

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
COX VIRGINIA TELCOM, INC.,)	
)	
Complainant,)	
)	
v.)	File No. EB-01-MD-006
)	
VERIZON SOUTH INC.,)	
)	
Respondent.)	

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 2002

Released: May 10, 2002

By the Commission:

I. INTRODUCTION

1. In this Order, we grant a formal complaint that Cox Virginia Telcom, Inc. (“Cox”) filed against Verizon South Inc.¹ (“Verizon South”) pursuant to sections 208 and 252(e)(5) of the Communications Act of 1934, as amended (“Act”).² In its complaint, Cox seeks to recover, pursuant to an interconnection agreement with Verizon South (“Agreement”), payment of reciprocal compensation for the delivery of traffic bound for Internet service providers (“ISPs”).

2. As discussed below, we conclude that the Agreement obligates Verizon South to pay reciprocal compensation for the delivery of ISP-bound traffic. We further find that, prior to April 6, 2001, Verizon South waived its right to object to being billed for end-office, rather than tandem, termination, and to being charged reciprocal compensation for calls to customers that have no physical presence in the local calling area associated with the NXX code Cox has assigned.

¹ Verizon South Inc. formerly was known as GTE South Incorporated. Joint Statement of Cox Virginia Telcom, Inc. and Verizon South, Inc., File No. EB-01-MD-006 (filed Apr. 19, 2001) (“Joint Statement”) at 1-2, ¶ 2.

² 47 U.S.C. §§ 208, 252(e)(5).

II. BACKGROUND

A. The Parties and their Interconnection Agreement

3. Cox is a facilities-based competitive local exchange carrier in Virginia.³ Verizon South is an incumbent local exchange carrier in Virginia.⁴

4. Cox and Verizon South interconnect their networks to enable an end user subscribing to one party's local exchange service to place calls to and receive calls from end users subscribing to the other party's local exchange service.⁵ In March 1996, Cox initiated negotiations with Verizon South regarding an interconnection agreement pursuant to section 252(a)(1) of the Act.⁶ During negotiations, the parties reached an impasse over certain issues, which they then submitted to the Virginia State Corporation Commission ("VSCC") for arbitration pursuant to section 252(b)(1) of the Act.⁷ At the conclusion of arbitration, the VSCC approved the resultant Agreement pursuant to section 252(e)(1) of the Act.⁸ Cox and Verizon South signed the Agreement on March 25 and 27, 1997, respectively.⁹ The parties dispute whether the Agreement remains in effect.¹⁰

5. The Agreement obligates the parties to "reciprocally terminate local exchange traffic . . . between each other's networks,"¹¹ and to pay reciprocal compensation to each other for the delivery of "Local Calls" that are "originated from [one party] and terminated to [the other party's] end offices or tandems."¹² This obligation does not apply, however, until there is an "imbalance" of "Local Traffic" that "exceeds plus-or-minus 10%."¹³ The Agreement defines

³ Joint Statement at 1, ¶ 1.

⁴ Joint Statement at 1-2, ¶ 2.

⁵ Joint Statement at 5, ¶ 23.

⁶ Joint Statement at 2, ¶ 4; 47 U.S.C. § 252(a)(1).

⁷ Joint Statement at 4, ¶ 17; 47 U.S.C. § 252(b)(1).

⁸ Joint Statement at 2, ¶ 5; 47 U.S.C. § 252(e)(1).

⁹ Joint Statement at 2, ¶ 5. From the record, it does not appear that either party appealed the Agreement pursuant to section 252(e)(6) of the Act. 47 U.S.C. § 252(e)(6).

¹⁰ See Initial Brief of Cox Virginia Telcom, Inc., File No. EB-01-MD-006 (filed July 11, 2001) ("Cox Brief") at 34-37; Verizon South Inc.'s Opening Brief on the Merits, File No. EB-01-MD-006 (filed July 11, 2001) ("Verizon South Brief") at 38; Reply Brief of Cox Virginia Telcom, Inc., File No. EB-01-MD-006 (filed July 20, 2001) ("Cox Reply Brief") at 18-20; Verizon South Inc.'s Reply Brief, File No. EB-01-MD-006 (filed July 20, 2001) ("Verizon South Reply Brief") at 19-20. If necessary, we will address in a subsequent damages proceeding whether the Agreement still governs.

¹¹ Formal Complaint, File No. EB-01-MD-006 (filed Mar. 9, 2001) ("Complaint"), Exhibit B (Interconnection Agreement), ¶ V.A.

¹² Complaint, Exhibit B (Interconnection Agreement), ¶ V.C.

¹³ Complaint, Exhibit B (Interconnection Agreement), Exhibit B (Detailed Schedule of Itemized Charges), ¶¶ A.1.a., B.1.a. Exhibit B of the Agreement establishes call termination rates for "Local Traffic." Joint Statement at 5, ¶ 21; Complaint, Exhibit B (Interconnection Agreement), Exhibit B (Detailed Schedule of Itemized Charges). The Agreement does not define the terms "Local Calls" or "Local Traffic." The parties apparently consider those terms

(continued....)

“Local Exchange Traffic” as “any traffic that is defined by Local Calling Area.”¹⁴ “Local Calling Area,” in turn, means “Extended Area Service (EAS) and Extended Local Service (ELS) calling area as defined in [Verizon South’s] local tariff at the date of this agreement.”¹⁵ During their negotiation of the Agreement, Cox and Verizon South did not address specifically whether ISP-bound traffic constituted “local exchange traffic” for purposes of the Agreement’s reciprocal compensation provisions.¹⁶

6. Two provisions of the Agreement address waiver of rights. Paragraph XIX.AM., which is captioned “Waiver,” is the more general of the two provisions. It states:

The failure of either Party to insist upon the performance of any provision of this Agreement, or to exercise any right or privilege granted to it under this Agreement, shall not be construed as a waiver of such provision or any provisions of this Agreement, and the same shall continue in full force and effect.¹⁷

Paragraph XIX.G.1. is entitled “Dispute” and falls under the heading “Billing and Payment.” This paragraph, which is more specific than Paragraph XIX.AM., provides:

If a Party disputes a billing statement, that Party shall notify the other Party in writing regarding the nature and the basis of the dispute within thirty (30) calendar days from the bill date or twenty (20) calendar days from the receipt of the bill, whichever is later, or the dispute shall be waived. The Parties shall diligently work toward resolution of all billing issues.¹⁸

7. Paragraph XIX.G.5. of the Agreement establishes the rights of the parties to perform an audit:

Each Party shall have a right to audit all bills rendered by the other Party pursuant to this Agreement, verifying the accuracy of items, including but not limited to, the services being provided on a wholesale basis pursuant to this Agreement, usage recording and provisioning, and nonrecurring charges.¹⁹

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to be interchangeable with the defined term “local exchange traffic” (*see* Joint Statement at 3-4, ¶ 12), and nothing in the Agreement leads us to conclude that such an understanding is incorrect.

¹⁴ Joint Statement at 4, ¶ 19; Complaint, Exhibit B (Interconnection Agreement), ¶ II.49.

¹⁵ Joint Statement at 4-5, ¶ 20; Complaint, Exhibit B (Interconnection Agreement), ¶ II.46.

¹⁶ Joint Statement at 4, ¶ 13. Nor did the parties raise this issue during arbitration of the Agreement before the VSCC. Joint Statement at 4, ¶ 18.

¹⁷ Complaint, Exhibit B (Interconnection Agreement), ¶ XIX.AM.

¹⁸ Joint Statement at 6, ¶ 30; Complaint, Exhibit B (Interconnection Agreement), ¶ XIX.G.1.

¹⁹ Complaint, Exhibit B (Interconnection Agreement), ¶ XIX.G.5.

B. The Parties' Implementation of the Reciprocal Compensation Provisions

8. In September 1997, Verizon South and Cox began to exchange traffic in accordance with the Agreement.²⁰ Cox sent its first bill to Verizon South for reciprocal compensation in November 1997,²¹ and, a month later, specifically notified Verizon South that local traffic was out of balance by more than 10 percent.²² On December 29, 1997, Verizon South informed Cox in writing that “charges for local termination of traffic . . . have been billed in error,” because the parties allegedly had agreed, in September 1997, “to remain in a bill and keep arrangement until January 1998.”²³ Nevertheless, Cox continued to bill Verizon South on a monthly basis for reciprocal compensation.²⁴

9. During a February 23, 1998 meeting, Verizon South advised Cox that, due to technical limitations of the switch through which Cox interconnected with Verizon South's network, Verizon South could not measure traffic for purposes of reciprocal compensation billing until Verizon South converted its trunks from two-way trunks to one-way trunks.²⁵ The parties agreed to a March 6, 1998 conversion date.²⁶ It was not until August 14, 1998, however, that Verizon South installed and converted the trunks.²⁷

10. On August 17, 1998, Verizon South sent Cox a letter disputing Cox's reciprocal compensation bills through August 1998 on the ground that the parties allegedly had agreed to a bill and keep arrangement until Verizon South installed one-way trunks.²⁸ Verizon South reiterated this view in October 16, 1998 correspondence, but nonetheless agreed to “an earlier

²⁰ Joint Statement at 5, ¶ 23; Complaint at 7, ¶ 14; at 12, ¶ 41; Answer of Verizon South, Inc., File No. EB-01-MD-006 (filed Apr. 6, 2001) (“Answer”) at 18, ¶ 51; at 23, ¶ 80.

²¹ Joint Statement at 5, ¶ 24.

²² Joint Statement at 5, ¶ 24; Complaint at 12, ¶ 42; Answer at 23, ¶ 81.

²³ Answer, Exhibit F (Letter dated December 29, 1997 from Kimberly Tagg, Support Manager – Emerging Markets, GTE Network Services, to Jill Butler, Director Regulatory, Cox Fibrenet); Joint Timeline at 1. Cox and Verizon South stipulate that Verizon South mailed the letter on the date reflected on its face, and that Cox received the letter. Joint Statement at 2, ¶ 3.

²⁴ Joint Statement at 5, ¶ 27.

²⁵ Complaint, Exhibit G (Letter dated August 17, 1998 from Cynthia Lamb, Support Manager – Emerging Markets, GTE Network Services, to George Cozens, Cox Fibrenet); Exhibit H (Letter dated October 16, 1998, from Cynthia Lamb, Support Manager – Emerging Markets, GTE Network Services, to Jill Nickel Butler, Director, Regulatory Affairs Southeast, Cox Communications, Inc.) at 1; Answer, Exhibit C (Declaration of Cynthia Lamb) at 2-3, ¶ 10; Answer, Exhibit D (Declaration of Kimberly Tagg) at 1, ¶ 3; Timeline for Cox/Verizon South Reciprocal Compensation Dispute, File No. EB-01-MD-006 (filed Apr. 27, 2001) (“Joint Timeline”) at 2.

²⁶ Joint Timeline at 2; Complaint, Exhibit H (Letter dated October 16, 1998, from Cynthia Lamb, Support Manager – Emerging Markets, GTE Network Services, to Jill Nickel Butler, Director, Regulatory Affairs Southeast, Cox Communications, Inc.) at 2.

²⁷ Complaint, Exhibit G (Letter dated August 17, 1998 from Cynthia Lamb, Support Manager – Emerging Markets, GTE Network Services, to George Cozens, Cox Fibrenet) at 1; Answer, Exhibit C (Declaration of Cynthia Lamb) at 2-3, ¶ 10; Joint Timeline at 2.

²⁸ Complaint at Exhibit G (Letter dated August 17, 1998 from Cynthia Lamb, Support Manager – Emerging Markets, GTE Network Services, to George Cozens, Cox Fibrenet); Joint Timeline at 2.

reciprocal compensation billing start date of April 1, 1998,” and asked Cox to submit invoices for local traffic Cox terminated to Verizon South from April 1, 1998 forward.²⁹

11. In a December 7, 1998 letter, Verizon South complained to Cox that there was “an error in [Cox’s] billing for the reciprocal termination of local traffic as provided for in our interconnection agreement. It appears Cox is billing [Verizon South] for more than ‘Local Traffic’ as defined in [the] agreement.”³⁰ Verizon South requested that the parties “establish a discussion and work toward resolution of the dispute as soon as possible.”³¹ Four days later, Cox and Verizon South agreed to begin reciprocal compensation billing as of March 6, 1998.³²

12. In a January 6, 1999 letter to Cox, Verizon South stated that it had “determined the traffic to Cox is terminating to Internet service providers, not to actual end users in the local serving area and Internet traffic is not local in jurisdiction.”³³ Verizon South proposed that the parties agree to withhold payment for such traffic until the “FCC, the state Commission or court of competent jurisdiction issues a final and non appealable order regarding the compensation for Internet traffic.”³⁴ Cox responded to Verizon South in correspondence dated February 3, 1999, which pledged that Cox would seek relief from the VSCC if Cox did not receive payment of all outstanding reciprocal compensation invoices by February 19, 1999.³⁵ As discussed below, Cox filed a complaint with the VSCC in March 1999.³⁶

13. Throughout the remainder of 1999, the parties debated Verizon South’s obligation to pay reciprocal compensation for the delivery of ISP-bound traffic.³⁷ Prior to April 2000, Verizon South did not pay any reciprocal compensation to Cox.³⁸ Beginning in April 2000, and

²⁹ Complaint, Exhibit H (Letter dated October 16, 1998 from Cynthia Lamb, Support Manager – Emerging Markets, GTE Network Services, to Jill Nickel Butler, Director, Regulatory Affairs Southeast, Cox Communications, Inc.); Joint Timeline at 3.

³⁰ Complaint, Exhibit I (Letter dated December 7, 1998 from Cynthia Lamb, Support Manager – Emerging Markets, GTE Network Services, to Jill Nickel Butler, Director, Regulatory Affairs Southeast, Cox Communications, Inc.); Joint Timeline at 3.

³¹ Complaint at 15, ¶ 53; Exhibit I (Letter dated December 7, 1998 from Cynthia Lamb, Support Manager – Emerging Markets, GTE Network Services, to Jill Nickel Butler, Director, Regulatory Affairs Southeast, Cox Communications, Inc.). See Joint Timeline at 3.

³² Joint Timeline at 3; Joint Statement at 5, ¶ 26.

³³ Answer, Exhibit G (Letter dated January 6, 1999 from Ann Lowery, Manager-Interconnections/ Negotiations, GTE Network Services, to Jill Nickel Butler, Director, Regulatory Affairs Southeast, Cox Communications, Inc.). See Joint Timeline at 3.

³⁴ Answer, Exhibit G (Letter dated January 6, 1999 from Ann Lowery, Manager-Interconnections/ Negotiations, GTE Network Services, to Jill Nickel Butler, Director, Regulatory Affairs Southeast, Cox Communications, Inc.). See Joint Timeline at 3.

³⁵ Complaint, Exhibit K (Letter dated February 3, 1999 from John D. Sharer, counsel for Cox, to Richard D. Gary, counsel for Verizon South); Joint Timeline at 3. The next day, Verizon South acknowledged receipt of Cox’s letter. Complaint, Exhibit L (Letter dated February 4, 1999 from Richard D. Gary, counsel for Verizon South, to John D. Sharer, counsel for Cox); Joint Timeline at 3.

³⁶ See paragraph 14, *infra*.

³⁷ Joint Timeline at 4.

³⁸ Joint Statement at 5, ¶ 28.

in each of the next four months, Verizon South sent Cox payments for reciprocal compensation for what Verizon South determined was “bona fide local traffic.”³⁹ This excluded what Verizon South estimated to be the volume of ISP-bound traffic. Cox returned Verizon South’s first two checks, stating that the payments did not constitute the full amount due.⁴⁰ Verizon South ceased making reciprocal compensation payments to Cox in August 2000.⁴¹

C. Proceedings Before the VSCC and this Commission

14. In March 1999, Cox filed a complaint with the VSCC requesting an order “declaring that local calls to ISPs constitute local traffic under the terms of the Agreement and that Cox and [Verizon South] are entitled pursuant to their Agreement to reciprocal compensation for the completion of such calls; and enforcing [Verizon South’s] obligations under the Agreement to make payments to Cox.”⁴² The VSCC refused to act on Cox’s complaint, citing concerns about issuing a ruling that possibly would conflict with a subsequent decision by this Commission regarding reciprocal compensation for the delivery of ISP-bound traffic.⁴³

15. On June 30, 2000, Cox filed a petition with this Commission requesting preemption of the VSCC’s jurisdiction over Cox’s reciprocal compensation complaint pursuant to section 252(e)(5) of the Act.⁴⁴ In September 2000, the Commission granted Cox’s petition, stating that it would resolve the following question: “whether the existing interconnection agreement between Cox and [Verizon South] requires [Verizon South] to pay compensation to Cox for the delivery of ISP-bound traffic.”⁴⁵

16. On March 9, 2001, in accordance with the *Preemption Order*, Cox filed a formal complaint against Verizon South alleging that Verizon South violated the unambiguous reciprocal compensation provisions of the Agreement by failing to pay Cox for the delivery of ISP-bound traffic.⁴⁶ The Complaint seeks an order from the Commission (1) determining that all

³⁹ Complaint, Exhibit O (Letter dated April 14, 2000, from Laura Schneider, Manager – Contract Compliance, GTE Network Services, to Accounts Payable, Cox Fibrenet); Joint Timeline at 4-5; Joint Statement at 5-6, ¶ 28.

⁴⁰ Joint Statement at 5-6, ¶ 28.

⁴¹ Joint Statement at 5-6, ¶ 28.

⁴² Joint Statement at 2, ¶ 6 (citing Answer, Exhibit J [*Cox Virginia Telcom, Inc. v. GTE South, Inc.*, Petition of Cox Virginia Telcom, Inc. for Enforcement of Interconnection Agreement for Reciprocal Compensation for the Termination of Local Calls to Internet Service Providers, Case No. PUC 99046 (filed Mar. 18, 1999)]).

⁴³ Joint Statement at 2, ¶ 7.

⁴⁴ Joint Statement at 3, ¶ 8; 47 U.S.C. § 252(e)(5) (“If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission’s jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.”).

⁴⁵ Joint Statement at 3, ¶ 9; *Cox Virginia Telecom, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 15 FCC Rcd 17958, 17960, ¶ 6 (2000) (“*Preemption Order*”).

⁴⁶ Complaint at 1-2.

traffic terminating to telephone numbers within the defined local calling area, including traffic bound for ISPs, is local traffic for reciprocal compensation purposes under the terms of the Agreement; and (2) requiring Verizon South to pay compensation for the transportation and termination of all local traffic, including ISP-bound traffic, delivered to Cox, as well as local interconnection facilities used to transport this traffic.⁴⁷ In the event the Commission does not construe the Agreement in Cox's favor, the Complaint alleges that Cox is entitled to recover under a quantum meruit theory for the value of the termination services it rendered.⁴⁸ Cox requests damages in the amount of \$4,372,047.84 for its transport and termination of traffic.⁴⁹

17. On April 6, 2001, Verizon South filed an Answer to the Complaint. The Answer asserts, *inter alia*, that ISP-bound traffic is not eligible for reciprocal compensation under the unambiguous terms of the Agreement, because, under an "end-to-end" analysis, such traffic is jurisdictionally interstate.⁵⁰ The Answer further argues that the Commission lacks jurisdiction over Cox's quantum meruit and trunk facilities claims.⁵¹

18. On May 9, 2001, Commission staff bifurcated the issue of liability from the issue of damages and ruled that the liability issue would be adjudicated first.⁵² In doing so, Commission staff explained that, during the liability phase of this proceeding, rulings would be rendered regarding (1) whether the Agreement requires the payment of reciprocal compensation for the delivery of ISP-bound traffic; (2) if not, whether Cox is entitled to some compensation under the doctrine of quantum meruit; (3) whether Verizon South waived its right to object to Cox's charges for reciprocal compensation for calls to customers that have no physical presence in the local calling area associated with the "NXX code" Cox has assigned;⁵³ (4) whether Verizon South waived its right to object to the rate of compensation; and (5) whether Verizon South waived its right under the Agreement to require an audit of Cox's bills for reciprocal compensation.⁵⁴

⁴⁷ Complaint at 1-2. The parties subsequently settled Cox's claim that Verizon South failed to compensate Cox for local interconnection trunks used to transport ISP-bound traffic. See Letter dated January 24, 2002, from J.G. Harrington, counsel for Cox, to Magalie Roman Salas, Secretary, Federal Communications Commission, File No. EB-01-MD-006 (filed Jan. 24, 2002).

⁴⁸ Complaint at 38-42, ¶¶ 128-39.

⁴⁹ Complaint at 42, ¶ 141.

⁵⁰ Answer at 56-66.

⁵¹ Answer at 52-54, ¶¶ 195-201.

⁵² Letter dated May 9, 2001 from David Strickland, Attorney Advisor, Market Disputes Resolution Division, Enforcement Bureau, to J.G. Harrington and Laura Rocklein, counsel for Cox, and Lawrence W. Katz, Aaron M. Panner and Scott G. Angstreich, counsel for Verizon South, File No. EB-01-MD-006 (filed May 9, 2001) at 1. See 47 C.F.R. § 1.722(c).

⁵³ The NXX code is the three-digit switch entity indicator that is defined by the "D," "E" and "F" digits of a 10-digit telephone number within the North American Numbering Plan. Each NXX code contains 10,000 station numbers. Complaint, Exhibit B (Interconnection Agreement), ¶ II.62.

⁵⁴ Letter dated May 24, 2001, from David Strickland, Attorney Advisor, Market Disputes Resolution Division, Enforcement Bureau, to J.G. Harrington and Laura Gallagher, counsel for Cox, and Lawrence W. Katz, Aaron M. Panner and Scott H. Angstreich, counsel for Verizon South, File No. EB-01-MD-006 (filed May 24, 2001) at 2-3.

III. DISCUSSION

A. The Interconnection Agreement Determines the Parties' Reciprocal Compensation Obligations for the Delivery of ISP-Bound Traffic.

19. The Commission twice has held, and the parties do not dispute, that during the period relevant here, carriers could address in their interconnection agreements the issue of compensation for the delivery of ISP-bound traffic.⁵⁵ The parties appear to agree that the Agreement does, in fact, address and conclusively govern this compensation issue.⁵⁶ Thus, the first question we confront in this proceeding is whether the Agreement entitles Cox to receive reciprocal compensation for the delivery of ISP-bound traffic.

B. The “Plain Meaning” Rule under Virginia Law Governs Our Interpretation of the Agreement.

20. In interpreting the Agreement, we stand in the shoes of the VSCC.⁵⁷ We agree with the parties that Virginia law supplies the applicable rules of contract interpretation.⁵⁸ Virginia adheres to the “plain meaning” rule: “where the terms of the contract are clear and unambiguous, we will construe those terms according to their plain meaning.”⁵⁹ Although the cornerstone of a “plain meaning” analysis is a contract’s language,⁶⁰ in ascertaining the parties’ intent “as expressed by them in the words they have used,”⁶¹ a court also may examine the

⁵⁵ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9160, ¶ 16 (2001) (“*Order on Remand*”), appeal pending, *WorldCom Inc. v. FCC*, Case No. 01-1218 (D.C. Cir.) (citing *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, ¶ 22 (1999) (“*Declaratory Ruling*”), vacated and remanded sub nom. *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (“*Bell Atlantic Remand Order*”). On April 27, 2001, the Commission adopted an interim compensation mechanism pertaining to the exchange and delivery of ISP-bound traffic. See *Order on Remand*, 16 FCC Rcd at 9151. The established regime, however, “applies as carriers renegotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions.” *Id.*, 16 FCC Rcd at 9189, ¶ 82. Neither party argues that the interconnection agreement involved in the instant proceeding contains change of law provisions that would be triggered by the *Order on Remand*.

⁵⁶ Complaint at 26-27, ¶¶ 87-94; Answer at 56-67; Cox Brief at 8-11; Verizon South Brief at 7-21; Cox Reply Brief at 6-10; Verizon South Reply Brief at 3-12.

⁵⁷ See 47 U.S.C. § 252(e)(5); *Preemption Order*, 15 FCC Rcd 17958, 17960, ¶ 6.

⁵⁸ See Complaint at 30, ¶ 112; Answer at 57 n.10; Cox Brief at 5 n.9; Verizon South Brief at 7 n.4. See also Complaint, Exhibit B (Interconnection Agreement), ¶ XIX.R. (“This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia and shall be subject to the exclusive jurisdiction of the courts therein. In addition, insofar as and to the extent federal law may properly apply, federal law will control.”). See generally *Southwestern Bell Tel. Co. v. PUC of Tex.*, 208 F.3d 475, 485 (5th Cir. 2000) (applying Texas law in construing reciprocal compensation provisions of interconnection agreements).

⁵⁹ *American Spirit Ins. Co. v. Owens*, 261 Va. 270, 275, 541 S.E.2d 553, 555 (2001). See *Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983).

⁶⁰ See, e.g., *Lerner v. Gudelsky Co.*, 230 Va. 124, 132, 334 S.E.2d 579, 584 (1985) (“The writing is the repository of the final agreement of the parties.”); *Berry v. Klinger*, 225 Va. at 208, 300 S.E.2d at 796 (a court must construe a contract’s “language as written”).

⁶¹ *Ames v. American Nat’l Bank*, 163 Va. 1, 38, 176 S.E. 204, 216 (1932).

“surrounding circumstances, the occasion, and [the] apparent object of the parties.”⁶² In particular, a court may consider the legal context in which a contract was negotiated, because the laws in force at the time a contract is made become “as much a part of the contract as if incorporated therein.”⁶³ Moreover, “custom and usage may be used to supplement or explain a contract,” as long as this type of evidence is not inconsistent with the contract’s express terms.⁶⁴ Furthermore, course-of-performance evidence can be considered to ascertain a contract’s meaning (but cannot “create a new, additional contract right”).⁶⁵

21. Both parties invoke the “plain meaning” rule in support of their positions.⁶⁶ According to Cox, as interpreted under the “plain meaning” rule, the Agreement clearly treats ISP-bound traffic as compensable local traffic.⁶⁷ Verizon South similarly relies upon the “plain meaning” rule to argue that the Agreement unambiguously does not require payment of reciprocal compensation for the delivery of ISP-bound traffic.⁶⁸ For the reasons described below, applying Virginia’s rules of contract interpretation, we agree with the parties that the Agreement is unambiguous regarding compensation for the delivery of ISP-bound traffic. We further conclude that the Agreement requires reciprocal compensation for the delivery of ISP-bound traffic.

C. The Agreement Obligates Verizon South to Pay Reciprocal Compensation to Cox for the Delivery of ISP-Bound Traffic.

22. Under the terms of the Agreement, the parties must pay reciprocal compensation for the delivery of “local exchange traffic” that is “originated from [one party] and terminated to [the other party’s] end offices or tandems,” once there is an “imbalance” of such traffic that “exceeds plus-or-minus 10%.”⁶⁹ The Agreement defines “Local Exchange Traffic” as “any

⁶² *Flippo v. CSC Assoc. III, L.L.C.*, 262 Va. 48, 64, 547 S.E.2d 216, 226 (2001) (quoting *Christian v. Bullock*, 215 Va. 98, 102, 205 S.E.2d 635, 638 (1974)).

⁶³ *Marriott v. Harris*, 235 Va. 199, 215, 368 S.E.2d 225, 232 (1988); *Paul v. Paul*, 214 Va. 651, 653, 203 S.E.2d 123, 125 (1974).

⁶⁴ *Chas. H. Tompkins Co. v. Lumbermans Mut. Cas. Co.*, 732 F. Supp. 1368, 1374 (E.D. Va. 1990) (applying Va. law) (“*Chas. H. Tompkins Co.*”). See *Piland Corp. v. REA Constr. Co.*, 672 F. Supp. 244, 247 (E.D. Va. 1987); Va. Code Ann. § 8.1-205(4) (“The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.”).

⁶⁵ *Chas. H. Tompkins Co.*, 732 F. Supp. at 1375. See also Va. Code Ann. § 8.2-208(2) (“The express terms of the agreement and any course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade.”).

⁶⁶ Complaint at 31-32, ¶¶ 112-14; Cox Brief at 8-11; Cox Reply Brief at 6; Answer at 56-57; Verizon South Brief at 7-8; Verizon South Reply Brief at 3-4. We note, however, that a contract is not rendered ambiguous simply because each side argues that the contract plainly means the opposite of what the other side contends. *Dominion Savings Bank, FSB v. Costello*, 257 Va. 413, 416, 512 S.E.2d 564, 566 (1999) (citing *Ross v. Craw*, 231 Va. 206, 212-13, 343 S.E.2d 312, 316 (1986)).

⁶⁷ Complaint at 32, ¶ 114. See also Cox Brief at 8-9; Cox Reply Brief at 6.

⁶⁸ Answer at 56-57; Verizon South Brief at 7-8; Verizon South Reply Brief at 3-4.

⁶⁹ Joint Statement a 3-4, ¶ 12; Complaint, Exhibit B (Interconnection Agreement), ¶¶ V.A., V.C.; Exhibit B (Detailed Schedule of Itemized Charges), ¶¶ A.1.a., B.1.a.

traffic that is defined by Local Calling Area.”⁷⁰ “Local Calling Area” means the “Extended Area Service (EAS) and Extended Local Service (ELS) calling area for each exchange as defined in [Verizon South’s] local tariff at the date of [the] Agreement.”⁷¹ Thus, the Agreement’s definition of compensable “local exchange traffic” ultimately derives from the scope of local traffic under Verizon’s South’s local tariff. Accordingly, whatever traffic is “local” under the tariff is compensable traffic under the Agreement.

23. The parties agree that ISP-bound traffic is “local exchange traffic” under the tariff. Specifically, the parties stipulate that, when a Verizon South customer places a call to the Internet through an ISP, using a telephone number associated with the caller’s local calling area, Verizon South rates and bills that customer for a local call pursuant to the terms of Verizon South’s local tariff.⁷² Consequently, ISP-bound traffic must constitute traffic defined by the tariff’s “Local Calling Area.” Accordingly, because the Agreement adopts the tariff’s conception of local exchange traffic, we conclude that the Agreement plainly requires Verizon South to pay reciprocal compensation for the delivery of ISP-bound traffic.⁷³

24. Verizon South contends that it would be “remarkably unfair” for the Commission to rely on Verizon South’s manner of billing for termination of ISP-bound traffic, because it merely reflects Verizon South’s adherence to the “positive requirements of federal law.”⁷⁴ This objection is meritless, because Verizon South voluntarily agreed to link the compensability of traffic under the Agreement to the classification of traffic in the tariff.

25. Verizon South further asserts that the parties intended the Agreement to follow the requirements of federal law, by distinguishing in the Agreement between “local traffic” on the one hand and exchange access traffic on the other.⁷⁵ According to Verizon South, this difference mirrors the distinction that the Commission drew in paragraph 1034 of the *Local Competition Order*,⁷⁶ where the Commission concluded that “reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area....”⁷⁷ We disagree. The Agreement does not track the language used by the Commission to implement section 251(b)(5) of the Act.⁷⁸ In particular, the Agreement’s definition of “local exchange traffic” does not speak in terms of “origination” and “termination” of traffic. Moreover,

⁷⁰ Joint Statement at 4, ¶ 19; Complaint, Exhibit B (Interconnection Agreement), ¶ II.49.

⁷¹ Joint Statement at 4, ¶ 20; Complaint, Exhibit B (Interconnection Agreement), ¶ II.46.

⁷² Joint Statement at 8, ¶ 48.

⁷³ The language of the Agreement resembles the language of an interconnection agreement between Verizon South and another competitive local exchange carrier that we recently interpreted in a similar fashion. See *Starpower Communications, LLC v. Verizon South Inc.*, Memorandum Opinion and Order, File No. EB-00-MD-19, 2002 WL 518062, ¶¶ 42-49 (F.C.C. Apr. 8, 2002).

⁷⁴ Answer at 66; Verizon South Brief at 20-21; Verizon South Reply Brief at 10-11.

⁷⁵ Answer at 57-58; Verizon South Brief at 9-10, 17-18; Verizon South Reply Brief at 4-6.

⁷⁶ Verizon South Brief at 9-10, 17-18 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) (subsequent history omitted) (“*Local Competition Order*”). See also Answer at 57; Verizon South Reply Brief at 4.

⁷⁷ *Local Competition Order*, 11 FCC Rcd at 16013, ¶ 1034.

⁷⁸ 47 U.S.C. § 251(b)(5).

although the Agreement references “Local Calling Area[s],” it does so simply as a means of incorporating Verizon South’s tariff.⁷⁹

26. Finally, in further support of its argument that the parties intended the Agreement to track the requirements of federal law,⁸⁰ Verizon South relies heavily on a recent decision by the United States Court of Appeals for the Fourth Circuit, which found that “many so-called ‘negotiated’ provisions [of interconnection agreements] represent nothing more than an attempt to comply with the requirements of the 1996 Act.”⁸¹ *AT&T v. BellSouth* is inapposite, because the interconnection provision at issue in that case (pertaining to unbundled network elements) obligated BellSouth to offer a service that it clearly was required to provide by then-controlling federal law. “Where a provision plainly tracks the controlling law,” the Court said, “there is a strong presumption that the provision was negotiated with regard to the [Act] and the controlling law.”⁸² The Court found that, where an interconnection agreement “was clearly negotiated with regard to the 1996 Act and law thereunder,” the contested provision could be reformed if there were a change in controlling law.⁸³ In this case, there was no controlling federal law mandating a particular compensation arrangement for ISP-bound traffic.⁸⁴

27. In sum, given the Agreement’s reference to the tariff’s conception of local traffic, whatever calls Verizon South bills to its customers as local calls under the tariff must be compensable local calls under the Agreement. Because it is undisputed that Verizon South bills ISP-bound traffic as local calls under the tariff, such calls are compensable under the Agreement. Thus, Verizon South must pay reciprocal compensation to Cox for the delivery of ISP-bound traffic.⁸⁵

D. Prior to April 6, 2001, Verizon South Waived Its Right to Object to Being Billed Reciprocal Compensation at the Tandem Served Rate and to Being Billed Reciprocal Compensation for Calls to Customers that Have No Physical Presence in the Local Calling Area Associated with the NXX Code Cox Assigned.

28. We must address two waiver issues.⁸⁶ The first issue is whether Verizon South

⁷⁹ Joint Statement at 4, ¶ 20; Complaint, Exhibit B (Interconnection Agreement), ¶ II.46.

⁸⁰ Answer at 58; Verizon South Brief at 10; Verizon South Reply Brief at 4-5.

⁸¹ *AT&T Communications of S. States, Inc. v. BellSouth Telecommunications*, 223 F.3d 457, 465 (4th Cir. 2000) (“*AT&T v. BellSouth*”). See Answer at 58-60; Verizon South Brief at 10; Verizon South Reply Brief at 4-5.

⁸² *AT&T v. BellSouth*, 223 F.3d at 465.

⁸³ *AT&T v. BellSouth*, 223 F.3d at 465.

⁸⁴ See *Declaratory Ruling*, 14 FCC Rcd at 3703, ¶ 22.

⁸⁵ We emphasize that, in issuing this decision, we stand in the shoes of the VSCC. Thus, although we determine an aspect of Verizon South’s reciprocal compensation obligations, we do so solely as a matter of contract interpretation, and do not establish any requirements regarding reciprocal compensation for ISP-bound traffic that are applicable generally to all carriers.

⁸⁶ A third waiver issue – whether Verizon South waived the right to object to the inclusion of ISP-bound traffic in Cox’s reciprocal compensation bills – is moot. Complaint at 28-29, ¶¶ 100-103; Answer at 67-68; Cox Brief at 7-8; Verizon Brief at 23-24; Cox Reply Brief at 4; Verizon Reply Brief at 12-14. Specifically, even if Verizon South

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waived its right to object to being billed reciprocal compensation at the “tandem served” rate.⁸⁷ The second issue is whether Verizon South waived its right to object to being billed reciprocal compensation for calls to customers that have no physical presence in the local calling area associated with the NXX code Cox assigned.⁸⁸ Cox contends that Verizon South waived both of these objections, because the first time Verizon South raised them in writing was in its Answer in this proceeding, which was filed on April 6, 2001.⁸⁹ According to Cox, neither of these objections “was made in any notice provided to Cox in accordance with the requirements of the dispute provision or, for that matter, in any notice at all prior to the Answer.”⁹⁰

29. As explained above, the Agreement contains two waiver provisions. Paragraph XIX.AM. generally disfavors a finding of waiver,⁹¹ while paragraph XIX.G.1. requires a precise reservation of rights to preserve a billing objection.⁹² Verizon South argues that paragraph XIX.AM. “clearly establishes a background rule against finding that a party has waived its right under the agreement.”⁹³ Verizon South maintains that paragraph XIX.G.1., read in conjunction with paragraph XIX.AM., does not require a party to raise all of its potential disputes with a bill simultaneously, and that a pending dispute between the parties regarding billing subsumes any subsequent billing objections.⁹⁴ Verizon South contends, therefore, that it did not waive its rate and NXX code objections, because it notified Cox as early as December 7, 1998 that it disputed

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had preserved such an objection, it would be meritless in light of our holding that the Agreement requires Verizon South to pay reciprocal compensation for the delivery of ISP-bound traffic.

⁸⁷ According to Verizon South, Cox does not perform a tandem switching function in delivering traffic to its customers, because Cox’s switch has no subtending end offices. Answer at 69-70. Verizon South argues that Cox’s switch cannot be characterized as a “Tandem Office Switch” under the Agreement. Answer at 70 (citing Complaint, Exhibit B (Interconnection Agreement), ¶ II.86). See Verizon South Inc.’s First Set of Interrogatories to Cox Virginia Telcom, Inc., File No. EB-01-MD-006 (filed Apr. 6, 2001) (“Verizon South’s Interrogatories”), Interrogatory No. 4. Consequently, Verizon South asserts that it violates the Agreement for Cox to bill Verizon South for the use of Cox’s access tandem, for transport between the tandem switch and the end office, and for end office switching. Answer at 69. See Verizon South Interrogatories, Interrogatory No. 3.

⁸⁸ Answer at 70. See Verizon South Interrogatories, Interrogatory Nos. 5, 6. Verizon South maintains that, under the Agreement, such calls do not terminate in the same local calling area in which they originate, and, accordingly, that Cox is not entitled to reciprocal compensation for such calls. Answer at 70.

⁸⁹ Cox Brief at 6; Cox Reply Brief at 2-4.

⁹⁰ Cox Brief at 6.

⁹¹ Complaint, Exhibit B (Interconnection Agreement), ¶ XIX.AM. (“The failure of either Party to insist upon the performance of any provision of this Agreement, or to exercise any right or privilege granted to it under this Agreement, shall not be construed as a waiver of such provision or any provisions of this Agreement, and the same shall continue in full force and effect.”).

⁹² Joint Statement at 6, ¶ 30; Complaint, Exhibit B (Interconnection Agreement), ¶ XIX.G.1 (“If a Party disputes a billing statement, that Party shall notify the other Party in writing regarding the nature and the basis of the dispute within thirty (30) calendar days from the bill date or twenty (20) calendar days from the receipt of the bill, whichever is later, or the dispute shall be waived. The Parties shall diligently work toward resolution of all billing issues.”).

⁹³ Verizon South Brief at 22. See Verizon South Reply Brief at 14 n.15.

⁹⁴ Answer at 68-69; Verizon South Brief at 22; Verizon South Reply Brief at 13.

the contents of Cox's reciprocal compensation bills.⁹⁵

30. We disagree. Paragraph XIX.G.1. specifies how parties must preserve their rights regarding billing disputes. Although Paragraph XIX.AM. expresses a general rule against waiver, we view paragraph XIX.G. as an exception to that rule in the context of billing matters. Our conclusion is consistent with Virginia law holding that specific contract language controls over more general contract language.⁹⁶ Moreover, were we to construe paragraph XIX.AM. as broadly as Verizon South posits, objecting to one aspect of a bill would enable a party at any time to object to any aspect of the bill. This would undermine the Agreement's directive that the parties "diligently work toward resolution of all billing issues."⁹⁷ Accordingly, in order to preserve its rate and NXX code objections to Cox's reciprocal compensation bills, Verizon South had to "notify [Cox] in writing regarding the nature and the basis" of those disputes within 20-30 days of the challenged bill."⁹⁸

31. We find that Verizon South raised the tandem served rate and NXX code objections for the first time in its Answer filed in this proceeding on April 6, 2001.⁹⁹ Prior to that date, Verizon South sent nothing in writing to Cox making Cox aware of the "nature and the basis" of a dispute regarding these issues. More specifically, Verizon South never previously questioned in writing whether Cox was billing reciprocal compensation for calls to customers located outside the local calling area associated with the NXX code Cox assigned; and the only occasion on which Verizon South ever even mentioned end-office (versus tandem) switching to Cox in writing was an April 14, 2000 letter stating that Verizon South "calculated the payment amount [for "bona-fide local traffic"] using the end office switching . . . rates contained in the current interconnection contract."¹⁰⁰ This April 14, 2000 correspondence neither suggested that Verizon South disputed Cox's use of the tandem switching rate nor, assuming such a dispute then existed, explained Verizon South's basis for the dispute.¹⁰¹ Accordingly, prior to April 6,

⁹⁵ Answer at 68-69; Verizon South Brief at 22-24; Verizon South Reply Brief at 12-13.

⁹⁶ *Chantilly Constr. Corp. v. Department of Highways & Transp.*, 6 Va. App. 282, 294, 369 S.E.2d 438, 445 (1988) ("[A]ny apparent inconsistency between a clause that is general and broadly inclusive in character, and a clause that is more specific in character, should be resolved in favor of the latter."); see generally Restatement (Second) of Contracts § 203(c) (1979).

⁹⁷ Complaint, Exhibit B (Interconnection Agreement), ¶ XIX.G.1.

⁹⁸ Complaint, Exhibit B (Interconnection Agreement), ¶ XIX.G.1.

⁹⁹ We find that these objections were effective even though they were not sent to the individuals specified in the notice provision of the Agreement. See Complaint, Exhibit B (Interconnection Agreement), ¶ XIX.Z. *But see* Cox Brief at 8 n.15; Cox Reply Brief at 4 n.6. Because Verizon South made the objections during the course of heated litigation between the parties, we have little doubt that Cox is fully aware of them. See *Akers v. James T. Barnes of Washington, D.C., Inc.*, 227 Va. 367, 370-71, 315 S.E.2d 199, 201 (1984) (where the conditions of a contract have been deviated from in "trifling particulars," there nonetheless is substantial compliance if the deviations do not materially detract from the benefit the other party would derive from a literal performance).

¹⁰⁰ Complaint, Exhibit O (Letter dated April 14, 2000, from Laura Schneider, Manager – Contract Compliance, GTE Network Services, to Accounts Payable, Cox Fibrenet).

¹⁰¹ See Cox Brief at 6 n.13. Verizon South asserts that it has the right under paragraph XIX.G.5. of the Agreement to audit Cox's bills for the purpose of determining "whether those bills include non-local calls for reasons independent of Cox's improper inclusion of Internet-bound traffic." Answer at 70. In particular, Verizon South wants to investigate its tandem served rate and NXX code concerns. Verizon South Brief at 24; Verizon South Reply Brief at 14. We believe Verizon South has a right to audit Cox's bills under paragraph XIX.G.5. of the

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2001, Verizon South waived its rate and NXX code objections to Cox's bills.¹⁰²

V. CONCLUSION AND ORDERING CLAUSES

37. For the above reasons, we find that the Agreement between Cox and Verizon South requires Verizon South to pay reciprocal compensation to Cox for the delivery of ISP-bound traffic. In addition, we find that, prior to April 6, 2001, Verizon South waived its right to object to being billed reciprocal compensation at the tandem served rate and to being billed reciprocal compensation for calls to customers that have no physical presence in the local calling area associated with the NXX code Cox assigned.

38. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 208, and 252(e)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and 252(e)(5), that the formal complaint filed by Cox against Verizon South is hereby GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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Agreement, which, unlike paragraph XIX.G.1., contains no time limitation within which a party must assert the right. Complaint, Exhibit B (Interconnection Agreement), ¶ XIX.G.5. ("Each Party shall have a right to audit all bills rendered by the other Party pursuant to this Agreement, verifying the accuracy of items, including but not limited to, the services being provided on a wholesale basis pursuant to this Agreement, usage recording and provisioning, and nonrecurring charges."). However, because we find that, prior to April 6, 2001, Verizon South waived its tandem served rate and NXX Code objections, any audit of bills received before that date cannot be used to gather information relating to those objections.

¹⁰² Verizon South argues that it had no obligation under the Agreement to dispute contemporaneously particular components of Cox's bills prior to December 11, 1998, because before that date the parties had operated under a bill and keep arrangement. Answer at 67-68; Verizon South Brief at 22-23; Verizon South Reply Brief at 13 n.14. We need not reach this issue. As discussed above, the record demonstrates that Verizon South did not raise its tandem served rate and NXX code objections until April 6, 2001. Consequently, even assuming Verizon South correctly characterizes the date on which its obligation to "flyspeck" Cox's bills began, Verizon South did not timely raise these two objections after that date.