

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

PETITION OF

COX VIRGINIA TELCOM, INC.

v.

CASE NO. PUC990046

GTE SOUTH, INC.

**For enforcement of interconnection
agreement for reciprocal compensation
for the termination of local calls
to Internet Service Providers**

**Reply of Cox Virginia Telcom, Inc. to
GTE's Additional Comments**

Cox Virginia Telcom, Inc. ("Cox"), by counsel, pursuant to this Commission's August 9, 1999, Second Preliminary Order, responds to the Additional Comments submitted by GTE South, Inc. ("GTE") in which GTE asks for an evidentiary hearing in this matter.

- I. There is no need for an evidentiary hearing because there are no material facts in dispute.

GTE seeks in vain to establish the existence of a material, disputed fact. There is none. The Commission may take judicial notice of the Cox/GTE interconnection agreement to observe that it neither segregates ISP traffic from its definition of "local traffic" nor refers to a mechanism by which such traffic could even be tracked. Moreover, GTE cannot deny (1) that the FCC itself has noted its policy of treating ISP-bound traffic as local and has exempted it from interstate access charges, (2) that GTE

served ISPs out of its Virginia local tariffs, (3) that its revenue for ISP or ESP traffic has been counted as "local" for separations purposes, (4) that GTE has no method of metering or segregating ISP traffic from local traffic, (5) that its message or measured local exchange customers are billed as such for seven digit dialed calls they place to ISPs, and (6) that ISP-bound traffic would go uncompensated if it were treated as other than local. See, FCC Declaratory Ruling¹ at paragraph 24, pp.15-16; Reply of Cox Virginia Telcom, Inc. to Answer and Memorandum of Law of GTE South, Inc., ("Cox Reply of July 19, 1999") pp. 8-13.² The parties' intent is conclusively established by these factors.

GTE has attempted to raise a factual question by framing the issue as whether the two parties expressly agreed to include ISP traffic in their interconnection agreement. See, GTE's July 7, 1999 Memorandum of Law at p. 8 and Additional Comments at p.2. Its argument is based on GTE's misreading of paragraphs 21-27 of the FCC Declaratory Ruling. GTE implies that the FCC requires state commissions to take evidence in order to find that the parties intended ISP traffic to be expressly included for compensation. Instead, those paragraphs practically invite state commissions to continue treating ISP traffic as local and compensable unless and until the FCC rulemaking concludes differently. In fact, paragraph 27, at p.18 concludes, ". . . nothing in this Declaratory

¹Declaratory Ruling and Notice of Proposed Rulemaking, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68 (Released February 26, 1999) ___ F.C.C. R ___, (hereafter "Declaratory Ruling").

² Since the filing of Cox's Reply, yet another state commission has ruled that it has jurisdiction to resolve the dispute as to whether ISP in-bound calls constitute local traffic and that such calls do constitute local traffic. *See In re: NEVD of Rhode Island, LLC Petition For Declaratory Judgment that Internet Traffic Be Treated as Local Traffic Subject to Reciprocal Compensation* - Docket No. 2935, Order (Rhode Island P.U.C. July 21, 1999) (a copy of which is attached as Exhibit 1). The Rhode Island Public Utilities Commission cited many of the same factors Cox noted in its Reply to determine the intention of the parties to the interconnection agreement in question, apparently without conducting the type of evidentiary hearing that GTE seeks.

Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate below.” The Virginia law enables this Commission to determine compensation on contractual principles without a hearing. [Also, ¶ 24 discusses that commissions have the opportunity to consider all relevant facts, including the conduct of the parties pursuant to those agreements. Nothing GTE has done during or since those negotiations gives credence to their arguments]

II. Virginia law holds that contracts which are unambiguous are enforced without the use of extrinsic evidence.

Virginia courts will not admit extraneous evidence to interpret and enforce an unambiguous contract. As the Supreme Court of Virginia stated in *Ross v. Crow*, 231 Va. 206, 212, 343 S.E.2d. 312, 316 (1986), “A well-settled principle of contract law dictates that ‘where an agreement is complete on its face and is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself.’” (Citations omitted). The question of whether an agreement is ambiguous is one of law, not fact, and contracts are not rendered ambiguous merely because the parties or their attorneys do not agree upon the meaning of the language used to express the agreement. *Doswell Limited Partnership v. Virginia Electric and Power Co.*, 251 Va. 215, 222-223, 468 S.E.2d. 84, 88 (Va.1996)³. In the present case, as explained at pages 9 and 10 of the

³ This legal principle is even incorporated into the Agreement itself, at § XIX. N., p.40 as follows: This Agreement constitutes the entire agreement of the Parties pertaining to the subject matter of the Agreement and supersedes all prior agreements, negotiations, proposals, and representations, whether written or oral, and all contemporaneous oral agreements, negotiations, proposals, and representations concerning such subject matter. No representations, understandings, agreements, or warranties, expressed or implied, have been made or relied upon in the making of the Agreement other than those specifically set forth herein.

Cox Reply, July 19, 1999, Section V.C.1. of the Agreement treats traffic between Cox and GTE as either toll or local. Calls to ISPs are clearly not toll (except for those unfortunate customers who must dial long distance to reach an ISP). As a result, no evidentiary hearing is needed for this Commission to conclude the obvious: that the Interconnection Agreement's use of the term "local calls" includes ISP-bound traffic.

The custom and industry use of the term "local calls" confirms this conclusion. In Virginia, contracts that use terms of art are read to incorporate the industry custom and usage for such terms. See, Westmoreland-LG & E Partners v. Virginia Electric and Power Co., 254 Va.1, 486 S.E.2d. 289 (Va.1997) and *Doswell*, supra. In the telecommunications industry, local calls have always included ISP-bound traffic.

Contrary to GTE's continued assertions, the FCC's Declaratory Ruling confirms this:

Since [1983], the Commission has maintained the ESP exemption, pursuant to which it treats ESPs as end-users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs. As such, the Commission discharged its interstate regulatory obligations through the application of local business tariffs. Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local. In addition, incumbent LECs have characterized expenses and revenues associated with ISP traffic as intrastate for separations purposes. (footnote omitted).

Against this backdrop, and in the absence of any contrary Commission rule, 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.

Declaratory Ruling at ¶23 and ¶24, p. 15 (emphasis added). Therefore, there can be no question but that the term “local calls” under the Interconnection Agreement included ISP-bound traffic.

The Declaratory Ruling notes other factors that show ISP traffic to be local. One indicator is “whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation.” Declaratory Ruling at ¶24, p.16. Here, the Interconnection Agreement is silent on either metering or segregating ISP bound traffic from local traffic. Moreover, GTE has admitted that it had no means to do so. GTE’s July 7, 1999 Memorandum of Law, at pp.11-12, sets out the pertinent part of Ms. Ann Lowery’s (GTE’s Manager-Interconnections/Negotiations) January 6, 1999 letter which for the first time describes a segregation and measuring methodology. Her letter states, “GTE proposes that compensation be paid based upon terminating volumes and industry average hold times for the type of traffic terminated (e.g. local, Internet).” In other words, as of January this year, GTE could not distinguish Internet-bound traffic from local except by indulging an assumption that any customer call that remains connected for an extended period of time must have been routed ultimately to the Internet. Therefore, since the parties neither envisioned segregating these ISP traffic from local calls nor had the ability to do so, ISP bound traffic must have been included as local calls.

Additional indicators noted by the FCC include: (1) whether incumbent LECs serving ESPs (including ISPs), have done so out of intrastate or interstate tariffs; (2) whether revenues associated with those services were counted as intrastate or interstate

revenues; (3) whether, in jurisdictions where incumbent LECs bill their end-users by message units, incumbent LECs have included calls to ISPs in local telephone charges; and (4) whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic.

Declaratory Ruling, ¶24, pp.15 and 16. GTE cannot deny that, (1) GTE serves ESPs and ISPs out of its intrastate, Virginia SCC tariffs, (2) the revenue GTE has received from serving such ESPs and ISPs is counted as intrastate revenue, (3) where GTE bills its end-users by message or measured units, calls from GTE's customers to ESPs or ISPs are charged as such, and (4) if ISP traffic were not treated as local and subject to reciprocal compensation, there would be no compensation for an ILEC or CLEC delivering this traffic to an ISP. No hearing is needed to establish these facts.

III. This Commission and those in other states have ruled ISP traffic to be compensable without receiving evidence.

Other state commissions have decided ISP compensability in light of the FCC's Declaratory Ruling.⁴ Several have done so without resorting to an evidentiary hearing. For example, The Oregon P.U.C. made its decision on compensability by granting, in part, a motion for summary judgment. Similarly, the attached Rhode Island decision indicates that the Commission was able to rule on the basis of the pleadings and the NEVD/BA-RI Agreement, without conducting an evidentiary hearing. Moreover, just as this Commission construed the Cox/BA-VA interconnection agreement from its four corners, it may likewise construe the Cox/GTE interconnection agreement without resorting to extrinsic evidence.

⁴ A partial listing is contained in footnote 3 of Cox Reply of July 19, 1999.

IV. The delay encompassed in conducting an evidentiary hearing works only to the advantage of GTE.

As Cox already has explained in its previous filings, the Interconnection Agreement requires that GTE make payments to Cox, even though GTE may dispute them. Yet, GTE has refused to make any payments for reciprocal compensation to Cox. An evidentiary hearing means additional delay which, in turn, means more time for GTE to hold fast to its cash and to deprive Cox, its competitor, the revenue that is due under the Agreement. As a result, should the Commission should find it necessary to conduct an evidentiary hearing, Cox would encourages an expeditious hearing process and would request that this Commission enter an interim order requiring that GTE pay either to Cox or into an escrow account the amounts that Cox has billed GTE.

V. Conclusion

For the reasons discussed here and in the Cox Reply of July 19, 1999, Cox respectfully requests that the Commission determine as a matter of law that ISP traffic is compensable within the meaning of the Cox/GTE Interconnection Agreement and order GTE to pay the invoices submitted by Cox together with interest.

Respectfully submitted,

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Date: August 13, 1999

CERTIFICATE OF SERVICE

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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, JANUARY 24, 2000

PETITION OF

STARPOWER COMMUNICATIONS, LLC

CASE NO. PUC990023

For Declaratory Judgment
Interpreting Interconnection
Agreement with GTE South, Inc.

and

PETITION OF

COX VIRGINIA TELCOM, INC.

CASE NO. PUC990046

v.

GTE SOUTH INCORPORATED

For enforcement of interconnection
agreement for reciprocal compensation
for the termination of local calls
to Internet Service Providers

FINAL ORDER

On February 4, 1999, and March 18, 1999, Starpower Communications, LLC, ("Starpower") and Cox Virginia Telcom, Inc., ("Cox") filed their respective petitions against GTE South Incorporated ("GTE"), seeking declaratory relief and enforcement of their interconnection agreements with GTE. Specifically, Starpower and Cox seek the payment of reciprocal compensation for their transport and termination of GTE's traffic to Internet service providers ("ISPs"). All pleadings have been filed by

the parties as provided in the Commission's Preliminary Order of June 22, 1999, and Second Preliminary Order of August 9, 1999.

In Case No. PUC970069,¹ Cox, in its petition for enforcement of its interconnection agreement with Bell Atlantic-Virginia, Inc. ("BA-VA"), presented the issue of payment of reciprocal compensation for its transport and termination of BA-VA traffic to ISPs served by Cox. We found in that case that calls to ISPs as described in the Cox petition constituted local traffic, and that both Cox and BA-VA were entitled to reciprocal compensation for the termination of this type of call. We found that calls to an ISP dialed on a seven-digit basis were local in nature.

Subsequent to that Order, the Federal Communications Commission ("FCC") issued an order in which it held that the jurisdictional nature of ISP-bound traffic is determined by the end-to-end transmission between an end user and the Internet.² The FCC further concluded that such ISP-bound traffic is jurisdictionally mixed and appears to be substantially interstate rather than intrastate.³

¹ Petition of Cox Virginia Telcom, Inc., For enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc., Case No. PUC970069, 1997 S.C.C. Ann. Rep. 298, Final Order (Oct. 24, 1997).

² 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, CC Dockets 96-98 and 99-68, FCC 99-38, released Feb. 26, 1999 (hereinafter, "Reciprocal Compensation Order"), at ¶ 12.

³ Id. at ¶ 1.

In its Reciprocal Compensation Order, the FCC did not support the extension of its jurisdiction over locally dialed calls to ISPs with any rules regarding inter-carrier compensation for ISP-bound traffic. Nor has the FCC made modifications to jurisdictional separations systems that apportion regulated costs and revenues between intrastate and interstate jurisdictions.

The FCC did, however, establish a further rulemaking to consider prospective inter-carrier compensation methods for ISP-bound traffic. As part of this rulemaking, the FCC requested comment on the implications of various alternative inter-carrier compensation proposals "on the separations regime, such as the appropriate treatment of incumbent [local exchange carrier ("ILEC")] revenues and payments associated with the delivery of such traffic."⁴ In the interim, the FCC left it to state commissions to consider what effect, if any, its ruling had on state decisions regarding present reciprocal compensation provisions of interconnection agreements whether negotiated or arbitrated.⁵

This matter is of serious concern to this Commission because, notwithstanding its interstate classification of ISP-bound traffic, the FCC continues to require ILECs to account for

⁴ Id. at ¶ 36.

⁵ Id. at ¶ 27.

costs and revenues associated with end users' and ISPs' end office connections for ISP-bound traffic as intrastate for jurisdictional purposes and to require that such services be purchased from intrastate tariffs.⁶

In its Order, the FCC assures us that it has no intention of permitting a mismatch of costs and revenues between the jurisdictions.⁷ However, the FCC has yet to commit to the separations reform necessary to match the jurisdictional costs and revenues to its "newly" determined interstate jurisdiction for ISP-bound traffic.⁸ Moreover, to date the FCC has not acted in its rulemaking regarding inter-carrier compensation for ISP-bound traffic nor adopted separations reform.⁹

The FCC's stated goal in its Separations Reform NPRM was a comprehensive review of the Part 36 separations rules to

⁶ The Chief of the Common Carrier Bureau of the FCC has directed Bell Atlantic and SBC Communications to reclassify their ISP-bound expenses and revenues as intrastate in their ARMIS reporting. See "Common Carrier Bureau Issues Letter To Bell Atlantic Regarding Jurisdictional Separations Treatment of Reciprocal Compensation For Internet Traffic", ASD 99-40, Released July 30, 1999.

⁷ Separations Reform Order at ¶ 36.

⁸ The time may come when the State Corporation Commission will have to consider disallowing, for ratemaking purposes, intrastate costs associated with carrying ISP-bound traffic even though the FCC continues to require these costs to be apportioned intrastate.

⁹ In re Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Notice of Proposed Rulemaking, 12 FCC Rcd 22120, 22122 (1997) (hereinafter, "Separations Reform NPRM").

consider changes in the telecommunications industry.¹⁰ The Separations Joint Board is currently reviewing various proposals for separations rule changes. As part of this effort, the State Members of the Separations Joint Board have recently developed a cost study tool to help evaluate cost shift effects of separations rule changes.¹¹ To demonstrate the use of this tool the State Members estimated the possible effect of two recent FCC decisions, one of which was the Reciprocal Compensation Order. The potential misallocation of costs to the state jurisdictions appears enormous.

The cost study tool estimated costs that would be allocated to the interstate jurisdiction if the FCC had found that Internet minutes should be counted as interstate for separations purposes. The State Members reported that "it appears that the effect of moving Internet minutes to the interstate jurisdiction would be a shift in costs of about \$2.8 billion annually nationwide (about \$1.40 per line per month) to the interstate jurisdiction."¹²

¹⁰ "The fundamental basis on which separations are made is the use of telecommunications plant on each of the [interstate and intrastate] operations." (47 C.F.R. § 36.1(c)).

¹¹ See "Formal Request from State Members For Notice and Comment on Separations Simulation Cost Study Tool", filed October 28, 1999, in the FCC proceeding captioned In the Matter of Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, CC Docket 80-286. The FCC requested comments on the cost study analysis tool by December 17, 1999.

¹² Id.

Based on the FCC's failure to act on either inter-carrier compensation or separations reform for ISP-bound traffic, we conclude that the Reciprocal Compensation Order has created great regulatory uncertainty. In the absence of any FCC rules on inter-carrier compensation for ISP-bound traffic, any interpretation of the instant agreements we might reach may well be inconsistent with the FCC's final order in its rulemaking. Further, our decision on these agreements might also conflict with the FCC's ultimate resolution of the separations reform issues, which also remain unresolved.

Given the possibility of conflicting results being reached by this Commission and the FCC, we believe the only practical action is for this Commission to decline jurisdiction and allow the parties to present their cases to the FCC. The FCC should be able to give the parties a decision that will be compatible with any future determinations that it might issue. Being unable to determine the FCC's ultimate resolutions of these issues, any decision by us would be compatible with such rulings only by coincidence.

We further conclude that the FCC's Reciprocal Compensation Order, to the extent it intends to confer regulatory jurisdiction, is of dubious validity. The FCC has concluded that ISP-bound traffic is "jurisdictionally mixed and appears to

be largely interstate" in nature.¹³ Nevertheless, the FCC has suggested that the states should continue to approve and construe interconnection agreements that establish compensation for transport and termination of ISP-bound traffic, because "neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by Section 251(b)(5), so long as there is no conflict with governing federal law."¹⁴

The Commission is a constitutional agency that derives all of its powers and authority from the Constitution of Virginia and properly enacted legislative measures. A statement by the FCC does not, per se, grant jurisdiction to this Commission. Thus, even if we could, by chance, respond to the petitions in a manner not inconsistent with rules the FCC may later adopt, our ruling might be challenged on jurisdictional grounds by a party dissatisfied with the outcome.¹⁵

Therefore, upon full consideration of the pleadings, the Reciprocal Compensation Order, and the applicable statutes and rules, we find we should take no action on the petitions. We

¹³ Reciprocal Compensation Order at ¶ 1.

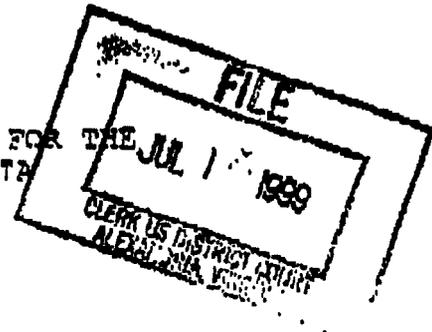
¹⁴ Id. at ¶ 26.

¹⁵ We will not comment on the validity of such a challenge, but note that the invitation of the FCC for us to act in these cases may encourage such a challenge.

will dismiss these petitions without prejudice but encourage the parties to carry their requests for construction of these agreements to the FCC where they can obtain relief that should be consistent with the rules the FCC may issue in the future. It is also our hope that referring these parties to the FCC might encourage the FCC to complete its rulemaking on inter-carrier compensation and to address the separations reform issues for ISP-bound traffic. Accordingly,

IT IS THEREFORE ORDERED that the petitions in Case Nos. PUC990023 and PUC990046 are DISMISSED and, there being nothing further to come before the Commission, the papers transferred to the files for ended causes.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION



BELL ATLANTIC-VIRGINIA, INC.)
)
 Plaintiff,)
)
 v.)
)
 WORLDCOM TECHNOLOGIES OF)
 VIRGINIA, INC.,)
)
 Defendant.)

CIVIL ACTION NO. 99-275-A

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendant WorldCom Technologies of Virginia, Inc.'s ("WorldCom") Motion to Dismiss for lack of subject matter jurisdiction. Plaintiff Bell Atlantic-Virginia, Inc.'s ("Bell Atlantic") Motion for Partial Summary Judgment is also before the Court. Plaintiff and Defendant are competing carriers who have entered an Interconnection Agreement ("Agreement") pursuant to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of Title 47 of the United States Code). Essentially, the parties dispute

whether local calls to Internet Service Providers ("ISPs")¹ constitute local traffic and are subject to reciprocal compensation under the terms of their Agreement. Bell Atlantic originally filed a complaint against WorldCom for breach of contract and unjust enrichment, and also seeking a declaratory judgment ruling that it is not liable for reciprocal compensation charges on Internet calls. For the reasons stated below, the Court grants Defendant's Motion to Dismiss, and denies Plaintiff's Motion for Partial Summary Judgment, as moot.

I. Facts and Background

Plaintiff Bell Atlantic and Defendant WorldCom² are telephone companies that provide competing local telephone service in Virginia. The Telecommunications Act of 1996 ("the Act") requires competing carriers to interconnect their networks to enable customers of one network to call customers of another. 47 U.S.C. § 251 (1994, Supp. II 1996). The Act imposes certain

¹ISPs are entities which provide their users the ability to access online information over the Internet by communicating with web sites. Illinois Bell Tel. Co. v. WorldCom Tech., Inc., No. 98 C 1925, 1998 WL 419493, at *19 (N.D. Ill. July 23, 1998), *aff'd*, Nos. 98-3150, 98-3322, 98-4080 (7th Cir. June 18, 1999). Internet access enables subscribers to use electronic mail, file transfers, and Internet Relay Chat, as well as to browse and publish on the World Wide Web. *Id.*

²WorldCom was formerly MFS Intlanet of Virginia, Inc.

obligations on all local exchange carriers and requires them to enter interconnection agreements. Id. § 251(b), (c).

Pursuant to § 251(b)(5), competing local telephone companies must make arrangements to pay each other reciprocal compensation for telecommunications. As stated in the regulations, reciprocal compensation only applies to "local telecommunications traffic," or local calls. 47 C.F.R. § 51.701(a) (1998). Local telecommunications traffic is defined as traffic that "originates and terminates within a local service area established by the state commission." Id. § 51.701(b)(1). Simply stated, local calls are calls that originate on one carrier's network and terminate on the other carrier's network, but are within the same local calling area. The two carriers must assist each other in delivering the calls. The Act requires the caller's local carrier to compensate the other carrier whose facilities are used to complete the local call. Reciprocal compensation is the "arrangement between two carriers . . . in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier." Id. § 51.701(e). The reciprocal compensation arrangements for local calls are given effect through the interconnection agreements between the competing carriers.

Pursuant to § 252 of the Act, interconnection agreements can be arrived at through negotiation or arbitration. Any interconnection agreement adopted by negotiation or arbitration must be submitted for approval to the state commission. Id. § 252(a).

In July 1996, Bell Atlantic and WorldCom entered their Agreement based on voluntary negotiations. In October, the Virginia State Corporation Commission ("Virginia Commission") approved the Agreement. Under the terms of the Agreement, Bell Atlantic and WorldCom expressly agreed to pay each other reciprocal compensation for local traffic. See Agreement, § 5.7. The Agreement defines "local traffic" as "traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that Party's network, within a given local calling area" Id. § 1.44.

WorldCom charged Bell Atlantic for carrying Internet calls originated by Bell Atlantic customers and handed off to WorldCom ISP customers as local calls subject to reciprocal compensation. ISPs provide Internet connections through the telephone network. Illinois Bell, Nos. 98-3150, 98-3322, 98-4080, slip op. at 4. ISPs are assigned local telephone numbers. The telephone companies bill customers for local calls when they call ISPs within the local calling area. Id. However, the ultimate connections are web sites. Generally, the web sites are located

outside of the local calling area in distant locations. Id.

To date, Bell Atlantic has paid reciprocal compensation for ISP calls. However, Bell Atlantic claims that WorldCom violated federal law by collecting "reciprocal compensation" for delivering Internet calls from Bell Atlantic customers to WorldCom ISP customers. In this present action, Bell Atlantic sues WorldCom to recover sums paid for these Internet calls on the theories of breach of contract (Count II) and unjust enrichment (Count III). Additionally, in Count I, Bell Atlantic seeks a declaratory judgment ruling that it was not liable to WorldCom for reciprocal compensation charges on Internet calls. Bell Atlantic requests partial summary judgment on the declaratory relief and as to liability on its breach of contract claim.

WorldCom moves to dismiss the complaint on two grounds. First, WorldCom contends that the Court lacks jurisdiction over the subject matter until the Virginia Commission addresses the issue. Second, WorldCom contends that Bell Atlantic fails to state a claim because it voluntarily paid the reciprocal compensation.

II. Subject Matter Jurisdiction

Primarily, the Court must address Defendant's Motion to

Dismiss for lack of subject matter jurisdiction. The issues presented are: 1) whether § 252(e)(6) of the Act applies in this case and divests the Court of its federal question jurisdiction until determinations are first made by the Virginia Commission; and 2) whether the terms of the parties' Agreement subject their dispute to judicial review.

A. Standard of Review

Pursuant to Federal Rule Civil Procedure 12(b)(1), a claim may be dismissed for lack of subject matter jurisdiction. The burden in proving subject matter jurisdiction is on the plaintiff. Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). Where subject matter jurisdiction is challenged, the factual allegations are assumed true. Virginia v. United States, 926 F. Supp. 537, 540 (E.D. Va. 1995). The court may look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether subject matter jurisdiction exists. Richmond, Fredericksburg & Potomac R.R. Co., 945 F.2d at 768.

B. The Scope of § 252(e)(6)

Pursuant to 28 U.S.C. § 1331, district courts have original jurisdiction over all cases arising under the Constitution, laws

or treaties of the United States. Section 1331 serves as a general federal question statute and gives district courts original jurisdiction over federally created causes of action unless a specific statute assigns jurisdiction elsewhere. Molinary v. Powell Mountain Coal Co., 125 F.3d 231, 235 (4th Cir. 1997). Thus, the Court has jurisdiction unless a statute specifically vests jurisdiction in another entity.

In the present case, the Agreement between the parties was entered into pursuant to sections 251 and 252 of the Act. Initially, the parties dispute whether the Court's jurisdiction arises generally under 28 U.S.C. § 1331 or under § 252 of the Act. In pertinent part, § 252(e)(6) provides:

In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

WorldCom contends that § 252(e)(6) of the Act specifically assigns jurisdiction of issues related to interconnection agreements to state commissions, and in this case, the Virginia Commission. Under § 252(e)(6), WorldCom argues that the district court's jurisdiction attaches only to review the state commission's determination. Furthermore, WorldCom relies on the Federal Communication Commission's (FCC) Declaratory Ruling. According to WorldCom, the FCC Declaratory Ruling stated that, in the absence of any contrary federal law, the issue of reciprocal

compensation for calls to ISPs depends on the terms of the parties' interconnection agreements, as interpreted by the export state agencies. Relying on several decisions from other jurisdictions, WorldCom submits that this Court lacks jurisdiction over the case because Bell Atlantic was required to raise its claims first with the Virginia Commission. Indiana Bell Tel. Co. v. McCarty, 30 F. Supp.2d 1100, 1104 (S.D. Ind. 1998); AT&T Communications of Ohio, Inc. v. Ohio Bell Tel. Co., 29 F. Supp.2d 855, 855-56 (S.D. Ohio 1998); AT&T Communications of Illinois v. Illinois Bell Tel. Co., No. 97 C 0886, 1998 WL 525437, at *4-5 (N.D. Ill. Aug. 18, 1998).

Bell Atlantic contends that federal courts have jurisdiction over claims arising from interconnection agreements because the agreements are the law, not mere contracts. MCI Telecommunications Corp. v. Garden State Inv. Corp., 981 F.2d 385, 387 (8th Cir. 1992). According to Bell Atlantic, nothing in the Act strips the Court of its federal question jurisdiction. Bell Atlantic contends that § 252(e)(6) provides for review of determinations made by state commissions in rejecting or approving interconnection agreements, at the time of creation. § 252(e)(6) does not apply as the Agreement was beyond the approval stages and into performance. According to Bell Atlantic, it seeks relief for breach of the Agreement. Furthermore, Bell Atlantic contends that it seeks