

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

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OFFICE OF THE SECRETARY

Petition of)
)
KMC TELECOM OF VIRGINIA, INC.,)
KMC TELECOM IV OF VIRGINIA, INC. and)
KMC TELECOM V OF VIRGINIA, INC.)
)
For Declaratory Judgment Enforcing)
Three Interconnection Agreements with)
Verizon Virginia, Inc. (f/k/a Bell Atlantic)
-Virginia Inc.) and Directing Verizon Virginia)
to Pay Reciprocal Compensation for the)
Termination of Local Calls to Internet)
Service Providers)

Case No. PUC01 _____

PETITION OF KMC TELECOM OF VIRGINIA, INC., KMC TELECOM IV OF
VIRGINIA, INC. AND KMC TELECOM V OF VIRGINIA, INC.
FOR DECLARATORY JUDGMENT ENFORCING THREE INTERCONNECTION
AGREEMENTS TO PAY RECIPROCAL COMPENSATION FOR THE TERMINATION
OF LOCAL CALLS TO INTERNET SERVICE PROVIDERS

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Dated: November 9, 2001

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**PETITION OF KMC TELECOM OF VIRGINIA, INC., KMC TELECOM IV OF VIRGINIA, INC. AND KMC TELECOM V OF VIRGINIA, INC.
FOR DECLARATORY JUDGMENT ENFORCING THREE INTERCONNECTION AGREEMENTS TO PAY RECIPROCAL COMPENSATION FOR THE TERMINATION OF LOCAL CALLS TO INTERNET SERVICE PROVIDERS**

KMC Telecom of Virginia, Inc., KMC Telecom IV of Virginia, Inc., and KMC Telecom V of Virginia, Inc. (collectively "KMC"), through their undersigned counsel and pursuant to Section 5-20-100 of the Virginia Administrative Code, hereby file this Petition with the Virginia State Corporation Commission ("Commission") seeking enforcement of three interconnection agreements¹ between KMC and Verizon Virginia, Inc. (f/k/a Bell Atlantic-Virginia, Inc.) ("Verizon"). Verizon has repeatedly breached the Agreements by refusing to compensate KMC for the transport and termination of local dial-up calls originated by Verizon end-users and bound for subscribers purchasing local service from KMC. Verizon's offered rationale for not paying is

¹ The operative interconnection agreements are referred to as the "First Agreement" (entered into on March 12, 1997), as the "Second Agreement" (entered into on September 18, 2000), as the "Third Agreement" (entered into on May 14, 2001), and collectively as "the Agreements." They are identified more fully below.

its position that calls from its subscribers using its local exchange service and bound for KMC subscribers that are Internet Service Providers (“ISPs”) are not subject to the payment of reciprocal compensation as provided for in the Agreements. However, as amplified below, these calls *are included* in the parties’ reciprocal compensation arrangements under each of the three Agreements and are fully compensable.

I. THE PARTIES

1. KMC is a corporation licensed to provide local exchange services in the Commonwealth of Virginia, with its principal place of business located at 1545 Route 206, Suite 300 Bedminster, New Jersey 07921. KMC is a “telecommunications carrier” as defined in 47 U.S.C. §153(44).

2. Verizon is a corporation licensed to provide local exchange services in the Commonwealth of Virginia. Its address is 600 East Main Street, 24th Floor, Richmond, Virginia 23261. Verizon is a “telecommunications carrier” and an “incumbent local exchange carrier” in Virginia, as defined in 47 U.S.C. §251(h).

II. JURISDICTION

3. The Agreements provide that, should the parties fail to resolve their disputes thereunder by good faith negotiations, “either Party may initiate an appropriate action in any regulatory or judicial forum of competent jurisdiction.”² In this case, as explained below, attempts to resolve these disputes have failed, KMC, therefore, seeks enforcement of the Agreements before the Commission.

² *First Agreement Section 29.9, Second Agreement Section 29.9, Third Agreement Section 28.9.*

4. Pursuant to section 252(e) of the Act, the Commission has jurisdiction to interpret and enforce interconnection agreements between telecommunications carriers.³ This authority has been explicitly affirmed by the Federal Communications Commission (“FCC”).⁴

5. The Commission has constitutional and statutory duties to regulate the operations of telecommunications public service companies to ensure conformance to the public interest. *See* Va. Const. Art. IX §2 and Code of Va. §56.35. This authority has been reaffirmed by the enactment of §56-235.5.B.

6. Pursuant to 5 VAC 5-20-100, the Commission has jurisdiction to issue declaratory judgments.

³ *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, 208 F.3d 475 (5th Cir 2000) (“[T]he Act’s grant to the state commission of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.”); *Illinois Bell Telephone company v. WorldCom Technologies, Inc.*, 179 F.3d 566 (7th Cir (Ill.) June 18, 1999) as amended (Aug., 19, 1999) (holding that the Act “specifically provides state commissions with an important role to play” in interpreting and enforcing interconnection agreements).

⁴ *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd 3689, 3703, para. 22 (1999) (“Declaratory Ruling”) (stating “where parties have agreed to include this traffic within their section 251 and 252 interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions”), *vacated sub nom Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000); *see* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, *Order on Remand and Report and Order*, FCC 01-131 (April 27, 2001) (“ISP Remand Order”) (affirming that the Order “does not preempt any state commission decision regarding ISP-bound traffic for the period prior to the effective date of the interim regime”); *see also* Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-52, *Memorandum Opinion and Order*, 15 FCC Rcd 11277, para. 6 (2000).

III. STATEMENT OF FACTS

A. The *First Agreement*

7. On or about March 12, 1997, Verizon entered into a voluntarily negotiated interconnection agreement with KMC pursuant to Sections 251 and 252 of the Act (the “First Agreement”). In accordance with Section 252(a), the *First Agreement* was filed with, and approved by, the Commission in Case No. PUC970037 in an Order Approving Agreement entered on August 5, 1997. The *First Agreement* provided, *inter alia*, for compensation for the termination of local traffic originated on one party’s network and directed to a local exchange customer of the other party.

8. The reciprocal compensation obligations of the parties are set forth in Section 5.7 of the *First Agreement*. Section 5.7.2 provides in part as follows:

The Parties shall compensate each other for transport and termination of Local Traffic in an equal and symmetrical manner at the rates provided in the Detailed Schedule of Itemized Charges (Exhibit A hereto) or, if not set forth therein, in the applicable Tariff(s) of the terminating party, as the case may be.

First Agreement at 19.

9. “Local Traffic” is defined in Section 1.44 of the *First Agreement* 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 other Party’s network, within a given local calling area, or expanded area service (“EAS”) area, as defined in BA’s effective Customer tariffs, or if the Commission has defined local calling areas applicable to all LECs, then as so defined by the Commission.

First Agreement at 6.

10. The *First Agreement* does not exclude from reciprocal compensation traffic that meets the definition of Local Traffic but happens to be ISP-bound traffic. There are no

requirements in the *First Agreement* that either Verizon or KMC segregate calls to ISPs for any purpose whatsoever, let alone for the particular purpose of billing for reciprocal compensation.

11. Each party is to be compensated at the same rate. Exhibit A to the *First Agreement*, entitled "Detailed Schedule of Itemized Charges," set the rate for "Local Traffic delivered to Bell Atlantic Interconnection Point"⁵ and the rate for "Local Traffic delivered to KMC Interconnection Point"⁶ at the symmetrical rates of \$.003/mou for End Office Termination and \$.005/mou for Tandem Termination. The reciprocal compensation rates in the Detailed Schedule of Itemized Charges do not differentiate between ISP-bound and non-ISP-bound traffic.

12. The *First Agreement* was amended by the parties on July 30, 1999, to incorporate the rates from the Commission's Final Order in Case No. PUC 970005.⁷ Pursuant to the Order, local call termination rates for traffic subject to tandem compensation was set at \$0.001590 per minute of use.⁸

13. The *First Agreement* expired July 1, 1999, but KMC and Verizon continued to exchange traffic pursuant to the terms of the *First Agreement* until KMC opted into the *Second Agreement*, as described below.

14. In accordance with section 29.5 of the *First Agreement*, the governing law for the construction, interpretation and performance of the agreement is the law of the Commonwealth of Virginia.

⁵ *First Agreement*, BA Services, Facilities and Arrangements, section 13.a, p. 6.

⁶ *First Agreement*, KMC Services, Facilities and Arrangements section 3.a, p. 8

⁷ See Ex Parte: To determine prices Bell-Atlantic-Virginia, Inc. is authorized to charge Competitive Local Exchange Carriers in accordance with the Telecommunications Act of 1996 and applicable State law, *Final Order*, Case No. PUC 970005, Attachment A, (Va. S.C.C. Apr. 15, 1999).

⁸ See Second Amendment to the *First Agreement*, Exhibit AA, Detailed Schedule of Itemized Charges.

B. The *Second Agreement*

15. Pursuant to the Bell Atlantic-GTE Merger Conditions, a telecommunications carrier in one state may elect to adopt a voluntarily negotiated interconnection agreement in another state between Bell Atlantic and another telecommunications carrier.⁹ The *Merger Conditions* specify that such interconnection agreements will be made available to the same extent and under the same rules as section 252(i) adoptions.¹⁰

16. KMC elected to exercise its 252(i) rights, by letter dated September 18, 2000, stating its decision to port the negotiated Global Naps (“GNAPS”)/Bell Atlantic-Maine agreement (“GNAPS/BA-ME Agreement”) which was approved by the Maine Public Utilities Commission, to the Commonwealth of Virginia (“Second Agreement”).¹¹ This agreement became effective on September 18, 2000, and superseded the terms of the *First Agreement*.

17. Like the *First Agreement*, the *Second Agreement* provides that each party will compensate the other for the transport and termination of Local Traffic and ISP-bound traffic. Section 5.7.2 of the *Second Agreement* sets forth the parties’ reciprocal compensation arrangements: “The Parties shall compensate each other for the transport and termination of Reciprocal Compensation Traffic.”

⁹ Application of GTE Corp. Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer of Control, *Memorandum Opinion and Order*, 15 FCC Rcd 14032, App. D, para 32. (2000) (“Merger Conditions”).

¹⁰ *See id.*

¹¹ The *GNAPS/BA-ME Agreement* had been negotiated between New England Telephone and Telegraph Company d/b/a BA-Maine with GNAPS, a competing telecommunications carrier, pursuant to Section 252 of the Act on or about October 1, 1998. The *GNAPS/BA-ME Agreement* was filed with, and approved by, the Maine Public Utilities Commission in Docket No. 98-662 on September 16, 1998.

18. Reciprocal Compensation Traffic includes all Telephone Exchange Service Calls that qualify for Reciprocal Compensation, to the extent consistent with FCC and State

Commission Rulings:

“Reciprocal Compensation Call” or “Reciprocal Compensation Traffic” means a Telephone Exchange Service Call completed between the Parties, which qualifies for Reciprocal Compensation pursuant to the terms of this Agreement and prevailing Commission or FCC rules that may exist.

Second Agreement at 9 (¶1.67).

19. Telephone Exchange Service Calls included are all intra-LATA dial-up calls made from one end user customer to another that do not involve long-distance or toll dialing prefixes:

“Telephone Exchange Service Call” or “Telephone Exchange Service Traffic” means a call completed between two Telephone Exchange Service Customers of the Parties located in the same LATA, originated on one Part’s network and terminated on the other Party’s network where such call was not carried by a third Pary as either a presubscribed call (+1) or a casual dialed (10XXX) or (101XXX) call. Telephone Exchange Service Traffic is transported over Traffic Exchange Trunks.

Second Agreement at 11 (¶1.85). ISP-bound traffic meets the definition of Telephone Exchange Service Traffic.

20. “Reciprocal Compensation” is payable for the transport and termination of Local Traffic and is defined in Section 1.66 of the *Second Agreement* as:

“Reciprocal compensation” is As Described in the Act and refers to the payment arrangements that recover costs incurred for the transport and termination of Local Traffic originating on one Party’s network and terminating on the other Party’s network.

Second Agreement at 9, ¶ 1.66.

21. “Local Traffic” is defined in Section 1.50 of the *Second Agreement* as traffic exchanged between the parties that falls within the local calling scope of the calling party:

“Local Traffic” means 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 other Party’s network, within a given local calling area, or expanded area service (“EAS”) area, as defined in BA’s effective Customer tariffs, or if the Commission has defined local calling areas applicable to all LECs, then as so defined by the Commission.

Second Agreement at 7, ¶ 1.50.

22. Although the *Second Agreement* provides that there will be Reciprocal Compensation for Local Traffic, it establishes that the issue of whether ISP-bound traffic meets the definition of Local Traffic as defined in the agreement has not been determined. Nonetheless, Section 5.7.2.3 provides that Verizon will compensate KMC for ISP-bound traffic at the reciprocal compensation rates applicable to Local Traffic generally until such time as the issue of whether ISP-bound traffic constituted local traffic under the *Second Agreement* was resolved. The *Second Agreement* did not provide for a true-up upon such resolution. The *Second Agreement* provided, however, that, as a surrogate for that determination, the parties would look to FCC or court resolution of whether ISP-bound traffic constitutes local traffic on which reciprocal compensation must be paid pursuant to the 1996 Act, an issue that in 1998 (when the GNAPS/BA-ME Agreement was executed) was ostensibly before the FCC in Docket No. CCB/CPD 97-30.¹²

23. Specifically, the provisions in the *Second Agreement* regarding the reciprocal compensation arrangements between the Parties state that:

The Parties stipulate that they disagree as to whether traffic that originates on one Party’s network and is transmitted to an Internet Service Provider (“ISP”) connected to the other Party’s network (“ISP Traffic”) constitutes Local Traffic as defined herein, and the charges to be assessed in connection with such traffic. The issue

¹² *Second Agreement* at 22.

of whether such traffic constitutes Local Traffic on which reciprocal compensation mush[sic] be paid pursuant to the 1996 Act is presently before the FCC in CCB/CPD 97-30 and may be before a court of competent jurisdiction. The Parties agree that the decision of the FCC in that proceeding, or as such court, shall determine whether such traffic is Local Traffic (as defined herein) and the charges to be assessed in connection with ISP Traffic. If the FCC or such court determines that ISP Traffic is Local Traffic, as defined herein or otherwise determines that ISP Traffic is subject to reciprocal compensation, it shall be compensated as Local Traffic under this Agreement unless another compensation scheme is required under such FCC or court determination. *Until resolution of this issue, BA agrees to pay GNAPS Reciprocal Compensation for ISP Traffic (without conceding that ISP Traffic constitutes Local Traffic or precluding BA's ability to seek appropriate court review of this issue) pursuant to the Commission's Order in Case 97-C-1275, dated March 19, 1998, as such Order may be modified, changed or reversed.*

Second Agreement at 22 (emphasis added), 5.7.2.3.

24. At the time KMC opted-into the GNAPS/BA-ME Agreement, the FCC had in place no effective decision in CCB/CPD 97-30 regarding whether ISP-bound traffic is subject to reciprocal compensation under the Act. In fact, a February 1999 FCC Order concluding that such traffic was not local telecommunications traffic subject to reciprocal compensation under the Act had been vacated by the U.S. Court of Appeals for the D.C. Circuit.¹³ Accordingly, at the time KMC opted-into the GNAPS/BA-ME Agreement in September 2000, the issue upon which continued compensation by Verizon for ISP-bound traffic was based had not been resolved by the FCC and Verizon remained obligated to compensate KMC for ISP-bound traffic until such time, if ever it would be resolved.

25. Since the *Second Agreement* was an adoption of an agreement ported from another state to Virginia, pursuant to the *Merger Conditions*, it incorporated by reference the

¹³ *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

rates promulgated by the Commission in Case No. PUC-970005.¹⁴ Specifically, the appropriate tandem call termination rate for Local Traffic is \$0.001590 per MOU.

26. In accordance with Section 29.5 of the *Second Agreement*, the governing law for the construction, interpretation and performance of the agreement is that of the Commonwealth of Virginia.

27. The *Second Agreement* was superceded by the adoption of the *Third Agreement* on May 14, 2001, as described below.

C. The *Third Agreement*

28. On May 14, 2001, KMC notified Verizon in writing of its adoption of the interconnection agreement between Level 3 Communications, Inc. ("Level 3") and Verizon, pursuant to Section 251(i), which was approved by the Commission on January 13, 2000, in Case No. PUC 980054 ("Third Agreement"). KMC's adoption of the Level 3 agreement became effective upon its written notification that it is exercising its rights under Section 252(i).

Therefore, the *Third Agreement* became effective on May 14, 2001.

29. The *Third Agreement* provides for Intercarrier Compensation, defined as remuneration received by one Party (the "Receiving Party") to recover its costs for receiving and terminating Local Traffic or receiving and handing off Compensable Internet Traffic that originates on the network of the other Party (the "Originating Party").

Third Agreement at 5, ¶ 1.36.

¹⁴ See *Merger Conditions*, 15 FCC Rcd at 14310, para. 32 (noting that the prices of ported interconnection agreements will be established on a state-specific basis pursuant to the extent applicable.).

30. Compensable Internet Traffic includes all dial-up calls by one party's local exchange customers that are local to the originating end user and are destined to the numbers of ISP -customers served on the other party's network:

"Compensable Internet Traffic" means dial-up switched Internet Traffic that is originated by an end-user subscriber of one Party, is transmitted to the switched network of the other Party, and then is handed off by that Party to an Internet Service Provider which has been assigned a telephone number or telephones numbers within an NXX or NXXs which are local to the originating end-user subscriber.

Third Agreement at 3, ¶ 1.16.

31. "Internet Traffic" is defined as "any traffic that is transmitted to or returned from the Internet at any point during the duration of the transmission."¹⁵

32. Section 5.7.3, provides that the party on whose network Compensable Internet Traffic originates will compensate the party serving the Internet service provider:

For Local and Compensable Internet Traffic delivered by the Originating Party to the Receiving Party during the period from and including July 1, 2000, to and including September 30, 2002, the Originating Party shall compensate the Receiving Party at a rate equal to the lesser of \$.0015 per minutes of use or the applicable Reciprocal Call Termination rates in effect forty-five (45) days prior to the date on which the Parties agreed in writing to pay Intercarrier Compensation . . . ; provided, however, that during any month after January 1, 2001, in which the balance of traffic (including both Local Traffic and Compensable Internet Traffic) between the Originating Party and the Receiving Party exceeds a ratio of 10:1, then the rate to be paid by the Originating to the Receiving Party in that month for traffic in excess of said 10:1 ratio shall be the lesser of \$.0012 per minute of use or the applicable Reciprocal Call Termination rates in effect forty-five (45) days prior to the date on which the Parties agree in writing to pay Intercarrier Compensation

Third Agreement at 20, ¶ 5.7.3.

¹⁵ See *Third Agreement*, Section 1.39

33. Section 22.3 specifically provides for the case where a change of law affects reciprocal compensation. The relevant portion of the provision reads as follows:

... if the Commission, the FCC or a court of competent jurisdiction should at any time after the date hereof issue or release an order, or if a federal or state legislative authority should enact a statute, that by its terms (i) *expressly supercedes or modifies existing interconnection agreements* and (ii) specifies a rate or rate structure for reciprocal compensation, intercarrier compensation, or access charges that is to apply to Internet Traffic, then the Parties shall promptly amend this Agreement to reflect the terms of such order or statute for the foregoing interim period (but, for the avoidance of any doubt, not for any period prior to the start of such interim period);...

Third Agreement at 63 (emphasis added). No FCC or court order has been issued that expressly supercedes or modifies the reciprocal compensation provisions of existing agreements.

34. In accordance with Section 28.5 of the *Third Agreement*, the governing law for the construction, interpretation and performance of the agreement is that of the Commonwealth of Virginia.

35. The initial term of the *Third Agreement* expires on September 30, 2002. Thereafter, the Agreement will continue to be effective until cancelled or terminated as provided for in the Agreement. The Agreement will also remain effective during any interim period, not to exceed one year after the proposed date of termination, during which the parties negotiate a new interconnection agreement.

D. The Dispute

36. Pursuant to the three Agreements, KMC terminated local calls originated on Verizon's network and sent to KMC for completion to its local exchange end users. KMC has submitted invoices to Verizon seeking compensation for transporting and terminating such calls.

37. Since the parties began exchanging traffic, KMC has billed Verizon the total sum of \$1,225,738.24, including interest for transporting and terminating local traffic. This amount includes all local traffic terminated and billed, including dial-up calls to ISPs that have telephone numbers within the scope of Verizon's customers' local service.

38. Of this amount, Verizon has paid the sum of \$60,442.65 leaving a balance due of \$1,279,107.44. A summary of the outstanding balance owed to KMC as of October 1, 2001, 2001 is attached hereto as Exhibit A.

39. Verizon has stated in writing that its partial payments represent the portion of the local minutes of use terminated by KMC that Verizon alleges are attributable to calls that did not terminate to ISPs, but KMC has been unable to verify the accuracy of Verizon's calculations.¹⁶ Verizon's partial payments have not been based on any actual measurement by Verizon of ISP-bound traffic; rather Verizon has, without explanation or justification, unilaterally paid KMC only for traffic volumes up to twice as great as the amount of traffic Verizon claimed it terminated. Neither Verizon, nor KMC measure ISP-bound traffic separately from other local calling.

40. Verizon, in an e-mail message from David A. Brock, Billing Specialist, to Nathan Fuchs, Cost Analyst, KMC, on May 30, 2001, mistakenly noted that the Commission has never ruled on the issue of whether internet traffic is subject to reciprocal compensation.¹⁷

41. The Commission in fact has ruled on whether ISP-bound traffic is local traffic under an interconnection agreement in at least one case. In 1997, Cox Virginia Telecom, Inc.

¹⁶ See e-mail message from David A. Brock, Billing Specialist of Verizon, to Nathan Fuchs, Billing Specialist of KMC, on May 30, 2001, and letter of Lori Carbone, Local Interconnection Acting Manager, Verizon, to Michael Sternberg, President KMC Telecom of Virginia (August 10, 2001).

¹⁷ A copy of the e-mail message is attached as Exhibit B.

(“Cox”) petitioned the Commission to interpret and enforce the terms of an interconnection agreement by and between Cox and Verizon, then Bell Atlantic-Virginia (“Bell Atlantic”) (“Cox/BA Agreement”) to provide for reciprocal compensation for ISP-bound traffic.¹⁸ The Commission determined that *calls to ISPs were eligible for reciprocal compensation.*¹⁹

42. The provisions defining Local Traffic and providing for its compensation in the Cox/BA Agreement are the same as the provisions in the *First Agreement* between KMC and Verizon. Consistent with the Commission’s finding in that earlier case, KMC is entitled to reciprocal compensation under the *First Agreement* for all Local Traffic, including ISP-bound traffic.

43. The *Second Agreement* expressly requires Verizon to compensate KMC for Internet Traffic up until resolution of the issue of whether such traffic is local traffic as defined in the *Second Agreement*.

44. Similarly, the *Third Agreement*, expressly provides for Intercarrier Compensation of Compensable Internet Traffic, *i.e.*, ISP-bound traffic.

45. In short, under the terms of the Agreements, KMC is entitled to recover from Verizon for all local traffic terminated by KMC at the reciprocal compensation rates set forth in the respective agreements (less amounts previously paid by Verizon). KMC is also entitled to the lesser of 1½% per month or the highest rate of interest that may be charged under applicable

¹⁸ *Petition of Cox Virginia Telecom, Inc. for Enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet service providers*, Final Order, Case No. PUC970069 (Va. S.C.C. Oct. 24, 1997).

¹⁹ *See id.*

law for late payments under each of the Agreements.²⁰ Based on the balance due, the interest that has accumulated under the Agreements is \$94,950.29

IV. LEGAL ANALYSIS

A. The *First Agreement*

46. KMC is entitled to a judgment against Verizon under the *First Agreement* on the basis of issue preclusion. The issue of whether ISP-bound traffic is included in the definition of Local Traffic found in the *First Agreement* has been previously litigated fully and fairly by Verizon, and decided against Verizon. Verizon is precluded from relitigating this issue. The Commission's ruling that ISP-bound traffic is Local Traffic in the earlier case involving the Cox/BA Agreement is equally applicable to the *First Agreement* which has an identical definition of local traffic. Assuming *arguendo* the Commission would need to review and interpret the *First Agreement de novo*, the plain terms of the *First Agreement* indicate that ISP-bound traffic is included in the definition of Local Traffic under the *First Agreement*. Further, the extrinsic evidence supports this same finding.

1. Verizon is Precluded from Relitigating Whether ISP-Bound Traffic Is Local Traffic Under the *First Agreement's* Definition.

47. Verizon has already fully litigated the issue of whether ISP-bound traffic falls within the definition of Local Traffic as it appears in the *First Agreement*. As explained in the *Cox Petition* seeking enforcement of its interconnection agreement with Verizon (then Bell Atlantic) in Virginia (see ¶ 41, *supra*), which as described above has the identical definition of Local Traffic as the *First Agreement*, Verizon refused to compensate Cox for ISP-bound traffic. Verizon claimed that calls terminating at ISPs were not local calls subject to the reciprocal

²⁰ *First Agreement* at 29.8.7, *Second Agreement* at 29.8.7., *Third Agreement* at 29.8.7.

compensation provisions of that agreement.²¹ The Commission rejected Verizon's arguments and held that calls to ISPs as described in the *Cox Petition* constituted local traffic under the terms of the parties' agreement. The Commission, in that proceeding, resolved the issue finding that reciprocal compensation was due for the termination of this type of call.²² Verizon is precluded from relitigating this issue because it fully litigated this issue in the proceeding resulting from the *Cox Petition*.

48. The courts have recognized the right of a litigant which was not a party to the prior judgment to use that judgment "offensively" to prevent a defendant from relitigating issues resolved in an earlier proceeding.²³ The doctrine of collateral estoppel promotes important judicial goals including the finality of judgments, preservation of the judicial system's integrity by eliminating inconsistent results, and judicial economy by conserving time and resources of the parties and the court.²⁴ Offensive use of collateral estoppel has been allowed in many circumstances especially where the party now raising it had no opportunity to participate in the original proceeding and where the defendant previously had a full and fair opportunity to defend its position on this issue.

49. Collateral estoppel applies when the issue sought to be precluded is identical to the previously litigated issue; the issue is actually determined; the determination of the issue is a

²¹ Cox Virginia Telecom, Inc. v. Bell Atlantic-Virginia, Inc., for enforcement of interconnection agreement and arbitration award, for reciprocal award, for reciprocal compensation, for the termination of local calls to Internet Service Providers, *Response of Bell Atlantic-Virginia, Inc.*, Case No. PUC970069 (August 29, 1997).

²² Petition of Cox Virginia Telecom for Enforcement of Interconnection Agreement with Bell Atlantic-Virginia, Inc. and arbitration for the termination of local calls to Internet Service Providers, *Final Order*, Case No. PUC970069 (Oct. 24, 1997).

²³ *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1997).

²⁴ *Johnson v. Watkins*, 101 F.3d 792 (2nd Cir. 1996).

critical and necessary part of the decision in the previous proceeding; the prior judgment is final and valid; and the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum.²⁵ Few states still require mutuality, the policy requiring that the favorable preclusive effects of a judgment be available only to a person who would have been bound by any unfavorable effects. The overwhelming majority of states have abandoned this rule.²⁶

50. Generally, courts will apply collateral estoppel where it is clear from the prior record that the party in the subsequent action against whom collateral estoppel is asserted has fully and fairly litigated and lost an issue which was essential to the prior judgment. In this case, it is clear that Verizon has had a full and fair opportunity to defend its position on this issue and should be precluded from relitigating the issue. First, in the *Cox Petition* case, Cox sought to compel Verizon to pay reciprocal compensation for ISP-bound traffic as provided in the Cox/BA Agreement. In this case, KMC is seeking to achieve the same thing as Cox under identical contractual terms. Second, the Commission in its Final Order in the *Cox Petition* made the determination that ISP-bound traffic meets the local traffic definition under the agreement and is compensable. Third, the Commission squarely decided the ultimate issue in the *Cox Petition* case – whether ISP-bound Traffic met the agreement’s Local Traffic definition – leading to a finding of liability against Verizon. As such, the finding that ISP-bound traffic met the definition of Local Traffic was an indisputably critical and necessary part of the Final Order in that case. Fourth, even though Verizon initially appealed the Commission’s decision to the Supreme Court

²⁵ *Sedlack v. Braswell Services Group*, 134 F.3d 219, 223 (4th Cir. 1998).

²⁶ Virginia has reconsidered this issue numerous times and is mindful of the trend to abolish mutuality. See *Norfolk and W. Ry. Co. v. Bailey Lumber Co.*, 272 S.E.2d 217 (1980).

of Virginia, it soon thereafter withdrew that appeal, making the Final Order a final and nonappealable decision.²⁷ And fifth, Verizon had a full and fair opportunity to litigate the claim before the Commission.²⁸ Accordingly, precluding Verizon from relitigating this issue on the same facts is appropriate.

2. The Terms of the *First Agreement* Support a Finding That ISP-Bound Traffic Is Local Traffic.

(i) The Terms of the *First Agreement* are Clear and Unambiguous.

51. The Commission's decision in the *Cox* case was a sound one. Assuming for the sake of argument the Commission decides to review the *First Agreement de novo*, the result would be the same even if issue of preclusion did not apply. Principles of contract interpretation under Virginia law require that where a writing or a term in question appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the document without resorting to extrinsic evidence.²⁹ Where the parties have reduced their contract to a writing in clear and explicit terms, the writing will be "the sole memorial of that contract and it is conclusively presumed that the writing contains the whole contract."³⁰

52. The *First Agreement* expressly defines "Local Traffic" in a way that unquestionably includes calls to ISPs that were made by callers pursuant to local exchange service. The definition plainly includes calls that originate with Verizon local service subscribers

²⁷ See *Bell Atlantic-Virginia Inc. v. Cox Virginia Telecom, Inc., et al*, Record No. 980385, Petition for Appeal Filed February 24, 1998; See *id.*, Order granting Motion For Leave To Withdraw Appeal (April 10, 1998).

²⁸ For example, Verizon filed a nineteen page response along with an affidavit to the *Cox Petition*.

²⁹ See *Berry v. Klinger*, 225 Va. 201, 208, 300 S.E. 2d 792, 796 (1983) .

³⁰ *Steward-Warner Corp. v. Marvin Smithey, et al*, 163 Va. 476, 487, 175 S.E. 882, 886 (1934) *citing* *Coal River Coleries v. Eureka Coal & Wood Co.*, 144 Va. 263, 132 S.E. 337, 343, 46 A.L.R. 485).

to KMC subscribers that are within the scope of the calling party's local exchange service. The *First Agreement* unequivocally provides for reciprocal compensation for Local Traffic.

53. Further, the *First Agreement* does not distinguish between ISP-bound traffic and other types of traffic that meet the "Local Traffic" definition. If Verizon wanted to exclude a category of calls from the definition that otherwise meets the definition of Local Traffic, it could have done so, but it did not. A Verizon subscriber's local exchange call to a KMC local subscriber that is an ISP falls squarely within the definition of Local Traffic.

54. Even though Verizon may seek to dispute the meaning of the term "Local Traffic" as it applies to ISP-bound traffic, the ordinary meaning of the term as it is used in the *First Agreement* is clear. A contract will not be rendered ambiguous "merely because the parties disagree as to the meaning of the language employed by them in expressing their agreement."³¹ Verizon's differing interpretation of the term "Local Traffic" will not render the *First Agreement* ambiguous and prompt the Commission to introduce extrinsic evidence, since the definition is clear on its face. Therefore, under the plain language of the *First Agreement*, calls placed to an ISP end user customer of KMC that is within the local calling area of Verizon's customers fall within definition of "Local Traffic."

55. Any other interpretation of the *First Agreement* that would exempt ISP-bound traffic would require terms to be added that are not present in the *First Agreement* as it was negotiated and signed by the parties. Where the language is clear, "the law will not insert by construction, for the benefit of a party, an exception or condition which the parties omitted from

³¹ *Wilson v. Holyfield*, 227 Va. 184, 187, 313 S. E. 2d 396, 398 (1984).

their contract by design or neglect.”³² Adding such terms would be contrary to principles of contract interpretation, and contrary to the provisions of the *First Agreement*, which specifically provide that any amendment must be in writing and signed by both parties.³³ As such, Verizon’s intention to exclude calls to ISPs from the provision governing compensation for the termination of local traffic is immaterial if the language is not ambiguous.

(ii) The Extrinsic Evidence of the Parties’ Intent Supports the Conclusion Based on the Plain Language that the Local Traffic Definition Includes ISP-Bound Traffic.

56. Were the Commission to look at extrinsic evidence to ascertain the intent of the parties, the Commission would conclude that the plain language interpretation described above indeed coincides with the parties’ intent. In determining the parties’ intent whether the definition of “Local Traffic” included ISP-bound traffic based on extrinsic evidence, the Commission must consider the circumstances surrounding the execution of the *First Agreement*. The *First Agreement* was negotiated in the context of the longstanding policy of the FCC and state commissions all over the country of treating calls to ISPs as local calls.³⁴ Thus, when KMC and

³² *Bridgestone/Firestone, Inc. v. Prince William Square Associates*, 250 Va. at 407,463 S.E. 2d 661, 664 (Va. 1995).

³³ See *First Agreement* Section 29.19.

³⁴ See generally, Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with U S West Communications, Inc., Docket Nos. U-2752-96-362 and E-1051-96-362, Decision No. 59872, *Opinion and Order* (Ariz. CC Oct. 29, 1996); Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions with U S West Communications, Inc., Docket No. 96A-287T, Decision No. C96-1185, *Decision Regarding Petition for Arbitration* (Colo. PUC Nov. 5, 1996); Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCIMetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US West Communications, Inc., Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729, *Order Resolving Arbitration Issues* (Minn. PUC Dec. 2, 1996); In re Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions, Docket No. Arb 1, *Arbitrator’s Decision* (Ore. PUC Nov. 8, 1996); In re Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and U S West Communications, Inc., Docket No. UT-960323, *Order*

(footnote continued on next page)

Verizon executed their interconnection agreement in 1997 they reasonably believed that calls to ISPs fit within the definition of “Local Traffic” and, therefore, were subject to their respective reciprocal compensation obligations.

57. At the time that the *First Agreement* was executed, ISP-bound traffic was treated as local in virtually every aspect by all industry participants, including this Commission.³⁵ Verizon was fully aware of the industry’s prevailing treatment of ISP-bound traffic as local when it negotiated and entered the *First Agreement*. Verizon’s intent to include ISP-bound traffic in the definition of “Local Traffic” is apparent in several circumstances. First, in its position in the Reply Comments in the FCC’s *Local Competition* proceeding, it urged the FCC to reject a “bill and keep” methodology for reciprocal compensation and acknowledged the propriety of paying CLECs reciprocal compensation for outbound traffic to ISPs if bill and keep was not implemented.³⁶ Verizon was aware that dial-up ISP-bound traffic would be originated on its network and handed over to competitors for termination and conceded that such traffic would be compensable at the reciprocal compensation rates.³⁷

58. Second, during the negotiations with KMC for the *First Agreement*, Verizon was in the midst of a disagreement with Cox over the proper treatment of ISP-bound traffic for reciprocal compensation purposes under the already approved Cox interconnection agreement.

(continued from previous page)

Approving Negotiated and Arbitrated Interconnection Agreement (WA UTC Jan. 8, 1997); Petition of the Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Services Provider Traffic, Docket No. 97-05-22, *Decision* (Conn. DPUC Sept. 17, 1997).

³⁵ See previous footnote for example.

³⁶ See *In re* Implementation of Local Competition Provisions in the Telecommunications Act of 1996, *Reply Comments of Bell Atlantic*, CC Docket No. 96-98, at 20-21 (May 30, 1996) (a copy is appended hereto as Exhibit C).

³⁷ See *id.*

Nevertheless, Verizon did not seek to exempt ISP-bound traffic from the definition of Local Traffic in the *First Agreement* with KMC. Indeed, Verizon agreed with KMC to the same material terms as it had with Cox, relegating itself to the same outcome in both cases.

59. The FCC itself addressed the complex interplay of factors to be considered by state commissions in construing the parties' agreement pursuant to extrinsic evidence to determine whether ISP-bound traffic should be treated similarly as local traffic in its *Declaratory Ruling*.³⁸ The factors cited by the FCC are whether incumbent LECs serving Enhanced Service Providers (including ISPs) have done so out of intrastate or interstate tariffs; whether revenues associated with those services were counted as intrastate or interstate revenues; 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; 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 whether, if ISP-bound traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic.³⁹

60. After careful consideration of the extrinsic evidence related to the factors listed above, the Commission would find that under the Agreements ISP-bound traffic was to be treated as local traffic. Verizon's ISP end user customers have been and are served out of intrastate tariffs for dial-up traffic. Verizon treats the revenues associated with those services as intrastate revenues. As noted above, it is KMC's understanding that Verizon or KMC made no efforts to segregate ISP-bound traffic or track it separately for purposes of billing reciprocal compensation.

³⁸ *Declaratory Ruling*, 14 FCC Rcd. at 3690.

³⁹ *See id.*, 14 FCC Rcd. at 3703-3704, para. 24.

KMC did not take such steps nor did Verizon ask KMC to do so. Verizon provided message unit local exchange service in Virginia and included dial-up calls to ISPs as subject to message unit charges. Finally, without reciprocal compensation for Verizon customer-oriented traffic delivered by KMC to its ISP customers, KMC would *not* be compensated for the transport and switching in such delivery.

61. State commissions may continue to enforce interconnection agreements and more specifically the reciprocal compensation provisions thereof by examining the factors stated above. Particularly, the FCC's more recent *ISP Remand Order* left intact the jurisdiction of state commissions to enforce and interpret reciprocal compensation provisions of pre-existing agreements.⁴⁰ As such, the *ISP Remand Order* did not affect the significance of these factors when state commissions examine the reciprocal compensation provisions of pre-existing agreements. The *ISP Remand Order* only had a prospective effect in certain agreements, and even then no earlier than June 14, 2001: the *First Agreement* was superseded in 2000.

62. The regulatory environment at the time of the *First Agreement* and the proper consideration of the relevant factors listed by the FCC in the *Declaratory Ruling* indicate that a Commission review of extrinsic evidence would support the conclusion that ISP-bound traffic is included in the definition of Local Traffic in the *First Agreement* and is compensable.

B. The *Second Agreement*

1. Verizon Expressly Agreed to Pay Reciprocal Compensation for ISP-Bound Traffic

63. It is clear from Section 5.7.2.3 of the *Second Agreement* that, while the contract articulates a detailed definition of Local Traffic, the original parties – GNAPS and Bell Atlantic

⁴⁰ See *ISP Remand Order*, para. 82.

– disagreed whether ISP-bound traffic constituted Local Traffic as defined in Section 1.50 of the Agreement. It is equally clear, however, that the parties intended for Verizon to compensate GNAPS for transporting and terminating ISP-bound traffic at the reciprocal compensation rates applicable under the Agreement until such time as the issue of whether ISP-bound traffic was local telecommunications *under the Act* was ultimately resolved by the FCC or a court of competent jurisdiction. The parties understood that, at the time, the FCC was considering in Docket CCB/CPD 97-30 the issue of whether ISP-bound traffic was “local” traffic under the Act. While this is a different issue from the determinative one of whether ISP-bound traffic is Local Traffic under the *Second Agreement*, the contract provides that the FCC’s determination would operate as a surrogate to settle the disagreement between the parties and determine whether Verizon’s obligation to compensate the other carrier for ISP-bound traffic at the reciprocal compensation rates would expire, change, or continue. By opting into the GNAPS/BA-ME Agreement, KMC is entitled to the same treatment of ISP-bound traffic as GNAPS.

64. Neither the FCC nor any court has resolved the issue of whether ISP-bound traffic is local telecommunications under the Act for reciprocal compensation purposes. In 1999, the FCC issued a *Declaratory Ruling* addressing the nature and treatment of ISP-bound traffic. In its *Declaratory Ruling*, the FCC found that ISP-bound traffic is jurisdictionally interstate and, thus, concluded that it was not local traffic under the Act.⁴¹

65. On appeal, the U.S. Court of Appeals for the D.C. Circuit vacated the *Declaratory Ruling* on this very issue and remanded the case back to the FCC.⁴² The resulting *ISP Remand*

⁴¹ See *Declaratory Ruling*, 14 FCC Rcd. at 3707-09.

⁴² See *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (stating that “the Commission has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as ‘terminat[ing]... local telecommunications traffic,’ and why such traffic is ‘exchange access’ rather than ‘telephone exchange service.’”).

Order, was released on April 27, 2001. In the *ISP Remand Order*, the FCC did not return to the question addressed in the vacated *Declaratory Ruling* of whether ISP-bound traffic is local traffic under the Act; rather, the FCC took a different approach to the questions it faced and concluded that ISP-bound traffic is “information access” traffic and is not subject to reciprocal compensation for that reason under Section 251(b)(5) of the Act.⁴³ Accordingly, the issue of whether ISP-bound traffic was “local” for purposes of Section 5.7.2.3 remained unresolved for the entire term of the *Second Agreement*. Therefore, Verizon must compensate KMC for transport and termination of ISP-bound traffic for the entire period from September 18, 2000, until May 14, 2001, when the *Second Agreement* was superceded by the *Third Agreement*. Assuming for the sake of argument that the *ISP Remand Order* did address the issue identified in the *Second Agreement*, that Order is under appeal, so the issue was still not resolved before the *Second Agreement* was superceded. Furthermore, the *ISP Remand Order* did not even take effect until June 14, 2001 (30 days after Federal Register publication), a month after the *Second Agreement* no longer governed the parties’ relationship.

C. *The Third Agreement*

1. **The Terms of the *Third Agreement* Are Clear and Unambiguous: Compensation Is Due for ISP-Bound Traffic**

66. As stated above, under Virginia law, when the terms of an agreement are clear and unambiguous, the agreement’s meaning is to be found within the four corners of the document.⁴⁴ The terms of the *Third Agreement* are clear and plain on their face. They expressly provide for compensation for the termination of local traffic as well as for termination of Internet traffic that

⁴³ See *ISP Remand Order*, para. 34.

⁴⁴ See *Berry*, 225 Va at 208, 300 S.E.2d at 796.

is within the local calling scope of the originating party. The language of Section 5.7.3 indicates that the Parties in the *Third Agreement* specifically contemplated that ISP-bound traffic would be compensable under the terms of the Agreement. The rates in Section 5.7.3 relate not only to local traffic but to “compensable Internet traffic.” There is no ambiguity surrounding the obligations of the parties to the *Third Agreement* concerning reciprocal compensation.

67. The *ISP Remand Order* did not alter the reciprocal compensation provisions of the *Third Agreement*. Since KMC opted into the underlying Level 3/Verizon agreement before the effective date of the *ISP Remand Order*, the *Third Agreement* qualifies as a “pre-existing agreement.” The *ISP Remand Order* alters pre-existing agreements only to the extent required by the change of law provisions in those agreements. The *Third Agreement* has a change of law provision specifically applicable to reciprocal compensation. That provision states that an amendment is allowed only if the FCC, the Commission or a court of competent jurisdiction issues an order, a decision or if a federal or state legislative authority enacts a statute that (i) expressly supersedes or modifies existing interconnection agreements *and* (ii) specifies a rate or rate structure for reciprocal compensation that applies to Internet traffic. In this case even though the *ISP Remand Order* arguably created a rate structure for compensation of ISP-bound traffic, the first prong is not met. The *ISP Remand Order* does *not* expressly supercede or modify pre-existing interconnection agreements, quite the opposite. The *ISP Remand Order* states that it leaves reciprocal compensation arrangements unaltered unless changed by the agreement’s own terms. Thus, Verizon is obligated under the *Third Agreement* to make reciprocal compensation payments consistent with the unambiguous provisions of the Agreement and compensate Internet traffic accordingly.

V. RELIEF SOUGHT

68. KMC seeks an order from the Commission (1) determining that KMC is entitled to be compensated for transporting and terminating calls to ISPs under the terms of each of the three Agreements in effect between KMC and Verizon, (2) declaring that Verizon is liable to KMC for all past due amounts accrued under all three Agreements together with interest or late fees thereon, as permitted by the Agreements or by applicable Virginia law, and (3) ordering Verizon to compensate KMC on an ongoing basis for transporting and terminating calls to ISPs under the *Third Agreement*, prospectively, according to its terms.

VI. CONCLUSION.

69. KMC respectfully requests that the Commission issue an order and take other actions as specified herein.

Respectfully submitted,



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KMC Telecom IV of Virginia, Inc., and
KMC Telecom V of Virginia, Inc.**

Dated: November 9, 2001

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2001, a true and correct copy of the foregoing Petition of KMC Telecom of Virginia, Inc., KMC Telecom IV of Virginia, Inc. and KMC Telecom V of Virginia, Inc. for Declaratory Judgment Enforcing Three Interconnection Agreements to Pay Reciprocal Compensation for the Termination of Local Calls to Internet Service Providers was served by certified mail, postage prepaid, return receipt requested upon:

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Eric M. Page

Exhibits

Exhibit A: Summary of the outstanding balance owed to KMC as of October 1, 2001, 2001.

Exhibit B: Email message from David A. Brock to Nathan Fuchs on May 30, 2001.

Exhibit C: Implementation of Local Competition Provisions in the Telecommunications Act of 1996, *Reply Comments of Bell Atlantic*, CC Docket No. 96-98, at 20-21 (May 30, 1996).