

ORDER NO. 75717

IN THE MATTER OF THE PETITIONS FOR
APPROVAL OF AGREEMENTS AND
ARBITRATION OF UNRESOLVED ISSUES
ARISING UNDER SECTION 252 OF THE
TELECOMMUNICATIONS ACT OF 1996.

* BEFORE THE
* PUBLIC SERVICE COMMISSION
* OF MARYLAND
*

CASE NO. 8731

ORDER ON ARBITRATION

On December 3, 1998, Sprint Communications Company L.P. ("Sprint") filed a Motion for Resolution of Disputed Issues ("Motion"). Through this Motion, Sprint requested that the Commission make a determination that calls made to Internet Service Providers ("ISPs") are local in nature and subject to reciprocal compensation.

By letter dated January 14, 1999, the Commission directed Bell Atlantic-Maryland, Inc. ("BA-MD") to file a response to the Sprint Motion. On January 21, 1999, BA-MD filed its response by which it claimed that the Federal Communications Commission ("FCC") had issued an order that invalidates Sprint's claims that ISP traffic terminates locally.¹

On January 26, 1999, Sprint filed a Reply contending that the FCC had not issued an order resolving this dispute and that the Commission had jurisdiction to rule on the matter. On February 1, 1999, the Commission issued a ruling finding that ISP traffic was local in nature and therefore subject to reciprocal compensation from BA-MD.²

¹ BA-MD relied upon the FCC's Memorandum Opinion and Order issued in GTE Telephone, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79. FCC 98-292 (October 20, 1998).

² Letter from Felecia L. Greer, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Bell Atlantic-Maryland, Inc. and Cathy Thurston, Sprint Communications, L.P. (Feb. 9, 1999).

On February 26, 1999, the FCC released an Order clarifying the jurisdictional nature of calls to ISPs.³ In response to the FCC Order, BA-MD filed a "Petition for Declaratory Order" ("Petition"). Specifically, BA-MD sought an order declaring that, pursuant to the FCC Order, and under the terms of BA-MD's interconnection agreements, calls from BA-MD's network to ISPs served by interconnecting carriers do not constitute local traffic subject to reciprocal compensation.

On March 19, 1999, Sprint filed a "Complaint and Motion to Require BA-MD to Sign an Interconnection Agreement" ("Second Motion") Sprint requested that the Commission direct BA-MD to incorporate into its interconnection agreement with Sprint language that is consistent with the Commission's directive of February 9, 1999. Sprint also objected to BA-MD's proposed language concerning the provision of unbundled network elements ("UNE"). On April 21, 1999, BA-MD filed a Response to the Second Motion and asked that BA-MD's proposed language be incorporated into the agreement. BA-MD also informed the Commission that Sprint had agreed to its proposed UNE language.⁴ At the Commission's weekly Administrative Meeting of May 5, 1999, Sprint confirmed that the issue with regard to unbundled network elements had been resolved by the parties.⁵ Both Sprint and BA-MD also presented argument regarding why the Commission should adopt the language concerning ISP calls which each had proffered.

On June 11, 1999, the Commission issued Order No. 75280, which resolved the issues raised by BA-MD's Petition. Under this Order, the Commission determined that the parties

³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket 96-96 (rel. Feb. 26, 1999)

⁴ Answer of BA-MD at page 2-3.

who do not have approved interconnection agreements should receive the arbitrated reciprocal compensation rates contained in the approved Statement of Generally Available Terms ("SGAT") as an interim compensation mechanism until the FCC establishes an appropriate inter-carrier compensation mechanism for ISP-bound traffic.

By letter dated June 25, 1999, the Commission informed both Sprint and BA-MD that the Commission's generic resolution of this issue in Order No. 75280 also resolved the specific issue raised in Sprint's Second Motion. The Commission directed the parties to incorporate into their interconnection agreement language consistent with Order No. 75280 and to file this agreement for approval by the Commission within thirty days.

On July 23, 1999, Sprint filed its proposed interconnection agreement. As noted by Sprint, the parties were unable to agree on terms related to traffic delivered to ISPs, UNEs and Internet Telephony. Specifically, Sprint objected to BA-MD's attempt to include language that classifies Internet traffic jurisdiction as not local traffic and the exclusion of Internet Telephony from the definition of Internet Traffic. With regard to the UNE proposed language, Sprint stated that subsequent to its initial review of BA-MD's proposed language, it determined that this language was inconsistent with another section of the proposed interconnection agreement and was inconsistent with the Commission's UNE Order and other applicable law.

On July 26, 1999, BA-MD filed its own proposed language. BA-MD argued that its language regarding ISP traffic and Internet Telephony is necessary to demonstrate that BA-MD disagreed with treating ISP traffic as local, including Internet Telephony calls. With regard to the UNE language, BA-MD argued that Sprint agreed to BA-MD's proposed language over

⁵ Tr. At 41.

three months ago. According to BA-MD, Sprint should not be permitted to reopen this aspect of the litigation. In a letter response dated August 2, 1999, Sprint argued that BA-MD's language "does not meet our current business needs" and is inconsistent with Commission's Order No. 74671.

Staff filed comments on August 26, 1999. With regard to the UNE language issue, Staff argued that Sprint originally accepted BA-MD's language despite the Commission's Order on UNE combinations. According to Staff, Sprint should not be permitted to abandon its prior agreement because it has subsequently found that the agreement did not meet its current business needs. With regard to the ISP issue, Staff proposed its own language which it contends is consistent with the Commission's prior orders, federal law and will not foreclose any rights BA-MD may have to challenge such orders.

The Commission considered the language to be incorporated in the interconnection agreement at its weekly Administrative Meeting of September 15, 1999. At this meeting, BA-MD stated that it was in general agreement with Staff's recommended language with one exception. BA-MD argued that Staff's language would bind the Company in the future even if the Commission's Order was overturned.⁶

Sprint contended that it had not negotiated away its right to take a position on the UNE language because its negotiations with BA-MD were ongoing in nature and Sprint should not be bound until the Company has actually signed an agreement.⁷ Sprint also did not have a problem

⁶ TR at 30-31.

⁷ TR at 32-33.

with Staff's language but asked the Commission to remove from the definition of local service the statement that Internet traffic is not local traffic.⁸ At the close of the meeting, the Commission directed the parties to attempt to come to an agreement on the proposed language and to report back to the Commission on their progress by September 20, 1999.

On September 20, 1999, Staff filed a letter with the Commission regarding the status of the negotiations. The parties were able to reach agreement on the following language:

As per the Maryland Public Service Commission's Order No. 75280, dated June 11, 1999, the rates for Internet Traffic shall apply (unless Order No. 75280 is subsequently modified by action of the Maryland Public Service Commission, the Federal Communicative Commission, or a court of competent jurisdiction) until the FCC issues an order creating an inter-carrier compensation mechanism for Internet Traffic.

However, the parties were unable to resolve any of the other issues raised at the hearing.

Despite several attempts to resolve their differences, the parties have been unable to produce a joint Interconnection Agreement for Commission approval. The differences between the two proposed Interconnection Agreements involve the UNE proposed language and the reciprocal compensation language.

With regard to the UNE language, the Commission finds that Sprint is bound by its previous agreement to accept BA-MD's proposed language. Sprint argued that because the negotiations with BA-MD are ongoing, it should not be bound by any positions taken by Sprint during the negotiations until the agreement is signed. If all that had occurred was negotiations

⁸ TR at 33-34.

between the two companies, Sprint's position may very well be true. However, Sprint took these negotiations one step farther when it informed the Commission that the issue was resolved. At this point, the issue regarding UNE platform language was taken out the Commission's hands.⁹ Since Sprint by its own actions removed this issue from the Commission's consideration, Sprint must remain bound by that decision. To determine otherwise would inject a degree of uncertainty into Commission proceedings which is unwarranted and would also adversely impact the finality of such proceedings. The parties are hereby directed to incorporate into their interconnection agreement BA-MD's proposed language that Sprint agreed to in April of this year.

With regard to the reciprocal compensation proposed language, both Sprint and BA-MD stated that, in general, they had no objection to Staff's proposed language. Thus, the Commission shall utilize Staff's proposal as the starting point for determining the reciprocal compensation language to be included in the interconnection agreement.

Staff's proposed language is as follows:

2.5 In accordance with and to the extent required by the Maryland Public Service Commission's Order dated June 25, 1999 in Case No. 8731 ("Maryland Order"), each Party shall charge the other Party Transport and Termination charges applicable to Local Traffic (as defined in section 2.2) for Internet Traffic on a temporary basis, at rates ordered by the Maryland Public Service Commission in Case No. 8731, Phase I Order No. 74365, at page 17, as contained in Attachment 1 (Detailed Schedule of Itemized Charges) in the manner set forth in section 2.4 of this Attachment 15.

As per the Maryland Public Service Commission's Order No. 75280, dated June 11, 1999, the rates for Internet Traffic shall apply until the FCC issues an order creating an inter-carrier compensation mechanism for Internet

⁹ It should be noted that pursuant to the Telecommunications Act of 1996, a State commission has authority to consider only those issues presented to it by the two negotiating parties. 47 U.S.C. §252(b)(4)(A).

Traffic. Specifically, the rates for Internet Traffic shall be the reciprocal compensation rates established by the Maryland Commission's Arbitration order and contained in BA-MD's approved SGAT.

BA acknowledges that this section 2.5 does not constitute voluntary agreement by BA to pay transport and Termination charges, or other charges, for Internet Traffic. Nothing in this section shall affect BA's right to seek appeal, modification, or revision of any decision or order requiring BA to pay transport and Termination charges or other charges, for Internet Traffic.

BA reserves the right to assert in any appropriate forum that Internet Traffic over which telephony is conducted ("Internet Telephony") is subject to a different compensation structure (such as, for example, access) than the compensation structure specified in this Section 2.5. The Parties agree to abide by any legally effective order of the FCC, the Commission or a court of competent jurisdiction, regarding the compensation structure applicable to Internet Telephony.

Nothing in this section 2.5 constitutes an agreement by BA that Local Traffic includes Internet Traffic.

The Commission shall adopt the first paragraph of 2.5 in its entirety. With regard to the second paragraph, the parties submitted a letter to the Commission on September 20, 1999 which provided the agreed upon language for this subsection. The Commission shall adopt the language negotiated by the parties.

In the third paragraph, Sprint objects to the inclusion of the statement that "BA acknowledges that this section 2.5 does not constitute voluntary agreement by BA to pay transport and Termination charges, or other charges, for Internet Traffic."¹⁰ Similar language appears in the final paragraph of section 2.5. This paragraph states that "Nothing in this section 2.5 constitutes an agreement by BA that Local Traffic includes Internet Traffic."

¹⁰ BA-MD contended that this language should be changed to read that Sprint acknowledges BA-MD's position. TR at 46. However, Staff explained that the language was included to allow BA-MD to state its

BA-MD contends that language was necessary to prevent Sprint from arguing later that this section constitutes a voluntary agreement to pay reciprocal compensation for ISP traffic.¹¹ The Commission rejects the language describing BA-MD's position because such language is inappropriate for an interconnection agreement. BA-MD has emphatically stated in several instances on the record that it disagrees with the Commission's decision in Order No. 75280. Given the record in these proceedings, there is no reasonable manner by which BA-MD's obligation to pay reciprocal compensation for ISP calls could be interpreted as voluntary. The Commission finds that BA-MD's legal position is fully protected without resort to the addition of inappropriate language into the agreement.

To summarize, Staff's proposed language for section 2.5 shall be amended to read:

2.5 In accordance with and to the extent required by the Maryland Public Service Commission's Order dated June 25, 1999 in Case No. 8731 ("Maryland Order"), each Party shall charge the other Party Transport and Termination charges applicable to Local Traffic (as defined in section 2.2) for Internet Traffic on a temporary basis, at rates ordered by the Maryland Public Service Commission in Case No. 8731, Phase I Order No. 74365, at page 17, as contained in Attachment 1 (Detailed Schedule of Itemized Charges) in the manner set forth in section 2.4 of this Attachment 15.

As per the Maryland Public Service Commission's Order No. 75280, dated June 11, 1999, the rates for Internet Traffic shall apply (unless Order No. 75280 is subsequently modified by action of the Maryland Public Service Commission, the Federal Communications Commission, or a court of competent jurisdiction) until the FCC issues an order creating an inter-carrier compensation mechanism for Internet Traffic.

Nothing in this section shall affect BA's right to seek appeal, modification, or revision of any decision or order requiring BA to pay transport and Termination charges or other charges, for Internet Traffic.

position and that Sprint should not be forced to acknowledge BA-MD's position. TR at 46-47. Sprint agreed that it should not be forced to acknowledge BA-MD's position. TR at 47.

¹¹TR at 47.

BA reserves the right to assert in any appropriate forum that Internet Traffic over which telephony is conducted (“Internet Telephony”) is subject to a different compensation structure (such as, for example, access) than the compensation structure specified in this Section 2.5. The Parties agree to abide by any legally effective order of the FCC, the Commission or a court of competent jurisdiction, regarding the compensation structure applicable to Internet Telephony.

In a related matter, Sprint argued that the definition of local traffic should not include the statement that Internet Traffic is not local traffic.¹² Sprint objects to this language because it contends that two sections of the agreement would be contradictory if this phrase is included. According to Sprint, one section of the agreement would state that traffic is not local while another section would say this traffic should be treated as local.¹³

BA-MD argues that this language is necessary to preserve the Company’s position that Internet traffic is not local and it is not voluntarily agreeing to pay compensation for such traffic.¹⁴ For the reasons discussed above, the Commission finds that BA-MD’s legal position is fully protected without resort to this additional language. The Commission therefore finds that the statement “Internet traffic is no local traffic” should be deleted from the definition of local traffic.¹⁵

IT IS, THEREFORE, this 29th day of October, in the year Nineteen Hundred and Ninety-nine, by the Public Service Commission,

¹² TR at 33.

¹³ TR at 54.

¹⁴ TR at 47.

ORDERED: That Bell Atlantic-Maryland, Inc. and Sprint Communications Company, LP shall file a joint interconnection agreement incorporating the directives set forth above within ten days of the issuance of this Order.

Commissioners

¹⁵ This definition appears in Attachment 11, page 7 of the Inter-connection Agreement filed with the

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Commission.