contends that starting with a March 10, 1999, invoice, BA-NH has wrongfully withheld payment totaling over \$2 million.² NEFC states that the wrongful denial of the compensation is negatively impacting its business.

The gravamen of NEFC's complaint corresponds with those of GNI and NEVD. NEFC states that local exchange carriers (LEC) bill customers for local calls to the customer's Internet Service Provider (ISP). Instead of receiving access charges from the ISPs, the LEC provides local services to the ISPs under local tariffs. As a result of this treatment, the parties understood when they negotiated the interconnection agreement that local calls to ISPs would be treated as Local Traffic and subject to reciprocal compensation, according to NEFC.

As a result of the similarity of the complaints NEFC moved for consolidation of its complaint with the already-joined dockets. NEFC avers that consolidation is appropriate as it raises issues of law and fact that are common to the already- pending dockets, permits the matters to be resolved on the basis of a common record and promotes orderly and efficient conduct of the proceedings. No parties objected to

²The \$2 million figure represents invoices for the period of March 10, 1999 through October 10, 1999.

the consolidation of the dockets. BA-NH opposes the complaint of NEFC but believes that the consideration of the complaint should take place in this docket so as to avoid the piecemeal litigation of identical issues.

V. SUMMARY OF BELL ATLANTIC'S MOTION

BA-NH's motion of August 31, 1999 contains three separate issues. First, BA-NH argued that a majority of parties were unresponsive and wrongly objected to most of the 44 data requests it propounded. Given the parties' unresponsiveness, the Company moved to compel answers to the requests.³ The second issue BA-NH asked the Commission to consider was a clarification of the scope of the proceeding. Finally, the Company requested a revision to the procedural schedule given the discovery issues.

The Company alludes to the fact that the problems with discovery may have arisen because of questions concerning the scope of the proceeding. Many of the objections to BA-

³BA-NH noted that AT&T was not subject to the motion as AT&T provided responses to (or agreed to supplement) the questions propounded. BA-NH's motion seeks to compel the following answers from each of the relevant parties:

NEFC: DR #'s 1-10, 12-17, 19, 21, 23-37, 39, 40 and 43.
GNI: DR #'s 1-10, 12-17, 19-37, 39, and 41-44.
BayRing: DR#'s 1-10, 12-19, 212-37, 39 and 43.
NEVD: DR #'s 38, 43 and 44.
Sprint: DR # 44.

NH's data requests were made on grounds of relevance. Other objections were made on the grounds that the information sought is either not available or is competitively sensitive. The Company, therefore, not only asked for an order compelling the discovery but also one to clarify the exact nature of the proceeding.

Specifically, with regard to scope, the Company is asking that the Commission identify all parties who are affected by the proceeding. The Company seeks clarification on whether and how the proceeding will affect (i) CLECs who are not parties to this proceeding but that have adopted interconnection agreements similar to those of CLECs that have chosen to participate; and (ii) CLECs who have separately negotiated interconnection agreements and have not chosen to participate. The Company asks the Commission to rule that the proceeding will affect all facilities-based CLECs that are certified to operate in New Hampshire and that have existing interconnection agreements. BA-NH provides a chart that shows four categories of interconnection agreements relevant to the docket and states that the Commission should limit the proceeding to reciprocal compensation issues that arise from existing agreements.

BA-NH also argues that any decision regarding

reciprocal compensation should consider all relevant information which includes policy matters and not just the "four corners" of the agreement. The Company, thus, is asking for clarification as to whether this Commission will look at policy considerations in order to resolve the dispute.

VI. SUMMARY OF RESPONSES TO BA-NH'S MOTION TO COMPEL

A. GLOBAL NAPs

GNI argued in its response filed on September 9, 1999, that BA-NH is deliberately trying to delay resolution of a case that should be straightforward by making the case "insurmountably complex and burdensome." GNI, September 9, 1999 Response, p. 1. GNI complains in its response that BA-NH's "current posture is an anticompetitive free ride for Bell Atlantic." *Id.* at 2.

With regard to discovery, GNI argues that it filed detailed and specific objections to BA-NH's data requests. The Company contends that it did not comply with the PUC Rules 204.04 (d) and (e) because it had a misunderstanding that the specific procedural schedule in the case superceded the more general provisions of the Commission's rules.

GNI contends that the interrogatories posed by BA-NH are not relevant to the contract dispute at issue because the

contract is a matter of public record and the FCC provided the states with seven factors governing how to interpret interconnection agreements. GNI argues that the Commission should review the data requests in light of the seven factors to focus on the real issues in the case. GNI breaks down the data requests into groups and provides reasons why the questions are irrelevant, beyond the scope of the proceeding or simply improper discovery requests.

B. NEW ENGLAND FIBER COMMUNICATIONS

NEFC believes that the scope of the proceeding should be limited to the interpretation and construction of the existing interconnection agreements. In that regard it agrees with BA-NH that the proceeding should deal solely with existing agreements but NEFC disagrees that BA-NH should have information that goes beyond the interpretation, construction or circumstances surrounding the formation of the particular agreements.

NEFC argues that the data requests it did not answer are not relevant to this proceeding, as the information does not relate to or aid in interpretation of the interconnection agreements. BA-NH should not be allowed to use policy arguments to attempt to rewrite the existing interconnection agreements.

It is the position of NEFC that since further discovery is unnecessary, the schedule should be modified so that parties have seven days after the Commission's ruling on these matters to submit testimony on the case.

C. NEW ENGLAND VOICE AND DATA

NEVD agrees with BA-NH and NEFC that the scope of the proceeding should be limited to determining the intention of the parties who have existing interconnection agreements. It contends the sole issue before the Commission is whether the parties intended internet traffic to be local and subject to reciprocal compensation payments. It further posits that no policy arguments are necessary to undertake such an evaluation.

NEVD also suggests that the Commission is the arbiter of interconnection agreements and as such may undertake a more generic proceeding regarding compensation for Internet-bound traffic, which would go beyond the contract and look at the more general policy considerations. This type of analysis, NEVD argues, would apply on a going-forward basis to future agreements rather than to existing interconnection agreements. This analysis, however, is not necessary under the declaratory judgment action brought by NEVD, and should only be undertaken in a generic proceeding.

Like GNI, NEVD believes that the process is a straightforward one and should not be complicated by BA-NH's desire to delve into matters that are extraneous to the parties' interconnection agreements. On that score, NEVD argues that BA-NH should not be permitted to seek discovery unrelated to the parties' intentions with respect to the particular interconnection agreements at issue.

NEVD specifically argues that data requests 38, 43 and 44 are improper. NEVD argues that 38 and 44, are irrelevant to the sole issue in the proceeding as this is not a cost proceeding. NEVD further argues that BA-NH's request in question 43 for the NEVD business plan is improper as its business plan is not relevant to the issue in the proceeding.

D. SPRINT COMMUNICATIONS

On September 3, 1999 Sprint filed its opposition to BA-NH's motion. Sprint took the position that the Commission should limit the inquiry in the proceeding to the interpretation and construction of existing interconnection agreements of the CLECs participating in the proceeding. Sprint suggested that once the Commission makes its determination with regard to those contracts then the Commission could determine to what extent its ruling impacts the interpretation of non-participating CLEC contracts.

Moreover, Sprint argued that only the four corners of the contracts were critical and no consideration should be given to policy concerns.

Sprint like the other parties argued that BA-NH's discovery requests were not relevant to the proceeding at issue. Furthermore, Sprint argued it complied with the requirements of the Commission rules because it provided a response within the time period designated by the Commission.

E. AT&T

In its opposition to BA-NH's motion AT&T only addressed its position with regard to clarifying the scope of the proceeding as it had no dispute regarding discovery. AT&T, like BA-NH, NEVD, GNI and NEFC, believed that the proceeding should be limited to the interpretation of existing interconnection agreements. AT&T did suggest that clarification of the scope was needed "in light of the overboard data requests submitted by BA-NH in this proceeding." AT&T response, dated September 8, 1999, p. 2.

AT&T proposed that the proceeding should be limited to issues bearing only on the intent of the parties regarding reciprocal compensation payments and not on policy considerations. Like NEVD, AT&T argued that the Commission could consider the varied policy concerns in a future generic

proceeding.

F. BAYRING COMMUNICATIONS

On September 8, 1999 counsel for BayRing filed the response to BA-NH's motion and this Commission's September 1, 1999 letter. BayRing contends that the scope of the proceeding is clear and that BA-NH is merely attempting to prolong a decision in the case by propounding wholly irrelevant discovery by conducting a "fishing expedition."

BayRing argues that the action should be decided by this Commission analyzing the actual interconnection agreements at issue. It argues that since the parties are requesting a declaratory ruling, "the only issue to be resolved is whether local exchange traffic originated by a BA-NH customer, handed off to Global NAPs or NEVD, and then terminated by Global NAPs or NEVD to customers that happen to be ISPs, is eligible for reciprocal compensation under their interconnection agreements." BayRing September 8, 1999 Response at p. 2. BayRing continues its objection by stating that the data requests submitted by BA-NH to BayRing are not relevant and have "nothing to do with whether the reciprocal compensation provisions in the interconnection agreements apply to ISP-bound traffic." *Id.*, at p. 3.

To support its position that the BA-NH data requests have no reasonable nexus to the reciprocal compensation issue under the current interconnection agreements, BayRing points to evidence that BA-NH used the same data requests in other proceedings on unrelated issues.⁴ BayRing states that data requests 23-39; concerning routing of calls, location of switches, length of loops and sharing of compensation, are not relevant to issues in this proceeding and thus it should not be obligated to answer. The same argument is made regarding data requests numbered 11 through 21 which deal generally with NXX codes.⁵

BayRing responds to the Commission's query regarding PUC Rules 204.04 (d) and (e) with the argument that the rules are not applicable to the present case. BayRing states that BA-NH did not argue that the parties waived any right to object to BA-NH's requests. It avers that it is BA-NH's responsibility to make such an argument and this Commission

⁴BayRing maintains that the source of most of the data requests is a New York Public Service Commission investigation into BA-NY's reciprocal compensation payments for traffic to "convergent customers." This proceeding, BayRing contends, was not a contract enforcement proceeding and the discovery was necessary to develop a record regarding the network design between CLECs and ISPs, something that is not at issue here.

⁵BayRing asserts that these data requests are virtually identical to ones posed to CLECs in a Vermont Public Service Board investigation into the practice of assigning an ISP local calling numbers in local calling areas in which the ISP maintains no presence.

should not *sua sponte* impose a sanction. Furthermore, BayRing contends that the Commission's procedural schedule provided dates for the parties to comply with various requirements and the schedule failed to delineate when objections to data requests should be filed. It avers that enforcement by the Commission of a procedural rule when the Commission adopted a different procedural schedule should be precluded "out of fundamental fairness to the parties." *Id.*, p. 10.

Finally, with regard to changing the procedural schedule BayRing asserts that by this Commission's stay of the case the schedule is in fact changed. It argues that because no further responses to BA-NH's data requests are required the case should proceed immediately to the filing of testimony.

VII. COMMISSION ANALYSIS

A. INTERVENTIONS

The four petitions to intervene came from NEFC, Sprint, AT&T and BayRing. These petitions for intervention were granted at the conference. As OCA did not submit a petition to intervene we must evaluate the intervention under RSA 541-A:32, II, which states that we may grant a petition for intervention at any time, "upon determining that such intervention would be in the interests of justice and would

not impair the orderly and prompt conduct of the proceedings." Having no reason to deny the OCA's participation its intervention is granted.

B. NEFC CONSOLIDATION

Our rules provide for the consolidation of dockets when the petitions or complaints request the same or similar relief. PUC Rule 203.08. In this instance no parties object to the consolidation and in fact argue that consolidation will promote administrative efficiency. We agree that the issues involving the three complaints are intertwined and that joining them together will expedite the proceedings, and facilitate the consideration of each petition. We therefore grant NEFC's motion to consolidate.

C. SCOPE

The 1996 Telecom Act (TAct), 47 USC § 251 (b),(c), imposes obligations on incumbent carriers. One such obligation is that all local exchange carriers must "establish reciprocal compensation arrangements for the transport and termination of telecommunications." *Id.*, § 251 (b)(5). The Act only requires a local carrier to pay reciprocal compensation for local calls. *Id.*, § 251(b)(5), 47 C.F.R. § 51.701(e) (1998). At the heart of this dispute is whether the

interconnection agreements entered into between BA-NH and the CLECs contemplate that BA-NH compensate the CLECs for calls delivered to ISP customers.

BA-NH's position has been that the calls to ISPs involve transmission of information across state lines, and are thus interstate, and should not be billed as local traffic. BA-NH supported this argument with the FCC's 1999 Reciprocal Compensation Ruling finding that ISP traffic is non-local in nature.

Recently, the Court of Appeals for the District of Columbia vacated the FCC ruling and remanded it with instructions to provide a satisfactory explanation supporting the conclusion that calls delivered to ISPs do not constitute termination of local telecommunications traffic. *Bell Atlantic Telephone Companies v. FCC*, 2000 WL 273383 (D.C. Cir.). The Court indicated that the "end-to-end" analysis applied by the FCC was insufficient and that the case was remanded for "want of reasoned decision-making." *Id.*, p. 3.

GNI asks us to summarily dispose of the case because the Court vacated the FCC ruling. GNI argues that since the FCC order was the only basis for BA-NH not paying, it should be ordered to immediately abide by its interconnection

agreement.⁶ The case originally came before us on GNI's petition for declaratory judgment. Jurisdiction was proper given the FCC's hands-off policy with regard to state commission determinations of whether reciprocal compensation provision of interconnection agreements apply to ISP-bound traffic. We cannot say with any degree of certainty that the D.C. Court of Appeal's remand will bring about a different result with regard to our jurisdiction over the context of interpreting and enforcing existing reciprocal compensation agreements.

Summary disposition is an excellent "device to make possible the prompt disposition of controversy on the merits without a ... [hearing] ..., if, in essence, there is no real dispute as to the salient facts or if only a question of law is involved." *New Hampshire York Company v. Titus Construction Company*, 107 N.H. 223, 224, 225 (1966). The proper interpretation of a contract is a question of law. *Catamount Construction v. Town of Milford*, 121 N.H. 781, 783 (1981); citing *Murphy v. Doll-Mar, Inc.*, 120 N.H. 610, 611 (1980).

⁶ GNI's Motion for Summary Disposition describes its interconnection agreement with BA-NH as different from other CLECs as the agreement has specific language relative to ISP-bound traffic. The paragraph at issue, Section 5.7.2.3 of the GNI-BA interconnection agreement reads that until there is resolution of the issue of whether ISP traffic constitutes local traffic, "BA agrees to pay GNAPS Reciprocal Compensation for ISP traffic..."

We agree that there are different competing issues at play here. The various parties have different contracts and some interconnection agreements are not as specific as that of GNI. See, footnote 6, *supra*. There appear to be four different types of interconnection agreements: those where, (i) the contract is silent on the issue, (ii) the contract language expressly excludes Internet traffic from reciprocal compensation, (iii) the contract points towards a future FCC decision and excludes internet traffic in the interim; and (iv) the contract explicitly requires payment on Internet-bound traffic until a future event. See, Attachment I, to BANH Motion to Compel and Clarify, dated August 31, 1999.

Therefore, we believe the case should be broken down into separate phases. The first phase will determine the narrow issue of the interpretation and construction of the existing interconnection agreements, and whether the parties intended Internet-bound traffic to be local and subject to reciprocal compensation. As part of this phase of the proceeding, in the event we determined, in any case that Internet traffic was meant to give rise to reciprocal compensation we would proceed to determine the level of compensation to be paid.

Phase I can be accomplished through a review of the parties paper filings. In this regard, after discovery has been completed, parties will be required to file motions for summary judgment and will then have an opportunity to respond to motions filed by other parties. If we determine that the parties intended ISP-bound traffic to be subject to reciprocal compensation in any case, the parties in question will have 10 days to submit materials proving damages and the amount owed under the agreements, if any.

Phase II of the proceeding will be a broader, more generic undertaking and should determine the future of this type of agreement. In this phase we will determine the overall policy for future interconnection agreements and how it relates to numbering resources and local calling areas between Independent Telephone Companies and CLECs. Given the recent vacating of the FCC order and the uncertainty of how ISP-bound traffic will be treated we believe the best course of action is to begin this investigation now, while we await further FCC action.

In the interest of promoting administrative efficiency and expediting the proceeding during Phase I we direct the parties to review the BA-NH prepared Attachment I to its Motion to Compel, regarding the various interconnection

agreements to verify that the determinative language regarding local calls and reciprocal compensation is captured within the Attachment. The parties should bring to Staff's attention any discrepancies and point to the pertinent language in the interconnection agreements that clarifies the language. This will help in facilitating the analysis of each interconnection agreement.

Interconnection Agreements reached between BA-NH and the CLECs are different today than what they were a few years ago. The 1996 Act instructed that terms for reciprocal compensation were reasonable if they provided for "the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier...." 47 USC §252(d)(2). The application of that provision has evolved.

In the amendment to the interconnection agreement between BA-NH and Level 3 Communication signed in October, 1999, a compromise was struck establishing a new category of compensation that covers the local calling formerly subject to reciprocal compensation, as well as locally-dialed Internet-bound traffic. The parties held this amendment out as a model for other carriers embroiled in the battle over whether

reciprocal compensation applies to Internet traffic. The parties are directed to review this document and as part of an initial filing for Phase II submit their positions as to whether that type of an agreement is appropriate on a going forward basis.

The parties are also directed, during Phase I, to meet with Staff who will act as mediators to discuss the potential settlement of the reciprocal compensation dispute using the Level 3 plan as a potential guide.

D. DISCOVERY

Our rules direct that any objections to data requests are to be made within four (4) days of receipt of the request. PUC Rule 204.04(d),(e). We take this opportunity to point out that the parties objecting to the requests failed to comply with our rule. In the September 1, 1999 letter from the Commission's Executive Director, the parties were directed to address the requirements of the rules relating to objections to discovery. The common argument was that since the Commission adopted a procedural schedule detailing when discovery was due this somehow superceded the procedural rules. We find the argument without merit. However, since BA-NH did not raise the timeliness of the objections as an issue we need not consider a remedy. The parties should note

that our rules must be complied with unless this Commission specifically grants a waiver or expressly adopts procedures different from the rules.

We have reviewed the discovery questions and objections keeping in mind the narrowed scope defined in Phase I of this proceeding. Although we believe that some of the questions may be relevant for our Phase II investigation, the majority of questions are not relevant and go beyond the scope of Phase I. We find that questions #2, #6, #7, #8, #13, #14, #16, #17, #18, #20, #22, #34, #35 and #40 will provide information relevant to the limited scope of Phase I of the docket, and therefore require an answer. We will not compel answers to the remainder of the requests. Questions #6, #7, #8, #13, #14, #16, and #17 are relevant only to a damage determination and need not be answered until we have issued an opinion on payment responsibility.

We note that some of the questions contain an answer with an objection. We will not require parties who have answered in this manner to further supplement their response.

E. REVISION OF SCHEDULE

Given our determination of the scope of this proceeding the following is the schedule for the remainder of the docket.

Phase I will commence as follows:

Discovery Answers as Ordered	10 days from date of Order
Settlement conference	May 5, 2000 (all parties) ⁷
Cross Motions/Briefs	May 12, 2000
Objections/responses	May 22, 2000

We will waive the administrative rules with regard to motion filing except for the amount of copies to be filed with the Commission.

The examination of damages shall commence upon a determination that any existing agreement requires BA-NH to pay reciprocal compensation. If we find that a particular agreement requires compensation, a hearing will be scheduled to determine the amount of damages. Proof of damages must be forwarded to the Commission five (5) days in advance of the hearing. Discovery should be answered in compliance with this order within 5 days of any responsibility decision.

Phase II will commence with the parties filing their position statements regarding the Level 3 Amended Interconnection Agreement along with a proposal for procedural schedule and a listing of other potential questions that must be resolved during this second phase of the docket. These

⁷The Executive Director will issue a letter informing the parties of the time they are to appear.

initial position papers are due May 31, 2000.

Based upon the foregoing, it is hereby

ORDERED, that the NEFC motion for consolidation is granted; and it is

FURTHER ORDERED, BA-NH's motion to compel and to clarify the scope of the proceeding is partially denied, and otherwise granted consistent with this Order; and it is

FURTHER ORDERED, that the parties who did not answer the questions as described above supply BA-NH with appropriate responses within 10 days of this order; and it is

FURTHER ORDERED, that the parties submit to mediation with Staff commencing on May 5, 2000 at 9:00 a.m.; and it is

FURTHER ORDERED, that Cross Motions for Summary Judgment be submitted by May 12, 2000.

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By order of the Public Utilities Commission of New
Hampshire this twenty-first day of April, 2000.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary