DT 99-081
DT 99-085

NEW ENGLAND FIBER COMMUNICATIONS, LLC
VERIZON NEW HAMPSHIRE

Consolidated Proceedings Relating to Payment of Reciprocal Compensation for Calls Terminated to Internet Service Providers

Order on Motions for Summary Judgment

O R D E R N O. 24,238

November 12, 2003

These consolidated proceedings require the New Hampshire Public Utilities Commission (Commission) to decide whether Verizon NH (Verizon), an incumbent local exchange carrier (ILEC), is obligated under the terms of a 1997 interconnection agreement to compensate New England Fiber Communications, LLC (NEFC), a competitive local exchange carrier (CLEC), for calls originated by Verizon customers to internet service providers (ISPs) through a local number provided by NEFC. In this order we find that under the 1997 interconnection agreement, calls made by Verizon customers to ISPs physically located in the originating callers' local calling area would have been eligible for reciprocal compensation through June 13, 2001.[1] ISP-bound calls made on or after June 14, 2001, pursuant to the 1997 interconnection agreement, would have been eligible for the intercarrier compensation for ISP-bound traffic as outlined in

[1] This case is based on a ruling of the FCC, discussed in Section III, C herein.

the FCC's order in FCC Docket No. 96-98 (FCC 01-131) released April 27, 2001.

I. BACKGROUND AND PROCEDURAL HISTORY

We begin by summarizing the cases' extensive history. The relevant facts are undisputed and are as set forth in NEFC's motion for summary judgment. The parties entered into an interconnection agreement on July 17, 1997, which the Commission approved on October 13 of the same year. For more than a year, Verizon paid NEFC reciprocal compensation for calls by Verizon customers that were terminated to ISPs among NEFC's customer base. On February 26, 1999, the Federal Communications Commission (FCC) issued an order concluding that such payments were at variance with the requirements of the TAct. This prompted Verizon to discontinue such payments.

The Commission opened Docket No. DT 99-081 to consider a May 28, 1999 complaint filed by Global NAPS, Inc., a CLEC. Global NAPS alleged that Verizon (then Bell Atlantic)[2] had violated the terms of a September 1, 1998 interconnection agreement providing for reciprocal compensation pursuant to the relevant provision of the Telecommunications Act of 1996 (TAct), 47 U.S.C. § 251(b)(5) (requiring all local exchange carriers,

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[2] Owing to a series of mergers, the entity that is now Verizon NH has changed its name several times since entering into the interconnection agreement at issue here. This order will use "Verizon" to describe the entity regardless of the nomenclature that may have actually been employed at any particular time.

whether incumbent or competitive, to "establish reciprocal compensation arrangements for the transport and termination of telecommunications"). On June 4, 1999, Conversent Communications of New Hampshire, LLC (Conversent)[3] filed a petition for declaratory judgment asking the Commission to determine that internet-bound traffic must be treated as local traffic and thus subject to reciprocal compensation. Unlike Global NAPS, Conversent had yet to begin providing service to any ISPs and, thus, had not suffered any adverse impacts from Verizon's refusal to pay reciprocal compensation in such circumstances. Conversent simply requested that the Commission interpret its interconnection agreement with Verizon so as to require reciprocal compensation for calls terminating to a number provided to an ISP. The Commission opened Docket No. DT 99-085 to consider the Conversent petition.

The Commission entered an order of notice on July 8, 1999, consolidating the two proceedings in light of the similarity of the issues raised. At the request of the Commission Staff, all facilities-based CLECS in New Hampshire were advised of the pendency of the proceedings and the likelihood they would yield a determination that would affect

[3] The filing was actually made by NEVD of New Hampshire, LLC, now known as Conversent Communications of New Hampshire, LLC.

them. The order of notice scheduled a prehearing conference and included a tentative procedural schedule.

The prehearing conference occurred as scheduled on July 27, 1999. The Office of Consumer Advocate entered an appearance pursuant to RSA 363:28 on behalf of residential ratepayers. Without objection, the Commission granted intervention petitions submitted by Sprint, NEFC (an affiliate of WorldCom)[4], AT&T and BayRing Communications. At a technical session following the prehearing conference, the parties and Staff agreed to a revised procedural schedule, culminating in two days of hearings in November 1999, which the Commission adopted by secretarial letter on August 2, 1999.

Discovery commenced. Verizon submitted a motion on August 27, 1999 to compel discovery, to clarify the scope of the proceedings and to revise the procedural schedule. On August 31, 1999, NEFC filed its own complaint, raising issues similar to those identified by the Global NAPS and Conversent filings. NEFC requested that its complaint be included in the instant consolidated proceedings.

By secretarial letter on September 1, 1999, the Commission suspended the procedural schedule and directed parties

[4] The pleadings do not clarify the present relationship between NEFC and WorldCom with precision. The NEFC complaint describes MCI WorldCom Communications, Inc. as the “successor-in-interest” to NEFC. Subsequent pleadings have continued to identify NEFC as the entity pursuing its case here. We will refer simply to “NEFC” herein.

to submit any objections to the Verizon motion by September 8, 1999. NEFC, on December 30, 1999, requested a ruling on the pending motion and an expedited resolution of the merits of the proceedings. On April 3, 2000, Global NAPS submitted a motion for summary disposition, to which Verizon objected on April 19, 2000.

The Commission entered Order No. 23,444 on April 21, 2000. *See Global NAPS, Inc.*, 85 NH PUC 289 (2000). In Order No. 23,444, the Commission granted NEFC's request to consolidate its complaint with the Global NAPS and Conversent proceedings and made certain determinations as to the scope of the ensuing proceedings on all three filings. *See id.* at 296-98.

Order No. 23,444 took note of then-current proceedings before the FCC and the U.S. Court of Appeals for the District of Columbia Circuit with respect to reciprocal compensation for calls made to ISP customers. The FCC determined that such calls were "non-local" in nature because they involved the transmission of data on an interstate basis – a conclusion that favored Verizon. Although the D.C. Circuit had recently remanded the question to the FCC, this Commission concluded that it could not "say with any degree of certainty" that the remand would "bring about a different result with regard to our jurisdiction over the context of interpreting and enforcing existing reciprocal compensation agreements." *Id.* at 297. The Commission therefore rejected Global NAPS' argument that Verizon should simply be directed to provide reciprocal compensation in light of the D.C. Circuit's order of remand. *Id.*

Instead, the Commission determined that the proceedings were amenable to "summary disposition" inasmuch as they raised primarily, if not exclusively, questions of law that did not require the taking of evidence. *Id.* Order No. 23,444 therefore ruled that the proceedings would thenceforth be divided into two phases, with Phase I resolved on pleadings and limited to "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." *Id.* (The Commission noted that, if necessary, Phase I would also involve a determination of what level of reciprocal compensation must be paid.) Phase II, the Commission ruled, "will be a broader, more generic undertaking and should determine the future of this type of agreement." *Id.*

To facilitate resolution of Phase I issues, the Commission advised that it would entertain summary judgment motions at the conclusion of discovery in May of 2000, followed by responsive pleadings. If, after this, the Commission concluded that a particular agreement required reciprocal compensation, it would then schedule a hearing to determine the amount of damages.

In Order No. 23,444, the Commission required the parties to participate in mediation of Phase I issues. The Commission thereafter scheduled a mediation session for May 5, 2000. The Commission also noted that it would begin its investigation of Phase II issues immediately, rather than await further rulings from the FCC.

Global NAPS filed a letter on April 28, 2000, arguing that, in light of Order No. 23,444, its previously filed summary judgment motion was ripe for adjudication following the mediation session.

Several additional parties sought intervenor status at this point in the proceedings: Granite State Telephone, Inc., Merrimack County Telephone Company, Wilton Telephone Company, Hollis Telephone Company, Dunbarton Telephone Company, Northland Telephone Company of Maine, Bretton Woods Telephone Company, Dixville Telephone Company (all appearing jointly) and RNK Telecom.

In light of then-ongoing negotiations among parties and Staff, the Commission extended the filing dates for summary judgment pleadings and Phase II position papers. On May 26, 2000, pursuant to the revised deadlines, Verizon and NEFC filed motions for summary judgment. Both parties also submitted responsive pleadings on June 5, 2000.

Conversent advised the Commission by letter received on May 26, 2000, that it would not be submitting a summary judgment motion, but that it concurred with the positions taken by NEFC. Conversent stated that it had not yet begun providing service to ISPs, that its interconnection agreement with Verizon was to expire in July 2000 and that it was negotiating a new agreement with Verizon.

On June 12, 2000, the Commission by secretarial letter granted the pending intervention requests and advised the parties that it was suspending the deadline for Phase II position papers. Nevertheless, such a position paper was filed two days later by Granite State Telephone and the other companies appearing jointly with it.

Global NAPS advised the Commission by letter received on July 11, 2000, that it had entered into a settlement agreement with Verizon and was withdrawing its complaint before the Commission. The proceedings thereafter remained in abeyance until May 7, 2002, when NEFC filed a request that the Commission expeditiously issue a decision. Verizon responded to the request on May 28, 2002, which NEFC renewed on June 11, 2002. The Commission received a letter from NEFC on June 4, 2003, bringing certain additional authorities to the agency's attention. Verizon responded to this submission on June 23, 2003.

II. POSITIONS OF THE PARTIES

A. The NEFC Summary Judgment Motion[5]

NEFC contends in its summary judgment motion that the express provisions of the Interconnection Agreement dictate the result in its dispute with Verizon, in accordance with New Hampshire contract law. However, NEFC takes the position that because the agreement contains technical terms, New Hampshire law also allows the Commission to consider parol evidence – specifically, evidence of a usage of trade. According to NEFC, evidence of industry custom, usage and practice leads to the conclusion that reciprocal compensation for ISP-bound calls is required under the Interconnection Agreement. Further, NEFC contends that even if the contract were deemed to be ambiguous, the parties' conduct and other extrinsic evidence vindicate NEFC's view of the agreement.

The extrinsic evidence to which NEFC refers includes what NEFC characterizes as a custom, usage and practice in the telecommunications industry of deeming a call to be terminated when it is delivered to the called party and a signal is sent to

[5] Any recitation of the parties' positions as articulated in their summary judgment motion should begin with the caveat that the original positions are themselves three years old at this point and thus do not and cannot refer to the many subsequent legal developments. However, neither party has withdrawn the positions taken in its initial pleadings and each has supplemented them with pleadings referencing additional authorities as time has passed. We list those additional assertions in chronological order and have taken all of them into account in reaching our decision today.

confirm that the call has been answered. Thus, according to NEFC, an ISP-bound call is terminated within the meaning of the agreement when it is connected to the modem of the receiving ISP, as opposed to when the calling party connects to a remote web site via the ISP. According to NEFC, in view of this established industry practice, if Verizon did not intend to treat ISP-bound calls as local traffic subject to reciprocal compensation, it should have specifically excluded such calls from the reciprocal compensation provisions of the contract.

NEFC invokes the principle of New Hampshire law that contracts should be construed so as to avoid absurd results. According to NEFC, because ISP-bound calls are not subject to access charges under the Interconnection Agreement, they must give rise to reciprocal compensation. Otherwise, the parties would have agreed to deliver each other's calls to ISPs for free, which NEFC considers to be an absurd conclusion.

B. The Verizon Summary Judgment Motion

Verizon grounds its argument in favor of summary judgment in New Hampshire contract law as well. According to Verizon, an objective assessment of the meaning of the words used in the Interconnection Agreement vindicates its position – particularly because the parties explicitly conformed the terms of their agreement to the requirements of federal law. According to Verizon, neither federal law nor the terms of the agreement itself require reciprocal compensation for calls terminated to ISPs.

Further, Verizon contends that both federal telecommunications law and this Commission's own precedent compel a conclusion that an ISP-bound call terminates not with the ISP but with the remote web site with which the caller ultimately communicates. The Commission precedent on which Verizon relies is *Atlantic Connections Ltd.*, 76 NH PUC 91 (1991), *aff'd sub nom. Appeal of Atlantic Connections*, 135 N.H. 510 (1992).

Verizon then argues that the origination of internet-bound traffic is "switched exchange access service" within the meaning of the Interconnection Agreement and, therefore, by the express terms of the Agreement, it is excluded from reciprocal compensation. Verizon further contends that even if the Commission disagrees with both of its foregoing arguments, reciprocal compensation would still not be required because the Commission would be compelled to conclude that the terms of the contract are so ambiguous there could not have been a meeting of the minds sufficient to bind the parties.

According to Verizon, its position under New Hampshire contract law is bolstered by the deleterious consequences of contrary result. It would be inappropriate as a matter of utility policy, in Verizon's view, to treat calls terminated to ISPs as ordinary local calls for inter-carrier compensation purposes because ISPs do not use the network in a manner that is comparable to ordinary business end-users. Therefore, according to Verizon, paying reciprocal compensation for internet-bound calls shifts the costs of network access in a manner that is inefficient and unfair. Verizon further contends that such a result would have the pernicious effects of encouraging the misallocation of investment and discouraging the development of residential telephone competition.

The final argument in Verizon's summary judgment motion is that, regardless of whether the Commission concludes that reciprocal compensation is owed for calls terminated to ISPs, in no circumstances may NEFC collect reciprocal compensation unless the ISP's premises are physically located in the same local service area as the calling party. Absent such a physical presence, Verizon argues, the calls are not "local traffic" within the meaning of the Interconnection Agreement and thus not subject to reciprocal compensation.

C. NEFC's Reply to Verizon

In reply to Verizon, NEFC takes exception to the suggestion that the Interconnection Agreement merely implements the minimum requirements established under the TAct. According to NEFC, when the agreement describes "reciprocal compensation" as being "As Described in the Act," a phrase which itself is defined to be "as described in or required by the Act," the

Agreement is simply defining reciprocal compensation as a form of inter-carrier compensation distinct from other forms of compensation, such as access charges. According to NEFC, other provisions of the contract define when reciprocal compensation is due.

In its reply memorandum, NEFC adds that, even if the Interconnection Agreement were deemed to be a mere implementation of requirements established under federal law, NEFC would still be entitled to reciprocal compensation for calls terminated to ISPs. According to NEFC, at least as of the date of its reply memorandum, neither the FCC nor any of the federal circuit courts had conclusively established that such calls are non-local and, thus, not subject to reciprocal compensation.

NEFC takes exception to Verizon’s contention that calls to ISPs are “switched exchange access service” within the meaning of the TAct or the Interconnection Agreement. And NEFC contends that Verizon’s “no meeting of the minds” argument is wrong as a matter of New Hampshire law because objective evidence demonstrates the correctness of NEFC’s view of the disputed terms.

With regard to what Verizon considers deleterious consequences if the Commission were to decide the case in favor of NEFC, NEFC responds that it is the parties’ intent in 1997, as opposed to any policy implications today, that governs. NEFC adds that the Commission has no obligation to ensure that Verizon profits from contracts it negotiates. Finally, NEFC disagrees with Verizon with respect to reciprocal compensation for ISP-bound calls when the ISP does not have a physical presence within the local calling area. According to NEFC, whether such a call is "local traffic" for purposes of reciprocal compensation is, under the contract, purely a function of whether the originating and terminating NXX codes are within the same local service area.

D. Verizon's Reply to NEFC

In reply to NEFC's summary judgment motion, Verizon contends that NEFC sidesteps the express language of the Interconnection Agreement that governs reciprocal compensation. That language, according to Verizon, demonstrates that Verizon agreed to honor only those reciprocal compensation obligations imposed by federal law. According to Verizon, NEFC cannot claim that federal law is irrelevant because the parties were free to go beyond the requirements of federal law in negotiating their agreement. Verizon asserts that, though it was free to do so, Verizon manifestly did not take that step during the negotiations at issue here.

With respect to NEFC's arguments about industry custom, Verizon argues that such evidence is irrelevant in the face of contract terms that are clear. Further, according to Verizon, NEFC's gloss of the contract is inconsistent rather than consistent with industry custom because it assumes the parties adopted an understanding of call "termination" that is directly contrary to established principles of communications law.

According to Verizon, interpreting contracts so as to avoid absurd results actually favors Verizon and not NEFC. This is so, Verizon contends, because it would be absurd to conclude that Verizon "would have consented to a system under which CLECs could reap an enormous windfall by choosing (as many, including [NEFC affiliate] MCI in New Hampshire, have done) to provide service exclusively or nearly exclusively to ISPs, and not to compete for residential customers." Verizon Reply Memorandum at 13. According to Verizon, under NEFC's view of the case, if a Verizon customer stays on the Internet for a mere two hours per day, Verizon could end up paying NEFC more in reciprocal compensation than the total monthly fee for providing basic local service to that customer.

Verizon takes exception to NEFC's argument that resolving the case in Verizon's favor amounts to requiring NEFC to provide free services to Verizon and/or Verizon customers. According to Verizon, while NEFC would not be able to obtain inter-carrier compensation for such call deliveries, it would be able to recoup its costs through the rates it charges its ISP customers. In this respect, Verizon contends, NEFC would be in the same position as ILECs, under FCC rulings on access charges.

According to Verizon, NEFC is wrong in arguing that extrinsic evidence suggests that the parties intended ISP-bound calls to be subject to reciprocal compensation. Verizon contends that in so arguing, NEFC relies on a declaration of an employee who was not involved in negotiating the Interconnection Agreement at issue. By contrast, Verizon offers a rival declaration of a Verizon employee who was part of the negotiations and who states that during the negotiations no party ever suggested that reciprocal compensation would apply to Internet-bound traffic.

The final argument made by Verizon seeks to bolster its theory that even if reciprocal compensation is required for some ISP-bound calls under the Interconnection Agreement, calls to ISPs not physically located in the same local calling area as the caller would be excluded. Verizon invokes its tariffs, which are cross-referenced in the Interconnection Agreement and which Verizon contends make plain that a local service area is a physical concept. If the Commission were to find otherwise, according to Verizon, NXX codes – a scarce resource in New Hampshire – might be diverted inappropriately to carriers seeking to take advantage of reciprocal compensation opportunities.

E. Subsequent Arguments

Subsequent to the submission of the summary judgment papers, both Verizon and NEFC have provided the Commission with additional authorities favoring their respective positions. On

May 28, 2002, Verizon transmitted to the Commission a copy of an April 2002 FCC order rejecting claims for reciprocal compensation based on language Verizon characterized as "strikingly similar" to that at issue here.

NEFC's June 10, 2002 filing provided the Commission with copies of (1) the 2002 order of the U.S. Court of Appeals for the District of Columbia Circuit taking issue with, but not vacating, the FCC's most recently expressed view of reciprocal compensation for ISP-bound traffic under section 251(b)(5), (2) a May 10, 2002 order of the FCC that found, under Virginia contract law, a Verizon affiliate was required to pay reciprocal compensation for ISP-bound traffic, and (3) the same FCC order previously furnished by Verizon on May 28, 2002.

On June 9, 2003, NEFC submitted a letter transmitting a copy of *Michigan Bell Telephone Co. v. MFS Intelenet of Michigan, Inc.*, 2003 WL 21146045 (6th Cir., May 20, 2003), a separate decision of the Illinois Appellate Court for the Third District in *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, and a third case, *Indiana Bell Telephone Co. v. Time Warner Communications of Indiana, L.P.*, 786 N.E.2d 301 (Ind. App. 2003). Verizon submitted a letter in response, arguing that the authorities cited by NEFC are inapposite.

III. COMMISSION ANALYSIS

A. Questions Presented

The public policy issue raised by this case has been succinctly described by the U.S. Court of Appeals for the Ninth Circuit:

> When Congress drafted the [Telecommunications] Act, it did not foresee the dramatic increase in Internet usage and the subsequent increase in telecommunications traffic directed to [ISPs]. Not long after Congress adopted the Act, newly formed CLECS began targeting ISPs to benefit from the reciprocal compensation provisions in interconnection agreements and the compensation they would receive from one-way traffic that flows into ISP customers but does not flow in the opposite direction.
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> [W]hen an Internet user with telephone service provided by an ILEC . . . connects to the Internet, the user may dial into an ISP served by a CLEC . . . . Under the reciprocal compensation provisions of the interconnection agreement, [the ILEC] must pay the CLEC for the completion of its customer's call to the ISP. The Internet user will likely make many extended calls to the ISP, but the ISP will rarely call the [ILEC] customer. Thus, CLECs with ISP customers receive far more compensation from the ILEC for completing its customers' calls than they pay to the ILEC because ISPs do not reciprocate with calls back to the originating ILEC.

Pacific Bell v. Pac-West Telecomm, Inc., 325 F.3d 1114, 1118-19 (9th Cir. 2003).

The issue has been the subject of much litigation before the FCC, various federal courts and most of our counterpart state utility regulatory commissions across the country, with varying conclusions. It arises here in a particular context. We are called upon to interpret the July 17, 1997 Interconnection Agreement between Verizon and NEFC. This task is distinct from, though related to, the one confronted by the FCC in the administrative proceedings that led to its February 1999 Order and, more recently, to *WorldCom, Inc. v. Federal Communications Commission*, 288 F.3d 429 (D.C. Cir. 2002). As described more fully below, the question in those cases was whether the TAct, as opposed to any particular interconnection agreement, mandated a specific resolution to the problem of reciprocal compensation for calls terminated to ISPs.

B. Contract Law Principles

Verizon and NEFC appear to be in agreement as to certain baseline propositions. There is no dispute that the question here involves the meaning of the interconnection agreement and that the Commission has jurisdiction to decide the case. Further, notwithstanding the unique federal statutory scheme under which the dispute arises, the parties agree that we should apply principles of New Hampshire contract law in resolving the case. We thus begin with those principles.

When interpreting a written agreement, a New Hampshire tribunal of competent jurisdiction must “give the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole.” *Lawyers Title*

Ins. Corp. v. Groff, 148 N.H. 333, 336, 808 A.2d 44, 48 (2002). Unless the tribunal determines that an ambiguity is present, "the parties' intent will be determined from the plain meaning of the language used in the contract." *Id.*

We discern no ambiguity. Section 5.7 of the Agreement sets forth the parties' obligations with respect to reciprocal compensation with clarity. Section 5.7.1 provides that reciprocal compensation "applies to the transport and termination of Local Traffic billable by [Verizon] or NEFC which a Telephone Exchange Service Customer originates on [Verizon's] or NEFC's network for termination on the other Party's network," subject to a pricing schedule set forth elsewhere. In furtherance of this provision, section 5.7.2 provides that 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."

The term "reciprocal compensation" has a particular definition in the Agreement. Specifically, section 1.55 recites that reciprocal compensation "is As Described in the Act," meaning the TAct. The phrase "As Described in the Act" has its own specific definition, contained in section 1.6: "'As Described in the Act' means 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 PUC."

This clearly evinces an intention by the parties to incorporate by reference the FCC's officially promulgated view of reciprocal compensation (as well as the view of this agency) – a contract-drafting technique that has long enjoyed recognition under New Hampshire law. *See Berke Moore Co. v. Phoenix Bridge Co.*, 98 N.H. 261, 270-71 (1953). In other words, each party undertook the risk that, during the effective period of the Agreement, the FCC would promulgate an interpretation of the relevant provisions of the TAct that would be at variance with that party's expectations, business plan or general economic interests. We see no evidence the parties lacked "the same understanding as to the terms" now under scrutiny. *Simonds v. City of Manchester*, 141 N.H. 742, 744 (1997). We cannot find, therefore, that there had been no meeting of the minds.

C. The FCC Proceedings

We now turn to what reciprocal compensation "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 PUC" truly means in light of the present state of the relevant FCC proceedings. The FCC's official view of this issue has a complicated history. As already noted, in 1999 the FCC issued the order that triggered Verizon's decision to cease the provision of reciprocal compensation for ISP-terminated calls under the Interconnection Agreement. In that decision, *In the*

Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 14 F.C.C.R. 3689 (1999) ("Initial FCC Order"), the FCC excluded ISP-bound calls from the reciprocal compensation requirement contained in 47 U.S.C. §251(b)(5) on the theory that such calls are not "local". The Initial FCC Order reached that conclusion by applying a so-called "end-to-end" analysis, suggesting that the true termination point of an ISP-bound call is not the ISP's modem but, rather, the web site anywhere in the world with which the ISP customer is communicating.

Appeal ensued, and the U.S. Court of Appeals for the District of Columbia Circuit rejected this analysis. *See Bell Atlantic Tel. Cos. V. FCC*, 206 F.3d 1 (D.C. Cir. 2000). Specifically, the Court noted that the "end-to-end" analysis is typically applied to determine whether the FCC (which regulates solely interstate commerce) has jurisdiction over a particular call. According to the Court, the FCC had failed to explain adequately why this mode of analysis informed the question of whether such calls are "local" and thus not subject to reciprocal compensation. *Id.* at 8. Therefore, the Court vacated the Initial FCC Order and remanded for further administrative proceedings.

Those further proceedings yielded *In the Matter of Implementation of the Local Competition Provisions in the*

Telecommunications Act of 1996, 16 F.C.C.R. 9151 (2001) (Second FCC Order).[6] In response to the pointed criticism by the D.C. Circuit noted above, the FCC adopted an alternative analysis. The FCC now relied on 47 U.S.C. 251(g), which provides for the "continued enforcement" of certain exchange access and interconnection requirements subsequent to the omnibus revision of federal telecommunications law effectuated by the 1996 TAct.

Section 251(g) contains a reference to "information access" as among the services that local exchange carriers must provide under obligations that antedated the TAct. According to the Second FCC Order, ISP-bound traffic fits within the definition of "information access," a term originating in the consent decree that ended the AT&T telephone monopoly in the 1980s. *See* Second FCC Order, 16 F.C.C.R. at 9171. The FCC concluded that "information access", including calls terminated to ISPs, is not "part of the new statutory framework" and thus not within the scope of the telecommunications to which the reciprocal compensation obligation of section 251(g) applies. *Id*.

This triggered further appellate proceedings, and another remand. *See WorldCom*, 288 F.3d at 434. The D.C. Circuit flatly rejected the Commission's interpretation of section

[6] The FCC adopted the "Second Order" on April 18, 2001. It was subsequently published in the Federal Register on May 15, 2001, resulting in an effective date of June 14, 2001.

251(g), concluding that the provision "does not provide a basis for the Commission's action." *Id.* Significantly, however, the Court expressly made "no further determinations" and did not vacate the Second FCC Order. *Id.* Rather, the Court held open the possibility that there might be grounds for the FCC's view that ISP-bound traffic does not give rise to reciprocal compensation in the statutory definitions of "telephone exchange service" or "exchange access," or even the scope of "telecommunications" covered by section 251(b)(5). *Id.* The FCC has not yet acted on the Court's remand.

The fact that the D.C. Circuit did not vacate the Second FCC Order looms large. It means that, as of June 14, 2001, the date on which the Second FCC Order was released, and continuing through the present day, there has been in effect a definition of reciprocal compensation, as described in the TAct, as "interpreted in the duly authorized rules and regulations of the FCC" that excludes ISP-bound calls from the definition. Left intact by the D.C. Circuit are the FCC's amendments to its rules designed to achieve the substantive result adopted in the Second FCC Order. *See* 16 F.C.C.R. at 9210 (appendix to Second FCC

Order, amending Part 51, Subpart H, of Title 47 of the Code of Federal Regulations).[7]

The FCC has expressed the concern that requiring reciprocal compensation for ISP-bound calls "has created opportunities for regulatory arbitrage and distorted the economic incentives related to competitive entry into the local exchange and exchange access markets." *Id.* at 9153. The FCC cited two "troubling effects" of the regulatory arbitrage:

> (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act; [and] (2) the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels.

Id. at 9162.

There is, of course, a countervailing policy view. One company's "regulatory arbitrage" is another's regulatory risk. Both Congress, at the time it enacted the 1996 Telecommunications Act, and Verizon, at the time it signed its 1997 Interconnection Agreement with NEFC, were certainly aware that individual

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[7] In its recent decision governing reciprocal compensation, the U.S. Court of Appeals for the Sixth Circuit suggested that the FCC "has yet to promulgate an official rule" governing reciprocal compensation for calls terminated to ISPs. *MFS Intelenet*, 2003 WL 21146045 at *7. For this proposition, the Court cited the Initial FCC Order as issued in 1999. *Id.* While the Second FCC Order still leaves pending "the adoption of a rule establishing an appropriate interstate compensation mechanism," *Id.*, the 2001 order made what the FCC deemed any immediately necessary rules revisions. Moreover, the Second FCC Order was obviously adopted with the same level of formality and generality as would apply to a rulemaking.

telephone customers were using their telephone service to connect to ISPs and, thus, to the Internet. With respect to Verizon in particular, one could reasonably conclude that it explicitly undertook the risk that it would be vulnerable to the kind of ill effects of which the FCC warned in its 2001 order. It is axiomatic that the utility regulation process does not guarantee profitable operation of a utility and, particularly in a regulatory environment designed to harness competition, a regulated company like Verizon may sustain financial losses arising from business developments it failed to foresee.

The FCC opted to prevent ISP-related regulatory arbitrage, as opposed to the more hard-knocks regulatory risk approach. The FCC's original 1999 decision was vacated and, therefore, was never truly effective. But, as of June 14, 2001, there existed and continues to exist an FCC-mandated view of reciprocal compensation that, by the plain meaning of the Interconnection Agreement, transitions compensation over a 3-year period, toward a "bill-and-keep" system for calls by Verizon customers that are terminated to ISPs served by NEFC.

D. Local Traffic

Having thus determined what "reciprocal compensation" means within the context of the parties' agreement, we must next determine the extent to which it applies to the calls at issue in this case. As already noted, Section 5.7.1 of the agreement provides that reciprocal compensation applies only "to the transport and termination of Local Traffic." The term "Local Traffic," in turn, has its own explicit and specific definition in the agreement: in relevant part, Local Traffic is "a call which is originated and terminated within a local service area as defined in NHPUC No. 77 Tariff, Part A, Section 6."

Part A, Section 6 of Verizon's Tariff No. 77, in turn, is essentially a listing of the "extended local service areas" in Verizon's service territory. This listing describes geographic locations "whereby the local service area of an exchange is enlarged by combining it with one or more additional exchanges in order to eliminate toll charges." NHPUC No. 77 Tariff, Part A, section 6.1.1. *See also id.* at § 1.1.6 (defining "exchange" as "[a] *geographical* unit established for the administration of telephone communications in a specified area" (emphasis added)).

We apply a plain-meaning analysis to this language. Under the interconnection agreement, reciprocal compensation applies only to local traffic, which is defined in the tariff as calls originating and terminating within a specified *geographic* area, established for purposes of defining the zone within which in-state toll charges will not apply.[8] This leads ineluctably to

[8] Tariff No. 77 has been superceded; the currently effective Verizon tariff is designated No. 81. We need not and do not decide whether the currently applicable tariff language would support a similar result inasmuch as the parties to the interconnection agreement explicitly incorporated the language from Tariff No. 77.

a determination here that the parties did not intend reciprocal compensation to apply to calls that were terminated to an ISP physically located outside the originating caller's local service area.

In reaching that result, we do not adopt Verizon's argument that the calls at issue are subject to access charges because they represent "exchange access" service within the meaning of the TAct. Rather, we conclude that the language of the interconnection agreement reveals that (1) the parties intended to track the currently applicable FCC view with respect to the general question of whether internet-bound traffic qualifies under the definition of "reciprocal compensation" and (2) reciprocal compensation applied only to calls originating and terminating within the geographic boundaries of a local calling area described in Tariff No. 77.

F. Other Arguments

The remaining arguments of the parties do not alter the result. NEFC's "usage of trade" argument is to no avail for substantially the reasons stated by Verizon. Finding no ambiguity in the contract's terms, "custom and usage cannot be used to vary the express terms of a contract." *Heaton v. Boulders Properties, Inc.*, 132 N.H. 330, 336-37 (1989).

Nor can we agree with NEFC that the interpretation of the Interconnection Agreement proposed by Verizon would lead to an absurd result that would therefore be at variance with New Hampshire law. The recent cases speak of giving the terms of a contract their "reasonable" meaning, *see, e.g., Groff*, 808 A.2d at 48, and we cannot say it was unreasonable for the parties to have allocated the relevant business risks in a manner consistent with our determination. Finally, we are unable to agree with NEFC that the Interconnection Agreement defines "reciprocal compensation" as it does purely to distinguish reciprocal compensation from other kinds of inter-carrier compensation implicated by the contract. If that were the purpose of the definition, it would not have been necessary to include the reference to subsequent administrative interpretations.

We need not address the additional arguments raised by Verizon. It is undisputed that Verizon paid NEFC ISP-related reciprocal compensation until shortly after the FCC issued its Initial Order. We share Verizon's view that the FCC's officially promulgated determination as to whether ISP-terminated calls are subject to reciprocal compensation under the TAct is dispositive.

G. Relief

In its initial complaint, the relief requested by NEFC was (1) a finding that Verizon was in breach of the Interconnection Agreement, and (2) an order requiring Verizon to pay MCI WorldCom Communications, as successor to NEFC, the amounts due in reciprocal compensation under the Verizon-NEFC

Interconnection Agreement and otherwise to comply with the reciprocal compensation obligations of the contract. In light of the foregoing analysis, it is our determination that NEFC is entitled to some of the requested relief. Specifically, NEFC should have received reciprocal compensation payments under the 1997 Interconnection Agreement from Verizon for calls originated and terminated to ISPs located within the originating callers' local calling areas up to and including June 13, 2001, or until the Interconnection Agreement was terminated, whichever was earlier. As of June 14, 2001, the term "reciprocal compensation", as described in or required by the TAct and as from time to time interpreted in the duly authorized rules and regulations of the FCC, excludes ISP bound calls. However, to the extent the 1997 interconnection agreement was still in effect after June 13, 2001, the FCC established an interim compensation mechanism, pending the outcome of its proposed rulemaking, for carriers who deliver calls to ISPs. Therefore, from June 14, 2001, until the contract termination, or until the FCC completes its rulemaking on this issue, whichever is earlier, Verizon shall pay NEFC compensation for ISP-bound calls pursuant to the second FCC order.

Order No. 23,444 contemplates additional proceedings, specifically: (1) a potential evidentiary hearing to determine what payments are owed to NEFC, and (2) the Phase II proceedings described above. Phase II proceedings have been addressed in DT 00-223. We will give the parties sixty days to settle the payments Verizon owes to NEFC pursuant to the rulings in this order. If the parties are unable to determine the amount of payment owed, then either party may file a petition requesting the Commission hold evidentiary hearings to determine the appropriate payment.

Finally, we address the motion for Declaratory Judgment submitted by Conversent. The Motion concerned an interconnection agreement that had been entered into before Conversent commenced operations in New Hampshire. As previously noted, Conversent advised the Commission that it was renegotiating a new interconnection agreement with Verizon in 2000 and, thus, there is no actual dispute over the interconnection agreement that gave rise to the Motion. Conversent, therefore, is not entitled to the requested declaratory judgment. *See Delude v. Town of Amherst*, 137 N.H. 361, 363 (1993) (concluding that declaratory judgment inappropriate unless party seeking judgment has demonstrated a "present legal or equitable right").

Based upon the foregoing, it is hereby

ORDERED, that the petition of New England Fiber Communications, LLC is GRANTED IN PART AND DENIED IN PART, as set forth fully herein; and it is

FURTHER ORDERED, that the Motion for Declaratory Judgment filed by Conversent Communications of New Hampshire, Inc. is DENIED; and it is

FURTHER ORDERED, that the parties shall advise the Commission on or before sixty days whether and to what extent additional proceedings are necessary to determine the level of reciprocal compensation payments owed by Verizon, NH to New England Fiber Communications, LLC.

By order of the Public Utilities Commission of New Hampshire this twelfth day of November, 2003.

Thomas B. Getz Chairman	Susan S. Geiger Commissioner	Graham J. Morrison Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary